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*Beyond the Washington Consensus -
Governance and the Public Domain in Contrasting Economies:
The Cases of India and Canada*

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GOVERNANCE: CIVIL SOCIETY, THE STATE, THE ECONOMY

Harry Arthurs

*York University
Toronto, Canada
email: harthurs@yorku.ca*

1. Introduction: Contrasting Economies, Converging “Governance”?

This is a conference about two contrasting economies, and by extension, about two very different societies, cultures and polities. More specifically, it is about the ways in which the public domain has fared in these contrasting economies and different societies during the two decades dominated by the so-called Washington consensus, the powerful ideas of neo-liberalism and globalization. But while an assessment of the Washington consensus is central to the agenda of this conference, it is more in the nature of background to my assigned topic: governance. Consequently, I will provide that background in the form of four preliminary observations about the past, present and future of globalization and neo-liberalism. First, neo-liberalism and globalization have affected most countries in the world profoundly but in very different ways. Second, neo-liberalism and globalization have produced both winners and losers but in a somewhat unpredictable fashion: even in countries where some elites have prospered enormously, other elites have seen an erosion of their social, economic and political capital; even in countries where some workers have been exploited ruthlessly, others have gained higher wages and greater rights. Third, global economic activity may come to be more intensively regulated, if only for its own good, and neo-liberalism may adopt a more humane aspect; but both will thereby be strengthened rather than weakened or transformed. In other words, neither globalization nor neo-liberalism will disappear any time soon. And fourth, the success of the Washington consensus resides not so much in the fact that it has achieved a re-distribution of global economic and political power, but in the fact that it has fundamentally revised what we “know” and what we value - the epistemological and ethical assumptions underlying “expert” analysis, the vocabulary of politics, and the conventions of governance.

My task is to examine what our two countries, Canada and India - with their “contrasting economies”, and their very different encounters with the Washington consensus - have to say to each other about governance. At first blush, governance might seem to be an important point of convergence, not divergence, between Canada and India. After all, both countries are federal parliamentary democracies whose formal institutions - parliament, the courts, the civil service - were shaped in an early era of globalization by British mercantilism and colonialism. In both countries, these same institutions are still struggling to define their relationship with each other and to adapt the constitutional conventions inherited from Westminster to local realities. Of course, each of our countries adapted in ways which reflected our special cultural, historical, geo-political, material and temporal circumstances. India in particular - the pioneer of post-war post-colonial societies - made fairly radical adjustments to the Westminster model.¹ Nonetheless, similarities persist. Long after independence, governmental institutions in both countries are still preoccupied with problems directly attributable to their colonial inheritance - with nationalism, ethnic conflict, religious sectarianism and threats of secession, and with more contemporary and universal issues such as prosperity, social justice, the environment and, of course, globalization and neo-liberalism. Why, then, is governance in India and Canada so very different?

While the *formal institutions of governance* which we inherited from the United Kingdom have changed somewhat, the *practice of governance* has been constantly and profoundly reshaped by the dynamic forces of political economy which distribute and redistribute functions amongst state and non-state sites of governance, including civil society, markets and supra-state institutions. This redistribution has resulted in governance being conducted in ways which bear little resemblance to the formal assumptions which govern modern, liberal democracies, in which the state supposedly enjoys the exclusive right to govern. And this disjuncture between formal and practical governance has led, in turn, to the emergence of a new *conceptual vocabulary of governance*. This vocabulary rests on two developments. The first is the emergence of considerable empirical evidence that normativity - the creation, promulgation and enforcement of rules governing human conduct - is not unique to the nation state, but rather is characteristic of all social fields.² The second builds on the first. To claim that the state has a monopoly of governance functions not only assumes as inevitable what is historically and culturally

¹U. Baxi, “Acquisitive Mimesis in the Theories of Reflexive Globalization and Politics for Human Rights” (University of Chicago, Humanities Institute, 1996, unpublished).

²Galanter?

contingent; it masks the existence of other sites and structures of power which “govern” us as effectively as the state itself, if not more so. This characteristically postmodern analysis has given rise to an extensive literature focussing on “the microphysics of power”.³

To summarize the initial argument of this paper: we have revised our understanding of what governance is and how it operates, not merely as a result of changes in formal governance structures, but especially as a result of change in political economy and in social theory. That is why, despite the formal similarities between our two systems of state governance, they differ so considerably. The next question to be addressed is whether in the era of the Washington consensus, or in the post-consensus era, if that is where we are, we are likely to see greater convergence or greater contrast in the governance of India and Canada. One way to answer that question is to ask how the governance of the public domain is being conducted in each country.

2. The changing discourse of the “public domain”: globalization, technology, neo-liberalism

Neither my own allusive and metaphoric account of the public domain through history⁴ nor more explicit attempts at definition,⁵ give the term a great deal of precision. However, making a virtue of necessity, let me note that the idea of the “public domain” is as creatively imprecise, and as hotly contested, as the notion of “governance” itself. The public domain - our common goods and spaces - stretches across state, civil society and markets but cannot be conflated with any of them; it embraces multiple, dynamic social fields each of which generates its own normativity but also interacts with others; and our encounters with the resulting internormativity⁶ in effect constitute our experience of governance. To describe the governance of the public domain in India or Canada is therefore a formidable task; simple, stipulated definitions will not bring us any closer to understanding. It is better to acknowledge the inherent open-endedness of the questions we have set ourselves: how has governance - in all its manifestations - been changed by neo liberalism, globalization and the other forces associated with the Washington consensus?

