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From the Private to The Public to the Private? Historicizing the Evolution of Public and Private Authority*

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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 soon 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. The implied a respecification of public and private authority that remains central to our understanding of authority to this day.

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INTRODUCTION

In recent decades, a turn to contract-based, private governance has been observed.[1] From supply chain management and self-regulatory regimes to corporate social responsibility, a considerable part of the norms guiding global exchanges is developed within transnational, private-based frameworks or through hybrid arrangements with national and international public institutions.[2] This development is furthermore seen to imply a migration of authority and power away from (democratic) nation state institutions and toward (unaccountable) transnational private regimes. In other words, a shift is being observed away from public toward private authority, and with it, a shift from public to private law and from legislation to contract.[3]

The factuality of this development can hardly be denied. But questions arise concerning the novelty of this development and the driving forces behind it. Much scholarship on private governance tends to take the era of *embedded liberalism* and the *golden age nation state*, which existed for a short period in the post-WWII North Atlantic area, as its point of departure.[4] This institutional framework might, however, have been an exception, which only gained facticity under very specific and time-limited circumstances that cannot be reproduced or brought back to life.[5]

With this background, this article reconstructs the evolution of the private/public

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[1] *See generally* GALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW (2010) (analyzing transnational law-making processes, particularly those both public and private in nature); THE POLITICS OF PRIVATE TRANSNATIONAL GOVERNANCE BY CONTRACT (A. Clair Cutler & Thomas Dietz eds., 2017) (exploring transnational governance in both politics and the economy through private contract).

[2] *See* Poul F. Kjaer, *The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law, and the Political in the Transnational Space*, 2 WIS. L. REV. 489, 506 (2010).

[3] *See generally* A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (Cambridge Stud. Int'l Rel. No. 90, 2003) (analyzing the role international economic law plays in global governance).

[4] *See* John Gerald Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG., 379 (1982).

[5] *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 202–04 (Arthur Goldhammer trans., 2014).

distinction and deciphers the kind of authority and power that underpins it. In doing so, it questions both the Westphalian state-centric narrative, which traditionally has guided large segments of legal and social scientific enquiry, and the increasingly dominating globalization narrative that tends to be based on the assumption of an ongoing reduction in the centrality of public power and authority.[6]

The distinction between private and public has existed and constantly evolved as an analytical device and ideological program since the eleventh century, but factually it has never provided an adequate description of how social processes unfold or where power and authority is located in society. A central reason for this is that law and the social sciences tend to observe society from the state out, thereby providing the basis for a notion of a state-centric society. Although objections have appeared throughout modern history, this epistemological and methodological bias remains dominant to this day.[7] The thesis advanced here is, however, that when viewed from a historical perspective, state-based public power and authority appear to be framed by private power and authority rather than the other way around. At all levels of world society (local, national, and transnational), private ordering has been a central and, in many instances, the dominant feature of societal organization.[8] But more profound than this, states have never been the sole institutional repository of political, *i.e.* public, power.[9] The demarcation of the boundaries of states vis-à-vis other segments of society has been systematically unclear and loaded with contradictions. Political power and authority has *always* been exercised and

[6] *See* SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES 225 (2006).
[7] *See generally* POUL F. KJAER, CONSTITUTIONALISM IN THE GLOBAL REALM – A SOCIOLOGICAL APPROACH (2014) (providing a sociological approach to address national and transnational forms of constitutional ordering).
[8] *See generally* Gunther Teubner, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012) (developing a theory of societal constitutions in the global sphere).
[9] *See* Poul F. Kjaer, *Context Construction Through Competition: The Prerogative of Public Power, Intermediary Institutions, and the Expansion of Statehood Through Competition*, 16 DISTINKTION: JOURNAL OF SOCIAL THEORY 146 (2015).

institutionally stabilized within conglomerate frameworks consisting of a plethora of partially overlapping and partially conflictual institutional arrangements operating across the formal distinction between private and public. An adequate framework for the description of the exercise of political power and authority, which may serve as a basis for normatively informed endeavors in relation to institutional design and policy, would therefore have to cut across the private/public distinction.

I. AUTHORITY AS CONDENSED POWER

Since the Old Testament, the founding text of the Western World, authority has been about *obedience*. Abraham followed God's command and prepared Isaac, his only son, as a sacrifice and was rewarded for his efforts.[10] Max Weber's tripartite understanding of authority as charismatic, traditional, or legal follows in the footsteps of the Bible. According to Weber, the three types of authority are functional equivalents.[11] The objective inherent to these three types of authority remains the same, as expressed through his concept of power, namely the imposition of one's will against the will of another within a social relationship.[12] Authority and dominance (*Herrschaft*) thereby becomes two sides of the same coin.

This view still dominates mainstream legal and social scientific understandings of authority. When acknowledging that authority, factually is about power, it is however possible to argue that Weber and his followers underestimate the structural transformation that the phenomenon of power has undergone in the cause of the evolution of modern society.[13] While traditionally power has been about domination, its fundamental characteristic was arbitrariness (*Wilkür*). Power was, in its origin, contingent and non-calculable and could be exercised without

[10] *See Genesis* 22:14.
[11] *See* MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT: GRUNDRISS DER VERSTEHENDEN SOZIOLOGIE 122 (5th ed. 1972).
[12] *Id*. at. 22.
[13] See, however, the contribution of Eva Hartmann to this special issue.

justification on the basis of subjective will.[14] At the dawn of mankind, no distinction, either conceptually or factually, existed between power and violence.[15] Within the empires of the axial age, however, this changed as power became transcendentally and mythologically justified.[16] As bemoaned by Carl Schmitt and celebrated by others, the history of modernity from the tenth and eleventh century Investiture Conflict between the Pope and the Emperor is nonetheless the history of the gradual replacement of transcendental mythological power with a different type of power.[17] This development has also been described as a move from despotic to infrastructural power.[18]

As pointed out by Michel Foucault and others, power is intrinsic to all social relationships.[19] From such a perspective, the differentiation between political and non-political power, and with it the differentiation between private and public power, evaporates as power becomes 'total.'[20] However, the Foucaultian claim concerning the totality of power implies that power ceases to be a useful analytical category as its specificity disappears. In contrast to the Foucaultian perspective, one might argue that the specificity of political power under *modern conditions* is constituted by the following characteristics:[21]

