THE FUTURE OF PUBLIC LAW*

1.0 Introduction

Law is a process, the human-willed system of cause and effect that governs the conduct, relationship and evolution of togetherness of those who choose to act together. It is an inevitable source code on which society runs, its output read and acted upon to yield one physical moment and then the next.[1] A constitutional state functions on the bases of laws that are determined through democratic process and respect for the basic and human rights of all people. This is a self-evident starting point for all public sector operations.[2] Therefore, public sector operations and management require juridical expertise, which in turn, form the basis of the way the discipline of public law is taught.[3]

In the modern world, the primary concern of public law is how the institutions of states operate to govern the people residing in a territory. States govern through institutions, so an important dimension of public law is to understand the origin and function of these institutions.[4] The topic of this lecture – the future of Public law – invites an analyses of the evolution and future

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[1] Law is the projection of an imagined future upon reality.' Robert M. Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601 at 1604.

[2] University of Vassa 'Public Law' < http://www.uva.fi/en/about/organisation/faculties/public_law/> accessed 29 May 2016.

[3] Ibid.

[4] Gabrielle Appleby ' The Idea of Public Law ' at 2 <http://lib.oup.com.au/he/Law/samples/appleby2e_auspubliclaw_sample.pdf> accessed 1 June 2016.

course of Public law. This evolution manifests principally as a process of assimilating some or all properties of another branch of law or losing its character to other branches or giving vent to other streams. This evolution of course impacts the study as well as the practice of law.

The evolution of public law presents a challenge to lawyers, because we have traditionally been concerned with the creation, protection and enforcement of private rights; nowadays the significance of private rights is diminishing in comparison with the predominance and significance of rights and interests, which arise under public law.[5] Afterall it is to public law we turn whenever private rights are tested beyond the narrow confines of private interests. We invoke anti-competition, consumerism and other forms of regulation to keep exploitative tendencies in check and criminal law to punish deviance that offends the public good. With discussions concerning public law now interspersed with the rule of law, constitutionalism and sovereignty, perceptions about the current status of public law in general are changing.

The first part of this lecture explores the philosophy and historical understanding of the nature of public law, and its relationship with private law and other branches of law. The second part focuses on the domains, values, and functions of public law in contemporary (state) legal practice, as seen, in part, through its relationship with private domains, values, and functions. It also analyses the ability of public law to influence

[5] Justice Brennan 'The Future of Public Law - The Australian Administrative Appeals Tribunal' (1977 - 1980) 4 *Otago L Rev* 287.

other disciplines and its evolution as a vibrant branch of law that is primarily concerned with regulatory functions. The third part engages with the new legal scholarship on global transformation, analyzing the changes in public law at the national level, including the new forms of interpretation of public and private law in the market state, as well as exploring the ubiquitous use of public law values and concepts beyond the state. We also question the implication of these intertwinning concepts for the academic who may be a public law expert and proffer recommendations in that regard.

1.1 Historical Background of Public Law

Public Law, in the sense first defined by the Romans, is the law of *res publica*, literally the public thing, that is, the public interest or common good, predicated on the differentiation between the state and the government.[6] It was created by the Romans to solve problems arising out of Rome's domination of the Mediterranean Basin. In order to avoid a return to the Oriental tradition of power personified in a single man, such as the Egytian Pharaoh, the Romans invented the notion of *res publica.* This refers to the goals, the affairs, institutions that are the thing of the peoples, a sort of property held in common; a *res publica* which belongs to everyone in general and to no one in particular.[7]

Cicero pioneered the definition of the public thing as the thing common to all, the thing of the people, a notion that

[6] Elisabeth Zoller 'Public Law as the Law of the *Res publica*' (2008) *Articles by Maurer Faculty* Paper 146 at 95. <http://www.repository.law.indiana.edu/facpub/146> accessed 02 June 2016.
[7] Ibid.

eventually evolved into the common good or the public good – *res publica, res populi.* Cicero wrote:

