

Eva Hartmann and Poul F. Kjaer (eds.): ‘The State of Authority in the Globalizing Economy: Beyond the Public/Private Distinction’

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Section I: Setting the Scene: A New Take on Public/Private Authority

Eva Hartmann (University of Cambridge) and Poul F. Kjaer (Copenhagen Business School):

THE STATUS OF AUTHORITY IN THE GLOBALIZING ECONOMY: BEYOND THE PUBLIC/PRIVATE DISTINCTION

ABSTRACT

Over the past decades, the idea that national sovereignty and the authority of the state have been increasingly challenged or even substantially eroded has been a dominant one. Economic globalization advancing a neo-liberal dis-embedding of the economy is seen as the major reason for this erosion. Concerns have increased about the negative consequences for the social fabric of societies, deprived of the strong shock absorption capacity that the welfare states had established in the time of the embedded liberalism to use a term John Ruggie coined. The concerns have also helped nationalistic movements to gain power in many high-income countries, not at least in the United States, calling for putting their economy first. Accordingly, a number of commentators have announced a return of the nation state. In this special issue, we will show that the retreat-of-the-state thesis as well as the return-of-the-state thesis shares the same shortcomings. They conflate state and authority. As a consequence, both theses underestimate important transformations of authority that have taken place since the end of the “short 20TH century,” to use Eric Hobsbawm's periodization.

With this special issue, we seek to contribute to a more nuanced analysis of the transformation of authority. The issue is the outcome of a conference that took place at the Copenhagen Business School in 2015, hosted by the research project ‘Institutional Transformation in European Political Economy: A Socio-Legal Approach’ and funded by the European Research Council.

Poul F. Kjaer (Copenhagen Business School):

FROM THE PRIVATE TO THE PUBLIC TO THE PRIVATE? HISTORICIZING THE EVOLUTION OF PUBLIC AND PRIVATE AUTHORITY

ABSTRACT

A central assumption in much contemporary scholarship is that a central shift has taken place over the course of the last four decades: a shift from a world largely centered on public authority to a world that is increasingly dominated by private authority. The central expression of this shift is seen to be a concurring move from public to private law and thus from legislation to contract as the central legal instrument structuring economic as well as other social processes.

While developments in this direction can certainly be observed, this article provides a more nuanced perspective. Outlining a long-term historical perspective, this article reconstructs the manifold and volatile dynamic between institutionalized forms of public and private authority. It does so on the basis of the argument that, in the course of this evolutionary process, the very function and meaning of both public and private authority has been fundamentally altered. This alteration implies the transformation of both dimensions into functionally limited and more specific phenomena. With this background, it becomes possible to argue that societal evolution is characterized by a dual expansion of both public and private forms of authority.

The starting point is an understanding of authority as condensed power. Asymmetric relations implying either direct or indirect forms of domination are observable throughout society and are as such an intrinsic element of all social relations and processes. Authority is, however, based on a particular institutionalization of power, typically delineated and condensed with the help of legal instruments. Under radical modern conditions, law becomes constitutive for authority to the extent that one might argue that no form of authority exists outside its legal form.

With this background, the article argues that the pre-1945 world at the local, national, and transnational level of world society was characterized by a relative dominance of private forms of authority. The process leading to state-based modern public law gaining not only a formal but also a factual capacity to structure societal processes was a century-long process: a process which implied an epic struggle aimed at undermining and eradicating alternative centers of public and private authority in society. It was, however, a first in the mid-twentieth century that an outright breakthrough of this claim and aspiration could be observed. This implied a respecification of public and private authority that remains central to our understanding of authority to this day.