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[14] *See* Jean Clam, *What is Modern Power?*, *in* LUHMAN ON LAW AND POLITICS: CRITICAL APPRAISALS AND APPLICATIONS 145, 154 (Michael King & Chris Thornbill eds., 2006).
[15] *See* HANNAH ARENDT, ON VIOLENCE 35 (1970).
[16] *See* KARL JASPERS, THE ORIGIN AND GOAL OF HISTORY 2–3 (Michael Bullock trans., Routledge 2010).
[17] *See* HAUKE BRUNKHORST, CRITICAL THEORY OF LEGAL REVOLUTIONS: EVOLUTIONARY PERSPECTIVES 120 (Darrow Schecter series ed., 2014).
[18] *See* Michael Mann, *The Autonomous Power of the State: Its Origins, Mechanisms and Results*, 25 EUR. J. SOC. 185, 188–89 (1984).
[19] This is de facto also recognized by Weber as he speaks of power in general terms "within a social relationship" (my translation, PFK). *See* WEBER, *supra* note 11, at 28.
[20] *See generally* MICHEL FOUCAULT, POWER: ESSENTIAL WORKS OF FOUCAULT 1954–1984 (James D. Faubion ed., Robert Hurley et al. trans., vol. 3, 2000) (discussing the concept of the elimination in the differences between private and public power as power becomes total).
[21] For a similar yet different list of characteristics of public power, see Poul F. Kjaer, *European Crises of Legally-constituted Public Power: From the 'Law of Corporatism' to the 'Law of Governance*, 23 EUR. L. J. 417, 419-20 (2017).

1. Political power is based on a *claim* to authority and autonomy.[22] A political unit constitutes *itself* without recourse to external transcendental sources by claiming a *right* to define its own boundaries and criteria of inclusion.[23] A right that, in relation to states, traditionally has been associated with the concept of sovereignty. The *act of claiming* furthermore implies that political power is characterized by *publicness*.[24]

2. Political power is abstract and non-paternalistic. It does not relate to specific individuals but to generalized social processes. It is a generalized social medium, which is *intended* to be applied across the board within a social order, from Paris to Corsica, from Washington, D.C. to Alaska, and from the Vatican to the remotest congregation.[25]

3. Political power is *non-substantialist* and merely *coordinating* to the extent that power cannot grasp or define the content of the social processes it is oriented against but only provides a general framing of such social processes. Modern political power does not, for example, possess the capacity to evaluate the validity of a scientific argument or the capability to estimate the profit prospects of a business transaction. Neither does it possess the aptitude to grasp the depth of a religious sentiment; the competence to provide an adequate diagnosis of a patient's health; nor the ability to define the essence of good art. Political power is, in other words, *structurally constrained* in a manner which makes it

[22] KJAER, *supra* note 7, at 70.
[23] Boundaries should here be understood as boundaries of meaning and not as territorial borders, though the former might be symbolically reflected in the latter. *See* Niklas Luhmann, *Sinn als Grundbegriff der Soziologie*, *in* THEORIE DER GESELLSCHAFT ODER SOZILTECHNOLOGIE 25 (Jürgen Habermas & Niklas Luhmann eds., 1971).
[24] KJAER, *supra* note 7.
[25] *See generally* NIKLAS LUHMAN, TRUST AND POWER 167–72 (1979) (discussing the relationship between power and society).

functionally limited since only a limited segment of the social world is *directly controllable* through political power. Confined by its own limitations, the purpose of power therefore becomes power itself.[26]

4. Political power is *formalized*. The content of political power and its structure is provided by formal organization and as such, its *claim* to authority is vested in formal organization.[27]

5. Political power is *proceduralized* and as such *temporalized*. Power is reproduced through a never-ending stream of formal decisions and as such it evades fixation as well as any claim to transcendentality.[28]

6. Political power is, as also apparent from points three and four, constituted through law, as it is through its legal framing that power is *condensed and generalized* and claims to authority are *justified*. Law provides the distinction between political and non-political power and, as such, it is law that constitutes the political as a specific realm of society and not the political, which constitutes the law. In essence, the study of the political is therefore the study of law. A type of law, which, under modern conditions, is non-patrimonial, substituting privilege with a dual focus on generality and specificity, carrying *in itself* the means of changing itself.[29]

The evolution of political power in modernity is, in other words, the history of its "self-

[26] *Id.*
[27] *See generally* Franz L. Neumann, *The Change in the Function of Law in Modern Society*, *in* THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER 101 (William E. Scheuerman ed., 1996) (discussing how the role of law has changed over time).
[28] *See* Rudolf Wiethölter, *Proceduralization of the Category of Law*, *in* CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 501, 504, 509–10 (Christian Joerges & David M. Trubek eds., 1989).
[29] Neumann, *supra* note 27, at 106–07.

emptying."[30] This is expressed through the increased de-substantialization of power through increased abstractness as well as its increased substitution by law.[31] The move from despotic to infrastructural power is not only a move from arbitrary to increasingly calculable power but also a move toward a world where the boundaries of political power are defined by law: Beyond legally-vested sovereignty there is no power, only violence.[32] Under modern conditions, political authority is therefore to be understood as legally condensed power.[33]

II. THE PRIVATE/PUBLIC DISTINCTION AS AN ANALYTICAL DEVICE

It is on the basis of this evolutionary trajectory and fundamental *transformation* of power that the corresponding evolution of the binary contradiction (*Gegensatzpaar*)[34] and mutually constitutive distinction between private and public authority has to be seen. When the private/public distinction is looked upon as an analytical device, most telling is the importance granted to the distinction. The distinction has been considered central to Western political and legal thought[35] and its institutionalization into social praxis as nothing less than the starting point of modernity.[36] Furthermore, within political economy and international law, it has been regarded as an analytical distinction that emerged in the late eighteenth and the early nineteenth centuries. A distinction which has been deployed as one of the most central techniques in order

[30] Clam, *supra* note 14, at 154.
[31] *See generally* Martin Loughlin, *What is Constitutionalisation?*, *in* THE TWILIGHT OF CONSTITUTIONALISM? 47 (Petra Dobner & Martin Loughlin eds., 2010) (discussing the movements in government and power that gave rise to the idea of constitutionalisation).
[32] *See generally* ARENDT, *supra* note 15 (discussing the relatedness of violence and society); BRUNKHORST, *supra* note 17 (discussing that power struggles affect legitimacy).
[33] For a more elaborated perspective on this, see Kjaer, *supra* note 21.
[34] For the logical implications of the Hegelian term binary contradiction, see Poul Kjaer, *Systems in Context: On the Outcome of the Habermas/Luhmann-Debate*, ANCILLA IURIS 66, 72 (2006).
[35] *See generally* Peer Haldén, *Fundamental but Not Eternal: The Public–Private Distinction, from Normative Project to Cognitive Grid in Western Political Thought*, 24 SMALL WARS & INSURGENCIES 211 (2013) (analyzing the three strands of thought regarding the private/public distinction); Duncan Kennedy: *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (discussing various arguments regarding the private/public distinction).
[36] *See generally* HAROLD J. BERMAN, LAW AND REVOLUTION, VOLUME I: THE FORMATION OF WESTERN LEGAL TRADITION (1990) (discussing the development of law in Europe); BRUNKHORST, *supra* note 17 (discussing the stability of modern society through law).

