

# **The idea of the constitutional state and global society**

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## **Introduction**

It is a commonplace observation that historically established modes of state formation are inadequately adapted to global social scale (see for example Kettl 2000; and for a theoretically sophisticated treatment of this issue Sassen 2000), although as we shall see this observation underestimates the dynamic by which this adaptation is currently occurring. Many commentators seem to conclude from the current lack of fit between the established type of state formation and global social scale that the state as such is not adequate to the demands of governing global society. This view conflates the two distinct dimensions of political organisation and social scale. Political organisation does have to be able to work with social scale, of that we can be certain, but the nature of their relationship is not one of containment. The state does not contain society, nor is it the role of the state to express society. Rather the role of the state is to provide the institutional order that brings society to account in relation to the procedural and substantive norms of justice. Units of political organisation do not have to match units of social organisation for there to be a relationship between them.

When we disentangle the two dimensions of political organisation and social scale, we are ready to contemplate the possibility that, contrary to the argument that the relevance of the state has receded in today's global society, in fact it has increased. Ours, this global era, is

an era of the universal extension of state formation to all the peoples of the world. The universal extension of state formation reflects the establishment of a post-colonial standard of political legitimacy. It is no longer acceptable for imperialist structures of political organisation to be the mode of governing global society. With the development of the state on a universal scale, the interstate order has had to develop in the same measure. The problem, then, so far as it exists of a lack of 'fit' between political organisation and social scale, does not arise out of the inability of political organisation to adapt to social scale but out of an historical conjunction where political organisation in this work of adaptation is still catching up with contemporary social scale. The process of catch-up involves contradictions not least of these being the persistence of neo-imperialist modes of the political organisation of social scale alongside newer and still poorly developed post-colonial ones.

The scale of social interaction always transcends the unit of the political organisation of social life. The reason for this is that the horizontal relationships of exchange (of all kinds) cut across the vertical relationship of the integration of social life into a unit of political organisation. From the standpoint of any single state, or one unit of political organisation, the scale of social interaction flows across its boundaries. There has, however, to be a link between political organisation and social scale, and this is provided by cooperative arrangements between states or units of political organisation that provide for the political management of the patterns of social interaction that transcend single states. It is for this reason that the contemporary era of 'globality' (Beck 2000; and see also Yeatman 2003) is also that of the development of interstate institutions of government. These provide different kinds and degrees of political organisation that match different aspects of global social scale: trans-state-global multilateralism; trans-state-regional multilateralism; and trans-state-bilateralism.

Contrary, then, to those who argue that the grip of the state on social life is weakening, my argument is that the state has never been so salient in the political organisation of social life. This point is impossible to

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understand from the position that sees the role of the state as one of giving expression to society, for here the boundaries of the state should follow those of society. Should the latter outrun the former, it follows there must be a weakening of state power and control. This idea of the role of the state as giving expression to society not only conflates social scale and the unit of political organisation but it also reduces the complexity of social scale to a social identity that a single state can express. The conception of the state as the vehicle of a social identity is predicated on two assumptions which I reject. The first is that it is the role of the state as the unit of political organisation to express a group identity of some kind. The second is that there is no differentiation of the social and the political, and that it is meaningful to reduce the state to being the expression of the social. When we disentangle political organisation from social scale, we are able to appreciate that the state's role is a differentiated one — it concerns only the political organisation of society.

From the standpoint of political organisation, the social is included only to the extent that it concerns the bases of right or ethical life as Hegel conceives it. Hegel (1991) offers an elaborated conception of the rule of law in his idea of 'right' in relation to what it means for the social actor to enjoy the freedom to be a self-determining person. On this conception it is the role of the state to provide an organised focus for ethical life understood as relationships that are structured by what it means to be a self-determining person who is capable of recognising others as persons too. Whether we adopt the Hegelian perspective, or a more conventional understanding of the state as the constitutive basis of the rule of law, it is clear that the normative ideal for the state (and interstate order) is that of the constitutional state. Thus the social is included within political organisation only as it is framed by and oriented within the norms, procedures and policies of the constitutional state. Otherwise it is in the nature of the social to out-run the state, and there are many aspects of social interaction that have nothing to do with its being brought to account within the norms, standards and practices of the constitutional state.

The mistaken conception of the state's role as one of the expression of society (the confusion of political organisation with social scale) requires those who adopt it to veer between two opinions, both of which concede the impossibility of political organisation containing social scale. The first is the conclusion that, in a global society, there can be no effective political organisation and thus the state must lose its grip in relation to social life. The second position is a rearguard version of the first. It takes the form of an argument that somehow the state has to (re)assert its control over society, that because social scale outstrips political organisation, there has to be Canute-like effort to brook this trend and to bring society back into the unit of political organisation as though it were ever 'contained' there.

