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## **Abstract**

This paper asks whether and how modern law may be understood as necessarily public in character. It begins by looking at the two main ways—doctrinal and disciplinary—in which law is understood as only selectively and contingently public. In both these cases law's public quality is counterposed to its private quality. However, publicness can also be conceived of as the juridical master category embracing the public and the private in the disciplinary and doctrinal senses. This conception of the necessary and irreducible publicness of law draws on the tradition of *ius publicum*, recently revived in the Anglophone world in the work of Martin Loughlin. That body of thought conceives of the state as a pre-positive and generically public jural foundation—a scheme of intelligibility for making sense of the positive law (constitution, statute law, common law) of the state. This is a plausible and powerful way of understanding the history of the modern state-based, sovereigntist legal constellation. However, it may be challenged both methodologically for elevating the state-based account to the status of the only plausible narrative, and substantively for its inability to capture the state-decentring aspects of contemporary globalization. A conception of pre-positive publicness no longer simply proposed as a dominant, value-neutral historical paradigm of explanation, but now underpinned by a normative commitment to democracy, is proposed as way of addressing both the methodological and the substantive limitations of the *ius publicum* account.

## **Keywords**

public, private, doctrine, discipline, *ius publicum*, globalization

# On The Necessarily Public Character of Law

Neil Walker

## 1. Introduction

No-one 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.

## 2. 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,<sup>1</sup> 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,<sup>2</sup> 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-

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<sup>1</sup> L Wittgenstein *Philosophical Investigations* (Oxford: Blackwell, 1953) para 256 *et seq.*

<sup>2</sup> See M van Hoecke *Law as Communication* (Oxford: Hart, 2002)

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’ overinclusive 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.<sup>3</sup> 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

### **3. 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

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<sup>3</sup> See e.g. P. Cane, “The Anatomy of Private Law Theory: A 25<sup>th</sup> Anniversary Essay” (2005) 25 *Oxford Journal of Legal Theory* 203-217.

legal *doctrine*. This involves the characterization of some legally relevant feature of the world—a form of property, an office, an action, a service, a policy, a location, a relationship, an interest, a benefit, a duty—as somehow ‘public’. The point of the attribution of ‘publicness’ here is particularizing and practical. It is particularizing in that its focus is on a specific norm or complex of norms. It is practical—that is, it involves the application of practical reason<sup>4</sup>—inasmuch as it is concerned with working out what that norm means and how one should act on the basis of that norm.

Secondly, as already noted in the Introduction, we think of law as being selectively ‘public’ with regard to the *disciplinary* division between private law and public law. What we are concerned with in this case is a distinction that can be made within any and all legal systems between two basic branches or fields of law—a distinction that turns upon whether the state or similar ‘public body’ is or is not directly involved in the matters regulated. The point of the ‘public’ attribution here, therefore, is not particularizing and practical, but generalizing and theoretical. It is generalizing in that its aim is to allocate a legal norm or set of legal norms to one rather than another broad disciplinary category—public rather than private. It involves the application of theoretical reason inasmuch as it is concerned with the regulation of *belief* about the law rather than of *action* within the law; in particular, with developing a better understanding of the nature of the legal universe, its internal structure, and how it fits with the social and political world in which it figures.

Of course, these two senses of publicness—doctrinal and disciplinary—are closely interconnected, but they remain distinctive in ways that tend to be underappreciated. First, while much of the discipline of ‘public law’ covers how we invoke notions of the ‘public’ in legal doctrine, the fit is far from perfect. For it is also the case that, as we illustrate below, many doctrinal invocations of ‘publicness’ take place within the disciplinary field of private

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<sup>4</sup> The distinction between theoretical and practical reason has its origins in Classical Greek philosophy, most prominently in the writings of Plato and Aristotle. For an overview, see R. J. Wallace, “Practical Reason” *Stanford Encyclopaedia of Philosophy* (2008); available at <http://plato.stanford.edu/entries/practical-reason/>

law (contract, tort, trusts, etc); likewise, many state or other public bodies that we locate within the disciplinary field of public law engage in particular legal activities and relations that we primarily associate with private parties (procurement, employment etc). Secondly, and more importantly for present purposes, as is suggested by the distinction between practical and theoretical reason, while the use of the ‘public’ in a doctrinal sense is *internal* to the domain of positive law, the deployment of public law in a disciplinary sense is *external* to the domain of positive law. It is concerned with how, as students, practitioners, authors or subjects of the law, we grasp and make sense of the legal world.—with how we comprehend the anatomy of the legal order, and in particular, with the contribution of that part of the legal anatomy known as ‘public law’. In a nutshell, where publicness as doctrine is concerned with authority *within* the many particulars of the law, publicness in the disciplinary sense is concerned with the surface forms and, at root, the deep structure of authority *of* the law in general. And, as we shall see in due course, this distinction between the internal and the external, as well as that between the particular and the general, leads us to draw different conclusions about the contribution of the two selective perspectives on law’s publicness—the doctrinal and the disciplinary—to the argument about law’s necessarily public quality.

#### A. ‘Publicness’ in Legal Doctrine

If we now turn to consider in rather more detail, first, the doctrinal dimension of publicness, what is immediately striking is the sheer variety of ways in which ideas of publicness impinge upon the law. This is not simply a function of the vast range and diversity of situations in which the characterization of some legally relevant feature of the world as public makes a difference to how implicated agents may or should act. Rather, it reflects a more fundamental truth. As Raymond Geuss has powerfully argued, “there is no such thing as *the*



public/private distinction, or, at any rate, it is a deep mistake to think that there is a single substantive distinction here that can be made to do any real philosophical or political work.”<sup>5</sup> Instead, it is a division that has grown over pre-modern and modern times, bringing together “[d]isparate components—conceptual fragments, theories, folk reactions, crude distinctions that are useful in highly specific practical contexts, tacit value assumptions— from different sources and belonging to different spheres”.<sup>6</sup>

So various yet historically interwoven are the strands from which our modern contemporary distinction between the public and private is constructed, indeed, that they defy easy classification, as do the ways in which these strands map on to legal doctrine. Nevertheless, we can distinguish a number of different if overlapping broad frontiers of meaning. The most venerable basis for the distinction, originating in classical times, concerns modes of access to or control over property or (of increasing relevance in the modern state) information.<sup>7</sup> Property or information which falls on the public side of the divide—across a boundary that itself can be blurred and uncertain—carries with it both legal privileges and legal restrictions. On the one hand, the publicness of property or information implies common access and availability. On the other hand, there are constraints of decency, of orderly behaviour, of modes of assembly, of non-discriminatory exclusion and inclusion, of state security etc, as regards the enjoyment of public property and public access to information which do not apply to property or information in private ownership or possession.

