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EDITORIAL

Introduction to the Special Issue

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1 Introduction

Privatization of coercive functions is increasingly prevalent in contemporary societies, but it is the source of deep skepticism. Some scholars regard it as an intrinsic wrong, arguing that coercive functions cannot legitimately be outsourced to private parties (Dorfman and Harel 2016). On a broadly Kantian version of this view, this is because citizens ought to be the authors of the law through democratic processes (Cordelli 2020). Moreover, scholars have pointed at the constitutional danger of outsourcing legislative powers and the difficulty of safeguarding judicial review and due process rights when private actors are tasked with quasi-judicial and legislative powers (Dorfman and Harel 2021). Such arguments give rise to interesting questions. For example, could an actor with legitimate authority (such as a state) *delegate* coercive functions to private actors in such a way that the latter "inherit" legitimate authority? If so, under what circumstances? Could coercive functions legitimately be outsourced to private actors if chains of delegation or authorization are (as they often are) attenuated from the perspective of citizens? Furthermore, can private actors *acquire* legitimate authority by providing valuable services related to coercive enforcement of the law? This special issue addresses such questions. A theme which runs throughout the papers is to question the role of the state and sovereignty in understanding the notion of authority in law, including at the supranational or transnational level.

Privatization has been debated for some time in political theory, constitutional law theory, and related fields (e.g., Cordelli 2020; Eisen 2017; Harel 2014; Thorburn 2010). This does not mean, however, that the issues are settled or that there are no new questions to ask. For example, we may ask how the debate on democracy as a key element of constitutionalism could be tied in with the debate on markets and outsourcing, or how it informs the broader notions of global governance and constitutional questions in the area of artificial intelligence (AI) and climate change.

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Moreover, in the framework of the EU, we may ask what the EU market model tells us about the increased intermingling of public law matters and market law when it comes to privatization and different notions of coercion. Despite the renewed interest in privatization in the last decade, there are many questions that are still unresolved and hence exciting to explore. The papers collected in this special issue are novel in that they either address new questions or take new approaches to old questions. They are also diverse in terms the disciplinary background of the authors. We include here papers written by political theorists as well as by legal scholars.

2 What Is Privatization?

Privatization can generically be defined as the transfer of ownership or control from public actors to private ones. This concise definition hides, however, several relevant distinctions. Privatization can be seen as a process or an outcome, and it can be broken down into different types depending on what exactly has been transferred. Lundqvist (1988) offers a taxonomy of no less than eight different senses in which the delivery of a service may be seen as "privatized" depending on whether regulatory control, financing, or production is public or private. At a general level, however, it is reasonably clear what "privatization" refers to. A paradigm example is the sale of a previously publicly owned enterprise to a private company. Another common example is the contracting out of goods and service provision by a public agency. While both types of privatization frequently keep the state "in the game" in the sense that the private owners or contractors operate under the state's regulatory oversight, they nevertheless represent a significant change in the way goods and service provision are organized.

Privatization rose to prominence in the 1970s and 1980s, when many governments faced the problem of growing expenses from the welfare sector. It was accompanied by the revolution in governance called "new public management," according to which the public sector ought to be organized along the lines of the private sector. Prominent intellectuals and politicians argued that public monopolies were a bad idea and that states should allow market forces and consumer choice to decide. This, it was argued, would get rid of the inefficiencies which allegedly plague the public sector and would allow for a cost effective and flexible provision of goods and services. Others argued that privatization, by allowing for greater consumer choice, would help shore up the legitimacy deficits facing public-sector enterprises and agencies. Finally, selling state-owned enterprises gave governments well-needed revenue with which they could balance budget deficits (Dunleavy and Hood 1994; Rothstein 1998; Megginson and Netter 2003).

With the widespread acceptance of these ideas, privatization became a prevalent feature of society not least in advanced democracies. In our home country Sweden, for example, the last four decades have included the sale of many major state-owned enterprises as well as the partial privatization of core welfare sectors like education and health care. In addition to this, publicly owned enterprises such as the post service and the national railroad company have been reorganized so that they are required to operate at a profit.

