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The safety of the people: from prerogative to reason of state

The safety of the people is the supreme law. This deceptively simple maxim seems to have been coined by Cicero.[1] Certainly the phrase *salus populi suprema lex esto* appears in *The Laws* as part of an ideal constitution embodying the principles of the uncorrupted Republic. When faced with a violent threat to the security of the republic, the Senate was to designate the consuls as supreme military commanders and authorize them to take any measures they thought necessary to counter the threat. In such a situation, Cicero argued, a procedure was needed through which the consuls might be permitted to use force against fellow citizens without concerning themselves too much with the strict legality of what they did. A legal process was required that would allow the subversion of normal legal guarantees in extraordinary moments for the purposes of safeguarding the legal order as a whole.

The process Cicero described was a stylized version of the so-called 'last decree' (*senatus consultum ultimum*)[2] increasingly used in the late Republic as the widening empire began to put intolerable strain on existing political structures.[3] As consul in 63 BC, Cicero himself had been the recipient of a last decree, and drew on its authority to crush the Catiline conspiracy before persuading a reluctant Senate to agree the extra-legal execution of the defeated conspirators.[4] Cicero argued

[1] Marcus Tullius Cicero, *The Laws* (Oxford: Oxford University Press, trans. Niall Rudd, 1998), Book 3.8, 152.

[2] Andrew Lintott, *The Constitution of the Roman Republic* (Oxford: Oxford University Press, 1999), 89–90. Lintott notes that the term *senatus consultum ultimum* was not used in antiquity and that a more precise title would be the *senatus consultum de re publica defendenda*.

[3] Michael Crawford, *The Roman Republic* (London: Fontana, 2nd edn., 1992), 94–170.

[4] Sallust, *Catiline's Conspiracy* (Oxford: Oxford University Press, ed. William W. Batstone, 2010). After the Second Punic War (218–201 BC), the office of dictator largely fell into disuse, although it did resurface when the *Lex Valeria* named Sulla dictator in 82 BC and again in 49 BC when Caesar (soon to become *dictator perpetuo*) was nominated by Lepidus after a similar law. These later uses revived the institution in a stronger and more

before the Senate that when the law was impotent, extra-legal action was necessary and that by taking action against the state the conspirators had in any case become enemies of the state (*hostes*) and so relinquished their rights as citizens.[5] This stance came back to haunt him. The persistent use of the last decree did absolutely nothing to halt the collapse of the Republic he cherished.[6] And Cicero himself was proscribed as an enemy of state under the Second Triumvirate of Mark Antony, Lepidus and Octavian (soon to become Emperor Augustus), to be killed shortly afterwards.[7]

The type of power invoked by Cicero, which in turn brought about his demise, was expressed at a later stage in European history in the idiom of 'reason of state'. The term entered the political vocabulary shortly after the death of Machiavelli, that great student of republican constitutional politics, and can be linked to the revolution in thinking about politics that he instigated.[8] In his analysis of the concept's subsequent development, Philip Bobbitt shows how changes in the nature of reason of state connect to epochal shifts in state form.[9] So, the Italian origins of *ragione di stato* reflect the genesis of the concept in the idea of the princely state that Machiavelli[10] and his fellow Florentine Guicciardini[11] formulated

authoritarian form as the Republic collapsed into anarchy. Crawford, *Roman Republic*, 151; Lintott, *Constitution of the Roman Republic*, 109–113.

5 Marcus Tullius Cicero, '*In Catilinam ("Against Catiline") I*' in *Cicero Political Speeches* (Oxford: Oxford University Press, ed. D. H. Berry, 2006). Julius Caesar made a famous speech in dissent. He argued, presciently as it turned out, that the illegal repression of the conspirators would set a dangerous precedent for future proscriptions.

6 On Cicero's role in articulating the disintegration that accompanied the collapse of political authority in the late Republic, see Andrew Wallace-Hardrill, *Rome's Cultural Revolution* (Cambridge: Cambridge University Press, 2008), chapter 5.

7 Kathryn Tempest, *Cicero: Politics and Persuasion in Ancient Rome* (London: Continuum, 2011), chapter 16.

8 Maurizio Viroli, *From Politics to Reason of State: The Acquisition and Transformation of the Language of Politics 1250–1600* (Cambridge: Cambridge University Press, 1992).

