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POLITICAL JURISPRUDENCE

MARTIN LOUGHLIN

I: INTRODUCTION

Political jurisprudence is a discipline that explains the way in which governmental authority is constituted. It flourished within European thought in the period between the sixteenth and nineteenth centuries and since the twentieth century has been in decline. That decline, attributable mainly to an extending rationalization of life and thought, has led to governmental authority increasingly being expressed in technical terms. And because many of the implications of this development have been masked by the growth of an academic disciplinary specialization that sacrifices breadth of understanding for depth of knowledge, sustaining the discipline has proved difficult. Since we may now have reached a critical period in which the influence of technique threatens entirely to subvert the intelligibility of the foundations of modern governmental authority, it seems an appropriate moment at which to reflect on the nature and significance of political jurisprudence.

II: SCHOOLS OF JURISPRUDENCE

Throughout the Middle Ages, jurists maintained a distinction between positive law, law made by the sovereign, and natural law (sometimes expressed as 'fundamental law'), law that made the sovereign. With the transition to modernity, the predominant meaning of law altered: as the authority of natural law waned, the term came to signify positive law, that is, rules of conduct expressing the will of the sovereign. The question of why one should obey the sovereign's laws – the issue on which natural law focused - did not disappear. What changed is that most jurists came to believe that the question lies beyond the bounds of legal cognition. The question remains, but it raises issues of a moral, political, or sociological character and is not one for legal science.

This position, commonly associated with the school of legal positivism, is directly challenged by political jurisprudence. It is true that in the modern era law is positivized and that public law emerges as a distinct body of positive law that establishes and maintains the activity of governing. But political jurists contend that the status and meaning of positive public law cannot be grasped

without understanding the socio-political factors that condition governmental authority. Political jurisprudence, then, is a science that emerges as natural law is transformed, moral theology pushed to a private sphere, and the idea of fundamental law acquires a new meaning within the autonomous domain of the political. The nature of public law, it is contended, can be properly specified only from the perspective of political jurisprudence.

Political jurists are not alone in maintaining an anti-positivist stance and arguing that there is an intrinsic connection between legality and legitimacy. However, many who take a critical position with respect to legal positivism skew the nature of that connection by making two distorting shifts in orientation. Having become preoccupied with the expanding jurisdiction of courts, anti-positivist legal scholars often claim that law is, in its essence, a principle-embedded argumentative practice. They believe that the true character of law is revealed through an analysis of the rulings of the court acting as the 'forum of principle'. While this has become an important aspect of contemporary practice, this claim neglects a more basic modern function of law: that of establishing the institutions of government and equipping them with their powers of rule. Once this constitutive aspect of law is overlooked, a second distorting move soon follows: anti-positivists promote a moral rather than a political reading of that exercise. The basic task of public law, they maintain, is to explicate what are perceived to be the fundamental moral principles of a governmental regime, and these are invariably expressed in some catalogue of citizens' rights. The neglect of the more basic constructive dimension of law and the consequential foregrounding of one special institutional forum sets the frame for regarding law as a moral rather than a political discourse. This leads anti-positivists to conflate legality and legitimacy.

Political jurisprudence seeks to redress this imbalance. It is founded on the assumption that law is a dimension of the political. The political, it is maintained, is an autonomous universe of discourse, and it is able to build the power of that worldview only through the operation of its own fundamental laws. Legality and legitimacy are distinct but interrelated concepts. They must be drawn into an appropriate relation, but legitimacy – otherwise, authority – is a political concept, and one that should not be equated with legality.

Legal positivists treat the office of the sovereign as the ultimate authority, and this remains the case even in sophisticated accounts that rest the authority of law on some 'founding norm' or on a 'rule of recognition'. In those accounts, questions of legality and legitimacy are kept distinct. Anti-positivist normativists conflate the two. They do so by seeking to eliminate the sovereign altogether, replacing that figure with the self-sustaining authority of a corpus of values, norms and principles of

an abstract, morally-laden legality. From the perspective of political jurisprudence, by contrast, the central object of inquiry is neither the sovereign as such, nor the unfolding integrity of a moral practice. Rather, it is the relationship that evolves between a 'people' and its office of government. It is this distinctively political relationship that holds the key to understanding the modern concept of fundamental law. The sovereign, it might be said, is above fundamental law only in the way that a building is above its foundations: tamper with the foundations and the building might collapse. Formally, the sovereign's authority to make (positive) law is unlimited. But the task of political jurisprudence is to specify those 'laws' that establish and condition a formally unlimited authority of positive law-making. This is the basic 'law' of 'the political'. This central investigation for political jurisprudence is the search for what I have variously called *jus politicum*, *droit politique* or, in English, 'the science of political right'.

III: The Nature of the Inquiry

I have advanced this inquiry in two ways - synchronic and diachronic – that are intended to be mutually reinforcing. In *The Idea of Public Law*, I sought to specify the conceptual building blocks of this subject.[1] These are: *the activity of governing*, the unique object of the subject (ch.2); *politics*, the distinctive practice that evolves to manage the activity of governing (ch.3); *representation*, the symbolic basis of public law (ch.4); *sovereignty*, the modern representation of the autonomy of the political domain (ch.5); *constituent power*, the juristic representation of *collective autonomy* in modern public law (ch.6); and *rights*, the juristic representation of the principle of *individual autonomy* in modern public law (ch.7). These elements were then drawn together to specify the distinctive method of public law as political reason, or *raison d'état* (ch.8). And finally (ch.9) I suggested that, since Kelsen presents a pure theory of positive law,[2] this account of the basic elements of *jus politicum* – which establishes a specific (i.e. autonomous) way of world-making - aspired to offer a pure theory of public law.

