



INTERNATIONAL LAW AND THE MAKING OF THE MODERN STATE: REFLECTIONS ON A PROTESTANT PROJECT⁺

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I. Introduction

The theme of this special issue – “in search of authority, rebellion and action” – invites us to rethink our relations to law. Critical scholarship involves a performance of the critic’s relation to an object of study. At stake in that performance for the critical legal scholar are the questions of what we want from authority, what we want from rebellion and what we want from action. The focus of this special issue on this aspect of critical work seems both timely and productive. This is because a pervasive uneasiness about the legitimacy and authority of power, particularly state power, informs the contemporary study of law. The writings of Martin Luther and John Calvin inaugurated a debate about the relation between the liberty of the Christian subject and the lawfulness of civil authority that has not yet ended. In the early modern period, Hobbes sought to resolve the Protestant problematic of freedom and authority, through suggesting that equals in the state of nature could covenant to create a common power. That common power would exist to procure the safety and welfare of the population. The individual was left with the freedom to determine when the conditions of the

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covenant had been breached. In the eighteenth century, the project of perfecting the state form and so guaranteeing the freedom of the individual was taken up in the political theory of Kant. Kant placed greater emphasis on the voluntary nature of submission to state authority, but in so doing argued for a greater limitation on the freedom of the individual to resist that authority. For Kant, the project of constraining the form of the state was linked with international and cosmopolitan right. Today, as this article will suggest, that project of perfecting the form of the modern state is at the heart of the theory and practice of international law.

II. Hobbes, Protestantism and the modern state

The modern state is often represented as the successful realisation of a project of secularism, where secularism is understood in opposition to theology (Goldie 1987: 200). For some, this is seen to be a good thing – the secular state offers a means for avoiding the conflict produced when people seek to ground authority and law on competing religious confessions or private beliefs. For others, it is precisely this amoral quality of the state that requires the transcendence of state law – whether through bringing into being a new cosmopolitan law that can truly represent the interests of our common humanity, or through the creation of a law that manifests Christian or Islamic faith. Yet for the early advocates of the modern state as a form of political authority, the political and the theological were not so easily separated. The work of Thomas Hobbes is emblematic of the ways in which state theory has involved the juridical working through of secularism as a protestant project.

Before looking at the ways in which Hobbes' *Leviathan* can be understood as a protestant vision of the state, it is perhaps worth noting the ways in which Hobbes did offer a challenge to ecclesiastical authority and jurisdiction. *Leviathan* is an argument for privileging the *de facto* authority of states over the claims to *de jure* authority made by the Pope and the Holy Roman Emperor (Orford 2009a). According to Hobbes, the creation of political order depended upon the establishment of a common power – a commonwealth. The authority of such an earthly power would be grounded on its capacity to guarantee protection to its subjects. In that sense,

Hobbes' model opposed the arguments of a medieval jurist like Bartolus, who had sought to show that the Roman emperor was lord of all the world as a matter of right, even if the emperor had no control over particular territories as a matter of empirical fact (Fasolt 2004). Hobbes resisted the idea of a universal jurisdiction in space and time that was the hallmark of ecclesiastical law. In addition, *Leviathan* represented a challenge to the idea that two masters could co-exist within the state – one representing civil and one representing ecclesiastical jurisdiction. Hobbes explicitly opposed the idea that there existed a kind of 'ghostly authority' that could undermine the authority of the state. Thus for Hobbes, as for many political theorists writing after Luther and Calvin, the theory of the modern state was a challenge to the claim of the church to represent the fusion of civil and ecclesiastical authority.

However, rather than understanding Hobbes as a thinker who inaugurates the jurisdictional *separation* of civil and ecclesiastical authority, he is better understood as giving expression to an egalitarian universalisation of the notion that there can be a worldly representative of Godly authority. Hobbes accepted the argument made by Protestant reformists – that 'the kingdom of God is not yet come' in this world and that as a result there is no worldly representative of God in the form of an individual or an institution (Hobbes 1651: 405). His model of the commonwealth gave expression to that vision. Yet while Hobbes was concerned to develop the idea of the secular commonwealth, secularisation here should be understood as a protestant project. As Mark Goldie argues:

... secularisation was an evangelical pursuit, it was the working out of a central idea in the thought of the Reformers, the "priesthood of all believers". Where the medieval church hypostatized priesthood in a particular class, the Reformers universalised it. Where the "false religion" of medieval popery invested the means of sanctification in particular persons, practices and material objects, "true religion" discovered sanctification in the conduct of ordinary human relations (Goldie 1987: 200).

