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Private as an economic concept: Natural law and economic agency

Pernille Ulla Knudsen

Private property is the basic precondition for the free movement of goods and services, and as such, it is considered to be the foundation of the modern economic system. Accordingly, property rights enjoy special protections at law. The legal definition of private property can be traced back to the rise of modern natural law in the seventeenth century, when, for the first time, private property was defined as a right that attached to the person. Private property can thus be considered as the starting point for the notion of fundamental legal rights, a notion that much later would be codified in the free constitutions and the international declarations of human rights.

Despite this obvious connection between the private economy, private property and legal rights, the *private economy* has received little attention from researchers interested in exploring the dichotomy between the private and the public in the early modern period.¹ It should be noted, however, that private economic development in the eighteenth century was considered to be the basic foundation for the emergence of Jürgen Habermas' both famous and controversial 'political public sphere'. According to Habermas, 'In the meantime, the public very much assumed its specific form; it was the bourgeois reading public in the world of letters even as it assumed political functions; education was one criterion for admission – property ownership the other.'² As Habermas continued to explain,

On the contrary, only property owners were in a position to form a public that could legislatively protect the foundations of the existing property order; only they had private interests – each his own? – which automatically converged into the common interest in the preservation of a civil society as a private sphere. Only from them, therefore, was an effective representation of the general interest to be expected, since it was not necessary for them in any way to leave their private existence behind to exercise their public role.³

I owe thanks to Prof Helle Vogt, who helped me with the word mining of 'private' in the Copenhagen newspapers, and who helped in writing the report upon which many of the observations in this article are based; she has also provided many stimulating discussions, and helped ruthlessly cut the text down. I also owe a big thank you to Dr Matthew McHaffie for his excellent help with proofreading and copyediting.

Habermas here articulated the emergence of a civil society that changed the traditional understanding of the private and public, and transformed it into what we may term the private *in* the public.⁴

The private economy and private law form the subjects of this present article. Its starting point is a major terminological study of the occurrence of the word 'private' in the Copenhagen newspapers during the period 1673–1800.⁵ The study showed that two-thirds of the occurrences of the word 'private' were linked to economic concepts. It is hardly surprising that newspapers, which at the time served as an important medium for commerce and trade, situated the concept of 'the private' within an economic framework. However, a study of 'the private' in relation to the private economy and, consequently, to private property allows us to see perspectives of the private that would normally be hidden by an excessively rigid theoretical division of the private and public in early modern history.

Private property is a personal right connected to human beings in their capacity as economic agents. By attaching the private to *people* instead of to *places*, we get an opportunity to recognize the private as an element of social interaction. An agent-centred perspective⁶ usefully shifts our focus away from a place-bound framework for understanding the private and the public. A place-bound framework rests on the sharp demarcation traditionally thought to separate the private household from an indefinable public space, where the doorstep of the private home serves as the threshold at which everything else (i.e. the public) is kept out. However, with an agent-centred approach, we see that women and men moved in, out and across those thresholds in complex social and economic patterns that could only unfold because the same agents engaged in social and private economic interactions. During the eighteenth century, the private market economy was expanding all over Europe, including in Copenhagen.⁷ A focus on agency takes us away from a spatially determined definition of private and public by which historians end up paralyzing the people of the past.⁸ Some agents had goods for sale while others were buyers: but both were necessary for private enterprise. The private market was conceptually linked to private property, which itself was an individual legal right that existed independently of the state and which was perceived as inviolable.

Within the Copenhagen newspapers, citizens emerge as private economic agents operating in the framework of a Habermasian 'civil society'. The newspapers allow us to focus on a conceptual understanding of classic economic ideas about private property and the private economy. The interpretation of the relationship between private economy, private property rights and legal rights requires an understanding of how modern secular natural jurisprudence during the seventeenth century came to set entirely new legal standards that remain the basic principles that inform present-day public and private law. A new legal framework was formed for this natural jurisprudence that was based on the systematic reinterpretation of the concepts of duty and right, drawn from the general law of obligations. Habermas also recognized the importance of the law of obligations in driving economic development, but he discussed it only briefly:

The concept of the legal transaction as involving a contract based on a free declaration of will was modelled in the exchange transaction of freely competing owners of commodities. At the same time, a system of private law that in principle

reduced the relationships of private people with one another to private contracts operated with the assumption that the exchange relationships that came about in accordance with the laws of the free market had model character. Of course, parties to a contract were not in every case also exchange partners, but the relationship of the latter, which was central to civil society, supplied the model for all contractual relationships.⁹

A recent study by the economist Arild Sæther has examined how natural law influenced the origins of politico-economic thought in the seventeenth and eighteenth centuries. Sæther's study is based on the German-born natural law jurist Samuel Pufendorf (1632–1694), who played a key role in the development of a new natural law theory in the late seventeenth century. In 1672, he published his legal masterpiece, *De jure naturae et gentium liber octo* (*On the Law of Nature and Nations in Eight Books*). However, it was the shorter, summary compendium of *De officio hominis et civis juxta legem naturalem libri duo* (*On the Duty of Man and Citizen According to Natural Law in Two Books*), published in 1673, that made him the most influential *legal* (as opposed to political) philosopher for more than a century. This work was translated into English, French, Swedish, German and Danish, among others, and reached a wide readership across Europe.¹⁰ Sæther's reinterpretation of one of the most significant theoretical lawyers in legal history provides an opportunity to take Pufendorf's natural law theory as a starting point to explain how his natural law doctrine of duty came to form the legal basis for the private market economy, as described in the above quotation from Habermas.

My interpretation will be based on Pufendorf's compendium, which will provide a legal framework into which the results of the terminological study of 'private' as found in the newspapers and the private economic market can be placed. The theory of natural law, as illustrated through private property law, will broaden our general understanding of law's influence on the development of the notion of 'the private' in the eighteenth century.

Searching for *private* in the Copenhagen newspapers 1673–1800

In recent years, the digitization of historical newspapers has been carried out across Europe, under the auspices of national libraries, and allows researchers to conduct systematic searches in an otherwise large and inaccessible body of material. In Denmark, the digitization of the *National Newspaper Collection* was completed in 2017.¹¹ As part of an interdisciplinary terminological project, we have therefore been able to use the Copenhagen newspapers from the period 1673 to 1800 to carry out a systematic registration of the word 'private', as it occurred both textually and contextually.

In 1634, the first weekly newspaper was founded in Copenhagen by royal privilege. It was not until 1749, however, when the publisher E.H. Berling reformed the newspaper market with his publication *Kjøbenhavnske Danske Posttidender* (1749–1762) that newspapers became common. With a mixture of local advertising, international

newsletters¹² and monthly official information, Berling's newspaper became the model for other political newspapers in the eighteenth century. Even so, there was no political newspaper in the modern sense of the term because the newspapers were subject to censorship during most of this period.¹³

Local news acquired an entirely new dimension in Copenhagen from 1759, when the publisher Hans Holck introduced his advertisement-based newspaper, *Adresseavisen* (1759–1854).¹⁴ The main content of *Adresseavisen* was advertisements, classifieds, commercials, lost and found property, local news and all kinds of other useful public information. Holck opened the newspaper medium to a wider audience, and because of this, *Adresseavisen* opens a privileged window on to the agents' perspective within their social context.