"The public thing is the thing of the people and by people I mean not just any gathering of people, but a large group of people forming a society and united by their adherence to a pact of justice and the sharing of common interests (juris consensus et utilitatis communion sociatus)".[8]

The content of the *res publica* was further articulated in the opening statement to the great compilation of Roman laws that form the Digest:

The law obtains its name from justice; for…law is the art of knowing what is good and just…(2)Of this subject, there are two divisions, public and private law. Public law is that which has reference to the administration of the Roman commonwealth; private law is that which concerns the interests of individuals; for there are some things which are useful to the public, and others which are of benefit to private persons. Public law has reference to sacred ceremonies and to the duties of priests and magistrates.[9]

Hence, the *res publica* involves the general public utility (*utilitatis communion)*, which brings people together in a society bound by common objectives (the public good, the general welfare) as well as by legal bonds (the constitution). The conceptualization of *res publica* as distinct from private interests is one of the greatest legacies of Roman civilization.[10] However, by the 16th century, *res publica* had become absorbed in the State, which developed within the matrix of sovereignty.[11]

[8] Alfred Fouillee (ed) *Cicero, De La Republique* (Delagrave 1868)12 in Zoller, n 6 at 95.
[9] Theodor Mommsen & Paul Kruger (eds),*The Digest of Justinian* (Alan Watson Trans.,Vol. 1, 1998) 1. See also Zoller n 6, p 96.
[10] Zoller, 97.
[11] Ibid, 7.

With reference to English Law which followed a similar pattern to that of Rome, by the 13th century, the King was under the ordinary laws of England and also under the law of God and nature, a fundamental law having no earthly tradition. Loughlin notes that the 'idea of a fundamental law separate from the ordinary laws constituted by states and governments was deeply embedded within the European legal tradition, which influenced English legal thought.' [12] As the modern state emerged from its pre-modern origins, public law emerged from the idea of fundamental law.[13] As people came to be seen not just as subjects of the king but as forming an association or commonwealth with plenary powers of self-government or sovereignty free from external religious authority, and as questions about transcendent truth came increasingly to be seen as matters of individual conscience rather than points of royal dictation, politics in the modern sense became possible.[14] An autonomous public sphere separate from the private and spiritual worlds emerged, dominated by the uniquely political challenge of reconciling the equal freedom of individuals to seek truth in their own way with their association within a peaceful state.[15] Public law is thus formed in the modern world,' writes Loughlin, 'as the code of this emerging autonomous political sphere'[16]. Flowing from this background, *res publica* has evolved from common

[12] Martin Loughlin *Foundations of Public Law* (Oxford: Oxford University Press, 2003).
[13] Mark D Walters ' Is Public Law Ordinary?' (2012) 75 (5) MLR 898 <http://law.queensu.ca/sites/webpublish.queensu.ca.lawwww/files/files/Faculty%20%26%20Research/Faculty%20Profile%20Documents/waltersIsPublicLawOrdinary.pdf> accessed 30 May 2016.
[14] Ibid.
[15] Ibid.
[16] Loughlin, n 12.

good and the legal regulation of same to discourses on the idea of public law and its intricacies in modern 21st century. For the purposes of this paper, a working definition of the term 'public law' is provided below.

1.1.2 What is Public Law?

Public law is one of the foundational subjects of study in all legal systems. Indeed, without a functioning system of public law, there would be no other forms of law within a state, since it is by means of the network of principles and rules which make up public law that authority is conferred upon institutions such as Parliament or the National Assembly and courts to make enforce and apply laws within that State.[17] It is not merely an 'area of law' or 'category of legal thought' but is also central to our very understanding of what law is – to our 'concept' or 'theory' of law.[18]

Lord Woolf, in an article written in 1986, defined public law as *'the system which enforces the proper performance by public bodies of the duties which they owe to the public.'* [19] Loughlin further notes this about the term 'public law:'

…But by public law I do not mean a categorical division within positive law, as is often intended when drawing a distinction between public law and private law. I mean something much

