PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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that the political must be defined apart from a definition of the state, there is, as Gopal Balakrishnan has noted, a tendency surreptitiously to reintroduce the state, as a vehicle for conflict management, 'as the natural subject of political life.'[31] This ambiguity notwithstanding, Schmitt's objective in building from the concept of the political is useful, especially because it yields a powerful insight into the question of what the intricate exercise of state-formation might involve.

From Schmitt's perspective, it is only through the establishment of the state that a group of people within a certain territory becomes 'a pacified unity encompassing the political.'[32] Once it becomes possible to define a people as a group that is to be differentiated from other political units, what emerges is a sense of 'national consciousness,' by which is meant a minimal degree of cohesion and distinctiveness that is forged amongst a people.[33] With the recognition of a 'we' that can be set against the 'they' of the rest of mankind, the friend-enemy distinction is capable of being externalised. Michael Howard has observed how, from the very beginning, 'the principle of nationalism was almost indissolubly linked, both in theory and practice, with the idea of war.'[34] But it is also a consequence of this process that domestic antagonisms become capable of being managed effectively, thereby remaining below the level of intensity of friend versus enemy.

By acquiring a monopoly of coercive power, the state imposes peaceable order and gradually forges some notion of the unity of a people. This perspective on state formation enables us both to recognise the significance of the distinction, which is often drawn in international relations, between external and internal conceptions of sovereignty[35] and also to appreciate the importance of the ideology of nationalism as a source of state-building energy.[36] Since the state is thus able to institutionalise domestic political antagonism at a lower level of intensity than that of friend versus enemy, one of its most basic achievements is that of being able to keep conflict and disagreement within a framework of order. For these conditions to be realised, however, the tensions that exist within the state must be actively managed. Once this positive role of the state is acknowledged, we can

[31] Balakrishnan, above n 29, at 110. This ambivalence is also reflected in Schmitt's treatment of Hobbes who, in the first edition of *The Concept of the Political* he described as 'by far the greatest and perhaps the sole truly systematic political thinker', a position from which he resiled in the light of Leo Strauss's observation (above n 20, at 89–93) that Hobbes's individualistic principles are constructed precisely for the purpose of negating, in Schmitt's sense, the political. See Meier, above n 30, esp at 32–38.

[32] Ernst-Wolfgang Böckenförde, 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory' in Dyzenhaus (ed), above n 29, at 37, 39.

[33] Karl W Deutsch, *Nationalism and Social Communication: An Inquiry into the Foundations of Nationality* (2nd edn, Cambridge, Mass, MIT Press, 1966), 173.

[34] Michael Howard, 'Empires, Nations and Wars' in his *The Lessons of History* (Oxford, Clarendon Press, 1991), 21, 39.

[35] See, eg, RBJ Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge, Cambridge University Press, 1993).

[36] See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (rev. edn, London, Verso, 1991). Gellner captures something of this spirit when he observes that states are 'groups which *will* themselves to persist as communities': Ernest Gellner, *Nations and Nationalism* (Oxford, Blackwell, 1983), 53.

begin to understand the state to be an artefact or, in Jacob Burckhardt's expression, as 'a work of art.'[37]

Within a relatively stable political regime, such as that of the United Kingdom today, this achievement is in danger of being overlooked.[38] But the fact of the matter is that 'today virtually everywhere in the world, groups of human beings need with the utmost urgency to decide whom to fear and whom to trust, whom to identify with and whom to identify against, with whom and against whom to seek to cooperate or to struggle, even, *in extremis*, whom to seek to kill.'[39] Viewed in this light, state formation must be treated as a complex process through which many of these fears and tensions can be controlled, regulated, and also manipulated. It is at this second-order level of the political, politics within a viable system of government, that what might be called the practices of politics emerge. Here, the political system operates mainly through a range of second-order distinctions, such as those between governors and governed or government and opposition.[40]

POLITICS AS STATECRAFT

Schmitt believed that conflict was not only endemic but also existential: group life without conflict—society without politics—constitutes a denial of the human condition which, if ever realised, would amount to a moral loss.[41] This is a view that Schmitt shared with Machiavelli. But whereas Schmitt concentrated on the existential character of this phenomenon, Machiavelli's overriding aim had been to offer advice to rulers on the most effective way to govern. Furthermore, although both Schmitt and Machiavelli accepted the intrinsically political nature of society and embraced the political reality of conflict, important differences exist between them. The nature of these differences is instructive.

Although Schmitt worked through the concept of the political in a highly systematic manner, he had the rather unsound tendency to raise the inevitability of conflict into a foundational principle. Machiavelli, by contrast, was concerned primarily to demonstrate how, through the cultivation of sound political practice, enmities could not only be handled but positively harnessed. For Machiavelli, a sound politics requires *virtù*, by which he means courage, vigour, vitality and

[37] Jacob Burckhardt, *The Civilisation of the Renaissance in Italy* (Oxford, Phaidon Press, 1945), Pt I.

[38] Nevertheless, the situation in Northern Ireland is instructive. Here, ever since its founding in 1920, and especially over the last 30 years, the integrative function of the state in forging a unity of the people has been placed in question. In this situation, the danger exists that the friend-enemy distinction does indeed become determinative of all significant issues within domestic politics.

[39] John Dunn, 'Specifying and Understanding Racism' in his *The History of Political Theory and Other Essays* (Cambridge, Cambridge University Press, 1996), 148, 151.

[40] See Niklas Luhmann, *Political Theory in the Welfare State* (John Bednarz (trans), (Berlin, de Gruyter, 1990), esp chs 3 and 5.