The second book, *Foundations of Public Law*, provided a thicker account of the texture of public law by presenting a historical reconstruction of its conceptual formation. It provides an account of the origins of the subject in medieval and early-modern jurisprudence (Pt I), examines the search for a modern science of political right (Pt II) and then explains how the fundamental laws

[1] Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003).
[2] Hans Kelsen, *Introduction to the Problems of Legal Theory* B.L. Paulson and S.L. Paulson trans. of first edn. [1934] of *Reine Rechtslehre* (Oxford: Clarendon Press, 1992).

of modern political reality that have evolved shape understanding of (i) the nature of this mode of political association (the state: Pt III), (ii) the scope of its office of authority (the constitution: Pt IV), and (iii) its distinctive modes of action (government: Pt V).[3]

The basic argument made in *Foundations* is that the tensions inherent in this distinctive type of political association ensure that a science of political right can never be realized. This is for two main reasons. The first is attributable to the nature of political association, an issue which will be considered below in section V. The second, attributable to the nature of law, is addressed now. The basic point is that *jus politicum* must not be assumed to refer merely to a set of abstract normative principles, such as the principles of equal liberty. To count as law, these principles must be operationalized within actual regimes. Law is concrete and embedded. Realizing both the normative power of facticity and the facticity of normative power is an altogether more challenging task. Rousseau had suggested that putting the law above man is a problem in politics similar to that of squaring the circle in geometry. If it can be solved, good government results. If not, then wherever people believe that the rule of law prevails, they deceive themselves: 'it will be men who will be ruling'.[4]

But if this 'law of the political' cannot be discovered through normative abstraction, then neither is it a set of scientific laws of causation, not least because the world of the political presents itself as a domain of freedom. In *The Spirit of the Laws* Montesquieu tried to explain political right in such causal terms but, as Rousseau noted, he had been 'content to discuss the positive right of established governments', which is a different matter.[5]

Some might therefore conclude that the idea of 'political right' refers only to a loose collection of prudential maxims, and this does not deserve the designation of 'law'. Before yielding to such pragmatism, it might be noted that Rousseau's innate pessimism derives in large part from his unworldly nature. In postulating an ideal – the general will – as the principle on which the state is founded, his thesis effectively guarantees that this principle of political freedom will become corrupted. Rather than assuming some immaculate conception, it is more realistic to inject a dose of historical materialism and explain political ordering as the product of the ongoing struggle to give precise institutional meaning to contentious principles of political right. The political domain is not a

[3] Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010).
[4] Jean-Jacques Rousseau, *Considerations on the Government of Poland and on its Projected Reformation* [1772] in his *The Social Contract and other later political writings* Victor Gourevitch ed. (Cambridge: Cambridge University Press, 1997), 177-260, 179.
[5] Jean-Jacques Rousseau, *Emile, or On Education* [1762] Allan Bloom trans. (New York: Basic Books, 1979), 458.

regime that has authoritatively legislated certain principles of right; it is a domain within which the tensions between contested expressions of *jus politicum* are continuously negotiated.

Jus politicum might therefore be defined as an expression of the immanent laws of the domain of the political. Causal laws, whether those of Montesquieu (factors of climate, commerce, spatial location etc.) or Marx (generated between the forces and relations of production), undoubtedly exert considerable influence in structuring the domain of the political. But *jus politicum* refers to that body of constitutive and regulative rules and practices that sustain the autonomous character of the domain of the political. These laws are distilled from political practice. The 'law of the political' is derived neither from the wisdom of the ancient Greeks nor from utopian thought experiments. Far from expressing an ideal arrangement of liberal-democratic norms, *jus politicum* can only be derived from lived experience.

From this perspective, the contrasting expressions of the 'law of the political' offered by such scholars as Bodin, Hobbes, Locke, Pufendorf, Montesquieu, Rousseau, Hegel and their followers all deserve acknowledgement. Claims to the authority of the sovereign will, the foundational importance of rights to life, liberty, and property, the influence of causal social laws, and the striving for equal liberty in solidarity are all capable of shaping the character of a political regime. But regimes invariably incorporate a variety of these formally incompatible precepts. The political domain expresses a distinctive mode of association but it remains open and indeterminate. Its discontinuities – between the appeal to the universal and the demands of the local, between the absolute and the conditional, between the formal and the material – can be neither eliminated nor reconciled: they can only be negotiated. *Jus politicum* does not just require an explication of certain principles of political right; of its nature, it expresses an endless tension between different conceptions and the manner of their institutionalization at particular moments. Any reconciliation must be the result of practical reasoning and prudential judgment. This is an exercise in *juris-prudentiae*. And it is for this reason that the science of public law is best called 'political jurisprudence'.

IV: The Political Domain

Modern western political thought has drawn much of its energy from a basic conundrum: that despite our common historical experience of regimes built on conflict, domination and the threat of disorder, we nevertheless feel the appeal of the idea of human association formed as an orderly, just

and peaceful community. An influential strand of political thought devotes itself to the task of overcoming that gulf between reality and ideal. Drawing on earlier studies by the Stoics and medieval Christian scholars, this strand of thought is expressed most clearly in the work of certain Enlightenment writers who suggest that the laws of nature and the laws of reason can be reconciled. Reconciliation is achieved by realizing a form of human association made accessible to us through the power of reason. Initially expressing an overarching, divinely-sanctioned unity, in its post-theological phase it presents itself as a set of principles of association that humans are impelled rationally to adopt.