According to modern estimates, in 1766, just under 10 per cent of households in Copenhagen had access to newspapers at home. In addition to household circulation, individuals could also access newspapers at public coffeehouses, clubs and bars. Compared to the 1720s, it has been estimated that newspaper circulation in Copenhagen had tripled in volume by the 1760s.¹⁵ In the early nineteenth century, the Copenhagen newspapers had between 7,000 and 9,000 daily subscribers, yet a significant portion of the city's households still did not have access to them. People with low or unstable incomes could not afford to buy a newspaper,¹⁶ although they did still have access to advertisements and the job market at *Adresseavisen's* office. During the second half of the eighteenth century, newspapers became the most widely distributed media in Copenhagen. When adopting a terminological approach to the concept of private in the eighteenth century, the newspapers therefore unquestionably had the widest impact, the most readers and the broadest reach of any media across all social strata in Denmark at the time.¹⁷

Looking at the occurrences of the word 'private' in the newspapers allows for some main conclusions, of which the three main conclusions will be summarized briefly as follows:

1. *Private was not a frequently used word.* The registration of occurrences of the word 'private' in newspapers over the years 1673–1800 shows that it only appeared 4,069 times out of roughly 167,000 digitized newspaper pages that have been digitized in the database, *Mediestream.dk*. The overall conclusion must be that the word 'private' was seldom used in the newspapers during this period – although a small increase in usage can be observed for the second half of the eighteenth century. On the other hand, it should also be emphasized that the newspapers probably also constitute the only type of Danish material where the word 'private' occurred in such large numbers at all during this period.
2. *Private was not a homogeneous concept.* 'Private', when used as an adjective, appeared alongside a surprisingly heterogeneous range of words that had both material and conceptual meanings. A total of 381 different words were used in connection with private – 180 of which occurred only once in the material. In addition, it is noticeable that usage of the word 'private' was much more varied in the past, compared to nowadays. The dichotomy between the private and public, which is otherwise traditionally associated with the concept of the private in historical theory, cannot be applied to the 4,069 occurrences of the word 'private' in the newspapers.¹⁸

Figure 2.1 The overall result. The 4069 instances of the word *private* are systematized according to content in thirteen different categories. Of these, six categories comprise themes that can be considered as economic in the broad sense, which corresponds to 65.2 % of the total number of occurrences recorded (here all marked in the same dark blue colour). Knudsen 2020.

3. *Private was primarily an economic notion.* When ‘private’ appeared in the newspapers, it was typically found in connection to different economic concepts, such as business, commerce, proclamations, private education, private associations and ownership. More than 65 per cent of instances of ‘the private’ occurred in combination with words related to the economy, either based on the immediate context in which the word was used, or on its direct linguistic meaning. This observation is important in helping us understand how the modern understanding of ‘private’ as an individual protected legal right came into being.

It is not so much the occurrences of the word ‘private’ *per se* that is of interest when seeking to understand the term, but rather the context in which ‘private’ occurs – what we have named ‘private+’ (i.e. private plus something more). The collected data showed that the word *private* was normally used as an adjective modifying nouns and, to a much lesser extent, as an adverb modifying verbs. The research process then moved from quantitative data-collection and registration to a more traditional qualitative historical source analysis, where we identified thirteen different categories that can account for various usages of the word ‘private’.¹⁹

Economy

The six categories named economy, commerce, education, ownership, purpose and association comprise together more than 65 per cent of the occurrences of the word *private*. These six categories all comprise themes that can be directly connected to *private economy* in a broad understanding of the term *economy*. The result represents such a large proportion of the results that there can be no doubt that the connection between

the word private and various economic concepts constitutes the central understanding of the word's practical use in the newspapers, during the period 1673–1800.

A few words should be attached to the six categories that are included in the collective term, economy. Mentions of private 'commerce' referred to both local and international trade. Instances of local private trade are typically found in advertisements; for example, the private stock exchanges regularly advertised auctions for all kinds of good, ranging from kitchen utensils to dining room furniture. When considering international trade, the phrase 'private expeditions' calls for special attention. This phrase appeared in advertisements encouraging investors to finance private foreign-trade expeditions. This does not mean, however, that all other international trade was *publicly* funded. The real distinction here was between investors who were external and those who were internal to the established trading companies.²⁰ Therefore, the absence of the word 'private' in connection to trade does not signify that trade was a public economic matter. The trading companies with a monopoly and other associations were, despite their royal privileges, primarily financed by private shareholders.

The fuzziness of the word 'private' and its usage emerges clearly in the category of 'associations', taking as an illustrative example the advertisements for *Det Private Livrente-Societet* (the Private Annuity Society) – a private pension company founded in 1775. The society's name itself amounted to more than half of all occurrences of the word 'private' in this category. As the company's name shows, this was a private company, even though it was established by law and the state provided a guarantee for its members' deposits in the event of the company's dissolution.²¹

The second largest category, 'education', consists of different types of privately offered teaching, ranging from children's basic education to private university courses. In total, 886 occurrences of 'private' fall within this category. This largely reflects the fact that teaching was offered as a private commodity during the eighteenth century. With very few exceptions, education could just as easily have been included in the category 'commerce'. Usage of 'private' in the realm of education did not indicate any qualitative difference from public teaching; 'private' only speaks to the way in which the teaching in question was provided.²²

Closely associated with the category of 'private commerce' is that of 'private economy'. This accounts for the largest category, with 918 occurrences of the word 'private'. This category also encompasses the greatest diversity of words found in connection to 'private'. Such words include cost, creditor, account, business, service, tax, subscription, due, money, loan, fine, work and commission, to name just a few. In sum, 'private' appears in combination with eighty-eight different words within this category.

Within the category of 'private economy', one type of notice dominates: advertisements made for the benefit of creditors (*proclama*: proclamation) following a succession, bankruptcy or the occasion when a public official left office. Prior to the newspapers, the public notification of private changes in economic circumstances – thereby informing potential creditors of such changes – had taken place at the local court of justice.²³

While advertisements or notifications for creditors meant that the newspapers regularly made use of the category 'private economy', the same cannot be said for the category of 'private ownership'. Indeed, in only eighty-five instances was private used in connection to the words ownership or possession.

Nevertheless, private property formed the basis of the private market and of the private economic activities that were mentioned in the newspapers. Once again, we must appreciate that the absence of the word 'private' does not indicate that the newspapers did not address private property – far from it. As we have seen above, the newspapers during this period were principally an advertising media. Their primary purpose was to facilitate contact between buyers and sellers. Thus, it is hardly surprising that the economic notion of the private that emerges from a survey of the newspapers cannot be linked to the traditional private sphere of household and family, but instead referred to actions that took place in a public 'marketplace'. As such, the private economy, based on how it appears in the newspapers, cannot be tied down to a physical place or sphere. The 'private' is instead a conceptualizing term: what matters is not the private itself, but what the 'private' helps qualify, namely the room for manoeuvre available to economic agents, which again was based on the private ownership of goods on the private market.

The 'business plan' of *Adresseavisen* was laid out in a royal letter of privilege dating from 14 April 1759. The letter of privilege divided the information that the newspaper had a duty to publish into sections, which together provide a good indication of the newspaper's private economic purposes: (1) all travellers who arrived or left the city; (2) the price of all food; (3) weekly lists of the dead, born and married; (4) the exchange rate; (5) the arrival of ships and their cargo; (6) employment services for jobseekers; (7) merchants or others in the provinces with stockpiled goods for trade; (8) wholesale goods; (9) all other goods, either movable or immovable property, which someone wanted to sell or requested to buy, rent or auction; (10) transport from Copenhagen; (11) proclamations on death; and (12) provisions of capital for loans.²⁴ This listing clearly shows that regardless of whether the word 'private' had been included in the newspapers, the primary purpose of the newspaper was to facilitate private economic activity.

Private purpose and the utility of society

It is in this context that we encounter another set of distinctions, this time between the individual (and private) economic agent and the interests of the state, as well as between the individual citizen and so-called civil society. The category of 'private purpose' encompasses ideas such as private matter, private best, private virtue, private advantage, private freedom, private benefit, private deed, private intention, private interest, private passion, private bliss, private manner, private utility and private prosperity. These concepts all brought together disparate political, legal and economic discourses during the eighteenth century. The category of 'private purpose' is not large – there are only 204 occurrences, with seventy-three different words appearing in combination with 'private' – but the category of 'purpose' differs markedly from the others. It is in this category, for instance, that we find what can best be described as value-laden expressions by which 'private' acquires either a positive or a negative character.

