

SYMPOSIUM ON FRÉDÉRIC MÉGRET, “ARE THERE ‘INHERENTLY SOVEREIGN FUNCTIONS’ IN INTERNATIONAL LAW?”

THE DEMOCRATIC CONSTRUCTION OF INHERENTLY SOVEREIGN FUNCTIONS

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In this essay, I approach the question of privatization from a normative political theory perspective. Following Mégret’s lead, I focus on the inter- or transnational domain, with the aim of making explicit the norms that undergird Mégret’s analysis despite the functional approach he apparently adopts. I argue that the normative basis of the ideas of sovereignty and publicness he relies on is parasitic on the principles of democratic legitimacy developed on the level of the constitutional democratic state. Put differently, my concern is less with the potential demise of public international law that privatization seems to portend, and more with privatization’s threat to democratic self-government under both domestic and international public law.

Mégret wants to counter the trend of seemingly unlimited privatization of functions once ascribed to states by both domestic and international law. He is particularly worried about the future of public international law, developed to regulate the territorial sovereign states it helps construct as distinctive public entities and legal subjects. Legally constituting and regulating sovereigns helps render them accountable to one another and to their populations whom they presumably represent, protect, and govern. While mitigation efforts to protect individual rights in response to privatization may be helpful, he argues that without the idea of “inherently sovereign functions” (ISFs) specific to the state, we risk losing the distinctiveness of public power (sovereignty) and of public international law altogether. Where we differ is that I proceed from a clear commitment not only to the rule of public international law, but, above all, to democracy and democratic legitimacy as the real stakes of privatization both domestically and internationally. This does not mean that the effort to delineate “inherently sovereign functions” would apply only to democratic states, but rather that the principles one arrives at regarding what should be properly in the domain of public power and directly or indirectly regulated by public law involves normative and aspirational questions that must be addressed through democratic processes.

I am thus not neutral regarding privatization any more than Mégret is. But neither do I think that the neutrality of international law or law’s integrity is undermined by arguing for the principles of democratic legitimacy as the ultimate basis of the legitimacy of law today. The normative argument links public power to accountability, representativeness, and, aspirationally, to projects for regulating power so as to foster the common good, both domestic and international. A key element of this includes protection of the human rights of people subject not only to public, but also to delegated, private corporate power, as the civilizing/mitigating efforts referred to above suggest. But it also clearly involves democratic legitimacy, insofar as deliberation is required so that we can arrive at some degree of consensus as to what the common good is (domestic and global) and what is required, domestically and internationally, to achieve it. The normative basis of all this thus must be made clear. I try to do this in this essay

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and then to indicate how to think about countering the threats that privatization poses both to law's legitimacy internationally and to projects of democratic self-government that use law as a means of social ordering.

Stateness, Sovereign Responsibility, and Human Rights

Mégret takes note of the privatization of an ever-increasing set of functions previously considered sovereign, including the use of force, punishment, education, welfare and health systems, currency, and taxation, mostly for the sake of profit and run on a commercial basis. He is well aware that such functions were not always “public,” nor deemed the prerogative of the sovereign, but came to be so over time with the making of the modern state and states system, and with the making of public international law. Despite insisting on the importance of deeming certain functions “inherently sovereign”—i.e., functions that the state may not devolve to other actors under international law—his argument is neither essentialist nor functionalist.¹ He makes it clear that states can and have delegated many such functions to private actors domestically, and that states differ on what they deem to be ISFs or public functions. He also acknowledges that there is no function that private actors are incapable of carrying out, in some cases more efficiently than states.