The contemporary rights-orientated anti-positivist stance I have outlined amounts to a reprise of this conviction. Political jurisprudence develops in opposition to this strand of thought. Sceptical about the possibility of reconciliation through transcendence, political jurisprudence recognizes the unbridgeable nature of the gulf between reality and ideal. Political jurisprudence might acknowledge the influence of 'abstract universals' but it does not ignore 'necessary conditions'.[6] It appeals to reason but does not seek an escape from history. It presents itself as a practical discourse which, although orientated to norms, also has regard to pre-conditions, contexts and consequences.[7] Rather than advocating reconciliation through the promotion of some overarching moral sensibility, political jurisprudence seeks through phenomenological investigation to explain the immanent logic of political reason that sustains this distinctive way of ordering the world. What, then, are the underlying assumptions on which political jurisprudence rests?

We might start by recognizing that the arrangement adopted when humans enter into some type of collective association is not determined by nature. Early-modern scholars occasionally used analogies drawn from nature, such as the beehive or the family, to demonstrate that human association takes a pre-determined hierarchical form.[8] Political jurists of the formative era, by contrast, recognized the need to found human association on some notion of equality. Too much should not be made of this criterion: the essential point they were making is that the right to rule exists neither as a divinely-ordained nor a natural right and that its justification required acceptance

[6] GWF Hegel, *Philosophy of Right* [1821] TM Knox trans. (Oxford: Clarendon Press, 1952), §§ 29-33. See Axel Honneth, *The Pathologies of Individual Freedom: Hegel's Social Theory* (Princeton: Princeton University Press, 2010), 15: 'here [in this section of *Philosophy of Right*] it becomes clear that the term *right* has the double meaning of a "necessary condition" and a "justifiable claim".'

[7] See, esp., Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge: Cambridge University Press, 2001).

[8] See, eg, John Locke, *Two Treatises of Government*, [1680] Peter Laslett ed. (Cambridge: Cambridge University Press, 1988), the first treatise of which was a critical analysis of Robert Filmer's *Patriarcha*, which sought to show that paternal power and political power must be differentiated.

of formally-equal individuals. In order to express this point, they were obliged to draw a distinction between public and private.

Bodin was the first of the early-modern scholars to retrieve the Aristotelian distinction between the household (*oikos*) and the polity (*polis*). He thereby opened up the possibility of differentiating between a natural hierarchy based on master and slave (or superior and inferior) operating in a private space, and a public domain involving an arrangement of government that, in the absence of divine or natural ordering, can properly be constituted only by an exercise of will.[9] When Hobbes presented Bodin's argument in a more systematic manner, he emphasized that this type of collective association is not drawn from nature: it is created by artifice, an exercise in imagination. The political domain is established through an exercise of imaginative representation and its mode of government is created through consent (though, in Hobbes' case, this was consent generated by fear).

This exercise of imagination draws on a specific philosophical anthropology. Hobbes's sketch of life without governing authority, a world of perpetual conflict, is exemplary of the anthropological scepticism maintained by political jurists. Even if we do not accept Hobbes' account, we might still recognize that his sources of human conflict – acquisitiveness, diffidence, and the striving for glory – are distinctive features of politically-orientated behaviour. Machiavelli had argued in similar fashion, claiming that humans are creatures of appetite and passion. Since rivalry, competition and conflict among humans is ingrained, resource scarcity is not some existential fact that drives us to compete; such scarcity is itself the consequence of human attributes. Similar assumptions underpin the work of political jurists.[10] Far from being inspired by an image of ideal order, they were driven by the threat of disorder. Political jurisprudence founds itself on the belief that conflict is an intrinsic feature of collective human association.

Political jurisprudence also rests its claims on the belief that humans are political animals. They are political animals by virtue of being sociable creatures who recognize the need to cooperate in order to flourish but they are also driven to compete with one another as a means to their own satisfaction. They must therefore simultaneously cooperate and compete, and they compete not only

Comment [MW1]: It struck me that this section (the rest of this paragraph, the previous paragraph and the next) is all about competition (and verges on naturalizing competitiveness in a way that seems inimical to the historical-contingent thrust of political jurisprudence). What happened to co-operation (or sociability)? But feel free to ignore this comment…

[9] Jean Bodin, *The Six Bookes of a Commonweale* Richard Knolles trans. 1606, Kenneth Douglas McRae ed. (Cambridge, Mass: Harvard University Press, 1962), I. 2.

[10] James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* I. Kramnick ed. (London: Penguin, 1987), No.51: 'If men were angels, no government would be necessary' (Madison). His claim derives from J-J Rousseau, 'The Social Contract' in *The Social Contract and other later political writings* V. Gourevitch trans. (Cambridge: Cambridge University Press, 1997), Bk. II, ch.7 (68-69): 'To discover the best rules of society suited to each Nation would require a superior intelligence who saw all of man's passions and experienced none of them … It would require gods to give men laws.'

over material goods but also for fame and glory. This need to compete over marks of esteem that require public acknowledgement suggests that politics – the struggle for power under conditions of mutual recognition - is intrinsic to the human condition.

