

SOUTHEY MEMORIAL LECTURE: CONSTITUTIONALISM IN THE GLOBAL ERA*

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Sir Robert and Lady Southey, members of the Southey family, Professor Crommelin, distinguished guests, Ladies and Gentlemen. It is an honour to join you today for the twentieth Allen Hope Southey Memorial Lecture. I intend to celebrate the memory of Allen Hope Southey by addressing the issue of constitutionalism in the global era.

Constitutionalism is a legal theory that seeks to guarantee the liberty and rights of individuals under a limited government. For those who hold to a hard definition of constitutionalism, this can be achieved only through the medium of a written constitution. For those who accept a soft approach to constitutionalism, a written document labelled 'constitution' is not absolutely necessary. A country with no written constitution may nevertheless adhere to constitutionalism. This is the case in Israel, New Zealand and the United Kingdom. In other words, what matters is the substance of constitutionalism, not the procedural aspects. As a matter of substance, constitutionalism is made of two fundamental principles: first, all powers derive from the people, and second, all people are endowed with fundamental human rights. Hence, the two basic principles of constitutionalism: democratic governance and respect for individual rights. I intend to discuss the impact of globalisation on these two basic principles.

The term globalisation has now entered the vocabulary of laypeople. It is often used as a synonym for internationalisation. This is misleading because the two phenomena are not totally identical. Since the end of the nineteenth century, many political, economic or social matters have become 'internationalised' — that is, made subject to bi- or multinational cooperation between states. These matters have been internationalised by being regulated by treaties and conventions between states. The key issue is that treaties and conventions can only come into being through the free will of states. Accordingly, the distinctive feature of internationalisation is the fact that states succeeded in keeping the whole process under their control.

Control by states seems to be lacking in the globalisation process. Today political, economic and social matters are globalised without states having any part in the process. Worse, in some cases, matters are globalised against the will of states. This is the case with serious threats to the environment such as ozone depletion or climate change. This is also the case with financial markets since the

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movement of capital has become largely independent of the control of state agencies.

Thus, there is a difference between internationalisation and globalisation. As opposed to internationalisation, globalisation has made national borders meaningless, if not obsolete. Here lies the major challenge of globalisation for constitutionalism because democracy and respect for individual rights need a place to grow. Both are territorially based. I will address the threats posed to constitutionalism by globalisation in two areas. Firstly, I will discuss democratic governance and the impact of market globalisation on the democratic decision-making process. Secondly, I will consider the impact of an increasing global culture on the rights of the individual.

I DEMOCRACY AND THE GLOBAL MARKETS

Democracy refers to a form of government in which the people rule. Actually, the people seldom rule directly. Participatory democracy is still an oddity in most Western states. These states adhere to the so-called liberal or representative democracy, which is a system of rule in which officers chosen by the citizens in free and regular elections make the decisions affecting the community. This system develops and ensures the idea of a 'national community of fate' — a community that rightly governs itself and determines its own future. Globalisation of markets has brought two major challenges to this institutional scheme. The first concerns the decision-making process of constitutional democracies; the second relates to the future of government in market-oriented societies.

In terms of the democratic decision-making process, representative democracy remained meaningful as long as politics managed to keep the market society under control. The job of the liberal democracy was indeed to uphold the market society by regulating competition between economic actors. This worked well when the boundaries of states marked out the territory — a 'place' — within which law prevailed.

It is important at this point to recall that with the coming into being of democracy, law's first claim became spatial or territorial, in contradistinction to the feudal system in which law's basic claim was personal — that is, attached to the individual, not the territory or the 'place'. It was left to the philosophers of the Enlightenment to demonstrate that there is no liberty where the governed are subject to legal commands due to their status or their act of birth. In so far as people cannot be free if they are subject to a law that they have not freely consented to, it is necessary to break the link between the person and the law by making everyone equal before the law and by giving everyone a chance to participate even indirectly in the law-making process. Thus a territory — or a 'place' — is of primary importance for the constitutional democracy to work out in a meaningful way. Democracy begins with drawing the limits of the constituency. Therefore, it necessarily implies borders which actually realise the adequation between the market place and the polity.

With the globalisation of markets, the place of the polity and the place of the market no longer coincide. This means, on the one hand, that the marketplace is

out of reach of the decisions of the polity and, on the other, that the polity is subject to decisions in which its elected officers have taken no part. Under such circumstances the idea of a 'national community of fate' becomes an empty phrase. In order to get out of this quagmire, global markets have to be regulated in such a way that constitutional democracies can again pretend to be in charge of their own destiny.