9 Philip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (New York: Alfred A. Knopf, 2002), 87, 108, 135–136.

10 On Machiavelli and the reason of state tradition see Friedrich Meinecke, *Machiavellism: The Doctrine of Raison d'État and Its Place in Modern History* (New Brunswick: Transaction Publishers, ed. Werner Stark, 1998).

11 It seems that it was Francesco Guicciardini who introduced the actual expression *ragione di stato* (reason of state) into political discourse. Guicciardini enjoined the reader of his *Dialogo del reggimento di Firenze* (1526) to think in terms of the reason and customs of the states ('*secondo la ragione e uso degli stati*') rather than the imperatives of moral conscience when considering the preservation of states. Viroli, *From Politics to Reason of State*, 178.

in the sixteenth century.[12] The proliferation in the seventeenth century of the term in its French form *raison d'état* reflects the emergence of the kingly state, exemplified by the state-building machinations of Richelieu.[13] The German cognate *Staats raison* is more appropriate once the eighteenth-century territorial state emerges, Bobbitt argues, since that stage is best reflected in the designs of Frederick the Great. At each of these historical phases the meaning of reason of state subtly changes in accordance with emerging beliefs about the state and the relationship between government and governed. Among the Italian princely states, '*ragione di stato* simply stood for a rational, unprincipled justification for the self-aggrandizement of the State; whereas *raison d'état* achieved a parallel justification through the personification of the state, and leveraged the imperatives of this justification to impose obligations on the dynastic ruler'. *Staats raison*, by contrast, represented 'a rationale given on behalf of the State, and imperative that compels its strategic designs' but which 'identifies the state with the country, the land'.[14]

The point of introducing Bobbitt's stylized historical reconstruction[15] is to illustrate the value of reason of state as a lens through which to examine constitutional change. Reason of state presupposes a situation in which state action moves from one register, based on law and right, to another, based on interest and might.[16] The condition for such a shift is normally

[12] The concept soon spread elsewhere in the Italian peninsula. Perhaps the most famous work in this genre is that of the Piemontese Giovanni Botero, *Della Ragion di Stato* (Venice, 1589).

[13] On Richelieu, reason of state and the kingly state, see William F. Church, *Richelieu and Reason of State* (Princeton: Princeton University Press, 1972) which provides extensive treatment of the professional writers Guez de Balzac and Jean de Silhon, the jurist Cadin Le Bret, the diplomat Philippe de Béthune, and, perhaps most important of all, Henri, duc de Rohan. See also J. H. Elliott, *Richelieu and Olivares* (Cambridge: Cambridge University Press, 1984), 121–129; Martti Koskenniemi, 'International Law and *Raison d'État:* Rethinking the Prehistory of International Law' in Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010), 305–314.

[14] Bobbitt, *Shield of Achilles*, 87, 108, 135–136.

[15] For a nuanced historical exploration of the connection of *raison d'état* and the 'new humanism' infused with Tacitean scepticism, see Richard Tuck, *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993). Tuck points to the central importance of two thinkers, one Dutch, Justus Lipsius, the other the Frenchman Michel de Montaigne, and notes the way in which in the Netherlands and France in particular the Wars of Religion made manifest the concept's core idea, the legitimacy of violent and immoral means in the service of higher ends.

[16] Carl Joachim Friedrich, *Constitutional Reason of State* (Providence: Brown University Press, 1957).

the assertion that the state's vital interests are at stake. In the course of acting in its own interest, the state might face the prospect of violating moral and legal norms in protecting its overriding interests or security.[17] Understood in these terms, reason of state offers a number of advantages for the constitutional theorist. First, it is a juridical concept that operates not only in the interstices of law and politics – as many other concepts do, including 'sovereignty' and 'rights' – but also, and in particular, at the intersection between political norms and state action. Second, reason of state is a relative constant, having been in continuous use since Machiavelli's time. Third, it connects to the relationship between government and governed – between the agents of government to whom the 'reason' of reason of state refers and the 'people' with whose well-being the *salus populi* principle is concerned. Fourth, it is associated with hard strategic choices and difficult political and moral decisions. Concentrating on this dimension of constitutional politics is rather like focusing on hard cases in the study of law.[18] We expect a hard case to reveal not just something about itself but also something important about the wider context of which it forms a problematic part. Likewise, reason of state has the potential to illuminate disproportionately the deep structure of a constitution and the principles that inform it.

