

**Transformations of the State –  
From Monopolist to Manager of Political Authority**

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## 1. How is the state adapting?

Who exercises political authority? Until recently, the answer to this question was clear: the State. Today, however, it is a matter of some debate whether the State is still the central body of political authority. In the 1980s, a vocal body of opinion began to emerge claiming that *the State is becoming weaker*: it is past its peak; its political authority is being eroded by globalization; it may face terminal decline (Reinhard 2007: 122, 1999; Camilieri/Falk 1992, Zacher 1992). What is left is an empty, powerless, institutional shell (Strange 1996).

This “end of the State” perspective has drawn criticism from two different quarters. Scholars coming from a statist perspective doubt a fundamental weakening of the State is taking place at all. They claim that the State has retained its former strength and is “alive and well” (Krasner 2001). Its political authority was never unchallenged, and consequently it cannot be expected to be any different today (Thompson 1994). Its dominant position is not fundamentally jeopardized, not even through the globalization process. After all, the State itself was the driving force behind this process (Streeck 2004). Admittedly, it adapts its policy profile to globalized conditions, but its ability to do so is in itself an expression of its undaunted viability and strength (Garrett 1998; Levy 2006, Weiss 1998). Scholars from a governance perspective, on the other hand, contend that the State is not the only possible unit of political rule. Authority, they argue, is increasingly exercised “without government” (Rosenau/Czempiel. 1992) by institutions “beyond the State” (Zürn 1998), i.e. by international institutions (Zürn et al. 2007) and transgovernmental administrative networks (Slaughter 2004), through global public-private partnerships (Reinicke 1998), civil society networks (Keck/Sikkink 1998) and private actors (Cutler et al. 1999). The – possible – decline of the State should not, therefore, be equated with a decline of political authority per se.

In this paper, we argue that both the statist and the governance perspective are broadly correct but each suffers from specific blind spots. The governance perspective is correct in emphasizing the growing governance role of non-state actors, i.e. of international institutions, private entities and transnational organizations. Frequently, however, the proponents of this perspective are so absorbed in analyzing the increased political authority of non-state entities that they overlook how crucially these entities depend on state support in order to function effectively and legitimately. The statist perspective, by contrast, is correct in stressing the continuing centrality of the State in political affairs. It tends to overlook, however, that the

reason for this centrality is changing. It no longer lies solely, or even most importantly, in the State's exclusive, quasi-monopolistic claim to political authority but, increasingly, in its ability to manage and complement denationalized (i.e. internationalized, privatized or transnationalized) authority.

In order to adjust for these blind spots we explore empirically the interplay of state and non-state authority in the 'OECD-world' of advanced western democracies. Aiming at a more adequate description of the state of the state at the beginning of the 21<sup>st</sup> century, we proceed in three steps. First, we briefly sketch how, beginning in early modern times, the emerging State gradually divested non-state authorities such as pope and emperor, the aristocracy, guilds and municipalities of their independent rights and powers (Section 2). This *nationalization* of political authority continued until, by the 20<sup>th</sup> century, there was a broad congruence between State authority and (legitimate) political authority in advanced western states. In a second step, we show how at least since the 1970s the trend has reversed and a *denationalization* of political authority has taken place (Section 3). Political authority is – again – asserted by international, private and transnational (i.e. non-state) institutions. Finally, in a third step, we show that the denationalization of authority does not make the state redundant but remains fundamentally dependent on it – at least for the time being. Denationalization itself becomes a remit of the State. The State remains crucial, but its role is changing from that of a “*monopolist of political authority*” to a “*manager of political authority*” (Section 4). We conclude by summarizing our findings, highlighting some of their limitations and discussing how they reflect on the competing perspectives on the future of the State mentioned above (Section 5).

## **2. The Nationalization of Political Authority**

A *State* is defined as an organization specialized in exercising political authority within a given territory and over the people in that territory. Political *authority* is the capacity, firstly, to make collectively binding decisions (*decision-making competence*), secondly, to implement such decisions with the appropriate organizational means (*organizational competence*) and, thirdly, to give these decisions normative justification so as to increase the likelihood of “quasi-voluntary compliance” (Levi 1988) by the subjects of authority (*legitimatory power*). Although “specialists” in exercising political authority already existed in antiquity, a new feature of the modern State is that it monopolized it – or at least attempted to. Not only did the modern State do “only” politics, it also aspired to do “all” politics (Poggi 1990). In some countries – Britain, but also France or Sweden – the nationalization of political authority

began quite early, while in other countries –Germany, for instance – it took much longer. But wherever it occurred, the history of the modern State can be seen as the progressive extension and monopolization of political authority (Reinhard 1999, 2007). On the one hand the competences to make binding decisions and organize their implementation were gradually nationalized – a process which we shall call instrumental nationalization (1.1); and on the other hand, by institutionalizing democratic as well as rule of law principles, the State gradually nationalized the power to legitimize political authority – we shall call this legitimacy nationalization (1.2).<sup>1</sup>

## **2.1 Instrumental Nationalization**

The nationalization of political authority began with the gradual monopolization of *decision-making powers* by the State. The rising State successively stripped non-state authorities such as the Church, the aristocracy, guilds and municipalities of their autonomous decision-making powers (Spruyt 1994), first in the areas of security and taxation and later also in other areas (Tilly 1990): traditional feuds were prohibited, traditional feudal tributes were abolished or marginalized, as gradually the State established its exclusive claim to legitimate force and taxation (Elias 1969). Already in the Age of Absolutism the State also began to intervene in economic processes (North 1981). It decided on the construction of public infrastructures such as roads, ports, canals, on land reclamation and cultivation. In the 19<sup>th</sup> century it laid the foundations for a national market economy by granting the freedom of trade, codifying private law and unifying monetary systems. In the 20<sup>th</sup> century, economic policy became a central remit of the State. Spurred by the two world wars, it began to control investment decisions and regulate prices, to fund industrial research and stabilize macro-economic processes. The State also concerned itself with social welfare; it passed decisions on educational matters, poor relief, health care, retirement pensions, unemployment compensation or child labour (Alber 1982; Pierson 1991). Even matters that were originally not perceived as public – from the environment to the arts, sports, gender, childcare and the protection of non-smokers – have meanwhile become subject to the decision-making powers of the State (Kaufmann 1996).

