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Introduction

DAVID DYZENHAUS AND THOMAS POOLE

The twentieth century may be said to have witnessed the apotheosis of the state. The state became capable of operating on an unprecedented and potentially all-encompassing scale. It could provide for its subjects in a previously undreamt of manner, taming *Fortuna* to the extent that the vicissitudes of life that at any previous stage of human history would have meant their demise might now be treated as mere inconveniences. But the state could also fight total wars on an intercontinental scale, requiring vast sacrifices from its populations.[1] And, as the century progressed, the state also showed itself capable of controlling its subjects in ways that were deeply troubling to liberals who valued above all the freedom of individuals to decide on the good for themselves.

The rise of the modern state and the possibilities for liberty within it were staple topics of twentieth-century social and political thought. But the subject also had crucial juridical dimensions that are more commonly overlooked. From the turn of the century onwards, theorists realized that the requirements of the modern state put increasing pressure on accepted understandings of law. The dynamism of the new century meant that law, once seen as both relatively settled and stable and protective of individual liberty, was now subject to rapid, sometimes dramatic and unpredictable change. Law increasingly became something made or legislated, connected to functions determined by the organs of the state and as such a 'positive' rather than a 'natural' phenomenon. This development not only reinforced general concerns about the demise of humanistic values in the 'Machine Age', but it also threatened the connection that was previously assumed between the law and the

[1] Historians have begun to argue that the First World War in particular ought to be seen 'not merely as a war between European nation states, but primarily as a war of multi-ethnic, global empires': see Robert Gerwarth and Erez Manela, 'Introduction' in Gerwarth and Manela (eds), *Empires at War, 1911–1923* (Oxford University Press, 2014), 3.

basic values or mores of the community. And this was occurring at a time when, with other traditional forms of social cohesion losing their force, law was being called upon to do more by way of legitimating the government apparatus. This sense of juristic disorientation was heightened by the specificity of the new functional rule making. As law seemed to become regulation, increasingly a matter of detail and of technique, it became unclear what space remained for the image of law as anchor of basic principles and brake on overweening or arbitrary political action. If the *Rechtsstaat* is meant to embody general liberal principles, how can it abide a particularistic core?

This collection examines the response to the problems of law and liberty raised by the modern state of three of the last century's greatest thinkers: Carl Schmitt (1888–1985), Friedrich Hayek (1899–1992) and Michael Oakeshott (1901–1990), whose lives almost spanned the entire century. All were associated with a conservative reaction to the progressive forces of their time, although these reactions took very different forms. Their formative experience was the crisis of European society in the inter-war years. Each was an acute, if controversial, analyst of the juristic form of the modern state and the relationship of that form to the idea of liberty under a system of public, general law. They were also influenced by each other's work, although this occurred as much through the irritant effect one's thought had on another's as through more direct or positive means. Hayek had the highest regard for Schmitt's understanding of the *Rechtsstaat*, despite considering him to be dedicated to the destruction of that form of state. Schmitt, as Perry Anderson observed in an essay on the three thinkers, 'was never far from Hayek's mind – standing for the prime example of a skilled jurist whose sophistry helped to destroy the rule of law in Germany, yet a political theorist whose stark definitions of the nature of sovereignty and the logic of party, at any rate, had to be accepted'.[2] Hayek also acknowledged Oakeshott's influence, notably for the distinction, crucial to his own theory, between a teleocratic (purpose-governed or managerial) form of state and a nomocratic (law-governed or juridical) form.[3] Oakeshott, for

[2] Perry Anderson, 'The Intransigent Right: Michael Oakeshott, Leo Strauss, Carl Schmitt, Friedrich von Hayek', *London Review of Books*, 24 September 1992; republished in Anderson, *Spectrum: From Right to Left in the World of Ideas* (London: Verso, 2005), 15.

