

A NEW PUBLIC LAW? AUSTRALIAN CONSTITUTIONALISM IN THE AGE OF GLOBALISATION

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I TWO GLOBAL ALTERNATIVES

When the history of the age of globalisation is written, the last five or so years may well be counted as among the most significant. That significance is visible but by no means obvious, at least not for those absorbed in conventional (ie, chiefly liberal) academic debates and pre-occupations. I am not talking about an explosion in the value of global financial transactions, or even, despite the lurid 'bio-tech' dreams of this moment, a technological catapult. The significance of this time lies in the realm of political ideas and action. In these years, two alternative global futures have lined up for battle, on the streets of Genoa and Prague, Melbourne and Seattle. Some have died for their cause. But it is the coming to life of communities, of a 'newish' politics, not the death of individuals, that distinguishes these displays of anger, fear and optimism.

But before going further – weren't the protestors on the streets of Genoa and Prague anti-globalisation protestors? Isn't there a broad consensus on the left that globalisation is an evil? That idea is beginning to slip away. Any perpetuation will most likely come from the media's determination to paint contemporary activists as 'hippy anachronists'. Globalisation is not a disintegrative force, a tide of limitless endings on which we must either float (according to the neo-liberals) or against which we should pile the sandbags (to follow state socialists and nationalists). Globalisation is an identifiable, if not entirely discrete, step in the evolution of the social life of the species. No one group or nation controls it, can lay moral claim to it, or can even claim to know precisely where this step will evolve *to*. In this way, the now highly visible and idealistic politics of anti-capitalism are not merely global in scale, but also, it is now clear, a defining ideological and political quality of globalisation itself. Pursuing this line, the real alternatives are not those of global hyper-capitalism, with all its risks and technological rewards, or a return to old-fashioned styles of

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community life. The alternatives are, to borrow from Richard Falk, *inhumane* globalisation versus *humane* globalisation.¹

My aims here are modest. I want, firstly, to introduce these two models of globalisation. Secondly, I will argue that the shift to humane globalisation involves fundamental changes to the way we think about the rule of law and about the *Australian Constitution* ('Constitution'). Humane globalisation will probably involve constitutional amendments, but the substantive content of those amendments is not, refreshingly, the important point. More important is what such amendments would necessarily signify; that is, a re-appraisal of conventional ideas about what our Constitution is and does, and, by extension, a revisiting of settled conceptions of the rule of law.

II INHUMANE GLOBALISATION

Contrary to the claims of many, the rise to dominance of global capital, a development at the heart of inhumane globalisation, does not herald the demise of the nation state. The story is far more complex than that. Global capital relies on states to protect property, secure markets, produce workforces, subdue unhappy populations, maintain the rate of profit and exploitation and allow for the corporate control of resources. There is nothing new in this. But inhumane globalisation does have distinctive elements. First, national development is defined in terms of competition between states; that is, competition for private globalised capital. Second, and in a related sense, the corporate control of resources extends well into the formerly public sphere, such that policies of privatisation, deregulation and contractualisation put a brake on the state's redistributive and traditional nation-building functions. As Jürgen Habermas observes:

[N]ational governments have been forced into a zero-sum game where the necessary economic objectives can be reached only at the expense of social and political objectives. In the context of a global economy, nation states can only increase the international competitiveness of their 'position' by imposing self-restrictions on the formative powers of the state itself.²

It is in this way that inhumane globalisation earns its label. The ideals of self-rule and self-determination for individuals and communities merely form part of the empty backdrop of nationalist rhetoric. Governments regularly and wilfully expose their populations to the extremities of a ferocious and unstable global market. The interests of capital regularly trump the interests of citizens.

