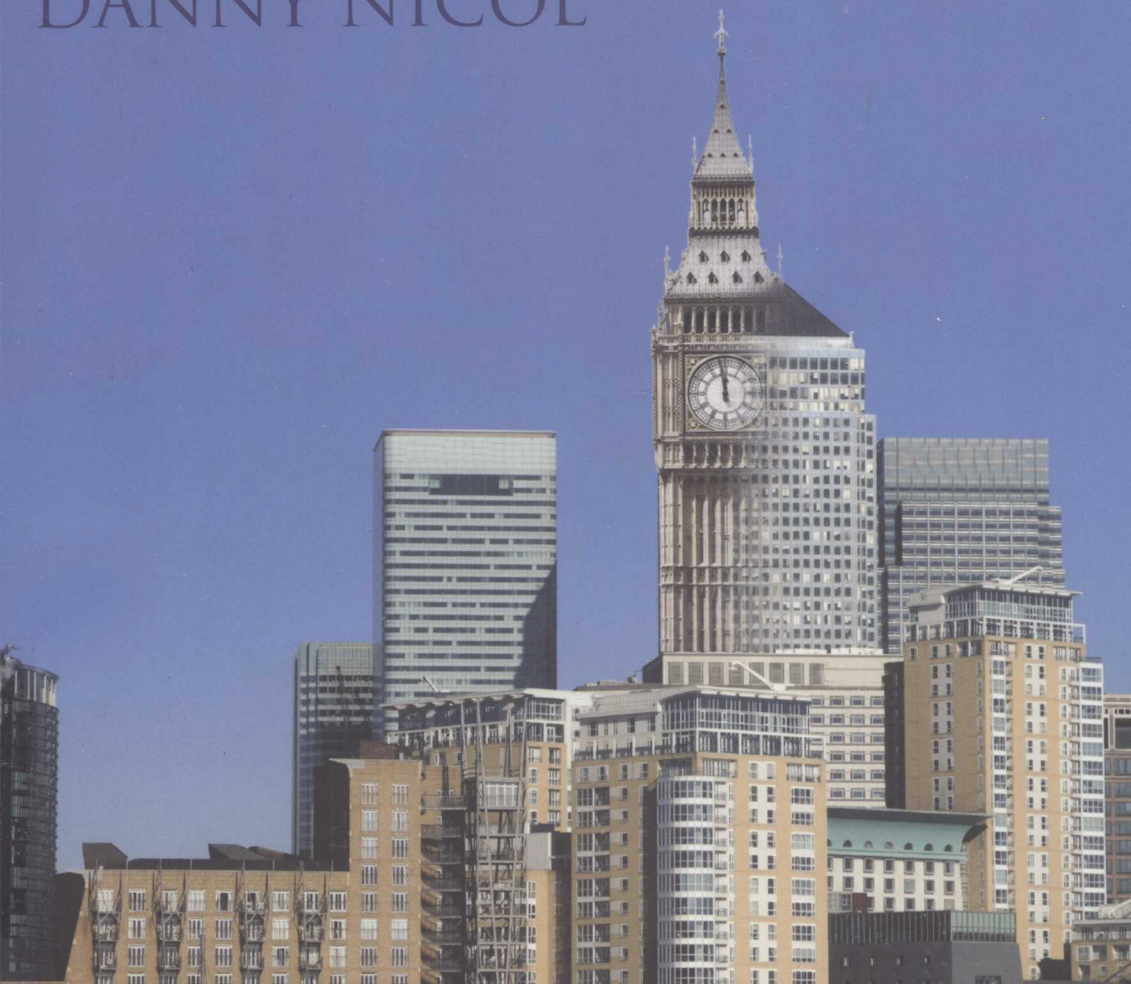
THE CONSTITUTIONAL PROTECTION OF CAPITALISM

DANNY NICOL



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Danny Nicol

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THE CONSTITUTIONAL PROTECTION OF CAPITALISM

In 1945 a Labour government deployed Britain's national autonomy and parliamentary sovereignty to nationalise key industries and services such as coal, rail, gas and electricity, and to establish a publicly-owned National Health Service. This monograph argues that constitutional constraints stemming from economic and legal globalisation would now preclude such a programme. It contends that whilst no state has ever, or could ever, possess complete freedom of action, the rise of the transnational corporation nonetheless means that national autonomy is now significantly restricted. The book focuses in particular on the way in which these economic constraints have been nurtured, reinforced and legitimised by the creation on the part of world leaders of a globalised constitutional law of trade and competition. This has been brought into existence by the adoption of effective enforcement machinery, sometimes embedded within the nation states, sometimes formed at transnational level.