Political jurists maintain that competition and conflict cannot be eliminated, and nor should we try to, since conflict and struggle are intrinsic to human freedom. Only through these struggles are the singular human qualities of autonomy, difference and distinction realized. Only then can individuals and groups assert themselves (ie, forge an *identity* in the world) and only through acknowledgement of that identity (ie, through *recognition*) do they acquire status within *a common world* (ie, affirm themselves as members of a common association). Political jurisprudence recognizes that politics is an aspect of the human condition and is born of the need to manage rather than eliminate conflict.[11]

If the struggle for recognition is a central feature of political existence, it follows that the key to understanding the human condition is found not in nature but in historical experience. Humanity is not revealed by some fixed and abstract conception of human nature: human nature is the product of an evolving sense of mutual recognition. The political domain emerging from the dissolution of a medieval belief in the divinely-ordained, legally-prescribed intelligible cosmos is characterized by openness to historical contingency. It emerges because different ways of viewing the world are opened up: scientific, moral, economic, aesthetic, technical … and political. The political evolves as a specific type of interaction; political relations are not reducible either to moral or to socio-economic relations.

The autonomy of the political, then, expresses itself in a number of distinctions: as autonomy from a theological or religiously-derived worldview, exemplified by the replacement of the principle of 'one prince, one faith, one law' with that of a freedom of religious worship in a private sphere and the authority of a secular sovereign in the public; autonomy from the idea that force or conquest provide a sound basis for building a political society; autonomy from custom or tradition as the determinative source of legitimation; and autonomy from the idea that property

[11] Niccolò Machiavelli, *The Discourses* L.J. Walker trans (London: Penguin, 1970), Bk.I.4 (p113): '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 … [I]n every republic there are two different dispositions, that of the populace and that of the upper class and all legislation favourable to liberty is brought about by the clash between them'. As scholars such as Arendt and Lefort have shown, the attempt in the modern world to bring about the elimination of social conflict leads only to totalitarianism. See, eg, Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (Cambridge, Mass: MIT Press, 1986), 79. Totalitarianism, he argues, 'is not a political regime: it is a form of society, that form in which all activities are immediately linked to one another, deliberately presented as modalities of a single world … that form in which, lastly, the dominant model exercises a total physical and spiritual constraint on the behaviour of private individuals'.

equals sovereignty, that political power is reducible to economic power. The establishment of an autonomous domain of the political is a historical achievement.

If the autonomy of the political is a historical achievement then so too are the concepts by which the political operates: these concepts amount only to a 'fragment of historical experience captured in words' and they 'bear the scars of political struggles'.[12] Although political concepts may express principles of universal aspiration, they can never shed their marks of historical particularity.

It follows that the law of the political cannot be an ethic of ultimate ends. Civil peace is achievable only when the moral convictions underpinning people's beliefs remain primarily in the private sphere. Consensus is generally reached only on outcomes rather than the reasons for them.[13] This is what Weber called an 'ethic of responsibility',[14] concerning how we are able to act responsibly and in accordance with the particular requirements of whichever life one finds oneself in.[15] Principles take us only so far; the political domain rests on cultural and contextual factors that permit the emergence of the idea that political conduct involves a trade-off between rival and often incommensurable goods in circumstances where there is no authoritative principle or standard for resolving any dispute.

V: THE STATE

Political jurists recognized that in order to manage conflict and build authority some symbolic representation of the unity of the association is needed. This was Hobbes' objective in devising the figure of an omnipotent sovereign, and we see variants in Rousseau's concept of 'the general will' and also in the concepts of 'harmonic proportion' proposed by Bodin and Montesquieu.[16] Symbolic representation of unity diffuses those conflicts that threaten to undermine order and converts such conflicts into more manageable tensions. Generating a strong sense of political unity also performs the delicate task of maintaining order while permitting change. This is a necessary task but because the power of the traditional image of the prince as the majestic sovereign is eroded it proves difficult

[12] Wilhelm Hennis, *Politics as a Practical Science* Keith Tribe trans (Basingstoke: Palgrave Macmillan, 2009), 27.
[13] Note, eg, Merleau-Ponty's observation that the 'purity of principles not only tolerates but even requires violence': Maurice Merleau-Ponty, *Humanism and Terror* John O'Neill trans. (Boston: Beacon Press, 1969), xiii.
[14] Max Weber, 'Politics as a Vocation' in From Max Weber: Essays in Sociology H.H. Gerth and C. Wright Mills ed. (London: Routledge & Kegan Paul, 1948), 77-128, at 120-8.
[15] See Wilhelm Hennis, 'Max Weber's "Central Question"' in his *Max Weber: Essays in Reconstruction* Keith Tribe trans (London: Allen & Unwin, 1988), ch.1
[16] Bodin, above n.9, Bk. VI; Montesquieu, *The Spirit of the Laws* A. Cohler, B. Miller and H. Stone trans. and ed. (Cambridge: Cambridge University Press, 1989), Bk.11, ch.6.

to sustain. The traditional image of the prince is supplanted by an abstract, rather ethereal notion of 'the people' as the source of ultimate authority. This is a much less powerful representational device, and it makes the maintenance of a sense of political unity a more uncertain and contingent undertaking.

Rather than simply resting on an ambiguous notion of 'the people' as the ultimate authority, political jurists devised an institutionalized expression of ultimate authority in the concept of the state. The autonomy of the political domain is made manifest in the juristic idea of the state. When a group are drawn together in common association, there comes a moment at which they are perceived as existing as a distinct people occupying a defined territory and subject to a governing authority. This arrangement is known as a state: the state is an expression of the scheme of association that characterizes a people within a defined territory as being subject to an authoritative form of government. Individuals are conceived as subjects when passive, citizens when active, but never primarily as labourers, producers, consumers, or family members. Within this scheme, they realize freedom as a consequence of a struggle for recognition. Such political freedom is never absolute, but always contextual and conditional. And although freedom is realized through law, this expression refers to *jus politicum*, which operates as the code of the political domain.

