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The constitution of global capitalism

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Abstract

The topic of this conference session is “the capitalist world: past and present”. My central argument in this paper is that the dominant juridical and political dimension of governance in the present-day global political economy is what I call “the new constitutionalism of disciplinary neo-liberalism”. It corresponds in significant ways to what Karl Polanyi called in his book, The Great Transformation, the attempt to create a “stark utopia” on a world scale. This was the political project to institutionalise the self-regulating market system in the nineteenth century - a project carried out by the ruling classes and the early capitalist state in England. In this sense, new constitutionalism is a political project combining the old and the radically new as we enter the twenty-first century.

As we shall argue, this stark utopia - or dystopia - is in practice unachievable since it has in-built contradictions. On the one hand it is a process central to the intensification and extension of alienation, exploitation and commodification of human life and nature - processes that are now intensifying in the present era of capitalist globalization. However, the privatisation and marketisation of social life - for example in the institutions of the family, churches, medical provision, education - associated with the capitalist market order tends to atomise human communities and destroys the integrity of the ecological structures that support all life forms. It is therefore unsustainable politically, not least because different social movements and classes resist the destruction of their livelihood and the intensified discipline of capital that is central to neo-liberal globalization. Thus the central contradiction of globalization is not that between capital and democracy as such, although this is crucial to new constitutionalism. It is much broader and it concerns the degree to which neo-liberal globalization is serving to generate a crisis of social reproduction on a world scale, a crisis that is ecological as well as social. The wide-ranging nature of this crisis links together diverse forces across and within nations that oppose neo-liberal globalization in new forms of political struggle that will shape global politics in coming years.

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The constitution of global capitalism¹

Introduction

Despite unprecedented material affluence, at the end of the twentieth century a small minority of the world's population enjoys relatively affluent and secure conditions, in "islands" of prosperity and "contentment", whereas a substantial proportion of the world's population lives in vast "seas" of poverty, and in situations characterised by insecurity, economic deprivation, ecological degradation and violence (Gill 1995c). So how do we characterise aspects of the ethics and politics of the present era of globalization? It would appear that the maxim of distributive justice of this system, to paraphrase The Book of Matthew is, "to him that hath shall be given, from him that hath not shall be taken away". Indeed, in many respects, the 1990s represents a counter-revolution of the powerful against the weak, and more specifically, a counter-revolution of capital on a world scale, a revolution that reconstitutes state and capital as well as intensifying social hierarchies associated with class, race and gender relations, on a world scale. This revolution specifically involves the extension of the processes of commodification and alienation based on the intensification of the discipline of capital in social relations (what I call disciplinary neo-liberalism). It also involves imposition of new constitutional and quasi-constitutional political and legal frameworks - with respect to the state and the operation of strategic, macroeconomic, microeconomic and social policy (what I call new constitutionalism).

Thus this paper will elaborate two of the constitutive historical structures of the global political economy today: *disciplinary neo-liberalism* (its dominant socio-economic form) and *new constitutionalism* (its dominant political-judicial form). The second half of the paper highlights the ethical, normative and political implications of these developments. Here I will elaborate on two "moments" determined by, but in opposition to disciplinary neo-liberalism and new constitutionalism. First I will elaborate how dominant forces in the global political economy are seeking to incorporate progressive forms of opposition, for example how feminist discourses of empowerment of women are being rearticulated by the international financial institutions in order to channel and control the role of women in the processes of economic development. Then, in conclusion, I will contrast new constitutionalism, which privileges large capital, and specifically, the investor as the dominant political subject, with what I call democratic constitutionalism, or the self-determination of the people.

In this context, whilst many authors have stressed the short-term perspectives associated with dominant forms of economic globalization, for example the sense of immediacy associated with time-space compression, the crucial strategic significance of new constitutionalism is how it seeks to provide political anchorage for the power of capital in the *long term*. This is achieved through political and legal mechanisms that are difficult to change: moreover such mechanisms also limit democratic influence in the political economy. These long-term mechanisms include legal and quasi-legal agreements, the institutionalisation of standards and constitutional changes. Such mechanisms take on both national and transnational forms, in effect forming a liberal constitutional structure for the global political economy. Nevertheless, such mechanisms are linked to processes that are generating a number of contradictions in the global political economy, of which perhaps the most central is the way that the discipline of capital intensifies a general crisis of social reproduction and the depletion and destruction of nature - this is why many activists throughout the world are calling for greater political, social and ecological democracy.

So why is new constitutionalism occurring today? What is involved politically? And which social forces benefit most from global new constitutionalism? To answer these questions we first outline the discourse of disciplinary neo-liberalism.

¹ A previous version of this paper was presented at the conference: Feminist Perspectives on the Paradoxes of Globalization. Heinrich Böll Stiftung, UFA-Fabrik, Viktoriast. 13-18, Berlin-Tempelhof. Organised by the Research Group on Globalization Sustainability and Gender, Dept. of Political Science, Free University Berlin, Berlin November 5 -6, 1999, and at the British International Studies Association, Annual meeting, University of Manchester, 20-22 December, 1999. It forms one of the introductory chapters of a book MS in progress - provisionally to be published with the same title as this paper.

Disciplinary neo-liberalism

One of the most remarkable features of the period since the 1970s, is how there has been a shift towards a more neo-liberal, and indeed more disciplinary world order. One aspect of neo-liberal dominance has been the growth in the power of capital world-wide. The neo-liberal shift has involved the growing strength and positional power of neo-liberal ideas and ideologies such as those associated with Nobel Prize winners for economics, F.A. von Hayek and James Buchanan; their application in the practices of key social institutions (e.g. state, market, schools, universities, international organisation), and is intimately related to the re-configuration of power relations, a re-distribution of wealth and the intensification of new patterns of social and economic inequality.

This has also meant a shift in the form of discipline being exercised, so that this is exercised increasingly through market-based structures. In this context the power of capital is both direct (e.g. capital's superior bargaining power over labour, or relative to states which bid for investment against one another) and indirect (e.g. discipline exercised on firms, their workers, or on governments in the financial, e.g. stock and bond markets). Thus the state is also subjected to market disciplines. Indeed, public policy has been redefined in such a way that governments seek to prove their *credibility*, and of the *consistency* of their policies according to the degree to which they inspire the *confidence* of investors. In this way, new political and constitutional initiatives in the sphere of money and finance are linked to the imposition of macro-economic and microeconomic discipline in ways that are intended to underpin the power of capital in the state and civil society.

Thus disciplinary neo-liberalism is connected to what I call the three "C's" of the power of capital. It involves the ways that public policy has been redefined so that governments seek to prove their *credibility*, and the *consistency* of their policies according to the criterion of the *confidence* of investors. Credibility is defined by the World Bank, as the "reliability of the institutional framework" and "the predictability of its rules and policies and the consistency with which they are applied" - the key issue being the need to minimise uncertainty in the minds of investors by sustaining law and order, protection of property, and the application of rules and macroeconomic policies predictably - otherwise, investors do not consider such states credible [World Bank, 1997: 4-5].