Market regulation can be achieved, first, by international cooperation between states and, in particular, through appropriate treaty-making. A second option — more ambitious, but perhaps more efficient — is to set up, above states, institutional arrangements that will reproduce the constitutional decision-making process existing below. From a practical standpoint, it could be said that the first option has been the choice made by the Contracting Parties to the General Agreement on Tariffs and Trade (GATT) when they transformed their organisation into the World Trade Organisation (WTO). The second option is the choice made by the European states when they created the European Economic Community (EEC) which subsequently became the European Union (EU). In terms of market regulation, the difference between the two options is huge. Whereas the world market is hardly regulated at all, the European market is the only one that provides for some kind of control by the state.

Where does that lead us? Simply to this: international arrangements must be subject to the critical test of constitutional democracy, if one is serious about bringing under better control the pressing problems that today escape the control of the state. This is no easy task as the painful discussions on the new institutions of the EU currently underway have already demonstrated.

On the other hand, democratic control over global markets cannot be achieved without some transfers of sovereign competencies. Sooner or later, the upward movement of political and economic powers raises the question of what will remain within the jurisdiction of the states. European states have tried to solve the dilemma by having recourse to the concept of 'subsidiarity'.¹ In a nutshell, the Community shall take action only if, and in so far as, the objectives of the proposed action cannot be sufficiently achieved by the Member States. On its face the idea is very appealing, but it really works only for the policies that are divisible. In a world of global interconnectedness such policies are not numerous: culture, artistic activities and possibly education are cases in point.

The second challenge brought by the global markets for the system of constitutional democracy relates to the size and the functions of government. No one today is untouched by the power of government. Its impact on our daily life and work is impressive. Twentieth century governments have been called upon to

¹ Article 3b of the Treaty on European Union (1992) 31 ILM 247, 258-9 reads as follows:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

regulate a welfare state and manage the economy, to foster industrial development and protect the environment. They concern themselves with national education, artistic activities, consumer protection, energy protection, equal pay for men and women and restrictive trade practices. The growth of governmental power has followed inevitably from the increase in the tasks of government and has been stimulated by the demands of social justice and public welfare. In carrying out their increased commitments, governments have grown into huge bureaucracies providing work for thousands of civil servants and dependence for an even more impressive number of people. The question is whether these large bureaucracies will survive in market-oriented societies.

Against a backdrop of increasing global competition for markets and investment, constitutional democracies seem to be torn apart between two contradictory requirements. On the one hand, if it is true that globalisation necessarily entails downsizing, the era of 'big government' — in American parlance — is over. In the same manner that globalisation has generated a new organisational form of business in the private sector, known as the 'hollow corporation', it could generate in the public domain what might be called a 'hollow state'.² The metaphor describes the intense effort made by the Thatcher cabinet in Great Britain and the Reagan and Bush administrations in the US to privatise public services. In some domains, such as delivery of health and human services which used to be performed by public agencies, governments have increasingly contracted out with private non-profit and for-profit agencies. Advocates of privatisation are right in making the point that government can provide, or arrange for citizens to receive, a service without government actually producing it. But there are limits in downsizing government. In contradistinction to what happened in the private sector, a 'hollow state' that consists of a lean headquarters with only four departments such as defence, justice, home affairs and foreign affairs, is unlikely and truly impossible.

There is indeed no possible return to nineteenth century governments. Globalisation of markets has generated huge social disruption that calls for even more welfare. This sad result, particularly in Europe, is a rather ironic lesson for the hard liberals who believed that the globalisation of markets would necessarily pave the way to a new economic Eden. Doubts may be cast as to the possibility of a disappearance of the welfare state. Instead of withering away, the welfare state will more likely be reallocated or redistributed to local government. However, globalisation of markets has also taken place in a context of fierce competition for attraction and retention of jobs and a high level of economic prosperity within the borders of the state. Major corporations and big multinationals do not enter this competition alone as, say, noble knights in a tournament of the Middle Ages. More often than not, these national firms are the champions of states. National administrations put their full weight behind the firm's efforts to win significant contracts abroad.

² H Milward and Keith Provan, 'The Hollow State: Private Provision of Public Services' in Helen Ingram and Steven Smith (eds), *Public Policy for Democracy* (1993) 222-37.

Accordingly, the relation between government and the market has changed. Actually, the transformation had already begun with the national market. What happened at the global level is only a continuation of a heavy trend in the new configuration of the state. The decisive factor is that government is not out of the market; rather, government uses the market and the market forces to more efficiently further collective, public interest goals. A fundamental feature of the constitutional state, the distinction between the public and the private sector, the political and the civil society, is diminishing. Government is everywhere, with everyone, all the time. In order to describe this pervasive omnipresence of the state in society, political scientists and constitutional lawyers tend to refer to the concept of governance. As the Report of the National Performance Review prepared in the United States by Vice-President Gore put it: 'Governance means setting priorities, then using the federal government's immense power to steer what happens in the private sector.'³ This is very far from what constitutionalism taught us in terms of government. A limited government was indeed the *raison d'être* of the constitutionalist ideology, for this was the best way to protect our individual rights.