The nationalization of decision-making powers was accompanied by the appropriation of *organizational competences* by the State. Originally, the State was dependent on non-state

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<sup>1</sup> We use the term “nationalization” to indicate any gradual shift of political authority from non-state actors to state agencies regardless of whether the respective state is a nation-state. We, hence, use the term “nationalization” in the sense of “etatization”.

actors for the implementation of its decisions. It succeeded in reducing this dependency by successively expanding its own administrative structures. In the 17<sup>th</sup> and 18<sup>th</sup> centuries it replaced the mercenary armies, which it had initially needed to disarm the aristocracy, with standing armies (Thomson 1994). Later, locally organized and funded police forces were placed under state supervision, and tax farmers were replaced by public tax administrations (Tilly 1990). The State also took over the organizational responsibility for public services such as the postal services and road-building, water supplies and refuse disposal, railways and telegraphy, radio broadcasting and air traffic control (North 1981; Spruyt 1994). Education and social welfare were transferred from the auspices of the Church or charity organizations either to state administrative bodies such as public health services and public schools and universities, or to parastatal bodies such as compulsory social insurances. Later the state, using its own administration or parastatal agencies, even ran public museums, community sports facilities, saving banks and public broadcasting companies.

### **2.1. Legitimatory Nationalization**

The increased nationalization of decision-making and organizational authority was accompanied by the State's appropriation of the power to legitimize authority. The notion of the divine right of kings (and queens) was supplanted by contractual conceptions of the State (Elias 1969) and absolutist rule was superseded by the constitutionalization of the State, i.e. by the gradual establishment of the rule of law and the democratization of political decision-making procedures. While initially forced upon the State by revolutionary movements, this process of constitutionalization proved to be vital for enhancing the State's legitimatory power. The history of constitutionalization began with the Bill of Rights in England in the late 17<sup>th</sup> century and was furthered by the revolutions in America and France in the late 18<sup>th</sup> century, but did not prevail in all Western European countries until two hundred years later with the fall of the authoritarian regimes in Portugal, Spain and Greece and, finally, in most East European countries after the fall of the Iron Curtain.

The constitutional state rests on two pillars that have contributed to it being conceived as having the legitimacy to rule: democracy and the rule of law. Put simply, the principle of the rule of law means that individuals should be governed by generally applicable and publicly known laws, and should have equal access to effective legal remedies if their rights are infringed under these laws. The institutional backbone of the rule of law is an independent judiciary that (a) gives all citizens equal access to the courts, and (b) ensures that the courts

judge all actions on the basis of their legal merits alone rather than their political or social implications. Democracy means that all citizens should have an equal chance to actively participate and be heard in public decision-making processes on issues affecting them. In institutional terms, this usually implies (a) the election of legislative bodies by universal suffrage (active participation) and (b) the open and undistorted deliberation over the normative appropriateness and factual effectiveness of public decisions and decision-making agendas.

The constitution both constitutes and constrains the States' claim to political authority at the same time (Grimm 2003). Constitutionally bound to the principles of democracy and the rule of law, the state becomes an agent of the interests and liberties of its citizens (Elias 1969; Held 1995). This allows citizens to understand themselves as a society that governs itself through the State, and thus increases the perceived legitimacy of the State. At the same time it reduces the legitimacy of non-state actors. Their claims to authority come under suspicion of being illegitimate. Democracy and the rule of law become the exclusive domains of the State – a state monopoly in which non-state actors may participate but to which they have no claim in their own right.

### **2.3 The State – (quasi) Monopolist of Political Authority**

The nationalization of decision-making and organizational competences as well as of the power to legitimize these competences was a gradual, uneven and discontinuous process (Tilly 1990; Spruyt 1994). Different states pursued divergent paths, which all, however, led to an unprecedented concentration of political authority in the hands of the State in the 20<sup>th</sup> century (Reinhard 1999, 2007). This near-monopoly of political power gave the State the destructive potential that made political catastrophes on the scale of German National Socialism, Soviet Communism and the two world wars possible. On the other hand it turned the State into an ideal instrument for political self-determination: as political authority lay almost completely in state hands, it was possible, through the constitutionalization of the State, to bind all political authority to principles of democracy and the rule of law (Grimm 2004). The state monopoly over authority did not imply totalitarian rule; it only implied that within the national territory there was essentially only one political authority, namely the State. And if that State was a constitutional state, then its authority could in principle remain fairly restricted. Nor did it imply that non-state actors had no role to play in exercising political authority. International institutions have been a feature of international politics since

the 19<sup>th</sup> century, and private business and federations have remained deeply involved in the management of policy fields such as social security or transport. The state monopoly over political authority did imply, however, that the activities of these non-state actors were closely supervised and directed by the state. Rather than competing as an alternative to the rule of the State, they constituted bridgeheads of the State into the international and social realms. It might therefore seem more appropriate to classify them as ‘parastatal’ actors (Mayntz and Scharpf 1995) rather than non-state actors. Finally, the state monopoly over the means of effective and legitimate authority did not imply that the State was always an effective or legitimate ruler. It did mean, however, that inefficiencies and legitimacy deficits were inevitably blamed on the State. For the State, claiming overall responsibility for political authority also implied assuming ultimate responsibility for failures in the exercise of authority. If anything went wrong, the State was the final addressee for the allocation of blame and calls for assistance.