For example, based upon its neo-liberal ideology of reform and "best practice" in late 1999 the IMF's key Interim Committee urged the following principles to enhance government credibility:

In many emerging market economies and developing countries, raising growth rates on a lasting basis will require not only sustained growth in industrial countries, but also key structural reforms. These include banking reform, corporate restructuring, tax reform and tax administration, establishment of effective legal systems, protection of property rights, and improved governance.²

As such, policy rules are seen as political counterpart to the discipline of market forces (for example international capital mobility) and the power of capital. In this way, the IMF's 1997 *World Economic Outlook* links "discipline" directly to economic globalization:

The discipline of global product and financial markets applies not only to policy-makers, via financial market pressures, but also to the private sector, making it more difficult to sustain unwarranted wage increases and mark ups. If markets adopt too sanguine a view of a country's economic policies and prospects, however, this could relax policy disciplines for a time and result in a high adjustment cost when market perceptions change ... [and then] markets will eventually exert their own discipline, in such a way that the time period for adjustment may be brutally shortened (IMF, 1997: 70-71).

This quotation illustrates why I refer to the dominant system of political economy associated with globalization that of "disciplinary neo-liberalism". It relies upon the market, especially the capital market, to discipline economic agents. And it is premised on the fact that investors constitute a privileged stratum in capitalist societies - since the process of economic growth depends on the need to maintain investor confidence and thus governments are driven to sustain their credibility in the eyes of investors by attempting to provide an appropriate business climate. This is a form of the structural power of capital (Gill and Law 1989a). Indeed, since discipline in the workplace is viewed by investors as crucial for confidence, it indicates that the indirect power market forces is not enough to ensure the reproduction of

² Communiqué of the Interim Committee of the Board of Governors of the International Monetary Fund, September 26, 1999. Press Release No. 99/46: International Monetary Fund, Washington, D.C.

capital. Direct power is also needed in the form of state action to ensure social control, and in the provision of laws and coercive potential to ensure that the owners of capital determine how production takes place.

We need to critique and deconstruct the neo-liberal discourse of the three C's. In this context, since the onset of global economic crisis in the early 1970s, at least at the global level, a particular model of capitalist development - Anglo-American neo-liberalism - has tended to prevail. This model, in turn, is based on a set of institutions and practices which tend to promote a social Darwinist reconfiguration of priorities, policies and outcomes. The most pervasive - and perverse - consequence of this shift has been a rapid deepening of social inequality within particular states and social formations, and between nations. Its ethical and political consequences are partly reflected in the observations of many people - from disillusioned former Thatcherites to religious and civic leaders, including the Pope, that capitalism has moved into a brutalising and criminal phase, especially in parts of the Third World and the former Soviet Union.

So what social forces underpin disciplinary neo-liberalism? This market trend is partly driven by the growth of giant corporations and institutional investors, for example pension funds, who deploy the life savings of millions of mainly affluent workers, primarily from the OECD nations (reflecting the social base that generally supports disciplinary neo-liberal policies, in so far as they realise stock market gains that may boost future pensions). J.K. Galbraith has termed this social stratum in the USA the "culture of contentment" (Galbraith 1992). Institutional investors place these funds in asset markets. In the context of fiscal and other forms of economic crisis, fund managers press for neo-liberal austerity policies such as tight budgets, reductions in government expenditures and low inflation macroeconomic policies, as well as flexibility in labour and good markets, free capital mobility and strong protection for private property rights (Harmes 1997). This perspective is reinforced by the private bond-rating agencies, as well as by the rating and risk assessment departments of financial and other corporations (Sinclair 1994). Some of these policies are associated with so-called "Washington consensus" of the international financial institutions, for example macroeconomic stabilisation and Structural Adjustment Programmes. In this context, many studies indicate that a disproportionate burden of adjustment to these harsher circumstances for the poor has fallen on the shoulders of the less well-paid, on women and children, and the weaker members of society - the old and the disabled. In an era of fiscal stringency, in many nations social and educational provisions have been reduced, creating a crisis of social reproduction as well as a tendency towards the depletion of nature (Bakker 1994).

This means that for a majority of people on the planet, the future appears to be bleak - and, for the young, worse than that which was experienced by their parents. Indeed, if many present trends continue, for example the tremendous increase in inequality within and between nations (and if these trends are not politically countervailed), for many the world might come to resemble the one depicted metaphorically by Goya, in his painting, "Saturn devouring [one of] his children". This picture is an allegory of the decay and ultimate destruction of civilisation - and its collective future - through wantonness and violence.³ Of course, Goya's macabre image might appear to some to be a rather pessimistic way to represent possibilities for world order in the twenty-first century. Nevertheless, in many respects it seems apt given that many of the victims of world society in the 1980s and 1990s have been women and children, especially in the Third World and the Former East Bloc (Gill 1995c). Put differently, the crisis of social reproduction engendered by neo-liberal restructuring can be interpreted, at best, as a form of collective insanity, and at worst a form of social violence and civilisational suicide.⁴ In this sense, the leadership template of the World Economic Forum might correspond metaphorically to the head of Saturn (see Box 1).

Unless countervailed by alternative or counter-hegemonic social forces, this destructive trend looks set to continue. And, as I have noted earlier, although much has been made of the way that disciplinary neo-liberal patterns of accumulation are often associated with shorter time horizons and the rapid turnover time of capital (what Harvey

³ This painting is a mural from the Quinta del Sordo, transferred to canvas, 1819-23. It hangs in the Museo del Prado. (Chalbrun 1965: 228)

⁴For example in the Former East Bloc much of the evidence indicates that the restoration of capitalism has gone with a catastrophic decline in the standard of living and quality of life of the vast majority of the population, with women, children and the elderly particularly hard hit. Not only has there been a decrease in life expectancy, especially in Russia, but there has been a precipitate drop in the birth-rate, as women, like men, experienced greater anxiety and insecurity about the post-Communist future. Since 1989, there has been a steep increase in murder, suicides, crime rates, domestic violence, and a rapid increase in income inequality. See UNICEF MONEE project, Women in Transition (New York, UNICEF, 1999) <http://www.unicef-icdc.org/monee>.

calls “time space compression”) the constitutional aspect of the contemporary global political economy shows that the issues are much more long term - both in terms of the deep structural transformations in economy, state and society that are underway and because constitutions are generally very difficult to change.

New Constitutionalism and the Rule of Law

In this context, new constitutionalism can be understood historically as part of the *longue durée* of liberal state formation as well as a political project to “lock in” the power gains of capital on a world scale in the 1990s and beyond - that is it combines the old and the radically new. At the same time many of its political precepts are regressive and link the right of representation to the possession of property and as such hark back to a pre-democratic age, i.e. to the three great bourgeois revolutions - the Glorious Revolution in England of 1688, and the French and American Revolutions. Of course today formal democracy has extended with relatively universal suffrage - citizenship rights are not formally premised on private property and as such, the politics of new constitutionalism also involves the need to attenuate or incorporate and co-opt democratic forces and potential opposition to globalization.

However, the main point I want to make at this stage in the argument is that the liberal conception of the state is a limited one, constrained by, and ultimately subordinate to, interests within civil society. The state thus has a limited legal competence because the constitutional framework of a liberal state is pluralist, and it involves formal decentralisation of power, or put differently, the subordination of the state to civil society. This framework of power is the corollary of private property rights and freedom of contract which are written into, and protected by, the constitutional forms. Thus freedom of enterprise appears as a constitutive element of the Rule of Law. In turn, the Rule of Law formally defines the actions of the state in terms of a separation of state and civil society, of public and private, and of statute and contract. Of course, pluralism in the modern context needs to be related to a world in which there are large concentrations of private power - for example in a global political economy organised in many sectors by vast corporations operating in oligopolistic markets. Nevertheless, in a liberal constitution the state is subordinated to civil society and thus by definition, it cannot monopolise power and authority, which is in principle decentralised, albeit in the context of concentrations of capital that serve to define the distribution of power.