Given these prevalence and significance of privatization, it is no surprise that legal theorists, political philosophers, and other scholars have turned their attention to privatization. There is by now a voluminous literature debating the benefits and drawbacks of privatization as a method of organizing goods and service provision (see Dorfman and Harel 2021 for an overview). The critics can be distinguished into different camps depending on what they take the problem to be. According to some, the problem with privatization is *instrumental*, that is, related to consequences. These critics argue that, far from being a way to ensure cost effectiveness and choice in the provision of goods and services, privatization often comes with a set of negative consequences. A frequent complaint is that privatization, by turning ability to pay into an important principle of allocation or by encouraging producers to cut corners in the name of greater profit, ensures that some people do not enjoy the goods, services, or treatment to which they are entitled as citizens or residents. Other critics instead argue that the problem is *intrinsic*. They maintain that private provision of some goods and services is simply inappropriate, meaning that privatization would remain a bad idea even if it would not have any negative further effects. A prominent example of this sort of argument have been offered about privately owned prisons: some have argued that private prisons are intrinsically problematic simply because punishment must be delivered by the state and not by private companies operating at their behest.

The distinction between instrumental and intrinsic concerns means that we can usefully map attitudes to privatization onto a 2×2 matrix.

		Is privatization wrong or bad for *intrinsic* reasons?	
Is privatization wrong or bad for *instrumental* reasons?		Yes	No
	Yes	I	II
	No	III	IV

Someone occupying box IV rejects both the instrumental and intrinsic critique. They deny privatization's supposedly negative effects as well as its supposed inherent inappropriateness. Someone occupying box I, by contrast, finds privatization to be wrong or bad for both reasons, meaning that it is normatively overdetermined that this method of organizing goods and service provision is unjustified. Boxes II and III represent the more subtle positions where one rejects privatization for one reason but not the other. It is a substantive normative question how the two dimensions relate in terms of normative weight, but a standard view would be that even instrumentally beneficial privatization would be wrong or bad if privatization is wrong or bad for intrinsic reasons.

Of course, there is little to be gained by thinking about attitudes to privatization as though it were one thing. We may well feel that privatization in one area—telecommunications or steel, say—is entirely unproblematic, whereas it is deeply problematic in other areas. The devil, as they say, is in the details, and it is noteworthy that current scholarship tends to focus more on core public goods and services (legal punishment, primary education, environmental protection) than on consumer

goods. It is once we address privatization in these domains that privatization goes from being a "mere" question of public expenses to a profound question about the political organization of our communities, not least since it connects to the nature of political authority and our liability to power and control exercised by others.

3 The Special Issue

The papers in the special issue all concern crucial questions regarding the legitimacy or justification of privatization.

In "Coercion or Privatization? Crisis and Planned Economies in the Debates of the Frankfurt School," Claudio Corradetti kicks off the special issue by identifying a long-term structural thread of transformation starting from the transformation of the German economy in 1930s and touching upon post Second World War problems of states' restructuring along privatization/coercion divides. Corradetti shows how the power of the private market turned into the coercive power of the state in its capacity to shape the market. Corradetti discusses how on a historical account coercion and privatization reinforced each other. Corradetti points at the famous Pollock-Neumann debate. These intellectuals expressed views not only intended to shed light on their historical period of time but also to formulate long-term considerations about the authoritarian trends embedded in our contemporary democracies. The power of the state became privatized into exclusive circles of powers—rackets groups—masked under a nationalist ideology. Corradetti shows how on a critical theory assessment of National Socialism, coercion and privatization did not behave as mutually exclusive terms. Rather, they defined in conjunction a specific type of configuration from power-to-private property and from private property-to-privatized power.

The idea of privatized power is also very visible in "Are Private Prisons Intrinsically Wrong? An Analysis." In this paper Goran Duus-Otterstrom and Andrei Poama address the supposed intrinsic wrongness of private prisons. More specifically, they analyze two main arguments that have been given for this conclusion: the idea that private prisons are wrong because they are insufficiently controlled by democratically elected representatives or because they cannot condemn convicted offenders in the name of the public. Duus-Otterstrom and Poama find these arguments wanting. A fundamental problem, they argue, is that the arguments speak against public prisons just as much as they speak against private ones. Moreover, it is unclear whether the criticism hits all private prisons as opposed to just those who are owned and operated by profit-seeking private companies. The upshot is that the state may well be able to contract out some imprisonment services to private entities without undermining the status of these punishments as acting in the name of the state or the public. There is also a special reason to *avoid* public prisons in situations in which the state is responsible for serious injustice against the population.