The authority of this scheme is expressed in the concept of sovereignty, which recognizes the absolute authority of the state to govern itself through positive law. Sovereignty expresses the autonomy of the political domain and the state's independent status in the political world. It establishes both the autonomy of states to regulate their own affairs through law and the principle on which modern international relations are conducted. This first develops as a *jus publicum europaeum* founded on a mutual acknowledgement of the inviolable domestic authority of sovereign states and mutual recognition of autonomous states in the international arena. This hegemony later assumes a global significance. Not subject to any common higher authority and conferring the right to make war (*jus ad bellum*), inter-state law evolves in the modern era to replace the medieval idea of 'just war' (*justa causa belli*). This distinctive political arrangement is recognized by the emergence of a body of public international law which regulates inter-state relations.

This juristic idea of the state should not be misunderstood: although comprising territory, people and ruling authority, it is not reducible to any one of these elements. Rather, the state is that which enables us to think systematically about governmental institutions and practices and the set of political relations with respect to people and territory that arise between them. The state is the regulatory idea that gives meaning to the workings of political life. And yet, when we inquire further

into its character we encounter a fundamental ambiguity. The state can be properly grasped only as 'an unresolved tension between two irreconcilable dispositions'.[17] The state presents itself both as an arrangement of authoritative rules of conduct (*societas*) and as a corporate entity established in furtherance of designated purposes (*universitas*). These might be read as alternative images of the nature of the state since, although irreducible, they cannot be combined. But since they cannot stand as self-sufficient specifications, each must be embraced as the specification of the self-division of this key concept of the state. And this illustrates why it is in the nature of political jurisprudence that it operates to negotiate these intrinsic tensions in the political domain.

VI: Power and Authority

Jus politicum operates to maintain the authority of the state. That the state must possess authority is elementary: authority is the lifeblood of the state without which security, justice and liberty cannot be maintained. But in order to understand the concept of authority a distinction must be drawn between two concepts of power: *potestas*, the power generated by being-in-common and experienced as 'power to', and *potentia*, the ability to achieve intended effects, experienced as 'power over'. Authority is generated primarily by the former and deployed as the latter.

Potestas is a type of power intrinsic to political jurisprudence; it creates authority as a product of the people's capacity to act in common. Since it is the power created by drawing people together in a common undertaking, *potestas* is derived from the imaginative power of symbolic representation of a people existing in common association. *Potestas* is the power generated by the conviction that the association forms a unity, a collective singular: 'we the people'. This provides the foundation for collective security, not least because it is the source of the people's willingness, *in extremis*, to fight to preserve that mode of association.

The original source of *potestas* is some notion of a founding moment when a multitude conceives itself as forming a people. This notion is invariably shrouded in myth and legend, and its power is generated through augmentation of these founding myths. That is, the power expressed in *potestas* rests on a foundation it does not itself establish. It draws on stories of peoplehood that generate a sense of common identity. This might be based on ethnicity, culture, language and shared history, but whatever its source it must be transformed into a common sense of *political* identity. This is

[17] Michael Oakeshott, 'On the Character of a Modern European State' in his *On Human Conduct* (Oxford: Clarendon Press, 1975), 185-326 at 200-1.

what Rousseau meant by the need to promote a 'civil religion' able to instill the virtues of patriotism.[18] It also explains the importance of the modern notion of political nationalism.[19] *Potestas* maintains its vigour through reinforcement and augmentation of a foundational myth.

Potentia, by contrast, is the power deployed by government to control and regulate conflict, to maintain order, and to promote the public welfare. Governmental 'power over' its subjects is often regarded as domination, enforced obedience to rules. Weber was referring specifically to this when suggesting that from a sociological perspective one can define the state 'only in terms of the specific *means* peculiar to it, as to every political association, namely, the use of physical force'. In his elaboration, he defined the state as 'a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory'.[20] But Weber here is describing the state only as an instrument of rule and consequently he analyses its power only as force. This distorts the juristic idea of the state and neglects the generational aspect of power created by action-in-common, power that renders the force of *potentia* 'legitimate'. *Potentia*, as 'power over' or domination, is a central element of political jurisprudence, but it is only the distributive aspect of a political power generated through *potestas*.

The essence of the political rests in the relationship between *potestas* and *potentia*. Carl Schmitt had defined the essential criterion of the political as the drawing of a friend-enemy distinction. This inclusionary-exclusionary criterion is critical to the formation of a sense of a people but this is only one of the elements of the building of an autonomous world of the political. State-building through *jus politicum* rests most importantly on the dynamic between *potestas* and *potentia*. This relationship is often expressed paradoxically: constraints on power generate power. This apparent paradox, first identified by Bodin,[21] is resolved once it is understood that constraints on governmental power (*potentia*) provide the decisive means of enhancing authority (*potestas*). *Potestas* is based on trust and allegiance, qualities strengthened by the imposition of controls and checks on officers of government. *Potentia* exercised in an unrestrained or arbitrary manner, by contrast, ends up corroding the basis of authority, leading to a loss of power (*potestas*).[22] For this reason, Montesquieu regarded despotism as the antithesis of political order and recognized the necessity of building

[18] Rousseau, *Social Contract*, above n.10, at 142-151, id, 'Discourse on Political Economy', ibid. 3-38 at 16-17.
[19] See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2006).
[20] Weber, 'Politics as a Vocation', above n.14, at 78.
[21] Bodin, above n.9, 517.
[22] Friedrich Meinecke, *Machiavellism: The Doctrine of Raison d'État and its place in Modern History* D. Scott trans. (New Haven: Yale University Press, 1957), 10: 'Power which gushes out blindly, will end by destroying itself; it must follow certain purposive rules and standards, in order to preserve itself and to grow.'

