

Review Essay

THE SPIRIT OF THE LAWS: REPUBLICANISM AND THE UNFINISHED PROJECT OF MODERNITY, by Andrew Fraser, University of Toronto Press, Toronto 1990 (i-xiv; 1-455) ISBN 0 8020 5836 1

RICHARD CULLEN*

Introduction

This is quite a remarkable book. I will explain why shortly. Before I do that however, I should say a little about my approach to reviewing this book.

Andrew Fraser has written a dense and demanding book which draws on many years of scholarship in legal and socio-political philosophy. This is not my background. Andrew Fraser also has a strong, indeed a passionate interest, in constitutional law. I share that vigorous interest. My interest derives from a conviction about the practical and fundamental relevance of constitutional law to our day-to-day lives. My research and teaching are not "black-letter". They might be termed applied constitutionalism, or dare I say it, rational constitutionalism.

Through this rationalist approach to constitutional study I have developed a keen interest in the comparative study of political structures.¹ One of the reasons I agreed to review this book is that it has a comparative slant. In particular, Fraser spends a lot of time discussing the history and operation of the classical federal systems in Canada and Australia and also in the United States.²

I have enjoyed reviewing the book. I am sure it will be reviewed by others whose backgrounds more closely resonate with Fraser's. In particular, as Fraser spends a considerable time taking the Critical Legal Scholarship (CLS) movement to task, it should be reviewed by somebody with a strong background in CLS in due course.

My views coincide with Fraser's at one important level. I endorse his exhortation that constitutional scholars in Australia and Canada (and elsewhere) need to move beyond their accustomed role. We can, he says, "no longer limit ourselves to the task of either disguising or bewailing the incoherence of constitutional doctrine."³

* LLB (Hons) (Melbourne); DJur (Osgoode Hall, Toronto). Director, Comparative Public Policy Research Unit, Monash University. Senior Lecturer in Law, Monash University, Melbourne, Australia. I would like to thank my colleague, Dr Andrew Goldsmith for his help during discussions about this review. The views expressed remain my own, of course.

1. Recent written work includes: *Federalism in Action: The Australian and Canadian Offshore Disputes* (1990), "Adaptive Federalism in Belgium" (1990) 13 *UNSWLJ* 346-358, "Australian Federalism: Its Provenance and Its Prognosis" (Häberle ed) *Jahrbuch des Öffentlichen Rechts*, (1991).

2. Fraser would not, I think, regard any of these systems as being truly federal.

3. Fraser, A, *The Spirit of the Laws* (1990) at 341.

In Fraser's view the new task to which constitutional scholars should apply themselves is the development of a modernised republican scheme of political architecture which seeks to preserve the achievements of political discourse to date whilst escaping its many traps. My prescription is less clear. But I am completely of the view that we need, in Australia, to engage in constitutional discussion of a much more adventurous sort than has hitherto been the case. Indeed the discourse at the time of the development of a current constitution was far more adventurous for its time than today. I am not under-valuing the worth of achievements coming from the ad hoc incremental style of discourse with which we have become so familiar. But it is only part of the project of constitutional renewal required in Australia. I have written elsewhere about these matters.⁴

Conspectus of the book

The book should be widely read. It has a central argument worthy of deep consideration even if, like me, you remain sceptical about its principal prescription. My understanding of that prescription is that Fraser is arguing, albeit cautiously, for the establishment in Canada and Australia (and probably beyond) of what he calls a civic republic. This would be a modern version of what he refers to as classical republicanism. Such a republic which would be federal in nature and which would place real responsibility and authority in the hands of a wide range of groups (or, as he calls them, little republics) embedded within a nation state. The nation state would still exist but in a significantly attenuated form.⁵

I suspect that the book will mostly be read by specialists. I found it demanding and indeed, initially, difficult to read. The structure is complex. Sentences are long. You need a dictionary of political philosophy as well as a good standard dictionary handy. My first impression was that I had encountered a text suffering a severe case of "jargonitis". My initial reaction was partly misplaced. The complex writing style serves a purpose other than to display verbal pyrotechnics or to frighten off the timid reader. Nevertheless the writing style in Part 1 of the book is intimidating. Fraser becomes more brisk later (particularly when dealing with the works of others).