[41] This explains why Schmitt opposed the forces of technology which he believed to be threatening the political: see McCormick, above n 29. We might also note Joseph Cropsey's comment that, in his attack on modern liberalism, Schmitt believed that liberalism was 'complicitous with communism in standing for the withering away of the political and replacing it with the technological—the reduction of humanity to the last man.' See Cropsey, 'Foreword' to Meier, above n 30, at x.

strength of purpose. By acting with *virtù* and in accordance with the requirements of necessity, *fortuna*—the unpredictable or fortuitous—could be tamed and glory secured.[42] Machiavelli's purpose was to provide guidance on how to handle this contest between freedom and necessity whereas Schmitt, having constructed a political reality based on conflict, appeared simply to celebrate this condition and to 'transform enmity and brokenness into metaphysical principles'.[43] As FR Ankersmit comments, this is 'as if marital quarrels were seen not as an unavoidable aspect of living together, but as its very basis.'[44] As an account of politics within a system of governance, Machiavelli's is to be preferred.

Machiavelli was the first writer to argue that politics, especially once it is understood to be a set of practices relating to the art of the state, rests on its own rules and principles. Emphasising the point that politics is concerned with the pursuit of power, Machiavelli rejects the classical view that it should be understood simply as the art of maintaining 'the good community.' But in order to understand his position, it is necessary first to consider how he develops this notion of the autonomy of the political from his views about human nature. For Machiavelli, the inner life of man (*animo*) is not a sphere of repose, harmony or self-control, but one of continual motion. Man, he suggests, is ruled not by reason but by appetite and ambition, and these characteristics, which provide the source of action, lead to competition and conflict. This analysis of the human condition causes Machiavelli to adopt a novel approach to the issue of scarcity. For the ancients, the phenomenon of scarcity in the world was resolved by self-discipline and education. Machiavelli, by contrast, argues that 'since the scarcity of objects is the result of the nature of appetite and passion, and not the other way around, competition and conflict between men is natural and inevitable.'[45] Machiavelli's innovation was to suggest that man is a political animal precisely because people are required to engage with one another as a means to their own satisfaction. Because people strive not only to achieve material success but also to attain fame and glory—qualities which require some degree of public acknowledgement—politics must be conceived to be a natural condition.

Although Machiavelli here breaks with classical assumptions, his writing should still be interpreted in the context of the early modern revival of the republican idea of politics as a set of practices that evolve within a form of order that seeks to promote the common good.[46] Machiavelli thus employs the term 'politics' to denote those practices operating within a regime of authority that is constrained by laws, and he contrasts such a regime with the unrestrained exercise of power, which

[42] Niccolò Machiavelli, *The Prince*, [1513] Stephen J Milner trans. (London, Dent, 1995) chs 25, 26.

[43] FR Ankersmit, *Aesthetic Politics: Political Philosophy Beyond Fact and Value* (Stanford, Stanford University Press, 1996), 127.

[44] *Ibid.*

[45] Martin Fleisher, 'A Passion for Politics: The Vital Core of the World of Machiavelli' in Fleisher (ed), *Machiavelli and the Nature of Political Thought* (New York, Atheneum, 1972), 114, 130.

[46] See Maurizio Viroli, 'Machiavelli and the Republican Idea of Politics' in Gisela Bock, Quentin Skinner and Maurizio Viroli (eds), *Machiavelli and Republicanism* (Cambridge, Cambridge University Press, 1990), 143–71.

generally is called tyranny.[47] Consequently, although Machiavelli displaces the rule of reason both within the individual and the collectivity, he does not suggest that politics can be reduced to the pursuit of appetite and desire. While there is no room in Machiavelli's world for an objective natural law that yields authoritative precepts of right conduct, this does not mean that politics is reducible simply to the pursuit of material self-interest.

This last point is one that is central to the understanding of politics as an autonomous sphere of activity. Machiavelli's work emphasises the gulf that exists between the private and public spheres, between what Hannah Arendt, echoing the classical division, called 'the sheltered life in the household' and 'the merciless exposure of the *polis*.'[48] The activity of attending to the arrangements of the public sphere, Machiavelli is arguing, requires special skills that go beyond those of household management. It is for this reason that Arendt suggested that Machiavelli is the 'only postclassical political theorist who, in an extraordinary effort to restore its old dignity to politics, perceived the gulf and understood something of the courage needed to cross it.'[49]

Those that seek to rule in the common good, Machiavelli argues, are certainly obliged to act with vigour and courage. But they must also cultivate the virtue of prudence. Prudence in politics requires rulers to possess certain skills of practical reason, including those of being able to speak fluently, to act persuasively and to deliberate wisely. In chapter 15 of *The Prince*, Machiavelli lists 11 pairs of qualities that bring a ruler praise or blame: generosity or miserliness; beneficence or greed; mercy or cruelty; trustworthiness or faithlessness; strength or weakness; humanity or pride; chastity or lasciviousness; uprightness or guile; flexibility or severity; seriousness or light-heartedness; religiosity or scepticism. Although recognising that it would be laudable to find all the good qualities combined in a ruler, he states that:

> since it is not possible either to possess or wholly to observe them, because human nature does not allow it, it is necessary for him to be sufficiently prudent that he knows how to avoid the infamy of those vices that will deprive him of his state.[50]

But he also goes on to comment that the ruler:

> should not worry about the infamy incurred by those vices which are indispensable in maintaining his state, because if he examines everything carefully, he will find that something which seems virtue [*virtù*] can, if put into practice, cause his ruin, while another thing which seems a vice can, when put into practice, result in his security and well-being'.[51]

[47] See Niccolò Machiavelli, *The Discourses*, I.25 [1531] Leslie J Walker trans. Bernard Crick (ed) (Harmondsworth, Penguin, 1983) (contrasting a 'political regime' with 'despotism' or 'tyranny').