³P. Miller and N. Rose, “Governing Economic Life” (1990) 19 *Economy & Society* 1 at 8.

⁴H.W. Arthurs, “The Re-Constitution of the Public Domain” in D. Drache and R. Higgott (eds.) *The Public Domain After the Triumph of Markets* (London: Routledge) (forthcoming).

⁵Drache, Intro to book

⁶Cite Belley on Internormativity

Thirty or forty years ago, most “right thinking people” believed that unregulated markets produced outcomes which were often unfair and sometimes inefficient; that in the interests both of social justice and of the economic growth needed to sustain it, the state should govern the economy by either displacing markets or stimulating, stabilizing and regulating them; that the international economic order should make it possible for states to undertake this important work; and that domestic constitutions and legal regimes should limit state action only so far as necessary to protect individual liberties or to ensure communities their fair opportunity to contribute to and benefit from state interventions. In short, to speak of “governance” was to speak of state action, and in the social democratic/social market idiom, to speak especially of robust state action.

But now the discourse has changed. States, we are told, have failed to do what social democrats and the architects of the social market imagined they could do. In fact, many of their well-meaning initiatives are now alleged to have been counterproductive. By interfering with the discipline of markets, states distorted economic development, imposed disabling burdens of taxation and public debt on successive generations, exacerbated unemployment and promoted ruinous inflation. By providing a social safety-net, they stifled the individual initiative and enterprise of the well-to-do and the middle class and perpetuated the passivity and dependency of the poor. And by their egregious intervention, they created new opportunities for rent-seeking by politicians, public servants and privileged client constituencies.

From these premises, a number of prescriptions conventionally flow: states should abandon market regulation and other social democratic/social market strategies; governance should cease to be the monopoly of the state; and vestigial state governance functions should focus primarily on creating optimal conditions for the operation of “free” markets. Thus, the neo-liberal state implies the adoption of new strategies of governance: state powers must be constitutionally constrained so as to permanently privilege private over public actors and forestall any backsliding in the direction of social democracy; where state functions are retained in order to impose public order, provide infrastructure or maintain financial integrity, they should be provided cheaply and efficiently; and all “non-essential” welfare, security, service and production functions of the state should be privatized, with the state performing - at most - some residual monitoring functions.

Of course, it is one thing to prescribe such changes, quite another to actually adopt and implement them. While some countries - Chile, New Zealand and the United States, for example - have gone much farther than others, neo-liberal governance is still far from fully realized anywhere in the world.

Moreover, such changes in the actual practice of governance did not result only from displacement of the paradigmatic assumptions of social democracy and social market programs by the ascendant forces of neo-liberalism. A number of other factors were at work de-linking state and governance.

To begin, information technology has created a series of paradoxical outcomes which have at once undermined and reinforced the state's capacity to intervene. Technology has dissolved "natural" monopolies - both state and private - and made competition a realistic substitute for regulation; but it has also facilitated the growth of new ("unnatural?") monopolies by using start-up capital, intellectual property rights and global "branding" as barriers to market entry. It has extended the capacity of governments to maintain surveillance and control; but it has also enlarged the ability of citizens and corporations to escape surveillance and challenge control. And it has endowed corporations with the means to delegate decision-making functions to directors and managers located around the world - even to ordinary workers using sophisticated information systems; but it has also reinforced the temptation to use the same means to tighten the grip of head office over all aspects of corporate policy and workplace activity. While I will not proffer real-life examples of each of these contradictory developments, I do want to note that each of them challenges traditional strategies of public and private governance.

Technology, in turn, has enabled the spatial reconfiguration of both markets and governance structures in ways which have made it inconvenient, not to say impossible, to confine governance functions to the nation state. The globalization of markets, market processes and market actors requires that to be effective, regulation must reach beyond national borders. However, national and international law both make such regulatory outreach juridically problematic. True, states have jurisdiction over their own citizens and residents - at home or abroad - and by extension, over corporations they have chartered or ships flying their flag. But domestic courts will not read national legislation as if it were meant to operate extraterritorially, unless there are express provisions to that effect; and international law is reluctant to support attempts by one country to regulate or tax its own nationals when they are subject to the laws of another country. State regulation of the activity of transnational corporations is also problematic in a political sense. Corporations which are either physically present in their "home" state, or doing business abroad subject to its extraterritorial reach, can deflate its regulatory ambitions by threatening disinvestment. Indeed, they need not even threaten. The adoption of aggressive regulatory or tax policies by any state will likely be punished promptly by the money and currency markets, condemned by the IMF and stigmatized by the OECD. And

finally, regulation of corporations is problematic in a practical sense. Polluting or exploitative corporations, money launderers, renegade stockbrokers and vendors of sex or arms can and do evade regulation by moving their operations across boundaries either physically or electronically, thus placing them beyond the reach of state authorities in the countries where their wrongful behaviour has its consequential effects. For all of these reasons, then, global market activity and actors lie to a considerable extent beyond the regulatory reach of national governments.

Finally, technology did not emerge spontaneously. Obviously, human and corporate agents were indispensable. But most technological advances, ironically, were made possible because states subsidized them through military or geo-political programs, through subventions to universities and research centres, or through tax expenditures and enhanced protection for intellectual property rights which effectively made corporate R and D not only possible but highly profitable. This is not to contend that corporations were the sole beneficiaries of the great scientific or technological advances of the past hundred years, and certainly not to argue that global capitalism invested in R and D with the express purpose of frustrating state regulation or defeating the state's power to tax. Nonetheless, it is certainly true that globalization, neo-liberalism and the digital and bio-technical revolutions have coincided in time, and that their temporal convergence has forced choices on the state which favour especially - if not exclusively - the interests of transnational corporations, their allies and clients. Those pressures, in my view, at the very least inhibit the state's inclination or capacity to serve as custodian of the public domain.