The four words used most frequently in this category are happiness (20), interest (16), purpose (20) and utility (30), and they were used throughout the period 1751–1800. This is the only category for which the word 'private' can be identified as a marker of

value. In the other twelve categories, the word 'private' was used as a neutral description. However, the few instances of 'private' in the 'private purpose' category do not allow for any conclusions as to the wider significance of these occurrences when thinking more generally about the potential 'moral' values attached to the word private in this period.²⁵

The idea that economic policy could improve society was the first political topic to become the subject of general public discourse under the Danish-Norwegian monarchy. In part, the spread of such a discourse can be linked to what Habermas identified as the rise of bourgeois 'public opinion'. Yet conversely, it does not make much sense to talk about free public debate within an absolute state that practised censorship. Nevertheless, because of a top-down governmental interest in strengthening the theoretical basis for economic policies, a controlled public debate on economic improvements was introduced and permitted. Here, Denmark-Norway was no different from wider European developments, but the way in which the economic debate was launched in Denmark remains remarkable. A state appeal was issued on 31 March 1755, urging all righteous patriots to come up with 'all the insights that serve to maintain the country's prosperity, reduce spending, multiply incomes and, in general, the needs of the people'. This call for patriotism led to the creation of a new state-controlled and state-financed economic magazine, *Danmarks og Norges Økonomisk Magasin* (Denmark and Norway's Economic Magazine) in 1757–1764, with the university's pro-chancellor as editor, and with contributions from priests, civil servants, merchants and landowners.²⁶

Henrik Horstbøll has examined the significance of this journal and similar such publications in the second half of the eighteenth century. He identifies how the theoretical economic policy changed from what had previously been an orientation to microeconomic practice towards, instead, a macroeconomic societal perspective. As Horstbøll puts it, 'Instead of the traditional discourse on good management of the household and estate, we now find discussions concerning progress, improvement, growth and profitability'.²⁷ This debate can also be traced in the newspapers, especially after the abolition of censorship in 1770. During the 1770s, the newspapers present a lively discussion about the merits of the old economic system, consisting primarily of large trading companies with royal privileges (e.g. the West Indian Company), or whether free trade was in fact more beneficial to the state and its citizens.

The second half of the eighteenth century witnessed the establishment of private or semi-private associations, each pursuing different social or economic goals. One of the more successful of these was the *Det Kongelige Danske Landhusholdningsselskab* (Royal Danish Society for Agricultural Housekeeping), an association established in 1769 (modelled on a foreign example) that still exists today.²⁸

Legal professor Peder Kofod Ancher (1710–1788) wrote a lengthy preface to the Danish translation of a French economic dissertation in 1759. In the following excerpt, we gain a sense of the character of the Danish economic debate:

Moreover, there are such innocent deeds, which have no connection with the state: these should be voluntary and left to everyone's own will. Something must be left over where everyone remains his own master. This is yet another remnant of the

first and original state, of which the subjects engaged in civil trade should not be deprived. Such activity requires by nature a peculiar diligence and devotion, and is conducted solely by the conception of self-interest. It is necessary that everyone be allowed the freedom to pursue his use and his sustenance in any way that seems best and most advantageous to him. For in promoting his own happiness, every man desires to act according to his own will.²⁹

Ancher's statement demonstrates a clear conceptual relationship between free trade and the citizenry's autonomy to pursue their own economic activity without direct interference from the state. This freedom and right was a consequence of natural law, and self-interest was understood to be a necessary precondition for such a right. This was exactly the same idea that Adam Smith would, seventeen years later, describe in his 1776 manifesto on capitalism, *The Wealth of Nations*. That Ancher and Smith reached the same conclusions shows that they were each directly inspired by and applied the jurisprudence of Pufendorf's modern natural law to their economic theories.³⁰ It is in this capacity that Pufendorf becomes relevant when we come to interpret the association between the word 'private', and the more general economic matters that we have observed in the newspapers during the second half of the eighteenth century. Pufendorf's legal doctrine provides a general framework for understanding the concept of the private in both legal and economic contexts, and it helps us to understand how 'private' and 'privacy' became legal rights.

The second part of this article therefore takes a closer look at Pufendorf's legal principles in order to explain how they formed the legal basis for private economic development. Here, private property came to play a crucial role. As Ancher put it: 'Everyone must be sure that they can always keep what they once legally acquired. It is this certainty that encourages a trader to venture so much, and without it, he seems to put all his diligence and effort at stake.'³¹ Rights arising from private property connect the economic developments of the eighteenth century to the modern understanding of the notion of the private as an individual legal right. Private property came to form the spearhead of the legal guarantees that would later be codified as constitutional civil liberties and international human rights.

Samuel Pufendorf and the natural law

Pufendorf created a new paradigm for modern natural law, and his work contributed to the development of an independent legal science that was detached from both moral theology and political philosophy.³² Pufendorf obtained the first professorship in natural law at the University in Heidelberg in 1661. By this point, he was already a well-known, albeit controversial figure in German academia. He accepted another professorship in natural law in 1668, at the University of Lund, in Sweden. Then, in 1677 he was appointed as the royal Swedish historiographer and counsellor at the Royal Court in Stockholm, before being called to Berlin in 1688 to serve as royal historiographer and legal counsellor. Pufendorf died in Berlin in 1694. Pufendorf's legacy as an innovator of a modern universal jurisprudence extended far beyond Scandinavia and Germany.

Throughout the eighteenth century, Pufendorf's legal theories enjoyed enormous influence in France, England and the North American colonies. His 'duty doctrine' served as a common ground for jurisprudence across both civil and common law, and its influence continues to be felt today, not least since it constitutes a basic principle in both private and international law.³³

A secular natural law

Pufendorf's *De jure naturae et gentium* offered a comprehensive presentation of modern natural law, along with the basic principles of private and public law. Pufendorf was, of course, indebted to the works of other legal writers – especially those of Hugo Grotius (1583–1645) and Thomas Hobbes (1588–1679) – but in *De jure naturae*, he managed to create a new, coherent legal system for a modern European jurisprudence. He detached modern natural law from the Christian models that had hitherto provided the basis for it, whether that be the Catholic version based on Thomas Aquinas (1225–1274), or the Lutheran version based on Augustine (354–430) and Philipp Melanchthon (1497–1560).

Pufendorf did not try to challenge the idea of God's creation, nor to deny the fundamental social importance of moral theology. He simply insisted that religious dogmas were not a part of either natural or human jurisprudence. Pufendorf explained this legal secularization by referring to the division between 'external' and 'internal' human 'actions'. Human law and natural law were only concerned with the external actions of human beings: 'For moral theology however, it is not enough to mold men's external conduct to propriety. Its chief task is to conform the mind and its internal motions to the will of God.'³⁴ It is hardly surprising that this part of Pufendorf's new legal philosophy was particularly controversial – opposition from protestant theologians was especially fierce.³⁵ It was not until 1687, however, that Pufendorf addressed the question of 'religious tolerance'. His discussion of this issue fell within his work *De habitu religionis christianae ad vitam civilem* (*Of the Nature and Qualification of Religion in Reference to Civil Society*).³⁶ Pufendorf constructed his doctrine of religious tolerance upon conceptual foundations that juxtaposed the public and private: 'For, if these [religious standpoints] are kept within the compass of peoples thoughts, without breaking out into public or outward actions, they are not punishable by the law, neither can any human power take cognizance of what is contained only, and hidden in the heart.'³⁷

On the Duty of Man and Citizen

In 1673, Pufendorf published a summary of his *De jure naturae* in two small books entitled *De officio hominis et civis juxta legem naturalem libri duo* (*On the Duty of Man and Citizen*).³⁸ In the preface, he wrote that the purpose of this 'compendium' was 'to expound to beginners the principal topics of natural law in short'.³⁹ His compendium introduced new standards for legal textbooks in central and northern Europe for more than a hundred years. Although it is only 177 pages in the modern English translation, *De officio* nevertheless provides an introduction to all the general legal principles upon which both private and public law are built. *De officio* was translated into the main

European languages, and countless legal students, civil servants and lawyers across eighteenth-century Europe studied this work, ensuring that Pufendorf's legal principles enjoyed a deep influence and were applied in the daily legal practices of those who had studied his work.⁴⁰ The significance of this textbook for the dissemination of a modern European jurisprudence in the eighteenth century cannot be overstated. *De officio* was first translated into Danish in 1742,⁴¹ with the stated intention that it be used as part of the legal curriculum at the University in Copenhagen, which had been reformed in 1736.⁴²

The doctrine of duty

It is easy to overlook the fact that Pufendorf was neither a political nor a moral philosopher. He has the distinction of being the first pure philosopher of law. This is important when seeking to understand his work and influence. Pufendorf based his legal synthesis on the law of obligations, that is, on his 'doctrine of duty'. The first volume of *De officio* dealt with the principles of natural law and with their consequences for private law. The second volume covered public law, including Pufendorf's interpretation of the 'social contract' as a common model for the foundation of the state within his vision of modern natural law.