[48] Hannah Arendt, *The Human Condition* (Chicago, University of Chicago Press, 1958), 35. Cf Aristotle, *The Politics* [c 335–323 BC] TA Sinclair trans. Trevor J Saunders (ed) (Harmondsworth, Penguin, 1981) Bk I, ii.

[49] *Ibid.*

[50] Machiavelli, *The Prince*, ch 15.

[51] *Ibid.*

Machiavelli here asserts the autonomy of the political by suggesting that, within the sphere of politics, there is no power of reason superior to that of prudence. We must therefore be quite clear about the meaning of this term. In an insightful essay, Martin Fleisher provides a most useful explanation of Machiavelli's conception of prudence.

> Prudence is not to be measured principally by the existing standards of right and wrong but by the assessment of the best means to achieve one's ends. Prudence is not synonymous with caution, nor is it the dominance of reason over the appetites and passions. It is, instead, the cool calculation of what must be done in a given situation to accomplish one's purposes without judgment of the situation being unduly affected by passions or the contemporary conventions and ideals of right and wrong.[52]

Prudence is the ability to assess the situation and adopt the most appropriate course of action. It is to be distinguished from rule-governed action or from following the precepts of conventional morality primarily because new situations require innovative responses. It must also be distinguished from following the dictates of appetite, since the function of prudence is properly to serve the appetites (such as ambition) through an ability dispassionately to assess the requirements of the situation.

It might be noted that missing from the qualities listed above is that of justice. Machiavelli believes that to govern well rulers must be able to cultivate a reputation for being good.[53] But what he is suggesting at base is that the measure of justice is that of prudent rule. Cities and empires that are ruled well increase in glory, reputation and power. Such regimes will be law-governed. But the limits of laws should also be acknowledged and rulers might find it necessary, for the promotion of the common good, to break promises, to proceed deceptively or act belligerently.[54]

In common with Schmitt, then, Machiavelli's conception of politics is built on the belief that there is no single over-arching normative criterion for resolving existential conflicts.[55] His genius was to have recognised so early that there is no one true answer to the classical question: how should I live? Moral and political values are irreducibly plural and conflicts are inevitable: politics arises from the necessity of having to make choices between rival, sometimes incommensurable, goods in circumstances where there can be no authoritative principle or standard for resolving the dispute.

[52] Fleisher, above n 45, 139–40.

[53] Machiavelli, *The Prince*, ch 18. In this chapter Machiavelli indicates that political power depends primarily on what the people believe. The distinction between appearance and reality is irrelevant to the pursuit of politics: appearances—what the people believe—is the reality of politics.

[54] See, eg, Machiavelli, *The Discourses*, Bk III, ch 9: 'Piero Soderini [Florence's *Gonfaloniere a vita*, 1502–12] conducted all his affairs in his good-natured and patient way. So long as circumstances suited the way in which he carried on, both he and his country prospered. But when afterwards there came a time which required him to drop his patience and his humility, he could not bring himself to do it; so that both he and his country were ruined'. On Soderini see: Felix Gilbert, *Machiavelli and Gucciardini: Politics and History in Sixteenth Century Florence* (Princeton, Princeton University Press, 1965), ch 2.

[55] See Isaiah Berlin, 'The Originality of Machiavelli' in his *Against the Current: Essays in the History of Ideas* (Oxford, Clarendon Press, 1989), 25–79.

This *agonal* conception of politics, it should be emphasised, is not one that Schmitt shared. Heinrich Meier has convincingly argued that although he located politics in the necessity of action in the face of conflict, Schmitt ultimately answers the critical question—how should I live?—by appealing to a political theology which builds on the necessity of faith and of the truth of divine revelation. Drawing on the authority of biblical teaching,[56] Schmitt affirms the centrality of original sin, believes that these existential questions cannot be solved by reason alone and places his faith in 'the certainty of the God who demands obedience, rules absolutely, and judges in accordance with his own law.'[57] Schmitt's political theology is not content to leave matters of politics to deliberation and contest; he recognises that the battle between faith and errant faith admits of no neutral and must be waged in favour of the truth of divine revelation. This is a path that few can—and none should—follow.

The overriding significance of Schmitt's analysis of the concept of the political is that it helps us to appreciate the true originality of Machiavelli's thought. Although Schmitt explains how the political may have its source in enmity, the conduct of politics—what has been called the second-order of the political—is not built on the celebration of conflict: it is generated by the need to ensure its effective management. Politics is, as Michael Oakeshott expresses it, often an 'unpleasing spectacle':

> The obscurity, the muddle, the excess, the compromise, the indelible appearance of dishonesty, the counterfeit piety, the moralism and the immorality, the corruption, the intrigue, the negligence, the meddlesomeness, the vanity, the self-deception and finally the futility ... offend most of our rational and all of our artistic susceptibilities.[58]

But in so far as it succeeds in 'modifying the reign of arbitrary violence in human affairs, there is clearly something to be said for it, and it may even be thought to be worth the cost.'[59]

Politics is cultivated through those practices that enable the activity of governing to be effectively conducted. Through the development of these practices, especially when they are harnessed to the forces of nationalism, bonds of allegiance are strengthened and a sense of the unity of a people is forged. And it is this forging of a sense of common identity, which may be based on ethnicity, culture, language or common history, that provides the key to explaining why the political antecedes the state. As Ulrich Preuss expresses it, 'the common feeling of a group's oneness is the determining state-building social energy.'[60] Understood as a set of practices

[56] Genesis 3:15: 'I will put enmity between thy seed and her seed.' In tracing matters back to the doctrine of original sin, Schmitt's thought here displays similarities with the work of de Maistre: see Joseph de Maistre, 'The Saint Petersburg Dialogues' [c.1802–17] in Jack Lively (ed), *The Works of Joseph de Maistre* (London, Allen & Unwin, 1965), 183.