My view, of course, is a pessimistic view of the fate of the state and its implications for the public domain. But there is an optimistic view as well, which comes in three versions. Some optimists argue that neoliberalism has not in fact produced the dramatic consequences which its proponents desired and its critics feared; some that we have entered a new era - the "post-Washington consensus" - when predatory capitalism is being replaced by more responsible corporate behaviour, and purely economic versions of neo liberalism by mutant strains which are more hospitable to humane social and political values; and some that globalization and neo-liberalism have energized and empowered popular opposition movements around the world, which - thanks to the internet and CNN - now have the capacity to bring repressive regimes to their knees, to disrupt international negotiations such as the MAI or the Seattle round of the WTO, and to hold corporations accountable for environmental depredations and the exploitation of labour.

The evidence mustered by the optimists certainly deserves careful attention. Daniel Drache, for

example, has noted that state expenditures on welfare, health and education have actually increased - not decreased - over the past decade in most OECD countries. At least in the context of North America and Europe, he argues, the welfare state survives intact, albeit somewhat slimmed-down.⁷ Other studies reject the notion that the state has retreated from intervention in the marketplace, and point to the persistence of strong regulatory tendencies especially in Europe, even during the period of neo-liberal ascendancy.⁸ And as for globalization, while the volume and volatility of trans-border transactions have increased spectacularly over the past two decades, much of this increase, strictly speaking, is neither global nor trade. It occurs between - and especially within - the powerful regional trade blocs of North America and Europe;⁹ its most dramatic manifestations are flows of capital engendered by short-term currency and stock market speculation; and much of the balance consists of intra-firm transfers, or moves along production and distribution chains controlled by a limited number of transnational corporations which have largely retained their national character and affiliations.¹⁰

There is, then, some evidence that the effects of both neo-liberalism, globalization and technology may have been overstated, that the nation state has not been “hollowed out”, that its capacity and appetite for intervention remain fairly robust and that the apparent crisis of governance - if it indeed exists - must be explained by reference to other factors. However, the evidence is far from conclusive. Significant problems of methodology and interpretation remain. For example,

should we measure fluctuations in levels of state activity in terms of inputs: dollars spent, civil servants employed, pages of legislation enacted? Or should we look to outputs: patients seen in hospital, levels of post-tax economic inequality, cases of water contamination detected? Or should we respond to highly impressionistic, non-quantifiable measures: burdens of tax and regulation as perceived by the business community, changes in access to public goods as perceived in opinion polls by citizens? And how should we calibrate or benchmark inputs and outputs? By reference to our own country’s state sector during the “golden era” of the postwar Keynesian welfare state? Or to that of all other countries during the present, non-golden era? Or only to OECD countries? Or in the case of Canada, to both our NAFTA partners or to our sole

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⁸Cite EU studies - see also Daintith

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¹⁰Gillies, other?

“relevant other”, the United States? And finally, can we ever reliably measure the future effects of present policies on our quality of life? Many of the consequences of neo-liberal policies introduced in the 1980s and 1990s will become visible only in future decades, because they flow from decisions to cap future spending increases rather than to reduce current expenditures, to shift the cost burden over time from the state to individuals, and to privatize public services such as universities, public utilities and prisons. For all of these reasons, it is hard to know whether reports of the triumph of neo-liberalism are erroneous, understated, premature or merely conjectural.

When we come to consider whether states have indeed been disempowered by globalization, we confront equally daunting questions of definition and evidence. Of some developments, there can be little doubt: that international money markets have grown spectacularly; that they exercise a powerful discipline over the fiscal and monetary policy of virtually all states; that they have been crucially important in the consolidation of corporate wealth and power; and that this corporate consolidation has had the effect of transforming many independent local businesses either into the subsidiaries of transnational corporations or into links in their production and distribution chain. I have elsewhere argued that, at least in the Canadian case, this process has operated to the prejudice of local business elites, which in turn has reinforced U.S. influence over our public policy, and potentially impoverished our civic culture and community life.¹¹ Perhaps elsewhere - the Netherlands? Finland? Taiwan? Mexico? - the catalytic effects of globalization have produced more clearly positive results. Perhaps anyway the fate of business elites is not a matter that we ought to be concerned about, at least if we believe that the deep logic of capitalism ensures that they will pursue the same business strategies, whichever corporation they work for, and whatever its “national” provenance.

Equally puzzling is the question of whether the Washington consensus - which embodies, inspires and advances neo-liberalism and globalization - is indeed being transformed and whether, as Drache,¹² Marquand¹³ and others have argued, a new conception of the public domain is gaining traction. True, there has been a change in discourse, as former adherents to the Washington consensus have started to emphasize the importance of human capital, social development, environmental responsibility, honest and efficient governance, democratic

¹¹“The Hollowing Out of Corporate Canada”

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development and the rule of law.¹⁴ But it is by no means clear whether global capitalism is actually acquiring a human face, or whether its new rhetoric is designed merely to camouflage the predatory practices of the powerful institutional, corporate and sectoral actors which dominate the world economy.