If the political is thought of as the expression of the social, then we have to hand a reduction of the political to the social. My argument is that if such a reduction operates, it is impossible for us to grasp and understand the significance of the idea of the constitutional state, and to see that new developments in social scale require this idea to be revisited and renewed. The cost of making the political a vehicle for the expression of the social is the loss of the ethical idea of right. There are many aspects of the social that have no ethical dimension whatsoever and still others that are oriented by group-based norms that cannot be reconciled with ethical life oriented as it is to the freedom of the person in the company of other persons. The reduction of the political to the social necessarily leads to neglect of the idea of the constitutional state. When such neglect informs public opinion, it leads to both a general erosion of this idea and a weakening of constitutionalism in both theory and practice. Such weakening creates a window of opportunity for anti-constitutionalist currents of various kinds, these sharing the view that constitutional constraint should be jettisoned precisely because it fetters the freedom of the arbitrary will to do as it pleases.

The article is divided into the following sections. In the first, I discuss further what is at stake in distinguishing social scale and political organisation. In the second I develop the idea of the constitutional state. In the third I discuss the development of a contemporary constitutionalism that is contributing to the renewal of the state's authority within a global interstate system. This is a constitutionalism that requires the

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state to be multilateral in its orientation to the interstate system, aware of the internationalisation of legal reasoning, willing to be held accountable to highly explicit and reflective standards of legal reasoning, and oriented to human rights. In the final sections I return to the point that the idea of the constitutional state is the basis of right, and argue that we need to recognise anti-constitutionalist currents in our time for what they are, and to reject them.

### The distinction between social scale and political organisation

Ulrich Beck's (2000) proposition that social scale today is organised on a global basis is unexceptionable. He (2000: 10) variously terms global social scale 'globality' or 'a world society'. In a way that is congruent with my argument that social scale always outstrips the unit of political organisation, he points out that it is the nature of global society to transcend the boundaries of the nation-state.

Beck, however, takes this to mean that world society is not politically organised. He moves from the proposition that "'World society", then, denotes the totality of social relationships which are *not* integrated into or determined (or determinable) by national-state politics' (Beck 2000: 10, emphasis in the original) to the further proposition: 'World society without a world state means a society that is *not politically organized*, where new opportunities for action and power arise for transnational actors that have no democratic legitimation' (Beck 2000: 26, emphasis in the original). He appears to think that because the nation-state can no longer 'contain' society, society on a global scale will remain politically unorganised.

If the unit of political organisation has to match social scale, then we face a utopian vision of a world state and a counsel for despair. If however, political organisation merely has to be adapted to the type of social scale that prevails, there is no particular reason why the political form of the state cannot be adapted in this way (for such argument see Cohen 2001; and also Sassen 2000). This includes the adaptation of the inter-state system to the global scale of trans-state relationships and issues.

If the particular state *cannot* contain transnational social space, this does not mean that transnational social space lies *outside* the state in the sense of being beyond the jurisdictional reach of the state. Beck has overlooked an important feature of global society, and this is the universal development of the state organisation of society. Now, in a way that was not the case even 30 years ago, it is the state mode of organisation that articulates social life for all the world's peoples. In the same measure that the state has become the unit of political organisation for all societies, the interstate order has assumed a globally inclusive form and global reach. The interstate order has several kinds and levels of expression: the universal multilateral institutions of law and governance such as the United Nations; regional multilateral institutions of policy coordination across states that enable them to cooperate on shared issues and challenges; and bilateral institutions of policy coordination across states. Statehood does not just pertain to what individual states do with regard to their internal affairs; it concerns also their concerted state action. Policy coordination across states currently assumes an extent and intensity that is largely invisible to actors whose focus remains largely oriented to the internal affairs of particular states. This is especially true of the areas of policing, security, immigration and trade, but it is also true for policy in the areas of higher education, employment assistance, disability and old age. Where interstate cooperation has a regional structure of governance as in the case of Europe (see Wallace 1999), or the Closer Economic Relations Agreement between Australia and New Zealand, policy coordination assumes a tight, regular and routine aspect.

Instead of Beck's proposition that global society spells the demise of the state as the unit of effective political organisation, we might argue then that global society signifies the universal development of the state as the unit of effective political organisation. As transnational issues and challenges of security, development and sustainability press harder, we are likely to see more rather than less coordination of state action by means of the various expressions and instruments of the interstate system.