[57] Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy* (Chicago, University of Chicago Press, 1998), 11.

[58] Michael Oakeshott, *The Politics of Faith and the Politics of Scepticism* [c.1952] Timothy Fuller (ed) (New Haven, Yale University Press, 1996), 19.

[59] *Ibid* at 19–20.

[60] Ulrich K Preuss, 'Political Order and Democracy: Carl Schmitt and His Influence' in Chantal Mouffe (ed), above n 29, 155, 157.

operating within a system of government, politics is a significant accomplishment. The nature of this achievement was eloquently voiced by Lord Balfour when he remarked of the British system that 'the whole political machinery presupposes a people so fundamentally at one that they can safely afford to bicker; and so sure of their moderation that they are not dangerously disturbed by the never-ending din of political conflict'.[61]

This conception of politics has its roots in Machiavelli's resoundingly realistic portrayal of the human condition. We begin, Machiavelli argues, without any inheritance. His starting point has been concisely summarised in these terms: 'God did not give us a perfect beginning, as the Bible says, and nature did not provide us with a potentiality for politics, as Aristotle says. We began bare, unprotected, insecure, and justly fearful.'[62] Politics, in Machiavelli's thought, springs from what is necessary to ensure human survival and flourishing and, given the existential nature of enmity and conflict, politics has evolved to ensure that these conflicts are constructively handled.[63]

But this does not mean that politics seeks the elimination of conflict. Machiavelli argues that, far from being a destructive condition, conflict and dissension are vital ingredients of cohesion. Reflecting on the Roman republic, he notes that 'those who condemn the quarrels between the nobles and the plebs, seem to be cavilling at the very things that were the primary cause of Rome's retaining her freedom'.[64] In every republic, he concludes, 'there are two different dispositions, that of the populace and that of the upper class and that all legislation favourable to liberty is brought about by the clash between them'.[65] Machiavelli here impresses on us two important messages: that politics is concerned with the handling, not elimination, of conflict, and that liberty has its source not in ideas or in texts but in the cut and thrust of political struggle.

THE THIRD ORDER: CONSTITUTIONAL LAW

Although conflict remains an important element of politics, the cultivation of a sense of even-handedness constitutes a vital aspect of the project of state-building. For conflict to be positively harnessed, some less partisan framework of rule needs to be devised. This concern brings us directly to the question of constitutional law.

[61] Earl of Balfour, 'Introduction' to Walter Bagehot, *The English Constitution* (Oxford, Oxford University Press, 1936), xxiv; cited in Schmitt, *Political Theology*, above n 30, xxiii. See also Ernest Barker, 'The Discredited State: Thoughts on Politics before the War' (1915) 2(o.s.) *Political Quarterly* 101, which emphasises the vital condition of unstable equilibrium in state-society relations as being necessary for the continuation of progress.

[62] Harvey C Mansfield, *Machiavelli's Virtue* (Chicago, University of Chicago Press, 1996), 55.

[63] Cf Michael Oakeshott, *Rationalism in Politics* (London, Methuen, 1962), 127: 'In political activity, then, men sail a boundless and bottomless sea; there is neither harbour for shelter nor floor for anchorage, neither starting place nor appointed destination. The enterprise is to keep afloat on an even keel; the sea is both friend and enemy; and the seamanship consists in using the resources of a traditional manner of behaviour in order to make a friend of every hostile occasion.'

[64] Machiavelli, *The Discourses*, I.4.

[65] *Ibid.*

Many of the ideals associated with law, especially those of the rule of law and the assimilation of law to justice, help to create intimacy, shape identity, generate trust, and strengthen allegiance. The evolution of institutions of government that aspire to operate at one remove from direct manipulation by power-wielders removes certain decisions and disputes from partisan political processes and this too serves to bolster faith in the system. The cultivation of a belief in the law-governed nature of the state is, in short, a means of generating political power and an especially powerful aspect of state-building. But does this mean that law can be said to transcend the political?

The appropriate starting point must be to begin by treating constitutional law as a third order of the political. The establishment of a legal system that operates in accordance with its own conceptual logic and remains free from gross manipulation by power-wielders is, without doubt, an achievement of considerable importance. But whenever this modern idea of the rule of law is invoked, the predominant image is that of the formation of a legal system that serves the purpose of adjudicating between citizens[66] or ensures that rigorous procedures governing the imposition of criminal penalties are maintained.[67] This image is derived primarily from Montesquieu who, in Judith Shklar's words, advocated the establishment of 'a properly equilibrated political system in which power was checked by power in such a way that neither the violent urges of kings, nor the arbitrariness of legislatures could impinge directly upon the individual in such a way as to frighten her and make her feel insecure in her daily life.'[68]

Within a legal system that exists for the purpose of handling civil claims between citizens or for enforcing the norms of criminal conduct, it can be assumed, at least for the purpose of this analysis, that judges perform the important but relatively mundane task of resolving disputes in accordance with the rule system that has been laid down.[69] When we reflect on the idea of constitutional law, however, matters become much more complicated. Here we are concerned not with law as the expression of the sovereign authority of the state, but with law as a means of establishing a framework through which the sovereign authority of the state can be recognised.[70] To put the matter crudely, the image of law as command must, in this context, be jettisoned: law now presents itself as a species of 'political right'.[71]

[66] See Ernest J Weinrib, 'The Intelligibility of the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Toronto, Carswell, 1987), 59, 62: 'I wish to argue that in private law the non-instrumental aspect of law shines forth with particular brilliance, so that through reflection on private law we can grasp the Rule of Law as a coherent conceptual possibility.'

