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The explicative value of public-private separation in interest representation

1. Introduction

1.1. The origin of the research question

Since central governments have been established in order to conduct the affairs of a political community under their authority, they have always had to deal with the presence of interest groups.

One could witness diverse forms of solutions over the centuries how the rulers and the ruled channelled in the special interests, whether they were balanced, unequal, co-operating or confronting with each other. After the principle of popular sovereignty got widely accepted in the ideologies present in our democracies, new forms of institutionalised interaction between the political decision-makers and the interest groups have taken place. Their evolution lasts without cease.

Once the classical pluralist idea was rejected, according to which the emergence of one interest group triggers quasi automatically the emergence of the counter-interest group,¹ there was no doubt that for the sake of unbiased government and legislation, one has to better understand the interest group activity in order to be able to draft effective regulation. Most democratic countries have no regulation at all nonetheless. As interest representation is the very core issue of all democratic states and being so it is strictly circumscribed by several democratic principles, it would be logical to expect that the margins of democratic legislation over the western hemisphere would converge and yield similar solutions. However, that does

¹ Dahl, A. Robert, *Who Governs? Democracy and Power in an American City*, Yale University Press, 2005.

not seem to be the case. The interest representation is openly dealt with and regulated in the Anglo-Saxon countries but much less attention is devoted to the issue on the Continent. The European Union seems to become the first exception, owing to mainly the presence of inter- and transnational actors.

In spite of the common declared objectives of all regulation of interest representation, namely (1) assuring the open access to political decision making which is rooted in the fundamental right to petition, (2) assuring the transparency of the public decision making process and (3) countering corruption, the regulatory regimes set up in the US and at the European institutions took surprisingly different shapes. As long as the European Commission propagates self-regulation of the interest representation community, which means that the Commission is reluctant to propose even a mandatory register of lobbyists, the US Congress changed track in 1995 and adopted detailed rules for direct lobbying and for ‘honest leadership’,² applying to lobbyists, to the members of Congress and in some cases to public servants as well.

Till a certain degree one is certainly used to experience divergent democratic problem-solving legislation, for example the structure of the healthcare system or the configuration of constitutional courts, nevertheless these regulatory regimes are usually constructed from the same elements, even if in different proportions.

That is the reason why we find the rather huge gap between existing interest representation regulation worth of explication. In the United States already the founding fathers put an accent on the righteous treatment of special interests – or as they called it, factions.³ As a result of the sophistication of the regulation over hundred years, today twenty thousand Washington lobbyists on Capitol Hill must face rigorous rules in their interaction with public decision-makers, in particular with legislators.⁴ This means regular financial disclosure, declaring the interests represented, complying with code of good conduct, restriction of gifts and financial support to decision-makers, restricting of the so-called ‘revolving door’ practice, mandatory registration of lobbyists – and in case of shortcomings, severe fines may be imposed on the violators.

The second largest lobbying community of our knowledge resides in Brussels, in the capital of the European Union. Their number is estimated over ten thousand, depending on the

² Lobbying and Disclosure Act of 1995, Honest Leadership and Open Government Act of 2007.

³ Madison: Federalist Papers, No. 10.

⁴ Overall more than thirty thousand lobbyists are registered through the federal states of the US.

methodology applied.⁵ Meanwhile, the European institutions have no common approach to the regulation of interest representation: as long as the European Parliament accepted a mandatory lobby register, the European Commission, the body that is still the most important in the eyes of lobbyists for having quasi-exclusive right of law initiation, has defended its soft regulation approach, which covers mainly an informal, non-mandatory register and the belief in the self-regulation of the interest representation community through the establishment of and compliance to a code of conduct. The European Parliament disposes a mandatory lobby-register, nevertheless the data supplied by the accredited individuals contains nor case-to-case information, neither any financial disclosure. Besides the two main institutions, the European Economic and Social Committee introduced a regime to institutionalise the dialogue with the civil society. The other EU Institutions have no explicit rules.

Several questions follow: do these regulations share truly the same objectives? Is there a difference in the belief concerning the power of the self-regulation of the interest representation community? Could it be explained by the different factors in their respective history? Are these divergent legislative attitudes leading finally to the same results? Is there such a difference between the lobbyists of Washington and Brussels that they cannot be treated the same way?

In order to find answers to these puzzling questions, we wish to examine the framework of legal-historical factors that may have contributed to the regime-difference. The borderline, over which lobbying is supposed to pass, stands in the focus of our analysis, namely the border of public and private realms. For any enquiry dealing with interest representation, this should be the starting point, to make certain axioms explicit. The public-private separation will be treated first in view of sovereignty concepts, how willing is the state to accommodate societal interests under different interpretations of sovereignty. Secondly we ask how the border is dividing the actors of our interests, whether there is a similar concept behind Brussels and Washington about the public and private realms. We will argue that both in the concept of sovereignty and in the public-private dichotomy numerous variations were observable since the birth of these ideas, nevertheless the forces of globalisation were able to converge the approaches employed. In result, the earlier deviation of the understanding of private-public relationship still retains certain explanatory value.

⁵ Lehmann, Wilhelm and Bosche, Lars, 'Lobbying the European Union, Current Rules and Practices', Directorate-General for Research, Working Paper, Constitutional Affairs Series, AFCO 104 EN, 2003.

1.2. Interest representation research

The research of interest representation lately has brought the focus on widening the spectrum of theories and eventually to bring overarching theories to the field, while in the last decades the abundance of case studies is evident. The problem consists in the segmentation of research: different EU policies – and the unequal distribution of competence of the EU - triggered different level of activity of interest groups. Study of consumer protection or transport liberalisation can bring truly contradictory results.⁶ Furthermore, not only the empirical analysis and methodology diverges, but the applied theoretical sets as well. Interest representation studies first took tools from comparative politics and international relations, later developed their own frameworks of theoretical and normative analysis, however, these frames are not necessarily compatible, leading to an unfortunate situation where case studies are incomparable. The present paper intends to avoid further segmentation and wishes to expand our knowledge on the subject matter in the following ways.

Firstly, we believe that the study of the regulation of lobbying is a case where sectorial differences of interest groups play no role. In other words, all actors in the political system are influenced by the form of regulation, thus they all have incentives to participate and to seek to promote their own interest. In this way the regulation of interest representation is a meta-case, establishing a general framework for all sectors, so our investigation in this perspective can escape from falling into the trap of segmentation.

Secondly, the research undertaken will help future researchers to be explicit about their axioms. Social sciences have always devoted much time to epistemology, even if epistemology has transformed into a research area of its own. Yet one cannot and should not side-step from the major questions as the replies may largely influence the research agenda, topic and methodology. Interest group scholars themselves remarked the lack of epistemological consciousness: “As Baumgartner and Leech have put it for the US literature, such progress will come only ‘from an increased willingness to be explicit in our theoretical perspectives, from clear statements of the limits of our chosen theoretical perspectives, and from concerted efforts to build on the findings of others’.”⁷ The deeper comprehension of the public-private separation reveals the too often implicit axioms.

⁶ Rainer Eising: *The Political Economy of State-Business Relations in Europe*, Routledge, 2009, p. 17.

