Osgoode Hall Law Journal

Volume 49, Number 1 (Summer 2011)

Article 8

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Book Review

A PERILOUS IMBALANCE: THE GLOBALIZATION OF CANADIAN LAW AND GOVERNANCE, by Stephen Clarkson and Stepan Wood[1]

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WE OWE A GREAT DEBT to the now defunct Law Commission of Canada for having brought Stephen Clarkson and Stepan Wood together as virtual scholars-in-residence. The unlikely duo of Clarkson, who has done path-breaking work on the political economy of continental integration, and Wood, who is one of Canada's leading scholars of international environmental law, have joined forces to produce a comprehensive account of Canada's entanglement with globalization's legal rules and institutions (what I call herein transnational legality). Their project is to map out the imbalance in Canada's transnational legal commitments that favour the logic of economic rationality (in part 1) and to offer a path to rebalancing the global legal terrain in favour of non-economic rationalities having to do with such things as the environment, labour, and human rights (in part 2). The state has a role to play in this project of rebalancing, but the authors appear to prefer to keep this role to a minimum. In what follows, I turn first to the book's main arguments and then to a discussion of two matters of particular concern.

The book opens with the observation that Canada has long been subject to international political and economic forces,[3] principally originating out of the United Kingdom and the United States. But Canada's fate has not been entirely out of its own hands. Instead, Canada exhibits the features of a middle power: It is both a "rule taker" and a "rule maker."[4] The first part of the book is taken up with an assessment of Canada's role in the construction of the international economic

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1. (Vancouver: UBC Press, 2010) 347 pages.
2. Professor of Law, University of Toronto.
3. *Supra* note 1 at 9.
4. *Ibid* at 32.

legal order, focussing on the *Canada-United States Free Trade Agreement*[5] and the *North American Free Trade Agreement*.[6] Regional agreements such as these exhibit a global preference for codifying the economic interests of powerful capital-exporting states "at the expense of human welfare and global ecological sustainability."[7] This imbalance gives rise to an unevenness in how globalization is being experienced in various locales—some places require more adjustment (what Saskia Sassen calls "state work"[8]) than others.[9] Lying in the semi-periphery, the Canadian case demanded some realignment in domestic policy choices[10] and, more significantly, subservience to the exigencies of transnational legality. This is the consequence of Canada's new "supraconstitution." A variant of the model of "new constitutionalism" developed by Stephen Gill,[11] the supraconstitution is described by Clarkson and Wood in muscular terms as having a superior legal force that both "constrains" and "prevails over conflicting domestic laws."[12]

By way of illustration, the authors take up *NAFTA* Chapter Eleven, namely, that part of *NAFTA* intended to promote and protect the interests of foreign investors. Though there is much that is contentious in Chapter Eleven, the authors focus on the prohibition on indirect expropriations that can be likened to a regulatory takings doctrine, as it is called in the United States. To the extent that *NAFTA*'s takings rule represents US constitutional doctrine (it does not do so faithfully—it goes much further than even US law would admit[13]), it

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5. 2 January 1988, Can TS 1989 No 3 (entered into force 1 January 1989, currently suspended).
6. 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*].
7. *Supra* note 1 at 38.
8. *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006) at 171, 232.
9. In the Mexican case, see Stephen Clarkson, "NAFTA and the WTO in the Transformation of Mexico's Economic System" in Joseph S Tulchin & Andrew D Selee, eds, *Mexico's Politics and Society in Transition* (Boulder: Lynne Rienner, 2003) 215.
10. See Daniel P Drache, "The Mulroney-Reagan Accord: The Economics of Continental Power" in Marc Gold & David Leyton-Brown, eds, *Trade-Offs on Free Trade: The Canada-U.S. Free Trade Agreement* (Toronto: Carswell, 1988) 79 at 81, n 5.
11. *Power and Resistance in the New World Order* (Hampshire: Palgrave Macmillan, 2003). Clarkson, admittedly, has been writing about such things for quite some time independently of Gill. See *e.g.* Stephen Clarkson, "Constitutionalizing the Canadian-American Relationship" in Duncan Cameron & Mel Watkins, eds, *Canada Under Free Trade* (Toronto: James Lorimer, 1993) 29; Stephen Clarkson, *Uncle Sam and Us: Globalization, Neoconservatism, and the Canadian State* (Toronto: University of Toronto Press, 2002).
12. *Supra* note 1 at 55.
13. Vicki Been & Joel C Beauvais, "The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine"

appears dissonant with the way in which property rights are recognized in both Canadian and Mexican constitutional law. The authors go so far as to claim that the values promoted by the supraconstitution are "at odds with the domestic constitutional and legal norms most valued by citizens in Canada and other liberal democracies."[14] Though property rights are not subject to the same heightened constitutional protections in Canada and Mexico, it is not clear, without further empirical support, that in most contemporary liberal democracies, including these two, prevailing conceptions do not attribute high value to property.[15]