Causation is even more difficult to determine. If the Washington consensus actually is transforming itself, is it doing so because global capitalism has willingly embraced - out of conviction or for reasons of self-interest - the values of democracy, social justice and environmental responsibility? or because it is reacting to pressure from social activists and aroused citizens? or because governments - the original shapers of the consensus - feel that they can no longer be seen to abdicate to the World Bank and the WTO, the OECD and the G8 responsibility for the well-being of their communities and countries? This last possibility brings us full circle, to the issue of states and governments.

3. The changing discourse of state, government and politics: place and identity

The state is not what it used to be; nor is government; nor is politics.

Many countries have experienced the emergence of a new politics of place. State power is no longer consolidated in the hands of the central government, and political cultures have become more polymorphous - and perverse - than they used to be. The relocation of constitutional power and political energy to sub-national units of government has occurred for various reasons: because cultural, religious, ethnic or linguistic minorities became estranged from national governments; because local regions generated their own space-economy based on an historical sense of solidarity, complementary patterns of development or physical resources; because forces opposed to strong state intervention used constitutional or political strategies to win devolution of powers to subnational units - provinces, states, *länder*; or conversely, because activist local governments were able to use constitutional or political strategies to gain the power to do what neo-liberal national governments refused to do. However, although state power may have devolved to sub-national units in many respects, it does not follow that they also possess the capacity to use that power. Sub-national units often lack sufficient financial and technical capacity to carry out significant schemes of social welfare or economic restructuring. This tendency has had important side-effects in Canada, whose sense of national identity is closely intertwined with practical national projects such as the building of the railroad and the postwar

¹⁴Cite Wohlfenson, Soros etc.

welfare state.¹⁵

Moreover, because the political events which led to this constitutional realignment are often divisive and disruptive, sub-national units and political movements closely aligned with them may be less than credible when they attempt to deal with issues which have a national or transnational dimension. Indeed, for the same reason, they cannot rely on the cooperation of other units and groups, especially that of the national government whose powers they have eroded. The result is a kind of constitutional hiatus: neither national nor sub-national governments can act authoritatively on many matters. And a parallel political hiatus: national parties cannot forge a national consensus, while sub-national parties cannot form effective alliances with other actors.

The new politics of place have combined, in turn, with the new politics of identity - language, race, gender - to confuse, and to some extent to trump, the politics of class. This has lead especially to a weakening of labour movements and of political parties of the left and centre-left with which labour has been traditionally aligned. This decline has been exacerbated by a growing popular mistrust of the state, of *dirigisme* and neo-corporatism, of rule by experts, *enarches*, mandarins and professionals. This mistrust largely animates right wing populist movements, but it also divides what might otherwise be an emerging “new left” coalition of state clients and marginalised communities - aboriginal peoples, welfare recipients, farmers and fishers and environmentalists.¹⁶ Finally, the decline of class-, rights- and interest-based left and centre-left politics has coincided with the decline of broad-based political coalitions in general - the New Deal Democrats in the United States, the Congress Party in India, the Christian Democrats in Italy, and the Progressive Conservatives in Canada all come to mind. Indeed, reinvented or reconfigured versions of such coalitions - the “third way” of Clinton, Blair and Schroeder; the Canadian Alliance Party; the Olive Tree coalition in Italy - may have been initially successful, but there is a growing doubt about their long-term viability.

Ultimately, the problem may be less a matter of creating or recreating political parties than of combatting widespread disinterest in both parliamentary politics and other forms of civic participation.¹⁷ This disinterest is as evident in newly-democratic states such as Russia and

¹⁵Jenson

¹⁶N. Klein {column on the NDP: title?} Globe and Mail Dec. 20, 2000 p. A?

¹⁷Putnam

South Africa, as in mature democracies such as the United Kingdom and the United States. Nor have the politics of elite accommodation fared any better. National elites have been disempowered by globalization, divided by the politics of identity and place and discredited by a rising tide of populism. As a result, government by “the best and the brightest” - no less than electoral politics - is in disarray in many countries, India and Canada not least.

And now to make the obvious point: the constitutional and political stasis which has disrupted the dynamic of the activist state, the erosion of support for its proponents and programs, the estrangement of ordinary citizens from the political process has created positive conditions for the triumph of neo-liberalism. In the case of Canada, at least, these factors loom as large as technology, globalization and neo liberalism itself in what some would argue is a crisis of governance.

4. The changing discourse of law, regulation and governance

The crisis of governance can be understood at one level as the product of exogenous forces, especially neo-liberalism, globalization and technological change. But it can be understood also as the product of internal forces, which have placed the institutions and processes of the state under great stress. In liberal democracies, we conventionally assume that governance emanates from governments in the form of laws. The legislature enacts laws, the courts interpret and apply laws, and the executive administers laws. Although it is widely understood that all three branches of government engage in symbolic and practical forms of governance which belong to other branches, or which are not captured at all by the conventional formulation, we still tend to think of these law-driven activities as constituting the “governance” process of the modern, democratic state.

This tendency reaches across the broad middle of the political spectrum. Social democrats, progressives, centrists and many conservatives share the underlying conviction that the purpose of government is to govern, to advance the public interest, and to provide and distribute public goods: to protect and enhance the public domain. While they may disagree about what the public interest is, about what goods are best considered public as opposed to private, and about the modalities of state governance, they all acknowledge that the state plays a dominant, arguably exclusive, role in governance. The position of Marxists is somewhat more ambiguous. They believe that the dominant social and economic forces in society govern through their control of the machinery of the state. They further insist that formal constraints on the state and the ruling class - electoral democracy and the rule of law - are significantly compromised by an

unequal distribution of wealth and power. They are therefore alert to detect the exercise of power - of what we might call governance - not only by and through the state, but especially within the deep structures of social relations. This sceptical view of the state's monopoly of governance is shared, oddly, by neo-liberals, especially those who espouse public choice theory. Beginning from the assumption that value-maximization is the dominant, if not the sole, motive of social actors, public choice theory explains the behaviour of politicians and public servants as rent-seeking on their own behalf or on behalf of their clients and constituents. Nonetheless, for both Marxist and neo-liberals, as for centrists and social democrats, the question is not so much whether the state governs, but how and on whose behalf.