### **3. The Denationalization of Political Authority**

The gradual nationalization of political authority, which had characterized state development in countries of today’s OECD world since the 17<sup>th</sup> century, came to a standstill in the second half of the 20<sup>th</sup> century, with the 1970s marking a reversal back towards a new denationalization of authority (Zürn 1998; Reinhard 1999).<sup>2</sup> Non-state actors (re-)claim decision-making competencies, organizational capacities and legitimacy power of their own, eroding the State’s near monopoly of political rule. Depending on whether these non-state actors are public or private, and whether they relate to national or transnational territories (Walter 2001), three types of non-state authorities can be distinguished (Table 1):

- *International Actors* are inter-state institutions like the United Nations Organization (UNO) or the European Union (EU). They derive their public legal status from that of their member states; unlike states, however, their authority is not restricted to a national territory but extends across national borders. If international institutions gain authority, this process is called *internationalization*.
- *Private Actors* are non-state institutions such as federations, associations, co-operative societies and businesses. They differ from state institutions in particular in terms of their private legal status, but as with states their authoritative functions are restricted to the

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<sup>2</sup> We use the term “denationalization” to indicate any gradual shift of political authority from state actors to non-state entities, regardless of whether the respective state was a nation-state. The term is meant to denote any process that reverses the “nationalization” – in the sense of etatization – of political authority.

national territory. If the authority of private actors grows, then we call this process *privatization*.

- *Transnational Actors*, like private actors, are federations, associations and businesses which however, unlike private actors, exercise their authority beyond the borders of individual state territories. This is especially characteristic of transnational associations and federations – so-called Non-Government Organizations, or NGOs. A growth in the significance of transnational actors in the administration of authority is referred to here as *transnationalization*.

**Table 1: State and Non-State Authorities**

	<b>National Territory</b>	<b>Transnational Territory</b>
<b>Public Status</b>	State Actors	International Actors
<b>Private Status</b>	Private Actors	Transnational Actors

In the following we describe how international, private and transnational actors acquire their autonomous decision-making and organizational competences – which we categorize together as instrumental forms of denationalization – (3.1), and whether and to what extent the same actors appropriate their own power of legitimation – which we categorize as legitimacy forms of denationalization (3.2).

### 3.1 Instrumental Denationalization

The denationalization of decision-making and organizational authority follows a typical pattern (Table 2): international institutions gain decision-making competences, but not necessarily organizational responsibility; sometimes they even lose organizational competences. Private actors, by contrast, gain organizational competences but often lose decision-making authority. Only transnational organizations win both more decision-making powers and more organizational responsibility.

**Table 2: Denationalization of Decision-making and Organizational Competence**

	<b>Decision-making Competence</b>	<b>Organizational Competence</b>
<b>International Actors</b>	<i>Increasing</i>	<i>Decreasing</i>
<b>Private Actors</b>	<i>Decreasing</i>	<i>Increasing</i>
<b>Transnational Actors</b>	<i>Increasing</i>	<i>Increasing</i>

#### 3.1.1 Internationalization



The significance of *international actors* as decision-making authorities has increased substantively. Of course, international institutions are not a new phenomenon. The Universal Postal Union, the International Telegraph Union, or the International Union of Railways all originated back in the 19th century, and almost all of the international institutions of central importance today were established in the 1940s and 1950s: the UN, NATO, EU, GATT, OECD, IMF, IBRD etc. (Rittberger/Zangl 2006:25-57). What is new, however, is the wider range of issues falling under the decision-making competence of international institutions. They are no longer restricted to coordinating national policies at the border but are also concerned with unifying and harmonizing policies behind the border (*wider scope*). What is also new is that these institutions are becoming increasingly autonomous. Their decision-making processes are no longer completely under the control of the member states (*autonomization*) (Zangl/Zürn 2003: 206-245).

*Wider scope of International Decision-making Competences:* There is hardly an issue area today which is not to some extent regulated by the decisions of international institutions (Hurrelmann et al. 2007; Leibfried/Zürn 2005). Even in core areas of national sovereignty, international institutions increasingly exercise their decision-making powers. The UN asserts the authority to order the freezing of bank accounts of suspected terrorists, the international Criminal Court (ICC) issues arrest warrants against war criminals such as Slobodan Milosevic and Radovan Karadzic. The European Court of Human Rights condemned the employment bans imposed on alleged political extremists. And the Organization for Security and Cooperation in Europe (OSCE) sent a delegation of observers to the USA in 2004 to monitor the presidential elections. However, it is in the economic sphere where international decision-making competences have extended furthest. The World Trade Organization (WTO) decides, for example, over whether European states must permit the sale of American meat from livestock treated with hormones, and what tax privileges the US may offer export businesses. And the decisions of the EU penetrate far into the domestic realm of its member states: VAT rates, budget deficits, gambling concessions, university entrance requirements, company pension schemes, TV and radio broadcasting, promotion of the arts – all these and similar issues are today regulated, or at least, co-regulated through decisions made at the European level.

*The Autonomization of International Decision-Making Competences:* International institutions not only penetrate further into the domestic politics of states, they also increasingly do so

without individual member states being able to control their decision making (Zangl/Zürn 2003: 206-245; Zürn et al. 2007). This is testified by the growing decision-making powers of supranational bodies and transgovernmental administrative networks. Although formally, transgovernmental networks such as the so-called EU comitology only prepare and implement decisions that are made by the relevant intergovernmental bodies, in reality decision-making is often largely left to them (Slaughter 2004). By establishing cross-border ties between national bureaucrats, they relax the States' hierarchical control over these bureaucrats and thus gain a measure of autonomy (Joerges/Godt 2005). At the same time, the precision of international decisions increases, the monitoring of compliance is successively centralized, and the mediation of rule conflicts is increasingly delegated to supranational dispute settlement bodies. This constrains national discretion in interpreting international decisions. Under the old GATT, for instance, states were able to judge unilaterally whether, say, a given level of market disruption justified a deviation from free-trade obligations. Since the establishment of the WTO, however, this possibility is severely restricted. The WTO specifies in detail how to verify market disruptions, and how, if at all, states may react to them. If, moreover, disputes arise over national reactions to market disruptions, it is not the states themselves, but the largely supranational dispute settlement body of the WTO which decides on their legality (Zangl 2006).

