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Constitutional Reason of State

Thomas Poole^{*}

Abstract: This paper defends reason of state as an explanatory category. It begins with an analysis of the law relating to the prerogative, before observing that prerogative cases are much less typical today than an expanding suite of cases involving related matters but where the power in question is sourced in statute or the constitution. The long-term historical narrative towards the constitutionalization of reserve powers can thus be expressed as a move from a princely model of reason of state, epitomized by prerogative, to a polity or law-based model of reason of state, whose characteristic form is statute. Locke's analysis of prerogative is seen as a classic early-modern account of the princely model. Hobbes's state theory provides the basic script of the polity model, but it is in the republican theorists of the same period, notably Harrington, that we see a recognizably modern concern to normalize reason of state through constitutional and institutional design. The paper then takes issue with modern liberals who follow Hayek in wanting to remove the concept of reason of state from constitutional politics altogether. Such an approach can only work if the state is itself made to vanish, or if a liberal state disengages from interaction with other states. Neither option is plausible. The paper ends with a reflection on the value of the category of reason of state for constitutional theory.

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INTRODUCTION

Reason of state is a fundamental dimension of constitutional law, operating as a limit concept, mediating between law and politics, and politics and violence. Although hard to define with precision, reason of state is associated with situations in which state action moves from one register, based on law and right, to another, based on interest and might.¹ The condition for such a move is normally the assertion that a vital interest of the state is at risk. “The core meaning of the phrase “reason of state” is that public necessity or state interest overrides the legal and ethical restraints that normally apply to human action.”² Reason of state’s traditional habitat is the apparently marginal activities of the state, war and peace, commerce and empire, diplomacy and inter-state relations. I say *apparently* marginal not only because such activities were central to the formation of states,³ but also because they helped shape the constitutions of those states.⁴ As such, reason of state can be understood as a juridical concept or category, and it is this understanding of the term that is explored here.⁵

This paper defends reason of state as an explanatory category. It begins with an analysis of the law relating to the prerogative (I), before observing that prerogative cases are much less typical today than an expanding suite of cases involving related matters but where the power in question is sourced in statute or the constitution (II). The long-term historical narrative towards the constitutionalization of reserve powers can thus be expressed as a move from a princely model of reason of state, epitomized by prerogative, to a polity or law-based model of reason of state, whose characteristic form is statute (III). Locke’s analysis of prerogative is seen as a classic early-modern account of the princely model. Hobbes’s state theory provides the basic script of the polity model, but it is in the republican theorists of the same period, notably Harrington, that we see a recognizably modern concern to normalize reason of state through constitutional and institutional design. The paper then takes issue with modern liberals who follow Hayek in wanting to remove the concept of reason of state from constitutional politics altogether (IV). Such an approach can only work if the state is itself made to vanish, or if a liberal state disengages from interaction with other states. Neither option is plausible. The paper ends with a reflection on the value of the category of reason of state for constitutional theory (V).

¹ Gianfranco Poggi, *The State: Its Nature, Development and Prospects* (Cambridge: Polity, 1990), 84.

² J.S. Maloy, *Democratic Statecraft: Political Realism and Popular Power* (Cambridge: Cambridge University Press, 2013), 13.

³ See, e.g., Charles Tilly, *Coercion, Capital, and European States AD 990-1992* (Oxford: Blackwell, 1990).

⁴ See, e.g., Phillip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (New York: Alfred A. Knopf, 2002)

⁵ See also Carl Joachim Friedrich, *Constitutional Reason of State* (Providence: Brown University Press, 1957).

I

Anglophone public lawyers are more familiar with the prerogative than reason of state. Admittedly, prerogative has itself rarely, if ever, been clearly understood, and even the greatest of the common law jurists struggled with the concept. Blackstone characterized prerogative as the despotic power that ‘the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity.’⁶ Such a power operates in a space beyond the reach of normal law: ‘in the exertion of lawful prerogative, the king is and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him.’⁷ This vision of legally untrammelled executive authority was somehow meant to fit with an equally inflated conception of Parliament as absolute and omnipotent.⁸ Dicey defined prerogative as ‘nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.’⁹ This is an attempt to define the category (‘prerogative’) solely in terms of what it is not (‘ordinary law’), hoping that constitutional conventions will somehow square the circle and bring a measure of normality to the otherwise abnormal.¹⁰

The case law on prerogative is similarly indeterminate. The great sequence of seventeenth-century cases, and the shift in constitutional tectonic plates to which they relate, did clarify certain things. The Bill of Rights 1688 is a constitutional statute one function of which was to exclude a number of ‘pretended’ prerogative powers, including the power to suspend or dispense with the law and the power to levy money without Parliamentary consent. Some relatively clear principles have emerged from this constitutional base. (1) An Act of Parliament passed in an area previously under prerogative authority ousts that prerogative power.¹¹ (2) The courts have authority to declare the existence and extent of claimed prerogatives: ‘the King hath no prerogative, but that which the law of the land allows him’.¹² (3) No new prerogative powers can be created.¹³ (However, given that the courts recognize in principle a power to do whatever is ‘necessary to meet either an actual or an apprehended threat to the peace’¹⁴ and a power to do all things necessary in an emergency,¹⁵ this principle is perhaps less restrictive than might be supposed.)