The book does make assumptions, perhaps unconsciously, about the knowledge and perceptions which the reader will bring to the book. In the case of a reader like myself, with a limited exposure to the background literature, this presents problems. I must say, however, that as my reading progressed my initial feelings of alienation diminished: I got used to the style and grew accustomed to the terminology.

4 Article in *Business Victoria*. Cullen, R, "The Story of Australian Federalism" (1991) 67 (12) *Current Affairs Bulletin* 15; Cullen, R, "It's time for Constitutional Change" (1991) 1 (4) *Business Victoria* 12.

5 The nature of civic republicanism is discussed further below.

Structure and fundamental arguments of the book

The book is divided into three parts. Part One is entitled *Genesis: Classical Republicanism and Westminster Constitutionalism*. Part Two is entitled *Decline: Civic Federalism and the American Republic* and Part Three is entitled *Renewal: Constitutional Reformation of the British Dominions*.

In Part One Fraser makes it quite clear (and he repeats this point throughout the book) that we are mistaken if we think that the monarchical⁶ form of government in Canada and Australia is nothing more than a matter of form. At its worst, Fraser argues that the monarchical structure serves as a splendid, quasi-legitimizing device for the imposition of modern despotic government. The monarchical form of government embodies the political idea, in Canada and Australia, that nation-state sovereignty resides within the Crown. The Crown in turn stands for the sovereign as such but, more importantly, it is the constitutional embodiment of the government in and out of Parliament.

Fraser argues powerfully that the pre-eminent force shaping our political architecture is our entrenched, economic system. This self-determining system may be traced back to the beginnings of the modern industrial era in western Europe. Concomitant with the rise of capitalism and the division of labour a system of needs emerged which provided the dynamic requirement for national growth.⁷ At this time, we first saw the beginnings of a leap in general material abundance. More importantly, this growth in material wealth was perceived as providing the answers to the human dilemma. It is fair to say that we still see this as the principal solution to most problems on the planet. We now have recognised some difficulties associated with producing the abundance. But that has not destroyed our faith in the fundamental principle.

Fraser goes on to argue that legal theorists such as Bentham and Austin recognised that society in general had a developed perception of needs and this in turn was leading to greater discordance within civil society. Hence, the role of government was to apply the principle of utility to meet these needs for the greatest number. As Fraser says, once this imperative is recognised, it becomes difficult to conceive of a social contract existing between society and those who govern it. The real test is not the contract or its validity. Legitimacy for a given government is going to arise as a result of its success in addressing needs; the test is teleological. It follows from this that enlightened, despotic government which addresses those needs effectively is to be preferred to rulers acting pursuant to some sort of social contract who are unable to address those needs as effectively.

This analysis leads to Fraser's principal argument about the fundamental incoherence of Westminster constitutionalism (and indeed many other forms of constitutionalism). The Westminster constitutional system arose from a desire, *inter alia*, to reduce the despotic powers of the monarch. Thus the monarch, in her own right, was reduced to a person subject to the control of Parliament. Real power moved to Parliament and ultimately to the

6 Throughout the book Fraser uses the term monarchical. Monarchical is an alternative spelling (as is monarchial see *Chambers English Dictionary*, (1988)).

7 Fraser, at 29.

government in Parliament. Thus constitutional-monarchy was envisaged as a despot-controlling system. However, the economic system which has developed from what we know as industrial revolution has created a culture which craves for abundance (a system of needs). Modern despotic government, disguised as constitutional representative government, has emerged as the means by which we seem best able to meet those needs. Our constitutional form is thus designed to protect us from despotism. At the same time our politico-economic substance encourages despotism in its modern form for the purposes of creating greater abundance.

It will come as no surprise to learn that Fraser is an enemy of big government. Like many of those on the Left who share very serious concerns about the role of the state in society he finds himself in company with advocates of small government from the Right. The crucial difference is, of course, that almost invariably those advocating small government on the Right have an obsession with protecting property rights from the encroachment of a re-distributive government. Those enemies of big government on the Left are much more concerned with the destructive effect of pervasive, interfering government in the private development of individual potentialities. Indeed, those on the Left foresee a re-distribution of property and mechanisms for maintaining a more equitable distribution as being fundamental to any of their schemes specifying small government. Fraser also subscribes to this view.