[3] F. A. Hayek, 'The Confusion of Language in Political Thought' (1967) in Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (London: Routledge & Kegan Paul, 1978), 89.

his part, resisted the comparison. Hayek's assault on rationalism, in his view, failed to go far enough. It may have been doctrine against doctrines, but it remained a doctrine for all that. 'A plan to resist all planning may be better than its opposite, but it belongs to the same style of politics.'[4] And although Schmitt seems to have been unaware of Oakeshott's work on Hobbes until the last years of his life, Hobbes was a theorist of cardinal importance to both. Oakeshott's comment about *Leviathan* being 'the greatest, perhaps the sole, masterpiece of political philosophy written in the English language'[5] was a judgement on which Schmitt could wholeheartedly concur.

Despite these points of salient connection and productive contrast, the three writers are rarely discussed together, a gap in the literature which becomes more pronounced at a time when political theorists, lawyers and international relations scholars increasingly turn to foundational texts of twentieth-century thought. This collection considers the juridical aspects of the work of Schmitt, Oakeshott and Hayek and the way that those aspects intersect with their thinking on liberty and the modern state. While some of the essays pay attention to the context in which the theorists wrote, this volume is not primarily historical. Its main aim is to deepen our understanding of the conceptual thinking of the three theorists with a view to identifying what remains useful in the context of contemporary issues and concerns. No strict editorial grand plan has been imposed on the essays. While some authors confine themselves to the thought of one thinker, others discuss linkages and dissonances between two or among all three. The editors have instead devised what they considered the most coherent and satisfying arrangement, one which both places essays that speak most directly to each other wherever possible side by side and also serves to shed the most light on the collection's overarching themes. This has resulted in putting first those essays which have Schmitt as their centre of gravity, then those which concern Oakeshott and finally the essays on Hayek and Hayekian themes. It also means that the collection moves from an initial reflection on the character of the state and sovereignty (Chapters 2–5), through analyses of the theorists' responses to crisis, reason of state and the 'exception' (Chapters 6–8) and their understanding of the rule

[4] Michael Oakeshott, 'Rationalism in Politics' in Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, IN: Liberty Press, 1991), ed. Timothy Fuller.

[5] Michael Oakeshott, 'Introduction to *Leviathan*' (1946), collected in Oakeshott, *Hobbes on Civil Association* (Oxford, UK: Basil Blackwell, 1975), 3.

of law (Chapters 9 and 10), to a discussion of more institutional dimensions of their thought (Chapters 11–13).

The collection opens with an essay by Nehal Bhuta (Chapter 2) which brings an important focus on international law and on the enterprise of state building. Bhuta develops a comparative reading of Schmitt's and Oakeshott's diagnoses of the origins and nature of the state, examining in particular their understanding of state concepts and state formation. Noting the two writers' sensitivity towards the fragility of that special kind of liberty which is connected to the modern state form, Bhuta argues that despite their different practical commitments in politics, 'Schmitt and Oakeshott share essential commonalities in their analyses of the state and . . . together they leave us with an understanding of the state that has significant implications for how we think about the state and state formation today.'

Hans Lindahl's chapter (Chapter 3) focusses on the systematic relation between state, law and freedom that emerges from Carl Schmitt's discussion of law as a concrete order. Lindahl argues that when legal order is reconstructed as authoritative collective action, a theory of concrete order supports several of Schmitt's objections to normativism while also forcefully rejecting his attempt to ground the validity of legal constitutions in a condition of political normality. Indeed, there is no original normality which lends an independent measure to normativity, no pure 'social type' which could provide the inner measure to which legal norms must correspond if they are to be valid. Constitutional crises reveal that normality is always the outcome of a process of normalization which responds to the abnormal; hence that collective self-restraint is an integral part of the exercise of collective freedom. 'Normality, including constitutional normality', the chapter concludes, 'is always to a greater or lesser extent the outcome of a process of (constitutional) normalization', meaning that the normative domain is never only pre-reflexive but also post-reflexive.

