The Public in Law

Representations of the Political in Legal Discourse

Edited by
Claudio Michelon, Gregor Clunie, Christopher McCorkindale and Haris Psarras

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Editors' Introduction

'The public' is a crucial concept in the disciplinary division and doctrinal understanding of the legal realm, whilst also animating much scholarly exposition of the relationship between law and society. This work provides a synoptic overview of the instantiations of 'the public' which appear in a number of legal spheres, and attempts to ascertain whether the notion can maintain a coherent essence in spite of the heterogeneity of its application. A key question framing the contributions relates to the work which is done by 'the public' in structuring the relationship between law and society – the extent to and manner in which it allows the interests and opinions of social groups to be represented and reflected in legal discourse. A related, and subsequent question, concerns the ability of the legal system to effectively impose such collectively-generated imperatives upon political and economic actors.

It is clear that the notion of 'the public' plays a 'gathering' role in relation to law and legal research that pertains to issues such as: the production and management of public goods; the mediation of the relationship between citizens and state agencies, and the rights and responsibilities entailed therein, and the process of constitutional democracy that produces consensus from the interplay of a plurality of opposed political interests. What is less certain, however, is whether 'the public' functions in reality as an interface between law and the political community, or rather inaugurates a process of self reference whereby the legal system reproduces its own guiding logics. To the extent that 'the public' does genuinely operate as a hinge between the legal system and the collective demands of an extra-legal political community, it should further be considered whether the interests and identity of the latter are distorted in their transversal of this boundary; is 'the public' deformed by its refraction into the legal? If the movement from the ground zero of the population at large to the rising edifice of 'the public' is one of selective filtration, what can be said to have been *lost* in this process of reduction? Further and related issues arise as to whether law's function can best be understood as *representative* or *constitutive* – questions which bear on the fundamental relation between law and politics and the ontological (and thus analytical) priority accorded each. In addition to these questions, the volume will explore more broadly whether the notion of 'the public' is immanent to the form and function of law as an institution, a discourse or a sub-set of social relations – whether law has a *necessarily* public quality.

The papers brought together in this collection interrogate the operation of 'the public' in a range of different legal (as well as illegal and arguably a-legal) spaces and are written by scholars from diverse disciplinary backgrounds. Such a composition is reflective of an understanding that the role of 'the public' in relation to law is not exhausted by the conventionally demarcated field of 'public law', nor

are public lawyers the only commentators with an interest in this relationship. The volume also productively brings together scholars at different stages in their academic careers, from exciting young researchers to well-established academics.

The volume is introduced and broadly framed by Neil Walker's chapter 'On the Necessarily Public Character of Law'. Walker asks whether, beyond the selective doctrinal and disciplinary senses in which law is designated as 'public', we can understand law more generally to be of a public character. His study blends historical and normative approaches, whilst deploying as an analytical device a distinction between first (positive) and second (pre-positive, constitutional) orders of law. Under this framework, the liberal legalist public/private dichotomy operates as a first order distinction, behind which Walker attempts to establish law's second-order *publicness*, using as a pivot the constitutive relationship between law and public authority. Further, he engages with contemporary narratives which emphasize the decentring of the state as the primary locus of political power, assessing whether second-order publicness may be de-moored from the state as a mobile virtue in the age of globalization.

The remainder of the book is structured into five parts: Constituted Publics; Unconstituted Publics; Excluded Publics; Public/Private, and; Emerging Publics: the Role of the Victim in International Criminal Justice. The first section (Constituted Publics) considers constitutionally-bounded spaces and institutional formations for the articulation of the voices and interests of political communities. Christopher McCorkindale's chapter opens the discussion by revisiting the political philosophy of Benjamin Constant in an attempt to excavate a republican moment. For McCorkindale, Constant's thought cannot be reduced to an anatomy of liberties ancient and modern and the accordance of priority to the latter, such as the readings of Isaiah Berlin and Philip Pettit would suggest. Rather, precisely at the moment when Constant asserts the primacy of modern liberty, he returns to the liberty of the ancients and the (re-)constitution of the public realm as the remedy for the ills of modernity. McCorkindale further engages with the republicanism developed by Pettit and Quentin Skinner, arguing that the latter, in tailoring their vision of liberty as non-domination to the ideological hegemony of liberal modernity, jettison too much of the republican tradition. For McCorkindale, freedom cannot be negatively framed, requiring instead the positive exercise of political liberty, courage and the public-minded virtue of *zoon politikon* being necessary conditions of non-domination.

