

# **Reconstituting the Global Liberal Order**

Legitimacy and regulation

**Kanishka Jayasuriya**

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# Reconstituting the Global Liberal Order

The events of September 11 have been a significant watershed in the emerging global order. The nature and consequences of this changing global order, however, remain unclear.

This book argues that this emerging order is as much the result of issues relating to the evolving methods and forms of governance, as of the new role and position of the United States in the world system. Jayasuriya develops an innovative framework that extends the work of theorists such as Carl Schmitt, Franz Neumann and Herbert Marcuse to explore the reconstitution of the post-war global liberal order. He analyses the nexus between domestic political and constitutional structures and the global order, and examines how the post-war framework of international liberalism is crumbling under the economic and political pressures fermented in the post cold war period. As well as looking at the implications of 9/11 for the global order, the author:

- Relates the events of 9/11 to the deep transformations of the post-war global order.
- Emphasizes the importance of the rise of the new regulatory state.
- Examines the new politics of fear in liberal democracies including the US, UK and Australia.
- Studies the appropriation of the 'language of the left' by conservative forces.
- Notes the profoundly illiberal outcomes of actions undertaken in the name of liberalism.

This unique and timely study will interest students and researchers of international political economy, globalization and international political theory.

**Kanishka Jayasuriya** is Principal Senior Research Fellow at the Asia Research Centre, Murdoch University. His most recent publication is *Asian Regional Governance: Crisis and Change* (ed.) (Routledge 2004).

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**Kanishka Jayasuriya**

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**For my parents Laksiri and Rohini**





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# Preface

I am writing this on the eve of the US presidential election and the parliamentary election in Australia – one of the most loyal foot soldiers of the new ‘imperial’ order. Both campaigns have sought to frame issues of security around a new politics of fear. Nothing more starkly illustrates the changed global landscape since 9/11 than the way these events have reverberated not just in the trammeling of long established international principles but equally in the more mundane terrain of domestic politics in countries like Australia, the US and the UK. This volume examines how the events of 9/11 have amplified more fundamental social, economic and political changes in the global order that have engulfed the global order since the end of the cold war.

While the events of September 11 – clearly a significant watershed in the emerging global order – and their broad ranging impact on all facets of public life are becoming more apparent, the nature and consequences of this changing global order remain unclear. But it is evident that there has been a fundamental change in the principles and practices of global and national governance. In this respect the volume differs from a number of other recent studies in suggesting that the events of September 11 and cognate events in its aftermath belong to a set of issues that inform a broader transformation of the post-war liberal order. It is the reconstitution of this *liberal* order – rather than the specific dynamics of the US global dominance – that serves as a distinctive feature of this study.

Within the last couple of years there have been several scholarly contributions on what may be described as the ‘re-emergence of Empire’ or the new imperialism and its consequences for the global order. For some theorists, such as David Harvey, this new orientation reflects a long-term consequence of the weakening of American Power within the global order. On the other hand, the new proponents of liberal imperialism, such as Robert Cooper and the neo-conservative

Robert Kagan, offer a different perspective on this changing order. Their concerns reflect a 'post modern' world order within Western Europe and North America as one confronting a more 'modernist' Hobbesian system where state failure is rife. Yet others understand the new conjuncture within the contemporary global order as nothing more than a military intensification of the post-war US dominated global system; a new phase of US hegemony.

The difficulty with all these perspectives on the global order – despite their divergence – is that they remain singularly focused on shifts from a multilateral to a unipolar system. However, what such a focus tends to obscure is the more fundamental changes in the prevailing post-war liberal constitutional order. The new system of global governance, we argue, has all the features of a global 'state of exception'. This notion originates from the work of Carl Schmitt and refers to the temporary suspension of the domestic legal order, which it is suggested has been increasingly internationalized. In short, this 'state of exception' brings in its wake a major departure from the institutions of international liberalism and the practices of formal international law.

The crucial point we develop here is that the emerging global order is defined in the name of legitimacy, in terms of enforcing 'values', as against the formal and abstract structures of legality and international politics. From this point of view a central element of the new global order is what we term the 'new culturalism'. Importantly, this signifies a move towards valorizing a new legitimacy in the form of affirmative cultural values defined in terms of the defence of a certain mode of political existence that is at 'risk' from various sources around the globe. At the same time, these values are framed in liberal terms and implemented in a highly illiberal way. Therefore a key context for this study is the liberal/illiberal entanglement evident in the new celebration of empire – so prevalent among conservative and even some liberal analysts.

Unravelling this entanglement goes beyond descriptions of US hegemony, or the balance between coercion and consent in the exercise of that hegemony to focus on the broader issues of the transformation of the social and economic context that marks the post-cold war era. But what is intriguing in this transformed context is that the progressive language of the left couched in terms of democracy, rights, and liberation has now been captured by conservative political forces. How has this come about? We seek to answer this question by linking the transformation of the post-war global order to the deeper change in the constitutionalization of social interests – especially that of labour – which remained at the heart of the social state in the post-war period.

This social state was underpinned by a set of embedded democratic relations defined by ‘communities of interest’ and the imaginative underpinning that underlined these interests. It is the crisis of this ‘social state’ that is linked to long-term crises of the constitutional principles which underpinned the international legal and political order of an earlier era.

Just as the post-war liberal order was linked to a form of social constitutionalism, a new kind of regulatory state is at the heart of the emerging new global governance. The hallmark of this regulatory state is a shift from an interventionist regime which takes on a greater managerial role in the provision of economic order. In addition this leads to regulating the proliferating risks associated with the global economic order at the interstices of the domestic and global economy.

At the global level, this new regulatory state is associated with the development of new forms of sovereignty that differ in significant respects from models of ‘Westphalian’ sovereignty. This ‘complex sovereignty’ reflects the transformation and reconstitution of the notion of state and sovereignty in the face of the globalization of economic relations. At the heart of these changes lies a move towards the dispersion and dissolution of powers of governance in civil society as well as the economy. The basic form of this orientation to governance may be subsumed as a move away from government to governance. To be sure, there is no doubt that the profoundly important changes that are taking place are not so much at the level of governance – but in the *form* of governance.

An important element of this transformation of sovereignty is the transition from *political* to a kind of *economic* constitutionalism. The intertwining of law and the territorial state was reflected in the forms of political constitutionalism that developed with the liberal state in the nineteenth century; these can be understood as an attempt to constitutionalize executive authority. Above all the development of the regulatory state sees a shift in the politics of interest that characterized the welfare state to a new politics of values that seeks to de-politicize key areas of social and economic governance.

And this is the nub of the volume: the deep seated social and economic changes can only be understood in terms of a decisive transformation of the ‘social constitutionalism’ that defined most of the twentieth century. What we now see is the emergence of a radically different constitutional and political order that has major ramifications for the governance of the global order.

This volume was completed while I was attached to two world-class research institutions: the Asia Research Centre of Murdoch University

and the Southeast Asia Research Centre of the City University of Hong Kong. I wish to acknowledge the intellectual space and the collegiality provided by these two institutions, and in particular, Richard Robison, Kevin Hewison, and Garry Rodan. I also wish to thank Garry Rodan and the Asia Research Centre for providing shelter to a wandering academic. This greatly facilitated the completion of this work. Finally my greatest debt is to my parents Laksiri and Rohini without whose support and encouragement this work would not have been possible.

Kanishka Jayasuriya

# 1 Reconstituting the global liberal order

## **Introduction: towards a global state of exception**

International history is replete with those moments when bricks and mortar of an international political order, weakened by the steady escalation of pent up pressure crumble under the onslaught of a fiery storm. Without doubt, the events of 9/11 and the resulting ‘war on terror’ as well as the Iraq war should be seen as historical landmarks ushering in a new and distinctive form of global governance. If 9/11 and the ‘war on terror’ represent the fiery storm, then the crumbling walls of brick and mortar symbolize the post-World War II framework of international liberalism – that distinctive constitutional order which guided the post-war international system. This constitutional order pertains to fundamental principles such as the formal political equality of all states. This principle of formal equality reflects an ongoing process of broadening the membership of the international community, notions of collective security embodied in the UN Charter, and above all, the increasingly widening definition given to notions such as ‘war’ and ‘self-defence’, all of which have greatly diminished widely accepted notions of international law. True, these principles were more often than not observed in the breach – and in some cases were deeply imperfect – but nonetheless they provided the founding motifs of the post-war system of governance.

While it may be seen that the war on terror and the advent of the Bush presidency provided a catalyst for the crisis in the global order, it is evident that the pressures on the international order predated the 9/11 World Trade Center (WTC) attack, and may be traced back to the end of the cold war and the economic globalization of the last two decades of the twentieth century. This introductory and the subsequent chapter will endeavour to map out the main features of this global governance – its nature, form, and character. The remaining



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chapters will examine the ramifications of the changes in global governance for the form and structure of domestic governance, especially those leading to the formation of a new kind of regulatory state.

September 11 is without doubt a critical juncture in shaping the global order, but the central thesis of this book is that the events of September 11 and its aftermath are part and parcel of a broader transformation of the post-war liberal order. It is the *reconstitution of this liberal order* – rather than the specific dynamics of the US hegemony – that is a distinctive feature of this volume. Much of the International Relations scholarship has focused on the way the events of September 11 have reconstituted the global system of governance, and overlooks the fact that the world order after the settlement of World War II ushered in a very distinctive form of liberal order. Most international relations studies focus on the ‘order’ side of the post-war liberal order and neglect the fact that this order was made possible within a given framework of international liberalism located within a larger set of embedded democratic relationships that underpinned what may be called the ‘social state’ of the post-war period.

One of the contributions of this study is to suggest that the events of September 11 amount to something of a ‘constitutional moment’ within the global liberal order – one which unravelled, marginalized, or made redundant some of the key assumptions and normative principles of the post-war liberal order. Consequently in contrast to various realist theories of global order, this study pays particular attention to the way in which US hegemony was exercised within a specific constitutional framework of international liberalism.

The volume then attempts to locate the significance of this new ‘constitutional moment’ in the transformation of international liberalism. It suggests that this new liberal hegemony – which had already gained ascendancy since the end of the cold war and accelerated since the events of 9/11 – is based on the mobilization of a set of affirmative cultural values that are now ranged against the universal and abstract structures of international legality and politics. The management of legitimacy itself becomes the business of international politics, and paradoxically, it is this new legitimacy, couched in the cultural tones of liberalism, that leads to profoundly illiberal outcomes. Therefore, rather than focus on the exercise of US military power, this volume seeks to explore how and why the post-war liberal order is being reconstituted.

At the same time, this transformed international liberalism reflects a more profound transformation in the domestic constitutional and political arrangements of the advanced industrial states. To the extent

that the reconstitution of the post-war world order reflects the end of a particular form of an international liberal project, it also mirrors the crisis of the 'social state' that defined the politics of the post-war period. In place of this 'social state' the new international order facilitates the emergence of a new regulatory state that seeks to maintain and regulate the economic order. One of the main effects of this transformation of the state is the diminution of the political representation of class and social interests – the embedded democratic relations of the post-war order – in favour of communities defined in terms of values rather than interests.

The events of 9/11 and the 'War on terror' alongside broader changes in the organization of the domestic and global order bear all hallmarks of – to use the terminology of Carl Schmitt – a 'state of exception'. A state of exception refers to the way by which actions of the major liberal democracies are driven by the growing accretion of discretionary executive power which appears increasingly to bypass existing legislative and judicial institutions and their ability to respond to what in effect are becoming permanent states of exception. But the point – and here we do clearly depart from a Schmittian framework under whose influence came realists such as Morgenthau<sup>1</sup> – is that this 'state of exception' is increasingly internationalized. Not only have coercive instruments of power increased but – and this is the nub of the argument – this coercive power is legitimated under the rhetoric of a new culturalism, a 'turn to values' which requires a constant resort to a logic of police within the global order. It should be clear that our use of the state of exception here is very much a heuristic device to understand the global order itself as having the properties of a domestic state of emergency. Indeed, Megret has provided a sophisticated use of the notion of the state of exception to answer the question of 'the vexing problem that war is supposed to be waged against states, not against social phenomena, so that none of the unfolding events would seem to fit into law's neat categories' (Megret 2002: 363). But before examining the constitution of this new global state of exception, it is important to explore briefly this contentious idea of the state of exception, and how the notion of exception is developed in the writings of Carl Schmitt.<sup>2</sup>

Well known as a trenchant critic of the Weimar Republic, Schmitt later sought to justify the Nazi regime. He was also an important critic of positivistic legal thinking,<sup>3</sup> and is perhaps the most pre-eminent theorist of the 'exception'. The notion of 'exception' refers to the capacity of the sovereign to make decisions in terms of its political will rather than be constrained by normative law. Schmitt suggests that

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exception is ... codified in the existing legal order, [and] can at best be characterized as a state of peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to preformed law' (Schmitt 1985a: 6). One of Schmitt's central concerns was with the particular problems that emergencies and exceptions pose for liberal theory and practice.<sup>4</sup> His argument is that liberalism particularly fails to adequately theorize states of emergency or states of exception and is unable, therefore, to provide for the emergency measures to be taken in times of peril. For Schmitt, it is during periods of state emergency that 'sovereign decision-making' emerges as the true centre of politics. This, in effect, made the executive centre of state sovereignty; this form of 'exceptional state', as Maus (1998) points out:

corresponds to the principle that Schmitt projects upon the absolutist state seen as capable of bringing civil war to close 'a state of the executive and the government' exclusively aimed at a achieving a maximal degree of effectiveness; he describes it as a state that produces 'public order and security'.

Maus (1998: 202–3)

Schmitt<sup>5</sup> sharply distinguished between the various elements of the 'constitutional state' (*Rechtsstaat*) and its political *essence*, identified in terms of the political identity of the 'people', which he argued has priority over the liberal components of the constitution. For Schmitt, to make this argument congenial to the emergent fascist order, the substance or essence of *political identity* had to be represented in terms of the cultural and social homogeneity of the 'people' (Schmitt 1965). The significant inference to be drawn from this argument is that all legal orders need to have an external foundation, and that the constitutional state is not identical with the state as such. Therefore, for Schmitt, elements of the normal legal order could be waived in states of peril where there were internal or external threats to order. Clearly, this analysis<sup>6</sup> has much to do with attacking the liberal constitutional Weimar regime and providing a juridical legitimation for the fascist legal and political order.

Schmitt was certainly no friend of political liberalism (Schmitt 1976). But as several keen observers<sup>7</sup> have noted, he identified a critical problem with liberalism, namely, that all legal orders have an 'outer core', and in the context of emergencies, delineating the nature of this 'outer core' poses a number of challenges. Foremost among them is how liberalism can defend and maintain its own basic presuppositions,

including respect for civil rights and tolerance, during a time of significant external threat. Schmitt was clearly wrong about the inability of liberal democracies to respond to emergencies, such as the events of September 11. Indeed, while there are troubling indications that many of the measures taken have increased executive power and curtailed civil liberties in Britain and the United States, none of this approximates to the suspension of the liberal constitutional order advocated by Schmitt. He has also been proven faulty on another score. Liberalism has responded to the events of the September 11 by employing new forms of statecraft and practices that – borrowing a term of Judith Shklar, but used in a somewhat different sense – I refer to as a new ‘post-liberal politics of fear’.

At the same time it is clearly evident that the events of September 11 have accelerated the accretion of emergency and exceptional powers in countries such as Australia, the UK, and the United States. These developments in turn reflect a broader trend towards the marginalization of representative political institutions in favour of executive power. Thus we find that in surprisingly short order several liberal democracies have sought to offer political leaders and other public officials a legislative framework for acting outside normal constitutional and representative institutions. Temporary suspension of the legal protection implied in the activation of these broad emergency powers has been justified on the basis that in times of ‘states of emergency’ or great peril, liberal democracies need to undertake special actions to safeguard security (Jayasuriya 2002c).

But one of the inadequacies of this legalist approach to the state of exception is the fact that it fails to recognize this condition not merely as a temporary suspension of the normal legal order, but as a more permanent state associated with the evolution of the social and political structures of organized capitalism. This sociological understanding of the state of exception is in fact evident in the work of the Frankfurt School inter-war legal theorists such as Neumann (1944, 1986), Kirchheimer (Scheuerman 1996),<sup>8</sup> as well as others such as Poulantzas (1978) who much later used the notion of ‘exception’ to explore changes in the form of both law and the state. The work of Neumann deserves special mention as he sought to place the notion of a ‘state of exception’ within the broader context of the political sociology of law. For Neumann, general legal norms are an attempt to subsume and limit the power of sovereignty; and, as Scheuerman suggests, law ‘is not simply a manifestation of that power but embodies a noble and unfinished attempt to make authority tolerable’ (Scheuerman 1995: 102). Implicit in this argument is that legal norms

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are more than a means of securing a degree of economic calculability and predictability for capitalist economies; rather, they have a deeper and more universal emancipatory purpose. For Neumann, it is the constant tension between ‘sovereign decision’ and general legal norms that leads to the institution of the state of exception. Hence Neumann argues that the progressive development of capitalism away from a competitive to a more monopolistic economy leads to what he defined as the increasing deformalization of international law. What is more, this deformalization and the shift from the universalism of the rule of law reside in the very structural foundations of modern capitalism.

### **A global constitutional moment?**

Building on these insights, Scheuerman (1999a) argues that one reason for the rapid expansion of emergency and exceptional powers in the twentieth century even in liberal democracies has been the conflicting temporal requirements of modern fast capitalism when compared with the slower time cycles required for legislative decision-making. He suggests that modern contemporary capitalism demands a more rapid response to emergencies that can be provided by executive action. But these varying and often conflicting temporal rhythms increasingly operate within the spaces of the global economy and not merely within the domain of the nation state. As economic integration proceeds at a rapid rate it is clear that there is increasing pressure for executive response at the global level to bypass existing international institutions: in short, a global state of exception.

But can we transport the state of exception from the domestic sphere to the global level? One approach is that: there is ‘built into the liberal international order a contradiction. Subjectivity in the assessment of one’s obligation is the capacity to enforce one’s subjective views means that international order requires a coercive mechanism to overcome difference’ (Carty 2002: 46). Carty’s argument here is – and this echoes Schmitt – is that the presumed anarchic structure of the international system imposes pressure on states to act outside the legal order in the defence of national security. This is of course different to the conditions that pertain under a global state of exception where the exception is defined not in relation to the domestic legal but the international order. When transported on to the terrain of the international legal order the ‘exception’ is defined in terms that any threat to the international political order can only be met by the capacity to declare a state of emergency in the name of some putative international community.

Consequently, the argument at the global level is that the international legal order needs an ‘outer coercive core’ to sustain the ‘normal’ legal international order; the normal order is sustained and fortified by the capacity to declare a state of exception which in effect ‘lawfully’ overturns the entire apparatus of the legal order. The crucial point is that the state of exception becomes ‘internationalized’ so that the exception is defined in terms that transcend both the national and the global – the boundaries of the ‘homeland’ reach beyond territorial boundaries. But, here is the rub: like domestic ‘emergencies’ these international exceptions in short order become a permanent state of exception. It is this permanent state of exception that forms the basis for a fundamental reconstitution of the global liberal order. It is not simply a question of the liberal legal order being suspended but of a thoroughgoing transformation of the post-war constitutional order. Stripped to the bones here lies the basic anatomy of the global exception.

The contention being made here is that much can be gained by expanding these insights on the state of exception as a means of providing valuable contextual background in understanding the constitution of a new global order.<sup>9</sup> A number of writers, of course, have drawn attention to the manner in which the new global order of post-September 11 exhibits the features of a state of exception. For example, Bhuta argues that:

the statements and posture of the Bush Administration imply a vision of international order where ‘law’ is merely one policy consideration amongst others, not a binding legal obligation – except when applied to the enemy, with respect to whose illegal acts the notion of ‘legality’ adopts a ferocious and uncompromising polemical content.

Bhuta (2003: 380)

Hence the exception itself serves to highlight some of the key organizing principles that make up the post-cold war political order, all of which challenge the mainsprings of the post-war constitutional order.

These principles are, unilateralism, pre-emptive action, and humanitarian intervention (see Hovell 2003).

### ***Unilateralism***

Unilateralism is an important element that animates the new emerging global order. Resort to unilateral action takes place outside normally accepted forms of international law and multilateral institutions.

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Clearly, the invasion of Iraq without recourse to formal authorization by the Security Council flies in the face of the UN Charter that:

a decision to use force must be – and, in the practice of the Council, generally has been – expressly made by the Council ... The Security Council's monopoly on non-defensive uses of force reflects a philosophy of legalism that is deeply realistic about the behaviour of states.

Bhuta (2003: 377)

However, it would be an error to see this shift towards unilateralism as emanating solely from the neo-conservative dominance of the Bush Administration's foreign and defence policy outlook. In reality, unilateralism or better, the suspension of the normal process of international law was equally evident during the Clinton Administration's intervention in Kosovo, see Bowring (2002); Koskenniemi (2002) and Douzinas (2002). In fact the difference between the two administrations is to be located in the flexible and broad partnership between the EU and the US manifest in the Kosovo intervention as against the more unilateral (with British, Australian and Spanish) intervention in Iraq. In both cases, the point is not unilateralism *per se*, but the fact that both interventions were backed by the hard fist of sovereign power acting in the name of a global community (Douzinas 2002).<sup>10</sup> In fact, it will almost certainly be the case that future administrations are forced through economic or other circumstances to rely more on partnership and coalition building; but this does not alter the fundamental reality that 'emergency action' which operates outside the normal process of international law has become a reality in the emerging global order and with this a fundamental transformation of the post-war liberal order.

### ***Pre-emptive action***

Resort to pre-emptive action elevates the right to take anticipatory action in order to circumvent what are seen to be threats to the security and well being of the international order. It animates the new global order. The notion of anticipatory action or pre-emption serves to bring to the global order an important aspect of domestic counter-insurgency warfare, which is to identify and eliminate current and possible threats to security. As with domestic counter-insurgency programs this can only work in a context where the normal processes of law have been suspended and executive discretion is amplified in a

condition of emergency. The national security strategy of the United States makes this new notion of pre-emption crystal clear when it notes that:

the greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.

White House (2002: 19)

But this is not all. Pre-emption implies that individuals, groups, or even countries considered to be potential threats need to be constantly policed in order to combat perceived threats to the security of the international system. Running through the new governance of the global order then is the belief that the international order is faced with ‘existential threats’ – whose definition is often arbitrary – of such a magnitude as to suspend the normal and cautious process of international law and politics.

### ***Humanitarian intervention***

Humanitarian intervention is a principle that animates the new global order and more importantly, this right to humanitarian intervention operates in a new and widely expanded domain. The emerging global order gives a new lease of life to the old notion of a ‘just war’ in the form of humanitarian intervention, but with one crucial difference: humanitarian intervention is premised on an extension of the notion of ‘emergency’ to encompass threats to human security. Much of the international policy literature has routinely normalised this notion of an ‘emergency’ with more neutral terms such as ‘complex political emergency’.<sup>11</sup> As a result, the very novelty of these ‘emergency conditions’ becomes obscured under a form of technocratic managerialism.

But the crisis of human security – like other existential threats to the global order – is defined outside of politics. Hence, lurking under this technocratic managerialism is the global state of exception. Bobbitt (2002) makes this point clearly when, referring to the war in Bosnia, he makes a distinction between *civil wars* and *emergencies*. In this formulation, ‘civil wars are commonly held to be the bloodiest and most violent of wars. For our purposes, what is important about the characterization of a crisis as a “civil war”; is that it blurs recognition of the crisis as an *emergency*’ (Bobbitt 2002: 433). This of course, does



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not provide any justification for this slippage from civil war to emergency but it is a slippage – and Bosnia provides an ideal example – that has considerable ramifications for the emerging global order. Most importantly, it means that threats to human security are understood in moralistic terms, that is, as ‘ethical imperatives’ of powerful decision-makers<sup>12</sup> rather than understood as outcomes of political struggle and conflict. Hence the significance of this moralistic twist is to significantly mutate the notion of a ‘just war’, which despite its variegated historical meaning had at its core a normative framework of justification. This defence was one that clearly included a view that the goals of just war had fixed ends, mandated by legitimate authority and through some degree of proportionality. But

we may now be compelled to discard the principle of proportionality altogether – not simply because we asked to accept ‘disproportionate’ means but because in the absence of specific ends, no such calculus is relevant at all. There is a new principle of war without end, either in purpose or time.

Wood (2003: 149)

In short, the notion of humanitarian emergency, like more hard-edged threats to international security, such as terrorism, requires the suspension of the normal legal order. More to the point, this suspension occurs under the wide and ambiguous latitude of ethical imperatives exercised under executive discretion that is needed to confront what are considered to be threats to certain modes of political existence. It is the accentuation of ‘decisionism’, to use a term of Schmitt, which provides telling evidence that the post-war constitutional order of international liberalism is in the midst of a profound transformation of its central governing principles.

In this respect Kupchan (2003) makes the crucial point that the kind of changes outlined above amount to defining a shift from the post-cold war commitment to international liberalism by the United States. He argues that:

America’s diminishing appetite for liberal internationalism is a direct product of the changing international environment. America refused to embrace liberal internationalism until World War II, when the prospect of Germany and Japan becoming aggressors with global reach necessitated its multilateral involvement in shaping the balance of power in both Europe and East Asia. The Soviet threat then ensured that the United States would

maintain extensive overseas commitments and institutional entanglements for the rest of the twentieth century.

Kupchan (2003: 21)

At the same time Kupchan correctly notes (a point that is often neglected by normative proponents of strong multilateralism) that this post-war constitutional order was underwritten by the hegemonic power of the US. Where Kupchan errs is in arguing that the collapse of the post-war constitutional order of international liberalism is likely to be marked by the end of US unipolarity, and the drift towards isolationism and unilateralism. This is a strange combination of elements, because unipolarity and unilateralism are surely not contradictory elements in the current global order; in fact, both may be essential conditions for the emergence of a new global order.

To understand the elements of this new order we need to place the kind of analysis offered by Kupchan within the framework of the shift from post-war constitutional order to something akin to what we have referred to here as a 'state of exception'. The post-war constitutional order – which we have dubbed 'international liberalism' – was in an important sense, dependent on the executive power of the United States and its transatlantic allies. Nevertheless, this was within the framework of a generally accepted system of international law and politics. What is significant, however, about the recent changes in global governance is the way the marginalization of this legal order is reflected in the way the US and its allies have been using a global state of exception to bypass, marginalize, and even suspend the existing framework of international law and institutions.

A useful way of interpreting these transformations in the constitutional order of international systems is through Ackerman's (1991) distinction between 'normal politics' and 'high constitutional politics'. He differentiates between various regimes of US constitutional history, and argues that there are decisive constitutional moments, such as the New Deal era, when political movements engage in the process of constitution making that is very distinct from the normal politics in which political and legal change occurs under stable constitutional conditions. From this standpoint, the end of the cold war and the accelerated economic globalization in the last decades of the twentieth century unleashed changes within the constitutional order that undermined the very foundations of the post-war liberal constitutional order. But it is here that we need to part company with Ackerman's argument: these changes have not come about because of the democratic movement of individuals or states challenging the legitimacy of

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the constitutional order. Rather, they have come through the suspension and bypassing of the normal constitutional order by the United States and its allies, creating what in effect is a permanent state of exception. More to the point, the significance of this constitutional moment lies in the very exclusion or suspension of the institutions and processes such as the United Nations that may have ushered in a new constitutional order.

While notions of multilateralism and what Ruggie (1983) calls the ‘embedded liberalism’ of the post-war order are useful as pointers to changes within the post-war global order, they remain limited as explanations of the underlying process of constitution making which animate the post-war global order. Pivotal to our argument is the fact that post-war constitution making cannot be separated from the broader democratic struggle of the twentieth century to gain constitutional recognition for labour within the constitutional and political structure of industrial democracies. In short as Eley’s (2002) work makes clear, democracy in the twentieth century is inextricably linked to the centrality of class and the labour movement in pushing the boundaries of democratic inclusion within the national and international society. In the post-cold war period the language of human rights and humanitarian intervention tends to obscure the vital connections between democratic advance and the central issues of class conflict that have framed politics throughout the last century. What has been vital here is the growing societal and constitutional recognition of labour as a political actor which has given shape to a larger politics of ‘interest’ and representation in the advanced capitalist democracies. As Eley keenly observes, despite the institutional compromises of the post-war social settlements:

Class kept its centrality. It was necessary for making sense of the society under capitalism – from the organizing of social life and the mapping of human differences to the charting of inequalities in the social distribution of value produced in the economy.

Eley (2002: 394)

Hence democratic advance was embedded in this wider social and political project of constitutionalizing labour within representative institutions and practices.

Of course, this is not to deny the fact that – as Rustin (2004) in a review of Eley, points out – the post-war geopolitical role of the US was important in constraining progressive politics in the cold war period. But the important point here is that it is the recognition of

labour within political and constitutional structures that provided a context for the politics of interest that dominated the Keynesian welfare states of the post-war period. More to the point, it is this 'politics of interest' that gave substance to post-war democratic politics in the advanced capitalist economies, and at the same time laid the foundations of the post-war liberal order. In short, the post-war liberal order was itself shaped by the embedded democratic politics of national economies and the constitutionalization of labour that it implied. Consequently, the collapse of the post-war liberal order needs to be located in the crisis and demise of the politics of interest that defined the twentieth century. The real strength of this perspective is that it allows us to situate changes in the global constitutional order within a broader transformation in the politics of interest that shaped national and international politics of the last century.

In this context it is important to bear in mind that if the decline of international liberalism reflects a global constitutional moment – a transition to a more illiberal constitutional order – then these changes will reverberate through the armature of various local constitutions. Indeed, the events of September 11 have led to the widespread and extensive use of executive discretionary power under the broad rubric of the 'war on terror'. These developments, in turn, reflect a broader trend towards the marginalization of representative political institutions in favour of executive power (Manin 1994; Bobbitt 2002). Thus, we find that in surprisingly short order several liberal democracies have sought to offer political leaders and other public officials a legislative framework for acting outside normal constitutional and representative institutions. Governments enacting these broad ranging emergency powers have argued that in 'states of emergency' or great peril, liberal democracies need to undertake special actions to safeguard security (Jayasuriya 2002c).

More than anything else, Bobbitt (2002) provides the important insight that grand strategy, constitutional order, and the form of the state, are mutually constitutive. In this context, the emergence of an internationalized state of exception is linked to more profound changes in the practices of representation and participation within the domestic sphere. These have in turn led to the development of a more executive-centred regulatory state. Just as post-war international liberalism reflected both the pattern of domestic social settlements (Ruggie 1983) and the various practices of social representation by organized groups, the increasing vulnerability of international liberalism reflects a more profound *transformation* in the character and form of the domestic constitutional order. This is

clearly towards a more *regulatory state* encased within an increasingly authoritarian shell. Simply put, the post-cold war events usher in a period of international geopolitics – a ‘grand strategy’, to use the jargon of the international relations specialists – that is set to leave its dark shadow on fundamental elements of the constitutional order in post-war liberal democracies. But what we need to recognize is how the changes in what we have termed the global constitutional order are mutually constitutive of the domestic political order.

### **The structure of the global state of exception**

It is useful here to reiterate the fact that, unlike notions of ‘exception’, which see it as ranged against the domestic liberal order, the ‘global exception’ explores what happens ‘when there is no state against which to go to war’ (Megret 2002: 370). If we are to use the framework of the state of exception, we need to rethink the way sovereignty has been redefined in the post-cold war global order. In this context, an important part of this argument about the constitution of a global regime of exception rests on the emergence of new forms of transnational structures and regulatory forms remain – even while they may be dominated by the US – much more than a simple assertion of US hegemony. Instead, what is evident is the rise of a web of transnational connections and structures that link various capitalist states, a process that creates new forms of complex sovereignty in the global economy (Jayasuriya 1999).

There is no single sovereign centre within the global order; neither can the global order be reducible to the usual ‘Westphalian’ global ordering of multiple and pluralist sovereign units. In fact, Hardt and Negri’s (2000) much discussed book on the ‘empire’ makes the critical point that it is sovereignty itself which is being rapidly reconfigured. Unfortunately, the near mystical nature of their analysis makes their understanding of empire analytically vacuous. More relevant for our purpose is a version of globality<sup>13</sup> proposed by Shaw (2000), which suggests that a global state form may be found in the ‘extension of globally legitimate international institutions. It also involves the transformation of the national form of the state – including concepts of sovereignty’ (Shaw: 2000: 193). In turn Shaw’s notion of globality has a resemblance to the earlier notion of Keohane and Nye (1977) of complex interdependence as well as – from a very different perspective – Kautsky’s (1970) notion of ultra-imperialism. While the idea as it stands needs to be broad and flexible enough to encompass different

political projects within this transnational entity (to call this a 'state' I think, would leave us mired in a Westphalian confusion), it does enable us to explore how the globalization of the state of exception can be framed in terms of the emergence of these new transnational political structures. Yet this is not all, as we shall in the next chapter see that one of the distinctive elements of this putative global sovereign is the ideological character it takes on as a defender of a set of particular affirmative cultural values – a thickening of normative bonds that bind advanced capitalist states – often against the abstract and universal principles embodied in the international law. The dialectical tension between liberal values and illiberal global policies to advance these values sets the stage for the emergence of an illiberal and authoritarian political global order.

In this context it is useful to distinguish this framework from that of those who have suggested that recent US foreign policy marks a shift from a benevolent hegemony that typified its posture in the post-war period to a more coercive militaristic stance. For Perry Anderson (2002), the end of the cold war together with the advance of economic globalization changed the equilibrium between force and consent that drove US policy in the aftermath of World War II. Instead, in the aftermath of the cold war the balance tilted towards a more coercive hegemony as:

with the erasure of the USSR, there was no longer any counter-vailing force capable of withstanding US military might. The days when it could be checkmated in Vietnam, or suffer proxy defeat in Southern Africa were over. These interrelated changes were eventually bound to alter the role of the United States in the World. The chemical formula of power was in solution.

