

Danny Nicol. *The Constitutional Protection of Capitalism*. Oxford: Hart Publishing, 2010. Pp. 220. \$70. ISBN: 9789004179080.

When the current economic crisis began, political leaders all around the world spread the idea that capitalism needed somehow to be reformed.¹ A couple of years later one might think that not much has been achieved in that direction and blame politicians for their lack of will. However, it is not so clear that reforms – even if the political will existed – would be easy to realize. As Danny Nicol argues, the neoliberal conception of capitalism is constitutionally shielded as a result of the content and the development of different but coexisting legal regimes such as the World Trade Organization (WTO) or the European Union (EU), and of the activism of the European Court of Human Rights (ECtHR). Describing the resulting ‘constitutional protection of capitalism’ is precisely what this book is about: Nicol tries to determine to what extent national politics are pre-determined by the ongoing economic integration. Or, putting it differently, his research aims at explaining how much room for manoeuvre states, and in particular the United Kingdom, maintain now that the international and European economic integration treaties they ratified years ago have evolved in an unexpected way. The author thus identifies two trends ‘that have pervaded the evolution of transnational regimes’ (at 156), namely their widened scope and their enhanced binding character, and claims that such developments have a special impact on the freedom of Parliament to decide,² a freedom which, as we must bear in mind, is at the core of British constitutionalism. Both the title and the cover of this book, in which the symbol of the British Parliament, Big Ben, blurs among the buildings of the City, are very explicit about the national perspective from which this book approaches transnational regimes.

The book is structured in five chapters. The first describes the theoretical basis of the research, the following three deal with the issue of how the WTO, the EU, and the ECHR regimes, respectively, have affected the (British) conception of democracy, and the final one is devoted to the main findings and conclusions. This extremely clear structure makes the book’s arguments very easy to access and understand. Briefly summing them up, we can say that Chapter 1 explores the relationship between transnational regimes and national democracies. To that end, the author takes the British conception of democracy as a yardstick, considering that it relies on three main concepts: (1) *contestability*, or the idea that there can be no universal or self-evident truths that shall be enshrined as supreme law. Indeed, what the constitution should do is to guarantee the permanence of contestability; (2) *ideological neutrality*, which means that the constitution’s ideological commitment must be to democracy itself, thereby permitting the polity to be led into whichever ideological direction reflects the will of the political community; and (3) *accountability*, ensuring that rulers are responsive to those they rule, which requires accountability both to be continuous and to permit the sanction of dismissal.

Chapter 2 explains that a radical change took place when the GATT 1947, which ‘represented an ideological compromise between free trade and national autonomy, allowing governments to pursue reasonable interventionist domestic policies’ (at 60), was replaced by the 1995 WTO

¹ Take as an example Sarkozy’s words at the end of Sept. 2008: ‘[s]elf-regulation to solve all problems, it’s finished. *Laissez-faire*, it’s finished. The all-powerful market that is always right, it’s finished. . . . Self-regulation is sometimes insufficient. The market is sometimes wrong. Competition is sometimes ineffective or disloyal. It is necessary then for the state to intervene’ (as transcribed by *The Washington Post* on 26 Sept. 2008).

² The author partially dealt with some of these issues in a previous monograph. See D. Nicol, *EC Membership and the Judicialization of British Politics* (2001).

Agreement. What the author demonstrates is that the latter modifies the role states play in their economies mainly as a result of the improvement of the transnational regime's enforcement mechanisms. Even though private companies lack standing to instigate actions before a WTO panel or the Appellate Body, litigation highly depends on them. This is the case since authorities rely on industry both at the moment of identifying obstacles to free trade and when collecting factual information and legal arguments for the procedure before a panel. Indeed, Nicol claims, panel decisions are related to the degree of mobilization of the private sector or, in other words, to companies' own commercial interests. Measures adopted by the US and the EU for implementing the WTO's Dispute Settlement Understanding (respectively, section 301 of the US Trade Act 1974 and the Trade Barriers Regulation³) result in an institutionalization of the collaboration between the government and private companies. As a consequence, 'private companies have thereby been accorded a privileged institutionalized position from which to challenge the legislation and policies of states' (at 64).

Chapter 3 deals with the substantial changes the European integration process has introduced to national democracies, mainly focusing on three extremely relevant issues. The first one is the hierarchy of values that flows from the ECJ's *Cassis de Dijon* ruling⁴ and its 'mutual recognition principle'. In *Cassis* the Court held that commodities lawfully produced in one Member State should be accepted as lawful in any other Member State. This mutual recognition principle can be overcome only by regulatory measures that aim at promoting a public purpose and that pass a test of proportionality. According to Nicol, this case law 'seriously compromises the ability of governments to favour competing considerations over those of free trade' (at 97). The second issue dealt with in this chapter is how the coordination of economic policies between Member States, with its non-enforceable multinational surveillance procedure of the Stability and Growth Pact based on recommendations by the Council (Article 121 TFEU),⁵ has a real impact on national democracies by making governments accountable to interests other than those of their own constituencies: 'public naming-and-shaming would have an adverse effect on markets and investment, and against this backdrop it might be considered a more effective, if informal, sanction' (at 105). During 2010 this informal sanctioning mechanism has been corroborated by successive increases in the rate some Member States have to pay for borrowing money on the market. Finally, the third issue refers to how Article 345 TFEU, which supposedly guarantees respect for the system of property ownership in the Member States,⁶ has been interpreted. The ECJ has applied the same rules (i.e., market rules) to all, public and private, enterprises. However, Nicol suggests that, instead of adopting this approach, the Court should have recognized that each kind of enterprise follows a different rationality and concluded that public enterprises would not be forced to comply with competition rules, nor with the state aid regime.