The model developed by Hobbes can thus be understood as a response to the challenge posed by the Protestant reformists to worldly authority. Protestants challenged papal authority with

the argument that there was no '*humanly available presence of the authorizing deity*' (Strong 1993: 157). God could be known only through Scripture – not through the Pope or through priests, but through the written word that was available to the priesthood of all believers. Just as for the Protestant reformists there was no '*humanly available presence of the authorizing deity*', so too for Hobbes there was no humanly available presence of the authorizing creator(s) of the commonwealth. The intentions of the authors of the Commonwealth could be known only through their representative, the sovereign. How then to recognize the representative of the sovereign?

According to Hobbes, the sovereign is the one who achieves protection in the broad sense of bringing into being a condition in which the safety of the people is procured as obliged by natural law.

The office of the sovereign, (be it a monarch or an assembly,) consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of *the safety of the people*, to which he is obliged by the law of nature ... [B]y safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself (Hobbes 1651: 222).

The sovereign, in other words, is the one procuring the safety of the people in conformity with the terms of the covenant, that is, as sovereign by right. For Hobbes, the sovereign will be recognizable as such only to the extent that it governs in accordance with the covenant (Dyzenhaus 2008).

Hobbes' choice of the covenant as the vehicle through which subjects would bring a common power into being was central to this sense that sovereign authority was constrained. The political crisis of the civil war had brought into 'explosive contact' the covenant theology of Protestants such as John Preston, and the voluntarist or contractualist accounts of natural law such as that developed by Grotius in his *De jure belli ac pacis* (Kahn 2004). The result was a widespread debate about political obligation couched in the twinned languages of covenant

and contract. For the inhabitants of seventeenth-century England, and for Europe more generally, 'the subject's duty when two or more legitimate authorities were competing to claim his allegiances at the sword's point' had become a live question (Pocock 1992: xiv). Ideas drawn from covenant theology and from natural law theories were relevant to the resolution of this question. The Engagement controversy of 1650 gives a good example of this. In the aftermath of the execution of Charles I, the abolition of the monarchy and the House of Lords and the creation of the Commonwealth of England, the Parliament passed an act on 2 January 1650 requiring all adult men to 'declare and promise' that they would be 'true and faithful to the Commonwealth of England, as it is now established, without a King or House of Lords' (Gardiner 1906: 391). For many Englishmen, the question of whether to take this Engagement required them both to make a judgment about the legitimacy of *de facto* authority and to resolve whether in good conscience they could swear an oath which seemed to violate previous obligations (Vallance 2001: 59). The Engagement controversy thus raised a question of private conscience for those who had sworn oaths to earlier rulers. For Anglicans, it raised the question of whether the Engagement was compatible with the oath of allegiance, by which they had promised to defend the king and his successors 'to the uttermost of my power against all conspiracies and attempts whatsoever' (Burgess 1986: 516). For Presbyterians the issue was whether this new oath was compatible with the Solemn League and Covenant of September 1643, by which they had promised to defend 'the King's Majesty's person and authority, in the preservation and defence of the true religion and liberties of the kingdoms' (Vallance 2001: 66). The practice of requiring oaths or covenants of obedience was a well-established one during the wars of religion, and had led to the growth of an accompanying tradition of moral theology that sought to explain how and why such oaths might be conditional. This tradition was mobilized in England during the Engagement controversy. Pamphleteers and divines argued that it was possible to subscribe to the Engagement and swear an oath to the commonwealth, meaning by the commonwealth not existing authority but rather the English nation (Burgess 1986: 516). Or perhaps, as one pamphleteer argued, the earlier Solemn League and Covenant was no longer binding, because it had been conditional upon the King's continued 'preservation and defence of the true religion and liberties of the kingdoms'? (Vallance 2001: 66)

