

Review Essay

NEO-CONSERVATIVE CONSTITUTIONALISM
WELFARE STATE OR CONSTITUTIONAL STATE? by
Suri Ratnapala, The Centre for Independent Studies, St
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ANDREW FRASER*

For neo-conservative scholars the welfare state has become synonymous with cultural decline, moral decay and political corruption. At the same time, neo-conservatives sing hosannas to the pristine perfection of the free market. The result is a curiously contradictory and unbalanced picture of life in the modern corporate welfare state. Technical progress and economic growth are welcomed as products of private initiative and enlightened self-interest. But the consumerist hedonism and political dependence supposedly spawned by the welfare state are condemned as insidious threats to the traditional cultural values underlying the free enterprise system. Neo-conservatives, in short, deplore the cultural consequences of capitalist modernity even as they celebrate its social and economic dynamism.¹

In their eagerness to expose the failures on the welfare side of the corporate welfare state, neo-conservatives often mistake cultural symptoms for the underlying causes of a systemic crisis. A similar confusion of cause and effect can be seen at work in Suri Ratnapala's polemical essay on the conflict between constitutionalism and the welfare state. Using Hayek as his theoretical mentor, Ratnapala identifies the growth of the welfare state as the cause of a profound constitutional crisis. With the vast expansion of welfare claims on the state, its coercive powers must be expanded. State-provided welfare for some must be provided at the expense of others who are thereby deprived of their rights to liberty and property. As democracy degenerates into a self-interested scramble for shares in the distribution of state largesse, the welfare state steadily undermines the rule of law.

Others might see that constitutional crisis as symptomatic of systemic dysfunctions fuelled by the unrestrained pursuit of private self-interest. To be fair to Ratnapala, he does not purport to provide a comprehensive analysis of the causes of the constitutional crisis that he describes. Instead he challenges the conventional wisdom that denies the very possibility of a serious constitutional crisis in a stable parliamentary democracy.

Ratnapala believes that the norms of private property and individual liberty associated with the growth of a free market economy have a stable and enduring significance that can and should be preserved by the rule of law. Liberty and property rights are embedded in a constitutional tradition that has limited the power of rulers to interfere with the private realm of individual freedom. According to Ratnapala, the "subversion" of the British constitutional tradition has been "facilitated by certain intellectual errors occurring within constitutional theory" (at 7). In his view, the lawyers and judges who committed those errors effectively dissolved the unwritten constitutional constraints on the growth of a new administrative despotism.

* Associate Professor, Faculty of Law, Macquarie University.

1 Cf Habermas, J, "Neo-Conservative Culture Criticism in the United States and West Germany" (1983) *Telos* 56 at 75-89.

Ratnapala provides a convincing and useful analysis of the way in which the government's electoral mandate is routinely invoked to licence the unconditional expansion of state power into every aspect of social and private life. The Australian High Court, he claims, has been fully complicit in the erosion of constitutional standards. In *Dignan's case*² the High Court approved the wholesale delegation of parliament's legislative authority to the executive. As a consequence, open-ended legislation that leaves substantial law-making powers with the executive has become commonplace. This means that unelected and unaccountable bureaucrats can make laws affecting individual rights to life, liberty and property without effective public scrutiny. When they are asked to review such open-ended grants of discretionary power, courts are deprived "of the pre-established criteria of the legality of coercive executive action" (at 10). If the legislation provides no general principles to guide executive action, "the law is effectively what officials decide it ought to be" (at 10). Under these conditions the courts have no constitutional role to play. They must either defer to the executive or substitute their own judgments on matters of policy and administrative convenience. When they choose the latter option the courts only make worse the problem created by the absence of democratically agreed general principles to guide the exercise of administrative discretion.

Ratnapala sets out to debunk the notion that the New Administrative Law in Australia has provided a solution to the problem of uncontrolled official power. He is at his best when he argues that the work of the Administrative Appeals Tribunal mainly recycles the old administrative law under a new label and in a new package. True, the tribunal does sometimes assert its statutory authority to substitute its own judgment on the merits of particular cases for that of the administrative decision-maker. But when it does so, it in effect *becomes* the administrative decision-maker. Once the policy-making role of the AAT becomes "intrinsically indistinguishable from the policy-making of officials" (at 93) it loses its separate constitutional identity as a court. According to Ratnapala, "law, not policy, mainly governs judicial decision-making" (at 93).

A critical legal scholar might see in all this further evidence of the doctrinal indeterminacy inherent in every effort to justify the hegemonic structures of bureaucratic power. Ratnapala's formalist vision of the rule of law treats bureaucracy as legitimate only when it functions merely as a transmission belt for legislative directives emanating from on high. Frug, for example, has shown us how that formalist image of bureaucracy is routinely supplemented and unavoidably challenged by the competing expertise or representation of interest models of administrative law.³ Ratnapala makes no allowances for the antinomic indeterminacy of liberal legalist categories.

Ratnapala believes in a fundamental law of the constitution that judges may legitimately invoke to prevent the grant of open-ended legislative discretions to administrative officials. In his view the High Court was simply wrong to conclude "that British constitutional practice had discarded the rule against delegating primary legislative power" (at 23). The unwritten law of the British constitution had long recognised the crucial link between the rule of law and the separation of powers.