[67] See Douglas Hay, 'Property, Authority and the Criminal Law' in Hay *et al* (eds), *Albion's Fatal Tree* (Harmondsworth: Penguin, 1975), 17–63; EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth: Penguin, 1975), 258–69.

[68] Judith Shklar, 'Political Theory and the Rule of Law' in Hutchinson and Monahan (eds), above n 66, at 1, 4.

[69] See, however, Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford, Hart, 2000), ch 6.

[70] Cf Justinian, *Digest* I.1.1: '*Publicum ius est quod ad statum rei Romanae spectat*' [Public law is that which pertains to the constitution of the Roman state.] (Ulpian). [534] Alan Watson trans. (Philadelphia, University of Pennsylvania Press, 1998)

[71] In the exercise of analysing this conception of law, it might be noted that we remain handicapped

I do not propose to elaborate here on the idea of political right.[72] All that need be said is that, in this context, law is best understood as a set of practices that is embedded within, and which acquires its identity from, a wider body of political practices. Whilst it is possible to formulate constitutional law as a relatively discrete set of rules (that is, as positive law),[73] it must be understood that the meaning, function and mode of application of such rules is governed by the practices of politics.[74] This claim is not meant in the trite sense that constitutional law is rooted in the political because it serves the function of regulating political institutions, processes and decisions. Following the general approach of Machiavelli and (to a lesser extent) Schmitt,[75] the claim is founded on three basic convictions. The first is that of the autonomy of the political. The second is the promotion of a conception of constitutional law as a body of law that is not handed down from above but which exists as part of the self-regulatory processes of this autonomous political realm, and which may therefore be conceptualised as principles of political prudence. The third is the belief not only that the political cannot entirely be eliminated and subsumed into the rule-based logic of legal decision-making but that it should not be, since, properly understood, the primacy of the political provides a condition of human flourishing.

Since many of the contemporary misunderstandings of constitutional lawyers stem from a mischaracterisation of constitutions, it may be helpful to proceed by analysing the nature of conventional approaches to modern constitutional arrangements.

CONSTITUTIONS

We might begin by noting that the term 'constitution' is itself a source of ambiguity. Its most consistent usage in ancient times was as an expression of formally declared legislation.[76] However, *constitutio* was also used as a translation

by the fact that, while other European languages are able to draw a distinction between *jus, droit, diritto* and *Recht*, on the one hand, and *lex, loi, legge* and *Gesetz* on the other, there exists no corresponding differentiation in English of the word 'law'.

[72] I discuss this subject further in 'Representation and Constitutional Theory' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe* (Oxford, Oxford University Press, 2003), ch 3, and 'Ten Tenets of Sovereignty' in Neil Walker (ed), *Sovereignty in Transition* (Oxford, Hart, 2003), ch 3.

[73] In the British context, this was Dicey's outstanding achievement: AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, London, Macmillan, 1915), esp ch 1.

[74] This has been the major failure of Dicey (*ibid.* at 199: 'the principles of private law have ... been by the action of the Courts and Parliament so extended as to determine the position of the Crown and its servants') and his followers.

[75] Cf Robert Howse, 'From Legitimacy to Dictatorship—and Back Again: Leo Strauss's Critique of the Anti-Liberalism of Carl Schmitt' in David Dyzenhaus (ed), above n 29, at 56, 69: 'Schmitt puts Machiavelli's teaching in the form of legal scholarship, which at times appears to be a learned internal critique of an "autonomous discipline", ie, juridical science.'

[76] Justinian, *Institutes* I.2.6: 'whatever the emperor has determined (*constituit*) by rescript or decided as a judge or directed by edict is established to be law: it is these that are called constitutions'. [534] Peter Birks and Grant McLeod trans. (London, Duckworth, 1987). That this formulation influenced

of the Greek *politeia*, and therefore stood as a descriptive term for the entire body politic.[77] This latter formulation of the idea of constitution as an expression of the laws, institutions and practices which make up a tradition of governing has been of particular influence in English thought. It is in this sense that we might refer to Britain's distinctively political constitution. This type of formulation enables us to identify the constitution as 'an entailed inheritance.'[78] It also helps us to recognise the intrinsically political character of the governing relationship.

Notwithstanding the breadth of this characterisation, it must be emphasised that the laws are vital ingredients of a political constitution: they regulate many of the basic rules of political conduct, provide a source of stability in governing arrangements and, as a consequence of their handling and interpretation by a judiciary insulated from direct political influence, ensure a degree of even-handedness in rule application. This last aspect is of particular importance because, especially through law's claims to generality and universality, the appeal to the law-bounded character of the system contributes greatly to the maintenance of the system's legitimacy, and hence also capacity. But it is invariably the case that a constitution will leave space for what might be called extra-legal governmental action. The constitution here is following a basic law of political necessity: the necessity of rulers being able to take decisive action for the purpose of ensuring that conflict and dissension is handled effectively.