In the next paper, Alon Harel and Gadi Perl show how problematic the notion of privatization is in the area of artificial intelligence (AI). In "Can AI-Based Decisions be Genuinely Public? On the Limits of Using AI-Algorithms in Public Institutions," Harel and Perl present principal arguments against privatization in AI matters by

linking the question to the core of what is public. As they show, the agent responsible for the decisions made by AI-based algorithms is not the public but the algorithm. They argue that AI algorithms cannot count as genuinely public. The authors discuss the importance of public decisions and the reasons why we should care about them. For example, they argue that AI-based algorithms are incapable of providing adequate explanations or accounts of the reasons underlying their decisions, i.e., they are not transparent. While, if properly executed, decisions made by AI can promote the public good and, more particularly, generate decisions that are superior to those made by judges or other public officials, they fail to tell us *why* they made these decisions. In addition, it has been maintained that the power provided by these algorithms puts democratic values at risk; more particularly, it promotes surveillance capitalism. As Gadi and Perl show, algorithms also empower the already powerful segments of society and increase inequality as a result.

Next and moving on to climate change and privatization, in "The Privatization of Climate Change Litigation: Current Developments in Conflict of Laws," Sara de Vido critically discusses the concept of "event giving rise to the damage" as applied in CO_2 reduction claims by using a novel ecofeminist perspective. Specifically, de Vido shows how the Rome II Regulation as applied by the Dutch Court in the *Milieudefensie et al v. Royal Dutch Shell plc* reflects an ecofeminist approach, even though that was not surely the intention of the domestic judges. Inspired by the work of Roxana Banu, de Vido argues for a relational understanding of the concept of "event" and considers an ecofeminist perspective on the environment as something which is composed of human, non-human beings, and natural objects, and their relations with each other. As de Vido shows, it is clear that the ubiquitous nature of the applicable law in the case of environmental damage is not only important but also reflects the need to respond to unprecedented threats. "Private" cases could potentially bridge the gap between public and private international laws solving private disputes with a global governance perspective. The article welcomes the possibilities that private climate change litigation has opened but warns against the risk of reducing everything to private actors without a change of perspective that puts the environment, to which humans belong, at the core of the discussion.

In the last paper, also on privatization and climate change, Ester Herlin-Karnell in "Privatisation and Climate Change: A Question of Duties?" discusses to what extent privatization can be justified on a Kantian account when states do not do enough to tackle the climate emergency. Herlin-Karnell argues that despite the many forceful arguments against privatization, there is a variety of privatization, and in some areas such as the environment, we may discuss the question of duties. Moreover, Herlin-Karnell discusses the question of privatization as such, the notion of coercion and force in the specific context of the EU environmental and EU security regulation as well as the theme of marketization and privatization in this area. She highlights the many similarities between EU security regulation and environmental laws, both areas being inherently public and often subject to emergency situations. She also uses the judgment in *Milieudefensie* et al. *v. Royal Dutch Shell plc* concerning the obligation of private actors to cut CO_2 emission as an interesting test case of privatization and duties. Subsequently Herlin-Karnell discusses why, on the Kantian reading, there is something deeply problematic about privatization. The paper

concludes by addressing in what circumstances Kantian inspired viewpoints of privatization would allow for privatization by discussing the idea of hybrid privatization and the question of violence.

4 Conclusion

The special issue demonstrates that responses to privatization often depend on whether one takes an instrumental or non-instrumental perspective on privatization. However, the papers also show that, in some cases, this distinction is less clear and require an "in between" approach depending on how one views publicness, justice, and duties. It is our hope that this special issue will spark renewed debate and attention to an important topic that is at the core of law, politics, and philosophy.

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