

## THE PUBLIC LAW-PRIVATE LAW DISTINCTION IN EUROPEAN AND AMERICAN LAW\*

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*Introduction.* THE DISTINCTION between public law and private law seems to many continental European lawyers<sup>1</sup> to be fundamental, necessary and, on the whole, evident. Institutional works, student manuals and treatises contain discussions of the dichotomy, often in confidently dogmatic terms that put to rest incipient doubts. The law student, who encounters this sweeping division at the outset of his career, tends uncritically to absorb it. It quickly becomes basic to his *Rechtsanschauung*.<sup>2</sup> Some legal scholars attack the "mighty cleavage"<sup>3</sup> as neither fundamental nor necessary, and certainly not clear, but to the average continental lawyer such questions seldom occur. He *knows* that public law and private law are essentially different. Where classification as one or the other is difficult, the tendency is to blame the positive legal order, which does not yet adequately comprehend and articulate the true nature of the underlying

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<sup>1</sup> The degree of commitment to the distinction varies widely within Europe. In Switzerland it is embodied in Article 64 of the Federal Constitution; in other nations its significance is doctrinal. It has not been possible, within the limits of this article, to describe these variations in any detail. For introductory discussions of the distinction of continental European legal thought as seen by French, German and Italian scholars, respectively, see I. MARTY & P. REYNAUD, *DROIT CIVIL* ch. 4 (1961); L. ENNECCERUS, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS* § 34 (15th ed. 1959); Pugliatti, *Diritto pubblico e diritto privato*, in 12 *ENC. DEL DIRITTO* 696 (1964).

While recognizing these variations, I have chosen to base the discussion of continental views on Italian law and legal scholarship, in part because of its tendency, more than any other western European jurisdiction, to be a kind of paradigm of the continental civil law. For a discussion of the reasons why Italian law is more representative of the civil law tradition than either the French or German taken alone, see Merryman, *The Italian Style I: Doctrine*, 18 *STAN L. REV.* 39, 40-42 (1965).

<sup>2</sup> Legal perception. [Ed.]

<sup>3</sup> The phrase is Holland's. T. HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* (13th ed. 1917).

reality. Fortunately, legal scholars continue to work on such problems, and eventually legal science will make it all clear.<sup>4</sup> Meanwhile statutes, decisions and doctrine that either assume or attempt to clarify the dichotomy continue to appear, embedding it ever deeper in the law.

The public law-private law distinction is not taken as seriously in the United States.<sup>5</sup> One hears the terms, but their use is more often limited to convenience of communication.<sup>6</sup> Law students are not taught about a division of all law into these fields; they do not find the division employed in statutes, decisions or doctrine. There is no debate over the reality of the distinction, little attempt to define the terms or indicate the precise line between the two domains. American lawyers, American law and American legal scholarship seem to get along without any conscious use of the great division between public and private law.<sup>7</sup>

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<sup>4</sup> There is no attempt in this paper to describe the various definitions of public and private law that have achieved some importance in Europe. The interested reader will find an adequate discussion in Pugliatti, *supra* note 1. For a brief discussion in English of the principal attempts of *definition* see J.W. JONES, *HISTORICAL INTRODUCTION TO THE THEORY OF LAW* 139-54 (1940).

<sup>5</sup> Neither "public law" nor "private law" is employed as a heading in or in the indexes to such commonly used classifications of the law as those of *Corpus Juris*, *Corpus Juris Secundum*, *American Jurisprudence*, *American Law Reports*, *Annotated*, the *American Digest*, or the *Library of Congress List of Subject Headings*. "Private law" was never used in the *Index to Legal Periodicals*, but "public law" appeared for a time, dropped from sight, reappeared and disappeared again.

Some works, typically jurisprudential, do mention the distinction in passing. Thus H. BERMAN, *THE NATURE AND FUNCTIONS OF LAW* 8 n. 8 (2d ed. 1958) states: "The phrases public law and private law have no precise meaning." And W. SEAGLE, *THE QUEST FOR LAW* 267 (1941) states: "The jurists who are busy making legal classifications distinguish between 'public' and 'private' law. This distinction, like the abstraction of the juristic person, was vague and confused in all ancient systems of law, even Roman law . . ."

<sup>6</sup> There is a technical usage, which is only remotely related to the topic of this paper: the distinction between public acts, statutes or laws and private acts, statutes or laws. As defined in CAL. CODE OF CIV. PROC. § 1898 (Deering 1967), for example: "Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations." The most important operational consequence of the distinction is that courts will take judicial notice of public statutes, but private statutes must be specially pleaded. The practice of enacting such "private" laws, and hence the importance of this distinction in the United States, is declining. For a fuller discussion see H. READ, J. MACDONALD & J. FORDHAM, *CASES AND OTHER MATERIALS ON LEGISLATION* 717-50 (2d ed. 1959).