Anderson (2002: 7)

There is much to be said for this argument. To be sure the recent pattern of US foreign unilateralist policy in Iraq, the war on terror, as well as its unwillingness to ratify international agreements or to be bound by collective security institutions, seems to tilt the odds sharply in favour of the view that there is a rebalancing of forces and consent in the operation of US hegemony. Yet, there remains very much a realist picture which in one sense assumes that international politics continue as before, but now with a strongly unipolar environment. And herein may be the problem: this line of reasoning tends to discount the significant transformation in the nature of the state as well as the broader global environment in which it operates. Most

accounts of hegemony, or indeed, the recent popularity of the term ‘empire’ seem to overlook the decisive way in which recent changes in the global order reflect a far deeper mutation in the modes and mechanisms of political rule as well as in new forms of international legitimacy.

Others, who portray these changes in terms of a shift in US foreign policy from *multilateralism* to *unilateralism*, have expressed much the same view. Accordingly, ‘the desire to maintain freedom of operation militarily has led the US to eschew multilateral entanglements in favour of direct, frequently bilateral interactions that permit maximum leverage and freedom of movement’ (Beeson 2003: 9). Bilateralism represents a significant movement in the direction of US policy in the manner indicated by Beeson, i.e., towards liberalism. Nevertheless, locating these shifts within the framework of a new regime of exception allows us to conceptualize the move towards bilateralism and marks the vulnerability of international multilateral institutions – framed in liberal terms – to an increasingly flexible form of bilateral and coalitional activity. In this sense, it is not just a realist reassertion of US power but one aspect of a more pronounced reconfiguration of the post-cold war global order away from multilateral institutions – based on principles of formal international equality – towards increasingly situation-specific forms of law and practice. It is this aspect of the global order that defines the regime of exception.

### **Political economy of the global state of exception**

International liberalism encompasses much more than a framework of international legality. Ruggie’s (1983) influential work sought to articulate the way in which post-war liberalism contained a particular structure of political economy that he refers to as ‘embedded liberalism’. The essence of the post-war economic order lay in the fundamental reconciliation of two distinct objectives: the need to provide a framework for a liberal international trading order, as well as the conditions for domestic social stability. For example, the restrictions, exceptions, and safeguards of GATT were designed in such a manner as to allow for the protection of domestic stability while at the same time benefiting from the advantages of liberal free trade. At the global level, embedded liberalism reflected the dominance of a kind of social liberalism. The core of this embedded liberal compromise was twofold: ‘unlike the economic nationalism of the thirties, it would be multilateral in character; [and] unlike the liberalism of the gold standard and free trade, its multilateralism

would be predicated upon domestic interventionism' (Ruggie 1983: 209).

The mode of global governance identified as 'embedded liberalism' has been crucial to the organization and structure of the 'welfare state' broadly defined to include not only social programs but also particular patterns of economic governance. It is in this sense that Cerny (1990) uses the term 'welfare state' not only in terms of social programs but also to include such core features as the pursuit of full employment, employing Keynesian techniques of macro-intervention and regulated labour markets. Analogously, the East Asian developmental state – though, most emphatically not a welfare type state – was able to prosper within this framework of embedded liberalism.

Since the end of the cold war, the resultant transformation of the global political economy has made the social and political compromises that sustained post-war embedded liberalism untenable. There have been three significant changes in the global economy during the last three decades of the last century. First, the process of capital and financial deregulation has weakened the capacities of nation states to enforce the forms of macro-economic disciplines that sustained the post-war liberal order (Jayasuriya 2001a). Second, these changes in financial deregulation have been accompanied by a move away – at least in major industrial countries – from Fordist patterns of production to more flexible forms of accumulation, sometimes called 'post-Fordism'. In turn, these production patterns have weakened the domestic and international structures which sustained the post-war economic order (Steinmetz 2003). Finally, there has been an intensification and expansion of market forms to what previously would have been termed the 'commons' (Harvey 2003). These include areas such as communications technology and intellectual property, all of which are subject to new global juridical regimes (Jayasuriya 2001b).

But the real importance of these profound changes lies in the serious erosion of the significance of class as a social force. To be sure, it was a gradual and incremental process that made class less salient as a political force. However, it was not just the force of economic circumstances that made class a marginal political force; it is also the imaginative underpinning of those 'communities of interest' that provided the backdrop for democratic politics in the twentieth century. The working class was

never only a homogeneous category of wage earners. Whatever the stage of capitalism, the working class was always in the process of



being formed. It had to be made into an operative unity – one with recognized public meanings and an active political presence.

Eley (2002: 397)

These imaginative understandings – the political vocabulary of interest – formed the bedrock of those institutions and practices of representation that were at the heart of the Keynesian welfare or ‘social’ state. The decline of this social state paved the way for the emergence of a new regulatory state whose function is to police the new economic borders. Along with these momentous shifts in the domestic political order, the post-war principles of embedded liberalism came to be replaced by a form of economic constitutionalism (Jayasuriya 2001b).

Economic constitutionalism refers to the attempt to treat the market as a constitutional order with its own rules, procedures, and institutions, operating to protect the market order from political interference. The increasing juridical role of the World Trade Organization, the shift towards independent central banks, and above all, the tough conditional agreements imposed by international financial institutions are factors that have moved towards economic constitutionalism. Economic constitutionalism demands the construction of a specific kind of state organization and structure: *a regulatory state*, the purpose of which is to regulate and provide ‘economic order’ within the global market.

Given the affinity of this term to the German *ordo-liberal* school of thought, it may be appropriate to call the emerging jurisprudence a kind of ‘global *ordo-liberalism*’. It is useful to focus on the writings of this school because it highlights the link between authoritarian politics and constitutional conceptions of economic order. Some of its prominent exponents were closely associated with the extremely conservative Von Papen government. Pivotal to *ordo-liberalism* and those of its prominent exponents such Eucken (1950) was the idea that the construction of economic order cannot be left to the spontaneous actions of the market, and needs to be constructed through a consistent order-based policy (*Ordnungspolitik*) of the state (Peacock and Willgerodt 1989). For the *ordo-liberals*

[the] various economic, political, legal and other social processes are interrelated. Each act of government intervention must therefore be seen in connection with the total processes and overall economic order so as to ensure the ‘system conformity of measures’.

Petersmann (1991: 63)

Accordingly, the state should not attempt to conduct the economy; rather, it should provide a system of juridical institutions that would facilitate the construction of the market. In fact, in its emphasis on the role of economic institutions in creating market order it presages the new institutional economics. The point here is that the purpose of the state is to protect the underlying values and traits ('the economic constitution') of the economic order.

Running through the ordo-liberal movement, it is possible to discern a distinctive conception of the political ramifications of notions of economic constitutionalism. In essence the ordo-liberals develop a political conception of market order where institutions are designed to protect it from the corrosive influence of politics; it is *a politics of anti-politics*. Those theorists such as Eucken (1950) and others were deeply concerned about the anti-competitive effects of society on the economy. Echoing Schmitt's analysis of the growth of the interventionist state, Eucken (1950) argued that by the end of the nineteenth century the state was increasingly captured by private interest groups leading to the politicization of the economy, and that this in turn weakened the state. In other words, the main purpose of economic constitutionalism was to protect the economy from these political pressures. This understanding of economic order implied the existence of institutions to prevent and circumscribe the politicization of the economy. It called for a form of institutional jurisprudence.

These new systems of economic constitutionalism fractured the social compromises that had underpinned the post-war economic order. Some have perceived the emergence of the new state of exception as yet another departure from some of the main tenets of a post-cold war system of economic constitutionalism. In an incisive argument Lipschutz (2002) has suggested a transition from what he calls 'disciplinary neo-liberalism' to one based much more on the military might of the US. There is no doubt that this is a powerful argument defending the way which the regulation of the global order has shifted from a predominately 'soft' decentralized and diffused system of regulation to more military-dominated US-based order. Indeed, Higgott (2003) has advanced a parallel argument that economic globalization 'is now seen not simply in neo-liberal economic terms, but also through the lenses of the national security agenda of the United States' (Higgott 2003: 5). Arguing along these lines, he suggests that US foreign economic policy is becoming increasingly securitized and this marks a significant change from the US foreign economic policy of the 1990s which sought to subordinate security to economic concerns. In effect the greater militarization of

the global economy in the aftermath of the war on terror constrains the unbridled economic globalization of the 1990s. Hence,

policies geared towards controlling globalization, unlike in the more laissez faire period of the last decades of the twentieth century when the market alone was meant to drive it – have a much stronger place in US policy under the Bush Administration.  
Higgott (2003: 20)

In the early decades of the twenty-first century both Lipschutz and Higgott seem to suggest that economic globalization will be subordinated to an increasingly securitized global agenda.

While these arguments are persuasive in terms of the changed dynamics of economic globalization in the post-September 11 era, we need to make the distinction between the securitization of globalization or the state of exception as the political form of the global order and the underlying economic foundations of global order which are still tethered to the practices of neo-liberal globalization; the securitization of the global political order and a system of economic constitutionalism are not mutually exclusive. It is more useful to see the unfolding of the process of neo-liberal globalization as giving rise to a variegated series of governance projects throughout the last decade and half. These have sought to recalibrate the engine of post-war multilateralism – the ‘UN Republic’ to use Lipschutz’s term. In the 1990s this system of economic constitutionalism, as Lipschutz and Higgott observe, was configured to a decentralized system of multilateralism which is now being replaced by a more coercive US-based system of global governance. However, the events of September 11 gave way not only to a new governance project but also to one which sought to establish the foundations of a new global constitutional order; not just a recalibration but an overhaul of the post-war engine of international liberalism. Therefore, what is significant about the economic order post-September 11 is the fact that economic constitutionalism is contained within a political core that operates outside of the normal process of international legality. As Steinmetz (2003) aptly comments, global economic openness remains central to the US foreign policy objectives, but economic constitutionalism now functions within the more authoritarian frame of a global state of exception. None of this should be surprising as the experience of capitalist industrialization in East Asia and elsewhere has shown us that markets are compatible with a diverse array of political forms. Likewise, global capitalism is compatible with a diverse array of political forms

and the events of September 11 signal a shift towards a more authoritarian political form.

It is well to remember here that there is an affinity between ordoliberalism and authoritarian political order. In fact, the main purpose of economic constitutionalism was to protect the economy from these political pressures, and as such, it remains imbued with a strong anti-political ethos. In this regard, it is worth noting that there is a strong resemblance between the ideas of the ordo-liberals in Germany in the 1930s and the recent rise of the law and economics movement. In both cases it is a jurisprudence which attempts to ground law not in a political process but in terms of the values of the institutional order which are of course perceived as 'natural', and consequently disembedded from the play of politics and power. In effect, a form of global ordoliberalism demands a more authoritarian global political order. As Neumann (1944) has argued so insistently, legal deformatization at the national level is rooted in a fundamental transformation of capitalist economies over the greater part of the twentieth century. In this respect at least, the post-September 11 crisis of the international liberal legal order represents a similar process of a move away from formal international law in response to the growing complexity and integration of the global capitalist economy.

## **Conclusion**

In sum, this chapter has sought to locate the events of 9/11 in the context of deep seated shifts from the policies and practices of international liberalism towards what we have termed a global state of exception. One facet of this shift is obviously in the marginalization and suspension of the international political and legal order. But perhaps more significantly, the move towards a state of exception is reflected in what may be called the emergence of a putative set of transnational regulatory structures – or what Shaw (2000) calls 'globality' – that seek to act in the name of the global community. In this sense, the events of 9/11 usher in a new global order which is much more than simply a new and more aggressive deployment of US military power, and in effect amounts to the emergence of a new global constitutional order that is more authoritarian and illiberal than the post-World War II constitutional regime of international liberalism.

In the next chapter we turn to explore these changes in the nature of political rule and the mechanisms by which the internationalization of the 'state of exception' transforms the spaces of global politics into normal and exceptional zones that are subjected to constant supervision

and policing; it represents a fundamental reconstitution of the post-war liberal order. The most significant dimension of this transformation is the privileging of legitimacy as against legality within the new global order. This new legitimacy takes the form of a move towards what we term a 'new culturalism' in the global polity that seeks to transform international politics into conflicts over identity and values. These values in turn are seen to be justified in terms of a new and highly illiberal 'political existentialism' that seeks to construct the new legitimacy around the defence of a particular mode of existence. While couched in liberal terms this new legitimacy has deeply illiberal and authoritarian elements that overturn many of the practices of the international legal order.

Finally we suggest that this cultural turn forecloses a politics based on the antagonism and conflict rooted in material rather than cultural or symbolic conflicts; ironically, the net effect is to produce a global capitalism without capitalism. The second aspect is that alongside this new cultural turn there is parallel transformation in – to use Ong's (2002) terminology – the 'spatiality' of global politics which leads to a transformed understanding of the nature of war and violence as well as forms of political rule within the global polity that depart from the practices of international equality that have dominated international politics in the post-World War II era.

## 2 From legality to legitimacy

### The new culturalism in global politics

#### PART 1: CULTURALISM AND THE NEW LEGITIMACY

##### The turn to values

One of the more intriguing intellectual developments since the events of September 11 and the consequent US reaction has been the acceptance, and indeed, the celebration of the idea of empire by conservative and some liberal theorists and analysts (see for example, Ferguson 2001, 2003; Krauthammer 2001b; Boot 2001, 2002; Mallaby 2002; Kagan 2003; and Ignatieff 2003).<sup>1</sup> But this new conservative analysis of imperialism differs from that of traditional radical analysts in one decisive aspect: this is an imperialism of values, of the affirmation of the defining cultural values of those states which together constitute the core of what Shaw (2000) has called 'globality'. Tory historian Ferguson captures well the new celebratory mood of empire when he notes that:

Political globalization is a fancy word for imperialism, imposing your values and institutions on others. However you may dress it up, whatever rhetoric you may use, it is not very different in practice to what Great Britain did in the 18th and 19th centuries. We already have precedents: the new imperialism is already in operation in Bosnia, Kosovo, East Timor. Essentially it is the imperialism that evolved in the 1920s when League of Nations mandates were the polite word for what were the post-Versailles treaty colonies.

Ferguson (2001)

Ferguson here, and in (Ferguson 2003), seeks to justify imperialism. But it is a sugar coating of empire in the language of values, which in this new landscape of legitimacy goes far beyond proponents of

empire to include those who, for example under the guise of human security, seek to 'securitize' areas such as economic development or the environment. Argument here is not about the imposition of any specific set of values but about the legitimation now played out in a new terrain of culture and its symbols that substitute for the material relations of conflict and power. Played within the new registers of this emergent culturalism, liberalism becomes orchestrated within broad tones of illiberal harmonics.

It is this shift to values and the new landscapes of legitimacy that come along with it that defines the post-war liberal order and its transformation in the post-September 11 era. In this sense our argument differs from those such as Anderson (2002) who argue that the post-cold war era and especially the events of September 11 have intensified the coercive aspects of this hegemony. But at best, this remains only a partial explanation of the changing global order as it overlooks the broader ideological and political context in which the post-war liberal hegemony was exercised (Latham 1997). What is being transformed is not US hegemony but the post-war *liberal* hegemony of the United States; and it is this transformation of the liberal dimension of this hegemony that holds the key to understanding the transformation of the global order. In other words, we need to consider more carefully the way in which liberalism has been transformed both domestically and globally from a politics of interest to a new emphasis on the politics of values or culture.

This new global order provides the basis for the declaration of the state of exception allowing a group of states – acting in the name of the international community – to act outside the normal rules and processes of the international legal order. But this assertion of the right to act outside the normal process of legality is made in the name of legitimacy, in terms of enforcing 'values' against the formal and abstract structures of legality and international politics. As we shall see, it is this new shift towards culturalism that shapes the recent conservative celebration of empire: an empire of 'values'. The main thesis advanced in this chapter is that this new celebration of empire arises from a tension within liberalism itself that works itself out through the emergence of new illiberal and authoritarian political forms. How do we explain this? It is suggested here that increasingly liberalism turns away from formal and abstract structures of politics and law in favour of an affirmation of values. This 'inward' or ethical stance is evident in the increasing weight given to notions of legitimacy as opposed to legality. In other words, the liberal order is directed at the subjective affirmation of particular or concrete modes of existence

and the identification of threats to these forms of life instead of a commitment to abstract and formal processes of legality and politics and the principles of political equality that go hand in hand with these formal and abstract principles and processes.

The exploration of this liberal/illiberal entanglement draws heavily from some of the ideas of the Frankfurt School theorists, especially the work of Marcuse (1968) on interwar fascism which suggests that this affirmation of cultural values – and its resultant authoritarian and fascist tendencies – is not so much antithetical to liberalism as a problematic aspect of liberalism's own transformation. It is argued here that this transformation is now taking place at the level of the global order along with the consolidation of new transnational structures rather than at the national level. More recently, King (1999) has explored the way in which the liberal polities have often implanted highly illiberal policies, including the recent workfare policies in Britain and the US. Although we differ somewhat on the shape of this liberal/illiberal entanglement, a similar problematic nexus between liberalism and illiberalism provides the context for our present study.

The intimate relationship between liberalism and empire has been the subject of some study (Mehta 1999). Most famously John Stuart Mill provided a justification for empire (and not coincidentally the practices of the East India Company) in his theory of representative government. Mill contentiously claimed that British India lacked the requisite capacities for effective self-government. In the twentieth century, Max Weber, despite his liberal propensity remained – albeit cautiously – a supporter of German imperialism. Weber's (Mommsen 1989) argument was that imperialism and the competition between systems were essential elements in safeguarding liberal values. These examples demonstrate the distinct affinities of the cultural argument for liberal expansionism; for Mill it was a question of civilizational deficits and for Weber it was an antagonism of values. Yet our argument here differs in one decisive aspect: the contradictions and tensions within the liberal order that we seek to analyse take place at the global rather than the national level. In this sense the key change that takes place in the global order is the reconstitution of the post-war liberal project. Consequently we seek to understand recent moves towards culturalism and an illiberal politics as a product of the contradictions and tensions within the global liberal order that came into being after the Second World War. These tensions within the global liberal order – we might add, that predated the September 11 events – reflect a deeper transformation of the liberal global order. In much the same way that various forms of illiberal politics, including fascism,



came to overwhelm liberal politics during the interwar period within Europe, we note similar tendencies within the contemporary global order especially insofar as they articulate notions of politics as underpinned by forms of existential antagonism organized around 'cultural' categories. This existential antagonism was of course a central motif in the various notions of the 'political' and the exception developed by anti-liberal political theorists such as Schmitt.

In framing the notion of sovereign decision as a state of exception, Schmitt sought to define politics as antagonism between friends and enemies. The essence of the sovereign decision, which comes into full bloom at the time of the state of exception, lies in an acute inflation of this antagonism. Of course, political theorists, most notably Mouffe (1992, 1993) have used this as a springboard to develop a framework of radical democracy. But to accept this interpretation would signal a failure to recognize that for Schmitt what was critical was that the outer coercive core which underpinned a liberal constitutional order was premised on the defence of a culturally defined 'pre political' unity of the 'people'. The decisive point is the fact that the emergence of the state of exception unleashes a form of cultural war that provides a basis for grounding social conflict around cultural values rather than relations of conflict over access to material, distribution, and production of goods. It is for this reason this cultural 'turn' can be aptly termed a 'politics of anti-politics'.

Hence, the state of exception goes beyond the suspension of normal constitutional processes to mould the structure, patterns, and forms of social conflict on the basis of cultural rather than material cleavages. It provides very specific cultural schemata through which conflict is patterned. Culture here refers to the way in which it 'plays off the spiritual world against the material world by holding up culture as the authentic values and self-contained ends in opposition to the world of social utility and means' (Marcuse 1968: 95). This affirmation of cultures as 'values' needs to be distinguished from the idea of culture as the material production of 'ways of life' which is an essential ingredient in the reproduction of social and economic life (Williams 1983). Shifting to an understanding of culture as 'values' provides a basis through which capitalist economic processes are progressively culturalized. What this means is that 'culturalization' has the effect of channelling the material conflicts of capitalism along streams of cultural or value conflict, which empty out into the marshes of a kind of '*gemeinschaft* capitalism'.<sup>2</sup> *Gemeinschaft* capitalism is an ideological hybrid that fuses together capitalism and communitarianism within a shell of anti-liberalism.

It is exactly this fusion of communitarianism and capitalism that Sternhell (1983, 1994) has observed in relation to interwar fascism which ‘was the product of both a crisis in liberal democracy and a crisis in socialism’ (Sternhell 1983: 2). Above all this cultural turn was a ‘rejection of “materialism” that is of the essence of the European intellectual heritage from the seventeenth century onward’ (Sternhell 1983: 268). Liberalism and socialism were twin heirs to the materialist heritage which were rejected by a number of fascist and radical conservative movements in the early twentieth century. In Bush’s *Compassionate Conservatism* or Britain’s *New Labour’s Third Way* – by no means whatsoever suggesting that these movements simply replicate fascism – one can clearly identify elements of this anti-materialist ideological hybrid of communitarianism and free markets. Of course, cultural motifs can be put to the service of very different ends. In Europe, far right parties such as Jean-Marie Le Pen’s *Front National* have long sowed the fertile fields of cultural politics in the form of ‘radical critique, an idiom of cultural solidarity and the crucible of exclusionary social justice’ (Holmes 2000: 69). Le Pen’s view of the immutability of cultural difference stands in contrast to the malleable cultural engineering of US neo-conservatism or British *New Labour*, but both represent an appeal to an empire of values that differs sharply from the communities of interest that drove both modern liberalism and socialism.

But the compelling attraction of culturalism is equally evident in the rise of these culturalist ideological forms at the level of the global order and the way this symbolic order eviscerates the prevailing international liberal constitutional order. The clearest indication of this new anti-materialist turn is the remarkable resurrection of modernization theory. Modernization theory, which was influential both as theory and practice in the field of development studies, suggested that political and economic development was driven by the extent to which individual countries possessed cultural attributes essential for development. But the difference from modernization theory’s heyday of the 1960s is that the current cultural turn is a conscious and reflexive strategy of the US and various international financial institutions; culture becomes a building block of social engineering. Influenced by the methodical individualism of rational choice theory, these new variants of modernization theory assume that requisite cultural attributes for economic development – often seen in terms of good governance – can be engineered through a properly defined mix of sanctions and incentives. (Jayasuriya 2001b).

Of course, the revival of modernization theory, sometimes in the guise of rational choice theory, is one of several examples of the way in which international relations theory reflects a more fundamental

tilt towards culturalist analysis, exemplified, of course, by Huntington's (1996) argument on the clash of civilizations. Huntington, however, remains outside the mainstream culturalist influences on diplomatic activity. These ideological forces have been most evident in the work of influential policy studies of conservative theorists such as Kagan (2003), and also in the work of former British diplomat and Blair adviser Robert Cooper. Cooper conjures up a theory of liberal imperialism that rests on what he calls the 'post-modern' international relations of Europe and the modernist Third World. He argues that in order not to be engulfed by the chaos of the modernist hinterland the metropolitan liberal empire of the 'west' must discipline and regulate this hinterland. This is a curious inversion of modernization theory, where instead of positing a pre-modern east versus the modernist west, there is a dramatic confrontation between the postmodernist west and the modernist east. However, at root the basic antinomy here between postmodernism and modernism can be reduced to an antagonism of cultural values. The rapidly growing influence of culturalism manages to remain outside of the established precincts of international theory, in for example, the so-called recent constructivist approaches to international relations with an emphasis on norms. This theorizing reflects a shift away from understanding international and domestic conflict, from interests to values. Harroonian,<sup>3</sup> in an incisive article on post-modernist approaches to globalization observes, this mode of theorizing 'authorizes the primacy of claiming cultural diversity or difference'. (Harroonian 2002: 22) as the regulative mechanism for the global polity. In all these culturalist registers the global order – whether conceived in terms of a set of rather thin essential cultural values or a world of diversity – the material conflicts of the global economic order come to be misrecognized in various forms of culturalism. In other words, a '*gemeinschaft* capitalism'.

In fact, this new culturalism forms an important part of the tradition of what Sternhell (1994) and Berlin (1976) refer to as 'counter-enlightenment' in western political thought. But this counter-enlightenment has also moulded various forms of what Margalit and Buruma (2004) have described as 'facets of an occidental revolution'. As they suggest, various political and ideological movements, ranging from Japanese nationalism to Baathist ideology in Syria and Iraq, have drawn on this counter-enlightenment. Noting a similar configuration within German conservatism during the Weimar period, one historian (Herf 1984) has appropriately described this politics as a form of reactionary modernization. Herf's analysis

placed particular emphasis on the way in which German conservatism was able to reconcile modern technology with a reassertion of forms of cultural community.

The term 'reactionary modernization' captures well the manner in which conservative political programs can be committed to technological modernity whilst remaining hostile to political aspects of the Enlightenment. The latter pertain to normative characteristics such as the values of universalism, political equality, and social amelioration, all of which in one way or another have served to underpin both liberalism and social democracy. Curiously then, the events of September 11 have provided sustenance for forces on all sides who have sought to articulate the 'war on terror' as driven by fundamental cultural antagonism.

Yet, important as these disciplinary developments may be as a reflection of changes in the global order, it is at the level of international practice that the turn to values has become greatly evident. The following statement in the counter-terrorism strategy makes clear the importance of values in defining the global order:

We will never forget what we are ultimately fighting for – our fundamental democratic values and way of life. In leading the campaign against terrorism, we are forging new international relationships and redefining existing ones in terms suited to the transnational challenges of the 21st century.

White House (2003: 2)

This is a theme that has echoed right across the Bush Administration and its British and Australian allies. Herein lies one of the most important differences between earlier notions of counter-insurgency and the kind of global counter-insurgency waged by the United States and its allies. The 'enemy' is not defined in political terms – as it would be in the standard anti-communism of the cold war – but framed within a cultural perspective that denies and strips conflict of any political content; it is fundamentally anti-political. In this at least, it mirrors the anti-politics of Islamic fascism.

Wendy Brown's perceptive critique of the moralism and anti-politics of contemporary identity movements that could be equally applicable to recent developments in international politics, observes that:

Moralism so loathes overt manifestations of power – its ontological and epistemological premises are so endangered by signs of action or agency – that the moralist inevitably feels antipathy

towards politics as a domain of open contestation for power and hegemony.

Brown (2001: 30)

Over and above all these facets of moralistic anti-politics, there remains the insistent denial of the artificial or contingent nature of politics – i.e. that there is no fundamental truth to be discovered therein – which is an essential part of the practice of political liberalism.

Certainly, there is a deep affinity between these emphases on values and the broader neo-conservative movement in US politics, which has acquired great influence in the Bush Administration. These neo-conservatives, influenced by the political theory of Leo Strauss (who himself was deeply influenced by Schmitt) bemoaned the pluralism and the incommensurable worldviews that sapped the authority of the state (Drury 1997). Instead, Strauss argued that what is required is a strong state founded on a shared set of authoritative values – ‘myths’ if you like – that provided for a common way of life. And the argument is that the end of the cold war provided just this opportunity for the United States to pursue its values on the global stage.

Over and above the significance of this neo-conservative thrust in US foreign policy, this ‘culturalist’ leaning is located in the more deep-seated recent changes in the global polity and economy. The end of the cold war, and with it the possibility of competing systems of political and economic forms, press towards a more closely intertwined world of global capitalism which has ensured that issues of legitimacy are driven to the foreground of global politics. In this respect Clark (2001) is right to argue that in the post-cold war period there has been a ‘normative thickening’ of the global order in the pursuit of a narrowly economic liberalism.

But here is the rub: this normative shift has been followed by the coercive or other methods and techniques of intervention that operate outside the international legal order. What is more problematic is that the suspension of formal international law occurs in the name of a ‘turning to ethics’. It is in this sense that the post-cold war regime underlines the extent to which the global political order had been underpinned by a set of ethical and value commitments that increasingly seeks to work outside the liberal international political and legal order. It is in this very fundamental sense that there has been a move away from international liberalism.

Clark, employing Polanyi’s (1944) terminology here describes this as a double movement consisting of a move towards a broadening of the political membership of the international community for much of

the twentieth century, followed by a movement that has 'struck back at the very pluralism that the global state system has generated, and of which the World Wars and the cold war were symptomatic. It has sought to reassert a greater central control of the international system' (Clark 2001: 254). A group of advanced capitalist states of economic and political structures are deeply interlocked and have 'begun more self consciously to articulate its legitimating values as being appropriate for the wider international system as a whole' (Clark, 2001: 55).

In one sense, Clark points out that the decisive change is not so much in the bases of legitimacy but in the fact that within the global system this legitimacy itself has become the currency of legitimacy, paid out in one set of unified values framed in a very narrow and particularistic ways which stands against the – however imperfect – universalism of the global international order. As we have seen, this culturalism can take on a neo-conservative form, but it is equally evident in some of the emphasis of the anti-globalization movement on 'localism'. In either case, conflict is encased within an anti-materialist ideological shell.

A key facet of this culturalism is the articulation of an antagonism between a notion of legitimacy – the outer normative coating of the global state of exception – and the legality of the international system embodied in the universalization of formal international law. As legitimacy comes up trumps in this particular dialectical game, the legality of specific acts is perceived as inseparable from a determination of the acceptability of specific actions (legitimacy). Legitimacy comes through the suspension of the normal international legal order in the name of values that are said to underpin that very international legal order.

Shifting the balance of the international global order to legitimacy in effect reproduces the essential antagonism – so central to anti-liberals, such as Schmitt – between legitimacy seen in terms of adherence to a 'substantive homogeneity' of a particular state and the elements of a formal liberal pluralistic legal order. The authoritarian resolution to this problem is to reduce legality to legitimacy 'which hopes for order on the basis of substantive values created initially through an act of irrational decision' (Dyzenhaus 1996a: 650).<sup>4</sup> Consequently, there is a subtle but discernible distinction between legitimacy – defined in narrow terms as relating to specific political and economic values with a notion of economic liberalism at the forefront – and the core legal institutions bounded within the iron framework of values.

This new turn to values and cultural commitment is starkly illustrated in George Bush's description of the Anglo-American partnership as an alliance of values where 'foreign policies of Britain

and the US were guided by their “deepest beliefs” in the value of human rights and “open societies ordered by moral conviction” (*The Guardian Online* 19 November 2003). More pertinently he notes that this turn to values means that

those in authority are not judged only by good motivations. The people have given us the duty to defend them. That duty sometimes requires the violent restraint of violent men. In some cases the measured use of force is all that protects us from a chaotic world ruled by force.

*The Guardian Online* (19 November 2003)

Note the significance here of the fact that legality – that later in the same speech he claimed to be embodied in the League of Nations and the United Nations states – is deemed incapable of defending values in a world where the only viable response in a legally chaotic world is the use of force to defend a set of cultural values which bind the advanced capitalist states.

The very particular values of the core capitalist states within the emerging transnational structures of the global order (see Chapter 1) are set against the formal structures of international law and politics. Hence the emerging transnational order within advanced capitalist states is defined not just in terms of a common set of global institutions but also of a set of values. Foregrounding the particularism of values has deleterious consequences for international politics because it disinherits the universalism that enabled political struggles and claims to be made within the international order. We should, of course, not overestimate the emancipatory potential of the actual legal and political structures, but simply need to note the way in which post-war international liberalism was invested with universalistic notions such as international equality that enabled political claims to be made. Turning to values disables this politics; it is at root a conservative form of anti-politics. It is this emerging motif of culturalism that resides in the anti-liberal architecture of the global order.

### **Liberalism and illiberal politics**

What makes this current commitment to the emerging culturalism at once intriguing and puzzling is that the values that give the legitimacy to the international system are couched in terms of the pursuit of liberal ends. The US may be in hot pursuit of an empire but this is very much a ‘liberal empire’ that is different even from the British Empire

of the nineteenth century that had liberal pretensions. The US is set to build an empire of values in which the neo-conservatives driving the Iraqi campaign – as well as the more sober policy makers in the Clinton Administration – sought legitimation for their actions under the armature of liberal ends. Hence, the puzzle at the heart of this new global state of exception is that it suspends the constitutional order of international liberalism on behalf of liberal ends; it uses illiberal means to pursue liberal values.

The illiberal qualities of the emerging international system then, emerge from the pursuit of a particular kind of liberal cultural order. To understand the illiberal qualities of this ‘liberal culturalism’, we need to grasp the crucial slippage here from liberalism understood as a product of social conflict generated by changing material circumstances to a notion of liberalism understood as an affirmation of a set of values. Useful here is Marcuse’s (1968) early writing on the way liberalism comes to accommodate illiberalism through its adherence to what he terms ‘affirmative cultural values’. He argued that the decisive characteristic of affirmative culture is the

assertion of a universally obligatory eternally better and more valuable world that must be unconditionally affirmed: a world essentially different from the factual world of the daily struggle for existence yet realisable by every individual ‘from within’, without any transformation of the state of fact.

Marcuse (1968: 95)

As Raymond Williams argues, this is a view that privileges a romantic vision of culture as an ‘informing spirit’ that animates a way of life. It is, as he points out ‘a noun of configuration or generalization of the “spirit” which informed the “whole way of life” of a distinct people’ (Williams 1983: 10).<sup>5</sup> He contrasts this with a view that sees culture in material terms as a component in the reproduction of social order. But it is the latter inward looking idea of culture in which notions of legitimacy are being minted. In essence, this cultural liberalism substitutes an affirmative set of values that effectively dispenses with the historical character of political forms like democracy.

At root then, this notion of affirmative culture is vehemently anti-political, and through it permits an understanding of notions of democracy and the rule of law not as outcomes of complex social struggles and conflict, but as a set of institutions or a set of techniques to be engineered or imposed for the technocratic management of social relations. What is at stake here goes much further than the



contemporary global temptation to use illiberal means to justify liberal ends. It is equally pervasive, as King (1999) has superbly articulated in a whole range of areas extending from current workforce policies to early twentieth-century assimilationist policies in countries such as Australia. Consequently, the mainsprings of these illiberal inclinations of liberalism are the framing of agency – be it of individuals or states – in cultural rather than political terms.

Let me give some examples. The implementation of the principles of the rule of law is a major objective of multilateral agencies such as the World Bank and the Asian Development Bank which spend considerable resources in the provision of legal reform projects. Implicit in the advocacy and/or study of the rule of law is the assumption that legal institutions are part of a wider package of market and (at least for some) democratic institutions. In fact, this argument is reminiscent of an old maxim of modernization theory that ‘all good things go together’. Viewed from this perspective the implementation of rule of law projects is quintessentially liberal.