to adjudicate rights and obligations, just as it, both critically and affirmatively, has been considered a tool used to promote specific ideological programs.[37]

However, the political economy and private law perspective is somewhat reductionist, as it is based on the assumption that the distinction between politics in the state form and the economy is the dominating distinction which society rests upon.[38] The private/public distinction emerged as a result of the eleventh and twelfth century Investiture Contest.[39] This contest set out the course for the establishment of an autonomous legal order of the Church, which was legally constructed as the Holy See and recognized as independent of emperors, kings, and feudal lords.[40] The outcome of the contest was the establishment of the sphere of religion as a specific legally reconstructed private social realm resting on its own sources of law and authority.[41] This did not, as pointed out by Donahue Jr., amount to the constitution of a private law regime in the modern sense because the substance of the contest was concerned with issues that today would fall under areas such as administrative law (for example in relation to the appointment of bishops); constitutional law (in relation to the division of competences between the Pope and the Emperor); or criminal law (in relation to the selling of religious offices through simony).[42] But it did amount to the recognition that autonomous and legally constituted, nonpublic, normative orders can operate outside the realm of, in today's vocabulary, state power. The Investiture

[37] *See generally* A. Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4 REV. INT'L POL. ECON. 261 (1997) (discussing the private/public distinction in international law as an analytical construct); Gerald Turkel, *The Public/Private Distinction: Approaches to the Critique of Legal Ideology*, 22 L. & SOC'Y REV. 801 (1988) (applying Marx's critique to the public and private distinction in application to contemporary approaches to the distinction in legal studies).
[38] KJAER, *supra* note 9.
[39] Principles of *ius publicum* and *ius privatus* could also be found in Roman law but not in the functionally differentiated form which emerged after the Investiture Conflict. *See* BRUNKHORST, *supra* note 17.
[40] BERMAN, *supra* note 36; BRUNKHORST, *supra* note 17, at 92.
[41] For more on this, see Poul F. Kjaer, *Claim-making and Parallel Universes: The Legal Pluralism of Church, State and Empire in Europe, in HANDBOOK ON EU LEGAL PLURALISM*, Chapter 2, forthcoming (Gareth Davies & Matej Avbelj eds., 2018).
[42] Charles Donahue Jr., *Private Law Without the State and During Its Formation*, 56 AM. J. COMP. L. 541, 546 (2008).

Contest, therefore, not only marked the birth of an independent (functional differentiated) religious legal order but also the establishment and acknowledgment of the principle that states are not the only legally constituted forms of autonomous normative ordering. From FIFA[43] to Walmart,[44] the Investiture Contest therefore remains central to our contemporary understanding of the possibility of autonomous ordering beyond the state.

But not only was the concept of autonomous "non-state" normative orders constituted in this process, the core element of what eventually became the central characteristic of modern state-based political orders also emerged through this process as the recognition of autonomy was a two-way street.[45] The Pope, as well as the Emperor, gained autonomy, thereby providing the basis for subsequent claims to sovereignty by worldly powers in the wake of the reformation.[46] In short, the evolutionary process, eventually leading to the institutionalization of the fundamental distinction through which modern states are constituted and the distinction between the state and the rest of society, was also initiated through the Investiture Conflict.[47]

The Investiture Conflict circulated around the religion/politics distinction and, as such, this nexus became the formative dimension of early modern states in Europe.[48] The early modern state, which might also be labeled the Hobbesian state, emerged as a reaction to religious wars, and its *raison d'être* was the expulsion of religion from the emerging public realm. The increased differentiation and automatization of a specific social autonomous sphere of public power within

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[43] *See generally* Ken Foster, *Is There a Global Sports Law?*, 2 ENT. L. 1 (2003) (discussing the conflict between international sports laws and global sports laws with the other as well as national laws).
[44] *See generally* Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739 (2007) (discussing the role of Wal-Mart in the emergence of non-governmental agencies influencing traditional legal systems).
[45] For more on this, see KJAER, *supra* note 41.
[46] *See generally* HAROLD J. BERMAN, LAW AND REVOLUTION, VOLUME II: THE IMPACT OF THE PROTESTANT REFORMATION ON THE WESTERN LEGAL TRADITION (2003) (discussing the impact of the German Reformation and the English Revolution on the development of law in Germany, England, and Europe).
[47] KJAER, *supra* note 41.
[48] *Id.*

the framework of the emerging modern state was thus, in its core, not oriented toward economic but rather against religious processes.[49] The religious universe from which the modern states emerged served as the central source of organizational structure as well as legitimizing mythology. It is therefore hardly surprising that the Hobbesian state remained based on a holistic notion of "body politic."[50]

This started to change with the breakthrough of modernity in the époque of the Atlantic revolutions, including the American and French, which unfolded in Europe and North and South America from the late eighteenth century onward. This development marked a switch from the Hobbesian to the Hegelian state. A stronger distinction between private and public realms, most notably enshrined in the emergence of private rights such as property rights, had started to emerge in England from the seventeenth century onward.[51] Until the end of the eighteenth century, the vast majority of Europe, however, largely maintained a conglomerate structure constituted through a plethora of corporate bodies, which could not be easily assigned to one or the other side of the private/public distinction. It was this organizational setup that formally came to an end with the breakthrough of modernity. The fundamental novelty of the French Revolution, in particular, was its break with the corporation or corporate bodies as the foundation of societal organization, from trade, crafts, and industry to the church and the state itself.[52]

The arrival of modernity implied, among many other things, an internal and an external