The Head of Saturn?

Box1: The World Economic Forum: a leadership template for global capital?

The World Economic Forum is a consciousness-raising forum for the leaders of the world's biggest transnational corporations and for government leaders (especially prime ministers and senior economic ministers and central bankers). The World Economic Forum has several categories of members, listed below. Members are interlinked through private, advanced communications and information technologies.

1. *Foundation Members* are leaders of "the 1000 foremost global companies in the world today, which are driving the world economy forward".
2. These include *Forum constituents*, members of "clubs" that "bring together individuals committed to strengthening international co-operation in their particular fields... Each group is private and admission is limited in order to preserve their peer character".
3. *Industry Governors* are: "exclusive groups made up of the chief executives of the most important companies in key industrial sectors".
4. *Global Leaders for Tomorrow* are "some 600 men and women, born in the second half of the century, who constitute the new generation of global decision-makers".
5. *World Media Leaders* are "those with most influence within the world's media groups whose inclusion in our activities both guarantees credibility and impartiality and adds value for participants".
6. *Forum Fellows* are "world recognized experts from political, economic, scientific, social and technological fields".

They are normally joined at meetings by:

- *Public Figures* ("Key decision-makers from governments and major international organizations");
- *World Cultural Leaders* ("some 100 distinguished figures from the world of arts");
- *Mega Cities Mayors* ("heads of some of the world's most dynamic and successful regions and mega-cities");
- other *ad hoc* "leadership groups".

Themes at the World Economic Forum 1998 meeting (29 January to 3 February, 1998) were "Priorities for the 21st Century" © (sic) and "Agenda 1998: Managing Volatility" © (sic). The latter addressed "thoroughly the ongoing crisis in Asia and its implications".

Source: <http://www.weforum.org/>.

Within this context, the bourgeois state gave rise to a specific legal form - drawn from Roman Civil Law - that constituted the property-owning legal subject as the bearer of Rights (Anderson 1974). The subject of the law is understood as a possessive individual who has full ownership of him/her self, and has formal equality before the law. He/she is assumed to have free will and thus the freedom to enter into contracts (as a citizen). This of course allows for the labour contract - as well as other contractual relations - to take place *as if* they involved free exchange between individuals exercising their will.⁵

Thus this legal form underpins the commodification of labour and of things, or more precisely the power to control the disposition of people relative to things. Moreover, legal discourse transforms both human beings and social entities so that corporations become legal subjects who bear rights and duties and form primary constituents of Law. Thus the law can be said to *actively constitute* the very subject whose existence it refers to. In Althusserian terms it *interpolates* individuals as subjects with certain attributes, powers and freedoms within the practice of law. Thus Law is not merely an external mechanism of regulation but a constituent way in which social relations are lived and experienced. In this way, the form of the subject constitutes a basic grounding for the rights of property

⁵ Of course the law may place limits on the scope of contractual relations (for example forbidding an individual from selling parts of his/her body or genetic code, although as we shall see, these limits are increasingly transgressed).

(and of political representation) (Hunt 1993: 14-21).⁶ That is it is a part of the ongoing constitution of global capitalism.

This is why Marx contrasted the formal freedoms of the Law with the substantive inequality generated in the processes of production and exploitation. Thus drawing on Marx's *Grundrisse*, Maurice Edelman argues "Law puts the marks of property, freedom, and equality on the face of exchange value - whereas in the relations of production these can be read as exploitation, of slavery, inequality, and sacred egoism" [Edelman, 1979: 94-95].

In this way, the Law facilitates the capitalist form of the relationship between labour and capital, granting employers rights regarding to not only control and exploit labour but also over hiring and firing. As Alan Hunt argues, the Law of Contracts is central and all of the most important relations within capitalist society are molded into the form of contractual relations, that is they rest ultimately upon the separation of public and private, or state and civil society in the constitutional and political structures of the state (Hunt 1993: 22-30).

For example it was the post-revolutionary French *Code Civil* that marked the advent of liberalism in France. Drawing on a range of sources in French jurisprudence, Georges Robé notes that the texts of the *Code Civil* still constitute the framework in which property rights are used in France and these can be summarised as follows: The owner (and today this principally means the corporation) is his own sovereign in a specific field of action - whatever the limited, constitutionally valid application of the state's legislative and regulatory powers may entail. Where state legislation has not intervened, or where the state is constitutionally prevented from intervening, "individual property is a sovereign right, exclusive and perpetual"; "Nothing which is prohibited to the holder of property rights derives from what is authorised to him; on the contrary, it is what is or remains allowed to him which results from what is specifically prohibited". Robé concludes that the full acknowledgement of private property rights is "thus a decentralisation of sovereignty for the legal order acknowledging them. The cardinal rule is that individuals can enjoy their property in the way in they intend and can agree amongst themselves on what is not prohibited - and not everything can be prohibited (Robé 1996: 57-60).

Thus power is decentralised in a liberal society principally through property, and this explains the high degree of autonomy of the corporation (and large property owners) relative to the state and the rest of civil society, that is the citizens. The Rule of Law allows the corporation autonomy to make decisions concerning the disposition of private property rights. The enterprise also commands the individuals under its jurisdiction as a consequence of the labour or employment contracts they have signed. Contracts constitute the foundations of the corporation in positive law. Thus with regard to employment contracts, the employer has authority over employees. Employees have freely entered into the employment contract, creating a necessarily unequal relationship based on the command of the employer over the employee since the employer controls the property rights of the enterprise. Thus the existence and power of the enterprise derives from fundamental legal principles that guarantee private property rights as a part of liberal constitutions. The power of the enterprise is therefore built upon positive constitutional foundations which the *liberal State must* abide by (Robé, 1996: 60, his emphasis).

Robé goes on to argue that the Liberal State opens up the possibility for the employer to create special "private" laws, the existence of which is accepted by the state since they derive from overriding legal principles that guarantee private property rights. Thus the enterprise forms part of the constitutional structure of the exercise of power, ultimately sanctioned by liberal constitutions.

Enterprises thus, to a certain extent, constitute a form of private government since some of the legal rules they create are final and may not be reviewed by any public body. Thus, when defining property, the French Civil Code speaks of "the right to enjoy and dispose of *things*, not *people*."

He notes, however, that property is not so much a right "over the thing itself as much as a right over the behaviour of others, (including the state's agents and judges) in connection with the thing." (Robé, 1996: 60). Indeed, as the American scholar and judge James Oakes points out, drawing on sources in American jurisprudence, property is a broad set of legal *relations* - that is it is a subset of social relations and it

⁶ At the same time, the bourgeois forms of state have become democratized, so that the "legal-subject-as-citizen" is arrived at and whose significance is that "right is no longer remain exclusively tied to property relations", and the culmination of this process was the emergence of welfare states after World War I, characterised by distinct forms of social rights. For the purpose of clarity in the context of our specific argument in this paper, we will leave this aspect of rights to one side and focus on economic rights, powers and freedoms in liberal capitalist states.

encompasses a range of rights and freedoms, as well as certain limitations therein. Oakes shows that property rights are aggregates of different rights, rights-correlatives and obligations (see Box 2).