The form, breadth, and conditional nature of this extra-legal governmental power have varied throughout history. An early version of this power can be identified in the ancient Roman practices of constitutional dictatorship.[79] It appears in the medieval literature in the form of the doctrine of necessity.[80] A more

the work of English jurists is evident in the work of Sir John Fortescue, *De Laudibus Legum Anglie* [1468–71] SB Chrimes (ed) (Cambridge, Cambridge University Press, 1942), 36–37: 'But customs and the rules of the law of nature, after they have been reduced to writing, and promulgated by the sufficient authority of the prince, and commanded to be kept, are changed into a constitution or something of the nature of statutes.'

[77] See Graham Maddox, 'Constitution' in Terence Ball, James Farr and Russell L Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge, Cambridge University Press, 1989), 50–55; Howell A Lloyd, 'Constitutionalism' in JH Burns (ed), *The Cambridge History of Political Thought* (Cambridge, Cambridge University Press, 1991), 254–55.

[78] Edmund Burke, *Reflections on the Revolution in France* [1790] Conor Cruise O'Brien (ed) (London, Penguin, 1986), 119.

[79] See Clinton L Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, NJ: Princeton University Press, 1948), ch 2. We might note Machiavelli's assessment (*The Discourses*, I.34) of the Roman practice: 'It is clear that the dictatorship, so long as it was bestowed in accordance with public institutions, and not assumed by the dictator on his own authority, was always of benefit to the state.'

[80] See, eg, FM Powicke, 'Reflections on the Medieval State' in his *Ways of Medieval Life and Thought: Essays and Addresses* (London, Odhams Press, 1949), 135–36: '[T]he lords and knights about Philip the Fair were familiar with a conception of *utilitas* which carries us very far in the theory of statecraft. They could express or at least appreciate the expression of public utility in terms of *necessitas*, and by necessity they meant more than the public need. They meant the right and duty of the king and his agents ... to override positive law in the common interests for which they were responsible. The word 'necessity' had had a long history in ecclesiastical literature. Pope Gregory VII [in the eleventh century] had asserted that the pope in case of necessity could make new laws. A century later we find, applied to policy, the phrase 'necessity knows no law'. ... St. Thomas Aquinas developed a theory of necessity. He argued that, in certain circumstances, necessity knows no law; also that a tyrant can be removed on the

regularised variation exists in the distinction between *gubernaculum*, the inherent power of the king to govern his realm, and *jurisdictio*, a sphere of right in which the king is bound by the law.[81] And many of the English constitutional disputes of the seventeenth century were articulated with respect to the boundaries between the 'absolute' and 'ordinary' prerogatives of the crown.[82] Since the seventeenth century, however, constitutional thought has been underpinned by the necessity of ensuring the accountability of governors to the people. One product of this development has been an understandable concern to express sovereign authority in terms of that institution which has the final word over the course of action that best promotes the *salus populi*.

The British solution—that sovereignty rests in the crown-in-parliament—is sufficiently abstract and general to be capable of providing a plausible response in terms of the mode of political association, whilst at the same time fudging a variety of practical political questions, including that of the nature of any governmental power beyond law. In his opening words to *Political Theology*—'Sovereign is he who decides on the exception'[83]—Carl Schmitt offered a characteristically provocative formulation. The essence of his argument was that: 'The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception.'[84] Once again, Schmitt is guilty of pushing an astute insight to its extreme, thereby overstating its force. So although he seems correct both in his contention that the exception cannot be banished from the world and also in the observation that the exceptional situation

ground of necessity ... The legists of Philip the Fair gave a more positive direction to the argument. Necessity, in their mind, was more than a sanction of self-protection; it was a call to assert the power of the king, over and above the limits set by custom and tradition, in the interests of his kingdom and of the Christian community of which his kingdom was a responsible part.'

[81] See Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (rev edn, Ithaca, NY, Cornell University Press, 1977), ch 4; SB Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge, Cambridge University Press, 1936), 40–62; Francis D Wormuth, *The Royal Prerogative 1603–1649: A Study in English Political and Constitutional Ideas* (Ithaca, NY, Cornell University Press, 1939), 55–60.

[82] See *Bate's Case* (1606) *State Trials*, II, 389 per Fleming CB: 'The Kings power is double, ordinary and absolute, and they have several laws and ends. That of the ordinary is for the profit of particular subjects, for the execution of civil justice, the determining of meum; and this is exercised by equitie and justice in ordinary courts, and by the civilians is nominated *jus privatum* and with us common law: and these laws cannot be changed, without parliament ... The absolute power of the King is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people and is *salus populi*; as the people is the body, and the King the head; and this power is guided by the rules, which direct only at the common law, and is most properly named Pollicy and Government; and as the constitution of this body varieth with the time, so varieth this absolute law, according to the wisdome of the King, for the common good.' See Francis Oakley, 'Jacobean Political Theology: The Absolute and Ordinary Powers of the King' (1968) *J of the History of Ideas* 323–46. The Bill of Rights 1689, art 1 abolished this absolute prerogative: 'The pretended power of suspending of laws, or the execution of laws by regal authority, without the consent of parliament, is illegal.'

[83] Schmitt, *Political Theology*, above n 30, at 5.

[84] *Ibid* at 15. Schmitt's continuing interest in this question is indicated by the fact that he also published a work specifically on the history of commissarial dictatorship: Schmitt, *Die Diktatur* (Leipzig: Duncker & Humblot, 1921). For analysis, see Balakrisnan, above n 29, at ch 2.

has juristic significance,[85] he goes too far in asserting that the exceptional reveals the essence of the concept of sovereignty.

