

# Public and Private Authority in a Global Setting: The Example of Sovereign Debt Restructuring

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## ABSTRACT

*This article argues that the public-private distinction is essential for safeguarding individual autonomy and democracy. As the article shows at the example of sovereign debt restructuring, global governance has blurred the distinction between public and private actors, instruments, and processes, and this causes immediate risks for human rights and democracy. This raises the question how the public-private distinction can be maintained under the structural conditions of global governance. For that purpose, the article ventures to propose a definition of publicness for global governance inspired by discourse theory. It argues that whenever a community, defined by the prevalence of communicative action, exercises authority over its members, there is an act of public authority that needs to respect standards of human rights protection and democratic self-determination. The article applies this framework to sovereign debt restructuring and identifies exercises of public authority in current sovereign debt restructuring practice, which need to, but often do not, meet these standards. The public-private distinction is thus an important tool for criticizing global governance.*

## INTRODUCTION

Public authority used to be the privilege of the state. This greatly facilitated the identification of acts of public authority—even though state power might never have been as monolithic as commonly

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perceived,<sup>1</sup> and even though the state might at times act as a private person.<sup>2</sup> One cannot say the same about global governance. Global governance by definition consists in a complex agglomerate of public and private, formal and informal, actors, processes, and instruments.<sup>3</sup> On the global level, important issues commonly perceived to be of public interest, such as the regulation of the economy, have been laid into the hands of market participants.<sup>4</sup> Global governance has therefore called the distinction between public and private law into question. Some argue that many global legal phenomena, such as investor-state arbitration, defy any characterization as public<sup>5</sup> and hail the emergence of transnational law.<sup>6</sup> Scholars from common law jurisdictions feel vindicated as their domestic law never espoused that distinction to the same extent as civil law jurisdictions.<sup>7</sup> Others seek to carve out principles of an emerging global (public) law applicable across legal orders,<sup>8</sup> prompting again others to reassess the contribution of international private law.<sup>9</sup>

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1. Cf. Poul F. Kjaer, *From the Private to the Public to the Private? Historicizing the Evolution of Public and Private Authority*, 25 IND. J. GLOBAL LEGAL STUD. 13 (2018) (arguing that private and public power have expanded concurrently).

2. See, e.g., Stephan W. Schill, *Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization* 27–28 (N.Y.U., Jean Monnet Working Paper No. 05/13, 2013), <http://www.jeanmonnetprogram.org/wp-content/uploads/2014/12/Schill.pdf>; see also GIULIO NAPOLITANO, PUBBLICO E PRIVATO NEL DIRITTO AMMINISTRATIVO (2003).

3. Cf. Martin Hewson & Timothy J. Sinclair, *The Emergence of Global Governance Theory*, in APPROACHES TO GLOBAL GOVERNANCE THEORY 3, 3–19 (Martin Hewson & Timothy J. Sinclair eds., 1999) (discussing how global governance theories have developed over time); Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379, 379–81 (2001). See generally James N. Rosenau & Ernst-Otto Czempiel, GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James N. Rosenau & Ernest-Otto Czempiel eds., 1992) (examining the background, causes, and primary features of governance without government).

4. The seminal works in this field, Gunther Teubner, *'Global Bukowina': Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3, 8–10 (Gunther Teubner ed., 1997) and A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY 33–34 (Steve Smith et al. eds., 2003) are worth noting.

5. E.g., José E. Alvarez, *Is Investor-State Arbitration 'Public'?*, 7 J. INT'L DISP. SETTLEMENT 534 (2016).

6. Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNAT'L LEGAL THEORY 141, 150–51 (2010).

7. Carol Harlow, *"Public" and "Private" Law: Definition Without Distinction*, 43 MOD. L. REV. 241, 241–42 (1980). On the limited significance of the distinction for U.S. law, see John Henry Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUB. L. 3, 4, 14 (1968).

8. See, e.g., NEIL WALKER, INTIMATIONS OF GLOBAL LAW 15–18, 203–05 (2015); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. &

This article studies the operation of the public-private distinction in a global setting at the example of mechanisms for the restructuring of sovereign debt. On the basis of a discourse theoretical approach to democracy and law, the article in section one argues that the distinction is necessary to realize both freedom and democracy in a society. Nevertheless, as argued in section two, the distinction has become blurred with the emergence of global governance. Sovereign debt restructurings are a typical example of this development. The apparent blurring of the public-private distinction makes it difficult to assess and control the impact of sovereign debt restructurings on democracy and human rights. In section three, the article proposes to adapt the public-private distinction to a pluralistic environment, whereby public authority is the authority exercised in the relationship between a community and its members. Although there are different possible approaches to defining communities, the article chooses to identify communities by their communicative qualities. Section four shows that on this basis, much of the contemporary governance of sovereign debt restructuring can be characterized as exercises of public authority, whether it takes place in formal institutions like the International Monetary Fund (IMF), informal intergovernmental settings like the Paris Club, or in fragmented negotiations with private creditors. Therefore, the article holds in the conclusion, sovereign debt restructurings need to respect basic principles of democracy and human rights, the standards that render public authority legitimate.

### I. THE FUNCTION OF THE PUBLIC-PRIVATE DIVIDE

The distinction between the public and the private is generally a child of early modernity. Although the conceptual roots of the distinction reach back to Roman law, public law as we know it only came into existence with the emergence of the modern state.<sup>10</sup> The

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CONTEMP. PROBS. 15 (2005); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 IND. J. GLOBAL LEGAL STUD. 605, 625 (2013).

9. See, e.g., Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 TRANSNAT'L LEGAL THEORY 347, 375–79 (2011); Horatia Muir Watt, *Private International Law's Shadow Contribution to the Question of Informal Transnational Authority*, 25 IND. J. GLOBAL LEGAL STUD. 37 (2018).

10. NORBERTO BOBBIO, DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER 11–15 (Peter Kennealy trans., 1989); Michael Stolleis, *Öffentliches Recht und Privatrecht im Prozeß der Entstehung des Modernen Staates*, in ÖFFENTLICHES RECHT UND PRIVATRECHT ALS WECHSELSEITIGE AUFFANGORDNUNGEN 41–59 (Wolfgang Hoffmann-Riem & Eberhard Schmidt-Aßmann eds., 1996); Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423 (1982). However, on the

distinction is of crucial significance for both liberal and republican theories of democracy, albeit it plays a different role in each strand, reflecting different understandings of the relationship between society and the state.<sup>11</sup> Whereas in liberalism the distinction serves the advancement of individual autonomy (A.), in republicanism it fosters the integrity of democratic decision-making (B.). These different functions might be at the root of the confusion surrounding the public-private distinction. Nevertheless, liberalism stands in a tense relationship with democracy, while republicanism has had a difficult time acknowledging guarantees of individual autonomy such as human rights. Jürgen Habermas has argued that it would be best to combine both strands and see in the public-private distinction a precondition for the preservation of both democracy and human rights (C.).

### A. Liberalism

The rise of liberalism began in sixteenth century Europe as a counter-reaction to absolutism that emphasized the idea of individual autonomy. Its proponents considered the sovereign state as an independent legal entity, which exercised its authority over citizens from a hierarchically superior position by means of public law. To safeguard individual autonomy against the power of the state, relations among the citizens were presumed to be governed by the non-statal, non-positive corpus of private law.<sup>12</sup> The normative basis of private law was believed to reside in natural law, like in Locke's account of a natural right to property;<sup>13</sup> or in practical reason, like in Kant's post-natural law theory of right;<sup>14</sup> or in a metaphysical idea of the nation,

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significance of the Investiture Conflict see Kjaer, *supra* note 1. On the emergence of a realm of the political during the middle ages see Martin Loughlin, *The Nature of Public Law*, in AFTER PUBLIC LAW 11, 12–15 (Cormac Mac Amhlaigh et al. eds., 2013); Chris Thornhill, *Public Law and the Emergence of the Political*, in AFTER PUBLIC LAW 25, 27 (Cormac Mac Amhlaigh et al. eds., 2013).

11. DIETER GRIMM, DAS ÖFFENTLICHE RECHT VOR DER FRAGE NACH SEINER IDENTITÄT 7–8 (2012); Michel Foucault, *Governmentality*, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87, 87–104 (Graham Burchell et al. eds., 1991); MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND 126–191, 394–404 (1988).

12. DIETER GRIMM, RECHT UND STAAT DER BÜRGERLICHEN GESELLSCHAFT 85–103 (1987); HANS Kelsen, REINE RECHTSLEHRE 288 (2d ed. 1960).

13. JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. 4, at 303–320 (Cambridge Univ. Press 1970) (1698) (note § 44 especially). Cf. Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 787 (1985).