Andrew Maloney investigates the role of the political party as a form of constituted public representing the aggregation of interests in the context of the tense complementarity of electoral and liberal conceptions of democracy. The chapter centres on a critique of the decision of the European Court of Human Rights in *Refah Partisi*, which concerned the dissolution of the party of that name on grounds of lack of respect for secularism in terms of the Turkish constitution. Maloney argues that the decision in *Refah* constituted a subversion of core principles of liberal and electoral democracy, especially the principles of equal respect and equality of influence as the basis for majority rule.

In the final contribution to the *Constituted Publics* section, Richard Collins considers the role of international institutions as a site for the formation and articulation of an *international* public interest. Collins identifies within the institutional structures of Inter-Governmental Organizations (IGOs) the reproduction of a tension between the increasingly 'public' content of international law and its underlying contractual form. These structural tensions are explicable in view of the application of Weiler's notion of geological layering, such that we may recognize in international law a Westphalian base, a 'communitarian' infra-structure and a regulatory/governance superstructure. Collins evaluates the potential for productively harnessing the tension between organizations as actors and as agoras (forums and enterprizes), arguing that the constituted politics of the IGO as multilateral arena should be regarded as provisional or relatively autonomous spaces understandable by reference to Arendt's concept of the political.

The second section, *Unconstituted Publics*, addresses the potentialities of the formation and activity of political subjectivities outside of (and in opposition to) institutionally-framed economies of representation. A key issue in this regard is whether there are instances or moments in which constituent power can, through an organic process of self-organization, gain purchase on the legal and political landscape in such a manner as to reveal foundational contradictions in the dominant legality and undermine existing lines of inclusion/exclusion. Scott Veitch, in the opening paper of the section, problematizes the very notion of the 'unconstituted public', arguing that different senses of 'the public' are always already constituted by the operation of institutional logics. Indeed, the primary relevance of 'the public' may be regarded as its role as a normative horizon and regulative signifier. However, Veitch argues that there remains space for contestation in the dialectical relation between the demarcated spaces of the 'constituted' public and the residual energy of that which is left behind.

Piero Moraro's paper considers the position of the civil disobedient – she who acts illegally or against command, yet (purportedly) in the interests of the (a) public – with specific regard to the question of whether she should plead 'guilty' or 'not guilty' at trial. Contrary to traditional accounts, in which first, the civil disobedient signifies her 'fidelity to the law' with a guilty plea, and second, the court affirms her status *qua* civil disobedient with a reduced sentence, Moraro persuasively argues for an alternative. For him, a 'not guilty' plea may be preferable insofar as it provides an opportunity for the civil disobedient to prove the prosecutor's charges to be inappropriate and persuade the jury and political community of the compatibility of her actions with the public interest. The paper confronts the assumption that the interests and identity of a political community can be distilled into a *legal* public and that the civic virtue of political action may be determined solely by the operation of law's cartographic lines of (il-)legality. Indeed, the development of the identity of the community and the pursuance of their interests may necessitate action outside of the law, as in the case of civil disobedience. In this context, the question of how the disobedient should plead goes to the heart of our understanding of the capabilities and orientation of the legal form.

A 'guilty' plea could demonstrate the inability of the law to accommodate the diverse expressions and interests of a political community, thus symbolically undermining the very notion of legal justice. In contrast, a 'not guilty' plea would suggest an appeal to the reflexive qualities of law, a belief that dissent or protest can be (and *should* be) accommodated by (and contained within) the legal system.

Haris Psarras, in the final contribution to the *Unconstituted Publics* section, considers a different question of civil disobedience, this time in the context of the European Union. Psarras asks whether the EU's polycentric governance model creates the conditions whereby an official may disobey the orders of a hierarchically superior officer in the name of values promoted by the law. In essence, the paper assesses the opposition between political and legal prescriptions – both of which purport to represent the public interest – in a decentralized command system, the investigation proceeding against the background of the case of *Bernard Connolly v Commission*.

The third section of the book, *Excluded Publics*, considers the role of law in creating the public sphere, investigating the process by which the public space of politics (the *polis*) is defined and policed through a series of inclusions and exclusions. The chapters consider in different contexts how legal lines dissect the political environment, framing identities and both enabling and restricting communicative possibilities. These cartographical lines attribute legal personality, determining who may suffer harm (or put otherwise, whose suffering may register legally) and who may have recourse to legal mechanisms to assert their rights and offset the wrongs they have suffered. Key issues include the relationship between patterns of legal inclusion/exclusion and processes of economic distribution and cultural (mis-)recognition, while the debate is crucially informed by the tension between circumscribed spaces of constitutional discourse and the imperatives and articulations of constituent power.