The law of obligations was based on the general assumption that obligations must be kept – that is, the maxim *pacta sunt servanda*.⁴³ Pufendorf employed this axiom when outlining his doctrine of duty: 'The general duty imposed by natural law in this matter is, that every man must keep his faith given, or fulfil his promises and agreements. For without this, we would lose most of the possible advantage of mutual exchange of services and things' (I.9.3). In the first two chapters of Book I, Pufendorf defined the legal basis for a modern law of obligations through a few general legal principles, placed within a framework of natural law. Bilateral agreements made between two parties had, by their own merit, a legally binding effect, and thus existed independently from any state intervention – at least in principle. Pufendorf further substantiated the separation between private and public law by pointing out that natural law, on a theoretical level at least, antedated the first processes of state-formation: that is, natural law comes from the time before humans decided to renounce their natural liberty and, through the social contract, submit to a state's sovereignty. In this way, Pufendorf very cleverly established a connection between private law and individual liberty that existed in the state of nature. Pufendorf thus stated that this original natural freedom remained in force in the private law of obligations. It is not surprising then that Ancher thought that trade 'should be voluntary and left to everyone's own will'.

The principles of contract

A contract or agreement is a 'legally binding' promise made between two parties. Hence, a promise is an undertaking by one person to do something (or to refrain from doing something) if another person does something in return. In order for an agreement or contract to be legally binding, the parties must exchange both an offer and an acceptance.⁴⁴ Both parties, moreover, must agree to the contract with their own free will. A party's genuine consent is an essential element in the creation of a legal obligation.⁴⁵ There must

therefore also be mutual acceptance (*consensus*) among the parties of the agreement or contract. Free will represents the alpha and the omega in the law of obligations: every legal agreement imposes a restriction on human freedom, whereby one person assumes a duty towards another. If one person has a duty, the other, conversely, has acquired a right. A right in the law of obligations is, accordingly, a reflection of a duty. Duty, understood in this context, is something completely different from a moral or religious duty.

The newspapers were full of (private) offers. Newspaper advertisements were, in fact, nothing more than the first step in the creation of a contract – they were the offer, so to speak. Prior to that, the advertiser had entered into a contract with the newspaper in order to publish the advertisement in the first place. Another contract had put the advertiser in possession of the product that he now wanted to sell. A single newspaper was thus composed of a myriad of contracts with their underlying duties and rights, free will, offer and acceptance, and consensus.

The constitutive legal principles of mutual duties and rights formed, according to Pufendorf, the core of all human coexistence, both in the original state of nature as a principle of natural law, and as the legal basis for public law and state regulation.⁴⁶ As Reinhard Zimmermann states: ‘Thus, to the natural lawyers, contract was the essential tool for the regulation of human affairs, the cornerstone of all the institutions of the positive law.’⁴⁷ The first principle of private law is that agreements entail both duties and rights. In *De officio*, Pufendorf systematized his duty-doctrine into three principal types, each of which was imposed upon humans by the law of nature itself, even in the absence of a human-made law or regulation that could force individuals to adhere to them or prosecute individuals when they failed in these duties. The three divisions were (1) duty to God, (2) duty to oneself and (3) duty to others.⁴⁸

In Chapter 4 about duties to God, Pufendorf, on the basis of natural law, identified that man (as an individual) was obliged to recognize the existence of God (I.4.1).⁴⁹ Here, Pufendorf reviewed a long list of obligations that one has towards God. The trained lawyer, however, would immediately realize that duties towards God were not *absolute legal* duties. One cannot make a mutual agreement with God, which would be unenforceable, because one cannot summon God for breach of contract. The prerequisites that are necessary for an agreement to qualify as a legal contract are therefore not applicable in the case of God. Thus, one’s duties to God are not legal agreements. As for duty to oneself, Pufendorf argued that ‘self-love’ compelled man to have a careful concern for himself ‘and to get all the good he can in every way’ (I.5.1). Man thus had a duty to self-preservation and, arising from this, he also had a right to self-defence. In the state of natural liberty, this right was more far-reaching than it would be under a civil government (I.5.8–9). Pufendorf explained the principles of self-defence in relation to attempts ‘on life, limbs, virtue, and property’ (I.5.10–16), and he thus defined the fundamental objects of human rights (I.6.3 and 5). For Ancher and Adam Smith, this meant that the citizen, in principle, also had the same duty to act in his benefit when it came to his own private economy.

Absolute duties and private law

In relation to duties to others, Pufendorf introduced two other legal concepts: absolute duties and perfect rights. By using the words ‘absolute’ and ‘perfect’, Pufendorf

emphasized the point that duties to life, limbs, virtue and property were *legally* binding by merit of the law of nature itself, thereby allowing for the pursuit of self-help outside of any direct intervention from the state.

The first absolute duty was as follows: not to harm others with respect to their life, limbs, chastity, liberty and property (I.6.3). The second absolute duty obligated each man to value and treat the other as a natural equal in the state of nature. This natural equality disappeared, of course, when humans formed societies, but natural equality nevertheless remained the legal basis upon which agreements were formed in the law of obligations. Legal agreements required, as we have seen, the use of free will, consensus and the recognition of a mutual obligation, meaning that both parties were equally obligated (I.7.3–4).

The third absolute duty was an extension of the second. As Pufendorf put it: ‘The duty owed by every man to every man, to be performed for the sake of common sociality, is: Everyone should be useful to others, so far as he conveniently can’ (I.8.1). It is thus not enough to refrain from harming others; one must also be obliged to care for others. These three absolute duties summarized the basic legal principles of obligations – and still today provide the binding standards of legal responsibility.⁵⁰ Here we meet the key distinction in the economic discourse of the eighteenth century that emerges from the Copenhagen newspapers and the state-controlled debate on the economy. The dynamic between the duty to oneself and the duty to others has, since the time of Pufendorf’s duty-doctrine, constituted the fundamental legal understanding of social interaction between the individual and the community. What Pufendorf described was not a dichotomy between private and public interests. Pufendorf instead explained that before the states were formed, and before man-made regulations had been imposed upon people, the state of nature itself had required that every human being discharge their absolute duty to each other. Therefore, one can argue that Pufendorf in reality created a notion of ‘a civil society’, as a legal concept, that existed *before* the state was founded.

Private law was (and is) not subject to the same degree of regulation as public law. Private agreements and contracts thus constitute the binding ‘rules’ in private law. The interpretation of such contracts is based on general legal axioms and principles, and takes place in the civil courts.⁵¹ Pufendorf detached the principles of natural law from its hitherto metaphysical and moral-theological framework, and instead established close relationship between it and private law. Accordingly, he also drew a close relationship between individual liberty as it had once been possessed in the state of nature, and the continued individual freedom to enter into private agreements after the formation of states and into the present. This is why, for Pufendorf, the state should refrain from interfering in the private market.

Ownership and property law

In the second half of Book I of *De officio*, Pufendorf discussed the principles of the two major branches of private law: the law of obligations and property law. In the field of

property law, Pufendorf's theory formed a new legal understanding of private property rights and of their origins:

'It follows [from ownership] that we may dispose as we will of things which belong to us as property and bar all others from using them, except insofar as they may acquire a particular right from us by agreement' (I.12.3). The right to property is a consequence of the first absolute duty not to harm others with regards to their life, limbs, chastity, liberty *and property* (I.6.3). Treating the right to property as an extension of the duty not to harm others, however, does not explain how private property first came into being. Pufendorf thus explained that God had made all things available to all men. As he put it:

To avoid conflicts and to institute good order at this stage, [the humans] took the step of dividing the actual bodies of things amongst themselves, and each was assigned his own proper portion ... In this way, property in things [*proprietas rerum*] or ownership [*dominium*] was introduced by the will of God, with consent [*consensus*] among men right from the beginning and with at least a tacit agreement [*pactum*]

(I.12.2).