[17]Keith Syrett *The Foundations of Public Law: Principles and Problems of Power in the British Constitution* (London: Palgrave, 2ed, 2014)1.
[18]Peter Cane 'Public Law in the Concept of Law' (2013) 33 (4) *Oxford Journal of Legal Studies* 1.
[19] H Woolf, 'Public Law–Private Law: Why the Divide? A Personal View' [1986] 220 in Jason N E Varuhas *The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications'* Legal Studies Research Paper Series, Paper No. 61/2014, University of Cambridge Faculty of Law Legal Studies; UK) 7.

more basic: the 'law' by which public authority is established and maintained.' [20]

For Loughlin then, public law is the normative (in a rule-based sense) structure concerned with the creation and ongoing dynamics of public authority. It is about power, but power with a public face, granted legitimacy by a constitutional system.[21] Public law is concerned with those precepts of political right that establish and maintain public authority.[22] Thus, public law is, inevitably, the product of a complex interaction of social, political and legal forces.[23] Public law involves a study and interaction with constitutional law, administrative law, procedural law, tax law, criminal law and where necessary, commercial transactions as it affects the state and individuals or companies.

Public law must be distinguished from 'public interest law' which is the use of law by non-profit organizations, law firms and government agencies to provide legal representation to people groups or interests that are under-represented in the legal system.[24] Areas of public interest include constitutional issues, civil rights/liberties, domestic violence, government, children/youth advocacy, Immigration Law Reform, Labour Law, etc. While

[20] Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2004). See also Emilio Christodoulidis and Stephen Tierney 'Public Law and Politics: Rethinking the Debate' in Emilios A Christodoulidis and Stephen Tierney (eds) *Public Law and Politics - The Scope and Limits of Constitutionalism* (England: Ashgate Publishing Ltd, 2008)1.

[21] Ibid, 3.

[22] Ibid.

[23] ' The Modern Development of Public Law in Britain and the Special Impact of European Law' (1999)11 *Singapore Academy of Law Journal* 267, being a lecture delivered by Lord Irving of Lairg (Lord High Chancellor of Britain).

[24]It should be noted that public interest law and public service law are often used interchangeably. See ' Chapter 1: Introduction to Public Law' <http://www.**law**2.byu.edu/cso/careerpaths/guidebook/**Public**_Interest-Chap1.pdf> at 1, 3.

undoubtedly a subset of Public law, such areas are narrower than the province of public law.

Thus, public law is concerned with three matters which are fundamental to the operation of any modern state.[25] First, it entails study of the institutional structure of government and of the rules which underpin this structure. Secondly, and relatedly, it sets out the relationships which the various institutions of government have with each other and the limits beyond which they may not lawfully act. Thirdly, it is concerned with the relationship between the individual and the state.

1.1.3 Separating Public and Private Law

The breadth of public law is delimited by a distinction between the private and the public.[26] Vinogradoff emphasizes that the classical division of law into public and private law was originally introduced into jurisprudence for the purpose of study.[27] There is no one criterion which could be universally applied.[28] This 'newly fledged' 'new found' distinction between public and private law had become an entrenched feature of review jurisprudence by the mid-1980s.[29] Loughlin does not consider the relationship between public and private law in any depth, but he hints at two possible, perhaps complementary distinctions. First, that public law is about collective action whereas private law is about relationships between people, paradigmatically connected to

[25] Syrett, n 17, p 1.
[26] Appleby, n 4, 18.
[27] Vinogradoff, *Common Sense in Law* (1914) ch. V-VII in Ludwik Ehrlich 'Comparative Public LAw and the Fundamentals of Its Study' (Nov. 1921) 21 (7) *Columbia Law Review* 631.
[28] Ibid.
[29] Varuhas, n 19, 4.

property ownership.[30] Secondly, that public law is concerned with the creation and regulation of offices, whereas private law is concerned with the legal position of individuals.[31]

Private law on the other hand, traditionally encompasses the common law of contract, torts, and property that regulates relations among individuals. Thus the role of government in private law would be purely facilitative of horizontal dealings among private parties. Its role in contract law for instance, would ideally be limited to providing the means of enforcing whatever bargain or agreement the competent individual contractors had freely entered into.[32]

