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Searching for the state

Lawyers must work forwards as well as backwards. The stream must be traced downwards as well as upwards.[1]

Searching for the state

The orthodox view is that the British do not have a developed concept of the state. Disliking abstractions, they prefer to focus on real people vested with real powers. Consequently, it is claimed, there is no sufficiently distinct body of public law or developed concept of state responsibility in British law. The absence of a developed state concept has also been blamed for the ease with which privatization policies have been able to be effected. There is undoubtedly truth in all of these claims. But what if we were to view these consequences as evidence of a particular state tradition rather than as evidence of its absence? What if we were to view this as Britain's struggle with the same questions as her continental counterparts but reaching different solutions? Then we might uncover a subtle, complex and distinct conception of statehood and one with its own riches as well as blind spots.

This book tests the claim that British legal thought has never had a very robust conception of the state. It identifies ideas of statehood in legal writing and attempts to trace their influence on legal doctrine, and legislative and administrative structures. In doing so, it takes legal thought seriously as a variety of political thought.

At times the common law's own (often older) pre-commitments resist external ideological movements and at others embrace them. Spanning the period 1832–2010, the book traces the influence on legal thought of

[1] F. W. Maitland, 'The Shallows and Silences of Real Life', in H. A. L. Fisher (ed.), *The Frederic William Collected Papers of Maitland*, 3 vols. (Cambridge University Press, 1911), vol. I, p. 493.

intellectual movements such as Utilitarianism, Idealism, Pluralism, Fabian Socialism and public choice theory. Beginning in 1832, with the first Reform Act, the book covers the development of centralized bureaucracy and the expansion of state functions, the rise of administrative law and its new public morality, nationalization and privatization of industry, changing relationships between the state and civil society and changing views about the relationship of the individual to the collective, and the advent of a new era of human rights. This is not a story about Empire, though sometimes the imperial story breaks through into the domestically focused one. At times it is more of an English than a British story and at others a more general 'common law' one.

Searching for the state in the idea of the Crown

Historically speaking the obvious starting place from which to investigate the state in British thought is in the concept of the 'Crown'. But even choosing the Crown as a starting place is controversial among common law scholars. The Crown may be the common law's closest approximation to the state,[2] but at the same time the idea of the Crown is commonly regarded as responsible for inhibiting the development of a state concept.[3] Another school of thought contends that we simply do not need a conception of the state (founded in the Crown or elsewhere) in order to get on with the public law project.[4] There is some truth in each of these propositions. That is why the Crown will sometimes take centre stage and at other times inhabit the peripheries in our search for the state.

It is Blackstone who has been credited with giving expression to a Hobbesian theory of state in English legal thought in his *Commentaries of the Laws of England* (1765).[5] In the introductory essay, Blackstone

[2] See M. Loughlin, 'The State, the Crown and the Law', in M. Sunkin and S. Payne (eds.), *The Nature of the Crown* (Oxford University Press, 1999) where he contends that both of these first two propositions are true. *Rudolph Wolff & Co Ltd and Norranda Inc.* v. *The Crown* [1990] 1 SCR 695 69 DLR (4th) 392: 'The Crown cannot be equated with an individual. The Crown represents the state.'

[3] T. Daintith and A. Page, *The Executive in the Constitution* (Oxford University Press, 1999), pp. 12–13.

[4] J.A.G. Griffith, 'The Political Constitution', *Modern Law Review* 42 (1979), 1, 16. See Chapter 6.

[5] W. Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Clarendon Press, 1765–9). See Q. Skinner, 'A Genealogy of the Modern State', *Proceedings of the British Academy* 162 (2009), 325–70.

portrays the people, unified through a social contract, as forming the state. The state is a *persona ficta* with a distinct moral personality which is in turn represented by the sovereign which is itself an artificial person. By these fictions, the state as a collective is able to act as if it were 'one man' with 'one uniform will'. Sovereigns may come and go but the state endures.

