

# **Artifice, ideology and paradox: the public/private distinction in international law**

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## **ABSTRACT**

This article examines the distinction between public and private international law, arguing that it is not reflective of an organic, natural or inevitable separation. Rather, the distinction is presented as an analytical construct that evolved with the emergence of the bourgeois state. The public/private distinction provided the ideological conditions for the emergence of liberal market economies and, in law, formed the foundation for territorially individuated state authority. However, contemporary developments in capitalist production and finance are reconfiguring the private and public spheres and contributing to the empirical decline of the distinction. The distinction remains very powerful symbolically, however; this is attributed to the influence of neoliberal ideology that asserts the superiority of private law in the regulation of international commerce. An alliance between private and public authorities who are united in their commitment to the expansion of capitalism through disembedding international commerce from national, social and democratic controls is advancing this ideology and contributing to the troubling and paradoxical exercise of public authority by private actors.

## **KEYWORDS**

Public international law; private international law; public/private distinction; international trade law.

## **INTRODUCTION**

This article examines the foundational and problematic distinction between public and private international law, focusing specifically on international trade relations. It argues that the distinction is not reflective of an organic, natural or inevitable separation, but is an analytical construct that evolved with the emergence of the bourgeois state. Moreover, the distinction is in empirical decline as forces of

globalization and privatization are blurring the separation between private and public authority. These forces are consolidating a corporate/legal/governmental elite and are enhancing the opportunities and resources for private actors to create and enforce international commercial norms. Private actors are assuming roles conventionally attributed to state authorities. Indeed, a range of globalizing forces are integrating the world and, simultaneously, disintegrating previously embedded institutions and practices, effecting a reconfiguration of the relationship between public and private authority (Jameson, 1991). At the heart of these forces is the development of an alliance between private/corporate and public/state authorities, which are united in their commitment to the expansion of capitalism through the further disembedding of international commerce from national, social and democratic controls. Stephen Gill (1995: 413) refers to these developments as 'disciplinary neoliberalism' and a 'new constitutionalism', which 'confers privileged rights of citizenship and representation on corporate capital, whilst constraining the democratisation process that has involved struggles for representation for hundreds of years'. Significantly, disciplinary neoliberal practices are being articulated through private law concepts. Indeed, the public/private law distinction is being asserted with new vigour as justification for the supremacy of private legal regulatory arrangements. These arrangements enhance and facilitate globalization by minimizing the impact of domestic and national impediments to international commercial activities. They are also effecting a reconfiguration of private and public authority and diminishing the empirical significance of the distinction.

However, although in decline empirically, the distinction continues to hold powerful conceptual and symbolic meaning, creating a disjuncture between commercial practice and theory. This disjuncture is, in turn, reflective of the more profound impact that changes in capitalist production are having on the way in which states and societies relate nationally and globally (Cox, 1981). As an analytical construct, the public/private distinction was articulated as part of the ideological foundations of the bourgeois state.<sup>1</sup> In international law, it provided a means for reconciling the principles and practices of state sovereignty with the extraterritorial application of legal obligations. The separation of public and private domains, of political and economic activity, is central to the constitution of capitalist productive relations and is a 'structural requirement for the reproduction of capitalist societies' (Hirsch, 1995: 271; Wood, 1981). However, the content of the public and private realms has not remained constant. Changes in patterns of capitalist production have shifted the placement of the boundary between the two realms and altered their content. The contemporary erosion or blurring of the distinction is a significant reflection of the crisis of late capitalism. One aspect of this

crisis involves the 'de-linking of economic liberalism and democracy' (Hirsch, 1995: 297), as public authorities privatize their activities, abdicating, abandoning or selectively devolving their public roles on private agents who are unconstrained by principles of democratic accountability. Another aspect of this crisis involves globalizing influences that are enhancing the regulatory roles of private corporate actors. Private commercial actors are reasserting the superiority of private law in facilitating the internationalization of productive and financial relations.<sup>2</sup> Increasingly, decisions over production, wages, employment, working conditions, environmental standards and the like are being removed from national public policy-making space and relocating in private space.

David Held (1995: 127–8) also notes a disjuncture between theory and practice,

between the formal authority of the state and the spatial reach of contemporary systems of production, distribution and exchange which often function to limit the competence and effectiveness of national political authorities. Two aspects of international economic processes are central: the internationalization of production and the internationalization of financial transactions.

(Also see Perraton *et al.*, 1997.) However, the reconfiguration of state/society relations and the disjuncture between formal and actual authority are obscured by the commitment to the distinction between the public and private domains. The former domain is associated with the world of politics, while the latter is associated with an apolitical domain of economic exchange. International legal theory reproduces this distinction in the differentiation between public and private international law. This distinction is foundational in that it identifies public/state authorities and institutions as politically significant, but denies the political significance of private/economic corporations and institutions, thus obscuring the authority of private power. This article argues that this identification has never adequately accounted for the nature and historical evolution of private international trade law. A review of the history of private international trade law, or the law merchant (*lex mercatoria*) as it is generally known, discloses the central role that private actors and institutions have played in its development. Moreover, the article argues that the private/public distinction operates, conceptually, to obscure the political significance of the law merchant as a constitutive ideology of capitalism. The law merchant provides the juridical foundations for capitalism by establishing basic rules of private property and contractual rights and obligations.<sup>3</sup> These rules structure economic relations by providing for stability of possession. Indeed, they articulate the conditions that make economic relations possible in conditions of uncertainty

and insecurity generated by non-simultaneous transactions over time and space. They also function distributionally to allocate risks and to determine the rights and duties of parties engaged in economic transactions. Most importantly, however, the law merchant assists in the reconfiguration of state/society relations by legitimizing the private regulation of international commercial relations, entrenching and deepening the paradoxical exercise of public authority by private agencies.