⁷ Baumgartner, F. R. and Leech, B. *Basic Interests. The importance of groups in politics and political science*, Princeton, NJ: Princeton University Press, 1998, p. 21., in: Eising 2009, p. 18. (Italics ours)

Thirdly, our comparison of the European Union and the United States (restricted though to Washington and Brussels, member states in both case are omitted) bridges gaps of the discipline. On the one hand, the use of the concept of sovereignty opens a connection between interest group research and a classical domain of political science and jurisprudence. The better integration of interest group research has been a longstanding objective. Still in 2006 the discipline was regarded to be in the state of a “not so splendid isolation”⁸ or “elegant irrelevance”⁹, despite the recurrent borrowing of methodological tools and adaptation of theories from other fields of political science.

On the other hand, the relevance of any comparison between the US and the EU in this respective have been disputed earlier. Certain scholars have argued so that the difference of the two systems renders any comparison senseless, or at least, the comparative way is not considered the most useful in view of a *sui generis* European forum.^{10,11} Recently though the European exceptionalism is in decline and the comparativism is encouraged in order to promote the convergence of EU-US knowledge and scholarship, and to successfully integrate existing middle-level theories while avoiding further segmentation.¹² “A comparison between the two largest lobbying ‘industries’, namely Washington, DC and Brussels, is particularly insightful for a better understanding of the ways in which institutional conditions determine lobbying methods or styles. Even if the EU is not a state like the United States (US), lobbyists in both polities interact with a fixed set of institutions that are comparable in terms of the functions and roles they play in the policy process. Comparisons between the US and the EU are gradually becoming more common, but they are still in their infancy.”¹³

1.3. Definitions

Almost as an obligatory paragraph in the relevant literature, hardly any author pass without lamenting on the lack of commonly accepted definitions concerning interest representation. Already, the names to cover interest groups or lobbyists and their activity vary

⁸ Beyers, Jan, Eising, Rainer and Maloney, William, *Conclusion: Embedding Interest Group Research*, *West European Politics*, 31: 6, 2008, pp. 1292-1302.

⁹ Baumgartner, Frank R., and Beth L. Leech, *The Importance of Groups in Politics and in Political Science*. Princeton, NJ: Princeton University Press, 1998.

¹⁰ Coen, David and Richardson, Jeremy, *Lobbying the European Union, Institutions, Actors, and Issues*, Oxford University Press, New York, 2009.

¹¹ Woll, Cornelia, *Lobbying in the European Union: From sui generis to a comparative perspective*, *Journal of European Public Policy*, 13:3, 2006, pp. 456-469.

¹² Beyers-Eising-Maloney 2008,

¹³ Woll, 2006, p. 457.

across huge spectre: interest organisation, special interest groups, economic interests, factions, strikers, pressure groups, advocacy groups, organised associations, political associations, issue networks, policy networks etc. All belongs to a given approach with its implicit and explicit presumptions.

The paper will use interchangeably “interest representation” and “lobbying” in describing the organisational level, and it will talk of “lobbyist” and “interest group” at the individual-collective level. Although the term “lobbying” still has to cope with some negative associations due to earlier lobby scandals, we believe that lobbying is a central and inevitable phenomenon of democracies – and of any hierarchical political system. The misuse of lobbying as a synonym to corruption is still present in the news, refuelling the negative association times by times.¹⁴ Scientifically it is often argued that the differentia specifica of lobbying is the target: as long as corruption is dealing with single discretionary decisions, as a grant, subsidy or authorisation; lobbying implicitly – however not always – denotes legislative lobbying.

2. Sovereignty and private-public separation

2.1. Outline of the analysis

The paper will not deal with the description of the interest representation regulations that have already been object of different studies.¹⁵ Our interest lies in the socio-philosophical and legal framework of the United States and the European Union, in what extent may the historical path be accountable of the difference of the interest representation legislation. When we consider lobbying as an intermediation between privately organised groups and the public decision-maker – who ultimately represents the authority of the state – then it is justly asked how private groups may have access to public affairs; what is held public and what is private?

The public-private distinction is fundamental in Western culture, nevertheless one should be aware that it may denote very different concepts in politics, in normative theory, in democratic theory, or in the philosophy. Weintraub published one of the few analytical essays that deals in depth with the problem. He identified four frames of the modern private-public discussion: (1) the liberal-economic model, taking the state and the market separate, (2) the

¹⁴ Higgs, Robert, "Military-Economic Fascism", The Independent Review, XII:2, Fall 2007, pp. 299-316.

¹⁵ For an up-to-date introduction, see Obradovic, Daniela, 'Regulating Lobbying in the European Union', Chapter 15 in Coen, David and Richardson, Jeremy, Lobbying the European Union, Institutions, Actors, and Issues, Oxford University Press, New York, 2009, pp. 298-334.

republican model, where public is discerned from the administrative state and from the market as well, (3) the dramaturgic-sociological research where public is the space for a fluid socializability and (4) finally the frame of family (private) and the outside world (public) in modern feminist research.¹⁶ As we will examine the decision-makers relationship with those who are not directly responsible for the decision, the first two approaches must be studied, permanently being aware however when passing the borders between two concepts.

In our effort to focus the research, we have chosen one certain aspect of the public-private debate, relating to the first two frames of Weintraub, without entering into more detailed analysis of other domains. The openness of the state and the access (and will to access) of the non-state actors are not always overlapping phenomena. Accordingly, we investigate two readings: first we ask how the public-private relationship was understood in the age of nation-states when the concept of sovereignty was drafted. What is the approach of the state towards its subjects? The idea of sovereignty is diverse, it seems that it has followed variable tracks depending on the social context. Is it similar or divergent in the two systems, the US and the EU respectively? May it be relevant to regulation? How is the openness conceived by the general concept? This is our first factor.

Secondly, zooming in on the access-arena, we trace back how the public-private borderline evolved over time and how this evolution of the separation is affecting the understanding of lobbying. Our second factor is thus the public-private borderline.

Whether the state is superior to individuals or is institutionalized as a partner, as a neutral mediator, it fuels scientific and political discussions since the ancient times. It returns under different coats but the basic question remains the same. One recent form is the thin borderline between private and public realms. Lately, communitarians and liberals disagree over the priority of individual or collective autonomy.¹⁷ Another earlier version puts it into the liaison of individual interest to the common interest. The latter has been defined in several ways, public will, general will, public interest, *raison d'État* and so on. What is the individual's margin of manoeuvre facing the authority of a fief, a king, a state or another individual?

Our examination begins first with the debate in an older set of terminology based on the principles of sovereignty. Secondly we analyse the newer terms of public-private separation.

¹⁶ Weintraub, Jeff, 'The Theory and Politics of Public/Private Distinction', in: Weintraub, Jeff and Kumar, Krishan, *Public and private in thought and practice: perspectives on a grand dichotomy*, The University of Chicago, London, 1997, pp. 1-43. p. 7.

¹⁷ G. Fodor, Gábor, 'Az érdek mint a politika mozgatórugója' in: Kégler, Ádám – Bayer József (ed.) *Kormányzati, gazdasági és civil érdekérvényesítés az Európai Unióban*, MTA PTI, Budapest, 2009.

2.2. Sovereignty, openness and the impact of human nature

We will concentrate on the period after the birth of modern statehood. The next paragraphs try to answer in an abstract and historical perspective the question whether the individual will and the interference of the individual in the affairs of the ruler (or the state) is desirable, prohibited, encouraged or discouraged in principle.