political power through institutional development.[23] The 'law of the political' dictates that political power is enhanced by virtue of its institutionalization.[24]

Political power is not a thing-in-itself; it is a product of the relationship between *potestas* and *potentia*. Contrary to Mao's claim, political power does not emanate from the barrel of a gun.[25] It is generated through through the symbolic representation of political unity, which expresses itself in an institutional configuration of authority. As the state becomes more powerful, this institutional configuration becomes more complex and robust. Despotic power diminishes and infrastructural power increases.[26] Political power does not reside in any specific locus: it is generated through the relationship itself. This expresses the dynamic aspect of the political domain. Power (*potentia*) is a central feature of the state and is often deployed through the medium of positive law but it relies on a foundation of authority generated through the operation of 'political right'.

What about conquest? Although violent conquest (in contrast to domination) plays no direct role in political jurisprudence, the fact that the origins of order often spring from conquest makes force the dark shadow of political ordering. This is Hobbes' critical point about man's natural state being that of a perpetual 'war of all against all'. In this respect, he was following the ancients.[27] And although he uses this as the basis of an analytical exercise, it remains the 'original sin'.[28] Hobbes' point is reinforced by Rousseau's claim that the original acquisition is generally effected through

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[23] See Montesquieu, *Spirit of the Laws*, above n.16, esp. Bks. 8 and 11. Note also Machiavelli, *The Discourses*, above n.11, Bk.III.5 (p.396). 'From this princes should learn … that they begin to lose their state the moment they begin to break the laws and to disregard the ancient traditions and customs under which men have long lived'. Cf. Michael Oakeshott, *The Politics of Faith and the Politics of Scepticism* [c.1952] Timothy Fuller ed. (New Haven: Yale University Press, 1996), 35: 'the barbarism of order appears when order is pursued for its own sake and when the preservation of order involves the destruction of that without which order is only the orderliness of the ant-heap or the graveyard'.

[24] Freedom, like power, cannot to be treated as some pre-existing condition: freedom is a status that is realized only within the state. Consequently, the sovereign's commands (i.e. positive law) cannot be conceived as imposing restrictions on some pre-existing freedom; such commands might equally be viewed as conditions for the realization of freedom. The discourse of political right, operating to enhance the power of the public domain, strives to realize an equal liberty for all through an institutional arrangement that imposes a structure which constrains and disciplines individuals. The discourse of political right is simultaneously enabling and constraining. Rousseau concisely expressed this dilemma when claiming that the state 'cannot endure without freedom, nor freedom without virtue, nor virtue without citizens'. If we are able to create citizens, he added, we will realize liberty. But if we fail in this endeavour, we will create 'nothing but nasty slaves, beginning with the chiefs of the state'. Rousseau, 'Discourse on Political Economy', above n.18, at 20

[25] Mao Tse Tung, 'Problems of War and Strategy', 6 November 1938 in *Selected Works, Vol. II*, 224 (Marxists Internet Archive): 'Every Communist must grasp the truth: "Political power grows out of the barrel of a gun".'

[26] Michael Mann, 'The autonomous power of the state: its origins, mechanisms and results' (1984) 25 *Archives Européenes de Sociologie* 185-213 at 190.

[27] See, eg, Heraclitus (535-475BC): 'War is the father of all and king of all, and some he shows as gods, others as men; some he makes slaves, others free'. G.S. Kirk, J.E. Raven & M. Schofield, *The Presocratic Philosophers: A Critical History with a Selection of Texts*, (Cambridge: Cambridge University Press, 2nd edn. 1983), 193. See further, Thucydides, 'The History of the Grecian War' in W. Molesworth (ed), *The English Works of Thomas Hobbes* (London: Bohn, 1843) vol.8, 348: 'war is a most violent master'.

[28] For a Freudian reading, founded on the original patricidal pact that enables brothers to recognize themselves as equals, see: Panu Minkkinen, *Sovereignty, Knowledge, Law* (Abingdon: Routledge, 2009), 1-6.

force and only subsequently legitimated through institution. This renders the question of foundation particularly complicated: what some celebrate as liberation and the opening of a new era, others experience as defeat and subjugation.[29] Since political jurisprudence is rooted in the connection between the imaginary and the real, this problem cannot be ignored. Arendt was right to claim that violence has no role in political jurisprudence.[30] Political power is generated by institutionalization and though it might be experienced as domination, domination must be differentiated from violence by virtue of its symbolic dimension and its promotion of collective ordering. Yet the application of force must always pose a threat to 'being-in-common', and therefore to power itself. This is why the science of political jurisprudence seeks to manage conflict, to overcome the original usurpation, to build authority, and to realize political right.

VII: CONSTITUTION

The domain of the political is not a discrete sphere of society in which institutionalized politics is undertaken: it refers to an entire world considered from the distinctive perspective of the political. Just as economists envision the sum of all human interaction as an economic calculus of profit and loss, or moral philosophers evaluate human interactions according to a moral calculus of good and evil, so too do political jurists conceive the entire world according to an increase or decrease in political power (generated by the relation between *potestas* and *potentia*). It is precisely because political power is potentially all-encompassing that a constitutional framework is required.