The discussion proceeds in three parts. The first part addresses the public/private distinction in international law, tracing its origin and historical evolution as articulations of the emerging states system, of capitalism and of liberal political economy. In the second part the distinction is criticized as an ideologically inspired separation that generates paradoxical sources and notions of authority. The third part then examines the generation and enforcement of norms in private international trade relations.

## **THE PUBLIC/PRIVATE DISTINCTION IN INTERNATIONAL LAW**

The distinction between private and public international law is of crucial significance in the constitution of identity in the global political economy. The discussion will first consider a few central definitional and conceptual matters concerning the nature of and the relationship between public and private international law. It will then examine the history of the private/public distinction in international law.

### **Definitional and conceptual issues**

The distinction between public and private international law operates at two levels. At one level the distinction operates as a separation of academic subjects; at another level it operates as a separation of legal doctrines (Paul, 1988). In terms of subject matter, public international law deals with matters relating to states, international organizations, and, to a very limited extent, corporations and individuals that raise 'an international legal interest'.<sup>4</sup> In contrast, private international law refers to conflict or choice of law principles that determine the appropriate jurisdictional norms to apply to individual claims involving a foreign element or foreign persons (Paul, 1988: 150). Private international law also includes international commercial transactions relating to 'domestic and international regulation of foreign investment and the movement of goods and workers across national borders'.<sup>5</sup> Fox (1992: 351, 357) defines 'private international law' as 'rules which govern the choice of law in private matters (such as business contracts, marriage, etc.) when those questions arise in an international context, e.g., will

country A enforce the divorce granted under the laws of country B'. 'Public international law', in contrast, is defined as 'law dealing with the relationship between states'. As Paul (1988: 163, 150) notes, private international law 'is about private interests engaged in private transactions (and not about the exercise of public power)'; it 'excludes questions of international public policy, such as the role of multinationals on social and economic development or the effect of international arbitration clauses on the enforcement of domestic antitrust laws'. International public policy concerns are the domain of public international law, for it is states which are deemed to be authoritative agents in the exercise of public power in international affairs.

Doctrinally, private and public international law are treated as separate. Private international laws derive largely from municipal legal systems, while public international law derives from international sources.<sup>6</sup> However, while many of the principles of private international law are separate and distinct from those of public international law, often deriving from domestic or municipal law, the doctrinal status of private international law is contested. Legal theorists disagree about the status of private international law. As will be explained below, Anglo-American theorists have traditionally expressed doubts that private international law is anything more than domestic or municipal law. In contrast, European scholars regard private international law as an integral part of public international law.

The public/private distinction is used by students of domestic and international law and has many different connotations. It has been used to differentiate between 'open' and 'intimate' in the context of privacy concerns (Klare, 1982). The distinction also informs that between 'work/government' and 'social life/family', which is central to much feminist analysis (Romany, 1993; Charlesworth, 1992; Rosow, 1994). It also provides the foundation for the distinction in liberal political theory between the 'state' and 'civil society', the latter extending to socio-economic as distinct from political matters (Klare, 1982: 1358–9, note 2). Klare, a critical legal scholar, observes that:

it is seriously mistaken to imagine that legal discourse or liberal political theory contains a core conception of the public/private distinction capable of being filled with determinate content or applied in a determinate manner to concrete cases. *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 an analytical tool . . . but it functions more as a form of political rhetoric used to justify particular results.<sup>7</sup>

(1982: 1361)

In international law, the distinction takes on specific and contested meanings that are related in a rather complex way to its historical origins and to different views about the status of private international law, matters to which we will now turn.

### **History of the public/private international law distinction**

The public/private distinction is a historically specific analytical construct that has undergone revision with changing material, ideological and institutional conditions. As Joel Paul observes, the public/private distinction 'began with the rise of liberal capitalism in the eighteenth century. It was closely associated with the idea that the market was a neutral, apolitical institution for allocating liability and maximizing productivity' (1988: 153). Curiously, though, while the distinction came under attack from legal realists who exposed the public and political dimensions of domestic private law, international law largely escaped attack. Paul suggests that the distinction escaped criticism in international law because 'most legal realists in international law were too busy defining the field and arguing over the sources of international norms to address private international law issues'. He also identifies deeper reasons that are directly relevant to this discussion. These relate to the isolation of private international law stemming from conceptual uncertainty about its status as an autonomous legal order and the belief held by some that private international law is not really 'international law' at all. He notes that 'Kelsen affirmed that the public/private distinction was inapplicable to international law; private international law is municipal law. Thus, the public/private distinction was not a concern of legal realists in international law' (1988: 153, note 12). This conceptual uncertainty contributed to the obscurity of private international law and stemmed from obstacles posed by the principles and practices of state sovereignty and by liberal mythology. A review of the origin of the distinction in international law reveals the complex role played by the emerging states system, capitalism and liberal political economy in the construction of the public and private spheres. Before proceeding, however, it is important to consider how private international law operates as a system of conflict of laws rules.

The rules of private international law operate to identify the national law to be applied in a situation of conflicting jurisdictional options. As one commentator notes, private international law 'deals primarily with the application of laws in space' and indicates 'the area over which the

rule of law extends'. Moreover, 'the area of recognition, the sphere of authority, the rule of law is wider than the territorial jurisdiction of the sovereign power by which it is enacted' (Starke, 1936: 397). This is because the sovereign is in effect applying and upholding the rule of a foreign territorial law in applying the principles of private international law when those rules designate foreign law as the applicable law:

If, for instance, an English Court decides that the capacity of a person who bought the goods in France must be governed by French law, what it decides in effect is that the rule of the French territorial law relating to capacity is effective outside the territorial limits of the French law maker.