The original idea of the subsequent interpretations was found in Raymond Aron's post-war lectures,¹⁸ the re-application of his analysis for interest representation is our own. Aron's historical comparison draws from the 17-18th century of England and France, two leading democracy of the 20th century, nonetheless his theorization is valid (and intended to be valid) for all democracies of the West. The line of thoughts of course does not cover all aspects and may be judged even subjective, nevertheless we find it very useful in explaining some basic principles of today's democracies relevant to interest representation.

Still, in a preliminary remark it has to be justified why this two country may be representative when the paper deals with Brussels and Washington. The Anglo-Saxon linkage between the history of England and the United States is clear, the common law tradition though later took different shapes, altogether the image of governance converged a lot in the early years and the last fifty years of their common history. On the other hand, why France? The French administrative culture was central to all the long history of the European Communities and of the EU. "As far as the EU is concerned, its administrative system was built according to French traditions and conceptions."¹⁹ While the French administrative culture influenced the functioning of the European Commission and other European institutions; the presence of functionaries socialised in the French way has been significant as well. Think of the "concours", the famous entry exams for future administrators, in addition to the system of Directorate Generals and other characteristic footprints. One could also mention the only recently fading importance of the French language. The EU later of course adapted to the recent developments of world politics and the enlarging integration, by being transformed into a global player on its own, yet path-dependency shall not be ignored.

Aron's interest was to describe how "large is the range of action of the dominant oligarchy compared to the mass of citizens".²⁰ By oligarchy, he understands that a smaller number of rulers govern the masses of citizens; numerically the governors are always and

¹⁸ Aron, Raymond, *Introduction à la philosophie politique – démocratie et révolution*, Inédit, Paris, 1997.

¹⁹ Neunreither, Karlheinz, 'Elected legislators and their unelected assistants in the European Parliament', *The Journal of Legislative Studies*, 8: 4, 2006, p. 40-60, citation from p. 48.

²⁰ Aron 1997, p. 57.

necessarily lesser than the governed. He applies this principle to all hierarchical social organisations, so he had to look for other factors to delimit and explain the variability of regimes in the world. He found that by the democratic regimes the same concept of sovereignty is put in practice through electoral competition, the actual functioning of the regimes vary greatly in their *modus operandi*, depending on the source of the sovereign power, on how much the governors can be contested.

On this ground we find it particularly interesting to introduce Aron's comparison of the two country and their “early” logic of access.²¹ How are the different conceptions of sovereignty dealing with the access of outsiders to government issues? His variable in the analysis is *inter alia* the perception of human nature. The presumption lays down that in the early days of popular sovereignty the philosophical impact was great: depending on the judgement of human nature, whether it was deemed inherently bad or good, played an important role in determining the interpretation of popular sovereignty and the desired relationship between citizen and the state. Bad human nature is resulting in a different reading of sovereignty, as does good human nature. As Aron himself notices, this version of the lecture of history is just one out of many, as “there are numerous philosophies, otherwise contradictory, in the origin of the two readings [why the democracies developed in different ways]”.²²

The *Contrat Social* and its application during the French Revolution, with all its implicit ideas, is contrasted to the English constitutional-process. Theodore Woolsey noted in 1893, “[T]he quality of sovereignty, however, does not necessarily imply unlimited power or unchecked power; much less undelegated power.”²³ The adaptation of the philosophical concept of sovereignty to the everyday political life meets numerous crossroads, resulting in diverse outcomes.

In the first case, the French environment was favourable – in large part due to Rousseau – to believe in an inherently good human nature. The foundations of the centralised French government may be found right there, together with the accentuation of equality in detriment to autonomy of the individuals. To unfold this previous sentence, consider the next

²¹ “Logic of access” is a recognised *terminus technicus* of interest group research, denoting the underlying patten of private parties’ access to state institutions (legislature, government, justice), which sometimes is investigated under the so-called “venue-shopping” or “forum-shopping”. See for example: Michalowitz, Irina, *EU Lobbying: Principals, Agents And Targets Strategic Interest Intermediation In Eu Policy-making, Public Affairs And Political Management series*, volume 4, Lit Verlag, 2006.

²² Aron 1997, p. 72. (translation ours)

²³ Woolsey, Theodore, *Political Science or The State*, New York: Scribner's, 1893, 1, p. 203. in: Garson, G. David, ‘*On the Origins of Interest-Group Theory: A Critique of a Process*’, *The American Political Science Review*, 68:4, 1974, pp. 1505-1519

arguments. First, the elected governors of the people are inherently good persons, insofar that one presumes the pre-emption of abuse of power is less important than the guarantee of the popular roots of power.

On the other hand, the representation function – the election of governors – is also a technical necessity, given that the population was already too large for a direct democracy, unlike in Switzerland’s small cantons.²⁴ In the interpretation of the popular sovereignty during the Revolution, the decision made by the elected representatives is the people's decision. If one wants to be loyal to the idea of the popular sovereignty, the accent in this reading is put on the origin of power. This is assured by the equality of the people: as long as everyone (of course not in today's terms) is eligible, the optimist foundation of the democracy considers this condition sufficient to avoid abuse of power. Not the barriers in front of the governors, but the origin of power lies at the heart of the Rousseau-type optimist democratic interpretation.

To complete the image of Aron’s good governors, consider their stance: they are the representatives of the sovereignty and of the public will. The general interest that they represent is superior to any individual interest, since, as Rousseau elsewhere defined, the general interest (or general will, *intérêt général*) is not the simple vector of individual wills, it may even be contrary to those. So the general interest must be firstly respected and the guardians of the general interests are the elected representatives.

What happens if the human nature is taken inherently bad? The picture changes completely to the adverse. Logical or not, if people are bad, they are called to be interfering with government affairs. We consider in the second place the ‘pessimist’ foundations of democratic regimes. By introducing the evolution of England, the analysis is founded on Hobbes. The well-known *bellum omnium contra omnes*²⁵ denotes a natural state where the human nature is everything but good. It is again esteemed that bad human nature underlies the sovereign theories.

Historically, the fight of the English nobles for more and more autonomy can be conceived as an act to counterbalance and delimitate the royal power. While slowly enlarging

²⁴ Aron points out two possibilities to link the popular sovereignty and the electoral competition. One is the technical necessity, the other is the development of the democratic regime through the evolution of earlier representative bodies, as in the case of England. However he accentuates strongly that the electoral competition is just one possible form of the put-in-practice of popular sovereignty. Aron 1997, p. 59-60.

