1

Introduction

DAVID DYZENHAUS AND THOMAS POOLE

Hobbes's philosophy provokes perennial fascination, such is its force and originality. But Hobbes's political thought has become particularly prominent in recent years, with a surge of scholarly interest, evidenced by a number of monographs in political theory and philosophy. At the same time, there has been a turn in legal scholarship towards political theory in a way that engages recognizably Hobbesian themes, for example: the law and politics of security; the law and politics of fear; and the relationship between security and liberty. It might even be the case that the scholarly surge and the turn to Hobbesian themes are connected in that Hobbes's focus on security and order as foundational values of civilized society seems particularly apt in unsettled times.

However, there is surprisingly little engagement with Hobbes as a juristic or legal thinker, despite the fact that Hobbes devoted whole works to legal inquiry and gave law a prominent role in his works focused on politics. This volume seeks to begin to remedy this by providing what we believe is the first collection of specially commissioned chapters devoted to Hobbes and the law.

The collection is in one way more in line with the surge than the turn in that it does not canvass Hobbesian themes, but Hobbes's thought. However, its interdisciplinary scope means that those themes recur within the particular discussions of aspects of Hobbes's juristic thought. For the collection contains original essays from scholars in the fields of political philosophy, the history of political thought, legal theory (jurisprudence), legal history, public law, and criminal law and criminal justice. Our aim in publishing the collection is thus to add to the scholarly study of Hobbes and to enrich inquiry into Hobbesian themes.

Perhaps the most surprising feature of Hobbes's juristic thought, both to scholars who have not turned their attention to it and to those whose understanding of Hobbesian themes does not draw on it, is its complexity and depth. Hobbes took law seriously, as one of the constitutive elements

of the stable order of the civil society that we establish in order to escape the state of nature. So he was deeply concerned with the relationship between politics and law. But he was as deeply concerned with the task of elaborating a legal theory that would explain the internal workings of law – the legal nature of sovereignty as a product of human artifice, authority, adjudication, and the role of both criminal law and contract in sustaining legal order. Moreover, this elaboration requires, in his view, attention to a long list of the laws of nature and to the way in which these laws interact with the enacted law of the sovereign in a civil society.

There is, as this collection well illustrates, no uncontroversial interpretation of Hobbes's juristic thought. But one can discern from the essays collected here three main interpretive possibilities.

First, Hobbes's account of the relationship between the laws of nature and the enacted law of the sovereign is designed to establish an entirely secular basis for sovereignty, which enables the sovereign to rule effectively by law, though in a way that makes the sovereign not answerable to any standards that transcend his publicly expressed judgements about the collective welfare of his subjects. Thus Martin Loughlin argues that Hobbes uses natural law as an instrument to overthrow the idea that the laws of nature are transcendent standards to which the sovereign is answerable, which transforms the laws of nature into a set of axioms of civil peace; they become the 'immanent laws of civil government' and so help to constitute a science of political right. Loughlin's treatment presents a snapshot of Hobbes within what we might think of as a genealogy of modern political thought about the state. It is an exercise, that is, in the history of political and legal thought. But driving to the same conclusion though by dint of a philosophical reconstruction of the logic of Hobbes's argument, Ross Harrison investigates Hobbes's puzzling statement that 'The law of nature and the civil law contain each other and are of equal extent'. Harrison argues that, properly understood, natural law and civil law are neither equal in the extent of their power, nor in the extent of their content. Rather, natural law merely shows that there has to be civil law, but does not thereby limit its content. Similarly, Michael Lobban sets a detailed analysis of Hobbes's theory of contracts within his general philosophy to argue that the main function of the laws of nature was to impel men to set up a sovereign who would be the source of all laws governing them and to provide the tools to set the sovereign on firm foundations.

Together these three essays support what might be said to be the orthodox view of Hobbes, as an early legal positivist thinker, but who diverges

from the kind of positivism that united Bentham, Austin and Hart because of the role of natural law in his theory to provide a secular legitimation of de facto sovereign power. The second line of interpretation is presented by Thomas Poole who exploits the rich resources of Hobbes's discussion of law in *Behemoth* to display a tension in Hobbes's legal theory between the commitment to government by an entirely artificial sovereign who makes his judgements known only by enacting public laws that create a stable framework for social interaction, and a commitment to the necessity for the sovereign to be able to act against the law by relying on his prerogative authority to decide what is best for the safety of his subjects. On Poole's interpretation, this tension between the commitment to rule by law and the commitment to natural law – the safety of the people – does not make Hobbes's system unstable, but rather holds it together.