14. IMMANUEL KANT, DIE METAPHYSIK DER SITTEN 58 (Königsberg 1797).

like Savigny's concept of the "Volkgeist" (peoples' spirit).<sup>15</sup> In all cases, liberalism emphasized the ability of society to regulate itself and assign to the state a residual function (e.g., the enforcement of judgments).<sup>16</sup>

This theoretical framework brings liberalism on a potential collision course with the idea of democracy. This is especially true for the utilitarian strand of liberalism, which elevates self-interest to the level of a moral principle that requires individual autonomy for its protection. The interest of a community, then, is nothing more than "the sum of the interests of the several members who compose it."<sup>17</sup> For a political theory based on these premises, democratic decision-making merely consists in more or less well-gauged compromises between different particular interests. So why not let societal actors negotiate that compromise directly through the market or similar venues instead of mediating it through the state? After all, societal actors will know their interests much better than the state. This is the essence of Hayek's theory of spontaneous orders.<sup>18</sup> Overwhelming trust in private self-regulation and decided mistrust towards traditional politics and their cognitive limitations made Hayek sing swan songs on democracy.<sup>19</sup>

In postmodernity, liberalism took a different, more skeptical turn with systems theory. The latter claims that it is not the individual, but social systems that are really autonomous. Accordingly, society is divided into functionally differentiated, self-reflexive systems like law, the economy, and politics, whose self-reflexivity prevents them from communicating directly with each other.<sup>20</sup> Even though the goal of approaches informed by systems theory is very different from Hayek's in that they seek a reconstruction of the modern welfare state instead of its destruction,<sup>21</sup> they agree that the idea of (individual or systemic) autonomy defeats the possibility of a truly common, inter-subjective or inter-systemic interest to be decided upon by democratic means.<sup>22</sup> Contemporary proponents of systems theory therefore look for

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15. FRIEDRICH CARL VON SAVIGNY, *VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (2d ed. 1828).

16. GRIMM, *supra* note 11, at 15.

17. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 3 (reprt. 1907) (2d ed. 1823).

18. 1 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 36–52 (1973).

19. 3 F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 8–19 (1979).

20. NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 38–124 (1993).

21. Zumbansen, *supra* note 6, at 150, 174.

22. See HAYEK, *supra* note 19, at 8–17; ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, *REGIME-KOLLISIONEN* 57, 57 (2006) ("Lasciate ogni speranza."). For a critique see OLIVER LEPSIUS, *STEUERUNGSDISKUSSION, SYSTEMTHEORIE UND PARLAMENTARISMUSKRITIK* 61–62 (1999).

normative and functional equivalents to democracy under the structural condition of globalization, which often culminates in proposals for rules of conflict between different legal or constitutional orders.<sup>23</sup> However, managing conflicts between diverging functional, national, or regional orders is very different from collective decision-making that encompasses these orders.

### *B. Republicanism*

The republican (holistic) strand of thought does not equal the distinction between the private (or private law) and the public (or public law) with the one between state and society. According to Rousseau, there is no law prior to the foundation of a society. All law derives from the social contract.<sup>24</sup> But Rousseau's work does not yet distinguish between state and society. Hegel took this decisive step by coining the concept of civil society.<sup>25</sup> Accordingly, civil society is the place where citizens may exercise their freedom to pursue their private interests to meet their individual needs, while the state constitutes the realization of the ethical idea (i.e., the collective entity, which is more than just the sum of private interests).<sup>26</sup> Both private law, which lends protection to transactions in civil society, and public law are positive, statal law ("Gesetz").<sup>27</sup> In a republican perspective, the state enables freedom. Civil society is thus not opposed to the state, but essential to its operation.<sup>28</sup>

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23. Cf. POUL F. KJAER, CONSTITUTIONALISM IN THE GLOBAL REALM: A SOCIOLOGICAL APPROACH 136 (2014) (analyzing the development of constitutionalism globally); GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (Gareth Norbury trans., 2012) (advocating for a sociological approach to the challenges posed to traditional constitutionalism by transnationalization and privatization).

24. JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE ch. 3, 5 (1762).

25. See Manfred Riedel, *Bürgerliche Gesellschaft*, in 2 GESCHICHTLICHE GRUNDBEGRIFFE 719, 779–80 (Otto Brunner et al. eds., 1975). On the contribution of Friedrich Schleiermacher to the formation of the concept of civil society see ARNULF VON SCHELIHA, PROTESTANTISCHE ETHIK DES POLITISCHEN 103 (2013).

26. GEORG FRIEDRICH WILHELM HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS §§ 257–58 (1821).

27. See *id.* §§ 188, 211; see also ARMIN VON BOGDANDY, HEGELS THEORIE DES GESETZES 63 (1989).

28. See HANNAH ARENDT, THE HUMAN CONDITION 22–78 (2d ed., Univ. of Chicago Press 1998) (1958); PHILIP PETTIT, REPUBLICANISM 51–79, 241–270 (1997) (regarding the concepts of freedom and civil society).

This strand of thought, a historic novelty at the time,<sup>29</sup> took account of the rising role of positive, statal law for the organization of society. The Napoleonic codifications of private law epitomize the idea of sovereign control over private law.<sup>30</sup> But, like liberalism, this strand of thought features certain flaws and risks. The trust in governmental capacity and mistrust in private self-regulation might not only bring about inefficient regulation. If taken to the extreme, on the basis of a pre-constitutional idea of the state and a rejection of methodological individualism, it might amount to an argument for the total state.<sup>31</sup>

Similar, but different risks might arise from later theories belonging to this strand, like those of Hans Kelsen. Although his neo-Kantian constitutionalism might make him an uneasy fit within the republican camp, his Rousseau-inspired approach to democracy justifies such a classification.<sup>32</sup> For Kelsen, the state is nothing but a legal entity. Private and public law do not reflect a difference between state and society, but merely an ideological difference *within* the legal order.<sup>33</sup> As a consequence of his pure theory, law as such provides no justification for public authority.<sup>34</sup> Rather, such justification must derive from democratic government—a fact most often overlooked by adaptations of Kelsen in authoritarian regimes, which over-emphasize and abuse the idea that the legal is legitimate.<sup>35</sup> While these risks are external to Kelsen's theory and result from a misreading, he actually did not answer the question of how social integration should be achieved (i.e., why the minority should obey the decision of the majority if compromise cannot be achieved given that the state is simply understood as a legal construct requiring no further attachment of its members).<sup>36</sup> In the absence of a discursive understanding of public law, his theory cannot

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29. Thomas Duve, *Katholisches Kirchenrecht und Moralthologie im 16. Jahrhundert: Eine globale normative Ordnung im Schatten Schwacher Staatlichkeit*, in RECHT OHNE STAAT? ZUR NORMATIVITÄT NICHTSTAATLICHER RECHTSETZUNG 147, 151 (Stefan Kadelbach & Klaus Günther eds., 2011).

30. See GRIMM, *supra* note 12, at 199. Though probably underestimating the impact of liberalism on continental private law, see also Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1, 24–25 (2006).

31. See DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 85–98 (1997) (referencing Carl Schmitt).

32. See Horst Dreier, *Kelsens Demokratietheorie: Grundlegung, Strukturelemente, Probleme*, in HANS KELSEN WEGE SOZIALPHILOSOPHISCHER FORSCHUNG 79 (Robert Walter & Clemens Jabloner eds., 1997); cf. HANS KELSEN, VOM WESEN UND WERT DER DEMOKRATIE 13 (1929) (“An die Stelle der Freiheit des Individuums tritt die Souveränität des Volkes . . .”) (emphasis added).

33. See KELSEN, *supra* note 12, at 285.

34. See *id.* at 320.

35. See *id.* at 213.

36. KELSEN, *supra* note 32, at 14–16, 53 et seq.

explain what keeps society together—a fatal flaw for a republican approach.<sup>37</sup>

*C. Merging Liberalism and Republicanism: Discourse Theory*

The preceding overview reveals that each strand of thought attaches different functions to the public-private distinction. While liberal theories assign to it a key conceptual role for securing individual autonomy and individual rights, republicanism considers it as conceptually constitutive of democratic forms of government. Both these functions should be crucial for any modern liberal democracy. Yet, the different functions assigned to the public-private distinction reflect different understandings of the relationship between state and society. I believe that this is a crucial factor for the varying significance attached to the public-private distinction from one jurisdiction to the other. While the common law in the United States and England undeniably bears the traits of relatively liberal societies democratizing at a comparatively early stage, French law has developed under the influence of republicanism, and German law under the impact of liberalism in the context of oppressive regimes. I also think that the different pedigrees of the public-private distinction account for much of the recent confusion surrounding the purpose and feasibility of maintaining this distinction in times of global governance.<sup>38</sup> We might fundamentally disagree on the relationship between state and society, so we are likely to disagree on the function of the public-private distinction, too. The crux with this is that the choice between liberalism and republicanism is not straightforward. Each strand carves out an important aspect of liberal democracy, but it might also give rise to extreme versions, which endanger freedom or democracy.

In this situation, discourse theory might lend itself as a useful compromise. Discourse theory, as developed by Jürgen Habermas, combines liberalism and republicanism in a skillful way. It acknowledges that both the liberal and the republican understanding of the relationship between state and society, as well as the associated differences in the function of the public-private divide, reflect important

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37. See KELSEN, *supra* note 32, *passim* (pointing to what one might consider rudimentary discursive preconditions of society, like a common language); cf. ERNST-WOLFGANG BÖCKENFÖRDE, DIE VERFASSUNGSTHEORETISCHE UNTERSCHIEDUNG VON STAAT UND GESELLSCHAFT ALS BEDINGUNG DER INDIVIDUELLEN FREIHEIT 19 (1973).

38. Cf. Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 1, 3 (Jeff Weintraub & Krishan Kumar eds., 1997).

aspects of modern societies.<sup>39</sup> It may therefore serve as a basis for a public-private distinction in global governance.