In the first contribution to the section, Daniel Augenstein investigates the dynamics of exclusion accompanying the operation of the liberal public-private dichotomy in the context of religious practice/observance. Augenstein questions the existence of a neutral secular public space, noting that the operative notion of 'publicness' is often impregnated with Christian and national values. Such an arrangement facilitates the practice of assimilation and intolerance in the guise of secularism and the promotion of social cohesion. However, Augenstein contends that rather than abandoning the public/private divide as a foundational ontology of liberal democracy in view of its failure to accord 'equal' public recognition to 'private' differences, what is required is rather its re-conceptualization as an open, reflexive space for negotiating diversity. He argues that the dichotomy provides paradoxically the very basis for the *inclusion* of the religious other in a pluralistic political community, whilst further operating as a lever upon which such minorities can challenge majoritarian accounts of the public.

The chapters contributed by Vanessa De Greef and Coel Kirkby both consider instances of exclusion from 'the public', or else the construction of alternate, subordinate 'publics' through processes of disenfranchisement legitimized by criminalization (in the case of prisoner's voting rights) and racialization (in the context of the formation of the Imperial Public of the British Empire). In both

cases, law is instrumental in the construction of a self-other dichotomy, the delineation between 'inside' and 'out', included and excluded. The insight that neither the 'ins' nor the 'outs' constitute an identifiable group when decoupled from their opposite highlights the central role that processes of boundary construction and maintenance play in the formation of collective identity. De Greef, in her paper, contests both the possibility of and the logic underlying the identification of prisoners as a homogenous, subordinate public whose active citizenship may be legitimately suspended. For her, the taxonomy dividing voters into 'law-abiding' and 'law-breaking' publics is simplistic, the one distinguishing between 'normal' and 'anormal' voters is senseless since the 'normal' voter, supported by law, does not exist. Coel Kirkby's historical analysis of the institutionalization of 'an imagined public sustained by law' at the beginning of the twentieth century suggests that the distance between the promotion of a cultural identity and the legitimization of cultural racism is not large; particularly, when the formation of a consensus-based public domain entails the political and spatial segregation of people who would otherwise be treated as equal subjects under a unifying authority. Kirkby identifies the practice of exclusion as a constitutive element in the formation of the cultural borders through which the fictitiously homogeneous public space of the British Empire attempted to define itself.

Public/Private is the title of the fourth section of the volume, which brings into sharper focus the foundational ontology which crucially prefigures the work as a whole. In the opening chapter, Gregor Clunie challenges the conventional understanding of the public sphere as a space or moment which exists independently of and prior to the private. This conception, which animates much political and legal theory, identifies the 'private' as a secondary, derivative realm which is framed and constituted by the public. Adopting a different approach, Clunie appeals to the analytical tools of Marxist political economy in order to investigate the operative relevance of the public/private dichotomy from the perspective of capital accumulation. Demonstrating the organic interpenetration of relations of production and social reproduction in capitalist society, he argues that the commodity form comes progressively to structure the emergent totality. Building on the dialectical jurisprudence of Evgeny Pashukanis, Clunie further contends that this unity is mirrored by the formal coherence of public and private law, such that all law may be regarded as being of a fundamentally bourgeois character, its deep structure and logic being that of the commodity form. From this perspective, the dichotomy between public and private appears as a first order distinction operating to facilitate and rationalize the reproduction of the social conditions which ground capital accumulation. Demonstrating the limitations of the legal form in rectifying the social contradictions which emerge out of the system of generalized commodity production, Clunie argues for a revolutionary transformation of the mode by which society organizes production and reproduction.

Claudio Michelon, in his paper on the public nature of private law, challenges the liberal vision of the private sphere as a realm in which agents are justified in acting without taking into consideration anyone else's interests. Michelon argues

that the private realm cannot be thought in isolation of private law, which should in turn be conceived as an embodiment of the mutual interest of the members of that group in the flourishing of one another. The paper criticizes the liberal conceptualization of the private sphere for treating it as unavoidably impenetrable by the deontic considerations that prevail in the public domain. With that in mind, Michelon invites us to consider private law as an enterprise that further enhances the political interaction between free and equal actors.