The concept of constitution has two distinct meanings. It refers first to the entire scheme of intelligibility of the political, that is, to the way in which the constitution of the state is formed. It refers secondly to the formal body of law, generally contained in a written document, which provides the template for the government of the state. The two concepts are related but distinct. Both are means by which political power is generated. But the first is articulated through *jus politicum*, while the second is expressed in positive law. It is this relation between these two concepts that gives the political domain its dynamic quality. The nature of this relation also indicates why there can

[29] Weber, 'Politics as a Vocation', above n.14, at 78: "'Every state is founded on force", said Trotsky at Brest-Litovsk. That is indeed right. If no social institutions existed which knew the use of violence, then the concept of "state" would be eliminated, and a condition would emerge that could be designated as "anarchy", in the specific sense of this word. Of course, force is certainly not the normal or the only means of the state - nobody says that -but force is a means specific to the state.'

[30] Hannah Arendt, *On Revolution* (London: Penguin, 1973), 19: 'violence itself is incapable of speech … Because of this speechlessness, political theory has little to say about the phenomenon of violence and must leave its discussion to the technicians'.

be no fixed constitutional settlement. Constitutions serve both symbolic and instrumental purposes and they are constantly evolving in the light of political necessities.

VIII: The Logic of Political Jurisprudence

I have suggested that the various tensions intrinsic to the practice have to be negotiated. How is this done? The distinctive logic of the science of political jurisprudence is that of dialectic. Dialectic involves a duality, an opposition or conflict. It is a logic relating to the unity of opposites, and its primary objective is to elicit understanding rather than to demonstrate truth. Dialectic seeks to show how the interdependence of opposing forces is able to provide the basis for the relative stability and dynamism of structural configurations. Since it deals only with the meanings of the terms of discourse and does not seek to establish truths beyond this discourse, such truths as are established are relative to the practice.

The dialectical method of political jurisprudence specifies a relation of terms and although these are numerous, three primary forms might be highlighted. The first derives from the fact that the state draws on the sense of unity of common association but it acquires an institutional form only by dividing members from officers in a hierarchical arrangement of rulers and ruled. There is consequently a powerful tension between unity and hierarchy, between horizontal relations formed by the will to live in common and the vertical relations of domination and subordination. Aspects of this can also be seen in the tension between authority and liberty but the most basic tension is between unity and hierarchy.

A second tension arises between the universal aspiration to equal liberty and the necessity of accepting historically-situated contingencies. This theme runs through Rousseau's writing. On the one hand, the ideal constitution of *The Social Contract* is a virtual exercise, yet it aspires to shape the formation of existing political regimes. On the other, actual constitutions might offer a glimpse of liberty through an expression of principles of right, but may serve only to mask the dominant power of ruling elites. However rational the idea of the state may be, it unfolds in history by means of decisions. Political jurisprudence exhibits the dialectic of reason and history, of universality and historicity.

The third tension is between the discursive claim to autonomy and the oppositions it must inevitably provoke. The political is asserted as an autonomous domain: it conceives the entire world in terms of its own distinct discourse. This involves a claim to the primacy of the political, which

regulates all other domains of life (economic, religious, cultural, etc.). Yet from the perspective of these other discourses, the political is reduced to a specific and limited domain, a sub-system of society that governs the relationship between rulers and ruled. Within political jurisprudence, the state is conceived as the entire scheme of intelligibility, but from outside the discourse it is merely the institutional apparatus of rule. The state is both the scheme that regulates other domains and that which is regulated by those other domains. As a discursive system, the political is a domain of dialectical elaboration but the dialectic is not complete unless subjected to the oppositions of its own discursive claims. Montesquieu's causal laws, for example, operate here to constrain the scope of the political. Political jurisprudence exhibits the dialectic of autonomy and heteronomy.

These dialectical tensions - unity and hierarchy, universality and historicity, and autonomy and heteronomy – are replicated in many of the propositions of political jurisprudence: between sovereignty and the figure of the sovereign, between the people-as-one and the people-as-the governed, between the historic form of the nation-state and its universal aspirations, between 'power to' (*potestas*) and 'power over' (*potentia*), between *jus politicum* and positive law, between the constitution of the state and the constitution of the office of government, and so on. The philosopher who came closest to providing a systematic expression of dialectic as method was Hegel but he tied his method to an Absolute Idea in which all tensions are resolved. The notion that dialectic culminates in an ideal synthesis of these political tensions is implausible. On the contrary, the 'tragic' character of the political rests on the conviction that the dialectical method undertakes its work without any terminal point.

IX: CONCLUSION

Political jurisprudence is a modern discourse that has evolved since the late-sixteenth century. By the twentieth century, however, it was widely misunderstood. This was mainly attributable to the growth of academic specialization. Various components of the practice were separated off into the new disciplines of political economy, political science, public administration, political philosophy and analytical jurisprudence. One consequence was that within public law many of the leading scholars maintained that the discipline could only acquire a professional and scientific status if confined to

the study of positive law. That the golden era of writing systematic treatises of positive public law occurs during the latter half of the nineteenth century is not coincidental.[31]

The dominance of the school of legal positivism in modern public law has led to a considerable narrowing of the boundaries of juristic knowledge. This is graphically illustrated by the legal positivists' treatment of the idea of the state: the state is reconstructed as a legal person, an entity which possesses rights and duties. This personification of juridical order led to a considerable narrowing of the concept of the state, not least, by removing its intrinsically political aspects. This positivization in the pursuit of scientific knowledge reaches its apotheosis in Hans Kelsen's theory of positive law, which 'purifies' sovereignty of all political aspects and treats state and legal order as synonymous.[32] It then becomes possible to treat public law as 'a pure and simple technology of rules'.[33]