Part Two of the book tends to concentrate on the American experiment with republicanism. Fraser makes the point the USA cannot be considered to be a true republic, although there was potential for this to occur in its developmental phase. The economic developmental logic referred to above, the preoccupation with the production of abundance, the economics of growth and the accumulation of private wealth and property all helped crucify any chance of real civic republicanism developing in the United States. Thus he sees no difference in substance between the British monarchical system and the "elective kingship" of the United States or the French "nuclear monarchy".⁸

Part Three is the Part devoted to renewal. If you come to it looking for a detailed discussion of how a new civic republic would look, how it might develop, what are the strategies for its implementation and how it might be managed you will be disappointed. These matters are dealt with but not in any detailed way. Part Three is really more of a continuation of the argument as to why we need to adopt a modern civic republic. And the arguments continue to be couched in largely negative terms. That is, the critical evaluation of our experience in the development of political structures to date continues. Even Chapter six in Part Three, *The Idea of a Perfect Commonwealth: Critical Theory and The Political Architecture of Federalism*, follows this pattern. Prescription is always the difficult task is it not!

Fraser is deeply hostile to all forms of what he calls hierocratic government. Australia and Canada's long distance monarchies fall squarely into this category. This monarchical form of government lends itself to the

8 Id at 39.

legitimation of modern, despotic big government particularly because of the myths of Westminster constitutionalism. The sovereign is the repository of all sovereign power but that power, in actuality, is meant to be distributed to other than the sovereign through a representative democratic system. At the end of the day Fraser sees that representative system as being, at best, a semi-facade. Modern despotism thrives behind this facade as it attempts to meet the challenges of the "divine economy". This is the term Fraser uses to capture the idea of the modern corporate-welfare state nourished by a system of needs which knows no bounds and has developed an appetite for a life of abundance.⁹ Here, he says, is a community which seems perpetually in danger of collapsing into the nightmarish reality of the totally administered society.¹⁰

As noted above, Fraser laments the failure in the new Republic of the United States to establish an alternative model or paradigm. He quotes the American historian Charles Beard, an early organiser of the new School for Social Research in New York. Beard launched a scathing attack on the myths of republican government in the United States in one of his best known works, *An Economic Interpretation of the Constitution*¹¹ first issued in 1913. The constitution, for Beard was a device driven by the concern to protect dominant economic interests. It existed only nominally as a republican instrument to operate on behalf of the people.

Fraser then moves fairly swiftly across time in his review of American constitutional jurisprudence to the contributions of the CLS movement. He also looks at the work of CLS in Canada. In particular, he concentrates on the work of Roberto Unger in the United States and of Patrick Monahan in Canada. He finds the contribution of CLS to constitutionalism fatally flawed. What is the problem? Ultimately, Fraser argues that contemporary American radicals are now urging their fellow citizens to adopt a new scheme of modern despotism designed to promote a revitalised society of perpetual growth.¹² Moreover, their insistence on moving towards a structure-free-structure, to a contingent society where no set of civic or institutional arrangements can be immunised against the possibility of fundamental revision offends Fraser's strong vision of the need for institutional stability.

He notes that Unger does not argue for a continuation of the private wealth accumulation syndrome of the mainstream capitalist era. Unger's answer, according to Fraser, is to produce a rotating fund of social capital and open up access to it to a wide range of interests which could indulge in all sorts of innovation and experimentation. Fraser attacks with vigour the CLS lack of structure and preoccupation with contingency. He is hostile to the radical agenda which rejects the authority of law.¹³

The author devotes considerable time to discussing the work of Patrick Monahan. Again there is the argument that CLS, and Monahan in particular,

9 Id at 31.

10 Id at 30.

11 Beard, C A, *An Economic Interpretation of the Constitution of the United States* (1956).

12 Fraser, at 219.

13 Id at 228.

reads contingency not as a fact of life to be overcome by virtuous action but rather as the very essence of the life process of society.¹⁴ Fraser argues that Monahan, like Unger, sees law as merely frozen politics.¹⁵

The argument progresses as follows:

Political life, in Monahan's view, should be liberated from the ideological constraints imposed by the invented narrative traditions of permanence, stability, and consensus. The experience of politics, he claims, is "again a journey without a destination . . . the journey is the destination". Like Unger, Monahan believes that society should be "cracked open to politics" so that the terms of our collective existence are permanently thrown up for grabs.