Other elements of transnational legality—the authors examine international environmental, health, and human security regimes, among others—are not part of Canada's supraconstitution. Though some are legally binding, most are considered soft law, having only reputational effects in the event of their breach.[16] For example, *NAFTA*'s environmental side agreement, in contrast to *NAFTA*'s Chapter Eleven, is described as "toothless"[17] and "hobbled and lame."[18] Nor are there dispute resolution mechanisms available of the sort that produce legally binding awards. These other elements of transnational legality do not, in short, have the kind of primacy associated with the supraconstitution. It is for these reasons that "[e]nvironmental lawyers often look longingly at the robust structures of the multilateral trading system and hope to see the global environmental regime develop in a similar manner."[19] This leads to one of the constituent elements of the authors' prescriptive account: that "governance institutions responsible for implementing environmental, labour, and human rights agreements [be given] powers equal to those of the institutions of global economic governance. Weak individual rights need to be bolstered by granting them weight equivalent to the already strong economic rights accorded to transnational business."[20]

The second part of the book aims to map out a means by which Canadians and the Canadian state may repair this imbalance. First, the authors acknowledge that the state plays an ambivalent role—it is both author of and subject to many of the constraints of transnational legality. Nevertheless, the authors hold out

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(2003) 78 NYUL Rev 30.

14. *Supra* note 1 at 108.
15. See *e.g.* the survey of property clauses in André Van der Walt, *Constitutional Property Clauses* (Cape Town: Juta & Co, 1999).
16. *Supra* note 1 at 130.
17. *Ibid* at 169.
18. *Ibid* at 171.
19. *Ibid* at 161-62.
20. *Ibid* at 183.

hope that the state can exercise jurisdiction in the "service of hope"[21] rather than in "reinforce[ing] ... prevailing orthodoxies."[22] Here they appear to follow Boaventura de Sousa Santos in his hesitant embrace of the state as the "newest social movement."[23] In the current conjuncture, states play an increasingly marginal role compared to, if not overtaken entirely by, the activities of non-state actors. Like Santos, the authors are ambivalent about state capacity.

Private-public partnerships, privatization, and governance are some of the terms we associate with this transfer of authority away from the state, and it is governance that Clarkson and Wood embrace in their book. Elsewhere[24] they even buy into Gunther Teubner's formulation of "global law without a state,"[25] yet they correctly concede, in tension with this formulation, that states remain central to the structuration of transnational legality. In which case, we can expect states to play more of a steering role in rebalancing the global legal order. The examples they offer, however, suggest a pretty marginal role for state actors that well complements the dominant non-state formulations that proliferate in the global public sphere. The Forest Stewardship Council, a global system for certification of sustainable forestry operations and products (in chapter 7), and the New Directions Group, which formulates corporate social responsibility (CSR) standards in the extractive industries (in chapter 8), are offered as examples of how to rebalance a global order that is out of whack. It is instructive that both cases concern what the authors describe as "non-state global governance"[26] and "hybrid multi-stakeholder initiatives"[27] between business and civil society groups, where the state role is marginal or non-existent. In the case of the New Directions Group, a role for government is envisaged, but it is limited to offering tax credits, working with securities regulators, and participating in a "multi-stakeholder group" to advise on implementation and further development of the CSR framework.[28] This is a

21. *Ibid* at 188.
22. *Ibid* at 220.
23. *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2d ed (London, UK: Reed Elsevier, 2002) at 492.
24. *Supra* note 1 at 61, 270.
25. "'Global Bukowina': Legal Pluralism in the World Society" in Gunther Teubner, ed, *Global Law Without a State* (Aldershot, UK: Dartmouth, 1997) 3; "Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?" in Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds, *Transnational Governance and Constitutionalism* (Oxford: Hart, 2004) 3 [Teubner, "Societal Constitutionalism"].
26. *Supra* note 1 at 258.
27. *Ibid* at 259.
28. *Ibid* at 276-77.

modest outcome for a project that envisages the "revitalization of the state as an instrument of human progress."[29]

I now turn to two distinct concerns that arise from this book. The first is Clarkson and Wood's appropriation of the term supraconstitution to describe the order of priority established by transnational legality's economic dimension. This innovation looks like a logical outgrowth of Gill's suggestive "new constitutionalist" framework.[30] When placed in the context of the literature regarding the constitutional features of transnational law, the phrase seems overdrawn, if not technically inaccurate. This is not to say that constitutionalism cannot be envisaged at levels beyond nation states, only that we should enter this terrain with some conceptual and empirical tools readily at hand.