Yet Mégret wants to get at a conception of a public domain specific to sovereign states that international law delineates for its own reasons, i.e., for reasons that are specifically international. He adopts a “resolutely normative” approach that is interpretive of how we have come to understand domestic and international legal developments contributing over time to a distinctive sense of the state as a public persona and aspirational regarding how we should consider ISFs in the future. His approach is fundamentally deontological, focused not on outcomes or pragmatic solutions, but on principles.²

It is important to specify clearly the other structural feature of a sovereign state, namely, its domestic supremacy. This feature is implicit in the Montevideo Convention insofar as it stresses territory, population, and government (effective control) as criteria for sovereign statehood. Supremacy refers not only to the monopoly of the legitimate use of force by the state, but also to the law of the state and most crucially, to the state's competence to make collectively binding law and to determine the competences of other domestic actors. The Germans call this “*Kompetenz Kompetenz*,” “Government” in the sense of domestic supremacy pertains to the ultimate authority of the sovereign to decide what and how to govern—to legislate, administer, and adjudicate—including the decision regarding what functions to delegate or outsource. Accordingly, a sovereign state could conceivably delegate everything except the ability to delegate, so that all functions would ultimately still be traceable back to it. This would be a vanishingly thin state but perhaps still enough of one for international law purposes. The point is that a state that sells out entirely to private interests has relinquished its statehood, ceasing to be the delegator and renouncing its *Kompetenz Kompetenz*, along with the residual distinction between public and private spheres.³

Can we go from here—a concept of minimal stateness—to get at what should be deemed inherently sovereign functions in public international law? Mégret analyzes two ways to proceed: reflection on sovereign functions that involve mutual international legal obligations, and reflection on the development of international human rights law, although he relies primarily on the latter.⁴ According to him, human rights law points us in the right direction by turning the legal gaze away from horizontal duties between states in the international society of states to obligations

¹ Frédéric Mégret, *Are There “Inherently Sovereign Functions” in International Law?*, 115 AJIL 452, 454 (2021). See also DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY* (2001) and JEAN L. COHEN, *GLOBALIZATION AND SOVEREIGNTY* (2012).

² Mégret, *supra* note 1, at 485.

³ *Id.* at 466

⁴ See *id.* at 467 and 478-90 for Mégret's discussion of the relevant conventions and documents.

that states potentially owe to the international community and the individuals that comprise it.⁵ Mégret notes the emphasis on neutrality towards the general organization of society in international law generally and in the various human rights documents, acknowledging that the post-WWII approach was pragmatic, due in part to Cold War exigencies. But he argues that today's international human rights law invites the state back in (regarding public functions and responsibilities) in ways that are hard to reconcile with unlimited outsourcing. While the goal of international human rights law is human rights protection, standardly oriented towards limiting states, states are also the key protectors of human rights and such limits do not aim to weaken or privatize public state power but rather to steer it in normatively acceptable directions. Indeed, while human rights may be system-neutral in the above socioeconomic sense, they do seem to have a connection to one regime in particular—democracy. Why else, Mégret asks, would the leading human rights instruments protect the rights to vote and stand for public office?⁶

Accordingly, Mégret tries to inductively arrive through human rights analysis at the idea of the state (instead of the reverse), insofar as international human rights law would seem to require states to guarantee human rights and to assume that this cannot be done without the state being a state and indeed, a democratic one.⁷ This suggests that a state owes it to human rights to preserve a certain governmental, public, and democratic aptitude, and not surrender the discharge of functions central to the enjoyment of human rights to private actors. However, it still does not get us much beyond the obligation of a state to be a state, although arguably it implies that some public functions are “inherently sovereign,” such as the protection of the security of persons, the use of force, and the ability to punish for rights violations, among others.⁸

The Publicness of Public Power

The inductive approach to arguing for inherently sovereign functions through rights analysis suffers from a fundamental problem: the focus on fortifying existent and codifying new subjective human rights might inadvertently reinforce the privatization tendencies undergirding the codification of capital by law (domestic and transnational). Examples are the tendency to ascribe fundamental constitutional and even human rights to corporate “persons,” and to exempt transnational corporations from a range of domestic and international public law regulations through private law codification.⁹ Indeed, the inductive rights-based approach distracts analysis away from what I deem to be the fundamental normative challenge: arguing for the intrinsic value of the publicness of public power in connection with democratically legitimate sovereignty.¹⁰ Put differently, a risk of focusing on international human rights to get at ISFs is a one sidedness that loses sight of the intrinsic value of democratically legitimate public power in favor of its instrumental functions in protecting individual subjective rights. As Christoph Menke puts it, “the individual pays for its political empowerment by subjective rights the price of disempowering politics.”¹¹ If subjective rights primarily protect the “liberty” and property of individuals construed as self-interested profit-maximizers, then the democratic politics that renders rights determinate, along with the importance of maintaining sovereign public functions, would be undermined instead of reinforced.

