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Introduction

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and Neil Walker

The life of modern public law has been lived under siege. It first announced itself against pre-modern forms of political organization and it did so by pushing an agenda predicated upon ideas of political equality (as opposed to *status*-centred forms of political organization), sovereignty, state, nation, and constitution. As modern public law conceived of itself as the *legal* embodiment of such ideals and forms, and not merely a philosophically sophisticated account of politics, from the outset it had to assert itself against private law or what was then simply understood as 'the law'. The dynamics of this interaction also provoked lawyers to rethink the institutions of private law, and the reciprocal adjustments and accommodations between private law and public law drew contested and fragmented borderlines between the two realms.

But if the boundary with private law has been far from unproblematic, the relation between public law and government, and indeed the polity in general, has also been a perennial source of concern to public lawyers. The notion that, after the long ascendancy of collective planning, administrative centralism, and social welfarism, our political, social, and legal worlds are changing again due to the 'hollowing out of the state' and the growth of post-national governance, and that this poses challenges to our conventional understanding of these worlds, has become an important theme in contemporary legal and political scholarship. Awareness of such a rapidly transforming landscape calls into question the very conceptual and value structures upon which public law relies. If we understand public law as the 'part of the law that deals with the constitution and functions of the organs of central and local government, the relationship between individuals and the state, and relationship between individuals that are of direct concern to the state',[1] then any threat to the capacity and competence of our received institutions of public authority clearly creates vicarious challenges to the field of public law. What function and what future has a branch of law whose regulatory object is in decline? So prevalent are such concerns, indeed, that tracing transformation and discontinuity, and prognosticating the fate of the state and its cognate concepts and values has become the inarticulate premise of one prominent branch of contemporary public law scholarship.

[1] *A Dictionary of Law*, E. A. Martin and J. Law (eds) (Oxford: Oxford University Press, 2009).

With skirmishes on various fronts and a more fundamental challenge on the horizon, it is not surprising that public law has been conceived of in many different ways, sometimes overlapping and sometimes conflicting. One of the aims of this volume is to contribute to the literature on the various encounters of public law with its surrounding social and conceptual landscape. But there is also a more specific sense in which this book seeks to contribute to the debate. A common theme in the discussion of the many conceptual and political fault lines between public law and what lies beyond it (the private, post-state institutional legality, etc.), is that of loss. If these developments and transformations do result in 'losses',[2] particularly of the 'linchpin of all constitutional functions',[3] then one of the main objectives of this set of studies, which emerged from a workshop held at Edinburgh University in June 2011, is to assess carefully what, if anything, has been relinquished. The current volume, therefore, should be perceived as much as an occasion to take stock of the idea, concepts, and values of public law as it has flourished alongside the growth of the state in modernity, as an opportunity to examine what might be salvaged or offered as an alternative in the legal and governmental practices of globalized states and supra-state institutions. It is a project that can be seen to work in the spirit of Hegel's theory of philosophy; that is, as a search for deeper insight into a historical condition, in this case public law, just as it passes away or mutates into something significantly different.[4] The examination of public law in the shadow of Minerva's Owl, it is hoped, will reveal a particularly lucid picture of the forms through which it has dominated the legal, social, and political aspects of the world in modernity.

An ambiguity in the title indicates the variety of means employed to achieve the ambitions of the book. Perhaps most obviously, the volume, especially in its concluding section, seeks to explore what comes 'after public law' in a *chronological* sense; that is, if global transformations indicate the demise or degrading of public law along with the state, sovereignty, and democracy, then this section asks what can or will replace it. As such, the contributions of the final section of the book explore the possibilities and expressions of ideals and concepts of public law both within the globalized state and in the institutions of global governance. However, in keeping with the stock-taking approach prompted by the flight of Minerva's Owl, the volume is also 'after public law' in the *inquisitive* sense of attempting to capture, understand, or excavate the deeper essence of the field. Thus, both through theoretical reflection and analysis of the practice of public law, the book attempts to grasp the conceptual and axiological dimensions of public law as it has existed in the state context. The third sense of the title speaks to the *sequential* meaning of 'after', which in turn reflects a particular methodological approach to the object of study. A dominant conceit of public lawyers is

[2] D. Grimm, 'The Constitution in the Process of Denationalization' (2005) 13(4) Constellations, 447, 455.

[3] Grimm 'The Constitution in the Process of Denationalization', 455.