II INDIVIDUAL RIGHTS AND THE GLOBAL CULTURE

By global culture, we might refer to the increasing similarities that seem to bring together beliefs, sentiments and creeds all over the world. A single set of subjective attitudes and mental representations is progressively taking place. With the end of the cold war, the phenomenon has been particularly striking in the field of political culture. As a concomitant of the globalisation of markets, there has been some movement towards a relatively uniform constitutional law. This is the case with two basic tenets of constitutionalism: respect for human rights and judicial review. Both institutions appear to be singularly successful and serve as world models. Does this mean that individual rights may now be considered as universal, regardless of the political culture of the countries concerned? I will address this question by analysing the impact of globalisation, first, on the content of individual rights and, second, on their constitutional guarantee by judicial review.

The growth in international concern for human rights has been especially dramatic since the end of World War II. Initially, the movement was launched as a revolt against the barbarities that had been practiced by the Nazis. Subsequently, it grew in importance as the totalitarian practices of the communist states were made public. In many respects, this movement may be regarded as a victory for constitutionalism. However, it should be pointed out that there has always been some ambiguity as to the exact content of the individual rights that ought to be placed 'above all sovereignty'. In 1948, the United Nations (UN) spelled out what was meant by 'human rights' in the Universal Declaration of Human

³ Al Gore, Report of the National Performance Review — *From Red Tape to Results: Creating a Government that Works Better and Costs Less* (1993) 62.

Rights.⁴ The Declaration was adopted without dissent, but with abstentions by the Soviet bloc nations, South Africa, and Saudi Arabia.

From a legal viewpoint, the Declaration was not considered as a legally binding instrument, in so far as the rights enumerated therein had to be codified in a full-fledged international treaty. In the subsequent years, while the Cold War was under way, the controversy that had already arisen between East and West during the elaboration of the Declaration, as to the content of human rights, became more acute. Soviet bloc nations contended that the civil and political rights of the West were merely virtual, as opposed to the economic and social rights that ought to be considered as truly real. As it proved impossible to reconcile the two approaches, the UN committee that was in charge of codifying human rights had no other option than to prepare two drafts, one on the political and civil rights, the other on the economic, social and cultural rights. This is why the UN adopted in 1966 two separate covenants: the International Covenant on Economic, Social and Cultural Rights⁵ and the International Covenant on Civil and Political Rights,⁶ both adopted on 16 December 1966.

The revolutions that swept Central and Eastern Europe in 1989 have not made a reconciliation between the two approaches easier. The view that economic and social questions should be thought of in terms of rights has survived the demise of the communist empire. Moreover, human rights activists in a number of Third World countries, especially in Asia, have long held the view that economic and social rights, on the one hand, and civil and political rights, on the other, are not severable. Last, but not least, one may wonder whether a new dividing line is not taking place between Europe and America as it seems increasingly obvious that Europeans, in contradistinction with Americans, do not take economic and social rights lightly. The fact remains that a global and comprehensive approach to human rights is out of reach.

Differences in national approaches to human rights have worsened in the post-Cold War era. Against a backdrop of postmodernity, doubts have been cast on the ideal of universality that pervades the discourse on human rights. The questioning of universalism originates in a body of thought and sensibility known as 'postmodernism'. The postmodern political and social thought emanates from France, where it developed in the aftermath of the Parisian uprising of 1968. Postmodernists questioned the whole paradigm of human rights. As France was approaching the Bicentenary of 1789, postmodern attacks were launched against the French Revolution and the Declaration of Rights. Before long, the postmodern intellectuals displayed a ferocious contempt for the Enlightenment, for the Revolution, for humanism and for the idea of human rights.

⁴ Universal Declaration of Human Rights, GA Res 217A, 3 UN GAOR (183rd plen mtg), UN Doc A/Res/217A (1948).

⁵ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3, 6 ILM 360 (entered into force 1976).

⁶ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force generally 1976, entered into force for Australia 1980).

Rejecting the traditional individualistic approach to human rights, postmodern scholars claim that the Western idea of human rights is wrong because it discounts the differences between people, which they consider more important. The human differences most interesting to them are sex/gender and race/ethnicity. In terms of practical activities, they focus almost wholly on causes and groups. Instead of individual rights, they favour group rights. For example, they fight oppression and injustice against women, homosexuals and people of colour.

The impact of the postmodernist discourse on constitutionalism is difficult to assess. True, the ideal of universality prevailed in Prague when demonstrators went up against armed Soviet troops, bearing signs that said 'Truth will prevail', or when students in Beijing died with 'We shall overcome' on their shirts. But relativism has already greatly influenced some domestic policies on human rights. A case in point is the United States where, by virtue of laws requiring or permitting racial segregation, individual rights must in certain cases yield to group rights. Interestingly, in those states that provide for constitutional guarantees of individual rights, the chances are that constitutional courts will eventually be the ultimate arbiter between the two approaches.