(Starke, 1936: 397)

To the extent that sovereigns came to give effect to foreign laws in deference to the requirements of international comity,<sup>8</sup> private international law, like public international law, was regarded as facilitating relations between independent territorial entities. Both were

ultimately concerned with the possibility of maintaining a unified economic and social order for the conduct of international trade and intercourse among independent political units of diverse cultures and stages of civilization, different legal and economic systems and varying degrees of physical power and position.

(Stevenson, 1952: 567)

Paul argues that the conceptual distinction between public and private international law only became clear in the nineteenth century as part of an effort to integrate domestic and international conflicts principles (1988: 155). However, it is possible to trace the origin of the distinction to earlier attempts to reconcile the emerging, individuated, territorial state with a notion of commitment to a broader community of states. The distinction became part of the constitutive separation of the modern state and the international system and was an attempt to address the growing dualism between domestic politics and international relations.<sup>9</sup>

Although we do not know the specific origins of private international law, it is believed that elements of modern private international law derive from the medieval period and became 'a serious question in Europe after the collapse of the Roman Empire and the emergence of city states' (Paul, 1988: 156). Following the collapse of the Roman empire persons were generally subject to the law of their tribe. As feudalism developed in the tenth to twelfth centuries, persons were subject to the law of the feudal lord. As Paul notes (1988: 156), foreign laws were disregarded and there was no concept of universal personal rights. However, in response to the differentiation in authority structures attending the emergence of city-states, thirteenth- and fourteenth-

century Italian authors developed a system comprised of a comprehensive set of categories differentiating local and universal rights.<sup>10</sup> The system was referred to as the doctrine of the statuists and it differentiated between local and universal rights: property rights were subject to local law (*lex loci*), while personal rights (i.e. contract, marriage) were subject to the law of the place of origin. Paul argues, however, that this separation did not yet reflect the public/private distinction because the statuists presumed the existence of a natural and universal legal order, 'so that in theory conflicts principles [governing personal rights] should be uniform everywhere'. The emergence of nation-states in the seventeenth century and the articulation of the principle of state sovereignty 'challenged the statuists to explain why sovereign states should sometimes apply foreign law in their courts' (1988: 157). This challenge was an instance of what John Ruggie (1993: 164) refers to as the 'paradox of absolute individuation':

Having established territorially fixed state formations, having insisted that these territorial domains were disjoint and mutually exclusive, and having accepted these conditions as the constitutive bases of international society, what means were left to the new territorial rulers for dealing with problems of that society that could not be reduced to territorial solution?

The Dutch, seeking to limit the application of foreign law in their efforts to gain independence from Spanish hegemony, responded to this challenge with a conflicts theory based on the notion of territoriality. They rejected the statuists' appeals to a higher, universal order with a theory of vested rights which provided that laws apply to all persons and property within the territory of a state. It was left to states to decide whether or not to apply a foreign law within their territory on the basis of international comity and reciprocal sovereignty, not as a necessity dictated by a higher law.

The Dutch thus began the reconciliation of the territorial state with the community of states, but did not yet distinguish between private and public international law. The Dutch view was not very influential in Europe, where natural law theories remained current. However, English and Scottish lawyers who were schooled in Holland in the eighteenth century introduced the vested rights theory to English law, which had no conflicts system. Again, however, the theory did not rest on a distinction between public and private international law. It was Justice Joseph Story who invented the term 'private international law' in *Commentaries on the Conflicts of Law*, published in 1834. The *Commentaries* became the foundation for American jurisprudence and also gained fame throughout Europe. Story drew on the Dutch vested rights theory, identifying territoriality and comity as the foundations for private inter-



national law. The distinction between private and public international law thus evolved in the context of the growing territorial individuation of political and legal authority in the modern state. It became a method of managing conflicting territorialities and of addressing the paradox of absolute individuation. Private international law became the mechanism for the extraterritorial application of the law. It was the means by which states interacted with each other 'by tolerating within themselves little islands of alien sovereignty' (Ruggie, 1993: 165, quoting Garrett Mattingly). Paul notes in the following passage that in articulating the foundations of private international law, Story identified a basic symmetry in function that gave rise to a unity of the public and private domains. This symmetry lay in the role both systems of law play in facilitating international commerce and cooperation:

the *Commentaries* reflects a faith in the essential unity of private international law as an integral branch of international law. Story saw conflicts [i.e. private international law] as the cohesive principle to hold together his system of law; public and private law could not be separated. Commerce thrived on political unity and political unity was fostered by commerce. This was as true internationally as it was true domestically. . . . Like his contemporary Savigny, Story postulated that the goals of private international law were identical to those of public international law, and therefore, conflicts of law also should be resolved based upon the interests of international cooperation and commerce. This sentiment reflected an enlightenment belief in the rationality and science of law, even at the same moment that Story was asserting a more modern view of the state in the guise of the territorial principle.

(Paul, 1988: 161)

Despite the unity of the domains postulated in the *Commentaries*, there is no consensus regarding the foundation or status of private international law. Some scholars treat private international norms as municipal or local in origin and status, while others regard them as deriving from and forming an integral part of public international law (e.g. Shaw, 1991; Akehurst, 1987: 48–50). Many deny the autonomous status of private law norms which are identified with municipal law. This view is associated with A. V. Dicey (1896) whose Hegelian view of the state and Austinian conception of sovereignty were incompatible with the notion of giving effect to the laws of another sovereign (Starke, 1936). The contrary view, held primarily by European legal scholars, posits that private international law is subsumed by and is an integral part of public international law. This has been referred to as the 'law of nations doctrine' and is traced to the work of Savigny in the nineteenth century (Stevenson, 1952: 564–5). According to Savigny, the law of nations, or public international

law, developed customs and practices to ensure that private international cases would be decided in the same way regardless of the state within which a case was litigated (Stevenson, 1952).