*The Decline of International Organizational Competences:* Despite their growing decision-making powers, international institutions have not necessarily gained organizational competence. This is remarkable, given that many international institutions were originally founded for organizational – rather than decision-making – purposes. The UN Charter envisaged the UN having their own troops to stabilize peace; the World Bank was established to facilitate reconstruction in war-torn Europe through development loans, the IMF was founded to stabilize the Bretton Woods fixed exchange rate system with temporary loans to countries in current account deficit, and NATO built up integrated command and logistic centres to organize the defence of Western Europe. Intelsat was tasked with setting up a global network of news satellites, the International Coffee Organization (ICO) with administering buffer stocks to stabilize coffee prices, and the EU, too, was originally founded to provide a variety of organizational services such as the promotion of the European steel and nuclear industries as well as European agriculture. Today, many of these institutions, such as Intelsat have become completely redundant, or the significance of their organizational competence has diminished – at least for OECD countries. The World Bank loans never had

the relevance that was anticipated in 1945, and no core OECD country has taken out an IMF loan since the late 1970s. Only with regard to non-OECD countries have international institutions been able to expand their organizational competences. This is true of the UN, for instance, which took over transitional governmental authority in Kosovo and in East Timor using its own financial and administrative resources. This is also true of the IMF and World Bank loans, which are now given exclusively to developing countries and countries in transition outside of the OECD. And it is true of all the special UN organizations such as the Children's Emergency Fund, the High Commissioner for Refugees or its Development Programme.

### *3.1.2 Privatization*

In contrast to international institutions, *private actors* have mainly acquired organizational competencies. Organizational tasks that were previously administered by state agencies are delegated to private actors, and newly arising organizational tasks are often assigned to private actors right from the outset. Of course, the delegation of public organizational tasks to private actors is nothing new. In many states the provision of electricity, gas, water or the operation of airports, waterways and rail transport always rested at least to some degree with private actors, often for fiscal reasons. Some pension schemes and health insurances have always been private, too. What *is* new is the growth in the significance of private actors as organizational agencies. In more and more sensitive issue areas, key organizational competences are provided by private rather than state actors (*wider scope*) (Obinger/Zohlnhöfer 2006; Schneider/Tenbücken 2004). What is also new is the growing autonomy with which private actors utilize their organizational competences (*autonomization*). The direct control of the State is weakening. The shadow of state hierarchy is fading.

*Wider scope of Private Organizational Competences:* There are hardly any issue areas today in which private actors are completely excluded from public organizational tasks. Public security is no longer provided by the police forces alone, but increasingly also by private security firms. Private security guards now patrol railway stations and shopping centres. Airlines forward security-relevant passenger information to the security forces. Banks are called upon to cooperate in campaigns against money laundering and organized crime. The armed forces draw upon private security companies not only to set up camps, carry out vehicle maintenance and provide the catering, but also, as is currently happening in Iraq, to

provide bodyguards for American government staff, interrogate prisoners and carry out assignments for the secret services (Singer 2003). Even in the area of tax administration, some states experiment with the privatization of tasks such as the collection of tax debts. Of course, the privatization trend in the public utilities and one-time state-dominated industries is much more prominent. Most airlines are now privatized, and the provision of gas, water, electricity, telecommunications, postal services and rail transport is now increasingly organized by private businesses (Ehni et al. 2004). State involvement in “strategically” vital industries such as coal, steel, arms, or banking and insurance, is gradually being reduced, and state subsidies for private businesses are being cut back. Many economic steering functions hitherto carried out by state or parastatal institutions, such as for instance Swedish pension insurance, German savings banks or the Japanese post office bank system, are now in the hands of private investment companies.

*The Autonomization of Private Organizational Competences:* The expansion of private organizational competences goes hand in hand with their autonomization. This is most apparent where state-owned, or state-administered, enterprises are privatized and sold to private investors, as has often happened with airlines, telecommunications companies or the utilities. It is also the case when parastatal actors are deprived of their special privileges and exposed to market competition, for instance when public contracts are no longer automatically passed to a few privileged appointed suppliers but awarded by tender. And it is the case where new organizational tasks such as the management of cellular networks or road toll collection systems are assigned to private actors right from the start instead of being assumed by state authorities. The direct organizational control that the State was previously able to exert is dwindling. For instance, it is losing its grip on how much a private water supplier should invest on the maintenance of the water supply system, how often a railway network operator should overhaul which stretch of the track, or how many workers it employs and under what conditions. More fundamentally, the State loses control over who assumes certain organizational tasks – former state-owned enterprises or private competitors, local building companies or their foreign rivals. In one notable case, the Senate of Berlin was forced to award the contract for its internal mail administration to the PIN Group on the basis of its low bid, although it subsequently had to subsidize the low wages of the PIN workers through supplementary benefit (Frankfurter Allgemeine Zeitung 14.08.2007).

*The Decline of Private Decision-Making Competences:* While the organizational responsibilities of private actors are on the increase, their decision-making competences tend to be in decline. In former parastatal sectors, where hitherto the State respected or even encouraged private self-regulation, it increasingly assumes direct regulatory responsibility. And where, in a neo-corporatist context, private actors were directly involved in state decision-making processes, their influence has been reduced. In Great Britain, for instance, the largely autonomous self-regulatory mechanisms of the capital markets are now increasingly being re-shaped by state regulation (Moran 2006; Zimmermann 2007). Since the 1990s, the mandatory health insurance companies in Germany, which traditionally enjoyed a large degree of autonomy in fixing contribution rates and negotiating fees with healthcare providers, are bound to increasingly stricter guidelines stipulated by the State (Rothgang et al. 2006). And in the Netherlands, the State has markedly strengthened its position in corporate decision-making processes, and even excluded the social partners completely from certain socio-political decision-making processes (Hemerijck/Vail 2006).

### *3.1.3 Transnationalization*

Unlike international and private bodies, *transnational actors* frequently gain both decision-making powers and organizational capacities. They not only make collectively binding decisions, but often also implement them through their own organizational resources. Again, transnational institutions are not new; the Catholic Church is several hundred years old, and the Red Cross and the International Olympic Committee also date back more than a hundred years. Nor is the relative autonomy of their operations new; in fact, it is a constituent part of this type of actor. What is new, however, is the growth in number and importance of transnational organizations (Shanks et al. 1996; Cutler et al. 1999) and the increasing scope of their decision-making and organizational authority (*wider scope*).