For Monahan, Fraser argues, federalism has nothing to do with dissipating power amongst civil associations formed for some good purpose. The society of perpetual growth requires political architecture which simply gives expression to current existing cleavages. So that the federal society merely follows the contours, as Fraser puts it, of the current distribution of power. This Fraser argues, collapses the distinction between state and civil society.¹⁶

At the end of the day, the divine economy dictates all. It even dictates to radical constitutional scholars. It dictates the nature of the political architecture. That architecture must follow the commands of the divine economy. Society and its institutions no longer have a separate, pre-existence. The demands of a scheme of perpetual growth ultimately stipulate the shape of the state and of the society. There are no intrinsic or ontological institutions. There are just needs or the teleological requirement of growth for its own sake.

A prescription for the future: civic republicanism

Fraser's "trashing" of the CLS project on constitutional (and societal) reform is not all the book is about. It moves beyond that. It proffers, as an alternative, Fraser's world of the modern civic republic. The proposed new civic republic attempts to avoid many of the dangers and failings of our progress to date in developing different systems of political architecture.

Ultimately, however, Fraser provides only very limited answers to fundamental questions. How would a civic republic work in the 21st century using as its base material, societies imbued with long histories not attuned to this style of social and political organisation? How does one begin to introduce or make the transition to such an arrangement? These questions are touched upon. They are not really dealt with.

In the first place Fraser is very cautious in his advocacy of this new order. As is the experience with most serious analysts, once you have turned the blow torch on alternative proposals you become wary about the worth and durability of your own. Accordingly, throughout the book, Fraser says that his civic republic "could" work or it "might" open the way to improvement and so on. This hesitancy carries through into the ultimate conclusion. On the

14 Id at 277.

15 Id at 279.

16 Id at 280.

final page, Fraser, after again attacking the CLS movement (for giving in to a life to be shaped and reshaped by the aimless expansion of a disembodied system of needs) asserts, in the final sentence of the book, that, by trying the civic republic route

We might at long last build into the institutional matrices of a self-assertive civil society, practices of authority that actually work to honour the promise of liberty, equality and fraternity, once held out by the enlightened champions of modernity.¹⁷

As to the shape of civic republicanism, some things are clear from the book. First, although it is not clear what its precise form would be, Fraser is strongly of the belief that firm institutional structures constitutionally protected are crucial. He flatly rejects the contingency principle. He says that the future of constitutional freedom may depend upon our will to continue the quest for the institutional pre-conditions of the good and just life. He sees the shape of this constitutional structure arising from judicially articulated, common law of political association.¹⁸ We are talking here of some sort of common law constitutionalism arising from below.

Fraser also sees a highly revitalised role for the corporate entity, the commercial corporate entity with which we are so familiar. It would be freed from its preoccupation with profits and wealth accumulation and would be developed so as to focus on producing, in its own way, "the good and just life" (to use Fraser's term) for those associated with it. Corporations and other groupings in society would form (again to use Fraser's term) "little republics". Within this multitude of little republics participants would pool resources,¹⁹ it seems, to overcome material constraints currently placed on people because of their lack of access to economic power. They would then work for the good and just life exercising authority with a self-referential sense of responsibility. Within the civic republic the nation state would still have a place but a greatly attenuated one. Much of the decision-making activity would devolve to the little republics. There would be two levels of public life. One at the little republic level and another at the nation-state level.

Fraser is also most insistent on the need for a private sphere of life beyond the control of or intrusion by the public sphere. He spends some time explaining the need for people to have a secure refuge away from any prying eyes. In explaining the operation of this private sphere or space he uses the example of the need for such space for the successful operation of inter-personalrelations.²⁰ Thus we would have fixed and stable, public places in which people were to operate and live their lives. These would be a multitude of regionalised or widely distributed spaces plus a much weakened national state. Then there would be guaranteed private spheres. This is the antidote to modern despotism; a dispersal of power balanced in this way.

Within the little republics, however, reliance is placed on what seems a wishful belief. Fraser wants/expects a consensus to emerge about what makes the good and just life and how it might be achieved. This assumes that we will

17 Id at 375.

18 Id at 355.

19 Id at 359.

20 Id at 363-366.

have or can develop widespread senses of prudence, responsibility and tolerance throughout society or at least across a wide spectrum of it. Fraser also seems to envisage hierarchies emerging within the little republics so that those most able to provide direction will tend to do so.

The fundamental organisational principle underlying this arrangement would be federalism. This is the kind of federalism which goes well beyond being a shifting distributor of power depending on current successes or failures in the divine economy. This is a federalism which locks into place a structure designed as a bulwark against despotism. This is a federalism which establishes institutions meant to draw us away from the politics of mindless and endless growth.

