

**Constitutionalism, Sovereignty, and the Troubled Category of
Social Citizenship**

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Abstract

In a recent paper Martin Loughlin laments the fact that during ‘the last 20 years or so’ a serious misunderstanding of constitutional authority has found its way into a great deal of social, legal, and political thinking. Loughlin contends that this misunderstanding is a reaction to ‘the growing range of governmental functions now being exercised through supra- or transnational institutional arrangements’. In a not-unrelated set of papers, Grahame Thompson highlights the way this problematic thinking about constitutionalism has infected discussions about the role of global corporations, especially those that attempt to grant to some global corporations the status ‘global corporate citizen’. After setting out a distinctive understanding of ‘the social’, this paper explores some aspects of these interventions by Loughlin and Thompson. The paper then builds on their insights to develop an argument that the category of social citizenship is unsustainable.

Keywords: constitutionalism, citizenship, the social, social citizenship, politics, law, state, sovereignty

Introduction

In a recent paper Martin Loughlin laments the fact that during ‘the last 20 years or so’ a serious misunderstanding of constitutional authority has found its way into a great deal of social, legal, and political thinking. Loughlin contends that this misunderstanding is a reaction to ‘the growing range of governmental functions now being exercised through supra- or transnational institutional arrangements’. It entails the assumption that ‘we are living today in a post-industrial or post-modern era’ and it entails the related assumption that we are ‘entering an era of post-state, post-sovereignty’. As a corollary of these assumptions, the misunderstanding features a commitment to think about rule in terms of multi-level government, based on transnational and international constitutionalism (Loughlin 2009: 1-2). In a not-unrelated set of papers, Grahame Thompson highlights the way this problematic thinking about constitutionalism has infected discussions about the role of global corporations, especially those that attempt to grant to some global corporations the status ‘global corporate citizen’ (see esp.: Thompson 2006; 2008; 2009).

This paper will first explore some aspects of these interventions by Loughlin and Thompson, then, in its second section and its conclusion, it will build on their insights to develop an argument that the category of social citizenship is unsustainable.

In all this I will be drawing on my previously formulated arguments about the nature of the category ‘the social’ (see esp.: Wickham 2007; 2008a; 2008b; 2008c; 2010; Wickham

and Evers 2010). Here I have room only for a brief summary of what I regard as the main features of the social.

While I do not reject the common idea that the social is fundamentally about human interaction, I do reject the idea that the social is *no more than* human interaction and I reject the related idea that in being *only* about interaction the social is timeless and universal. As we shall see later, it is the idea of the timeless and universal social that informs the category of social citizenship.

I think it is far more productive to understand the social as a particular historical development, with its own times and places. In this way, the social is a domain of safety and freedom which emerged in Europe in the seventeenth century, as the result of a process whereby a complex amalgam of politics, law, sovereignty, and state was able to bring to an end a long period of devastating civil war, generated in the main by a sequence of dramatic confessional shifts, sometimes referred to as 'the Reformation'. As it relates to citizenship, then, the social is a domain of this world with its own complex history; it is not a universal, timeless, metaphysical gift.

To wrap up this summary of my account of the social I need to offer my particular definitions of each of the four components in the crucial 'complex amalgam' that produced the social as a distinct domain.

Politics for this amalgam has two forms. The first is what Schmitt calls 'the political'. It is concerned with deciding at any time who is friend and who is foe and then with the killing of foes (Schmitt 1976). The other face of politics is concerned with a grouping of non-violent activities (administration, discussion, diplomacy, policy formation, etc.) which, Loughlin proposes, 'enables the activity of governing to be effectively conducted' (Loughlin 2003: 39; see also 156-7).

Law for this amalgam is both the *constituting* of the sovereign – the law that was 'created by the secularization, historicization and positivization of natural law', that is, the body of law often called 'public law' – *and* all the laws 'created as a consequence of' the constituting public law, that is, the body of law often called 'positive law' (Loughlin 2009: 5).