It is that sense of a conditional authority that Hobbes invokes in his use of the covenant in *Leviathan*. According to Hobbes, '[t]he obligation of subjects to the sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them' (Hobbes 1651: 147). The frightening power of *Leviathan*, 'that *Mortal God*' (Hobbes 1651: 114), is constrained by the telos of the covenant. The sovereign represents the unified will of the people, but that will is constrained by the terms for which the sovereign was created – its representatives cannot act in their own private interest or declare war against the people. Nonetheless, the power of the sovereign is absolute, and the subject has no right to resist that which he has covenanted to create – 'in the act of our *submission*, consisteth both our *obligation*, and our *liberty*' (Hobbes 1651: 144). It is through the claim to represent a general interest or a common wealth that the state will continue to confront the individual 'as a priority and as a *demand*' – in particular, as a demand for obedience (Marcuse 1936: 43). Hobbes makes very clear the tension between authority and freedom that is embodied in the form of the state.

III. Kant and the state of right

Kant is often represented as a thinker who rejects the absolutist power of the state and champions individual freedom and cosmopolitan right. Yet in many ways Kant's state theory is more absolutist than that articulated in *Leviathan*. Like Hobbes, Kant sees the state as existing to protect individuals from the state of war or state of nature. Like Hobbes, Kant argues that property and security are only possible in the civil state. Like Hobbes, Kant sees the collective or general nature of the state as the source of its legitimate right to limit the freedom of the individual. Kant appears to be more troubled by the tension between state authority and individual freedom than was Hobbes. Kant's way of dealing with this is to argue for the rational nature of the limitations on freedom. For Kant, like Hobbes, a fundamental principle of 'moral-practical reason' is: '*There shall be no war*, either between individual human beings in the state of nature, or between separate states' (Kant 1797: 174).

Thus it is no longer a question of whether perpetual peace is really possible or not, or whether we are not perhaps mistaken in our theoretical judgment if we

assume that it is. On the contrary, we must simply act as if it really could come about (which is perhaps impossible), and turn our efforts towards realizing it and towards establishing that constitution which seems most suitable for this purpose (Kant 1797: 174).

As this passage illustrates, where Kant differs from Hobbes is through his turn to internal reason rather than to words and covenants as the foundation of the state of right. For Kant, obedience to authority is not conditional upon that authority acting within the terms of a covenant by which it was created. Rather, the relation of sovereign and citizen is 'an *idea* of reason' (Kant 1792: 79). With this move, we can see 'a marked shift in the weight of authority towards its free recognition by the autonomous individual, and this means that the structure of authority has become rational' (Marcuse 1936: 40). Yet precisely because Kant understood subjection as voluntarily assumed and the structure of authority as rational, he set up 'correspondingly stronger' prohibitions 'within the legal order itself against the destruction of the authority relationship' (Marcuse 1936: 40). Kant was very clear that the citizen owed total obedience to the state. The supreme power was constituted in order to secure '*the rightful state*, especially against external enemies of the people' (Kant 1792: 80). In contrast to Hobbes, Kant argued that if the supreme power 'makes laws which are primarily directed towards happiness (the affluence of the citizens, increased population etc.)', that should not be mistaken as 'the end for which a civil constitution was established' (Kant 1792: 80). 'The aim is not, as it were, to make the people happy against its will, but only to ensure its continued existence as a commonwealth' (Kant 1792: 80). It follows from this counter-revolutionary reasoning that 'all resistance against the supreme legislative power, all incitement of the subjects to violent expressions of discontent, all defiance which breaks out into rebellion, is the greatest and most punishable crime in a commonwealth, for it destroys its very foundations' (Kant 1792: 81). It is the general interest which justifies the overriding of individual freedom: there can 'be no rightful resistance on the part of the people', because 'a state of right becomes possible only through submission' to the 'universal general will' (Kant 1797: 144).

