Authors: Ando, Clifford / Rüpke, Jörg

Title: “Introduction“

Published in: Public and Private in Ancient Mediterranean Law and Religion
Berlin: De Gruyter

Year: 2015

Pages: 1 - 9

ISBN: 978-3-11-037102-4

Persistent Identifier: https://doi.org/10.1515/9783110367034.1

Introduction

The distinction between public and private plays an essential role in modern understandings of nearly all aspects of social conduct. Indeed, it might even be said to be foundational in modern conceptions of the individual.[1] The terms themselves derive from Latin roots, *publicus* and *privatus*. As with all such *faux amis*, the genealogical relation between lexemes works to efface the historical specificity of the distinctions mapped by this essential polarity, as well as the very meaning of the terms themselves. For example, whereas Anglo-American liberals and most Protestants conceive of religion as an essentially private matter – albeit for different reasons, within different frameworks – Cicero's clauses on religion in *On the Laws* assign to all individuals both public and private religious lives, the one entailed by citizenship, the other normatively familial (Cicero *De Legibus* 2.19).

The aim of this volume, as of the conference in which it originates, is to explore the public-private distinction in two grand normative domains of life in the ancient Mediterranean, law and religion. From its inception, the project has taken two principles as axiomatic: first, for all the weight with which the distinction is freighted, its definition and salience within particular ideological contexts are highly contingent. Second, notions of public and private (insofar as these have reasonable correlates in the cultures under study) themselves interact with highly charged but equally contingent concepts: the household, the family, and the people as political collectivity among them. For these reasons, we planned a conference and volume that were avowedly comparative and historicist.[2] In this way, the project aspires to shed light not simply on why, when and where boundaries are drawn, but also, *ex comparatione*, on where they are not.

By way of setting the stage, we might set in dialogue with each other and with our own project some notable works of scholarship in related domains. In some contexts – American search and seizure law, for example – the household or, more properly, the walls of one's dwelling, are taken as a boundary between the public and private.[3] In Athenian political thought, the household is not simply a site privileged and protected in law; it is also accorded an ontology prior to that of the political. In Aristotle's *Politics*, for example, the *oikos* pre-

1 A point stressed by Eidinow in her chapter.

2 This aspiration to comparatism differentiates this project from several very fine recent works on aspects of the public-private distinction in antiquity, notably de Polignac and Schmitt Pantel 1998, Macé 2012, and Dardenay and Rosso 2013.

3 Davies 1999 offers an idiosyncratic history.

cedes the *polis* and, indeed, political communities can be regarded as formed from an agglomeration of households. And yet, as Susan Lape has shown, the intertwined notions of family and *oikos* have a history, and an intensely political one at that: it was Solon who established the intergenerational and conjugal household as the normative basis for social reproduction.[4] The contingency and cultural specificity of the Roman household, by contrast, is emphasized not simply by Roman lawyers speaking to the peculiarity of *patria potestas*,[5] but also by the myth of Rome's origin in Romulus' asylum: in that history, Rome is founded through a gathering of individual males, and its households are necessarily established both later and by exogamy.

In the Greco-Roman, liberal and republican traditions, at least, what one establishes as prior to the political is necessarily naturalized, and is thereby often removed from the reach of statal power. Within this heuristic, Athens and Rome are two different worlds.

Of course, the notional autonomy of the household – its existence beyond statal control – is largely an ideological artifact. We are therefore compelled to ask, in the interest of whose power, and whose subjugation, were these narratives crafted, modified and retold. Of course, Athenian and Roman households were similar in being patriarchal, but the reach of ideologies of household and family structure do not end there. Rather, social and religious authority in the household is regularly established in explicit homology to the structures of authority in the public sphere.[6] In this way, the notional autonomy of the household has historically often operated to naturalize patriarchy in public magistracy, and vice versa: so in Athenian tragedy, the health and purity of king's household is often treated as synecdochic for the health and purity of the community as a whole, while at Rome, the authority of the household is often figured as dependent upon the status of the elite male in the public sphere. That said, whatever the explicit direction of analogy in argument, the prevalance of patriarchy in the two domains is de facto mutually constitutive or, one might say, they are mutually dependent and (logically, at least) equally fragile. This quarrel over the ontology of the household and its relation to the political is mirrored at the dawn of Anglophone political theory, in the sharp disagreement between Hobbes and Locke about the parties to the social contract and, indeed, the equality of women to men.[7] Not for nothing, therefore, have principal aims of the feminist