Secondly, there is a more capacious idea of publicness which specifies the realm of matters and affairs that concern everyone as opposed to purely personal or group concerns and interests.<sup>8</sup> Again, this is of classical vintage, and again it is greatly expanded in the

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<sup>5</sup> R. Geuss, *Public Goods, Private Goods* (Princeton: Princeton University Press, 2003) 106.

<sup>6</sup> *Ibid* 10.

<sup>7</sup> *Ibid* 7.

<sup>8</sup> *Ibid* ch.3.

modern age. The legal doctrinal manifestations of the recognition of this special public sphere—of *res publica* in its expansive meaning<sup>9</sup> —are many and varied. Again, the implications of the attribution of publicness may be either burdensome or advantageous. It may impose higher standards, deeper obligations and wider responsibilities. Alternatively, it may involve the granting of immunities or the bestowal of other benefits. What is covered here includes the expansive public- regarding duties of care of public authorities in tort and their distinctive susceptibility to judicial review on grounds of procedural fairness and substantive rationality, as well as the latitude granted to public authorities just because of the range and diversity of their obligations and their scarcity of resources;<sup>10</sup> or the special legislative (and sometimes common law) powers attaching to certain officials as opposed to private citizens to carry out key tasks of state—for example the police and security services—as well as special offences, supervisory regimes and sanctions associated with the abuse of these special powers;<sup>11</sup> or the greater immediacy of legal responsibility associated with the perpetration of certain acts by public rather than private bodies, including the ‘horizontal direct effect’ of EU legislative directives on public bodies, and the imposition of a direct obligation on public bodies to act consistently with human rights under current British legislation.<sup>12</sup> In all of these cases, moreover, again the definitional question of the boundaries of publicness, and so whether a particular entity or act belongs to the public sphere, can prove controversial. Different, inconsistent and sometimes mutually contested lines of doctrine exist. They variously emphasize one or more of legal source and pedigree, institutional form and location, autonomous or unilateral authority, functional or purposive remit, range of

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<sup>9</sup> The fact that *res publica* as originally and narrowly conceived referred only to public ‘property’, as in our first formulation of the public/private divide, is, of course, itself a good illustration of the historical fluidity and interconnectedness of ideas of ‘publicness’. See Geuss, n5 above, ch.3.

<sup>10</sup> See, for example, D. Oliver, *Common Values and the Public-Private Divide* (Butterworths: London, 1999) esp. chs 5 and 8.

<sup>11</sup> For a recent discussion of the police case, see the exchange between Malcolm Thorburn and John Gardner; M. Thorburn, “Justification, Powers and Authority” (2008) 117 *Yale Law Journal* 1070; “Reinventing The Night-Watchman State?” (2010) 60 *University of Toronto Law Journal* 425-443; J. Gardner, “Justification Under Authority” (2010) 23 *Canadian Journal of Law and Jurisprudence* 71

<sup>12</sup> Human Rights Act 1998, s6.

interests served, or target constituencies, as more or less influential upon or decisive of the question of publicness of the entity or act in question.<sup>13</sup>

Thirdly, there is a sense of publicness in legal doctrine the function of which, in the tradition of modern liberalism, is to define the limits of the private domain conceived of as a protected area of activity and choice.<sup>14</sup> This might appear simply to be the flipside of the previous distinction, but the underlying rationale and point of departure—the negative aim of establishing the outer boundaries of a universal private domain rather than the positive aim of establishing the contours of the public domain—is somewhat different.<sup>15</sup> Here, to take but a few examples, we may be talking about the *contra bonos mores* qualification of the right to enforce private contractual terms or conditions of a will, or the public interest defence to defamation, or restrictions on the right to privacy on grounds of public safety, or restrictions on the freedom of conscience or religion in order to protect public order, health or morals.<sup>16</sup>

Within legal doctrine, then, we see many different, if complexly overlapping rationales for classifying certain things as public, which rationales inform an immense range of different legal propositions. What is more, legal doctrine is no mere passive receptor of these rationales. Rather, it exhibits a degree of reflexivity in debating and developing the meaning and location of the various threshold distinctions—public property, public space, public order, public safety, public interest etc—upon which the applicability of the relevant legal propositions depend. That reflexivity only serves to reinforce the sense that, from a doctrinal perspective, the boundaries of the public and the location(s) of the public/private

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<sup>13</sup> These debates are probably most fully developed and engaged over the question of the scope of judicial review. Here, as elsewhere, the doctrinal position is often complicated by the fact that judges seek a balance between universalism and particularism—between a sense that the general rationale of the public-private divide should be similar across jurisdictions, and so foreign precedents should be considered as persuasive authority, and a sensitivity to distinctively locally rooted conditions and considerations. See, for example, in the context of the treatment of the supervisory jurisdiction under Scots and English law, A. McHarg, “Border Disputes: The Scope and Purposes of Judicial Review” In A. McHarg and T. Mullen (eds) *Public Law in Scotland* (Edinburgh: Avizandum, 2006) 219-240.

<sup>14</sup> Geuss, n5 above, ch.5.

<sup>15</sup> *Ibid.* 76-80.

<sup>16</sup> The last two examples are drawn from Articles 8 and 9 respectively of the European Convention on Human Rights,

distinctions are drawn *within* the law—supplying a range of internal cuts and divisions—rather than being coterminous with the boundaries of the law itself. There is no question, then, that when we consider publicness as a doctrinal category, it invariably involves a partial and selective claim about the public nature of law rather than a comprehensive and necessary one.

### B. *‘Public Law’ as a Disciplinary Field*

When we come to consider ‘public law’ in the disciplinary sense, these qualities of partiality and selectivity are even more palpable, and so may seem on first view yet more remote from any claim that publicness is definitive of law in general. Whereas private law, as we have already noted, designates the field of law that deals with those relationships between individuals with which the state or similar ‘public bodies’ have no direct concern, public law designates that field of law in which the state or similar ‘public’ bodies are in direct relationship with individuals and other legal persons, or in which different organs or agencies of the state or similar ‘public bodies’ are in relationship with one another. In other words, the very disciplinary definition of public law implies its merely partial coverage of the legal field.