<sup>7</sup> In the first issue of the *Journal of Public Law* the editor announced that this publication "[a]s [its] name suggests . . . will be directed toward Public Law fields. However, to determine that Public Law merits separate attention is one thing. To

The contrast in attitudes is remarkable and has never been adequately discussed. The purpose of this article is to indicate some of the reasons why the public law-private law distinction seems so important and so fundamental to Europeans and so insignificant to Americans.

*History.* The distinction between public law and private law has a long history on the Continent. Whether it first appears in the classical Roman law or only later, in the *Corpus Juris Civilis*, is not important here.<sup>8</sup> Irnerius observed the distinction and wrote and taught about it.<sup>9</sup> The Glossators, the post-Glossators and the Commentators all accepted and employed it. It became a part of the common store of basic assumptions of the European *jus commune*, and it not only survived but was actively employed (for ideological reasons described *infra*), during the process of codification and reform in the 19th century. This continuous history both lends the cleavage authority and builds it into the culture. Concepts that have been in active use for nine centuries come to seem fundamental, necessary and evident.

The Roman law never had the impact in England that it exerted on the Continent.<sup>10</sup> If the revival had begun a century or so earlier, before the

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make the necessary decision as to the scope of Public Law . . . is quite another. Accordingly, when the publication of the *Journal of Public Law* was decided upon, inquiries were sent to a number of individuals . . . asking for brief comments on Public Law as a distinct concept . . .” The responses follow. There are eight of them, of which six ignore the question and two make rather dispirited attempts to face it. That is the end of the matter. The *Journal of Public Law* goes on, but this perfunctory symposium is its only expressed effort to define its field. The British have an analogous periodical called *Public Law*, which begs the question by its subtitle: “The Constitutional and Administrative Law of the Commonwealth.”

<sup>8</sup> T. HOLLAND, *supra* note 3, at 130, states that the distinction was “clearly grasped and stated by the Romans” and J.W. JONES, *supra* note 4, at 139, says that the division has been current since at least the time of the classical Roman law. W. MARKBY, *ELEMENTS OF LAW* 152 (6th ed. 1905), on the contrary, says that it originally appeared in the Institutes of Justinian, and Pollack, *The Contact of Public and Private Law*, 1 *CAMB. L.J.* 255 (1943) agrees with him.

The distinction, which was indigenous to the Italian law and was diffused throughout much of France at an early period, was unknown to German law until the Reception. See I. BOEHMER, *GRUNDLAGEN DER BÜRGERLICHEN RECHTSORDNUNG* 171-72 (1950).

<sup>9</sup> For a thorough discussion of the history of the dichotomy in Roman and European law see Calasso, *Le basi storiche delle partizioni*, in 12 *ENC. DEL DIRITTO* 822 (1964).

<sup>10</sup> There has been considerable debate about the extent of Roman influence on England, but all would agree that it is of a lesser order than that exerted by Roman law on the Continent. For a good discussion and review of the literature see Pluck-

Norman Conquest, English legal history might possibly have taken the Roman direction.<sup>11</sup> But by the time Vacarius came to England to teach,<sup>12</sup> a vigorous native legal system was in force. The emerging English legal system owed much to northern influence and little to the Roman law—even the barbarized Roman law of the Dark Ages.<sup>13</sup> The teaching of Vacarius and Bracton's cribbing from Azo<sup>14</sup> were only two of a number of opportunities for Roman incursions into English law.<sup>15</sup> They are chiefly remarkable for their transitory influence. The "Roman" parts of Bracton have been much less influential than the English parts, and his garbled version of Azo's treatment of the public law-private law dichotomy has gone unheeded.<sup>16</sup>

It has been said that English government became the least feudal and English land law the most feudal in Europe.<sup>17</sup> The point about the strongly feudal nature of English land law is particularly important. In a truly feudal legal system the distinction between public and private law fails to make sense.<sup>18</sup> Property and office are indistinguishable; tenure of land

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nett, *The Relations Between Roman Law and English Common Law down to the Sixteenth Century*, 3 U. TORONTO L.J. 24 (1939).

<sup>11</sup> Irnerius of Bologna is the name most often associated with the revival of Roman legal studies in Europe, and the years 1100-1130 are given by the authorities as the time during which he wrote and taught. The Normans conquered England in 1066.

<sup>12</sup> The year 1149 is generally assigned to his book, the *Liber Pauperum*, supposedly written by him for impecunious students. For a scholarly edition and discussion of the man and his work and its influence on English law see *THE LIBER PAUPERUM OF VACARIUS* (F. de Zulueta ed. Selden Society No. 44, 1927).

<sup>13</sup> The Norman legal institutions that were imposed on England came from that part of France in which there was the stoutest resistance to Roman law, and in which the dichotomy was unknown. See Walz, *Public Law*, in 12 ENC. SOC. SCI. 657 (1934); note 8 *supra*.

<sup>14</sup> On this topic see *SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO* (F. Maitland ed. Selden Society No. 8, 1895). Maitland demonstrates that much of Bracton is copied more or less directly from the works of Azo, one of the Commentators.