Martin Loughlin's contribution (Chapter 4) looks at the question of origins, a perennial juristic question, here examined through a reading of Carl Schmitt, one of the subject's most important and controversial modern interlocutors. Loughlin does so by illuminating Schmitt's attempt in *The Nomos of the Earth* to recapture the original meaning of *nomos* by going back to its Greek origins, where the term connoted the appropriation, distribution and productive use of land. Schmitt's aim in doing so was not to breathe artificial new life into dead myths but as part of the exercise of following the constitution of political authority to its source. All questions of collective order are to be traced back to the three processes

of appropriation, distribution and production. Part of Schmitt's aim in restoring the original meaning of *nomos* thus serves, Loughlin argues, to place in question the authority of the predominant positivism and normativism of modern legal thought.

Lars Vinx's chapter (Chapter 5) asks whether Carl Schmitt's theory of sovereignty manages to establish, as intended, that a sovereign is essential to the very existence of a legal and political system. The concept of sovereignty has come in for a great deal of criticism in legal, political and constitutional theory. It cannot account for a number of key features of developed legal systems, critics argue, such as their continuity through time or the existence of secondary norms. Schmitt's defence of sovereignty, Vinx argues, is at least partially successful. While Schmitt does not manage to show that there must be a sovereign wherever there is an established legal and political system, he does establish that the existence of a sovereign authority in something like the classical sense is not necessarily incompatible with a modern legal and constitutional system characterized by institutional continuity and a rich internal normative structure. Schmitt also succeeds in linking his reformulated understanding of the classical concept of sovereignty, as the power to decide on the exception, to modern notions of popular sovereignty and national independence. His reply to the normative criticism of sovereignty exploits these links by arguing that true popular sovereignty and political self-determination are possible only where sovereignty authority is recognized as the legitimating source of political and constitutional order. Schmitt does not succeed, however, Vinx argues, in showing that sovereignty is politically attractive. Far from being an indispensable condition of the legitimacy of law, the existence of a Schmittian sovereign inevitably undermines the legitimacy of legal order.

David Boucher's contribution (Chapter 6) focusses on the contributions of Schmitt and Oakeshott to the inter-war body of literature on the 'crisis of civilization'. Boucher charts the fascination that Hobbes' political thought exerted upon both writers. As such, it brings to the surface a general sub-theme of this collection: namely, the importance of Hobbes' state theory as an influence on Schmitt and Oakeshott and as a foil for Hayek. Reflecting on the conceptual confusion and the erosion of the theory and practice of authority, Schmitt and Oakeshott identified in Hobbes an individualism that was somehow contributory towards modern liberalism, which they saw as both a cause and a symptom of the modern crisis. Reading Schmitt on Hobbes against Oakeshott on Hobbes sheds light on the sharp differences between them. Thus, while

Schmitt saw politics fundamentally as the ability to distinguish between friends and enemies and thought that modern trends had impaired the state's ability to act decisively in this zone, for Oakeshott, it was the enhancement of the state's ability to act decisively, exacerbated by a propensity to go to war too hastily, that suppressed the individualism of citizens.

Thomas Poole's chapter (Chapter 7) examines the responses of Schmitt, Hayek and Oakeshott to the rise of the modern state and its warping effect on the concept of law by exploring what each had to say about the idea of reason of state. Each may be said to reflect a characteristic response to the years of crisis that beset twentieth-century Europe. For Schmitt, reason of state is connected with the central idea of the exception, tied to a substantive politics of belonging and thus to the basic political question of who counts as friend and who the enemy. Reason of state offers a source of redemption and escape from the humdrum realities of the creeping bureaucratic state. Hayek, by contrast, sees reason of state as the antithesis of his ideal of the common law *Rechtsstaat*,[6] the evolutionary body of law tied closely to the lived experience of the people and which contains the virtues of the many-minds principle in juridical form. His response to the threat presented by reason of state is to try to eradicate it, both normatively and as a matter of institutional design, a move especially evident in his model constitution. Oakeshott shares Hayek's distrust of reason of state but recognizes that the practice of reason of state lies at the heart of one of two conceptions of politics that vie for prominence within the modern European state. Built into the institutional structures and pathways of government, reason of state may be impossible to eradicate, but we may be able to check its more dangerous excesses.

