



Webpapers on  
Constitutionalism & Governance  
beyond the State

Year 2007 | No 1

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ISSN: 1756-7556

conWEB – webpapers on Constitutionalism and Governance beyond the State

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**Equality, Authority, and the *Locus* of International Order**

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**Abstract**

The puzzle of international society has long occupied International Relations (IR) theory, but it lends itself to a clearer articulation in legal positivist theory. On strict legal positivist terms, international society is defined as a compact of legal equals, states. However if states claim to belong to a social order they ought to recognise a common authority. Authority is a form of hierarchy—‘authoritative’ means ‘one that cannot be overridden’, ‘one of a higher standing’. The paradox of international society then is this: state relations are organised horizontally and each state is seen as independent from other states, but at the same time these relations seem to be organised hierarchically because each state is dependent on an authority other than its own. As I argue, the crux of the matter depends on clarifying *where* authority resides, not *who* holds it. After discussing authority in political theory (Jean Bodin, Thomas Hobbes, Carl Schmitt, Giorgio Agamben), the essay goes on to articulate a concept of international authority compatible with an equality-of-states principle. Crucially, this concept rests on what I call ‘rule-based legal positivism’ traceable to the writings of H.L.A. Hart. The question of international authority thus invites us to attend to the conversation of three traditions: IR theory, political theory, and legal theory.

**Keywords:** law, institutions, internationalism, normative political theory, rule of law, sovereignty

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## Introduction

From the standpoint of mainstream IR theory, the problem of international order is a standing one because international life is assumed to take place in a condition of ‘anarchy’ or in the absence of a common superior.\* Yet, this does not rule out the possibility of ordering state relations either through: (1) empire or hegemony (whereby the assumption of anarchy is rejected); or (2) international society (where the assumption of anarchy is endorsed).<sup>2</sup> This essay explores the second possibility by asking whether order can emerge *within anarchy*.<sup>3</sup> ‘Order’ refers to an intelligent arrangement which reflects the workings of human thought and choice, not a natural arrangement produced by natural forces.<sup>4</sup> Invoking the classical Roman stipulation that ‘where there is society, there is law’ (*ubi societas, ibi jus*), I define order as law thereby redirecting the discussion from IR theory to legal theory.

A legal perspective is adopted for two reasons. First, the term *society* is ambiguous for it connotes an indiscriminate array of relations: political, economic, cultural, military, and so on. But all those relations have a legal element. Using law as

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\* I wish to thank Terry Nardin, the editors, and two anonymous reviewers for comments and criticisms for improving this paper. All remaining errors are my own.

<sup>2</sup> The tradition of international society is associated with early modern writers such as Hugo Grotius, Emmerich de Vattel, Samuel von Pufendorf, and more recently with mostly UK-based academics referred to as the ‘English School’. See Hugo Grotius, *The Law of War and Peace* [De jure belli et pacis], tr. Francis W. Kelsey, 3 vols (New York: Oceana, 1964 [1646]); Samuel von Pufendorf, *Eight Books on the Laws of Nature and Nations* [De jure naturae et gentium libri octo], tr. C. H. and W. A. Oldfather (New York: Oceana, 1964 [1688]); Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* [Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains], tr. from the French, no translator specified (Northampton, Mass.: Thomas M. Pomroy for S. E. Butler, 1805 [1758]); The identity of the English School is a matter of scholarly debate. Its first generation members include Herbert Butterfield, Hedley Bull, Adam Watson, and Martin Wight. See Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations: Essays in the Theory of International Politics* (London: Allen and Unwin, 1966); Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 3rd edn (Basingstoke: Macmillan, 2002 [1977]); Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (Oxford: Oxford University Press, 1984); Adam Watson, *Diplomacy: The Dialogue between States* (London: Eyre Methuen, 1982); Adam Watson, *The Evolution of International Society: A Comparative Historical Analysis* (New York and London: Routledge, 1992); Martin Wight, *Power Politics*, 2nd edn, ed. Hedley Bull and Carsten Holbraad (Harmondsworth: Penguin, 1986 [1946]); Martin Wight, *System of States*, ed. Hedley Bull (Leicester: Leicester University Press, 1977).

<sup>3</sup> The main argument of Bull’s *Anarchical Society* is that the condition of anarchy in the international realm does not necessarily lead to self-help but admits of order and rules.

<sup>4</sup> Herbert Butterfield defines the balance of power as a human understanding, as ‘a precept, about which one can have a certain option—an injunction to behave in one manner rather than another’. See H. Butterfield, ‘The Balance of Power’, in Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations*, pp. 132-148, 147. Butterfield’s definition of the balance of power can be seen in broader terms as a definition of order.

an organising concept therefore offers the possibility of theoretical coherence. Second, law and morality are usually considered to be things of serious importance for the common life in a political association.<sup>5</sup> In this sense my investigation addresses a classical theme in legal philosophy, namely, how does morality relate to law? Natural lawyers have insisted that the former is the foundation of the latter—a stance captured by the dictum ‘Unjust law is not law’ (*Lex iniusta non est lex*)—whereas legal positivists have rejected this position asserting instead that morality and law constitute distinct domains.

The following pages seek to defend one specific variant of positivism, henceforth called ‘rule-based positivism.’<sup>6</sup> While the traditional version propounded by John Austin claims that law is a command (of a sovereign habitually obeyed)<sup>7</sup>, the rule-based version associated with H. L. A. Hart, among others, postulates that ‘the law as it is’ presents something different from ‘the law as it ought to be’ (morality).<sup>8</sup> It is important to distinguish between positivism’s two variants—one centered on commands and obedience and one focused on obligations and rules—because they produce qualitatively different understandings of international society, only the latter of which is able to reconcile the demands of equality *and* authority. To support this proposition, the next section begins by defining international society (or a society of states) as a legal association of equals.<sup>9</sup> This definition is consistent with traditional legal positivism and it poses the puzzle of international order in the following way: order demands a supreme decision-maker or *authority* but on the international scene each state strives to preserve its *equality* vis-à-vis other states or to avoid surrendering

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<sup>5</sup> H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), p. 84. But later on Hart qualifies this point, arguing that in a community morality tends to be regarded as more important than law, pp. 172-173.

<sup>6</sup> My expression ‘rule-based’ positivism is similar but not identical to Terry Nardin’s ‘rule-of-law positivism’ as developed in his ‘Legal Positivism as a Theory of International Society’, in David R. Mapel and Terry Nardin (eds), *International Society: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998), pp. 17-35. The terms ‘positivism’ and ‘legal positivism’ are used interchangeably in this paper. Sometimes it is argued that legal positivism implies ‘objectivity’ characteristic of *logical positivism* associated with Rudolf Carnap, Viktor Kraft, or Karl Popper (The Vienna Circle), and that therefore legal and logical positivism are related doctrines. But Hart denies the cogency of this relationship. See H. L. A. Hart, ‘Positivism and the Separation of Law and Morals’, in Ronald M. Dworkin (ed.), *The Philosophy of Law* (Oxford: Oxford University Press, 1977), pp. 17-37, p. 18, n. 1.

<sup>7</sup> John Austin, *The Province of Jurisprudence Determined And the Uses of the Study of Jurisprudence* (London: Weidenfeld and Nicolson, 1954 [1832]). For Austin’s claim that ‘each and every law is a command’ see p. 13 and for the argument that sovereign is a superior habitually obeyed, p. 194.

<sup>8</sup> Hart, *The Concept of Law*; Nardin, ‘Legal Positivism as a Theory of International Society’; Michael Oakeshott, ‘The Rule of Law’, in Michael Oakeshott, *On History and Other Essays* (Indianapolis: Liberty Fund, 1999), pp. 129-178.