²⁵ Hobbes, Thomas, *De Cive*, Praefatio, section 14. Original context: “Ostendo primo conditionem hominum extra societatem civilem (quam conditionem appellare liceat statum naturae) aliam non esse quam *bellum omnium contra omnes*; atque in eo bello jus esse omnibus in omnia.” (*I show in the first place that the state of men without civil society (which state may be called the state of nature) is nothing but a war of all against all; and that in that war, all have a right to all things.* Wikipedia Translation)

the independent subjects in the Kingdom, people must be conferred with rights of freedom in order to be able to resist and avoid the potential abuses of governors. The more rights the people have, the more the principle of popular sovereignty is valid, in other words, the more the people are sovereign. The sovereignty is then defined in opposition to the governor. Eventually the governor's position is also effected by the evolution of events and enlargement of freedom rights. The institution of governor was going to be fully circumscribed and loses the autonomy of decisions in the most vital questions. The possibility of demise of the ruler is the breakthrough point of popular sovereignty. As the ultimate step of the application of popular sovereignty, the electoral competition gains its importance here, when the people can elect their own governor. That is the other way to relate the electoral competition and democratic ideas, where the will to elect stems from the delimitation of rulers. Contrary to the French version, as equality is not in the focus, the rulers are not symbolising the popular sovereignty of power through election. Their decisions must be legitimised otherwise, by respecting the opposition. Without listening to the voices of minority, the ruler is simply unable to fulfil his role and seems to abuse his power.²⁶

The guarantee of the stability of the state – ruled probably by bad humans – is the constitution, delimiting the rights of the governor for the benefit of the people. In comparison to the ‘optimist’ regime, the accent is not on the origin of power but on its limitation. Thus the liberty of the people – the individual autonomy vis-à-vis each other – is the cornerstone of the democratic state, as free people are able to stop the abuses of the rulers. “Less the people are good, less should the power be left alone to governors”.²⁷ Through the imposition of individual autonomy, the interference in public affairs is not only allowed but also necessary to keep the balance of power.

2.3. Derivatives for interest representation studies

The opposition characterized by Aron is also mirrored in the later market-literature. To begin with, general will is not always understood as superior, suggested by Rousseau. His qualitative differentiation between public (general) and private interest stands in complete contradiction to Adam Smith's invisible hand, which consists of the sum of the individual

²⁶ It would be worthy of further consideration to compare the use of “people” and “nation” in the two contexts: the famous “We the people” beginning of the US Constitution and widespread presence of “la nation” in the French political texts.

²⁷ Aron 1997, p. 72.

wills. Enlarging by one step our understanding, Smith and Locke promotes markets free from state intervention because the self-interest is not bad in itself, while in the worldview of Hobbes or Bentham the self-interest is not driving to any good, as a consequence the patriarchal state has to step in and administer the interactions. To put it plainly, the hand must be visible.²⁸ Good and bad nature not only explains the sovereignty concepts but the market concepts as well.

This debate is replicated in several forms in political theory and philosophy, where individualist moralism is driving to the primary respect of individual rights, in spite of the political community.²⁹ Habermas put it into the categories of „liberal-democracy” and „civic republicanism”, where the first is supporting most the civil autonomy, while the second embraces in the first place the political or collective autonomy.

Once the people have not only good men as governors, but at the same time these governors are vested in absolute power and may decide about the manifestation of the public will as happened in France, it is not possible to imagine any interference from the bottom. Firstly, there is no reason to doubt the decision of the ruler, secondly, the elected ruler is the only one in a legitimate position to elaborate on decisions. In more severe interpretation, the interference of private individuals promoting particular interests would put the realisation of general interest in danger, so any interaction should be in principle excluded.

The French (or optimist) interpretation of sovereignty is consequentially creating a supreme role for the state in regard of the society, where intercourse with anyone who is deprived of the legitimacy of elections goes against the principle of sovereignty. In other words, the elected representatives are not mediators of interests or spearheads for certain special interests, they themselves are the representatives of interests in a simple one level game. Outside of the legal and legitimate arena, no interest should be channelled. In the English example, by contrast, such a limitation would directly drive to the abuse of power. The different importance of equality and autonomy (or liberty) determines the place of special interests in the social structure.

It is not surprising after all that we witness the oldest lobby culture of Europe around the Westminster. By contrast, at the *Assemblée Nationale* in France lobbyists are rare, instead a very different network of interconnected public servants and CEOs has developed. The two separate example of state evolution sums up well why the lobbyists have always been welcomed – never prohibited – in England and in the United States, and why the traditional

²⁸ Weintraub 1997.

²⁹ G. Fodor 2009.

French centralized state had been deaf for classical lobbying and till today is offering very limited possibilities.

This in turn explains why the Anglo-Saxon countries have an empirical advantage in dealing with lobbying: since their foundation the question is openly debated and the presence of lobbyist is mainly accepted, just their way of operation is disputed. The negative connotation of the word 'lobbyist' shows the strength of the other interpretation, where lobbyists are a threat to democratic institutions and to the majority rule. Minority is not synonym for a necessary counterbalance.

The relevance of such differences is however blurred probably by the most recent developments in statehood and sovereignty in the era of globalisation. The EU as a new supranational organisation has been reformed in many ways to stand better the globalisation process. The US is also not exempted from the pressure of globalizing forces. In such context, it rests only a philosophical hypothesis how much the history of thought can impress the processes of today.

The certain conclusion can be however drawn that Washington and the constituents of the federation have long been experiencing with lobbying and on occasion with its regulation. Conversely, the European Union is not only lacking experience because of its shorter history (almost about ten times shorter 1776 vs. 1992), but the original stance of several continental states and founding members was considerably different on lobbying. Under this angle, it is noteworthy that the United Kingdom joined just later the Community. Let us draw further conclusions after the discussion of the public-private separation.

2.4. The thin red line: border of public and private realms

In this chapter we attempt to map the birth and evolution of the border between public and private realms. In our eyes this is highly necessary to understand the logic of interest groups and their interaction with public bodies. Certain answers see the border completely artificial, product of ideological discourses. Others understand it by giving supremacy to the state. Whatever shall be the reply, it is of relevance to the regulation of lobbying, which in itself is the institutionalized interaction of private and public. That is our chief argument why this separation should stand in the focus of lobby-regulation studies. We are going to present how the separation grew out and where it is standing now.

The fundamental questions that are touched by the chapter are numerous: whether the regulation of interest representation should be considered as a victory of the public decision-makers in bridging the public and private realms under their own direction, so the public sphere can continuously oversee private affairs and get free information input? Or is the existence of a stringent regulation advantage for those who support the supremacy of the private sphere in opposition to the public realm, and the installation of an official regime of interest representation is just one step forward to appropriate the public bodies? Proceeding so is just to open the backdoor for more and more private interference?

2.4.1. United States and Anglo-Saxon traditions

It is widely accepted in the common-law tradition that the jurisprudence of the Middle Age did not understand the private-public distinction in our modern way. Today's private and public law were deeply intertwined and these bounds were loosened in the US jurisdiction from the early 19th century on. Since then serious ideological fights populate the backyard of the public-private debate.

The reappearance of the distinction was a result of more parallel processes, most importantly the emergence of the “market” and the intention to counterbalance the previously absolute ruler or in other words, to interpret and apply the popular sovereignty. This two catalysed each other and contributed on a large scale to the rise of classical liberalism. Locke and the ideas of natural rights stood in face of the absolute ruler who was seen as omnipotent in both – public and private – spheres. (It's another question whether the ruler indeed so influential was.) On the other hand, the concept of an efficient market rooted in a special symbiosis of private and public: it denied the existence of a substantial public realm, by defining it as a frame. It means that the public realm ideally is composed substantially of private terms (or will).³⁰ The public became not more than the simple vector of private interests, leading the invisible hand. In turn, the neutrality of the state – as it was theoretically deprived of any substance – was set as the norm. Hence arrives the “night watch” and “laissez-faire” policy.