Contemporary theorists continue to contest the nature of the relationship between private and public international law, shedding doubt on the conceptual status and autonomy of private international law (see, e.g., Horn, 1982). However, while private international lawyers were uncertain about the status of their discipline, public international lawyers became increasingly certain about theirs, distinguishing private international law as a branch of public international law in the latter part of the nineteenth century. By the end of the Second World War, 'the division of public and private international law became an article of faith for public international lawyers' (Paul, 1988: 163). This was precipitated by a number of developments, a significant one being the growing distinction of public and private law in the domestic arena as a key move in the liberation of markets from state regulation.

Morton Horowitz argues that the public/private distinction arose out of a 'double movement in modern political and legal thought' (1982: 1423). One movement involved the emergence of the nation-state and theories of sovereignty in the sixteenth and seventeenth centuries in which a distinctly 'public realm' began to crystallize. The second move involved attempts to create 'private spheres' free from state regulation. He traces the origins of a distinctively public realm in England to late medieval English law governing property rights in land and taxation laws. With regard to the former, the differentiation between the public and private roles of the monarch as landowner crystallized in the seventeenth-century conflicts over the king's power to alienate certain types of land that came to be regarded as crown or public land. With regard to the latter, in the seventeenth-century taxation came to be regarded as a part of public law, exacted by the state, and not as a private gift, as had formerly been the case. He notes that 'it was only gradually that English and American law came to recognise a public realm distinct from medieval conceptions of property. And equally gradually legal doctrines developed the idea of the separate private realm free from public power' (1982: 1424).

Perry Anderson (1974: Ch. 1) shows how the public/private distinction came to be articulated with the emergence of the centralized and absolutist state. In western Europe, an important development was the reception of Roman law and the concept of unconditional and absolute property rights, which replaced the medieval notions of conditional property and parcellized sovereignty (1974: 25). The reception of Roman law had the political effect of enhancing and centralizing the power of monarchs. Roman law embodied the distinction between civil law (*jus*), which regulated private and economic relations among citizens, and

public law (*lex*), which regulated relations between the state and its subjects. The recognition of the two spheres facilitated 'commodity exchange in the transitional economies of the epoch', while at the same time enhancing the consolidation and 'concentration of aristocratic power in the centralized state apparatus' (Anderson, 1974: 27). This Anderson describes as the 'double social movement', wherein the 'juridically unconditional character of private property consecrated by the one found its contradictory counterpart in the formally absolute nature of imperial sovereignty exercised by the other' (1974: 27).

The separation of the public and private spheres did not occur uniformly throughout Europe. Moreover, the situation was somewhat different for England where Roman law was never received as it was in Europe. In England, the distinction between private and public evolved in the context of class relations attending the emergence of the bourgeois state and the growth of constitutional and responsible government (Horowitz, 1982; Hanson, 1970). It took the advancement of capitalism and the demise of the feudal order to effect the separation, which was articulated in terms of the separation between politics and economics. Significantly, Giddens notes how the advent of capitalism not only defined the polity and economy as separate spheres, but also broadened the scope of the former, while narrowing that of the latter.

The 'polity' in traditional states is limited to the active participation of the few, whose policies and internal conflicts mainly determine the distribution of authoritative resources. With the arrival of modern capitalism, a definite sphere of the 'economic' – as 'the economy' – comes into being. Traditional states, of course, had economies in the sense that their existence depended upon the generation and distribution of allocative resources. But the modern 'economy' is a (relatively) distinct sphere of activities from other institutional sectors in capitalist societies. 'Distinct' in this context has to be understood as 'insulated' from political life, not as cut off from it. 'Politics', on the other hand, has a broader definition in modern societies (that is, in nation-states), encompassing the mass of the population.

(Giddens, 1987: 67–8)

What is critical to note is that the separation of economic relations from political relations under capitalism is not simply a separation of independent spheres. It is a distinction, as Justin Rosenberg notes, that is '*internal* to the mode of production' (1994: 85). This distinction has not effected an 'evacuation of relations of domination from the realm of production' (Rosenberg, 1994: 84), but has 'insulated' economic relations from political controls (Giddens, 1987: 68). Ellen Meiksins Wood captures the nature of the separation very well:

the differentiation of the economic and the political in capitalism is, more precisely, a differentiation of political functions themselves and their separate allocation to the private economic sphere and the public sphere of the state. This allocation reflects the separation of political functions immediately concerned with extraction and appropriation of surplus labour from those with a more general communal purpose . . . the differentiation of the economic is in fact a differentiation within the political sphere.

(1981: 82)

Under feudalism, not only was power diffuse and parcellized, Wood argues, it was also 'privatized' in that the 'instruments of appropriation' were controlled by private feudal lords. She argues that the privatization of political power was perfected under capitalism with the 'complete expropriation of the direct producer and the establishment of absolute private property' and the centralization of public power. The state 'divested the appropriating class of direct political powers and duties not immediately concerned with production and appropriation, leaving them with private exploitative powers, purified, as it were, of public, social function' (1981: 88-9). In a word, capitalism transformed political powers into economic powers and identified the latter as a separate 'apolitical' sphere.

Indeed, it was the emergence of the market as a central legitimating institution that placed the public/private distinction at the centre of political and legal discourse in the nineteenth century.<sup>11</sup> But the emergence of market society was not an automatic or natural occurrence. Polanyi shows that the self-regulating market characteristic of modern capitalism did not simply emerge spontaneously, but was the product of a complex set of legislative interventions to remove impediments to the exchange of labour, land and money. He argues that this demanded 'nothing less than the institutional separation of society into an economic and political sphere. Such a dichotomy is, in effect, merely the restatement, from the point of view of society as a whole, of the existence of a self-regulating market' (1944: 71). Polanyi argues that '[neither] under tribal, nor feudal, nor mercantile conditions was there, as we have shown, a separate economic system in society. Nineteenth century society, in which economic activity was isolated and imputed to a distinctive economic motive, was, indeed, a singular departure' (1944: 71). The separation, which was only fully operative in the nineteenth century, was never complete institutionally due to countervailing protectionist trends that were devised to limit the dislocation caused by the moves to a market society (1944: 196). Moreover, the nature of the separation has undergone revision in response to changing social forces.