Some contend however that these distinctions appear problematic. Barber for example notes that the state, through the legal system, has created private law institutions to encourage individuals to act in certain ways.[33] He argues that it is not just public law that helps maintain the stability and power of government; private law also has a part to play. Public law officials make use of private law institutions to achieve public objectives. They include terms in procurement contracts requiring those they hire to behave in socially or environmentally responsible ways. The law regulating employment and constraining the power of landlords could be seen, in part, as attempts to create a society in which all have a stake in the

[30] Loughlin, n 20, 77, 158, para [22].
[31] Ibid,132, 157, para [18].
[32] Michel Rosenfeld, 'Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction' (2013) 11(1) International Journal of Constitutional Law 125 <http://icon.oxfordjournals.org/content/11/1/125.full.pdf> accessed 15/6/16
[33] N W Barber '*Professor Loughlin's* Idea of Public Law' (2005) 25 (1) *Oxford Journal of Legal Studies* 165.

maintenance of the state.[34] The objectives of public and private law overlap; no deep divisions can be detected between them.[35]

Barber further asserts that

It is not only the objectives of public and private law that overlap, so too do their methods….public law principles slip into other neighbouring areas of law. For example, the common law rationality requirements found in administrative law are very similar to the statutory requirements found in labour law. Both areas seek to define the reasons for which decisions can be made, both impose procedural requirements about how decisions should be reached.[36]

Tay and Kamenka also note that:

The significance of distinctions between public and private law is not well brought out by semantic analysis or by a classificatory approach. Both of these, in the case of law, tend to smack of circularity or to run into considerable conflict between the theoretical interest in consistency and the enormous impact of historical accident and peculiarity on the actual development of legal systems. Classificatory approaches are forced to recognise the existence of mixed forms and though they can do so without overt contradiction, such recognition does not help to illuminate the reasons for the mixture, the nature of the conflict or the character of legal trends. A far better approach is to think of private and public law in terms of conflicting paradigms or ideal types, representing internally coherent and externally conflicting legal trends or 'moments' within the law.[37]

1.1.4 Is Classification necessary?

The dividing line between public and private law became increasingly blurred at the beginning of the twentieth century with

[34] Ibid, 166.
[35] See generally, D. Oliver, *Common Values and the Public/Private Divide* (Butterworths: 1999) in Barber, n 35, 166.
[36] Barber, n 35, 166.
[37] Tay and Kamenka, 'Public Law – Private Law', 83 in Christian Turner ' Origins of the Public/Private Theory of Legal Systems' 15 -16.

the expansion of public concerns encroaching into private law (such as torts, contract and company law). These examples of private law are overlaid with laws that have public aims, such as anti-discrimination laws, laws of fair trading, laws for the disclosure of information and paradoxically, laws protecting privacy.[38] Also, as noted above, governments regularly operate in the private sphere, engaging in commercial activities and entering into contracts with private individuals.[39]

Therefore, it is important that scholars, judges and practitioners look past the veneer of unity, fostered by a common procedure for public law claims, to the substance of contemporary public law. This, like contemporary private law, is a diverse field of law composed of meaningfully distinct bodies of doctrine which each perform distinctively valuable functions, out of which regulating public power in the public interest is just one. Some scholars go as far as suggesting that we eschew reliance on any putative 'general' divide between public law and private law.[40] For example, they contend that the idea that there is some sort of 'general functional separation between private law and public law'[41] is not only opaque, in that the nature of this divide is seldom articulated, but also fundamentally flawed. Different bodies of public law perform fundamentally distinct functions from other bodies of public law doctrine (some of which mirror the functions of bodies of law classified doctrinally as private law), just as the law of contract performs fundamentally distinct functions

[38] Appleby, n 4, p 17.
[39] Ibid.
[40] Varuhas, n 19, 2.
[41] D Nolan, "Negligence and Human Rights Law: the Case for Separate Development" (2013) 76 MLR 286, 295

from the law of torts or the law of equity or the law of maritime insurance.[42]

In my respectful view however the distinction is of conceptual and practical importance in many spheres of activity that are moderated by the law. While one may not hang classification on whether the actor is a private individual or state actor, the very nature of the activity engaged in may attract different rules. For example the concept of the rule of law is understood as exerting a moderating influence on powers and duties of public authorities[43].