[49] *See* Kjaer, *supra* note 9.
[50] *See generally* ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY (1997) (tracing the development of political theology to the Middle Ages).
[51] Traces of this distinction can furthermore be traced back to the Medieval Times. It was first at a quite late stage however that did the use of legally enshrined rights become a central instrument introducing filters between the public and the private thereby legally constituting a specific political realm. *See* CHRIS THORNHILL, A SOCIOLOGY OF CONSTITUTIONS: CONSTITUTIONS AND STATE LEGITIMACY IN HISTORICAL-SOCIOLOGICAL PERSPECTIVE (Chris Arup et al. series eds., 2011).
[52] *See generally* Liana Vardi, *The Abolition of the Guilds During the French Revolution*, 15 FRENCH HIST. STUD. 704 (1988) (discussing the rise and fall of the guild system during the French Revolution and why the guild system became obsolete economically).

differentiation of the state. Internally, as already empirically observed and conceptualized by Charles-Louis de S. Montesquieu and later Immanuel Kant, the state was divided into branches.[53] Its central organizational component further shifted from corporate bodies to a new type of modern, formal organization based on positive law and non-patrimonial principles of authority.[54] This change implied a switch from a static to a linear, and therefore dynamic, concept of time,[55] transforming states into entities characterized by constant change and reform.[56] This move to modern organization, epitomized by Weber, was already outlined in detail by Georg W. F. Hegel in the *Philosophy of Right* some one hundred years before Weber developed his theory of bureaucracy.[57] Hegel, in addition, codified the dual external differentiation of the state: First, the institutionalization of the state/society distinction, essentially reduced the state to one of the three segments of society next to the family and civil society (with the latter factually conceived of as equaling the market).[58] Secondly, through the principle that a state is a state which is recognized as a state by another state. This made the phenomenon of the modern state both a universal and, in its concreteness, a particularistic entity.[59] This move to particularism, breaking the Universalist and transcendental claims, which remained at the center of state formation in Europe until the dissolution of the Holy Roman Empire in 1806,[60] provided the basis and functional need

[53] *See* IMMANUEL KANT, DIE METAPHYSIK DER SITTEN §§ 45–49 (Königsberg, F. Nicolovius, 1803) (1797); MONTESQUIEU, DE L'ESPRIT DES LOIS, I (Éditions Gallimard, 1993) (1748).
[54] *See* Max Weber, *Bureaucracy*, *in* WEBER'S RATIONALISM AND MODERN SOCIETY 114 (Tony Waters & Dagmar Waters, eds. & trans., 2015).
[55] *See generally* REINHART KOSELLECK, BEGRIFFSGESCHICHTEN: STUDIEN ZUR SEMANTIK UND PRAGMATIK DER POLITISCHEN UND SOZIALEN SPRACHE (Suhrkamp, 2006); ALEXIS DE TOCQUEVILLE, DE LA DÉMOCRATIE EN AMÉRIQUE (Garnier-Flammarion, 1981) (1835).
[56] IMMANUEL KANT, KRITIK DER URTEILSKRAFT § 65 (Felix Meiner Verlag GmbH, 2001) (1790).
[57] *See* GEORG WILHELM FRIEDRICH HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS § 277 (Felix Meiner Verlag GmbH, 1911) (1821).
[58] *See id.*
[59] *Id.*
[60] But at the same time, the torch of transcendental universalism was picked up and carried on until 1918 in so far as the Austrian-Hungarian Empire, the First and the Second French Empires, the German *Reich* of 1871, the Osman and Russian empires all in different ways considered themselves successors to the heritage of either the Western or the Eastern Roman empire. *See* BRUNKHORST, *supra* note 17.

for the emergence of the modern versions of not only public but also private international law.

The understanding of the private/public distinction, which has guided both legal and social scientific as well as political and ideological discourse in the last 200 years, is derived from this setup. Both liberal and republican theories of law and democracy, either affirmatively or with a critical touch vis-à-vis private autonomy, have circled around the question of where the appropriate delineation between public and private should be and the question of whether public law should and could be considered supreme vis-à-vis private law.[61] Marxist inspired approaches have, furthermore, emphasized the function of the distinction as an analytical construct aimed at providing ideological support for capitalist reproduction and dominance.[62]

III. THE PRIVATE FRAMING OF PUBLIC POWER

The dominating trait of scholarship on the private/public distinction over the last four decades assumes that the version of private/public distinction, which as outlined above was instigated in the wake of the Atlantic Revolutions, has been "in decline"[63] or "becoming increasingly difficult to sustain"[64] in the course of the last four decades. At the national level, the "turn to governance" is said to have implied a shift from government to decentered and hybrid forms of governance. This "turn to governance" transcends the private/public divide,[65] just as the emergence of transnational governance is said to have fundamentally altered the way societal processes are regulated. This is, for example, through a switch toward an increased reliance on

[61] See the contribution of Matthias Goldmann to this special issue. Matthias Goldmann, *Public and Private Authority in a Global Setting: The Example of Sovereign Debt Restructuring* 25 IND. J. GLOBAL LEGAL STUD. 1, (2018).
[62] See the contribution of Claire Cutler to this special issue. A. Claire Cutler, *The Judicialization of Private Transnational Power and Authority* 25 IND. J. GLOBAL LEGAL STUD. 1, (2018); *see also* Cutler, *supra* note 37; Turkel, *supra* note 37.
[63] Kennedy, *supra* note 35, at 1349; Cutler, *supra* note 37, at 262.
[64] CUTLER, *supra* note 3, at 2.
[65] *See* R.A.W. RHODES, UNDERSTANDING GOVERNANCE (1997); R.A.W. Rhodes, *The Hollowing out of the State: The Changing Nature of the Public Service in Britain*, 65 POL. Q. 138 (1994); R.A.W. Rhodes, *The New Governance: Governing Without Government*, 44 POL. STUD. 652 (1996); Gerry Stoker, *Governance as Theory. Five Propositions*, 50 INT'L SOC. SCI. J. 17 (1998).

self-regulation and legal ring-fencing of private activities from public intervention.[66]

This narrative however rests on a simplified understanding of the actual social practices associated with the reproduction of the private/public distinction. Most work on the private/public distinction rests on the narrative of a Westphalian state-centric world, which once existed but now has either ceased to exist or has come under sustained pressure and, as such, has been increasingly eroded. Turning from the private/public distinction as an analytical device and to its actual evolutionary unfolding, a more complex picture however emerges. We live in a world society.[67] But in contrast to what we can learn from public law textbooks and from mainstream political science and international relations scholarship, world society is not just consisting of a world of states. The Westphalian world has always been a mere segment of the world. Traditionally this insight has, through a mixture of methodological blindness and deliberate conceptual engineering, been conceptually carved out of law and the social sciences, thereby allowing these disciplines to operate *as if* the world only consisted of states.[68] Going beyond state-centric reductionism, three different organizing logics of social organization can be observed in world society with each of them related to entangled layers of institutional reproduction: local, national, and transnational:[69]

A. *Local*:

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[66] *See generally* DANNY NICOL, THE CONSTITUTIONAL PROTECTION OF CAPITALISM (2010) (arguing that the government would be unable to nationalize major industries due to current transnationally imposed constitutional restraints).