In 'Reconfiguring Reason of State in Response to Political Crisis' (Chapter 8), Duncan Kelly explores what he takes to be a project shared by Oakeshott and Schmitt of understanding the modern state through the emergence of its central ideas in the history of political thought. But, Kelly argues, the commonalities between the two go even deeper. The point of developing an account of the state through an exploration of the history of political thought is, first, to undermine the claim of liberal theory to be able to understand the state as neutral, or non-ideological, or apolitical and, second, to show the political nature of the Western

[6] John Grey, *Hayek on Liberty*, 3rd edn. (London: Routledge, 1998), 69.

secularization process. It is for this reason that both took so much inspiration from Hobbes. Hence, both Oakeshott and Schmitt rejected what one might think of as the rights fetishism of twentieth-century liberal thought and argued for the return of a historically informed sense of the centrality of the 'political' in shaping our contingent practices.

Erika Kiss's chapter (Chapter 9) disinters the philosophical assumptions that drive Oakeshott's rejection of conventional accounts of the rule of law. In part, she suggests, misunderstandings of Oakeshott's argument, which caused him some frustration, are his responsibility, and she seeks to remedy these by reference to his little-known work, *A Guide to the Classics*, an early, jointly authored book on gambling at the horse races. She argues that one can derive from Oakeshott's account in that work an idea of 'stochastic rationality', 'an epistemologically relaxed mode of intellectual engagement, which is somewhat unconcerned with outcomes'. It is akin to the skill involved when people learn their native language. The point for law and the rule of law are that, as 'with a vernacular language, the rule of law will not prescribe what has to be said, and sometimes things can be said that nobody had ever thought could be said in the language at all; as with gambling, we do not know what the outcomes will be – we can just wager as best as we can, using our judgment'. This understanding of the rule of law, Kiss suggests, is apt for a world in which we do not have the certainties that would make it possible for experts and technocrats to lead us.

In 'Dreaming the Rule of Law' (Chapter 10), David Dyzenhaus explores common themes in the accounts of Schmitt, Hayek and Oakeshott of the importance of the rule of law to the liberal state. All three thinkers argued that the rule of law has to be understood as a formal principle of government that is somehow liberty preserving. But, Dyzenhaus argues, the similarities end there. Schmitt thought that the liberal rule-of-law project had been transformed into a politically vacuous, positivistic commitment to granting legitimacy to any technically valid law. In contrast, while both Hayek and Oakeshott considered that the rule-of-law state was in constant danger of being undermined by state forms designed for centralized social planning, they both considered that it remained a viable project. Dyzenhaus focusses mainly on Oakeshott in a bid to show that despite his aversion to instrumental accounts of politics, he developed a natural-law theory of the rule of law that explains why there is a politically valuable connection between legal form and liberty.

Jan-Werner Müller's contribution (Chapter 11) explores Hayek's at first sight rather odd conception of a model constitution for liberal

democracy. The conception is odd because Hayek suggested that there should be two assemblies. The Legislative Assembly was to be elected by citizens aged forty-five and older, who would choose candidates of the same generation for a fifteen-year term. It would devise the just rules of conduct for citizens. The Governmental Assembly would be subject to regular election and party political competition. A Constitutional Court would adjudicate conflicts between the two bodies. Müller argues that the Model Constitution does not appear so odd when one takes into account that in times of crisis, people might want to make a fresh start with a different kind of democracy and that it is not uncommon for people to vote to narrow their political choices. He also sketches problems that the Model Constitution encounters in terms of some of Hayek's own central commitments. However, the basic idea behind it retains some allure just because it offers the prospect of 'relief from irrational partisan politics and the burdens of involving oneself in politics and wasting too many evenings'.