<sup>9</sup> Order need not be equated to law (or even to rules). For an alternative articulation of international society based on rules but not on *legal* rules see Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2006).

its individual decision-making power. Does international society exemplify this tension? It appears to be so. But rule-based legal positivism provides a different answer by redefining international society as a system of legal *rules* rather than as aggregate of agents. Such redefinition would imply that international authority is not a person or an agent (who commands habitual obedience). To spell out what precisely the notion of such international authority involves, one must determine *where* authority resides, not who holds it. And since an investigation of authority is peculiar to political theory, this essay can be seen as an attempt to identify the *locus* of authority on the map of international political theory.

### **International order: authority vs. equality?**

The opposition between authority and equality is a graver issue for international than for domestic order, where authority is taken to trump equality. As Thomas Hobbes writes, the social contract, by establishing the state as an authoritative system of law, subordinates a group of previously independent individuals to the will of a common sovereign.<sup>10</sup> There is no equality between ruler(s) and ruled since the former alone can amend or repeal the existing laws. Although a party to the social contract upon its institution—in the ‘original position’—the sovereign remains outside the contract, after it is instituted (The rulers are exempt from the law they create). Domestically, citizens are willing to obtain order at the expense of equality. But states—and this marks a key difference between the state and the citizen—are reluctant to sacrifice equality to purchase order. This is why order is a problem for *interstate relations* in the first place.<sup>11</sup>

It is instructive to consider the two canonical approaches—associated with Hugo Grotius and Thomas Hobbes—of establishing order among states. Both Grotius and Hobbes equate law to order. But while Hobbes postulates that law can be found solely inside the state, Grotius holds that law exists between states.<sup>12</sup> For Hobbes, law is a property of the state—the state *is* a legal order—whereas the international realm is

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<sup>10</sup> Thomas Hobbes, *Leviathan*, ed. C. B. Macpherson (Harmondsworth: Penguin, 1981 [1651]), chs. 13, 14, 20, 21.

<sup>11</sup> Nicholas J. Rengger, *International Relations, Political Theory and the Problem of Order: Beyond International Relations Theory* (New York and London: Routledge, 2000).

<sup>12</sup> Relevant here are the first two volumes of the translation of Hugo Grotius’s *The Law of War and Peace*.

disorder and lawlessness.<sup>13</sup> This however does not mean that a concept of international order cannot be derived from Hobbes's theory. It can, leading to an extrapolation of the Hobbesian domestic model into a world state. The important consideration is that for Hobbes law always resides in a state—either an individual state (original Hobbes's model) or a world state (the extrapolated model). Yet, the classic worry is that a state which encompasses the entire political space of the globe would be tyrannical. The wish to defend the individual state's independence against encroachment by such a hypothetical universal empire has led political thinkers to suggest that equality should have priority over authority, as a guiding principle of interstate relations. This is the well-known argument supporting the balance of power.<sup>14</sup>

Curiously, the principles of equality and authority clash even when one adopts the Grotian frame of reference. Grotius postulates the existence of an international society—a compact of legal equals. But precisely because his frame of reference is juridical, the concept of equality conflicts with the concept of authority. The difficulty is obvious: if states are taken to be *legally equal*, they cannot at the same time be subordinated to a *legal superior*. This is the paradox underpinning both Grotius's and Hobbes's position. Authority and equality appear to be mutually opposed ideas for those who reject the possibility of international order adopting the original Hobbesian stance, but also for those who endorse this possibility following Grotius. To untangle this conundrum, the idea of authority needs to be clarified.

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<sup>13</sup> Hobbes is traditionally seen as a proponent of a physicalist theory of society and state. But Michael Oakeshott reads him in a legalist fashion, and I adopt Oakeshott's reading here. Michael Oakeshott, *Hobbes on Civil Association* (Oxford: Blackwell, 1975).

<sup>14</sup> Canonical expositions of the classical balance of power doctrine include Friedrich von Gentz, *Fragments on the Balance of Power in Europe* [*Fragmente aus der neuesten Geschichte des politischen Gleichgewichts in Europa*] (London, 1806) and A. H. L. Heeren, *A Manual of the History of the Political System of Europe and Its Colonies From Its Formation at the Close of the Fifteenth Century to Its Reestablishment upon the Fall of Napoleon* [*Handbuch der Geschichte des europäischen Staatensystems und seiner Colonien von seiner Bildung seit der Entdeckung beider Indien bis zu seiner Wiederherstellung nach dem Fall des Französischen Kaiserthrons*], 5th edn, 2 vols (Oxford: Talboys, 1834). For a contemporary assessment, see Edward Vose Gulick, *Europe's Classical Balance of Power* (New York: W. W. Norton, 1955).

## Authority as sovereignty: Jean Bodin and Thomas Hobbes

In political theory, authority is conventionally linked to sovereignty. The following section aims to show that this link has significant implications for international political theory. Jean Bodin articulated the idea of sovereignty in the sixteenth century, although it can be traced back to thirteenth-century debates over the scope of princely power.<sup>15</sup> Hitherto, medieval legal discourse had centered on the notion of an immutable, universal order of things—‘natural law’ (*ius naturale*)—of which princes were passive interpreters. But Bodin upset the predominant mode of thinking by portraying them as active law-makers. He defined sovereignty as legislative prerogative—that is, as supreme power to create law as opposed to capacity to merely interpret the already available legal arrangements.<sup>16</sup> But Bodin’s radicalism should not be overstated since he accepted the then-conventional argument that each prince is subject to natural law.<sup>17</sup>

Further, for Bodin sovereignty is perpetual, absolute, and indivisible.<sup>18</sup> It is ‘indivisible’ in the sense that it comprises a single type of power—in this case, embodied in the legislative office. It is ‘perpetual’ because it extends over the entire life of the ruler who holds it,<sup>19</sup> and it is ‘absolute’ since it is the highest power in a political association which implies an unconditional license.<sup>20</sup> The people can institute such power—that is, an absolute mandate to do things in a realm—by giving up their rights to the rulers via transfer which is unconditional and complete. This procedure presupposes the notion of *a right*. If the people have no rights, they will simply have nothing to give away to the sovereign. As Richard Tuck observes, ‘...to have any kind of right [is] to be a *dominus*—to have sovereignty over that bit of one’s world...’.<sup>21</sup> The idea of sovereignty is connected to the idea of rights—both invoke an independent agent who can own, and therefore claim, things. Both place the agent or

<sup>15</sup> See Brian Tierney, “‘The Prince is not Bound by the Laws’”. Accursius and the Origins of the Modern State’, *Comparative Studies in Society and History*, vol. 5, no. 4 (1963), pp. 378-400; Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993).

<sup>16</sup> Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, ed. and tr. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), ch. 10.

<sup>17</sup> Bodin, *On Sovereignty*, pp. 31, 39.

<sup>18</sup> Bodin, *On Sovereignty*, p. 1; ch. 9.

<sup>19</sup> Bodin, *On Sovereignty*, p. 6.

<sup>20</sup> Bodin, *On Sovereignty*, pp. 7-8.