The separation was assisted and legitimized by liberal theories of political economy and law that rationalized the privatization of corporate, contractual and tortious (wrongful) activities.

Above all was the effort of orthodox judges and jurists to create a legal science that would sharply separate law from politics. By creating a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be dangerous and unstable redistributive tendencies of democratic politics, legal thinkers helped to temper the problem of 'tyranny of the majority'. Just as nineteenth-century political economy elevated markets to the status of the paramount institution for distributing rewards on a supposedly neutral and apolitical basis, so too private law came to be understood as a neutral system for facilitating voluntary market transactions and vindicating injuries to private rights.

(Horowitz, 1982: 1425-6)

In domestic law, in the United States, the public/private distinction drew criticism from legal realists in the 1920s and 1930s, in response to growing perceptions of the concentration of capital.<sup>12</sup> They emphasized the coercive and distributive nature of all law and ridiculed the notion of private law as neutral and apolitical. Of crucial significance to this attack on the distinction was the belief that 'so-called private institutions were acquiring coercive power that had formerly been reserved to governments' (Horowitz, 1982: 1428). By the 1940s, Horowitz says, it was a 'sign of legal sophistication' to recognize the problem of the distinction. Yet today the distinction is being revived in domestic law and persists virtually unchallenged in international law. It is to the growing artificiality and ideological significance of the distinction in international law that we will now turn.

## ARTIFICE, IDEOLOGY AND PARADOX

Duncan Kennedy argues that for a distinction to be meaningful it must meet two requirements (1982: 1349). First, it must make sense intuitively to divide something between its two poles and this sense should be generally shared. Second, the distinction must make a difference in that 'it seems plain that situations should be treated differently depending on which category of the distinction they fall into' (1982: 1349). He identifies the public/private distinction as one of a particular set that constitutes 'the liberal way of thinking about the social world' that has been in decline since the turn of the century. The distinction is passing through six stages in decline from 'robust good health to utter decrepitude'. These include the emergence of *hard cases* that test a distinction; the development of *intermediate terms* in recognition of the inadequacy

or indeterminacy of a distinction; the *collapse* of a distinction; the creation of continuums (*continuumization*); the creation of stereotypes (*stereotypification*), dissolving distinctions; and lastly, *loopification*, whereby the ends of the continuum come together (Kennedy, 1982: 1355).<sup>13</sup>

In terms of international law, the public/private distinction is growing increasingly incoherent, at the very least reflecting the collapse of the distinction. Moreover, to the extent that the distinction is merely a construct of historical, material and ideological conditions and reflects no organic or natural differentiation between spheres of activity, one may regard it as having achieved the final stage in its decline. The dissolution of the distinction and the coming together of the private and public institutions and activities are crucial moves in the consolidation of contemporary global capitalism. However, the distinction still operates conceptually and ideologically, serving to conceal the foundational role played by private international law in legitimizing processes of privatization and globalization.

The incoherence of the distinction in international law admits to three explanations that may be referred to as empirical, conceptual and ideological. The first relates to a blurring of the distinction caused by empirical changes in the nature of the activity constituting the two spheres. This suggests that the distinction may at one time have reflected empirical conditions, but has ceased to do so. Of concern here is the growing interpenetration of the spheres, in that private actors are acting publicly and public actors are acting privately. The former is illustrated by the activities of multinational corporations, private trade associations and arbitrations, or cartels that impact on matters of national public policy, eroding the policy-making autonomy of states. The latter is illustrated by state trading and other economic activities in which states engage as private commercial actors. There appears to be much evidence to support this view.<sup>14</sup> Robert Cox argues that the distinction between the polity and economy, between the state and civil society,

made practical sense in the eighteenth and early nineteenth centuries when it corresponded to two more or less distinct spheres of human activity or practice: to an emergent society of individuals based on contract and market relations which replaced a status-based society, on the one hand, and a state with functions limited to maintaining internal peace, external defense, and the requisite conditions for markets, on the other.

He continues: '[t]oday, however, state and civil society are so interpenetrated that the concepts have become almost purely analytical (referring to difficult-to-define aspects of complex reality) and are only very vaguely and imprecisely indicative of distinct spheres of activity' (1981: 86). Cox identifies the internationalization of production and finance as

central contemporary developments that are reconfiguring state–society relations and recasting the public/private distinction. In a similar vein, Susan Strange emphasizes the increasing porousness of the boundaries between public and private activities, noting the development of the ‘defective state’, wherein ‘state authority has leaked away, upwards, sideways, and downwards. In some matters, it seems even to have gone nowhere, just evaporated’ (1995a: 56). The growing significance of non-state authority and the erosion of state authority have been likened to a re-medievalization of the world (Held, 1995: 137; Strange, 1995b). But there is a crucial distinction between medieval and modern authority structures. In the medieval period, private authority operated by virtue of the absence of political authorities desirous or capable of disciplining international commerce, whereas in the modern period private authority operates with the full support of state authorities (Cutler, 1995).<sup>15</sup> Indeed, the contemporary period is experiencing a merging of public and private authority in a transnational managerial and commercial elite committed to neoliberalism and the privatization and globalization of authority (Cox, 1981: 111; Gill, 1995, 1993). To the extent that contemporary incoherence is a result of the interdelegation or merging of public and private authority, one may identify the distinction, empirically, in the final stage of decline. However, it continues to be invoked to justify the private regulation of international commerce, the explanation of which is linked to conceptual and ideological considerations.