All of these processes rely, in some way, on the claim of states to sovereignty. We can think of sovereignty, a concept belonging to jurisprudence, as the hierarchical ordering of decision and law-making powers, such that those powers can be traced to a highest point or set of highest points negotiating among themselves for supremacy in a given context. Defined in this way, there is an

1 Richard Falk, *On Humane Governance: Towards a New Global Politics* (1995).

2 Jürgen Habermas, *The Post-National Constellation* (2000) 51.

inherent tension between the idea of sovereignty and the realisation of democracy, a tension that is not dissolved by accompanying ideological claims that the state, the product of a social contract of some kind, embodies a popular sovereignty. For Hannah Arendt, 'the famous sovereignty of political bodies has always been an illusion, one which can only be maintained by instruments of violence; that is, with essentially non-political means'.³ Politics, on this reading, is defined by open discussion and debate, oriented towards the higher questions of community life. For the French legal theorist Leon Duguit,⁴ sovereignty is a purely metaphysical idea, one that, even where it is associated ideologically with popular sovereignty, has always been used to justify tyranny and despotism. More recently, Jürgen Habermas has argued for the abandonment of all Austinian conceptions of positive law, including the notion of parliament as the expression or representation of popular will.⁵

This is not to say that the sovereign state has always served us badly. For much of the 20th century, the inherent violence of sovereignty was obscured by a measure of success in incorporating democratic elements into the policy program of the state. The 'welfare state' appeared to offer a lasting compromise between real democracy and liberalism. But as globalisation and neo-liberalism have become entrenched, the Arendtian critique of sovereignty has become more persuasive. The state's claim to embody a *popular* sovereignty rings even more hollowly. First, processes of commodification and marketisation that characterise the 'enterprise state' rupture the claims to civil association that underpin the idea of social contract. Second, the picture is complicated by the well-publicised loss of sovereignty to global capital, a loss probably best understood in terms of the demise of the state's 'formative powers'.⁶ The 'hollowing out' of the state in this sense only seems to increase the urgency and forcefulness of the state's claim to sovereignty *vis-à-vis* its citizenry. The legitimacy deficit finds compensation in both the state's use of force and in strident nationalism. The neo-liberal state, it is often suggested, is strong and slim.

This critique of sovereignty is also implicitly a critique of the liberal rule of law and of liberal constitutionalism, a point that becomes clearer when we ask: how can law rule power? On one hand, law can rule sovereign power by establishing a new power and constituting a new sovereign; for example, in the form of a constitutional court administering a Bill of Rights. But this is not what the rule of law claims for itself. In fact, when law constitutes power, law itself ceases to rule. The central claim of the rule of law, rather, is that where power is exercised according to the precepts of that rule – that is, where the rule of law limits sovereign power – the sovereign is civilised. In this way, the rule of law not only protects the rights, interests or human dignity of those subject to the decisions of the sovereign, but, despite its opposition to power, goes a long way towards protecting sovereignty itself from ideological attack. As Julien Freund

3 Hannah Arendt, *Between Past and Future: Five Exercises in Political Thought* (1954) 90.

4 Leon Duguit, 'Law and the State' (1917) 31 *Harvard Law Review* 1.

5 Jürgen Habermas, *Between Facts and Norms* (1992).

6 See Habermas, above n 2.

puts it, the 'sovereignty of law', the key claim of liberal legalism, exists not to constitute power, but to legitimate it.⁷

Another way to think about this problem is in terms of the *mutual and antagonistic presupposition of sovereignty and the rule of law*. Over sixty years ago, the Frankfurt School legal theorist Franz Neuman wrote that

both sovereignty and the Rule of Law are constitutive elements of the modern state. Both however are irreconcilable with one another, for highest might and highest right cannot be at one and the same time realised in a common sphere. So far as the sovereignty of the state extends there is no place for the Rule of Law. Wherever an attempt is made at reconciliation we come up against insoluble contradictions.⁸

The liberal rule of law is wedded to sovereignty. A post-sovereign rule of law would, it follows, also be a post-liberal one.

III HUMANE GLOBALISATION

In a world of sovereign states, the overbearing monopolists of physical coercion and legal control jostle competitively for the attention of private capital. These sovereigns do reach agreements over their differences, but those agreements have little to do with the internal democratic processes of those states. In the case of the various trade agreements of the last fifteen years, sovereign states have sold or bartered (in many cases unwillingly) the publicly-owned goods and effective markets of their populations. More broadly, the activities of governments derive not from democratic will but from perceptions of the competitive position of the state in the global market for capital.