<sup>21</sup> Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), p. 28. *Dominium* for Tuck stands for ‘ownership’. But this essay attempts to show that it is more coherent to link the idea of sovereignty to *dominium* understood as a ‘realm’ and specifically as ‘legal realm’.

the individual in the centre of political discourse. Hobbes and John Locke, writing in the later contractarian tradition, explicitly adopt the vocabulary of rights to theorise sovereignty, thereby also embracing the paradigm of individualism.<sup>22</sup>

Two aspects of Bodin's argument have relevance for international relations. First, by emphasising the legislative prerogative of princes, Bodin associates sovereignty with the state—for him *sovereignty* stands for 'state sovereignty'. This is an important clarification because sovereignty can be interpreted more broadly, to mean autonomy of choice, discretion, or agency. In this latter meaning, it can characterise entities other than states.<sup>23</sup> Secondly, Bodin's definition of sovereignty demarcates a border between the international and the domestic. Recall that inside the state, rulers possess an ultimate law-making power (over positive or instituted laws) but outside it, they can only *interpret* natural law (perennial law residing in God, Nature or Reason). For Bodin, princes, and therefore states, coexist in a domain regulated by natural law.

Bodin's idea that princes are bound by the *law of nature*, Hobbes transforms into a doctrine of the *state of nature*. *Ius naturale* (Bodin) or, alternatively, the state of nature (Hobbes) is the condition of international coexistence among princes. But while Bodin seems to think that a shared law of nature will curb rulers' ambitions and mitigate international conflict, Hobbes claims the reverse. For Hobbes, the state of nature is a state of war. Interestingly, despite the difference in starting premises, Hobbes reaches the same conclusion as Bodin—the sovereignty of the individual state translates into legal independence between states.<sup>24</sup> If the state commands supreme power, as Bodin maintains, the relations between states must be predicated on the premise of nominal equality. Otherwise, one ruler would have to be treated as unequal or subordinate to another, but this entails a contradiction since by definition each prince is supreme in its realm.<sup>25</sup> For Hobbes, it is this *de jure* equality between states which renders war an ever present possibility. In his words, 'yet in all times, Kings and persons of soveraigne authority *because of their independency*, are in common

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<sup>22</sup> John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett, 1980).

<sup>23</sup> Otto Gierke for example juxtaposes the sovereignty of the individual with the sovereignty of the state, when discussing late medieval political theory. See Otto Gierke, *Political Theories of the Middle Age* (Cambridge, at the University Press, 1900), pp. 87-94.

<sup>24</sup> This can be inferred from Bodin's argument that the prince is 'bound by the contracts he has made, whether with his subjects or *with a foreigner*', *On Sovereignty*, p. 35, emphasis added.

<sup>25</sup> The predicate 'its' is used to indicate that sovereignty characterises the ruler's office, not the ruler as a named person.



continually jealousies, and in the state and posture of gladiators...which is a posture of war'.<sup>26</sup>

The upshot of Bodin's and Hobbes's argument is that the absolute power of the state internally *automatically* entails nominal equality between states externally. The 'inside' of the domestic constitutes the 'outside' of the international: one cannot theorise one without the other.<sup>27</sup> Sovereignty, despite that it characterises the state, is a concept which becomes intelligible on the border between the domestic and the international.<sup>28</sup>

It follows that the expression 'to be sovereign', used when talking about states, has a dual connotation—within the discourse of domestic politics it means 'to be supreme in one's own realm', and within that of international politics it means 'to be nominally equal or independent from other agents (states)'. But none of these definitions is fit to sustain a theory of international order. For what each definition includes is the idea of international equality but the idea of *international authority*—or precisely what a theory of international order demands—is absent. To articulate the missing international authority element Bodin's and Hobbes's notion of sovereignty has to be reconstructed, so that it accounts for two distinctions: (a) between authority and power; and (b) between sovereignty as a principle and the sovereign as a holder of this principle.

### **A decisionist theory of sovereignty: Carl Schmitt**

It is helpful to investigate a theory of politics which conflates these distinctions—authority-power, and sovereignty-sovereign—as exemplified by Carl Schmitt's writings. Schmitt won much popularity with his dictum that '[s]overeign is he who decides on the exception.'<sup>29</sup> This was the opening line of his 1922 *Political Theology* where he expounded a view of sovereign power based on an exaggerated, almost totalitarian, interpretation of Hobbes. In a later book, *The Political*, Schmitt argued that the state is the only agent commanding such an ultimate power, thereby linking

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<sup>26</sup> Hobbes, *Leviathan*, pp. 187-8; spelling in the original, emphasis added.

<sup>27</sup> R.B.J. Walker, *Inside/Outside International Relations as Political Theory* (Cambridge: Cambridge University Press, 1993).

<sup>28</sup> Robert Jackson, 'Martin Wight and the Good Life', *Millennium*, vol. 19, no. 2 (1990), pp. 261-272, p. 261.

<sup>29</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, tr. Georg Swab (Chicago: University of Chicago Press, 2005 [1922]), p. 5.

sovereignty to the state.<sup>30</sup> Schmitt's reputation as a legal writer was tarnished because of his involvement with the Third Reich. Ironically, his Hobbesian argument in *Political Theology* can be read as having anti-totalitarian implications for strengthening the Weimer constitution against extremist parties such as Hitler's National Socialist German Workers' Party.

Characteristically, Schmitt defines sovereignty as power to *decide*. His statement that 'the sovereign decides on the exception' merits special attention. It contains two propositions: one stipulating an act of deciding; and one asserting the presence of a person who has prerogative to decide. Nothing however sets limits on decision-making—the sovereign alone is the source of exception. Here Schmitt engages the conventional reading of Hobbes, where the rulers are outside the law—they institute law but are not themselves bound by it. The conclusion Schmitt reaches is that sovereignty resides in a decision, and that the legal order is product of the sovereign's command.<sup>31</sup>

In all likelihood Schmitt was influenced by Hobbes's claim that law is command. Indeed, Hobbes holds that '*a law is the command of him, or them that have the sovereign power, given to those that be his or their subjects, declaring publicly and plainly what every of them may do, and what they must forbear to do*'.<sup>32</sup> But this is hardly a decisive textual evidence to support the view that Hobbes is a consistent proponent of a command theory of law. (Actually, Bodin is relatively more prone to describing law as command.<sup>33</sup>) The troubling pronouncement which links law to command is made by Hobbes in *A Dialogue between a Philosopher and a Student*<sup>34</sup>, whereas *The Leviathan* is structured around the argument that the sovereign acts because, ultimately, it is authorised by the body politic and not because of its unlimited power of discretion. Hobbes thus writes: 'For it has been already shewn that nothing the sovereign representative can doe to a Subject, on what pretence soever, can properly be called injustice, or injury; because every subject is *author* of every act

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<sup>30</sup> Carl Schmitt, *The Concept of The Political*, tr. Georg Swab (Chicago: University of Chicago Press, 1996 [1932]).

<sup>31</sup> Carl Schmitt later elaborates this view in his *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, tr. George Swab and Erna Hilfstein (London: Greenwood Press, 1996 [1938]).

<sup>32</sup> Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England* (1681) *The English Works of Thomas Hobbes of Malmesbury: Now First Collected and Edited by Sir William Molesworth*, 6 vols, vol. VI (London: Bohn, 1839-45), p. 26, emphasis added.

<sup>33</sup> Bodin, *On Sovereignty*, pp. 11, 51.

<sup>34</sup> See note 31 above.

the sovereign doeth'.<sup>35</sup> Further, 'For he that he doth any thing by *authority* from another, doth therein no injury to him by whose authority he acteth: But by this institution of a commonwealth, every particular man is author of all the soveraigne doth.'<sup>36</sup> Finally, Hobbes speaks of 'laws, which are but rules *authorised*'.<sup>37</sup> Law, and sovereignty as a legislative prerogative, depends on prior authorisation rather than on the ruler's command.