It is in these ways that the modern state is the inheritor of the religious foundations of European law and authority (Orford 2009b). In early modern Europe, no state could have

commanded the unquestioned obedience that states take for granted today (Post 1964). That kind of obedience, to the extent that it was owed, was owed to God. By the eighteenth century, Europe had witnessed the shift of authority from God and his worldly representatives to the State. Thus Kant could argue in 1797 that we should act as if certain things were true if to do so would help to move us towards the civil state, and that one of the things we should treat as if true is that 'all authority comes from God' ((Kant 1797: 143). Not long afterwards, Hegel in turn would assert that 'man must ... venerate the state as a secular deity' (Hegel 1952: 285).

Kant did perceive some limits to the authority of the state. The limits on the authority of the state that for Hobbes arise out of the covenant, for Kant arise out of the society in which the state exists. Kant's principles of international and cosmopolitan right embody the constraints on state action. According to Kant, the state exists as one of three interrelated forms of public right. The first form of public right is the state or the commonwealth, which is the name given to the 'condition in which the individual members of a people' each having abandoned 'the state of nature' agree 'to live in a state of right under a unifying will' (Kant 1797: 137). The second form of right is international right, which Kant envisaged as the 'right of *states* in relation to one another' (Kant 1797: 164-5). International right is directed towards regulating resort to war, the conduct of war, and peacemaking, with the aim of making it possible for states to abandon the state of nature in their external relations. The third form of right for Kant was cosmopolitan right, which derived from the fact that 'the earth's surface is not infinite but limited' (Kant 1797: 137). Just as the common interest precedes individual property in the context of the state, so too all nations should be understood as '*originally* members of a community of the land' (Kant 1797: 172). This is a community premised upon 'reciprocal action (*commercium*)' (Kant 1797: 172). It follows from this common interest that States must not limit the capacity of people to 'have commerce with the rest' (Kant 1797: 172). This right to commerce was enshrined as one of Kant's principles of perpetual peace: 'the right of a stranger not to be treated with hostility when he arrives on someone else's territory' (Kant 1795: 105). According to Kant, these three forms of right depend upon each other for their existence: 'if even only one of these three possible forms of rightful state lacks a principle which limits external freedom by means of laws, the structure of all the rest must inevitably be undermined and finally collapse' (Kant 1797: 137). It is international and cosmopolitan right

(rather than the form of the covenant) that impose constraints on the will of the state. The goal of the system of intersecting forms of political, international and cosmopolitan right is to preserve and secure the freedom of each state (Kant 1795: 104).

In turn, Europe must perfect the form of the state through the 'regular process of improvement in the political constitutions of our continent'. Indeed, Europe 'will probably legislate eventually for all other continents' (Kant 1784: 52). Yet despite commenting upon the probability that Europe would come to legislate for the rest of the world, Kant remained uneasy about the possibility of one world sovereign being created. He recognised the undesirability of centralising power in such a way. According to Kant:

The idea of international right presupposes the separate existence of many independent adjoining states. And such a state of affairs is essentially a state of war, unless there is a federal union to prevent hostilities breaking out. But in the light of the idea of reason, this state is still to be preferred to an amalgamation of the separate nations under a single power which has overruled the rest and created a universal monarchy. For the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy (Kant 1795: 113).

It was those two aspects of Kant's political theory – the role of international and cosmopolitan right in limiting the will of the state, and the possibility that Europeans may become the reluctant legislators for all humanity – that would be taken up more broadly in nineteenth-century international law.

IV. International law and the state

It was in the nineteenth-century, with the emergence of the international legal profession, that the determination of the proper ends and limits of protection, or the constraint of the will of the state, began to be treated as an international project (Koskenniemi 2002). Already for

Hobbes, the will of the state was limited by its purpose – to guarantee protection and safety for its people. In the writings of nineteenth-century international lawyers, the constraint of the will of the state became a function of international law and the condition of a society of states (Koskenniemi 2007). From that period onwards, international lawyers would see it as their task to criticize and limit the absolutism of state power. Much of international law since the beginning of the twentieth-century has been concerned with constraining and perfecting the state. States have negotiated treaties, charters and covenants that seek to regulate the use of force by states externally and internally, to impose constraints on the uses of territory to harbor terrorist activity or pollute the environment, and to specify policy settings that states can adopt in areas ranging from intellectual property protection through to health and safety regulations. In addition, the perfection of the Third World state through peace-building and international administration in the aftermath of civil war has formed a major part of the work of the United Nations. Yet while international lawyers may at times see themselves as the representatives of a civilized conscience or shared sensibility that transcends the state, they still rely upon the state as the vehicle through which this universal law is to find expression. The international order brought into being through international law still depends upon state power. States are the authors of international law, whether as negotiators of treaties or as generators of customary practice. States are the agents of coercion, whether through collective security mechanisms or resort to force in self-defence or as counter-measures. States are the creators of courts and the implementers of international obligations domestically.