[67] *See generally* Niklas Luhmann, *Die Weltgesellschaft*, 57 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 1 (1971) (discussing the world society).

[68] *See generally* DANIEL CHERNILLO, A SOCIAL THEORY OF THE NATION–STATE: THE POLITICAL FORM OF MODERNITY BEYOND METHODOLOGICAL NATIONALISM (2007) (discussing the Nation-State Theory); Daniel Chernillo, *Social Theory's Methodological Nationalism: Myth and Reality*, 9 EUR. J. SOC. THEORY, 5 (2006) (discussing theories and critiques concerning methodological nationalism); Jan Klabbers, *Of Round Pegs and Square Holes: International Law and the Private Sector*, *in* REGULATORY HYBRIDIZATION IN THE TRANSNATIONAL SPHERE 29 (Paulius Jurčys et al. eds., 2013); Michael Zürn, *Politik in der postnationalen Konstellation Über das Elend des methodologischen Nationalismus*, *in* POLITIK IN EINER ENTGRENZTEN WELT 21, at 181 **(**Christine Landfried ed., 2001).

[69] *See* SASSEN, *supra* note 6; TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015).

The emergence of the Hobbesian state in seventeenth century England is often seen as the central move toward a modern, centralized, and territorially delineated state-centric society resting on an integrated concept of sovereignty.[70] Directions toward the emergence of this sort of statehood were a protracted affair. Although moves toward a similar centralization of statehood also could be observed in France, the Netherlands, and in Scandinavia, this happened in a far less sustained and institutionally stable form than in England.[71] Moreover, in the rest of Europe, the dominating form of statehood until 1918 was the imperial one. It was first with the implosion of the multi-national Austria-Hungarian, German, Osman, and Russian empires, which all were characterized by institutionally disperse, multilevel forms for the exercise of power, that modern statehood became the paradigmatic form of political organization in Europe. But even in relation to states, such as France and Spain, which obtained relatively clear territorial demarcations vis-à-vis other states at an early stage, the core trait was that central power remained engaged in lateral relations with other centers of authority, vested within the nobility, the Church, and guilds throughout the early modern period.[72] Formally, this came to an end with the French revolution but factually this dispersed setup continued to be a central feature of even the most advanced parts of Europe throughout the nineteenth and early twentieth centuries.[73] The attempt of the emerging modern states to establish coherent and unitary societies based on a legally codified and singular set of norms did not gain reality "on the ground" outside European capitals before some one hundred years after the Atlantic Revolutions. Eugen Erlich's study of the parallel universes of local custom and formalized state law in Bukovina is a paradigm case for how both the social reality of individuals and the actual integration of society, to a large extent, if not

[70] *See* THORNHILL, *supra* note 51, at 152.
[71] *Id.*
[72] *Id.*
[73] *See* ARNO J. MAYER, THE PERSISTENCE OF THE OLD REGIME: EUROPE TO THE GREAT WAR 102–03 (Verso Books, 2d ed. 2010) (1982).

primarily, continued to rest on local norms and locally embedded forms of sanctions.[74] In a similar vein, the transformation of rural peasant populations into nation-state citizens, which not just formally but also substantially could be considered subjects of the state, did not begin to happen until the end of the nineteenth century.[75] The emerging modern states had a localistic and 'private' underbelly that evaded modern concepts of law and the political. The modern state-centric version of the private/public distinction accordingly had little substantial relevance for the concrete organization of the life of the majority of Europeans before the twentieth century.

Accordingly, the central conflicts and challenges of the emergent modern states were center/periphery conflicts rather than class-driven conflicts. The core challenge of the emergent modern states was to counter local and particularistic defiance of centralized power. The emerging modern states consistently struggled to project power from the capitals and out in the remotest corners of the territories they claimed supremacy over. Even today, this remains a central issue within considerable segments of Europe, such as in Italy, Spain, and throughout the Balkans. If one goes beyond Europe and the rest of the Western world, the dominance of localism remains manifest and central today. The overwhelming bulk of the world's population lives in areas of the world, most notably in Africa, Asia, and Latin America, which remain dominated by localistic modes of social organization. In the majority of the world, formal types of law and politics, as embodied in the private/public distinction, only serve as a thin layer of varnish covering up very resistant modes of localistic societal organization.[76] The Hegelian idea of the state as "the march of God through the World" ("*Der Gang Gottes in der Welt*"),[77]

[74] *See* EUGEN EHRLICH, GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS (1929) (describing how law is a combination of historical precedent and living law from current social norms).
[75] *See* EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE 1870–1914, at 241 (1976).
[76] *See* Haldén, *supra* note 35, at 218.
[77] HEGEL, *supra* note 57, § 258.

provides the foundation for the Westphalian worldview in the sense that the state is seen as capable of codifying society in its entirety and capable of reconstructing society in its own image. This phenomenon has, however, only gained factual realization within a small segment of the world—in North Western Europe, in North America, and in a few other places. This is also testified by the fact that modern statehood did not become a global phenomenon before the 1960s in the wake of decolonization.

B. *National*:

In most parts of the world, modern states sail on a sea of localistic 'private' orders factually limiting the reach of state power. But even in the parts of the world where modern statehood has manifested itself more profoundly, the modern state never gained the purity and clear demarcations that standard legal and social scholarship assumes are in place. Modern statehood emerged in a protracted manner from *within* the already existing feudal setups, which core characteristic was their foundation in *private status*.[78]

The United Kingdom is the standard example of an entangled order where the privilege-based feudal order of the kings and lords and the order of the modern state, characterized by modern modes of bureaucratic organization, representative democracy, and the rights-based rule of law relying on general principles, operated hand in hand in an integrated manner for centuries. The latter dimension only gradually emerged and in a slow-motion process marginalized the former dimension, step-by-step emptying it from its material content while formally maintaining the shell provided by the preceding feudal order.[79]

Similar, although often more volatile, processes could be observed throughout Europe since conglomerate frameworks characterized by entangled feudal and modern modes of

[78] *See* THORNHILL, *supra* note 51, at 86.
[79] *Id.* at 40-54.