The third line of interpretation also does not seek to reduce Hobbes's account of law to the enacted law of the sovereign, with natural law supplying the reason to obey enacted law since, like Poole, it seeks to give natural law an independent role within civil society. However, unlike Poole, that role is located in the way that the sovereign's artificial role is constituted by the laws of nature in ways that give a moral shape to civil society thus softening considerably Hobbes's reputation for authoritarianism. Thus Alice Ristroph analyses Hobbes's theory of punishment to show that Hobbes thought that a state had to punish non-compliance with the law but was deeply concerned about the inhuman character of punishment. He was therefore anxious to moderate the inhumanity of punishment by subjecting it to the rule of law. Evan Fox-Decent argues that the sovereign and subject in Hobbes are in a trust-like or fiduciary relationship that explains how the sovereign's possession of public power yields authority and obligation independently of consent. Dennis Klimchuk explores Hobbes's discussions of equity to show that equity serves as a criterion of legality in the common law and as a principle of statutory interpretation. Lars Vinx argues, against neo-republican critiques of Hobbes, that Hobbes shared the republican aim of understanding law as a way of avoiding arbitrary treatment and domination, but had sound reasons to avoid constructing the more demanding account of non-domination favoured by neo-republicans. And David Dyzenhaus sets out an account of Hobbes's theory of legal authority in which the subordinate judiciary play a role, arising from their duty to the sovereign, in ensuring that the sovereign's laws do in fact serve the legal subjects' interest in equality and liberty, with the result that consent to the sovereign's rule is rendered intelligible to those subject to it.

There is much more in these essays than can be conveyed in this exercise of bringing them into direct dialogue with each other. And there is finally one essay that is not involved in this dialogue though it shares with all others the aim of displaying the depth of Hobbes's juristic thought. Daniel Lee shows how Hobbes, despite his disavowal of Roman civil law, was nevertheless dependent upon it, and used elements of Roman private law such as ownership, guardianship and suretyship to craft more precisely the different forms of authorization and representation central to his understanding of the state.

2

The political jurisprudence of Thomas Hobbes

MARTIN LOUGHLIN

Introduction

Thomas Hobbes was a jurist of the first rank, and his *Leviathan* stands as the greatest masterpiece of political jurisprudence written in the English language. Commonly regarded as a political philosopher,[1] 'political jurisprudence' more precisely specifies the nature of his scholarship. Hobbes was certainly a philosopher in some sense, yet he remained very critical of abstract theorizing and so-called philosophical thinking, believing that true wisdom, 'the knowledge [*scientia*] of truth in every subject', comes only from experience.[2] His speculations were continually fixed on practical matters.[3] He thought he was engaged in a thoroughly practical undertaking which he himself termed 'civil science' but which, given its juristic orientation, could also be called 'political jurisprudence'.

I have benefited from presentations at the seminar on Hobbes and Law at the LSE Legal and Political Theory Forum in May 2010 and at a Cardozo Law School Faculty Seminar in September 2011. In addition to the participants in those seminars, I thank Philip Cook, Neil Duxbury, Chris Foley and Grégoire Webber for their written comments.

[1] See, e.g., Michael Oakeshott, 'Introduction to Leviathan' [1946] in Michael Oakeshott, *Hobbes on Civil Association* (Indianapolis: Liberty Fund, 2000), 1, 3: '*Leviathan* is the greatest, perhaps sole masterpiece of political philosophy written in the English language'.

[2] See Thomas Hobbes, *On the Citizen*, edited by Richard Tuck and Michael Silverthorne (Cambridge University Press, 1998), 4–5 (hereafter: *De Cive*, DC). Noting in his introduction to *De Cive* that 'the war of the sword and the war of the pens is perpetual', Hobbes suggested that one reason was that 'both parties to a dispute defend their right with the opinions of Philosophers'. Much of what passes for philosophy, he complained, 'has contributed nothing to the knowledge of truth': its appeal 'has not lain in enlightening the mind but in lending the influence of attractive and emotive language to hasty and superficial opinions'.