<sup>15</sup> See the interesting speculations of Maitland on the possibility of an English "reception" in the 16th century in F. MAITLAND, *English Law and the Renaissance*, in *SELECTED HISTORICAL ESSAYS OF F.W. MAITLAND* 135 (H. Cam. ed. 1957) and Holdsworth's discussion of and disagreement with Maitland's thesis: 4 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 252-93 (1924).

<sup>16</sup> Maitland discusses this point in *SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO*, *supra* note 14, at 33.

<sup>17</sup> W. HOLDSWORTH, *HISTORICAL INTRODUCTION TO THE LAND LAW* 4 (1927).

<sup>18</sup> For brief discussions of this point see 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 230-31 (2d ed. 1898); J.W. JONES, *supra* note 4, at 141; G. PATON, *A TEXT-BOOK OF JURISPRUDENCE* 291 (3d ed. 1964).

determines both “public” and “private” rights and duties. Depending on one’s premises he could today characterize all feudal law either as private law or as public law, but there was no occasion for such speculation at the time.

Hence, during its formative period, the English law developed without reference to the public-private cleavage. Just as the distinction was built into the culture of the civil law, it was built out of that of the common law. One reason why the continental jurist uses the dichotomy today is that his predecessors have used it for more than eight centuries; one reason why the Anglo-American jurist tends to ignore it is that his predecessors have gotten along without it for nine centuries.

*Methodology.* There is a strong tradition of legal scholarship in Europe, extending back to the Italian Glossators (or, according to some, to the Roman juriconsults). The contemporary law teacher-scholar on the Continent is the conscious inheritor of this tradition. Such men have for centuries been the pre-eminent men of the law, and this historical fact helps to explain the strongly academic cast of much European legal thinking. It is a law of the professors. This does not mean that European professors create law in any formal sense. It does mean that they mold the materials of the law and the legal tradition into a doctrinal system, a model of the legal process.<sup>19</sup>

The nature of this model has varied at different periods of European history. In its present form it is a legacy of the 19th century, a monument designed and built by the German teacher-scholars who have since come to be called the Pandectists. Their work, as developed and diffused throughout the civil law world, has come to be called conceptual jurisprudence. Its principal distinguishing features, for the purpose of the present discussion, are first, a limitation of the focus of legal scholarship to the study of pure legal phenomena, to the exclusion of nonlegal facts and values, and second, the attempt to establish a “scientific” reconstruction of the law, embodying “scientifically valid” legal concepts, categories, institutions, relationships and processes drawn from the study of pure legal phenomena. Such a structure, if sufficiently comprehensive, is called a general theory of law. It is, and is intended to be, conceptual and abstract. The dominant

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<sup>19</sup> On the influence of scholars in civil law countries see F. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 69-76 (Thomas Cooley Lectures No. 5, 1953); David, *Le rôle des Juristes dans l'Elaboration du Droit Selon la Conception du Système de Droit Romano-Germanique*, in 1 FESTSCHRIFT FÜR HANS DOLLE 359 (1963).

method is that of formal logic, uncomplicated by intuition or the subconscious. Although it is expected that the structure will contribute much to the proper development and application of the law by legislatures and courts, the resolution of concrete social problems is not the primary concern of the scholar, the basic scientist. This is the work of the engineers of the law, of legislators and judges.<sup>20</sup>

In such a context it is imperative that concepts be clearly defined and distinctions sharply drawn. Public law and private law are mutually exclusive concepts forming a part of the prevailing general theory of law in Western Europe. Hence their proper definition and a clear formulation of the distinction between them are matters of some importance to legal science.<sup>21</sup>

If the civil law is a law of the professors, the common law is a law of the judges. The tradition of legal scholarship in the common-law world is neither very old nor very strong. A class of teacher-scholars did not emerge until very recently,<sup>22</sup> and most of the great books of the common law were, until late in the 19th century, written by judges. A judicial methodology, focused narrowly on the resolution of concrete cases and the practice of reasoning closely from case to case, dominated the legal process. Inherent in this methodology was a reluctance to define broadly, to go beyond the requirements of the instant case, to state general rules or to build general theories of law.

The first really significant manifestation of an emerging tradition of academic legal scholarship in the United States took place in the early decades of the present century, culminating in such systematic treatises as those of Scott,<sup>23</sup> Wigmore,<sup>24</sup> and Williston<sup>25</sup> as well as the first Restate-

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<sup>20</sup> For a more detailed description of continental legal science, with particular emphasis on Italian legal scholarship, see Merryman, *supra* note 1.

<sup>21</sup> On the methodological importance of the distinction see Pugliatti, *supra* note 1, at 721-22.

<sup>22</sup> The writer has never encountered an adequate explanation of this fact. It probably has something to do with the tradition that English lawyers receive their training from the practicing bar, rather than in universities. And this is undoubtedly related somehow to the fact that, although there was no reception of Roman law in England, only Roman law was taught in the universities until the 18th century. For an interesting brief discussion see H. HANBURY, *THE VINERIAN CHAIR AND LEGAL EDUCATION* 1-10 (1958).