Sovereignty for this amalgam has two forms, in much the same way that politics has two forms. The first form is extremely basic and raw yet full of power, while the other is less powerful but more sophisticated and subtle. Here too Schmitt's work is helpful in thinking through what is entailed in the raw form. In short, for Schmitt raw sovereignty is the capacity to decide on the exception, that is, the capacity to make an effective decision (one which is realised) about a situation which has truly broken with what is normal. The exception in Schmitt's hands is not really a matter of rarity, though he does not deny that in practice exceptions are very rare. Rather, the exception effectively defines sovereignty inasmuch as it produces a decision in the fullest sense of that word, that is, the capacity to enforce it (Schmitt 2005: 5). In a concrete setting, Schmitt argues, as opposed to an

abstract definition, the ultimate exception is that which threatens the existence of all protections against the danger of civil war, including the state. By its very nature the exception cannot be dealt with by norms alone for it is precisely that which is not normal, that which the normal cannot possibly anticipate (Schmitt 2005: 5-6). Loughlin (2003: 92) defines the other type of sovereignty as 'an institutional framework established for the purpose of maintaining and promoting peace, security, and the welfare of citizens'. Central to this other type of sovereignty is the proposition Loughlin draws from Hobbes – that the sovereign is always meaningfully, even if minimally, representing those being ruled (Hobbes 1845: 171). This proposition helps to ensure that 'certain standards are attached to, and certain limits imposed on, the office of the representative' and 'that public law deals mainly with duties that attach to such offices' (Loughlin 2003: 57).

Finally, the state for the amalgam is, as Michael Oakeshott puts it, a "somewhat ramshackle construction" born as nothing more than "the activity of attending to the general arrangements of a set of people whom chance or choice ... brought together" in very difficult circumstances (Loughlin 2003: 16, 79, quoting Oakeshott). In this way the state is whatever loose set of institutions and procedures has managed, first, to gain a monopoly on the means of large-scale violence and, secondly, to use this monopoly to institute a form of government suited to achieving civil peace in any particular territory.

I hope it is clear from this that the most powerful element in the amalgam is politics. As sovereignty and the state are reasonably obviously products of the tense relation between politics and law, the main import of this point is that politics is more powerful than law.

Nonetheless, consistent with the idea that politics exercises what I call a restrained primacy, politics can never be so powerful as to violently drive law out of the relation altogether – something which would define a slide into extreme authoritarianism (of which Schmitt has often been accused; Loughlin 2003: 69; see also Pels 1998; Weiler 1994).

Problematic constitutionalist thinking

Taking a lead from Schmitt, Loughlin (2009: 9) problematises ‘the modern tendency to think of constitutions as formal documents. The constitution is assumed to be a text, the text is treated as being a statute, and the constitution is thus, in the course of time, conceived to be a document containing a set of individual constitutional laws’. This is to say that constitutions become ‘relativized’, and as they do their fundamental role in ‘the constitution of the state’ is increasingly ignored.

This all too often leads to ‘the emergence of normativism’. Normativism is the position by which politics, state, and law are all reduced to norms, with the constitution being the most basic norm, the norm by which sovereignty is granted to a supposedly ‘autonomous legal order’, itself of course nothing other than ‘the totality of norms’. As Loughlin helps to make clear, this is extremely problematic thinking, effectively leaving politics, law, sovereignty, and state out of the analysis of the operation of constitutions, or at least taming them such that they are treated as the non-political household pets of a moral discourse. Nonetheless, it is extremely pervasive thinking, to be found, as Loughlin notes

(2009: 9), in claims that ‘the constitutional order expresses the sovereignty of reason or “the rule of law”’.

In locating problematic constitutional thinking in various analyses of global corporate behaviour, particularly in those advocating the idea of global corporate citizenship, Thompson works very much in the context of his longstanding research project (much of it undertaken with the late Paul Hirst) into the extent to which the supposedly epochal change of ‘globalization’ has actually taken place (Thompson 2008: 4; Hirst and Thompson 1996; Hirst, Thompson, and Bromley 2009). Among the main symptoms of the malaise, he argues (2006: 7), are: a commitment to the idea of the constitution as a residue of a fundamental norm (invoking Kelsen’s *Grundnorm*); a commitment to the idea of the constitution as a guarantee of rights; a commitment to the possibility of transnational constitutions; and a commitment to the increasing juridification of politics and even of management.