The 2004 definition of the rule of law offered by the United Nations (UN) also notes that –

[The rule of law is a] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[44]

Waldron notes that in public law, we must face up to the implications for private individuals and businesses, and acknowledge that much of the regulatory activity of the administrative state is going to affect the context and exercise of private rights like contract and property. He argues that public law

[42] Varuhas n. 19 at 2.

[43] Jeremy Waldron 'Public Rule of Law' (2014) *New York University Public Law and Legal Theory Working Papers,* Paper 482 at 2 <http://;sr.nellco.org/nyu_plltwp/482> accessed 19 May 2016.

[44] *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies – Report of the Secretary General* UN Doc S/2004/616 (23 August 2004) 5 [11].

is not necessarily supposed to 'back down' when it faces this prospect[45] but submit to the moderation of the rule of law.

Another perspective is the different weight accorded the consent of private individuals or consensus under private and public law. In the former consent, is fundamental save where public policy or public law forbids. This in turn gave rise to estoppel and the concept of holding out. On the other hand consent of individuals and related doctrines are relatively insignificant under public law when measured against the larger interests of the public.

2.0 GLOBALISATION AND (THE) "PRIVATIZATION" (OF PUBLIC LAW)

Emanating from constant and growing interactions among various sovereign states, the sharp divide between public and private law domains appears to have been covered over with some conflicting, and sometimes, overlapping application of laws regulating the conduct of various states. Traditional public law perspectives have been ordinarily rooted in the notion that sovereign states are the sole sources of law and authority within their jurisdiction and thus the only legitimate norm-setting institutions. However as the concept of the supremacy of the rule of law gradually took root and with the rise of constitutional Republics, the notion of the sovereign (or more appropriately the state) not being subject to law became otiose.

The State now became a custodian of the public trust to be censured by constitutionally empowered institutions whenever it deviated from the social compact. A similar evolution was to be

[45] Ibid.

observed at the the international legal order. Although 'the sovereign' or "the state" within a particular national order is conceptualised as an embodiment of the public will, when elevated to the international plane the state is in many spheres understood to be 'private' actors.[46] This mutation of traditional public law constructs did not change the character of public law as a branch of the law concerned with the relationship between public institutions and individuals.

Sovereign immunity prevents the government or its political subdivisions, departments, and agencies from being sued without its consent. The doctrine stems from the ancient English principle that the monarch can do no wrong.[47] The case of *Trendtex Trading Corp. v. Central Bank of Nigeria (CBN)*[48] highlights the subtlety of the transition from public law to private law albeit one which could lead to loss of state immunity in the international scene with respect to commercial contracts.

Globalisation and Privatisation are terms which highlight the notion of an apparent erosion of public law in its traditional classification and scope. This notion is typically associated with the awareness that different localities and people are intimately connected through, for example, trade relations, environmental concerns, and the consequences of wars and conflicts. The implication of this phenomenon, which has expanded significantly since the 1990s with the rise of globalisation, is twofold: on the one

[46] Yishai Blank and Issi Rosen-Zvi, 'The Persistence of the Public/Private Divide in Environmental Regulation' (2014) 15(1) Theoretical Inquiries in Law 199, 203 <www7.tau.ac.il/ojs/index.php/til/article/download/533/497> accessed 1 June 2016

[47] http://legal-dictionary.thefreedictionary.com/Sovereign+Immunity

[48] [1977] 1 QB 529, [1976] 3 All ER 437, [1976] 1 WLR 868

hand, it implies that domestic administrations operate beyond national borders; on the other, it means that norms produced by international regimes apply to national public bodies to an increasing extent.[49]

The effect of globalisation becomes more evident as one proceeds from the traditional nation-state to a transnational legal order such as that carved out by the regional bodies like European Union (EU) or African Union (AU) and further to a global one such as that issuing from the United Nations (UN).[50] Tensions and contestations inevitably occur between the transnational and domestic legal orders.