[4] 'When philosophy paints its grey in grey, then has a shape of life grown old. By philosophy's grey in grey it cannot be rejuvenated but only understood. The owl of Minerva spreads its wings only with the falling of the dusk'. G. W. F. Hegel, 1820 preface to the *Philosophy of Right*, T. M. Knox (trans.) (Oxford: Clarendon Press, 1971) 13.

that in any ordering of legal fields, public law necessarily comes first, given its foundational and constitutive nature, and its close relationship to sovereignty. With public law thus having granted itself top billing, the volume attempts to re-engage with what usually comes beneath public law in the list of credits; namely, *private law*. Yet, while the deep imbrication of the state and the field of public law in modernity has done much to promote the image of the derivative nature of private law and the private realm,[5] we must remind ourselves that this is not a disinterested 'view from nowhere'. In this third sense of 'after' public law, therefore, we wish to challenge this conceit of public lawyers—and their associated sense of the appropriate sequential logic in exploring the anatomy of law—by investigating what the vantage point of private law can tell us about public law. That re-interrogation of the relationship between public and private law may involve postulating the obverse of the position common in public law, that *public* law is derivative of *private* law. This position is suggested by the co-option by public law of private (particularly Roman) legal concepts, the foundational device of much of public law theory—the social *contract*—being a case in point. Alternatively, such a re-examination of the terms of mutual influence and engagement between public and private may reveal that both domains derive from or express a common institutional or ideational framework, as, for example, in the centrality of the language of rights to both domains, or the articulation of interlocking conceptions of freedom or autonomy. As such, part of our methodology in analysing the field of public law is to adopt the vantage point of its alter ego, thus gaining insights that would not be revealed through an exclusive reliance on the domain of the public as a point of departure.

The three sections of the volume, then, build on these objectives. The contributions in the first section offer a conceptual, philosophical, and historical understanding of the nature of public law, the nature of private law, and the relationship between the public, the private, and the concept of law. The second section focuses on the domains, values, and functions of public law in contemporary (state) legal practice as seen, in part, through its relationship with private domains, values, and functions. The third section engages with the new mainstream legal scholarship on global transformation. It analyses the changes in public law both at the national level, including the new forms of interpenetration of public and private in the market state, as well as exploring the ubiquitous use of public law values and concepts beyond the state.

The volume begins with a vigorous defence by Martin Loughlin of an older and often neglected understanding of public law as *droit publique*. This approach, which traces the secularization of natural law along a lengthy trajectory from Hobbes to Bodin and Rousseau, understands public law not as the positive law of government but as the pre-positive conceptual furniture of the state itself—understood as the embodiment of an autonomous political sphere. According to Loughlin, those who claim to see in the contemporary departure of governmental

[5] For example, Hobbes stipulated the power to create rules of private law as one of the rights of the sovereign. T. Hobbes, *Leviathan* [1651], R. Tuck (ed.) (Cambridge: Cambridge University Press, 1996) 125.

authority to private and supra-state sites either the demise or the rebirth of public law fail to appreciate the resilience or the significance of these deeper foundations. Some reduce public law to its positive state-centred manifestations, and so see only destabilization and loss, while others engage in an unanchored normativism which hypothesizes a new post-national legal world without attending to the need for a corresponding reimagining and re-embedding of the political domain similar to that which brought forth the juridical model of the modern state. For Loughlin, therefore, the new public law scholarship is prone either to misdirected pessimism or to ungrounded optimism.

Chris Thornhill's essay also excavates the deep conceptual and historical foundations of public law as a way of understanding its contemporary nature and potential, but in so doing draws quite different conclusions from Loughlin. Thornhill is critical of accounts which look to the political, and its constitutional coding, as occupying the symbolic centre of society and as reflecting a unifying substructure of behaviour and experience. Rather, he understands the concept of the political from the early modern period onwards as describing a discrete functional realm, as a way of dealing with those exchanges within an increasingly complex, differentiated society which possess a collective resonance not easily absorbed and contained within specific sectors. The political realm, for Thornhill, operates through a process of abstraction and inclusion, and public law, especially through the spread of the idea of rights, is best understood as the legal formula which gives effect to this process. In this view, far from being a categorical overextension, and so a denial or a parody of politics, the growth of public law forms beyond the state is seen as a way in which an ever more versatile menu of rights becomes vital to—even constitutive of—the practice of selectively inclusive forms of transnational politics.