The legal relations associated with property are thus connected to the behaviour of people relative to things, in the present and in the future, as well as to control over flows of income deriving from control over a commodity (an asset or investment). Thus it is possible for the house owner to say that someone can only enter his house if his consent is given, or else:

I am the owner of my plant, and it will produce what I want (whatever the consequences over the environment, understood in a general sense) together with whom I want (thus without all those I will not hire or will fire), the way I want (however despotic I am towards those I command). Positive law creates only partial exceptions [to these rules]... Economic power thus always has certain aspects of the sovereignty of property. It remains unilateral and discretionary even when it applies to considerable quantities of people and goods (Robé 1996: 60).

When we think of these issues in global politics, contemporary trade and investment rules and procedures can be viewed as a counterpart to the liberal Rule of Law on a multilateral basis. Thus quintessential new constitutional frameworks include multilateral investment agreements and bilateral investment treaties, and these can be understood as are forward-looking “commitment mechanisms” or “disciplines” (Schneiderman 1997). These agreements have quasi-constitutional status at the global level in key aspects of economic and political life - in ways that subordinate the state to elements in civil society, in this case investors and private corporations. Thus new constitutionalism is a liberal global political project *par excellence*, indeed it is the primary political project of globalization today.

The World Trade Organisation and other organisations of governance such as the international financial institutions are attempting to create a set of long-term economic and political reforms that gain constitutional status, thus underpinning the extension of the disciplinary power of capital on a world scale. In the case of the World Bank, this also relates to an effort to reshape the internal and external structures of states in the Third World. The goal is to create an “enabling state”, that is one that will deliver an improved *long-term* investment climate, better protection of private property rights, and *inter alia*, higher levels of profit flows in the future. Thus a central goal of new constitutionalism is to secure protection for property rights and investor freedoms on a world scale, although the precise form that such initiatives will produce varies in and across different states and civil societies.

Box 2: Property as a set of legal relations: rights, limitations, liabilities

1. the rights of a person to *possess* the thing or, in the case of incorporeal things, to exclude others from possessing it;
2. the right to *use* the thing;
3. the right to *manage* the thing;
4. the right to the *income* or *profits* from use of the thing;
5. the right to the *capital* in the thing, i.e., the power to consume, waste, commodify, sell or alienate, or even destroy it;
6. the *immunity* from expropriation of the thing by another or the state; and
7. the power to *transmit* the thing by gift, bequest, or devise.

There may be four limitations upon [such rights or relationships] including:

1. The term of tenure, which in a universe of human beings is, at least in most cases, life, except as modified by the power to transmit;
2. The duty not to use the thing so as to harm others;
3. A liability to execution on the thing, e.g., for debts; and
4. A liability to revert to abandonment of the thing.

There may be other limitations on individual rights in the bundle, e.g., against perpetuities in the case or the right to transmit or for taxation in the case of the intent of alienation. [Oakes, 1981:589, emphasis in the original].

Many of the changes just mentioned are related to an American-led G-7 project to institutionalise disciplinary neo-liberalism on a world scale, although what is striking is the degree to which the United States government refuses to accept the constraints and limitations on its sovereignty that it advocates for other states: unlike Ulysses before the Sirens it refuses to be tied to the mast of neo-liberal economic globalization, and, unlike other countries it enjoys the relatively unique privilege of paying its debts in its own currency. Nevertheless, the American government has been strongly associated with the promotion of global liberalization and a particular form of limited, electoral form of democratisation defined in terms of free, periodic elections and party competition for votes as a means to strengthen American leadership in global politics (Robinson 1996). Some of what this means in a strategic sense was spelled out recently by the former U.S. Treasury Secretary for the Clinton Administration, Robert Rubin. Rubin, who has just joined the world's biggest financial conglomerate, Citicorp (on October 27, 1999) explained the geo-strategic aim of American policy towards Russia and the Former East Bloc was not to create a liberal democracy in Russia as such, but rather to build what he called a "market democracy". He noted that unlike other countries in Central Europe, seventy years of communism meant that Russians had "no memory of a functioning market economy". He then outlined, in an odd use of the future conditional, what are the basic components of new constitutionalist strategy as applied to the reform effort in Russia:

Contract law and property rights would have to be created from scratch. Institutions to develop and enforce market regulations would have to be established. Judges to interpret the laws and regulations would have to be trained. ... The rule of law is not established overnight. Nor is a market democracy. These are long-term objectives.⁷

The modern origins of this process can be found in the post-war occupation settlements in Germany and Japan under the Marshall Plan Administration: where the writing of new constitutions was part of the effort at political and economic reconstruction.

⁷ Robert E. Rubin, "Don't Give Up On Russia" New York Times, September 21, 1999

New constitutionalism - a summary

In this context, some of the context of for the present emphasis on new constitutionalism can be gleaned from a reading of three “texts”. In late 1997, the globalization theorist Saskia Sassen, based on her attendance at the predominantly white, male and plutocratic World Economic Forum in Davos, Switzerland during the 1990s, reported on a shift in policy emphasis amongst the leaders of corporate capital (see Box 1 below for the structure of the World Economic Forum). Sassen noted that Davos participants previously stressed “market, market, market” as the focus of reform efforts world-wide. Now what was emerging was a concern to reinforce a “global economic governance” project, with more conscious emphasis on actively moulding and reinforcing the state to provide a more stable political environment for capital.⁸ Davos participants’ concerns were also reflected in the World Bank’s World Development Report (1997), a document that in many ways exemplifies the project to create a constitution *for* global capitalism. And finally, the general nature of this project was reflected in the comment by Renato Ruggiero, Director General of the World Trade Organisation, who stated “we are writing the constitution of a single global economy.”⁹

So how does new constitutionalism relate to the extension of capitalist markets and free enterprise? From the viewpoint of the owners of capital, its freedoms - for example the freedom to acquire, exchange or move property rights, require not only constitutional guarantees against expropriation, but also the imposition, internally and externally, of *binding constraints* on states’ macroeconomic, trade, investment and industrial policies. For example devaluation or inflation may affect the capital value of an asset or investment; state industrial strategies may imply that domestic capital gains preferential treatment over foreign capital; national laws may have the same effect.

Some of the general political and economic goals of new constitutionalism were spelled out by Michel Camdessus, the Managing Director of the IMF in a speech to the Institute of International Bankers in Washington in March 1999 (Camdessus 1999). He saw the overarching method to realise the IMF’s utopia in the twenty-first century as the “universal promotion of free market mechanisms strengthened by a set of standards and principles of good conduct”. Specifically Camdessus called for “open and integrated capital markets, achieved through a gradual process of liberalisation supported by good macro-economic policies and sound financial institutions”. Second, Camdessus imagined a world where the discipline of capital (“the private sector”) would operate along rationalist principles based on full access to relevant public and private information, with data bases constructed according to uniform accounting and financial standards so that risks can be calculated more effectively (this is a process of normalisation and surveillance we call “panopticism”):

A world where market participants and governments will operate according to high standards of transparency and governance... A world that will rely primarily on the private sector - both domestic and foreign on a truly equal footing - to mobilise resources for investment and growth. All this implies that it will be a world where markets must be able to function efficiently, with risks being assessed realistically and the rewards of success and the costs of failure fairly distributed (Camdessus 1999: 2).

Third, Camdessus noted that universal market extension requires “sound” macroeconomic policy. Fourth, however, he acknowledges that it may need compensatory measures to deal with marginalization and the economic and social dislocations associated with the extension and deepening of the commodity form. Here his arguments are similar to those stated in the World Bank’s, *The State in a Changing World* (1997). Thus the IMF utopia will be a world where “no countries are marginalised. . . [and for] social policies [to insure] equitable access to opportunities in education, health, livelihood, and social protection in times of crisis (Camdessus 1999:2).