*Wider Scope of Transnational Decision-making Competences:* The issue areas in which transnational actors exercise no decision-making or organizational competence are growing few and far between. The influence of transnational organizations is particularly salient in the area of technical standardization, which for a long time was dominated by national standards institutions such as the German Standards Institute (DIN) in Germany. The decisions made by existing organizations such as the International Standards Organization (ISO) are increasing, and new transnational standardization organizations such as ETSI or ICANN are emerging. Administrative standards have gained significance, too, and some of them are set by

transnational organizations, as in the case of the International Accounting Standards Board (IASB) (Zimmermann 2007). Rating agencies such as Standard & Poor's or Moody's provide uniform ratings of credit risks of public and private debtors (Kerwer 2002). In the context of the so-called *lex mercatoria*, international law firms standardize contract structures for international trade, and thus establish transnational norms that facilitate cross-border transactions (Callies 2004). International sports associations have created a transnational sports law – or *lex sportiva* – and various transnational internet organizations are working on the so-called *lex informatica* – an autonomous internet law (Leib 2004; Lehmkuhl 2004). Since the 1990s, transnational associations have drawn up codes of conduct to which multinational companies subscribe to mark their commitment to minimum environmental, labour and health standards (Hassel 2008).

*Wider scope of Transnational Organizational Competences:* In addition to decision-making powers, transnational organizations often also exercise organizational powers. The International Olympic Committee (IOC) and other international sports associations involved in drawing up the *lex sportiva* organize major international sporting events such as the Olympic Games or world championships, and draw up anti-doping procedures in order to detect individual athletes who have taken performance-enhancing drugs and disqualify them from competitive events (Lehmkuhl 2004). ICANN, one of the central institutions behind the *lex informatica*, has similar administrative powers. Most importantly, it controls the server that administers domain names, and is able to remove domain names used for illicit purposes from the web (Leib 2004). Another example of transnational organizational competences are the numerous relief organizations such as Médecins sans Frontières or the increasing number of private foundations such as the Gates Foundation, which carry out tasks traditionally reserved for state development aid policy.

### **3.2 Legitimatory Denationalization**

Is the accretion of both decision-making powers and organizational competences by non-state authorities accompanied by an increase in their legitimacy powers? In this section, we analyse the efforts of non-state actors to democratize their decision making and establish an internal rule of law in order to develop their own sources of legitimacy. By doing so, we assume, that such efforts would strengthen their perceived legitimacy. We find that international and transnational institutions indeed push towards a partial constitutionalization

of their decision-making procedures and dispute settlement arrangements, while private actors, by contrast, make no efforts in this direction.

**Table 3: Denationalization of Legitimatory Powers**

	<b>Democratic Principles</b>	<b>Rule of Law Principles</b>
<b>International Actors</b>	<i>Partially Increasing</i>	<i>Partially Increasing</i>
<b>Private Actors</b>	<i>Decreasing</i>	<i>Decreasing</i>
<b>Transnational Actors</b>	<i>Partially Increasing</i>	<i>Partially Increasing</i>

*3.2.1 Internationalization*

There is indeed a pervasive trend towards democratization in *international institutions* (Held 1995). However, the implementation of the fundamental principles of democracy – guaranteed options for individual participation in legislative bodies and institutionalized public deliberation – remains fragmentary and incomplete. In particular, international institutions offer hardly any access points for individual participation in their legislative processes. Citizens usually have no means to call power holders in international institutions to account for legislation they disagree with (Grant/Keohane 2005; Steffek 2008). Directly elected parliaments are absent in international institutions. The European Parliament is the only exception in this respect, while NATO, the OSCE and the Council of Europe have rather insignificant parliamentary assemblies.

However, most international institutions have now at least established some basic pre-conditions for an informed public deliberation over their legislative decisions and practices. Legislative processes that used to be dominated by secretive diplomatic negotiations between state representatives are now gradually becoming more transparent and open to the participation of stakeholders. Practically every international organization now includes hearings in its law-making processes in an effort to involve relevant stakeholders (Nanz/Steffek 2007; Steffek et al. 2007). The participation of civil society actors in global negotiation processes on issues such as the protection of the ozone layer, on climate change or on banning landmines may serve as examples here. To be sure, even routine stakeholder participation does not guarantee free and unbiased deliberation. Yet it tends to increase the onus on states to justify their respective bargaining positions not only in terms of national interests but *also* from the point of view of common transnational interests (Zangl/Zürn 2003: 246-268).

The incomplete democratization of international institutions is accompanied by an equally incomplete adoption of the rule of law. Of the two basic rule of law principles, namely, that individuals should have access to independent judicial bodies and that these bodies should act on the basis of legal rather than political reasoning (Keohane et al. 2000, Zangl/Zürn 2004a), the latter has spread much more widely among international institutions than the former. While disputes over alleged breaches of international commitments were formerly settled purely through diplomatic channels on the basis of states' interests and power resources, there is a growing tendency to settle such disputes by judicial means, through court-like bodies that have to give legal reasons for their decisions on the basis of existing international rules. This can be observed particularly clearly in international trade. Diplomatic dispute settlement procedures under the GATT have been superseded by judicialized dispute settlement procedures under the WTO, which has had a remarkable impact on states' dispute settlement behaviour practices (Zangl 2006).

However, institutionally guaranteed access to the judicial bodies of international institutions has hardly improved for individual citizens, and access is still usually restricted to states. Individuals who feel disadvantaged because their state or another state violates international trade rules are not able to file a complaint with the WTO. They can only try to persuade their own state by political means – but not by legal means – to alter their trade practices or to lodge a complaint with the WTO against another state's practices. Nor do the international climate, ozone or whaling regimes permit individual citizens to take legal action to protect their rights. However, in the European Community, individual citizens may invoke domestic courts to refer to the ECJ for a preliminary ruling (Alter 2001). Only in the field of human rights has access for individuals markedly improved. Individual citizens have standing to bring action in the European Court for Human Rights (ECHR). Similarly, the UN Human Rights Committee is directly accessible to individuals, although this access is restricted to citizens from states which have ratified the so-called Optional Protocol to the International Covenant on Civil and Political Rights.