<sup>23</sup> A. SCOTT, *THE LAW OF TRUSTS* (1st ed. 1939).

<sup>24</sup> J. WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (1st ed. 1904).

<sup>25</sup> S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* (1st ed. 1920).

ment of the Law.<sup>26</sup> These works were built on the traditional materials of the common law—on judicial decisions—and sought, with varying degrees of emphasis and success, to draw some systematic order from them. Thus the objectives were roughly equivalent to those of European legal scholarship, within the limits imposed by a different methodological tradition and a different body of authoritative legal materials. However, these works were accompanied by and, particularly in the case of the Restatement, tended to stimulate reactions in legal thought that have led American academic legal scholarship in quite different directions from those predominating in Europe.

These currents of thought, of which the most prominent have come to be called legal realism<sup>27</sup> and sociological jurisprudence,<sup>28</sup> are in some ways the antithesis of conceptual jurisprudence. Among the more prominent tenets is a strong belief in the importance of recognizing and exploring the relationships between law and the socio-economic order. Abstractness is disparaged and concreteness encouraged. Formal legal concepts are avoided, as are definitions and generalizations. There is much discussion of the limitations of formal logic and of the parts played by individual and group values, intuition and the subconscious in the legal process. The emphasis is on the solution of social problems through the law, a process in which it is assumed that judges and scholars, as well as legislators, are and should be involved.

In the presence of this kind of methodology there is little room for legal science of the continental kind. Everything that tends to reinforce the methodological importance of the public law-private law distinction on one side of the Atlantic is either absent or is submerged by contrary assumptions and values on the other. Since such concepts as public law and private law have little utility in the solution of concrete legal problems in the United States, they go undefined and undifferentiated. The "mighty cleavage" is ignored.

*The separation of powers.* It has always seemed more obvious to Europeans than to Americans that the legislative, judicial and administrative

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<sup>26</sup> RESTATEMENT OF THE LAW (1932-44).

<sup>27</sup> For a brief discussion and collection of authorities on the reaction of the realists to the Restatement see Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613, 629-34 (1954). For a more general description of legal realism see E. GARLAN, *LEGAL REALISM AND JUSTICE* (1941); Gilmore, *Legal Realism*, 70 YALE L.J. 1037 (1961).

<sup>28</sup> For an extensive, thoroughly documented study of this school see J. STONE, *THE PROVINCE AND FUNCTION OF LAW* 381-785 (1946).

powers are clearly and logically distinguishable and that each should be prevented from intruding into another's area. The sources of this dogma are generally traced to the rationalism and secular natural law of the 17th and 18th centuries and to the role of the *parlements* as principal whipping boys of the French Revolution. The abuses attributed to the judges under the old regime<sup>29</sup> were to be avoided by clearly conceiving and rigorously applying the distinction between legislating and adjudicating. Legislators, and only legislators, could make law. There was no power of judicial review or of judicial amendment disguised as interpretation. Courts could only apply law. The power of interpretation was given them by the Code Napoléon, but it was expressly restricted to the ascertainment and effectuation of legislative intent.

A similar combination of emphasis on the separation of powers and distrust of judges influenced the growth of European administrative law. The administration was a third, separate branch of government, and its independence had to be preserved. It was necessary to subject the administration to controls, but it was unthinkable that these controls should be exercised by judges. Hence the establishment of tribunals within the administration. Before these had been in existence very long they began to look much like courts, but they were not formally a part of the judiciary. The result was that there were two sets of courts.<sup>30</sup>

There is a good deal of discussion, legislation and litigation about the extent of jurisdiction of the administrative courts and the ordinary courts and the allocation of specific cases to one or the other in European countries. The development has varied from one nation to another,<sup>31</sup> and in none is the distinction between public law and private law congruent with that between administrative and ordinary jurisdiction. For one thing, criminal law, invariably classified as public law by Europeans, is uniformly in the ordinary judicial jurisdiction.

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<sup>29</sup> Most histories of the French Revolution include some discussion of the causes of popular dissatisfaction with the courts and judges of the *ancien regime*. See, e.g., L. GERSHOY, *THE FRENCH REVOLUTION AND NAPOLEON 18-22* (1939).

<sup>30</sup> The French *Conseil d'Etat* is the archetype of European administrative courts. See Riesenfeld, *The French System of Administrative Justice* (pts. 1-3), 18 BOSTON U. L. REV. 48, 400, 715 (1938); B. SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD* (1954).

<sup>31</sup> For a good discussion of the Italian development see S. GALEOTTI, *THE JUDICIAL CONTROL OF PUBLIC AUTHORITIES IN ENGLAND AND IN ITALY* (1954); for a comparison between German and French development, see the discussion in R. SCHLESINGER, *COMPARATIVE LAW* 240-48 (2d ed. 1959).