Thus new constitutionalism involves more than simply “locking in” forms of market discipline. It encompasses three broad sets interrelated constraints and “productive” measures, that are linked to:

1. Measures to reconfigure state apparatuses that is to make them operate in the context of greater market discipline, and to allow entry and exit options for mobile capital, that is states are made to operate under the discipline of capital in an international framework. What may be novel, then is innovation with regard to national

⁸ Remarks at the opening session of the conference, Non-State Actors and Authority in the Global System, Warwick University, UK, 31 October 1997.

⁹ Renato Ruggiero, Director General of the World Trade Organisation, “The High Stakes Of World Trade”. *Wall Street Journal*, interactive edition, February 28, 1997.

and international constitutional constraints relative to economic policy, and how this is linked to the re-orientation of the purposes and practices of government institutions according to the ideology of “best practice” promulgated by the international financial institutions and think-tanks such as the OECD.

States are being internally restructured through the application of new systems of incentives and surveillance, as well as market forms of discipline. In some cases state agencies are made to compete with the private sector in, for example, service provision, and behave, at least in theory, as if they were market-place actors. As we have noted, these reforms are justified in the name of *credibility* and the provision of political conditions that will guarantee full security to the rights of property and thus encourage private investment [World Bank, 1997: 50-2]. However, what neither the World Bank nor the IMF emphasise is that these measures involve limiting mass popular-democratic and indeed parliamentary influence over central aspects of economic policy. These measures also institutionalise protections for corporations and investors from democratic accountability and control.

Thus two sets of overlapping measures involved here. For the sake of simplification, these are listed as constitutional and institutional changes.

(a) Constitutional measures

(i) *National constitutional changes*, in the fundamental sense of sense of the *supreme framework of laws* of a political association, especially with respect to judicial independence and review and the definition and protection of property rights - both social and private. Here the clearest cases are the new constitutions produced in the Former East Bloc after the collapse of communist rule.

(ii) Changes to *national constitutional forms either in anticipation of or contingent to* international agreements or conditionality policies of the international financial institutions, for example changes to the 1917 Mexican Constitution in anticipation of the signing of NAFTA; the effects of NAFTA on the Canadian system; and the effects of Bilateral Investment Treaties on constitutional provisions, for example the post-apartheid South African constitution (Schneiderman 1997).

(b) Institutional measures

(i) *Institutional and legal innovations* that provide not only *rights of entry and establishment* to capital in foreign jurisdictions, that is to new markets and territories, but also to the provision of *exit options*. These measures include Bilateral Investment Treaties, regional arrangements such as NAFTA, and global arrangements such as those associated with the World Trade Organisation. If the Multilateral Agreement on Investment had been adopted in the late 1990s it would have extended the web of these arrangements and disciplines on a more extensive multilateral basis. In addition, the institutionalisation of the offshore world has proliferated since World War Two. Offshore provides minimally regulated, low tax and relatively secret zones of finance, production, trade and investment, in effect providing accounting and legal devices to partly insulate capital from the effects of domestic regulatory and tax regimes. Thus capital escapes the costs of social reproduction partly because of the commercialisation of state sovereignty (Palan 1998). In addition, those who hold significant amounts of capital can buy citizenship. For example the Canadian government in the early 1990s introduced a scheme to offer citizenship to investors who brought C\$400,000 investment funds into the country.¹⁰

(ii) *Institutional, and policy measures* to insulate the making of micro and macroeconomic policy from democratic accountability and control. The goal of the latter is to allow for disciplined or “sound” fiscal, monetary and trade policy. Examples are balanced budget amendments, independent central banks and currency boards in macroeconomic policy. Changes of this type may also occur, indirectly through international agreements, for example acceptance of trade and investment disciplines under the World Trade Organisation in microeconomic policy, as well as of course from programmes of stabilisation agreed with the IMF in the context of financial and balance of payments crises, or the governance aspects of Structural Adjustment Programmes.

¹⁰ A recent independent audit of this scheme showed, however, that very little real investment had flowed into Canada despite the fact that 50,000 people (investors plus their families and dependents) had taken advantage of the scheme. Often the investments were in nameplate companies with no real economic function. The scheme has also been criticised as offering citizenship to Hong Kong’s yacht people anxious to leave the territory before Chinese rule was re-imposed, whilst Canada has been resisting offering asylum to Chinese boat people and other refugees.

2. Measures to construct and extend liberal capitalist markets, grounded in the separation of the political and the economic, and of and state and civil society, for example the liberalization of markets for capital, goods and labour in microeconomic policy in ways that extend the commodification of land, labour and money. Some of this is linked to privatisation and the alienation of common lands and resources in a new enclosure movement (for example in the Amazon, in Chiapas). Other dimensions relate to the new frontiers of alienated property - for example the extension and institutionalisation of (intellectual) property rights and contract law in diverse areas such as computer software and the output of life science corporations, and the centralisation of ownership of patents over seeds or even parts of the human genetic structure.

What is at issue here, is, on the one hand, the gradual acceleration and universalisation of a social and biological mono-culture in ways that reduce cultural and biological diversity and, on the other, how this tends to intensify social and political hierarchies at the local and global levels.

Let us give some recent examples referring mainly to the USA - the nation simultaneously at the epicentre and the vanguard of the liberalization trend. Our examples are drawn from "engineering", that is genetic engineering, social engineering and financial engineering, indicating that the extension of markets is in fact planned and is a part of what Kees van der Pijl calls the dialectic between commodification and socialisation (Pijl 1998). We will let the reader judge for him/herself what the social and ethical implications of these developments might be.

Our first example relates the genetic engineering of animal forms linked to a process that has been called "unnatural selection". This is connected to the rapid destruction of bio-diversity, for example in seeds, crops and in the ever-reducing gene pools for animals, for example cattle. The economic conditions for the intensification of this trend are largely related to a combination of market power and legal protections. This process is conditioned by and premised on scientific and technological innovation but it rests politically and legally on the control of intellectual property rights over life forms by giant life sciences and agro-corporations. These corporations, as well as farmers that use their products, under competitive conditions fostered by liberalisation of trade and agriculture, search for ways to maximise crop and profit yields. The effect of their actions is, however, to narrow gene pools. An article in the Financial Times written by a farmer argued that the greatest genetic dangers in this process probably lie in animal breeding, especially in pigs and poultry which at the level of the farm, offer the fastest turnover of capital.

Geneticists use computer programmes to select the desirable traits from "a small number of apparently ideal animals and get results more quickly than ever before". It appears, however, that what are being reproduced are animals who "may have incredible performance potential and quality characteristics but cannot stand, will not breed and tend to lie down and die."¹¹ Dairy farmers world-wide, seeking greater milk yields, use the "best bulls in the world" to inseminate the cows, which, through super-ovulation can produce 20-30 eggs. The eggs are fertilised in test tubes and inserted in the wombs of host cows. Thus the virtually universal use of artificial insemination today means that one bull can father tens of thousands of "perfect" calves in his lifetime:

The danger is, however that most of the calves in the world may soon be related to just a few dozen superior bull families as breeders select from an ever-reducing gene pool... [Yet] Suppose one of these elite bulls had a congenital defect that did not show itself for a generation or two? Such is the potential influence of a single animal of these days that the result could be catastrophic on a world scale.¹²

Another related set of examples relates to the broad emergence of the commercialisation of genetic discourse and how new forms of eugenics are being practised, linked to the commodification of the human body.