Altogether, the democratization and legalization of international institutions have at best resulted in *semi-constitutionalized* decision-making procedures. While public deliberation in legislative proceedings and legal reasoning in judicial bodies have become more widespread,



the institutionalization of principles of individual participation in legislative processes and individual access to judicial review is still rudimentary.

### 3.2.2 *Transnationalization*

Similar constitutionalization processes can be observed in *transnational institutions*. There is some evidence of a partial democratization of legislative decision-making – again, predominantly through the establishment of procedures that facilitate public deliberation (Dingwerth 2007). Many transnational institutions take great care to ensure that their legislative processes are transparent to the public, and many also attempt to systematically involve stakeholders in the process. When transnational associations draw up codes of conduct defining labour, social or environmental standards, or award so-called ‘labels’ for good environmental or social practice, they do so in a way that ensures transparency and involves relevant stakeholders. The so-called Forest Stewardship Council, for instance, not only consults stakeholders, but, directly involves them in decision making over certification criteria for sustainable forest management (Conzelmann/Wolf 2007; Dingwerth 2007: 144-185).

As with international institutions, however, opportunities for individual participation in transnational organizations’ decision-making processes are few and far between. Seldom do these organizations have directly elected representative bodies. Admittedly, in 2000 the Internet Corporation for Assigned Names and Numbers (ICANN) held open, on-line elections for some members of its board of directors. This remarkable experiment in representative democracy, however, did little to improve ICANN’s legitimacy; in fact, it was alleged by many to be illegitimate because it was dominated by a few privileged groups (Bendrath et al. 2007). Institutional guarantees for stakeholder participation, generous as they may be, are not a substitute for individual participation. Individuals may not be able to join any stakeholder group that claims to represent their interests. Nor can they control which groups are recognized by transnational organizations as legitimate stakeholder groups. What is more, not all relevant interests are equally easily mobilized for political action. As a consequence, individual participation in transnational institutions remains precarious.

Transnational institutions increasingly follow the principles of the *rule of law*. Independent judicial bodies are created to provide, on the basis of legal reasoning, the judicial review of administrative decisions (Lieckweg 2003). This is the case, for example, with the so-called *lex*

*sportiva*, which is no longer applied by obscure committees or commissions, but by largely independent, court-like bodies such as the International Court of Arbitration for Sports (CAS) in Lausanne (Lehmkuhl 2004). If disputes arise over domain names (*lex informatica*), independent arbitration panels can be invoked to decide whether the contended names constitute an infringement of naming rights. On the basis of a ruling given by these arbitration bodies a domain name can even be taken off the internet (Leib 2004: 202-208). Many transnational associations that define codes of conduct on environmental or social standards or award labels meanwhile also have independent judicial panels that provide legally reasoned decisions when disputes arise.

Interestingly, transnational institutions offer individuals better access to their judicial proceedings than international institutions. In certain transnational organizations not only their members, but also non-members – and thus anybody – have the right to file complaints. For instance, any individual who feels that his or her rights are violated can file a complaint with ICANN, which then refers the matter to the independent International Centre for Dispute Resolution for settlement. However, while many transnational organizations allow only their members to lodge complaints, even then non-members may enjoy indirect access to judicial review proceedings. The Forest Stewardship Council, for instance, allows complaints from non-members to be brought to the attention of its dispute settlement panel if supported by an ordinary member.

Altogether, the democratization and legalization of transnational organizations has resulted in *semi-constitutionalized* structures. While there has been an increased institutionalization of the principles of public deliberation in legislative processes on the one hand, and of legal reasoning in judicial bodies on the other, the institutionalization of the principle of individual access to judicial bodies and, to an even greater degree, of individual participation in legislative processes still remains weak.

### 3.2.3 Privatization

The trend towards a quasi-constitutionalization of international institutions and transnational organizations cannot be observed in *private actors*. Indeed, the opposite appears to be happening: internal procedures for democratic decision making and judicial review are losing significance for private institutions. Unlike the various private or semiprivate associations and federations that exercised political authority in the parastatal sectors under the shadow of state

hierarchy in the 1960s and 1970s, private actors participating in the administration of authority today rarely have established procedures for internal democracy and judicial review. Private authorities address individuals less and less as citizens whose 'voice' is ensured through appropriate forms of internal democratic self-legislation and judicial review, but increasingly as clients to whom they offer certain, state-approved 'products of authority'. The 'clients', in turn, may either take the respective product or leave it in favour of a rival product, i.e. they may use their exit-option. Legitimation through commodification is particularly manifest in the public services – in telecommunications, energy and rail transport, for instance. It is also spreading in social welfare, for example with the introduction of free choice between mandatory health insurance companies in Germany in the early 1990s. The ensuing competition between health insurances severely reduced the significance of the election of insurance holders' representatives in the insurance companies' administrative councils (Rothgang et al. 2006). Similar developments can be witnessed in tertiary education policy. For instance, while the German Research Foundation, a quasi-monopolistic, self-governing organization founded during the Weimar Republic, is governed through its own quasi-democratic and legal procedures, the legitimacy of the new accreditation agencies for university programmes is based more on market competition with rival accreditation agencies. If customers are dissatisfied, they may change the agency (Martens/Wolf 2006).

To sum up: with the disintegration of the parastatal sector, self-constitutionalization loses significance as the basis for the legitimacy of private authorities while market competition gains in importance as a source of legitimation. In contrast to international and transnational institutions, private authorities undergo a process of *de-constitutionalization*.

### **3.3 Political Authority beyond the State**

There is a pervasive trend towards a denationalization of political authority. Increasingly international institutions, private actors and transnational organizations lay claim to decision-making competences, and/or provide organizational competences and/or, develop their own sources of legitimation. The State is no longer the sole repository of political authority. Its quasi-monopoly of political power is lost. Nevertheless, the power of international institutions, private actors and transnational organizations remains *incomplete*. International institutions have substantial decision-making competences, but few organizational capacities; private authorities have organizational competences but little decision-making competence, while transnational actors have both. In view of their legitimacy, however the authority of the

latter is just as incomplete as that of international and private institutions. The constitutionalization of international institutions and transnational organizations remains curtailed because they do not allow individuals access or participatory rights at legislative and judicial proceedings respectively, while the constitutionalization of private actors is completely left undone.