What is more, given that public law, when used in this disciplinary sense, essentially serves as an organising category offered as part of an external perspective upon the legal field in general, its basic analytical mode is a broadly descriptive one, and one that tends to take for granted the validity of the underlying framework within which that description takes place. The depiction of the public domain, in other words, is preoccupied with the surface ‘what’ rather than the deep ‘why’ of law’s anatomy. As that depiction is not concerned with particular doctrine or its legal consequences, it need not closely attend to the various specific and in some measure inconsistent distinguishing criteria of publicness—pedigree, authority,

function, interests etc—to be found in legal doctrine, and with the harder questions these more precise tests raise about the rationale for the public/private divide. Rather, the focus of the disciplinary view is on the core rather the periphery, on the undisputed heartlands rather than the disputed boundaries of publicness. For these purposes, the deep-rooted institutional connection between publicness and the apparatus of the modern state provides a definitional short cut that reinforces the tendency to curtail the more difficult questions, and the more revealing answers. The regular addition of ‘similar public bodies’ to the definition, therefore, is not typically intended to highlight complexity and inviting examination of difficult margins. Instead, it is often no more than an impatiently tautologous addendum to an unquestioned basic definition.

### **3. The Necessary ‘Publicness’ of Law**

#### **A. ‘Public Law’ as law’s constitutive discipline**

Yet this is not the whole story. There is also a body of work that *is* more concerned with and detained by the deep ‘why’ rather than merely the surface ‘what’ of the disciplinary quality and integrity of public law. Much of this literature, and much of the thinking that animates this literature, is not in the English language or tradition, but in that of other European continental countries. This is due in no small part to the different developmental trajectories of different national legal systems. Aspects of the evolution of national law have had the effect of making the public quality of law, considered as a distinct field, a more salient consideration in continental Europe. These include the modern tradition of foundational constitutionalism and the institutionalization within civilian legal systems of separate sub-systems of administrative law and administrative courts—‘administrative’ referring to the administration of governmental power and so being a category itself conventionally

dependent upon a distinction between the exercise of public and private power.<sup>17</sup> However, more recently, notwithstanding the absence of these features from our domestic legal traditions, there have been notable attempts to deepen our understanding of the disciplinary idea of public law in the British context which draw upon this wider European stream of thinking.

The contribution of Martin Loughlin is of pivotal significance here.<sup>18</sup> In a nutshell, the manner in which his work, and the European tradition he draws upon, seeks to make deeper sense of the discipline of public law is by showing how it can be understood as underpinning the legal system as a whole. Drawing upon older notions such as *ius politicum*, *droit politique* and *Staatsrecht*, Loughlin argues that beneath the topsoil of the field of public law considered as *constituted*, and so as positive law, there is a deeper layer of public law considered as *constitutive*, and so pre-positive and even pre-Constitutional. Public law, in this prior, deeper sense, is precisely “that which confers the right to govern by way of positive law.”<sup>19</sup> Of crucial importance, then, in terms of forging the link between a selective and a necessary understanding of law’s public quality, while Loughlin’s field of public law is still only one part of the legal universe, it now becomes the framing and therefore indispensable part.

But what does this deeper and constitutive layer consist of, and in what sense is it ‘public’ and in what sense ‘law’? The deeper layer consists, most basically, of the set of regulative understandings that establish the sovereign character of the modern state. That is to say, it embraces the claim of the state, composed of the familiar troika of demarcated territory, ruling authority and people<sup>20</sup>, to institute the autonomy and absolute authority of the

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<sup>17</sup> See e.g. Oliver n10 above, 16-19.

<sup>18</sup> See, in particular, his two key monographs *The Idea of Public Law* (Oxford: OUP, 2003); *Foundations of Public Law* (Oxford: OUP, 2010). In what follows, I will instead concentrate on a few articles that offer cogent and concise statements of his ideas.

<sup>19</sup> M. Loughlin “In defence of *Staatslehre*” (2009) 48(1) *Der staat*, 1-28, 5.

<sup>20</sup> *Ibid* 5-6.

political sphere—which sphere we also call ‘public’ as it is synonymous with that of *public* affairs rather than *private* force or property. And even though they are pre-positive, these concepts of state and sovereignty, must, for Loughlin, remain juristic concepts—concepts of public *law*. This is so, first, because sovereign political or public authority cannot be understood as an abstraction but must be secured and expressed in institutional form, and this is achieved by vesting or presupposing an original “rightful power”<sup>21</sup> in the state and its office of government. Secondly, not only the form but also the medium of sovereign state authority is legal, since the power that is conferred or presupposed is of an order that “equips government with an unlimited competence to govern through the instrumentality of [positive] law.”<sup>22</sup>

Loughlin’s aim in seeking to retrieve this pre-positive notion of the field and discipline of public law—a subject that he claims “seems to have fallen off contemporary maps of knowledge”<sup>23</sup>—is to trace the deep structure of legal and political authority to the idea of the state itself and no further. By so doing, he wants to challenge various misconceptions of the place of law and politics in the modern order of things that have filled the gaps left by the evacuation of the field by his preferred *Staatslehre*. In particular, he wants to reject, on the one hand, the idea of the state as the “agent”<sup>24</sup> of some other and higher authority, whether metaphysical or Constitutional, and on the other hand, an “essentialism”<sup>25</sup> that treats the state as the embodiment of some prior existential unity of the people. Instead, he seeks to show that the state, considered as a juristic idea in its own right rather than as something either merely post-Constitutional and so positive law or as mysteriously pre-legal,

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<sup>21</sup> *Ibid* 5.

<sup>22</sup> *Ibid* 5.

<sup>23</sup> M. Loughlin “Reflection on *The Idea of Public Law*” in E. Christodoulidis and S. Tierney (eds) *Public Law and Politics: The Scope and Limits of Constitutionalism* (Aldershot: Ashgate, 2008) 47-65, 47.

<sup>24</sup> Loughlin, n19 above, 7.

<sup>25</sup> *Ibid* 10

is the framing “scheme of intelligibility”<sup>26</sup> through which peoplehood and positive law are mutually and reflexively constructed and reconstructed over time. There is, in other words, no law that stands above the state and the political realm, but equally and reciprocally, there can be no articulation and operationalisation of the state and of the political *qua* political other than through and in the form of law. Public law, then, in this deeper form, is neither the servant nor the master of politics. Rather, it *is* politics, conceived of in its generative rather than its programmatic mode.

In looking to the juristic idea of the state and no further, Loughlin seeks to account both for what is distinctive about the modern political and public realm as compared to pre-modern systems of authority and for what the modern retains from the pre-modern. On the one hand, the very defining modern character of the political as political, and so of the public sphere as a public sphere, depends precisely upon its autonomy from other world-views. It supplies a new “representation—from a distinctive perspective—of the entire society”,<sup>27</sup> in so doing claiming to possess a self-constituting and so only *self*-limiting character that stands independent of any prior metaphysical or traditional forms of authority. Of course, *res publica*, as we have seen, has a pre-modern etymology, and at the doctrinal level this continues today in a whole range of operational indicators of what belongs to the domain of public affairs and what does not. However, only in the modern age does the idea of public authority also become the master or ‘second order’ category for deciding the nature of the ‘first order’ split between public and private affairs. That is to say, the very decision as to what are public affairs and what are private affairs does itself become for the first time in the modern age a ‘public affair’, so to speak. On the other hand however, the framing of the autonomy of the political through the mechanism of a pre-positive public law inherits and

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<sup>26</sup> *Ibid* 8

<sup>27</sup> Loughlin, n23 above, 57



adapts through a process of “secularization, historicization and positivization”<sup>28</sup> some of the core assumptions of earlier conceptions of natural law; in particular, it retains and sustains the idea of a level of law that is framing rather than framed—positing rather than posited—supplying an irreducible and infeasible basis for life in society.