However, this is a liberal project framed in terms of affirming a set of values which loses sight of the fact that the emergence of the rule of law in Western Europe is a product of a complex historical process,<sup>6</sup> not a set of affirmative values to be implemented by technocrats. In other words, legal institutions (like other institutions) are embedded in a wider ideological context and it would be naïve to think that liberal institutions and practices such as the rule of law can be simply engineered. Moreover, conceiving the rule of law in terms of a set of values like the protection of property rights means that the development of private rights entitlements in the economic sphere is disconnected from the growth of the public sphere of political participation. This sets the stage for rule of law programs to accommodate a range of illiberal political forms.

Indeed, as I have argued elsewhere (Jayasuriya 2002b) this leads to the emergence of what may be termed an ‘authoritarian legalism’. Authoritarian legalism is distinguished by the fact that the emergence of the rule of law – to use Moore’s (1967) very useful description – may be seen as a ‘revolution from above’ rather than a ‘revolution from below’. From this standpoint, the catalyst for the emergence of legal institutions (including property rights) is an outcome of the efforts of state élites to rationalize the state, and thereby expand its political power. This contrasts with the view that legal institutions are the outcomes of the actions of commercial-minded interests attempting to restrain the political power of the state; in other words, a revolution from below. Policy makers often

see law as bits of technology that can be deployed to attain very specific ends. Hence, the framing of the rule of law in terms of a set of values enables it to be made compatible with a diverse range of often illiberal technocratic projects.

A similar tendency to displace historical and social process by reducing it to a set of cultural values is apparent in democracy promotion programs. Since the end of the cold war, 'democracy promotion' – despite its often chequered history since the fall of the Berlin wall – has come to occupy a pivotal position in American foreign policy. Although it gained prominence within the Clinton Administration (Cox *et al.* 2000), this foreign policy principle has been selectively applied by the Bush Administration, and currently provides the ideological rationale for a broad spectrum of foreign policy goals. Here again, democracy is conceived in terms of a promotion of a series of cultural values rather than a product of a social and political process. Hence, like the rule of law, the assumption here is that democracy is simply a matter of engineering the 'right' set of institutional procedures. As one writer puts it, the purpose of democracy promotion is that the 'supply of assistance emanates from the international community's pursuit of democratization as a long-term path to global development and stability' (Sisk 2002: 6). In this view, democracy becomes a means to pursue a range of other goals and objectives, and regardless of the intrinsic worth of these goals and objectives, it is considered to be a set of procedures rather than a product – often a by-product – of social and political struggles.

In fact, a similar anti-political logic operates in the promotion of a range of projects under the governance banner of international financial institutions such as the World Bank. For example, the World Bank has in the last decade promoted a form of global social policy that places great importance on participation. It has sought to create 'social funds' that operate as institutions that bring together a number of non-governmental and governmental actors to take part in the delivery of services, and in general, problem solving. Participation, which is an important part of this program, is, however, seen in instrumental terms as 'problem solving' rather than as an aspect of conflict over material resources and representation. What it effectively does is to create a form of depoliticized participation or active participation that marginalizes conflicts of power and interests within capitalist societies.

It is useful to describe these notions of participation and deliberation as problem solving as it is especially appropriate in a regulatory state which acts like an enterprise rather than a civic organization (Oakeshott 1975). In a 'civic association', rules do not derive authority

from pursuing instrumental ends or objectives, or from the creation of a desirable set of outcomes. By contrast, in an 'enterprise association' the validity of rules springs not from the association itself but from the ends or purposes of the organization. An enterprise association, therefore, is a purposive and end-oriented organization. From the perspective of an enterprise association, participation is understood in terms of its ability to promote a given set of policy outcomes. Hence the anti-political sources of this view of participation lie beyond its role as problem solving in the very manner by which it marginalizes political representation.

Behind the 'problem solving' view of participation lies an assumption that participation – conceived in local terms – will reveal in fairly short order the real 'needs' of the community; these community interests are somehow seen as being pre-political. But what this account diminishes is the role of representation in articulating and giving expression to various identities and interests in the political community. And the important point is this: for this representation to take place it has to be mediated through a range of representative organizations, forms, and institutions; this means that there can be no simplistic overlap between the community and interests (Chandhoke 2003). In other words, participation is not seen as an end in itself. Rather, it is seen in an instrumental fashion as a means of achieving better technocratic policy outcomes and inculcating affirmative cultural values.

Both democracy promotion exercises and participation in global social programs have one thing in common: they disentangle political processes from the broader social and political structures. In consequence the elision of the social and political context of democratization or 'participation' provides the rationale for a whole gamut of illiberal impositions. In short, democracy promotion under the rubric of affirmative cultural values is prone to the same illiberal temptations that plague 'rule of law' programs. But the marginalization of the social and political context of democratization runs deeper than the affirmation of a set of values. Democracy promotion is viewed in terms of a set of techniques, the key purpose of which is to provide legitimacy; legitimacy becomes an end in itself.

Democracy, in this view, embodies a particular conception of politics as management and consensus. These are well summarized by Dean who observes that this 'focus on legitimation is ultimately depoliticizing. As it posits in advance a unified community, it withdraws the revolutionary energy long associated with claims to universality' (Dean 2002: 171). It remains a deeply problematic

understanding of democracy because it suggests a view of democracy that loses sight of the fact that democratic processes are the by-products of conflict over struggle for representation by political actors, such as, for example, the working class (Rueschemeyer *et al.* 1992) which has been denied recognition within the polity. It is the struggle for representation and the expansion of the political role of labour and the working class that continually increased the scope and intensity of democratic process which – we might add – led to expansion of membership within the international community; therefore democracy as a product of ongoing social conflict and the emergent political identity of the working class has been the driving force of democratic change. However, the weakening of the labour movement and the broader socialist movement has led to the privileging of ‘values’ or a culturalist understanding of democracy that disables the struggles for recognition, which lie at the heart of the movements for democratization. The ‘values’ view of democracy promotes a sanitized notion of democratic participation that is capable of excluding democratic projects which run counter to the technocratic visions of those organizations and groups who seek to promote democracy.

### **Illiberal politics and the new political existentialism**

A critical foundation of the new illiberal politics of the post-September 11 global order is to be found in the fact that legitimacy is seen to spring from the natural order of the global system, and more specifically from the imperative to secure order within a global system that is increasingly chaotic. However, what makes this pursuit of ‘order’ and the broader rubric of legitimacy on which this order takes shape so significant here is that it is counterpoised to the artificial order which international law (or legality in general) is said to provide. Hence the resort to values and its organic moorings is placed in sharp relief to the artifice of legality. Of course, this kind of antagonism between the organic foundation of values and the consequent hierarchy of states and individuals that it licenses, and the artificial nature of legality with its presumption of formal legal and political equality is a defining feature of what Berlin (1976) calls the counter-enlightenment. In fact this contrast between the artifice of legality and polity and the organic nature of values and legitimacy was an important element of the anti-liberalism of fascist and conservative thought of the interwar period (Marcuse 1968, Scheurman 1995). Of course, this is not to claim that the new global order is a fascist order writ large – this would be nonsense – but it is to argue that we can

identify a set of anti-naturalist ideas that weave together ‘facts on the ground’ that produce moral imperatives to act outside of normal processes of legality and politics. It produces a form of political existentialism that Marcuse so well analysed in the interwar period that is seen inflected not just in neo-conservative thought but in the broader movements towards the securitization of various practices of global and domestic governance. In fact as Williams (2003) notes the influential Copenhagen School of Security Studies has been influenced by the work of Carl Schmitt, and he revealingly draws a link between the political existentialism of the interwar period and the more recent efforts to securitize broad swathes of social and economic governance under the rubric of human security.

Running through this anti-naturalistic conception of political existentialism is the notion that these values are subject to a range of existential threats from within the global system. Indeed, if ‘values’ or common way of life form a common bond between the core capitalist states it is these values that are thought to be under attack from various threats within the international community. In this context the new culturalism leads to the formation of a type of political existentialism constantly predicated on the identification of ‘threats’ to a particular way of life. These threats, in turn, provide the basis for the identification of enemies, or – in the language of contemporary securitization theory<sup>7</sup> – the securitization of a broad range of existential threats ranging from environment to terrorism. It is this new political existentialism that is well summed up in a NATO Strategy Document which argued that:

Alliance security must also take account of the global context. Alliance security interests can be affected by other risks of a wider nature, including acts of terrorism, sabotage and organized crime and by the disruption of the flow of vital resources.

quoted in Coker (2002: 35)

What this document well serves to demonstrate is the notion that security needs to encompass the diverse risks inherent in globalization. The suggestion here is that one of the main effects of globalization is to produce new existential threats, the prevention and management of which are crucial for the defence of common values and interests. In this way existential threats become woven into the language of legitimacy and culturalism that is the central motif of the emerging global order.

In fact, the capacity to identify these existential threats become the basis on which a

secularized theological image of history emerges. Every folk receives its historical mandate as a 'mission' that is the first and the last, the unrestricted obligations of existence.

Marcuse (1968: 35)

Marcuse's description of this political existentialism differs from contemporary neo-conservatism in only one sense: their political existentialism is now infused with a rather inchoate theology. However, it is worth noting here that the 'political existentialism' goes much further than the currently influential group of neo-conservatives within the Bush Administration: it furnishes the crucial conceptual underpinning for Tony Blair's view of the world (Blair 1999); it has provided the justification for humanitarian intervention under the rubric of human security (Duffield 2002), and it has served to underpin discussions of environmental threats to the international system such as climate change.

These ideas have even influenced the way in which economic and social development has been cast. For example, development has shifted from the notion that aid and other forms of assistance should be geared towards the funding and sustaining of economic development to a view of development framed in terms of guaranteeing the security of the receiving as well as the donor states. In short, development has become securitized to be measured and assessed according to the extent to which it contributes to the global order and security. Therefore, development assistance may now take the form of assisting people to become better managers of their own risk and security, and more often than not this is associated with developing the right set of values. Good governance that has all but replaced the older developmental agenda now preaches the fostering of the right values or dispositions that will enable individuals to enhance their capacity to work within a risky global environment (Fine 1999; Cammack 2001). What has changed here is the transition from even the limited ameliorative nature of post-war developmental programs to a new understanding of development as the regulation of risk.

Development is now inevitably tied to the management of security in unstable or violent areas that potentially, or in fact, form a threat to zones of liberal peace; development is tied to the effective management of these unstable zones of governance by the regulation of complex emergencies in these zones of instability. Hence,

Complex emergencies arise on the borders of liberal peace where it encounters political systems whose norms differ violently from its

own. These events encapsulate behaviour that violently upsets the developmental schema of things.

Duffield (2002: 162)

This nexus between security and development is conceived in terms of the threat posed by zones of instability to those within the zones of liberal peace.

In this context an especially significant source from which these existential threats are seen to emanate is the so-called 'failed states'. Failed states are those entities within the international system beyond the boundaries of the legitimate international community, and consequently deemed suitable for policing by the global community. The source of the threat posed by these failed states is primarily existential: they threaten the 'way of life' – the culture of the international community. Failed states then constitute a threat to established order that can only be dealt with through robust coercive instruments and policies. Mallaby describes the nature of failed states in the following way:

Once a nation descends into violence, its people focus on immediate survival rather than on the longer term. Saving, investment and wealth creation taper off; government officials seek spoils for their cronies rather than designing policies that might build long-term prosperity. A cycle of poverty, instability and violence emerges.

Mallaby (2002: 35)

The clear implication of this analysis is that failed states fall outside the permitted range of legitimate behaviour or responsible conduct and consequently are liable to feel the hard edge of the new coercive whip of the international community.

As we see in the case of failed states the issues of risk management dominate the emerging forms of global governance. Hence the distinct tones of political existentialism are strongly coloured by the notion of risk. The argument here is that the complexity of the global economy creates new forms of risk that in turn lead to the creation of new forms of risk management.<sup>8</sup> Risk seems ubiquitous in the global polity – be it in the form of risk posed by trans-border capital transaction giving rise to such problems as contagion of financial risk, or money laundering. In short, in an increasingly globalized world, governance becomes more and more a matter of control and management of these new forms of risks.

The very distinctive understanding of risk that emerges in these regulatory frameworks is one of risk as precaution (Ewald 1999/2000),

or preventive governance (Shearing 1996), or prudentialism (O'Malley 1992). According to Ewald (1999/2000), the principle of precaution replaces the dominant notion of solidarity and compensation which formed the basis of much of the insurance programs of the twentieth century. Indeed, this new emphasis on 'prevention' takes us back to dominant nineteenth-century notions of risk. Ewald points out that:

The nineteenth and twentieth centuries were obsessed with the problem of accidents (work or car); we are now rediscovering the existence of disaster, but with the difference that disasters are no longer, as before, attributed to God and his providence, but to human responsibilities. It is in this deeply disrupted context that the notion of precaution now appears.

Ewald (1999/2000: 59)

It is exactly this principle of precaution or 'prudentialism' – to use O'Malley's (1992) term – that is most evident in the design of various programs of standards. Indeed this prudentialism of standards bears more than a passing resemblance to a whole genre of risk-based strategies ranging from health to welfare. In fact, a whole series of international standards are appropriately viewed as a set of routines to manage and foster responsible conduct towards risk in transitional economies. Like the welfare recipient or the criminal, whose conduct is regulated through a dose of sanctions and incentives, a similar type of medicine is prescribed to manage 'risky' economies and promote responsible behaviour.

In this context it is this self-regulation of risk by local agencies that is most obvious in a number of recent strategies of governance, and this which distinguishes the notion of precautionary principle from its earlier nineteenth-century understanding. In the new global regulatory state the precautionary principle works through creating incentives for responsible action in the context of 'organizational structures and processes'. In this sense, it is better described as a 'structural precautionary principle'. Weiner well describes how this new governance works in the context of international standards on money laundering where:

States have 'localized' control over transnational dirty flows of dirty and hot money within their territories, giving expression to the transnational rationality of governance in this area through assimilated systems of domestic criminal law. The regulators therefore 'discipline' the banks through coercion of criminal sanction,



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the banks discipline themselves through their internal reporting system. The banks become both watchers and watched in this system of transnationally assimilated, privatised governance.

Weiner (2001: 471)

Hence this new mode of precautionary risk management is linked to the notion of responsible agency through the idea that agents (individual or collective) need to be effective managers of their own risk. Governance in this new landscape of risk becomes oriented towards the modification of behaviour through the affirmation of responsible conduct via the inculcation of affirmative cultural values. What this does is to dislodge this idea of responsibility from the underlying structures of economic and social power. By making risk the central category, it naturalizes the social and economic context which gives rise to these new risks. Turning governance towards risk – instituted and justified in liberal terms – is to turn inwards towards subjective and concrete values. The precautionary principle

reintroduces a logic of pure decision. And the rationality of the decision can no longer satisfy itself with the conventional cost-advantage balance, which is in principle unknown or at least dubious. It results from logics which risk economists explain as irreducible to the conventional functions of utility.

Ewald (1999/2000: 78)

Politics on this view becomes one of identifying threats to the valued forms of existence and then acting on the basis of these threats.

A strong echo of these ideas is to be found in the work of social theorists, such as Beck (1999) and Giddens (1994), on risk and reflexive modernization. These social theorists argue that we may be living through a profound transformation in our attitude towards modernity and risk. In brief, they argue that early modernity was characterized by an attitude towards a quantifiable risk, the potential effects of which could be ameliorated through an appropriate mix of compensation. In contrast, in late modernity, the effects of risk are not easily calculable and individual (and collective) agents need to be more reflexive in the way they deal with risk. In these formulations risk arises out of the very process of modernization, and for Giddens reflexive modernization is based on the fact that:

Our daily actions are nevertheless thoroughly infected by manufacturing uncertainty of a less inclusive kind. For on an individual

or collective, as well as global level, the accumulation of reflexively ordered knowledge creates open and problematic futures which we have, as it were to ‘work on’ as we go along in the present

Giddens (1994: 79)

As Giddens notes here, this notion of reflexive modernization has ‘global’ implications because the new risks that it identifies are global in scope, and hence require an appropriate response at the global level. What remains problematic about these formulations is the fact that they fail to recognize the links between reflexive modernization and the illiberal and authoritarian notions of political existentialism. By conceiving of these threats as various types of risk, these theories of reflexive modernization work to dislodge the social and political context that produces these threats, and end up naturalizing these risks and failing to understand the way in which these risks are both naturalized and politicized. To understand this as a transition within modernity is to overlook the ideological and political dimensions of the construction of risk and the way it reshapes the landscape of legitimacy that valorizes the role of existential division in opposition to material conflict. Indeed, material conflict and social relations themselves are seen as belonging to the world of simple modernity that has now been overtaken by reflexive modernization. To the extent that this notion of risk remains a story about existential threats it reflects more the transition within the global liberal order rather than a movement within modernity.

Notions of risk and social theories such as reflexive modernization that seek to understand how these ideas are reshaping contours of modernity fail to recognize a crucial aspect of this new modernity: that is, the invasion of the political terrain of interests by the affirmative cultural values. Hence, what is distinctive about this modernity is not the language of political existentialism as such but the way it replaces notions of interest with culture as Holmes (2000) – writing about what he calls the new ‘integralism’ in Europe – identifies ‘a radical delimitation of society in which “cultural” idioms as opposed to abstract interests serve as instruments for expressive meaning and for deriving power’ (Holmes 2000: 5). In essence, then, the cutting edge of this new political existentialism is not to be found in the weight given to this or that particular set of cultural values but in the fact that its very usage presupposes a certain landscape of legitimacy where culture, rather than interests, tend to predominate.

At both global and national levels, this new landscape of legitimacy redefines the boundaries of the political. Politics ceases to be about the

conflict of interests and instead it comes to structure the existential divisions and antagonisms that run through the political body. It is exactly this reordering of global politics in terms of existential antagonisms that defines the contemporary global order. But what makes this new order so particularly troublesome and such a powerful ideological template is that this new cultural rendering is done in the language of liberal values. However, these liberal values are now set to play within a very different cultural landscape that produces the highly inflammable illiberal outcomes that have been so evident since September 11. It is this transition that theorists of 'reflexive modernization' seem unable to acknowledge – let alone analyse. It is this new rendering of global politics in cultural terms while economic globalization proceeds apace that produces forms of *gemeinschaft* capitalism having stark parallels with the illiberal politics of the interwar period.

In fact, political existentialism within the framework of the new legitimacy bears a strong resemblance to Schmitt's theory of the sovereign decision. In a very perceptive article Williams (2003) has identified the way in which the notions of securitization proposed by the Copenhagen School bear comparison with Schmitt's notion of the political. As he notes:

The theoretical mechanism that makes this possible is the identification of 'security' with a logic of existential threat and extreme necessity, a specificity that mirrors the intense condition of existential division, of friendship and enmity, that constitutes Schmitt's concept of the political.

Williams (2003: 516)

The stark difference in Schmitt's notion of the political is that the boundary that separates this existential antagonism is now captured by the boundary of a shared set of affirmative cultural values – a border of legitimacy – rather than the territorial boundaries of the nation state. Security, in this view, is defined in terms of the threats that are posed to various forms of social and political existence to the tightly integrated capitalist state structures of the 'west' that now form a putative global community. To be sure, this way of defining security is not new. Latham's (1997) pioneering analysis of what he calls the 'liberal moment' in the making of the post-war political and economic order takes exactly this view of security as a threat to various forms of life. This form of political existence is that it privileges affirmative cultural or subjective values to the exclusion of the universal practices and forms of liberalism. It is directed not at an ideological enemy – as it was during the cold war – but

at a set of generalized threats or risks to a form of life. Liberalism, in short, is made more concrete and particular, and therefore lends itself to increasingly authoritarian political practices. It is this particular dialectic – present within liberalism – that we now see unfolding in the various guises of what may be termed ‘liberal imperialism’, and which differs substantially from the liberal moment at the end of World War II that Latham so astutely explores.

One of the strengths of conceiving security in these terms is that it allows us to move beyond the meretricious view that the global order after September 11 represents an intensification of coercion over consent in the management of US hegemony. The problem with this view is that it fails to locate the shift in global order in terms of the deeper set of underlying tensions and contradictions within the post-war liberal order. Our argument is that the consent/coercion balance reflected a more fundamental dialectic between legality and legitimacy in the post-war architecture of international liberalism. It is the tilting of this balance towards legitimacy in favour of the new culturalism and its attendant coercive ramifications that marks the new global order. From this perspective, we are able to better understand how the new authoritarianism and illiberal political order flow from tensions inherent within the framework of modern international liberalism. The unsettling of the equilibrium between coercion and consent is part of a broader dialectical tension between legality and legitimacy within the global polity.

Political existentialism then provides a new form of anthropology of action based on the confronting threats that grow naturally through the unfolding dynamics of modernity. It is this naturalism that also breeds a sense of immediacy and urgency in dealing with these new threats. But it is action itself, rather than the reasons for action that counts here. Again, we see here the parallel between this notion of political existentialism and Schmitt’s concept of decision that sought to privilege the notion of politics as the exercise of sovereign decision. For Schmitt, what counts is precisely the capacity of the sovereign to make decisions to protect a way of life; it is the decision itself rather than its justification or the rules that govern the decision that is important here. Essentially there has been a globalization, if you will, of this Schmittian notion of decision where the global order is perceived as confronting a number of fatal threats to its existence that in turn justify a new coercive and authoritarian imperial power.

As Williams (2003) clearly shows, there is considerable similarity between this understanding of action and various theories of securitization. However, its influence is broader than this, and as I have

previously shown political existentialism provides the rationale for a variety of programs and policies ranging from human security to the war on terror, each of which privilege the autonomy of sovereign ‘decision’ in responding to the ever-present threats and risks inherent in the new global order. Each of these programs is informed by the idea that political action springs from a form of naturalism that in turn provides the basis for a political existentialism which licenses a whole range of legitimate behaviour.

In making this claim for the significance of political existentialism in defining the contours of the new authoritarian liberal order, we need to be cognisant of the fact that the link between social existence and security was a vital element of post-war liberal order making. It has been argued that in the immediate post-war period the security issue

revolve[d] around the question of how threats to contending ways of configuring social existence are identified, mitigated, or governed. In other words, the pursuit of security is about the organized effort of given social form (e.g., a polity) to contend with what it articulates and identifies as forces (e.g., ‘a military faction, another polity or economic collapse) that threaten its social existence.

Latham (1997: 76)

What then is the difference between what Latham identifies here as ‘social existence’ in his account of liberal modernity and our notion of political existentialism? The difference, I think, lies in the fact that the threats to the liberal order were conceived in terms of the clash of interests and social groups. At the level of the global order, this conflict is played out between competing social and political forms of socialism – even though tarnished with a Stalinist form – and liberal capitalism. At the national level this was reflected in the development of the social state – albeit in variegated forms – which sought to mitigate the clash of competing social or class interests; it sought to constitutionalize societal interests. It is this constitutionalization of social interests, particularly labour, that provided the basis for the ‘social state’ in advanced capitalist democracies and formed the foundation of the liberal post-war international order, though crucially the social state was enabled by the restrictive and limited domain of security imposed by the US-led post-war liberal order (Latham 1997).

In contrast, political existentialism eviscerated these conflicts of interest that constituted the social state in favour of social existence cast in terms of a threat to values and moulded in the form of defence of

legitimacy. Security becomes more expansive, and it is this expansive domain of security in the post-cold war period that creates a new regulatory order at the global and national levels: an order that seeks to regulate through a new governance of risk which is now conceived as all pervasive. So pervasive in fact that it threatens the autonomy of the political sphere so crucial to the constitutionalization of societal interests that framed the social state in the post-war period. The more general point here is that the emergent new global regulatory order depends on a decisive shift in liberal modernity towards a form of political existentialism. It is this rather than 'reflexive modernization' which best describes the changing character of the post-cold war global order.

The most problematic effect of this new political existentialism is to strip agency of the historical and political context in which it is situated. Hence, what are considered as fundamentally political relationships are interpreted as existential antagonisms; material relations of conflict are transformed into differences over values. Conceiving the global order as beset by a range of often frightening existential threats, originating from the inexorable dynamics of economic and technological developments, is a decisive turning point in the patterning of conflict at both global and national levels. What matters here is not so much the content of this legitimacy but the shifting terrains on which conflict takes shape. In short, the very social and political relations that determine the insecurities that form various existential threats are subordinated to the naturalistic or organic sources from which existential threats are seen to spring. In fact the 'existential as such is exempt from any rational standard or norm lying beyond it; it is itself the absolute norm and is inaccessible to any and all rational criticism and justification' (Marcuse 1968: 35). Political existentialism, even though it might be based on threats to a liberal way of life, provides the ammunition for illiberal policies that deny the very political foundations of these existential threats. Ultimately it represents a denial of material relations of conflict in favour of antagonisms over values.

It is an illiberalism that ranges across both the global and national political divides. Construing the new global threats in these terms tends at one at the same time to mask political and social antagonisms within the domestic political order. To the extent that the new culturalism calls for a common set of values to confront the emerging threats and risks to the new global order, these common values provide the basis for political strategies – often of a very authoritarian kind – that delegitimize political contestation over a range of social and economic issues. In short, the perception of ever-growing existential threats in

the global community grants political leaders the basis on which to appeal for ‘unity’ in confronting these threats. Culturalism then remains susceptible to highly authoritarian and illiberal politics within the domestic sphere of advanced capitalist states.

However, the really distinctive facet of this culturalism is the way it shifts the material relations of conflict and antagonism – so central to nineteenth-century ideologies of liberalism and socialism – towards a new realm of values and culture. Hence it is not merely security that is being redefined but economic and social conflicts and antagonisms in a context where global capitalism is more tightly integrated, and now played out on the new existential landscapes of risk and survival. The economy is culturalized creating in essence an ideological template of *gemeinschaft* capitalism. Of course, what makes this marginalization so paradoxical is that we are transported to this new subjective (or if you like ‘concrete’) realm on the tracks of liberal values. But the very reframing of these issues in ‘subjective’ or value terms opens up the possibility of a range of illiberal and authoritarian forms. As such, it is a curious kind of anti-political politics that views politics as the creation of enemies on the basis of existential threats. It is at this juncture that these new political rationalities of global order seem to have much in common with the ideological hybrids of community and capitalism that Sternhell explores in the context of interwar Europe.

## **PART 2: THE NEW LEGITIMACY**

### **Legitimacy and responsible conduct**

A corollary of this new political existentialism is the tendency to see international conflict in terms of moral purposes rather than in political terms. It is this underlying logic of anti-politics that provides the coinage for legitimacy thereby avoiding messy involvement of political conflict. This legitimacy increasingly comes to be defined in terms of adherence to ethical standards, and more broadly standards of responsible conduct (Jayasuriya 2002a) that are defined outside the formal culture of international law. And it is these notions of responsible conduct that activate certain forms of ‘ethical conduct’, which become the standards of international law and policy. One domain where the notion of ethical conduct is most evident is in the notion of ‘good governance’, markedly apparent in instances of the new global social policy. This policy focus seeks to implement workfare programs of poverty reduction through the instantiation of new forms of conduct

that marginalize issues of conflict and power. At the heart of this new global social workfare lies a concern with developing a stock of social capital amongst individuals and communities. Poverty and inequality are defined in terms of a lack of social capital. In the particular context of the global social policy, social capital refers to a web of networks and social relationships that individuals can draw on in times of social and economic emergency. Social capital, in this view, serves to foster certain forms of responsible agency, which have come to be understood as the individual possession of network resources enabling participation in the economic mainstream. In this view, responsible agency is geared to economic independence rather than to participation in the public sphere.

Social capital, in this sense, conveys a model of society very different from that which underpinned traditional post-war welfare state programmes. Here, society,<sup>9</sup> which is now composed of ‘norms’ and ‘relationships’ that can be mobilized for economic development, is an approach to social capital that ‘allows the new consensus to be selective in where and how it addresses the role of non-economic factors in economic performance’ (Fine 1999: 13). Perhaps, more importantly, this focus on norms, networks, relationships, and more generally a ‘culture’, leaves little room in this perspective for the structural and power inequalities embedded in economic institutions. In a scathing critique of social capital Harriss notes the fact that:

civil society exists in a field of power – or that there are differences of power within the civil society – hardly seems to cross the minds of those who wish to see the space of civil society expanded, and that of the state (and perhaps of the market) reduced. The discourse is in fact deliberately apolitical, in way that is ultimately supportive of neo-liberal orthodoxy.

Harriss (2002: 119)

Harriss rightly argues that this focus on social capital tends to obscure the underlying relationships of power that shape markets, and as such, it is an important component of the depoliticized governance that is the hallmark of the new regulatory state.

The notion of social capital, as we have argued, seeks to enhance the fostering of responsible agency reflected in the emphasis on norms, values and conduct that enable individuals to manage the vulnerabilities and risks of the global economy. Unlike the earlier governance programs, the social capital perspective complements the macro-institutional infrastructure needed for a market economy such



as credible legal institutions and strong property rights, framework, with an emphasis on the development of an appropriate set of norms. In fact, it transcends the earlier debate about the relative efficacy of states and markets that drove the Washington consensus agenda and the debate over the East Asian economic miracle. The clear high watermark of the latter agenda was the World Bank's *Miracle Report* (World Bank 1993), which sought to analyse the influence of norms, networks and effective civil society embodied in social capital, and best exemplified in *East Asia: The Road to Recovery Report* (World Bank 1998).

Yet another variation on notions of responsible agency can be found in the way in which notions of ethical and moral conduct have found their way into some World Bank conditionality programs. A neat example of this is seen in the recent efforts by the World Bank to place a very high premium on anti-corruption measures (Taylor 2002), even going to the extent of suggesting that effective anti-corruption measures may have a significant favourable impact on levels of economic growth as well as social well being. What is noteworthy about these claims is that they link to a notion that the most important contributory factor for economic growth is the focus on the ethics of conduct rather than structural issues of power and inequality. Likewise, movements like Transparency International – very prominent in pushing for transparency standards – have framed issues of corruption in a highly moralistic language, stressing issues of conduct rather than structural sources of inequality and power. Taylor expressed this succinctly by observing that:

The moral dimension of anti-corruption rhetoric is interesting because, at its most extreme, it echoes single issue moral campaigns against alcohol, sexual immorality and tobacco. These campaigns share a kind of satanic multiplier, where the catastrophe (in this case halting a country's economic development) is far greater than the sum of the human failings or inefficiencies being complained about.

Taylor (2002: 41)

Indeed, Taylor's comment should serve to remind us that the constant invocation of moral language in movements such as Transparency International bears more than a passing resemblance to the moralism of the likes of the temperance movement. It is worthy of note that even the more rational-choice approaches to corruption that focus on structures and incentives to control behaviour have an underlying thrust that

shares broad concern with values (Rose-Ackerman 1999). The latter approaches frame corruption as one of promoting responsible ethical agency wherein 'conduct' is divorced from the wider context of social and economic power. While these alternative – sometimes contradictory – strategies may lead to a variety of institutional designs, a common thread running through all anti-corruption programs highlights issues of conduct and responsible agency.

Again, while these strategies may vary in a number of ways – e.g. the degree of emphasis – they all place a premium on strategies to foster responsible conduct. A clear example of this is the adoption of specific strategies to build self-restraint in organizations by attempting to introduce a number of internal monitoring mechanisms such as audit and a discipline code to control corrupt behaviour. Transparency International promotes what it calls an 'island of integrity' approach based on 'the idea that all tenders for public contract and the government that issues it refrain from corrupt practices' (Wang and Rosenau 2001). Equally important is the widespread use of state audit institutions to monitor the performance of governmental agencies and organizations. In Indonesia, for instance, Hamilton-Hart argues that 'many new monitoring capabilities have been distributed throughout the state apparatus and in the non-state sector' (Hamilton-Hart 2001: 74). In fact, while it is certainly the case in Indonesia, as Hamilton-Hart points out – and a number of other studies concur<sup>10</sup> – that the outcomes of these programs are limited, the more general observation that should be made is the expressive or symbolic purpose in seeking to place issues of corruption in terms of conduct.

These are but a few of the examples of the ways in which international law and policy have moved to incorporate a set of vaguely defined international standards that seek to inculcate standards of 'responsible conduct'. It is these notions that now spill over to the 'war on terror' or actions against rogue states. No doubt the Iraq crisis, and the dominance of neo-conservatives in US foreign policy have served to highlight this moralistic turn, which really dates back to the end of the cold war. The problem with this new moralism is that it obscures the underlying antagonism and conflict that pervade international politics. Instead, it transforms the underlying politics of international relations into a series moral fables to do with the affirmative cultural values. It is this deformatization of law and policy that suspends or marginalizes the formal framework of international legality in favour of a notion of legitimacy shaped by an affirmative set of values; legitimacy framed by the new culturalism becomes the touchstone of global governance.

**Legitimacy and the delegalization of international law**

Legality is not simply trumped by legitimacy; the structure and function of international law undergo a fundamental transformation. In particular, the move towards the 'politics of anti-politics' is reflected in the increasing delegalization of international law in a move away from the culture of formality that prevailed in an earlier era to more situation-specific forms of law driven by the constant invocation to a form of moralism. At its crudest, this is reflected in the Bush Administration's reference to an axis of evil. In these new wars without end international disputes or conflicts are clearly driven by a police logic, substituting moralism for politics. Even more crucially, the new delegalized structure of international law is well evident in the growing importance attached to risk in matters of policy. For one thing this means that international policy would become more future oriented, that is, anticipating and permeating risks within the global system. This future orientation nicely chimes in with the political existentialism that defines the new world of risk. One consequence of this understanding of risk is that it serves to reinforce the anti-political effects of the new legitimacy and divest formal international law of the universalism which, despite its weakness, invested it with a political mission (Koskenniemi 2002).