#### **4. From Monopolist to Manager of Political Authority**

While the denationalization of authority has divested the State of its near-monopoly of political rule, it has not deprived it of its statehood. The State remains an institution specializing in exercising authority within a certain territory, and as such it remains a State. Nor has denationalization made the State redundant, for the incompleteness of non-state authorities means that these are reliant on support from the State for their legitimacy and effectiveness. In order for international institutions, private actors and transnational organizations to exercise authority, the State must provide them with the authority resources that they themselves do not have. In that sense, denationalization does not constitute a threat to the existence of the State, but has become one of its core functions. The State remains central to today's denationalized political authority structures, but its role is changing from that of a monopolist to a manager of authority. It provides complementary instrumental resources where non-state authorities are lacking in decision-making competence or organizational power (4.1), and it provides complementary legitimacy where non-state actors are unable to provide adequate legitimacy themselves.

##### **4.1 Instrumental Complementarity**

The State provides organizational support for international institutions and decision-making authority for private actors.

**Table 4: Instrumental Complementarity: the State's Contribution to Non-state Authority**

	<b>Complementary Decision making</b>	<b>Complementary Organizational support</b>
<b>International actors</b>	<i>No</i>	<i>Yes</i>
<b>Private actors</b>	<i>Yes</i>	<i>None</i>
<b>Transnational actors</b>	<i>Sometimes</i>	<i>Sometimes</i>

*Organizational Support for International Actors:* As a rule, international institutions have no organizational basis of their own; no military forces, no fiscal revenue, no public administration. They are therefore not in a position to implement their decisions themselves (Zangl/Zürn 2003: 246-267). For example, the UN can issue a directive to freeze the assets of listed terrorists and mandate the deployment of troops in crisis regions, but it does not have the capacity to actually freeze accounts, and it does not have troops of its own. It must rely on national authorities and national military forces to do this. By the same token, while the EU can specify standards for the quality of drinking water, it cannot take water samples to test the quality itself. The WTO can issue rules on the protection of intellectual property, but does not have the capacity to actually pursue copyright violators. The OECD can publish critical reports on the need for reform in, say, the Italian school system, but it cannot itself build new schools or restructure education in individual countries. And while the international climate conferences can impose reductions in carbon-dioxide emissions, they are just as incapable of shutting down outdated brown coal-fired power stations as they are of subsidizing solar or wind-generated energy. All these tasks have to be dealt with by the State, using its own organizational powers. If states refuse to provide the necessary organizational competences, the decisions of international institutions remain unimplemented and ineffective.

*Decision-making for Private Actors:* Usually private actors can assume organizational authority only if the State provides them with a regulatory framework which allows and enables them to do so. If in the past the State took over many organizational functions, it was usually because the market failed to fulfil them adequately. Market failures can occur, for example, when high entry costs create natural monopolies, as is often the case with network infrastructures. Market failures may also occur because – as in the case of defence or public schools – the goods are non-excludible and vulnerable to free-riding behaviour. But market failure can also mean that certain organizational services such as the postal services or health insurance are not available to everyone equally; affordable postal services, for example, are not available in remote areas, and affordable health insurance coverage is not available to certain risk groups. In order to enlist private actors for such organizational functions, the State has to provide a regulatory framework that prevents market failures. To this end the State has to decide, for instance, how to secure sufficient returns for private actors delivering post not only in downtown areas but also to remote islands, and how, in turn, to induce them to service these islands. It has to decide how to secure services to less solvent customers, how to structure the competition between network providers and service suppliers in

telecommunications or rail transport, or how to ensure the equity and fairness of private pension insurance schemes. In short then, the privatization of organizational authority makes demands on state decision-making competences. The State plays a central role even in policy areas in which private companies provide public services.

*Decision-making and Organizational Support for Transnational Actors:* Transnational organizations often have both decision-making and organizational competences, which leaves them comparatively independent of complementary decision-making and organizational competences provided by the State. Nevertheless, as transnational organizations usually only have very limited means to sanction behaviour positively or negatively, their effectiveness often also depends crucially on additional support from the State (Conzelmann/Wolf 2007; OECD 2001). The State provides incentives for cooperation in and compliance with transnational organizations, for example by offering financial benefits to private businesses that subscribe to voluntary codes of conduct, or by granting tax allowances for donations to charities. It provides a coercive backup for transnational organizations, for example, by providing public means for the enforcement of private transnational arbitration awards. The success of the *lex mercatoria* depends crucially on the fact that most OECD states have enacted legislation that, *firstly*, acknowledges transnational arbitration awards as binding; *secondly*, bars the parties to the arbitration from taking their cases to state courts; and, *thirdly*, requires the state administrations to enforce arbitration awards (Callies 2004). Moreover, as the president of ICANN, reflecting on its role in transnational internet governance, emphasized: "[A] purely private entity that must depend on the voluntary cooperation of many other entities is not likely to be able to coordinate anything globally without significant governmental support" (quoted in Hofmann 2005).

**4.2 Legitimatory Complementarity**

In terms of legitimation, non-state authorities are also reliant on support from the State. The State must complement what international, transnational and private authorities lack in terms of democracy and the rule of law.

**Table 5: Legitimatory Complementarity: the State’s Contribution to Non-state Authority**

	<b>Democratic Principles</b>	<b>Rule of Law Principles</b>
<b>International actors</b>	<i>Yes</i>	<i>Yes</i>

<b>Private actors</b>	<i>Yes</i>	<i>Yes</i>
<b>Transnational actors</b>	<i>Yes</i>	<i>Yes</i>

*Legitimation for International Institutions:* Although, increasingly, international institutions provide for public deliberation in their legislative decision-making processes and for legal reasoning in their dispute settlement procedures, the chances of individual citizens partaking in decision making or gaining direct access to international courts are still very restricted. It is precisely here that the complementary support of the State is of central importance. Through its participation in international legislation and its access to international adjudication, the State is often the only possible intermediary between individual citizens and international authorities; it represents its citizens before international institutions, but also, perhaps even more importantly, it can be held accountable by the citizens for the shortcomings of these institutions. The State provides the crucial transmission belt that gives citizens *voice vis-à-vis* international institutions and allows them to sanction the failure of international institutions by proxy. Take the BSE crisis in 2000 as an example: although the crisis was exacerbated by EU decisions, it was national ministers, and not EU commissioners, who were held to account by the electorate – and who, in some cases, had to resign (Scharpf 2007: 8).