³ Council Reg. (EC) No. 3286/94 of 22 Dec. 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization. OJ (1994) L 349/71.

⁴ Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* ('*Cassis de Dijon*') [1979] ECR 649.

⁵ The ECJ was able to decide only on the procedure, but not on the substance, of this control mechanism. See Case C-27/04, *Commission v. Council* [2004] ECR I-6649.

⁶ Art. 345 TFEU reads: '[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'.

Chapter 4 is devoted to the ECtHR's case law, particularly to its decisions on the right to property (Article 1 of the First Protocol of the European Convention on Human Rights).⁷ Departing from Jeremy Waldron's *The Right to Private Property*, Nicol distinguishes four ways of interpreting the content of property rights in a democratic context: considering it (1) not a fundamental but a common right (1945–1951 UK Labour government's view at the time of ECHR negotiations); (2) as a fundamental right of everybody to own property, but not to consolidate the existing, extremely unequal distribution of wealth; (3) as a human right guaranteeing the current distribution of propriety; and (4) as a right which prohibits expropriation beyond a certain level of wealth considered a minimum for living with dignity, autonomy, and responsibility. The author argues that the ECtHR in its decision in *Sporrong and Lönnroth v. Sweden*,⁸ the leading case in the field, departed from the conception of the right which resulted from the negotiations (and is expressed in the wording of the Article). Nicol states, 'It seems reasonably clear that the ECHR framers had not intended the propriety right to involve the same degree of restriction on state action as is the case with the other rights guaranteed by the Convention' (at 139). Furthermore, in an unexpected development resulting from what Nicol calls the 'elasticity' of the concept of general principles of international law, the ECtHR considered compensation, originally foreseen only in cases when the expropriated was a foreigner, as part of the essential content of the human right. Therefore, the ECtHR has pushed Article 1 of the First Protocol 'far beyond its textual limits and the original intent of its framers' (at 148).

Finally, Chapter 5 recalls the main findings of the previous chapters and contextualizes them historically as well as from a constitutional point of view. The main conclusion of the book is that, in contradiction to what the three parameters of *contestability*, *ideological neutrality*, and *accountability* demand, the decisions about the economic regime of a state are beyond the reach of its citizens or of their representatives in parliaments. Indeed, capitalism is constitutionally protected by international agreements promoting economic integration. This is so because (a) the procedures to change or amend such agreements (if they exist) are extremely cumbersome and require unanimous political will and commitment on the part of all parties; (b) until they are amended, these treaties are biased towards a neoliberal conception of economic policy; and (c) they modify democratic governments' behaviour since their accountability is gradually owed more to markets than to citizens.

As shown above, the book is based on the British conception of democracy, which relies on an unwritten constitution. This, however, does not render its conclusions irrelevant for states other than the United Kingdom. While in these states constitutions impose some limits on contestability, here too the impact of the agreements discussed in the book is evident and only exit from the agreements could overcome it. Indeed, the book's findings are of general interest.

It could be argued that Nicol's arguments remain strongly attached to the nation-state ideal in an era in which it is no longer capable of solving citizens' problems. However, his criticism

⁷ 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

⁸ *Sporrong and Lönnroth v. Sweden*, Series A No. 52, 5 EHRR (1983) 85.

of the way integration has been conducted hitherto, favouring economic interests and compromising national welfare policies, is absolutely pertinent: if the nation-state needs a complement, then we need to know what transnational regimes can offer. Nicol does not hesitate to attribute all the harmful inroads into state sovereignty which result from unexpected judicial decisions and from the development of new enforcement procedures to the neoliberal economic philosophy which has been dominant since the 1980s. In his narrative, neoliberal thinking, epitomized by the 'Washington consensus',⁹ has taken advantage of some years of prevalence among world leaders and is now embodied in international agreements which are rigid by definition, and thus of a *de facto* constitutional status.

Maybe the most important achievement of the book comes from applying the same scheme of study to three different regimes: the WTO, the EU, and the ECHR. The literature on how each of them relates to national democracies is huge,¹⁰ but Nicol's comparative approach reveals not only incidental parallel developments (he identifies, for example, some concomitances between the *Sporrong and Lönnroth v. Sweden* and *Cassis de Dijon* rulings),¹¹ but some common trends shared by all three regimes (such as their ever-stronger enforceability). As a result, we cannot but hail the book as an interesting contribution to the study of the consequences of economic integration for democracy, as well as to the growing debate about transnational democracy, to which, highlighting the national point of view, it constitutes a counterpoint.

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⁹ '[A] tacit but a powerful agreement among political, academic and business elites in favour of such reforms as the minimal state, the deregulated market, fiscal constraint, free trade, reduced welfare spending and lower taxation' (at 34).

¹⁰ For instance, on the WTO see M. Krajewski, *National regulation and trade liberalization in services. The legal impact of the General Agreement on Trade in Services (GATS) on national regulatory autonomy* (2003); on the EU see Y. Mény, P. Muller, and J.-L. Quermonne (eds), *Adjusting Europe. The impact of the European Union on national institutions and policies* (1996); and on the ECHR see H. Keller and A. Stone Sweet (eds), *A Europe of rights. The impact of the ECHR on national legal systems* (2008).

¹¹ 'In both cases, the courts adopted balancing exercises, and this is in itself significant, since such balancing tests involve a shift in polycentric decision-making power from governments and legislatures to the judiciary. Furthermore, in both cases the weighting involved in the balancing test was such as to favour aspects of neoliberal policy' (at 140).