There are many aspects of Loughlin’s thesis that enrich our understanding of the public quality of modern law. Certainly, his central argument that there is a deep public law basis for the whole of positive law, including that part of the whole of positive law that also attracts the label ‘public’ in both the doctrinal sense and in the shallow disciplinary sense, contains a key insight. It suggests that we can and should understand law’s publicness at two levels, at both a deep and necessary ‘meta’ level and also as a selective ‘object’ of positive law. Yet while this captures something important about the public nature of law, certainly as historically understood, we have to push still further, both challenging and building on Loughlin’s views, in order to gain the fullest sense of what this has amounted to and what it might amount to in the future.

This impulse to question and to push matters further is provoked by the methodological premises underpinning Loughlin’s work, and so by the strengths but also the limits of the kind of exercise he believes himself to be engaged in. His exploration and explication of the foundations of public law, for all that this is a significant and increasingly densely documented and intricately woven body of historical scholarship,<sup>29</sup> is not intended as a closely observed comparative empirical exercise—one looking at “the detailed arrangements of particular regimes”.<sup>30</sup> Nor, however, is it offered as a study in purely ideal theory—intended to elaborate “the structure of some ideal constitution”<sup>31</sup> and so instruct us as to how the modern relationship between politics and law *should* be conceived. Rather, it is

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<sup>28</sup> Loughlin, n19 above, 5

<sup>29</sup> Especially with the recent publication of the 500 page *Foundations of Public Law* (n18 above).

<sup>30</sup> Loughlin, n23 above, 50.

<sup>31</sup> *Ibid* 49.

a kind of stylized reconstruction, a simultaneously deep and encompassing account of a dominant conception of state-building that allows us better “to understand the ways in which existing constitutional arrangements can be said to work.”<sup>32</sup> Yet, for all the attractions of such an approach as a way of conveying a broad explanatory message, and for all Loughlin’s success in exploiting his methodology to provide an insightful account that retrieves a deeper sense of public law, the fact that the emphasis is neither on detailed empirical patterns nor on matters of ideal theory does leave certain questions hanging. And it is these questions, as we shall see, that prompt us to look beyond his own methodological prism to reframe and augment the question of the necessarily public quality of law.

Let us begin, then, with the question of the empirical range and credentials of the kind of reconstructive thesis that Loughlin proposes. Historically, just how broadly encompassing has the tradition of pre-positive public law been? If it is supposed to be a defining feature of modernity and modern law *tout court*, how, for example, do we account for the British case, where the constitutive idea of public law seems most emphatically to “have fallen off the contemporary map of knowledge” and where, indeed, it is harder to discern its consistent outline in historical maps? For Loughlin, the most notorious indicator of British singularity, namely the fact that the United Kingdom lacks a written constitutional pedigree, need be no impediment to its inclusion within the wider tradition of *ius publicum*, since such written constitutional law is itself merely the highest form of positive public law. As he acknowledges,<sup>33</sup> a documentary Constitution might, nonetheless, be viewed as a key product, and so as an important marker of the “scheme of intelligibility” and regulatory world-view that the deeper, pre-positive sense of public law encapsulates. Yet if we recall Loughlin’s understanding of the relationship between the constitutive law of ‘state formation’ and the constituted law of the ‘formed state’ as being reflexive and iterative, the ‘big bang’

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<sup>32</sup> *Ibid* 49

<sup>33</sup> Loughlin, n19 above, 14

documentary constitutional moment is neither the unique such marker nor even an indispensable component of the positive manifestation of an underlying constitutive public law. Rather, Loughlin stresses how the unwritten British constitution, centred on the idea of parliamentary sovereignty, can, like that of Britain's continental neighbours, be understood to have gradually evolved out of a new state-centred way of thinking about public authority that is the functional equivalent of *ius politicum*.<sup>34</sup>

Two difficulties, however, remain not only for the British case but for the historical record more generally. In the first place, however plausible the idea of a constitutive public law as the *leitmotif* of a comprehensive narrative about the generation and validation of positive law in the new age of the modern state, it is by no means the only narrative available. Typically, the positive law recognized by the modern state according to the deeper public authority of the *ius publicum* includes elements other than those documentary constitutional norms and legislative instruments that can be regarded as directly 'constituted' through the state. Other norms, including the common law and public international law, are instead recognized by the state system of positive law through homologation, incorporation or delegation. But there are other candidate narratives of generation for these extraneous elements. As Patrick Glenn persuasively argues, the common law itself is central to one such alternative narrative.<sup>35</sup> Here understood broadly to refer to a diverse stream of law, including elements of *ius gentium* and customary law as well as the various nominal forms of 'common law' that have developed alongside or across different state laws, the common law's key and defining feature in this generic mode is a claim to be common "in relation to"<sup>36</sup> law that is particular to a specific and bounded domain—primarily, the particular constitutional law and statute law of the state. The idea of 'in relation to' covers many possibilities, These range from the nurturing or supplementation of the particular law by the common law within the

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<sup>34</sup> See in particular, *Foundations of Public Law*, n18 above, ch. 9.

<sup>35</sup> H. P. Glenn *On Common Laws* (Oxford: OUP, 2005).

<sup>36</sup> *Ibid* ch.1.

domain of the particular law, to efforts through the common law to qualify or challenge the domain or content of the particular law, and also to attempts through common law to generalize and extend beyond the domain of the particular law. In all cases, the common law *sensu largo* is the repository and the expression of a set of claims to constitutive legal authority, typically grounded in conceptions of morality, in ethical constituencies or in communities of practice which transcend the state, that, while not (necessarily) denying a parallel claim to constitutive legal authority on the part of the state, challenge the claim of the *ius publicum* to provide through the pre-positive legal form of the state the *exclusive* source of positive legal authority within its jurisdiction.