Pufendorf claimed that property antedated the formation of states, and that it was founded upon mutual agreement. The protection of property was therefore an *a priori* 'right' that man had already acquired in the state of nature. The original allocation of property within the state of nature, as such, created a fundamental legal principle that implied the inviolability of private property.⁵² This legal definition of a proprietary right to 'things' also formed the basis of a 'private right'. We return to the two lines quoted above: 'We may dispose as we will ... and we may bar all others from using them.' Herein lies the essence of 'private' property – and probably also of the right to privacy. We can elaborate this further by referring to the legal division of *positive* and *negative* rights in property. Positive rights include the rights that the owner of a 'thing' has to sell, give away, destroy, abandon and otherwise use his property as he sees fit. Negative rights, in contrast, refer to the basic idea that others do *not* enjoy these same (positive) rights to the 'thing' in question. In addition to the list of positive rights that derive from property, this negative right of property thus also conveys an (implicit) right of privacy.⁵³

In this light, the private economic perspective as it appears in the newspapers suddenly becomes an expression of something that was protected by a special legal right. This idea makes it particularly relevant to investigate the relation between the expansion of a private economic market in the second half of the eighteenth century, and modern legal concepts of property.⁵⁴ The question now is how Pufendorf applied his duty-doctrine, articulated for the state of natural liberty, to the foundation of states.

The foundation of states and the social contract

In Book II of *De officio*, Pufendorf presented what can, in general terms, be described as public law. He reviewed the basic principles of criminal law, family law and inheritance law, and he derived from them the legal framework for what we today call constitutional law: that is, the legal framework for state formation and state governance based on

the natural law principle of the social contract. The social contract represented the transition from the state of nature whereby people voluntarily surrendered their natural freedom and submitted to a state in order to obtain security against the abuse of others. Here, Pufendorf applied the doctrine of duty to the legal principle of a binding contract through which the subjects surrendered their sovereignty to state government and obligated themselves to obey and remain faithful to the sovereign. In return, the government undertook to ensure the security and safety of its subjects.

Hugo Grotius (1625) and Thomas Hobbes (1651) had already introduced the idea of the social contract into the framework of modern natural law. Hobbes saw the state of nature as one of constant war between humans, and he argued for a theory of total submission in which individual self-preservation was the only motive behind state formation.⁵⁵ In Grotius's social contract, humans formed states because of their innate sociability, which helped motivate them to construct states.⁵⁶ Pufendorf sought to harmonize these two contrasting models of self-preservation and sociability.⁵⁷ According to him, humans did *not* have an innate predisposition for sociability; they instead had to learn social skills, not only for their own survival but also for the sake of the common good. Pufendorf considered such sociability as a survival strategy. The willingness for mutual commitment was, of course, a necessity in Pufendorf's duty-doctrine, and it formed the basis of human coexistence. It must be noted, however, that mutual commitment would be meaningless if the protective considerations that followed from the absolute duties to life, body, virtue and property in the state of nature had formally disappeared following the development of states.⁵⁸

Duties and rights of the sovereign

In full accordance with Pufendorf's duty-doctrine, the power of the sovereign was also described in the dyadic terms of duties and rights. Pufendorf explained that duties to oneself in the state of natural liberty amounted to the principle of self-defence with respect to attempts on one's life, limbs, virtue and property (I.5.10–16). In the state (in the political sense), this list was translated into the sovereign's right to and monopoly over the infliction of punishments on subjects who had committed action defined by the state as crimes. According to Pufendorf, 'With the introduction of government among men, the security of societies requires that rulers too have the capacity to suppress the wickedness of their subjects, so that most men may live securely with one another (II.13.5)'. The right to punish criminal behaviour stemmed from the very rationale underlying state formation: namely, the creation of security. Punishment could be imposed on life, limbs, virtue and property, whether through the death penalty, corporal punishment, deprivation of honour or the confiscation of property. In this connection, one should briefly note that virtue or reputation, for Pufendorf, was seen to be as a value (price) of a person 'in common life': 'Reputation in general is the value of persons in common life [*vita communis*] by which they may be measured against others or compared with them and either preferred or put after them' (II.14.1).

Honour and reputation – or the lack thereof – played a fundamental role in social interactions in the early modern period. Pufendorf placed reputation within a proprietary context because it was a concept linked to an individual's opportunities

to act as a private agent. Because of the importance attached to one's capacity to enter into agreements with other economic and social agents, it is little wonder that Pufendorf argued that reputation could have a direct influence on social and economic relationships. Pufendorf explained the seriousness of reputation:

It is a still greater wrong to give signs of contempt for others by deeds, words, looks, laughter or slighting gesture. This sin is to be regarded as worse, in that it vigorously excites the hearts of others to violent anger and desire for revenge. In fact, there are many men who would prefer to expose their lives to instant danger, to say nothing of disturbing the public peace, rather than let an insult go unavenged. The reason is that fame and reputation are sullied by insult; and to keep their reputation intact and unsullied is very dear to men's hearts.

(I.7.6)

The importance of reputation is echoed in Camilla Schjerning's chapter in this volume about the phenomenon of house-scorning and the readiness felt by individuals to defend any perceived attack on their personal reputations, as well as in Ulrik Langer's chapter about the consequences of a public moral uprising against some Copenhagen homeowners and their businesses. However, Pufendorf's concept of reputation in a legal and economic context provides an additional dimension to discussions of early modern honour.

On the power of the sovereign over property within the state

The rights of the ruler did not, however, come without limitations. In fact, these limitations were particularly relevant when considering the protection of private property, along with its accompanying and incipient legal definition of individual private rights. Pufendorf limited the sovereign's right to interfere in the citizen's use of private property to three specific situations that arose from the social contract: 'Property of which citizens have obtained full ownership by their own industry or in any other way is subject to three principal rights, which, by the nature of states and as necessary to their purpose, belong to sovereigns' (II.15.1). Two of these rights are today regulated in constitutional law: the right to expropriate private property and the right to collect taxes. Just like in modern constitutions, Pufendorf emphasized that there must be exceptional circumstances before the state could exercise expropriation, and the owner required compensation for his loss.⁵⁹

The right to collect taxes, on the other hand, was more complicated. Rights of taxation allowed 'the sovereign to collect a fraction of the citizens' property as tribute or tax'. But how much was 'a fraction'? Pufendorf used this discussion to provide guidance to rulers: 'Prudent rulers would be wise to take into consideration the resentment felt by ordinary people, and to make an effort to give as little offence as possible in collecting taxes' (II.15.3). The role played by taxation in mediating the relationship between the state and its citizen in relation to private property should not be underestimated. By the time that Pufendorf wrote his work, war and war-funding dating back to the Reformation had long-burdened large parts of Europe.⁶⁰

Sari Nauman shows in her contribution to this volume the consequences that could follow when a tense relationship between subjects and the local representatives of the state led to direct rebellion.⁶¹

The use of private property

Far more interesting than expropriation and taxation, however, was the ongoing regulation in the early modern period of the private economic market, which led to restrictions being placed on the individual's right to dispose of private property. In Pufendorf's words, 'The sovereigns may make laws obliging the citizens to accommodate their use of their property to the interest of the state; or defining the extent and nature of possessions, and the method of transferring property to others, and other matters of this kind' (II.15.2). It is especially the words *may* and *laws* that give pause for reflection. If sovereigns wished to restrict their citizens' right to dispose of their own property however they wished, then this was only possible *by law*. Today, we would call this principle the 'rule of law'. The sovereign was therefore not allowed to act for his private benefit; it was only the utility of the state that could legitimize state interference in an individual's property. The modern English translation renders Pufendorf's original Latin text of *ad utilitatem civitatis* (1673) as 'the interest of the state'.⁶² It is actually possible to get a little closer to Pufendorf's understanding of the relationship between state and citizen, for example, when he writes: 'Nevertheless, sovereigns must not merely collect from the citizens' property the funds necessary for the preservation of the state. ... For the strength of the state consists also in the virtue and wealth of the citizens, and therefore the sovereign must take whatever measures he can to ensure the growth of the citizens' personal prosperity' (II.11.11).

The regulation of private property to which Pufendorf referred was an element in the ongoing legislative processes during the early modern period that articulated the so-called good policy, a set of initiatives which aimed at creating a new kind of welfare-promoting legislation, not least in the field of economic trade. This regulation had significant effects for the framework in which private economic activities were conducted, in the same way that trade and consumer regulations do today. This regulation helps shed light on the relationship between the private interests of individual citizens and the needs of the state – and thus also on 'civil society'.⁶³ Here one must keep in mind that in classical economics, there are two traditional perspectives: that of the merchant and that of the consumer. These two roles, however, can easily exist within the same person, and thus which role one emphasizes when adopting an agent-centred perspective will always depend on the specific situation.