Some specific comments

I have reserved my more general comments about the book for the Conclusion. I do have a number of specific comments of a somewhat disparate nature to make, however. First, I found some discussions of constitutional law less than compelling. For instance, when speaking about the experience with the referendums and plebiscites in Australia and Canada Fraser presumes that referendums held within the Australian States would be of no more than advisory significance.²¹ I think most constitutional scholars in Australia would say that the case of *Attorney-General (NSW) v Trethowan*²² in 1931 established that the referendum procedure considered in that case validly added the electorate as an element in the constitution of the legislature for certain law making purposes.²³

The book has not been as well proof-read. The first typo occurs within the fourth line of the first page of the Preface. The typos are not particularly bad but they occur throughout the book; to the very end. For example, the running head on the Subject Index is wrongly shown as Name Index.

I was a little surprised, given the nature of the civic republic sketched out by Fraser, that there was not some interwoven discussion of the literature on political structures (including federal structures) discussed at various times by anarchist, anarcho-syndicalist and related, radical-Federal writers. Fraser does refer to Proudhon in a footnote noting that an English translation of his work recently has become available.²⁴

Another aspect of the work I found a little curious was its focus on Canadian, Australian, United States and, to a lesser extent, British constitutionalism. I can see the Anglo thread running through this but I didn't come away from the book feeling it had been explained why the book was focussed in this way. I think a case can be made out for so concentrating but if that case was made out in the book explicitly then I am afraid I missed it.

One other point which bothered me was that, although Fraser makes powerful arguments against the politics of mindless abundance and growth

21 Id at 370.

22 (1931) 44 CLR 394.

23 See for example, Hanks, P J, *Constitutional Law in Australia* (1991), 89.

24 See note 82 at 438. The book is: Proudhon, P J, *The Principle of Federation* (Translated and introduced by Richard Vernon, 1979).

for its own sake he does not discuss the corollaries. In particular, I see a strong connection between his arguments and the growing concerns about our overuse of and abuse of the resources of this planet. I would have liked to have seen some linkage developed between the criticism of the politics of excessive abundance and the development of a new ethos of self-restraint in consumption.

A couple of final quibbles. The book has no bibliography and I found that regrettable. I would have referred to it whilst I was reviewing it and indeed certainly would have found it useful for future reading. This is disappointing because it is clear that Fraser has consulted a rich variety of sources. My other concern with reading the book resulted from the style of notes to the text. These are all collected together at the end of the book. Personally I much prefer to have notes on each page. Time and again I found myself having trouble tracking down footnotes then finding my way back to the text. Moving between the two in a book like this is not easy. It makes for frustrating reading. At the end of the day my copy was festooned with copious yellow post-its in order to try and manage this task.

Conclusion

I said at the outset that this is a remarkable book. It is, also, overall, an optimistic book. It is energetically and, at times, passionately, written. It is a stimulating book and certainly opens up a wide range of issues to consider.

Disappointing aspects of the book occur on a couple of levels. First, it is difficult to get into. Particularly for one not well exposed to the background literature. I found the writing style dense, wordy and heavily reliant on complex terms. There were a number of undefined such terms which one had to seek out where one could.

At a substantive level, I think the book fails to do justice to Fraser's prescription for reform. The discussion of new civic republicanism is very sketchy. One of the important facilitating components of his new scheme is highly problematic. Are we remotely close to having the wide cross-section of persons willing to participate in the little republics? Persons possessed of some sort of shared vision of a just and good life and prepared to behave within those little republics with self-restraint and selflessness. In other words, willing to exercise authority with a highly developed sense of social or civic responsibility. I see little evidence of this on the scale which Fraser's scheme seems to require. Indeed, it is interesting that in the Preface Fraser mentions his participation, along with colleagues and students, in the experience of a little republic struggling to be born at the School of Law at Macquarie University.²⁵ The difficulties with that project are well documented. It appears to have been a painful and difficult process.

Overall, this is a book that surprised me. I was intimidated by it at the outset. Yet it proved to be an excellent experience reading it. We have debased the term thought-provoking by overuse. I have contributed to this. I regret having done so now because that genuinely is what Fraser's book is. I look forward to further debate on *The Spirit of the Laws*.

25 Fraser at xiv.