There remains, however, a rough sort of correspondence between private law and judicial jurisdiction. Private law is concerned with the recognition and enforcement of private rights, and in Europe the ordinary courts have always been the ones in which controversies about private rights have been decided. This does not mean that all public law questions (other than criminal matters) are exclusively in the administrative jurisdiction and that all private law questions (plus criminal matters) are in the judicial jurisdiction. The matter is much more complicated than that, but the public law-private law dichotomy is closely related to the phenomenon of the separate system of administrative courts on the Continent.

In the United States no strict doctrine of the separation of powers has ever had much practical effect. The so-called system of checks and balances is a denial of any rigorous separation of powers; the judiciary regularly reviews and revises the lawmaking activities of legislature and administration. Administrative adjudication is generally subject to judicial review. There is no dual system of courts and no consequent jurisdictional hardening of the public law-private law dichotomy.

*Ideology.* Much of the force behind the public law-private law cleavage in modern European legal thought is ideological, the expression of those dominant currents of economic, social and political thought of the 17th and 18th centuries that found expression in the civil codes of France, Austria, Italy and Germany in the 19th century.<sup>32</sup> This codified civil law was the heart of private law, and the dominant concepts in the codes were individual private property and individual freedom of contract. The thinking, of the sort we would now describe as extreme individualism, was an expression in forensic terms of the rationalism and secular natural law of the age. Both in their legislative statement in the codes and in the thinking of the jurists these fundamental rights of property and contract were guarantees of individual rights against intrusion by the state. The civil codes were thought of as serving a kind of constitutional function. Private law was that area of the law in which the sole function of government was the recognition and enforcement of private rights.<sup>33</sup>

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<sup>32</sup> For a brilliant documented discussion, from which I have freely borrowed in the text, see Giorgianni, *Il diritto privato ed i suoi attuali confini*, 15 RIV. TRIM. DIR. PROC. CIV. 391 (1961).

<sup>33</sup> The attempt to segregate private law is thus an attempt to establish the autonomy of the individual will, to create a private preserve for the individual, to guarantee the unfettered activity of juristic persons in the market. Private law is thus only another form of the triumph of freedom of contract. W. SEAGLE, *supra* note 5, at 267.

Accompanying this fundamental attitude were various corollary assumptions. Among these were a rather primitive view of the economy, in which the principal actors were private individuals, and an extremely limited view of the appropriate sphere of governmental activity. Neither associations of individuals in concerted activity, such as corporations and labor unions, nor broad participation by government in the economic and social life of the nation, so familiar to us in the 20th century, was contemplated. The sole actors in the legal universe were the private individual and the state, and each had its domain: private law for one and public law for the other.

In the legal scholarship of the 19th century this ideology was accepted, often perhaps without question. Indeed, much of the effort of legal science went into the construction of theories which embodied, but did not directly express, the essentials of what is commonly called 19th century liberalism. It is one of the major achievements of the German Pandectists that they raised this ideology to a highly systematic and abstract level in the name of legal science, and they did it so well that these essentially 19th century attitudes have been preserved in much of the European legal scholarship of the 20th century. The fundamental concepts of the German doctrine—the juristic act<sup>34</sup> and the subjective right<sup>35</sup>—embody 19th century individualism. They assume both the central importance of the individual and the limited function of government. They are juridical formulations of the role of individual autonomy in the law, and their area of effectiveness is coterminous with that of private law.

It was a kind of negative pregnant of this private law ideology that an entirely different attitude was appropriate in public law matters. There the role of government was not limited to the protection of private rights; on the contrary, the driving consideration was the effectuation of the public interest by state action. Public law had, from this point of view, two major components: constitutional law in the classical sense—the law by which the governmental structure is constituted—and administrative law—the

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<sup>34</sup> This is one accepted translation of the French *acte juridique*, the German *Rechtsgeschäft* and the Italian *negozio giuridico*. For a thorough and highly sophisticated doctrinal discussion see E. BETTI, *TEORIA GENERALE DEL NEGOZIO GIURIDICO* (2d ed. 1952).

<sup>35</sup> In Italy the concept of *diritto soggettivo* also has jurisdictional significance. Legal interests are classified as "subjective rights" or as "legitimate interests." The former are judicially protected; the latter fall in the administrative jurisdiction. For a thorough discussion of the subjective right in continental law see Sforza, *Diritto soggettivo*, in 12 *ENC. DEL DIRITTO* 659 (1964).

law governing the public administration and its relations with private individuals. In private legal relations the parties were equals and the state the referee. In public legal relations the state was a party and, as representative of the public interest (and as successor to the prince), superior to the private individual. The ideology of the time sharply distinguished public law from private law and hence further embedded the dichotomy in the legal order.