William Lucy follows a quite different methodological track than either Loughlin or Thornhill in trying to divine the quality of publicness in law. He searches for definition at the boundary, seeking to illuminate the meaning of public law in and through its contrast with private law. That boundary, however, is quickly revealed as a complex one. There is no single, comprehensive, compelling, or doctrinally dispositive way to distinguish public and private juridical domains, just as there is no such clean distinction between public and private as general terms of reference. Lucy, however, also wants to insist that this does not render the distinction meaningless or without use. Rather, the many distinctions between public and private law map onto a series of more specific and sometimes cross-cutting oppositions to do with different types of actions, goods, interests, and institutional locations, and all such distinctions remain significant within legal theory and practice.

In his chapter, Claudio Michelon is also concerned with the public/private divide, but his emphasis is upon private law as a complementary rather than a contrasting project to that of public law. He looks beyond the easy distinction between private law as the sphere of individual choice and voluntary relations, and public law as the sphere of mutual necessity and the common good. He argues that the relational dimension of private law already implicates it in the kind of associative enterprise against which we understand and evaluate the legal order as a whole, including its public law parts. Michelon argues that in these

terms, the contribution of private law is a shifting one, but that its tendency to objectify or reify the other in ways which conform to certain ideologies of privatism need not necessarily prevail over fuller and more respectful forms of mutual recognition.

The second part of the volume explores central aspects of the unfolding of public law and some of its traditional legal and social structures and explanatory categories in contemporary legal practice. Cormac Mac Amhlaigh's chapter connects the general discussion about the public/private distinction to the realm of legal practice. He is specifically concerned that the most prominent and familiar critiques of the divide tend to overlook its resilience as a central ordering component within our legal practices—a resilience that sustains the distinction in the face of transformations in positive law. Just because the division can be broken down into a number of more specific distinctions, or because it may reflect contingent ideological commitments, or because it may introduce harmful distinctions in certain legal sub-sectors, is no reason to consign the general legal categories of public and private to the conceptual scrapheap. In order to illustrate his argument, Mac Amhlaigh focuses on one key and contested area of our contemporary legal doctrine: namely, the state action provision in s. 6 of the Human Rights Act 1998 and its interpretation by the courts.

Richard Bellamy's contribution also departs from the identification of two salient features of public law. In his case its form and scope of application; namely, the regulation of the state and state functions, and its wider role in the justification and legitimization of public authority. Bellamy identifies a tendency to place constitutional rights at the core of the contemporary discourse of public law. This is a move that subjects the way public law constrains and regulates state power to a very particular account of the justificatory role of public law, that of fleshing out and protecting such rights. Bellamy considers this narrowing of the justificatory role to a constitutional rights discourse to be fundamentally misconceived. Instead, Bellamy puts forward an alternative conception of a public law discourse which is predicated on democracy which is legitimate in a way that, he argues, a constitutional rights account could never be.

Stephen Tierney's contribution looks at public law's current predicaments through the lens of what he identifies as its two basic functions; namely, facilitation of and restraint upon the exercise of political power. Tierney identifies a number of challenges which might affect public law's capacity to discharge those functions. In particular, he investigates the threat posed by the alleged demise of some of the central notions around which the modern juridical apparatus of public law was built: the state and the nation. He defends the resilience of those ideas against the overstated claim that contemporary trends towards globalization and privatization render them redundant. Indeed, Tierney argues that public law and its institutions not only remain relevant, but, as his discussion of referendums makes clear, become crucial instruments in helping polities to navigate their way in a globalized world in which nations continue to supply a vital point of reference and identity.

Hector MacQueen's chapter reflects on the relationship between private law and national identity, and on the related problem of the continuities and

discontinuities between legal and political nationalism. Scotland provides MacQueen with an exceptionally fertile ground to investigate those connections, as the Scottish legal system survives as a relatively autonomous body of law more than three centuries after the disappearance of the Scottish state into the United Kingdom. The chapter traces the way in which the defenders of the distinctiveness of Scots law have conceived of its relationship with political nationalism on the one hand, and national identity in a more cultural register on the other. The lessons MacQueen draws from this discussion are broad in scope and are offered as a contribution to the debate on the role that even a relatively apolitical brand of law might play in the construction of national identities.