Practically speaking, the emergence of the market means that the societies witness a rising new class, the bourgeoisie. In the dynamical balance of social power it came as a natural consequence that the nouveau-riche, after gaining considerable economical power,

³⁰ Horwitz, Morton J., "The History of the Public/Private Distinction", University of Pennsylvania Law Review, 130:6, Jun., 1982, pp. 1423-1428

they also reclaimed political power, first in order to secure their assets and secondly to assure their expansion. This social dynamic had its own ideologies and theories, which explained in the new terminology of the market for the contemporaries why their cause should be supported.

As a consequence of the ascendancy of the ideology of markets, the neutrality of private law was enforced through several new amendments, which targeted to separate the private and public legal fields. Just one typical example is the tort law, where earlier punitive damages were in use, the new wave banned it in the name of neutrality and of the pullout of public law from the spheres of private law. This was the unbundling of the 19th century. Now consider lobbying for a moment: is there a need to lobby the legislation if it has no competence and the state is denied of substance? On the other hand, the state itself becomes a playing field for societal interests, as earlier said, the vector of private wills. So how can we discern whether a regulatory state is lobbied or if lobbies are indeed providing the substance for the public decisions?

The critic of the separation gained stronger voice after the First World War.³¹ Legally they argued that everything is public, even the sacro-saint heart of private law, the contract was said to be a delegation of public power. Private law in their eyes was just as coercive as any other law, promoting a certain distributive order. Legal theory was divided, in the concrete cases it was even more difficult to coherently select the causes where state intervention could be justified. The special interests and their way to the federal and state levels are more and more known; their work and influence became a public issue. It is not by accident that the famous “Politics: Who Gets What, When and How” by Harold D. Lasswell was written in 1935.

However, the history will quickly repeat itself: by the end of the Progressive Era, the Great Depression brings the state back in, the border of public and private is considerably altered by the New Deal. Meanwhile, the critic of the truly active interest group life has a stronger voice, eventually claiming the intervention of public institutions. In the renewed interpretation of the public sphere, the state institutions are called to hinder the self-interested actors' proliferation in the public affairs. Once more the notion of public interest is filled with substance, the state is seen as an actor on its own right in order to keep back the otherwise malicious special interests. One may remark that the state is again not considered as a

³¹ Garson, 1974.

negotiator of interests, instead the trustee of the 'greater good'. Institutions are expected to transcend the egoist individuals, the offspring of market liberalism.

The Keynesian economic intervention as good as it was, the experience of the Second World War and the totalitarian ideologies managed to retransform again the definition of public interest. To put it bluntly, the simple promotion of any "general interest" was feared to be the first step toward dictatorship. The concept of market returns again into politics, letting no air to an autonomous public realm. The golden age of pluralism followed with such emblematic figures as Robert A. Dahl. The US Congress adopted the Federal Regulation of Lobbying Act in 1946. For the next fifty years, despite scandals, not much legislative work is performed in the field.

A definition of the state similar to the liberal-pluralist understanding was illustrated by Raymond Aron, who asserted as well that democracy in the developed industrial nations is simply the competition of organised groups.³² Moreover, as we noted above, he also stated that democracy was just a type of oligarchy,³³ where given – elected – group governs. This would match him with the elite pluralist approach.³⁴ The EU itself was also characterised as such times to times: shall it be named "inter elite-communication"³⁵ or "democratic elitism"³⁶ the meanings converge.

All in all, the Keynesians were largely dismissed to the benefit of liberalism and deregulation. One may curiously witness its partial return now as a reply to the last widespread financial crisis in 2009. In historical perspectives this dynamic is though small wonder.

The public-private distinction, however, was incorporated in the legal practice more and more. The normative political theories engaged in a dispute concerning its scope and not over its necessity. The conservative and liberal ideology draws two divergent borderlines, where the public realm ends and where the private begins. The major question to which they answer differently: what are the dimensions of the public realm? Traditionally, the conservatives wish to have less public realm in economics and more in the private life

³² Aron, Raymond, *Introduction a la philosophie politique – démocratie et révolution*, Inédit, Paris, 1997.

³³ Aron 1997, p. 56.

³⁴ E.g.: Schattschneider, Elmer Eric, *The Semisovereign People: A Realist's View of Democracy in America* (1960).

³⁵ Vasovic, Vucina, *'Polyarchical or Consociational Democracy?'*, in Vanhanen, Tatu (ed.), *Strategies of Democratisation*, Crane Russak, London, 1992, p. 91 from Chrysochoou, Dimitris N., *'Democracy and Symbiosis in the European Union: Towards a Confederal Consociation?'*, *West European Politics*, 17:4, 1994, pp. 1-14.

³⁶ Bachrach, Peter, *The Theory of Democratic Elitism: A Critique*, Univ. of London Press, London, 1967, in Chrysochoou, Dimitris N., *'Democracy and Symbiosis in the European Union: Towards a Confederal Consociation?'*, *West European Politics*, 17:4, 1994, pp. 1-14.

(marriage, family, sexual intercourse), while the liberals in the opposite, wish to reinforce the presence of the state in the economics and yield more freedom to individuals in the private life.³⁷ So conservatives are economic liberals. Of course, a whole bunch of normative theory supports each; the course of history privileged both in different decades.³⁸

For our investigation it is worth noting that lobbying can be considered under two different angles. Once when we adopt the idea of the pluralist neutral state, the abundant life of interest groups would be considered as a healthy sign, the state is a formal judge among them. Secondly we may accept the interventionist-protective state, supported by the anti-lobby critics. By contrary, this state would keep interest groups out of the reach. At the occasions of lobby regulation analysis, it is central to determine whether the public body became more or less accessible for certain groups after the regulation, whether the interests of the public body were incorporated in the piece of law or if the regime in its current form is just a vector of the different particular interests.

2.4.2. Public-private separation in Europe

Vestiges from the Ancient Greece and Rome have survived and still play an important role in our frame of thinking - assumed Habermas in his book on the transformation of *Öffentlichkeit*.³⁹ In the following analyse we rely greatly on the historical line drawn by Habermas as his research on the public sphere could not be paralleled till today.⁴⁰ His deep moral engagement for the successful renewal of democratic institutions is well reflected in his research, which remains as relevant today as fifty years ago.

In the Ancient Greece, the citizens of the *polis* drove a double life: taking part in the affairs of the *polis* and meanwhile mastering their household, the *oikos*. Without the latter there was no chance to take part in the common affairs. The Roman traditions survived in many ways, already at the linguistic level: “*res publica*” as “common-wealth”, as “the denomination of the Roman Empire” or simply as “non-private property”. Others remarked that the republican and imperial traditions of Rome are quite different.⁴¹ During the

³⁷ Here we must pay attention to the confusing terminology, economic liberalism promotes the market while political liberalism in the sense used here is understood as socially sensible, equality-supporting ideology, that would regulate more the markets.

³⁸ Mnookin, Robert H., ‘*The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*’, University of Pennsylvania Law Review, 130:6, Jun., 1982, pp. 1429-1440.

³⁹ Habermas, Jürgen, *Strukturwandel der Öffentlichkeit*, Hermann Luchterhand Verlag, 1961.

⁴⁰ Finlayson, James Gordon, *Habermas – a very short introduction*, Oxford University Press, 2005.

⁴¹ Weintraub 1997.

republican regime, “public” meant self-determination and self-governance, while in the latter period the “public” imperial administration was institutionally separated from the ruled populations in most cases. This thin demarcation line resurfaced in the Hobbes-Smith opposition mentioned above, when the nature of self-interest (or simply human nature) gives reason to idealize a neutral or interventionist state. Later, pluralists and the neocorporatists recreate the same separation, through other optic, but based on the same cleavage.