organization remained the central trademark. The German *Reich* of 1871, for example, remained a conglomerate structure of twenty-seven kingdoms, principalities, grand-duchies, duchies, principalities, free cities, and imperial territories. The constitutional setup meant that formal power was skewed toward the rural-based nobility, which to a large extent was capable of maintaining its autonomy and privilege-based feudal prerogatives. Both from a constitutional perspective and in terms of political praxis, the German *Reich* remained a semi-private structure characterized by a factual absence of clear-cut demarcations between the private and the public. As such, the German state conglomerate remained characterized by a limited degree of systemic autonomy since no clear-cut and institutionalized sphere of public power and authority existed.[80] As noted by Franz Neumann in 1933, Germany had, in fact, never obtained the feature of a unified and singular state-centric society.[81] The German setup was characteristic for how state and society relations unfolded and were institutionally stabilized elsewhere in Europe, for example in the Austrian-Hungarian Empire, Italy, the Osman Empire, Russia, and Spain. As such, Germany did not take a "*Sonderweg*" (special path), but rather represented the "normality" of how state/non-state relations were institutionalized and unfolded in Europe at the time.[82] Or differently expressed: Kant's argument that a modern state cannot be a *patrimonium*, a private property, was only a partial factual reality in nineteenth century Europe.[83]

This continued encroachment of private status-based power on state organization manifested itself in both Europe and the United States through private individuals' continued practice of purchasing public office and the widespread understanding of public office as private

[80] *See* Kjaer, *supra* note 9, at 148.
[81] Franz L. Neumann, *The Decay of German Democracy*, *in* THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER 29, 29 (William E. Scheuerman ed., 1996).
[82] Chris Thornhill, *The Constitutionalization of Labour Law and the Crisis of National Democracy*, *in* CRITICAL THEORIES OF CRISIS IN EUROPE: FROM WEIMAR TO THE EURO 89, 99 (Poul F. Kjaer & Niklas Olsen eds., 2016).
[83] *See* IMMANUEL KANT, ZUM EWIGEN FRIEDEN 25 (Otfried Höffe ed., Akademie Verlag GmbH 1995) (1795).

property.[84] In relation to economic reproduction guilds and other types of intermediary associations, exercising public functions in relation to policing, education, product, and labor regulation were formally abolished in France during the revolution of 1789, as well as in the areas occupied by revolutionary France. But rather than disappearing, they underwent consecutive rounds of transformations and were rebranded as *syndicats* or *chambres syndicales*.[85] Although being increasingly marginalized in a gradual process spanning most of the nineteenth century, they never fully disappeared, just as calls for the formal reinstallment of guilds was a central element of political discourse throughout the period.[86] In other parts of Europe, such as Germany, Italy, and Spain, this development came even later.[87] The hybrid structure of institutionalized power, as a phenomenon that was resting on amalgamations of state structures and dense private frameworks, which factually and often formally exercised public functions, was the normality of nineteenth century Europe.

In the context of the rapid urbanization, industrialization, and internationalization processes of the latter half of the nineteenth century, the feudal trademarks increasingly vanished, but the amalgamations and hybridity reappeared in new forms as soon as the old disappeared. Industrial self-regulation was a widespread phenomenon and the boundaries between state and 'non-state' entities in relation to everything from railways and water supply to telecommunication remained notoriously difficult to pin down.[88] In contrast to the widespread liberalist rhetoric of the period, cartelization remained a central feature of economic

[84] *See* Haldén, *supra* note 35, at 216; Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PENN. L. REV. 1423, 1424 (1982); William E. Nelson, *Officeholding and Powerwielding: An Analysis of the Relationship Between Structure and Style in American Administrative History*, 10 L. & SOC'Y REV. 187, 194 (1976).
[85] *See* Michael David Sibalis, *Corporatism After the Corporations: The Debate on Restoring the Guilds Under Napoleon I and the Restoration*, 15 FRENCH HIST. STUD. 718, 725–26 (1988).
[86] *See* EMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY, at xlviii (trans. W.D. Halls, 1984) (1893).
[87] *See* KATHLEEN THELEN, HOW INSTITUTIONS EVOLVE: THE POLITICAL ECONOMY OF SKILLS IN GERMANY, BRITAIN, THE UNITED STATES, AND JAPAN 51 (2004).
[88] *See* PETER COLLIN ET AL., SELBSTREGULIERUNG IM I9. JAHRHUNDERT – ZWISCHEN AUTONOMIE UND STAALICHEN STEUERUNGS – ANSPRÜCHEN (Peter Collin et al. eds., 2011).

organization. Cartels were constituted and operated independently from state power but at times were instigated by the states. In a similar vein, industrial organization remained based on highly patrimonial traits, just as the timid welfare reforms instigated first in Germany and later on elsewhere in Europe from the late nineteenth century onward were characterized by strong amalgamations between patrimonial, company internal, and generalized state-based frameworks. While the discourse of the era was predominantly liberalist, its social organization—especially outside the Anglo-American world—was dominated by other tendencies. Nineteenth century liberalism was more of an aspiration than a reality, as the feudal setups turned out to be extremely persistent. The world is not as modern as we tend to think, and the liberalism versus socialism conflict, which retrospectively has been seen as the central dividing line of modernity, has remained an epiphenomenon unfolding on top of a far more profound conflict between feudal and modern modes of societal organization.

This did not change after World War I. The interwar period became characterized by a profound radicalization of political discourse through a turn to various kinds of corporatist ideologies, which all advanced the idea of dissolution of the society/state and private/public distinctions that are at the heart of liberal thought.[89] Both interwar Europe, and due to colonialism thereby also the majority of the rest of world, and Latin America succumbed to corporatist ideas and practice. This was the case from Argentina and Brazil to Austria, Germany and Italy, throughout Eastern and Central Europe, and on the Iberian Peninsula. In the interwar period, the term corporatism was as popular as the term governance is today, and only a handful of states withstood the corporatist wave.[90] Corporatism emerged in totalitarianism, authoritarianism, and populist variants, but the dissolution of the foundational distinctions,

[89] *See* Kjaer, *supra* note 9, at 160.
[90] *See generally* MIHAÏL MANOÏLESCO, LE SIÈCLE DU CORPORATISME: DOCTRINE DU CORPORATISME INTÉGRAL ET PUR (Felix Alcan 1934) (discussing the role of corporatism in the world).

mainly through a move to cartelized economies, commonly implied a factual (re)privatization of state-based political power.[91]

