

A FEW REFLECTIONS ON GLOBALISATION AND THE CONSTITUTION OF SOCIETY

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I INTRODUCTION, OR ABOUT GLOBALISATION AND CONFUSION

Australia is currently celebrating the centenary of its constitution. The *Australian Constitution* ('Constitution') was promulgated for a quite different society, at the commencement of the 20th century. Many would argue that the Constitution has served us very well (to the extent that it is possible to make such a judgment), looking back over the last one hundred years. However, in evaluating the Constitution in light of society both as it exists today, and will develop over the course of the Constitution's second century, we should address the important question: what is the relationship between our written Constitution and globalisation? Below, I will try to sketch some answers to this question.

Globalisation in recent years has become a fashionable keyword and a very confusing phenomenon. Usually, it is perceived as something negative, but sometimes as something positive. It unites against itself people separated not only geographically but also ideologically. Against globalisation fight Trotskyists from Germany as well as members of the ultra-national Vlams Blok in Belgium. While some claim that globalisation is responsible for environmental degradation in different parts of the world, others claim that it enlarges our freedom. According to one opinion, globalisation is responsible for racism; according to others, it spreads peace and human rights across the globe. It is responsible for unprecedented concentration of power and also for unprecedented decentralisation of power. Globalisation is supported by Vaclav Havel and opposed by millions of others. In French, the term globalisation is a synonym for the greatest contemporary evil, because it means the spread of American culture, and as such should be opposed. However, the French have developed a new term with a positive connotation – '*mondialisation*' – and that type of globalisation should be supported because it means the spread of universal values – read French values. Indeed, globalisation is a somewhat confusing phenomenon.

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That was on the level of popular discourse, and the situation is no better in scholarship. Today, there are chairs in globalisation, but confusion persists despite the fact that the term has become legitimate. In numerous conferences and journals, there are plenty of articles and papers using the word. Even in the legal sciences, which are usually far behind the other social sciences, it has become a legitimate term. Is it possible to find any agreement about the term? Probably those for and those against agree that globalisation means a new quality in social space, a shrinking world, and also that globalisation means, among other things, that nation states have lost part of their power. Nearly everybody would agree with such a vague description, whatever their worldview, but that is the end of any agreement. After that there is only confusion.

Historians, too, contribute to confusion about globalisation. Some historians claim that globalisation is nothing new and has existed since the 18th century. In arriving at this conclusion, what they take into account is freedom of the market economy. Moreover, some claim that the global market was freer in the 18th or 19th centuries than it is now.

Notwithstanding this confusion about the meaning of the term, and the fact that the term itself is used with different meanings, what seems to me important is that the term globalisation represents a new quality in global social relations – particularly in terms of the impact of geographically remote processes on local social, economic and political institutions. Before globalisation the world was still connected, but processes taking place in other continents did not have such a direct and rapid impact on local social institutions and social structures as they do in the world in which we are now living. Of course, even today, the degree of that impact varies across the different dimensions of social activity.

II ABOUT GLOBALISATION AND UNHAPPINESS

Still, the question remains: how do we understand ‘globalisation’, and what is the best methodological approach to investigate the impact of globalisation processes within national legal systems?

Before I attempt an answer, let me relate a story. In the opening sentence of *Anna Karenina*, Leo Tolstoy wrote that ‘all happy families are alike but each unhappy family is unhappy in its own way’.¹ It appears that globalisation triggers social processes that stimulate unhappiness in different parts of the world, including Australia. This unhappiness, however, may take different forms in different parts of the world, and even within the same society. Despite my aim to write about Australia and globalisation, I will start with France.

In his book *The Lexus and the Olive Tree*,² Thomas Friedman considers a hypothetical situation in which countries are on offer on the stock exchange. He suggests to potential investors that they buy shares in Taiwan, keep shares in Italy and sell shares in France. His advice was guided by the criterion of how

1 Leo Tolstoy, *Anna Karenina* (first published 1877).

2 Thomas Friedman, *The Lexus and the Olive Tree* (1999).

each particular country is able to adjust to globalisation. Why buy shares in Taiwan? Because it is a country that has opened itself to global economic forces, and treats economic globalisation as a big opportunity. Italy treats it with hesitation, but is able to read the *Zeitgeist* – the spirit of the times – and find its place in the post-Cold War global world. But why sell shares in France? Because, according to Friedman, instead of accepting the trend, the French try to swim against the current and attempt to change the trend, which is just a waste of time.