4 Lape 2002/3; see also Lape 2003.

5 On which point see the chapter by Evans Grubbs, p. XXX.

6 Ando 2009: 180.

7 Hobbes of course posited individuals as the contracting parties and argued for the radical equality in nature, at least, of all persons.

traditional overall, and the Anglo-American feminist critique of liberalism in particular, been to analyze the "politics" and "economy" of the family and to call to account normative distinctions between public and private.[8]

The concept of the public deserves similar scrutiny and historicization, but, outside Roman law, this has been slow to happen in classical studies.[9] On this topic the essential provocation should have been the historical argument of Jürgen Habermas in *Strukturwandel der Öffentlichkeit* (1962), to the effect that antiquity had no notion of "the public sphere" as a non-private, non-familial but also non-statal space: this was a development of early modern England and, to a point, the Netherlands.[10] Was it in fact true that antiquity lacked the ability to conceptualize non-familial collectivities and non-household spaces except through the paradigm of the public?[11] If so, what implications would this hold for associational life, including but not limited to cult? As a related matter, the priority of the public in Roman ontologies of the political has the effect of establishing "the private" in dependency upon it: the private becomes merely that from which the public has withdrawn its claim.[12] Our ability to recognize the very different structure of ancient thought in this matter is hampered by the simultaneous persistence in contemporary thought of quite distinct notions of both public and private, which are often discussed using identical language. Alongside a notion of the public as communal and explicitly non-statal exists a notion of the public as citizenly and universal; corresponding to these are a range of understandings of public goods, from an aggregate arising from possessive individualism or interest-group pluralism to republican, communitarian, progressive or social democratic goods; and finally, we should acknowledge historical, cross-cultural and merely political variation in how one understands the agency of the public.[13]

---

8 Abbey 2011 provides a contemporary overview; see also Gavison 1992 and Brettschneider 2007.

9 A limited but valuable exception is Kuhn 2012; for some historical, theoretical and normative reflections on this topic see Ando 2012.

10 Habermas 1989 [1962]; Withington 2007 offers a useful summary of the reception of Habermas's work among historians.

11 For some brief remarks on the use by Roman jurists of analogical arguments drawing on public law to explain the structures of "private" associations see Ando 2015, chapter 2.

12 The starting point for any future inquiry into Roman understandings of the public must be Thomas 2002a and 2002b.

13 Horwitz 1982 provides a survey from a legal perspective; Gilens and Page 2014 provides an excellent survey of theories of democratic politics and, implicitly, their underlying notions of public goods. On the communal as public (or, another faux ami, "civic") see the classic works Putnam 2000 and Skocpol 2003.

Finally, to return to a theme announced above, distinctions between public and private regularly have quite distinct geographic, topographic and material aspects. Here, a principal achievement in recent decades has followed upon the crucial insight of Andrew Wallace-Hadrill, to the effect that for all their status as enclosed spaces – and their potential thereby actually to exclude non-members – Roman aristocratic houses offered a number of spaces that served public functions, just as, one might say, an aristocrat's *otium*, his leisure time, was always in fact open to public scrutiny as a measure of his suitability for public affairs.[14] But two further historical problems lie latent and underexplored in this literature, both arising from the normative status of the city in virtually all theorizing of politics and the public and private in the western tradition. It is often assumed, indeed, essential to theory, that public spaces are monumentalized spaces, and private spaces are urban dwellings. Tom Habinek has raised the question whether the emergence of sexuality as an analytically distinct component of theories of identity rested crucially on the forms of social interaction and demographic background of the ancient megalopolis.[15] His work challenges us to think, with Eidinow, about how ancient notions of the person, individual or *privatus* stand in relation to the modern individual or, indeed, the subject. Furthermore, was the public/private distinction drawn differently in the grand metropolitan centers, where individuals existed in more atomized relation to one another, than they were in mid-size municipalities, or villages, for that matter? Do changes occur in relation to mere population growth or are they better indexed to some increase in heterogeneity? Finally, we must not forget that there were normative traditions in the ancient world in which urbanism was explicitly dispreferred in relation to pastoralism (as one possibility): the book of Genesis is an important locus for such thought. Such traditions challenge the very fundamentals whereby the publicness of spaces can be conceptualized.