C. *Transnational*:

The early modern states emerged in conjunction with the emergence of overseas colonial empires. After the Portuguese and Spanish beginnings, the Netherlands and England were the first states that gained features which we today associate with modern statehood.[92] In both cases this happened in conjunction with the establishment of vast overseas colonial empires. Thus, the national and the transnational are *co-original*, in so far as the institutionalization of modern versions of national and transnational ordering emerged and expanded hand in hand. The states, which underwent the greatest leaps toward modern statehood, were those which were most closely linked to and integrated with transnational frameworks, thereby indicating that transnational ordering is as constitutive for national ordering as the other way around. The protracted expansion of modern statehood from one or two states in the early eighteenth century to a bit more than a handful in the early nineteenth century and to the globalization of modern statehood in the mid-twentieth century was accompanied by and reinforced by consecutive waves of expansionist transformations of transnational ordering. The private charted companies were the dominating framework in the early modern Hobbesian period and were from the 1830s onward only gradually replaced by state-based colonialism. The *Companhia de Moçambique*, for example, continued its activities until 1972, just as the late nineteenth century Congo Free State was classified as the private property of Leopold II.[93]

State-based colonialism, therefore, only lasted a short period before, beginning with the

[91] *See generally* Poul F. Kjaer, *From the Crisis of Corporatism to the Crisis of Governance*, *in* CRITICAL THEORIES OF CRISIS IN EUROPE: FROM WEIMAR TO THE EURO 125 (Poul F. Kjaer & Niklas Olsen eds., 2016) (discussing the rise of corporatism).
[92] THORNHILL, *supra* note 51, 77-156.
[93] *See* KJAER, *supra* note 7.

installment of the League of Nations, it started to be gradually replaced with what we today call transnational governance. For the purpose of this article, the core element of the evolution of transnational ordering is its foundation of private law principles, in particular the concept of *dominium*, governing exchange, and contract.[94] Since the sixteenth century, the world of states has been embedded in a partly formal and partly informal private, law-based framework of exchange. The global economy was, in other words, from its outset, based on private power and private law frameworks.[95]

In sum, law and the social sciences tend to look at the world from the state and out. States have been perceived as the frames or containers that embed the rest of society on the basis of a very specific epistemological perspective.[96] A more "complete" societal perspective, emphasizing the multi-layered structure of world society, thereby going beyond the state centrism inherent to euro- and western-centric world views, reveals that, historically speaking, state-based public power has in fact been framed by private power and not the other way around.

IV. THE (TRANS)NATIONAL CONSTITUTIONAL MOMENT

The breaking of the private framing of public power only experienced its breakthrough with the dual (trans)national constitutional moment, which unfolded from the end of World War II onward.[97] Strongly backed by the resources and power of the United States, an intense level of transnational "founding acts" occurred from Bretton-Woods in 1944; the establishment of the United Nations in 1945; GATT and OEEC in 1947; the Marshall Plan, running from 1948 to

[94] *See generally* Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1 (2011) (discussing the Spanish impact on transnational ordering).
[95] See most notably CUTLER, *supra* note 3.
[96] *See, e.g.*, Klaus Dieter Wolf, *The Non-Existence of Private Self-Regulation in the Transnational Sphere and its Implications for the Responsibility to Procure Legitimacy: The Case of the* Lex Sportiva, 3 GLOBAL CONSTITUTIONALISM 275 (2014) (discussing the transnational sphere and the impact of the epistemological perspective).
[97] BRUNKHORST, *supra* note 17; JOHN ERIK FOSSUM & AGUSTÍN JOSÉ MENÉNDEZ, THE CONSTITUTION'S GIFT: A CONSTITUTIONAL THEORY FOR A DEMOCRATIC EUROPEAN UNION (2011).

1952; and NATO in 1949. But also, the Allied occupation of Germany from 1945 to 1955 was a transnational endeavor including a vast amount of states and leading to the emergence of complex institutional frameworks aimed at sorting out differences and coordinating policies. The transnational reconstitution of Germany was far from the only national reconstitution process taking place. In fact, almost all European states granted themselves new constitutions or substantially revised their existing constitutions between 1945 and 1953.[98]

A central element of these processes was intense cross-border exchanges leading to a high level of "constitutional borrowing."[99] One consequence of this was that five of the six states, which came to act as the founding states of the European Coal and Steel Community (ECSC), inscribed a commitment to international and European cooperation and integration in their constitutions. As such, one might speak of a multifaceted, dual, (trans)national constitutional process through which European states, as well as numerous but intertwined transnational frameworks, were simultaneously reconstituted.[100] The core novelty in relation to the ECSC was, however, not the establishment of a transnational framework for specific industrial sectors. Such frameworks had always existed. By the outbreak of WWI, in the supposed age of liberalism, more than one hundred formally established international cartels existed.[101] Throughout the interwar period, transnational cartelization of economic exchanges was the norm rather than the exception. For example, the international steel cartel, the central framework for organizing international trade in steel, was developed as a hybrid framework

[98] In relation to the states under Soviet control this, of course, happened under very different circumstances than in Western Europe.
[99] *See* FOSSUM & MENÉNDEZ, *supra* note 96.
[100] *See* BRUNKHORST, *supra* note 17; FOSSUM & MENÉNDEZ, *supra* note 96.
[101] *See* WOLFRAM KAISER & JOHAN SCHOT, WRITING THE RULES FOR EUROPE: EXPERTS, CARTELS, AND INTERNATIONAL ORGANIZATIONS 189 (2014).

between states and private parties that introduced fixed quotas and price regulation.[102] The transnational integration of the steel industry had in fact begun a long time before 1952, and the fundamental novelty introduced through the ECSC was not the establishment of a transnational framework but rather the switch from a largely informal private framework to a highly formalized public law framework.