It is important to stress that state regulation of the private economy and the market is not in itself considered to be a one-sided state intervention that can lead to a fixed and definite understanding of the private, as opposed to the public. The dividing line here is not a clean cut between the state and the citizens, but is in fact a multi-faceted nexus of contact between different agents and interests. The private market worked insofar as no regulation or conflict took place in complete independence from state interference. The conflicts over private economic space did not take place between the state and the citizen, but rather between citizens as private economic agents.

Once again, the idea that the individual citizen's personal prosperity brought actual benefits to the state helps us conceptually differentiate the economy of citizens and the economy of the state: the private economic market is left to 'a civil society', that is, to the sum of all citizens.

Social and economic agents

The newspapers contain countless examples of this 'good policy' regulation, which was officially enforced by a myriad of different types of local officials. Copenhagen was physically enclosed by a massive military-defence system that was shut to outsiders every night; the city thus had the opportunity and the means to control all incoming and outgoing activity. Censuses from the second half of the eighteenth century recorded and registered the city's population of approximately 100,000 people. Citizens' lives were monitored by quartermasters, appointed taxation citizens, overseers of the poor and the corps of watchmen.

The police chief, his officers, the magistrate and the parish priests all supervised the citizenry's affairs and livelihood, while the royal court and civil servants devoted an especial attention to citizens' lives in the city. Although the state had a unique opportunity for extensive control and surveillance of its population, the newspapers nevertheless leave us with a picture of a private economic market that, in the midst of price regulation, trade restrictions and market control, existed and developed in the best possible way because of the accretion of interactions between private agents from across all social strata. The newspapers, day-by-day, week-by-week and year-by-year document continuous economic enterprise throughout the second half of the eighteenth century. Newspapers such as *Posttidende* and *Adresseavisen* well attest to this reality.

An assessment of the level of economic activity as presented in the local newspapers – though of course knowing that there were many other economic transactions besides those recorded in the newspapers, some of which were undoubtedly both shady and criminal – leaves the impression that measures of public control, along with litigation in the civil courts, were surprisingly inactive. What does this tell us about the private economy in Copenhagen during this period? Perhaps this indicates that the market actually was far more autonomous than the many regulations would lead us to believe. Private agents acted on market terms, and the state and local authorities seem to have given private economic enterprises the leeway that was called for in the economic debates of the time. This was a debate in which modern natural law helped to create a legal understanding of the private economy, with obligation and property law lying at its foundation. The level of activity reflected in the newspapers suggests that the Danish-Norwegian state had recognized the private market, even though it would take more than fifty years before the formal liberalization of traditional mercantile economic policy was abolished, with the Freedom of Trade Act, dated to 29 December 1857. How was the market able to evolve despite this outdated economic regulatory tradition? It seems that private law compensated for its shortcomings. Large segments of public 'good policy' regulation could easily be circumvented if the private agents agreed to do so. This applied, for example, to pricing, working conditions and to privileges.

Private agreements on marriage, inheritance and family matters could also be agreed upon bilaterally if arrangements other than those stipulated in public regulations were to apply; indeed, as a last resort, one could always apply for a dispensation from the rules. The long lines of closely written protocols surviving from petitions presented to the central administration of the Danish-Norwegian monarchy provide excellent examples of some creative solutions.⁶⁴

Concluding reflections

The result of the newspaper survey invites reflection on whether the methodology of word-mining for the term 'private' will lead to anything other than scattered examples of usage of the word within early modern sources, as well as observations as to how that usage is influenced by the scholar's choice of source material upon which to conduct the study in the first place. Let us take an example of another source. We have examined a very popular legal textbook, Lauritz Nørregaard's *Forelæsninger over den Danske og Norske Privat Ret* (*Lectures on Danish and Norwegian Private Law*), published in seven volumes in 1784. In the 2,770 pages about private law, only 315 occurrences of the word 'private' can be identified, and it appears in conjunction with sixty-one different words. The words used with 'private' in Nørregaard's textbook appear to have been somewhat narrower in terminological scope than were those found in the newspapers. No surprise there. More thought provoking, however, is the observation that the word 'private' does not appear to have been used to a significantly greater extent than it was in the papers. Similarly, Pufendorf's *De officio* in the original Latin used the word 'private' on only a handful of occasions, and the rendering of 'private' from the Latin varies across the different languages into which the text was translated.⁶⁵

On the one hand, our study shows what the use of the word 'private' in the newspapers was clearly associated with private economic meanings. As soon as we started to analyse the material with a traditional source-critical approach, however, it turned out that the word 'private' appeared in the newspapers with an astonishing infrequency. Apparently, there was no need to utilize the term in order to create a legal or a private economic terminology when describing something that individuals already seem to have recognized as a basic premise. The 'private economy', as a concept, is so prevalent in the newspapers that the word 'private' itself loses its significance. This realization only became apparent after we went from the quantitative, electronic registration of the word, to the qualitative analysis of how that word was used in context.

That said, our study has nevertheless established a convincing link between notions of the private and the economy. This led us to pursue how the notion of the economic market related to and interacted with property rights and the legal protection of those rights, which Habermas had already touched on in his theory describing the transformation of the public. The category that we labelled as 'private purpose' gave us a more conceptual understanding of the word 'private', as opposed to the spatial idea of private contra public. This understanding helped shape our wider interpretation of the connection between the private economy and private property. The interpretation

of modern natural law also contributes to our understanding of the link between the private economy and private property. From modern natural jurisprudence, we have seen that it is not sufficient to limit our understanding of private to the supposed dichotomy between the private and public. The protection that the social contract sought to guarantee primarily aimed at protecting citizens from whatever abuses they might suffer, either from each other or from external enemies. In this light, when looking at the private *in* the public, it is precisely in the conflicts between members of a 'civil society' that the boundaries of the private become clear, and where one finds the role of the authorities in conflict resolution.

Let us return briefly to Pufendorf's definition of duty to oneself and of duty to others. When writing about duty to oneself, Pufendorf explained the principles of self-defence when an individual was faced with attempts on life, limbs, virtue and property (I.5.10–16). Concerning duties to others, the first 'absolute duty' of the individual was to refrain from harming another's life, limbs, chastity, liberty and property (I.6.3). This is the first time in the legal tradition that we see a legal system constructed on the definition of rights. And since Pufendorf connected these fundamental rights to the sphere of private law, he also created a protectionist interest, especially with regards to 'the private'. 'Private', in his schema, became closely linked to basic legal principles; and through Pufendorf's work, these principles have achieved the importance they retain today. Therefore, Pufendorf's principles can also help bridge the gap between the past and the present when we talk about the 'private' as something to protect. In discussing the duty to oneself, Pufendorf further found his way to criminal law, via the social contract. For him, duty to oneself served as the general model for criminal law. The protection that followed from the individual's self-defence in the state of nature was handed over to the state in order to ensure that citizens did not suffer harm or loss with respect to their rights.

Judith Jarvis Thomson, in her article *The Right to Privacy*, discusses whether there are any independent protection rights in relation to privacy at all. It is Thomson's opinion that those rights that she refers to as 'the grand ones' already cover privacy: 'The right to life, the right to liberty, the right to not be hurt or harmed, and property rights.'⁶⁶ Concerning the right to privacy, she concludes that 'it is not a distinct cluster of rights but itself intersects with the cluster of rights, which the right over the person consists in [life and body] and also with the cluster of rights, which owning property consists in'.⁶⁷ There is little difference between how Pufendorf and Thomson each define rights. How we approach these basic legal principles has a profound influence on our understanding of private legal rights, in the contexts both of the early modern period and of today. Research into the private and privacy often mentions different sorts of rights – regardless of whether the discussion is about the lack of a particular right, or what should be protected by a right. However, there is often considerable uncertainty when it comes to the protection of a right to privacy. Protection of what, from whom, and by whom? These questions are nearly intractable, given that only *legal* rights can be protected.

The notion of a 'space' that is constituted by civil society – of a space between the private that is attached to the individual or the family, and the public as the 'state' or 'the absolute monarchy' – is an essential element in Habermas's theory about the

structural transformations of the eighteenth century. The establishment of a 'middle ground' position created a space in which the private agents of 'civil society' could pursue their social and economic activities; this space gives us the missing link in the private-public dichotomy.⁶⁸ Pufendorf's legal doctrine of duty provides a legal basis to understand the private market as follows: it was the sum of private economic activities that unfolded as a result of the meeting of economic agents who formed private legal contracts and agreements. The material from the newspapers shows how contact between these economic actors could be facilitated.