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As above, social scale is not the same kind of phenomenon as political organisation. It is not that they do not have a relationship. They do. As the unit of political organisation, both singly and in cooperation, states enter into different kinds and degrees of regulation of trans-state or global social exchange and interaction (see Sassen 2000). For instance 'free trade' is a policy, there are different kinds of free trade policy (for example, multilateralist and bilateralist regimes), and it is the nature of policy to be the expression of state agency. State regulatory systems are historical in character, and they are changed and adapted to fit new patterns of social interaction that are structured by the different kinds of social scale (local, subnational-regional, national, transnational regionalism, and transnational internationalism).

The primary issue is not whether state-based political organisation on a coordinated basis across states is available to regulate global social scale, for it will be and is available. The primary issue concerns how it operates and whether it is in accord with the values and practices of contemporary constitutionalism. Interstate cooperation as such is no guarantor of constitutionalism. When interstate cooperation is structured by bilateral relationships between a metropole state such as the United States and client states, this is an arrangement directed by the interest of the powerful state in maximising its influence, and such an arrangement will be antagonistic to constitutional values and procedures.

The development of a constitutionalism that integrates the domestic and interstate orientations of states is one of the challenges for our time. It is both more developed than we may think — as in, for example, the development of a human rights jurisprudence that has impacted on both domestic jurisdictions and international law — and not as developed as it needs to be if state formation is to be constitutionally oriented and, it follows, legitimate.

Thus I accept that the development of existing state formation to match the challenge of the universal extension of the state as the unit of political organisation has some way to go. To a considerable degree, existing state formation is still locked into an imperial-global patterning

of social scale, one where interstate relations are structured in terms of a hierarchy of power that determines relationships between states or by a brittle reaction against these power relationships. Against this background any genuine multilateralism across states must seem more like a pious hope than a current reality.<sup>1</sup> However, to suggest that existing state formation requires development in order to be appropriate to global social scale is not at all the same thing as suggesting that global social scale spells the end of the state as the effective unit of political organisation.

Those who argue the latter proposition are forced into the embrace of a global civil society that will somehow miraculously do the work of the state, if this work is to be done at all. These include both the exponents of the ‘invisible hand’ of global market relationships and the advocates of a politicised global civil society. They share an inability to understand the centrality of the state to an ethical ordering of social life.

Here we discover a further twist arising from the confusion between social scale and the unit of political organisation. I have said that social scale always transcends or outstrips the unit of political organisation. Thus the unit of political organisation cannot control the relationships and transactions that map social scale. Of course this has not stopped states from attempting to do this: it is the hallmark of the totalitarian state to attempt to force social scale to match the effective reach of its jurisdictional control, but it does not work, not at least if anyone is to be left standing. That the state cannot control the scale of social interaction is not the issue, for control is not an appropriate idiom for thinking about the relationship of the state to society. The basis of this relationship resides in the legitimacy of state power and this turns on the capacity of the state to secure an ethical framework for social action. The conventional account of the *raison d’être* of the state, and thus the justification of its power, as Bodin’s 16th-century contemporary, the Chancellor Michel de Hôpital puts it, is ‘de judger et faire justice’ (McIlwain 1950: 110). From this it follows that the power of the state, and the nature of the control that is adequate to that power, are oriented to and limited by right. Since the role of the state is to



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institute society in its aspect as ethical life, control is not the best idea to suggest the nature of the relationship of the state to society.

If the state is the basis of right, then no amount of stateless transnational social space will be adequate to the challenge of what is involved in instituting right. If the idea of right has assumed a global and universal scope, then it is not the displacement of the state by civil society that we should have in mind but the further elaboration and development of the state and the interstate system so as to be adequate to a universal idea of right. Non-state actors cannot claim the mantle of right and the public lawful institutional order on which it rests. Society on a global scale requires that we renew the idea of the constitutional state so that it is shorn of anachronistic elements belonging to an era when not all peoples were organised into states, elements for example that assumed some peoples presented as natural objects for colonisation by states already in existence.

### **The idea of the state as a constitutional state**

The legitimacy of a particular state resides in its constitutional orientation as an instantiation of the idea of the state as the basis of right. The rationality of the state concerns its obligation to secure and facilitate the integrity of individuals as persons as well as the kind of society that nourishes and supports individuals as self-determining persons. We presuppose this rationality when we seek to reform an empirical state by bringing it back within the framework of constitutional principles that should inform its policy and practice, or when we seek to revise established constitutional principles and make them more relevant to today's needs. All such action reveals the centrality of constitutionalism to the *raison d'être* of the state. It is in this context that we can understand Bernard Schlink's (1991: 348) argument that Hegel's conception of the state as 'inherently rational' is neither obscure nor utopian:

As a constitutional lawyer, I understand the state as something inherently rational. This is neither my personal idiosyncrasy nor my German and European heritage. Research, teaching, and practicing in the field of

constitutional law all presuppose the apprehension of the inherent rationality of the state. Without this presupposition we would simply flounder or even drown in a sea of legal discourse. This is especially evident in the field of interpretation. Interpretation is the reconstruction of a hidden rational meaning; interpretation of legal texts lives on the presupposition of their inherent rationality.