In 'Hayek and the State' (Chapter 12), Chandran Kukathas points out that Hayek surprisingly hardly ever refers to the 'state'. His diagnosis of this dearth of reference is that Hayek was in fact torn between two different arguments. The first is that we need to reform and liberalize the institutions of the modern state in order to protect liberty and uphold the rule of law. The second is that liberty and the rule of law cannot prevail unless we get away from a state-centric understanding of political order. Kukathas makes the case that only the second argument, one that repudiates the state as the fundamental institution governing human society, presents Hayek's distinctive contribution to political theory. In a careful account of the development of Hayek's thought, he shows that Hayek constructed an account of the liberal state as an 'abstract order of people who interact with and relate to one another not because they share particular deep ethical commitments but in spite of the fact that they do not'. Hayek thus puts forward an understanding of liberalism whose virtue is that it cannot secure any political unity, one that was opposed to ideas of community and that seeks to transcend, perhaps vainly, political boundaries.

In his contribution (Chapter 13), Adrian Vermeule casts doubt on Hayek's own case for a thoroughgoing hostility to the administrative state. Hayek and Hayekians, he points out, privilege context-specific knowledge about particular economic or regulatory problems, especially tacit or practical knowledge. But this Hayekian position, he argues, overlooks or downplays the fact that 'centralized synoptic regulation is

indispensable for epistemic coordination' – the creation of a common knowledge that could not be achieved if everything were left to myopic local actors. In addition, he argues that the administrative state has developed a representative bureaucracy devoted to the gathering and exploitation of local knowledge. While Vermeule regards the distinction between local and global knowledge as of central importance to understanding the scope of the administrative state and its internal organization, his argument exposes deep tensions within the Hayekian position on these issues which require further attention.

As one can see from these brief descriptions, there is much internal disagreement among the contributors about how to evaluate the work of the figure or figures on whom their contributions focus. For example, they differ as to whether one should take the account of law, liberty and state in any of the three figures as foil or as inspiration, or as some mix of both, and, if more than one figure is examined, on whether there are fundamental commonalities in the approaches each adopted to the rule of law. However, all the contributors agree at some abstract level that these figures have much to offer contemporary debates about such themes, and our hope is that readers will find illuminating both the areas of agreement and disagreement that emerge, whether explicitly or implicitly, from the twelve chapters.

2

The mystery of the state

State concept, state theory and state making in Schmitt and Oakeshott

NEHAL BHUTA

Both Schmitt and Oakeshott were antagonists of the rationalist style of thought in politics.[1] Today we might label them 'realists',[2] although the term is anachronistic. Both of them were deeply sceptical (and, in Schmitt's case, ideologically hostile) to the idea that cognitively derived normative principles could be the *foundation* for political orders and the answer to problems of state formation. Both would readily admit that normative reasoning was intrinsic to political practices and indistinguishable from the 'stuff' of politics. But neither accepted that the foundation of state power and authority lies in the voluntaristic assent of citizens persuaded by the best arguments for such authority. Rather, both thinkers approach the modern state and its nature through an historical understanding of the emergence of the state and the determination of its conceptual architecture and normative languages through inherited modes of authority and apparatuses of government, the content and functioning of which are transformed by a series of highly contingent historical developments in Western Europe. And both thinkers also understood the modern state as generating a distinctive kind of freedom, undermined by the dynamics inherent in the emergence of the modern state form itself: Oakeshott's nomocratic civil condition, under threat from teleocratic state action under the shadow of

Helpful comments and criticisms were received from Nida Alahmad, Samuel Moyn, Duncan Kelly, Benjamin Schupmann and Benjamin Straumann.

[1] Carl Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge, MA: MIT Press, 1988), trans. Ellen Kennedy; Carl Schmitt, *The Concept of the Political* (University of Chicago Press, 2007), trans. George Schwab; Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, IN: Liberty Fund, 1991); Michael Oakeshott, *On Human Conduct* (Oxford University Press, 1991).

[2] As Terry Nardin does; see Terry Nardin, 'Realism and Right: Sketch for a Theory of Global Justice' in Cornelia Navari (ed.), *Ethical Reasoning in International Relations: Arguments from the Middle Ground* (Basingstoke, UK: Palgrave, 2013), Chapter 3.