*Legitimation for Transnational Actors:* While legislative decision-making in transnational organizations usually follows the principles of public deliberation, and their dispute settlement procedures adhere to those of legal reasoning, and sometimes even grant individual access, the possibilities for individual citizens to participate in decision making are limited and unequal. Some people and stakeholder groups have better access – *de jure* or *de facto* – than others. And it is often the State which balances inequalities in participatory access to transnational organizations. EU member states, for example, ensured that the transnational European standardization organizations are open to the participation of all relevant stakeholder groups (Joerges et al. 2007). Also, where state representatives are involved in such transnational standardization organizations, they act as advocates of disadvantaged stakeholders. And in cases where such groups or citizens still feel disadvantaged, the State gives them voice through its courts. When ICANN did not allow a representative of web users to examine internal documents, he enforced his right through a state court in California.

*Legitimation for Private Actors:* Today, the legitimacy of private actors exercising public authority is often provided through market-based, competitive mechanisms. However, the

efficient and effective operation of these mechanisms often requires state regulation. The State thus constitutes a central legitimacy anchor of private authority. More importantly, the state provides the democratic and judicial procedures by means of which it is established which authoritative functions may be delegated to private actors and, hence, subjected to market competition at all. This is vital, as this act of delegation cannot be legitimated through market competition itself. Indeed, whether it be the railways, the postal system, energy providers, security services or pension schemes, the issue of privatization regularly gives rise to lengthy, animated parliamentary and judicial controversies. The State provides the constitutional framework within which it can legitimately be debated whether such authoritative functions can be delegated to private actors. Only when it is decided within that framework that privatization may go ahead can private actors expect to gain the societal acceptance needed for performing their authoritative functions.

#### **4.3 The State – Manager of Political Authority**

In the OECD world at least, the State remains the central body of political authority. While it increasingly shares authority with non-state actors, these actors remain dependent on it. The authority with which they are endowed is fragmentary and incomplete. Therefore they often cannot act effectively or legitimately unless the state provides them with the authority resources that they themselves lack, be they decision-making powers, organizational capacity, or democratic and judicial legitimacy. Thus, the state's involvement in the exercise of authority remains almost universal; there is hardly a policy area in which the state is not involved in one way or another. Nevertheless the nature of its involvement has changed fundamentally. The state is no longer a monopolist of authority, determining and controlling all aspects of domestic political rule, but increasingly acts as a manager of political authority which complements, and thereby enables and integrates, the diverse and selective authoritative acts of private, transnational or international non-state actors. The loss of its near-monopoly of political power certainly implies a certain weakening of the autonomy of the State. On the other hand, with the help of non-state actors, the State can potentially satisfy demands on political authority that it could not satisfy on its own.

Interestingly, as a manager of political authority, the State is still expected to bear ultimate responsibility for everything political. Although there is less and less that the State can achieve exclusively on the basis of its own authority, it is still the only actor involved in virtually all acts of political authority. Authority structures are increasingly denationalized, but the State remains the hub that holds these denationalized structures together. And as such



it is called to account wherever non-state political authorities fail to meet expectations. Of course, the expectations placed on the State as the ultimate bearer of political responsibility are hard to meet, precisely because the State has lost its former, near-exclusive control over political authority. At the same time, it also reveals the persistent strength of the State inasmuch as clearly only the State is deemed capable of assuming ultimate responsibility. Hence, the most striking feature of the State as manager of authority is not that it is weaker or stronger than it was as a monopolist of authority, but different.

## **5. Conclusion**

The findings of our empirical exploration can be summarized as follows: Since the second half of the 20<sup>th</sup> century, the gradual nationalization of political authority that was typical for much of the State's history since the 17<sup>th</sup> century has come to a standstill and given way to the denationalization of political authority. Non-state actors acquire political authority, thus giving rise to a complex and heterogeneous network of political authorities, in which the State is only one authority among others. Second, the denationalization of political authority remains fragmentary and incomplete. No non-state authority, be it an international institution, a private business or transnational organization, has the capacity to supplant the State. In fact, they all remain reliant on the State because only the State can provide the complementary resources that non-state actors lack to exercise political authority effectively and legitimately. Third, for this reason, the State remains the key body of authority despite denationalization and the accretion of political authority by non-state entities. Its role has changed, however. The State no longer exercises authority always directly and exclusively through its own powers and resources, but more and more indirectly, by providing and complementing the powers and resources of non-state actors.

How do our findings reflect on the three perspectives on the State mentioned in the introduction? First, and least surprisingly, they disprove the conjecture that the State is generally weakening. Yet, they also show that the State is weaker in at least one crucial respect, namely as a monopolist of political authority. Second, the findings confirm the statist presumption that it continues to be a key actor in political affairs. However, contrary to statist instincts this is no longer solely or even most importantly due to the State's exclusive hold on vital authoritative functions, but increasingly on its indispensability as a manager and facilitator of the authoritative functions of non-state actors. Finally, the findings suggest that the governance perspective remains fundamentally incomplete as long as it focuses

exclusively on the authority functions of non-state institutions, and thereby overlooks how these institutions interact with and depend on support from state authorities. State and non-state authority are complements rather than substitutes. Effective, legitimate governance beyond the State depends on effective, legitimate states rather on than their replacement. The state remains the central node in an increasingly decentralized authority structure.<sup>3</sup>

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<sup>3</sup> It may very well be, therefore, that in so-called “areas of limited statehood” (Risse 2008) not only state authority remains weak but non-state authority as well. This, however, is a matter for further research.

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