I realise that the points I have offered so far are little more than indicators, they certainly do not add up to a comprehensive survey of the problematic constitutional thinking in question. This, however, will have to suffice (for recent examples of the problematic thinking in operation, and of its dolorous consequences, see Loughlin 2009: 19-27; Thompson 2006: 5-11; 2008: 17-27). The directions taken by each of Loughlin and Thompson in dealing with the problem are more important to my argument here than are the details of their separate diagnoses.

Loughlin offers three important steps on the road to a better way to think about constitutions. One, ‘the formal constitution is not self-authorising; it is valid only by virtue of an existing political will that establishes it’. In other words, those who dream of a system of rule by which norms comprise the constitution, via the supposedly natural capacity of human minds to rise above politics and positive laws, are simply using the very idea of such a natural capacity as a vehicle for their own political wills. Two, the formal constitution’s ‘validity does not rest – as it might appear to – purely on its normative correctness or its conceptual unity’. Instead, Loughlin insists, constitutions are made valid in a much more ‘material’ way, by which he means that they are valid because they have won validity *in this world*, through politics, not by relying on some supposedly pre-existing universal and timeless set of norms. And three, rather than being a project of codification, “‘the unity of the constitution lies not in the constitution itself, but rather in the political unity, the peculiar form of existence of which is determined through the act of constitution making’” (Loughlin 2009: 10, quoting Schmitt). This, to me, is a point aimed squarely at the ‘de-tethering’ aspect of the problematic thinking, its attempt to grant to constitutions a bedrock ontological status, as a part of human nature, alongside and closely related to humans’ supposedly natural capacity to rule themselves without politics, law, sovereignty, and state.

Thompson confronts the problematic thinking in a blunt empirical way. Referring to global corporate behaviour generally, he says that ‘there is not as yet much specific and *formal constitution building* going on in this area’. He challenges those promoting this idea to show that it is actually happening (2006: 7, emphasis in original; see also:

Thompson 2008: 6) and he challenges those who ignore the lack of empirical evidence and who push on with their arguments by using Kelsenian theoretical formulations about constitutions being the expression of norms and/or Teubnerian theoretical formulations about the inexorable march of juridification (2006: 8-11; 2008: 17-27).

The troubled category of social citizenship

Two of the longest-running debates about citizenship – going back to at least the seventeenth century (with some aspects going back to ancient Greece and Rome) – are debates between a state-under-sovereignty camp and a rational-republican camp. In one of these long-running debates, on the very nature of citizenship, the state-under-sovereignty camp focuses on the duties and obligations of both sides of the ‘citizenship pact’ (the sovereign on one side, the citizens on the other), while the rational-republican camp focuses on the rights of citizens. In the eyes of rational-republican thinkers, such rights provide the very *raison d’être* of sovereignty, which, for them, can never be more than the expression of the will of the citizens, or at least the will of those of the citizens who have sufficiently realised their natural potential, as moral rational beings, as to be capable of not only governing themselves but, alongside other fully-realised moral rational beings, of forming and/or informing the government of those not so capable.

In the other long running debate, on the best means of citizen formation, the state-under-sovereignty camp has it that ideal citizens are those trained to obey the sovereign (provided that the sovereign – whether individual or assembly – continues to provide

them with protection from external threat and from the dangers of civil war) and, if called on by the sovereign, to advance the interests of the state-under-sovereignty, even if it means giving up their lives. The rational-republican camp, on the other hand, has it that ideal citizens are those humans who are formed by nature as rational self-governing creatures, with natural virtues, towards their task of governing themselves and governing those who are not so capable.