Instead of overemphasizing either individual or collective self-determination, Habermas parts from the observation that fundamental rights and popular sovereignty are co-constitutive for modern societies. In fact, we implicitly presuppose that they precondition each other: the fact that a group of individuals understands itself as a political community is preconditioned by the understanding that the members of that community grant each other certain fundamental rights. They are the basis of the community's life, and the reason for the acceptance of the community order by its members. They enable public reasoning that feeds into law-making processes by representative institutions as well as law application by the administration and courts. They ultimately lead to decisions that the members of the community have reason to accept.<sup>40</sup>

The mutual preconditioning (or equiprimordiality) of popular sovereignty and fundamental rights is the point where the public and the private spheres come together in discourse theory. Accordingly, the interaction of the public and the private spheres, of state and society, are essential for modern statehood. Without the former, there would be no democracy, while there would be no freedom without the latter. The political institutions of democratic states constitute society's integrative center. On the one hand, this is where ethical discourse in civil society about a good society is transformed into legally binding decisions reflecting society's common interest.<sup>41</sup> This constitutes the republican element of the theory. While liberal theories claim that the common interest is nothing but the aggregate of private interests,<sup>42</sup> Habermas argues that strategic action in the pursuit of self-interest ("bargaining") is just one side of the medal in human communication. There is also communicative action whereby people seek a form of understanding that transcends the level of mutual self-interest ("arguing").<sup>43</sup> This

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39. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 295–302 (William Rehg trans., reprint 2008) (1992).

40. See *id.* at 89–94.

41. *Id.* at 312–14; cf. ARENDT, *supra* note 28, at 12–16.

42. Cf. BENTHAM, *supra* note 17.

43. See 1 JÜRGEN HABERMAS, *THEORIE DES KOMMUNIKATIVEN HANDELNS* 369–420 (1981); see also Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345 (1999) (regarding the concepts of arguing and bargaining). This distinction has generated much debate. For a critical view, see Jens Steffek, *Norms, Persuasion and the New German Idealism in Ir*, in *ON RULES, POLITICS, AND KNOWLEDGE: FRIEDRICH KRATOCHWIL, INTERNATIONAL RELATIONS, AND DOMESTIC AFFAIRS* 191, 196 (Oliver Kessler et al. eds., 2010). Habermas makes a crucial distinction between

enables ethical discourse that becomes constitutive for the convictions of a community. On the other hand, the political institutions may also absorb pragmatic discourse among self-interested individuals. They give rise to negotiations, whereby self-interested individuals seek a compromise.<sup>44</sup> This is discourse theory's liberal element. Thus, the democratic process can integrate different types of discourse: ethical self-reflection; pragmatic negotiations; and universal moral arguments.<sup>45</sup> Consequently, the freedom prevailing in the private sphere is not opposed to the democratic institutions at the apex of the public sphere.

It is important to note that Habermas deems the dividing line between the public and the private spheres (i.e., between the pursuit of collective self-determination and the realm of individual freedom) to be variable and subject to change. In principle, every issue might move into the public sphere if it is important enough to a large enough group of people.<sup>46</sup> There is nothing inherently private that would be shielded from politics, and vice versa.

In sum, by combining elements of republicanism and liberalism and by holding the public-private distinction to be variable and contingent, discourse theory overcomes some of the fundamental problems that normally lead to confusion about the public-private distinction. Nevertheless, discourse theory also maintains that distinction to realize both democracy and freedom. This is what has become difficult in times of global governance.

## II. THE BLURRING OF THE LINE IN GLOBAL GOVERNANCE: THE EXAMPLE OF SOVEREIGN DEBT RESTRUCTURING

### *A. Sovereign Debt Restructuring*

As this section will show, the contemporary institutional and procedural arrangements that facilitate the restructuring of sovereign debt are illustrative of the blurring of the line between the public and the private in global governance, and the risks this involves. A sovereign debt restructuring is a complex process that consists in the

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communication in language and communication as a mode of action. See HABERMAS, *supra* note 39, at 17–18.

44. See HABERMAS, *supra* note 39, at 174–176, 297–302.

45. HABERMAS, *supra* note 39, at 151–68.

46. HABERMAS, *supra* note 39, at 306–08.

renegotiation of the terms of a state's debt with its creditors whenever a state finds it difficult to issue new debt at an acceptable interest rate.<sup>47</sup>

The concrete institutional and procedural regimes for sovereign debt restructuring have changed significantly over time. During the nineteenth and early twentieth century, sovereign debt restructuring used to rely exclusively on consent-based negotiations, following a private law paradigm.<sup>48</sup> Since the Second World War, an array of mechanisms for sovereign debt restructuring has emerged, mainly to address debt crises in the developing world, and replaced earlier colonial power with financial dependence.<sup>49</sup> Today, the IMF arguably sits at the center of the current regime. It might grant an interim loan to troubled debtor states, thereby restoring their credibility and financial health. Such a loan usually requires that the IMF consider the state's overall debt as sustainable (i.e., that the state has the capacity to repay its outstanding debt). If there are doubts about the sustainability of its debt, the state needs to renegotiate its existing debt with its creditors. The goal is to change the terms of the existing debt by exchanging old debt instruments for new ones with more generous terms. The IMF and other multilateral actors, such as the European Stability Mechanism (ESM), will grant a loan if they are satisfied that there has been, or will be, a successful renegotiation between debtor states and their creditors. Also, such new multilateral loans are always conditional upon the successive implementation of a political reform agenda (structural adjustment) that often involves austerity measures (i.e., cuts to public spending). The successful negotiation of an IMF loan is often a condition for other creditors to follow suit in restructuring their debt, such as the Paris Club, an informal venue for creditor states. The timing of a debt restructuring varies greatly and with the complexity of the case. While some debt restructurings only take a few weeks or months, others drag on for decades and involve extensive litigation between creditors and the debtor state.<sup>50</sup>

Concerning the public-private divide, sovereign debt restructurings involve a broad range of actors: its core consists of classical international organizations, such as the IMF and the World Bank, and

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47. For a comprehensive look at this and what follows, see Udaibir S. Das et al., *Sovereign Debt Restructurings 1950–2010: Literature Survey, Data, and Stylized Facts* 12–14 (IMF, Working Paper WP/12/203, 2012).

48. Juan Pablo Bohoslavsky & Matthias Goldmann, *An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law*, 41 *YALE J. INT'L L. ONLINE* 13, 17–18 (2016).

49. *Id.* at 18–21; Matthias Goldmann, *Staatsverschuldung und Entwicklung*, in *ENTWICKLUNG UND RECHT* 377 (Philipp Dann et al. eds., 2014).

50. Compare the case studies in Anna Gelpern, *Sovereign Debt: Now What?*, 41 *YALE J. INT'L L. ONLINE* 45 (2016).

informal intergovernmental settings, such as the Paris Club. The rise of private lending to developing states in the 1970s saw the addition of informal transnational private arrangements, such as the London Club and other creditors' committees for the restructuring of syndicated loans. The emergence of a much more dispersed bond market in the 1990s has elevated individual bondholders to the status of actors in sovereign debt restructurings as they need to give their consent to restructurings in accordance with applicable contractual clauses.<sup>51</sup> Multiple debt crises in the developing world have prompted the establishment of a cooperative framework for debt relief involving the IMF, the World Bank, and the Paris Club for the restructuring of heavily indebted poor countries' debt, the so-called Heavily Indebted Poor Countries Initiative (HIPC) and the Multilateral Debt Relief initiative.<sup>52</sup> All these actors rely on an array of public and private, formal and informal instruments for their operation. These instruments include international treaties, intergovernmental soft law, such as memoranda of understanding and letters of intent (IMF) or so-called agreed minutes (Paris Club), transnational private standards proposed by, e.g., the Institute of International Finance<sup>53</sup> or the International Capital Markets Association,<sup>54</sup> and in particular a great variety of contractual arrangements.

This variety of actors and instruments reflects the dispersed financing structure of most states. Borrowing Wolfgang Streeck's terminology, one could say that over the course of the last decades, the financing structure has changed from a "Durkheimian" institutional structure, characterized by few actors with long-term strategies, to a more dispersed and fragmented governance structure of the "Williamsonian" type.<sup>55</sup> What is of particular relevance here is how the present arrangement involves risks for human rights (or freedom) and democracy. Both have to do with the fact that the current amalgam of

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51. For an overview on venues and creditors involved, see generally Das et al., *supra* note 47.

52. See generally LEONIE F. GUDER, THE ADMINISTRATION OF DEBT RELIEF BY THE INTERNATIONAL FINANCIAL INSTITUTIONS (2009) (discussing the commitments of each of these organizations).

53. E.g., INST. OF INT'L FIN., PRINCIPLES FOR STABLE CAPITAL FLOWS AND FAIR DEBT RESTRUCTURINGS, REPORT ON IMPLEMENTATION BY THE PRINCIPLES CONSULTATIVE GROUP (2011), <http://www.iif.com/download.php?id=FwM6aDbqca0>.

54. E.g., INT'L CAPITAL MKTS. ASS'N, STANDARD AGGREGATED COLLECTIVE ACTION CLAUSES ("CACs") FOR THE TERMS AND CONDITIONS OF SOVEREIGN NOTES (2014), <http://www.icmagroup.org/resources/Sovereign-Debt-Information>.

55. WOLFGANG STREECK, RE-FORMING CAPITALISM: INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY 154 (2009); see also Eva Hartmann, *Transnational Private Authority in the Sphere of Education*, 25 IND. J. GLOBAL LEGAL STUD. 217 (2018) (discussing the distinctions between the structures).

public and private actors, instruments, and rules in sovereign debt restructuring makes the public-private distinction inoperable.