In other respects too the notion of sovereignty and State Utilities and corporations has been greatly eroded by increased privatisation, a growing universal pattern that is driven also by the increased competitiveness of a globalised world. In the global scramble for investment and economic activity states have to become lean and mean and jettison tasks that have traditionally been considered the core business of the state.[51]

Privatisation in broad terms refers to the shifting of a function either in whole or in part from the public sector to the private sector.[52] Thus, the role of government has been subject to the

[49] Lorenzo Casini, 'Down the Rabbit-hole: The Projection of the Public/Private Distinction beyond the State' (2014) 12 International Journal for Constitutional Law 402, 404 <www.irpa.eu/wp-content/uploads/2011/10/Int-J-Constitutional-Law-2014-Casini-402-28.pdf> accessed 30/5/16

[50] Michel Rosenfeld, (n 32)

[51] H S Taekema, 'Rethinking the Rule of Law in an Era of Globalisation, Privatisation, and Multiculturalisation' (2010) www.esl.eur.nl/fileadmin/ASSETS/frg/onderwijs/pdfkarin/Research_programmeRethinkingtheruleoflawfinalEditMay2010.pdf accessed 30/5/16

[52] Manuel Tirard, 'Privatization and Public Law Values: A View from France' (2008) 15(1-12) Indiana Journal of Global Legal Studies 285 <www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1374&context=ijgls> accessed 17 May 2016

many crosswinds of change mostly in the direction of less dependence on government and more reliance on the private sector.[53] So today we seldom engage in sterile almost historical discourse of the laws on State monopolies concessions or chartered corporations while the branching out of the laws of trust, commercial law and business associations into vibrant streams of private law (competition; Corporate governance; infrastructure finance etc,) has all but gone virile. With privatisation and the gradual disappearance of state Monopolies the public robes that hitherto shielded the activities of these concerns from the strictures of private law had to be shelved as they transformed into new entities in a fiercely competitive environment.

Remarkably, the regenerative ability of the law in this area has not been accompanied by a shrinking or diminution in the properties of public law. First with privatisation came the issue of how the protection of the public interest, inherent in the paternalistic role of the state, can be guaranteed in a regime of private service providers. When public tasks are privatised, society will need to be protected against the arbitrary exercise of private power.[54] There developed therefore in parallel to the transition to privatised services, administrative bodies that exercised regulatory powers over the private concerns. The fact that utilities are owned and operated by private concerns, apparently did not rob these services of their essential character as having a public interest element. Indeed whereas some installations are now completely

[53] ibid
[54] H S Taekema (n 51)

unworthy of being characterised as "public property" unlawful damage or destruction to such is accommodated under criminal law – a most dynamic sphere of public law – by recourse to the concepts of "economic sabotage" and "critical national infrastructure.

Also, it is not as if in some cases that transition has been instantaneous or unconditional. In the case of Nigeria for example while the provision of electricity and telecommunications are now undertaken by private bodies within a regulatory framework and subject to both private and public law regimes, the issue of road and Rail transportation seem to be in a perpetual state of policy evolvement and somersaults to the extent that in the singular instances, when state actors are proceeded against, they are shielded by opaque and antiquated rules on secrecy and liability[55].

3.0 THE REALITY OF PUBLIC LAW IN THE 21ST CENTURY

The above discourse reveals that past and current discussions of public law as a discipline and as a function of state cannot be complete without asserting the incursion of private law elements into the branch of public law. Environmental law nowadays has a composite nature due to its usage of a variety of regulatory instruments with different legal status. The relationship between this branch of law and the more traditional disciplines vary. In some respects, environmental law is like an assortment of

[55] Despite the inroads made by Access to Information Laws, official secrecy still exerts a baneful influence on the public's ability to contest wrongful action. In addition restrictive rules of procedure on the institution of suits and execution of judgments can frustrate civil suits at the instance of a private individual.

regulations stemming from other branches of law. In fact, environmental legislation constantly draw inspiration from private law, public law, criminal law and even tax law.[56] This inevitable obfuscation makes it rather unclear whether a particular environmental directive forms part of public or private law.

