

國立政治大學法學叢書 65

全球化下之管制行政法

Administrative Law and Regulatory
Policy in the Global Era

政治大學法學院
公法中心 編

國立政治大學法學院



在臺五十週年院慶

 元照

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院慶叢書 總序

政治大學法學院走過了半個世紀的歲月，在時代更迭之際即將度過五十歲生日。本叢書之出版，即係為祝賀政大法學院五十週年院慶。專書的出版恰可見證過去本院老師對社會議題的關切與努力。

質言之，法律本身是一門強調應用的學科，法律存在的意義就是為了解決社會發生的問題。然而要能妥適處理現實世界各種錯綜複雜的難題，勢必須有深入的分析研究，作為政策選擇背後的堅實依據。

本著這樣的初衷，政大法學院七大研究中心邀集76位教授，提筆撰寫103篇學術論文，將超過163萬字的研究成果集結成七冊專書，希望以專業所學回饋社會，共同實現法學院對國家的使命與承諾。

這套叢書從七個不同的法領域出發，切合社會時事並針對當代重要的新興議題，開展法學研究新頁。書中觀點勇於挑戰傳統概念，突破現行制度盲點與思想窠臼，彌平法律規範與社會生活事實間的落差，以符應快速變動中的社會需求，深刻關懷社會轉型期的弱勢保障。

此外，我們也期待藉由本叢書之出版，將我國之法學研究由傳統的單純比較法學，昇華至對全球化與本土化議題之高度關懷，展現作為法制繼受國家深刻的反思與自省，為未來社會之發展以及華人文化法系的創設，建構適切之法規秩序。

當然，法學院能有今日這般豐碩甜美的研究成果，必須感謝教育部頂尖大學計畫，讓我們能無後顧之憂追求知識份子治學淑世的理想，有計畫有系統的完成影響深遠的研究，為政治大學厚植學術能量真正邁向頂尖大學，更為國家奠基人文社會科學的軟實力。

政治大學法學院 院長

方嘉麟

2011年4月

序 文

這本《全球化下之管制行政法》，是政治大學公法中心在教育部頂尖大學計畫第一期的成果展現。總共收集了十六篇論文，作者除了本中心同仁外，尚包括美國、德國、日本、韓國、中國大陸，以及國內諸多學者。如此豐富而多元的論述，都集中在一個大問題下：在全球化的時代，公與私的界線不斷地變遷，政府與市場的角色也一直在游移，行政法的理論與實務要怎樣因應這個新時代？

我國的公法學，在許多前輩的努力下，已經有相當紮實的體系。既有文獻對於如何控制國家行政權力，保障人民權利，以及提供有效救濟這幾點，均有充分的論述。相關法制在行政程序法、行政訴訟法、行政罰法等相關法律制定後，也都陸續上軌道。

然而，行政法的思考架構，大致上仍然站在「公私二分法」的前提上。絕大部分的公法原理或是法律機制，都是針對「政府」或「公部門」的行政措施加以規範；對於私部門、市場運作則少有置喙。此外，行政法的理論偏向對公行政作用加以「約制」，以「踩煞車」為主。這樣的體系，基本上是把「國家」或「公權力」當成潛在的侵害者，而致力於保障私領域公司、市場、個人的自由。

這樣的二分法，在全球化時代開始遭遇衝擊。世界各國政府在「國家競爭力」的大帽子下，紛紛削減預算、緊縮人事，

並且進行一連串私有化（privatization）的措施——公營事業民營化、政府業務外包、解除管制、BOT……諸多措施顯示，很多原本由政府所為的事務（如：監獄、健保、學校、垃圾清運、高速公路收費、證照查驗等等），逐漸在外觀上變成「民間」或「市場」來承擔。如果行政法仍只關注形式上的公權力、國家組織、行政行為，卻忽視了愈發多樣的政策手段，那就難以因應新時代的問題。這種公私夥伴（Public-Private-Partnership, PPP）或公私混合關係。

相似的問題，在台灣也同樣發生。民營化、解除管制、BOT、政府業務外包等措施也相當風行。既有的法律該如何因應，我們同樣面臨困境。有鑑於此，政大法學院公法中心舉辦了多場研討會與演講，邀請國內外專家學者，對於各國如何調整行政法理論，以因應公私夥伴關係的新局面，交換經驗與觀念，並且提出各種不同的法律策略。