Humane globalisation, in contrast, envisions a world not of sovereigns, but of networked and cosmopolitan *civil societies*. States, stripped of their 'metaphysical' legal entitlements, would exist only as mechanisms for enforcing and administering law. Law, in turn, would no longer be conceived as the command of sovereign, but rather as the means for integrating the discussions and decisions of civil society. On this reading, associated most strongly with the recent writing of Jürgen Habermas,⁹ democracy is only possible and humane globalisation only plausible where the state is at all levels permeable to and determined by the democratic potentials implicit in a discursively open civil society.

We need to define civil society. Many long and scholarly books have been written about the history of that idea; this is the place for something short and simple. The term 'civil society' describes a politically effective community, one whose political power is distinguished and generated by a commitment to talking, in a manner inclusive of all the individuals that make up that community, about the issues and problems that face it. If so, it is easy to understand why civil society-based concepts of democracy have stolen the academic limelight. The reason is not, despite the recent genealogy of academic interest in the subject,

7 Quoted in A Benoist, 'What is Sovereignty?' (2000) 101 *Telos* 110.

8 Franz Neumann, *The Rule of Law* (1985) 4.

9 Habermas, above n 5.

that civil society played a pivotal and instructive role in some of the experiences of political revolution in Central and Eastern Europe. I do not have the feeling that Australians, for example, want 'people power' to, in a direct, sudden and reconstitutive action, overthrow the government. The reason is, rather, that civil society has an appeal which is altogether 'in tune with the times', by which I mean our intuitive sense of what is lacking in our lives – the feeling of empowerment that accompanies direct participation and contribution, as well as the feeling of belonging to a wider collectivity.

But if political community of this kind is what we all intuitively want (and I realise that this is a big claim), why don't we have it? Why do civil societies remain so flaccid and unimpressive, even in, or especially in, places (such as Australia) where civil and political rights – the rights which make civil society possible – are, for most of the population, only irregularly infringed? Perhaps the answer is that, as Darrow Schechter has put it, the sovereign state 'suspend[s] the potentially limitless political space of the political, and transform[s] it into a hierarchical chain of command'.¹⁰ For Schechter, as for Arendt, the sovereign state presents a sort of false politics, one which crowds out genuine – as well as genuinely political – communication between individuals. Humane globalisation would lie, then, with the expansion of such genuine politics, with the opening of the networks that link these various civil societies. The result would be something like a global civil society, generating its political power and capacities in a manner separate from states, but in a way that also connected those capacities with the administrative and legislative powers of states. The system of states would then become a way of integrating the discursive power of a global civil society and thus of solving problems of global significance. We would, it could be hoped, transcend the dismal failure of the state system in this arena.¹¹

One possible response to this democratic vision would be to dwell on its sheer idealism. That response would have some ground. All alternative visions are idealistic in some sense. But rather than presenting a model of a perfect system to be attained at all costs (a favourite basis for an anti-Marxist critique of left politics), humane globalisation presents us with a set of ideas for reorienting our current legal and political systems, for achieving a *better* rather than a best system. More importantly, the seeds of this reorientation are already with us, in the form of the so-called anti-globalisation movement of contemporary times. That electronically networked community is bolstered by wider popular discontent with states and, in particular, discontent with the current relationship between states and global capital.

10 Darrow Schechter, *Sovereign States or Political Communities?* (2000) 89.

11 Cf *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 ('*Kyoto Protocol*').

IV THE LIMITS OF LIBERAL CONSTITUTIONALISM

From the perspective of law, the shift to humane globalisation requires a reorientation of the rule of law, away from the project of civilising sovereign power towards the project of integrating and making politically effective the decisions which emerge from the political 'talk' of civil society. This radical democratic vision is not the province of esoteric political theory. It plays itself out as global and globally organised opposition towards neo-liberal government.

Is the choice between these two globalised paths, between neo-liberalism and democracy, a constitutional choice in Australia? If we take as our guide the content over the last ten years of matters of so-called constitutionalism, the answer is clearly 'no'. These questions have nothing to do with the republic or a Bill of Rights. They have nothing to do with the question of whether we should abolish the States. It follows that while both globalisation and our Constitution are widely recognised as a 'hot topics' for national debate, there is not in Australian academia or public life any apparent discussion of the relation between our Constitution and the way that we are now, in that global context, being governed. One could almost be forgiven for thinking that the question of the Constitution has nothing to do with the question of government. Given the urgency of the neo-liberal threat to democracy, are our current constitutional pre-occupations a case of fiddling while Rome burns, or perhaps a convenient distraction from the excesses of neo-liberalism?