Of course, there is no compelling reason why the common law narrative of authority—of legal world-making—should be preferred over that of the *ius publicum*. But that is beside the point. Rather, the very fact that an alternative juristic narrative of authority exists to that of a state-based public authority has to be taken seriously. Because it is an account that is nurtured and sustained within some relevant epistemic communities (e.g. amongst judges, other constitutional officials and jurists), because it tells a plausible story about the sources of authority of at least some of those laws that are generally recognized as positive law within the community, and because its narrative may be more prominent in jurisdictions such as those of the United Kingdom where the ‘common law’ carries a longstanding nominal significance as an additional category of positive law and where some of the more obvious juristic props of state-centred public authority are absent, (such as a written constitutional tradition and a special terminology to distinguish pre-positive ‘Law’ [*ius, le droit, das Recht*] from positive ‘law’ [*lex, le loi, das Gesetz*]), the claims that Loughlin makes on behalf of *ius publicum* have to be reassessed. The public authority-centred pre-positive account and authorization of the world of positive law that he reports remains a persuasive one, but it is not the only such claim ‘out there’, and it has to be

recognized that other deep accounts and authorizations of the world of positive law exist, and as a matter of historical fact provide alternative and in some respects rival schemes of intelligibility through which to construe that legal world.

A second, and more urgent empirical difficulty surrounding the narrative of *ius publicum* concerns the contemporary effects of globalization. There is no doubt today that the global pattern of positive legal authority is an increasingly interconnected one. The growth of transnational collective action problems and state ‘externalities’ in a word in which persons, goods, capital, services, communications, cultural forms and political regimes increasingly circulate across state borders has meant that more and more legal initiatives involve parties other than single states and affect populations other than those of single states. This is evident in the rise of supranational law in Europe and other regions, in the development of global jurisgenerative institutions such as the UN and the WTO, in more citizen-centred rather than state-centred forms of international law in human rights and criminal law, in the development of new forms of transnational ‘administrative law’ (or ‘Global Administrative Law’) where forms of governance absent or attenuated from a formal Treaty base abound, and in the growth of forms of functionally specific self-regulation lacking the pedigree of any state or state-like ‘public’ authority in areas such as sport and the internet.<sup>37</sup>

As Loughlin points out, none of this necessarily means, as many scholars of globalization too quickly assume, that, by world-historical standards, however measured, the nation state is in decline, or even that it exerts less overall influence than once it did.<sup>38</sup> What it does mean, however, is that the manner in which states individually and collectively exert legal authority, and the kind of legal relations and ‘irrelations’ they inhabit with regard to other non-state polities and agencies, is altered. It follows that the deep juridical map of the post-Westphalian age in which, with *ius publicum* as its key, states provided the relatively

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<sup>37</sup> See, e.g., my “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders” (2008) 6 *International Journal of Constitutional Law* 373-396.

<sup>38</sup> Loughlin, n19 above, 17

self-contained and mutually exclusive sovereign centres of authority, is less appropriate than once it was. It is no longer just a question, therefore, as in the historical example of the claims of the common law family of concepts, of there being a supplementary account of legal world-making that might challenge the *ius publicum* model at the margins. Rather, the basic model is itself under threat. The very way that we think of constitutive legal authority—how far state-centred, how far pooled across states, how far based in non-state settings, how far still a property of the state parts rather than the global whole—is now under challenge.

Loughlin is by no means unaware of this challenge. He is also correct to point out that the series of answers to that challenge provided by many of those who perceive or advocate the progressive shift of *constitutional* authority to non-state sites is often inadequate. For Loughlin, these increasingly numerous and influential postnational constitutionalists often tend to mistake symptoms for causes, superstructure for base. They are apt to treat constitutions as purely normative entities and constitutionalization as a purely normative process; that is, as consisting only in the development of forms of non-state positive law that are in different ways—form, structure, content—analogueous to the positive constitutional law of states. As Loughlin says, unless the connection is retained or remade between the positive constitution and the underlying material constitution of public authority, this kind of approach cannot get beneath the surface of the problem it purports to address. Rather than answering the question of constitutive public authority reframed in the context of the new globalization, the emergent postnational constitutionalism often merely begs it.<sup>39</sup>

Yet the lack of a satisfactory alternative to Loughlin's preferred *Staatslehre* does not rehabilitate the latter by default. It remains the case that present forms of legal and political globalization sharply question the sufficiency of a state-centred conception of public law as the constitutive basis of contemporary positive law. Here again, we come up against the

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<sup>39</sup> *Ibid* 17 *et seq.* See also his "What is Constitutionalisation?" in P. Dobner and M. Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford: OUP, 2010) 47-69.

limits of Loughlin's approach. Just as the evidence finally runs out in any attempt to make the historical case for the dominant constituent role of *ius publicum* against all-comers, so too, and more obviously and urgently, the adequacy of the state-based public law account as a way of understanding the contemporary world of positive law is profoundly challenged under conditions of increased transnationalisation of legal authority. In the end, with his emphasis on the deep and general explanatory character of his thesis, Loughlin bequeaths to us a persuasive, but by no means irrefutable, account of the indispensably public historical basis of modern law, together with a version of the public foundations of law in today's world that increasingly threatens to be undercut by the forces of globalization

If we want to continue and build upon the argument for the necessarily public quality of law as part of a two-level conception of publicness, we must recognize the restrictions imposed by a purely explanatory paradigm. As noted, Loughlin sets his stall out against ideal theory. He does so on the basis that its aspirational and ideological lens distorts understanding of how the world is,<sup>40</sup> and also because, in concentrating on the 'ought', ideal theory can be inattentive to the gap between 'is' and 'ought' and so to the issue of whether and how that gap may be bridged.<sup>41</sup> Yet, is there not a middle way? Can we not have an approach that that blends explanation, evaluation and ideal projection—that comprehends the real in light of the ideal and the ideal in light of the real? Can we not acknowledge the grounding of the idea of 'publicness' in certain historical and contemporary conditions of authority yet still try to find an ideal vantage point appropriate to these conditions for evaluating and criticizing or justifying these extant notions of publicness? Can we not in this way provide a more compelling account of why publicness has been important to law and why and how it might continue to be? And if we follow this approach, cannot the evaluative

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<sup>40</sup> Loughlin, n23 above, 50-54.

<sup>41</sup> For example, in his critique of the excessive normativism and attendant neglect of the underlying material constitution in much postnational constitutional writing, he stresses how little attention is paid by the exponents of this approach to the necessary preconditions of the realization of their ideal conception of constitutionalism. See e.g. Loughlin, n 19 above, 17 *et seq.*

dimension be added to the balance sheet in assessing the merits of rival historical understandings of the law, as well as supplying guidance in our working out whether and how we might retain or restore the public foundations of contemporary law under conditions of globalization?

In the following subsection I will set about trying to answer these questions in the affirmative. We can only explore the deepest resonance and full potential of law's publicness, I will argue, if we introduce this evaluative dimension. However, the consequence of so doing is not to resolve the question of law's character under globalization but merely to open that question up to a wider range of possible answers.

