Editorial

Oliver Butler* and Rajiv Shah**

1 Introduction

Issue 5(3) showcases scholarship presented at the 5th Annual Conference of the *Cambridge Journal of International and Comparative Law* held at the Faculty of Law, University of Cambridge on 8th and 9th April 2016. The conference theme, 'Public and Private Power', sought to explore how the landscape of public and private power is changing, where new and important networks and partnerships between public and private power have been developed, and where public power is co-opting or commissioning private power in larger projects. This interconnectivity between public and private power is a trend at all levels. It challenges traditional divisions between public and private bodies. This is being explored in current debates on pluralism and human rights. The theme was especially suited to the international, comparative and EU perspectives of the journal because public and private power raise new problems and opportunities for regulation in each of these areas of law. Presentations at the conference emphasised the role of globalism and pluralism in blurring the public-private divide across a diverse array of fields.

Keynote papers were presented by Professor Horatia Muir Watt, from Science Po, Paris, and Judge Dean Spielmann, former President of the European Court of Human Rights, and now a judge of the Court of Justice of the European Union. The conference was well attended with approximately 100 delegates, made up of academics, students and professionals. 40 presentations were made across 9 panels on standard-setting, tax, economic power, technology, control of private power, food regulation, armed conflict, alternative dispute resolution, and the subjection of public entities to private norms. The conference also launched two books: Mislav Mataija, *Private Regulation and the Internal Market* (2016) and Darryl Keith Brown, *Free Market Criminal Justice* (2016). Six papers, including the keynote presentations, were selected after peer review for publication.

* PhD Candidate, Emmanuel College, University of Cambridge.

** PhD Candidate, Downing College, University of Cambridge.

2 Overview of Issue 5(3)

In the first keynote address, Professor Muir Watt asks whether private international law has continuing relevance to modern legal theory, given radical change in the normative landscape beyond the nation state resulting from globalisation. In particular, she asks ‘whether private international law might fit within an ambitious strand of legal pluralism’ and argues that private international law has the potential for revival within the context of pluralism as an explanatory and normative framework. She observes that there has been an emergence of ‘eminently pluralist understandings of law-making power’. These understandings ‘hark back to the body of knowledge which first emerged in a pre-modern context of plural authorities, unchartered territories, and indeterminate boundaries between the public and private spheres’. They mean that private international law has the potential to contribute ‘principles with which to govern non-state authority, infuse hybrid normative interactions with ideas of tolerance and mutual accommodation and ensure accountability in the global decision-making processes through deliberation, contestation, and recognition’.

In his article, Verbruggen pursues this ‘pluralist understanding of law-making power’. He considers how private bodies contribute to regulation by examining changes in the institutions and practices of food governance since the 1990s. Verbruggen argues that change has occurred in two ways: (1) the subjection of national systems to transnational influences; and (2) the interaction between public food governance and private governance systems. Verbruggen shows how ‘an increased level of coordination between public and private regulatory activities, more and more frequently transcending national (jurisdictional) boundaries’ is best approached through the lens of New Governance and regulatory enrolment. Verbruggen seeks to show the potential for enrolment as a governance response to the rise of global supply chains where regulation is decentered and a variety of public and private actors build regulatory capacity in new, uncertain and complex circumstances.

However, this ‘pluralist understanding of law-making power’ can lead to fragmentation and to associated problems. Zhang considers the consequence of such fragmentation for air law with particular relevance to flights over conflict zones. This is an issue that was starkly raised following the downing of flight MH17 over the Ukraine. There is a potential conflict between five sets of norms: (i) the Chicago Convention of International Civil Aviation; (ii) international humanitarian law; (iii) international human rights law; (iv) general international

law; and (v) national laws. Given this fragmentation, how is the use of airspace over a conflict zone to be regulated? The Chicago Convention grants to States the exclusive jurisdiction to regulate its airspace. It states that States are permitted to restrict airspace in case of conflicts but there is no actual duty to do so. However, Zhang argues that under international humanitarian law there is a duty on States to take precautionary measures to avoid injury to civilians. She argues, by analogy with the *Corfu Channel* case, that elementary humanity requires that States secure their airspace for civilians. However, this is rendered difficult by the fact that there might not be a unified State, as many States outsource the responsibility for the regulation of their airspace to private companies. As such, the proper regulation of this area requires a solution that transcends the public/private divide.