Inevitably, therefore, considerable attention is paid in this era of the post-Washington consensus, to the mechanisms of state governance, as opposed to the mechanisms of market governance or public domain governance. The rhetoric is instructive. Appeals for attention to "good governance" and "institution building" emphasize the reform of the judiciary and public administration to ensure honesty, competence and efficiency - not reform of corporate management or improved access to financing for village cooperatives. A commitment to "the rule of law" means compliance with constitutional norms mandating free elections and judicial review of legislative and executive action - not stricter compliance by corporations with labour and environmental laws. Respect for "democratic rights" is usually understood to include guarantees of the right to vote freely for the party or candidate of one's choice - not access to public funds for protest parties seeking to challenge entrenched aggregations of wealth and power; And substantive "due process" refers to protection against uncompensated "regulatory takings" by the state, not against uncompensated loss of one's farm or job due to the restructuring of the economy.

Moreover, it is not just that the post-Washington rhetoric about law and democracy focusses largely on the reform of state governance, and hardly at all on the reform of market governance. It is that the reform of state governance so often takes the form of constitutional and institutional arrangements designed to ensure that the "reformed" state does not ever again become the activist state. To be fair, this view of "reform" is not confined to neo-liberals in their pre- or post-Washington incarnation. Partisans of all political stripes may be tempted to try to bind the hands of future governments through formal, structural and processual changes in the state which deprive it of the ability to govern any other way, which immunize the state from the effects of long-term shifts in public opinion and political power. Canada, for example, has seen at least three recent expressions of this impulse to constitutionalization: the adoption of a Charter of Rights and Freedoms, which included both individual rights and rights for certain specified

groups, especially aboriginal peoples and linguistic minorities; the unsuccessful attempt to add a new “Social Charter” which would, in effect, have welded the welfare state into our fundamental structures of government; and the equal but opposing movement to make it difficult or impossible for governments to run deficits, interfere with property rights or raise taxes - in effect with the aim of guaranteeing the permanent ascendancy of neo-liberal orthodoxy over the Keynesian heresy.

Some constitutional initiatives are more procedural than institutional, though the aim is much the same: to entrench a certain view of governance within the structures of the state. For some, the executive (which is variously deemed either too active or too passive) has come to dominate the legislature; hence the legislature should be restored to its rightful place as the dominant branch of government through the introduction of free votes, parliamentary review of judicial and executive appointments and other accountability measures, and fixed parliamentary terms. Depending on one’s political views, the Canadian state is too powerful or too passive: hence efforts have been made to shift power from the state to the people through various forms of direct democracy such as referenda and recall elections; or from one branch of government to another: from the representative lower chamber to an upper house where the provinces have equal representation, or from parliament to the courts. The federal government, it is contended, is too remote or too responsive to voters in other parts of the country who are not “like us”; power should therefore be devolved to supposedly more accessible provincial governments, to city-regions or to the communal institutions of aboriginal nations.

It is hardly surprising that at a time when neo-liberalism is still ascendant, many (not all) proponents of these constitutional and institutional changes anticipate and intend that they should weaken the capacity of governments to intervene effectively in the economy. And here is the link to globalization. Some of its most enthusiastic supporters hope to achieve similar outcomes, but by imposing constitutional and institutional constraints on the state from without, by treaties, rather than from within, by legislation. This approach has several attractive features from their point of view. Despite recent controversies over the FTA, the MAI and the WTO’s Seattle round; international matters have seldom determined the outcome of Canadian elections;¹⁸ foreign policy and trade negotiations are pretty much in the hands of the executive,

¹⁸Even in 1988, when the incumbent Conservatives were widely condemned for negotiating the Canada-US Free Trade Agreement, precursor to NAFTA, they won reelection with a handsome majority. And though they were virtually obliterated in the next election by the Liberals- who ran on a platform which called for renegotiation of the FTA - the agreement has been accepted by virtually everyone as a fact of life, with which successive governments would tamper at their peril.

and consequently relatively immune from legislative oversight or judicial review; ongoing administration of treaties can be treated as involving sensitive matters not appropriate for public scrutiny; and the substantive outcomes of treaties can be presented as complex, irreversible and even inevitable, in light of geo-political developments, *forces majeurs* or over-arching national interests. In effect, then, constraints on state action embedded in international arrangements in fact come to be regarded as virtually unalterable.

Indeed, there are juridical reasons for regarding treaties as the near-equivalent of constitutions. By adhering to international treaties or joining international organizations, states legally bind themselves to use their powers in certain ways and to abstain from using them in others. In certain circumstances, international treaties automatically take precedence over domestic law; in others, implementing legislation is needed to accomplish this result; in still others, treaties merely provide a context within which national law will be construed and applied; but in none are international obligations without legal significance. True: states have the right to resign from international organizations or abrogate treaties; true, if they violate their international commitments, there may be no practical means to hold them to account; true, encounters with international law may be too sporadic to confer on them the same formative influence as domestic constitutions. Nonetheless, so long as states choose to remain bound by treaties - and they may have no practical alternative - international commitments trump state law. In that sense, it is possible to treat international regimes as the functional equivalent of a domestic constitution, operating either juridically, or as "conditioning frameworks",¹⁹ to shape national policy.