The function of the constitution is to define the parameters and principles of what it is for the state to act as the institutional basis of right. Thus constitutional principles assume a foundational status in relation to all other action on the part of the state (see Alexy 2002), the import of which is that the judicial, executive and legislative branches of the state should conduct themselves within the authority, substantive ethic and legality of the constitution.

Constitutional right is foundational in relation to all other law and policy, and it is the constitutional authority of the entire state acting in accordance with the rule of law that is the basis of legitimacy. Thus, as Hegel (1991: 314, §276) argues in relation to the doctrine of the separation of powers, the separation of the legislative, executive, and judicial branches of the state means that they ‘are justified not as independent entities, but only in such a way and to such an extent as is determined by the Idea of the whole; their source is the latter’s authority [*Macht*] and they are its fluid members, just as it is their simple self’. The question is not the power of one branch vis-a-vis the others but whether each fulfils its distinctive role on behalf of the constitutional state as a whole.

Given the championship of plebiscitary democracy and the consequential elevation of the elected branch of government over the others, especially the judiciary, it is important to understand the constitutionalist nature of the doctrine of parliamentary sovereignty. In England it refers to a conception of the rule of law, and originally it referred to the sovereignty of the King in Parliament, a doctrine that has a history going back to medieval times (see Suanzes 1999). Suanzes (1999: §5) says: ‘The doctrine of the supremacy of Parliament is, at the same time, intimately linked to the medieval idea of the supremacy of the law — the rule of law — by virtue of which all public powers,

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including the King, must submit to the law.<sup>7</sup> It is because this doctrine was firmly established in England before the centralisation and strengthening of power in the monarchy occurred under the Tudors that absolute monarchy was never able to establish its legitimacy in England.<sup>2</sup>

### **Contemporary constitutionalism and the idea of right in global social context**

The idea of constitutionalism has to be periodically rethought so that it is adequate to current reality. This is occurring at this time even if it has a long way to go. The question of the basis of the authority of the state has had to be revisited in relation to three kinds of challenge. The first of these concerns the challenge to established constitutionalism posed by the universal idea of right embodied in the international law of human rights. The second concerns the rethinking of the authority of the state in relation to principles of internal devolution and of regional interstate communities of governance. The third challenge concerns the internationalisation of law and the impact of this trend on the rational argumentation of decisions in law within state jurisdictions. In different ways each of these challenges represents the impact of global social scale on the idea of the state. Let us briefly address each of these challenges.

First, there is a general challenge for states, particularly those that have been stable states oriented to liberal democratic principles of rule, to rethink the idea of right in relation to the universal conception of human rights. This is a process that is both ongoing and in its early stages. The significance of human rights law resides in its development of a universal idea of the person. Since the status of the person can be instituted only by means of the constitutional agency of the state, human rights law directly impacts on the development of the idea of the constitutional state. Consider in this context the examples of the 1982 Canadian Charter of Rights and Freedoms which interprets and adapts human rights law in Canadian context;<sup>3</sup> and the 1998 British *Human Rights Act* which gives further legal effect to the European Convention

on Human Rights and Fundamental Freedoms. In both cases the impact is of a constitutional nature and in the British case there is an extraordinary rethinking of the rationality of common law constitutionalism in relation to the European codification of principles that are explicitly recognised and argued in law (see for example Allan 1996 and Rivers 2002).<sup>4</sup> It is inconceivable that before this point of time British juridical thinkers would be taking German principles of constitutional law so seriously or that Julian Rivers, in his translation from the German of Robert Alexy's theory of constitutional rights, would so readily apply it to the contemporary British juridical context. Rivers's acknowledgment of the substantive as well as the procedural significance of those rights that have constitutional status is noteworthy in a context where constitutionalism has had a proceduralist cast. Rivers (2002: xix) declares certain rights to be constitutional not only because of 'their perceived substantive significance as expression of an underlying morality', but because also 'they have a status which is higher in the hierarchy of legal norms than ordinary legal rights', and 'this in turn gives rise to an expectation that they have relevance to the whole of law'. On this approach there will be a more explicit and substantively oriented reasoning of legal principles in the common law jurisdictions that have adopted a codification of human rights. The idea of the person as the subject of right will be one that is made explicit in such a way that its universality (the principle of non-discrimination) can be held to account to reasoned legal argumentation as this is expressed in an historically specific context. This in turn will develop the idea of the person and a better understanding of what is substantively as well as procedurally involved in securing the status of the person through the agency of the state.