Similarly, the Greek “*politeia*” had diverse meanings. The German tribal legal expressions of “*gemeinlich*” and “*sonderlich*” as “common” and “particular” could also gain meaning in the feudal epoch and later, “this specific meaning of ‘private’ as ‘particular’ reverberates in today’s equation of *special* interests to *private* interests”.⁴²

The *dominium-imperium* contrast and *privatus-publicus* distinction lived throughout the Middle Ages, especially in the works of the legal scholars, but had less significance due to the feudal (manorial) system.⁴³ The lord of the land had some similar household-prerogatives as a *pater familias*, mainly the *iurisdictio* over the people under his command. Nevertheless, a noble in tenure who received the land as a fief, did not dispose the entire spectrum of property rights over the land. That formed later a huge barricade for capitalist development because credits would have been accorded on the basis of mortgage, so slowly - starting in the United Kingdom in the 17th century, but lasting till the 18-19th century in the Eastern parts of Europe, - the fiefdoms were cleared from their feudal obligations, becoming privately owned and thus being able to be mortgaged for credits. The liberation of serfs and peasants surged at the same period with these developments.

As in the US, the expansion of market principles was driving to the reinvention of public-private separation. Habermas nails down that there was no public-private separation in sociological ways during the High Middle Ages in Europe. The evolution of representation can best explain how the mainly inseparable public-private life from the 16th century on finally approached our terms and meanings we attribute to them today. Before the de-personification of the state, in the age of the incorporation of the authority by the ruler, it was impossible to separate the two spheres. A vivid comparative image of “The structural transformation of the public sphere” can illustrate the point through architecture: the king’s

⁴² Habermas, Jürgen, *The Structural Transformation of the Public Sphere*, Polity Press, p. 6.

⁴³ A very interesting example is the use of “private rule” and “public rule” in Hobbes’ early scientific work. Private rule means that the sovereign’s immediate will is satisfied with the governance and he talked about public rule when the benefit of the commonwealth was the objective of the ruler. Naturally they both can overlap. For further details see: Abosch, Yishaiya, ‘*The Conscientious Sovereign: Public and Private Rule in Thomas Hobbes’s Early Discourses*’, *American Journal of Political Science*, 50:3, Jul., 2006, pp. 621-633.

bedroom often served public purposes, where the ceremonies of the morning wake-up and the evening “*couchée*” were completely normal, moreover the ruler could receive visitors in his bedroom. By contrast, afterwards these “private” rooms were restricted in access and transformed into spaces of privacy; later the bourgeois architecture of the epoch in large proportion expanded the individual private rooms to the cost of the common spaces of earlier ages.

So how is the separation realised? The original use of *privatus* as an expression meant those who had no public office. The extension of the meaning of the word gained significance once the ruling elite – nobles and bourgeois – excluded the people from their acts of representation. In other words, when the higher classes slowly closed up and bordered themselves from the people, in turn the society distanced itself from the leadership. By the end of the process, concludes Habermas, the public-private separation gained a new meaning, where the two could be opposed.

The symbols of the earlier ages, whose traditions were rooted in the inseparateness, were privatised. The Church became one public corporation out of many, the religious freedom being one of the first private autonomy. The budget of the ducal territory and its household were separated. Till the 16th century, the English judges sought of tax as a private gift arranged by the parliament and not as a public obligation. It took its present form only after the acceptation of sovereignty theories in the 17th centuries.⁴⁴ Military, bureaucratic and justice functions were separated and privatised from the court. The household was overruled by the market, expanded under public authority, but practised on private grounds. The scope of the word “economy” stretched over the limits of the household for the first time and started to cover its present sense. Finally, the public guilds and other associations of interests of the Middle Age loosed their public stance and in consequence formed something in opposition to the reified-distanced state: the public-private separation was born.⁴⁵

Habermas uses later the terms system and lifeworld to describe the dualism of the similar idea of public and private, moreover, he introduces a tripartite division of the spheres. The public sphere is dressed as the intermediary between private sphere and the sphere of public authority. Later he visions an ideally neutral state where the rulers are only legitimate

⁴⁴ Horwitz 1982.

⁴⁵ The linguistic traces of the earlier expressions were kept sometimes: when talking about the “publikum” of an early journal or public act, we were speaking of the “world”, “le monde”, “Lesewelt” or “die Welt”. It is not by accident that these words still figure in the main titles of journals. The French language guarded the expression all long, “tout le monde” - “every of the world” stays today for “everyone”. Habermas pp. 25-26.

according to his democratic theory, when they listen to the wishes articulated through the public sphere.

The state as an organisation (and not as a person or group), hence independent structurally of the personality of its ruler, turned to be subject to the “rule of law” and constitutionality. It would have been unimaginable earlier, with a personalised-incorporated state of the Middle Age, where only God could have been superior. The erosion of such untouchable authority begun with the discussion of sovereignty and the courage to put a ruler in front of justice: whether the bad ruler can be brought down.

Since then, private people coming together form a public, this public may oppose the state however, being existentially distinct.⁴⁶ This is a huge step forward: the public (in this sense), which earlier consisted of the state and its servants, now is an entity criticising it, for example in the bourgeois salons. How much the public means the assembly of private? We already discussed it through the example of Rousseau’s general will and Smith’s invisible hand. As a principle we may lay down that though the separation persists over the last two hundred years, the realm what the two covers are changing invariably.

2.5. Modern ages – the effect of globalisation

Once born, the disjunction of private and public has gone through a similar history as in the US, leaving us with the situation of our era and the most actual questions: how does globalisation influence the public-private separation? What do the theories of the modern state stipulate? Is the concept of the separation covering reality or do we talk about an unreliable abstraction or an ancient relic?

A well-known account of the liberal ideology with the consequences of liberal society is narrated by Marx.⁴⁷ Instead of the recital of the pivotal place of property rights in history, here we are interested in his description of the tripartite self-state-other relationship because that is *in concreto* dealing with our subject. In his view, the alienation of the self from the other resides in the double life forced upon the individuals by the enlargement of privacy and at the same time, the impossibility to gain personal experience of communal feelings. "Man leads a double life... In the political community he regards himself as a communal being; but

⁴⁶ This definition by Habermas is though not giving a tangible result, the two notions remain inherently interconnected.

⁴⁷ Freeman, Alan and Mensch, Elizabeth, *The Public-Private Distinction in American Law and Life*, Buffalo Law Review, vol. 36.,1987, pp. 237-257.

in civil society he is active as a private individual, treats other men as means... and becomes the plaything of alien powers."⁴⁸ The process of public life, which could sustain the community, is atomized by the state's intermediation, in other words, the self perceives the others in reference to the state, since it is the state that defines the rights of each. Individual private right-holders are inherently alienated, hindered in communal experience and reassuring the state's central role by each interaction. The introduction of private rights thus atomised the society and the state could pose itself in the middle of the relations as a frame, interpreter or mediator. As private rights are being guarded by state intervention, the first depends on the latter for being respected.