At the national level, fundamental transformations, drawing on developments reaching back to the 1930s with the New Deal in the United States, also unfolded through the establishment of generic welfare and labor market regimes. Such regimes had emerged progressively from the late nineteenth century onward but in most instances remained fragmented, institutionally weak, and contested. The singular Hegelian state-centric society is characterized by eradication of localistic private ordering and across the board generic public law frameworks. This phenomenon only fully materialized in the post-WWII era. The dual (trans)national reconstitution of the Western segment of world society implied a move toward the introduction of an organizational primacy of public law vis-à-vis private law-based arrangements. This was a fundamental novelty since it was at this point that an outright supremacy of public power factually capable of breaking private power emerged.[103]

V. EXPANSION AND INTENSIFICATION

The golden age framework, however, broke down in the moment it was constituted. Not only was the golden age nation state, which its proponents tend to forget, always a provincial affair as it was a very limited framework only spanning a small segment of the globe. Decolonization, which unfolded simultaneously with the establishment of the golden age framework, unleashed a fundamental decentering of the euro- and western-centric world. The

[102] *See* Daniel Barbezat, *A Price for Every Product, Every Place: The International Steel Export Cartel, 1933–39*, 33 BUS. HIST. 68 (1991).
[103] *See* BRUNKHORST, *supra* note 17; Kjaer *supra* note 9; Kjaer *supra* note 34.

dismantling of colonialism might be seen as the central driver behind the emergence of today's transnational governance. Modern public and private international organizations started to emerge in the mid-nineteenth century and gained traction in the aftermath of WWI with the establishment of the League of Nations and the International Labor Organization. However, modern public/private organizations only experienced real breakthrough as a global phenomenon after WWII and, in particular, after decolonization. The Yearbook on International Organizations now counts 68,000 active or dormant public and private international organizations covering essentially all segments of social interaction.[104]

The crucial thing is, however, that the gradual expansion of modern statehood into a global phenomenon and the reconfiguration of already existing transnational frameworks from colonialism to transnational governance emerged hand in hand. More statehood seems to imply more transnational governance and vice versa. Modern states emerged from *within* preceding feudal setups at the same time as they provided a fundamentally different setup in terms of their organization and normative points of orientation. As such, they simultaneously represented a perfect continuation and a perfect break with feudality. In a similar manner, contemporary transnational governance emerged from *within* the colonial framework while, at the same time, its organizational setup and normative orientation points remained very different than the colonial framework. The League of Nations mandate system, for example, served as a replacement of German and Ottoman colonial and imperial control, just as handling the process of decolonization was the central issue for the UN system in its formative years. Also, what in the meantime has become the European Union can be analyzed in this perspective as the European integration process was unleashed through the failed dual attempts of Germany to

[104] *See The Yearbook of International Organizations*, UNION OF INT'L ASS'NS, http://www.uia.org/yearbook (last visited Nov. 9, 2017).

establish an empire and the implosion of the Belgian, British, Dutch, French, and Italian overseas empires. The structural driving force of European integration should not be found in French/German reconciliation but rather in the reconfiguration of the relations between Europe and the rest of the world.[105] In a similar vein, the multinational company might also be seen as "taking over" from former colonial companies.[106] As such, the old private/public mix of the colonial setup has been fundamentally reconfigured, but it has not implied any particular strengthening of the private dimension. Both public and private transnational governance have expanded with rapid pace since the mid-twentieth century.

Also, in relation to so-called advanced Western states, it is difficult to detect a weakening of statehood. The golden age nation-state was not as clearlydelineated from private power as typically assumed. Variations can be detected from state-to-state, but from business regulation to health- and education-dense, typically profession-based, private frameworks, delivered, and continue to deliver, a string of public services. Also, in the golden age period the boundaries of the state were never clear-cut and the state remained only one, although the most dominant, repository of political power.

But also, the structural liberalist (or neoliberal) wave since the 1970s has not implied a weakening of statehood but rather a reconfiguration of the state, implying a shift from a welfare to a competition state. As such, the normative orientation and organizational setup of states has changed. But in terms of *state capacity*, Western states have larger regulatory capacities than ever before. The last forty years have implied the buildup of unprecedented capacities of micromanagement, which no state has ever possessed before. The golden age nation-state

[105] *See* POUL F. KJAER, BETWEEN GOVERNING AND GOVERNANCE: ON THE EMERGENCE, FUNCTION AND FORM OF EUROPE'S POST-NATIONAL CONSTELLATION (2010).
[106] BRITISH EMPIRE IN INDIA (2011) (discussing the role of the East India Company in the establishment of British rule over India); Backer, *supra* note 44 (discussing the role of Wal-Mart in the development of efficient systems of private law making).

possessed the capacity to install generic unemployment schemes, but the most advanced states today possess the capacity to develop individual action plans to interfere in the nutritional habits of every single unemployed individual and to regulate working environments down to the smallest detail. The turn to governance has furthermore implied an increased breakdown of profession-based autonomy.[107] This has not only implied freer sways for economic actors and with it higher volatility and individual insecurity, but just as much an expansion in the reach of state-based public power into parts of society where the state had never been able to go before. The turn to governance has therefore not only implied a migration of the contract tool into the state, but it has also opened the gate for an expansion of administrative law provisions into the private sphere.[108]

VI. PERSPECTIVES: POLITICAL POWER BEYOND THE PRIVATE/PUBLIC DIVIDE

States are alive and well, but this does not mean that world society has become state-centric. States continue to engage in multifaceted, lateral relations with institutionalized forms of private governance at the national and the transnational level. The blurring of the private/public distinction is observable but, taking a long-term view, this is nothing new. As an ideologically informed analytical device and technique the distinction remains very real. As such, our conceptual vocabulary seems to be in need of fundamental revision. A respecification is needed of the range of objects that can be considered political at the same time as the distinction between political and nonpolitical activities needs to be maintained. The outcome of the Investiture Conflict was that the Church was legally constituted as the Holy See and recognized

[107] *See* Eva Hartmann, *The Role of Competition in the Europeanization of the Professional Complex*, 16 DISTINKTION 245 (2015).
[108] *See* Grahame F. Thompson, *The Constitutionalisation of Everyday Life?*, *in* THE EVOLUTION OF INTERMEDIARY INSTITUTIONS IN EUROPE: FROM CORPORATISM TO GOVERNANCE 177 (Eva Hartmann & Poul F. Kjaer eds., 2015).

as an autonomous legal order.[109] But, as highlighted, it was in fact not a private order but a different kind of public order than the one represented by the Emperor.

Pursuing the task of respecification, a possible starting point would be to focus on entities that fulfill *public functions*, understood as *generic and non-substitutable activities*, which are essential for a specific segment of the world. From the local water supply and national railways to the Olympic Committee and the Google search engine, a whole range of contemporary legal entities located at all levels of world society would potentially fall under this category and be potential subjects to normative induced legal regulation and constitutionalization on the basis of appropriate standards.[110]

[109] KJAER, *supra* note 41.

[110] A full range of proposals are currently being developed: For interesting, recent takes on this see, for example, Matthias Goldmann, *A Matter of Perspective: Global Governance and the Distinction Between Public and Private Authority (and Not Law)*, 5 GLOBAL CONSTITUTIONALISM 48 (2016); Lars Viellechner, *Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law*, 6 TRANSNAT'L LEGAL THEORY 312 (2015). More generally, see KJAER, *supra* note 7.