Notes

- 1 Private economic perspectives on privacy are primarily dealt with in contemporary research. This is especially the case for the issue of private information as a commodity, usually in the field of information technology, on which see Posner 1984, 334–45; and Roessler and Mokrosinska 2015 on personal data and health from a market perspective. See also Lindgreen 2018, 181–207 for the economy from a cost-benefit perspective. In this handbook on privacy studies, the private economy is not mentioned at all in the historiographical article of Kuelen and Kroeze 2018, 21–5. Benn and Gaus 1983 remain a central work; see also McKeon 2006. McKeon discusses the private economy and rights in relation to the traditional theories about the distinction between the private and the public. However, the economic perspective does not constitute the main theme of the book.
- 2 Habermas [1962] 1991, 85.
- 3 Ibid., 87. Habermas's model does not rest on a dichotomy between the private and the public (political) sphere. For Habermas, incipient liberalism and trade capitalism are the real forces behind the development of a political public opinion. Interesting in Habermas's theory is 'the buffer-zone' that he created between the private and the public – what he termed 'the civil society', and which, according to him, formed the framework for the private economic market.
- 4 The concept of civil society in the eighteenth century is a separate topic for discussion, and is left untouched here. However, the fact that the trade economy in this period had evolved beyond a traditional economic model with the household and the family at its centre is quite obvious. According to Habermas [1962] 1991, 74: 'The social precondition for this "developed" bourgeois public sphere was a market that, tending to liberalized made affairs in the sphere of social reproduction as much as possible a matter of private people left to themselves and so finally completed the privatization of civil society. Under absolutism, the latter's establishment as a private realm was conceivable at first only in the privative sense that social relationships were stripped for their quasi-public character. The political functions, both judicial and administrative, were consolidated into public autonomy. ... With the expansion and liberation of this sphere of the market, commodity owners gained private autonomy; the positive meaning of "private" emerged precisely in reference to the concept of free power to control over property that functioned in capitalist faction.' For a new interpretation of the development of liberalism, see Rosenblatt 2018.
- 5 The research project of mapping all the instances of the word 'private' in the Copenhagen newspapers 1673–1800 was a part of The Danish National Research Foundation Centre for Privacy Studies (PRIVACY) research program: <https://teol>.

- ku.dk/privacy/about-privacy/. The purpose of the project was to test the centre's terminological research approach on a large body of material in order to shed light on actual usage of the word 'private'.
- 6 The agent-centred perspective has been well-described, and it is connected to two other concepts, interest and assess, that allow for an interesting alternative theoretical approach to the private and public; see Gaus 1983, 183–222.
 - 7 Andersen and Johansen 2016, 454.
 - 8 An example on the interesting use of the concept of agency in an historical perspective can be found in the collection of essays edited by Simonton and Montenach 2013.
 - 9 Habermas [1962] 1991, 75.
 - 10 Sæther 2017, 143.
 - 11 An overview of the digitalized Danish newspapers and Danish newspaper history can be found at <http://mediastream.dk/>.
 - 12 The international newsletters are discussed in Jørgen Mührmann-Lund's chapter, in this volume.
 - 13 Censorship is examined in Jesper Jacobsen's chapter, in this volume.
 - 14 For further information on *Adresseavisen*, see Jesper Jacobsen's chapter in this volume.
 - 15 Søllinge 1987, 29.
 - 16 *Ibid.*, 54.
 - 17 Reading *Adresseavisen* is like walking through the streets of eighteenth-century Copenhagen: the closest one can get to time travel. Where can you get fresh lemons this week? Have you seen that Widow Green has put the house in Easter Street up for sale – and that the king is back from the castle in Fredensborg? Details, names, locations, books for sale, linen, beef, lectures, theatre plays and Supreme Court decisions: all of these amazing impressions disappear when engaged in text mining. Fortunately, they return when the results of the actual usage of words require qualitative analysis.
 - 18 This once again leads to the fundamental problem of using modern analytical concepts to explain the past. This issue is also addressed in Keulen and Kroeze 2018 in relation to Aristotle's (384–322 B.C.) distinction between *oikos*, the private domestic sphere of the family, and *polis*, the public sphere: 'By using these references, historical review of privacy, suggest that in over 2200 years of history privacy was mainly understood in the same way' (24). This critique is also formulated in McKeon 2006, 48–9.
 - 19 The study's most important methodological finding consists in its variation, and this is the reason why we must agree with the general critique of the traditional theoretical dichotomy between the private and the public. From the beginning, we had planned to record every instance of this dichotomy, but we found very quickly that such a dichotomy only existed if we interpreted it directly into the material. Each of the occurrences has been analysed in its own context. The thirteen categories that we have identified contain some methodological considerations on selection and deselection. In this specific case, the intention was not to carry out an etymological analysis. Hence, in the subsequent systemization, priority was given to the historical meaning of the words rather than to their linguistic form.
 - 20 Andersen and Johansen 2016, 504. In 1772, Indian trade was liberated and handed over to private traders. From 1772 to 1807, private expeditions surpassed the number

of company expeditions, while the East India Company retained its monopoly on Chinese trade.

- 21 Although the company was not fully subscribed according to its original plan, it nevertheless remained in business until the Ministry of Finance took over its leadership in 1853. The last stakeholder died in 1866.
- 22 The category of 'teaching' has been placed on its own to emphasize how widespread the word 'private' was in connection to advertisements for teaching in the newspapers. In the eighteenth century, most of the education at all levels was handled by private individuals. This was true both for private schools, and for teaching that took place in the home of a private teacher or in the students' own homes. Language teaching, sewing, dance lessons and accounting have also been included in this category, as have the private lessons given by university professors in their own homes.
- 23 With access to newspapers, the requirements for public proclamations became considerably easier to implement, and more than half (52.8%) of the occurrences of private in the category 'economy' (a total of 484) were related to advertisements for proclamations.
- 24 Westen 1780, 24–5.
- 25 A search in Mediestream.dk for *lyksalig** (happy) produces 1,880 hits and *nytte** (utility) produces 10,370 hits; this more than indicates that the addition (or not) of the word 'private' does not qualify such concepts as good or bad. Furthermore, the 204 occurrences that we have found will hardly bring us closer to a conceptual understanding of whether the idea of private was good or bad.
- 26 Horstbøll 1989, 42–3.
- 27 Horstbøll 1987, 27.
- 28 *The Royal Society for the Encouragement of Arts Manufacture and Commerce* was established in 1759 as the first of its kind in England, followed by the French *Société royale d'agriculture de la Généralité de Tours* in 1760. The purpose of the Danish-Norwegian association was to improve the methods of agricultural cultivation and thereby improve the economy. See Dybdahl 1968 and Hertel 1919–1921.
- 29 Ancher 1759, 66–7: 'Der er desuden sådanne uskyldige gerninger, som ingen sammenhæng har med staten: Samme bør være frivillige og overlades til enhvers eget behag, at der må dog være noget tilovers, hvor udi enhver er sin egen herre. Dette er endnu en levning af den første og oprindelige friheds stand, som ikke bør betages undersåtterne i den borgerlige handel, som den er af den beskaffenhed, at den udfordrer en besynderlig flid og hengivenhed, og drives alene ved forestilling af egennytte, så det er fornødent, at der tillades enhver den frihed at drive sit brug og sin næring på hvad måde han synes selv bedst og fordelagtigst. Thi i at befordre sin egen lyksalighed, ønsker ethvert menneske at gå frem efter sit eget hoved'.
- 30 For the influence of Pufendorf's jurisprudence on Adam Smith (1723–1790), see Sæther 2017, 228–51. It is noteworthy that Smith used Pufendorf's theories of value, money and trade (from *De officio* I, ch. 14) in his work, *The Wealth of Nations* (1776), for which see Haara and Lahdenranta 2018, 19–37. Smith was translated into Danish in 1779–1780.
- 31 Ancher 1759, 82: 'Enhver må være vis på, bestandig at beholde, hvad han engang lovligen har erhvervet. Det er denne vished, som opmuntrer en handlende til at vove så meget, og uden samme synes han at sætte al sin flid og møje på spil'.