### *B. Risks for Human Rights*

Regarding human rights violations, the IMF has been severely criticized for the negative human rights impact of its policies on the population concerned,<sup>56</sup> including the effects of austerity measures for equality.<sup>57</sup> The IMF has staunchly defended its stance not to be subject to human rights obligations.<sup>58</sup> Still, the IMF is a kind of classical *public* international organization based on state consent. There is quite an impressive literature arguing that IMF policies need to respect human rights.<sup>59</sup> The problem is, however, that there is hardly an institution that could exercise human rights review. By contrast, the European Court of Justice has recently held that the European Commission cannot escape its human rights obligations when negotiating a sovereign debt restructuring.<sup>60</sup>

A much more profound problem in that respect is the question of human rights obligations of private creditors. Private creditor participation in the pluralistic financing structure outlined above gives rise to serious coordination problems in sovereign debt restructuring. The fragmented nature of contractual relations between creditors and their debtors allows so-called holdout creditors to escape a restructuring and seek the enforcement of their claims before courts while the majority of creditors agree to a restructuring.<sup>61</sup> Sovereign immunities,

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56. See Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47, 72–78 (1996).

57. Juan Pablo Bohoslavsky, *Economic Inequality, Debt Crises and Human Rights*, 41 YALE J. INT'L L. ONLINE 181, 193 (2016).

58. François Gianviti (General Counsel of International Monetary Fund), *Economic, Social and Cultural Human Rights and the International Monetary Fund*, ¶ 12, U.N. Doc. E/C.12/2001/WP.5 (May 7, 2001).

59. From the vast literature on the issue, see, for example, ADAM MCBETH, INTERNATIONAL ECONOMIC ACTORS AND HUMAN RIGHTS 176–184 (2010); SIGRUN I. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 101 (2001); Michael Lucas, *The International Monetary Fund's Conditionality and the International Covenant on Economic, Social and Cultural Rights: An Attempt to Define the Relation*, 25 REVUE BELGE DE DROIT INT'L 104, 119–35 (1992); Bradlow, *supra* note 56.

60. See Joined Cases C-8 P to C-10/15 P, *Ledra Advertising Ltd. v. Comm'n*, ¶ 57, ECLI:EU:C:2016:701, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183548&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=884615>.

61. Cf. *Sovereign Debt Workouts: Roadmap and Guide*, U.N. CONF. TRADE & DEV. (Apr. 28, 2015), <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=987>; Jill

which used to provide a “public” backstop against private entitlements, for the most part cannot prevent such litigation any longer. A customary exception to sovereign immunities emerged for commercial activities, among them the issuance of bonds.<sup>62</sup> Contemporary sovereign bonds also regularly contain more or less broadly phrased waivers of immunities. This has led to a significant rise in holdout litigation.<sup>63</sup> For this reason, an increasing number of authors claim that private creditors are directly subject to human rights obligations,<sup>64</sup> or stress the responsibility of states to protect the economic, social, and cultural rights of those affected by a sovereign debt restructuring—namely, the population of the debtor state—against private creditors.<sup>65</sup> Such claims constitute the attempt to revert the losses incurred in human rights protection by “privatizing” sovereign debt restructuring. Yet, it must be added that their success has been mixed at best.

### C. Risks for Democracy

No less challenging is the impact of the vanishing public-private divide on the democratic credentials of sovereign debt restructuring. The resolution of sovereign debt crises today depends to a significant extent on the voluntary cooperation of private creditors. Their willingness to cooperate sets the frame for democratic decision-making. At times, they try to foist their will upon democratic states by way of litigation.<sup>66</sup> Within the leeway given by this frame, debtor states have to

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E. Fisch & Caroline M. Gentile, *Vultures or Vanguard?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1043, 1049 (2004).

62. See, for example, the U.S. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (2017) and the U.K. State Immunity Act 1978, c. 33, § 3 among others.

63. Julian Schumacher et al., *Sovereign Defaults in Court* 6–10 (May 6, 2014 version) (unpublished manuscript) (can be accessed at <http://ssrn.com/abstract=2189997>).

64. See August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 37, 70–71 (Philip Alston ed., 2005) (based on the universal character of human rights); MCBETH, *supra* note 59, at 59–60 (based on the universal character of human rights); Armin von Bogdandy & Matthias Goldmann, *Sovereign Debt Restructurings as Exercises of Public Authority: Towards a Decentralized Sovereign Insolvency Law*, in SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING 39, 48 (Carlos Espósito, et al. eds., 2013) (based on the fact that private creditors may partake in the exercise of public authority when restructuring debt); Daniel D. Bradlow, *Can Parallel Lines Ever Meet? The Strange Case of the International Standards on Sovereign Debt and Business and Human Rights*, 41 YALE J. INT’L L. ONLINE 202, 209–11 (2016) (based on the increasingly dense network of codes of conduct urging corporations to observe human rights).

65. Human Rights Council Res. 20/10, U.N. Doc. A/HRC/RES/20/10, ¶ 13 (July 18, 2012).

66. Schumacher et al., *supra* note 63.

decide how to spend the public funds available under the given circumstances and how to implement the required adjustment measures. This has not remained unchallenged by domestic democratic processes. While such challenges are well-known in debt crisis-stricken developing and emerging economies, the Eurozone sovereign debt crisis has brought these conflicts to the attention of a Western audience. Thus, the Cypriot parliament rejected the conditionalities attached to prospective ESM funding in 2013, and the Greek people rejected the initial third bailout package by referendum in 2015.

The theoretical argument that the conflicts between private creditors and public decision-making characterizing the current regime for sovereign debt restructuring constitute a risk for democracy rests on two premises: first, the premise that sovereign debt restructuring requires democratic legitimacy and, second, the premise that the market for sovereign debt is not an appropriate venue for democratic decision-making. The first premise raises the question whether the restructuring of sovereign bonds governed by private law and owned by private persons or entities is an exercise of public authority, hence, a decision that requires democratic legitimacy. Given that sovereign debt restructuring and the associated adjustment programs determine the fate of a whole state and its ability to provide welfare to the population, one is inclined to answer this question in the affirmative. Also, sovereign debt restructurings have consequences for bilateral and multilateral lenders (and the taxpayers financing them) and other states by virtue of their effects on growth. However, to ultimately determine whether sovereign debt restructurings entail the exercise of public authority, one would need to clarify the meaning of “publicness” under the structural conditions of globalization.

The second premise that market transactions are no replacement for democratic decision-making leads to the core of the private-public distinction. Wolfgang Streeck has accentuated this point in his account of the development of democratic capitalism. Whereas the market is oriented toward self-interest and produces a formal, transactional kind of “market justice,” only the institutions of government may transcend self-interest and achieve “social justice” that calls into question, and modifies, the distributive results of the market.<sup>67</sup> The difference between market justice and social justice only collapses in societies that equate market justice with social justice and entirely dispense with the correction of the distributive results of the market.<sup>68</sup> As long as this is still not the case for most societies, the difference needs to be upheld,

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67. WOLFGANG STREECK, *GEKAUFTE ZEIT: DIE VERTAGTE KRISE DES DEMOKRATISCHEN KAPITALISMUS* 117–132 (2013); cf. HABERMAS, *supra* note 39, at 38–41.

68. STREECK, *supra* note 67, at 92.

including in the field of sovereign debt restructuring. The exercise of public authority in the context of sovereign debt restructurings thus cannot be left to the market.

This does not seem to go without saying in the recent debate about the current regime for sovereign debt restructuring and its need for reform. One core point of that debate is the issue of holdout creditors who refuse to participate in a negotiated debt restructuring and remain unresponsive even to pressure from international actors. That debate is often forgetful of the public-private distinction and the different conceptions of justice it implies. In fact, the debate focuses very much on the technicalities of contractual frameworks that might, or might not, improve creditor participation in sovereign debt restructurings. The IMF in particular advocates an approach that centers on popularizing and improving so-called Collective Action Clauses, or Majority Restructuring Clauses.<sup>69</sup> They allow a majority of cooperative creditors to impose the terms of a restructuring on a minority of uncooperative creditors. While such clauses might indeed have practical advantages, they do not resolve the clash between market justice and social justice. Voices in the debate that reject purely contractual solutions and favor statutory, public law solutions instead mostly do so for reasons of effectiveness. Questions of democratic self-determination usually do not surface.<sup>70</sup>

Admittedly, though, it is not easy to propose a solution that respects democratic principles in the achievement of social justice. This would again require a concept of the “public” within which distribution is supposed to take place. One cannot simply defer the decision to existing democratic institutions at the level of the debtor state. The Greek referendum of July 2015 is a case in point. It juxtaposed various constituencies on the domestic and supranational levels, each claiming

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69. IMF, *Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring*, Staff Report and Press Release (Oct. 2014).