In modern constitutional thought, this question of the exception has been obscured by the precepts of constitutionalism.[86] The edifice of modern thought has been erected on the principle that the constituent power rests in the body of the people, who delegate a limited authority to government to promote the public good. Governors are thus presented as servants of the people, and they are required to account for the powers entrusted to them. Governments, in Locke's words, are vested with 'only a fiduciary power to act for certain ends'.[87] From here it requires but a short leap of constitutional faith to embrace the idea of an original compact, the belief that the workings of the state are driven by the principle of self-government, and the acceptance of the claim that governmental action is based on enumerated powers. Such beliefs acquired great impetus from the American and French revolutions, which not only brought about a radical shift in notions of the source of governmental authority, but also led to the emergence of a relatively novel understanding of the term 'constitution'. This new understanding was concisely expressed by Thomas Paine, when he argued that a constitution 'is a thing *antecedent* to a government' and that 'a government is only the creature of a constitution.'[88]

In this conception, the constitution assumes the form of a document that receives its authorisation from the people. This constitution ostensibly establishes and delimits the powers of government, lays down the principles of political engagement and determines the relationship between the citizen and the state. By apparently defining the rules of political conduct, the document presents itself as a powerful instrument for controlling the practices of politics and of providing a measure of stability to what otherwise might be a rather volatile contest. Provided this type of constitutional document is recognised to be the product of a political bargain—an attempt to devise a formal framework outlining some of the principal forms and working arrangements of the political constitution—it can provide a useful aid to the activity of statecraft. But once 'the constitution' is assumed to establish the foundation of all political engagement and, further, once it is treated like any other legal text to be interpreted and enforced by lawyers, then we enter a new phase of understanding. Once the modern constitutional text is treated as positive law, an important shift in the idea of the constitution is effected.

[85] *Ibid* at 7, 13.

[86] On this matter, Schmitt seems essentially correct: 'All tendencies of modern constitutional development point toward eliminating the sovereign in this sense' (*Political Theology*, above n 30, at 7). But see Rossiter, above n 79

[87] John Locke, *Two Treatises of Government.* [1680] Peter Laslett (ed) (Cambridge, Cambridge University Press, 1988) II § 149.

[88] Thomas Paine, *Rights of Man* [1791–2] in his *Rights of Man, Common Sense and Other Writings* (Mark Philp (ed), Oxford, Oxford University Press, 1995), 122.

CONSTITUTIONAL LEGALISM

The constitution has traditionally been viewed as a set of institutions and practices that serve to identify the character of a political regime, and in accordance with this political constitution only a portion of these arrangements are embodied in positive law. The modern constitution, by contrast, presents itself as a body of 'fundamental law'. Once it is accepted that the precepts of this fundamental law are to be enforced through the institutional mechanism of courts,[89] positive law comes to be viewed—by lawyers at least—as laying the foundations of political order.

This constitutional legalism obfuscates the issue of governmental authority. Operating on the fictions of original grant, self-government and enumerated powers, constitutional legalism radically suppresses the issue of rulership. As a representative institution deriving its power from the people and encompassing the law-making power, the authority of the legislature can readily be acknowledged. As faithful servants of the legislature (and the people), charged with the responsibility of ensuring that the will of the people is given precise effect, the status of the judiciary is given due recognition. But the office of government occupies an ambivalent position. In effect, 'government' is replaced with the notion of 'the executive'. The question is: executive of what? Within modern constitutions, the executive is invariably presented as an agent. But the fact that everywhere and without exception this 'executive' actually exercises a much greater power than any reading of constitutional texts would suggest presents us with a conundrum. Constitutional legalists see this phenomenon as an abuse, one that must be curtailed by a more assertive use of law to curb the executive's power of action. But is it possible that their analyses are rooted in error? Rather than starting with the document for the purpose of drawing conclusions about the activity, perhaps we should start with the character of the activity for the purpose of deriving conclusions about the nature of the document.

If constitutionalist reasoning is indeed rooted in error, what is the root source of this mistake? Here, it may be helpful to return to those early-modern political theorists whose works have helped shape such constitutionalist thinking. Thomas Hobbes has little to contribute on this subject. By focusing on the power-conferring moment, that moment when sovereign power is brought into existence through the voluntary action of rights-bearing individuals, he radically modernised the understanding of government. But Hobbes had little to say about the forms through which governmental power is exercised. In effect, he simplified political power by reducing it almost entirely to the legislative form—the power of command. For the purpose of addressing the question of the constitutional forms

[89] The breakthrough with respect to the US Constitution is achieved in *Marbury v Madison* 1 Cranch 137 (1803). See Rogers Smith, *Liberalism and American Constitutional Law* (Cambridge, Mass, Harvard University Press, 1985); Robert Lowry Clinton, *Marbury v Madison and Judicial Review* (Lawrence, Kansas, University Press of Kansas, 1989).

of rule, then, it is necessary to turn to Locke and Montesquieu. On this issue it is worth emphasising that although Locke and Montesquieu are rightly regarded as founders of the modern liberal doctrines of the separation of powers and the rule of law, both recognised the pivotal role of governmental power.