Section II: Transnational Private Law

Horatia Muir Watt (Sciences Po Law School, Paris)

PRIVATE INTERNATIONAL LAW'S SHADOW CONTRIBUTION TO THE QUESTION OF INFORMAL TRANSNATIONAL AUTHORITY

ABSTRACT

This contribution attempts to approach informal transnational authority through the lens of critical private international law. It subscribes to the underlying idea within this volume, according to which the workings of the highly complex dynamic between the public and the private are cardinal to understanding contemporary global shifts in transnational authority, placing the rise of informal transnational authority at its epicenter. Expressions of private authority in the global arena take place outside formal legal discourse. Capital expanding beyond state boundaries has organized its own forms of authority, which arbitrate, enforce

and legitimize new processes and structures beyond the state. To understand the ways in which this has taken place, the methodological dimensions of private international law, which have been central to these processes, require closer scrutiny.

A. Claire Cutler (University of Victoria)

THE JUDICIALIZATION OF PRIVATE TRANSNATIONAL POWER AND AUTHORITY

ABSTRACT

This article examines the judicialization of private systems of governance that are transforming “common sense” understandings of who should govern states, societies, and political economies. The focus is on the private transnational institutions and processes in the global investment and financial regimes. These regimes contribute to the maintenance and expansion of capitalism by assisting in the management and mitigation of risk, but they also participate in the construction of the sorts of risks that require management and mitigation. In so doing, they are deeply involved in determining what requires governance, as well determining the appropriate mechanisms and manner of governance. They constitute a form of private transnational authority, performing governance functions usually attributed to states and to public authorities. In the areas of global investment and finance, private transnational experts craft the legal foundations that advance and secure the expansion of capitalism as the common sense of our time. These laws are characterized as a form of “new constitutionalism,” for they constitute both the material and ideological foundations for ordering societies and political economies under the discipline of an increasingly transnationalized market civilization. Transnational market civilization subordinates national political authorities to disciplines emanating from international investment, derivatives, and project financing agreements that function constitutionally to limit the policy and legislative autonomy of national governments, thus seriously impacting their sovereignty. However, while the areas examined reveal a complex and hybrid mix of public and private authorities that raise significant legitimacy concerns, the mix is not fixed, but is mutable and open in places to resistance and contestation, suggesting that the discipline of transnational capitalism is incomplete and might one day reflect better or “good sense.”

Section III: The Role of Expertise in Private Authority

Orr Karassin (Open University of Israel, Tel Aviv) and Oren Perez (Bar-Ilan University, Tel Aviv)

SHIFTING BETWEEN PUBLIC AND PRIVATE: THE RECONFIGURATION OF GLOBAL ENVIRONMENTAL REGULATION

ABSTRACT

Over the past two centuries, public environmental regulation (PER) has been progressively supplemented by private transnational regulation (PTR), creating a hybrid environmental

governance regime. A five-category typology is developed to describe the ways in which international and national PER interact with private forms of environmental regulation. We then analyze the policy considerations that are relevant to the design of such hybrid regimes and various forms of interaction. Next, we describe two case studies that demonstrate the diversity of interactions between PER and PTR in a single regime. The case of sustainability reporting illustrates how public law builds on the expertise developed by private organizations as gradually more reporting obligations are incorporated into public law. The case of sustainable forest management regulation is somewhat more mixed, reflecting a tendency for increased state intervention, which led to partial suppression of PTR.

Hans Krause Hansen (Copenhagen Business School)

POLICING CORRUPTION POST- AND PRE-CRIME: COLLECTIVE ACTION AND PRIVATE AUTHORITY IN THE MARITIME INDUSTRY

ABSTRACT

How are we to understand the proliferating attempts amongst transnational corporations (TNCs) at collectively reducing the risk of corruption in business operations and interactions with state officials around the world? How are these endeavors linked to transformations of public and private authority in the global political economy? Premised on the observation that corruption is globalized and the growing efforts at tackling it equally so, this article draws on the literatures on private authority, governmentality, and criminological studies to explore anti-corruption in terms of pre-crime and post-crime policing. The case of the maritime industry is analyzed, including the ways in which corruption is policed post-crime by governments and pre-crime by a collective action initiative, the Maritime Anti-Corruption Network (MACN). The paper finally discusses how the incipient collective policing of corruption undertaken by corporations nowadays intersects with changes in the organization of public and private authority. Corporate policing of corruption does not imply a simple shift from public toward private authority, but rather a growing emphasis on pre-crime interventions in a largely disaggregated, polycentric, and liquid global governance set-up, with corporations and their collective action initiatives emphasizing anticipatory logics and attempts at forestalling corruption.