Ideologies consequently have a good deal to do with the view taken of the great cleavage. If one is convinced that the interest of the collectivity ought to take precedence over that of the individual, and if he sees private property and liberty of contract as institutions standing in the way of social progress, he may tend at the extreme to agree with Lenin that "all law is public law."<sup>36</sup> If he sees private law institutions as devices by which the middle classes acquire and increase their power at the expense of the masses, and if he views public law institutions as the means by which they consolidate their power, he may agree at the extreme with Pashukanis that "all [bourgeois] law is private law."<sup>37</sup> If, like many Europeans, one has seen the principle that the state is superior to the individual in public law relations systematically abused by totalitarian governments of the right and left he may wish, with Kelsen, to destroy the distinction in order to subject the state to principles of strict legality of the sort found in private law.<sup>38</sup> If one believes that continentals make too much of the state, which is merely one of a number of entities that occasionally require special legal treatment, he may, with Austin, reduce public law to a part of the law of persons.<sup>39</sup>

American social, economic and political thought in the 19th century was not greatly different from the European. Similar problems were prominent in both areas, and similar ideologies guided public and private responses to them. Extreme individualism had its season in the United States; private

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<sup>36</sup> See the letter from V. Lenin to Kurskii, 1922, in 20 SOVIET LEGAL PHILOSOPHY 292 (H. Babb transl. 20th Century Legal Philosophy Series No. 5, 1951).

<sup>37</sup> Discussed in W. FRIEDMANN, *LEGAL THEORY* 332 (4th ed. 1960).

<sup>38</sup> Discussed in W. EBENSTEIN, *THE PURE THEORY OF LAW* 168-73 (1945); Lauterpacht, *Kelsen's Pure Science of Law*, in *MODERN THEORIES OF LAW* 105, 115 (1933). Duguit reached the same view for similar reasons. See W. FRIEDMAN, *supra* note 37, at 182.

<sup>39</sup> 2 J. AUSTIN, *LECTURES ON JURISPRUDENCE* 774-77 (3d ed. rev. 1869). Paton said of this classification: "To consider the powers of the state in connection with the status of married women, infants and lunatics seems to suggest a lack of proportion." G. PATON, *supra* note 18, at 291.

property and liberty of contract had their period of sanctity. Here, as in Europe, the dogmas of 19th century liberalism are perpetuated in the alien world of the 20th century and the welfare state. Similar problems of adjustment of institutions to great transformations in the society and the economy have faced Americans. Similar variations in point of view about the role of the state and the individual are forcefully expressed here. The significant difference is that in the United States the public law-private law dichotomy has never provided the forensic terms of the discussion. Early in our legal development the federal and state constitutions, not civil codes, became the formal sources of fundamental private rights. A generalized private-law ideology of the European sort did not arise here, and indeed one found protection for property and contract rights in public law—in a constitution—rather than in private law. In Europe the great ideas and events that we symbolize by the French Revolution led to a reaffirmation, an intensification, of the bipolarity of law. In the United States similar events and ideas produced constitutions and an approach to their interpretation in which public law and private law were meaningless terms.<sup>40</sup>

*The contemporary crisis of the dichotomy.* It is apparent that the distinction between public law and private law in Western Europe derives much of its strength from historical ideas and events, rather than from inherent legal reality. As presented and discussed in student manuals and traditionally-oriented treatises it adopts, formalizes and perpetuates the dominant political, social, economic and legal thought of the 19th century. Meanwhile there have been great changes in government and in economic and social institutions, producing a substantial disparity between the bases of the legal theory and the facts of contemporary life. The “mighty cleavage” is in crisis and is the subject of a good deal of lively discussion in European juridical circles. It may be useful to examine briefly some of the reasons for the contemporary crisis of the concepts of public law and private law.<sup>41</sup>

First, Western Europeans have learned a great deal about the common law. It might have been possible for a parochial continental jurist of the 19th century to believe that the common law was crude and barbarous by

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<sup>40</sup> For a good general discussion of the American development see E. CORWIN, *LIBERTY AGAINST GOVERNMENT* (1948).

<sup>41</sup> On this subject see Georgianni, *supra* note 32, and the other works cited *supra* note 1. See also the interesting work by R. SAVATIER, *DU DROIT CIVIL AU DROIT PUBLIC* (1950) and the extensive criticism by Eisenmann, *Droit Public, Droit Prive*, 1952 REV. DE DROIT PUB. ET DE LA SCI. POL. 903.

comparison with the civil law. But the increase in cultural interaction between the civil and common-law worlds and, in particular, the flowering of comparative legal studies on the Continent, have revealed to the scholar that the Anglo-American common law is not measurably less sensitive, efficient or just than his own legal system.<sup>42</sup> He is aware that western, democratic, capitalist societies other than his own have been able to reach an advanced stage of legal development without the use of technical conceptions of public law and private law. This need not lead him to conclude that his own legal system should discard the dichotomy, but it does suggest that it is not a necessary part of every developed legal order.