About a year ago, the media informed us about a French symbol of swimming against the current – the leader of the French peasants or farmers, Jose Bove. Mr Bove succeeded, in the sense that his act of violence against a McDonald's restaurant, which should have been mentioned only as a short note in the tabloids, became a symbol of national struggle against 'evil global forces', receiving headline news coverage around the world. His actions provided a contemporary version of the David versus Goliath struggle. In that version, Jose Bove is David, representing everything that is local and French, against Goliath, representing global forces. More precisely, David represents French traditional culinary art with Roquefort cheese at its heart, while Goliath is the fast food chain offering the same type of food – especially hamburgers – around the world.

The media called Mr Bove a contemporary Robin Hood from Roquefort. The reality, however, is different. Jose Bove does not represent the poor and powerless against the rich and powerful. French farmers receive huge subsidies from the European Union ('EU') and are protected by a powerful political lobby. Roquefort cheese is a luxurious commodity. Hamburgers are not able to steal customers of Roquefort simply because most customers of McDonald's cannot afford it.

The two stories mentioned above illustrate the inadequacy of the dominant approach to globalisation, which sees it as solely an economic force. They also show how quick people are to blame globalisation when economic processes undermine local interests. It is true that the most visible dimension of globalisation is the economic one. Nevertheless, outside of the economy, there are other dimensions that are not so visible, which accompany economic globalisation and have an enormous impact on existing social structures.

In each country, it is possible to find leaders who are willing to use violence in their protest against 'evil global forces'. All of them play on local sentiments and emotions of some form. Is this just a game of interests, or is something more at stake? It would appear that it is not only economic interests that are at stake – globalisation is a social and cultural revolution. In the strict sense, the situation is paradoxical because globalisation is not about the homogenisation of social, cultural and legal identities. Globalisation does not question separate national and regional differences, but is changing the world into open space in which, as in the new type of office space without walls, it is possible to see who works and who does not, who is having a nap and who sits at their desk. For people who used to love their own small, uncomfortable space where it was possible to shut

the door and escape from control and surveillance, this new situation creates challenge and cultural shock.

Change could mean that effort will be noticed and rewarded, or that weaknesses will be noticed and accounted for. In the eyes of those mentioned above, globalisation is the worst kind of evil and possesses of all the features of evil ascribed to 19th century capitalism. It does not have mercy for the weak, and rewards only the strong. There is also fear that globalisation will change the world into a big global marketplace where it will be possible to buy and sell everything, where only commodities will be important, and where there will be no place for values, norms, local and national traditions and cultures. In other words, there is a fear that globalisation, at the end of the day, will just equal the 'Americanisation' of societies and countries.

However, there are conceptualisations of the globalisation phenomenon that do not reduce it to market forces, but stress the multidimensional character of the new situation. Below, I will sketch one such approach that in my opinion is particularly fruitful for the social and legal sciences.

III GLOBALISATION – CHARACTER OF THE PROCESS(ES)

As a category, globalisation is very confusing. And, as I tried to show using some illustrations and metaphors about cheese, rather than being a merely economic phenomenon, globalisation could be treated as a process of opening social space and stimulating global transparency.

Much of contemporary social theory is not a great help in understanding globalisation, as serious work on the conceptualisation of globalisation has only just begun. At the moment, the focus is, rather, on packaging some observable phenomena, but not providing us, as yet, with the comprehensive tools with which to grasp globalisation in its entirety. Ulrich Beck – one of the leading social theorists of the contemporary time – is in my opinion correct in claiming that globalisation is the challenge for existing paradigms within social theory.³ Initially, social theory focused on analysing societies within the nation state framework. Such an approach provided the nexus between social and legal theory, since both accepted the 'box' of the nation state as the starting point for analysis. Globalisation requires a radical change in the cognitive approach – a jump outside the nation state as setting limits for analysis. At the moment, we do not have sufficient tools to do this.