The second challenge, one of rethinking the authority of a particular state in relation to both its internal and external partners in government has been provoked by pressures toward internal devolution coupled with pressures toward integration of a state into some kind of trans-state regional unit of intergovernmental cooperation. We might term this trend the development of a multilateral conception of the exercise of state authority. It reflects the impact of global social scale on units

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of governance so that they become multi-levelled and the state becomes the authoritative centre for how these different levels of governance are to be structured as a field of state action. The British case is an obvious one where the process of integration of the British state into the institutions of the European Community has intensified over time and where also within what has been a non-federal state there has been recent devolution of some domestic state powers to the Scottish Parliament, Northern Ireland Assembly and Welsh Assembly. The Canadian case is also interesting: the patriation of the Canadian *Constitution* and the adoption of a Charter of Rights and Freedoms for all Canadians was the basis of re-negotiating the identity of the Canadian state in relation both to the fiscally powerful provinces of Canada (see Chrétien 1990), and its very much more powerful transcontinental partner in matters of interstate cooperation, the United States. In this context the survey data reported by Adams (2003) that indicates Canadians have a different hierarchy of values from Americans, one that is more friendly to the contemporary non-discriminatory conception of the person, is suggestive of how the Charter's conception of right, one that is in line with the contemporary conception of human rights, has impacted on the identity of the Canadian polity.

The third challenge concerns the internationalisation of juridical methods of argumentation and principles. It is evident in the example I have given of British common law being developed in conversation with continental legal principles. Lord Slynn of Hadley (1996; and see also Allan 1996) names two significant aspects of the continentalisation of British public law, each of which contributes to the development of an internationally oriented, explicit and reflective substantive legal rationality. The first one is the principle of proportionality adapted from German administrative law ('has the authority gone beyond what is needed to achieve the desired object') instead of the doctrine of *Wednesbury* reasonableness ('could a reasonable Minister acting reasonably in the legislative context have done what the Minister did?') as the basis of evaluating the legitimacy of the policy and action of the state (Lord Slynn 1996: 176). The second is the impact on British judicial reasoning of the 'more purposive approach' of the European

Court, an approach that asks the question ‘What was Parliament trying to do?’ in evaluating the validity of a particular piece of legislation (Lord Slynn 1996: 177). Other examples could be readily given whether they refer to the internationalisation of the common law tradition itself (see Lord Cooke of Thorndon 1996) or to the wider impact of international treaties on state-based law and judicial reasoning (see Evans 1996). The general impact of the internationalisation of the law on constitutional thought will be one of requiring constitutional thinkers and lawyers at the level of the particular state to develop the explicit rationality of their thought in dialogue with a broader global universe of constitutional principles and methods of reasoning. To the extent that this occurs, customary modes of legal argumentation that have prevailed within a particular state jurisdiction will cede place to a substantively rational mode of legal reasoning which, in turn, is likely to contribute to the development of principles of constitutionalism and to their understanding.

All three trends contribute to the development of an idea of the constitutional state that is universal in scope and subject to a universally oriented discourse of rational argumentation. Their effect is to de-provincialise the self-consciousness of the particular state as a constitutional state and to bring it into a wider interstate and global community of thought about the person as the subject of right, constitutionalism and the institutional agency of the state.

### **The continuing salience of the state in global society**

In the context of global society the state is certainly not less salient than it was in a world where state action was primarily focused on a domestic project of nation-building (see Cohen 2001 on the current disengagement of ‘the boundaries of the state’s authority from its territorial borders’; also Sassen 2000), and where metropolitan–colonial axes of integration were more significant than horizontal–multilateral axes of integration in structuring the relationships between states. If there is merit in the argument that constitutional principle and reasoning assume a more substantively explicit, reasoned and internationally

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applicable aspect than they did before, it is possible to argue that the state as the basis of right is more salient today than it ever was before. In support of this argument I would make the following points.

Firstly, the entire reason for being of a constitutional foundation for a state is to ensure that the state in all its power and authority is directed by a rational rather than an arbitrary will, whosoever will this may be (that of the government of the day, those who elected this government, or those who have most influence on the government's decisions). As McIlwain puts it, while government implies will, it must be bounded by law (1950). The implication of which is that the doctrine of popular sovereignty does not mean that the people are above the law. Here Allan's (1996: 161) citation of Laws J is pertinent:

Ultimate sovereignty rests, in every civilized constitution, not with those who wield governmental power, but in the conditions under which they are permitted to do so. The constitution, not the Parliament, is in this sense sovereign.