Iain Frame's chapter uses an illuminating example from English economic history – the banking law reform that followed the 1825 banking crisis – to illustrate the extent to which financial innovations are reliant upon a certain market and property environment facilitated by the implementation of legal rules and the encouragement of particular legal practices. Frame's argument is supported by carefully scrutinized historical data and a subtle analysis of certain aspects of the interpenetrative relation of law and economics. Crucially, the paper attempts to recover an understanding of the market as an instituted process, arguing for the centrality of law to financial transactions in all contexts, rather than solely at those moments of crisis which necessitate bold legislative interventions. Frame thus demonstrates the inherently public character of areas of economic activity which are often regarded as the exclusive domain of autonomous private actors.

Stephanie Switzer, in the final chapter of the section, considers the public-private divide as it is reflected in the tension between multilateral and unilateral approaches to the meaning of 'development' as a process and a commitment within the World Trade Organization. Switzer argues in favour of a multilateral conception of development, emphasizing the potential of such a model to grasp development not only as a process driven by efficiency considerations, but also as a commitment to the community of all WTO Member States. Through her defence of the multilateral approach, Switzer captures the concept of development in the WTO context in terms of a public discourse that can still accommodate elements of private decision-making.

The final section is entitled *Emerging Publics: the Role of the Victim in International Criminal Justice*. The three papers in this section approach from different perspectives the role of victims in proceedings before the International Criminal Court (ICC). The question of the appropriate role of the victim in criminal proceedings finds divergent answers in different domestic contexts and is centrally engaged in such pivotal issues as: whom does the law address, and; how and under what conditions does 'the public' appear in the court room? May the interests of the victim be said to coincide with and be adequately represented by the prosecution, or are there circumstances which necessitate the more direct participation of victims, free from institutional mediation? The founding of the ICC has re-posed these difficult questions in an international context as the court attempts to marry the interests of an emerging public with the idiomatic peculiarities of the criminal trial. While considering at a procedural level and in valuable detail the integration of the victim into ICC proceedings, the papers in this section cast new light on themes which frame the work as a whole, revealing in a complex, developing

context tensions which are fundamental to the concept of 'the public'. Specifically, the reader is invited to revisit the question of the efficacy and appropriateness of law as a mechanism for the mediation and reconciliation of often divergent interests – here, for instance, the interests of the victims of a particular crime as against the more general interest of the public in the efficient operation of the criminal justice system. Further, one is obliged to consider whether the legal system, with its limitations of form and procedure, is capable of operationalizing in a coherent and integrated manner the outcomes of political contestation. If this question receives a negative response, then the operation of law – revealed in the courtroom in its most fundamental, adversarial form – must necessarily appear as arbitrary: a coercive force grafted problematically onto a contradictory terrain of political discourse. 'The public' is then revealed as at best an uneasy and fragile compromise and at worst a vacuous signifier which functions only to legitimate the rule of political and economic elites.

In the opening chapter, Ania Salinas and James Sloan consider the Rome Statute's recognition of the role of victims in ICC proceedings as a significant step forward, yet highlight the pragmatic problem of the conflict between the victims' right to access to justice and the necessity for the Court to function efficiently, without unreasonable administrative burden. Moreover, they identify the substantive tension between the victim's rights to participate and the accused's right to a fair trial. In view of the fact that the Rome Statute does not provide specific guidance on some key aspects of victim participation, in particular on the problem of the stages at which the victim's right to participate can be exercized and on the modalities of such participation, the ICC has called upon itself to provide such guidance. Salinas and Sloan map the landscape drawn by ICC jurisprudence on victim participation, identifying questions left unanswered.

In the second chapter of the section, Olivia Swaak-Goldman provides an analysis of victims' participation from the perspective of the Office of the Prosecutor (OTP). Her paper focuses upon the OTP's policy, with specific emphasis on prosecutorial strategy and how the OTP has influenced jurisprudence and court-wide policy making on victims' participation. The paper details how the OTP has attempted to navigate a path between the imperative to allow victims to take part in ICC proceedings and the necessity to ensure the latter's safety from the harm that might ensue from this process of participation.