70. This even applies to Martin Guzman & Joseph E. Stiglitz, *Creating a Framework for Sovereign Debt Restructuring That Works*, in TOO LITTLE, TOO LATE: THE QUEST TO RESOLVE SOVEREIGN DEBT CRISES 3, 9 (Martin Guzman et al. eds., 2016), who discuss efficiency and equity issues, but never mention democracy. Many authors put much emphasis on allegedly neutral expertise, for example, Barry Herman, *Toward a Multilateral Framework for Recovery from Sovereign Insolvency*, in TOO LITTLE, TOO LATE: THE QUEST TO RESOLVE SOVEREIGN DEBT CRISES 206, 214 (Martin Guzman et al. eds., 2016); Richard A. Conn Jr., *Perspectives on a Sovereign Debt Restructuring Framework*, in TOO LITTLE, TOO LATE: THE QUEST TO RESOLVE SOVEREIGN DEBT CRISES 231, 235 (Martin Guzman et al. eds., 2016); Christoph G. Paulus, *Should Politics be Replaced by a Legal Proceeding?*, in A DEBT RESTRUCTURING MECHANISM FOR SOVEREIGNS: DO WE NEED A LEGAL PROCEDURE? 191, 191 (Christoph G. Paulus ed., 2014).

to have at least an equal say in the decision-making process.<sup>71</sup> An international, democratic representative framework seems necessary. The General Assembly of the United Nations might come closest to an institution, in particular if transformed into an institution representative of the states and the people along the lines suggested by Habermas.<sup>72</sup> But that would presuppose a truly global public sphere to provide input into democratic decision-making processes. In addition, one cannot expect a body of the size of the General Assembly to have the necessary procedures in place for efficient, fast-paced executive decision-making. It might be more suitable for the adoption of quasi-legislative principles.<sup>73</sup>

In sum, without coming to any definitive conclusions here, the case of sovereign debt restructuring demonstrates how global governance blurs the distinction between the public and the private, and how this causes direct consequences for human rights protection and democracy. As has been shown before, the insistence on the private law character of sovereign debt instruments serves as a tool for entrenching a neoliberal agenda and for discarding important public interests.<sup>74</sup> Any improvement hinges on a viable definition of “the public” for the purposes of sovereign debt restructuring, and in the context of global governance in general.

### III. PUBLICNESS IN GLOBAL GOVERNANCE

The above considerations raise the need for a more abstract, theoretical definition of publicness under the structural conditions of global governance to determine human rights obligations in sovereign debt restructurings as well as to identify the relevant public from which it needs to derive democratic legitimacy. By way of a disclaimer, I should add that this article does not elaborate on the concept of authority. As authority, I take every act whose author claims to be entitled to restrict the freedom of others, be they individuals, states, or corporations.<sup>75</sup>

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71. On the Greek referendum, see Philip Oltermann, *Jürgen Habermas’s Verdict on the EU/Greece Debt Deal – Full Transcript*, THE GUARDIAN (July 16, 2015, 3:26 PM), <https://www.theguardian.com/commentisfree/2015/jul/16/jurgen-habermas-eu-greece-debt-deal>.

72. See HABERMAS, *supra* note 39, at 87–88.

73. Cf. G.A. Res. 69/319, Basic Principles on Sovereign Debt Restructuring Processes (Sept. 10, 2015). On this approach, see Bohoslavsky & Goldmann, *supra* note 48, at 23.

74. Cf. A. Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4 REV. INT’L POL. ECON. 261 (1997).

75. In this context, on the concept of authority, see MATTHIAS GOLDMANN, INTERNATIONALE ÖFFENTLICHE GEWALT: HANDLUNGSFORMEN INTERNATIONALER

*A. Publicness as the Relation between a Community and Its Members*

The discussion of sovereign debt restructuring in the previous section provides an important hint to a decisive criterion for a distinction between the public and the private that is suitable for global governance. The applicability of standards of human rights protection and democratic decision-making seems to depend on the objectives pursued by sovereign debt restructuring. Is sovereign debt restructuring a purely economic issue affecting only the financial interests of creditors and debtors? Or is it an activity that has a bearing upon the public sphere, including the situation and interests of a certain community, whether it be the debtor state, the European Union, the members of the Paris Club, or the international community? The focus on public interests, on the community as a whole, seems to be what characterizes public authority (just like public law). By contrast, private authority (just like private law) pursues the (mutual) self-interest of the actor(s) as part of their individual self-determination.<sup>76</sup> It is apparent that this distinction stems from republican theories of democracy. Discourse theory opened a way of reconciling it with more liberal approaches.<sup>77</sup>

When translating this distinction between common and private interests to a pluralistic environment characterized by multiple communities with overlapping membership, public authority becomes a matter of perspective: public authority is the authority exercised *within* one such community, while private authority is the authority exercised among the members of a community (or among such communities).<sup>78</sup> On that basis, I propose the following definition: public authority is an act of authority whose actor reasonably claims to be mandated to act on behalf of a community of which the observer is a member, or a member of such member.<sup>79</sup>

Some crucial explanations are in order. First, one needs to carefully distinguish the descriptive dimension of the definition and its normative consequences. The definition has a *descriptive purpose*, namely that of

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INSTITUTIONEN IM ZEITALTER DER GLOBALISIERUNG 319–337 (2015); Armin von Bogdandy et al., *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EUR. J. INT'L L. 115, 133–140 (2017).

76. Cf. ROUSSEAU, *supra* note 24, at ch.6, 7; HEGEL, *supra* note 26, § 258. From more recent literature see Claudio Michelon, *The Public, the Private, and the Law*, in AFTER PUBLIC LAW 83, 85–87 (Cormac Mac Amhlaigh et al. eds., 2013) and Jacqueline Best & Alexandra Gheciu, *Theorizing the Public as Practices: Transformations of the Public in Historical Context*, in THE RETURN OF THE PUBLIC IN GLOBAL GOVERNANCE 15, 32 (Jacqueline Best & Alexandra Gheciu eds., 2014).

77. Cf. *infra* Part I.

78. Cf. BOBBIO, *supra* note 10, at 2–3, 13.

79. See Goldmann, *supra* note \*, at 77.

identifying acts which require a specific kind of legitimacy because the actor claims to promote the interest of a community on its behalf, i.e., to act in furtherance of the community's collective self-determination. Whether an act thus identified actually has that kind of legitimacy is a different question. This is where the *normative upshot* of the above definition comes into play. Accordingly, public authority needs to be equipped with a legal framework that ensures it enjoys a presumption of legitimacy. In a discourse theoretical perspective, this requires structures of adequate representation, participation, transparency, accountability, and human rights protection that will bring about ethical and moral discourse based on communicative action, not only pragmatic compromise based on strategic action. The assumption of legitimacy is rebuttable.<sup>80</sup>

To clarify what I mean here, my approach can be contrasted with that of Kingsbury and Donaldson. While I agree with Kingsbury and Donaldson that public authority is the authority adopted in the name of a public (i.e., a community),<sup>81</sup> they establish the additional requirement that such exercises of authority need to respect certain defined substantive and procedural principles *in order to be considered as public authority*. By contrast, the present definition of public authority rests on the conviction that it is better not to fuse legality with legitimacy. Public authority should comprise acts which *claim* to be legitimate because they meet the applicable legal requirements—and nothing more. This move gives the concept of public authority its particular emancipatory thrust. By classifying all acts that claim a certain legitimacy (the descriptive dimension of the concept) as public authority, one immediately engages the responsibility of their authors to ensure that the act effectively respects individual and collective self-determination (the normative dimension of the concept).

Second, public authority is always exercised within a community.<sup>82</sup> This is why I refer to the *observer* in the above definition: one and the same act may affect different people or groups, some of which may be members of the community on whose behalf the actor is mandated to act; others may not. For the non-members, the act might be considered as one of private authority. Accordingly, the rules of private law apply to

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80. Cf. Joseph Raz, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 210, 215–18 (Joseph Raz ed., 2001); JOSEPH RAZ, *THE AUTHORITY OF LAW* 5–8 (1979).

81. See, e.g., Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law*, in *FROM BILATERALISM TO COMMUNITY INTEREST* 79, 84 (Ulrich Fastenrath et al. eds., 2011); Benedict Kingsbury, *International Law as Inter-Public Law*, in *MORAL UNIVERSALISM AND PLURALISM* 167, 180–81 (Henry S. Richardson & Melissa S. Williams eds., 2009) (referring even to “the whole society”).

82. See BOBBIO, *supra* note 10, at 13.

it, be it domestic contract and tort law or their international law equivalents like the Vienna Convention on the Law of Treaties and the customary law of state responsibility as codified in the Articles on State Responsibility. They ensure that such authority is exercised on the basis of consent, the justificatory backbone of the private law paradigm. But the exercise of private authority does not require democratic legitimacy. To give an example: Authoritative acts of non-universal international organizations, such as the Organization for Economic Cooperation and Development (OECD), are acts of public authority for their members. This means that they need to derive their democratic legitimacy from the member states and their citizens. However, they do not need to derive democratic legitimacy from non-member states and their citizens, even if they cause indirect effects for them, such as an act of the OECD causing policy changes in OECD member states that might affect their trade with non-member states. Only if the OECD could credibly claim to have a legal mandate to act also on behalf of non-members, the latter would see themselves confronted with an act of public authority.

The case is different if the impact of such private authority on the self-determination of those affected becomes too strong to be justified by consent (e.g., because it causes enormous, non-remediable externalities or is exercised in the context of huge, unacceptable power disparities). This would be the case if an OECD policy establishes a global standard that has enormous consequences for non-member states, such as the OECD policy on tax havens.<sup>83</sup> In such a case, two options remain: either a competent public authority such as the state or an international institution needs to regulate the exercise of such private authority. Fundamental rights might afford additional legal protection and mitigate power disequilibria to the extent that they have horizontal effects.<sup>84</sup> Or, the exercise of such authority needs to be transformed into public authority to be exercised by an institution with a mandate

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83. On the varying success of this policy, see generally JASON C. SHARMAN, *HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION* (2006); Peter Dietsch & Thomas Rixen, *Tax Competition and Global Background Justice*, 22 *J. POL. PHIL.* 150 (2014). This policy has been revitalized though Action 5 of the OECD Base Erosion and Profit Shifting Action Plan. See *BEPS Actions: Base Erosion and Profit Shifting*, ORG. ECON. CO-OPERATION & DEV., <http://oecd.org/ctp/beps-actions.htm> (last visited Feb. 7, 2018).

