

Book Review: Constitutional Rights After Globalization, by Gavin W. Anderson

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CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION BY GAVIN W. ANDERSON (OXFORD & PORTLAND, OREGON: HART PUBLISHING, 2005) 156 pages.¹

BY DAVID SCHNEIDERMAN²

Twenty years ago, the late Alan Freeman published a review essay in the American Bar Foundation Research Journal (precursor to Law and Social Inquiry) regarding a collection of papers edited by David Sugarman.³ Freeman took the occasion to theorize linkages between the left legal academic thought of the United Kingdom and the critical legal studies movement in the United States. For almost ten years, “critical legal thought [had] been threatening and destabilizing mainstream American legal thought,”⁴ wrote Freeman. First, there was a “pre-Marxist period of eclectic disillusionment,” which prompted a wave of epistemological nihilism, followed by the “exhilarating”⁵ rediscovery of Marx, which precipitated, finally, a strategy of avoiding the reduction of all to simple materialist analysis. Freeman described this last phase as “postcritical neolegalist Marxism,”⁷ which he associated with a move to legal pluralism in the United Kingdom: “The classic response to reductionism is to substitute multiplicities for singularities, to offer manyness instead of oneness, in short, to show that the world is more complicated (or more contradictory) than one had previously thought.”⁸

The Sugarman book exemplified this desire to create a role for law and legal institutions autonomous of the interests of the ruling class. For Freeman, this sort of move was unsatisfactory, as it returned critical

¹ [*Constitutional Rights*].

² Professor of Law and Political Science, University of Toronto, and Visiting Faculty, Georgetown University Law Center.

³ David Sugarman, ed., *Legality, Ideology, and the State* (London: Academic Press, 1983). The review appears in Alan Freeman, “The Politics of Truth: On Sugarman’s Legality, Ideology and the State” (1986) Am. Bar Found. Res. J. 829 [Freeman, “Politics of Truth”].

⁴ Freeman, “Politics of Truth,” *ibid.* at 831.

⁵ *Ibid.* at 834.

⁷ *Ibid.* at 836.

⁸ *Ibid.* at 835.

legal thought “right back to the 1950s where this story began.”⁹ It amounted to embracing what he called “substantive pluralism” and “British ... appropriation of American liberal pluralism.”¹⁰ Brit-crits, like their American cousins, Freeman concluded, were not “immune from self-destructive and immobilizing moves.”¹¹

I trust that Gavin Anderson will forgive me for taking up valued book review space with a discussion of another review of someone else’s book. He will, I am confident, appreciate somewhat the salience of Freeman’s review. First, Freeman makes the categorical error of tracing the origins of British legal pluralist thought back to the American strand of political pluralism associated with Robert Dahl and others.¹² In fact, the tradition of British political pluralist thought, associated with the likes of Frederic Maitland, John Neville Figgis, and Harold Laski, predates U.S. authorship by many decades and is also very unlike it.¹³ Freeman fails to recognize the diversity of the sources of what we might call constitutional knowledge—one of the principal lessons of Anderson’s book. Second, and more significantly, Freeman maintains that pluralism is a dead-end—like much in critical legal studies, it is “self-destructive and immobilizing.” For Anderson, legal pluralism offers up the obverse: an opportunity to re-engage with constitutional law and theory on terms that provoke counter-hegemonic possibilities. Rather than immobilizing, Anderson maintains, this form of critique is liberating.¹⁴

Anderson’s new book not only builds on this earlier pluralist tradition, it is an important and critical intervention in its own right. Few books aim to theorize linkages between constitutional law and economic

⁹ *Ibid.* at 839.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² See e.g. Robert A. Dahl, *Who Governs? Democracy and Power in an American City* (New Haven: Yale University Press, 1961):

¹³ See e.g. F.W. Maitland, “Moral Personality and Legal Personality” (1905) 6 *J. Soc. Com. Legis.* 192; John Neville Figgis, *Churches in the Modern State* (London: Longmans, Green and Co., 1913); and Harold J. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917). See generally David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 2003).