The ambitions of these international regimes vary considerably. Many of the most sophisticated and effective are concerned with banking, intellectual property, air traffic, technical standards and trade; but others fight crime and corruption, protect the biosphere and advance universal human rights. Likewise their membership. Some - such as the UN - embrace virtually all states; some - such as the OECD or the G8 - operate as exclusive clubs; and the EU - the most effective, with its own parliament, court and bureaucracy, central bank and currency, social and cultural policy, foreign policy and defence force - seems to be emerging as a federal super-state.

While the EU may be unique, however, international regimes are frequently described in language which analogizes them to the legislative, judicial and executive organs of the nation state. The WTO, for example, has been described as "the constitution of the global economy".²⁰

¹⁹Grinspun and Kreklewicz

Multilateral treaties, universal conventions and customary international law are conventionally analogized to state legislation and common law; the World Court, the new International Criminal Tribunal and the WTO's arbitral and appeal tribunals are perceived by some as the nucleus of a transnational judiciary; UN peacekeepers as international "police", and so on.

However, these analogies are far from perfect. International or transnational "laws" usually become effective - legal and operational - only when they have been ratified by the legislature and implemented by the executive; international bodies typically lack the means to coordinate policy across different domains - trade and labour rights, for example; and have few if any operatives to implement their ongoing policies or monitor compliance over the long term; international tribunals have limited power to proceed against non-consenting litigants; and little by way of coercive power to enforce their "legislation", "judgments" or "findings". And, fatally, international regimes typically lack a democratic mandate: there is no global constitution, no global political process, no global mechanisms of accountability.

But perhaps we should not place too much emphasis on the absence within the international sphere of state-like structures. After all, in the 17th century, when the Treaty of Westphalia was signed, states themselves often lacked such structures: they had no parliaments; their courts decided little of consequence; they leased out the right to harvest taxes; they hired or borrowed foreign regiments to fight international foes and domestic dissidents; they entrusted the barebones apparatus of state to a few score civil servants; and they raffled off the acquisition and management of empires - including India and Canada - to investment syndicates. Nonetheless, three or four centuries later, we have (or had until recently) effective nation states; and one day nation states may yet be superceded by effective international regimes. Assuming that day comes, what will it mean for governance?

5. The Changing Discourse of Governance: The De-centering of the State

To this point, I have tried to described the travails of the state in the world of international economics, politics and law. However, the state has come under attack on a second front, the world of social theory, inquiry and discourse. The very notion that states possess power and can use it purposefully has been put into question by a protracted intellectual and ideological debate around the notion of "governance". That debate hinges on the crucial issue of whether we ought to think of governance as the exclusive prerogative of states, of governments; or whether we ought to use the term more broadly, to embrace to all institutions, processes and actors who shape human conduct.

Scholars have for some time now been sceptical about the extent to which states actually do “govern” in the sense that they are able effectively to control the behaviour of markets, citizens and communities. Essentially, this scepticism derives from the repeated observation that a significant gap exists between what state laws prescribe and their actual consequences.²¹ At one level, this observation grounds what is now regarded as an almost self-evident truth: that the forces which shape people’s conduct tend to be social, economic, political and cultural rather than legal. At another, it has produces a more complex and controversial corollary: that the state is not the sole site of governance, that its centrality in our political and legal discourse is a matter of historical and cultural contingency, and that “governance” is in fact generated discursively, by non-state actors using a plethora of normative, tutelary and coercive technologies .²² Thus architects, banks, insurance companies, private security forces, standards organizations and social work agencies all in some way or other “govern” in the sense that they define, promote and enforce standards of conduct. Their “technologies” extend to:

...humble and mundane mechanisms...techniques of notation, computation and calculation; procedures of examination and assessment; the invention of devices such as surveys and presentational forms such as tables; the standardization of systems for training and the inculcation of habits; the inauguration of professional specialisms and vocabularies; building design and architectural forms - the list is heterogenous and is, in principle, unlimited....²³

In this view of governance,

...[t]he classic terminology of political philosophy and political sociology - State v Civil Society, public v. private, community v. market and so forth - is of little use.... Such language always needs to be investigated, to the extent that it functions ... within political rationalities and political programmes, providing them with an ethical basis and differentiating the legitimacy of varied types of governmental aspiration. But at the

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²²See e.g. J.L. Campbell, J.L. Hollingsworth & L.N. Lindberg (eds) *Governance of the American Economy* (Cambridge: Cambridge University Press, 1991); N. Rose, “Government, authority and expertise in Advanced Liberalism” (1993) 22 *Economy & Society* 283; J. Matlary, “New Forms of Governance in Europe? The Decline of the State as the Source of Political Legitimation” (1995) 30 *Cooperation and Conflict* 99; B. Jessop, “Capitalism and its Future: Remarks on Regulation, Government and Governance” (1997) 4 *Rev of Political Economy* 561; G. Stoker, “Governance as Theory: Five Propositions” (1998) 50 *Int’l Social Science Journal* 17; J. Simon, “Law after Society” (1999) 24 *Law & Social Inquiry* 143; J. Freeman, “The Private Role in Public Governance” (2000) 75 *NYU Law Review* 543.