Set against the universalism of formal law, 'the particularity of the ethical decision, formalism consists of a horizon of universality, embedded in a culture of restraint, a commitment to listening to others' claims and seeking to take them into account' (Koskenniemi 2002: 174). What is of critical importance here is that this universalism, in turn, presupposes a plurality of competing political and social interests within the global order (as well as within states), but this is the pluralism of interests that was irreparably diminished in the post-cold war era. With this diminution, there has been an inclination – most notably in the United States – to reach beyond the law to particular values and norms of dominant states, which are interconnected within transnational regulatory structures. Hence the tension between legality and legitimacy in the state of exception veils a sharper antagonistic relationship between the principles of universality (in part mirrored in the formal culture of international law) and the growing particularism of legitimation. The latter is reflected in the proliferating instances of the delegalization of international law in the form of vaguely defined standards so that 'legal boundaries are being equated with legitimacy of the regimes' goals' (Kirchheimer 1996: 4). For this reason the underlying dialectic between universalism

and ‘particularity’ reflects the deeper convulsions of international liberalism, norms, and institutions in the post-cold war period as the pluralism in the politics of the global order of states made way for a set of interconnected transnational regulatory structures, bound together within a common normative framework. This signifies that these new forms of political rule depend on the emergence of a new deformed, situation-specific notion of law.

This harks back to much of Neumann’s work which was in part driven by his desire to understand the legal changes that move away from the formal law towards what he called ‘a state of deformed law’. Neumann’s argument is that capitalism is inherently dynamic, and is increasingly characterized by the concentration of capital in the form of cartels and monopolies – a far cry from the model of equal competition envisaged by liberal competitive capitalism which propels a move towards the use of legal standards rather than formal legal norms. These tensions within capitalism provide a structural context for the desire to assert state sovereignty (what he calls a ‘state of exception’) because it implies particular decisions as against the application of general legal norms that submerge sovereignty. According to Scheuerman:

in this view, unchecked state sovereignty results from this tension: it is bourgeois society’s sad attempt to overcome the gap between its implicitly egalitarian legal ideas and real social and economic inequalities by means of sacrificing the former for the latter.

Scheuerman (1995: 104)

Equally Neumann argues that the adoption of legal standards is related first to the challenges, and then subsequently to the collapse of parliamentary democracy such that:

the system of pluralism, and the changed structure of the economic system, naturally strengthened the power of the government as against that of parliament. Although Parliament was formally sovereign, its power subsequently decreased in proportion to that of the government, or better, that of the ministerial bureaucracy increased.

Neumann (1986: 272)

In other words,<sup>11</sup> Neumann’s contention appears to be that the political structure of monopoly capitalism pushes in an increasingly illiberal direction. Supportive of this view is the evidence that the

political system in these situations is characterized by contracts and agreements between various groups in society rather than a parity between independent and autonomous economic agents which was characteristic of competitive capitalism. While Neumann's analysis applies to the specific dynamics of the Weimar Republic, it points in the direction of what could be characterized as a form of authoritarian statism that runs counter to the liberal impulse of general universal law. The rich complexity of Neumann's argument is evident in his tracing of the complex interrelationships between the structure of capitalism, changing political forms, and the decline of the general legal norms in favour of situation-specific legal standards.

While there are difficulties in extrapolating directly from this account of deformalization of law to the international legal order, it is abundantly clear that the development of these new forms of sovereignty is based on the prior performance of responsible conduct and competence; legitimacy becomes the key attribute of sovereignty, and this departs from a formal culture of international law predicated on equality of membership in the international community. Instead, deformalization, places the onus on situation-specific forms of law and policy. Koskenniemi, in an astute analysis of this process of deformalization looks pointedly at what he calls the turn to ethics in international law. He notes that what counts 'are the experience of the decision-maker and his or her sensitivity to the demands of the situation' (Koskenniemi 2002: 170–1). This is a far cry from formalism because according to him, 'formalism is precisely about setting limits to the impulses – moral or not – of those in decision-making positions in order to fulfil general, instead of particular interests; because it recognizes the claims made by other members of that community and creates the expectation that they will be taken account of' (p. 174). Restraint, in this view, forces states to justify their action in terms which make sense to all members of the international community so that

it forces states to run the risk of committing a performative contradiction by ensnaring them within the idealising presuppositions of a legal discourse; this, in turn, provides a toehold for criticism that cannot be brushed aside as mere words without a certain cognitive dissonance.

Bhuta (2003: 385)

It is this very restraint that the turn to sovereignty in the form of a global state of exception, and ethics, in the guise of situation-specific

standards, seeks to expunge in their break from previous formalistic international legal systems. In other words, the move towards deformed international law in the global polity is but another instance of the subordination of legality to the imperatives of legitimacy grounded in 'particularistic' values. It is the embracing of these particularistic values – even if it be in the name of affirmative liberal values – that leads to the violent collision with the universal principles of international law. More importantly, it reveals how the goals of liberal legitimacy lead to fundamentally illiberal outcomes; yet another instance of the illiberal temptations of culturalism.

Of course, the emancipatory potential of formal international law to which Koskenniemi calls attention, should not be exaggerated. For Neumann, the equality implied by universal legal norms reflected not only in the imperatives of competitive capitalism but contained within it 'a noble and unfinished attempt to make authority tolerable' (Scheuerman 1995: 102). Nevertheless, this emancipatory potential constantly ran up against the concrete political and social inequalities generated by capitalism which eventually led to its replacement by new forms of deformed law. On account of this, the progressive potential of universal legal norms remained, at best, partial, and at the global level is further limited by the absence of democratic or deliberative forums. Despite these severe limitations at least the restraint that legal formalism imposes on states requires a recognition of politics which is what the ethical 'turn' seeks to reject. It is in this sense that the adoption of legal standards provides a kind of politics of anti-politics that is deeply inimical to the constitutional structure of international liberalism. Proliferating notions of 'moral conduct' that animate the new global order remove agency from its political context and place it within a 'moralistic' frame of conduct: values determine the substance of international law and in so doing marginalize the emancipatory practices within the international political and legal order.

This deformed international law is another feature of a common thread that runs through this chapter: the illiberal product of liberal purpose. In this case, the deformed international law – the denial of political equality that is inherent in formal international law – derives from a tendency to frame the inter-state international order as being 'chaotic' or a sphere that exists outside of the constraints of international law. It is the defence of order and much more than order – really a kind of political identity that needs to be protected from the exigencies of a threatening environment, justifying the implementation of coercive and illiberal measures are justified and implemented. But what makes liberal imperialism unusual is that the political identity that

is being protected is in some sense a liberal, or in his formulation a 'post-modernist' entity.

In the context of international law one source of this illiberal temptation lies, however, in the fact that the current inter-state order is thought to be chaotic and beyond law – a point well illustrated by Fine's (2003) analysis of Hegel's critique of Kant. With the post-September 11 events very much in the foreground, Fine suggests that Hegel's critique has much relevance as it suggests that 'states are more like individuals in civil society who relate to one another on the basis of right except that in the case of the states there is no court to establish 'what is right in itself. Hence, as against Kant, Hegel maintained that the Westphalian model is not devoid of right' (Fine 2003: 621). What Fine is pointing out here is that this tendency to see the 'Westphalian' system as somehow being outside the 'sphere of right' lends justification to the coercive action of a coalition of liberal states attempting to restore order within the 'chaotic' and disordered state system.

This paradox of illiberal temptation of liberal governance is a constant theme that runs through contemporary international political practices of international interventionism. One of the great virtues of Tuck's (1999) work on the influence of the Hobbesian tradition is to pinpoint the relationship between Hobbesian theories of the state of nature and the international system. Rousseau's answer to this paradox was entirely pessimistic, but Kant's resolution was more intriguing. Contrary to the popular depiction of Kant's cosmopolitanism, Tuck argues that he remained essentially within the Hobbesian tradition. He saw the rules governing the state of nature a bit thicker than the Hobbesian state of nature, but thinner than civil society. In this sense, the only way to enforce his particular cosmopolitan rule was through the interventions of like-minded nations. From this reading, Kant's liberal international order 'represents in many ways the vindication of the ideas of Hobbes and Rousseau against their critics, and the perpetuation of those ideas into the new diplomatic world of the nineteenth century' (Tuck 1999: 225). In this sense at least, Kant's cosmopolitanism may have more in common with the current 'imperialism of values' than most would seem to realize.

The contemporary relevance of this Hobbesian argument should be obvious: liberal interventions as in Iraq are justified on the basis of a thin rendering of the Westphalian system not bound within the framework of international rights. It is a small step from this to the illiberal imposition or policing of the international system in order to promote liberal values: the rendering of the international order in terms of

‘anarchy’ prepares the ground for effective implementation of illiberal policies and practices. But as with our analysis of culturalism, the root causes of the illiberal temptations of liberalism develop from the effective stripping away of political agency from sovereign agents, be they individuals (think of work-to-welfare schemes) or states. In either case removing legal protection renders these agents politically impoverished.

One of Neumann’s significant contributions to legal theory was to explain how this effective curtailment of legal protection was purchased at the cost of political equality that could provide the seeds for emancipatory political projects. As Koskeniemi’s work on international law has forcefully recognized, the strength of formal international law lay in the way it embodied notions of formal political equality. Formal political equality, it must be pointed out, could only be understood – as Neumann argued in his Weimar writing – within the frame of the dialectical character of formal and general legal norms. On the one hand, this is an ideological representation of the reification of formal equality driven into the heart of capitalism, and on the other, one which displays an equally emancipatory potential that was embodied and reflected in the formal political equality of the formal general law. In a nutshell, deformalization of international law captures exactly those notions of political equality that have been negated in the depiction of the Westphalian system as ‘devoid of right’. Portraying the Westphalian system as being akin – and here is another phrase used by Neumann – to legal chaos not only diminishes the character of formal international law but has profound negative implications for the movements towards substantive political equality within global capitalism. This plays out the dilemma of legality and legitimacy in the context of an increasing deformalization of international law.

Of course Tuck’s (1999) argument is that the illiberal inflexions of liberalism are built into the texture of political theory. From this standpoint the recurring instances of illiberalism within the global order resound to an underlying set of political harmonics. However the current ‘global state of exception’ goes beyond the illiberal inflexions of liberalism that Tuck so well identifies to a qualitatively different ordering of the global system. The uniqueness of contemporary global politics lies not simply in the intensive ‘global’ policing of the international system but in the broader framing of security in terms of existential threats to the global order. These existential threats originate – and this is a major transformation of the global order – from both non-state and state actors. But the difference lies



even deeper: framing these often ambiguous threats in terms of 'existential' threats is to deprive these actors of political agency within the global system. Consequently, the broad definition of security that has been wrapped around the war on terror forecloses rather than simply suppresses the flow of global politics.

### **Legitimacy and zones of governance: the new spaces of global politics**

The developing antagonism between legality and legitimacy wrought within the boundaries of the new culturalism also permeates the very constitution of 'zones of governance' within the international order. Therefore, in mapping the new global order it is well to keep in mind the distinction between an inner and outer core – that is, between the normal zone of legality and outer core that is pervaded by the use of executive decision. Fraenkel (1941) developing these ideas of exception, argued that this form of state is best described as a 'dual state', i.e. a state wherein the element of executive prerogative or exceptional rule exists alongside a normative state that provides an element of legal predictability for capital. He used the term 'dual state' to distinguish between the spheres of exception and what he called the normative state that regulated the operation of the capitalist economy. Consequently, a key element of this form of the state is its disembodied or fragmented character. Fraenkel argued that this form of state is best described as a 'dual state', i.e. a state wherein the element of executive prerogative or exceptional rule exists alongside a normative state that provides an element of legal predictability for capital.

Using the framework of the 'dual state' it could similarly be suggested that it is the mutual constitution of spaces of exception and normality within the global state of exception that defines the basis of the global order. In other words, the delimitation of a zone of exception is pivotal to the constitution of a more normal or 'peaceful' sphere bound by the rules and procedures of legality. The sphere of legality depends on a constitutive power that is able to subvert and operate outside this zone in order to protect the very boundaries of the liberal order. This juxtaposition is clearly evident in the work of Tony Blair's adviser Robert Copper (2002) who suggests that a new post-modern condition of inter-state relations is emerging in Europe, but at the same time notes that that this post-modern state needs to be safeguarded from those states that still operate according to the 'law of the jungle'. In this, at least, he follows Kant and anticipates the influential work of Robert Kagan (2003) who compared the Hobbesian US to

Kantian Europe. Both Kagan and Copper seek to make the point that the condition of law needs to be safeguarded through the use of power even if this has to be outside of the normal institutional framework of legality. The point then is that:

the United States must sometimes play by the rule of a Hobbesian world, even though in doing so it violates Europe's postmodern norms. It must refuse to abide by certain international conventions the may constrain the ability to fight effectively in Robert Copper's jungle.

Kagan (2003: 99)

In fact, both Kagan and Copper essentially promote a form of liberal imperialism that in all essentials is referred to in this paper as a 'state of exception'; but more to the point, the revealing part of their argument lies in the way the bailiwicks of the liberal spaces of the global order are to be safeguarded through the use of illiberal techniques to police zones of exception; liberalism (though this is economic not political liberalism) presupposes a wide configuration of illiberal practices. In an insightful analysis of the democratic peace thesis, Barkawi and Laffey urge us to recognize that:

mutually constitutive relations between zones of war and peace – the division of the international system into discrete zones characterized by different logics of interstate relations is internal to processes of global social change

Barkawi and Laffey (1999: 404)

But the price to be paid for the state of exception so welcomed by Copper and Kagan is the demise of international political liberalism that defined – however imperfectly – the post-war global order.

Kagan's (2003) 'neo-conservative' appeal to the use of American unconstrained power against weak-willed Europeans in reality contains the defining antagonism between the international legal order and the exception. Here, his argument traverses Schmitt's critique of liberalism that the liberal order depends on the existence of 'sovereign decision that itself must lie outside the legal order. Kagan essentially transfers this critique of liberalism to the international order with the US as the locus of sovereign decision and Europe that of 'liberal normality'. Again, the logic of the argument is that the sphere of normality is constituted by the 'state of exception', but what makes this especially interesting is that Kagan seems to envisage – as indeed

we have argued – that this is likely to mean a ‘permanent state of exception’?

It is as well to recognize that this is not a temporary exception to be terminated after a particular emergency has passed. Rather, the real importance of this new regime of exception lies in the way it becomes, in short order, a permanent condition of the international global order. Hence, the global regime itself is constituted as a permanent regime of exception. This much is clear from the way in which ‘war’ has been redefined in such broad terms as to include almost any definition of self-defence. One of the features of the ‘war on terror’ is that its duration is seen as being open ended. As Magret (2002) notes,

there is self defense because that self defense in fact occurs as part of a continuous process of war. The war started a few years ago – no one really knows when – perhaps after the bombing of the US embassies in Tanzania and Kenya or even after the first bombing of the World Trade Center in 1993 – and it will continue for as long as the enemy is not defeated.

Magret (2002: 376)

It is in this reordering of the justification for war in terms of continuous self-defence that the exception asserts itself with the full force that we have witnessed most recently in the Middle East. Herein lies the core of our thesis: that this is likely to be a permanent state of exception and serves to broadly constitute a regime of exception that defines the post-cold war global order in terms of defending against the threat to certain forms of political existence.

Therefore, it is useful to consider the global state of exception as having some of the properties of the dualistic state – that is, a sphere of *exception* and a sphere of *normality* – but this dualistic order needs to be conceived of in terms of ‘spaces’ within the global order. The global state of exception then, to use Ong’s (2002) rather revealing terminology, suggests a ‘new spatiality’ that points to anthropological texturing spaces of order and disorder. In an earlier analysis of sovereignty Ong (1999), with her notion ‘graduated sovereignty’ presents a perspective on the transformation of sovereignty. Graduated sovereignty, which has broader applicability than the Southeast Asian focus of her study, refers to the way in which ‘the state flexibly manages different population segments located in various zones of sovereignty, or a system of graduated sovereignty that is superimposed on the conventional arrangements of national states in Southeast Asia’ (Ong 1999: 224).

The differential governance of social and economic life that shapes this graduated sovereignty represents the kind of re-ordering of global and regional space that the state of exception entails. This suggests that at the global level some states and non-state actors are subject to the blunt edge of sovereign decision while others remain within a zone of legal or normal order. Moreover, it needs to be recognized that this mapping of the global order in 'spatial terms' implies a significant departure from the usual state-centric notions of the international system. This is mainly because these spaces of exception do not merely encompass traditional inter-state relations, but also include a broad array of non-state actors within and without the traditional boundaries of the national state. From a political economy perspective, this reordering reflects what Robertson *et al.* (2002) call 'rescaling' of the levels of governance so that:

shifting scales involves the active construction and reconstruction of territories for the purposes of governing. In particular, issues that appear fundamental at one scale disappear entirely from view at another; factions that are active participants at one scale can fade from the scene or even change at another.

Robertson *et al.* (2002: 472)

'Rescaling governance' is another term used to depict the increasing contested forms of spatial ordering that are provided by social theorists such as Lefebvre (1991) and Harvey (1999). In these analyses of space and power, spatial structures are not just given, but are constantly produced and reproduced. At the same time, this 'spatial reordering' goes beyond mere economic governance to encompass new forms of political rule. However, what is distinctive about the global order in the state of exception is the primacy given to a 'spatial location' within the global order *itself* as a way of organizing political order within the global system.

Significantly this argument suggests that the notion of exception logically implies that different spaces within the global order are governed by different rules and standards of conduct. From this perspective, recent developments such as the intervention in Iraq do not indicate a wholesale departure from international law for all actors within the international system. Instead what is being suggested here is that those states or non-state actors operating within the sphere of exception are subject to the operation of what amounts to a form of global executive discretion where the normal processes of international and domestic law have been suspended. Perhaps the clearest examples

of this are those captured in Afghanistan and now held at Guantanamo Bay, who are denied protection of either the domestic or international law and subject to the blunt edge of executive decision and discretion. In an important sense, these individuals and states are denied political and legal recognition within the international system.

Political recognition – even the capacity to be subject to the normal laws of war – is now assumed to flow not from membership of the international society, as international liberalism would assume. Instead, it has increasingly become a privilege conferred by certain states within the international system. If there is one feature that defines the post-cold war global order, it is the growing conditionality attached to membership of the international society. This conditionality reverses a trend where during the post-war era, membership of the international community was broadened and widened to include popular sovereignty, nationalism and decolonization. The decisive reason for these shifts in the valorization of legitimacy can be traced to the post-cold war decline of various competing states – particularly the collapse of the Soviet Union – within the global system, and the ensuing set of transnational state structures seeking adherence to a set of standards of legitimation through the institution of a permanent state of exception. Hence, the increasingly illiberal understanding of membership of the international community as well as the marginalization of international politics reflect a new assertion of ‘sovereign decision’ at a global level where sovereignty itself becomes a contingent condition.

At the outer edges of this new state of exception one finds the surprising re-emergence of the notion of trusteeship.<sup>12</sup> Trusteeship, a concept of the late colonial state, has made a surprising return to political theory and practice. Trusteeship depends on the exercise of unconstrained executive power, and indeed, it is this operation of executive immunity that is most amply demonstrated in the cases of Kosovo, East Timor, as well as the intervention in Afghanistan and Iraq. For example the internationally appointed Ombudsperson in Kosovo makes a case ‘to place Kosovo completely outside the purview of any international human rights monitoring or judicial mechanisms, where it will remain for the conceivable future’ (quoted in Bowring 2002: 14). This provides a striking example of the operation of a global state of exception unencumbered by a legislative or judicial framework. At the same time, in the case of the trusteeship there is an apparent recalibration of the practice of international equality so that participation in the international community is contingent on meeting certain standards or values. As a result, failure to meet these standards

will ensure that the protection of the international legal order will not be extended to those members of the international community. Indeed this trusteeship goes along with the contemporary rendering of a colonial version of

‘mission civilisatrice’ – the colonial-era belief that that the European imperial powers had a duty to ‘civilize’ their overseas possessions. Although modern peace builders have abandoned the archaic language of civilised versus uncivilized, they nevertheless appear to act upon the belief that one model of domestic governance – liberal market democracy – is superior to all others.

Paris (2002: 638)

In this new era where legitimacy trumps legality, membership of the international community becomes a privilege that is granted rather than one of right. This is perhaps the most decisive change from the Westphalian system of sovereignty.

While trusteeship as an international practice is evident at the outer edges of the global order, many more states are subject to various forms of global regulation. A great many states while not subject to trusteeship conditions nevertheless have strict conditions that regulate membership of the international community. One of the forms of new governance is to be found in the emergence of new forms of ‘contractual governance’ – a term used here in a very broad sense to signify implicit or explicit contracts. This is obvious in the familiar governance programs of international financial institutions (IFIs) but is also evident in such instances as the accession agreements between EU candidate member states and the EU to meet an agreed set of preconditions or standards in order to gain the benefits of membership of a particular international regime or organization.

Further, this contractual governance works through ‘chains of contract’ where, for example, one international (the World Bank) or regional (the EU) entity delegates policy authority to a domestic agency which in turn imposes a further set of contractual obligations on public or private sector organizations. Take, for instance, the Basle Accord on capital adequacy, which works through the adoption of best practice standards by national regulatory authorities and implementation of compliance regimes by individual private sector entities. Another example is the money laundering standards; here again, ‘best practice’ standards are implemented by local regulatory authorities who in turn impose compliance standards on individual financial entities. In essence, legitimation within the international system leads to

the emergence of new forms of contractual sovereignty. Therefore, in what could well be called the new spatiality, borders are porous and flexible and are subject to constant surveillance and monitoring. For this reason boundaries and spaces of exception run across and beyond conventional national boundaries. Hence

the notion of where home is also being revised, as the links between the homeland and the law-enforcement relations have extended beyond it. There is a sense that the nation is linked to constellations of spaces heretofore beyond the view of the nation's security apparatus.

Ong (2002: 2)

The state of exception does not simply denote a political relationship; it is also coloured by a certain anthropological texture, as it also

indicates a fragmentation of the global marketplace, not along Cold War lines of market-driven versus centrally planned economies. Instead, new alignments and divisions have emerged out of an ideological calculus of the relative safety or danger regions, nations, ethnicities, and religion.

Wee (2003: 6)

Hence, reordering this global space also needs at the same time to assign relative weights of danger to various spaces in the global order.<sup>13</sup> This, in turn, becomes an element in the complex ensemble of forces that worked to mould sovereignty in the post-cold war period. For one, this has ramifications for the complex relationship between globalization and sovereignty, especially as this is manifest in the emergence of a rather paradoxical approach to globalization. On the one hand, states embrace economic globalization in the form of encouraging the movement of trade and capital, and on the other, they seek to erect unprecedented barriers to the movement of people (Jayasuriya 2002c).

What needs to be underlined is that these political borders are being closed in the name of preserving cultural identity and protecting the 'integrity' of the nation, which is reflected in an increasing assertion of national sovereignty. This is evident in the intensification and monitoring of national, or even regional, borders such as those of the European Union. Similarly, this new 'reassertion of sovereignty' is also apparent in the international effort to criminalize people, the effort to circumvent well-established international treaties for the treatment of

refugees (Hayter 2000). Consequently, at the heart of this new constitution of the global exception is an illiberal approach to globalization – embracing economic globalization but at the same time also paralleled with the assertion of sovereignty within and beyond the conventional ‘Westphalian’ boundaries. Economic liberalism is buttressed by increasing resort to powers of exception. The implication of this line of reasoning is that liberal spaces of the global order increasingly depend on illiberal intervention in other parts of the globe. But, the crucially political nature of this intervention is obscured by the often anti-political terms in which this intervention is prefaced.

The vulnerability of the institutional framework of international liberalism lies in the unfolding of what may be termed a new form of legitimation around a logic of police. This characterizes the nineteenth-century use of the term ‘police’ where it does not refer to any specialized agency of law enforcement. Instead, it pertains to an agency concerned with the detailed and comprehensive regulation of urban life in order to create a well-ordered and secure environment for trade and commerce. This public agency was designed as one equipped with security as its primary motive, and concerned primarily with the regulation of a range of social, economic, and personal areas of life. In this sense, the key dimension of the global state of exception is the way in which the zones of exception are constantly policed.

## **Conclusion**

The transformation of the global liberal order is best reflected in the fact that the new legitimacy being promoted by core capitalist states and implemented through a logic of policing ‘exceptions’ instantiates a form of anti-politics. This anti-politics remains antithetical to notions of international equality and the formal international law that formed the bedrock of post-war international liberalism. Significantly, these spaces of exception are disembedded from the broader global context of economic and political relationships. They are seen to be policed for either humanitarian reasons in the pursuit of common values or because they pose a risk to global stability and security or broadly a threat to political existence. Either way, these spaces of exception are seen as being in need of constant policing, and crises within these spaces are constantly ‘securitized’ so that the source of these often recurring crises are seen to lie outside the domain of material relations of power and conflict. The internationalizing of the state of exception is mirrored in a shift in global politics from a logic of politics to a new logic of regulation.



This new logic of regulation foregrounds legitimacy as the driving force of the emerging global order. Legitimacy, is couched in a form of affirmative cultural values which have come to overwhelm the forms and practices of international law. Hence legitimacy becomes an assertion of the particularistic values associated with a group of core capitalist states whose state structures have become intertwined within emerging global regulatory structures. It is these particularistic values – a positive version of what is aptly termed the occidental revolution by Margalit and Buruma (2004) – that have come to dominate the practices and forms of international governance: a new governance driven by the imperatives of confronting a new political existentialism through the constant monitoring of the legitimate behaviour of states and individuals as well as the zones of exception where illegitimate behaviour predominates.

However, as much as this new governance is framed in terms of a new political existentialism, it remains very much a deeply anti-political project because it removes the political agency of individual states in favour of affirmative cultural values in the global order. In short, it substitutes a new brand of ethical decision-making for the material conflict of politics. It is important here to acknowledge that this new culturalism not only infects the hard language of security in the form of the war on terror, but it is also the ‘soft’ language of securitization that grounds notions of human security or climate change. The roots of these lie in a conception of political existentialism which permits greatly coercive policing of legitimate behaviour. But what makes this new culturalism so paradoxical is that the affirmative cultural values being pursued in the name of legitimacy are often liberal values that permit a range of illiberal practices. How is this possible? Quite simply, because liberalism is torn from the historical and political context in which it was formed to become an associate with a particularistic way of life, or as Margalit and Buruma (2004) put it, as part of the west. It is this incipient culturalism that is the basis of the new illiberal global order. In essence, this is the new imperialism that is now being celebrated by conservative forces in the US and the UK.

But this is not all. The constant resort to a set of unifying values renders invisible the conflicts, divisions, and antagonisms that pervade the core capitalist countries. To the extent that these states are said to be unified in the defence of a common set of particularistic values the deeper material divisions and antagonisms that pervade these states are marginalized, or even worse made illegitimate. This seems an inevitable outcome of the kind of cultural boundaries of legitimacy that are being mapped within the global order. Therefore, this new

‘political existentialism’ points to deeper changes occurring within the internal ideological terrain of the advanced capitalist states. In much the way that Sternhell depicted interwar fascism as the ideological hybrid of communitarianism or culturalism and free market where this

political culture, communal, anti-individualistic, and anti-rationalistic, represented at first a rejection of a heritage of the Enlightenment and the French Revolution, and later the creation of a comprehensive alternative, an intellectual, moral, and political framework that alone could ensure the perpetuity of a human collectivity in which all strata and all classes of society would be perfectly integrated.

Sternhell (1994: 6)

The new global political existentialism throws up a curious range of ideological hybrids – ranging from the Third World’s anti-globalization movement, New Labour’s Third Way or the current dominant US neo-conservatism – that seek new combinations of culturalism and free markets. There is no doubt that all differ in substantial respects, but what this chapter seeks to emphasize is the fact that this new culturalism – the privileging of legitimacy – moves the terrain of conflict away from material relations of power to notions of political existentialism, and although the values that this political existentialism purports to defend may be construed in liberal terms they have deeply illiberal effects. It is this nexus between the turn towards values – reflected in the conservative celebration of the empire of values – and its inevitable illiberal and authoritarian character that is probably the most distinctive facet of the new global order. The post-cold war period in global politics, amplified by the events of 9/11, ushers in a new project of modernity that is framed in terms of threats and risks to political existence.

To an extent this reflects, as Giddens (1994) would have it, a transition from simple to a more reflexive modernity. However, the most glaring lacunae in the analysis of reflexive modernization is the failure to acknowledge that the defining characteristic of the modernist project was not so much the way it dealt with issues of uncertainty or risk, but that it contained within it a set of registers – be it liberal or socialist – to deal, negotiate, and contest the conflicts of interest that arise from capitalist development. This politics of interest then provides the ballast for a social constitutionalism whose dynamics were shaped by the social settlement between labour and capital at the national level, and the global conflict between capitalism and ‘really existing socialism’ during the cold war. The post-war liberal order at

both the domestic and international levels embodied within its broader constitutional project an understanding of interest and social dialogue which was a central pillar in the development of the social state at home as well as in the inclusionary international society abroad. What has crucially disappeared now is this notion of interest and conflict based on material relations of power. Instead of interests we now have the mobilization of values and culture as the central axis of late capitalism which inevitably leads to a form of existentialism concerned with the protection of risks and threats to life itself said to be inherent in the very structure of our globalized world. More to the point, these risks and threats are believed to go beyond the boundaries of politics and political conflict. This is the heart of our argument, namely that the transformation of the post-war liberal order must be seen in the framework of this transition from interests to values.

### **3 Transnational regulatory governance and complex sovereignty**

#### **Introduction: globalization and law**

As the emerging politics of the new legitimacy continues to reshape the ‘spatiality’ of the global order it is clear that this has major ramifications for our understanding of sovereignty which is a referent object for the disciplines of international relations and law. It is evident that as we reformulate the entrenched disciplinary assumptions underlying these conceptual definitions of the national and the international, we necessarily move the concept of sovereignty to the foreground of the analysis of the relationship between globalization and law. There is no doubt that the process of globalization is transforming traditional conceptions and constructions of sovereignty. The conventional image of a sovereignty associated with exclusive territorial jurisdiction – given the shorthand term ‘Westphalian’ to denote the importance of the treaty of Westphalia in giving recognition to these kinds of sovereignty – is no longer theoretically or empirically serviceable in the face of the internationalization of economic and social activity (Ruggie 1993). Similarly, the notion that within a state, there is a form of internal sovereignty or unity around a monistic legal order is increasingly challenged by the fragmentation of the state (Jayasuriya 1994a; Picciotto 1996; Slaughter 1997).

International law, like international relations, relies on a political theory of sovereignty to buttress its conceptual framework. In a sense, the concept of sovereignty stands in much the same relation to international law and international relations as does the concept of markets to the discipline of economics. But as with the concept of the market, the notion of sovereignty has until recently not been subject to critical scrutiny in the mainstream literature. With the rapid globalization of the economy, the growth of regional institutions like the European Union (EU), and the emergence of international regulatory regimes,

the conventional notion of a sovereign state has limited efficacy. The understanding of the sovereign state as an entity that has exclusive jurisdiction over its territory (with the concomitant limitation on external encroachment on its power), as well as the notion of an internal sovereignty reflected in the internal unity of the state and its 'monistic' legal order, stands in need of rethinking. The notion of a single unified system of internal sovereignty has become increasingly problematic in a global political economy surrounded by islands of sovereignty rather than a single central decision-making authority. As MacCormick remarks in relation to sovereignty and the EU, among other things, this means that in order to:

escape from the idea that all law must originate in a single power source, like a sovereign, is thus to discover the possibility of taking a broader, more diffuse, view of law. The alternative approach is system-oriented in the sense that it stresses the kind of normative system law is, rather than some particular or exclusive set of power relations as fundamental to the nature of law.

MacCormick (1993: 8)

Our main objective here is to explore the ramifications of this fragmentation of sovereignty for our understanding of international law and international relations. As will be argued later, the development of this 'complex sovereignty' reflects the transformation and reconstitution of the notion of state and sovereignty in the face of the globalization of economic relations as well as the increasing militarization of the global polity in the wake of the events of 9/11. Our central thesis is that the emergent system of global governance depends on a fundamental reconstitution of our conventional Westphalian-inspired ideas of sovereignty and statehood. More fundamentally, the new 'complex sovereignty' reflects the emergence of a new form of transnational regulatory governance of core capitalist countries that significantly reshape the very assumptions of formal international law.

This argument is developed here under three sections. The first deals with what might be called a structuralist perspective to the analysis of the transformation of sovereignty under the pressure of the globalization of economic relations. In the second the 'unitary state' assumption of international relations theory is subjected to critical scrutiny by identifying the key actors in regulatory regimes as independent state agencies who are increasingly playing an 'international role' within the domestic state apparatus. The final section seeks to challenge some of the presumptions of international lawyers about the

nature of international law. This is mainly because the legal form of regulatory regimes is governed by networks of regulatory agencies that depend on decentralized enforcement by the national agencies – rather than on supranational international regimes – often reflected in a preference for compliance rather than enforcement. We intend to probe in a more extensive way the manner in which formal international law has been deformalized.

### **Globalization, global governance and the reconstitution of sovereignty**

Periods of crisis and transformation result in critical scrutiny of the taken-for-granted background assumptions of many fields of study. This is markedly evident in the discipline of international politics and law where a number of recent studies have subjected the notion of sovereignty to sustained analysis. One approach, that may be termed ‘formalist’, takes a rather abstract approach to sovereignty and attempts to match abstract features of sovereignty with state practice. Jackson (1990),<sup>1</sup> for example, suggests the term ‘quasi-states’ to account for those cases where there is gap between juridical sovereignty and actual state practice as, for example, in Africa. These formalist approaches are ahistorical and fail to grasp the fact that forms of sovereignty are not immutable, but change over time. For these theorists sovereignty is a zero-sum – you either have it or you don’t. Another perspective, labelled ‘constructionist’,<sup>2</sup> has been strongly shaped by post-modernist thinking, and broadly suggests that emergent forms of political communities cannot be encompassed within traditional notions of sovereignty. While this perspective is more historically sensitive than the formalist approach in that sovereignty is viewed as a social construction, it nevertheless, remains trapped within a zero-sum framework because proponents of this perspective subscribe to the implicit assumption that the global political community will move beyond sovereignty.