Conceptual uncertainty as to the status of private international law as an autonomous legal order, as an entity *sui generis*, contributes to the obscurity of private international trade relations. This in turn leads to the invisibility of the enhanced ‘political’ authority of the private sphere. The sarcastic observation of a leading scholar that private international law has been ‘pompously baptised international law’ by fuzzy-thinking international lawyers reflects profound doubt as to the conceptual status of the distinction (David, 1972: 209). The view that private international legal norms are no more than municipal law norms reflects a tension between private international law conceived of as the embodiment of national power and sovereignty and the view that it exists as an extension of or projection beyond state territoriality. The latter view challenges the territorial foundations of political/legal authority in that it contemplates the extraterritorial application of legal norms. To the extent that this threatens the orthodoxy of the territorial state as ‘the geopolitical container for human relationships’ and as ‘coterminous with the minimum self-sufficient human reality’ (Neufeld, 1995: 11), the autonomy of private international law poses a multifaceted and deeply subversive challenge to territorial conceptions of authority in international relations. Modern textbooks on international law exhibit a subtle imprecision over the status of private international law, which relates

very much to conceptual incoherence as to its status as an autonomous legal order.<sup>16</sup> Arguably, such doubt has been present since the distinction between public and private international law emerged. However, what intensifies the uncertainty today is the reaffirmation of the public/private distinction in assertions of the distinctive nature of private international trade relations as the source of legitimacy for enhancing and deepening the private regulation of international commerce. Private international trade law differs from public international trade law, we are told by trade experts, in its essentially 'apolitical' nature.<sup>17</sup> Private regulatory arrangements are said to be natural, neutral in application, efficient and, ultimately, more consistent with globalizing and privatizing trends than are public regulations (Cutler, 1995: 394–6).

The paradoxical nature of the disjuncture evident in elite reaffirmations of the analytical vitality of the public/private distinction and empirical evidence of its decline suggests the operation of changing ideological conditions. Karl Klare emphasizes that the ideological function of the public/private distinction is reflective of the role played more generally by legal discourse:

The peculiarity of legal discourse is that it tends to constrain the political imagination and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate. The *modus operandi* of law as legitimating ideology is to make the historically contingent appear necessary. The function of legal discourse in our culture is to deny us access to new modes of conceiving of democratic self-governance, of our capacity for and experience of freedom.

(1982: 1358)

He describes the 'chameleon-like alterations in public/private imagery' that encode ideological messages, suggesting that the distinction operates most significantly at a symbolic level (1982: 1390). Indeed, the associations of the private realm with civil society and the market and the public realm with the state and government are powerful symbols. However, as Gramsci notes, the distinction between civil society and the state is not organic, but methodological. *Laissez-faire* liberalism 'is a deliberate policy, conscious of its own ends, and not the spontaneous, automatic expression of economic facts' (1971: 160). Moreover, liberalism, Klare argues, is caught in a dilemma of being incapable of rejecting a distinction vested with so much ideological significance yet unable to capture human experience. Liberalism responds with the

ever-renewed effort to refract the complexities of social life through the basic dualities like public/private ... liberal discourse has



become an intellectual practice designed to generate images of the world conducing to a belief that one can meaningfully conceive of the realm of social and economic intercourse apart from the realm of politics.

(1982: 1416)

The 'essence' of the public/private distinction is 'the conviction that it is possible to conceive of social and economic life apart from government and law, indeed that it is impossible or dangerous to conceive of it any other way' (1982: 1416). The distinction operates to deny the mutually constitutive nature of the economic and the political domains, thus inhibiting the belief that the institutions which order social life are the product of human agency and therefore can be altered. In the context of trade relations, it operates to obscure the political nature of private trade relations and the role of private trade law as the constitutive ideology of global capitalism.

The artificiality and untenability of the separation of economics and politics in contemporary international relations has been noted by students of international relations and economics alike.<sup>18</sup> The separation, as maintained by the public/private distinction, is reproduced by academic and practical lawyers and by governmental and private elites, obscuring the paradoxical result of private actors legitimately exercising public functions.<sup>19</sup> While the reverse situation of public actors exercising private functions is also the case, it does not raise the same concerns of democratic accountability. The key implication of this paradox for this article is the issue of the nature of agency or rather the nature of 'agencies of public power'. The paradoxical exercise of public power by private actors can be illustrated with a review of the historical constitution of authority in private international trade relations.

### **NORM GENERATION AND ENFORCEMENT IN PRIVATE INTERNATIONAL TRADE RELATIONS**

Historical differences in the generation and the enforcement of norms governing private international trade relations illustrate significant episodes in the constitution of the private sphere. They also provide important insights into the processes by which political authority is constituted and reconstituted over time by private and public actors. Students of private international trade law generally identify three phases in the historical development of the law merchant (Cutler, 1995). During the medieval phase, private merchants developed trade customs that acquired universal application throughout the European trading world through the activities of consuls and specialized merchant courts that settled disputes in markets, fairs and ports (Berman and Kaufman,

1978). Some of the customs came to be codified in merchant laws that operated independently of local legal systems and were enforceable only in merchant courts. Private actors operated more or less autonomously in the regulation of international commercial relations due to the absence of public authority desirous or capable of exercising a greater role. While local markets and local transactions were heavily regulated by religious and political authorities, international commercial transactions were regulated by the merchants themselves. The primary source of the law was merchant custom, while dispute settlement through private merchant arbitrations was the norm governing enforcement. In both norm generation and enforcement merchant practices emphasized procedural and evidentiary informality and gave rise to transactions that were unique and limited to the merchant community. At this time there was no distinction between public and private international law. Indeed, the absence of a clear distinction between the two spheres reflects the general imprecision in and ambiguity of political authority in the medieval world.