Unlike Schmitt, then, Hobbes draws a distinction between power and authority. The distinction is twofold. First, power is 'a can', whereas authority is 'an ought'. While *authority* is a capacity to do something, circumscribed by limits (social, moral or legal), *power* is a capacity to do something which admits of no limits—agents will seek to amass more of it as long they can and provided that no competition presents an obstacle. Second, authority implies authorisation, and this effectively means, transfer of rights. It is not accidental that Hobbes terms the social contract—the cradle of sovereignty—'the mutual transferring of right.'<sup>38</sup> Rights stand for claims, and to hold a right means that another agent has a corresponding *obligation* to acknowledge it. But power is not a relationship between right-holders. It is what Hobbes calls 'liberty': discretion, a capacity to decide anyway one sees fit. Despite appearances, a right and liberty are notions which have little in common.<sup>39</sup> The idea of rights presupposes a relationship between agents (that is, between more than one agent), and specifically, a relationship in terms of obligation. Conversely, the idea of liberty does not suggest such a relationship—it pertains to an atomistic individual outside society. It is evident that any *social* order, be it domestic or international, needs to move beyond an atomistic discourse of liberties and into a genuinely social discourse of rights and obligations.

Since Schmitt treats sovereignty as liberty—as a capacity to decide—he ends up conflating sovereignty (the principle) with the sovereign (the holder of this principle). Instead of asking 'What is sovereignty?', Schmitt asks 'Who is the sovereign?' But authority understood in this way—as a single author with supreme

<sup>35</sup> Hobbes, *Leviathan*, pp. 264-5.

<sup>36</sup> Hobbes, *Leviathan*, p. 232.

<sup>37</sup> Hobbes, *Leviathan*, p. 388.

<sup>38</sup> Hobbes, *Leviathan*, p. 192.

<sup>39</sup> Hobbes expresses this in the following manner: 'A right is liberty, namely that liberty which the civil law leaves us, but civil law is an obligation; and takes from us the liberty which the law of nature gave us. Nature gave a right to every man to secure him selfe by his own strength and to invade a suspected neighbour, by way of prevention; but the civil law takes away that liberty, in all cases, where the protection of the law may be safely stayd for. Insomuch as *lex* and *jus* are as different as obligation and liberty,' *Leviathan*, pp. 334-5.

discretion—cannot be applied internationally. Given the premise of a multitude of independent agents (states), an all-powerful leviathan cannot dominate the international realm. Domestic authority may technically be equated to a common sovereign ruler but *international authority* cannot—this violates the assumption of international plurality. This however does not mean that some final, authoritative source operating in the international sphere cannot be identified. It only means that such a source cannot be a person (or a body of people): the only option left is that it must be a *principle*.

### **Sovereignty and the right to life: Giorgio Agamben**

Aside from considerations of international relations, there is another reason as to why sovereignty as a principle should not be confused with the supreme discretion of a ruler. Let us consider Schmitt's argument once again. Schmitt claims that liberalism invests in the value of deliberation but when an imminent threat, war, is impending, there is no time for deliberating (or parliamentary procedures)—someone must decide. This someone is the ruler(s) who mobilises the citizens to defend the country against an enemy for 'to the enemy concept', he goes on to remark, 'belongs the ever present possibility of combat'.<sup>40</sup> 'The political' is an act of deciding as to who the enemy or friend of the nation is:

The political is the most extreme and intense antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping. In its entirety the state as an organized political entity decides for itself the friend-enemy distinction.<sup>41</sup>

But war, for Schmitt, is not an abstract theoretical threat—it is an existential threat;<sup>42</sup> it involves the 'possibility of real killing,' and compromises the life of the community directly and immediately.<sup>43</sup> The state therefore must possess absolute power to decide in situations of immanent danger.<sup>44</sup> This justifies the state—or the sovereign—in

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<sup>40</sup> Schmitt, *The Political*, p. 32.

<sup>41</sup> Schmitt, *The Political*, pp. 29-30.

<sup>42</sup> Schmitt, *The Political*, pp. 28, 33, 72-73.

<sup>43</sup> Schmitt, *The Political*, p. 49.

<sup>44</sup> Schmitt, *The Political*, pp. 20, 39, 43.

laying claim on the lives of its soldiers and citizens, who are called upon to die in its name.

Sovereignty, then, is about the right to life and death in a polity.<sup>45</sup> This is why the sovereign not merely decides but decides ‘on the exception’—that is, settles the matter as to whether someone else will live or die. And this is why it is dangerous to treat this power as a mere decision left in the hands of rulers unchecked by common rules (constitutional limitations as in the rule-of-law tradition).

It is instructive to contrast Hobbes’s and Schmitt’s position over the right of life and death. Hobbes postulates a *natural* right to life: the state is instituted to protect this right and all *civil* rights can be seen as derivative from it.<sup>46</sup> This natural right is unalienable—the individual cannot transfer it to the state.<sup>47</sup> The sovereign can sentence a subject to death for crimes but such a ruling concerns the person as a citizen, not as a natural (living) being. Citizens are obligated to keep the law *but they are not obligated to die*; hence they can resist the sovereign and try to escape the sentence. In Hobbes own words, ‘For by allowing him [the sovereign] to kill me, I am not bound to kill my selfe when he commands me’.<sup>48</sup> Here lies, I think, the fundamental difference between Hobbes and Schmitt. Schmitt views the imperative to defend one’s country as a higher morality which suspends all other moral codes—including the individual’s right to life.<sup>49</sup> This transforms the state into a political sphere where human existence is no longer sufficiently valued. For Schmitt, the citizens have an obligation to die for the state. But for Hobbes, citizens have an obligation to live, and the state is solely an instrument for completing this task.

The ‘state of exception’—by reference to which Schmitt justifies sovereign power and its ultimate right to death—is what thinkers since antiquity have called *expediency*. Expedient is a situation where criteria are unavailable to guide action but choice cannot be avoided—the agent must act. And while the idiom of expediency or necessity can hardly be eliminated from politics, it cannot ground a theory of political order. This is so because under the weight of the expedient or the necessary all moral and legal discourse breaks down. As the ancient Romans warn us, ‘necessity has no law’ (*necessitas legem non habet*). To render expediency the master-concept of the

<sup>45</sup> Bodin, *On Sovereignty*, p. 56; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), ch. 4.

<sup>46</sup> A similar argument is advanced by H. L. A. Hart, ‘Are There Any Natural Rights?’, *Philosophical Review*, vol. 64, no. 2 (1955), pp. 175-91.

<sup>47</sup> Hobbes, *Leviathan*, p. 268.

<sup>48</sup> *Leviathan*, p. 269

<sup>49</sup> Schmitt, *The Political*, pp. 47, 71.

political order is to claim that when arranging our political life we need not bother with questions of morality and law.

But Giorgio Agamben has argued that Schmitt's notion of the sovereign exception does not deny the legal order. It only *suspends* it.<sup>50</sup> (Schmitt's approach in other words does not amount to a *necessitas legem non habet* clause.<sup>51</sup>) The 'state of exception', in Agamben's reading of Schmitt, designates the boundary of the legal order.<sup>52</sup> It is 'the definition of the very space in which the juridico-political order can have validity'.<sup>53</sup> And it is 'the threshold where fact and law seem to become undecidable',<sup>54</sup> since the sovereign must decide (this decision is a matter of fact) on the question of who counts as a citizen or insider to the legal system and who does not (this question is a matter of law).