Mation considers the position of Sovereign Wealth Funds (SWFs). These are funds owned by States and which invest in foreign countries, and, as such, they straddle the public/private divide. Nonetheless, the literature has tended to look at them through private lenses because they are ostensibly committed to making investment decisions based on economic considerations alone. Mation argues that this purely private model is inadequate for three reasons. First, other actors in the market are suspicious of SWFs and work on the presumption that geopolitical considerations factor in their decision-making. Second, SWFs have started to make decisions based not only on financial return but also on sustainability and development. Third, whilst (notwithstanding the above two points) the private model might describe the external governance of SWFs, it fails to account for the internal governance where SWFs are governed based on domestic and foreign political principles. For these reasons, Mation argues for an approach to SWFs that traverses the public/private divide.

In the second keynote address, Judge Dean Spielmann contributes to discussion on pluralism by considering the position of companies in human rights law. He presents the approaches adopted by the European Court of Human Rights towards companies as potential victims of human rights violations and companies as violators of human rights. He comments on the Strasbourg Court's acceptance of the enjoyment of human rights by companies: an extension of human rights beyond natural persons. The application of human rights to companies has 'never been seriously questioned', despite the apparent oddity of human rights being extended to legal persons who are not human individuals. Nevertheless, companies have been treated as 'non-governmental organisations' for the purposes of the right of individual petition provided by Article 34, and the Court has consistently refused to pierce the corporate veil. Human rights have been applied to companies

not merely where they are explicitly mentioned in Article 1 Protocol 1 and Article 10(1) but also Articles 6, 7, and 8 and Article 4 Protocol 7. Spielmann argues that such an approach is ‘essential for upholding the rule of law’:

In a globalised world, distinguishing between individuals and companies, granting fundamental rights to the former but not to the latter would have led to insurmountable practical difficulties.

Spielmann surveys accountability for human rights violations through positive obligations under the Convention and argues that the ‘potential development of respect for the fundamental rights of companies should go hand in hand with “corporate accountability”’.

Frost also considers the position of companies in human rights law. An orthodox application of the divide would suggest that they are objects of international human rights law. However, Frost argues that developments in corporate social responsibility should lead us instead to consider them as active regulators of international human rights. She does so by adopting the broad socio-legal paradigm of the legal transplant framework. Under such a framework, the law is not simply the law of the state, but also includes ‘standards, regulation, soft-law, treaties, customs and international agreements’. Within that framework, TNCs can be seen as agents of legal change via their corporate social responsibility policies. She illustrates this using a case study of the Rana Plaza disaster in Bangladesh. Due to inadequate standards, a factory which produced garments for a number of western TNCs collapsed and killed 1130 people. Following the disaster, the TNCs got together and agreed to certain standards that would have to be followed and this was implemented in Bangladesh. In that manner, the TNCs became agents of legal change that protect workers’ rights.

3 Acknowledgements

The Conference Convenors would like to thank a number of people and organisations for their assistance with the conference. First and foremost, we would like to thank the members of the Faculty of Law at the University of Cambridge, who so willingly offered their expertise and time. In particular, we would like to thank Professor John Bell, Dr Dominic de Cogan, Dr Markus Gehring, Dr Hayk Kupleyants and Dr Oke Odudu, who supported the Conference by chairing its panels and reviewing papers. The Faculty of Law also provided invaluable funding, without which the Conference would not have been possible, and kindly agreed to

host us for the conference. Edward Elgar, Hart Publishing and Oxford University Press kindly supported bookstalls. We also wish to thank Emmanuel College, who generously hosted us for an excellent conference dinner.

We are also extremely grateful to our team of Conference Assistants: Ana Carolina Dall'Agnol, Konstantina Goergaki, Abhijnan Jha, Paige Mason, Su Wai and Tianshu Zhang for their hard and diligent work. Special thanks are due to our Editors-in-Chief, Catherine Gascoigne and Barry Solaiman, who assisted in every way with the project at all of its stages. All members of the Editorial Board contributed to the preparation of this Issue for publication, for which we are very grateful. Finally, we are grateful to all those who attended and participated at the conference and made it the success that it was.