¹⁴ See also Wendy Brown & Janet Halley, “Introduction” in Wendy Brown & Janet Halley, eds., *Left Legalism/Left Critique* (Durham and London: Duke University Press, 2002).

globalization, and so this book stands virtually alone in the field.¹⁵ Law and legal forms play a key role in the structuration of economic globalization, from the facilitation of financial and currency transactions to the enabling of private forms of transnational dispute resolution. It might be assumed that constitutional law has little or no role to play in the processes associated with economic globalization. Indeed, the dominant variant of “rights constitutionalism,” associated with “liberal legalism” (terms which Anderson commandeers), prefers to keep a comfortable distance from relations of economic power. Yet, those who promote economic globalization seek secure commitments from national governments to eliminate local regulations that unduly constrain the movement and operation of market actors. This can be achieved via national legal reform, including constitutional reform, but also via the embrace of transnational legal norms which prevail over national legal norms. This is the constitutional and legal project associated with economic globalization, that of limited government and the subordination of politics to economics: in short, the ideology of neo-liberalism. It is a matter of some urgency, then, that scholars take stock of the ways in which law, and constitutional law in particular, is implicated in the structuration of economic globalization. Anderson, to his great credit, undertakes this very task.

Anderson’s book rests on the claim that legal pluralism best aids in comprehending law’s role. A pluralistic lens, Anderson maintains, “enables us to understand better, and respond to, the challenges facing constitutionalism in an age of globalization.”¹⁶ The typical model of rights constitutionalism associated with a liberal legal order is premised upon a negative rights-based model enforced by judicial review, in which all state action is suspect. This is the model at which Anderson takes aim. If the state is not the exclusive source of law-making authority, as pluralists maintain, then the dominant model—in which private actors,

¹⁵ Among the few books that broach the subject are Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2d ed. (London: Butterworths LexisNexis, 2002); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press 2004); Heinz Klug, *Constituting Democracy: Globalism and South Africa’s Political Reconstruction* (Cambridge: Cambridge University Press, 2000); Mark Tushnet, *The New Constitutional Order* (Princeton: Princeton University Press, 2003) c. 5; and David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* [forthcoming].

¹⁶ *Supra* note 1 at 3.

and multinational corporations in particular; not only flex their economic muscles through legal forms but are important sources for the generation of legal norms—is sadly out of touch with current legal processes. At bottom, Anderson’s book is a call for an expanded understanding of constitutionalism that captures not only public but also so-called private exercises of political power.

Anderson’s pluralist critique is structured on the distinction between external and internal legal pluralism. From the outside, external legal pluralism is capable of ascertaining a multiplicity of sources of law-making authority. Drawing on Santos’ social-theoretical account of the constellations of structural power—which includes places like the state, the household, the workplace, and the market¹⁸—external legal pluralism treats the state merely as one among a number of sources of legal authority. From within, internal legal pluralism redraws the portraits of sovereign legal orders so that they are made up of a diversity of norms, some of which may be contradictory and which may render the law incoherent. Anderson relies here on the work of Sampford, who argued that the disorder of the law follows from a social and legal “mêlée” that is precipitated by asymmetrical power relations between conflicting groups and institutions.¹⁹ Building on this argument from incoherence, Anderson then takes aim at Dworkin’s account of “law as integrity,”²⁰ which purports to draw correct answers to legal questions from the available material. Testing Dworkin’s thesis against conflicting U.S. Fourteenth Amendment equality and Canadian freedom of expression jurisprudence, Anderson concludes that constitutional theory cannot provide judges with principled answers to legal questions, nor are judges much interested in seeking guidance from theory.²¹ Instead, judicial decision making under bills of rights is better understood as the product of “the variety of real pressures and

¹⁸ Santos, *supra* note 15 at 371.

¹⁹ Charles Sampford, *The Disorder of Law: A Critique of Legal Theory* (Oxford: Basil Blackwell, 1991) c. 6-7.

²⁰ Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1988).