84. For the pathbreaking case in this regard, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVERFGE] 198 (Ger.). On the horizontal effects of fundamental rights in the law of the European Union, see generally Verica Trstenjak & Erwin Beysen, *The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the Cjeu*, 38 *EUR. L. REV.* 293 (2013); Dorota Leczykiewicz, *Horizontal Application of the Charter of Fundamental Rights*, 38 *EUR. L. REV.* 479 (2013); and Muir Watt, *supra* note 9, at 400–02.

allowing it to act on behalf of a more inclusive community comprising those so severely affected.<sup>85</sup> Ideally, this would lead to the convergence of those significantly affected by an authoritative act, with the community in whose name such authority is being exercised. Such a shift from private to public authority might require the creation of new international institutions.<sup>86</sup> It would be illiberal to prescribe an existing group to expand its membership. It may only do so on its own. If one allows people to form communities for the purpose of self-determination, there will be exclusion. Public law can only impose restrictions on whether and how such communities may exercise authority.

Certainly, it is a political question, a question of legitimacy and not one of legality, to determine the point at which someone needs to intervene and regulate private authority, or to transform it into public authority by shifting it to a more inclusive institution. This issue is therefore up for contestation, and, absent a world parliament, there is no forum that could ultimately decide this question in a legitimate manner. However, the United Nations General Assembly provides a relatively inclusive forum for the discussion of such matters, although it only comprises states.<sup>87</sup>

Third, it is not sufficient that the actor subjectively has the intention to pursue the community's interest. The actor also needs to claim to be *mandated* to act on behalf of a community. It belongs to the community's collective self-determination to select the persons or entities that may pursue its common interest, and how. Also, only those who claim to be empowered by the community face claims for democratic legitimacy, not those who voluntarily align their action with what they think is the common interest. It is irrelevant whether the mandate has a legal basis in soft or hard law. I consider both soft and hard law as potential acts of authority, hence as acts that might empower other exercises of authority.

Fourth, the actor exercising public authority needs to make a *reasonable claim* that he or she is mandated to act on behalf of a certain community. Such a claim is reasonable if the actor may, with some plausibility, invoke a legal basis entitling him to act on behalf of the respective community. This is an intersubjective criterion that is meant

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85. This seems to me one of the main differences between this approach and the approach discussed in Megan Donaldson & Benedict Kingsbury, *Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation*, 14 CHI. J. INT'L L. 1, 45–46 (2013).

86. Cf. STEVEN WHEATLEY, *THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW* 330–31 (2010).

87. For recent example illustrative of this potential, see G.A. Res. 69/319, *supra* note 73.

to exclude gross abuses of power. Striking *ultra vires* acts should not be beatified by according to them the status of public authority, since public authority implies a claim to at least potential legitimacy, not only in the understanding of discourse theory.<sup>88</sup> However, this has nothing to do with the question whether such egregious *ultra vires* acts may trigger the responsibility of the agent or institution. One should not mix up questions of *iustitia distributiva* (public authority and its legitimacy) with questions of *iustitia commutativa* (damages) or criminal law sanctions.

Fifth, the above definition not only applies if the affected entity is a member of the community in whose name the act has been adopted, but also if it is a *member of such member*. The latter case concerns in particular acts of international or supranational institutions that directly affect private individuals of their member states. Examples comprise arrest warrants of the International Criminal Court, judgments of international courts and tribunals where one of the parties is a private individual, or acts of information, such as Interpol red notices. Each of these examples has direct legal or factual consequences for private individuals. States granted the respective international institution the necessary powers to exercise such authority directly over their citizens. This necessitates considering such authority as public, even though the individual affected is not directly a member of the acting institution.

But one important question remains: What is a community (or a public) in a pluralistic, global, non-state centric setting?

### *B. What is a Community?*

The definition of community can tap on a rich theoretical reservoir. For one, Ferdinand Tönnies famously carved out the distinction between community (*Gemeinschaft*) and society (*Gesellschaft*), whereby the former is distinguished from the latter by the existence of a collective will that transcends individual interests.<sup>89</sup> There is no need to rehash this literature here. Rather, given the discourse theoretical underpinning of this article, I elaborate the concept of community from this perspective. This mainly has the purpose of achieving theoretical consistency within this chapter. I do not mean to imply that this renders a better result than approaches departing from different theoretical vantage points. Indeed, this would be foolish given the richness of

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88. See *infra* Part I; HABERMAS, *supra* note 39, at 87–88.

89. FERDINAND TÖNNIES, *GEMEINSCHAFT UND GESELLSCHAFT* § 1 (1897).

theoretical thought on this question and the criticisms that have been advanced against discourse theory.<sup>90</sup>

Discourse theory rejects any kind of foundational concept of community that would be held together by substantive bonds reaching back to times immemorial, like a common history or ethnic or linguistic affiliation, as traditional accounts of nationhood have it.<sup>91</sup> The only requirement for a community is a communicative one: in a community, ethical discourse, a form of communicative action, prevails and enables social integration. This does not exclude the appearance of pragmatic discourse, a form of strategic action, as long as ethical discourse gives the discourse its shape and particular meaning.

Transferring this concept to the global level involves a problem. According to Habermas, one can only engage in meaningful ethical discourse if one shares a common life-world (i.e., if one holds shared basic convictions about an ethical life resulting from processes of opinion-formation in the public sphere of an open society).<sup>92</sup> Despite what has been said about the emergence of world public opinion,<sup>93</sup> the members of the fragmented communities of the present global order do not share a common life-world that is as thick and rich as that shared by the citizens of many states. They might only possess a rudimentary array of shared convictions. The latter is perhaps better called “identity” instead of life-world, since it does not amount to the thick layer of common basic convictions usually associated with a life-world. Identity, in this respect, does not refer to sameness but to shared elements in the self-understanding of the members of a community on the supranational level.<sup>94</sup> This concept of identity refers to a social phenomenon that is independent from the law and presupposed by it.<sup>95</sup> Identity designates the frames necessary for value judgments, which hinge on a person’s self-understanding. That, in turn, depends on how she sees herself in relation to others. Identity is therefore an inter-subjective construction characterized by the dynamic interplay of the identities of the self and

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90. *E.g.*, LUHMANN, *supra* note 20.

91. *E.g.*, ERNST-WOLFGANG BÖCKENFÖRDE, STAAT, NATION, EUROPA 124–126 (1999).

92. HABERMAS, *supra* note 39, at 176–86. On the concept of lifeworld (“Lebenswelt”) see *id.* at 21–23.

93. *E.g.*, Michael Zürn et al., *International Authority and Its Politicization*, 4 INTERNATIONAL THEORY 69, 72 (2012).

94. *Cf.* Armin von Bogdandy, *Europäische und Nationale Identität: Integration durch Verfassungsrecht?*, 62 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRICHTSLEHRER [VVDStRL] 156, 162 (2003) (Ger.).

95. In the context of the concept of life-world, see HABERMAS, *supra* note 39, app. at 498.

of our respective communities.<sup>96</sup> In case a community is composed of abstract entities like states, the relevant community identity will always include the individual members of these entities like citizens.

By virtue of their structure, some legal entities might be more predisposed to bring about ethical discourse than others. They might therefore be presumed to constitute a community. This is based on the following consideration: The idea of the identity of a community has a factual and a normative dimension. On the one hand, the members of a community may, as a matter of fact, share a stronger or a weaker form of community identity; on the other hand, community membership might require its members to share a stronger or a weaker form of community identity. A strong community identity resembles a life-world.<sup>97</sup> The stronger the community identity is as a matter of fact, the better ethical reasoning will work. The more a community requires its members to share a common identity, the less inclusive it will be and the more externalities it will produce. As a result, the “ideal” community may rely on a strong shared identity of its members (i.e., a common life-world) which facilitates communicative action, but it may not require its members to share much of that identity, thereby keeping it inclusive. Based on these considerations, one might establish a number of ideal typical communities, each characterized by the factual and normative aspects of their identity. These ideal types should not be understood too rigorously, but rather as different points on one continuum.

It is not difficult to derive from the foregoing that the modern liberal state assumes a predominant role for the exercise of public authority. It has few identity requirements and protects the freedom of its citizens to make up their minds about their idea of a good life.<sup>98</sup> At the same time, most states may rely on the broad, shared life-world of its members. The same applies for sub-state territorial entities, although the shared identity of their citizens may vary by degrees.

With respect to international organizations, one needs to distinguish the United Nations as a universal organization with broad powers from other, more specialized or regional organizations. According to the preamble of its charter, the United Nations requires even less commitment from its member states or their members than a state.

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96. See CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 19–24 (1989).

97. See Roger Cotterrell, *Transnational Communities and the Concept of Law*, 21 *RATIO JURIS* 1, 12 (2008), which suggests Weber's four types of social action: instrumental, value-based, emotional, and traditional. While the first type corresponds to strategic action, the other three categories might play varying roles in the constitution of a life-world.

98. Bogdandy, *supra* note 94, at 180–83.

However, the citizens of the world are far from sharing a common life-world. Only some rudimentary shared convictions might exist, which are at best coextensive with the principles of the preamble. Thus, while the United Nations is an extremely inclusive actor, communicative action is hard to organize. It may therefore exercise public authority, but such authority must not be very intrusive unless it corresponds to the few shared convictions that might find worldwide acceptance.