The apparent uncoupling of these questions (the governmental and the constitutional) is not merely the outcome of an uncritical national debate but, more fundamentally, a lopsidedness and ultimately dysfunction in the liberal conception of what a constitution is and does. Dario Castiglione, a writer attuned to the long history of constitutionalism, has argued that constitutions have three interrelated functions. The first is to constitute a political entity. This points not only to an act of origin, but also, it logically follows, an ongoing and genuine relationship between that act of origin (classically, the constitution of 'a people') and the operation of a system of government. In this way, the constitution gives authority to that system. The second is to 'give form to the institutions and procedures of governance of a political community'. This not only means defining what counts as public power (ie, what counts as constitutionally-regulated power) but also incorporating into the constitutional picture the normative and descriptive elements of relationships between constitutional actors; that is, those who wield public power. The third function of a constitution is to limit public or sovereign power. Castiglione points out that the liberal conception of the constitution places an overwhelming emphasis on the third possible function.¹² As I have argued above, it is a chief claim of the rule of law that where law circumscribes and constrains sovereign power, law civilises that power. Castiglione writes that:

12 Dario Castiglione, 'The Political Theory of the Constitution' in R Bellamy and Dario Castiglione (eds), *The Constitution in Transformation: European and Theoretical Perspectives* (1996) 9-10.

Modern liberal constitutionalism insists that a clear definition of negative limits to the sphere of, and capacity for government action and the normative restriction of political sovereignty are indeed the primary function of constitutions. But this does not follow from any particular property of the constitution in general. The more immediate way in which constitutions limit power follows rather from what has been said with regard to its two other main purposes ... [for example], certain forms of power are de facto excluded by simply naming the principles, institutions and procedures which are properly political ... the definition of the 'political' guarantees that political power is limited in so far as its normal workings are made regular and predictable.¹³

The result of liberal constitutionalism's distinctive emphasis on limits is not merely that in liberal legal systems public power is poorly defined and poorly constituted, but that because of those weaknesses, the liberal constitutional tradition – despite its rhetoric and best intentions – allows for only weak limitations of sovereign power. The relation between the Constitution and the government in Australia provides a useful illustration. To the extent that the Constitution has almost nothing to say about the structure of executive government, it does not, in Castiglione's words, 'give form to the institutions and procedures of governance of a political community'. The common law, to the extent that it has a constitutional role, does not go much further. As a result, in common law countries, the transformation of government and of administration under policies of contractualisation, privatisation and commercialisation has no clear constitutional status or significance. Putting the matter bluntly, government could be transformed beyond recognition (it arguably has) and Australian constitutional theorists, much less constitutional lawyers, would not even notice. If so, we must at least question the relevance or significance of the written and perhaps even the common law Constitution.

Correlative to that lack of constitutional status mentioned above is a reduction in the effective constitutional limits on power. This happens in two ways. First, the commercialisation or contractualisation of governmental power often takes government beyond the reach of judicial review; judicial review being liberal constitutionalism's chief mechanism for the civilising of sovereign power. For instance, common law courts, guided by a desire to maintain a strict division between public and private law, generally view government contracts as falling on the private side of the line. Such questions of the province of judicial review cause considerable and justifiable anxiety among judges and academics but this is not, from the point of view of administrative law, the most important aspect of commercialisation. More important is that commercialisation transforms the form and substance of governmental power. No longer does government primarily exercise its power through rules, with all their associated assumptions of prospectivity, generality and stability. A private-like form of managerial governance, devoted to flexibility and responsiveness, now dominates the administration of public resources and the regulatory projects of government. As liberal theorists (both constitutional theorists and writers more broadly) debate the meaning and inherent good of the rule of law, the relevance of the conventional conception of the rule of law is rapidly diminishing.