For instance, Neil Walker has been tracing the constitutional outlines of the European Union project along a number of dimensions. Indicators include the institutionalization of juridical and political-institutional orders, notions of collective self-authorship, elements of social integration, and discursive practices associated with constitutionalism. As applied to the European Union, Walker finds that the EU is "registering across all five constitutional dimensions, although in no one register do its claims go unchallenged."[31] Deborah Z. Cass has developed her own (less fluid) check list for measuring the constitutionalization of the World Trade Organization (WTO) and finds that body falls far short of a fully constitutionalized entity.[32] More recently, Jeffrey L. Dunoff and Joel P. Trachtman have proposed a functional approach to determining those elements of international law that have risen to the level of constitutional.[33] Their approach generates a rather limited list of institutions that enable or constrain the production of international law—the UN Security Council turns out to be a paradigmatic example of international constitutional law-maker. Dunoff and Trachtman do not include in this list institutions that produce what they designate "ordinary" international law (such as international trade and investment law).[34]

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29. *Ibid* at 187.
30. Gill, *supra* note 11.
31. "Taking Constitutionalism Beyond the State" (2008) 56 Political Studies 519 at 533 [citation omitted].
32. *The Constitutionalization of the World Trade Organization* (Oxford: Oxford University Press, 2005).
33. "A Functional Approach to International Constitutionalization" in Jeffrey L Dunoff & Joel P Trachtman, eds, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge, UK: Cambridge University Press, 2009) 3.
34. Jeffrey Dunoff & Joel Trachtman, "Ordinary and Constitutional International Law: A Response to David Schneiderman" (14 December 2009), online: EJIL: Talk! <http://www.ejiltalk.org/ordinary-and-constitutional-international-law-a-response-to-david-schneiderman/>.

In my own work, I have undertaken an analysis of the features of international investment law—of which *NAFTA*'s Chapter Eleven is emblematic—in order to identify what I describe as its "constitution-like features."[35] This aids in re-politicizing investment rules, encourages the promotion of alternative constitutional visions, and makes more transparent the process by which candidates for transnational legality arise out of privileged national legal sites, such as the United States.[36] Much of my own account is congenial with Clarkson and Wood's, but they dispense with any qualifications, claiming that the supraconstitution "prevails over conflicting domestic laws."[37] This seems to go further than a structural argument: that there are massive pressures emanating from capital-exporting states and international financial institutions not to deviate from the legal norms expressed by the supraconstitution. Instead, the authors' claim goes so far as to maintain that transnational legality takes "precedence"[38] over domestic legal norms—a quality they call "primacy."[39] Without more, this formulation seems out of balance. Indeed, it is a premise that would not be tolerated by countries such as the United States.

It would have been conceptually more helpful to conceive of the system by other formulations. Consider, for instance, James Tully's suggestive idea of "informal paramountcy," which is meant to describe a new form of imperial legal order that continues to operate in the aftermath of the era of decolonization.[40] Tully is referring to the tradition (perfected by the British in the nineteenth century) of "'informal' imperial rule over another people or peoples by means of military threats and military intervention, the imposition of global markets dominated by great powers, a dependant local governing class, and a host of other informal techniques of indirect legal, political, educational and cultural rule... ."[41] Tully designates its contemporary variant as a form of "informal paramountcy" where the hegemon tolerates self-rule, but by "informal means ... induce[s] the local governments to open their resources, labour and markets to free trade and liberalisation... ."[42] Tully does not go into such detail,

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35. David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge, UK: Cambridge University Press, 2008) ch 1.
36. This is a process that Santos helpfully describes as "globalized localism." *Supra* note 23 at 179.
37. *Supra* note 1 at 55.
38. *Ibid* at 58.
39. *Ibid* at 55.
40. *Public Philosophy in a New Key* (Cambridge, UK: Cambridge University Press, 2008) vol 2: *Imperialism and Civic Freedom* at 196, 212, 260.
41. *Ibid* at 132.
42. *Ibid* at 260.

but a constitutional doctrine of paramountcy governed relations between the United Kingdom and the princely states of India.[43] It gave expression to the supervisory authority exercised by the British Empire over its dependencies in the area of foreign relations and whenever "internal order" was threatened.[44] Otherwise, it generated scant legal precision in practice. When asked for clarification, a British Parliamentary Committee in 1928 responded with the tautology "[p]aramountcy must remain paramount."[45] Contrast this with the hardness and specificity associated with the aspects of the transnational legal order that I have described as constitution-like. Here, the better reference point might be Canadian constitutional law and its doctrine of federal paramountcy, which manages jurisdictional conflict (indeed, this might have been what Tully had in mind when he coined the term "informal paramountcy"). In the case of constitutionally valid federal and provincial laws that are operationally in conflict, the provincial law will yield to the federal to the extent of the inconsistency.[46] We might think of conflicts between transnational and national/local law in the same way but as giving rise to an informal rule or practice rather than a strict legal rule of priority: The local will yield to the transnational to the extent of the inconsistency because the supposed logic of global economic rationality demands it.