Specialized international organizations like the World Trade Organization (WTO) or regional organizations like the Council of Europe require a specific kind of common identity on the part of their members. In case of the WTO, they need to subscribe to the idea of free trade, and the Council of Europe requires commitment to rather specific human rights obligations. This should in principle facilitate the potential of these organizations to bring about communicative reasoning, although that might be higher in regional organizations like the OECD than in organizations with broad membership like the WTO. At the same time, they have a huge potential to create externalities, both for non-member states and for policy areas outside their jurisdiction over which their shared identity does not extend.

Nonprofit corporations established under domestic law usually require their members to share a strong community identity (e.g., the purposes of the World Wildlife Fund). This alleviates the need for deliberative structures in their internal organization. Thus, under German law, the internal regulations of non-profit corporations only need to guarantee a minimum of procedural fairness to its members. However, the structure of organizations with an important economic or social position (i.e., a quasi-monopoly) needs to respect democratic principles.<sup>99</sup> In line with this, the Model Nonprofit Corporation Act of the American Bar Association proposes a number of provisions on the internal organization that ensure that governance of the organization is member-driven. Corporations may not derogate from some of these provisions.<sup>100</sup> The flipside of the strong community identity is, again, the risk that they might create externalities for non-members. On the domestic level, the rules of private law keep these externalities in check. On the international level, there might be lacunae. In this respect, so-called hybrid corporations, which count governmental institutions among their members, might have an advantage since this membership

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99. Cf. Martin Schöpflin, *Section 25, in 1 KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH* margin no. 40–41 (Heinz Georg Bamberger et al. eds., 2017).

100. Cf. Michael E. Malamut, *Issues of Concern to Parliamentarians Raised by the 2008 Revision of the Model Nonprofit Corporation Act*, NATIONAL PARLIAMENTARIAN, First Quarter 2009, [http://www.michaelmalamut.com/articles/2009Q1\\_-\\_2008\\_Model\\_Nonprofit\\_Corporation\\_Act.pdf](http://www.michaelmalamut.com/articles/2009Q1_-_2008_Model_Nonprofit_Corporation_Act.pdf) (reprint).

structure broadens the basis of the relevant community, sometimes including the citizens of the respective territorial entities in a more direct fashion. This is one of the reasons why the concept of hybridity needs to be “unpacked.”<sup>101</sup>

A crucial question is whether groups composed of for-profit corporations are communities, such as professional associations or the invisible group of global players from which the *lex mercatoria* emerged. Habermas considers economic activity as the exclusive domain of strategic action of self-interested actors. Individual market activity therefore does not contribute to social integration, but the market as a whole does. The legal framework of the market as a whole connects it to the integrative forces of communicative action.<sup>102</sup> While it is true that economic activity and market forces are ultimately geared toward mutual self-interest, I find it difficult to imagine that market participants would not occasionally switch to communicative action.<sup>103</sup> Economics and politics are not completely separate spheres. Indeed, the fact that transnational market participants have created a *lex mercatoria*,<sup>104</sup> or that professional organizations routinely engage in norm-setting,<sup>105</sup> provides strong hints that market participants might every now and then switch from bargaining to arguing about what is best for the community in order to maintain or improve the functioning of the market as a whole.<sup>106</sup> On the domestic level, the predominance and specificity of positive law relegates such communicative action among market participants to a back seat, perhaps with the exception of a few principles of honest trade. The situation is different for the international level. Here, the more substantial the shared identity of economic actors is, the more they might be expected to successfully engage in communicative action—and the more externalities they might

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101. Lorenzo Casini, “Down the Rabbit-Hole”: *The Projection of the Public/Private Distinction Beyond the State*, 12 INT’L J. CONST. L. 402, 412 (2014).

102. HABERMAS, *supra* note 39, at 38–41.

103. See AXEL HONNETH, *DAS RECHT DER FREIHEIT* (2011). With reference to Talcott Parsons, see *id.* at 19. With reference to the ideas of Adam Smith and Hegel, who believed that economic activity presupposes not only legal, but also moral or ethical rules, see *id.* at 320–21. Of course, the financial crisis exposed the gap between reality and the theoretical model.

104. Gunther Teubner, *Breaking Frames: Economic Globalisation and the Emergence of lex mercatoria*, 5 EUR. J. SOC. THEORY 199, 200 (2002).

105. *E.g.*, Orr Karassin & Oren Perez, *Shifting Between Public and Private: The Reconfiguration of Global Environmental Regulation*, 25 IND. J. GLOBAL LEGAL STUD. 97 (2018); OREN PEREZ, *ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM* 169 (2004).

106. Harald Müller, *Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations*, 10 EUR. J. INT’L REL. 395, 414–16 (2004).

create for non-participants. But it depends on the individual case whether such groups are to be considered communities.

A different thing is the relationship between for-profit associations and their members. While partnerships might occasionally witness communicative action (although strategic action might prevail), communicative action is extremely unlikely to come about among the shareholders of a public company. There is no identity requirement except for the ownership of at least one share, and no shared community identity may be presumed. Therefore, this is the ideal-typical model of a legally constituted group, which regulates its relationship by way of private authority, the antipode of the state.<sup>107</sup>

By way of an intermediate conclusion, it turned out to be possible to base the public-private distinction on the difference between community interests and private interests, and to apply the discourse theoretical understanding of community to global governance. This enables testing the theory.

#### IV. SOVEREIGN DEBT RESTRUCTURINGS AS EXERCISES OF PUBLIC AUTHORITY

This section first demonstrates that different crucial decisions and instruments in a sovereign debt restructuring have an authoritative character.<sup>108</sup> The second question is whether they are also to be characterized as exercises of *public* authority (i.e., whether they need to respect human rights standards and conform to expectations toward their democratic legitimacy). I confine the following analysis to the most important venues for debt restructurings—namely, the IMF, the Paris Club, and the London Club and comparable venues of private creditors.

##### A. *IMF Lending*

There can be little doubt about the *authoritative* character of IMF lending into arrears in case of sovereign debt crises, although the nature of the underlying arrangements is contested.<sup>109</sup> Procedurally, lending into arrears requires a decision of the IMF Executive Board. Substantially, states need to meet the conditionalities applicable to the

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107. This statement does not refer to the relationship between such companies and their employees. While strategic action might prevail here, too, the establishment of staff committees might increase the chance for communicative action.

108. On the concept of authority, cf. GOLDMANN, *supra* note 75. On the qualification of sovereign debt restructurings as authoritative, see Bogdandy & Goldmann, *supra* note 64.

109. On this contentious issue see ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 616–17 (2d ed. 2008).

lending instrument in question, including an economic adjustment program agreed in letters of intent and memoranda of understanding concluded with the IMF.<sup>110</sup> As soon as the borrowing state effectively receives financial support, these soft legal instruments acquire an authoritative character. The state is expected to meet the goals set out therein. If it fails to do so, it faces sanctions like the withholding of the subsequent tranche, which is not unlikely to happen since the introduction of performance targets.<sup>111</sup> This would seriously impede the entire restructuring process. Indirectly, conditionalities and adjustment programs bear important consequences for the citizens of the defaulting state and affect the ability of that state to service its external and domestic debt, thereby impacting the interests of third party creditors. The IMF is an international organization, so its authority also qualifies as *public*. It has a legal basis in the Articles of Agreement of the IMF,<sup>112</sup> a binding international treaty enjoying nearly universal membership. It represents the traditional way in which the international community of states exercises authority.

### *B. Paris Club Agreed Minutes*

The Paris Club, by contrast, lacks a basis in binding international law. Still, I contend that the “Agreed Minutes,” which conclude Paris Club negotiations about debt restructurings, constitute exercises of international public authority. First, they are to be considered as exercises of *authority* as they affect the financial situation of the defaulting state by stipulating the details of the deal between the borrower and its lenders, including whether there will be relief and the conditions of any debt restructuring. Backed by the economic power of its members, the Paris Club has the capacity to effectively implement the formally non-binding Agreed Minutes and frame and stabilize the normative expectations of all actors involved or affected, including the citizens of the defaulting and lending states. Moreover, the “comparability of treatment” clause requiring the state not to grant more favorable conditions to other creditors affects these very creditors, as well as the ability of the defaulting state to further lighten its financial burden.<sup>113</sup> Second, the Agreed Minutes are exercises of *public*

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110. IMF, *Guidelines on Conditionality*, Guidelines, ¶ 9 (Sept. 2002), <http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf>.

111. *Id.* ¶ 11.

112. Articles of Agreement of the IMF, Art. 5, § 3(a)–(c), 60 Stat. 1401, 2 U.N.T.S. 39.

113. See *What Does Comparability of Treatment Mean?*, PARIS CLUB, <http://www.clubdeparis.org/en/communications/page/what-does-comparability-of-treatment-mean> (last visited Sept. 30, 2017); Daphnè Josselin, *Regime Interplay in Public-Private Governance*:

authority because the Paris Club has turned from an institution pursuing the self-interest of its members, rich, capital-exporting states, to an institution that effectively pursues debt sustainability as a common interest uniting both the lenders and the debtor states. The soft legal framework of the Paris Club comprises fairly standardized terms for restructurings.<sup>114</sup> An important step in this respect was the adoption of the so-called Toronto Terms in 1988, which, for the first time, introduced debt cancellation for highly indebted developing countries. Testament to the new atmosphere is the key role assumed by the Paris Club in the HIPC initiative.<sup>115</sup> Thus, the Paris Club and its legal framework today reflect the implicit consensus of many states that debt needs to be reduced to a sustainable level. It therefore forms a community comprising both lenders and borrowers. Arguably, I therefore classify its Agreed Minutes as exercises of *public* authority.