⁵ *Id.* at 478-90.

⁶ *Id.* at 457 (citing the General Comment on the Nature of States Parties' Obligations under the Covenant on Economic, Social and Cultural Rights).

⁷ *Id.* at 489.

⁸ *Id.*

⁹ Turkuler Isiksel, *The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights*, 38 HUM. RTS. Q. 294 (2016). KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* (2019).

¹⁰ I do not endorse the reactionary sovereigntism of authoritarian populists. For my conception of sovereignty in the current changing sovereignty regime, see COHEN, *supra* note 1.

¹¹ Cited in PISTOR, *supra* note 9, at 231. CHRISTOPH MENKE, *KRITIK DER RECHTE* 265 (2015).

But there is another problem with arguing strongly for ISFs from an international law perspective absent the norm of democratic legitimacy, namely, that it gives us little leverage against authoritarian states that happily embrace their sovereign and dictatorial control over and against autonomous private powers. Obviously, human rights law tries to limit their exercise of sovereign power with regard to individuals' basic rights, but without a normative analysis that brings the supremacy of public power back to democratic legitimacy the higher ranking of sovereign, public over private power is on weak normative ground.

Both approaches analyzed by Mégret steer analysts away from reflecting on the normative and political reasons for advocating the publicness of public power and the sovereignty of states that arise from the democratic political project itself. However, the quote above by Menke points us in a more fruitful direction insofar as it acknowledges both that privatization can undermine the scope and efficacy of democratic sovereigns to regulate and decide in light of the common good (both domestic and international) and that democracy and rights are interrelated. Here we get to the crux of the matter regarding the normative basis for ISFs: international law's decentralizing and independence-respecting aspiration regarding states' political regimes (sovereignty), and the system-neutral stance of human rights law notwithstanding, democracy and human rights do mutually co-constitute each other in the long run. While we cannot derive human rights from democratic legitimacy, or vice versa, they implicate each other systemically and normatively. Human rights secure individual freedoms, but just which freedoms and with what scope must be determined through democratic deliberation. And democratic legitimacy is central to securing the voice and autonomy of individuals who should participate in such decision-making, insofar as it makes those who are subject to the law its authors albeit indirectly through representatives.¹²

Today, the democratic project combines the older republican idea of the importance of the constitution and use of public power for public purposes with the democratic ideal of public power and law as a medium of collective self-governance under law. Accordingly, we must provide normative arguments for what we should or do take to be inherently sovereign functions by articulating the principles of popular sovereignty and public power inherent in the idea of democratic legitimacy. Indeed, law's legitimacy, and this includes international law, ultimately derives from the democratic ideal insofar as it both rests on the idea that we see ourselves as capable of self-reflection and collective self-government and are able to consider what is good for all, and thus establish public power and legislation for that purpose.¹³ While we cannot derive a set of ISFs from any particular state's constitution or political arrangements, we can see that in a democracy these decisions are to be democratically made and thus that internationally too the voices of the relevant actors—sovereigns, experts, and civil society actors, including social movements—must be heard. Deliberation cannot be displaced by some essentialistic idea of an ISF. Rather, we are reflexively aware that it is we—those who will be under the relevant law, and those involved in the deliberative and decision-making processes—who decide what functions we think should be deemed inherently public and thus off the privatization table, and that international law can register this. The international arena is not and should not become a world state, but this does not preclude democratization in the sense of inclusion of the voice and influence of stakeholders on that level in the relevant deliberations.