In the 2006, 2008, and 2009 papers I referred to earlier, Thompson carefully establishes the proposition that there is no reason that the label 'citizen' should not be applied to corporate entities in the same way that it is applied to individuals. He makes plain that the great majority of contributors to the debate about global-corporations-as-citizens take up the rational-republican cause, as is the case with debates about citizenship more broadly. For this majority, certain multinational corporations and their employees are potentially global citizens because they advance the rational-republican ideal of (self-) government by enlightened groups and individuals. In particular, Thompson describes (2006: 3-4; 2008: 11-15) the way in which these multinational corporations have started, within the last ten years, to speak publicly about 'their promulgation of internal standards associated with ... [heightened] ethical, environmental and working conditions', towards the goal of 'a new global civic society'. In other words, the idea of global corporate citizenship is part of a larger idea: social citizenship. For social citizenship, *the social itself* (or 'society') is the force that guarantees citizenship, not politics, law, or the state. It is as if the social has been granted sovereignty.

Thompson (esp. 2008: 4-5) is dubious about the extent to which such corporations are actually 'global' (as I said earlier), dubious about the extent to which any of them are the 'good citizens' they claim to be, and just as dubious about the idea that citizenship can have any real meaning beyond the particular territories/jurisdictions that traditionally formalise it. Nonetheless, he chooses to gently counter the predominance of rational-republican thinking, on both the 'what is citizenship?' question and the 'how best are citizens formed?' question, by simply highlighting some state-under-sovereignty alternatives (see esp.: 2008: 27-30). On one occasion, for example, he recommends to those advocating citizenship status for global corporations that such corporations might need 'not only to perform friendly good works and civic duties but also "to come to the aid of the state when threatened"' (2009: 17, quoting Skinner).

While I agree totally with Thompson about the feasibility of applying the label 'citizen' to corporations, I feel the need to speak more forcefully than he does to the rational-republican majority, particularly because I wish to highlight the problems with the category of social citizenship that this majority relies upon. For me, citizenship exists in its present form *only* because of the emergence in early modern Europe of the amalgam of politics, law, sovereignty, and state described earlier. Hark back all they will to the forms of citizenship operating in ancient Athens or ancient Rome (more often than not ignoring the fact that these forms were entirely dependent on slavery and were so restricted that there were never more citizens in either of these city-states than would fit today on one side of any good-size football stadium), the advocates of social citizenship cannot change this pressing condition of operation.

State-under-sovereignty citizenship is simply the expression of the pact that Hobbes keeps talking about – whereby individuals and groups become subjects of the sovereign by either willingly agreeing to give their total obedience to the sovereign in exchange for the sovereign’s protection from external and internal threat or by having such agreement foisted upon them because enough of their fellow individuals and groups have so agreed (Hobbes 1845: 162).

It is certainly the case that forming individuals and groups into state-under-sovereignty citizenship has always been a complex business. However, the complexity of citizen formation, whether in the seventeenth or the twenty-first century, does not alter the fact that citizenship is, at its core, nothing more, and nothing less, than the operation of the pact that helps the politics-law-sovereignty-state amalgam to serve as the basis of civil-peace rule and, crucially, the basis of the social.

Conclusion

I wish to use my conclusion to say something about what I call the false grandeur of the social. In short, the advocates of social citizenship are deluded by this false grandeur. The social has never been anywhere near robust enough, even at its strongest, to survive without the ‘big four’ – politics, law, sovereignty, state.

So, while we might sensibly think of state-under-sovereignty citizens, in being formed in ever more complex ways, as protectors of the social – which is, after all, a domain produced and protected by state-under-sovereignty arrangements – they are only ‘social citizens’ *because of* the operation of state-under-sovereignty arrangements; without these arrangements there would be no citizenship and no social.

The advocates of social citizenship do not recognise this vital condition of citizenship and of the social, for they do not recognise the constraints of politics, law, sovereignty, and state. Instead, they allow themselves the luxury of thinking that the social is a strong, totally independent domain, above politics, law, sovereignty, and state.

Who could capture the spirit of this type of thinking better than Kant?

“The history of the human race as a whole can be regarded as the realisation of a hidden plan of nature to bring into being an internally – and for this purpose also an externally – perfect political constitution, as the only condition in which she can fully develop all of her capacities in mankind” ... the perfect republican constitution – in which citizens govern themselves through public laws executing their own common will (Hunter 2009, quoting Kant).

In the light of these observations, it has to be said that social citizenship is a category which has to be handled with such delicacy that it is not worth pursuing. It is unsustainable.

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