The papers in this volume engage these and related themes in a sequence of detailed and interrelated historicizations of the public/private distinction in Greek, Roman, Christian, Jewish and Islamic antiquity.

Edward Harris addresses the complex case of homicide and concepts of pollution associated with it, which might appear to have partially discontinuous histories in criminal and religious law. The chapter is able to show that ideas about pollution are not mere survivals from earlier period, but vigorous and functional. Legally, it remained the primary duty of the family to deal with homicide without

14 Wallace-Hadrill 1988 and 1994, which serve as points of departure for the chapters of both Begemann and Evans Grubbs in this volume.

15 Habinek 1997.

interference by the community. The ascription of pollution served a double purpose. It puts pressure on the family to swiftly deal with the crime. At the same time it acknowledges the wider effects of such crimes on the community as a whole. Public and private are thus perspectives that could apply at one and the same time to single events and situations.

"Public/private" is a distinction frequently employed in describing Athenian law in order to differentiate the status conferred in several respects to the household as a private sphere, including instances of judicial power, for instance over slaves, and situations of legal self-help against intruders. By concentrating on law enforcement, however, Adriaan Lanni is able to identify mechanisms employed both by courts and within judicial contexts whereby seemingly private conduct was exposed to public scrutiny and, indeed, to sanction. It is the whole life conduct of a person beyond and unrelated to the actual case at hand that was thematized and used in argument in litigation. In this way, norms of deviance were formulated and informal control and vituperation were encouraged. The mechanisms of communication and the range of such information and their influence were, however, difficult to assess.

Esther Eidinow considers a notion of the private very much in dialogue with one important to the chapter by Ahmed El-Shamsy. Commencing from some reflections on the inability of models of polis-religion to allow for a strong public-private distinction, even at the level of analysis, Eidinow suggests a turn at once to theories of mind and, as a related matter, to what might appear a theological conundrum, namely, whether the Greeks believed the gods could know thoughts and intentional states that remained unvoiced. The twinned consideration of notions of human interiority and divine knowledge opens up many new approaches to the texts under consideration.

In her chapter on the conflict of Marcus Tullius Cicero after his return from exile in 55 BCE, with Publius Clodius Pulcher, who had in meantime consecrated a temple of Liberty in Cicero's house, Elisabeth Begemann analyses a well-documented case from the late Roman republic. Public and private, *publicus* and *privatus*, are concepts at the very heart of the political, religious, and legal case. Given the fact that the very character of a house of a Roman *nobilis* and politician defies classification as either "public" or "private," by virtue of its use for receptions of colleagues and clients, for formal meetings of priesthoods as for the accessible display of wealth, all arguments based on the distinction have to be very carefully framed, as the chapter shows in its detailed analysis of Cicero's speeches, his insinuations and omissions. In the end, it is contingent circumstances, the whereabouts of the statue, and the personality of Clodius, rather than general rules, that had to carry the case.

William van Andringa offers a case study from a slightly later epoch, a temple foundation at Pompeii in 3 CE. The podium of the temple of Fortuna Augusta was built on private property, but the necessary stair leading up to the sanctuary covered not only public space, but even changed the urban layout by narrowing a street. This difference in the legal status of the property concerned is marked by the use of visibly different building materials. Van Andringa situates this move of Marcus Tullius (not related to Cicero) within the strategies of contemporary members of the elite and their attempts at building relationships to the local community as well as the central figure of the emperor. The epigraphic formula *solo et pecunia sua*, the author claims, is thus intended to denote these political as well as property facts.