Locke was perhaps the first modern theorist to take seriously the issue of executive power. Recognising three functions of civil government, the legislative, the executive and the federative,[90] he argued that, since there are many things that the law cannot provide for, 'the good of Society requires, that several things should be left to the discretion of him, that has the Executive Power'.[91] The executive power, then, is not simply the power of putting law into effect but includes the 'Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it.'[92] Locke here explicitly concedes that government cannot be reduced to law; constitutions must, of political necessity, allow for extra-legal governmental action. This is essentially a sphere of prudential action. In Pasquale Pasquino's interpretation of Locke's reflections on this subject, 'the branch that exercises the executive function is not reducible to a machine that applies the law; it is endowed with its own will and responsibility that permit it to face the unpredictable.'[93] What Locke in effect does, then, is to bring within the general framework of the constitution that dictatorial power to act *extra et contra legem* which Machiavelli had argued was an essential safeguard for the state.

Although generally credited with having devised the doctrine of the separation of powers, Montesquieu also gave due recognition to the importance of executive power. The great value of the executive, Montesquieu believed, was that it always is focused on 'immediate things', that is, on those matters of political necessity. But he went further in stressing the function of the executive. 'If the executive power does not have the rights to check the enterprises of the legislative body', he

[90] The federative power (derived from *foedus*, the Latin term for treaty) is that power to deal with foreign affairs, and is accepted by Locke as being 'much less capable to be directed by antecedent, standing, positive Laws, than the Executive': Locke, *Two Treatises of Government*, II §147. Notwithstanding the differences in function, Locke recognised that the federative power was invariably vested in the executive (*ibid* § 148). Vile's commentary on the federative power is significant: 'The importance of what Locke has to say here has generally been overlooked, and the failure, particularly on the part of Montesquieu, to take up this point, has contributed greatly to the inadequacy of the classification of government functions. Locke was writing at a time when the supremacy of legislature over the policy of the government *in internal affairs* was being established. The king must rule according to law. But Locke realised ... that the control of internal affairs, particularly taxation, presented very different problems from those of external affairs. In matters of war, and of treaties with foreign powers, it was not possible, and still is not possible today, to subject the government to the sort of prior control that is possible in domestic matters': MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Indianapolis, Liberty Fund, 1998), 66. The distinction between ordinary and absolute prerogative has thus, in part, been converted into a distinction between internal and external functions. This issue remains a major source of tension with respect to the continued existence of a sphere of unfettered discretionary power that governments possess to deal with emergencies: see, eg, Jules Lobel, 'Emergency Power and the Decline of Liberalism' (1989) 98 *Yale Law Journal* 1385.

[91] Locke, *Two Treatises of Government*, II § 159.

[92] *Ibid* § 160.

[93] Pasquale Pasquino, 'Locke on King's Prerogative' (1998) 26 *Political Theory* 198, 202.

contended, 'the latter will be despotic'.[94] Placing a modern gloss on Montesquieu's views, Harvey Mansfield has noted that executive power, 'expanding when needed, kept the rule of law from being, in effect, the rule of ambitious legislators and contrary judges'.[95] Its beauty, Mansfield continued, is that it 'can reach where law cannot, and thus supply the defect of law, yet remain subordinate to law'.[96] By recognising the need to maintain a balance between the legal and the non-legal, between rules and prudence, Montesquieu 'shows how liberty *emerges* in a whole which mixes the law with what we would call its conditioning factors in a series of "relations"'.[97]

The error, it would appear, lies not in the work of these political philosophers of liberalism. Instead, it is to be found in the emerging modern culture of legalism. What is particularly noteworthy is that within the framework of constitutional legalism it has proved increasingly difficult openly to acknowledge the real political function of the executive power. In Locke's thought, the legislative and executive powers were left in tension, with any conflict having to be addressed politically, and ultimately being resolved as a result of the people's residual right of rebellion.[98] Although advocating a more formal separation of powers, Montesquieu also recognised the political character of the exercise, believing that, provided each of these roles is properly acknowledged, the three branches of government 'are constrained to move by the necessary motion of things'.[99] With the emergence of constitutional legalism, however, came the belief that solutions to these intrinsically political matters are to be found in, or through, the text. Consequently, whenever —as has been the case in all modern states—the executive has acted to fill those spaces which exist within all constitutional documents,[100] this has been the occasion for disapprobation.

The error of constitutional legalism is of a most basic kind, that of mistaking the part for the whole. Such legalism fails properly to acknowledge the provisional character of constitutional arrangements and that 'the development and acceptance of a constitutional framework can occur only as the contingent result of irresolvable conflict.'[101] Indeed, this must be so, because its object—the activity of governing—is interminable. The arrangements of governing are in a permanent state of disequilibrium, since 'the system has never been designed as a whole, and such coherence as it possesses is the product of constant readjustment of its parts

[94] Montesquieu, *The Spirit of the Laws*, Bk11 [1748] Anne M Cohler, Basia Carolyn Miller and, Harold Samual Stone trans and (ed) (Cambridge, Cambridge University Press, 1989) ch 6.

[95] Harvey C Mansfield, Jr, *Taming the Prince: The Ambivalence of Modern Executive Power* (Baltimore, Johns Hopkins University Press, 1993), xx.

[96] *Ibid.*

[97] *Ibid.* at 221.

[98] Locke, *Two Treatises of Government*, II [1680] Peter Laslett (ed) (Cambridge, Cambridge University Press, 1988) ch XIX.

[99] Montesquieu, *The Spirit of the Laws*, Bk.11, ch 6.

[100] See, eg, Richard M Pious, *The American Presidency* (New York, Basic Books, 1979), 333: 'The President claims the silences of the Constitution.'

[101] Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago, University of Chicago Press, 1995), 217.