²³P. Miller & N. Rose, “Governing Economic Life” (1990) 19 *Economy & Society* 1 at 8.

technical level, operationalizing government has entailed putting into place, both intentionally and unintentionally, of a diversity of indirect relations of regulation and persuasion that do not differentiate according to such boundaries....²⁴

In effect, the old maxim “to govern is to choose” has been stood on its head: it is now widely argued that “to choose is to govern”.

While this new analysis may be profoundly disquieting for lawyers, for political scientists, for political theorists, it happens - for reasons canvassed above - to be a particularly timely approach to “governance” as we revisit the Washington consensus.

It suggests that if we focus only on conventional measures of state expenditures or on conventional accounts of state regulatory interventions, we will likely misunderstand how the global economy is actually governed, how nations and communities do (or do not) succeed in achieving objectives such as the provision of public goods, where power actually lies, how it is exercised, on whose behalf and with what practical outcomes.

First, it reminds us that we must find new ways to compare “governance” in our two countries, before, during and - if we have arrived at that point - after the heyday of the Washington consensus. Thus, a nation’s social safety net cannot be measured solely by welfare expenditures authorized by Parliamentary appropriation: it includes assistance in kind provided by communities and extended families, free services dispensed by clinics, food banks and civic organizations, and benefits distributed by employers, co-operatives, trade unions and insurers. Likewise, changes in regulation cannot be calibrated solely in terms of the number of statutory instruments enacted or repealed, the numbers of inspections and prosecutions conducted or aborted, or the growing or shrinking budgets of state regulatory agencies. Using the vocabulary of governance, and employing an analysis which acknowledges the microphysics of power, “regulation” also includes the design and engineering of safe products or accessible systems, the employment practices of software companies and auto makers, the consumer practices of small stores and taxi companies, the credit practices of banks, the influence of mass media on gender roles, the influence of new technologies on patterns of family life, the solidarity of kinship, community and cultural groups, the professional traditions of the civil service and the litigiousness of citizens victimized by private or public wrongdoers. None of this “regulation” results from state law, strictly speaking; though understandings concerning the likelihood (or

²⁴Idem.

improbability) of state legislation, lawsuits or prosecution may have helped to shape them. Nor does it result from “market” processes, strictly speaking, though understandings concerning the likelihood (or improbability) of long term economic consequences may influence some actors. Yet “regulation” does occur in the sense that these devices perform many of the normative and disciplinary functions - the governance functions - associated with state law and regulation.

Thus, far from suggesting that the state is irrelevant, I argue that it is very much part of the governance equation. But precisely *what* part is controversial. Non-state regimes interact with those of the state, sometimes the two are mutually reinforcing, sometimes state regimes suppress, subvert or capture non-state regimes, and sometimes non-state regimes transform the daily routines of state governance, shape the practical disposition of individual cases and produce what are regarded as perverse systemic outcomes. Yet even if the precise effects of the interaction between state and non state regimes are unpredictable, the discourse of governance has left an indelible mark on our whole understanding of regulation: we no longer think of it as a process emanating exclusively from the state.

6. Governance of the Global Economy: The Micromechanics of Power

If global governance does not operate primarily through states or super-states, what are its modalities? Here we return to the “micromechanics of power” which - given the weakness of states, and the absence of an effective global government - help to explain how markets are organized and commercial disputes resolved; how land, sea and air traffic can be made to move in a safe and orderly fashion; how technology systems can be made compatible and interactive; how human, environmental and labour rights can be given definition and cogency. A few examples from the literature may be suggestive.

How is the global economy governed? Teubner, Belley and many others have argued that transnational corporations and their production chains are themselves the site of governance, or at least that they are important sources of normativity - of law - in the global economy.²⁵ Salter has explained how international standards organizations undertake the “housework of capitalism”, the small necessary tasks of governing interactions amongst human and technical systems.²⁶ Applebaum, Felstiner and Gessner have traced the diverse strands which weave

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together in the creation of a new legal culture of international business.²⁷ DeZalay, Garth, Sugarman, Flood *et al* have shown how global law firms and consulting firms actually constitute the legal fields and governance structures which enable transnational corporations to raise capital, make contracts, settle disputes and declare insolvency.²⁸ Trubek et al have portrayed transnational advocacy networks of NGOs as the authors of what may turn out to be a new regime of transnational labour law.²⁹ And I have tried to show how, through a process I call “globalization of the mind”, knowledge-based elites can bring about the transnational harmonization, convergence or synchronization of national laws and policies.³⁰

In all of these cases, and many more, transnational or global governance emanates not only from states but from sites of normativity dominated by non-state actors cooperating and competing, sometimes in the interstices of state structures, but often at arm’s length from them, producing outcomes which subvert or transform (but occasionally reinforce) those structures. So too in the domestic sphere. Recent studies identify such unlikely contributors to governance as actuaries,³¹ “cultural elite groups”,³² financial institutions,³³ private security firms,³⁴ and - in East Asia especially - kinship and community networks.³⁵ Indeed, revisionist scholars have begun to question the hypothesis - which links Marx to Weber to the World Bank and the IMF - that the rule of law embodied in a rational-instrumental state legal system is a necessary precondition of economic development.³⁶

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³¹B. Glenn, The Shifting Rhetoric of Insurance Claims (2000) 34:3 Law and Society Review 779.

³²J. Hagan, Narrowing the Gap by Widening the Conflict: Power Politics, Symbols of Sovereignty and the American War Resisters’ Migration to Canada (2000) 34:3 Law and Society Review 607

³³Hutton, The State We’re In

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³⁶T. Ginsburg, “Does Law Matter for Economic Development? Evidence from East Asia” (2000) 34:3 Law and Society Review 829. Check David Sugarman et al.