[3] Cf. G.W.F. Hegel, *Lectures on the History of Philosophy* [1805] (London: Bell, 1894), Pt I B 3, who notes of Hobbes's books that 'there is nothing speculative or really philosophic in them'. He continues: 'The views that he adopts are shallow and empirical [i.e. there is "nothing properly philosophical" in them] but the reasons he gives for them, and the propositions he makes respecting them, are original in character, inasmuch as they are derived from natural necessities and wants.'

This chapter addresses the ambition and significance of Hobbes's political jurisprudence. One immediate barrier concerns his status as a jurist. He is occasionally regarded as a founder of legal positivism, but this tends to be a cursory acknowledgement that overlooks his pivotal role.[4] The reason for this is that, finding his authoritarianism repugnant and his criticisms of the common law method objectionable, many regard Hobbes's contribution to jurisprudence as thoroughly discreditable.[5] Contemporary legal positivists also seem embarrassed at the way Hobbes, having defined law as the command of the sovereign, proceeded to give natural law such a prominent place in his account.[6] Such criticisms reveal more about the

[4] It might be noted, e.g., that contemporary Anglo-American legal positivism takes its cue from H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), a work which does not address Hobbes's account of law and which treats John Austin's more reductive account as definitive of the older tradition.

[5] This type of assessment dogged Hobbes from the outset. Herman Conring, one of the leading German jurists of the seventeenth century, argued that: 'Hobbes philosophises in the *Elementa* and *De Cive* in an outrageous manner when he grounds sovereignty as a whole in the most powerful authority and explains hatred or enmity between human beings as the basis of the government of the state. Which upright person would expound something so preposterous? The author appears to deserve the hatred of all.' Cited in Horst Dreitzel, 'The Reception of Hobbes in the Political Philosophy of the Early German Enlightenment' (2003) 29 *History of European Ideas* 255, at 258. More recently, it has often been noted that Hobbes's statements to the effect that 'every man to every man, for want of a common power to keep them in awe, is an Enemy' forms the basis of Carl Schmitt's claim that 'the specific political distinction to which political actions and motives can be reduced is that between friend and enemy'. See Thomas Hobbes, *Leviathan* [1651], edited by Richard Tuck (Cambridge University Press, 1991) (hereafter L), 102 and Carl Schmitt, *The Concept of the Political* [1932], translated by George Schwab (University of Chicago Press, 1996), 26. Strauss offers an explanation. He refers to Hobbes as 'that imprudent, impish, and iconoclastic extremist [who] was deservedly punished for his recklessness, especially by his countrymen. Still he exercised a very great influence on all subsequent political thought, Continental and even English, and especially on Locke – the judicious Locke, who judiciously refrained as much as he could from mentioning Hobbes's "justly decried name"'. See Leo Strauss, *Natural Right and History* (University of Chicago Press, 1953), 166.

[6] George H. Sabine, *A History of Political Theory* (London: Harrap, 3rd edn, 1963), 460–461: 'It would undoubtedly have been easier for Hobbes if he could have abandoned the law of nature altogether, as his more empirical successors, Hume and Bentham, did. He might then have started from human nature simply as a fact, claiming the warrant of observation for whatever qualities … he might have seen fit to attribute to it'. Some argue that, because of his account of this relationship, Hobbes was not in fact a legal positivist: see Mark C. Murphy, 'Was Hobbes a Legal Positivist?' (1995) 105 *Ethics* 846 (showing Hobbes's affinities with Aquinas); David Dyzenhaus, 'Hobbes and the Legitimacy of Law' (2001) 20 *Law & Philosophy* 461 (showing Hobbes's affinities with Fuller and labelling Hobbes an 'anti-positivist'). Coyle states that: 'In the face of the foregoing account of (Hobbes' perception of) the relationship between natural law and the positive laws of a civil society, it may

construction of modern schools of legal thought than about Hobbes's contribution to jurisprudence. We should move beyond the argument of whether he is a natural lawyer or a legal positivist. Following his own injunction that one should try to understand the overall point of a scholar's writing,[7] we might focus on how Hobbes drew a clear distinction between natural law and positive law for the purpose of crafting a rich, ambitious and comprehensive account of the modern idea of law.