Blackstone suggests that at the same time as civil society is formed, a superior is constituted with the power to make and enforce the laws.[6] In Britain's mixed constitution, the 'making of laws' is entrusted to three distinct powers – King, Lords and Commons – all of which are independent of each other and balanced.[7] From this we may infer that Blackstone means to suggest that the sovereign that is artificially constituted by law to represent the state in Britain is composed of these three branches of government working together to make and enforce law for the good of the state, and authorized by it.

But Blackstone's account of the state also introduces the early seeds of potential confusion when he attempts to engraft a Hobbesian theory of state onto older medieval ideas of the King's two bodies – 'the disunion of the king's body natural from his body politic'.[8] According to medieval systems of thought, the King simultaneously embodies the body natural, which dies, and the body politic, which is perpetual. The distinction between the King in his natural person and the special qualities which the law assigns to the King in his political capacity is expressed by Blackstone (though not always consistently) as the distinction between the King and the Crown. The King understood in his political capacity is an artificial person (the Crown) which is the product of legal rules.

Confusion arises, however, in the later books, because it is the King *alone* whom Blackstone identifies as the one who unites 'those several wills and reduces them to one' and '[i]n the King therefore, as in a centre, all the rays of his people are united'.[9] But by 1765, it was well established that the body politic firmly resided in the King acting *with* the Commons and Lords. Blackstone's work represents an incomplete synthesis of modern political thought and medieval political theology.

[6] Blackstone, *Commentaries*, above n. 5, vol. I, p. 48.
[7] J.L. De Lolme, *The Constitution of England* another highly influential work of the period, would not be published until 1771 in France, an English version appeared in London in 1775.
[8] Blackstone, *Commentaries*, above n. 5, vol. I, p. 242 referring to *William* v. *Berkley* (1559) Plowden 233a.
[9] Blackstone, *Commentaries*, above n. 5 vol. I, p. 245.

Shortly after the *Commentaries* were published, Blackstone became the target of an 'almost lethal attack'[10] by Bentham, not least because of the absolutist powers he appeared to vest in the King.[11] Bentham suggested that Blackstone's indulgence in fictions involving political compacts and absolutist sounding sovereigns should be avoided altogether in legal thought. For Bentham, what constitutes rulers is not normative and neither is it the product of political theory: it is a fact of power. He urges that we should focus on real powers and on real people, and that we should avoid abstractions, such as King and Crown, which do not do any real work.

While Bentham's approach has tended to dominate British legal thought, a state tradition centred on the personality of the King and Crown would nevertheless survive. At the end of the nineteenth century, Maitland would revive the idea of the Crown. He had an unlikely object. He thought that the concept of the Crown could provide a means by which to capture the modern democratic relationship between citizen and state in the common law. In other words he sought to complete the task that Blackstone had left half done – to incorporate the modern political relation in the old feudal form. In doing so, he suggested we needed to reject the idea of the King as a 'corporation sole' – which treated the King's two bodies and capacities as residing in the one natural person. More fruitful, he thought, would be to adopt the less popular idea of the Crown conceived as a corporation aggregate of the many of which the King is merely the head. He admitted that this interweaving of the old and new, substituting the Crown for the King, was a subterfuge, but it was one he considered to be capable of providing a legal person to serve the role of representative of the state. His aim was to align common law thought and political thought so that the law represented the *real* political relation.

Thus Maitland drew explicit attention to the corporate nature of the state itself, at a time when it was being argued that corporate forms of social life depended entirely on the sovereign for their existence. Viewing the state through a corporate lens would have consequences for broader debates, both legal and political, about the basis of sovereignty, the relationships between sovereignty, civil society and the individual,[12]

[10] Skinner, 'A Genealogy of the Modern State', above n. 5, 355.
[11] J. Bentham, *A Fragment on Government*, W. Harrison (ed.) (London: Basil Blackwell, 1948) (first published 1789).
[12] Chapter 3.

the moral capacities of all corporations and whether sovereigns could be limited by law. The Crown itself, then, was not the simple object of the inquiry – but rather provided a point of entry into these much larger questions.