Within legal theory in particular, the focus is still on nation state legal systems. From this it is possible to draw two important methodological suggestions. First, it is impossible to build a legal theory that includes globalisation without adequate social theory. Second, due to a lack of proper social theory, all that is possible now is to describe the impact of globalisation processes on national legal systems; in other words, to describe the process of adaptation and resistance to new global social processes within the national legal

3 Ulrich Beck, *What is Globalisation?* (2000) 1-20.

system. Only legal scholars with an adequate background in social theory are in a position to grasp the process of globalisation.

These two methodological suggestions do not mean that an intellectual effort to build legal theory, which includes globalisation, should not be pursued. It means only that without adequate social theory such an effort cannot be fruitful. We should strive to develop such a legal-social theory constellation, and in the meantime draw on whatever preliminary insights contemporary social theorists can provide.

Globalisation was defined by one of the leading contemporary social theorists, Anthony Giddens, as the

intensification of worldwide social relations which links distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa. This is a dialectical process because such local happening may move in an obverse direction from the very distanced relations that shape them. Local transformation is as much a part of globalisation as the lateral extension of social connections across time and space.⁴

For Giddens, globalisation is one of the consequences of modernity. In his conceptualisation of globalisation, time and space play the most important roles. In my opinion, he is correct in finding that attention paid in social theory to 'society' should be replaced by the problem of how social life is ordered across time and space, what he called 'time-space distanciation'. That is Giddens' proposal to escape from the nation state 'box' approach in social theory. Local involvement and interaction across distance are crucial for understanding globalisation.

For Anthony Giddens,

the relations between local and distant social forms and events became correspondingly 'stretched'. Globalisation refers essentially to that stretching process, in so far as the modes of connection between different social contexts or regions became networked across the earth's surface as a whole.⁵

Following a four dimensional classification of modernity, Giddens also conceptualised globalisation as a four dimensional phenomenon. In my opinion, this paradigm is a useful tool for presenting the experiences of and reactions to globalisation in all societies. The four dimensions of globalisation are:

- nation state system;
- world capitalist economy;
- international division of labour; and
- world military order.

Giddens's four-dimensional characterisation of globalisation is very useful for analytical purposes in the social and legal sciences. Nevertheless, it remains at a very high level of abstraction in his social theory, and from the legal point of view, it requires operationalisation of a sort that would allow us to combine a view of legal institutions with one of the social world under the impact of globalisation. However, this is not the proper forum, and it is not my aim to do it

4 Anthony Giddens, *The Consequences of Modernity* (1990) 64.

5 Ibid.

here. What I want to discuss is the point of connection between globalisation and legal constitutions. It seems to me that such a junction is provided by the concept of the real constitution of society. The institutions of the social (real) constitution of society focus and compress all four dimensions of globalisation in the local social space.

IV GLOBALISATION AND THE CONSTITUTION OF SOCIETY

From my point of view, the most important aspect of the process of globalisation is the impact of global processes on institutional arrangements within the nation state. There seems to be a general consensus that globalisation is changing the institutional structure of society. That institutional structure is in the process of change, through the impact of all four mentioned dimensions of globalisation. Those changes create the situation that 'each family is unhappy in its own way'. The unhappiness, theoretically speaking, is an effect of the huge discrepancy between social cognitive power and the changing reality of institutional arrangements within society. The institutional framework is being changed, but we as social beings still use our old cognitive categories that usually cannot give comprehensive meaning to the social world we are living in. It does not mean that the changes in the institutional framework are made without our own participation, only imposed on us. In the course of changing, we are guided by different expectations. The outcomes of our own agency are always modified by processes and institutions outside our control. It is possible to concede this, and yet question how it all relates to the area of law, and especially constitutions.

There are two different approaches to constitutions. The first one is very narrow and takes into account only institutions prescribed in legal documents. Such an approach is sometimes useful, but not if we wish to discuss the relationship between globalisation and a constitution. The second and broader approach claims that legal constitutions are supposed to be in some relation with the constitution of society. That last term means the structure of the social institutions within society.