Some scholars opine that the ceding of national authority to global and international norms and institutions is proof of the public/private divide having been overcome in environmental regulations. Sovereign states can no longer, given the growing interdependency between states, act within their territory as if it were a 'private' sphere, immune from external intervention and regulation. Thus, states' permeability and submission to global and international norms and institutions manifests the breakdown of the sharp dichotomy.[57]

In view of this, the question that arises is: can public law be maintained as a pure discipline of study with defined boundaries in the 21st century and beyond? The answer to this is no. Public law as a field of jurisprudence is resilient and dynamic. Despite incursions by private law into several branches, public law has quite remarkably remained unbowed. For example If we were to go strictly by the principles of criminal law (public law) to tackle the menace of such complex crimes like terrorism, money laundering and other economic crimes without the influence of the trust and accountability concepts our criminal laws would be several years outdated. These undeniably inform statutory

[56] Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* (2014) Oxford University Press 208

[57] Yishai Blank and Issi Rosen-Zvi, 'The Persistence of the Public/Private Divide…' (n 46)

qualification to the right of silence and the exposure of proceeds of crime to civil forfeiture proceedings.

Indeed public law principles have exerted significant impact on several branches of private law. For example, the concept of consumer protection in the modern state is no longer simply informed by the narrower concepts of "fitness" and "merchantability" but has acquired vibrancy through a public interest driven concept of product liability. It must also be underscored that this is part of a wider process of regeneration and evolution of law.

Buoyed by overriding concerns of public interest and security, we note how public law concepts have made inroads into areas of commerial law, intellectual property law and lately Information technology law. if we take the latter for example a comparison of the Cybercrimes Prohibition, Prevention Act 2015 with the Council of Europe' Cybercrimes Convention 2004 (Budapest Convention) reveal the different priority accorded privacy, free enterprise, innovation and public protection in the two instruments. While the Nigerian Act is considered more disruptive and intrusive by its insensivity to the distinction between real time and stored data, the European instrument only obliges operators to share stored data. More recently in 2014, the the European Court of Justice typified this overarching right to privacy stance when it reaffirmed a "right to be forgotten" and that operators of search engines

had a responsibility to remove when requested links releated to the requester from public view.[58]

4.0 BEYOND PUBLIC LAW?

Having regard to the traditional concept of public law and subsequent incursions on the basis of globalisation and privatisation, this section of the essay will attempt to pursue a discourse into the future prospects and application of public law. It is fairly evident from the preceding subheads of this paper that public law, in its seemingly narrow sense has been layered over with incursions (from private law) into the traditional domain of public law[59].

Economic and Political integration of Europe has in our opinion exerted the most telling impact on classifications of law as we know them. European integration resulting into the EU was an antidote to the extreme nationalism that had devastated the continent after the Second World War. Thus, one of the most significant achievements of the Union is the creation of a Single Market. Its fundamental freedoms entitle businesses and citizens to move and interact freely in a borderless Union.[60]

Part 3 of the Treaty on the Functioning of the European union 2007 deals with Community policies and actions. The diverse range of areas covered include internal market, the free

[58] Google Spain SL, Google Inc v *Agencia Espanola de Protecion de Datos* and Mario Costeja Gozales C-131/12 of 2014

[59] Cormac Mac Amhlaigh, 'Defending the Domain of Public Law (Against Three Critiques of the Public/Private Divide)' in Cormac Mac Amhlaigh, Claudio Michelon and Neil Walker (eds) *After Public Law* (Oxford University Press 2013)

[60] The European Commission, 'Justice: Building an European Area of Justice' <http://ec.europa.eu/justice/contract/index_en.htm> accessed 15 June 2016

movement of goods, free movement of people, services and capital; the area of freedom, justice and security, including police and justice co-operation; transport policy; competition, taxation and harmonisation of regulations; economic and monetary policy, employment policy; the European Social Fund; education, vocational training, youth and sport policies; cultural policy; public health; consumer protection; Trans-European Networks; industrial policy; economic, social and territorial cohesion (reducing disparities in development); research and development and space policy; environmental policy; energy policy; tourism; civil protection; and administrative co-operation.