Second, the Nazi regime in Germany, the Fascist period in Italy and the development of socialist legality in Eastern Europe and the Soviet Union in this century all have tended to dispel the comfortable illusion that the traditional civil law conceptions of public law and private law expressed ideologically neutral scientific truth. As civil law Europe became ideologically heterogeneous, familiar legal terms took on unfamiliar meanings. Astute continental jurists have always been aware that these conceptions had, at bottom, an ideological basis, but the political history of Europe in this century has broadened and intensified that awareness. Such terms as public law and private law do not import any given meaning; they are supplied with content by the culture of a given time and place. This truism has been underlined both by those who attack and those who defend traditional conceptions.<sup>43</sup>

Third, European governments have changed; today it is common for the state to "intervene" in the society and the economy. The individualistic state of the 19th century has been replaced by the social state of the 20th century. The expanded role of government has often been viewed as leading to a contraction of the area of free play of private autonomy.<sup>44</sup> One

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<sup>42</sup> A common-law lawyer who seeks reassurance on this score should read F. LAWSON, *THE RATIONAL STRENGTH OF ENGLISH LAW* (Hamlyn Lectures No. 3, 1951).

<sup>43</sup> It has often been observed that attempts to introduce ideological innovations into the Italian legal process under fascism were effectively resisted by Italian jurists in the name of the traditional legal principles. See Cappelletti, *Il processo civile italiano nel quadro della contrapposizione "Civil Law-Common Law,"* 9 *Riv. Dir. Civ.* 59, 89 (1963); Falk & Shulman, *The Bellagio Conference on Legal Positivism*, 14 *J. LEGAL ED.* 213, 218, 227 (1961).

<sup>44</sup> And not only on the continent.

[P]ublic law . . . is gradually eating up private law. Industrial law is being controlled by administrative organs and is at the same time eating into the law of obligations. Quotas and marketing schemes under administrative con-

way of viewing this change is to see fundamental private law concepts as having been modified by the addition of social or public elements, and such terms as the "socialization" or "publicization" of private law are frequently encountered. Although a more traditional doctrinal writer may insist that the legal, as distinguished from the social and economic, content of private rights remains unchanged under the new government,<sup>45</sup> such a distinction is unconvincing. In fact, the content of private rights has been substantially altered.

Fourth, the "intervention" of the state in the economic life of the nation has, to a growing extent in Europe, been carried on by the direct participation of state entities or state-controlled corporations engaging in the conduct of enterprise and using the legal forms of private law. In this way the private law exerts a growing force on public activity carried on not through the traditional medium of the administration but through the conduct of industrial and commercial enterprise by state organs or by companies controlled by the state. This tendency has been summed up by some administrative law scholars as tending toward a "privatization" of public law, an expansion of the role of private law at the expense of administrative law.<sup>46</sup>

Fifth, this century has seen the growth in importance and legal recognition of so-called "intermediate groups"—associations of persons to engage in concerted activity. The earlier image of a legal universe populated solely by the individual and the state, each with its own sphere, has been dispelled. In its place is a much more complicated universe peopled not only by the individual and the state but also by a wide variety of organizations such as trade unions, co-operatives, foundations, commercial and industrial companies, consortia, religious societies and so on. Many of these—one need only mention trade unions and commercial and industrial corporations—exercise great economic and social power. They constitute a kind of "pri-

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trol reduce the operation of commercial law. Housing and planning legislation takes the law of property under public control. This is only to say that *laissez-faire* has been abandoned, the public lawyer is ousting the private lawyer, and the rights and duties of institutions are superseding the rights and duties of private citizens. Jennings, *The Institutional Theory in MODERN THEORIES OF LAW*, 68, 72 (1933).

Equivalent comments are frequently found in the United States. See, e.g., Pound, *Public Law and Private Law*, 24 CORNELL L.Q. 469 (1939).

<sup>45</sup> Cf. I. MESSINEO, *MANUALE DI DIRITTO CIVILE E COMMERCIALE* 54-58 (9th ed. 1957).

<sup>46</sup> Eisenmann, *supra* note 41. A well-known example is development of the Ente nazionale idrocarburi (ENI) under Enrico Mattei in Italy in the post-World War II period. For an account see D. VOTAW, *THE SIX-LEGGED DOG* (1964).

vate" government, which frequently has greater impact on the lives of large numbers of individuals than formally constituted "public" governments.<sup>47</sup> In so complicated a legal universe simple dichotomies like public law and private law seem to lose their utility.

Sixth, European constitutions have come to be the medium for the statement of fundamental individual rights, including property rights, guarantees of the right to engage in economic activity, and the like. Thus the civil codes have been deprived of their constitutional function. That function has been transferred from the most private of private law to the most public of public law sources. In a sense this might be described as a "deconstitutionalization" or "depublicization" of private law, and these terms have been used by the doctrine. This development could lead to a sharpening of the public law-private law distinction, but it also tends to reduce the significance of that distinction in the eyes of those who see it primarily as a method of preserving individual rights.

Seventh, rigid constitutions and judicial review of the constitutionality of legislation have been established in Italy and Germany. Special constitutional courts exist in both countries, but the ordinary judiciary also has a role to play.<sup>48</sup> In Italy, for example, even the lowliest judge can decide that a constitutional objection in a civil or criminal proceeding is "not manifestly unfounded," suspend the proceeding, and send the constitutional question to the constitutional court for decision. This necessarily reduces the significance of rigorous theories about the separation of powers and tends to blur the public law-private law distinction in the minds of those who see a close relation between that distinction and the separation of powers.