Perhaps the coming into being of a global constitutional culture is clearest and most dramatic in the fervour for judicial review. The spread of constitutional courts and constitutional judicial review in this *fin de siècle* seems to have been irresistible. The movement began after World War II when new constitutions with bills of rights and judicial review appeared in Italy⁷ and in Germany.⁸ Subsequently, Greece⁹ and Spain¹⁰ followed suit. More recently, the transmuted Eastern European states have adopted bills of rights and constitutional judicial review almost automatically, as if a constitutional court was a certificate for real, true, authentic democracy. Even more notably, countries whose political and legal tradition has been most resistant to constitutional judicial review now find themselves more or less compelled to swim with the current. This is the case with France whose originally modest Constitutional Council¹¹ has turned itself into a constitutional court with human rights jurisdiction.

Against the enthusiasm for constitutional judicial review, there are, it is true, some resistances. This is true in the case of Great Britain whose bedrock principle of parliamentary sovereignty still holds good, amid mounting criticism from the judicial review doctrine and the left because of the drawbacks of this principle when human rights come into play. This is also the case in the Netherlands, where the constitution provides that courts may not review the constitutionality of laws.¹²

However, the Dutch situation departs from the British tradition on a major point. The Dutch constitution provides that treaties have priority over domestic

⁷ Constitution of Italy (1948) art 134.

⁸ Basic Law of the Federal Republic of Germany (1949) art 93.

⁹ Constitution of Greece (1975) art 93(4).

¹⁰ Constitution of Spain (1978) art 162.

¹¹ Constitution of France (1958) Title VII, arts 56-63.

¹² Constitution of the Netherlands (1991) art 120.

laws.¹³ This obliges the courts to verify whether the legislation is in conformity with treaty law and, in particular, whether the statute conforms to the European Convention on Human Rights,¹⁴ which is binding on all European States. For all practical purposes, this means that rules of human rights treaties play in the Dutch legal order the same role as a bill of rights that is judicially enforceable. A statute which infringes human rights may not, and will not, be applied in The Netherlands legal order. Therefore, although explicitly deprived from the power of constitutional judicial review, Dutch courts nevertheless reach the same result by refusing to apply domestic laws on the ground that they are contrary to a treaty.

A similar result has been attained in France. Like their Dutch counterparts, but without specific constitutional provisions, French courts consider themselves as precluded from reviewing the constitutionality of statutes. Nonetheless, in so far as they now enforce Article 55 of the Constitution¹⁵ which gives priority to treaties over statutes, French courts are actually in a position to apply to statutes a test of conformity with human rights requirements that is as stringent, if not more so, than a traditional test of constitutionality would be. Notwithstanding their lack of constitutional judicial review, Dutch and French courts do possess 'conventional' judicial review because they are in a position to enforce the European Convention on Human Rights against their respective parliaments. Their experience is instructive for all the countries that abide by the European parliamentary tradition that rules out constitutional judicial review.

It may well be that this European parliamentary tradition rests on more solid ground than the advocates of constitutional judicial review seem to believe. Globalisation of constitutional judicial review would not advance the cause of constitutionalism as much as its strongest defenders believe. The reason is that amending the constitution in unitary states is usually not as difficult as in federal states. Therefore, whenever a constitutional court declares a statute contrary to the constitution, it may not take too long for it to be overruled by the *pouvoir constituant* — that is, the sovereign. This is what happened in France in respect of the right of asylum after the Constitutional Council had declared that it could not be restricted by way of treaty. Less than three months after the ruling by the Constitutional Council, the constitution was amended to authorise derogations to the right of asylum.¹⁶ Doubts may be cast as to whether this was a victory for judicial constitutional review.

¹³ Ibid art 94.

¹⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (entered into force 1953).

¹⁵ Article 55 of the French Constitution of 1958 provides: 'From their publication, duly ratified or approved treaties or agreements have a higher authority than *lois*, subject, for each treaty or agreement, to its implementation by the other party' in John Bell, *French Constitutional Law* (1992) 257.

¹⁶ Ibid art 53.1.

CONCLUSION

Constitutionalism is now part of our common constitutional heritage. Without it, it is doubtful that we would have attained the degree of liberty that we now enjoy in our respective states. True, in some cases, progress needs to be made and it is tempting to call for more globalisation. However, one should be careful in importing constitutional devices. There is no such thing as a 'one size fits all' in constitutional law. Constitutional rules have to be tailored to each country. However, regardless of the necessary adjustments, one should never forget that the fabric of constitutionalism is always the same. Constitutionalism has been devised for the good and the right of humankind. As globalisation of markets may put globalisation of constitutional law at risk because of its huge social costs, we must never forget that the starting point and the end result of constitutionalism is indeed the human being.