Secondly, 'the people' is an entity that has authority only to the extent that it is a public identity that derives from the constitutional construction of the people as 'the political society' whose political agency is expressed through the state. Contrary to the nationalist imaginary (Anderson 1991; and see also Hobsbawm 1990) 'the people' does not signify a pre-political social identity. Rather the construction of 'the people' brings into being a public identity that was not there before, and that continues to exist only as long as it is upheld and secured by the constitutional state that serves this political society. Moreover, the historical origins of a particular political society, and the identity of 'the people' that it denotes, has no validity beyond its continuing to be relevant to and reinterpreted within contemporary constitutional standards of right. As Hegel (1991: §258, 276) puts it: 'As far as the Idea of the state itself is concerned, it makes no difference what is or was the historical origin of the state in general (or rather of any particular state with its rights and determinations).' The idea of the state has continually to be re-made in relation to contemporary standards of right.

Thus, like any subject, ‘the people’ is historically specific, and any major constitutional change to how an existing political society is framed requires the conception of ‘the people’ itself to be remade. Thus, in the context of the constitutional developments of patriation and the Charter in Canada, and against Quebec (and to some extent Western regional) separatism as well as general provincial jockeying for power, Prime Minister Trudeau followed out the logic of how these constitutional developments remade the public identity of the Canadian people. In Chrétien’s (1990: 300–1) words:

The prime minister could not accept what was effectively a vision of Canada as a country founded by the provinces, with the federal government existing through their will. Mr Trudeau argued that the whole is greater than the sum of its parts and that the repository of real power in Canada is the people of the nation as a whole. Therefore he argued that an amending formula [for the constitution] should contain a referendum provision as a deadlock-breaking mechanism. The prime minister insisted on enshrining in the Constitution a recognition of values and ideals shared by Canadians wherever they live.<sup>5</sup>

In the Australian context the implication of the High Court *Mabo* decision in 1990 that native title was a concept at common law (Bartlett 1993) was and is of major substantive constitutional import for the construction of ‘the people’ of the Australian state. Paul Keating, when Prime Minister of Australia gave a major speech (‘the Redfern Park Speech’) that brings out this import, including these statements:

Mabo is an historic decision. We can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians. The message should be that there is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians. There is everything to gain (Keating 2000b: 62).

I said we non-indigenous Australians should try to imagine the Aboriginal view. It can’t be too hard. Someone imagined this event today, and it is now a marvelous reality and a great reason for hope.

There is one thing we cannot imagine. We cannot imagine that the descendants of people whose genius and resilience maintained a culture here through 50,000 years or more, through cataclysmic changes to the climate



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and environment, and who then survived two centuries of dispossession and abuse, will be denied their place in the modern Australian nation. We cannot imagine that. We cannot imagine that we will fail ... (Keating 2000b: 64).

However, Keating (and the Labor Party) lost the federal election of 1996, at which point a government came into power that was led by a prime minister bent on undoing all the new constitutionally oriented change in Australia that has been oriented to human rights for all Australians and to reconciliation with Indigenous Australia. In consequence, contemporary Australia is profoundly divided between two distinct and irreconcilable conceptions of 'the people' of this state: an older 'colonial' one that sustains the idea of a settler presence that has an historic tie to the English metropolis; and a new one that is post-colonial in orientation and informed by human rights law.

Thirdly, human rights are a juridical conception — they exist only through the agency of the state. Thus, in principle, they are oriented in terms of the idea of the constitutional state, and make no sense without this idea. Thus to think as many advocates of a global civil society do that human rights are independent of the idea of the state expresses a profound misunderstanding of the nature of right and its dependence on the state. Contrary to such opinion, human rights are not rights which the individual possesses against the state. Rather it is the constitutional state that constitutes the status of the person and secures it. If a particular government systematically abrogates the state's constitutional obligations to secure and protect the rights of those who come under its jurisdiction, then in accordance with the doctrine of the constitutional state, they are no longer obliged to accept this state's authority over them. The logic of this situation implies not that the state is antagonistic to right, but that a particular state has failed in its constitutional obligations, and that those subject to this state are entitled to seek to reform it or, if they are suffering under its tyranny, to seek refuge outside this particular state.

A constitutional state is one that secures the consent of those subject to its authority to accept its legitimacy.<sup>6</sup> A constitutional state secures consent because its rationality can be matched by the rationality of those subject to it as they use their freedom to think about right and its dependence on the constitutional state.

Fourthly, as Durkheim (1992: 51) put it, the ‘principal function’ of the state ‘is to think’. Durkheim viewed the state as the organised centre of a society’s capacity to think about how best to respond to its needs. The state’s work of thinking about the nature of social issues and how to address them is expressed in policy analysis. In a global world that is organised in terms of a highly differentiated and complex type of social life, thought rather than customary practice must direct the government of social action. For this reason also the state in its capacity as a centre of policy guidance and direction, and in policy coordination with other states, must become more rather than less salient.