It was the doctrine of parliamentary sovereignty that undermined the principle that the legislative and executive functions should remain separate. Ratnapala identifies the separation of powers doctrine with an ancient constitutional tradition of limited government. He downplays the extent to which the result in *Dignan's case* can be justified as a logical inference from British constitutional developments since the late eighteenth century. By that time, according to one historian, "the independence of

2 *Victoria Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

3 Frug, G, "The Ideology of Bureaucracy in American Law" (1984) 97 *Harv LR* 1277.

executive and legislature authority was that of King-in-Parliament, executive in legislature, and must ultimately collide with the principle of sovereignty of Parliament".⁴ Long before the rise of the welfare state, both David Hume and Alexander Hamilton had concluded that the corruption of the ancient British constitution was essential in the interests of energetic and effective government.⁵

Clearly *Dignan's* case was not a constitutional aberration. With the adoption of universal suffrage, the separation of executive and legislative power became completely redundant. The political power generated by the representative constitution fuses with the majestic authority of the Crown into a single concentrated source of sovereignty. As Ratnapala observes, constitutional jurists "rejected the classical constitutional limitations in favour of the single safeguard of periodic elections" (at 21). Once the legitimacy of the parliamentary state came to be anchored in the "political sovereignty" of the electorate, the constitution ceased to be a means of *limiting* the coercive power of the state, but became instead a device to *enhance* its capacity to realise the collective welfare goals of the nation.

Ratnapala concludes that "the welfare state is incompatible with the constitutional state" (at 52). He has enlisted in the continuing neo-conservative campaign to roll back the welfare state by restoring the constitutional traditions of limited government. He applauds the work of those economists who pioneered "the modern revival of the constitutional tradition" (at 102). Those who champion the values of private property and individual liberty are placed unambiguously on the side of the constitutional tradition, while the welfare state is identified just as clearly as the major threat to the survival of the rule of law.

Here Ratnapala confuses a political symptom for a much more deeply rooted disease. The welfare state is simply one manifestation of a schema of enlightened despotism that has been a recurrent temptation for rulers since the middle of the eighteenth century. It may have been possible for Locke to conceive a constitution solely as a means of limiting the coercive powers of the state; but by the middle of the eighteenth century the heterogeneous and conflict-ridden world of an emergent capitalist modernity enforced a shift in the meaning of constitutionalism. From that time on, political and legal discourse has oscillated between the poles of enlightened despotism and constitutional liberty.⁶

Much of the appeal of that schema of enlightened despotism reflects its self-contradictory and illogical character. Every modernised enlightened despotism simply transcends the limits of constitutional logic. By establishing limits to the coercive powers of the state, it becomes possible to enhance them. It was recognised long ago "that the effective quantity of political power varied directly with the imposition of controls to check and direct it".⁷ The substantive norms of the representative constitution served as a practical guarantee of enlightenment for every ruler bent on expanding state power over the welfare goals of the community. As individuals become preoccupied with the pursuit of their own private interests and ambitions, the perceived need for that sort of "elective dictatorship" has grown apace. What else could define, much less realise, the collective welfare?

Indeed, a despotism invasion of traditional personal and communal rights was necessary to establish the conditions in which individuals could assert an absolute right to dispose of their own property. The growth and development of a capitalist market economy was not simply the spontaneous product of private enterprise. It required a

4 Pocock, J G A, "1776: The Revolution against Parliament" in Pocock, J G A, (ed) *Three British Revolutions: 1641, 1688, 1776*, (1980) at 272.

5 Stourzh, G, *Alexander Hamilton and the Idea of Republican Government* (1970) at 84-85.

6 See, generally Krieger, L, *An Essay on the Theory of Enlightened Despotism* (1975).

7 Id at 39.

concentrated assault by the legally despotic will of the sovereign state on customary rights, including those of the poor and the landless protected by traditional moral economies of the European countryside.⁸ In a similar fashion the Thatcherite and Reaganite attack on the welfare state required a despotic intensification of the sovereign will to chop away coercive constraints on the free market, as well as to police the restive ranks of the functionally superfluous sector of the population.

Since Ratnapala confuses the symptoms of constitutional crisis with its causes, his prescription for a solution to the crisis is bound to be unconvincing. He insists that electoral politics has hopelessly corrupted the democratic ideal. Only if judges are restored to their proper constitutional role can the threat of administrative despotism be eased. He hopes that a groundswell of neo-conservative public opinion will allow judges to single-handedly roll back the welfare state. Why an enlightened judicial despotism should be preferred to the legislative will of a parliament at least formally responsible to the people is never fully argued. Once again, it seems, the people will be forced to be free. This time round, however, their saviours will be the same judicial institutions that are alleged to have sold them into bureaucratic slavery.

This slim volume provides a good summary statement of the basic tenets of neo-conservative constitutionalism. In study materials for classes on the separation of powers doctrine, extracts from the book could provide students with a useful and interesting counterpoint to *Dignan's* case. Judged as a contribution to the constitutional history or legal theory of "democratic despotism", however, the book is flawed by its narrow focus on a limited range of legal sources and ideological concerns.

8 Hont, I and Ignatieff, M, (eds) *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (1980).