With Britain enmeshed in supranational economic and legal structures from which it is difficult to extricate itself, the British polity no longer enjoys the range and freedom of policymaking once open to it. Transnational legal obligations constitute not just law but in effect a de facto supreme law entrenching a predominantly neoliberal political settlement in which the freedom of the individual is identified with the freedom of the market.

The book analyses the key provisions of WTO, EU and ECHR law that provide constitutional protection for private enterprise. It focuses on the law of services liberalisation, public monopolies, state aid, public procurement and the fundamental right of property ownership, arguing that the new constitutional order compromises the traditional ideals of British democracy.

To my mother and father

PREFACE

This book sprung from my dissatisfaction with British public law scholarship—especially my own. Like many public lawyers at the turn of the century, I became preoccupied with the Human Rights Act (HRA) 1998 and the way in which it would change the constitution. The HRA raised many interesting and important questions about the way in which power would be shifted to the judiciary and whether the hybrid structure of the HRA, with its delicate balance of preserving parliamentary sovereignty whilst augmenting judicial authority, would allow for a culture of controversy over the meaning of rights.

As the years went by, however, I started to wonder if my work had focused on the most important thing in life. The HRA, sadly, failed to usher in a new era of liberty. Faced with the tidal wave of the 'war against terror', it was not strong enough to withstand the gradual emergence of the surveillance society. It proved unequal to the task of extending civil liberties. But at the same time I started to question the centrality of the very issues on which HRA litigation tended to focus. These issues were undoubtedly important, not just to the people bringing the cases but to our comfort that we are living in a civilised society. Yet they had little bearing on the happiness of the broad mass of the population. Aside from the HRA's undermining of the position of complainants in sexual assault trials, which affected a large number of people—overwhelmingly women—the bulk of the population were largely unaffected by the Act, save for a general perception that the country's civil liberties had, if anything, diminished and the sentiment, perhaps unfair, that the Act seemed largely to benefit the criminal fraternity. The HRA is important and worthy of study, not least because what it tells us about the expansion of judicial power, but in terms of impact on the broad mass of the British population, most 'classical' civil liberties issues appear to be dwarfed by issues of economic policy, in terms of the human contentment or human misery that they generate.

At the same time, the first faint signs of economic calamity were starting to materialise. The catastrophic blunder of banks and financial institutions investing in sub-prime mortgages was beginning to show its consequences in terms of unemployment, insecurity, home repossessions and widening inequality. The British Prime Minister of the day, Gordon Brown, emphasised at every turn that the economic problems were not the result of national economic policy but global problems requiring global solutions. Brown's argument was not altogether convincing: the 'New Labour' government elected in 1997 had pursued neoliberal globalisation with vim and vigour and had embraced the cause of 'light-touch' regulation. Britain's banks had been allowed to make a free choice over their

purchase of the infamous 'poisonous' securities. Furthermore, the 'global solutions', when they finally materialised, were rather paltry. But be that as it may, the dire consequences of the credit crunch made me think that public law was not focusing on the most important issues. Whilst the study of the HRA remained important (irrespective of popular sentiment), analysis of the relationship between economic policy and public law seemed far more so. In my research, it became alarming to discover the extent to which free trade was acting as a cover for the security of private enterprise, as well as the extent to which contestable ideas had been constitutionalised at a transnational level. The study gave me cause to question, too, whether the study of public law should be so fixated on the state at the expense of transnational institutions and, indeed, even transnational corporations. Furthermore, whilst there had been considerable academic controversy about the merits and demerits of the shift in power from politicians to the judiciary, I came to see this shift as being part of a bigger picture, the evolution of a neoliberal constitution.

I would like to thank the following for the help they have given me in writing this book: Gavin Anderson, Kyungu Gordon-Walker, Carol Harlow, Adam Łazowski, Luke Martell, Mike Meehan, Harriet Samuels, Lisa Webley, Alison Young. I would like to thank Andrew Le Sueur and *Public Law* for allowing me to reproduce material on the negotiations of the European Convention on Human Rights that featured in my 2005 article 'Original Intent and the European Convention on Human Rights'. I am also thankful for participants in lectures and seminars at University College London, Glasgow and London Metropolitan University for their constructive remarks. Finally, this monograph also benefited from several anonymous reviewers, whom I would like to thank for their helpful criticisms and suggestions. In the nature of things, each of these reviewers proffered widely differing advice, so I hope they will forgive me if I have not be able to follow each piece of advice in the depth that I would wish.

Danny Nicol
London
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