In recent years there has been a broad emergence of commercial surrogacy, sex selection and the sale of sperm, eggs and human tissue. The forces pushing back the frontiers in this regard, at least in North America, are linked to the American liberal discourse of the Rule of Law and the doctrines of individual legal rights. Human beings have ownership of the self (they are self-possessive) and as such, they have the right to sell their ova, sperm or even body parts as their private property. American courts have therefore begun to declare property rights over the genetically engineered products made from human bodies, for example genes and cell lines. It is expected that

¹¹ David Richardson, "Unnatural Selection: care is needed to ensure the survival of crop and livestock varieties" Financial Times 3 January, 1996.

¹² Richardson, "Unnatural Selection".

genetically altered human “embryos” may soon be offered for sale. On the commodification of human reproduction:

Couples are paying \$2,500 and up for a healthy ovum, and we (sic) have finessed the definition of this payment by referring to it as a normal cost for the female donor’s time and inconvenience. This is similar to the payment made to men for donating sperm, which has always been accepted... [although] the sum paid to women is greater, as an ovum donation usually requires taking super-ovulatory drugs and surgical interventions to retrieve the eggs.¹³

It might be added that developments in science and technology indicate that very soon almost any part of the body - kidneys, the pancreas, the heart, and other vital organs - may be replaced with implants engineered from living cells and synthetic materials: the bionic age has arrived. Indeed at the 1996 American Association for the Advancement of Science (AAAS) meeting Professor Robert Langer of MIT predicted the creation of artificial wombs within 20 years, although it was also noted at the meeting that “the brain is the only organ whose replacement will remain off-limits for the foreseeable future”. Nevertheless, it was not impossible to imagine: since tissue engineering may allow for the growth of human nerve and brain cells. Dr. Gail Naughton, Research Director of Advanced Tissue Sciences [a California based skin tissue engineering company] noted at the AAAS that tissue engineering was furthest advanced with skin used to treat severe burns, wounds and deep skin ulcers but it had a range of unexplored possibilities:

Advanced Tissue Sciences obtains its cells from the foreskins of circumcised babies. “One foreskin will provide enough cells to give 250,000 sq ft - six football pitches - of new skin”.¹⁴

With respect to the privatisation and commercialisation of social risk and personal security, in the 1990s there has been a proliferation of so-called “gated” communities, entirely private walled-in communities with their own private governance structures, security guards and surveillance systems. This phenomenon is also observable not just in what Mike Davis calls “fortress L.A”. (Davis 1990/1992) but also throughout Latin America (for example in Buenos Aires), indeed, world-wide. Residential fortresses have proliferated as the so-called culture of contentment gets more and more anxious about conditions of personal security. The growth of gated communities in the USA has also been linked to the more general privatisation of incarceration (private prisons and the highest incarceration rates in the OECD). Indeed there is a quasi privatisation of the entire structure of the public good of law and order. In the USA the public, official police can now no longer function effectively without the co-operation of the private security forces. The private forces outnumber the public forces by a ratio of roughly 2:1.¹⁵ The extreme and perhaps the logical extension of this concept of the disappearance of public goods in a purely privatised urban space, intended to evoke hope and comfort rather than freedom from fear, is the newly invented Disney town, *Celebration*. This is a \$2.5 billion project to create a community founded on the post-modern illusion of bucolic and secure life. Disney Corporation’s privately owned and governed gated community is a nostalgic and “authentically reproduced” image of nineteenth century small-town America. This development parallels other aspects of “reality” in the USA. For example in America, the massive industry creating, packaging and selling candidates as virtual realities - “the image is everything” - is central to electoral politics in the “great democracy of cash”, as Librarian of Congress Daniel Boorstin once called it. Before they are elected, most politicians have been bought and sold many times.

In sum, not only life-forms, but also culture and politics are increasingly subjected to privatisation and commodification and the liberal extension of market forms, with American developments at the vanguard of the liberalisation trend.

Our final example of market extension relates to financial engineering and the potentially vast significance of transformations in capital markets along Anglo-American lines - a trend that has yet to take a deep hold in western Europe and Japan, but one that is nonetheless accelerating. Increasingly, it becomes easier to make real assets into liquid commodities, thus increasing the turnover time of capital. When capital markets are reorganised and

¹³ Maureen McTeer, “Putting a price on life” Globe and Mail (Toronto) 29 October, 1999.

¹⁴ Clive Cookson, “New body parts ‘will be grown from human cells’” Financial Times 12 February, 1996.

¹⁵ Timothy Egan, “The Serene Fortress: many seek security in private communities” New York Times 3 September, 1999.

integrated along Anglo-American lines they facilitate the process of making different forms of capital (assets) more fungible and liquid (tradable) by selling them as stocks and bonds (securitisation) or as new financial products (derivatives) in ways that combine and reallocate assets to offset risks and maximise profits. Thus capital itself is increasingly commodified and made abstract.

All of the above require as a condition of their existence a particular liberal structure of the Rule of Law and the strong institutionalisation of private property rights - elements that are central to new constitutionalism.

3. *Measures for dealing with the dislocations and contradictions* produced by disciplinary neo-liberalism. Because global constitutionalism requires dismantling certain types of protection for industry, agriculture, and for workers, it is resisted. It thus requires legitimisation as well as compensatory measures to prevent social atomisation and to constrain some of the political consequences of intensified exploitation of human beings and nature. More broadly, what is involved is an effort to co-opt political opposition in a process that Gramsci called *trasformismo* (see below). This is intended to constrain political tendencies that might generate a broad-based political backlash against neo-liberal globalization such as occurred from left and right in the 1930s. One of these tendencies relates to attempts to incorporate forces that wish to see a more fundamentally democratic form of constitutionalism in the next millennium.

Put differently, the politics of neo-liberal globalization involves a dialectic between the strengthening/ disciplining of the state (through new constitutionalism) to intensify the power of capital whilst, at the same time, seeking to widen the social basis of support for the state through incorporation of opposition (for example adopting arguments from the feminist and post-modern discourses of empowerment and linking these to material concessions).

So in the next two sections we will further deconstruct one of our three “texts” and outline the way that the World Bank - and by implication many of the most powerful forces in the G-7 - seek simultaneously to centralise and marketise state power, to extend consent through a strategy of incorporation or *trasformismo*.¹⁶

From mechanisms of restraint to mechanisms of incorporation

As noted, throughout the 1997 World Bank World Development Report there is a stress on “locking in good policies” (e.g. 1997: 50-2): the basic logic is to restrain any impulse to depart from announced policy commitments. Here the Bank stresses that it is better to err on the side of inflexibility to achieve long-run goals, and it suggests two strategies where “institutional capability” is weak: “Specify the content of policy in precise rules, and then lock in these rules using mechanisms that make it costly to reverse course”; and “work in partnership with firms and citizens, and where appropriate, shift the burden of implementation entirely outside government” (1997: 75). Thus the report spends considerable time discussing “instruments of restraint”, which, “To be enduring and credible these must be anchored in core state institutions” (1997: 99). The three elements of restraint identified as crucial are drawn from the American constitutional model, and some are linked to international organisations that are, in turn, strongly influenced by the United States government:

1. *Judicial independence and effectiveness* - that is the judiciary needs to have the capacity to hold the executive and legislature accountable and thus underpin credibility and the business climate.