Political jurisprudence

In later life, Hobbes claimed to be the founder of a new field of knowledge, that of civil science. This subject, which he defined in contrast to the natural sciences, was concerned with the relations of 'politic bodies', and especially of the rights and duties of sovereigns and subjects.[8] The subject of 'civil science', he boasted, is 'no older than my own book, *De Cive*'.[9] It was inspired by dramatic shifts in European thought since the sixteenth century which were to lead to the formation of the modern idea of the state. Governmental ordering was de-personalized: instead of focusing on the figure of the ruler and the conditions that legitimated his rule, attention came to rest on the commonwealth or state. This institution, rather than those who exercised its powers, set the agenda for Hobbes's inquiries: 'I speak not of the men', he explained, 'but (in the Abstract) of the Seat of Power'.[10] Rulership was displaced as the central object of political inquiry once it was recognized that the ruler's basic responsibility was to maintain the state.[11]

seem perplexing to persist in regarding such an account as positivist'. He does, however, recognize that there is a 'deeper sense in which Hobbes's thought should be regarded as the foundation of the modern positivist tradition': Sean Coyle, 'Thomas Hobbes and the Intellectual Origins of Legal Positivism' (2003) 16 *Canadian J. of Law & Jurisprudence* 243, 254–255.

7 It is not, he claimed, 'the bare words, but the scope of the writer that giveth the true light, by which any writing is to be interpreted; and they that insist on single texts, without considering the main design, can derive no thing from them clearly, but rather … make everything more obscure than it is': L, ch.43, 414–415.

8 L, ch.9.

9 Thomas Hobbes, *The Author's Epistle Dedicatory to De Corpore* [1656]: see *The English Works of Thomas Hobbes of Malmesbury*, edited by Sir William Molesworth (London: J. Bohn, 1839), vol. I, ix.

10 L, 3.

11 L, 231: 'The office of the sovereign … consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of *the safety of the people* … But by safety here, is not meant a bare preservation, but also all other contentments of life.'

In these emerging conditions of modernity, received ideas of natural law underwent important changes. The commonwealth was no longer seen as a natural or organic entity: the institution of the state was created as an act of imagination. Not by Nature, claimed Hobbes, but 'by Art is created that great Leviathan called a Commonwealth or State'.[12] The state was an artefact of 'self-government', an institution created by humans to serve human purposes. Although the 'laws' by which this institution was established and maintained might be categorized as 'laws of nature', they were derived entirely from human characteristics and from scientific investigations into the nature of the politico-legal world. The state was brought into existence through the exercise of political reasoning. This was a distinct, autonomous attempt to explain governmental ordering: if we cannot rest such claims on divine sanction or unchanging custom, how could obedience to authority be justified?

Hobbes was one of the most insightful scholars of the early-modern period to examine this question. The characteristics of his civil science were later specified by Rousseau in the opening sentence of *The Social Contract*. I want to know, said Rousseau, whether in the civil order (i) there can be some sure and legitimate principle of governmental ordering, (ii) taking men as they are and (iii) laws as they can be.[13] What Hobbes called civil science, Rousseau referred to as the science of political right (*droit politique*). Rousseau's statement made plain that this science was not limited to the task of proposing a logical, aesthetically pleasing normative scheme of government. It had also to recognize law's practical character, to draw on a plausible account of human psychology, and to provide a realistic portrayal of the nature of collective existence. Like Hobbes, Rousseau sought to explain how governmental authority could be established and maintained in the actually-existing world.

Both scholars recognized that civil science was not just a speculative undertaking. The world was, after all, littered with imaginative schemes that had foundered on the rocks of political realities. Even as thought experiments, they had often foundered because they were unable to reconcile two equally powerful but contrary human dispositions: the desire to be autonomous and the desire to be a participant in a common venture.[14] The difficulty was that since the disjuncture between freedom

[12] L, 9.

[13] Jean-Jacques Rousseau, *The Social Contract* [1762] in *The Social Contract and Other Later Political Writings*, edited by Victor Gourevitch (Cambridge University Press, 1997), 39, 41.

[14] See Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), ch.6.

and belonging could be neither eliminated nor reconciled, it could only be negotiated. It followed that a 'science', in any strict sense of the term, could never be established.[15] So-called civil science did not simply entail the explication of principles of political right; it required the exercise of prudential judgment.[16] It therefore seems better to characterize this undertaking as an exercise in political jurisprudence.