In contrast to these approaches, this essay adopts a ‘structuralist’ approach where the focus is more decidedly on the *way* the form of sovereignty changes in relation to a fundamental transformation in the structure of economic and social relations. This represents not an erosion (as a formalist perspective might imply) or a dissolution (within a constructionist perspective), but a fundamental transformation of the form of sovereignty. As MacCormick (1993) points out, the real significance of the EU is the fact that it suggests that sovereignty is being reconstituted in a way which challenges its conventional

models that underpin our understanding of the domestic legal and political order.

MacCormick rightly draws our attention to the importance of the EU for the emergence of complex sovereignty, but equally important in this regard is the emergence of new structures of global governance and regulation. Practitioners and scholars of international relations and law, therefore, need to forge new conceptual tools to explore the mechanisms and structures of international regulatory regimes; and these promise to be an important property of the emergent complex<sup>3</sup> global order. A distinctive aspect of this global order is the emergence of a new form of international regulation that has supplanted the institutions and practices of the post-war liberal order. The extensive international effort put in to regulate environmental, health, weapons, and even human rights standards, bears witness to this trend towards international regulation. But this demand for regulation is even apparent in the international financial sphere, especially as a response to the recent Asian currency crisis of 1997–1998.

The interdisciplinary work between international relations and international law of the last decade<sup>4</sup> is well suited for handling global regulation because of the increasing trend towards cooperation between domestic regulatory agencies to secure compliance with internationally agreed standards. Domestic regulatory agencies often act independently of their governments and in concert with private actors in a range of areas extending from financial and securities regulation to environment and health. Although this form of regulatory cooperation has become a vital mode of governance in the global economy, it is important to recognize that the nature and form of this regulatory cooperation differ significantly from the standard or classical model of international organization and law that informs much of contemporary international relations and law. It is this regulatory cooperation – central to the increasingly transnational global regulatory structure – that creates new and interlocking regulatory webs amongst advanced industrial states.

For scholars of international relations, international regulatory regimes reflect the emergence of new modes of global governance; for international legal scholars they reflect the emergence of new forms of international law. In fact, essentially what these regulatory regimes achieve is to expose the limitations of the Westphalian assumption of mainstream international relations and law, namely that territory was the central component of state sovereignty thereby conjuring up a legal world composed of interacting unitary states. From an international law perspective (see *Restatement of the Foreign Relations Law of*

*the United States*, 1987), many regulatory regimes fail to qualify because international organizations are considered to be ‘organizations composed of states and constituted by formal treaty’ (Zaring 1998: 285). Similarly, from an international relations perspective, regulatory regimes strike at the heart of the Westphalian assumption of a political world of unitary state actors because these regimes are composed of relatively autonomous (often self-regulatory) state agencies, and private or non-governmental actors, thereby confusing the disciplinary boundary markers between the international and domestic domains.

Slaughter *et al.* (1998) perceptively point to the need to rethink the relationship between international relations and law on the grounds that:

it is time to move beyond the canonical narratives of how the disciplines evolved, both separately and in conjunction with each other. These narratives are valuable both as intellectual history, providing necessary context for current debates, and as bulwarks against the ad hoc borrowing of terms and concepts. But it is time to move on.

Slaughter *et al.* (1998: 368)

In the spirit of Slaughter *et al.*, we need to work towards an alternative framework to move beyond the increasingly irrelevant Westphalian<sup>5</sup> paradigm in order to understand the development of new modes of governance in the global economy. These forms of governance – be they the emergence of the EU or the emergence of new forms of international regulation – challenge the Westphalian framework of sovereignty that has underpinned dominant models of international relations and law. More to the point, this new international regulatory order signals a decisive break with the post-war global liberal order in that it constitutes a new transnational regulatory form of governance that makes redundant some of the core principles of the postwar liberal order such as formal political equality of states. The crucial nexus here is between complex sovereignty and the way in which liberal practices of post-war international governance are being fundamentally reconstituted within this new regulatory order.

***Beyond conventional models of international law and politics:  
towards complex sovereignty***

In this regard, an especially influential mode of theorizing the interaction between international law and politics in the global systems is the



notion of an international regime.<sup>6</sup> According to Krasner (1983), an 'international regime' refers to a set of implicit or explicit principles, norms, rules, and decision-making procedures around a particular set of issues in a range of international policy areas. Stone (1994) who has used this framework<sup>7</sup> to explore the 'constitutionality' of international regimes maintains that international regimes differ in the degree to which norms are codified and decision-making procedures are institutionalized. For example, the EU represents the evolution of a highly developed constitutional order, whereas the institution of the balance of power or deterrence represents the manifestation of the most rudimentary norms within the international system.

The analysis of international regimes has clearly much to offer for a comprehensive understanding of the institutions of the contemporary global economy. For instance, its emphasis on the development of institutions and norms within the international system does not necessarily require the existence of formal international organizations. Additionally, it has the capacity to incorporate within its framework the plurality and fragmentation of the international response to 'global' problems on a range of issues. However, the regime framework is ill suited for the analysis of emergent forms of global governance. Thus, for example, in the area of regulatory cooperation this analysis is still trapped within the basic confines of the Westphalian paradigm of sovereignty, and as such is not able to encompass some of the fundamental changes in the architecture of international law within its framework.

Perhaps the best reflection of the 'Westphalian bias' of the regime theory is the fact that regimes are seen to be composed of states (often through treaty) and involve some degree of 'government' at the international level. In many international regimes the treaty is the central component through which states cooperate with one another; it is, as Chayes and Chayes (1993) note, implicitly or explicitly based on a contractual model of state relationships. This contractual model of regime formation is underpinned by the Westphalian model in which sovereignty is linked with exclusive territorial jurisdiction.<sup>8</sup> It is precisely this model of sovereignty which is being transformed under the pressure of the globalization of economic relations. The critical point to note is that the very notion of sovereignty needs to be disentangled from its linkage with territory;<sup>9</sup> models of sovereignty are embedded in specific social and economic structures and as these structures change so does the form of sovereignty.

Therefore, central to this new thinking is the view that sovereignty should be seen and understood as a historical concept that changes

over time. Rosenberg (1994), for example, has shown that the notion of sovereignty is a distinctive political form that not only enabled a set of external economic relations within formally equal states, but perhaps more importantly, allowed the constitution of separate spheres of public and private so central to the emergence of capitalist economy.<sup>10</sup> Arguing along these lines, Rosenberg maintains that:

the historical rise of the sovereign state is thus one aspect of a comprehensive reorganization of the forms of social power. The change that it works in the form and content of the international society is no less startling. For under this new arrangement, while relations of citizenship and jurisdiction define state borders, any aspects of social life which are mediated by relations of exchange in principle no longer receive a political definition (though they are still overseen by the state in various ways) and hence may extend across these borders.

Rosenberg (1994: 129)

In a nutshell, sovereignty can be considered a specific political form which is distinctive of capitalism; and, consequentially also enabled the constitution of a distinct sphere of international economic activity. But even within this framework, sovereignty was far from static as reflected first, in the rise of the notion of popular sovereignty reflected in what Manin (1994) calls 'parliamentary state' and later, in the rise of the social state and the associated constitutionalization of social interests. But the constitutionalization of these material social interests, especially labour, was dependent on the foundational cleavage between private and public that was enabled by this 'Westphalian' model of internal sovereignty.

It is this model of sovereignty, inextricably linked with the notion of territory, that is consistent with the growth and emergence of national economies. In contrast, the development of a global economy – rather than an international economy – and the associated reorganization of social power have transformed this essentially territorial model of sovereignty. It is important to recognize that this argument points to the transformation of the notion of sovereignty – not merely as an erosion or a replacement by a global leviathan. Cognisant of the fact that models of sovereignty are not fixed and immutable but contingent upon changing frameworks of economic and political power, we are able to move beyond the rather simplistic debates about erosion of the state to consider the ramifications of changing forms of sovereignty<sup>11</sup> by reformulating basic concepts

such as national and international domains in the study of international law and politics.

Conceptualizing sovereignty in these dynamic terms removes it from the formalist straightjacket in which scholars of both international relations and international law have generally understood it. The reformulation proposed here would suggest that the formal legal category of sovereignty is being constantly adjusted to respond to the changing social forms of capitalism. This approach is also exemplified in the work of the legal theorist Karl Renner. Renner illustrates his argument by pointing out that the notion of property as a legal category played a vastly different role in simple commodity production where producers of goods are independent artisans who own the means of production, unlike the situation that prevails in a modern complex capitalist economy. Renner's argument demonstrates the need to analyse the evolution of the legal institutions in terms of the distinction between legal categories that may remain static and the social functions of these categories, which are more dynamic. Therefore, the critical task is to understand the role played by legal categories under different economic structures. As Renner puts it, 'this constant divergence between legal norm and social efficacy provides the only explanation for the evolution of law' (Renner 1949: 52). In short, the adoption of Renner's methodology allows us to move beyond static and formalistic understandings of sovereignty and thereby enable a better appreciation of a contingent model of sovereignty.

Central to the new global economy is the disjunction between the territorial nature of sovereignty and the increasingly global nature of economic flows. In short, the territorial jurisdiction over economic life of the modern state is increasingly constrained by the globalization of economic and social relations. Susan Strange (1996), in a sophisticated analysis of these changes in the global political economy provides a two-fold argument: one, that all states – small and weak – have had their authority and functions greatly diminished because of the integration of states into the global economy; and, the other, that 'some of the fundamental responsibilities of the state in a market economy – responsibilities first recognized, described, and discussed at considerable length by Adam Smith over 200 years ago – are not being adequately discharged by anyone' (Strange 1996: 14). By identifying the significant increase in the power of non-state actors in the global system, Strange makes an important contribution to the study of state and the global political economy. In particular, she draws attention to the role and power of financial markets in constraining the ability of

the state to intervene effectively in large areas of economic life. She also observes that 'the authority over society and economy is undergoing another period of diffusion after two or three centuries in which authority became increasingly centralised in the institutions of the state' (Strange 1996: 86).

Interestingly, a related thesis is advanced by Cohen (1998) who, in an insightful account of recent changes in the international monetary order, distinguishes between 'spaces of places' and 'spaces of flows'. He suggests that our conventional imagery of currency is inherently territorial and is becoming increasingly redundant. A classic instance of this is the growth of 'dollarization' in many Latin American economies where private agents use US dollars instead of their own local currency. Yet another dramatic example can be found in the movement towards European monetary integration. This emergent monetary order, Cohen contends, subverts our territorial understanding of monetary space with an imagery more in tune with the transnational networks of capital. In other words, the greater integration of capital and money markets requires that we move from a notion of 'spaces of place' to 'spaces of networks'. As Cohen (1998) puts it, network images run counter to territorial conceptions of place mainly because the 'authoritative domain' of the currency – its sphere of influence, if you like – may not be congruent with territorial boundaries. Echoing Susan Strange, this leads Cohen to the view that:

Governments today are less and less capable of preserving even a modicum of monetary autarky; in a world of extensive cross-border competition among currencies, authority is not exercised solely by the state. On the contrary, private actors too play a key role, through their choices among vehicles to use for various monetary purposes.

Cohen (1998: 25)

Both Cohen and Strange provide a valuable and insightful analysis of the growing disjunction between the functional domain of economic activity and territorial reach of the sovereign. But, from this persuasive premise, they reach the flawed conclusion that sovereignty is subject to a process of gradual erosion, or to use Strange's (1996) evocative phrase, the 'leakage of power from state to society'. As previously argued, a conclusion of this nature can only be arrived at by construing the legal category of sovereignty in static and formalistic terms. As against this, the argument being advanced is that the notion

of sovereignty is being transformed, *not* eroded, by the process of globalization.

In this connection, Picciotto too points out that the notions of jurisdiction or the domain over which state power can be exercised have always been flexible. For example, he points out that historically the identification of sovereignty with the nation ‘transforms the basis of the exercise of the state sovereignty into the more flexible and elusive notion of national jurisdiction’ (Picciotto 1996: 99). According to him there is flexibility in notions of jurisdiction with regard to commercial activities, and this often provides a wider jurisdictional reach of the state than that assumed by the territorial model of sovereignty. Hence:

jurisdiction over a corporation can be based on the fictions either of its nationality or residence, and can vary for different purposes, using as criteria either the law under which it is formed, the location of its ‘seat’ or head office, or the place from which central management or control are exercised. A ‘control’ test may be used to justify a claim to jurisdiction over the worldwide activities of transnational corporate groups or Transnational Corporations (TNCs), on the grounds that foreign subsidiaries are subject to ultimate control by their dominant shareholders or parent company, and states have increasingly asserted such jurisdiction over ‘foreign’ companies especially to defeat or prevent regulatory avoidance by the use of ‘foreign’ subsidiaries incorporated in jurisdictions of convenience.

Picciotto (1996: 99–100)

A good exemplar of the elasticity of the notion of sovereignty in the face of its disjunction by globalization is provided by the US Supreme Court decision in the case of *Hartford Insurance Co vs. California*.<sup>12</sup> This case involved a conspiracy by London based co-insurance companies to limit the kind of insurance provided in the United States, particularly in relation to the limitation on pollution claims. As Trimble (1995) points out, the significant jurisdictional issue here was the fact that defendants had conspired in another jurisdiction to ‘offer reinsurance to American companies except on terms to which the London defendants had jointly agreed, thus harming parties for whom the state attorneys-general acted as *parentes patriae*’ (Trimble 1995: 44). The English defendants, while not disputing the effects on the US, contended that their conduct was fully legal in England and by the normal standards of international comity US jurisdiction should not apply in this case. In other words, this is a line of defence fully compatible with the

traditional model of sovereignty described above. However, the important point in this case was the fact that the court established the relative importance of effect (in this case, the US) over conduct (in this case, England) and clearly placed much more importance on the former rather than on the latter, thereby establishing and reinforcing precedents for the extra-territorial reach of the US judicial system.

The technical issues raised by the case need not detain us. Its importance lies in the fact that the territorial model of sovereignty is giving way to more flexible notions of jurisdiction based on effects rather than place of conduct. The debate over the consistency of the decision with the notions of jurisdiction in international law is relevant in that it points to the elasticity of the notion of sovereignty in the face of the changing structure of global economic relations.<sup>13</sup> However, important as these attempts are to establish a basis for an extra-territorial notion of sovereignty, a potentially greater far-reaching development has been the disruption of the internal ‘unity’ or sovereignty of the modern territorial state. More especially, these new notions of complex sovereignty reflect the increasing shift in the global order to a new set of interrelated advanced capitalist state structures that constitute a complex sovereignty, which exercises this sovereignty through the delimitations of zones of exception and normality.

### **Fragmentation and the internal sovereignty of the state**

Emerging forms of ‘complex sovereignty’ break down the internal structural coherence of the state replacing it with often autonomous regulatory agencies whose purpose is to mediate between the international and the local or national. The emergence of polycentric centres of power within the state,<sup>14</sup> therefore, internationalizes certain agencies (e.g. central banks) within the state while at the same time serving to break down the boundaries between domestic and international politics/law. Again, these emergent properties of sovereignty pose important, even revolutionary, implications for the study of international law and politics. But – contrary to those who seek to describe this as a new ‘medievalism’ – the argument advanced here reinforces the thesis that this is a transformation, not an erosion, of sovereignty.

One of the cardinal features of the modern state – modern, because as Ruggie (1993) points out, the conjoint development of territoriality and sovereignty is part and parcel of the emergence of modernity – is the development of ‘internal sovereignty’ or internal coherence within the state.<sup>15</sup> A central feature of the early state was the conflict between autonomous centres – be they corporate or ecclesiastical – as they

sought to defend their prerogatives and immunities. However, one of the major achievements of the nineteenth-century state was its emergence as the exclusive centre of all authoritative decision-making. The state has institutionalized the principle of internal sovereignty and thereby constituted a unitary ‘monistic’ legal order. As Poggi (1978) correctly observes:

Mature modern states are intrinsically ‘monistic’ and represent in this a return to the Roman tradition, whereby the *princeps*’ power was derived from the will of the *populus*. The Continental juristic construction of the state as person is a characteristically sophisticated way of expressing this principle.

Poggi (1978: 93)

Indeed, from this perspective, legal positivism, particularly as exemplified by the work of Kelsen,<sup>16</sup> provides a jurisprudential foundation for this internal sovereignty. Of course this juridical unification of the state went hand in hand with the development of a notion of a civil society. This is an important point: the development of internal sovereignty allows the state to distinguish itself clearly from the civil society and the market. Hence, the autonomy of both civil society and the market order is conditional on the emergence of certain forms of sovereignty. To give one example, the notion of a universal citizenship is only comprehensible in a context where there is – to use Poggi’s terminology – a monistic legal order. But perhaps more importantly, in terms of the thesis being developed in this chapter, the coherence of the state is of the first importance in establishing a juristic foundation for a domestic market order. From this structuralist perspective this particular form of internal sovereignty within the state is determined by a particular configuration of economic and social relationships.

However – and this is the nub of the thesis developed here – with the globalization of economic relations there is a growing incongruity between a territorial notion of sovereignty and the flow of economic activity which disrupts the internal unity or coherence of the state. Increasingly various agencies and institutions within the state develop a high degree of autonomy and independence.<sup>17</sup> This fragmentation of the domestic order of the state is central to the development of international forms of regulatory governance. In short, the global governance of the economy requires the internationalization of state agencies and institutions; but this can only occur if these institutions possess a degree of autonomy from other institutions within the state. In other words, the fragmentation of the

state is the form that sovereignty takes in an increasingly global economy.

It is important to remember, of course, that even within the parameters of the nineteenth-century state, internal sovereignty was never completely dominant. According to Poggi:

the army, the police, the diplomatic service, and sometimes top judicial bodies maintain substantial autonomous lines and traditions of political action, with the result that each operates in some cases as 'state within a state' as de facto holder of autonomous political prerogatives.

Poggi (1978: 94)

Nevertheless, the fact remains that globalization has accelerated the development of autonomous agencies, the development of 'a state within a state'. Slaughter (1997) underlines these observations by noting that trans-governmental networks of regulatory agencies such as central banks, rather than supranational institutions, will increasingly be preferred as a form of governance of the global political economy. She argues that 'disaggregating the state permits disaggregation of sovereignty as well, ensuring that specific state institutions derive strength and status from participation in trans-governmental order' (Slaughter 1997: 196).

In a nutshell, the globalization of economic relations increasingly fractures the internal cohesiveness within the state but this fracturing means the creation of islands of sovereignty within the state.

A good example of this fragmentation or the disaggregation of the state is the development of independent central banks. Central bank independence<sup>18</sup> provides a means of purchasing – albeit not always successfully – domestic stability through the credible commitment to pursue 'market friendly' monetary policy; but this is at the cost of the fragmentation of the state and the increasingly procedural nature of monetary policy. The role of independent central banks will be discussed in more detail in the next chapter, but for the present, it needs to be recognized that independent central banks are actively engaged in the regulation of international financial markets (e.g. through the Basle Accord or through their critical role in implementing structural adjustment programs of the IMF), and that they participate in these regulatory systems as independent autonomous actors. In turn, these agencies are often required to implement international regulations or agreements at the national level. Slaughter (1997) aptly terms this the 'nationalization of international law'. However,



what is important to note is the way in which structural changes in the global political economy lead to changes in the form of state sovereignty; these changes serve to radically reconstitute our understanding of the traditional boundaries between the international and the domestic spheres because agencies such as independent central banks are simultaneously part of the domestic order and a range of global governance mechanisms.

### ***Fragmentation of sovereignty and the polycentric legal order***

One of the ramifications of the fragmentation of the state and the greater permeability of the boundary between domestic and international domains is the emergence of a polycentric legal order that directly contradicts the 'monistic' legal order implied by an internally unified state. Perhaps the best example of this polycentric legal order and its disruption of the internal sovereignty of the state is the EU. It is useful to examine the experience of the EU not only to illustrate the emergence of new forms of sovereignty but also because it serves as a fulcrum for institutional innovation in the area of governance regimes that might be a pointer to developments in other areas of the global political system.

However, the application of a Westphalian notion of sovereignty to the EU requires the adoption of two problematic approaches to the question of sovereignty in the emergent European legal order – one pertains to a supranationalism, and the other to a statist model of the EU as a product of intergovernmentalism. The 'supranationalist' approach sees in the EU the strengthening roots of a new federal constitutional order – an order that will result in a layer of supranational governance. It envisages the EU as a form of 'cooperative federalism', which relies on formal and informal mechanisms of cooperation between member states and the new centre. As Bellamy and Castiglione (1997) point out, proponents of this approach do not necessarily advocate the centralization of political decision-making but suggest that sovereignty should move beyond the confines of the nation state. This perspective places a great emphasis on the constitutionalization of governmental functions (Weiler 1991), and as such has much in common with the broad liberal approaches to international regimes.<sup>19</sup> From this viewpoint, the function of international law is to uncover the increasing constitutionalization of multilateral regimes. To be sure, the EU represents a form of constitutionalism unmatched by other multilateral regimes; but as Stone (1994) argues, this is essentially a difference in the relative constitutionalization of international regimes.

In contrast, the other approach, i.e. the ‘statist model’ approach, insists that the national state in Europe remains strong. This is argued on the grounds that state interests remain the driving force of the EU, as well as the fact that the state still has a high degree of internal sovereignty. Thus, the Union is seen as an association of states that pool sovereignty in order to pursue common interests. This pooling of sovereignty is largely driven by the Council of Ministers influenced by geo-political interests. As Mann (1993) points out:

The major encroachments on national sovereignty are not really constitutional – the replacement of one sovereignty by another. Instead, they are the practical, surreptitious, and delayed implementations of decisions taken by the Council of Ministers, whose decision-making processes reflect partly consensus and partly the geopolitical influence of the various member Powers.

Mann (1993: 127)

Milward (1992) in his account of the evolution of the EU, suggests that the European integration, far from leading to the demise of the nation state, is a way of ensuring its survival. In short, from this perspective the emergence of the EU does little to disrupt the monistic legal order of the sovereign state.

This statist model approach is deeply flawed. The EU as an entity is surely more than a pooling of sovereignty. The increasing incorporation of the ECJ judgments into national law and the many references by national courts to the ECJ is in itself a telling factor against those like Milward and Mann who argue for primacy of the national state in the EU.<sup>20</sup> But at a deeper level, the problem with this argument is that it sees the European integration process as a move away from sovereignty rather than a reconstitution of sovereignty. The supranationalist or what is commonly termed the ‘federalist’ perspective, while empirically richer as an account of the integration suffers from a similarly fixed understanding of sovereignty; but here, the image of a monistic legal order is simply transferred to the level of the EU. Both perspectives, while reaching opposing conclusions, proceed from similar premises about the nature of sovereignty as a zero-sum game where the emphasis is on the distribution of fixed quantum of sovereign power rather than on how and where it is produced.

A distinguishing feature of the EU is the emergence of a polity that cannot be understood within the traditional confines of territorial-based sovereignty. The difference between a traditional model of sovereignty and the emergent complex sovereignty of the European political order

can be seen clearly in the kind of emphasis placed by the former on government and by the latter on governance. The emerging European polity is composed of several multiple layers of governance requiring the participation of state agencies, non-state actors, and European institutions, to create a form of 'interlocking politics'. Interlocking politics in the EU system refers to the highly ambiguous and overlapping division of labour between the national and EU levels that characterize policy-making in the European polity. In fact, much of this governance takes place through the operation of networks of public and private actors located at different levels of government. Several studies of the EU demonstrate that governance through policy networks is increasingly the preferred form of regulation. Indeed, as Risse-Kappen notes, governance through policy networks is particularly evident in policy domains and is subject to the heavy influence of EU policies. He goes on to state that:

the more a particular policy sector has been integrated and the more decisions in the area are governed by majority rule, the more likely it is that the policy-making process is characterized by transnational and transgovernmental coalitions among private, subnational, and supranational actors rather than intergovernmental bargaining.

Risse-Kappen (1996: 66)

Of particular importance is the so-called 'comitology web' which brings together various groups of national experts and officials in different sectors, such as for example, foodstuffs, drugs, health, and safety which are central to the regulation of the single market.<sup>21</sup>

It is beyond the scope of this chapter to examine these developments in detail but what needs to be strongly underscored is that these developments lend themselves in significant measure to the emergence of a polycentric legal order that is at odds with the monistic order implied by the assumption of internal sovereignty of the Westphalian model. MacCormick aptly describes the nature of this sovereignty when he observes that:

In the traditional legal sense of 'sovereignty', member states of the European Union no longer constitute legally sovereign entities. Nor does the Union, nor its internal pillar the Community, constitute a sovereign entity. The distribution of sovereign rights at various levels of course leaves a compendious 'external sovereignty' of all the member states intact and even in a sense strengthened.

MacCormick (1996: 149–50)

Sovereignty is reconfigured in the sense that it is no longer exercised within a monistic legal and decision-making structure;<sup>22</sup> instead, it is parcelled and diffused across a range of governmental and non-governmental authorities. Here, the constitutional principle of subsidiarity<sup>23</sup> is the appropriate constitutional description of this new and reconstituted sovereignty.

Undoubtedly, the EU furnishes the best example of the emergence of a polycentric legal order; but illustrations of reconfigurations of sovereignty can also be found in other contexts. For instance, the World Bank's governance programs may be cited as good examples of these processes. Governance programs seek to build and make transparent a whole range of regulatory institutions, but in so doing, it is necessary first to make these institutions more independent from the central state apparatus, thereby constituting islands of sovereignty within the state. As a process (though it does have a different normative basis) this has some affinity with the multilevel governance of the European polity.<sup>24</sup>

In recent years multilateral agencies have placed a great deal of emphasis on building effective systems of governance in the developing world, especially in the transitional economies. Not only is most lending tied to the effective implementation of governance programs but also multilateral agencies have followed up on these concerns with extensive aid programs for institutional strengthening or capacity building. The tenor of recent economic reforms in transitional economies and in Southeast Asian countries has been on establishing credible and independent regulatory institutions. A key element in the evolution of a framework of regulatory governance is the establishment of independent regulatory frameworks with a capacity to commit themselves to credible policies (ADB 1995).

Governance programs emerged out of the experience of structural adjustment programs of the 1980s. International policy makers, puzzled by the apparent failure of structural adjustment programs, began to examine more closely the capacity of economic and bureaucratic institutions to implement economic reform packages. As a World Bank discussion paper on governance noted:

The Bank's experience has also shown that when programs and projects appear technically sound but fail to deliver results, the reasons are sometimes attributable to weak institutions, lack of an adequate legal framework, damaging discretionary interventions, uncertain and variable policy frameworks and a closed decision making process which increases risks of corruption and waste.

World Bank (1991: 1)

In fact, governance programs provide a complementary set of institution building programs to support economic adjustment programs.

The emphasis placed on the role of the state as a regulator – which multilateral agencies seem to have recognized – requires not a reduction in the role of the state, but rather a restructuring of its governmental functions, shifting the ‘boundary between the public and private sectors, thereby enlarging the latter, with the government’s role changing from direct provision to regulation’ (World Bank 1994: 2). One of the concerns of the governance programs has been to ensure that the process of economic deregulation and privatization does not lead to the capturing of key markets by politically connected groups and individuals, and these concerns have taken on added importance in the light of the economic crisis in Asia.

For this reason, one of the major concerns of governance is the development of the ‘rule of law’, and to this end there has been a concerted effort to promote legal reform programs in a number of developing states. For example, there are a number of projects in China, which seek to establish credible and functional legal institutions. The widespread adoption of foreign commercial law in China is influenced by a highly instrumentalist approach to law and institution building. Law is seen as bits of technology, dislocated from its broader normative assumptions, to be employed where useful. This is strikingly apparent in the rapid growth of foreign trade arbitration in China as well as in a number of other emerging economies. But the important point is that the globalization of the Chinese economy leads to the constitution of distinct arenas of law for different groups and interests, a fragmentation of the legal order that stands in sharp contrast to the monistic legal order implied by the conventional notions of sovereignty. Rule of law and governance programs are clear manifestations of a polycentric legal order.

These examples are sufficient to illustrate clearly the thesis that globalization leads to the rupturing of the internal sovereignty of the state – a sovereignty so central to the conventional Westphalian understanding of sovereignty. However, this does not result in the dissolution of sovereignty, but rather its reconstitution in a different, more polycentric, form. It is this fragmentation that leads to the emergence of a polycentric legal order more attuned to the ‘governance’ rather than the ‘government’ of the global economic and political system. It is best reflected in the increasing emphasis on international regulation through networks of regulatory agencies. In short, one of the most distinctive aspects of the new emerging global order is a decisive shift in traditional ‘Westphalian’ norms of sovereignty towards a more ‘complex sovereignty’.

## **International regulatory state and network governance**

One of the important features of governance mechanisms in the global economy is the emergence of a system of regulatory networks. As the state becomes fragmented, regulatory agencies increasingly develop international connections with other regulatory agencies, thereby taking on an 'international' function. This reconstitution of sovereignty in a world of rapid globalization takes the 'internal' form of fragmentation and polycentricity and the 'external' form of 'network governance'. In fact, regulatory systems have become more important in the management of the global economy and pose significant challenges to our conception of the way international law is formulated and enforced. These regulatory webs do not depend on formal international treaties or rely on international organizations for their enforcement. In short, the emergence of an international regulatory state depends on, and in fact, requires, the active participation of agencies within the state. Again, the importance of the reconstitution of sovereignty in these new systems of global regulation should be recognized. Following the work of Picciotto (1996) we can term this a form of 'network governance'. As Picciotto (1996) observes:

these contacts can aptly be described as taking place through networks, in a number of senses. Firstly, they are informal or semi-formal in nature: even when they are publicly visible, they are often not founded on conventional legal instruments such as treaties, but on 'gentlemen's agreements' which may be semi-secret.

Picciotto (1996: 112)

Often these regulatory networks<sup>25</sup> rely on the application of formal standards rather than a set of rules; but more importantly, the operation of these regulatory systems depends on the national application of internationally formulated standards. In this regard it bears out Slaughter's (1997) contention that the reconstitution of sovereignty represents the nationalization of international law. What this signifies is that the operation of the global economy requires extensive regulatory changes at the national level.

Therefore, if network governance is the preferred form of management, regulatory harmonization is the conceptual framework for international regulatory networks. Here again, the EU provides a good illustration. The construction of the European Single Market has made it imperative that there be a complementary process of regulatory harmonization or a system of mutual recognition (Beeson and

Jayasuriya 1998). An analogous argument can be made at the global level that the constitution of the global economy requires similar mechanisms of regulatory harmonization at the national level. But this depends on the creation of 'islands of sovereignty' within the state. For a global economy to operate there has to be a high degree of cooperation in areas that fall within the traditional domain of the national state in order to facilitate a system of global governance. Hence, this global governance requires the nationalization of international law, which can only be achieved through the reconstitution of sovereignty. In other words, the form of sovereignty is determined by the changing structure of the capitalist economy.

In this context, the Basle Accord on capital adequacy standards – a set of standards agreed to by central banks to maintain adequate capital levels – provides a useful example of this type of regulatory mechanisms. Capital adequacy has become important because of the increasing integration of the financial services industry. As a result, there has been a demand for greater regulation or management of this increasingly mobile banking sector. As Peter Cook, the second chairman of the Basle Committee points out,

there was, in effect, a supervisory vacuum in this global market, which needed to be filled. Neither the supervisors, nor indeed the banks themselves, had fully appreciated the degree to which the banking environment was changing in character and the new and increasing risks involved in international business. Supervisors were still very much domestically oriented within the framework of different national banking systems.

quoted in Reinicke (1998: 104)

There are two significant features which stand out: first that regulatory cooperation was driven by the desire to protect sovereignty; secondly, that this cooperation could only be achieved by internationalizing regulatory agencies, thereby rupturing the internal sovereignty of the state.

The Basle Committee's chief objective then was to strengthen the supervision of the banking system by establishing a close relationship and mutual cooperation between national supervisory bodies. In short, any regulation had to be within its objective working through consensually agreed supervisory standards and practices. It meant that it had to operate through a dense regulatory web of national agencies. This in turn poses a significant challenge for international lawyers mainly because the Basle Committee does not attempt to enforce detailed

harmonization but depends on national supervisory agencies pursuing broadly accepted guidelines (Zaring 1998). In this respect, the mode of regulation exemplified by the Basle Accord crucially depends on the operation of the notion of subsidiarity. According to Reinicke (1998), the Basle Accord has two conceptions of subsidiarity. The first is a kind of functional subsidiarity that enables the Committee to distinguish between two definitions of capital – a core concept ‘which had to constitute at least 50 percent of bank’s total capital, was the same in all countries’ (Reinicke 1998: 115–16); and a lesser concept that allowed for national variations in the definition of capital. The second conception of subsidiarity is that of a structural subsidiarity which ensures the implementation of general consensual standards by national supervisory or regulatory agencies. Indeed, the key point about the Basle Accord and the reason it presents such an important challenge to international legal scholars is that its implementation required the national implementation of an internationally agreed set of standards. In this sense, structural subsidiarity can function within a framework of economic governance at multiple levels and this is increasingly the norm in many international regulatory systems.

The Basle Accord is not the only regulatory framework to be sustained through the mechanism of network governance. Another interesting example from the international financial area, is the International Organization of Securities Commissions (IOSCO). The IOSCO is the body that deals with the transnationalization of securities markets and attempts to provide a regulatory framework for these markets. This body is comprised of state and non-state agencies engaged in the operation of the securities market; and it serves as a regulatory response to the mobility of capital or to the increasing disjuncture between physical and economic geography. Again, the point to note is that the constitution of a global financial market necessitates a high degree of cooperation between regulatory agencies in areas normally considered to be within the prerogative of the national state. In this regard, one of the main objectives of IOSCO is the harmonization of regulatory standards, which is facilitated by operating through a system of network governance. Underhill (1995) remarks that:

the IOSCO policy community consists in the main of autonomous governmental agencies, self regulatory organizations (SROs) and market actors, interacting as non-governmental institutions in the international domain. In this case, the guardians of the rules of the market, and indeed those who make the very rules and create



market structure, are somewhat removed from traditional legislative accountability.

Underhill (1995: 273)

In short, network governance (the external dimension of complex sovereignty) depends on the functioning of independent internal self-regulatory agencies (the internal dimension of complex sovereignty).