### **Anti-constitutionalist currents**

It is in the nature of the constitutional state to constrain the arbitrary will. Accordingly subjects of whatever type, and for whatever reason, who resist such constraint will be motivated to resist the authority of the constitutional state. This is generally how I see the various kinds of resistance to the contemporary challenge of rethinking the constitutional state so that it is adequate to global social scale. Such kinds of resistance include: the unwillingness of particular states to account for their policy and practice in relation to human rights law (see Zifcak 2003 for the example of the Australian state under the government of Prime Minister Howard, 1996 to the present); the unwillingness of private actors who for reasons of profit or moral righteousness have no respect for constitutional principle or practice; and the unwillingness of many, including political parties, to rethink the status of the person in relation to contemporary standards of inclusion and anti-discrimination.

The particular kind of resistance I want to highlight is the unwillingness to think about right and its dependence on the idea of the state. This unwillingness to think is displayed in a number of ways (see also my argument, Yeatman forthcoming). There are those for whom the complexity of the state within the context of an interstate system in relation to global social scale defies their desire to have a simple rule-bound conception of authority. There are also those for whom their own subjective conception of moral principle has a validity that makes

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it unnecessary for them to become acquainted with the objective world of contemporary constitutional thought and its institutional expressions. They enjoy a freedom of being able to focus on what the state is failing to do in relation to their arbitrary subjective criteria rather than engaging in an informed debate about how best to continue to build the idea of the state at this time.

Perhaps the most sinister anti-constitutionalist current of our time is the tendency of existing states to subvert their own constitutionalist foundations and procedures in the name of security and counter-terrorism. A Manichean conception of using the force of the state to eradicate terrorism not only threatens to use state power to destroy aspects of society but by justifying a state-centred tyranny over society, it surrenders the legitimacy of state action and converts right into might. It is all too easy in this context for those who oppose the use of state power in this way to see the state as inherently antagonistic to right, and in so doing, they abandon the idea of the constitutional state. Tragically, such anti-statist opinion colludes with those who for various reasons act to substitute a unilateralist conception of state will and force for constitutionalism. If the most powerful state, the United States, with its counter-terrorist state allies such as Israel, the United Kingdom, Russia and Australia, elaborates its current practice of proscribing and hunting down those it casts as hostile to its survival, and uses every new terrorist action as justification of the use of force rather than law, then we face a massive onslaught on the idea of the constitutional state.<sup>7</sup> A vicious cycle of tyrannous state action that incites the very terrorism that it seeks to destroy will be substituted for the virtuous cycle of constitutionalist state action that fosters the kinds of multilateralist cooperation and dialogue within which the current challenges of global coexistence can be faced and worked on.

## **Conclusion**

I have argued that contrary to the views of many the state is just as central as it ever was to the possibility and actuality of right in a global society. I have argued also that the idea of the state as a constitutional

state has to be re-thought in the context of global society and that much work is being done already on this front. There is more work to be done. If the supremacy of law rather than the supremacy of power is to frame the conditions of action in the present, then we should lend our capacity to think to the project of rethinking the constitutional state so that it is adequate to global social scale.

## Notes

- 1 Paul Keating, Prime Minister of Australia 1991–6, in his account of his approach to foreign policy as prime minister, exemplifies a post-colonial multilateralism — for instance this statement: ‘After the [Second World] war, our neighbours were no longer European colonial powers but independent and assertive national governments. Now we had to deal with them directly, and not through London. The Labor Government’s early support for the Indonesian revolution in 1947 set the stage for a new sort of Australian engagement with the region: our effective resignation from the Colonial Club. Labor knew that if our interests were to be protected we had to develop our own foreign policy, our own institutions, our own approaches’ (Keating 2000a: 8). Keating in this was building on the multilateralist conception of the Australian state’s interest that the Labor Governments under Prime Ministers Whitlam (1971–5) and Hawke (1983–1991) had championed. Multilateralism enables participating states to be independent foreign policy actors in a way that bilateral agreements between stronger and weaker states do not. It is telling that the conservative side of politics at this time prefers neo-colonial bilateralist arrangements between states because it sees multilateralist approaches as constraining a state-based politics that is based in superior power. Here is Keating again on the first Bush administration’s equivocal relationship to the Australian state initiative of APEC: ‘George Bush had made a major speech in Detroit on 10 September 1992 in which he had foreshadowed a “strategic network of free-trade agreements across the Atlantic and the Pacific and in our own hemisphere.” Back in Canberra, the more we thought about the Detroit speech the more we worried. It seemed to foreshadow a retreat from the [Asian-Pacific] region-wide approach that APEC offered to a more limited strategy in which the United States would deal with countries individually. Senior Administration officials were speaking to our embassy of the need to “encircle” Japan with a network of free-trade agreements. Such an