The centrality of the state to international law presents a particular paradox in those areas of international law concerned to constrain the will of the state in its treatment of individuals. For example, those lawyers who espouse the importance of treaties dealing with human rights, refugee protection or genocide prevention do so in the language of a modern positivism that accepts the authority of the state as a sociological fact. Underpinning the legal recognition of the modern state as the *de facto* authority in the international system is the question of why this fact has a normative value. That question is no longer addressed in most accounts of the validity of international law. It is as if positive international law, like other forms of modern law, can no longer give an account of its own authority or even 'articulate the terms of its own existence' (Dorsett and McVeigh 2007: 3). Instead, international law becomes caught up in the

practice of statecraft (Orford 2006; Orford 2009b). The aim of modern treaties dealing with human rights or refugee protection is to find a way to reconcile the authority of the state and the autonomy of the individual. In the end, the reports of human rights or refugee lawyers shadow the state and adopt its language and perspectives. Rights as declared in treaties and international covenants are not absolute, but can be limited to the extent necessary in a democratic society to protect other values or interests such as public morals or security. Christian activists and humanitarian NGOs join with politicians in using the language of human rights to persuade the publics of Europe or the US to support the use of military force against African, Asian or Middle Eastern states. The language of rights both promises the energy and moral authority of resistance to power, and explains why those exercising such power are in fact guaranteeing the freedom of those they control and manage (Orford 2003).

V. Critical scholarship and the message of authority

The question of the limits and ends of state authority and the lawfulness of resistance return in contemporary international legal debates about the lawfulness of the interminable war on terror, in the embrace of the responsibility to protect at the United Nations, in the integration of development and security, and in the practices of state-building and international administration. In light of those developments, and at a time when the conflict in Darfur can be described on an activist website as 'the passion of the present', it seems productive to reconsider the relations between worldly authority, rebellion and action (or activism).

These themes of authority, rebellion and action go to the heart of what we do when we gather, in common, to speak about law. Legal institutions are places where arguments for the legitimacy of authority are made conventional and public, and where language goes to work to institute a collective opinion about power. Conventional or public representations of authority matter because authority, in order to be lasting, must be recognised as legitimate by rivals and subjects. Authority, in order to be profitable, must be recognised as legitimate by investors. Since at least the early modern period, the role, and relation, of rhetoric and law in producing that conventional sense of legitimate authority has caused unease (Kahn 1994).

Law is one name that is given in Western culture to the transmission of authority and the movement of meaning through the written text – rhetoric one name given to the ways in which meaning can be shaped to different ends. The legal scholar, like all scholars, has a somewhat extreme relation to the practice of writing and to the text. As Pierre Legendre comments, the scholar is ‘captured in a very radical way’ by the message of authority (Legendre 1997: 87). ‘Because [the scholar] *knows* that the written text contains *everything*, she wants to know the *whole truth*’ (Legendre 1997: 87). It is through this relation to the written text that the scholar experiences a relation to authority and the law.

In the modern industrial system of management, just as much as in the antique societies governed by religion, sacred texts constitute the law, and this law takes hold of [human beings] (Legendre 1997: 88).

Our relation to the legal text as critical scholars is thus in part a reflection of our relation to the sacred authority of writing, and to the sacred authority of law and all that it promises.

Bibliography

Burgess, G. (1986) “Usurpation, Obligation and Obedience in the Thought of the Engagement Controversy”. *The Historical Journal*, 29: 515-536.

Dorsett, S., and McVeigh, S. (2007) “Questions of Jurisdiction”, in McVeigh, S. (ed.) *Jurisprudence of Jurisdiction*. Oxon: Routledge-Cavendish, 3-18.