Timo Walter (University of Erfurt) and Oliver Kessler (University of Erfurt)

THE PUBLIC AND ITS PROBLEMS: HOW THE EU'S CAPITAL MARKET UNION DEFINES THE BOUNDS OF LEGITIMATE KNOWLEDGE AND REDRAWS THE BOUNDARIES OF (PUBLIC) AUTHORITY

ABSTRACT

Recent years have seen increasing theoretical and practical attempts to come to terms with the strains on public authority at the level of transnational regulation and governance. For the most part, these have followed what could be called a strategy of transposition, seeking to install functional equivalents to familiar forms of nation state or Westphalian public authority. While useful for some analytical purposes, the validity of this strategy depends on the nature of public authority remaining unchanged: the same 'function' is now fulfilled by somebody

else. In this article, we argue, in contrast, that the very form of public authority has changed. We propose to rethink authority in line with current social-theoretical and sociological insights into the ways in which the public presupposes, and public authority depends on prior forms of social order and coordination. We complement our theoretical argument about the consequences of failing to account for these entanglements between knowledge, expertise, and public authority with a short case study of the European Union's recent project of constructing a Capital Market Union in the Eurozone.

Section IV: Private Authority and Digitalisation

Chris Muellerleile (Swansea University) and Susan L. Robertson (University of Cambridge)

DIGITAL WEBERIANISM: BUREAUCRACY, INFORMATION, AND THE TECHNO-RATIONALITY OF NEOLIBERAL CAPITALISM

ABSTRACT

The social infrastructures that constitute both public and private administration are increasingly entangled with digital code, big data, and algorithms. While some argue these technologies have blown apart the strictures of bureaucratic order, we see more subtle changes at work. We suggest that far from a radical rupture, in today's digitizing society, there are strong traces of the logic and techniques of Max Weber's bureau; a foundational concept in his account of the symbiotic relationship between modernity, capitalism, and social order. We suggest the manner through which these techniques have shaped contemporary systems of social administration helps explain the remarkable legitimacy digital governance has acquired. We do this by exploring how digital technologies draw from, and give new substance to, the three key principles of Weber's theory of the bureaucratic efficiency, objectivity, and rationality. We argue that neoliberalism, or the widespread economization of politics, has conditioned the digital versions of these principles, not least by subordinating social ends to technical means. At the same time we argue that digitalism engenders the privatization of authority, not least through its "elective affinity" with market logics.

Eva Hartmann (University of Cambridge)

TRANSNATIONAL PRIVATE AUTHORITY IN THE SPHERE OF EDUCATION

ABSTRACT

It seems that an ever-shorter temporal rhythm is gaining ground with the end of the "short twentieth century," challenging the modern temporal horizon. The emerging economy relies on a continuous stream of scientific and technical knowledge closely related to information technology and networks. The increasing compression of both time and space has major consequences for the governance of the economy and the setting of authoritative standards in this sphere. This paper explores the consequences for education and training and its governance, where continuing education has become crucial. It studies the setting of authoritative standards in the field of information and communication technology (ICT) training, which has become vital for the knowledge-based economy. I will show how the

standardization of these trainings by way of third-party certifiers establishes a mode of private coordination between companies, sectors, and across national borders. A closer examination of competing claims to authority in this field provides interesting insights into the enabling conditions of this mode of coordination and also brings a geopolitical dimension to the fore.