But it is important to acknowledge that the principle of subsidiarity – so important to the emergence of governance mechanism in a number of different areas – could operate only because regulatory agencies had a high degree of autonomy and independence from core political institutions. Moreover, this autonomy and independence enabled the constitution of a system of network governance where these agencies actively participated in the formulation and management of the regulatory institutions.

Network governance is not unique to international relations and is a concept that has generated a large literature in the field of public policy (Rhodes 1998). It is worth enumerating the following characteristics of networks.

- networks are interdependent organizations that depend on the mutual exchange of resources to achieve their goals (Rhodes 1998);
- networks depend on reaching procedures and broad-based consensus; and,
- networks place a great deal of emphasis on reciprocity, i.e. the development of a normative standard of obligation (Rhodes 1998).

This only scratches the surface of the system of network governance, but nevertheless it is sufficient to establish its distinctiveness as a form of international governance. It is a system of governance that does not fit into the conventional understandings of sovereignty or international law. Zaring (1998), in fact, points out that many of the international regulatory networks fail to meet the formal requirements of international organizations as set out in the 'Restatement' (*Restatement of the Foreign Relations Law of the United States*, 1987), because these networks are composed of state agencies with their own specific interests. He goes on sensibly to suggest that developments in international law 'should make a place for these important organizations in its analytical framework' (Zaring 1998: 327). However, this would require the adoption of a model of complex sovereignty that is

more appropriate for the analysis of those transnational regulatory governance structures that are intertwined in core capitalist states.

Another distinctive character of international regulatory governance is its reliance on standards rather than specific rules, and again, this too fails to fit in with the conventional notions of international law. Clearly, both examples – the Basle Capital Accord and IOSCO – mentioned above rely heavily on standard setting. Similar examples abound in the domain of environmental regulation where standard setting rather than rule formulation is the name of the game. Franz Neumann (1986) suggested that the more complex and cartel forms of capitalism herald a shift from formal abstract norms – characteristic of competitive capitalism – to deformalized and particularized standards. Much the same argument can be made about the shift toward standards rather than rules in the global economy.

The importance of standards also points to the fact that international regulatory governance is often characterized by a system of decentralized enforcement by state agencies and authorities. The Basle Committee after it finalized the Accord on capital adequacy standards left its enforcement largely to member countries. Remarkably some of the Basle Committee standards have been adopted by a number of other countries which were originally not a part of the Accord. What needs to be understood here is that the enforcement of specific standards is left to individual regulatory agencies and is not the task of a supranational authority. The Committee sees its task as broadly laying down supervisory standards and practices. The IOSCO functions in much the same way: it leaves the task of enforcement to the member countries and sees its role as one of broadly monitoring compliance. It is clear this system of decentralized enforcement is the emerging regulatory model in a range of environmental areas. For example, the Kyoto Accord on climate change relies on member countries to conform to, and enforce, environmental standards. The task of the international regulatory agency in these areas then becomes one of monitoring the member compliance<sup>26</sup> through audits and other mechanisms rather than through direct enforcement of standards.

In this regard this emergent international regulatory state has much in common with the Teubner's (1983, 1992) concept of 'reflexive regulation'. Teubner's central contribution was to identify two distinct regulatory systems: one, through the use of law to directly regulate behaviour, and the other, through regulation of decentralized mechanisms whereby the regulatory state attempts to shape the general institutional conditions under which individual enterprises or institutions attempt self-regulation. In short, Teubner would suggest that

increasingly, regulatory law functions at a secondary level to regulate self-regulation. For Teubner, the increasing complexity of the social order demands that reflexive capacity be built in to the very structure of social subsystems.

Teubner's (1992) concept of the 'regulation of self-regulation' has much to offer for our analysis of international regulatory structures. The way decentralized enforcement operates in a range of financial areas that we have examined is analogous to recent developments in domestic regulatory regimes where there had been an emphasis on laying down the ground rules for self-regulation, not regulation *per se*. Unlike the self-regulation of enterprises in the domestic legal system the self-regulation in the global arena means that it operates at the level of relevant state agencies and actors. One of the major consequences of this kind of global regulation is the increasing importance of procedure in international governance; and again, the emergence of these forms of procedural regulatory systems cannot be adequately accommodated under conventional understandings of international law.

It is apparent that the increasing complexity of globalization brings with it a global system of governance and regulation. These regulatory forms have three main features:

- 1 they are governed by networks of state agencies acting not on behalf of the state but as independent actors;
- 2 the emergent international regulatory order is primarily concerned with laying down standards and general regulatory principles rather than strict rules; and,
- 3 recent developments in international regulation in the area of finance, securities and the environment suggest the emergence of a system of decentralized enforcement or the regulation of self-regulation.

In other words, the emergent regulatory system is characterized by a system of network governance providing broad standards and depending on compliance of state agencies in preference to direct enforcement. But a system of indirect regulation depends on a dramatic transformation of the Westphalian notions of sovereignty, which sits uneasily with the conventional understanding of international law.

## **Conclusion**

From the foregoing, it is clear that the process of globalization has transformed the traditional understandings of sovereignty and its

conjunction with specific and exclusive jurisdiction over a given territorial area. The main contention is that globalization transforms, not dissolves or erodes, the way in which sovereignty is produced. As such, this argument can be distinguished from a formalist analysis as well as from cosmopolitan accounts of sovereignty. The former seeks to understand the increasing gap between formal sovereignty and its practical effect through the proliferation of conceptual terms such as 'quasi sovereignty' (Jackson 1990), whereas the latter moves beyond sovereignty through the construction of different kinds of political communities. Both perspectives are, however, trapped within a fixed notion of sovereignty as territory. The alternative discussed in this chapter proposes a structural understanding of the sovereign form by suggesting that sovereignty in the Westphalian phase, stimulated by the expansion of capitalism on a national scale was governed by underlying changes in the distribution of social power. Hence, it is the shift towards a global rather than international economy that has set in motion significant changes in the form of sovereignty. In other words, the assertion is that the form of sovereignty is not fixed or immutable, but contingent on the underlying structures of economic and social relations.

The erosion of the internal sovereignty of the state is perhaps the first noticeable manifestation of the transformation of sovereignty. This is particularly the case because a key feature of the Westphalian model (and critical to the separation of the public and private in capitalism) is the internal unity of the state, which in turn implies a monistic legal order. Increasingly globalization fragments this model of internal sovereignty by creating multiple centres of governance around autonomous national and supranational agencies. The emergent multilevel governance of the EU is a good exemplar of this fragmentation of the internal sovereignty of the state. An important ramification of this change in the form of internal sovereignty within the state has been the emergence of a polycentric legal order, which has substantially broken down the boundaries between international and domestic law. In fact, it is these changes in the internal architecture of the state that have enabled the nationalization of international regulation, so critical to the constitution of global systems of governance. It is in this sense that the emergence of this new complex sovereignty brings with it a new regulatory order that undermines the formality of international law which was so constitutive of 'Westphalian' sovereignty.

Externally these changes in the form of sovereignty have been evident in the growth of regulatory regimes such as the Basle

Committee on capital adequacy standards, all of which are governed by a network of regulatory agencies. These networks consist of state or regulatory agencies that represent their own specific institutional interests – which may be distinct from other actors within the state – as well as those of their particular constituencies. In short, these agencies or organizations, like independent central banks, function at the boundary between the domestic and the global economy. It is clear that the emergence of network governance following the transformation of sovereignty has allowed states to regulate or govern economic processes that are increasingly transnational. This, in turn, has permitted the state through forms of network governance to close the gap between economic and physical geography, so central to the new global economy. A major consequence of these forms of regulatory governance is that they have enabled the ‘unbundling’ of territoriality and sovereignty, essential for the constitution of the global economy.

These developments in international regulation, however, pose important challenges for students of international relations and international law. The emergent new international regulatory order increasingly relies on the formulation and implementation of broad-based regulatory standards rather than on international rules. Moreover, there is a shift in emphasis from enforcement to securing compliance through national regulatory agencies by determining the general institutional or procedural framework under which regulation occurs. But this proceduralism of the international regulatory state cannot be easily accommodated within theories of international regimes because these emergent regulatory mechanisms re-articulate<sup>27</sup> the international sphere within the national domain; in other words, it breaks down the boundary between the domestic and the international so vital to our entrenched understanding of international relations and law.

Equally, the advent of this new complex sovereignty reflects a more profound transition from the ‘social state’ of the post-war period to a new regulatory state. In essence, the particular understanding of sovereignty that dominated the post-war period was much more than the monopoly of internal sovereignty. This sovereignty was equally based on the complex politics of interest that managed to regulate, negotiate, and mediate, class relations within broadly defined welfare regimes. No doubt, these welfare regimes came in various guises but at the heart of the post-war liberal global order there was a very specific understanding of sovereignty in terms of the social state. It is this ‘social state’ that is now giving way to a new regulatory state and with it a reconstitution of the global liberal order.

## 4 The changing architecture of the state

### From the social state to the new regulatory state

#### Introduction

The political patterns of the post-war global order have been inextricably woven with the rise of what Balibar (2004) terms the 'national social state'. At the same time we need to recognize that 'this was only ever instituted within the perspective of reinforcement of the equation between citizenship and nationality' (Balibar 2004: 163). It is in this sense that the transformation of internal sovereignty through the process of global economic change has also rendered the modes and practices of social citizenship – reflected in varying levels of intensity amongst advanced industrial states – increasingly vulnerable. Instead, the post-war social welfare state, as well as the developmental regimes of East Asia, have been supplanted by the emergence of the new regulatory state. Consequently the reconstitution of the global liberal order implies a corresponding transformation in the architecture of the state towards a regulatory form of governance which at the same time heralds an even more fundamental move away from the politics of interest and social bargaining that was so distinctive of the post-war constitutional order.

The process of globalization is reconfiguring the modern state. While shedding some of its traditional functions, the state is also creating a new framework of institutional regulation and coordination of economic management. The emerging complexity of the global political economy has two important effects on state structures: first, it creates great uncertainty in the global economy which in turn requires that the state acts in ways which will promote stability in the domestic economic order; second, this 'complexity' limits the capacity of the state to coordinate political bargaining, and compensate interest groups. In short, while domestic stability remains a major imperative of the state, it is now achieved through credible commitment to, or

compliance with, policies directed towards ensuring the confidence of international markets. A commitment to policy credibility leads to an emphasis on processes and procedures usually associated with the emergence of independent or self-regulating economic governance institutions.

One significant example of the emergence of this new state architecture is the growing importance of independent central banks in the management of monetary policy. Central bank independence provides a means of purchasing – albeit not always successfully – domestic stability through the credible commitment to pursue ‘market friendly’ monetary policy; but this is at the cost of the fragmentation of the state and the increasingly procedural nature of monetary policy. Fragmentation of the state and the proceduralization of economic management are the distinctive signposts of the new ‘regulatory state’. These features stand in sharp contrast to the coordination of economic management through political bargaining, the distinctive trait of economic governance in corporatist and developmental states in Western Europe and East Asia.

Differences in types of coordination are pivotal to understanding the changing nature of the state. These differences are best captured in Scharpf’s (1993) distinction between positive and negative coordination which can be used to explore the mutations of the state. Consequently, in place of those state structures, which provided a framework for bargaining, these emergent forms of coordination of economic behaviour provide a procedural foundation for the self-regulation of economic governance.

The basic thesis of this chapter is that both corporatist and developmental state structures are unsustainable in an era where capital controls have been significantly dismantled. Removal of capital controls, it is argued, makes it difficult to coordinate economic behaviour and outcomes which are central to the functioning of the developmental as well as the corporatist state. Accordingly, it is suggested that globalization is re-engineering state forms in Western Europe and East Asia. One of the main objectives of this chapter is to delineate the changing institutional form of the state and explore the structural principles underlying the re-engineering of the state.

The argument of this chapter needs to be situated in the context of the, sometimes contentious, debate about the relationship between globalization and the state, examined in the previous chapter. To summarize, it remains trapped in a debate within two divergent perspectives: one, a hollowing out perspective which suggests a leakage of authority from the state to international markets, and this takes on

the structure of a *zero-sum game* between the state and the global economy (Strange 1996); and the other, a statist perspective which places emphasis on the strategic capacity of the state to manage the process of internationalization, which takes the form of a *positive-sum game* between the state and the global economy (Boyer and Drache 1996). Both perspectives are ill equipped to deal with the analysis of the relationship between globalization and the state because they fail to capture how state forms (not just state power) are embedded within the particular sets of, what we have called, 'global constitutional orders'. The post-war national social state was situated within a constitutional order framed around the constitutionalization of societal interests, but this has now given way to a more regulatory state located within an emerging constitutional order seeking to marginalize interests in favour of affirmative cultural values. In this chapter we explore the shift between these two forms of state and the broader global political economy that has facilitated the emergence of the new regulatory state.

### **Globalization and the state: positive and negative coordination**

The nub of the argument here – using Scharpf's framework – is that there has been a significant change in the pattern of institutional coordination of the modern state. However it needs to be stressed that changes in institutional forms are but one aspect – albeit a highly significant one – of the impact of globalization on the state. The kinds of institutional transformations canvassed in this chapter are also paralleled by deep-seated changes in the social coalitions and policy patterns that have characterized post-war regimes in East Asia and Western Europe. Pempel (1997, 1998), in a path breaking analysis of institutional and coalitional transition in advanced industrial societies, defines a 'regime' as consisting of three key elements: a set of dominant socio-economic coalitions; a set of institutional arrangements, and a stable set of policy strategies. Regime shifts, suggests Pempel, are prolonged and may involve, as in the case of Japan, a period of prolonged transition where the old regime is dying but a new regime struggles to find its coalitional and institutional anchors. Our analysis of institutional forms suggests much the same process at work. Older forms of institutional coordination are in decline, but this should not imply that new forms of negative coordination will come to dominate instantly. The point, rather, is that while 'positive systems' of coordination are under great pressure and are losing their central position within the state, it is likely that both systems of institutional coordination will exist alongside each other. The crux of



our argument is to highlight the shifting forms and patterns of institutional coordination within otherwise very different political systems. However, this institutional transformation is underpinned by the kinds of coalitional forces identified by Pempel (1998).

But, while coalitions are a critical glue in keeping a variety of political regimes together, the full impact of institutional changes within the state is also reflected in the new terrain of political contestation within the state, which of course changes the incentives and structures of coalitional actors; in other words, it changes the very nature of politics. In this context, much of the debate over globalization and its impact on the state (Weiss 1999) overlooks the fact that globalization impacts not only on policy choices but also on the transition of the institutional landscape of the state towards a regulatory form of governance.

There is an emerging literature on the 'regulatory state'<sup>1</sup> where the following broad attributes are identified: an increasingly juridical economic arena; a greater emphasis on institutional self-regulation; a great attention to issues of process rather than outcomes; and, a technocratic hue to decision-making which is increasingly detached from the normal process of political accountability. In essence, as McGowan and Wallace (1996) point out, the regulatory state is 'likely to intervene to underpin the market rather than replace markets; it is concerned to make markets work better and thus to compensate or substitute where markets fail' (p. 63).

No doubt, these features of the regulatory state do capture important changes in the nature of modern governance in a range of advanced and newly industrializing countries. However, a focus exclusively on identification of the attributes of regulatory governance tends to diminish the importance of a defining feature of regulatory governance, namely the critical shift in the nature of coordination in the regulatory state. The shift from corporatism<sup>2</sup> and the developmental state to the regulatory state reveals, as will be shown, a decisive transition from *positive* to *negative* coordination.

The distinction between positive and negative coordination was originally proposed by Scharpf (1993, 1996) to clarify the nature of coordination between public sector agencies. It proceeds from the assumption that interdependence has increased the need for coordination within the state as well as between the state and private actors. Scharpf uses the notion of coordination in a welfare-theoretical sense to underline its desirability 'whenever the level of aggregate welfare obtained through the unilateral choices of interdependent actors is lower than the level which could be obtained through choices that are jointly considered' (Scharpf 1994: 27–8).

While this analysis is not specifically concerned with coordination problems posed by an increasingly global environment, it clearly provides us with an important insight into how an analytical focus on coordination can be related to the institutional architecture of political structures as diverse as social corporatism and the developmental state. Scharpf (1993) essentially distinguishes between what he calls *modes* of coordination – hierarchy: markets, and networks – and *types* of coordination: positive and negative. It is this latter notion of the ‘types of coordination’ – positive and negative – which is especially useful in understanding the shift towards the regulatory state. In a nutshell, these differing forms of coordination provide us with a compass to explore the institutional landscape of the state.

Positive coordination – and in the context of Scharpf’s analysis it must be recalled that this is intra-bureaucratic bargaining – is defined as an ‘attempt to maximize the overall effectiveness and efficiency of government policy by exploring and utilizing the joint strategy of options of several ministerial portfolios’ (Scharpf 1994: 38). On the other hand, negative coordination is designed to ‘ensure that any new policy initiative designed by a specialized sub-unit within the ministerial organization will not interfere with the established policies and interests of other ministerial units’ (Scharpf 1994: 39). In this schemata, while negative coordination is concerned with the construction of institutional autonomy and mechanisms to ensure that there is minimal conflict between the objectives of independent regulatory institutions, positive coordination is designed to actively bring about a superior set of outcomes through compromise and bargaining between different interests.

The institutional architecture of the emergent regulatory state is best understood in terms of the notion of negative coordination which stands in contrast to the positive coordination of economic management within social corporatist and developmental state structures. These forms of positive coordination were in turn dependent on forms of capital control made possible by the Bretton Woods institutions. In the next section we analyse the nature of positive coordination and the resultant political and economic crises in an era of financial and capital market deregulation.

### **Coordination and crisis within the corporatist and developmental state**

In much of the literature on corporatism and the developmentalist state<sup>3</sup> there is significant emphasis on the organization and strength

of state ‘capacity’, in the so-called organized political economies of Western Europe and East Asia, in adapting and adjusting to the world market. The tenor of these analyses is to suggest that the strong state, and above all, strong linkages with societal actors, were central to the impressive performance of these political economies in the global political economy. In particular, Katzenstein’s (1985) seminal work on democratic corporatism in open economies draws pointed attention to the way in which small states of Western Europe were able to blend social and economic policies,<sup>4</sup> thereby enabling the kind of positive coordination discussed above. As Katzenstein argues, the centralized and concentrated institutions of corporatism allowed for political bargaining amongst public and private actors such that:

bargaining is voluntary, informal and continuous. It achieves a coordination of conflicting objectives among political actors. Political preferences in different sectors are traded off one against another.

Katzenstein (1985: 33)

Pivotal to Katzenstein’s argument is the idea that uncertainties, posed by a highly open economy, needed to be mitigated by a system of compensation that gave security for labour, whilst concurrently providing assistance to internationally oriented industries, with a view to maintaining international competitiveness. Structurally, these bargains between political actors required an institutional system that enabled the incorporation of the interests into domestic economic policy, thereby creating what Katzenstein termed ‘democratic corporatism’. The precise nature of these mechanisms need not detain us,<sup>5</sup> but what needs to be underlined here is that successful adjustment to the international market required a system of compensation and a mode of conflict management and bargaining. These were provided by the European ‘social corporatism’ in the smaller more vulnerable economies as well as the larger less open economies such as Germany (Crouch 1993). These structures of bargaining and compensation, it should be noted, were themselves a product of exposure to the international economy, and as Katzenstein observed:

democratic corporatism of the small European state is a response to historical pressure. Its proximate historical origins lie in the economic and political crises of the 1930s and 1940s,

its enduring strength in the post-war era in the liberal international economy of the 1960s and 1970s. The fear of authoritarianism, depression, and war contributed to its emergence in the 1930s. The enjoyment of democracy, prosperity, and peace contributed to its maintenance after 1945. The factors that create political regimes are not identical with those that maintain them.

Katzenstein (1985: 192)

The crisis of corporatism is not due to a sudden increase of exposure to the global economy but to changes in the structure and governance of global markets.<sup>6</sup> Katzenstein clearly acknowledges that the small economies of Western Europe were always vulnerable to the vagaries of the international economy.

*Positive coordination* is an equally important element of the developmentalist state of East Asia. Again, the voluminous literature<sup>7</sup> on the developmental state helps us to highlight common patterns of policy coordination between social corporatism and the developmental state. Perhaps the most effective way of identifying these issues is through Evans' (1995) concept of 'embedded autonomy'. Embedded autonomy refers not only to the autonomy of state agencies from societal forces but also to the *degree* to which it is embedded in particular social structures and networks. Evans' notion of embeddedness 'implies a concrete set of connections that link the state intimately and aggressively to particular social groups with whom the state shares a joint project of transformation' (Evans 1995: 59). Whether this occurs through structures of administrative guidance in Japan or informal bargaining in South Korea, the fact remains that structures of bargaining and coordination<sup>8</sup> were important in helping to adjust, and indeed, to take advantage of exposure to the international economy. At this broad level, a common thread of positive coordination can be drawn between the social corporatism of Western Europe and the developmental state in East Asia, though of course, significant differences remain. For example, even if the East Asian political economy could be termed corporatist it was a 'corporatism without labour' (Pempel and Tsunekawa 1979), and derived from an illiberal form of economic governance (Beeson and Jayasuriya 1998). In short, these are two distinct forms of state structures but for our present purposes what needs to be underlined is that post-war forms of global economic management enabled the kind of positive coordination that underpinned a democratic corporatism in Western Europe as well as the developmental state in East Asia.

***Financial deregulation and crisis of coordination***

In order to understand the crisis of social corporatist strategies it needs to be recognized that these systems relied on compensation through demand management and the resulting reliance on the use of redistributive functions of government to stimulate consumption. This was achieved by redirecting incomes to low income earners through the use of expenditure and incomes policies. Demand management was of course an eminently suitable strategy in a context where capital mobility was restricted and exchange rate stability was provided by the US dollar reserve system – in shorthand, the Bretton Woods system. Capital immobility meant that significant amounts of investment capital lay within the confines of national boundaries.

Consequently, interest rate policy could be used as an instrument to influence the level of economic activity and the rate of investment. At the same time, Keynesian demand management could be used counter-cyclically to ‘smooth the business cycle and prevent demand-deficient unemployment, while union wage policy, where it could be employed for macro-economic purposes, was able to control the rate of inflation’ (Scharpf 1996: 16). As Scharpf rightly notes, this economic policy of demand and income management (the ‘Keynesian welfare state’) rested on two interrelated elements: an international economic order that restricted capital mobility and a domestic order providing for compromise between labour and capital (a system of compensatory politics).

However, in a context of global capital mobility, interest rate policies are no longer effective policy instruments because global markets determine the rate of return. It follows that any policy to reduce interest rates below international levels will be punished by capital outflows. Similarly, the capacity of governments to stimulate domestic demand carries risks of inflation, balance of payments difficulties, and the attendant risk of capital outflows and currency devaluation. Therefore, in the absence of international coordination of monetary and fiscal policy, a national attempt to stimulate economic policy is likely to lead to large outflows of capital, as the French socialists found to their cost in the early 1980s (see Sassoon 1996).

In short, the dismantling of capital controls (Helleiner 1994) has had the effect of eroding the capacity of national governments to pursue demand management and income policies. These changes in the global political economy have eroded the capacity of the state to provide the compensatory policies which nurtured the institutions of social corporatism. Free flowing capital markets build into corporatist

political economies a deflationary dynamic that erodes the mechanisms through which positive coordination between capital, labour and the state can be conducted. As Huber and Stephens point out:

any policy that is dimly viewed by the conservative-minded international financial markets can be expected to carry some penalty in the form of the weakening of the currency. Moreover, countries with a history of policies not favored by these markets can be expected to have to pay a premium on their interest rates.

Huber and Stephens (1998: 375)

To be sure, other aspects of globalization such as the shift toward flexible forms of production and heightened differences in economic return to skilled and unskilled workers have undermined the basis for centralized wage bargaining, the centrepiece of social corporatism. But the deregulation of capital controls has also been of crucial importance in the decline of the 'boundary control capacity' of the state, to provide the necessary conditions to facilitate bargaining between state and major societal interests.

Although corporatist institutions of Western Europe were nurtured in the structures of post-war international political economy, these arrangements were decisively weakened by the transformation of international market structures, and the deregulation of financial markets that limited the capacity of these European states to coordinate their political economy. Corporatist structures were eroded not through exposure to the global market but by changes in the structure and management of global markets, which constrained the bargaining possibilities between political actors. In a parallel fashion, the developmental state too is built around the institutions of positive coordination. True, the developmental state has a distinctive illiberal and distributional foundation which excludes labour, but this should not obscure the similarities in the coordinating role of the political institutions within social corporatism and the developmental state.

The developmental state was an artefact of certain kinds of structures of global economic governance, and it is the changes in these modes of governance that explain the crisis and demise of the developmental state. This proposition is made more explicit through the consideration of the Wade and Veneroso (1998) argument on the sources of the East Asian crisis. A crucial point made by these authors is that East Asian capitalism has been characterized by high debt equity ratios and this structure is the outcome of two key institutional features of the East Asian political economy. First, savings are much

higher than in other regions. In most East Asian nations domestic savings are about one third of GDP (World Bank 1993) and as most savings are held in bank deposits, it follows that bank lending is geared towards borrowing by firms. Second, in order to compete in large export markets local firms need to expend considerable resources, which can only be facilitated by extensive borrowing. Put simply, the only means of financing the export industrialization of the kind experienced by Japan, Korea and Taiwan over last three decades is through the mobilization of the large reserves of domestic savings by local corporations.

However, such a structure requires a high degree of collaboration between firms, banks, and the state. Consequently, the high debt to equity ratios of East Asian capitalism needs to be underpinned by its complex institutional infrastructure of control. Admittedly, the system is highly vulnerable to systemic shocks that depress the flow of capital, and therefore, it must be safeguarded against such shocks over and above having in place mechanisms for the constant monitoring of private firms and banks by the state. In effect, the privileged access to capital markets is traded off with acquiescence to the governmental monitoring of private sector performance. But these institutions of positive coordination require restrictions: 'the freedom of firms and banks to borrow abroad, and coordination of foreign borrowing by government, are a necessary part of this system' (Wade and Veneroso 1998: 7).

In Kornai's (1992) terms, the governmental monitoring of private firms and bank behaviour amounts to a system of non-price signalling vital for the stability of the distinctive system of economic coordination prevalent in East Asia. Nevertheless, the ability of the state to keep financial restrictions in place proved to be the chink in the armour of the developmental state. The Asian financial crisis is explained by the financial deregulation undertaken by East Asian governments which:

removed or loosened controls on companies' foreign borrowing, abandoned coordination of borrowings and investments, and failed to strengthen bank supervision. By doing so, they violated one of the stability conditions of the Asian high debt model, helping to set the crisis in train.

Wade and Veneroso (1998: 9)

Thus, in fairly short order, the virtuous cycle of the East Asian political economy has become a particularly vicious cycle plunging these

economies into deep crisis. But it needs to be clearly acknowledged that the crisis is not a result of policy error but rather a result of deep seated structural changes in the international political economy that produced powerful domestic constituencies in favour of economic deregulation – a point overlooked by Wade and Veneroso (1998).

In short, both democratic corporatism and the developmental state were forms – albeit with different normative and distributional basis – of positive coordination; they both relied on the state providing the institutional infrastructure and resources for political bargaining. As such, both state forms were parasitic on certain types of global economic governance, the most central of which was the ability to control the movement of capital. Consequently, the decline of corporatism and the current terminal crisis of the developmental state can be traced in large part to fundamental mutations in the structure of international financial markets and the changes in global governance which enabled greater capital mobility. These structural changes, in turn, led to a shift towards negative coordination characteristic of the regulatory state.

### **Regulatory state and negative coordination**

There is a fairly extensive literature on the modalities and instruments of regulatory policy, and the US policy literature in particular is replete with extensive discussions of regulation policy (Selznick 1985). In the context of the European Union (EU), Majone (1994) has noted that the EU is moving towards regulatory structures of the US kind. Majone's argument suggests that regulation policy – because of the financial and constitutional constraints – is a convenient way of organizing implementation of EU policy. Similarly, while the analysis of regulatory policy in East Asia is in its infancy, the proliferation of governance proposals – the cutting edge of the new East Asian regulatory state – is often understood in terms of policy design and implementation. However, this technocratic approach to regulation conceals the fact that regulation is much more than a mere change in the modality of policy intervention; it is in fact, a significant transformation towards negative coordination within the state.

Negative coordination – building on, but modifying, Scharpf's initial definition – requires the constitution of autonomously functioning structures of governance. In this context, the task of the state is to provide the institutional basis for this negative coordination which means not the retreat of the state, but rather, a *refashioning* of the modalities of governance. Here, the role of the state is to provide



the institutional foundations for the autonomy of regulatory institutions and to constitute procedures – ‘riding instructions’ – for the functioning of these institutions.

Just as compensating mechanisms were at the heart of the positive coordination, in the case of negative coordination an analogous role is played by the institutions to ensure the credibility and commitment to market order. In other words, institutions structured within a system of negative coordination aim to insulate the market order from politics or the political bargaining at heart of corporatism. Intervention in the market is designed not for the purposes of compensation but to institute and stabilize the market system or in effect to provide economic order. The constitution of the regulatory state proceeds from the recognition that the existence of a market system does not necessarily guarantee the provision of market order. Providing such market order requires the formation of a range of institutions to insulate the market from what is seen as the corrosive influence of political bargaining.

These ideas are well reflected in the new governance literature of the World Bank and other multilateral agencies where concepts like accountability, transparency, credibility, and commitment, abound. This ‘new governance’ points to the emergence of a kind of ‘economic constitutionalism’, which endeavours to place certain market regulatory institutions beyond the reach of transitory political majorities or the actions of the political executive, through mechanisms that provide for a high degree of autonomy for these institutions.<sup>9</sup> As such, some aspects of the emerging regulatory state have an affinity with the German *ordo-liberal* tradition which sought to combine a strong state with a free market (see Chapter 1).

A caveat is in order here: the premise that the systems of positive coordination that characterized corporatist structures in Western Europe are under stress does not imply the conclusion that European political economies are converging towards an Anglo-American model of capitalism. Just as there have been a variety of capitalisms (see Weiss 1998) embedded within very different systems of bargaining and compromise, it is clear that the emerging systems of negative coordination will also embody different values and principles. In this respect, the notion of embedded liberalism used in the recent work of Van Apeldoorn is instructive because he argues that embedded neo-liberalism is a ‘potentially hegemonic articulation of a predominantly neo-liberal ideology with elements of alternative ideological discourses of social democratic and neo-mercantilist projects in such a way that their opposition is neutralized’ (Van Apeldoorn 1998: 45). Though the focus is on economic ideology Van Apeldoorn draws attention to the

important point that there is no one single strand of neo-liberalism but increasingly several competing neo-liberalisms that are embedded in different institutional settings. For this very same reason, there is likely to be a range of modes of negative coordination which will embody different values. Moreover, while these mechanisms of institutional coordination will come to occupy a central position within the state, they will still need to configure with existing systems of political bargaining and compromise.

The distinction we have made between the structures of *positive* and *negative* coordination may also be clarified by the relative emphasis placed on *process* and *outcomes* in economic governance. Whereas positive coordination aims to influence economic outcomes through its impact on the behaviour of economic agents, negative coordination directs its attention to the design and implementation of the process of economic decision-making. For example, the political bargaining that distinguishes the corporatist or the developmental state implies the capacity to shape and influence economic outcomes. However, the complexity of globalization precludes the ability to alter or shape economic outcomes, and this, in turn, necessitates a greater emphasis on the process of decision-making. From this vantage point, negative coordination is distinguished by the fact that governance is organized primarily around the monitoring of the institutional processes.

Amongst scholars of regulatory policy there has been a great interest in the notion of self-regulation, or what Teubner (1983) calls 'reflexive regulation'. While this literature is mostly concerned with the regulation of social policies, it does have broader ramifications for our study of economic governance. From our perspective, a key feature of self-regulation is the increasing importance of the state in 'system enforcement' or monitoring rather than seeking to direct individual behaviour. Aalders and Wilthagen (1997) in a case study of the Dutch occupational safety and health regulations point out that occupational safety and health inspectors place less importance on intervention at the shop floor level, and instead, seek to 'monitor and regulate the operation of self-control systems and subsequently, intervene at the system level' (Aalders and Wilthagen 1997: 431). Another example: the Australian competition watchdog increasingly relies on compliance regimes within corporate bodies rather than direct enforcement of competition legislation. The more general point here is that negative coordination<sup>10</sup> within the regulatory state takes place at the level of institutional monitoring rather than acting directly on individual or corporate behaviour.

Here, it is important to recognize the distinction between the structures of corporatism and the developmental state and those of the

regulatory state. Whereas the former functioned in such a way as to *influence the behaviour* of individual and corporate economic agents, be they labour, capital or political actors, the structures of the regulatory state act to *shape the objectives and functions* of institutions. As the structures of the regulatory state are organized around the issues of *process* rather than outcomes, a central task for the regulatory state is guaranteeing the autonomy of a range of economic governance institutions. Hence, the broad objective of governance is to ensure that central economic institutions – such as central banks (which will be discussed below) – in a regulatory state are independent and also incorporate the appropriate decision-making procedures.

Emblematic of this form of economic governance is the increasingly juridical and legalistic nature of economic policy but it is a legalism directed at the regulation of governance structures and procedures, as well as guaranteeing the institutional independence of economic governance structures. From this perspective, economic management or coordination is primarily concerned with the establishment of procedural requirements for the functioning of institutions of economic governance.

One of the important consequences of the emphasis on issues of process in structures of negative coordination is the weight placed on transparency – transparency of objectives as well as the decision-making process of independent regulatory institutions. This transparency is manifest in the increasingly important role of public reporting or audit of independent institutions. This reporting often entails the specification of performance indicators or targets to be met by these institutions. For example, independent central banks may use monetary aggregates or inflation as benchmarks by which the success or failure of the performance of its monetary policy may be assessed. A similar emphasis is placed on the transparency of the decision-making process of regulatory institutions. In fact, the provision of an appropriate decision-making process becomes an end in itself. Negative coordination, on this account, is a *procedure-based* mode of economic management; hence, our focus needs to shift from *the politics of bargaining* to the *politics of procedure* as exemplified in the important role of one economic institution – central banks.