13 Ibid 11.

The preceding paragraphs can be summarised in this way: even if we define the constitutionalisation of power as the limiting of power, the currently dominant conception of the Constitution, by giving overwhelming emphasis to negative limitations, fails, perhaps even on its own terms, to constitutionalise what are increasingly dominant forms of governmental power. Those forms are linked intrinsically to the trajectory of inhumane globalisation.

V A POST-SOVEREIGN CONSTITUTION?

So far I have provided no clear suggestions on how we might achieve humane globalisation through the reorientation of constitutional thought. I have not intended to do so. That project is, however, an important one for the future, and I will close by briefly signposting a couple of future paths, both of which seem to lead, from different directions, to a new public law.

Firstly, if we are bound to a conception of the rule of law that takes as its starting point an opposition to state sovereignty, that accepts what I have identified as the mutual and antagonistic presupposition of the rule of law and sovereignty, then the tenets of humane globalisation will remain alien to constitutional discourse. Instead, we must begin to think of the rule of law as an institution that integrates the law-making power of the state with the law-making potentials of civil society, that integrates the vertical and the horizontal modes of deriving power. On the surface, this sounds like the public law equivalent of science fiction, but it is not. What makes public law a fascinating field of inquiry right now is that we are already part of the way there. It is a result of the contractualisation and quasi-privatisation of government that governmental power is now the product of a mixture of hierarchical and non-hierarchical relationships, both formal and informal. The American administrative lawyer Jody Freeman has recently argued that governance is

a set of negotiated relationships. This alternative conception of policy-making, implementation, and enforcement is dynamic, non-hierarchical and decentralised, envisioning give and take among private and public actors. Information, expertise and influence flow downward, from agency to private actors; upward from private actor to agency; and horizontally, among private and public actors.¹⁴

If this is true, then the emergence of a post-sovereign public law may simply mean the critical embrace of the realities of public administration. Of course, it would be wrong to assimilate privatisation and contractualisation with civil society-centred democracy. Nevertheless, we should not let ourselves remain blind to the opportunities for positive transformation that globalisation, a richly dialectical phenomenon, presents. The clearest example of this sort of dialectic is information technology, technology which not only underpins current forms of global hyper-capitalism, but also, in the case of the internet, powerful forms of global anti-capitalist dissent. The conditions of the success of the system are also

14 Jody Freeman, 'The Private Role in Public Governance' (2000) 75 *New York University Law Review* 543, 571.

the seeds of its demise. In a similar fashion, the fragmentation of the sovereign under the conditions of a globalised neo-liberalism might open doors to a more democratic form of post-sovereign legal thought. Certainly the discipline of public law is made more supple and more open by that process of fragmentation.

Secondly, the very questions that Castiglione sees as missing from liberal constitutionalism – ‘what is public power? What institutions and procedures count as properly public?’ – are questions that critical and reflective administrative lawyers are already asking. If, as I have argued, constitutional thought needs to remarry the question of government with the question of the Constitution, then legal scholars in the public law field must proceed by combining the ‘big picture’ of constitutional law with the ‘small(er) picture’ of administrative law.

This does not mean that we should disassociate the Constitution from the constitutional text. (Indeed, textual amendments are likely to be a necessary if not sufficient condition for institutionalising genuinely democratic political structures.) What it *does* mean is that we should make and clarify a distinction between constitutional codification and what we might call *constitutional practice*. Identifying constitutional practice in this way means more than simply viewing government through the prism of constitutional thought. By itself, that strategy will take us nowhere new. We will end up with a conception of public law unsustainably and unrealistically fixated on judicial review. We must *also* view the Constitution through the prism of government. To put things in bold terms, the chief constitutional project for the new millennium is the constitutionalisation, and hence codification, of the structures and institutional relationships required for a genuinely democratic governmental practice. Let us rein in the ad hoc, unprincipled and undemocratic transformation of our state. Let us reclaim, or perhaps claim for the first time, that state. When the problem is phrased in this way, we can begin to see that a critical approach to constitutionalism, to the project of re-coupling the question of constitution and the question of government, is a necessary condition for securing political structures at once post-sovereign and genuinely democratic.