During the second phase, with the development of centralized states, many of the merchant laws were incorporated into national commercial laws. State authorities engaged in state building sought greater control over international commercial transactions, and public authority largely eclipsed private authority in creating and enforcing international commercial laws. Merchant custom virtually disappeared as a source of commercial norms as positive law became the mark of state authority and codification a method of state building. In the area of enforcement, private merchant arbitrations were replaced by adjudication in national courts of law under national commercial codes. Merchant autonomy in norm generation and in enforcement contracted while state authority expanded. During the early part of this phase, mercantilist principles informed state regulation of commerce, but later the advent of liberal political economy marked a shift in favour of a more permissive and facultative approach that stressed free market principles. Public authorities thus generated norms and enforced disputes consistently with private law principles stressing freedom of contract and the facilitation of exchange.

In the contemporary phase, growing national differentiation generated a movement for the unification of commercial laws. This movement involves many public and private actors. Indeed, the diversity in international formulating agencies is so great that one observer comments that the 'organizational side of the transnational law of commercial transactions reveals a picture which in its complexity and colourfulness rivals that of the substance of this developing area of law' (Dolzer, 1982: 61-2). The unification movement is reasserting the primacy of merchant autonomy and the private regulation of international commerce. Merchant

custom is being heralded as the preferred method for norm creation, while dispute settlement through private arbitration is eclipsing adjudication in national courts. Private regulation is held out as the most progressive method for managing interdependencies, for achieving international competitiveness, and for securing justice in commercial relations.

The unification movement is an important instance of what Alexander Wendt refers to as 'the internationalization of political authority' (1994: 393). Wendt notes that the 'concept of authority has a dual aspect: legitimacy (or shared purpose) and coercion (or enforcement)' (1994: 393). Today, the private international trade regime, like his description of the international capital regime, embodies 'a degree of collective identity ("embedded liberalism"), routinized discussions of collective policy, and networks of organizational linkages' and an efficacious sanctioning system based upon a combination of private and public enforcement, that 'enable us to speak of an internationalization of political authority' (1994: 393). However, the collective identity of the trade regime is better described in terms of 'disembedded' liberalism, as private and public elites disembody the public sphere by expanding the private sphere to include norm generation and enforcement activities which were formerly regarded as part of the public sphere. In so doing, as they 'pool their de facto authority over transnational space, they remove it from direct democratic control' (Wendt, 1994: 393).

This alliance between public and private agents, between governmental and corporate elites, is working a reconfiguration of authority relations. It is blurring the distinction between the public and private realms and enhancing the legitimacy of the latter as a source of authority. The alliance is cemented by a commitment to the expansion of capitalism through the promotion of private regulatory authority. The disembedded law merchant provides the legal and ideological foundations for privatization.

The significance of private agents in internationalizing political authority provides a clear indication of the contemporary artificiality of the public/private distinction. Most importantly, however, the public/private distinction operates ideologically to obscure the operation of private power in the global political economy. The devolution of authority to private actors, domestically, internationally and transnationally, is reconfiguring political space. The balance between public and private authority is shifting as the regulatory scope of states contracts and facilitates the enhanced power and mobility of capital (Picciotto, 1988).

## REVISIONING THE PARADOX

The public/private distinction is not a natural, organic or inevitable attribute of the landscape of international law. It is an analytical

construct that evolved in response to the growing individuation and territoriality of state power and authority. The distinction played a critical role in reconciling the notions of state sovereignty and autonomy with the idea of commitment to a broader community outside the state. It assisted in state building and provided the political conditions for the rise of modern capitalism. The distinction also facilitated the growth of international commercial transactions by providing a mechanism for enforcing the laws of other states. But the grounding of this mechanism in the private sphere creates the potential for undermining commitments to a broader community because it obscures the political dimension of private international trade. Today, the distinction is marked by incoherence. At the very least, as an empirical distinction, it is in collapse. However, it is more likely that the distinction is in the final stage of decline as the activities and roles of private and public agents come together and create a disjuncture between its conceptual and empirical status. As John Dewey noted:

Failure to recognize that general legal rules and principles are working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations, explains the otherwise paradoxical fact that the slogans of the liberalism of one period often become the bulwarks of reaction in a subsequent era.

(1924: 26)

Today, the distinction obscures more than it clarifies about the nature of power and authority in international relations. It does not capture the rich and variable sources of authority in international relations. Moreover, it places obstacles to revisioning the nature of the relationship between the public and the private spheres – between governments and their peoples. This is because it conceals the processes by which globalizing and privatizing influences are driving a wedge between states and societies and, paradoxically, rendering public processes private and thus beyond democratic practices of scrutiny and review. The distinction functions practically and ideologically to deny the political foundations of private international trade relations. This obscures the efforts of corporate and government elites to restore the primacy of merchant custom as the source of norms and private arbitration as the pre-eminent method for resolving disputes. These moves are reasserting the neoliberal commitment to private regulation. Paradoxically, governments are participating in freeing international commercial transactions from national regulation and are thus contributing to their own inability to assert jurisdiction over international commercial matters involving domestic public policy concerns.<sup>20</sup> Most importantly, the denial of ‘the role of politics – the processes by which communities organize and

institutionalize their self-directive capacities – in constituting the forms and structures of social life is a way of impeding access to an understanding of the role of human agency in constructing the world' (Klare, 1982: 1417). The distinction exercises a form of closure to debate of alternative arrangements between different spheres or aspects of existence and suggests that this is the way things have always been. As such, it operates in a profoundly conservative manner. To the extent that this erodes the foundations of democratic accountability, it would appear that theorists of international relations and democratic theory might, indeed, want to work together.<sup>21</sup>

## NOTES

- 1 Polanyi (1944: 196) says of the distinction rendered in terms of the separation of economics and politics:

We are not dealing here, of course, with pictures of actuality, but with conceptual patterns used for the purposes of clarification. No market economy separated from the political sphere is possible; yet it was such a construction which underlay classical economics since David Ricardo and apart from which its concepts and assumptions were incomprehensible. Society, according to this 'lay-out', consisted of bartering individuals possessing an outfit of commodities – goods, land, labor, and their composites. Money was simply one of the commodities bartered more than another and, hence, acquired for the purpose of use in exchange. Such a 'society' may be unreal; yet it contains the bare bones of the construction from which classical economics started.