Obviously, this is not an argument for dispensing with state legal systems or against attempting to replicate them in a supra-state context. It is, rather, a reminder that the governance of both the economy and civil society depends - has always depended - much more on social and cultural factors than we might be inclined to believe. This reminder is not only salutary: it is timely. If the Washington consensus has not caused the hollowing out of the state, it has at least assisted in its reconfiguration. A random list of changes would include: the privatization of public utilities, transportation systems and prisons; the promotion of joint private-public ventures in schools, advanced research, foreign aid and culture; the shift from detailed state regulation to virtual self-regulation of the communications industry; the use of tax credits rather than direct expenditures to promote child care and sound environmental practices; the shift from government subsidies to partial user-pay policies in universities, health care and public transit; and many more.

Assuming that these developments represent a move towards smarter and better government, that the state continues to steer even if it does not row, that these innovations represent a sensible way to deliver public services more efficiently, they still raise large questions concerning governance.

They are typified by a recent crisis in the small Ontario town of Walkerton, where thousands of residents became ill, and several died, as the result of drinking polluted water. Preliminary indications are that the crisis resulted from a combination of factors: changes in farming practices which affected the groundwater, undetected deterioration and mismanagement of the municipal water system, the reassignment of water testing responsibility from provincial to private laboratories, and a significant decline in provincial oversight of water purity. Public outrage, the launching of a class action for millions of dollars of damages, revelations about similar deficiencies in other municipalities and the possibility of serious electoral consequences for the government have brought these issues into focus. The government has moved swiftly to rectify the situation, has provided improvement grants for municipal water systems, reached an expensive out-of-court settlement of the class action, and appointed a Royal Commission of Inquiry to report on the causes of the tragedy, assign blame and recommend prophylactic measures to prevent future recurrences.

These responses are all situation-specific. To turn to the broader governance issues, clearly what must be addressed is the appropriate balance between self-regulation and state regulation, between efficiency and effectiveness, between public accountability and private accountability. Moreover, attention must be paid to the technicalities of governance in the new era of hybrid

state-private responsibility for the public domain.³⁷ If, for example, government is to be held political responsible for the well-being, health or security of citizens, how can it ensure that the private sector actors which it has engaged to performs specific services fulfill their responsibilities? Or conversely, if we come to accept that government has no such responsibility, how will citizens be able to hold private sector actors accountable? These are complex technical issues. For example, if a private utility company violates its contractual undertaking to government to provide a given level of service, must government sue for damages or an injunction? Or can it treat the utility's default as a fundamental breach of the agreement, which in effect brings the utilities franchise to an end? Can citizens and communities, which are not parties to the franchise agreement sue on it? or are they, as so-called third party beneficiaries, ineligible to enforce it? Are various accountability standards which apply to the state itself - constitutional guarantees of equality rights, freedom of information legislation, common law requirements that officials act "reasonably" - applicable to corporations when they act as the extended arm of government in providing what were once regarded as "public" services? If the utility chooses to adopt a code governing service to the public or relations with employees, how are deviations from those standards to be detected or punished? Must the state perforce rely on information generated by the utility itself? Or will the state set up a parallel regulatory structure to monitor and measure the utility's performance? If the state chooses to defer to self-regulation, may other actors - workers, customers, investors - insist that the utility act in accordance with its own code?

In short, attempts to deal with issues of public policy through the legal forms and economicistic discourses of private business relationships are doomed to fail. The micro-physics of power at some point are likely to intrude on the force field of state law. No government which takes seriously its trusteeship of the public domain can afford to ignore corporate misbehaviour; no government which wants to get reelected can afford to ignore public concerns; and no government which values the principles of democratic governance can afford to absolve its agents of the obligations of accountability by which it itself is bound. And no corporation, however powerful, can afford to entirely ignore the state. Indeed, notwithstanding the anti-state ideology which is the bred in the bones of the Washington consensus, many corporations are quite willing to use the state when it suits their purposes. The state can coerce recalcitrant workers, collect debts from defaulting debtors, make long-term investments in human and physical capital, mediate competing corporate claims, and confer legitimacy on corporate

³⁷J. Freeman, "Collaborative Governance in the Administrative State" (1997) 45 UCLA Law Review 1; H. Arthurs in McGill LJ

behaviour. The state, in other words, can be very useful.

Thus, the time has come for us to name the potentially debilitating weakness of the Washington consensus: it relies too much on the microphysics of corporate power, too little on the macrophysics of state power. The Washington consensus was built on the proposition that governance is too important and too costly to be left to governments; but experience shows that it is also too complex to be undertaken without them. The Washington consensus assumed that a public domain would somehow emerge within a global political economy; but so far at least, there is only economy, little politics and only fragmentary experience of governance on a global scale. The Washington consensus assumed that the vocabulary of business and private relations was sufficient to conduct the affairs of public governance; but close examination of that vocabulary shows that it is clearly inadequate. The Washington consensus maintained that corporations could do what governments do; but experience showed that corporations also needed and wanted governments to perform certain tasks which only governments could.

The project of governance after the Washington consensus thus begins with an acknowledgement that the state must be reintroduced to the equation. But following on from that acknowledgement, formidable challenges remain: to comprehend both the logic and power of traditional state governance and the ubiquity and vitality of non-state governance; to understand the dynamic interplay between the explicit and implicit, the macro- and micro- forms of governance; and to articulate the processes of supra-state, state, sub-state and non-state institutions.