One can also put the problematic in terms of trust: the more the community dissolves by individualisation according to market principles projected on the private sphere, the less trust we have in each other by having less opportunity to build up trust on communal experience. Subsequently, the lower the trust, the more one has to rely on a third party – the state – to empower relationships. The public sphere of earlier forms being dismantled, Habermas notes an essential outcome: humanity – in the sense of achieving fame and recognition – has changed sides. In the ancient Greece it would have never been imaginable that the humane act is performed in the private realm, it must always have been public and had to relate to the public, mainly decoded as fame – or recognition, in today's modern vocabulary.⁴⁹ After the bourgeois turn in the 18-19th century, humanity's understanding moved to the private realm under the guise of charity, individual self-realisation and the like.⁵⁰

Habermas also notes in his later political works how much the conditions for public sphere, that once in principle provided equal access to everyone (in condition of a certain degree of education and amount of property though), became impossible to maintain and how public opinion turned to be manipulated through mass-media. When certain actors of the economy reached higher and deeper degree of internationalisation than the political structures of nation states, the problems are further aggravated. As a result, the definition – the framing – of the public-private separation is less in the hand of political actors than economic ones.

⁴⁸ Marx, Karl, On the Jewish Question, in Writings of the Young Marx on Philosophy and Society, 1967, p. 226-228, 241. cited in Freeman and Mensch 1987, p. 241.

⁴⁹ See as well: Honneth, Axel, Struggle for Recognition: Moral Grammar of Social Conflicts.

⁵⁰ Habermas p. 28.

2.5.1. Legal theory

In Freeman and Mensch's interpretation, the border of public and private determines the range of state responsibility and accountability.⁵¹ Once a decision is recognised as a private one, the responsibility also falls on the decision-maker, on an individual, falling short of public help.⁵² To drive the argument further, they state that the result of the private public separation without an objective content ultimately ends up with mutually exclusive rights conferred to individuals, creating cases that cannot be judged in coherent manner. Both sides might find an adequate and logical line of reasoning for their cause, nevertheless the decision will stay on discretionary grounds, showing different patterns over time. Legal history seems to confirm the argument that subsequent judgements are indeed not manifesting a sophistication of the very same borderline between public and private, but vaguely redrawing it time to time.⁵³

From another perspective, legally speaking, the reply of the lawyer is short: "As an analytical construct, the public/private distinction was articulated as part of the ideological foundations of the bourgeois state."⁵⁴ Sure, by the 19th century, after the adoption of Roman law in most European countries, one witnessed the contrast of two absolute right: sovereignty and propriety. How such a situation could come to life is rather explained by the evolving power groups in the society than the science of law: "There is no 'public/private distinction.' What does exist is a series of ways of thinking about public and private that are constantly undergoing revision, reformulation, and refinement [...] The public/private distinction poses as an analytical tool . . . but it functions more as a form of political rhetoric used to justify particular results."⁵⁵ As the Roman law reception was not carried out in England, the legal developments took different shapes, and the same goes for the United States. If we accept Cutler's argumentation, the separation is not the best way to express the process under

⁵¹ Freeman and Mensch 1987.

⁵² The reply to the question in which extent we hold the others responsible for their situation is also predetermined by the public-private line, as in the private sphere everyone is to blame for her/his fault. In societies relying on divine order it may be decided by the supreme being or the faith and the like. Today the belief in the merit-based society, directly deriving from the individualised vision of the market, explains the misfortune of others by their lack of merit for more (no hard workers etc.). Socially pre-constructed reality and namely equal chances for each represents thus two truly divergent account of our social life, hardly compatible. Nevertheless, social theory also dealt in evolutionary terms with social hierarchy, see Social Dominance Theory in Sidanius, Jim and Pratto, Felicia, *Social Dominance: An Intergroup Theory of Social Hierarchy and Oppression*, Cambridge University Press, 2001.

⁵³ See reversed cases of the US Supreme Court or other jurisdictions.

⁵⁴ Cutler, A. Claire, 'Artifice, ideology and paradox: the public/private distinction in international law', *Review of International Political Economy*, 4: 2, 1997, pp. 261-285, p. 262.

⁵⁵ Klare, Karl, '*The public/private distinction in labour law*', *University of Pennsylvania Law Review* 130, 1982, pp. 1358-1422, p. 1362, in: Cutler 1997 pp. 265-266.

investigation, it would be rather characterized by insulation. The economy has insulated itself from political control.^{56, 57}

Karl Klare argues “[T]he peculiarity of legal discourse is that it tends to constrain the political imagination and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate. The modus operandi of law as legitimating ideology is to make the historically contingent appear necessary. The function of legal discourse in our culture is to deny us access to new modes of conceiving of democratic self-governance, of our capacity for and experience of freedom.”⁵⁸

Very critical in its tone, Karl’s and Cutler’s brief historical account of the distinction aims to raise their voice against the growing unaccountability of private actors executing public roles. Here their argumentation implicitly justifies however the distinction with another ideological turn: they reintroduce the disdained separation by identifying the boundary of public-private realms in the terms of democratic accountability. Public actors shall retain accountability. The question remains unsolved in legal theory, with strong claims against the necessity or at least the usefulness of the distinction.⁵⁹

2.5.2. From balance to excess

The centralisation of political power, which deprived the representation function from the nobility of the countryside in large part, paved the way for the extension of private 'rule', for the new forms of capitalism. The vacuum left behind by lower nobility was filled. Moreover, as the centralised state is depending on the taxation of the subjects – otherwise unable to maintain the necessary bureaucracy and standing military – the developing market-

⁵⁶ Not a unique event in history, the wars of investiture could be drafted in similar manner: the Church willing to cut itself from the laic power-centres. As kings were not depending on the Church existentially (though excusing a ruler was not uncommon) as the modern nation-state's apparatus was depending on taxation of the economy, the battle in the 13th could not be won against the sovereigns, later evolving into reformatory movements and secessions from Roman authority.

⁵⁷ Insomuch as *laissez-faire* was a purposeful political tool and ideology, international private law, by its nature, can not be natural and manifests a need for the legitimacy of international private commerce. Cutler also notes a crucial dissimilarity in relating international private law to other branches of law: as far as in the Continental tradition it is under the auspices of international law, bifurcating in international private and public law, in the common law countries it was originally more considered as a municipal law. One should remark the extraterritorial character of international private law, extending the jurisdiction of the sovereign state in given cases, which is seen as contradictory to sovereignty itself for Cutler and others.

⁵⁸ Klare, Karl (1982) ‘The public/private distinction in labour law’, *University of Pennsylvania Law Review* 130, 1358-1422 in Cutler 1997, p. 276.

⁵⁹ Deegan, Anne, ‘*The Public/Private Law Dichotomy And Its Relationship With The Policy/Operational Factors Distinction In Tort Law*’, *QUT Law and Justice Journal*, 2001, accessed on 01.15.10 at <http://www.austlii.edu.au/au/journals/QUTLJJ/2001/18.html>

economy with its flourishing commerce is also depending on the political unity and secure environment. This symbiosis is grasped in the precious moment of the foundation of a new legal branch. Justice Joseph Story used the expression “international private law” in Commentaries on the Conflicts of Law in 1834 for the first time, nevertheless presuming that the objective of international public and private law remains the same: the regulation of commerce and affairs for the benefit of the states, as in his eyes commerce was dependent on political unity and vice-versa.⁶⁰

The recent process of globalisation, in the eyes of certain, renders the distinction useless,⁶¹ as public actors through privatization and direct presence juxtapose with private actors with increasing roles on public life and policy. Globalisation is indexed in many ways, beyond question stands however that it influences the US and the EU both in key spheres, leading to the undermining of a distinction that was created two hundred years ago in the support of actors of a previous era.