This scholarly movement helped shape an intellectual environment in which 'the European liberal state of the nineteenth century could portray itself as a *stato neutral ed agnostico*' and could therefore 'see its existential legitimation precisely in its neutrality'.[34] It is therefore not surprising that the dramatic growth in the range of governmental activities in the early twentieth century generated a crisis in understanding. Often expressed as the corrosion of the 'rule of law' or the undermining of constitutional government, the growth in the scale of government in response to the challenges presented by industrialization, urbanization and the extension of the franchise generated a series of disputes over public law method.[35] But the impact of positivist scientific method on legal consciousness was such that it became very difficult to sustain the discipline of political jurisprudence after the early twentieth century. In place of a dialectical engagement, the relationship

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[31] In Germany: C.F. von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig: Tauchnitz,1865); Paul Laband, *Das Staatsrecht des deutschen Reiches* (Tübingen: Laupp, 3 vols. 1876-82); Otto Mayer, *Deutsches Verwaltungsrecht* (Leipzig: Duncker & Humblot, 1895). In France: Maurice Hauriou, *Précis de droit administratif* (Paris: Sirey, 1892); Gaston Jèze, *Principes généraux du droit administratif* (Paris: Berger-Levrault, 1904); Raymond Carré de Malberg, *Contribution à la théorie générale de l'Etat* (Paris: Sirey, 1920). In Italy: V.E. Orlando, *Principii di diritto costituzionale* (Florence: Barbera, 1889); V.E. Orlando, *Principii di diritto amministrativo* (Florence: Barbera, 1891). In Britain, one looks no further than A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885).

[32] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: Mohr, 1920); Kelsen, *Introduction to the Problems of Legal Theory*, above n.2.

[33] Olivier Beaud, 'L'État' in P. Gonod, F. Melleray and P. Yolka (eds), *Traité de droit administratif* (Paris: Dalloz, 2011) vol.1, 207-267 at 213 [For the English version see: 'The State' *Sorbonne-Assas Law Review*: http://lawreview.u-paris2.fr/issue/2015/state]

[34] Carl Schmitt, 'The Age of Neutralizations and Depoliticizations' [1929] in his *The Concept of the Political* G. Schwab trans. (Chicago: University of Chicago Press, 1996), 80-96, at 88. Note that Schmitt also acknowledged the essential link between dialectic and the political. See, eg, ibid, 62: 'Hegel … remains everywhere political in the decisive sense. …Of a specifically political nature also is his dialectic of concrete thinking.'

[35] For the German literature on the *Methodenstreit* see Arthur Jacobsen and Bernhard Schlink, *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2002). The related French debate is explained in Beaud, above n.33. On the British disputes, see Martin Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992), esp. ch.7.

between the legal and the political was invariably conceived as an illegitimate attempt to cross the divide between norm and fact, between legal normativity and political science.

The impasse, then, was largely the product of the prevailing scientific method. Weber here is the pivotal figure. In adopting an instrumental conception of the state, reducing it to its specific means, and conceiving power in a purely material sense, Weber underplays the symbolic dimension of the juristic. He establishes a political sociology which, by conceiving law as an instrument of political domination (*Herrschaft*), effectively abandons the precepts of political jurisprudence. This insistence on a strict separation of facts and norms undermines the claim of 'the normative power of the factual'. Yet this formulation, transforming what exists and is tacitly accepted into a normative form, concisely expresses the way that political jurisprudence is able to do its work.[36] And it is able to maintain its symbolic power only so long as it is able to achieve this effect.

There are many threats today that erode the power of the discourse of political jurisprudence. One is a growing belief in technology as a neutral force and the consequential belief that law is now merely a technical instrument subject to a means-end rationale. This is corrosive because political jurisprudence is 'not just a *praxis prudentia*, and not just a craft'; it is also an achievement that remains 'deeply embedded in the adventure of Occidental rationalism'.[37] But that threat is now compounded by developments that threaten to displace the nation-state as the primary site of political power. This is not in itself the critical concern, especially as the juridical idea of the state is one of considerable flexibility and is not reducible to the material phenomenon of the nation-state. The main problem is that they threaten to undermine the power of the political imagination itself. These developments heighten the points of tension in the main dialectics of political jurisprudence: between unity and hierarchy (does the claim of political unity remain a decisive factor?); between universality and historicity (do universal claims remain historically grounded through the institution of the state?); between autonomy and heteronomy (is this autonomous worldview of the political still able to generate symbolic power?). These are real and

[36] Bourdieu expresses this point clearly in his lectures on the state when referring to the work of Spinoza: 'Spinoza speaks of what he calls the *obsequium*, a respect not for individuals, forms or people - but respect paid to the state or the social order. These "obsequious" acts display a pure respect for the symbolic order, which the social agents of a society, even the most critical, the most anarchistic, the most subversive, pay to the established order, all the more so as they do this without knowing it. As an example of this *obsequium*, I always propose the formulas of politeness or rules of conduct that are seemingly insignificant … By respecting them, homage is paid not to the individual who is the apparent object of respect, but to the social order that makes this person respectable. This is the most fundamental tacit demand of the social order.' Pierre Bourdieu, *On the State: Lectures at the Collège de France, 1989-1992* David Fernbach trans. (Cambridge: Polity, 2014), 34-35.

[37] Carl Schmitt, *Ex Captivitate Salus: Erfahrungen der Zeit 1945/46* (Cologne: Greven, 1950), xx.

powerful threats. The continuing value of political jurisprudence, it is suggested, is that it remains the most effective medium through which we might understand what presently is at stake.