For Agamben, the boundary of the legal order is revealed in the distinction between outlaws and criminals.<sup>55</sup> Although criminals are liable to punishment, they are still admitted to the perimeter of law and enjoy legal rights (right to trial, for example). But the Taliban detainees currently held at Guantánamo by the George W. Bush administration or Jews during the Third Reich have no such rights.<sup>56</sup> Each of them exemplifies what Agamben calls *homo sacer*—an outlaw. Killing *homo sacer* entails no legal sanction since law is blind to the existence of outlaws (they are literally 'out' of 'the law').<sup>57</sup> A person of this sort occupies an in-between position between a living being and a political being (citizen). *Homo sacer* has no political life or *bios*, and as a result of this, also no bare life or *zoē*. Agamben concludes, 'The fundamental categorical pair of Western politics is not that of [Schmittian] friend/enemy, but that of bare life/political existence, *zoē/bios*, inclusion/exclusion.'<sup>58</sup> Declaring an exception to the law—that is, stripping people of citizenship, or excluding them from the realm of law so that atrocities committed against them, such as deportation to camps, do not call for justification—is an act of moral significance. Because of its relationship to the right to life and death, the sovereign decision is never just a technical act of deciding.

<sup>50</sup> Giorgio Agamben, *State of Exception*, tr. Kevin Attell (Chicago: University of Chicago Press, 2005), p. 33; Agamben, *Homo Sacer*, pp. 17-18.

<sup>51</sup> Agamben, *State of Exception*, pp. 1, 24.

<sup>52</sup> Agamben, *State of Exception*, pp. 4, 23.

<sup>53</sup> Agamben, *Homo Sacer*, p. 19.

<sup>54</sup> Agamben, *State of Exception*, p. 29.

<sup>55</sup> Agamben, *Homo Sacer*, p. 20.

<sup>56</sup> Agamben, *State of Exception*, pp. 3-4.

<sup>57</sup> Agamben, *Homo Sacer*, ch. 3.

<sup>58</sup> Agamben, *Homo Sacer*, p. 8.

Agamben's concern is that the state of exception, with its moral enormity, threatens to turn into a *norm* of modern political life. And it can be added, 'international political life.' Indeed, *homo sacer* is often constructed as a threat by reference to the international. This throws light on Hobbes's argument that a commonwealth is designed for the sake of protecting the citizenry from an external attack—that is, not from other violent factions inside the state, but from other states.<sup>59</sup> And for Schmitt the political is a condition of confronting a *public* enemy—an enemy of the nation—not a foe or 'a *private* adversary whom one hates'.<sup>60</sup> The model of political conflict for Schmitt and for Hobbes is one community pitted against another, not one individual fighting another. What this suggests is that the idea of sovereign power cannot expulse moral judgment and that such judgment cannot be restricted to the area of domestic politics—it extends to that of international politics.

### **Authority and the limits on sovereign power**

Whether the sovereign is inside the law or outside it, Agamben reminds us, is not an analytical question. It is a moral question—it concerns the moral limits of sovereignty. And as elucidated before, the idea of limits transforms power into authority. Instead of sovereign *power*, moral discourse demands a consideration of sovereign *authority*.

But thinkers like Schmitt tend to reduce sovereignty to power, and moreover to personified power. The rationale is that because sovereignty is something absolute, it must be indivisible, and, when this view is pushed to the extreme, that such indivisibility resides in the body of a named ruler (or rulers).<sup>61</sup> But sovereignty need not be indivisible. For Jean-Jacques Rousseau, for example, it is shared between the government and the people. As Rousseau points out: 'The sovereign, having no other force than the legislative power, acts only by means of the laws, *and the laws being nothing but authentic acts of the general will*, the sovereign can act only when the people is assembled'.<sup>62</sup> And in contemporary theories of federalism, sovereignty can be split between various branches of government (and the people). The idea is not that

<sup>59</sup> Hobbes, *Leviathan*, pp. 232-233.

<sup>60</sup> Schmitt, *The Political*, p. 28, emphasis added.

<sup>61</sup> Throughout *The Political*, Schmitt refers to the sovereign as 'he'.

<sup>62</sup> Jean-Jacques Rousseau, *The Social Contract and Other Writings*, ed. and tr. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), p. 110, emphasis added.

one branch is subordinate to another but that each embodies one aspect of sovereignty—say, legislative sovereignty as opposed to executive sovereignty. Yet for such divisibility to be conceivable, sovereignty has to be defined as a principle—that is, as authority—rather than as the decision-making power of a ruler (rulers).

Further, those who view sovereignty as indivisible tend to portray it as unlimited. But as John Salmond noted, the argument that sovereignty is indivisible—the fact, that there is one generic type of supreme authority rather than different species of it—should not be confused with the argument that sovereignty acknowledges no limitations.<sup>63</sup> Even for writers like Bodin who assert its indivisibility, sovereignty is constrained by the precepts of natural law,<sup>64</sup> as well as by certain ‘constitutional’ provisions (for example, the sovereign cannot levy taxes without the citizens’ explicit consent).<sup>65</sup> And notably, for Hobbes, sovereign authority cannot exist *before* law is instituted.<sup>66</sup> Hobbes’s position is not explicitly constitutionalist but it can be interpreted along these lines. It implies that the sovereign changes laws not by virtue of some ultimate discretion but *within* the framework of the law, that is, in accordance with a constitution.

Is it possible to have an international constitution that governs state relations? This is the central question a theory of international order has to address (given the assumption of statehood). And if international authority is not an all-powerful actor—a universal empire—but a principle, where does this principle reside? What is the *locus* of international order?

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<sup>63</sup> John Salmond, *Jurisprudence*, 8th edn, ed. C. A. W. Manning (London: Sweet and Maxwell, 1930 [1902]), pp. 524-531, 531.

<sup>64</sup> Bodin, *On Sovereignty*, pp. 8, 13.

<sup>65</sup> Bodin, *On Sovereignty*, pp. 21, 40.

<sup>66</sup> Hobbes, *Leviathan*, ch. 14.



## International authority and international equality

### *Obligations, rules, and human agents*

In articulating the idea of an international constitution that governs state relations, rule-based positivism explores two interrelated concepts—rules and obligations. The following pages will first consider how this approach theorises rules and obligations as they characterise a domestic political association (of human beings), and will then examine them in the context of an international political association such as the society of states.

In Simmons' apt phrase, an obligation is a 'requirement'. 'Obligations,' he remarks, 'are limitations on our freedom, impositions on our will, which must be discharged regardless of inclinations.'<sup>67</sup> Like any other prescription, an obligation supposes that certain conduct is *due* (that is why obligations are often equated to *duties*<sup>68</sup>); that is, the obligee must perform the action specified in the obligation. 'The fact that obligations are requirements,' Simmons continues, 'accounts for the intimate tie between the concept of obligation ...and the notions of force and coercion which we associate with it. For to be "required" to act seems always to involve, at the very least, a serious pressure to perform.'<sup>69</sup> When obligations are not discharged, the injured party has a legitimate reason to seek redress, coercively if it comes to this.

As Hart argues in a well-known passage, in society there will always be those who fulfill their obligations because of a fear of sanctions (the exponents of what Hart termed the 'external point of view') and those who honor their obligations because this is the right thing to do (those who have adopted 'the internal point of view').<sup>70</sup> Clearly, this latter notion of obligation is moral—for it specifies what *ought* to be done. Were society a club of angels or altruistic beings, it could perhaps sustain itself as a web of obligations. Unfortunately however, there is a great temptation among most people to refuse to discharge their obligations while benefiting from other agents

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<sup>67</sup> A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), p. 7.

<sup>68</sup> Hart distinguishes duties from obligations in 'Are There Any Natural Rights?'. He argues the following: that duties (general moral obligations) are owed by all persons to all others while obligations have a more specific character; that unlike duties, obligations require an actual act or performance; that obligations give rise to correlative rights; and that the character of obligation is determined by virtue of its being a relationship between persons, not by virtue of the act it pertains to (p. 179, n. 7); Simmons invokes Hart's criteria in *Moral Principles and Political Obligations*, p. 14-15, n. 12.

