Introduction

A chance post-conference meeting in Jerusalem led to a realization that international lawyers, constitutional lawyers, private lawyers and legal theorists on both sides of the Atlantic were all concerned with the same overriding question: Where does the state begin and where does it end? Consequently, how should we conceptualize legal personality, state action, rights and their bearers and correlative duty-bearers? The result was a conference which took place in Cambridge, England in 2011. The papers delivered at that conference, and the discussions which they precipitated, form the nucleus of the present volume.

In this volume, the relation between two legal and political phenomena is examined: The first is the shrinking of the state as a monopoly of power in favour of the expansion of power over individuals in private hands, and the second is the change in the nature of rights.

Existing works on these two phenomena have often emanated either from a perspective of political philosophy or from the perspective of constitutional law or international law. This volume seeks to broaden, but also focus the discussion, by bringing together the disciplines of political philosophy, international studies, constitutional law, administrative law and international law, to examine the shrinking of the state and the change in nature of rights in a more integrated fashion.

While the topics covered in this book have aroused interest in the different fields, they are considered in this volume in conjunction with one another. We particularly find that international law,[1] private law[2] and constitutional law[3] are converging towards each other, but we should

[1] See Non-State Actors and Human Rights (Philip Alston ed. 2005) (for a recent discussion of the topic in international law).

[2] See Rights and Private Law (Donal Nolan & Andrew Robertson eds., 2011) (for the discussion within private law).

[3] See Allan R. Brewer-Carías, Constitutional Courts as Positive Legislators: A Comparative Law Study (2011) (for a recent book on constitutional law in this area).

also consider them together with the examination of rights in the private sphere.[4] The role of state constitutional law within the individual states of a federal state is also considered; in particular, the role of state constitutional law in upholding human rights in the private sphere,[5] international investment law[6] and the law of international organizations.[7]

The changes and legal responses by international law and by domestic legal systems should be viewed not as discrete systems but as legal solutions to the same problems. The political fact is the changing boundary state power, and the legal responses are varied as seen in this volume: from restriction of privatization to direct application of positive rights by the state to private parties. A reconceptualization of public life is in order, one that includes within its realm the structure of society and the structure of the economy within the state. This reconceptualization is included both within the political discussion and the legal discussion.

Several sub-questions arise out of this discussion, which cut vertically across the different legal disciplines and the chapters in this volume:

(1) *The question of symmetry between the capability of having rights and the capability of having obligations under human rights law*: Some contributors have noted that this is a worrying trend in the development of human rights law. Indeed, as Schneidermann shows, it is multinational corporations who have most successfully made use of international human rights provisions – such as protection of property and due process provisions – in international litigation, particularly in investment arbitration proceedings. Alvarez warns human rights advocates that recognizing corporations as legal persons capable of having obligations in international law will mean that they will also be able to claim rights in international human rights law. Scolnicov argues, however, that there is nothing inevitable about such symmetry of rights, neither in the conceptual analysis nor in the ability to recognize such a separation between being a rights bearer and an obligation bearer in an actual legal system, such as that of the European Convention on Human Rights.
(2) *The question of the change in the nature of rights*: Does the change in the nature of the state, associated with the rise of public power, mean

[4] This volume also connects these to positive obligations. Amongst the recent literature on this topic see Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties (2008).
[5] Hershkoff in this volume. [6] Schneiderann in this volume.
[7] Alvarez in this volume.

that we need to recognize or underscore different substantive rights than those previously recognized? Kahana suggests that it is perhaps not the nature of rights that should change, but that "low intensity" breaches of two or more combined rights – particularly positive rights – may be sufficient to warrant the same protection accorded when "high intensity" breaches of one right occurs. Examining the experience of Canada, he suggests that such adding-up of rights infringements can protect positive rights effectively. Hershkoff shows that positive obligations are not absent from United States (US) constitutional law either, as is often perceived. She argues that their existence in state constitutions and the influence of common law doctrines can lead to further extension of their applicability in US constitutional law beyond the common perception of the state action doctrine. Van der Walt shows that, surprisingly, a new constitutional court unencumbered by the past – the South African Constitutional Court – took a rather restrictive view to the application of constitutional rights to private law. The Court did not view constitutional rights as applying to the common law by virtue of the court's own involvement in the act of adjudication, and held that the application of constitutional law only applied when the state was otherwise directly involved. He sees this as an "abdication of sovereignty" by the Court, and suggests a bolder step could have been taken, especially through use of comparative law, particularly that of the German Constitutional Court.

Jackson argues that state obligations, rather than social and economic rights, should be the concern of state constitutions. This will allow flexibility to amend constitutions in times of economic downturn, without the risk that courts will view the amendments as unconstitutional – as some state constitutional courts have done with constitutional amendments detracting from enshrined social rights.

(3) *The theoretical and practical usefulness of the distinction between public and private is itself questioned*: Thomas argues that the distinction between positive and negative rights – and between rights against state actors and against non-state actors – should be abandoned, and instead the particular relationships in which they arise should be taken into account. Miller proposes that fiduciary duties in private law and in public administrative law should be viewed in tandem.

Not all the writers in this volume agree that the public/private boundary should be crossed. Alvarez warns against such boundary

crossing and against the application of public law principles (however these may be defined and incorporated within public international law) to such international law regimes as treaty arbitration or the application of the Alien Tort Claim Act in US law. These serve different purposes and principles from one side and should not blindly be transposed to the other.

Stephanie Palmer and Anne Davies both examine the phenomenon of transfer of public functions to private bodies, and the response to it in law in the United Kingdom (UK). Davies argues that contracting out should mandate, rather than negate, the applicability of both public law and human rights law. Palmer, looking at responses of the UK Supreme Court to the question of applicability of human rights argues that the concept of hybrid public bodies, introduced in the Human Rights Act, can be developed and interpreted in a way that will enhance the applicability of human rights rather than constrain it.

(4) *The question of contextualization of human rights in the new private sphere*: Several papers from different disciplines show that this cannot be done in the abstract but must take into account the position of weaker and disenfranchized members of society. Indeed, this is one of the reasons prompting us to edit this volume. We perceive a need for human rights law to address a gap in the protection of the rights of those most vulnerable – arising out of the "new boundaries" of the state. Kahana notes that the Supreme Court of Canada has stepped away from its usual practice regarding positive state obligations where the rights of employees who lack union organization are infringed.

Mesnah and Levi point to the tension created by the introduction of performance indicators borrowed from the private sector to measure the efficacy of international human rights protection as well as foreign aid. They show that this, born of a neo-liberal mindset, promoted the role of the private sector, creating inherent tension with the ideals behind these rights.

The questions raised by the chapters in this collection should offer avenues for further research. Should international law concern itself with legal persons in a way substantively different from how they have been conceived before? Can global public law provide a coherent basis for analysis of actions of states in both public law and international law? Are there other legal concepts like fiduciary duties which should be defined

similarly across the public/private divide? Should different jurisdictions strive towards one state action doctrine? How can rights be best protected in a global culture of privatization? All these we are sure will be discussed in academe and legal practice in years to come.

Finally, it is our great pleasure to thank the Centre for Public Law at Cambridge University and its director at the time, Christopher Forsyth, and Queen's University Law Faculty for hosting and funding the conference which led to this volume and John Berger of Cambridge University Press for seeing it to publication.

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