### **Self-regulatory institutions: independent central banks**

Perhaps nowhere is this shift toward a form of proceduralism reflected more than in the growing demand for central bank independence from the executive. Central banks, like other economic institutions, it is

argued, need to be protected from political interference, and therefore, need legislative and even constitutional insulation. The point about independent central banks is that monetary policy is determined by a set of procedures formulated by the state. However, crucially for our argument, it is important to understand that these procedures are designed to regulate the independence and the decision-making *processes* of the central bank. In short the executive regulates by shaping the boundaries of monetary policy governance rather than policy itself. What is important is the procedures governing the role and performance of central banks rather than the direct attempt on the part of the state to determine monetary policy outcomes.

A major reason for the enhanced power of central banks is the growing importance of monetary policy in an era dominated by the demand for more global financial integration. This trend resulted not only in a shift of policy instruments from fiscal to monetary policy, but also a shift of power *within* the state towards agencies such as central banks. This was not just a change of emphasis to a new set of policy instruments but a significant change in the *mode* of coordination within the state. In turn this trend towards more independent central banks reflects profound structural changes in the international political economy, particularly the increasing importance of global transnational financial structures.<sup>11</sup> In terms of the logic of the argument being advanced here, the emergence of independent central banks and the reconfiguration of the state that this implies are a manifestation of the deeper structural changes taking place in the global political economy, especially in the nature of international markets.

Clearly, independent central banks have become a major focus in the internal restructuring of the state because of the inherent complexities of a global political economy such as those resulting from highly mobile capital requiring a high level of credibility, and the commitment to the pursuit of 'hard money' policies. The economic argument for monetary credibility is that monetary signals are important for domestic and international economic actors. However, to be effective this signalling process needs to be credible. In turn, this credibility is gained by a perceived commitment on the part of monetary authorities to achieve specific monetary objectives which are best achieved through enhanced institutional independence of monetary authorities (Cukierman 1992).

While the conventional arguments stress the importance of credible monetary policy as a signalling device for a range of economic actors<sup>12</sup> and activities, the basis of our argument is about the role of global financial markets, which places a high premium on monetary

credibility and consequent demand for central bank independence. Financial deregulation has meant that the growing interest in 'central banking has risen with the internationalization of finance, and particularly with the growth of global securities market' (Maxfield 1997: 9). Similarly Bowles *et al.* (1998)<sup>13</sup> note that:

with greater financial market liberalization, the policies of the government are more open to expressions of disapproval by financial institutions and markets. Governments are increasingly exposed to massive capital flight if they attempt to pursue economic policies that are considered unsound by the financial markets.

Bowles *et al.* (1998: 7)

What this signifies is that the assertion of central bank independence sends out credible signals to investors about monetary policy. This is the economic logic of central bank independence, but from the vantage point of this argument, it is important to recognize that these structural changes in the global policy necessitate a significant restructuring of the state. In an era of mobile capital within a complex global political economy, one way in which domestic economic stability is achieved is by means of a credible monetary policy secured through independent central banks. However, domestic stability can be procured by disengaging the institutions of monetary governance from other parts of the state. Indeed, there are rational political reasons for this disengagement from the formulation of monetary policy. Governments do not want the opprobrium of having to follow a deflationary policy. For example, Bonefeld and Burnham (1998) argue that this was the case in the Blair Government's move toward giving more independence to the Bank of England.

A similar point is made by Bowles *et al.* (1998) in regard to moves by the Japanese government to give greater independence to the Bank of Japan (BOJ), in part motivated by a desire to distance itself from the BOJ's potentially politically unpalatable policy decisions. In both these instances, what needs to be reiterated is that the decision by governments to concede autonomy to the central bank arises from the recognition of the stark reality that governments have limited capacity to influence policy outcomes in the new global political economy. Whatever the proximate political reasons for these shifts toward central bank independence, the increasingly procedural form of monetary policy renders political bargaining, associated with positive coordination of social corporatism and the developmental state, increasingly

difficult to sustain. In its place, we find the emergence of new self-regulatory institutions such as the newly created European Central Bank System (ECBS).

Under the Maastricht Treaty, the European Monetary Union (EMU) will be managed largely through the ECBS which comprises the European Central Bank (ECB) and the various central banks of those states which comprise the EMU. The ECBS as the central monetary authority of the EMU is responsible for the core functions and policies carried by national central banks. The ECBS has been granted a high degree of autonomy or independence. In fact, while the Bundesbank is the prototype of strong central bank independence, the ECBS, probably at least legally, enjoys a greater degree of independence.

Central bank independence can be assessed in institutional, personal, and functional terms: *institutional independence* refers to the legal capacity of the bank to operate independently of other arms of the state; *personal independence*, to the security of tenure of senior central bank officials; and, *functional independence*, to the extent to which it has autonomy over the deployment of policy instruments over which it has control. It is clear that in all of these areas the ECB has a significant degree of autonomy. In institutional terms, the ECB can act independently and will have a legal personality (Art. 106 (2) EC Treaty), and its authority does not emanate from a community institution (Smits 1997). Even more significant for the institutional independence of the ECB, is its statute which is set out in a separate protocol and 'most of the provisions of this protocol can only be changed through an amendment to the EC Treaty' (Gormley and de Haan 1996: 101). In short, these provisions mean that the independence of the ECB is constitutionalized in a way that distinguishes it from even highly independent central banks. Moreover, under the ECBS, even national central banks have a legal capacity that allows them to act independently of their home governments.

These measures of institutional independence are matched by provisions that guarantee security and long tenures for senior central bank officials. Members cannot be dismissed during their term of office, and executive members have terms of eight years which are longer than those of other officers of the EU. With regard to functional independence, Smits points out that the powers of the ECBS:

give it a large measure of functional independence, circumscribed only – in a few instances – by the necessity of working on the basis of additional legislation to be adopted by the political institutions

and by the influence of the Ecofin Council in the area of exchange rate policy.

Smits (1997: 167)

Bearing out our proposition about the procedural character of economic management is the fact that the overriding objective of central bank policy is price stability because it is assumed that the organizational independence of the central bank will facilitate the pursuit of stable monetary policies. As Smits (1997) points out:

the maintenance of price stability as the objective of the ECBS implies that its first task will be to foster a climate of zero, or very low inflation. The wording has been chosen so as to reflect the absence of inflation from the very outset: the Maastricht criteria for entering Stage 3 of the EMU imply that the System will operate in a low-inflation climate.

Smits (1997: 184)

For self-regulating economic governance institutions such as independent central banks, clearly defined performance targets and benchmarks (such as price stability) are vital for the process of building accountability in independent regulatory institutions. However, for this performance audit to take place, performance indicators need to be made public and transparent. Transparency, therefore, requires 'public reporting' or 'audit' of the central bank's fidelity to its objectives, and this kind of public reporting is likely to be an important element in the development of the ECBS (EMI 1997). For self-regulating agencies such as independent central banks transparency is seen as a crucial factor for establishing credibility.

Equally important is the transparency of the decision-making process of independent institutions. For the ECBS, having an open and transparent decision-making process is a signal to financial markets that it has not been subject to undue political interference. It is the very transparency of the decision-making process (rather than outcomes) that can guarantee an independence from 'political' influences. Transparency of both performance indicators and decision-making process are a means of constituting accountability and legitimacy for self-regulating institutions such as the ECB. However, this accountability is not through the channels of political representation; it is a form of accountability and legitimacy rooted in the institutional procedures of the ECB rather than in the processes of representation.

Of course it could be argued that independent central banks are not unique to the emergent regulatory state and it could justifiably be pointed out that strong and autonomous central banks such as the Bundesbank played a pivotal role within corporatist structures. But, it needs to be underlined that central bank independence takes on a substantially different character in the regulatory, as opposed to the corporatist, state. Indeed, a consideration of these differences will serve to highlight our claims about the procedural character of economic management in systems of negative coordination.

Empirical analysis of monetary policy has drawn attention to the fact that central bank independence needs to be placed within the broader context of national economic institutions (Goodman 1991; Jayasuriya 1994b). From this perspective, central bank independence should not be disengaged from the broader bargaining structures of corporatism. In short, it is the interaction of centralized wage bargaining institutions and monetary policy, rather than independence *per se*, that is important. However, changes in financial markets have meant that central banks now operate within a very different state architecture where political bargaining is less significant; in essence, central bank independence has different effects in institutional frameworks of positive and negative coordination, and this is clearly illustrated in the differences between the Bundesbank and the ECB.

With respect to the Bundesbank, it is incorrect to assume, as many have done, that central bank independence is the prime determinant of monetary policy. Rather, it is the interaction between monetary authorities and central wage bargaining that provides the basis for a range of macro-economic outcomes. The public bargaining between the Bundesbank and unions is an important factor in determining annual macro-economic parameters. In this respect, central bank independence is important because it gives bargaining power to the Bundesbank and allows it be a 'first mover' (by setting annual inflation and monetary targets) in wage negotiations. Scharpf points out that being a first mover in this process allowed the Bundesbank 'to advocate better coordination in economic policy from a position of authority, because the social partners and the government have been put on notice about the available monetary policy for the coming year' (Scharpf 1987: 138). Further support for this reasoning is provided by Hall and Franzese (1998) who note that Germany's record of low inflation and low rates of unemployment, at least till the last decade, was 'based on a combination of central bank independence and coordinated wage bargaining' (p. 514).

The main difference between the ECB and the Bundesbank lies in the fact that the latter, while being independent, is embedded in



complex structures of bargaining and coordination with unions (centralized wage bargaining). The independence of the ECB is governed by its procedural rules, and disembedded from the wider framework of bargaining and coordination with other economic agents. Monetary policy under the ECB is depoliticized and given a highly juridical form although this does not mean that there can be no coordination within a regulatory state. But this coordination will be managed more through changes in procedural rules governing the operation of the ECB than through political bargaining. As Hall and Franzese (1998) perceptively observe, in the absence of centralized European based wage bargaining, a central bank committed to price stability or inflation fighting is likely to have a deleterious impact on unemployment. Under these circumstances, it is likely that the ECB will have to take employment objectives into account, and this is likely to take place within a form of procedural rather than ‘political’ corporatism. In sum, the ECB and the type of central bank independence that it embodies reflect the emergence of a new type of proceduralism in economic management; this must be seen as an institutional response to the emergence of new economic imperatives in the global economy.

Historically, in many countries – especially those within the OECD – pressure for strong central bank independence emanated from powerful domestic constituencies,<sup>14</sup> and as previously indicated in regard to the Bundesbank, central bank independence reflected more general political compromises within the national political economy. However, ‘new’ forms of central bank independence are purposely dislocated from these historic compromises, and indeed in many instances the push towards central bank independence emanates from international organizations and regimes that often require action by domestic state institutions and agencies. With respect to East Asia, in countries such as Korea, the transition to central bank independence reflects the pressure of international financial institutions such as the IMF. This is an important point because most of the literature on the political economy of central banks focuses on the nature and dynamics of domestic constituencies for independent central banks. In contrast, what is increasingly evident in the pressure towards the constitution of independent central banks is the role played by transnational public and private actors such as international financial markets and the IMF. Central banks have become key players because they provide the link between an international economic regime and the state. In this context, central banks are at the interstices of the engagement between the international economic order and the domestic state. In short, the

increasingly procedural character of central banks is a key feature in the management and regulation of a deregulated international economic order. This trend towards independent central banks is not only confined to Western Europe but is also refashioning economic management in East Asia.

Nothing is more indicative of these shifts than recent changes to Bank of Korea (BOK), the South Korean central bank. As Maxfield (1994) has noted, the BOK has not had a great deal of legislative or policy autonomy from the executive government. In fact, in South Korea, real economic policy-making power lay with the Economic Planning Board<sup>15</sup> and the Finance Ministry while the 'central bank does little more than implement credit policies in line with overall government spending plans' (Maxfield 1994: 561). However, recent modifications<sup>16</sup> to the BOK have significantly changed this legislative regime to provide for greater institutional autonomy for the BOK. The new BOK Act effectively entrenches the autonomy of the BOK from the Ministry of Finance. While mechanisms of consultation between the Ministry and the BOK have been established, the executive is unable to impose on the Monetary Board a particular course of monetary policy. In fact, the Draft Act was changed to reflect the IMF preference that while the Minister for Finance and the Economy has the power to request a reconsideration of the decisions of the Monetary Board, he/she cannot suspend the decision, and any such request will be made public immediately (Ministry of Finance and Economy 1998). Moreover, the BOK is explicitly mandated to pursue the objective of monetary stability.

These changes to the BOK Act are remarkable and are a clear illustration of a shift from a developmental to a regulatory state dominated by a form of economic constitutionalism. An independent central bank strikes at the heart of the developmental state by removing the power and capacity of central economic agencies to direct the kind of industry policies that have been a marked feature of the developmental state. In short, it shifts power from technocratic economic agencies to actors such as central banks. More importantly, it erodes the close political relationship or the bargaining between business and government that informed the operation of core developmental agencies.

A parallel transformation from the developmental to the regulatory state is also taking place in Japan. This is evidenced by the grant of greater independence by the Hashimoto Government to the bank. The Hashimoto Government legislation gives greater security of tenure to the Bank Governor and circumscribes the executive power to direct the

Bank (Bowles *et al.* 1998). While somewhat falling short of the Korean measures, these moves illustrate the extent to which the changes in international financial markets are re-engineering the internal structure of the Japanese state. The move towards greater independence for the BOJ demonstrates that there is a recognition of credit targeting and currency policies – the key pillars of the developmental state no longer feasible in a world of deregulated capital markets (see Bowles *et al.* 1998 for a survey of recent developments). In this context central bank independence is seen in terms of securing monetary stability and maintaining credibility.

## **Conclusion**

From the foregoing, it is clear that globalization has led not to a diminution of the power of the state but to a restructuring of its institutional form. Much of the literature on the relationship between the state and globalization has been framed within a rather unhelpful debate on the supposed decline of the national state. Market oriented theorists have argued that structural trends in the global political economy have severely curtailed the capacity of the state to institute, manage, and coordinate, economic governance. In contrast, strategic capacity or statist theorists argue that ‘strong states’ can take advantage of, and prosper, in a global economy. Both these approaches to the relationship between globalization and the state are problematic because they focus on the relative power of the state rather than attempt to understand the internal transformation of the state.

Such an approach to the relationship between globalization and the state requires an examination of the process by which certain kinds of state forms – in our case, corporatism and the developmental state – are nested within certain kinds of global governance. There is no doubt that the structures of global governance, in particular, capital and currency controls, have facilitated the emergence of social corporatism and the developmental state; and, as a corollary, the decline and dismantling of capital controls eroded the foundations of these state forms in Western Europe as well as in East Asia. In this sense, we concur with one aspect of the market model which is that deep seated structural changes in the international political economy lead to far reaching changes in political and state structures.

However, these structural changes in the political economy lead not to the decline of the state but to its internal restructuring: not a

retrenchment in the capacity and power of the state, but a transformation of the internal architecture of the state. This internal re-engineering of the state is best understood in terms of the transition from the structures of *positive coordination* to those of *negative coordination*. Positive coordination – the underlying internal architecture of the state which links both social corporatism and the developmental state – revolves around a set of institutions and policy patterns that enable bargaining between public and private actors. An important part of this system of positive coordination is the ability to organize appropriate compensatory mechanisms. Globalization, and more pertinently, the dismantling of capital controls, has shaken the institutional structures of coordination within corporatist and developmental state organizations.

The emerging new forms of the regulatory state are likely to be organized around the structures of negative coordination. Thus, for instance, economic institutions such as central banks are structured as self-governing institutions in order to provide a certainty and credibility to economic policy in a highly uncertain economic environment. Negative coordination refers to the emergence of an internal architecture characterized by multiple and fragmented governance institutions within the state. The role of political management or coordination is primarily concerned with providing procedural guidelines for the organization and functioning of governance institutions; or stated differently, the state provides general riding instructions for the organization. Indeed, organizational design becomes an end in itself as is evident in the example of independent of central banks, which by virtue of their independence, signifies a commitment to a certain policy posture.

In brief, the main features of this new regulatory state provide for:

- a separation of policy from operation through, for example, contracting services out;
- a creation of new and autonomous regulatory institutions such as independent central banks;
- an increase in the role of the state as the regulator of regulation – it acts like a *meta-regulator*. Hence, it does not attempt to regulate directly, but acts to shape the institutional context of regulatory institutions; and,
- a shift from a discretionary to a rules-based mode of governance in a range of economic and social policy areas. At its broadest the regulatory state implies a transition from government (direct intervention) to governance (facilitating intervention).

The defining feature of these regulatory institutions is the increasingly procedural character of the management of economic institutions such as central banks. This new proceduralism has three significant implications. First there is a tendency to depoliticize economic policy in that the emergence of self-regulating institutions implies the removal of political bargaining in economic policy. In fact, it is akin to a kind of economic constitutionalism where economic institutions associated with governance are insulated from the political process. What needs to be recognized here is that the governance strategies identified with the regulatory state provide the basis for new ways of organizing state power. In this context, Ferguson (1990), in developing a thesis on the depoliticizing effects of development projects, notes that:

outcomes that first appear as mere ‘side effects’ of an unsuccessful attempt to engineer an economic transformation become legible in another perspective as the unintended, yet instrumental elements in a resultant constellation that has the effect of expanding the exercise of a particular sort of state power while simultaneously exerting a powerful depoliticising effect.

Ferguson (1990: 21)

Second, alongside this depoliticization of governance, economic policy – such as monetary policy under independent central banks – takes on an increasingly juridical form. Finally, proceduralism implies an emphasis on institutional accountability secured through a process of public reporting and transparency of the decision-making process, but the accountability of self-regulating institutions is based on fidelity to institutional objectives rather than a responsiveness to the broader interests of the citizenry.

The central thesis of this chapter is that the type of global economic structure shapes the institutional architecture of the state. The structuralist argument advanced here is that new institutional forms are needed to respond to the structural imperative generated by globalization of the economy particularly the growing importance of global financial markets. Consequently, increased emphasis is placed on institutions that provide credibility and stability for international markets. Moreover, the rapid transnationalization of capital produces significant problems of collective action and organization for mobile capital that can only be resolved through the depoliticization and the increasingly juridical and procedural character of economic policy. Proceduralism is the institutional response to the

structural imperatives of the new global economy. This underpins one of the central arguments of this volume: the constitutionalization of societal interests, which shaped the 'social state' that evolved in the post-war period with the associated global constitutional order, has given way to the new regulatory state.

## **5 Global order and the new 'post-liberalism of fear'**

### **Liberalism and the transformation of the global order**

The conjunction of forces in the post-cold war order has led to a fundamental transformation of the liberal order at both the national and global levels. This is an intriguing transformation that has been carried out in the name of a new liberal legitimacy. However, this legitimacy is framed in terms of the mobilization of affirmative cultural values that are now played against the universal and abstract processes of international legality and politics; legitimacy trumps legality, strikingly illustrated by the point that conservative forces are now appropriating the progressive language of the left. Hence, a dominant theme of this volume is the emergence of a new 'constitutional moment' in the global order where the management of legitimacy becomes an overriding central and defining concern. As formal international law becomes attenuated, legitimacy becomes accentuated. In short, there has been an amplification of methods and strategies of constituting and managing legitimacy.

But the nub of our argument is the fact that this new legitimacy and the move to a form of culturalism is now played out in a new terrain of political existentialism where the identification of threats to certain ways of life or modes of political existence becomes paramount. These threats, in turn, provide the basis for the identification of enemies, couched in the language of contemporary securitization theory as a broad range of existential threats ranging from environment to terrorism are securitized. A point which applies just as much to the soft language of human security as it does to more mainstream security discourse as Williams (2003) has pointed out, the notion of human security as articulated by the Copenhagen School depends crucially on a form of political existentialism. But the problem with these notions of 'securitization' is that it removes a whole range of subjects from the

play of both domestic and international politics. It is this aspect of political existentialism, which requires the identification of 'pre-political communities' framed in terms of the values that bind the core capitalist states in emerging structures of transnational regulatory governance. In essence, it is the twin movement of political existentialism and the mobilization of affirmative cultural values – what we term culturalism – that has now become the basis for an illiberal and authoritarian political order.

The argument being advanced is that the nature of the post-war constitutional transformation needs to be viewed in terms of a more far-reaching change in the constitutional order within advanced capitalist states. 'Constitutional order' in the sense used here, goes beyond the basic institutional principles of the legal order (Ackerman 1991), and refers to the social and material practices that animate the principles of the formal constitutional system. It follows that the transformation of the post-war global order reflects a deeper change in the constitutionalization of social interests – especially that of labour – which remained at the heart of the social state in the post-war period. This social state was underpinned by a set of embedded democratic relations defined by 'communities of interest' and the imaginative underpinning that enabled these interests to operate politically (Eley 2002), helped to weave together various elements of the global post-war liberal order. Therefore the external constitutional order was contingent on those interior material and social practices which formed the basis of the social state.

The global and domestic order was constituted by the strength and imaginative understanding – the political vocabulary – of class and the more structural foundation of Fordist economic relations. Therefore, the erosion of this twin foundation has paved the way for what could be called the constitutionalization of values which is now becoming the animating principle within the post-cold war constitutional order. Indeed it amounts to a new 'occidental revolution' which ranks as the hallmark of this new order. Furthermore, this brings with it a substantial change in notions of political equality which at least in principle has remained one of the guiding motifs of the post-war liberal order. In this sense it represents a very fundamental makeover of the post-war global constitutional order which cannot be merely reduced to assertion of US unilateralism. At the same time this transformation has shifted from a politics of conflict and contestation over interests to that of a new political existentialism grounded in an antagonism of values or culture which has enabled the progressive language of the left such as 'democracy' and 'liberation' to be appropriated by conservative forces.



However, to understand the dynamics of this new order we need to see how it arises out of the tensions and antagonisms within liberalism itself, or what we have termed the 'liberal/illiberal entanglement'. Here, our analysis converges with some of the interwar work of the Frankfurt School theorists such as Marcuse (1968) and Neumann (1986) who argue that the development of capitalism exposes deep rifts within the liberal order, eventually paving the way for a more authoritarian political order. Just as Marcuse argued that tensions and antagonisms inherent within liberalism created the conditions for the emergence of authoritarian political orders through a turn to affirmative cultural values, our analysis shows that a similar transformation is taking place, but this time within the broader framework of the global liberal order. This transition to a new form of legitimacy is framed in terms of affirmative cultural values or a set of moral imperatives mobilized against the brute risks and insecurities that constantly threaten certain form of political existence. Within this anti-naturalistic framework, the inherent insecurities of the globalized world call for an autonomy of moral decision-making not rigidly bound by the constraints of international legality. Politics, therefore, comes to mean an underlying existential antagonism between warring systems of values. It is this anti-naturalistic view of values or culture that ultimately disables the notions of universalism and formal equality of membership in international society – though only very imperfectly accomplished, as Neumann indeed argued about formal legal equality – that provided the language for emancipatory movements within the global polity.

A major objective of this volume has been to document the new understanding of liberalism. As we have argued, liberalism is not, as is commonly understood within the international relations literature, a perspective on global politics, but a set of ideological or normative structures that are materialized within the practices of the post-war constitutional order. Latham's (1997) stimulating account of the post-war liberal order makes a significant point that the exercise of American hegemony needs to be placed in the context of the broader liberal project to which it remains tethered. Our analysis of the post-cold war order, amplified by the events of September 11, makes a similar case to focus on the broader nature of the transformation of the social and economic context that marks the post-war hegemonic position of the US. This entails going beyond the commonplace descriptions of US hegemony or the balance between coercion and consent in the exercise of that hegemony. Rather than focus on the US, we explore how and why the post-war liberal order is being

reconstituted in the post-cold war/post-9/11 era. It is this liberal hegemony of the US that has been transformed in gradual steps since the end of the cold war but most recently amplified by the events of September 11. It is this transformation of the broader post-World War II liberal project, rather than the intensification of US hegemony, that remains the key to understanding the gradual unravelling of the global order since the end of the cold war. If this is correct, the current dominance of US neo-conservatism may reflect a deeper tectonic movement in the underlying principles and practices of liberalism. This new framework places a high priority on defence of a particular form of social existence which is constantly threatened by the new, virulent, and often incalculable, dangers that arise within the global systems. It is important to recognize that what matters is not existential threats *per se*, but framing these new threats and risks in terms of an existential antagonism of values.

In response to these new dangers there has been a growing emphasis on the management of legitimacy or legitimate conduct. Framed in terms of security and risk, this represents a new legitimacy that calls for the autonomy of 'sovereign decision' from the restraints, and indeed, the politics of international legality. What is significant is that not only has legitimacy itself become an important dimension in the global order, but this new legitimacy is also played out in the registers of a new culturalism that is fundamentally disabling of a politics of interest.

To the extent that the post-war liberal order reflected a conception of liberalism it was broadly a form of liberalism that was shaped by a modernity conceived in terms of the conflict, negotiation, and tempering of social interests. It these social and material practices that 'embody[y] a certain number of fundamental rights that as group make up what has been called "social citizenship"' (Balibar 2004: 163). But this 'social citizenship has remained in close solidarity with the emergence and reinforcement of a national social state' (Balibar 2004: 163). It is this 'national social state' that in turn mutually constituted the post-war global liberal order. In fact, what is striking about Ruggie's (1983) notion of embedded liberalism is that it points to the manner by which the global order mirrored the ideological expression of the 'social state' that welded together the domestic structures and policies of advanced industrial states. The logic of this argument is that 'social constitutionalism' which was the defining feature of the post-war advanced industrial state shaped the character and shape of the global constitutional order. It is the crisis of the social state with its attendant social constitutionalism that now reverberates through the constitutional practices of global liberalism.

From this vantage point the critical move then is from a form of the 'social state' to the new regulatory state as outlined in the previous chapter. This new regulatory state diminishes the political representation of class and social interests in favour of a new policing of borders both economically (e.g. institutions such as the WTO and IMF) and politically. The latter is evident in the policing and monitoring not just of national borders but of internal borders in the form of immigrant population and the so-called 'undeserving poor'. It is the regulation and policing of these new boundaries cutting across traditional national boundaries that has become one of the hallmarks of the new regulatory state. It is important to recognize that, as shown in Chapter 3, this regulatory state itself is transnational in the sense that various regulatory functions within the core capitalist system are enmeshed in complex forms of global governance.

Perhaps a useful and illuminating way of understanding the nature of these changes is in terms of Garland's (2001) analysis of law and order in Britain and the US. Garland argues that there has been a movement away from what he calls 'penal welfarism' which reflected a social democratic politics, and more importantly, the 'politics of interest' that drove post-war politics. Penal welfarism has now given way to a form of governance, to a new culture of control with a 'focus upon control, an acknowledgement that crime has become a normal fact, and a reaction against the criminological ideas and penal policies associated with penal welfarism' (Garland 2001: 102). If we substitute 'welfare' or 'terrorism' for crime it becomes clear that the culture of control has relevance far beyond the law and order policies that are the subject of Garland's study. Moreover, this clearly shows that the new culture of control works through the modification and regulation of individual behaviour. Above all this is a form of control that departs from the post-war modes of governance through welfarism. In fact we show below that governance of transnational problems brings forth the criminalization and consequent punitive governance so evident in the new law and order state.

Garland's argument of a drift away from welfarism and the politics of interest to a new 'culture of control' remains relevant in understanding the broader transition from the 'social state' to the regulatory state and its associated culturalism. It is a transition from an associated politics of interest to a culturalism which is characteristic of the new and more regulatory global order. From this perspective the crisis of the liberal global order is to be found in the marginalization of the ameliorative strands – albeit as weak and imperfect as they were – of global and domestic governance. Instead, the new global order places a high

priority on the mobilization of cultural values and the resultant political and social inequalities both globally and nationally implied in this shift to the new culturalism. It is this new culturalism that has deeply illiberal resonances but paradoxically is prefaced in very liberal terms.

Even though the themes of liberal legitimacy may have intensified, these are now orchestrated within the framework of the new culturalism. And it is the orchestration of these liberal chords that produces the discordant illiberal tones so glaringly evident in the occupation of Iraq. Hence, the mainspring of the reconstituted global order is not to be found in the coercive exercise of US hegemony – as argued by those such as Anderson (2002). Rather, it needs to be located in the transition from the politics of interests to the anti-politics of ‘culture’. For this reason, these changes in the architecture of the global order are likely to be more durable than the current neo-conservative dominance of the US administration.

There is another implication of this argument. As notions of culture have predominated over interests, these new ideological forms resonate with the ideological meshing of community and capitalism such as that which was prevalent within interwar fascism, or more broadly, the tradition which Berlin (1976) referred to as ‘counter-enlightenment’. In this regard, Sternhell (1994) has persuasively argued that fascism grew out of disparate ideological traditions. Fascism, Sternhell observes, was distinguished by the masking of the material relations of conflict and power by, in effect, the culturalization of the economy or the emergence of a ‘*gemeinschaft* capitalism’. It sought to fuse communitarianism with the liberal markets. The key point is that social and economic transformation is understood in terms of value and ethical categories rather than in the form of material relations of power arising from within capitalism. Our understanding of changes in the global order needs to be cognisant of the more tectonic changes in the ‘categories’ by which social and economic change is analysed, understood, and acted upon. No doubt, hegemony is an important element of the present global order, but it is one which is exercised within the frame of ‘values’. It is the texturing of liberalism with these cultural registers that produces the liberal/illiberal entanglement which is so distinctive of the new global order in the post-cold war period.

### **Risk and the new post-liberalism of fear**

This liberal/illiberal entanglement is also manifest in a new politics of risk and the consequent rise of a new politics of fear. Poulantzas (1978), in describing the rise of what he calls ‘authoritarian statism’,

identifies the articulation of the 'mechanisms of fear' as one of its distinctive elements. He notes that there is:

something else to repression, something about which people seldom talk, namely, the *mechanisms of fear*. I have referred to these materials, and by no means subjective mechanisms as the theatricals of that truly Kafkaesque Castle, the modern state.

Poulantzas (1978: 83)

Similarly, we have argued that the political existentialism spawned by the new global governance operated both domestically and globally through this new mechanism of fear. It is this vocabulary and politics of fear that has radically transformed the post-war liberal project under which the US hegemony was exercised.

One of the most pervasive effects of the phenomena that we call 'globalization' has been to amplify 'risk' in the global community. What is perhaps most distinctive about this new world of risk is that it sutures the link between the domestic and the international. No longer can various sources of risk be quarantined from the safe harbours of domestic societies of many advanced industrial countries. Nothing more starkly illustrates this amplification of risk than the events of 9/11, which have brought home more effectively than anything else to date, the extent to which the new risks are global in nature. And it is not just terrorism that is the source of these new forms of risk. Risk now extends over a whole range of economic and social activities, as for example, in the economic collapse of Argentina, following earlier crises in East Asia, Russia, Brazil and Turkey. All these reveal the deep seated nature of economic risk in the new global political economy. This is not all: consider the familiar issues such as climate change, global health epidemics, underlined by the SARS, global movements of people, and transnational criminal networks.<sup>1</sup>

In terms of the argument of the social theorist Ulrich Beck (1999)<sup>2</sup> this may well be suggestive of a shift towards a risk society which is increasingly global. But it is clearly something more than this. First, these new risks have to be seen as emerging out of a constellation of economic and social interests. This change in the understanding of risk needs to be placed in the context of the globalization and transformation of capitalism that emerged in the last two decades. As Davis (2001) has aptly noted, we live in an age where there has been a 'globalization of fear', and this reaches outward from a sense of individual insecurity towards more generalized existential threats. But this

amplification of risks comes at the cost of marginalizing the ‘social constitutionalism’ of the post-war global order.

Furthermore, and indeed of critical importance is the need to consider how these new forms of risk have been turned into a new politics of fear. Indeed, as these new fears of globalization have been amplified, national governments have resorted to security as a key component of their political practice. Risk itself becomes currency in the political process. Moreover, even before the New York terrorist attacks, the increased valorization of security – already apparent as one of the distinctive signposts of the domestic political order, and readily evident in the rise of the law and order state in the US (Garland 2001) – was being paralleled increasingly in the transnational arena, as exemplified by heightened surveillance along the US-Mexican border (Dunn 1995). The events of 9/11 have accelerated these practices in a way that blurs the boundary between the domestic and the global. The accentuation of a ‘globalization’ of fear has been met by what could be a new form of statecraft, i.e. modes and practices of political rule, of which security is the dominant motif: a process that is leading to the creation of a new post-liberal state of fear.

A useful starting point in coming to terms with this new statecraft is Shklar’s (1998) notion of a liberalism of fear. Shklar’s singular analysis of liberalism identified a desire to tame the impulses of human cruelty that have been such an enduring aspect of the twentieth century. It is the liberalism of negative politics that places ‘damage control’ at its centre and that belongs, Shklar suggests – using Ralph Waldo Emerson’s words – to a ‘party of memory’ rather than a ‘party of hope’. In this sense, it is a ‘liberalism of fear’ tempered not by an optimistic account of human self-development, rationality, or personality but grounded instead in a memory of a history of cruelty inflicted by the powerful on the weak.

Unlike a traditional rights based view of liberalism, Shklar’s analysis exemplifies a conception of liberal practice that focuses on the consequences of diminishing the fear that arises out of public cruelty. Accordingly rights become instrumental rather than ends in themselves, because a liberalism of fear

cannot base itself upon the notion of rights as fundamental and given, but it does see them as just those licenses and empowerments that citizens must have in order to preserve their freedom and to protect themselves against abuse.

Shklar (1998: 19)

What makes Shklar's work especially useful in seeking to articulate the security motif that increasingly underpins the new statecraft of fear is the emphasis placed on liberal political practice as a means of tempering the sources of fear and cruelty that mark the often tragic history of the twentieth century. The notion of a 'liberalism of fear' resonates with the notion of the politics of fear; it is argued 'the fear we fear is of pain inflicted by others to kill and maim us, not the natural and healthy fear that merely warns us of avoidable pain' (Shklar 1998: 11). The emphasis being placed here is on the fact that one cannot, and should not ignore evidence of systematic governmental brutality, in both liberal and illiberal states. It follows from this that a fundamental norm of liberal practice must be that 'one must put cruelty first and understand the fear of fear', and defend the institutions of democracy that protect its citizens from state cruelty (Shklar 1998: 19).