Accountability in the long run also points towards the democratic legitimacy of law and of public power. Such legitimacy pertains to appropriate (that is, fair and representative) procedures and to commitments to use public power for public purposes, including legislating, governing, and protecting those who are subject to the law. But it

¹² See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* ch. 3 and appendix 1f (1996) (for an analysis of democratic legitimacy, human rights, and popular sovereignty); CLAUDE LEFORT, *DEMOCRACY AND POLITICAL THEORY* ch. 1 (1988) (analyzing democracy as a form of society and its relation to human rights); and JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY*, introduction (1992) (relating democracy to civil society).

¹³ See CHRISTINA LAFONT, *DEMOCRACY WITHOUT SHORTCUTS* (2019) (for an analysis of deliberative democracy), and HABERMAS, *supra* note 12 (for an analysis linking democracy and human rights).

also turns on the inclusion of the voice of constituents in a multiplicity of public spaces in civil and political society wherein debate can be held, and in decisions taken regarding what functions should be considered inherently public and enforced by public officials. Put differently, neither private corporations, nor the regulatory bodies they establish are governments, their executives are not our representatives, the internal rules they make are not laws, and the arbitrators and lawyers they hire are not defenders of the public trust and common good. Indeed, as Katherina Pistor has shown, while private law is certainly law, the lawyers who help make it transnationally tend to do so by coding capital in ways that exempt it from the level of scrutiny typically applied to other privileges granted by the state.¹⁴ Privatization entailing encroachment on public power has been fostered by the coders of capital who effectively set up a transnational system of private law precisely to immunize financial and corporate property from direct regulation by public actors to ensure accountability and the public good. The problem is that “the legalization of private interests has depoliticized critical questions of self-governance.”¹⁵

ISFs and Democratic Self-Governance

This is not the place to offer a systematic normative theory of what we should deem to be ISFs if we want to take both democratic legitimacy and human rights seriously. But we can articulate the general outlines of an approach that might help counter modes and forms of privatization that eviscerate democracy, public power, and public international law in the name of private right. What is needed is a three-tiered analysis that considers: (1) what functions should be directly legislated, administered, and adjudicated by the state and public courts of law (ISFs); (2) what functions or domains should be legislated by the state or states collectively, but may be administered by non-public actors or public-private partnerships; and (3) what should be left to the initiative and control of private actors and the private law they and their lawyers make. In the latter case especially, the regulation of private self-regulation by public power remains crucial to ensure that private action or lawmaking does not erode the capacity of democratic polities to govern themselves by public law, retain ultimate control over lawmaking (*Kompetenz Kompetenz*), and protect human rights.

An encouraging example is the agreement of 130 states around the idea of a global minimal tax on corporations to block tax evasion, and the race to the bottom on the part of sovereigns who lower tax rates in order to woo corporate investment.¹⁶ The idea is to tax corporations where they do business, not where they are headquartered, to end the self-defeating downward spiral triggered when corporations seek out lower tax jurisdictions for their headquarters. This agreement clearly assumes that taxation is an ISF. While much of the groundwork for it was prepared by the Organization for Economic Cooperation and Development, the agreement was achieved through international deliberation and coordination in multiple fora.¹⁷ It is premised on the assumption that public international law has an important role to play in securing the ISF of taxation meaningfully for sovereigns, reinforcing their power to act as states (through ensuring they have appropriate funds to do so) in pursuit of the common good as they see it. This would fortify democratic self government where it exists by reinforcing the power of states to tax and regulate corporations and securing funding necessary for other ISFs however these are construed.

I argue for thinking about ISFs in terms of what we should take to be central to the project of democratic self-government under law—a project that, like human rights, helps legitimate and constitute but also limit sovereign states and the domestic and international law that they make.

¹⁴ [PISTOR](#), *supra* note 9.

¹⁵ *Id.* at 222-23.

¹⁶ See Christina Wilkie, [130 Nations Agree to Support U.S. Proposal for Global Minimum Tax on Corporations](#), CNBC (July 1, 2021).

¹⁷ See the 2020 [OECD Inclusive Framework on Base Erosion and Profit Shifting](#), itself a product of deliberation and coordination among 137 states.