- 2 Cox (1981), reproduced in Cox with Sinclair (1996: 109–10), identifies the internationalization of the state with the internationalization of production, which he defines as 'the integration of production processes on a transnational scale, with different phases of a single process being carried out in different countries. International production currently plays the formative role in relation to the structure of states and world order that national manufacturing and commercial capital played in the middle of the nineteenth century.'
- 3 Wood (1981: 78–9) identifies legal norms or 'juridical' forms as 'constituent of the productive relations' of capitalism while Giddens (1971: 40–1) refers to the 'modern legal system and judiciary as a principal ideological support of the bourgeois state' which must be analysed 'in relation to the social relationships in which it is embedded'.
- 4 These include the sources and subjects of international law; the application of international law by domestic and international tribunals; the enforcement of public international law; international organizations; regional associations; dispute settlement; the international law of treaties; the laws of war; the law of the sea and outer space; international protection of the environment and of international human rights; state responsibility for injury to aliens; foreign relations law; diplomatic recognition; diplomatic and sovereign immunities; state responsibility for the acts of nationals; state succession; and the right of states to make claims on behalf of their nationals (Paul, 1988: 150, note 50).

- 5 It is also called transnational commercial law and includes international business transactions concerning the international regulation of foreign investment, the international sale of goods and services, and business transactions ancillary to contracts of sale, like insurance, transportation and finance. Such subjects include: export sales; licensing; distributorships; international loans; insurance; joint ventures; choice of law; the enforceability of arbitral awards; extraterritorial application of taxation, anti-trust and securities laws; and procedural matters, including choice of laws rules; proof of foreign law; domicile; residence; jurisdiction of domestic courts; enforceability of foreign judgments and foreign arbitral awards; the application of conflicts principles to contracts, property and family law and public policy exceptions to applying foreign law (Paul, 1988: 151).
- 6 The sources of public international law are generally identified as those listed in article 38 of the Statute of the International Court of Justice, two of the most important being international conventions and customs. It should be noted, however, that increasingly private international laws are being formulated internationally and embodied in conventions. This complicates the characterization of and distinction between private and public international law, at least as regards their sources.
- 7 The term 'critical legal studies' is used here to refer to a rather eclectic scholarship that, as Purvis (1991: 89) notes, attempts to  
 bringing the radical insights of modernism into law. The intellectual origins of the movement are in Legal Realism, New Left anarchism, Sartrean existentialism, neo-progressive historiography, liberal sociology, radical social theory, and empirical social science. Critical jurisprudence has sought to expose political choice, discredit the 'rights' discourse of liberal legalism, demonstrate the indeterminacy of law, and reveal the bias of liberal ideology.
- For a good introduction to critical legal studies see David Kennedy (1985-6).
- 8 Comity in international law has been variously described or defined in terms of reciprocity, courtesy, politeness, convenience, goodwill between sovereigns, moral necessity or expediency, and is invoked to explain why courts enforce or apply the decisions of foreign courts or limit their own jurisdiction in the face of a competing foreign jurisdiction. See Joel Paul (1991: 2-3).
- 9 Bartelson (1995) provides a brilliant analysis of the process by which the concepts of the state and the international system or society emerged through a process of constitutive separation. And see Smith (1995: 1-37) for a discussion of this dualism in terms of the tension between international theory and political theory.
- 10 Earlier Roman civilization and law also differentiated between local and universal rights, but did not differentiate between public and private international law (Paul, 1988).
- 11 For a classic account of the origin of the separation of public and private authority in terms of the disembedding of the self-regulating market from its social and political context, see Polanyi (1944).
- 12 Horowitz (1982: 1426) identifies the case of *Lochner v. New York* 198 U. S. 45 (1905), in which the Supreme Court enunciated the principle of freedom of contract as a constitutionally protected right, as the beginning of attacks launched by judges like Holmes, Brandeis and Cardozo, and theorists like Roscoe Pound, Morris Cohen and Karl Llewellyn, on the conservative ideology of the private/public distinction.

- 13 The final stage of loopification is described thus: 'one's consciousness is loopified when one seems to be able to move by a steady series of steps *around* the whole distinction, ending up where one started without ever reversing direction.' He illustrates this last stage in the decline of the public/private distinction in domestic law with the nature of the market and the family as both parts of the private sector.
- 14 See Held (1995), Gill (1995), Ruggie (1995).
- 15 See also Held (1995) and Perraton *et al.* (1997) for the continuing role of the state in the face of forces of globalization.
- 16 For an illustration of conceptual incoherence see Horn (1982: 12–15).
- 17 For a list of trade experts who express this view, see the references listed in Cutler (1995: 392, note 65).
- 18 See Strange (1995b) and Heilbroner and Milberg (1995). For what continues to be probably the most thoughtful analysis of the relationship between politics and economics in international relations see Ashley (1983).
- 19 See Held (1995: 133) for a similar identification of paradoxical notions of authority in the global economy generated by the internationalization of production and finance.
- 20 See Paul (1991) for a discussion of cases illustrating how corporate actors are able to take advantage of the rules of private international law and practices of comity to avoid national regulatory and public policy controls.
- 21 As suggested by Wendt (1994: 393).

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