²¹ For a frank admission from a judge that principled reasons often are not available, see Richard A. Posner, “Foreword: A Political Court” (2005) 119 Harv. L. Rev. 32 at 40 (“[T]he Supreme Court, when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature’s”).

motivations affecting judges, manifested in the form of asymmetrical social and legal relations.”²³

If the external pluralist account is correct—that the social world is made up of intersecting structural sources of normative authority—then there is usually no direct correlation between legal victory and social change. Yet, liberal legal theory assumes this correlation via the medium of constitutional litigation. Wading into debates over the instrumentality of constitutional litigation²⁴ (drawn from the realm of U.S. First and Fourteenth Amendment jurisprudence), Anderson concludes that an external legal pluralist account provides the best explanation for the “inability of rights constitutionalism to secure its own agenda.”²⁵

So far, there is little here to do with rights after globalization. The external pluralist account looks very much like the one Freeman described and critiqued in 1985, with its emphasis on multiplicity and complexity in the place of unity and coherence.²⁶ The internal pluralist story, with its emphasis on indeterminacy and the politics of judging, looks even more remote from the traditional British pluralist account. Indeed, Anderson’s internalist account appears to close the gap between the British and the U.S. critical legal perspectives identified by Freeman. What, after all, is the difference between them in so far as they rely on the “law is politics” and indeterminacy theses?²⁷ Moreover, what does

²³ *Supra* note 1 at 67. Anderson does not draw on the behaviouralist account of judging, though he might have. See Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press, 1993).

²⁴ See the debate between Gerald N. Rosenberg, “Positivism, Interpretivism, and the Study of Law” (1996) 21 *Law & Soc. Inquiry* 435 and Michael McCann, “Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive)” (1996) 21 *Law & Soc. Inquiry* 457. See also, more generally, Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: Chicago University Press, 1991); Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: Chicago University Press, 1994).

²⁵ *Supra* note 1 at 95.

²⁶ Freeman, “Politics of Truth,” *supra* note 3 at 838.

²⁷ For a discussion of these and the critique of rights in the heyday of the Critical Legal Studies movement, see Mark Tushnet, “Survey Article: Critical Legal Theory (without Modifiers) in the United States” (2005) 13 *J. Pol. Phil.* 99.

this have to do with the capacity for constitutional law to engage meaningfully with private power in the age of globalization?

Anderson begins to deliver on the book's promise in Part III (chapters 6 and 7). First, he enters into the debate on the "politics of constitutional definition." What qualifies as constitutional in an age of economic globalization? According to the traditional account, only the foundational rules authorized by national sovereign legal authorities count as constitutional law. Other accounts, associated with a critique known as "new constitutionalism," maintain that the rules and structures of transnational legalism can be characterized as constitutional for both descriptive and normative purposes.²⁸ Anderson sides with the new constitutionalist account. In order to develop the argument, he first overcomes objections by Brian Tamanha and others that legal pluralists have no satisfactory account of what law is.²⁹ If all social norms qualify, then the normative force of official law is diluted. Transferred to the plane of constitutional law, the same objection is made: if all law is constitutional, then no law is. For Anderson, the law's provenance as "official" law, as Tamanha would have it, is not sufficient to narrow the range of what qualifies as law. The question, instead, is necessarily a political one "which can only be answered in relation to the purposes served by attaching the label 'law' to some aspect of social life."³⁰ This is precisely why the debate over what gets defined as constitutional is ultimately a political one.

According to the traditional account epitomized by the U.S. Bill of Rights framework, private power may cloak itself in the mantle of constitutional rights but, given the vicissitudes of state action doctrine, will almost never be subjected to the disciplines imposed on public authority by the constitution. In so far as this is the model that is being promoted globally, then the politics of constitutional definition will limit the capacity of citizens and states to countervail power in this age of economic globalization. Applying, instead, the insights of legal pluralism

²⁸ See *e.g.* Harry W. Arthurs, "Governing the Canadian State: The Constitution in an Era of Globalization, Neo-liberalism, Populism, Decentralization and Judicial Activism" (2003) 13 *Const. Forum Const.* 16; Stephen Gill, "Globalisation, Market Civilisation, and Disciplinary Neoliberalism" (1995) 24 *Millenium: J. Int'l Stud.* 399; and David Schneiderman, "Investment Rules and the New Constitutionalism" (2002) 25 *Law & Soc. Inquiry* 757.