Judith Evans Grubbs takes up a problem that might seem to exist strictly within the domain of law and, indeed, within private social relations, to wit, the legal status of illegitimate children. But Evans Grubbs shows, through detailed chronological consideraton of the evidence, first, that illegitimate children were of many types: slave-born natural beings, *naturales*; freeborn children from non-legal couplings, *spurii*; and, as a special case, children from incestuous marriages. By contrast with the other cases, incest was a matter of religious concern and therefore fell within the domain of public law. Although juristic and documentary evidence from the classical and immediately post-Antonine period shows some flexibility toward a form of relation common among certain non-Roman peoples, Diocletian's legislation marks a severe change toward censuring such unions as both un-Roman and offensive to the gods.

Harry Maier turns to early Christian texts and the importance of a discourse on the household and domestic life in them. After a fashion kindred to the theological discourses studied by Eidinow and El-Shamsy, Maier reveals a discourse in which private conduct is the object of an evaluative gaze. In his case, however, the scrutiny is not divine, nor the discourse theological: private social relations, occurring within household spaces, become a proxy of religious worthiness and the interior spaces of houses become the object of a very public gaze. His essay has an affinity to the excellent and more material work of Kim Bowes on a later period and they might usefully be read together.[16]

The chapters by Rubina Raja and Natalie Dohrmann examine topics in many respects the inverse of Maier's. Whereas Maier's Christians nominally respect a distinction between public and private only to upend it, in seeking to expose the notionally private and domestic to public scrutiny, Raja and Dohrmann investigate notionally public spaces and discourses that are by varied means re-

16 Bowes 2008.

stricted in use, access or audience. Raja studies *tesserae* discovered (largely) in temple complexes of Roman Palmyra. The consensus holds these to have been used as tickets for banquets held at the temples. Raja contends that many of the banquets may have departed from the avowed status of the temples in two respects: first, the events appear to have been private, or at least restricted in attendance to invitees; and second, they may well have been held in honor of gods, or of priests of gods, other than the divinity to whom the temple space was dedicated.

Dohrmann examines the paradox of a normative discourse, that of the rabbis, that on her intrepretation sought simultaneously to claim a public authority but instantiated itself as ephemeral, as oral. The claim to public authority arises from the very form of the discourse the rabbis adopted, that of law. At the same time, they toiled to circumscribe the claims they made on its behalf. Inter alia, it was not the law of a statally constituted community and did not position itself as such in the terms standard to the day, which demanded material and manifest publication and an explicit claim to jurisdiction, over a population and a space. Dohrmann views the turn to oral law and its forms as complexly mimetic of Roman law or, at least, as deserving study on analogy with Roman law: as she puts it, the turn to oral law must be understood as an effort to make rabbinic discourse both authoritative and invisible in the landscape of the (imperial) rabbinic city.

Catherine Hezser, too, situates a problem in rabbinic law in analogical relation to arguments within Roman law, though she is concerned with a specific doctrinal issue. In the Palestinian Talmud, an earlier category of uncertain status, *carmelit*, emerges to temporary prominence. In short, earlier tannaitic sources describe as *carmelit* spaces of definitional ambiguity, materially and therefore ritually situated uneasily between private and public. In the Talmud, by contrast, *carmelit* emerges as a positive category, not so much liminal and uncertain as bridging. Hezser likens the carmelit to various forms of property in Roman law identified as property of no one (*res nullius*). In both traditions, she urges, thinkers reacted to the limitations and constraints of a rigid public/private distinction, with the crafting of some tertium quid that allowed certain practicalities to go forward.

Ahmed El-Shamsy addresses the Islamic distinction of public and private in the light of the notion of an all-seeing God. The strict separation of two spheres of action correlated to two different audiences or better: fellow human observers, that is, society on the one hand, and only God, on the other. The difference is conceptualized in terms of visibility, of cover and display. Earlier notions of sin and shame were re-elaborated in this framework. The unhindered – and unhinderable – view of God informed the development of an individual self and

ethic. In the long run it might have helped to shape a conduct and ethic suitable to the rise of urbanism within the growing Islamic Empire.