Eighth, the substantive differences between public law and private law have been reduced by the action of two separate but related forces. For one, the growth of administrative law on the Continent has produced progressively greater restrictions on the power of the state to act in disregard or in violation of the claims of private persons. Pursuit of the *Rechtstaat*,<sup>49</sup>

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<sup>47</sup> T. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) is the classic statement. For a more formal statement of the view that there is a "plurality of legal orders" within the state see SANTI ROMANO, *L'ORDINAMENTO GIURIDICO* (2d. ed. 1962). W. CESARINI SFORZA, *IL DIRITTO DEI PRIVATI* (1963), discusses the "law" made by private persons and organizations.

<sup>48</sup> See Cassandro, *The Constitutional Court of Italy*, 8 AM. J. COMP. L. 1 (1959); Rupp, *Judicial Review in the Federal Republic of Germany*, 9 AM. J. COMP. L. 29 (1960).

<sup>49</sup> Constitutional state. [Ed.]

insistence on the applicability of the rule of law to the state itself, leads at the limit to a homogeneous legal system in which the state is merely one kind—although still a very important kind—of subject of the law. This trend has been reinforced by the efforts of scholars to apply the conceptual structure of traditional legal science, originally developed out of the private law, to public law fields. The two together have produced a significant trend toward what might be called the “privatization” of public law.

Ninth, the traditional aims and methods of continental legal science and the general theory of law as taught in continental law schools, both largely derived from the work of the Pandectists in the 19th century, have been under attack by a small but growing scholarly *avanguardia* throughout the 20th century. Others, who see the traditional legal science as valid but spent, seek new directions for the fundamental work of legal scholarship. One result is a broadening of the field of interest of the legal scholar from the law itself to the relations between law and the cultural context from which it draws its life and the society and economy whose problems it must seek to resolve. Another result is a relaxation of emphasis on the validity and functional utility of conceptual structures and logical-formal thinking. The tendency clearly is toward a more “open” jurisprudence and a less technical methodology.<sup>50</sup> In the course of this development a primarily methodological emphasis on the public law-private law distinction inevitably loses some of its force.

*Conclusion.* Public law and private law, as terms of legal art, have a long history in the civil law system, and their meanings have varied at different periods in that history. As employed in the past century and a half they embody assumptions and values central to the great political, social and economic ferment that is generally symbolized in Europe by the French Revolution. Together with other ideologically-loaded concepts they have been built into a systematic conceptual legal structure that is taught in the faculties of law of the universities, limits and directs the thinking of the legal scholars who perpetuate it, provides the parameters of judicial interpretation and application of laws, precedents and legal transactions and, in a word, dominates the entire legal process. The role of these assumptions and values is concealed behind a facade of ideological neutrality and of the scientific study of purely legal phenomena. In this way European systematic jurisprudence embodies and perpetuates 19th century liberalism, locking in a selected set of assumptions and values and locking out all others.

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<sup>50</sup> See Merryman, *supra* note 27, at 614.

It also represents a great systematic achievement. Europeans are justly proud of their legal structure and methodology and of the very real contribution it makes to the certain, orderly and efficient statement, elaboration and administration of the law. Every phase of the legal process is the beneficiary of this systematic jurisprudence. It is not something to be lightly discarded.

The current crisis of the public law-private law dichotomy, which is merely representative of other similar current crises of key jurisprudential concepts, suggests the existence of an even more fundamental crisis in legal theory. There is an unmistakable trend toward a more open jurisprudence, and the root problem is whether this will require the sacrifice of systematic values. A major task of European legal theory in this century is to try to create a viable jurisprudence that is both open and systematic.<sup>51</sup>

Conceptions of public law and private law have never figured greatly in the history of the common law. They have no methodological significance, no jurisdictional consequences and no ideological relevance in contemporary American law. By their very irrelevance they illustrate two striking characteristics of American legal thought: its openness and its lack of system. Both sociological jurisprudence and legal realism emphasize the interrelations between law and other social phenomena; both are fundamentally opposed to the aims and methods of traditional European systematic jurisprudence. Neither has as yet provided an acceptable alternative systematic reconstruction of the law. It is too early to predict whether American legal scholarship will eventually impose some formal systematic order on American law,<sup>52</sup> but it does seem unlikely that the "mighty cleavage" between public and private law would play an important part in any such effort.

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<sup>51</sup> The principal attempt in this direction on the continent to date is called the jurisprudence of interests. It has had only limited success. See M. SCHOCH, *THE JURISPRUDENCE OF INTERESTS* (20th Century Legal Philosophy Series No. 2, 1948).

<sup>52</sup> For a brief discussion of this question see Merryman, *La funzione della dottrina nel diritto degli stati uniti*, 19 RIV. TRIM. DIR. PROC. CIV. 246 (1965).