Since Maitland, there have been other attempts to revive notions of statehood by focusing on the concept of the Crown and once again it is the point of entry into deeper controversies. The object of Kantorowicz's *The King's Two Bodies: A Study in Medieval Political Theology*[13] was not so much to democratize the state but to humanize it after its deification by German nationalists. Like Maitland, Kantorowicz argues that the modern state can develop out of the theological and absolutist beginnings represented in the medieval idea of the King's two bodies. In a work that has been described as 'demythologizing' and 'deliberately ironic',[14] he suggests that out of a shared European medieval heritage, the singular achievement of the English law was in conceiving of the Prince as a corporation sole '– admittedly a hybrid of a complicated ancestry – from which the body politic as represented by Parliament could *never be ruled out*'.[15] (He ignores the controversy about the corporation sole and aggregate that had so exercised Maitland.) This idea of the two bodies, he contends, was much more fully articulated, and closer to its Christological origins, in England. It played a part in establishing a healthier, more 'universal' and 'human' version of the nation state in England than in her continental counterparts.[16]

Kantorowicz suggests that the political theology of the King's two bodies also performs important work not explicitly identified by Maitland. The duality between the King's body natural and the body politic, according to Kantorowicz, also helps to explain the duality that the King is at once above and subject to the law (the source of the laws of man but subject to the laws of nature). The King's two bodies, he suggests, may also help to distinguish not only between the public and private natures of the King's person but between the public and private *within* the concept of rulership – matters affecting individual relations between the King and his subjects

[13] E. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press, 1957).
[14] C. Landauer, 'Ernst Kantorowicz and the Sacralization of the Past', *Central European History* 27(1) (1994), 1–25.
[15] Kantorowicz, *The King's Two Bodies* above n. 13, p. 20 (my emphasis).
[16] J. Mali, 'Ernst H. Kantorowicz: History as Mythschau', *History of Political Thought* 18 (1997), 579–603, 598.

and matters affecting all of his subjects.[17] Kantorowicz explicitly links the idea of the Crown to the distinction between public and private law.

Kantorowicz's contribution is significant to our broader project not least because it reminds us of the crucible in which Western conceptions of statehood have been played out in the twentieth century and just how much it has mattered how the state is conceived. What is noteworthy about Kantorowicz's work is that he contemplates that the state conceived as a distinct legal and moral person does not *need* to embrace the worse kinds of nationalism, and in doing so he uses the Crown as the basis for his argument. In this he is pretty much alone. As we shall see, the same political commitments moved lawyers such as Dicey, Lauterpacht and H. L. A. Hart to reject the idea of the state as a special moral and legal person. Superhuman overtones attach too quickly to such personifications. Kantorowicz's contribution is singular too because later legal theorists, such as Loughlin, would credit the absence of a distinct body of public law in the common law to the *incomplete* separation of the Queen and Crown in the English legal tradition. Once again we shall see that these issues run deeper than questions about the nature of the Crown itself.

Reacting to common law case law in more recent times, Loughlin has also attempted to revive the Crown as a central concept. He urges modern lawyers 'to re-conceptualise the Crown as a symbol of government'[18] as part of a 'continuing project of developing a body of public law and setting in place a more realistic conception of the nature of state power and the conditions under which it may legitimately be exercised'.[19] The Queen, standing for the state, is unable to satisfy the need for a general expression of an institution of rule.[20] Loughlin wants to complete Maitland's project. He argues that the Crown should be conceived as both 'a corporation aggregate standing for the community and as an executive body otherwise known as the government';[21] and for the common law development of a distinct public law 'of official liability for acts of the Crown'.[22]

Maitland, Kantorowicz and Loughlin share in common the view that the medieval concept of the Crown is able to be adapted to reflect the state in its modern political instantiation. They want the law better to reflect the contemporary political relation. They each regard this as

[17] Kantorowicz, *The King's Two Bodies*, above n. 13, p. 172.
[18] Loughlin, 'The State, The Crown and the Law', above n. 2, p. 33
[19] *Ibid.*, pp. 33–4. [20] *Ibid.*, p. 36. [21] *Ibid.*, p. 75 [22] *Ibid.*

necessary but for different reasons. Maitland wants to democratize the state, Kantorwicz to humanize it and Loughlin to hold it responsible.