### C. 'Publicness' of Law as Democratic Ideal and Aspiration

In recent work Jeremy Waldron has begun to address the challenge of considering law's publicness from a morally committed standpoint. He has sought to identify the necessarily public quality of modern law understood not only as a living practice, or as a legacy of past practice, but as a quality *ideally* suited to modern law.<sup>42</sup> Where and how does he locate this ideal dimension?

For Waldron, the key benchmark of appropriateness—of ethical adequacy—of contemporary law, is supplied by the idea of democracy. We now live in an age in which, as Amartya Sen points out, the democratic ideal of collective self-rule has ceased to be understood in its various localities as a purely local need and has come instead to be endorsed as a “universal commitment”, and so as a ‘normal’ template of government.<sup>43</sup> Democracy sets the basic standard of our political times, and our legal system, just like all our other modalities and institutions of government, should respect and reflect that basic standard. And

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<sup>42</sup> See J. Waldron, “Can There be a Democratic Jurisprudence?” in *New York University Public Law and Legal Theory Working Papers* (2008) 35. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1280923](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280923).

<sup>43</sup> A. Sen “Democracy as a Universal Value” *Journal of Democracy* 10 (1999) 3 -17.



if, according to Waldron, we duly pursue the imperatives of a “democratic jurisprudence”<sup>44</sup> then we will conclude that modern law should indeed exhibit, amongst other things, a necessarily and irreducibly public quality, but one that is best expressed through the presence of key input and output dimensions of the democratic ethic of collective self-rule; that is to say, modern law should function through “(i)... norms that purport to stand in the name of the whole society, and (ii) ...that address matters of concern to the society as such, not just matters of personal or sectional concern to the individuals who happened to be involved in formulating them.”<sup>45</sup>

We should note that, for Waldron, these standards mean both less and more than that each and every particular legal norm should emanate from a democratic source. While this may be an important way, indeed often the best way of fulfilling his first, input-based criterion, it is neither a strictly necessary nor a sufficient condition of the publicness of individual legal norms. It is not necessary because norms that are claimed to be made in the name of the whole society might be issued in good faith by those who have no formal democratic mandate but who can nevertheless plausibly claim to be “guardians of the public good”<sup>46</sup> in particular contexts of action. It is insufficient because a democratic source is not enough for the law to be properly ‘public’ unless it also meets the output-based criterion and effectively presents itself as oriented to the needs of society as whole; that is to say, unless it “*purports* to promote the public good.”<sup>47</sup>

Waldron’s approach is only sketchily developed. It is not explicitly concerned to pursue Loughlin’s central insight and distinguish between different tiers—constitutive and constituted—of public, democratic authority. Moreover, it does not directly engage with the

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<sup>44</sup> Waldron, n42 above.

<sup>45</sup> *Ibid* 39.

<sup>46</sup> *Ibid* 39.

<sup>47</sup> *Ibid* 41.

question of non-state forms of public authority. Nevertheless, it supplies a highly suggestive platform for building a more normative element into the Loughlin conception of publicness.

In the first place, the choice of democracy as a key background evaluative standard for publicness avoids the charge of remote or contentious idealism. More so than any other candidate ideal, the democratic standard is one that is both immanent within modern society and the modern state system, and, in principle, if not in practical detail, is relatively uncontroversial.

In the second place, the particular link forged between the ideal background standard of democracy and the modern historical development of law's constitutive public authority is a plausibly intimate one in which the real and the ideal are mutually informative. On the one hand, the real nurtured the ideal. Historically, the innovative modern idea of law as a constitutive public authority—so central to Loughlin's analysis—was at least proto-democratic in quality. It was based on a notion that certain matters should be treated as of general 'public' concern just in view of the fact that the interests of all members of society were affected. This, in turn, presupposed that the interests of all mattered and were to be taken into account, and the cultivation of such sentiments would lead eventually and after much social struggle to the development of modern institutional forms of representative democracy. Indeed, to recall the question of the historical credentials of law's necessary publicness, that proto-democratic quality—the germ and prospect of the ideal in the real—is one of the reasons why, in accounting for what is distinctive about modern law, we might favour a narrative that locates the constitutive basis and self-authorizing narrative of modern law exclusively in the principles of *ius publicum* over a narrative that embraces wider 'common law' sources as constitutive. On the other hand, and completing the circle of mutual influence, the ideal may be deployed to reshape the real. The modern democratic imagination that emerged out of the social reality of the development of a constitutive conception of

public authority, and which, however tentatively and unevenly, has become consolidated within the mature forms of that constitutive framework, may be and has been reciprocally deployed as an ongoing critical standard against which to test and guide that sense of publicness in state-centred and state-decentred frameworks of contemporary law alike.

In the third place, just as we understood the public character of law within a two-tier model as both the generative framework of all positive law and the selective object of that generative framework, so we may adapt and apply Waldron's insights in order to comprehend the standard of democracy associated with publicness in similarly two-tier terms. Most basically, the background standard of democracy, itself rooted in the constitutive sense of public autonomy, speaks to the importance of collective self-rule as a meta-principle of political organisation. That is to say, the very framework conditions of the "political pact"<sup>48</sup>—the constitutive sense of the proper subjects, territorial and functional jurisdiction, and key offices of the political which, in Loughlin's terms, make up the pre-positive juridical structure of the state—should so far as is possible, and even though they are by definition prior to the constituted forms of democratic rule, themselves be democratically mandated or homologated and be thus responsive to democracy's input standard.<sup>49</sup> Yet it does not follow from that constitutive democratic standard that every positive law duly constituted and every wide-ranging, public-affecting legal capacity duly created under positive law must or can itself meet the input standard of democracy. Sometimes there are reasons of principle why this is the case. Requirements of expertise, of impartial decision-making, of disinterested administration, of immunity from short-term electoral pressure, as well, of course, as the

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<sup>48</sup> Loughlin, n19 above, 20.

<sup>49</sup> Loughlin himself fully appreciates the incipiently democratic quality of the second-order "political pact". Indeed, he explicitly states that this pact rests on the principle of consent and, as such, also implies "some notion of representative, responsible, and accountable government" (*Ibid* 13). For him, however, this remains part and parcel of the 'real', and so a proper object of his explanatory thesis, rather than some ideal extrapolation from the real and benchmark for reinterpretation and refashioning of the real.