Yet, this interpretation of the negative politics of 'damage control' does not fully account for the new anti-politics of fear which drives politics in many liberal democracies. Shklar pits the weak against the cruelty inflicted by public governmental agencies. Of course, as we have seen, states now identify the sources of fear as emanating from non-state actors such as terror networks represented by al-Qaeda. Indeed, it needs to be added that states ranging from Russia to China and India have used the recent terror attacks to inflict cruelties on their minorities. Furthermore, and related to Shklar's emphasis on the 'liberalism of fear', the high priority given to constitutionalism – the institutional separation of power as an antidote for public abuse of power – is now threatened. Current political practices invoking enhanced security lead to a concentration of executive power and discretion; they tend to depart from, rather than reinforce, liberal constitutionalism. Whereas the 'liberalism of fear' espouses a form of negative politics, recent political practices organized around the 'mechanisms of fear' are more congruent with an *active version of anti-politics*. For this reason, the articulation of new mechanisms of fear within contemporary statecraft is more properly understood as a new 'post-liberal politics of fear' associated with the rise of a new form of political existentialism.

Another genealogical means of identifying this new anti-politics that informs the post-liberal politics of fear is by way of the nineteenth-century notion of 'police'. Police in this context does not refer to any specialized agency of law enforcement, but rather to a generalized concern with the detailed and comprehensive regulation of urban life

in order to create a well-ordered and secure environment for trade and commerce. This public agency was designed as one endowed with security as its dominant objective; it was concerned with regulating all aspects of social and personal life. In early modern Germany, as Raeff (1983) observes, new urban ordinances provided the framework within which new forms of bureaucratic practice and professionalized administrative functions started to develop. What is significant about these routines of politics was the emphasis placed not only on the provision of order, but also on the notion that what mattered was 'a government's ability to reach out to local communities and subordinate institutions, through effective channels of communication, that proved crucial' (Raeff 1983: 45–6). As Raeff (1983) points out, these older notions of police reflect a particular hybrid of liberalism and security which has come to play an important role in a range of domestic programs, including those associated with various notions of 'third way' social policy.<sup>3</sup> Indeed, recently both Garland (1996) and Neocleous (2000a) have drawn attention to the importance of the work of the early nineteenth-century British Magistrate Patrick Colquhoun and his broader concept of social policing of poverty in many recent social reform programs. This is not to suggest that there has been a reversion to these kinds of practices, but it does highlight the fact that current notions of 'security' and ideas of the diffusion of sovereign power or managing 'sites' of potential danger in the pursuit of order have an important anti-liberal lineage (Garland 2001).

What informs the current post-liberalism of fear is this older idea of police, which depoliticizes important areas of social and economic life (Neocleous 2000a). Complex social and economic changes in the structure of modern capitalism, of which globalization is the most prominent, have amplified a sense of insecurity and risk, and moved a wide range of public issues beyond the review and control of national and popular political processes. In turn, states and political actors – particularly those on the right – have responded by making security, or the attempt at security, a central motif of their political programs.

This emphasis on security is anti-political for a variety of reasons: (i) it criminalizes social problems at both the domestic and transnational level, thereby obscuring the underlying relations of power and conflict that underpin a range of social phenomena; (ii) it promotes, under the guise of border control, a highly exclusionary citizenship; and (iii), it relocates power away from deliberative and representative assemblies in a wide range of social and economic areas.



## **The anti-politics of risk and securitization**

In this section I will examine three key areas, namely, securitization and the growing significance of the transnational law and order state; border control and the rise of a system of exclusionary citizenship; and, the relocation of power within the state.

### *Security and the transnational law and order state*

One of the clearest ways in which globalization is shaping the new security order is through what international relations theorists awkwardly call 'securitization' (Weaver 1995). The term refers to the expansion of the framework of security to encompass aspects of transnational politics previously unrelated to it, and the ability of governments to invoke emergency measures in its name. After 9/11, examples of this securitization abound, e.g. public health, the environment, and even the financial system, through efforts to combat money laundering and to seize the assets of suspected terrorist organizations and their alleged supporters. There are good reasons for concluding that even before the events of September 11, the 'criminalization' of various issues in the transnational system was well in train. The massive intensification of border and immigration controls in most liberal democracies, alongside the existing war on drugs, for example, point to the development of a new transnational 'law and order state'.<sup>4</sup>

An analogy for the present crisis can be found in the anti-Communist and cold war rhetoric that dominated US domestic and international politics in the decades after 1945. The obvious parallels are to be found in the increasing importance attached to issues of 'security' in both domestic and international politics. The decisive shift in the political climate initiated by Truman, and consolidated by Eisenhower, lay not in the increasing salience of security for public policy and political language, but in how the US state apparatus came to be dominated by cold war imperatives. The pursuit of these imperatives was often at the expense of broader civil liberties, as exemplified by the infectious spread of McCarthyism.<sup>5</sup>

However, the analogy with the cold war 'national security state' remains somewhat limited because it obfuscates the way in which globalization has transformed the very notion of security in recent years so that it is increasingly understood in terms broader than merely 'guns and bombs'. The language of security now permeates every sphere of life. Globalization does not just weaken the state; it transforms the state.<sup>6</sup> The standard account of how globalization affects sovereignty

maintains that the rapid integration of the global economy or the increasing intensity of trade and financial flows serves to limit the functions of sovereign states. But the problem with this 'flow' model is that it leaves untouched the fundamental binary divide between the external and the internal.<sup>7</sup>

The binary divide has produced an unhelpful debate over the extent to which state power has been lost as a consequence of globalization. Susan Strange (1996), in a sophisticated analysis of these changes in the global political economy, argues that all states have had their authority and functions greatly diminished because of the integration of states into the global economy. In particular, she draws attention to the role and power of financial markets in constraining the ability of states to effectively intervene in large areas of economic life. While offering a valuable and perceptive analysis of the impact of globalization on the state, this account is limited by a kind of zero-sum conception of state power and autonomy. It neglects the degree to which sovereignty is being transformed from *within* the state as well as in its interactions with external actors. What is most evident in the securitization of domestic issues is that most drivers of change are to be found in the changes to the internal structure and organization of the state.

In recent years, the English speaking democracies of the United States, Britain, and Australia, spurred on by a climate of fear, have developed harsh penal regimes to combat so-called law and order problems. The emergence of the new law and order state has led to a very different conception of security. This understanding of security increasingly places less emphasis on the social causes of individual behaviour, as for example, in Garland's (2001) idea of penal welfarism, in favour of an approach to criminal activity that places emphasis on the issues of public order and control. In this new penology a variety of approaches may be taken, ranging from 'zero tolerance' to community policing, but the underlying theme which runs through them is that 'they share a focus upon control, an acknowledgement that crime has become a normal social fact, and a reaction against the criminological ideas and penal policies associated with penal-welfarism' (Garland 2001: 185). More importantly, in several western democracies this new post-liberal state of fear has also come to dominate other areas of social policy such as welfare reform. For example, under the new paternalism<sup>8</sup> of the US workfare or Britain's New Deal or Australia's policy of mutual obligation, there has been a significant increase in the surveillance and punishment of welfare seekers, which has a strong confluence with ideas of the new penology.

In this new post-liberal state, the emphasis on the *management of risk* at the level of population rather than individuals is critical. Thus, we find that new forms of risk management apply risk profiles to a set of relationships, institutions, and even geographic sites, rather than endeavour to manage or transform the behaviour of individuals. This approach is clearly evident in the high priority given to issues such as border control, use of identity documents, and the propensity to identify elements of 'state failure'. This approach to risk control and management strips away the social and legal context of individual behaviour as governments and other organizations seek to manage the 'sites' of criminal activity such as terrorism and international drug trafficking, or panic over so-called 'people smuggling'. In short, this not only constructs a transnational law and order state but also creates those 'mechanisms of fear' that underpin the new penology; and in turn this stands out as a distinctive feature of the statecraft of the post-liberal state. Again, the events of September 11 force us to confront the way in which globalization is changing the very form of the state.

Nevertheless, this language of security is not just confined to mainstream security agencies. It has also become an intrinsic rationale of the program of development agencies like the United Nations Development Program (UNDP).<sup>9</sup> For these international agencies and many other non-governmental organizations, the notion of 'human security' now includes such areas as poverty and the environment, and becomes the transnational analogue of 'community policing'. This new perspective embodies the more expansive understanding of security employed by state and transformed security agencies.

This new version of human security presents the same difficulties, as do the 'hard' definitions of securitization, because ideas of human security are premised on the view that in some way 'communities of security' can be constructed in isolation from systems of power.<sup>10</sup> Perhaps these difficulties are even more acute for theorists of human security as these understandings explicitly theorize security without an adequate recognition of the social and political relations of power that constrain individual behaviour. As Neocleous (2000b) aptly points out:

far from being unimportant, the 'insecurities' in fact raise the central questions of social and political power; the central questions, that is, of critical theory. And this is the point: in the process of being securitized these questions are being depoliticized.

Neocleous (2000b: 13)

As with the new political penology, approaches to human security are based on a 'culture of control' (Garland 2001), which is one of the key elements of the new 'law and order' state.<sup>11</sup>

The more expansive definition of security – whether used by the UNDP or the Pentagon – has disturbing consequences. It is reflected in the depoliticization of complex problems and issues as transnational problems are disembodied from the politics of power and interests, and situated within the *anti-political* framework of security and risk. Within the framework of the new security language – whether it is the 'hard' security of Bush's National Security Council or the 'soft' security of some international development agencies – conflict and debate, the raw materials of *politics*, get submerged in the search for *policies* of risk management and control. This 'politics of anti-politics' is an important component of the new post-liberal state that has been strongly reinforced by the events of 9/11. It is inimical to the institutions and values that sustain and animate the public sphere of liberal democracies.

### ***Border control and exclusionary citizenship***

Equally important for this new post-liberal politics of fear is the increasing salience attached to border control. Again, this is intimately linked to the process of globalization because one of the key aspects of current forms of globalization is that it not only accentuates the free flow of capital but also attenuates the movement of people – both migrant labour and refugees – to advanced industrial countries (Hayter 2000). In fact, in comparison with previous periods of internationalization, the current phase of globalization is marked by its distinctively one-sided nature; on the one hand are policies that accelerate the free movement of capital, and on the other, increasingly harsh barriers which constrain the free movement of people. Admittedly, these policies of 'border control' were previously prominent in the policies of a number of countries. This is evidenced, for example, by the extensive surveillance and control of the US-Mexican border or the development of wide and significant arsenals of border enforcement measures in Europe where border controls were scrapped within the EU while the external borders of the EU were to be tightly policed and the rights of non-EU nationals treated differentially.<sup>12</sup>

What is significant after 9/11 is that these policies are now clearly overlaid by the kind of security motifs that have become such an important component of the new post-liberalism of fear. These policies of border control as well as those relating to illegal immigration

tend to exclude significant groups of people from the public sphere of the liberal polity. Hence, an exclusionary form of citizenship becomes another key element of the new political order. The gradual inclusionary development of citizenship that has historically driven liberal democratic societies has now been reversed so that some citizenship entitlements become a privilege rather than a right.<sup>13</sup> Hence, an exclusionary form of citizenship becomes an even more exclusive privilege and stands out as another key element of the new political order. It is apparent then that these issues of border control are part of broader shift in forms of citizenship. For example, in a more comparative perspective; programs of welfare reform in several countries (e.g. the United States, the United Kingdom, and Australia) have sought increasingly to subject the rights to benefit and entitlement to the performance of various obligations, such as the work test (Jayasuriya 2001c).

Nothing is perhaps more illustrative of these issues of border control than the so-called 'Tampa' issue in Australia (Manne 2003; Marr and Wilkinson 2003). In early July 2001 the Norwegian ship MV Tampa picked up a number of asylum seekers from an un-seaworthy vessel and, and for safety reasons, headed to disembark at the nearest available coastline, which was in Australia. The Liberal-National Coalition government of Australia, in defiance of time honoured international conventions, refused to accept the *Tampa* and its human cargo of refugees and asylum seekers, and a crisis was ensured. It was only resolved after the 'refugees', now branded as 'illegal immigrants', were placed in harsh detention conditions under Australian government supervision on the small South Pacific island of Nauru – the so-called 'Pacific solution' to infringements of border security.

In short order, the events surrounding the *Tampa* in July/August were conjoined and compounded with the subsequent events of 9/11, leading to draconian legislative measures: first, the passing of 'border protection' legislation which in effect enabled the Australian government to circumscribe its migration zone, e.g. by excluding the mainland, and thereby denying access to the protection of international conventions; second, the legislative curtailment of some existing powers of judicial review pertaining to a whole range of refugee issues (Rubenstein 2001); and, finally, astutely engineering in a highly volatile atmosphere of a General Election, a political culture and climate of 'fear', the net result being a new kind of punitive right-wing populism which foreclosed any serious political discussion and debate (Rundle 2001).

The *Tampa* issue in Australia is one striking example that highlights the fact that there has been a growing convergence between the new

domestic and international political penology – one which vividly portrays the emergence of those new mechanisms of fear that form the practices of post-liberal statecraft; and the new policies of border control seek to restrict access to the public sphere, reinforcing a new exclusionary citizenship (Cole 2000). However, the issue of border protection is not just an external one because one of the consequences of this new post-liberalism of fear is to create internal enemies who are perceived to be threatening or dangerous, and whose civil liberties are thereby curtailed.

Douglas (1992), for instance, points to the way certain groups or categories of people come to be labelled as ‘dangerous’ within the political process. Clearly, in this political era of ‘fear’ it is exactly this process which is underway, namely, the creation of internal enemies. For example, one of the most striking elements of the policy response to this crisis is that many ethnic and minority groups are now deemed to pose a threat to national security. Against this background, many cold war warriors in the United States have given extraordinarily generous airplay to Samuel Huntington’s (1996) thesis of a clash of civilizations.

Although these threats to national security, unlike during the cold war, are now framed in terms of ‘ethnicity’ rather than ‘ideology’, the outcome poses the same challenge to basic rights. More interestingly, these dangers are not seen as external but as inhabiting the centre of the domestic sphere. In this regard, consider the post-9/11 growth of racial profiling in the United States directed mainly at Muslim citizens (Davis 2001). This type of political representation demonstrates the extent to which the domestic law and order state has begun to rely on constructing the image of certain groups as being especially prone to criminal actions<sup>14</sup> of the sort that threaten national or international security. The essential point to be drawn from this is to recognize how this new emphasis on border control has become subtly manifested in exclusionary policies of citizenship, i.e. the exclusion from the public sphere of citizens and residents on the basis that they pose a threat or a danger to the political community. Indeed, it is the growth of this political existentialism and with it various forms of exclusionary citizenship that exemplifies the move from a politics of interest to that of values.

### ***Relocating power within the state***

One of the major consequences of globalization has been the relocation of power within the state. Put simply, in a globalized world, the

state loses some of its traditional capacities and functions – such as autonomy in national economic policy making – to increasingly emerge as a *regulatory state* providing economic and social order. One important facet of this new regulatory state is the move towards a form of political governance which attempts to insulate key economic policy-making institutions, such as independent central banks, from the politics of bargaining (Jayasuriya 2001b). However the role of the regulatory state as the guardian of economic and social order in the new global economy is now conjoined with the new forms of political existentialism that have been so evident since the events of 9/11. As a sequel to the events surrounding 9/11 there has been a reinforcement of these trends in a whole range of new sectors to such an extent that even some of the economic institutions will increasingly be framed in terms of security. This means that the language of security and risk figure prominently in the way goals of economic and social order are defined.

As previously noted, clearest evidence of these trends is to be found in the growth of executive power, the serious curtailment of civil liberties, and the limitations placed on judicial oversight. In fact, in this context, the emergence of certain aspects of a 'state of exception' (see Chapter 1) should be a cause for concern for those interested in the protection of fundamental political rights. More especially these new forms of anti-politics may be pointing towards a new mode of illiberal political regulation which relies less on directly coercive repression by:

Assert[ing] itself in the establishment of new power techniques and in the development of various practices, channels and props intended to create a new materiality of that social body upon on which power is exercised.

Poulantzas (1978: 238)

In short, what Poulantzas perceived nearly three decades ago as the development of a form of authoritarian statism – and he was writing about advanced liberal democracies – may well be the new form of regulation in an era marked by both economic globalization and the greater militarization of the world.

Regardless of how one may describe this new form of political regulation, one of the important characteristics of this regulatory form of state is that it relocates power both within the state as well as in transnational governance networks (Jayasuriya 2001b). The argument here is that the new regulatory state, by internationalizing various functions, leads to the emergence of regulatory webs. Take for

example, the US which has pressured the Canadian government to impose 'perimeter continental security', with the objective of establishing common entry and exit policies for visitors, immigrants, and refugees (Golden 2001). What is significant in this proposal is that it will not only relocate power within the state (towards immigration and border enforcement agencies) but also increasingly require the establishment of networks of specialized agencies which work in concert to control borders.<sup>15</sup> This, in turn, raises substantive issues of democratic accountability. Posing the movement of people as primarily a security risk only serves to submerge the political questions of exclusion and inclusion in established democratic political systems, all of which raise issues of power within the broad fabric of security.

It is worth reiterating the point that one of Franz Neumann's (1986) central arguments is that the development of capitalism leads to the development of non-formal instruments of law. In fact, the last century has seen a gradual acceleration of legal fragmentation and dissolution. Legal deformalization, Neumann argued, is rooted in a fundamental transformation of capitalist economies over the greater part of the twentieth century. Building on Neumann's work Scheurman (1999a) has developed a persuasive argument of great importance, namely, that the process of globalization is leading to the institution of those very non-formal instruments of law perceived by Neumann as a threat to a democratic conception of law. In some respects, this deformalization process has been accelerated by the events of September 11, at both the international and domestic levels. These tendencies towards deformalization, and I would stress *depoliticization*, need to be situated in the context of the reconstitution of the global political and economic order.

### **Beyond the politics of fear?**

From the foregoing it is clear that globalization and its social consequences have changed the internal architecture of the state. This is evident in the emphasis given to indirect forms of regulation and the shift away from the structures of democratic accountability towards more independent economic institutions such as independent central banks. However, at the same time, globalization and its attendant social changes have also transformed the nature of politics and the public sphere of liberal democracies. The amplification of risk created by it has led to the increasing dominance of security embedded in the language of politics as well as in the programs, policies and institutions of government – a new post-liberalism of fear.



The emphasis placed on risk management and reduction is one of the defining features of the new post-liberal politics of fear. As we have seen, this operates in a variety of areas, ranging from welfare reform in countries such as the United States and Britain to the rise of the law and order state. Nevertheless, clearly though, while these forms of anti-politics have been evident for some time, the overall impact of 9/11 has been to accelerate and reinforce the growing trends towards the new post-liberal politics of fear. The events of 9/11 have not just reinforced these trends, but internationalized them. The influence of this new transnational law and order state, as we have argued, is underlined by the shift towards the *securitization* of civil society in a number of countries.

Carl Schmitt erred in arguing that liberal states are unable to respond to states of emergency. Nevertheless, the contention that liberalism is unable to articulate a political defence of liberal politics would seem to have some justification in the light of governmental responses to the events of September 11 in several democratic states. Instead, what has emerged is a constant appeal within liberal democratic polity – especially in the United States, Britain, Canada, and Australia – to ‘pre-political’ elements, whether cultural, or now, civilizational, notions of the nation; or even more problematically, to concepts of security. It needs to be emphasized here that the events of September 11 have only served to accelerate an already existent trend. Katznelson has drawn pointed attention to the illiberal temptations of liberalism by observing that:

liberalism also remains vulnerable to illiberal temptations by virtue of its principled thinness. Precisely those features many of us consider liberal virtues – its low-key approach to patriotism, its reticence in officially sanctioning communal origins, its commitments to individual autonomy – deprive liberalism of the resources with which to construct satisfying political and communal identities or normatively grounded guides to public policy.

(Katznelson 1996: 51)

However, while accepting Katznelson’s description of the illiberal temptations of liberalism, I differ on the causes of these illiberal temptations. These illiberal temptations spring not so much from what Katznelson refers to as the ‘thinness’ of liberalism, but from a failure to recognize that democratic politics – with its crucial element of the post-war global governance – was embedded in material relations of conflict and contestation. The real significance of the post-cold war era lies in the evisceration of these material relations of conflict through the development of neo-liberalism and the end of the political

battle between communism – albeit a highly Stalinist variety – and capitalism. It is this transformation that finds expression in the development of a form of political existentialism that seeks to substitute material relations of conflict within and beyond states with various forms of existential antagonisms that call for the autonomy of ‘ethical decision’ from the constraints of politics. It enables the new forms of statecraft to be organized along the lines of what I have called a post-liberal politics of fear.

In the contemporary context, this new politics of fear becomes a means of removing issues from the political arena. In this language of security and in the political programs that resonate with its assumptions, there is an occlusion of the relations of power and conflict that animate politics. In this new anti-politics the individual agency becomes disembedded from the larger social context and relocated within the framework of security and risk. Evidently, the relocation of power both within the state, as well as through various forms of international cooperation, poses difficult questions about the process and structures of democratic accountability.

Quite apart from its deleterious consequences for civil liberties, what is a matter of greater concern is that the new language of security may prove to be a significant hindrance to developing a *truly global* rule of law and cosmopolitan democratic governance. This surely must be the most effective means of dealing with the terrorism witnessed on September 11. And make no mistake; these problems have to be forcefully confronted by the global community. Without doubt, neo-fascist fundamentalism poses a threat to politics and to the discussion that is vital to its survival. But we should not allow this crisis to be used to threaten the very politics that neo-fascist movements so abhor. These movements can only be combated by articulating the rationale and principles underlying a *global rule of law*, which in turn means we need to acknowledge the elements of conflict and power that pervade modern politics. It forces us to return to the politics that the new expansive conception of security so clearly eschews. Above all, the liberalism of fear fails to recognize the public spaces and practices we have in common. As Arendt so eloquently put it:

to live together in the world means essentially that a world of things is between those who have it in common, as a table is located between those who sit around it; the world, like every in-between, relates and separates men at the same time.

(Arendt 1998: 52)

# Notes

## 1 Reconstituting the global liberal order

- 1 See Scheuerman (1999b) for an account of the way in which Hans Morgenthau was influenced by Carl Schmitt. See Morgenthau (1951).
- 2 For a very good recent introduction to the work of Schmitt, see MacCormick (1997) and Scheuerman (1995, 1999b). Both accounts are particularly good on Schmitt's legal and constitutional theory.
- 3 Particularly as it was represented by the work of the jurist Hans Kelsen. For an excellent overview of this debate see Dyzenhaus (1997). See also MacCormick (1997)
- 4 See McCormick (1997) for a good description of Schmitt's changing attitudes towards constitutional and emergency powers.
- 5 Schmitt (1965, 1985a).
- 6 And clearly, Schmitt's view on the nature of what he called 'decisionism' changed to a theory of what he called 'concrete normative order' in the 1930s. For a good account of these changes see Christi (1998).
- 7 See especially the work of Scheuerman (1995), MacCormick (1997), and Dyzenhaus (1996a, 1997).
- 8 See Scheuerman (1995) for a detailed analysis of the way these Frankfurt School theorists attempted to develop a sociology of the state of exception by placing it within the context of the development of capitalism. In a later article Schuerman (1999a) seeks to apply Neumann's ideas to the relationship between globalization and law. For Neumann see Neumann (1944, 1986).
- 9 For the use of the notion of the 'state of exception' in relation to changes in the global order see Megret (2002), Jayasuriya (2002b; 2002c), and Koskenniemi (2002).
- 10 As Douzinas notes: 'If the Kosovo war established the parameters of the new type of sovereignty or of a new type of independence for those outside the circle of friends and satellites of the major powers, it also sketched out the evolving map of a world order no longer based on the nation state or the traditional sovereignty' (Douzinas 2002: 25).
- 11 See Duffield (2002) for a good account of the way in which the new humanitarianism serves to depoliticize the development process.
- 12 Based on a set of consequentialist ethics (see Duffield 2002).
- 13 For similar versions of this notion of set of interconnected executive structures see Jayasuriya (1999); Agnew and Corbridge (1995).

## 2 From legality to legitimacy

- 1 Bowden (2002) has an excellent listing of sources of the new conservative justification of imperialism.
- 2 The term '*gemeinschaft* capitalism' is borrowed from Harroonian (2000).
- 3 See for example the edited collection by Appadurai (2000).
- 4 Though it needs to be pointed out that the opposite end of what Dyzenhaus (1996a) calls the Weberian problematic is the tendency to reduce legitimacy to legality. While a consideration of this issue is beyond the brief of this book this raises the more thorny issue of the relationship between democratic politics and international law that a comprehensive cosmopolitan democratic theory should encompass.
- 5 See also influence of Herder (trans 1968) on the notion of culturalism.
- 6 For the best illustration of this see Thompson (1975).
- 7 For the work of the Copenhagen School see in particular Weaver *et al.* (1993) and Buzan *et al.* (1998). See also Huysmans (1997).
- 8 For a good overview of the evolution of these new forms of risk at the global level see Beck (1999).
- 9 The point here is not a definitional one but rather the way the concept of social capital and civil society is used to become a broader element in new forms of symbolic politics. Consider, for example, how the term 'community' has replaced 'society' in the rhetoric and justification of social welfare programs. In this sense, what we want to capture is the ideological uses to which the notion of social capital has been put to articulate a particular anti-political notion of citizenship.
- 10 See the recent volume by Lindsey and Dick (2002), which provides critical commentary on corruption programs in Indonesia and Vietnam.
- 11 In fact, the relationship between democracy and general legal norms or the rule of law remains an area that has been explored (albeit with some important differences) by the recent work of Habermas (1996).
- 12 See for example Lugard (1929) for an outline of these ideas in a colonial context.
- 13 This has interesting parallels with Georges Bataille's view of sovereignty which though similar in some respects to Schmitt was based on the 'insistence that sovereignty means exemption from the principle of homogeneity, a principle that was, it will be recalled, one of the cornerstones of the Schmitt's anti liberal theory of democracy' (Jay 1993: 54).

## 3 Transnational regulatory governance and complex sovereignty

- 1 For another example of a formalist analysis see James (1986).
- 2 For a flavour of some of these constructionist arguments see Biersteker and Weber (1996).
- 3 I use 'complexity' in the sense that Jervis (1997) uses the term to indicate the nature of interconnectedness where 'the fates of the units and their relations with others are strongly influenced by interactions at other places and at earlier periods of time' (Jervis: 1997: 17).

- 4 For an early and influential attempt to incorporate international relations to international law see Abbott (1989); see also Slaughter-Burley (1993) and Slaughter *et al.* (1998) for a perceptive survey of the interdisciplinary literature.
- 5 See Strange (1996) for an excellent analysis of the circumstances and conditions that have contributed to the decline of the Westphalian model.
- 6 See Abbott (1989) for an early use of the notion of international regimes in the context of international law. In international relations the seminal analysis is by Krasner and Ruggie (see Krasner 1983).
- 7 Stone's framework takes seriously the role of liberalism in shaping the constitutionality of international regimes. The structure of the EU is in part determined by the liberal political rationality of Western European states. See also Beeson and Jayasuriya (1998).
- 8 Ruggie (1993) rightly sees this territoriality as an important component of modernity.
- 9 For a historical analysis of changing notions of sovereignty see Bartelson (1995).
- 10 Wood, for example, has argued that 'the differentiation of the economic and the political in capitalism is more precisely, a differentiation of political functions themselves and their separate allocation to the private economic sphere and the public sphere of the state' (Wood 1981: 82). It should be noted that the notion of sovereignty that we term 'Westphalian' is a broad term that includes the emergence of liberal state forms, which is the object of Rosenberg's analysis.
- 11 See Bartelson (1995) for a somewhat similar thesis about the contingent nature of sovereignty although it fails to locate changing models of sovereignty in the changing structural frameworks of capitalism.
- 12 *Hartford Insurance Co vs. California* 113 S.Ct 2891 (1993).
- 13 For example, see Trimble (1995). But, Trimble's formalist analysis does not deal with the fact that legal categories constantly adjust to changes in the underlying distribution of social power.
- 14 For a discussion of the notion of the fragmented or regulatory state see Jayasuriya (1994a). It is important to note that these agencies have relationships with specialized domestic and international constituencies. These issues are discussed in more detail in Chapter 4.
- 15 I follow Poggi (1978) in using the term 'internal sovereignty' to describe the development of this internal coherence within the state.
- 16 See, for example, Kelsen (1967) for an outline of these views.
- 17 Another way of looking at this is to view the state as an entity that is functionally increasingly differentiated. Much of the dominant literature in international relations and law perceives the state as an undifferentiated entity.
- 18 For a discussion of central bank independence, which places it in the context of changes in the global political economy see Jayasuriya (1994a); Maxfield (1994, 1997).
- 19 See Stone (1994) for an outline of such an argument.
- 20 See also MacCormick (1993).
- 21 For a survey of these committees see Joerges and Neyer (1997).
- 22 For an exploration of these issues see Joerges (1996).

- 23 For a discussion of the concept of subsidiarity, see MacCormick (1997). Emy (1993) explains subsidiarity as 'delegating responsibility for action or policy to the level deemed most appropriate in society' (p. 212).
- 24 For a consideration of some of these normative differences in the construction of regional groupings see Beeson and Jayasuriya (1998).
- 25 Picciotto's analysis of the legal governance of regulatory cooperation is a pioneering attempt to grapple with some of the major theoretical and empirical issues raised by regulatory cooperation. Zaring's (1998) recent work on international financial organization is also an excellent overview of the implications for international law of regulatory cooperation. Of course, there is an extensive international political economy literature on these issues. See, for example, Underhill (1995) who underlines the importance of network governance.
- 26 See Chayes and Chayes (1993) for an excellent discussion of the notion of compliance. This is an area on which international law needs to focus.
- 27 See Ruggie (1993) for an elaboration of this argument.

#### 4 The changing architecture of the state

- 1 For a survey of this literature in the context of the EU see McGowan and Wallace (1996). On the general notion of the regulatory state see Selznick (1985), Majone (1990).
- 2 Corporatism is used here as a broad category to include liberal and social corporatism (see Katzenstein 1985).
- 3 The literature on corporatism and the developmentalist state is voluminous. The seminal contributions to our understanding of corporatism are by Schmitter (1979), as well as by Katzenstein (1985) who used corporatism as a framework to study the small open economies of Western Europe. For the developmental state literature see Johnson (1982), Wade (1990), and Weiss and Hobson (1995).
- 4 Social democratic political economies depended on a combination of both 'supply side' and distributive policies. However recent contributions by Weiss (1998), and Huber and Stephens (1998) suggest that the crisis of the social democratic model is in part due to greater emphasis on the distributional aspect of these political economies.
- 5 Some of the best discussions of the issues remain with Schmitter and Lehbruch (1979).
- 6 I have discussed these issues at length elsewhere (Jayasuriya 1998b). A focus on globalization in terms of changes in governance rather than merely in terms of the volume and intensity of global trade and capital flows, allows us to move beyond the sterile debate on the extent of globalization (for a survey of these issues see Perraton *et al.* 1997).
- 7 For a useful survey of this literature see Weiss and Hobson (1995).
- 8 Evans (1995) would prefer to call this cooperation rather than coordination.
- 9 Economic constitutionalism refers to the attempt to treat the market as a constitutional order with its own rules, procedures, and institutions that operate to protect the market order from political interference.
- 10 The more comprehensive framework of negative coordination provides a way of incorporating the kinds of regulatory policies that concern

- theorists of reflexive regulation with broader structural changes within the state.
- 11 For a comprehensive overview of the arguments for central bank independence see Lastra (1992).
  - 12 One important area where these arguments have been applied is with regard to nominal wage contracting. See Hall and Franzese (1998).
  - 13 However, their argument for the sources of central bank independence stresses that globalization is just one cause of central bank independence.
  - 14 See Goodman (1991) for an analysis of coalitions that underpin the independence of the Bundesbank.
  - 15 Credit has been a key policy instrument of the Korean developmental state. See Woo (1991) and for more generally on the Korean developmental state see Amsden (1989).
  - 16 These legislative changes were passed by the Korean National Assembly in December 1997.

## **5 Global order and the new ‘post-liberalism of fear’**

- 1 For a review of the effects of globalization on the illicit economy, see Firman and Andreas (1998).
- 2 For recent, somewhat varied, attempts to understand the new forms of risk see Beck (1999), Giddens (1994), and Bauman (2000).
- 3 For an analysis of the new social policies such as workfare in these anti-political terms, see Jayasuriya (2000, 2001c).
- 4 However, it is perhaps better to view this new form of state as a kind of regulatory state which has security – broadly defined – as one of its central components. On the new regulatory state see Jayasuriya (2001a).
- 5 On the interplay of domestic and international policies in the origin of these national security policies, see Freeland (1972).
- 6 See Jayasuriya (2001a, 2001b) for a detailed argument along these lines.
- 7 Clark (1999) presents an excellent account of how holding on to this binary distinction distorts our analysis of globalization.
- 8 For a justification and overview of the new paternalism in social welfare see Mead (1997). Especially important in this defence of the new paternalism is the idea of responsible agency, an idea that informs not only the new political penology but also the new international liberalism of fear. Consider, for example, the governance programs of the World Bank. In this respect at least, it harks back to older notions of ‘police’ analysed above.
- 9 For a flavour of these approaches see Teharanian (1999).
- 10 See, for example, Booth (1997).
- 11 None of this is to dismiss the potential of some version of human security in providing a more political version of security. I have elaborated on some of these issues, using the work of Amartya Sen to develop a capabilities approach to freedom which places domination at the centre of its normative framework (Jayasuriya 2000).
- 12 For a recent excellent analysis of the politics of border control on the US-Mexico border, see Andreas (2000). This work draws attention to the symbolic assertion of border control signified by the use of a highly punitive law and order approach to border control.

- 13 Indeed rather provocatively, Tamas (2000) calls this a new kind of post-fascism.
- 14 See for example, Wilson and Harrenstein (1986).
- 15 For a good overview of the rise of specialized agencies and networks of regulatory agencies, see Slaughter (1997).



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