Reason of state describes a category familiar enough in practice, including in our own time where recourse is often made to exceptional powers to deal with crises or emergencies. Courts today frequently hear arguments about necessity and legal exceptionalism, and the constitutional politics of security and secrecy is now a feature of public debate. Writers on law looking to contribute to this debate have typically worked within one of three conceptual frameworks. While each offers insight, none is entirely successful. One such framework is 'emergency powers'.[19] It is increasingly clear, however, that we are not really talking about emergencies – or at least not *just* about emergencies. Some of the juridical developments that we want to discuss are not really about emergencies. Moreover, many laws

[17] Gianfranco Poggi, *The State: Its Nature, Development and Prospects* (Cambridge: Polity, 1990), 84.

[18] Ronald Dworkin, 'Hard Cases' (1975) 88 *Harvard Law Review* 1057.

[19] See, e.g., Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006); Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006); Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (New York: Oxford University Press, 2007).

initially justified as emergency measures stay on the books after the emergency is over.[20] They end up as part of the normal legal framework. This is a familiar pattern – indeed we see it at work in a later chapter when considering martial law in the *fin-de-siècle* British empire[21] – but it underscores the limited capacity of the emergency powers' framework to capture what is often most important about this area of state action.

A second framework works from the idea of the 'state of exception'.[22] There are some parallels between this framework and the approach taken in this book. But it needs to be handled with great care. One of its strengths is that it allows the commentator to rise above the level of legal specifics. But the synoptic view comes at a price. The language of exception seems all but impossible to disentangle from the work of the constitutional theorist (and sometime Nazi jurist) Carl Schmitt and other Weimar era 'crisis' theorists.[23] This body of work is undoubtedly important and stimulating, and I discuss it in a later chapter. But it is of limited relevance to our current situation – are we really living in a state of near anarchy? Worse, the vocabulary associated with this framework is tarnished. It is the language of grandiloquence, of *Sturm und Drang*, and it tends to trap commentators in an unfruitful binary opposition between 'norm' and 'exception', dragging them into problematic – and often existential – directions.[24] Working in this framework makes otherwise sane writers sound almost hysterical. Above all, exceptionalism tends to make one think of fundamental and existential moments – the birth and death of a constitution, for instance. But reason of state usually operates on a slightly less dramatic plane – war, diplomacy, safety, security – and in ways that are often rather quotidian. In fact, rather than being something exceptional that reaches outside legal orders for inspiration, reason of

[20] See, e.g., Conor Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006), chapter 4.

[21] See Chapter 6.

[22] See, e.g., Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, trans. Kevin Attell, 2005); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, trans. Daniel Heller-Roazen, 1998); Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy' (2000) 21 *Cardozo Law Review* 1825; Nomi Claire Lazar, *States of Emergency in Liberal Democracy* (New York: Cambridge University Press, 2009).

[23] See, e.g., David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1999); Arthur J. Jacobson and Bernhard Schlink (eds.), *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000).

[24] I explore this propensity in Schmitt's thought in Chapter 7.

state is generally built into the institutional structures and deeply embedded within the everyday working life of the modern state.

A third framework uses the language of 'prerogative'.[25] One advantage of this term is that it immediately connects our present concerns back to old debates about the abuse of power by unruly kings. It is familiar to Anglophone lawyers in particular and can certainly pack a polemical punch. Prerogative is usually used to express the writer's view that we are living under a government that is exercising powers arbitrarily. The tyranny of Stuart kings provides an implicit echo.[26] I have no doubt about the value of studying historical debates about law and the limits of legitimate authority. But this book, while immersed in the historical record, largely avoids the language of prerogative. One reason for this is that the historical parallel that the contemporary use of prerogative trades on is inaccurate. Fundamental changes in state and government have made prerogative in its original sense much less relevant as both an explanatory and a legal category. This is an important argument in the book and is sustained over its first chapters. But the prerogative is also too narrow for our purposes. It refers to a specific type of executive power, exercised in Britain in the name of the Crown and not requiring parliamentary consent. But many of the state actions that commentators now want to group together do not derive from this source – in fact, the vast majority take statutory form.