讀者在本書可以看到，公私夥伴或公私混合的現象，如何衝擊美、德、日、韓、大陸，以及我國的行政法學；而各國的行政法學者又如何發展新穎的法律理論、策略去因應這些問題。本書乃是台灣第一本深入探討全球化與公法如何互動的專論，相信對所有關心此一問題的人，都有高度的參考價值。

政治大學法學院公法中心 主任

廖元豪

2011年4月

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全球化下之行政管制



- Globalization from the Ground Up: Alfred C. Aman, Jr.
A Domestic Perspective

譯：由下而上的全球化
——一個國內的觀點

林榮光

- Öffentliche Aufgabenerfüllung bei sich wandelnden Marktbedingungen Peter M. Huber

譯：市場條件變遷下的公任務履行

詹鎮榮

Globalization from the Ground Up: A Domestic Perspective

Alfred C. Aman, Jr.*

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I. INTRODUCTION

The institutional developments known in common parlance as *globalization* are conventionally understood as involving broadly transnational processes of market-oriented governance, as well as what are widely presumed to be their homogenizing effects.¹ Without gainsaying the importance of the international and transnational aspects of globalization, limiting discussion to the extraterritorial in this way tends to obviate a clear understanding of the domestic processes through which globalization was and continues to be institutionalized. Imagining globalization only in terms of international affairs tends to focus attention on the power of the executive branch, given the executive's constitutional responsibilities in foreign affairs. Improving an understanding of globalization's domestic front means broadening that focus to include not only the regulatory functions of the executive branch, but the other branches and levels of government—especially the legislative branch. It is in those legislative and regulatory arenas that the politicization (and polemicization) of a particular construction of globalization—as a foreign economic threat coupled to a golden opportunity for global capitalism—is most evident, as well as its popularization and entrenchment in neoliberal terms. Those terms, however, are inadequate either to account for the current diversity of public-private arrangements, or to convey the range of current debate in relation to privatization and the public interest. Globalization blurs the distinction between public and private,

¹ For an extended discussion of how globalization has been construed and understood in market oriented terms, see ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM*, 1-14, 87-129 (NYU Press, 2004).

particularly when the state seeks to increase its competitiveness by contracting out some of its domestic responsibilities to private actors. Taking account of the domestic “face” of globalization is thus important as both a corrective to a flawed analysis of its causes and effects, as well as a necessary (if insufficient) step in addressing the democracy deficit inherent in globalization as it has developed in practice.²

Globalization is often understood largely in neoliberal, economic terms, as if it were a force of nature. For some, globalization is all about competition—a competition for markets and investments that is global in scale and more intense than ever before. For individual corporations to succeed, for example, they must become more efficient, taking full advantage of new technologies and moving various components of their operations around the world, so as to lower costs and expand their markets. States are expected to follow suit by deregulating their markets, privatizing governmental services, lowering taxes and, in the process, becoming more effective in attracting new businesses and, of course, jobs to their geographic region. The viewpoint of globalization that forms this paper, however, begins not in the inevitability of global markets, but in the role of domestic law and politics in producing certain market conditions (global or otherwise). In discussion, globalization is usually presented in a way that assumes a top down phenomenon, emphasizing scale and homogeneity. By contrast, the perspective I take is from the bottom up, taking into account the areas where domestic law and local communities are caught up, and too often caught out, by globalization.

To illustrate what a bottom up approach to globalization entails, it is necessary, first, to correct some prevailing myths about globalization

² See ALFRED C. AMAN, JR., *supra* note 1.

particularly those grounded in neoliberal discourse. The purpose of Part I is, in effect, to shift our perspective on the nature of globalization. Part II then deals with the domestic side of globalization, especially privatization, for reasons I will explain. In Part III, I offer some ideas for reform in which administrative law is the centerpiece. This brings us full circle to the issue of how different understandings of globalization have implications for our understanding of state power, particularly when it enlists the private sector to carry out significant public responsibilities.