Dyzenhaus, D. (2009) “Hobbes’ Constitutional Theory”, in Shapiro, I. (ed.) *Leviathan*. Yale: Yale University Press (forthcoming).

Fasolt, C. (2004) *The Limits of History*. Chicago and London: The University of Chicago Press.

Orford

Gardiner, S. R. (1906) *The Constitutional Documents of the Puritan Revolution, 1625-1660*. Oxford: Clarendon Press, 3rd ed.

Goldie, M. (1987) "The Civil Religion of James Harrington", in Pagden, A. (ed.) *The Languages of Political Theory in Early-Modern Europe*. Cambridge: Cambridge University Press, 197- 222.

Hegel, GFW (1952) *Hegel's Philosophy of Right*. Oxford: Oxford University Press (TM Knox trans.).

Hobbes, T. (1651/1996) *Leviathan*. Oxford: Oxford University Press.

Kahn, V. (1994) *Machiavellian Rhetoric from the Counter-Reformation to Milton*. Princeton: Princeton University Press

Kahn, V. (2004) *Wayward Contracts: The Crisis of Political Obligation in England, 1640-1674*. Princeton: Princeton University Press.

Kant, I. (1784/1991) "Idea for a Universal History with a Cosmopolitan Purpose", in Reiss, H. S. (ed.) *Kant: Political Writings*. Cambridge: Cambridge University Press, 41-53.

Kant, I. (1797/1991) "The Metaphysics of Morals", in Reiss, H. S. (ed.) *Kant: Political Writings*. Cambridge: Cambridge University Press, 131-175.

Kant, I. (1792/1991) "On the Common Saying: 'This May be True in Theory, But it Does Not Apply in Practice'", in Reiss, H. S. (ed.) *Kant: Political Writings*. Cambridge: Cambridge University Press, 61-92.

Kant, I. (1795/1991) "Perpetual Peace: A Philosophical Sketch", in Reiss, H. S. (ed.) *Kant: Political Writings*. Cambridge: Cambridge University Press, 93-130.

Kessler, O., and Werner, W. (2008) "Extrajudicial Killing as Risk Management". *Security Dialogue*, 39: 289-308.

Koskenniemi, M. (2002) *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. Cambridge: Cambridge University Press.

Koskenniemi, M. (2007) "The Legacy of the 19th Century", <<http://www.helsinki.fi/eci/Publications/MKLEGACY%20OF%20THE%2019TH%20CENTURY-07e.pdf>> at 17 April 2009.

Legendre, P. (1997), "Protocol of the Love Letter" in Goodrich P. (ed.) *Law and the Unconscious: A Legendre Reader*, 72-94.

Marcuse, H. (1936/2008) *A Study on Authority*. London: Verso (Joris De Bres trans.).

Orford, A. (2006) "Biopolitics and the Tragic Subject of Human Rights", in Dauphinee, E., and Masters, C. (eds.) *The Logics of Biopower and the War on Terror: Living, Dying, Surviving*. London: Palgrave Macmillan, 205-228.

Orford, A. (2003) *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*. Cambridge: Cambridge University Press.

Orford, A. (2009a) "Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect" *Michigan Journal of International Law* 30(3) (forthcoming)

Orford, A. (2009b), "The Passions of Protection: Sovereign Authority and Humanitarian War", in Fassin, D., and Pandolfi, M. (eds.) *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions*. New York: Zone Books (forthcoming).

Pocock, J. G. A. (1992) "Introduction", in Pocock, J. G. A. (ed.) *Harrington: The Commonwealth of Oceana and A System of Politics*. Cambridge: Cambridge University Press, vii-xxiv.

Post, Gaines (1964) *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322*. Princeton: Princeton University Press.

Strong, T. B. (1993) "How to Write Scripture: Words, Authority and Politics in Thomas Hobbes". *Critical Inquiry*, 20: 128-159.

Vallance, E. (2001) "Oaths, Casuistry, and Equivocation: Anglican Responses to the Engagement Controversy". *The Historical Journal*, 44: 59-77.