Works cited

Abbey, R. 2011. *The Return of Feminist Liberalism.* Montreal and Kingston.

Ando, C. 2009. "Evidence and orthopraxy." *Journal of Roman Studies* 99 (2009): 171–181.

Ando, C. 2012. "Empire, state and communicative action," in C. Kuhn, ed., *Politische Kommunikation und öffentliche Meinung in der antiken Welt:* 219–229. Stuttgart.

Ando, C. 2015. *Roman Social Imaginaries. Language and thought in contexts of empire.* Toronto.

Aubert, J.-J., ed. 2003. *Tâches publiques et enterprise privée dans le monde romain.* Geneva.

Bowes, K. 2008. *Private worship, public values, and religious change in late antiquity.* Cambridge.

Brettschneider, C. 2007. "The Politics of the Personal: A Liberal Approach." *American Political Science Review* 101.1: 19–31.

Dardenay, A. and E. Rosso, eds. 2013. *Dialogues entre sphère publique et sphère privée dans l'espace de la cité romaine: vecteurs, acteurs, significations.* Bordeaux.

Davies, T.Y. 1999. "Recovering the original Fourth Amendment." *Michigan Law Review* 98: 547–750.

de Polignac, F. and P. Schmitt Pantel, eds. 1998. *Public et privé en Grèce ancienne. Lieux, conductes, pratiques.* Ktèma 23.

Gavison, R. 1992. "Feminish and the Public/Private Distinction." *Stanford Law Review* 45.1: 1–45.

Gilens, M. and B.I. Page. 2014. "Testing theories of American politics: elites, interest groups, and average citizens." *Perspectives on Politics* 12: 564–581.

Habermas, J. (1989) [1962]. *The structural transformation of the public sphere. An inquiry into a category of bourgeois society*, translated by Thomas Burger with the assistance of Frederick Lawrence, Cambridge, 1989 = *Strukturwandel der Öffentlichkeit*, Darmstadt, 1962.

Habinek, T. 1997. "The invention of sexuality in the world-city of Rome," in T. Habinek and A. Schiesaro, eds., *The Roman Cultural Revolution:* 23–43. Cambridge.

Horwitz, M. J. 1982. "The History of the Public/Private Distinction." *University of Pennylsvania Law Review* 130.6: 1423–1428.

Kuhn, C. ed. 2012. *Politische Kommunikation und öffentliche Meinung in der antiken Welt.* Stuttgart.

Lape, S. 2002/3. "Solon and the Institution of the 'Democratic' Family Form." *Classical Journal* 98: 117–139.

Lape, S. 2003. "Racializing Democracy: The Politics of Sexual Reproduction in Classical Athens." *Parallax* 9: 52–63.

Macé, A., ed. 2012. *Choses privées et chose publique en Grèce ancienne. Genèse et structure d'un système de classification.* Grenoble.

Putnam, R.D. 2000. *Bowling alone: the collapse and revival of American community.* New York.

Skocpol, T. 2003. *Diminished Democracy: From membership to management in American civic life*. Norman.

Thomas, Y. 2002a. "La construction de l'unité civique. Choses publiques, choses communes, choses n'appartenant à personne et représentation." *Mélanges de l'École française de Rome, series Moyen Âge* 114, 7–39.

Thomas, Y. 2002b. "La valeur des choses. Le droit romain hors la religion." *Annales: Histoire, Sciences Sociales*, November-December 2002, 1431–1462.

Wallace-Hadrill, Andrew (1988). "The Social Structure of the Roman House", *PBSR* 56: 43–97.

Wallace-Hadrill, A. (1994). *Houses and Society in Pompeii and Herculaneum*. Princeton University Press.

Withington, P. (2007). "Public discourse, corporate citizenship, and state formation in early modern England." *American Historical Review* 112: 1016–1038.