²⁹ Brian Z. Tamanha, "The Folly of the 'Social-Scientific' Concept of Legal Pluralism" (1993) 20 *J.L. & Soc'y* 192.

³⁰ *Supra* note 1 at 106.

to the current situation brings the politics of definition to the fore. It exposes the advancement of neo-liberal globalism via the medium of legal rights and institutions which have the effect of separating and shielding economic interests from political power. "The objective of the new constitutionalism," Anderson writes, can then be seen as making the constitutional dimension of neo-liberal globalization more explicit, "with a view to engendering debate over whether it satisfies standards of procedural or substantive constitutional legitimacy."³¹ By redefining what we mean by constitutionalism, we uncover the myriad sources of oppression experienced by people in various locales and subject these sources to the standards of social justice.

Yet, the disciplinary effects of the new constitutionalism place limits not only on institutions but also on potential agents of change. The new constitutionalist account, Anderson observes, takes legal subjectivity seriously (just as critical legal pluralists would insist).³² If an individual's legal experience is made up of multiple interactions, it is also the case that, viewed in relational terms, the horizon of legal experiences and expectations will be viewed as quite cramped. The normativity of sovereignty—which competes with the pluralist and new constitutionalist accounts—aims to maintain stability and hierarchy, leading to social inertia. Taking a Gramscian turn, Anderson observes that existing legal and normative structures, having attained the status of common sense, constrain the capacity of agents to imagine alternative futures by acting as boundary setters.

How then can "existing epistemological structures ... deliver any meaningful counter-hegemonic engagement with private power[?]"³³ This, Anderson maintains, is the central question for contemporary constitutional theory. For reasons he outlines in the final chapter, any reformulated version of liberal rights constitutionalism is "unlikely" to offer up any counter-hegemonic narrative. This is because of "the difficulty in practice of transcending the classical liberal default."³⁴ Despite some advances in applying constitutional rights to private

³¹ *Ibid.* at 115.

³² See Martha-Marie Kleinbans & Roderick A. Macdonald, "What is Critical Legal Pluralism?" (1997) 12 C.J.L.S. 25.

³³ *Supra* note 1 at 35.

³⁴ *Ibid.* at 126.

power, as in *Shelley v. Kramer*,³⁵ concerning the enforcement of racially restrictive covenants attached to land titles in the United States, the presupposition of dominant liberal legalism is that “economic power should not be subjected to the same direct constitutional scrutiny as state power.”³⁶ There is an alternative model, prevalent in the European tradition of constitutional law, which imposes positive obligations on the state to protect fundamental rights even in the absence of state action. Constitutional obligations under this model may be imposed even on the conduct of private actors.³⁷ Though this goes substantially further than the classical default requiring state action, there are limits to the counter-hegemonic potential of this move. The model, Anderson notes, does not direct how constitutional dilemmas are to be resolved. It does not, in other words, provide correct answers to difficult constitutional questions—a reiteration of the indeterminacy thesis. In addition—this seemingly is the greatest flaw—the model relies on the state as the “ultimate perpetrator of rights violations, given its responsibility for the condition of the positive law.”³⁸ The model is organized around the idea that there are matters that fall within the expected realm of state responsibility, and then there are matters that fall beyond that realm—many within the domain of the “private”—and thus beyond the scope of constitutional rights. Both models fail Anderson’s test of counter-hegemonic constitutionalism: “that constitutional doctrine can be remade to subject private power to constitutional scrutiny.”³⁹ The dominant politics of constitutional definition insist on a divide between the state and society which “serves the crucial legitimating function of obscuring the broader constellation of law and political power—including corporate law-making and corporate political power—operating in society.”⁴⁰

None of this, Anderson insists, renders hegemonic constitutionalism inevitable or irreversible. Rather, he claims that there is at present a “paradigmatic movement to advance a new form of

³⁵ 334 U.S. 1 (1948).

³⁶ *Supra* note 1 at 135.

³⁷ See Aharon Barak, “Constitutional Rights and Private Law” (1996) 3 *Rev. Const. Stud.* 218.

³⁸ *Supra* note 1 at 142.