The category is probably not the most appropriate thus to grasp the essence of lobbying and interest representation, as it is flawed by ideologies on the first hand and the globalisation seems to overwrite the hence classical state-society relations. However, as it is so deeply rooted in our traditions, dealing with the separation is inevitable for social scientists. So far, few studies have paid attention to this framework of interest representation. The supply side of interest representation – meaning the for-profit and non-profit private actors – and the demand side – public institutions – are inherently netted by the phenomenon of public-private separation.

Scholars of international political economy have been investigating for decades the relations of public and private actors, together with international relations scholars of the transnational school.⁶² Susan Strange talks about the evaporation of state authority, in part taken over by private actors and thus leading to the “casino capitalism”. The deregulation – the retreat of the state from the boundaries of the former public realm - consequently leads to the coming into existence of a gray zone where nor the state, neither the private actors are able to regulate or control. The borders between public and private activity are blurred. Finally, the deregulation is construed as a negative-sum game, where the loss of state

⁶⁰ Cutler 1997.

⁶¹ Kennedy, Duncan (1982) ‘*The stages in the decline of the public/private distinction*’, University of Pennsylvania Law Review 130, pp. 1349-1357.

⁶² Keohane, Robert O. and Nye, Joseph, Power and Interdependence: world politics in transition, Longman Publishing Group, 2001, (3^{ème} ed.)

authority is not necessarily followed by a take-over of the gap.⁶³ The same idea pops up in Manuel Castells trilogy on the information society, he describes the same phenomenon as black holes in the world.⁶⁴ Previously Karl Polanyi also spelled out the artificial nature of market-state separation, which underlies the public-private distinction.⁶⁵

Habermas, once he outlined the formation of the public sphere as a space for contestation and discussion, independent from the state, he later sketches the reasons of the decay as well. First, there is a backward trend: in the representative culture of feudalism only one side was active, the overwhelmed spectators by the representative acts were passive. The step made forward by the bourgeois Öffentlichkeit is exactly by bringing the other side in movement, hence it is a conversation and dialogue. He argues that in the late capitalism the passivity returned by the spread of mass media, where routinised processes are carried out but not rational discussion.⁶⁶ The openness (or inclusivity) of the public space vanished to be replaced by an arena of influence, where the participants strive for the control of the flow of information. In his terminology, the welfare state and corporate capitalism eventually have gained so wide interference into the individual's life, that the borders of the system and the lifeworld, or in the paper's term, the public and the private are not clear anymore.

2.6. Explaining the regulation of interest representation

As a conclusion, we may ascertain in general that our factors would have had massive explanatory value for long decades or even a century, however recently their explicative strength has been deflated by the process of globalisation and the convergence of governance functions in the *Abendslander*. Yet, a critical assessment of the narrative surrounding the separation is still yielding important results, demonstrating the reframing of the borderline in the interests of the actually powerful players of political discourses.

At the outset, the trajectory of the evolution of public-private separation was on the same societal grounds, namely the emergence of the market and the reclaim of independence of the new bourgeoisie. Later it developed in divergent legal and theoretical ways, mainly by

⁶³ Strange, Susan, 'The Westfailure system', Review of International Studies, vol. 25., 1999, pp. 345-354., and Brown, Chris, 'Susan Strange – a critical appreciation', Review of International Studies, vol. 25., 1999, pp. 531-535. See as well: Strange, Susan, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge Studies in International Relations), Cambridge University Press, 1996.

⁶⁴ Castells, Manuel, *The Information Age: Economy, Society, and Culture*, Vol. 1-3., Wiley-Blackwell, 1996-97-98.

⁶⁵ Polanyi, Karl, *The Great Transformation*, Beacon Press, 2nd Edition, 2001.

⁶⁶ Finlayson 2005.

the end of the 19th till the Second World War. After the war, several factors contributed to the convergence of the understanding in the dichotomy, albeit the borderline was never the same in any two given jurisdiction. Generally speaking, still, the common experience of totalitarianism, the increasing integration of the world economy and the growing interdependence of international actors forced the corroboration of common perception of the dichotomy. Translated practically, the neoliberal deregulation policy of finance and investment was widespread in the industrialized states, which in turn had serious collateral effects on the governance and the margins of manoeuvre of governments. We will not discuss the case of the WTO and other international organisations dealing with the (direct or indirect) regulation of commerce, but as Cutler also argued, this domain played a crucial role in the converging public-private discourses. Over time, the separation is growing less relevant to describe the real functioning of state-individuals relations. The advocates claim that it is a relic of earlier social conflicts and still used in the support of political ideologies.

All in all, the United States as one of the leaders – perhaps initiator⁶⁷ – of globalisation and of neoliberal economic policies together with the European Union, an institution that was in part reinforced as a reaction to globalisation, they are both facing similar challenges in a similar global context. In addition, this context is particularly influential in economic terms, where the market-actors incline for similar legal frames on many fields.⁶⁸ It seems that the public-private separation as a tool resurges in the hands of market-ideologists. On the other hand, the framing of social discourses by the actual power groups in the society is a natural phenomenon.⁶⁹

Therefore, we do not believe that the earlier divergent understanding of private and public realm – even if conserving a few customs, habits and frames – could be entirely accounted for the differences in the regulation of interest representation in the present era. Perhaps in the second half of the 20th century, when the neocorporatist and welfare states in Europe abounded while in the US the classical pluralist state was on its height, the public-private variable would have yielded an important difference enough.

The same seems to be applicable to Aron's simplified but very spectacular distinction of the English-based state evolution, open to bottom-up civil interference into government

⁶⁷ In Susan Strange's hypothesis the United States is the relative winner of the process of globalisation as in the negative-sum game of authority-dissipation, Washington is loosing the least, while other states are more severely touched.

⁶⁸ Of course there is no doubt that the environmental law or the labour law is not amongst the fields that the market actors would prefer to harmonise, however the common international interpretation of legal security of investments, property rights and free competition are crucial for them.

⁶⁹ Sidanius and Pratto 2001.

affairs, and the French centralist state, being much closer for outsider influence. The checks and balances interpretation of popular sovereignty, philosophically based on the bad human nature stands in opposition to the reading of the French way of popular sovereignty, where the presumably good human nature creates an almost impenetrable private-public border. Aron's reading of sovereignty and especially of popular sovereignty explains well the different traditions in the private-public relations of the early modern times. However, the recent developments of globalisation equally influence this phenomenon, resulting in a *grosso modo* similar situation in the two political regimes.

At the same time the normative content of the dichotomy shall not be ignored. The private-public dichotomy is definitely not an inevitable way of describing the natural course of human life. As a subjective question, one might always ponder how much ideological load the distinction bears, but apparently not the fact itself is in question, whether it contains political charge at all.

In sum, the convergence witnessed in the era of globalisation is overwriting certain predisposition and renders other obsolete. The public-private separation is still playing an important discursive and legal role, while its weight on lobby regulation needs to be further examined. Certainly, when it comes to path-dependent phenomena, the present regulations reflect in part the legal-ideological status quo. Our objective was to shed some very humble light on the implicit axioms concerning the public-private separation in order to discover its normative influence in the debates of interest representation studies.

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