There is more than conceptual clarity at stake here. To the extent that the descriptive account is not entirely accurate, it has implications for political strategies intended to countervail transnational economic power. According to the alternative account I have offered here, states are not so much legally disabled as structurally enfeebled from overcoming the strictures of transnational legality. It might, in other words, be easier (at least legally) to resist these edicts than might otherwise be believed.

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43. Lloyd I Rudolph & Susan Hoeder Rudolph, "Rajputana Under British Paramountcy: The Failure of Indirect Rule" (1966) 38 J Modern History 138.
44. UK, Indian Statutory Commission, *The Simon Report on India: An Abridgement* by RW Brock with a foreword by Viscount Burnham (London: JM Dent & Sons, 1930) at 32 [*Simon Report*].
45. UK, HC, "Report of the Indian States Committee," Cmd 3302 in *Sessional Papers* (1928-1929) 1 at para 57 (Harcourt Butler, Chairman). The Committee "found it impossible to define paramountcy in a formula, and indicated that it was in the generality of the conception that the States would find their best security for the preservation of their independent rights in times to come" (*Simon Report*, *supra* note 44 at 30). Arthur Berriedale Keith suggests that this definitional inquiry was precipitated by a desire on the part of Indian rulers to have the Crown "acknowledge the right of the ruler to misgovern his state... ." *A Constitutional History of India*, 1600-1935 (London: Methuen & Co, 1936) at 474.
46. See *Bank of Montreal v Hall*, [1990] 1 SCR 121.

The above discussion might be considered overly technical and reminiscent of a family dispute. A second concern places in starker relief a difference of opinion, and it concerns an element of the authors' prescriptive account. As mentioned, Clarkson and Wood describe how environmental lawyers look longingly at the constraints available to protect the interests of powerful economic actors. Those constraints, and complementary supremacy, are not available to advance the interests of those seeking to protect the environment, human rights, or labour rights. They call, then, for rules and institutions that promote these more neglected interests equivalent to those advancing the interests of international economic actors. "Weak individual rights," they write—I am not certain why these should be characterized as individual rights—"need to be bolstered by granting them weight equivalent to the already strong economic rights accorded to transnational business."[47] This is not a call to dismantle structures that institutionalize the "hard" core of the supraconstitution. Instead, it is a call for equivalency in the powers available to these neglected domains. Whether the rise of new institutional formations to produce hard law advancing these neglected interests would be sufficient to countervail the power of transnational economic governance is not discussed. There is good reason to be sceptical about this sort of outcome. In light of the widespread hand-wringing over the fragmentation of international law[48]—of which the transnational legal economic order is but one feature[49]—there is little reason to believe that those institutions advancing international economic interests will absorb human rights, environmental, or other norms within the logic of their own norm-producing enterprises.[50] Rather, this outcome likely will be determined by the weight of political power these concurrently operating regimes will have. There is no evidence that the sum of these individual parts will be great enough to overwhelm the ramparts of international economic law—it is, in other words, unlikely that a countervailing

47. *Supra* note 1 at 183.
48. See Martti Koskenniemi & Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 Leiden J Int'l L 553.
49. See Campbell McLachlan, "Investment Treaties and General International Law" (2008) 57 ICLQ 361.
50. This is so, irrespective of one's views about the "cognitive openness" of these systems. On such matters, see Teubner, "Societal Constitutionalism," *supra* note 25. On the "slow" adaptation of international investment law to international human rights dimensions within investment law, see Jorge Daniel Taillant & Jonathan Bonnitcha, "International Investment Law and Human Rights" in Marie-Claire Cordonnier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011) 57 at 59.

power will materialize out of functionally disparate regimes.[51] It would have been wiser for Clarkson and Wood to recommend root and branch reform, if not repeal[52]—that such authority be stripped down, if not done away with entirely, and, if protections are considered necessary,[53] that they be rebuilt on entirely new foundations.

51. For an argument along these lines, see Eyal Benvenisti & George W Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law" (2007) 60 Stan L Rev 595.
52. For more detail, see Gus Van Harten et al, "Public Statement on the International Investment Regime" (31 August 2010), online: <www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf>. Both Clarkson and Wood have endorsed this statement.
53. I have responded to the claim that such constraints are necessary because they give voice to otherwise unrepresented interests of foreign investors. See "Investing in Democracy? Political Process and International Investment Law" (2010) 60 UTLJ 909.