On the difficulties associated with the idea of a democratic theory prior to and about the terms of establishment of the *demos*, see, for example, my "Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship" University of Edinburgh Law School Working Paper Series 2010/25; available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1650016](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1650016)

need—recognized in the very double articulation of modernity’s publicness at the comprehensive ‘meta’ level and selective ‘object’ level—to preserve significant spheres of private and associational autonomy within society, may militate against democratic forms of representation and accountability in and under the law. In these cases Waldron’s second, output-based criterion of publicness—that the norms generously and inclusively reflect and respond to concerns of society as a whole and not just particular sectional interests—may be in tension with and may override the case for democratic input standards. Furthermore, as we shall see, even where there is no such clash of principle, even when democratically inclusive ‘output’ is not jeopardized by democratically narrow, short-term or divisive ‘input’, there may nevertheless be practical impediments to the development of forms of democratic input, in which case attention to democratic output standards can still be of significant compensatory value.

Fourthly and finally, these considerations generate a decidedly mixed message for the prospects of a democratically informed standard of publicness under conditions of globalization. On the one hand, the Waldron approach is flexible in terms of what democratic jurisprudence demands of the public quality of law at the derivative, first-order level of individual legal norms. The fact that the democratic indices of publicness are about output standards as much as input standards allows considerable scope for forms of institutional design of positive law in which the link to a particular state-centred constituent people may be somewhat attenuated. On the other hand, if democratic pedigree is to count as the highest input standard, then it must be considered as especially important, perhaps even indispensable, at the basic, second-order level of the very constitution of publicness. That is to say, unless first-order legal norms and capacities of positive public law, whose own democratic credentials may only be output-based, can be ultimately traced back to an original second-order source of authority that exhibits incipiently democratic characteristics, then the

link upon which law's constitutive sense of publicness depends is broken, and with that severance the very idea of law's necessary publicness is jeopardized.

It is this mixed message that underwrites the open-ended, contested character of the question of law's necessary publicness under contemporary conditions. The prospects of a normatively informed idea of the necessary publicness of law in a globalizing age depend on just how these various first- and second-order issues of the relationship between democracy and public authority are approached and addressed. Crudely, we can distinguish three broad positions. First, there is a state-centred position in which the second-order publicness and the qualities of constitutive democracy associated with the second-order publicness of a state-bases *ius publicum* remains the exclusive key to law's necessarily public character. This is a position we can associate with Loughlin's elaborately developed theoretical model, but also with a whole generation of state-centred thinkers within constitutional and international law.<sup>50</sup> It holds that we can continue to conceive of the legal world in necessarily public terms only to the extent that non-state based positive law, whatever balance of input and output democratic qualities it might possess, can in the final analysis be understood as a delegation of authority from the original authority of the states.

A second position is one that, by contrast, pays no or less attention to questions of second order publicness and instead concentrates on the public qualities of first-order legal norms across the dispersed network of global governance. The advocates of this position, of whom we find prominent examples under such banners as Global Administrative Law<sup>51</sup> and

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<sup>50</sup> Loughlin nevertheless emphasizes the difference between his own more fundamental critique of post-state constitutional theory, which is ultimately *epistemic*—tied to the uniqueness of the state-centred constitutional view of the world and of the conditions which make that world-view possible, and the critique offered by a typical state-centred constitutionalist such as Dieter Grimm who focuses only on the first-order normative or positive accomplishment of constitutionalism but nonetheless perceives the full form of such an accomplishment as *culturally* distinctive of and (probably) peculiar to the political form of the modern state. See Loughlin, n19 above. 18. See also D. Grimm "The Constitution in the Process of Denationalization" (2005) 12 *Constellations* 447.

<sup>51</sup> The Global Administrative Law project remains strongly associated with its founding institution, New York University. See, e.g., B. Kingsbury, "The Concept of 'Law' in Global Administrative Law" (2009) 20 *European Journal of International Law* 23-57; "International Law as Inter-Public Law" in H. S. Richardson and M.S.

global constitutional law,<sup>52</sup> would want to exclude or downgrade the significance of second-order publicness either because they do not consider that the kind of constitutive democratic publicness associated with the state-centred position *can* be plausible understood as the source of all legal authority in the dense and multiform structure of transnational regulation, or because they believe that such a pedigree based conception of democratic publicness *should* in any case be held wholly or largely irrelevant to the question of the legitimate authority of transnational law. In focusing on the credentials of diversely situated arrangements of first-order norms they tend to understand publicness in terms akin to what Michael Walzer would call a “reiterative universalism”<sup>53</sup> That is to say, on the one hand, the qualities of publicness are seen to be intrinsic to public law as generally understood, while, on the other, the articulation of these common norms is not seen as a matter of simply ‘reading off’ the local version from some inert universal “covering law”,<sup>54</sup> but as a continuous and progressive process of recontextualization in which the universal is reshaped by the particular. According to one prominent scholar of Global Administrative Law, for example, the relevant universals can form around notions as general as the principles of legality, rationality and proportionality, together with respect for the Rule of Law and basic protection of human rights.<sup>55</sup> Over time, these normative ideas, all of which are engaged in democratic output-oriented tasks of “channelling, managing, shaping and constraining political power”<sup>56</sup> tend to circulate more widely and more readily. Gradually, “as the layers of

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Williams (eds) *Moral Universalism and Pluralism* (New York: NYU Press, 2009) 167-2004. Kingsbury draws explicitly on Waldron’s work (n42 above) in these pieces. See also the similar project on public authority and international institutions based at the Max Planck Institute in Heidelberg. See e.g. A Von Bogdandy, P. Dann and M. Goldmann, “Developing the Publicness of Public International Law: Towards a legal framework for Global Governance Activities” (2008) 9 *German Law Journal* 1375-1400.

<sup>52</sup> See e.g. M. Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State” in J. L. Dunoff and J.P. Trachtman (eds) *Ruling the World?* (Cambridge: CUP, 2009) 258-325.

<sup>53</sup> M. Walzer, “Nations and Universe” in *Thinking Politically: Essays in Political Theory* (David Miller ed., New Haven, Yale University Press, 2007) 183-218, 187

<sup>54</sup> *Ibid* 184.

<sup>55</sup> See Kingsbury “The Concept of ‘Law’” n51 above, 31-34.