This book takes a different path. It uses reason of state as a conceptual category with which to frame British debates about law, constitution and empire between roughly 1650 and the present day. It follows William Church's injunction that 'the only valid method of studying the history of reason of state is to examine the manner in which the problem was handled in a given period'.[27] The book does not track precisely the use of the phrase 'reason of state' across time – although we discover that a surprising number of the authors who play a central role in the book did in fact use that precise term or one of its cognates. Instead its standard method is to select key texts – Hobbes's *Leviathan* in Chapter 2, Harrington's *Oceana* and other major republican works in Chapter 3, Hume's political essays in Chapter 4, Smith's *Wealth of Nations* alongside Burke's speeches on India in Chapter 5, and so on. These texts, read in conjunction with relevant legal developments, court judgments and legal treatises, elucidate the dynamics

[25] See, e.g., Clement Fatovic, *Outside the Law: Emergency and Executive Power* (Baltimore: Johns Hopkins University Press, 2009).
[26] See, e.g., Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004).
[27] Church, *Richelieu and Reason of State*, 4.

of reason of state in a given era. The book can be said to adopt a contextual approach to its subject that is not altogether dissimilar from the method of the Cambridge historians of ideas.[28] Texts are read here against the constitutional background that gives them meaning. So read, they in turn illuminate the constitutional landscape to which they relate.

This method is grounded in a view that the best way to understand a constitutional concept is often through an elaboration of the way it evolved over time. But the historical method has additional benefits here. It reinforces the now familiar connection between political theory and public law,[29] while spotlighting the juridical elements of central works in British political theory. Moreover, in tracing a continuous tradition of reflection on reason of state within British constitutional thought,[30] it exposes the inaccuracy of those critics of liberalism, like Carl Schmitt, who claim that liberal theory had a blind spot as far as reason of state is concerned.[31] Unearthing such a tradition helps us to identify resources internal to liberal constitutional theory capable of handling the reason of state questions that face us today.

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Reason of state raises the issue of state agency. The concept presupposes the idea of a state which functions as a group agent capable of making choices and acting in ways it determines itself.[32] The 'reason' in question

[28] See, e.g., Quentin Skinner, 'Interpretation, Rationality and Truth' in his *Visions of Politics I: Method* (Cambridge: Cambridge University Press, 2002), 47. See also Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998), 103: the task of the historian of ideas is to conduct a 'wide-ranging investigation of the changing political languages in which societies talk to themselves'. For discussion of this method see my 'What's God Got to Do With It? Waldron on Equality' (2004) 31 *Journal of Law and Society* 387, 394–397.

[29] See, e.g., Martin Loughlin, *Public Law and Political Theory* (Oxford: Oxford University Press, 1992); T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford: Oxford University Press, 2013), 18–20.

[30] For reasons of elegance and simplicity I have for the most part avoided the awkward but more accurate label 'Anglo-British' to describe this tradition. The use of the word 'English' would be particularly problematic given the importance of Scottish thinkers to the analysis.

[31] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, trans. George Schwab, 2005), 11–14; Carl Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge, Mass.: MIT Press, trans. Ellen Kennedy, 1985), 37–38.

[32] Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011). List and Pettit's theory is drawn upon extensively in Chapter 8.

is, then, neither that of the people nor identical quite with that of the rulers. Reason of state thus raises the tricky question of the relationship between the active state – the state as decider – and the liberal constitution, not least because the latter tends to be predicated on the ideal of a depersonalized politics in which rules and procedures are relied upon to institutionalize politics and reduce the human factor to a minimum in the hope of taming the excesses that arise from the practice of politics.[33] This is a question that jurists today on the whole tend to avoid.[34] But the relationship between liberal principles and the active state deciding matters of necessity and security is a major reason why contemporary cases about national security and the politics of secrecy are so difficult. Older styles of constitutional theory were not so reticent. Constitutional theorists of the past recognized that reason of state related to an area of state action where the goals or *telos* of a political community and the norms and principles of its constitution were especially likely to collide. As the German historian Friedrich Meinecke observed in his treatise on the subject, reason of state reflects the balance each constitution strikes between *Kratos* and *Ethos*, between action prompted by the power impulse and action prompted by moral responsibility.[35] The reconciliation effected between power and right that occurs within the framework of reason of state contributes in no small measure to defining what one of the greatest of the old writers called the *spirit* of the constitution.[36]

The book seeks to recapture some of the flavour and ambition of those older theories. One element that sets them apart from modern accounts is their sensitivity towards *both* the inner and outer membranes of the constitution,[37] which they saw as internally related. A constitution, to adapt Hume, can be understood as an institutional and normative arrangement that reflects the balance a political community has struck between

[33] Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton: Princeton University Press, expanded ed., 2004), 349–351.

[34] But see, e.g., Philip Bobbitt, *The Garments of Court and Palace: Machiavelli and the World That He Made* (London: Atlantic Books, 2013), which talks in terms of the relationship between law and strategy.