The final part of the volume focuses squarely on the chronologically 'after', addressing the problems posed to public law by the movement of competence and capacity beyond the state. Inger Johanne Sand's contribution traces the evolution of public law from its associations with a general will to a more complex and variegated contemporary phenomenon involving state and supra-state actors as well as public and private bodies. She identifies two dominant features of this development; namely, the interaction between law and other systems such as science and technology and the increased use of self-regulation as a regulatory mechanism. She illustrates these developments by reference to the hybridity of contemporary legal forms such as international economic law, transnational administrative law, internet regulation, and the regulation of biotechnology. She argues that, as new regulatory concepts and techniques develop in new and unexpected domain-specific ways, the resulting legal miscellany invites further study.

In his contribution, Oliver Gerstenberg identifies the widespread practice of judicial review of law and policy as a potential failure of public law, particularly on democratic grounds. The democratic problem is exacerbated in respect of supranational courts such as the European Court of Justice and European Court of Human Rights, given that they are not embedded in the polity or political community. However, Gerstenberg argues that a closer look at the practices of these courts and, more importantly, their relationship with domestic courts, reveals that supranational judicial review is not as unilateral or authoritarian as sceptics claim. Rather, the interaction between domestic and supranational courts opens up a recursively dialogical space in which national administrations are compelled to justify particular policy choices in response to supranational judicial decisions. In this way supranational courts force states to 'look again' at domestic policy choices, particularly in the interests of individuals or groups such as the elderly, transsexuals, or prisoners who may be disadvantaged or marginalized by these policy decisions or legislative interventions.

Focusing on the broadest themes of post-national law, Neil Walker considers two regulatory ideas—global public law and global constitutionalism—that are typically neither examined together frequently nor sufficiently clearly distinguished from one another. Both ideas reflect a preoccupation with the increasing density of post-state regulation and the influence of supra-state entities on national law and politics, yet differ in their emphasis upon the importance of input, throughput, and output legitimacy. Walker analyses four possible permutations and combinations of the role and relevance of both of these concepts

beyond the state, from the double negative (no significant role for either post-state publicness or constitutionalism) to the double positive (a definite role for both), and positions in between. He concludes that whatever one's view of the possibilities of these concepts beyond the state, the problems and possibilities they frame remain an inescapable theme of our regulatory diagnoses, and even those who are 'doubly sceptical' about the export of publicness and constitutionalism beyond the state must reckon with this fact.

Megan Donaldson and Benedict Kingsbury pick up on the second of Walker's concerns—that of the notion of publicness beyond the state—through a focus on the public law regulatory techniques of institutions at the global level. They address this through an extended examination of one example of global level regulation—the *Handbook for Evaluating Infrastructure Regulatory Systems* of the World Bank. The chapter tracks Walker's twin concerns by offering the publicness of this type of regulation as a counterpoint to global constitutionalist discourses. The authors contend that the principles and standards of global regulation as illustrated in the *Handbook*, by tying together the managerial governance of the Bank with the ideals of the rule of (public) law, seek both to ensure the aims of good governance and to foster the legitimacy of the prescriptions and activities of the World Bank. As such, they argue, the broader regime of global administrative law and the exercise of international public authority, of which the *Handbook* is one instance, indicate a transformative trend in which global institutions such as the World Bank increasingly take on the role of the custodians of the future of public law.

Gianluigi Palombella's closing contribution also attends to a key duality of publicness—in his case 'political' and 'legal'—as it has evolved in the state context. He argues that, at least in the context of post-national law and organizations, the political dimension has received the greater attention, so inviting scepticism towards a post-state 'publicness' given the lack of indications of a social or political context within which such a public could emerge. By contrast, the *legal* dimension of publicness, which he dubs 'public through law', has been somewhat understated, yet offers a more promising starting point for consideration of publicness beyond the state. But even if law can forge a space for a post-national public sphere, it remains necessarily parasitic on thicker political contexts of publicness still domiciled in the state. The survival of publicness beyond the state depends, therefore, on whether a balance between different legal orders, global and domestic, can be achieved through dialogue, and in particular through post-national forms 'plugging in' to the normative power sources of extant nation-state political communities.

And so the collection ends as it begins, with a caution that the juridical successors to state-centred public law remain somehow, and somewhat paradoxically, dependent upon the legacy of the very forms and energies they seek to replace. Whatever comes after public law, we are reminded, can only be understood as emerging from and reacting to the presence or absence of public law, rather than as a tabula rasa on which we can set down an entirely new vision of legal and political ordering.