Two important caveats are in order. First, this does not mean that debt restructurings were always sufficient. In fact, they were not. The Multilateral Debt Relief Initiative had to be set up subsequently in 2005 in order to mitigate the shortcomings of the HIPC initiative.<sup>116</sup> Second, this does not imply that I consider the negotiating framework of the Paris Club sufficient and legitimate in all respects. Rather, it simply means that the Paris Club needs to respect human rights and democratic legitimacy.

### *C. Agreements with Private Creditors*

Qualifying restructurings negotiated between states and representatives of commercial creditors as exercises of international public authority is a more difficult task. Such negotiations take place in the London Club, the Institute of International Finance, or other venues, which convene in creditors' committees on an *ad hoc* basis.<sup>117</sup> At close inspection, such restructurings might usually be characterized as exercises of *authority*: for the debtor state, the effects of such restructurings are comparable to those of Paris Club Agreed Minutes.

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*Taking Stock of the Relationship Between the Paris Club and Private Creditors Between 1982 and 2005*, 15 GLOBAL GOVERNANCE 521, 531 (2009); see also Das et al., *supra* note 47, at 16 (emphasizing the discretion the application of the comparability principle gives to the Paris Club).

114. See PARIS CLUB, <http://www.clubdeparis.org> (last visited Sept. 30, 2017).

115. Cf. GUDER, *supra* note 52, at 194–95.

116. See generally Bernhard G. Gunter, *What's Wrong with the HIPC Initiative and What's Next?*, 20 DEV. POL'Y REV. 5 (2002) (discussing the shortcomings of the enhanced HIPC initiative and suggesting improvements for it).

117. On the functioning of the London Club, see FREDERICO STURZENEGGER & JEROMIN ZETTELMEYER, *DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES* 12–15 (2006).

For creditors, participation might not be so voluntary after all. In fact, without such venues like the London Club, creditors would be faced with a huge collective action problem leaving everybody worse off than if they participated in a common restructuring, especially if they have a significant exposure to the debtor.<sup>118</sup>

While such restructurings might therefore be qualified as authoritative for their parties, their *public* character is less obvious. The London Club is not included in the list of organizations that can be expected to exercise public authority over anyone except its members. No explicit hard or soft agreement authorizes the London Club or other venues to act in the public interest of the debtor state or the international community, or else. Nevertheless, they might at times operate with the implicit consent<sup>119</sup> of the IMF or other organizations that integrate these restructurings into their exercises of public authority. In the case of the London Club, the IMF has repeatedly shown its support for the Club's restructuring activities. One might regard it as an implicit expression of consent that the IMF has even compelled creditors and debtors to engage in London Club restructurings by its lending policies. Prior to 1989, debtors had to reach an agreement in principle with their creditors in order to qualify for funds under standby arrangements.<sup>120</sup> In 1989, the Fund launched its policy of lending into arrears in order to facilitate the restructurings of sovereign debt with private creditors and the corresponding adjustment programs.<sup>121</sup> It now requires countries to enter into negotiations with its *private* creditors in order to receive upfront public sector support.<sup>122</sup> The

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118. See Lee C. Buchheit & Ralph Reisner, *The Effect on the Sovereign Debt Restructuring Process on Inter-Creditor Relationships*, 1988 U. ILL. L. REV. 493, 500, 514 (1988).

119. On the sufficiency of tacit consent in international law, see S. Szurek, *Convention of 1969, Article 11*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES 197–98 (Oliver Corten & Pierre Klein eds., 2011).

120. Shean Hagan, *Sovereign Debtors, Private Creditors, and the IMF*, 8 L. & BUS. REV. AMERICAS 49, 51 (2002).

121. On the effects of a restrictive IMF policy on lending into arrears to private creditors, see Lucio Simpson (United Nations Conference on Trade and Development), *The Role of the IMF in Debt Restructurings: Lending Into Arrears, Moral Hazard and Sustainability Concerns*, U.N. Doc. UNCTAD/GDS/MDPB/G24/2006/2 (G-24 Discussion Paper Series No. 40) (May 2006) (claiming it had a pro-creditor basis).

122. See IMF, *The Chairman's Summing Up—Fund Involvement in Debt Strategy*, Executive Board Meeting 89/61, (May 23, 1989); IMF, *The Acting Chairman's Summing Up on Fund Policy on Arrears to Private Creditors—Further Considerations*, Executive Board Meeting 99/64, (June 14, 1999); and IMF, *The Acting Chair's Summing Up—Fund Policy on Lending into Arrears to Private Creditors—Further Consideration of the Good Faith Criterion*, Executive Board Meeting 02/92, (Sept. 4, 2002); cf. Hagan, *supra* note 120, at 52–53.

London Club in turn endorses IMF support by requiring borrowers to seek IMF assistance.<sup>123</sup> In addition to the IMF, state practice implicitly approves of London Club negotiations as an indispensable mechanism for the restructuring of sovereign borrowers' commercial debt. For example, the exchange of syndicated loans for Brady Bonds was facilitated not only by the International Financial Institutions, but also by some governments of creditors, which pledged collateral.<sup>124</sup> As a sign of such official endorsement, IMF staff has been regularly present at negotiations in the London Club.<sup>125</sup>

An interesting case is the Greek crisis. The Institute of International Finance (IIF), a non-profit industry association, represented the private sector creditors in the talks about the Private Sector Involvement in the solution of the Greek debt problem early in 2012, and negotiated the terms of a restructuring of Greek sovereign bonds.<sup>126</sup> The IIF might be taken to exercise public authority over its members. But did it partake in the exercise of public authority over Greece and its creditors? This would require a mandate to pursue the interests of the respective community. In fact, the outcome of the negotiations conducted by the IIF coincided with the agreement between the Greek government and the Eurogroup on the terms of a second bailout package, conditional upon the fulfillment of a number of adjustment measures. The understanding on the second bailout endorses the private sector agreement and underlines its significance for the materialization of the second bailout package.<sup>127</sup> One might consider this as evidence of a public sector mandate for the restructuring negotiated with the private sector.

Thus, it is not far-fetched to say that the London Club, the IIF, and similar venues for the private sector have at times struck their deals at least with the implicit approval of the International Financial Institutions as well as of a considerable number of states. Such restructurings therefore have been authorized at least on a non-binding basis, which justifies their characterization as exercises of public authority.

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123. Josselin, *supra* note 113, at 526.

124. LOWENFELD, *supra* note 109, at 686–87.

125. STURZENEGGER & ZETTELMAYER, *supra* note 117, at 22.

126. Press Release, Ministry of Finance of the Hellenic Republic, Hellenic Republic Launches Private Sector Involvement (PSI) Transaction (Feb. 21, 2012), <http://www.tovima.gr/files/1/2012/02/21/psilaunch.pdf>.

127. Statement, Eurogroup, Eurogroup Welcoming Agreement Reached with Greek Government on Public Finances of Greece (Feb. 21, 2012), [http://consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/128075.pdf](http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/128075.pdf).

Again, this does not mean that I consider them as automatically legitimate. Rather, it only implies that they are to be measured by the standards of democracy and human rights. To the extent that private creditors do not exercise public authority (for lack of an implicit endorsement by international organizations), the question arises whether their activities need to be brought under the umbrella of public law (i.e., whether they should better take the form of public authority), and, if so, how such public authority should be organized in a way that is respectful of democracy and human rights.<sup>128</sup>

It thus turns out that IMF lending, Agreed Minutes of the Paris Club, and certain agreements with private creditors are to be classified as exercises of public authority. By virtue of their public character, they need to respect standards of democratic decision-making and human rights protection, although the definition of these standards would be the subject of another paper.<sup>129</sup> In any case, it is normatively insufficient to rely on the private authority of the market alone.

#### CONCLUSION

The preceding analysis revealed in theory and at the example of sovereign debt restructurings how the public-private distinction can be upheld as a principle, even with respect to the complex global governance structures that have emerged in the course of the last couple of decades. While the distinction is not trivial and might evoke serious disagreements and legal controversies, it should be worth the price. The alternatives would be to give up the distinction entirely or to confine oneself to unspecified notions of hybridity that leave the idea of publicness implicit rather than making it explicit. Both would endanger democracy and human rights.

Certainly, some of the communities that this article expects to exercise democratic control over global governance will find it difficult to do so thoroughly and credibly. They might count non-democratic and semi-democratic states among their members, or lack the institutional structure for inclusive democratic decision-making. However, faced with imperfect alternatives, one might opt for such a solution rather than pouring out the baby with the bathwater. It might actually help the

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128. See Bogdandy & Goldmann, *supra* note 64. See generally Matthias Goldmann & Silvia Steininger, *A Discourse Theoretical Approach to Sovereign Debt Restructuring: Towards a Democratic Financial Order*, 17 GER. L.J. 709 (2016).

129. On such standards compare the contributions in SABINO CASSESE, RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW (2016) and EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE (2014). On how to square democracy with sovereign debt restructuring see Goldmann & Steininger, *supra* note 128.

people affected by global governance, such as the conditionalities imposed by the IMF and other lenders, if it can be shown that they might legitimately claim that the actors, institutions, and procedures involved in such global governance need to respect high standards of human rights protection and principles that foster democratic self-determination. Upholding the public-private distinction under the structural conditions of global governance is a necessary precondition for any such claim, and therefore an indispensable tool for the critique of global governance.