2. *Separation of powers* - the Bank calls this the “the classic constitutional mechanism” which is both horizontal (the three branches of government: judiciary, executive and legislature) and vertical (centralisation/decentralisation, federalism). The Bank notes that the separation of powers is a powerful, although not unambiguous method for locking in neo-liberal policies:

The broader the separation of powers, the greater will be the number of veto points to be navigated to change any rule-based commitments. Thus the separation of powers increases confidence in the stability of

¹⁶ The process of incorporation in the OECD seeks to strengthen the links between the “material” and the “ideological” in neo-liberal political discourse: many of the forces promoting disciplinary neo-liberalism are linked to institutional investors, for example pension funds who are seeking to maximise the returns to savers over time, and many of these savers are ordinary citizens concerned to protect themselves in old age.

rules. Multiple veto-points can be a double-edged sword, however: they make it just as hard to change harmful rules as to change the beneficial ones (1997: 100-1).

3. The third set of “mechanisms of restraint” are *external*. The Bank identifies many, but the main ones are:

- *International agreements* to strengthen commitments “not anchored in any domestic institution”: for example the European Union and NAFTA, and also the World Trade Organisation. Here withdrawal has costs in terms of policy reversal as well as threat of international censure.
- *Agreements with multilateral organisations, involving policy conditionality* (for example World Bank and IMF) can signal commitments and those countries with “weak commitment mechanisms can strengthen their credibility by binding themselves to pay a penalty should they violate the agreement.” (1997: 101).

So how does fiscal and monetary policy fit into the framework of disciplined government in a neo-liberal regime? Governments are urged by the World Bank Report to increase the transparency of their budgeting and thus help to prevent politicians disguising special favours and indulging in creative accounting. Here the Bank suggests that the best political method is to have a hierarchical (not collegial) approach to the making of fiscal policy, with central powers vested in the finance ministry “enabling a “top-down” control of spending and thus limiting the scope for legislators to expand the budget piecemeal.

With regard to monetary policy, the Bank argues (as it has long done) for more independent central banks, and other methods can include the choice of a conservative central bank governor (that is one who is more opposed to inflation than rest of society) or else give the governor a performance-related contract with a low target for the inflation rate and assign the central bank only instrument independence. Some of the other inflexible approaches that are discussed are described in the Report as “a high-stakes race against time” to gain credibility (1997: 51) for example the quasi-currency board adopted in Argentina, or the use of fixed nominal exchange rates - the Bank points out the risks, citing the example of Mexico’s problems with the peso in 1994 (recent experiences of currency turbulence in East Asia in late 1997 are also cited by the international financial institutions as further evidence for this). “International commitment mechanisms such as international adjudication or guarantee from international agencies” can also serve as a short-term substitute (1997: 8), that is “states should seek ways to enhance the credibility of their actions”, for example by being reinforced by IMF stabilisation programmes (1997: 60).

In sum, ideal-typical neo-liberal state formation incorporates legal and quasi-legal, indeed constitutional “mechanisms of restraint” in to lock in not only macroeconomic but also microeconomic policy in ways that involve a clear separation of the economic and political to lessen the possibility for democratic accountability. This links to what has become a significant trend in economic governance - the way that monetary policy is increasingly placed in the hands of (more) independent central banks, or other mechanisms such as currency boards, designed to prevent inflationary monetary policy. In the case of the European Union for example, monetary policy under EMU is now conducted by an independent and largely unaccountable central banking system combined with strict control over fiscal policy (the American equivalents are balanced budget amendments to States’ and Federal Constitutions). In this way, EMU in effect constrains the individual European Union governments from using fiscal policy for counter-cyclical reasons to offset recession.

Dealing with dislocations associated with commodification: trasformismo.¹⁷

By contrast, the World Bank’s approach to the question of democracy and development is also related to a strategy that Gramsci called *trasformismo*, or the processes of co-optation of left-wing opposition by bourgeois or right wing forces so as to offset the possibility of mass, direct democracy. *Trasformismo* tends to occur in a situation of passive revolution. For Gramsci, passive revolution refers to two sets of situations:

1. A revolution without mass participation that is often prompted by external forces, that is where an external or state dominated model of restructuring is imposed from above before local bourgeois classes have achieved hegemony.
2. A capillary or molecular social transformation which occurs more slowly, beneath the surface, particularly where the most progressive class must advance its position surreptitiously [Gramsci, 1971: 58-9; 105-120].

¹⁷ This section draws on (Gill 1998a).

A general example of this today would be in much of the former Soviet Bloc after the collapse of communist rule, and its gradual incorporation into the institutional and constitutional forms associated with Western capitalist hegemony, and gradually during the 1990s with European integration. Here it is noteworthy that the reform programs that have been introduced not just by external forces drawn from Western Europe, but within the broader framework of the institutional complexes of transnational capitalism linked to the leadership of the United States in the G7 and the international financial institutions. The process of transformation from state socialism and Soviet communism to liberal capitalism has been a classic example of the introduction of new constitutional and political forms from above - in order to advance capitalism in the absence of a domestic capitalist class that has attained hegemony.

Trasformismo also relates to the capillary aspects of power in society. An example is the way that the World Bank discourse on participation by the agents of civil society (NGOs, business associations) seeks to legitimate a hierarchical and unequal system of representation in the making of state policy - policy for example in Africa and Latin America that is linked to the expansion of an externally prescribed model of capitalist development. In this process the key areas of policy - relative to the "commanding heights" of the economy and strategy are separated from real democratic participation and accountability. Thus the World Bank develops its notion of "participation", for example the participation of women in shaping social programmes, partly as a means to make policies work at lower cost, and partly to incorporate opposition, or put differently, it is seeking to offset the limitations imposed on mass democracy in the economic realm by increasing democratic participation in other safely channelled areas.

One way that this is legitimated is by a strategy of targeting the very poorest with real material concessions, so that they can aspire to enter the world of market civilisation - and thus contain the possibility of mass based resistance in an era of growing inequality. Of course, in some nations, such as Mexico, as in many other developing nations, compensatory measures in the context of globalization and liberalization are notable by their absence, so if World Bank policies were actually followed it would constitute real gains for the poorest.

More generally, in a world of increasing inequality and instability associated with globalization, a key role of the international financial institutions and governments more generally is not only to restructure the state and the patterns of economic regulation but also to deal with the dislocations associated with the transformation process. This is reflected partly through the rhetoric of poverty alleviation and the new discourse of participation and the enabling state that is now central to the contemporary role of the World Bank.

Thus, for example on the question of basic services and infrastructure, the Bank points out that nearly 1 billion people in Third World lack access to clean water and 1.7 billion have no sanitation - water born diseases are thus pervasive. Education in the Third World is often poor yet the returns to education especially high at the primary level, especially among girls - better education links to improved health for women and children and lower fertility rates (1997: 52). Yet, as the Report stresses, in many Third World countries resources do not go to basic services - often they are wasted on defence and in state enterprises, or they are misallocated within sectors for example in education over-investment in higher education increases inequality (especially in Africa); health expenditure patterns which predominate world-wide are focused on clinical services that tend to benefit the rich. As such, one might expect that the World Bank's solution would be to remove the parasitic classes from state power and to encourage the installation of a more progressive ruling class.