³⁹ *Ibid.*

⁴⁰ *Ibid.* at 143.

constitutional knowledge” associated with the constitutional politics of definition. A legal pluralist constitutionalism assists in understanding this conjuncture as it opens up to constitutional interrogation all sources of power, public and private, irrespective of its provenance. Yet it does not mean supplanting one constitutional definition for another; rather, it suggests making the politics of definition “a constant feature of debate,”⁴¹ thereby continuously diversifying the sources of constitutional knowledge.

Given the prevalence of the dominant paradigm in constitutional epistemology, this suggestion is a radical and unsettling prescription, and also, for reasons outlined in the book, one unlikely to take hold any time soon. Nevertheless, Anderson remains hopeful, pointing to social movement actors as catalysts for resistance to the Washington consensus. In this regard, the oft-mentioned “water wars” in Cochabamba, Bolivia, are conscripted into the argument. There, in Bolivia’s third largest municipality, water rates almost doubled after privatization of the city’s water supplies under a concession granted to Aguas del Tunari (a subsidiary of San Francisco-based Bechtel Enterprises). This prompted a city-wide campaign to reverse the privatization plan and the declaration of a state of emergency. When hundreds were injured, six died, and company executives fled from Bolivia, the water wars became a *cause célèbre* for the anti-capitalist globalization movement and provoked Anderson’s interest in the case.⁴² There is more to the story, however. After the government terminated its concession with Aguas del Tunari, the company sought to recoup damages in the amount of twenty-five million U.S. dollars from the Bolivian government under a Holland-Bolivia bilateral investment treaty on the basis that there was a compensable taking of the company’s investment interest. There was some question whether Aguas del Tunari was permitted to sue under the Dutch treaty (having been incorporated initially in the Cayman Islands), but an international investment tribunal, which was established under the auspices of the

⁴¹ *Ibid.* at 148.

⁴² See Oscar Olivera with the collaboration of Tom Lewis, eds., *Cochabamba! Water War in Bolivia* (Cambridge: South End Press, 2005). I have succumbed to the allure of this story of resistance. See David Schneiderman, “Globalisation, Governance and Investment Rules” in John N. Clarke & Geoffrey R. Edwards, eds., *Global Governance in the Twenty-First Century* (London: Palgrave, 2004) 67 [Schneiderman, “Globalisation”].

International Centre for the Settlement of Investment Disputes (ICSID) at the World Bank, resolved that it had jurisdiction.⁴³ I have suggested elsewhere that the terms of the bilateral investment treaty likely favoured the company's claim, however meritorious the movement to cancel the privatization contract.⁴⁴ Most interesting about this postscript, and from which Anderson might draw some instruction, is that Aguas del Tunari ultimately withdrew its claims for damages. This likely occurred as a result of an effective social movement campaign to pressure the parent company, Bechtel, and its chairman and CEO, Riley Bechtel, to withdraw the claim.⁴⁵ Here is an instance where counter-hegemonic mobilization at the local level precipitated the cancellation of a seemingly irreversible water privatization scheme, and where a transnational network of social movement actors, primarily but not exclusively based in the United States, helped to secure the withdrawal of a claim for damages that otherwise was likely to succeed. It may be a precedent, however, difficult to build upon. Other company claimants may not feel they need to fold, while the transnational network mobilized to take on Bechtel might not have the capacity to take on the hundred or so cases pending before ICSID. What likely will endure, at least into the medium term, is the web of international investment treaties that entitle foreign investors to virtually guaranteed rates of return on their investments. It is this regime of hard, constitution-like law that likely will thwart social movement actors from achieving more lasting alterations to the new constitutional order. Anderson's prognosis, for this reason, is not far off the mark.

⁴³ *Aguas del Tunari, S.A. v. Republic of Bolivia*, (2006) 20 ICSID Rev. 450 (International Centre for Settlement of Investment Disputes).

⁴⁴ See Schneiderman, "Globalisation," *supra* note 42 at 78-81.

⁴⁵ See Jim Shultz, "Bechtel vs. the Bolivia: The People Win!!" *The Democracy Center On-Line* (19 January 2006), online: The Democracy Center On-Line <<http://democracyctr.org/newsletter/vol69.htm>>.