<sup>69</sup> Simmons, *Moral Principles and Political Obligations*, p. 7.

<sup>70</sup> Hart, *The Concept of Law*, pp. 86-88 and ch. 6.

who dutifully do so.<sup>71</sup> One way to understand the relationship between law and morality, according to the sort of positivism Hart recommends, is to think of law as a coercive institution designed to enforce (moral) obligations.

Yet, it would be wrong from a Hartian perspective to claim that coercion gives force to obligations. The possibility that obligations can be coercively enforced does not create obligations; it only increases their *efficacy*.<sup>72</sup> For an obligation must be in existence before *it* can be enforced. This has led many to accord to international law the standing of law proper even though it lacks centralised coercive organs, and even though it is weak compared to the centralised coercive system of municipal law. But if obligation is not the product of coercion, what generates it? The answer for *legal* obligation is usually: fact. Legal obligation exists because it forms part of the legal system under which a given agent (the same one who has to discharge this legal obligation) lives. *Moral* obligations however are invariably product of choice.<sup>73</sup> Agents undertake obligations or commitments voluntarily or *via* self-binding. Moral obligations are traceable to acts of will which have the form of I-statements. This provoked J. L. Austin to comment: ‘Similarly, an anxious parent when his child has been asked to do something may say ‘He promises, do not you Willy? But little Willy must still himself say ‘I promise’ if he is really to have promised.’<sup>74</sup>

For this reason, it would be inappropriate to assert that all obligations are at bottom moral. As A. Simmons argues, different obligations have different *ground*.<sup>75</sup> There are not only legal and moral obligations (like those just mentioned in the paragraph above) but also other forms of obligations; for example, the obligation a professor has to mark student papers.<sup>76</sup> ‘Ground’ is a felicitous expression not to be confused with ‘reasons’. Even careful students of Hart, like Joseph Raz, succumb to the problematic notion of reasons (although Hart who used the term repeatedly should

<sup>71</sup> Hart, *The Concept of Law*, p. 191.

<sup>72</sup> Hart, *The Concept of Law*, pp. 100-101.

<sup>73</sup> An alternative reading, prioritising duties over special obligations, would dispute my interpretation here since, in contrast to special moral obligations like promises which are self-imposed, duties are held to be ‘in the nature of things’. For a recent illuminating discussion of how nature (and specifically the *natural reasonableness* of human beings as captured by the tradition of natural law) as opposed to choice is foundational for morality see John Finnis, ‘Natural Law: The Classical Tradition’, in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), pp. 1-60.

<sup>74</sup> Austin’s point is that promises, as a special sort of obligations and commitments, can only be undertaken in the first person singular. We cannot commit somebody *else* through an act of our own. See L. J. Austin, *How to Do Things with Words*, 2nd edn, ed. J. O. Urmson and Marina Sbisa (Cambridge, Mass.: Harvard University Press, 1962 [1955]), Lecture V, p. 63.

<sup>75</sup> Simmons, *Moral Principles and Political Obligations*, pp. 20, 23.

<sup>76</sup> Simmons calls this class of obligations ‘positional’ to distinguish them from ‘moral duties’. *Moral Principles and Political Obligations*, pp. 16-22.

be blamed). Raz claims that obligations grant us ‘reasons for action’, and that authority should be understood as ‘normative power’ which specifies ‘excusive reasons for action’ (or overrides other exclusive reasons).<sup>77</sup> But the trouble with this line of reasoning is that no obligation by itself (leaving aside for a moment the thorny issue of what *kind* of obligation that is) suffices to provide action with closure. That is, we do not act towards our fellows because of considerations expressed in the form of obligation alone. To expect that the idea of obligation can capture all the modalities of social action is to burden it in a way no concept can endure. But even if we restrict the realm at issue to that of moral conduct—moral obligation cannot be the only consideration as to how we act towards other agents (since besides duty, motives and emotions can be such moral considerations). As Hart exclaims: ‘Moral obligation and duty are the bedrock of social morality but they are not the whole.’<sup>78</sup>

The distinction between ground and reasons matters because it elucidates the connection between rules and obligations. Rules impose obligations.<sup>79</sup> While obligations consist in prescriptions—setting obligatory limitations on conduct—rules are *propositions* which spell out or generalise these limits (‘No dogs on the elevator!’ for example is a rule).<sup>80</sup> But rules provide us with ground, not with a reason to act. They tell us how to do something (behave morally or sing beautifully) not what to do (‘Be nice to Jack!’ or ‘Sing a song now!’). A ground is a *standard* of conduct which governs action without thereby guiding it: agents are always free to choose what to do. Expressed differently, rules constrain the manner of carrying out a performance, not the performance itself. And because rules are standards, they are: (a) general,<sup>81</sup> and (b) relatively permanent.<sup>82</sup> Generality means that rules apply to a class of agents (not to Maja and Tony) but also to kinds of conduct as opposed to particular acts (to the signing of contracts, not to the signing of this or that contract). There would be no

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<sup>77</sup> Joseph Raz, *Practical Reasoning and Norms* (London: Hutchinson Press, 1975), pp. 29-32; Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), ch. 1, esp. p. 12. Raz’s position is much more complex and I hardly do justice to it by this observation. But my argument is confined to pointing out the distinction between reasons (which specify ends or reflect motives) and ground (which stands for a principle or something which is end- or motive-independent).

<sup>78</sup> Hart, *The Concept of Law*, p. 179; Simmons, *Moral Principles and Legal Obligations*, p. 25.

<sup>79</sup> Oakeshott ‘The Rule of Law’, p. 141; Michael Oakeshott, *On Human Conduct* (Cambridge: Cambridge University Press, 1975), p. 121; See also note 38 above on Hobbes linking law to obligation.

<sup>80</sup> As Hart argues, *obligation* and *rule* are related but not fully coterminous ideas. Whether certain rules are viewed as giving rise to obligations depends on ‘the insistence on importance or *seriousness* of social pressure behind the rules’, *The Concept of Law*, p. 84, emphasis in the original.

<sup>81</sup> Hart, *The Concept of Law*, p. 21.

<sup>82</sup> Hart, *The Concept of Law*, p. 23.

point of having a standard, say a meter, if this measurement unit constantly changed (in length) or if it were meant to serve Maja and Tony but nobody else.

What is more, generality and permanence are qualities differentiating a rule from a command. Commands are temporary orders which expire on the spot, but rules are ‘standing orders’.<sup>83</sup> And while it is possible to identify a command solely by reference to its issuer (who surely remains exempt from this command), rules characterise all relevant agents taken together. The appeal of a constitutional order stems from the idea of rule generality or to the notion that the ‘rules apply to everybody.’<sup>84</sup> Governmental officials are obligated to act within the constitutionally established limits as much as everybody else.

For Hart, a state constitution signifies the existence of rules which are legal rather than moral. Moral rules explicate (or condense in the form of a principle) obligations between autonomous agents and, in this sense, moral rules are something self-imposed. A moral rule cannot be imposed by force or by command, that is, by external agency (but a legal rule can!). The agents themselves have to choose to subscribe to the moral rule in question.<sup>85</sup> This accommodation of the idea of moral rules sets apart the traditional or command-based positivism of Austin from the rule-based positivism espoused by Hart.

Further, unlike morality, law presupposes coercion (point made above).<sup>86</sup> More importantly, when different moral conventions in a polity happen to conflict (such as when people wonder whether upon the king’s death his son is to inherit his throne or not), the law reduces uncertainty by issuing pronouncements which cannot be overridden. In contrast to a moral system of rules, a legal system comprises second-order rules (Hart names these ‘rules of recognition’, ‘rules of change’ and ‘rules of adjudication’) which authoritatively identify a disputed first order rule; that

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<sup>83</sup> Hart, *The Concept of Law*, p. 23; Oakeshott makes the same point by noting that ‘In being used, a rule is not used up’, *On Human Conduct*, p. 126.