<sup>56</sup> *Ibid* 32

common normative practice thicken, they come to be argued for and adopted through a mixture of comparative study and a sense that they are (or are becoming) obligatory.”<sup>57</sup> Meanwhile, a similarly cosmopolitan story is being told today about the development of constitutional law across state and post-state sites, centred upon the nurturing at of universal constitutional commitments to principles of legality, subsidiarity, adequate participation and accountability, public reason and rights-protection.<sup>58</sup>

The reiterative universalists, therefore, believe in an authority system that is horizontal and normatively guided, whereas in the state-centred approach authority is understood to be vertical and lexically dictated. Democratic publicness, for the reiterative universalist, is about the trans-polity corroboration and vindication of best practice in polity sites that, in an increasing number of cases, lack a constitutive framework of democracy, whereas from the state-centred perspective it is first and foremost about continuing to insist on just that high modern constitutive pedigree even where it is becoming remote from the relevant transnational contexts of the regulation of collective action. One or other of the twin democratic imperatives of publicness, input or output—either a constitutive collective self-authorization or an adopted commitment to an inclusive sense of public interest and responsibility in all legal contexts of collective action regardless of how removed they are from a constitutive frame — is given priority. Whichever side is emphasized however, the claim to publicness is arguably diminished and destabilized just because of the absence or neglect of the other.

This opposition helps to account for the attraction of a third approach, one that tries to give equal due to the importance of constitutive public authority and the shift of regulatory power away from the state. Such an outlook, often broadly based upon a Habermasian approach to public autonomy, insist that the deep pre-positive and proto-democratic structure

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<sup>57</sup> *Ibid* 30

<sup>58</sup> See Kumm, n52 above.

of public authority that we tend to associate with the state need not, after, all be exclusively tied to the state. Rather, if we concentrate on its general properties rather than its conventional historical model, it is a structure that can also be found in other settings. These setting may include state-like bodies such as the EU, where at least some of the cultural and institutional preconditions of the reflexive construction of public autonomy, including the recent trace of documentary constitutionalism in the ultimately abortive Constitutional Treaty, may be present.<sup>59</sup> But, on one view at least, perhaps most fully developed in the recent work of Nico Krisch, public autonomy, understood in the most general terms as the expression of a right to self-legislation can also imagined and fashioned—can provide the relevant “scheme of intelligibility”—in other more modest and less state-like settings of transnational collective action. Such settings will be inhabited by actors who may be ‘members’ of multiple polities and who, therefore, do not owe exclusive or even predominant loyalty to any one particular polity.<sup>60</sup> Within this model of pluralist public autonomy, according to Krisch, the weight of any particular collective claim to public autonomy will depend upon many factors; “on the strength of its social grounding, of the participatory practices that support it as well as the plausibility of its attempt to balance inclusiveness and particularity.”<sup>61</sup> The last element in particular is vital. Public autonomy in a world of interpenetrated rather than mutually exclusive political domains, of non-holistic commitment to multiple segmentalized polities each with widely ramified decision effects, has to find a new balance between the (more broadly) *affected* and the (more narrowly) *affectively* engaged. There must be sufficient common commitment to form a sense of common ‘publicness’, but there must also be a recognition that insider and outsider are positions on a spectrum rather than categorical opposites, as well as an awareness that however the balance

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<sup>59</sup> See e.g. J. Habermas “Why Europe Needs A Constitution” (2001) 11 *New Left Review* (Sep.-Oct.) 1-20.

<sup>60</sup> N. Krisch “The Case for Pluralism in Postnational Law” LSE Legal Studies Working Papers 12/2009, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1418707](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418707). See also his *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: OUP, 2010)

<sup>61</sup> ‘The Case for Pluralism’ n60 above, 38-39.



of affected interest and affective belonging is resolved in any one polity context must be assessed in the light of how it is resolved in all other overlapping contexts.

If we follow this approach, second order publicness may be revamped as a more mobile constitutive virtue of the law. And to the extent that original political authority can be conceived of in non-state settings, some of the burden of democratic publicness is removed from the second order input setting of the state, just as some of the burden is removed from the merely first-order and often predominantly output-orientated setting of the transnational. By this method, therefore, the test of the necessary publicness of law is one that tries to incorporate and remix aspects of all the main current strands of thinking—state-centred and reiterative universalists themes now joined and complemented by the possibility of original authority beyond the state.

#### **4. Conclusion: The Point of Departure**

Yet, for all that it seems to offer a new horizon of possibility, and one to which I have been attracted in my own work,<sup>62</sup> the conditional nature of the above formulation leaves us with an urgent political dilemma, and one that remains wrapped up in a deep conceptual question. Politically, to what extent *can* the emergence of non-state sites of governance ever adequately balance the loss of public authority by the states? In turn, this is as much a question of the limits of our categories for thinking about the ‘political’ and the ‘legal’ as it is an empirical question. For the underlying issue is whether the kind of collective autonomy we can imagine for the various generators of a new networked space of transnational collective decision, whether we are talking about the regulation of football or of Olympic sport, or the registration of internet names, or the upholding of regional human rights, or the development of worldwide system for punishing crimes against humanity, or the protection of the rain

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<sup>62</sup> See e.g. Walker n 37 above; “The Idea of Constitutional Pluralism” (2002) 65 *Modern Law Review* 317 -359; and in the specific context of EU law, “Reframing EU Constitutionalism” in Dunoff and Trachtman (eds) *Ruling the World?* (n52 above) 149-77.

forests, or the making of a transnational social market in Europe, bears a family resemblance to the kind of autonomy, originality and proto-democracy of collective authority we associate with the popular sovereignty of the modern state.

To the extent that it does bear such a family resemblance, it is because we believe the idea of publicness, with its strong links to democracy, to be sufficiently capacious and flexible and to identify and capture enough that is continuous between the high modern phase of statehood and the new phase of globalization, that it remains a useful master category for our legal foundations. To the extent that we believe the family resemblance to be lost, it is because we believe the conceptual mould of modern legal authority to be broken beyond repair, so requiring the very idea of law to be understood through a new scheme of intelligibility.<sup>63</sup>

Whichever side of the divide we fall on, however, we cannot, or at least we cannot yet, escape the idea of law's necessary publicness. It provides an indispensable point of departure—in the sense of a starting point—for the key contemporary debate about the distinctiveness of our emerging ways of framing the domain of the legal in a globalizing world, in particular whether and how these ways are continuous with the received model of high modernity. Whether we may also anticipate a point of final departure *for* the idea of law's necessary publicness—in the sense of its valediction—depends on the practical outcome of that debate.

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<sup>63</sup> The division between an approach that utilizes and an approach that rejects ideas of 'publicness' can be very fine, so underlining the point that publicness is not just the paradigm case but also the limiting point of the modernist understanding of law. For example, Gunter Teubner develops a theory of law that seeks to transcend the distinction between public and private, but his depiction of constitutionalism as concerning the balance between the necessary autonomy and excessive jurisdictional scope and penetration of different functional sectors *inter se* in a differentiated global order is one which finds much resonance in the work of Nico Krisch. See e.g. G. Teubner, "Constitutionalising Polycontextuality" (2010) 73 *Modern Law Review* (forthcoming). The contemporary range and detail of putatively post-public theories of law is, of course, a vast topic in itself, and one for another study.