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approach was hardly in Australia's interest. Japan was our largest trading partner, and our two-way trade with Japan was worth nearly \$20 billion. Unlike the United States, we ran a substantial trade surplus with Japan (and a substantial deficit with the United States). We did not benefit from approaches that discriminated against Japan'. And: 'We were to learn later that suspicion of such multilateral approaches was one of the main foreign policy differences between the Bush and Clinton administrations' (Keating 2000a: 33).

- 2 Suanzes (1999: §32–3) cites Pocock's work on the idea of the ancient or 'old' constitution in England, an idea that has the acts of the sovereign derive from a pre-existing body of customary law. He (§33) says: 'In any case, it must be added that throughout the 17th century, common law judges were forced to accept — not without complaints — the supremacy of the Statutes approved by Parliament in exchange for Parliament's recognition of the importance of customary law within the system — only subject to the laws of Parliament — and the essential role of Judges in the Rule of Law. In reality the alliance between Parliament (particularly the Commons) and the common law judges was fundamental to the triumph of Constitutionalism over Absolutism. An alliance that facilitated the acknowledgement that additionally Parliament was the highest judicial authority in the kingdom.'
- 3 Thus a legal text on the Canadian Charter of Rights and Freedoms declares (Beaudoin & Mendes 1996: 1–2): 'With the advent of the Charter, the principles on which the rights and freedoms of Canadians are based have the status of constitutional law. ... The judiciary's responsibility and power to uphold these rights and freedoms now exists as an integral part of the process of Canadian government. The fundamental principle underlying this dimension of our most basic law is that there are some phases of Canadian life which should normally be beyond the reach of any majority, save by constitutional amendment.'
- 4 One wonders if the following comment by Allan (1996: 147) could have been made without this context for the rethinking of the rationality of the common law — his reference to Australia is because he, a scholar in constitutional law at Cambridge, is contributing to a discussion of the Mason Court in Australia, one of the high points of Australian right-oriented adjudication: 'I want to argue that constitutional law, if it is rational, is ultimately an exercise in political theory; and the imaginative decisions of the modern [Australian] High Court illuminate the nature of some of the fun-

damental questions of authority, legitimacy, and freedom which all the constitutional democracies are required to confront — questions to which they are likely to seek analogous, if not identical, answers.’

- 5 The provinces had acquired considerable fiscal power in the context of Canadian federalism since 1959 (for details see Chrétien 1990: 292–3), the effect of which ‘was that as the federal government levied a smaller proportion of the taxes, the rich provinces got richer and the poor got poorer’ (Chrétien 1990: 293). In this context the Trudeau conception of a new Charter-based federalism that ensured mobility of rights, constitutional protection against discrimination ‘based on province of residence of persons and province of origin or destination of goods, services and capital’, and ‘explicit federal jurisdiction to regulate trade and commerce’ (Chrétien 1990: 294–5) makes sense.
- 6 In this connection, consider the following interpretation of Social Contract doctrine by Keith Mason (1996: 45) in relation to the idea of popular sovereignty in Australian High Court jurisprudence of the 1980s: ‘The contribution made by the social compact theory of authority and legitimacy of government being derived from the Australian people is explained by the following propositions:  
Major premise — all public authority is derived from the people  
Minor premise — the people would not have been silly enough to arm government with power to do X  
Result — the Executive cannot do X, nor (if the limitation can find a toe-hold in the Constitution) can Parliament authorize it.’
- 7 Naomi Klein (2004: A21) refers to this as ‘the Likudization of the world’. She explains: ‘Common wisdom has it that, after Sept. 11, a new era of geopolitics was ushered in, defined by what is usually called the “Bush doctrine”: pre-emptive wars, attacks on “terrorist infrastructure” (read entire countries), and an insistence that all the enemy understands is force. It would be more accurate to call this rigid world view the “Likud doctrine”. What happened on Sept. 11 is that the Likud doctrine, previously used only [by the contemporary Israeli state] against the Palestinians, was picked up by the most powerful nation on Earth and applied on a global scale. Call it the Likudization of the world, the real legacy of Sept. 11 ... It’s not simply that Mr. Bush sees America’s role as protecting Israel from a hostile Arab world. It’s that he has cast the U.S. in the same role in which Israel casts itself, facing the same threat. In this narrative, the U.S. is fight-

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ing a never-ending battle for its survival against irrational forces that seek nothing less than its total extermination.'

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