<sup>84</sup> ‘Everybody’ here means ‘everybody within the relevant class’. Certain rules or laws can pertain to certain agents only such as public officials or soldiers.

<sup>85</sup> By ‘moral rule’ I mean a special moral obligation not duty. See notes 67 and 72 above.

<sup>86</sup> Hart argues that unlike morality which ‘punishes’ wrongs by means such as disapprobation, law is more stringent: it presupposes strict liability. Good motives, even when they lead to reprehensible effects, may and often suffice to *excuse* action in moral settings but rarely in legal settings. Unlike legal rules, moral rules are less susceptible to abrupt social change (the so-called ‘secondary rules of change’, which are legal rules, are meant to produce such rapid institutional change). Finally, morals are usually regarded as prescriptions of a relatively greater importance (when compared to law) in the sense that people may still obey an obsolete law but they will rarely if ever continue to reproduce an obsolete moral convention, *The Concept of Law*, pp. 169-179. For a critique of Hart’s view that law is more exacting and coercive than morality see Matthew Kramer, *Where Law and Morality Meet* (Oxford: Oxford University Press, 2004), ch. 8.

is, they determine whether this rule is ‘valid’ (whether it is part of the legal system or not).<sup>87</sup> Such pronouncements are *authoritative* because they settle disputes with an air of finality; societal members are normally obligated to accept these pronouncements (rather than to continue discussing them). Authority, then, is a final arbiter.

Hart in effect claims that a system of legal rules does not stand in any necessary relation to morality. Law may happen to meet the requirements of morality but even if it does not meet them, it still, most likely, will count as law. A legal system merely testifies to the *facticity* of a way of life—of people cohabiting under rules. It signifies that law is accepted and practiced by a certain social group, not that this law is morally commendable. But Hart’s morality-law distinction does not indicate a refusal to engage with moral issues but a warning that a legal system can exist, despite that it is unjust. To claim that law only exists if it is just, as natural lawyers posit, is to remain blind to the ugly reality which admits of legal systems which fail the test of justice (The Apartheid regime of the South African Republic). Rule-based legal positivism, by insisting on the separation of law from morals, is itself a moral position: it invites us to criticize the prevailing legal order, not to endorse it.

This Hartian positivism then is concerned with morality, an attitude usually attributed to natural law. This is evident in Hart’s ‘minimum content of natural law’ thesis<sup>88</sup> aimed at refuting the popular positivist doctrine that law ‘may have any content’.<sup>89</sup> Every rule, and specifically a legal rule, for Hart must have a minimum moral content if it is to procure the utmost basic goal of societal coexistence: survival (given certain premises concerning human vulnerability, scarcity of resources, and

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<sup>87</sup> Hart, *The Concept of Law*, pp. 96-107, esp. pp. 100, 105. Crucial here is Hart’s own understanding of positivism. The key ‘rule of recognition’ (second-order rule) in a legal system by reference to which the validity of other (first-order) rules is ascertained is, as Hart writes, ‘not stated but its existence is *shown* in the way in which particular [first order] rules are identified, either by courts or other officials or private persons and their advisers’ (p. 98, emphasis in the original). Here and in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon, 1983) Hart argues that law is not a product emanating from certain *sources*, or clearly demarcated institutions or procedures, as it is commonly asserted by legal positivists. Instead, law reflects the *fact* that social agents accept it as practice. Contrast Hart’s perspective with Joseph Raz’s source-based doctrine of legal positivism elaborated in his *The Authority of Law*, ch. 4 and p. 151-153. Roberto Ago, in his erudite commentary on the legal positivist tradition, notes that this tradition is better understood as involving the idea of law as practice or a social fact, rather than the idea of law as generated by sources. Roberto Ago, ‘Positive Law and International Law’, *The American Journal of International Law*, vol. 51, no. 4 (1957), pp. 691-733.

<sup>88</sup> Hart, *The Concept of Law*, pp. 189-195, esp. p. 195; Hart, ‘Positivism and the Separation of Law and Morals’, pp. 36-37.

<sup>89</sup> Hart, *The Concept of Law*, p. 195.

other-regardingness).<sup>90</sup> This content is found in moral rules which protect persons (prohibit killing), property (prohibit theft), and promises (prohibit using other agents as means as opposed to ends in themselves). But this triad of irreducible *moral* components, in Hart's view, characterises *law*, not morality.<sup>91</sup> Although law and morality rub shoulders, they continue to demarcate distinct spheres.

### *Obligations, rules, and states*

Rule-based positivism offers a vocabulary to articulate a theory of international order. It finds expression in Hedley Bull's account of international society as a body of rules. Bull's occupation with the notion of legal rules reveals how much he was influenced by his teacher, Hart. It is not accidental that *The Anarchical Society*, Bull's major work, uses as its point of departure the idea of 'elementary goals of social life'—moral rules forbidding killing, theft, and protecting the sanctity of promises (*Pacta sunt servanda*).<sup>92</sup> Bull's elementary goals correspond to those moral rules Hart singled out under the rubric 'minimum content of natural law'. And while for Bull such elementary goals underpin the workings of a society of human beings, it is plausible to see them as a moral basis of the society of states as well.

But international society is defined as a system of legal rules. It can be said to exist whenever states regard such rules as *authoritative* or binding in their mutual conduct. Because of its lack of centralised coercive organs, international law cannot be identified as law by exclusive reference to coercion. However, it can be identified by reference to actual social practice. That international law comprises rules then is a statement of social fact—it points out that in actuality state interrelations operate via common legal standards.

But it is also an analytical statement because international society—conceived as a corpus of legal rules—is a conceptual space wherein international authority is located. This analytical proposition belongs to the lexicon of rule-based positivism,

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<sup>90</sup> Here it is helpful to contrast Hart's with Oakeshott's views. Oakeshott argues that certain moral rules are required to identify law (or the legal system). Such rules prohibit retrospective and secret laws, instrumental laws as well as laws which discriminate against persons or establish outlawry, 'The Rule of Law', pp. 155, 173. Philosophers like Oakeshott regard law as a mode of association premised on mutual respect and formal equality, not as a mode that produces these things as outcomes, much less mere survival. Hart's idea that law aims to procure survival is utilitarian, and, assuming that this proposition is sound, it shows the limitations of rule-based positivism when it comes to exploring questions of morality.

<sup>91</sup> Hart, *The Concept of Law*, p. 195.

<sup>92</sup> Bull, *The Anarchical Society*, pp. 4, 6-7.

not traditional positivism. As discussed previously, rules presuppose *obligations*.<sup>93</sup> Obligation to uphold the rules is not mere *consent* to the rules. Consent is a sister-idea of power—it refuses to acknowledge the point that action is subject to restraint. On this view, the state can depart from the rules whenever its interests dictate so, and this is what traditional positivism asserts.<sup>94</sup> Against this, rule-based positivism holds that an obligation renders certain ways of acting unacceptable and that these *must* be forborne, even when doing so prejudices the agent's interest.