The responses to these *particular* concerns, however, do not wholly or necessarily depend on how the *Crown* is conceived. While we may argue about how well it works in practice, constitutional convention has enabled the feudal forms of the legal constitution to adjust to modern democratic relationships while preserving a distinction between the legal and the political constitution. Similarly, ideas about the relationships between the sovereign, the state and civil society do not *necessarily* depend on the common law concept of the Crown, though viewing the state as another corporation is a powerful idea which may well shed light on such relationships. Laski, for example, shared many of Maitland's views about the relationship between the state and civil society, and yet rejected personifications of the state.[23] There are various ways to achieve Kantorowicz's object of humanizing and constraining state power as Dicey, Wade, Lauterpacht and Hart each demonstrate.[24] If the object is to create a distinct system of responsibility and public law, as Loughlin contends, then we ought to acknowledge the part already played by the Crown in the *existing* common law systems of Crown liability and judicial review. As I shall argue, in those areas of law the Crown often does represent a version of the state – being the 'collective will' or 'society in a moral guise'.[25] Difficulties occur when the Crown representing the public seeks to hold liable the Crown meaning the *core* political organs of the government apparatus. A separate system of state liability *is* emerging to fill this gap. It does not depend on notions of the Crown and, indeed, circumvents such notions. It depends instead on international law ideas of state which derive from European Union law and international human rights law. There are, then, other ways to argue about the nature of the state in British legal thought which do not necessarily place the Crown at the centre.[26] They involve arguments about sovereignty,[27] civil society and the public–private distinction,[28] and responsibility[29] – all issues which this book will address.

Ideas about the Crown are not necessarily central to these questions about the nature of the state – they can even sometimes get in the way. We can see an early example of this in Bentham's reaction to Blackstone. Given Britain's constitutional history and the fact that absolutist

[23] Chapters 4, 6 and 7. [24] Chapters 2, 5, 9 and 3 respectively.
[25] Chapter 7. [26] Chapter 9. [27] Chapter 3. [28] Chapters 4, 5 and 9.
[29] Chapters 7 and 9.

monarchies were plentiful in Europe at the time, endowing the Crown with the unified will of the people was unlikely to be an attractive proposition. Moreover, in common law thought, as we shall see, it was difficult to imagine quite how the Crown could have come to serve as the focus of unifying public law norms or positive duties. It never represented the whole of the public sphere and over the nineteenth century it came increasingly to be characterized as the repository of immunities and privileges – in contrast to other public and all private bodies.[30] Both private and public law obligations, as they evolved, focused on real officials and their real powers.[31] Another reason why the Crown is potentially problematic as a source of unity is that it has so many different legal guises. It has never been a single *personne morale* but rather it wears different masks in different areas of the law – representing the public and the law, power and authority, the Empire and sometimes represented as a private person. This is not merely a problem of terminology but one that, I shall argue, goes to the heart of the sovereignty debate.[32]

Focusing on the Crown as a *personne morale* may also distract us from more central questions about relationships between sovereignty, state and the citizen. The citizen's relationship to the state has been highly contested in political thought over the nineteenth and twentieth centuries. This book tells a legal version of that historical contest. Dicey's individualism is well-known. Not so familiar is the philosophical Idealists's conception of the individual as socially constituted or the influence of the new liberalism on the administrative lawyers of the early twentieth century and on the law's relationship to the state more generally.[33] The post-War distrust of ideas about the collective will and the new era of human rights continues to present a challenge to traditional common law concepts and I shall consider how the law has responded to these challenges. The legal relationship between citizen and state has been redefined much more through public administrative law (judicial review of administrative action) and the adoption of human rights instruments than through any reinterpretation of how the Crown has been conceived – though of course the question of what constitutes the public sphere continues to exercise scholars, lawyers and legal theorists. The search for the state in the Crown is only a small part of these much larger debates.