Section V: The Responsibility of Private Authority

Fenner L. Stewart (University of Calgary)

BEHIND THE CLOAK OF CORPORATE SOCIAL RESPONSIBILITY: SAFEGUARDS FOR PRIVATE PARTICIPATION WITHIN INSTITUTIONAL DESIGN

ABSTRACT

This article challenges the reader to consider what modes of governance will ensure that corporations advance collective welfare. It identifies and explores “new governance imagery,” which holds out the promise of a governance that is more “effective,” “efficient,” and “democratic.” Such imagery is woven into the arguments used to champion institutional design's reliance on corporate decision-making. The article then questions the use of corporate social responsibility rhetoric, showing how it may lure regulators to disregard valid concerns about the effects of privatization and give them false assurance that the transfer of public power to business actors will inspire them to behave as public servants.

Anna Leander (Graduate Institute of International and Development Studies, Geneva)

THE POLITICS OF LEGAL ARRANGEMENTS: THE “DUTY OF CARE,” JUSTIFYING, EXTENDING, AND PERPETUATING THE PUBLIC-IN-THE-PRIVATE FORMS OF PROTECTION

ABSTRACT

This article explores the place of formal legal arrangements in the politics surrounding the hybrid, enmeshed public-in-the-private forms of authority this special issue focuses on. It does so by analyzing the significance of one specific legal arrangement, the Duty of Care, for the politics surrounding public-in-the-private forms of protection. I show that the Duty of Care does considerable political work. It contributes to decentering, commercializing, and depoliticizing protection. In so doing, the Duty of Care is justifying this specific form of protection, defining and extending its scope, and perpetuating it. The article makes this argument by drawing both on the legal discussion about the Duty of Care and on close observation of its presence in the Security and Counterterrorism Expo trade fair. It concludes that acknowledging the politics of the Duty of Care requires shifting the focus and divisions currently organizing debates about the regulation of commercial security as well as about managerialism in international law more generally.

Section VI: Tendencies of Re-politization

Paddy Ireland (University of Bristol)

EFFICIENCY OR POWER? THE RISE OF THE SHAREHOLDER ORIENTED JOINT STOCK CORPORATION

ABSTRACT

This paper explores the attempts to depict the global rise to dominance of the shareholder-oriented joint stock corporation as largely economically determined and to portray these corporations as fundamentally “private” in nature. By analyzing the economic nature of the joint stock companies (JSCs) that emerged in growing numbers in the nineteenth century, the historical construction of a corporate legal form to accommodate them, and the very different possible futures contained within their rise (one highly “financialized,” the other increasingly “socialized”), the paper argues that special interests and power lie behind what is often dressed up as economic efficiency. Against this backdrop, the paper seeks to highlight the sharp contradiction between the continuing private appropriation of corporate surpluses and the increasingly social and transnational character of production and growing volume of public interventions, national and international, needed to protect rentier investors.

Matthias Goldmann (Goethe University Frankfurt)

PUBLIC AND PRIVATE AUTHORITY IN A GLOBAL SETTING: THE EXAMPLE OF SOVEREIGN DEBT RESTRUCTURING

ABSTRACT

This article argues that the public-private distinction is essential for safeguarding individual autonomy and democracy. As the article shows at the example of sovereign debt restructuring, global governance has blurred the distinction between public and private actors, instruments, and processes, and this causes immediate risks for human rights and democracy. This raises the question how the public-private distinction can be maintained under the structural conditions of global governance. For that purpose, the article ventures to propose a definition of publicness for global governance inspired by discourse theory. It argues that whenever a community, defined by the prevalence of communicative action, exercises authority over its members, there is an act of public authority that needs to respect standards of human rights protection and democratic self-determination. The article applies this framework to sovereign debt restructuring and identifies exercises of public authority in current sovereign debt restructuring practice, which need to, but often do not, meet these standards. The public/private distinction is thus an important tool for criticizing global governance.