[35] Meinecke, *Machiavellism: The Doctrine of Raison d'État and Its Place in Modern History*, 5.

[36] Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Cambridge: Cambridge University Press, trans. and eds. Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone, 1989).

[37] Bobbitt, *The Garments of Court and Palace*, 70.

authority and liberty.[38] But the old theorists realized that this balance was not purely the product of internal or endogenous growth. Constitutions face outwards as well as inwards, they recognized, and these two faces are related to the extent that the way in which a state engages with the world outside it feeds back into the way it constructs itself internally. This idea of the double-facing constitution has been largely lost from our discourse, due in no small measure to the specialization of the academic profession. The external dimension of constitutions tends now to be left to international relations theorists and international lawyers. But there are good reasons to recapture it for the study of public law too, not least because one of the few more obvious effects of contemporary trends, including globalization, the increased penetration of domestic legal orders by international law, and the pervasiveness of constitutionalism and rights as governance techniques, has been to undermine the image of a national constitution as a juridically sealed container.[39]

Reason of state has been an important part of the external dimension of constitutions since the birth of the state in its modern form. I have indicated already how it might be said to mediate between law and power, right and might. But reason of state is a limit concept in a second sense, in that it navigates the borders between the national and international, between the internal construction of the state and its external actions. One aim of this book is to illustrate the reflexive nature of reason of state, an objective realized largely through an exploration of the legal and constitutional debates over trade and empire. This focus is inevitable in a sense given the extent to which the British debate on reason of state is bound up with the history of (commercial) empire. But it has more general implications for public law scholarship. British public lawyers these days tend to think very much in national terms. For them, public law is essentially an island story. They tend to accept what has become the standard history in which principles and concepts developed largely as a result of autochthonous

[38] David Hume, 'Of the Origin of Government' in Hume, *Essays: Political, Moral and Literary* (Indianapolis: Liberty Fund, ed. Eugene J. Miller, 1985), 40. Hume is discussed at length in Chapter 4.

[39] Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010); Neil Walker, 'Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms' (2012) 3 *Transnational Legal Theory* 61; Jean Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge: Cambridge University Press, 2012).

pressures. (Honourable exceptions being made for fairly recent additions stemming from the UK's membership of the European Union and involvement in the European human rights system.[40])

Two prominent and contrasting examples might suffice to illustrate the point. Martin Loughlin's classic *Public Law and Political Theory* examines traditions of thought within British public law.[41] But the book makes the lawyers and theorists it discusses talk and write as though the empire never happened. By contrast, the analysis developed in this book suggests that reading great public law authors such as Dicey or Bagehot – let alone constitutional theorists such as Burke or Mill – without also trying to understand the external and imperial dimensions of their work leads at best to a partial understanding of their constitutional thought. T. R. S. Allan's great work on the common law constitution *Law, Liberty, and Justice* proceeds in a similar manner to Loughlin.[42] Its narrative is a British – indeed a very English – one. If it pays any attention to the external dimension of the constitution at all, it assumes that being an essential part of a juridical web that stretched rather haphazardly around the globe had no impact on the common law's essential nature. This account in my view diminishes the common law, not least in terms of its global significance and the range and complexity of the jurisdictional questions it handled.[43] It also blinds us to the fact that the common law is an imperial law in at least two senses. First by virtue of its origins: it extended the writ of the Crown throughout English domains, helping to consolidate Norman/Angevin holdings in England.[44] Second by virtue of its

[40] There was also a significant strand within public law thought which sought to draw upon American principles and the US experience more generally: see, e.g., Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Oxford University Press, 1991). This trend seems to have all but disappeared.

[41] Martin Loughlin, *Public Law and Political Theory* (Oxford: Oxford University Press, 1992). More recently, it is only fair to say, Loughlin has explored the development of British public law in the context of more general trends within European state theory: see his *Foundations of Public Law* (Oxford: Oxford University Press, 2010).

[42] T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Oxford University Press, 1994). See also J. W. F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007).

[43] One excellent example of this is the 'Great Writ' of habeas corpus: see Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, Mass.: Harvard University Press, 2012).

[44] S. F. C. Milsom, *Historical Foundations of the Common Law* (Oxford: Oxford University Press, 2nd ed., 1981); Paul Brand, 'Judges and Judging 1176–1307' in Paul Brand and Joshua Getlzer (eds.), *Judges and Judging in the History of the Common Law and Civil Law* (Cambridge: Cambridge University Press, 2012).