- 32 Tully 1991, xiv–xxxvi; Modr 2001, 11–23; Hochstrasse 2009, 40–71.
- 33 Today, Pufendorf’s legacy has become again the subject of intensive studies, especially his influence on later writers such as John Locke (1632–1704), Christian Thomasius (1655–1728), Christian Wolff (1679–1754), Charles-Louis de Secondat Montesquieu (1689–1755), Jean-Jacques Rousseau (1712–1778), Adam Smith (1723–1790), Jeremy Bentham (1748–1832), John Stuart Mill (1806–1873) and the Founding Fathers of the United States. See Sther 2017 and Scattola 2009, 21.
- 34 Pufendorf 1991, 9.
- 35 Darwall 2000, 987.
- 36 Translated by Crull 1698. This publication was a reaction to the Edict of Nantes in 1685, and was soon followed by John Locke’s *Letter Concerning Toleration* (1689). For a general introduction to Pufendorf’s religious standpoints, see Zuruchen 2000, 779–814.
- 37 It is tempting to claim that there is a connection between religious tolerance and a defined right to an inner private ‘space’. For Pufendorf, however, *external* and *internal* only served as a strict legal demarcation in relation to human legislation, where the fundamental principle remained that only external actions could be subject to legal regulation and prosecution. Pufendorf 1991, II.13.11: ‘If we reflect on the purposes of punishment and the condition of the human race, it becomes clear that not all offences are fit to be punished by human justice. The following are exempt from human punishment: Purely internal acts, i.e. delicious thoughts of sin, greed, desire and intention without action, even if subsequent confession reveals them to others. For no harm is done to anyone by such an internal impulse; and it is in no one’s interest that anyone be punished for it.’ Pufendorf returned to this division in relation to ‘human speech and thought’. In the context of the law of obligations, the parties had (and have) a duty to disclose all necessary information when entering into a contract. Nondisclosure could (and can) be considered as fraud, but only in a strict contractual meaning: Pufendorf 1991, I.10.4: ‘But it is not always the case that my thoughts have to be shared with another. ... And so, I may rightly conceal by silence, however pressingly questioned, what the other party has no right to get from me, and which I have no obligation to reveal’. On the modern legal conditions of private information, see Schoeman 1984, 411–12.
- 38 The English translation from 1991 is used for quotation.
- 39 Pufendorf 1991, 6.
- 40 Sther 2017, 136; Haakonssen and Seidler 2016, 388.
- 41 Pufendorf 1742.
- 42 For the influence of modern natural law in Denmark-Norway, see e.g. Knudsen 2001, 58–60; Vogt 2007, 590–613; Sunde 2007.
- 43 Zimmermann 1996, 576–7. The Roman law assumption became wedded through canon law to the moral precept of faithfulness (i.e. *fides*), on which see *ibid.*, 568. Grotius blended this tradition into a natural law concept that placed special emphasis on natural freedom and on the obligational part of a promise (544). Grotius’s contract theory and its intersection between theology and law have recently been addressed in Astorri 2020, 88–107.
- 44 Zimmermann 1996, 571.
- 45 *Ibid.*, 569.

- 46 Pufendorf 1991, I.2.3: 'Obligation is commonly defined as a bond of right by which we are constrained by the necessity of making some performance. That is, obligation places a kind of bridle on our liberty'. Grotius was also concerned with the idea of rights in his *The Rights of War and Peace*, vol. II, but here the law of obligations appeared only in two chapters (ch. 11 on promises and ch. 12 on contracts).
- 47 Zimmermann 1996, 544; see also: Haakonssen and Seidler 2016, 386–7.
- 48 Pufendorf 1991, I.3.13.
- 49 By defining religion as a duty of the individual, Pufendorf removed all forms of theological normativity from natural law and civil law. Later, this secularization of jurisprudence would lead to the religious freedoms that are guaranteed in constitutions and in human rights declarations: see Sloot 2018, 106.
- 50 Duty to care remains today the legal standard of reasonable care in actions on negligence in the common law. In the civil law tradition, the legal standard for negligence is *culpa*.
- 51 Another characteristic of private law is that the parties themselves seek redress in a court when a dispute arises, as opposed to criminal law where the state is responsible for legal prosecution. There is, therefore, an additional, private perspective to legal dispute resolution in private law, which can have quite an influence on how we understand early modern private disputes. With private law, we thus have a large area of social interaction that operates outside of the state's immediate remit, because it is the parties themselves who decide to go to court. It is important to keep this in mind when dealing with private conflicts, especially since the criminal courts tend to dominate the historical legal material. However, for the conflicts that arose between private 'agents', one must consult the records from the civil courts.
- 52 Pufendorf 1991, I.13.1: 'Every man is obliged to allow everyone (except an enemy) quietly to enjoy his own property, and neither by force nor fraud attempt to spoil, steal or misappropriate it. This is why theft, robbery and similar crimes against others' property are forbidden'. John Locke is traditionally seen as the founder of the inviolability of property and of the modern political economy. Sæther 2017 shows, however, that Pufendorf was Locke's primary source (148–65). Although Locke did not always agree with Pufendorf, key elements of Locke's economic theory can be traced directly back to Pufendorf. In *Two Treatises of Government* (1690), the inspiration from Pufendorf can be found in the famous quote by Locke: 'The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another *in his life, health, liberty or possessions*', emphasis added (II.2.6).
- 53 Thomson 1984, 275. Thomson argues that the right to privacy can be defined as an analogous interpretation of the negative right to property – that is, the idea of a right to privacy stems from a negative property right (278–80).
- 54 For a thorough legal introduction to Pufendorf's approach to property rights, see Buckle 1993, 54–124; note also Bisset 2015, 541–62; and Haakonssen and Seidler 2016, 377–401.
- 55 Hobbes 1651, part I, ch. 13.
- 56 Grotius 1625, I, VIII.
- 57 Pufendorf 1991, II.5.2.
- 58 Pufendorf gave the social contract a legal 'constitutional' shape. The first step of state-formation took place when people in the state of 'nature wish[ed] to enter into a single and perpetual union ... each and every one must consent to this agreement'

- (II.6.7). Then governance was introduced by legal decree, and finally everyone made the final agreement, thereby submitting their will to the sovereign 'and devolved on him the use of their strength to the common defense' (II.6.8–9). On sociability and Pufendorf's relation to Hobbes, see Darwall 2000, 987–1025; Haakonssen and Seidler 2016, 377–401; Haara 2018; Saastamoinen 2019, 107–31; Rosello 2012, 255–79.
- 59 Pufendorf 1991, II.15.4: 'The third right is eminent domain, which means that in a national emergency sovereigns may seize and apply to public use the property of any subject which the crisis particularly requires, even if the property seized far exceeds the amount which had been fixed as his normal obligatory contribution to his country's expenses. For this reason, however, as much of the excess as possible should be refunded to him.'
- 60 Pufendorf 1991, II.11.10: 'The only ground on which citizen must bear taxes and other burdens is that these are necessary. The duty of the sovereigns in this matter is not to extract more than the necessities ... and to keep the burdens as light as possible, so that the citizens suffer as little as possible'. Not that this made much of a difference in Denmark-Norway in the seventeenth and eighteenth centuries. In the wake of absolutism, the tax-financed part of the state-budget grew significantly, and so too did military spending: see Jespersen 2016, 341–2.
- 61 Some 103 years after Pufendorf's *De officio* was published, taxation became a central justification for the American colonies' declaration of independence from the English crown, July 4 1776: '[I]t is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security'. See <https://www.archives.gov/founding-docs/declaration-transcript>. For the relation between Pufendorf and The American Declaration of Independence, see Sæther 2017, 200.
- 62 The translation of the Latin word *civitas* to mean 'state' in early modern times has been interpreted as a clear distancing from the traditional Aristotelian division of *oikos* and *polis*, on which see Becker 2004, 146–7 and Saunders 2003, 476ff.
- 63 Mührmann-Lund 2019, 407. For the concept of 'good policy', see the registration project of good policy regulation in the early modern period: Härter and Stolleis 1996 (both the Danish and Swedish legislation are registered); Härter 2010, 41–65.
- 64 Bregnsbo 1997.
- 65 The English, Danish and French translations have been compared. The English follows the Latin original. The Danish follows the French tradition, where *privatus* is translated as *particulier*.
- 66 Thomson 1984, 280.
- 67 Ibid., 281.
- 68 For an introduction to the general concept of civil society, see Walton 1983, 249–66.