If we accept that Hobbes was engaged in political jurisprudence, the apparent discrepancies that some legal scholars believe characterize his work are resolved. We can make sense of the apparently paradoxical claim that Hobbes belongs to the natural law tradition yet also founds the modern school of legal positivism. We can also appreciate that although Hobbes's account is authoritarian, it is not absolutist. We can, most significantly, appreciate the sheer ambition of Hobbes's undertaking.

Hobbes on law

The contention that Hobbes was a progenitor of legal positivism is certainly justified.[17] The overriding objective of his work was to establish the authority of the state, conceived as a human artefact. Central to that objective was the claim that the office of the sovereign possessed the absolute power of law-making. Hobbes defined law as 'the Reason of this our Artificial Man the Commonwealth'.[18] Sovereign was the name given to the person (office) that represented the commonwealth, and it was 'his Command that makes Law'.[19] It was the authority of the sovereign, rather than the wisdom of scholars and philosophers, that made law: *Auctoritas, non veritas facit legem*.[20]

Law was the command of the sovereign. This concept of positive law (*lex*) should not be confused with right (*jus*). Hobbes argued that many

[15] This is a point that Rousseau himself recognized: see Jean-Jacques Rousseau, *Emile, or On Education*, translated by A. Bloom (New York: Basic Books, 1979), 458: 'the science of political right is yet to be born, and it is to be presumed that it will never be born'.

[16] Quentin Skinner points us in the right direction when suggesting that Hobbes came to recognize that the proper conduct of civil science rested as much on the art of persuasion as that of reasoning: Quentin Skinner, 'Hobbes's Changing Conception of Civil Science' in Skinner, *Visions of Politics: Vol. 3 Hobbes and Civil Science* (Cambridge University Press, 2002), 85. See also Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge University Press, 1996), Conclusion.

[17] See, e.g., M.M. Goldsmith, 'Hobbes on Law' in Tom Sorell (ed.), *The Cambridge Companion to Hobbes* (Cambridge University Press, 1996), ch.12.

[18] L, 187. [19] L, 187.

[20] Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England* [1681], edited by Joseph Cropsey (University of Chicago Press, 1971), 55.

people were confused about the distinction between right and law: right 'consisteth in liberty to do, or to forbeare' whereas law 'determineth, and bindeth'. Law and right therefore 'differ as much as Obligation and Liberty; which in one and the same matter are inconsistent'.[21] As the supreme law-maker, the sovereign was the sole source of right and wrong, of justice and injustice. Justice, for Hobbes, was a purely legal concept: justice consisted in acting in accordance with those commands. Since positive law provided 'the measure of Good and Evil actions', there could be no such thing as an unjust law.[22]

Once law was acknowledged as the command of the sovereign, it was evident to Hobbes that the sovereign could not be bound by that law. It was not possible 'for any person to be bound to himself, because he that can bind can release'.[23] The manner in which the pact between individuals for the purpose of creating the sovereign was constructed also supported this position. Hobbes argued that since the sovereign was not a party to this pact, he could not commit any breach of legal obligation to the parties to it. Further, the so-called 'rights' of 'the people' could not act as a counterweight to the will of the sovereign. Since 'the people', as distinct from 'the multitude', came into existence as a result of the pact to create the sovereign, the office of the sovereign represented the will of the people.[24] For Hobbes, the sovereign was a 'Mortal God' and the source of law.[25] Established by art – by political pact – the office of the sovereign was in no way dependent on any higher authority.

Hobbes here deliberately broke with the ancient world of virtue and vice, good and evil. Moral arguments of right and wrong were transformed into political claims of peace and war.[26] The edifice of the state was designed to subordinate all other sources of morality, justice or law. Its authority could not be qualified by property, international law, common law or religion. First, the sovereign not only possessed sole dominion over property; he determined what constituted property.[27] Second, Hobbes argued that the norms of the 'international community' of nations could not be binding on states.[28] Third, he challenged Coke's argument that law

[21] L, 91. DC, 156: 'There is then a great difference between *law* and *right*; for a law is a *bond*, a *right* is a *liberty*, and they differ as contraries.'
[22] L, 223. [23] L, 184.
[24] DC, 75–76, 137. [25] L, 120.
[26] See Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge, MA: MIT Press, 1988), 25.
[27] L, 125.
[28] L, 244. See further Noel Malcolm, *Aspects of Hobbes* (Oxford University Press, 2002), ch.13.