This, unfortunately, is not the case. The Bank's solution is the market: to "unbundle" services to allow for delivery through private markets, the use of vouchers, private contracting etc., so as to bridge public and private sectors, and to open up competition in provision and lastly to increase transparency of uses (1997: 54). Above all, the Bank notes that change requires "empowerment" of the users themselves. In this regard the Bank outlines a series of mechanisms that could be introduced to increase the participation of both the private sector and NGOs in the shaping and prioritisation of provision, although at no point are the elements of what the Bank calls "civil society" called upon to help shape macroeconomic or strategic policy, which under the Bank model, still remains beyond direct popular (or even parliamentary) scrutiny and accountability.

With respect to the crisis of social reproduction - in so far as this relates to care-giving and "protecting the vulnerable", the Report is concerned to deal with the fiscal crisis of the state. Here it differentiates between social insurance - which is cyclical and circumstantial help for example to the unemployed (no reference is made to structural unemployment) - and social assistance - that is help for the poorest who are unable to help themselves. The Bank points out that the welfare state blurs this distinction, and the spectre of deepening fiscal crisis is linked to growth in state pension costs which have tended to creep up in OECD as a percentage of GDP (from c.5 per cent in 1965 to c.12 per cent in mid-1990s). Here, as in many countries, the bank argues that programmes fail to

help the truly vulnerable and instead transfer real resources to élite groups with “fiscally destabilising consequences”. Thus in many developing countries social insurance policies have wreaked havoc with fiscal policy - many countries liabilities far outweigh “any reasonable” tax-raising capabilities of governments (see Table 3.2, 1997: 57). Worse still, demographic pressures will intensify - for example China’s over-60 population will double from 9 per cent to 18 per cent in 30 years - a transition that took 100 years in France and Britain (1997: 57). The Bank thus argues that it is imperative for governments to distinguish between insurance and assistance so that private competition can come into play in insurance and the state can provide residual assistance. In this way savings can be privately managed and made to become self-financing for the majority of the population, provided there is an enforceable legal framework.

Whereas the “locking-in” measures may be a coercive way of preventing a backlash against neo-liberal globalization (i.e. by insulating states from popular demands) measures dealing with dislocations are, in a sense, the consensual counterpart in that they seek to reduce the demands for other types of reform in the first place. With regard to ideas and perceptions, and as central material concessions to the working-class associated with the construction of the post-war order erode (for example the welfare state), new ideas are required to legitimate the privatisation of risk and to sustain minimum consent necessary for social order in an era characterised by the feminization of work and poverty and a crisis of social reproduction as public services erode. Thus it can be argued that the World Bank is attempting systematically to co-opt and channel forces of civil society: a tactic to legitimate the attenuation of democracy in economic policy by increasing participation in safely channelled areas. The priorities in the Bank’s agenda for participation and democracy make this clear - proposals are least participatory in the most central areas of economic governance (property rights and macroeconomic policy) - as well as in the area of strategy. The Bank offers no historic compromise on the fundamentals of the mode of production. Thus the Bank stresses that “In the technical and often sensitive areas of economic management, for example, some insulation of decision-making from the pressure of political lobbies is desirable”; elsewhere this equated with insulation “from political pressure” (1997: 117). In discussing decentralisation the Bank’s advice is to proceed with caution because of dangers of “local capture”: fiscal problems can be caused if control is not exercised over macroeconomics from the centre (1997: 128).

Yet greater participation especially by women - but by no means anything approaching direct democracy - is encouraged by the Bank in education (e.g. as school trustees), in health, in the social sector and in the environment (for example grazing lands, wildlife, forests and water sources). The Bank justifies this not in terms of the educative and developmental aspects associated with democracy by nineteenth century liberals like John Stuart Mill, but as a means to increase economic effectiveness, reduce transaction costs and to provide feedback mechanisms as well as to generate more openness and transparency (1997: 116-8). Returning to the “fundamentals”, the Bank continues to emphasise that government needs to sustain these possibilities by ensuring the foundations of the rule of law are in place to protect “both persons and property” which is crucial for a “vibrant civil society” (1997: 119).

Conclusion: new constitutionalism versus democratic constitutionalism

A review of the efforts of the G-7 and the international financial institutions in the 1980s and 1990s shows that the three elements noted above are occurring today in a deliberate and strategic manner. However, the World Bank’s The State in a Changing World does not argue for a minimalist, nor a “night watchman State”, nor even for a significant “retreat of the state.” Rather, it proposes a wide-ranging series of reforms that can strengthen the state’s capabilities to adapt to neo-liberal globalization. Indeed, it advocates pragmatically, a range of “best practices”, based on a series of exemplars and operative principles through which, it argues, governments can transform existing state capitalist, mercantilist, and state socialist structures.

With this last issue in mind, we argue that new constitutionalism is economic and involves a concept of the Rule of Law that is in practice narrowly based on the primacy of holders of large private property. However if constitutional order and Rule of Law is to constitute a positive form of freedom it cannot be simply and narrowly viewed as an economic mechanism that guarantees private property rights. It must be linked to more fundamental questions of democracy. A democratic Rule of Law thus might involve basic human rights (including political rights to freedom of conscience, expression and association), human security (freedom from all forms of violence, discrimination and intolerance) and human development (for example rights to education, health, livelihood and non-alienating work).

This would involve a very different programme of moral and social reform to that proposed by neo-liberals, indeed it would point towards a new form of state that would not be imposed from above, since it would correspond to

basic democratic and universal aspirations of people throughout the world, and to a historical process that has been called “reflexive democratisation” (Sakamoto 1994). Indeed, this democratic potential is linked to a historical process and normative project that seeks to unify the particular with the universal.

As Marx put it in his Critique of Hegel’s Philosophy of Right (1843):

In democracy... the *constitution itself* appears as only *one* determination, and indeed, as the self-determination of the people. In monarchy, we have the people of the constitution; in democracy, we have the constitution of the people... based on its actual foundation, on *actual man* (sic) and the *actual people* ... In democracy, law is the existence of man, while in other forms of state man is the existence of law. All other *state formations* are specific, definite, *particular forms of state*. In democracy the *formal* principle is at the same time the *material* principle. Only democracy therefore is the true unity of the particular and the universal (Kamenka 1983: 88-9, emphasis in the original).

By contrast the rules and disciplines of global constitutionalism operate in ways that seek to subordinate the universal to the particular interests of large capital, that is its discipline operates hierarchically (in terms of social classes, gender, race and in terms of national power) within and across different nations, regions and in the global political economy. Part of what is at issue is how world society has been progressively configured by possessive individualism, that is by individual, particular, or private appropriation, whilst production has become progressively universal and socialised. New constitutionalism prescribes a series of measures to restructure states and their civil societies based on the primacy of free enterprise, and the discipline of capital operating broadly within the constraints of classical liberal notions of the Rule of Law.

In sum, many changes associated with new constitutionalism have been linked to a pragmatic discourse of political economy which we call disciplinary neo-liberalism. However, such reforms are largely imposed *from above* on populations, and are largely premised on the subordination of democracy to the pursuit of profit. As such, they lack substantive legitimacy and hegemonic appeal. This is one reason why the new constitutional reform project is not complete, since it contains political and economic contradictions, and it provokes resistance from across the political spectrum, that is resistance to the projects of new constitutionalism and neo-liberal globalization. As such, the final dimension of new constitutionalism relates to political efforts to co-opt opposition and to prevent the emergence of significant alternatives to a neo-liberal world order. Whether this effort can succeed is one of the key questions for global politics as we enter the new millennium.

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