Now, if we want to combine one with the other, it is possible to claim that a legal constitution will possess a high level of social legitimacy and will be more stable if there are correlations between it and the social constitution. That does not mean that the legal is just a simple epiphenomenon of the social. There has to be a correlation between the basic institutions of the social and legal constitutions. The fundamental core of the legal institutions should correspond to the fundamental core of the social ones. The problem is that globalisation is a dynamic phenomenon, not a static one. The very essence of globalisation is that there are no social spaces immune from the influence of the global social processes. That does not mean that impersonal global forces work in such a way that they impose uniformisation of social institutions across the globe. Such an approach, which has 'McDonaldisation' as a paradigmatic model, is wrong. Global processes influence change and accelerate the pace of change, but change

in social institutions is taking place according to local cultural precepts that are themselves also under change.

The change in institutions of constitutional law is always slower than changes in social institutions. There are plenty of constitutional law devices to petrify constitutional institutions. That is the nature of constitutionalism: that norms of constitutional law create a higher order of norms, their function being to preserve and defend those institutions which provide stability and predictability for social and political order. There were always tensions between the legal constitution and institutions of the social constitution. What is new, under the influence of globalisation, is that the tensions are on a much higher level, and predictability is much reduced. The politico-legal institutions of the state are too big for individual citizens and too small to cope with global processes.

What are the consequences of such a situation for legal constitutions? Should the institutions become more flexible? The answers to such questions depend on one's preferred normative vision. I am not going to spell out my own, but let me state that the biggest problem faced by us is how to combine the necessary level of global coordination with as much local autonomy as possible. There are plenty of answers to such a question, but still it is nearly impossible to provide a constitutional manual.

I am convinced that we are in the middle of a profound change in constitutionalism as we know it – to the extent that we are experiencing a 'creeping' constitutional revolution. Everywhere, not only in common law countries and countries with established constitutional review, there is a shift from political to legal means of institutionalisation of social change. In other words, more and more decision-making processes are transferred from democratically elected institutions, such as parliaments, to the judiciary. Why is such a process taking place? On the one hand, it is an adaptation by the institutions of the legal constitutions to the changes in the social constitutions. But more importantly, it is a restriction of more and more areas of social space from political deliberation. The political class is not willing to take responsibility – that is true in liberal democracies. At the same time, it is impossible to blame the political class for everything, since, because of the global processes at work, they are not responsible for everything that is happening in the territory of the state. How is it possible in such a situation to make them accountable? What is required is redefinition of the public space, but that requires change in the social consciousness, a sort of *gestalt* switch.

V CONCLUSION

Globalisation triggered massive and profound change, bringing negative as well as plenty of positive opportunities. It provides enormous opportunity for citizen participation on the local, regional and also global level. That new dimension of citizenship (not restricted to passive carriers of usually negative rights) is the most important feature for the design of the new constitutions of society and also of the legal constitutions.

The new legal constitutions should possess features such as: a greater level of flexibility; new dimensions of public space; and a balance between rights and public duties, including regional and even global duties of the citizens and the states as well. In Australia, there is potential within the existing Constitution to accommodate some of those requirements and make the real constitution of society closer to the written one. It means that the written Constitution will accommodate new social institutions in the process of creation. Nevertheless, the written Constitution contains limitations to this process due to the nature of constitutionalism itself, but I believe that these limitations will be overcome under the pressure from globalisation exerted through new institutions within Australian society. The process of overcoming these limitations will require a new vision and a new constitutional consciousness based not only on legal expertise but also expertise in the social sciences.

The problem is that this new type of constitutionalism cannot be built in one state only. It requires an effort of at least a group of states. At present, it is impossible to see even a trace of such a process, apart from some nice dreamers. Having said that, I do not think that there is anything wrong with nice dreams. I started this paper with a discussion of global unhappiness, and now wish to conclude with the notion of nice dreams, which are also triggered by globalisation. The constitution of societies is changing due to globalisation, and this opens space not only for unhappiness, but also opportunities for change.