II. GLOBALIZATION, NEOLIBERALISM AND THE DEMOCRACY DEFICIT

Globalization as we know it today is inseparable from its domestic politicization as neoliberal reform and its promotion of world markets—by which I mean the so-called Reagan—Thatcher revolution³ of the early

³ The presidency of Ronald Reagan stands as the shift point in national power dynamics from the then-entrenched Democratic Party. The “Reagan Revolution” involved not only this shift in political fortunes, but a deliberate and sustained focus on economic reforms that included “deregulation, privatization, free market philosophy and a reduced role of government.” Joe Martin, *The Next Ten Years—A White Knuckle Decade with Nowhere to Hide; A Prospective on Management Trends*, BUSINESS QUARTERLY (Mar. 22, 1989), at 51. A concerted attempt to move toward increased privatization of government was always central to the Revolution’s ideological goals; however, movement toward privatization proved more difficult, and met with more resistance than advocates had anticipated. Privatization efforts by the Reagan administration met with consistent opposition, and prompted the Republican Party and other privatization advocates to move toward less confrontational tactics and to adopt less explicit language in an attempt to embed a privatization ideal in the political psyche. See Margaret E. Kriz,

1980's, its global export, the broad political consensus around its key terms (especially "privatization" and "deregulation") and the claim as to some inherent value in "disembedding" the market from the encumbrances of state and society (e.g., entitlements).⁴ I argue that the usual understanding of globalization (at least in the U. S.) is unduly

Slow Spin-Off, THE NATIONAL JOURNAL (May 7, 1988), at 1184 (describing privatization advocates as seeking to put forward ideas that would "continue to germinate" in future administrations, even if they were not Republican controlled). For a current perspective on the long-term effects on outcomes of the Reagan Revolution on the modern political, social, and economic landscape See Dick Meyer, *Reagan's Revolution Plus 25*, CBSNEWS.COM, <http://www.cbsnews.com/stories/2005/12/01/opinion/meyer/printable1088888.shtml> (last visted Dec. 1, 2005).

- ⁴ David Harvey has noted that for modern privatization advocates the meaning of the word "privatization" carries with it references to the political ideals of individual dignity and individual freedom that were deliberately incorporated into the founding of the modern neoliberal movement. See DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 5-6 (2005). "Contracting out" refers to the practice of government contracting with a private employer for the delivery of some good or service, where the ultimate responsibility for the success of the service or good delivery technically remains with the contracting government body. See Geoffrey Segal, Testimony to the Utah Law Enforcement and Criminal Justice Interim Committee, *Contracting Out Force Prisons to Focus on Results, Performance*, REASON FOUNDATION, http://www.reason.org/commentaries/segal_20050921.shtml (last visited Sep. 21, 2005). "Competitive sourcing" calls for the identification of government activities that are "commercial" and therefore able to be done by the private sector, and the institution of a competitive bidding process to assign such activities to their most "efficient and effective" source. Geoffrey F. Segal, *Competitive Sourcing: Driving Federal Government Results*, REASON FOUNDATION, http://www.reason.org/commentaries/segal_compsourcing.pdf (last visited Jan. 24, 2008).

restricted—the legacy of the way globalization was produced out of a particular political moment. As an approach to governing, neoliberalism favors markets over law almost across the board, and in the generation since the Reagan-Thatcher era, many new supra-national and global institutions have been developed for the advancement of global markets.

But globalization is far more than these institutional arrangements. It is also a way of *thinking* and *representing* the relationships between the market, state and society—i.e., it is also a discourse, and this discourse also has effects in that it makes some positions seem more obvious or easier to defend than others. In neoliberal discourse, markets and law tend to be treated as either/or options, law being treated as if it were a human intrusion in an otherwise natural system of economic forces. It also treats globalization as if it were “out there” in the world at large—while law is imagined as parochial or domestic. This is another way that law is imagined to encumber markets. These claims result in a mythical view of globalization that is to a large degree shared by pro- and anti-globalization advocates—who are alike in ultimately seeing the global economy as a universal norm in relation to which local government is largely irrelevant.⁵ This may seem to be an overstatement, but the fact remains that the discourse of neoliberalism so dominates our understandings that it is difficult to recognize it as something other than common sense, let alone conceptualize alternative accounts of globalization.⁶

⁵ See, *id.* at 87-128.

⁶ On the taken-for-granted validity of “laissez-faire ideology,” see Margaret Jane Radin & R. Polk Wagner, *Symposium on the Internet and Legal Theory: The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI-KENT L. REV. 1295, 1295; See also Berman, *infra* note 19, at 1278.