[30] Chapter 5. [31] Chapters 7 and 6 respectively. [32] Chapter 3. [33] Chapter 6.

It would be a mistake to suggest that those who avoid focusing on the Crown or any other personification are not interested in the state or in the normative questions associated with it. Indeed, as I shall argue, there is a British state tradition (though with mixed ideological commitments) which treats the common law judges as a representation of the state. This view can be found in Dicey who thought that judges would moderate the excesses of democracy. A different version is to be found in Robson who modelled all official actors on disinterested judges. His conception of the 'judicial mind' approximates to the 'collective will'. In contemporary times the judges have found themselves (perhaps reluctantly) in the middle of an effort to establish how a fragmented government apparatus can be held to a unified set of public law norms. Public law norms and not ideas of the collective will would now be viewed as the means to unify the state. The earlier constitutional neutrality about the functions a state should perform for its citizens has been challenged in the post-privatization era, and the common law judges now find themselves in the role of arbiters of these large questions too. In the process, many of the old issues about sovereignty, the state and civil society are required to be confronted once again. In the context of the European Union, the common law judges are beginning to ask questions about constitutional identity. It is now possible that the contemporary state may comprise a unified set of norms and commitments enforced by judges, rather than be represented as a person. Indeed, that is much closer to Hart's vision of law as a system of rules without a 'person' standing behind it.[34]

And, of course, flowing throughout this narrative is the issue about what is the relationship between the state and the law. Does the law serve the state? I deliberately avoid the issues surrounding terrorism and its potential threat to the state. That particular question has been the subject of important recent work. I am more interested here in what the mundane and commonplace interactions between the law and state may reveal about these issues.

Neither do I engage directly with Loughlin's *Foundations of Public Law*,[35] an important and challenging work that arrived too late for me to do its arguments justice. While I also press on the issue of whether there is a boundary between constitutive and constituted law, the distinctive aim of my project is to explore the *lived* state tradition in British legal thought.

[34] Chapter 3.
[35] M. Loughlin, *Foundations of Public Law* (Oxford University Press, 2010).

Together the theorists who focus on the persona of the state and Crown and those who seek other ways to conceive of statehood constitute a British state tradition. It is a debate full of contestation, but that makes it all the richer in what is an ongoing search for the state in British legal thought.

The state apparatus

The book begins by examining the development of the state apparatus during the nineteenth century. This is not to equate the state with the government apparatus – a view that Skinner attributes to Weber and describes as normatively impoverished.[36] Rather, as I shall argue, the ways in which the government apparatus has been organized has had very serious normative consequences for the ways in which the state has been imagined as a legal concept. Sometimes the very way in which the government apparatus is organized of itself reflects a representation of the state.

The nineteenth-century development of a centralized bureaucracy challenged older conceptions of authority and came to be connected with an Austinian version of sovereignty.[37] The fellowships of civil society struggled against the notions that all power was delegated from above as opposed to being self-originating.[38] And yet notwithstanding these changes (though for normative reasons) the common law persisted with a system of responsibility designed for an earlier conception of authority.[39] The twentieth-century expansion of the government apparatus and functions was associated with a particular view of the collective will and of the individual understood as socially conceived. This was reflected in much of the administrative law scholarship of that time.[40] The changes to administration giving effect to nationalization and later privatization also had normative consequences for how the state was conceived. Nationalization resulted in the loss of a number of legal resources which had formerly been used to define the public sphere.[41] Later privatization provoked a new urgency to define the public sphere by way of legal norms.[42] In both cases, it was a particular view of the relationship between state and law that allowed the expansion and contraction of state functions without legal impediment. At both points,

[36] Skinner, 'A Genealogy of the Modern State', above n. 5, 326. [37] Chapters 2 and 3. [38] Chapters 3 and 4. [39] Chapter 7. [40] Chapter 6. [41] Chapters 4 and 5. [42] Chapter 8.