The volume's concluding chapter, written by Gilbert Bitti and Leïla Bourguiba, closes section five by assessing the difficulties experienced in practice by victims attempting to access the ICC. The chapter focuses on (a) the obstacles to victims' effective access to the Court and (b) the challenges to their protection and the impact of those challenges on participation. The authors survey a variety of different sources, ranging from court decisions to NGO reports, in identifying particular obstacles to and structural limitations impacting upon effective victim participation. Bitti and Bourguiba demonstrate how these emerging publics articulate themselves beyond strictly legal contexts and, in so doing, provide an account of the shortcomings of the current victim participation procedure.

Chapter 1
On the Necessarily Public Character of Law

Neil Walker

Introduction

Noone would deny that the adjective 'public' has much to contribute to our understanding of the nature of modern law. Just how much is less clear. There are certainly various senses in which we can consider *some* law, or some laws, as possessing a public character, but is there any significant sense in which we can consider *all* modern law as having a public character? And what connection, if any, is there between these two measures of law's public character? Does the difficult case for the public character of all law – in other words, for law's *necessarily* public character – gain support from any of the indisputable ways in which some law displays a public character – in other words, from law's *selectively* and contingently public character?

My answer to both questions is a qualified yes. In the first place, there is a significant sense in which we may consider all law as having a public character. It is a fragile and disputed sense, and one that is under more threat than ever in today's world. Yet, however elusive the idea of the necessarily public quality of law, it remains a central theme of our attempts to make sense of law today as well as an important point of departure in our efforts to imagine the legal future. In the second place, that necessarily public character of all law is related to at least some of the ways in which law can be understood to be selectively and partially public, although the connections are indirect and have to be carefully traced.

In unpacking this argument below, we proceed from the more modest to the more ambitious claims. We begin by looking at the different ways in which the public label can be applied selectively to law. Then, in the light of what that tells about the relationship between law and 'publicness', we move to examine the proposition that law in some significant sense has a necessarily public character.

False Beginnings

Before embarking on this line of inquiry, however, we should pause to note, and to set to one side, one relatively *insignificant* sense in which law can be said to possess a necessarily public character. If, as Wittgenstein famously argued, we cannot imagine such a thing as a private language (Wittgenstein 1953: para 256 et seq), then, by close analogy, we might also hold such a thing as a 'private law' to be unimaginable, and by this route assert law's 'public' quality to be necessary

and inevitable. What Wittgenstein was alluding to was the idea that language is an undeniably social accomplishment, and that it is so in a double sense. It is both the case that language's basic purpose is the social one of communication and that the achievement of that basic purpose depends upon the successful social activity of arriving at a common or at least overlapping sense of what is meant, or signified, by the symbols making up a language. So, too, law may be conceived of as a social accomplishment in a double sense – both in its aim and in its method. Its basic purpose is the effective articulation and communication of a common normative framework (van Hoecke 2002), and the achievement of that purpose depends upon the development of some shared or overlapping sense of the meaning of norms, or at least some shared or overlapping sense as to how we should arrive at an authoritative version of the meaning of these norms.

Such a quick conclusion, however, begs more questions than it answers for anyone investigating whether law necessarily possesses a 'public' character. In the first place, it assumes that the opposite of 'private' is always 'public', or, more strictly, that the non-private is by definition public, thereby exhausting all categorical possibilities. But that assumption risks stretching the meaning of 'public' further than we want, and in so doing rendering the claim that law is necessarily 'public' over-inclusive and even trivial. After all, we have argued nothing more here than that law is intrinsically social; and if anything that is 'social' is by definition 'public', then the claim that law has a necessarily public character adds nothing to our understanding of law.

In the second place, if the issue is approached from the opposite direction, then the claim that law can never be 'private' goes against deep conventional usage. There may be much theoretical controversy about the proper *conception* of private law, but there is very little dispute about the significance of the core *concept* or idea of private law (Cane 2005). The term 'private law', as generally understood, specifies a disciplinary field of law that deals with those relationships between individuals with which the state or a similar 'public body' has no direct concern. Simply to ignore *this* 'private' aspect to law, which would be the consequence of reducing and restricting the private to the realm of the mentally interior and non-social in the Wittgensteinian sense, would be to deny much about how we understand the disciplinary division of the legal world. What is more, that same disciplinary division yields, on the other side, the domain of 'public law', which suggests a very different, and as we shall see, much more significant conception of legal 'publicness' than one that rests merely on law's social quality.

The Selective 'Publicness' of Law

There are two key ways in which we conceive of the 'public' character of law in a selective fashion. First, we consider law to be selectively 'public' with reference to various aspects of legal *doctrine*. This involves the characterization of some legally relevant feature of the world – a form of property, an office, an action, a service,