A veritable legislative list, it is quite comprehensive in scope and leaves no one in doubt about the pervasiveness of the European project. The list forms the basis of European Union Law - a complex body of Regulations and Directives emanating from the main organs of the European Union i.e. the Council and Parliament and which are supplemented by decisions of the European court. Where the laws of member states provide for lesser rights European Union law can be enforced by the courts of member states. In case of European Union law, which should have been transposed into the laws of member states, such as Directives, the European Commission can take proceedings against the member state.

Community law exerts a vertical influence on national law. It identifies a subject matter and pronounces what is good for the Community leaving in its wake a trail of dismantled concepts and anachronisms. Consider the hallowed concepts of *laissez faire*

and *caveat emptor* and the feeble attempts of the English common law with strong strains of *the lex mecatoria* to prevent unconscionable bargains.

With the EU Directive on Unfair Commercial Practises[61] however national principles were harmonised for the "proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests". Similarly the Consumer Rights Directive[62] is another instrument by which the divide between public law and private law are blurred in the unique EU style. Its scope and purpose is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts concluded between consumers and traders.[63]

How should we view EU law or similar instruments flowing from such confederation of States like Economic Community of West African States (ECOWAS) or like regional bodies? The classification of the nature of EU Law has been problematic chiefly because of the way it criss-crosses several branches of the law….a tapestry of rules belonging to no one branch but *sui generis*. Some scholars consider the EU less than a state, but more than an international

[61] **DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 OJEL 149/22**

[62] DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on consumer rights OJ L 304/64

[63] Art 1

organisation.[64] Marek Hlavac argues that although the EU wields extensive influence in some policy areas (such as competition policy or international trade regulation); its institutional powers are quite limited in many areas that remain firmly within the grasp of its Member States governments (such as security, justice, tax or redistribution policies). Furthermore, The European Union's supranational elements – especially the EU laws supremacy over the laws of individual Member States – distinguish it from international organisations, such as the United Nations (UN) or the World Trade Organisation (WTO). He concludes his argument by stating that the European Union is really a sui generis project that has not been attempted anywhere else.[65]

Some others who argue that the constitutive framework of the EU is more firmly situated within the ambit of international law, concede to the *sui generis* character of the Union legal order. However in their view, these features do not necessarily represent a departure from established international law principles.[66]

We submit however that the label "international law" inadequately characterises Community law. In any case this is not the way it is represented in Faculties and in the literature where we have seen a body of Community law grow side by side with municipal law.

5.0 CONCLUSION

[64] Marek Hlavac, 'Less Than a State, More Than an International Organisation: The Sui Generis Nature of the European Union' (2010) <http://dx.doi.org/10.2139/ssrn.1719308> accessed 30/5/16
[65] ibid
[66] Timothy Moorhead, 'EU Law as International Law' (2012) European Journal of Legal Studies 5(1) 126,129

The implications of all these for an academic who schooled in the discipline of the law but specialising in public law is the need, in the course of research or teaching, to be acutely conscious of the influence which other branches of law have or could have on the subject. Such a scholar must dispense with the notion that public law is a 'stand-alone' discipline and cannot function in isolation.

There is no single perspective or one size fits all approach to the study of public law. The perspectives on the subject are varied, in order to facilitate understanding of individuals and the State and the governance of both. This review compels the conclusion that the existing system of public law will continue to evolve as society develops. It remains the ultimate task of academics to not only capture the essence of this evolution but also ensure that the diverse interrelated properties of the legal system are entrenched in the minds of scholars, students and lawyers in Nigeria