This argument helps us to further clarify the definition of international society. As Nardin writes, “‘Statehood’ is a role defined by the rules that constitute international society’.”<sup>95</sup> That is, no intrinsic or essential properties of statehood exist outside those rules. If a state claims to be a member of international society, it has to pledge commitment to its rules—its diplomatic conventions, its rules regulating the use of force, its legal principles—and act in accordance with those (most of the time). In a similar fashion, Immanuel Kant, and more recently John Rawls have maintained that a law-abiding state or ‘republic’ should abstain from violence on the international scene.<sup>96</sup> This is a logical point. It would be contradictory for a state to identify itself with respect for the law (as democracies or ‘republics’ in Kantian terms purport to do) but then go on to violate legal rules. Proclaimed standards of international conduct can be transgressed, but when this happens, such illegitimate actions can be judged, and exposed for what they are. This is why any discussion of authority and order is, at the end of the day, a moral deliberation.

On the premises of rule-based positivism, the society of states is a system of legal rules. The international legal order is taken to parallel the domestic legal order. Like the equation between order and law, this parallelism is an assumption—it is not a foundational truth. But it is a potent assumption nonetheless because the concept of

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<sup>93</sup> This idea, as applied to state relations, is articulated powerfully in J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th edn, rev. C. H. M. Waldock (Oxford: Oxford University Press, 1963).

<sup>94</sup> A critic may argue that conduct or rules promoted by international organisations like the UN eventually depend on the consent of individual states. States in short will tend to abide by the rules when this corresponds to their interest but will digress from these when such correspondence is lacking. That international law is weak law when compared to municipal law is hard to dispute. Yet, international law does impose obligations, as evident from the wide-spread practice where states (or rather state officials) excuse or justify their actions by reference to the rules of international legality. Public justification of this sort, addressed to other states (officials), indicates that these rules are recognised as valid.

<sup>95</sup> Nardin, ‘Legal Positivism as a Theory of International Society’, p. 21.

<sup>96</sup> Immanuel Kant, ‘Toward Perpetual Peace: A Philosophical Sketch’, in *Kant's Political Writings*, ed. Hans Reiss (Cambridge: Cambridge University Press, [1795] 1991), pp. 93-130; John Rawls, *The Law of Peoples* (Harvard University Press, 1999).

authority accompanies law. Authority, like law, presupposes hierarchy; it also presupposes conduct bound by limits or duty (obligation). This marks an important distinction between authority and power—power is *not* constrained by duty. There is an additional difference. As the section on Schmitt illustrated, power implies that one agent (the sovereign) decides for another (the subject). But moral or legitimate authority is *self-imposed*: agents decide for themselves. The subject chooses to respect the sovereign, and the individual state chooses to treat the rules of international legality as obligatory. Care should be taken not to confuse the legitimacy of authority (which is a question about the moral quality of authority) with the facticity of authority (the existence of authority regardless of its legitimacy).

It follows that international order exhibits two fundamental modalities. The first materialises when a body (or an agent) commands, directs, and dominates its fellows through sheer power. While such a body may call itself authority, its rulings exemplify pure decisionism. In the realm of domestic politics, this yields the picture of a Schmittian all-powerful sovereign, whereas in the realm of international politics it is tantamount to an interventionist empire (following the precepts of *realpolitik*).

The second modality is an international society. It springs into being whenever a group of states consider a stock of international legal procedures as authoritative and binding among themselves. But since within such a common framework of rules states enjoy equality—and here the classical constitutionalist thesis of citizen equality before the law is extended to states<sup>97</sup>—this modality of international order meets both the demands of equality and authority. It appears that the puzzle of international order which has been driving the present inquiry is resolved.

But this would be an illusion because two major difficulties remain. One is that we never simply wish to establish the fact of order; we wish to establish its justice. We want to know whether the prevailing order—be it among human beings or among states—is just or not. It is not the case, as Bull seems to have thought, that the two issues can be treated in isolation.<sup>98</sup> True, from an analytical point of view (of rule-based positivism) these issues are separate but from a moral point of view (to which a rule-based positivism is not at all inimical) they are not. Unless the legal

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<sup>97</sup> States however are not equal in *rights*, since unlike *law* which implies general obligation between an agent and all other agents in society, a *right* refers to particular obligations. An obligation of the latter sort is held against a particular agent or in relation to a particular good.

<sup>98</sup> Hedley Bull, 'Justice in International Relations: The 1983-84 Hagey Lectures', in Kai Alderson and Andrew Hurrell (eds), *Hedley Bull on International Society* (New York: St. Martin's Press, 1999 [1984]). Despite common perception, in this work Bull does not substantively modify his earlier view of order as separate from justice.



principles of international society embody self-imposed rules, that is, moral rules, this society can claim authority (final, obligation imposing rules) but not legitimate (morally textured) authority.

This entails a second difficulty, as Hart was all too well aware. It is always possible for a powerful majority to institute (through coercion) a system of legally binding rules which discriminate against minorities.<sup>99</sup> The great powers or a single superpower for example can establish an “international society”, or a set of legal arrangements, which are morally unfair towards its weaker members. In such a situation the reference to rules and obligations will be just empty talk, since the case will resemble empire (the first modality) rather than a genuine international society (the second modality).<sup>100</sup> The notion of ‘rules’ and ‘obligations’ in other words is too crude. It does not tell us whether a particular order is just or not. Justice can be secured if the *legal rules* of the order in question, at the same time, have a character of *moral rules* or self-imposed rules. This demands that agents, humans or states, respect one another as moral equals (not simply as legal or nominal equals); or that each agent views the other as an end rather than as a means towards some ulterior end. In sum, even a theory centred on the notion of legal rules—as the doctrine of rule-based positivism pursued in this essay—ends up investigating serious moral issues.

While the conceptual sketch of international order proposed here focuses attention where it properly belongs—on ideas such as rules, morality, authority, and international law—it does not claim to have supplied a full account of the rule-governed conduct of states. To complete the task additional investigations have to be undertaken, notably in areas addressing the problem of rule change and the social context of rules. The need for such sociological and constructivist studies has already been recognised,<sup>101</sup> and in relation to which this essay figures as a preliminary investigation.

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<sup>99</sup> Hart, *The Concept of Law*, p. 197.

<sup>100</sup> The legal, moral, and political implications of the distinction between empire and international society have more recently been explored by Jean L. Cohen, ‘Whose Sovereignty? Empire Versus International Law?’, *Ethics and International Affairs*, vol. 18, no. 3 (2004), pp. 1-24.

<sup>101</sup> See Martti Koskenniemi, ‘Introduction’, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001), pp. 1-10.

## Conclusion

This paper laid out the preliminary postulates of a theory of international order. It began by defining the problem of order in terms consistent with traditional legal positivism, as an opposition between equality and authority. It registered the paradox of international society, as an example where legal equals coexist, while recognising common authority. And whereas in domestic politics authority is granted priority over equality, the reverse is typically the case in international politics. The challenge for the student of international relations, for the most part, is to articulate *international authority*.

The idea of sovereignty, or the canonical way for defining authority in political theory, was used as a foil to problematise the concept of international authority. As the critique of Schmitt showed, sovereign authority is a serious issue even for domestic politics. It cannot be otherwise since it regulates the right to life and death in a political community. Authority, as the preceding pages argued, can be an organising concept for both the domestic and the international order. But to defend this proposition, it was requisite to distinguish authority from power, and authority (sovereignty) as a principle from the idea of an author (sovereign) as an individual. Once these distinctions were in place, it became clear that equality and authority collide when the source of authority is taken to be the ensemble of states themselves. The equality-authority tension disappears when it is acknowledged that authority does not stem from an author—a single or a collective sovereign—but from the *rules* to which agents (states) subscribe. The *locus* of international order is the international society itself, as a corpus of legal rules: this is the message of rule-based positivism this exposition sought to defend. But besides reconciling equality with authority, an adequate theory of international order has to be sensitive to the requirements of justice: the legal rules of such an order in short have to possess the character of genuine moral rules.