⁶ William Blackstone, *Commentaries on the Laws of England, Vol. I* (Chicago: University of Chicago Press, ed. Stanley N. Katz, 1979), 232.

⁷ *Commentaries I*, 243.

⁸ *Commentaries I*, 160.

⁹ A.V. Dicey, *The Law of the Constitution* (Oxford: Oxford University Press, ed. J.W.F. Allison, 2013), 188.

¹⁰ *Law of the Constitution*, 189: ‘The conventions of the constitution are in short rules intended to regulate the exercise of the whole of the remaining discretionary powers of the Crown, whether these powers are exercised by the Queen herself or by the Ministry.’

¹¹ *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508. That prerogative power cannot subsequently be re-invoked or resurrected: *R v Home Secretary, ex parte Fire Brigades Union* [1995] 2 AC 513.

¹² *The Case of Proclamations* (PC 1611), 12 Co. Rep. 74, 76.

¹³ *Prohibitions del Roy* (1607) 12 Co. Rep. 63. See also *BBC v Johns* [1965] Ch 32, 79 (Diplock LJ): ‘It is 350 years and a civil war too late for the Queen’s courts to broaden the prerogative.’

¹⁴ *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26.

¹⁵ *Burmah Oil Co. Ltd v Lord Advocate* [1965] AC 75, 101. But Lord Reid, while recognizing such a prerogative, also said the ‘mobilization of the industrial and financial resources of the country could not be done without

(4) No free-floating plea of state necessity will protect anyone accused of an unlawful act.¹⁶ (Although the courts sometimes recognize a ‘third source’¹⁷ of authority: that government has the same liberty as an ordinary person to do certain things, such as distribute information and enter into contracts.¹⁸)

But despite the longevity of many of these principles, uncertainty continues to surround the law relating to prerogative. Both Blackstone and Dicey remarked on this lack of clarity which, while it helped to reduce tensions between Crown and Parliament, served to mask the operation of exceptional executive power.¹⁹ The ‘powers of Courts are a delicate subject, coming very near to the mystery part of prerogative’, William Harrison Moore wrote in his treatise on act of state, paraphrasing James I.²⁰ And this link between prerogative and *arcana imperii* (secrets of rule) led seventeenth-century judges more often than not to fall in line with the Crown.²¹ Similar connotations persist,²² and judges rarely manage to make it through a prerogative case without referencing Lord Atkin’s line about prerogative evoking ‘the clanking of mediaeval chains of the ghosts of the past’.²³

This is not to say that the courts have not tried to normalize the prerogative. The *GCHQ* case decided that exercises of prerogative might in principle be reviewable on ordinary principles.²⁴ Since then, courts have steadily encroached on what were once ‘forbidden areas’²⁵ of prerogative control. Litigants have brought cases on the prerogative of mercy,²⁶ the conduct of foreign policy,²⁷ treaty-making,²⁸ forced population resettlement,²⁹ the conduct of the armed forces overseas,³⁰ even

statutory emergency powers. The prerogative is really a relic of a past age, not lost by disuse but only available for a case not covered by statute.’ See also *Ex parte D.F. Marais* [1902] AC 109.

¹⁶ *Entick v Carrington* (1765) 19 State Tr. 1029, 1066.

¹⁷ Bruce Harris, ‘The “Third Source” of Authority for Government Action’ (1992) 108 *Law Quarterly Review* 626.

¹⁸ *Malone v Metropolitan Police Commissioner* [1979] Ch 344; *R (New College London Ltd) v Secretary of State for the Home Department* [2013] UKSC 51. Compare *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513, 524, where Laws J said that whereas individuals ‘may do anything ... which the law does not prohibit’, the ‘opposite rule’ applies to public bodies: anything that they do ‘must be justified by positive law’.

¹⁹ Dicey called the prerogative ‘a term which has caused more perplexity to students than any other expression referring to the constitution’: *Law of the Constitution*, 188.

²⁰ William Harrison Moore, *Act of State in English Law* (London: John Murray, 1906), 11.

²¹ *Five Knights Case (Darnel’s Case)*, 3 How. St. Tr. 1 (1627); *The Case of Ship Money (R v Hampden)* 3 How. St. Tr. 825 (1637).

²² See the House of Commons Public Administration Select Committee Report, ‘Taming the Prerogative: Strengthening Ministerial Accountability to Parliament’ (March, 2004).

²³ *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 29 (Lord Atkin).

²⁴ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. But see also *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864; *Laker Airways Ltd v Department of Trade and Industry* [1977] QB 643.

²⁵ *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [106].

²⁶ *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349.

²⁷ *Abbasi*; *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279.

²⁸ *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552.

²⁹ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61.

³⁰ *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26; *Smith v Ministry of Defence* [2013] UKSC 41 (partly successful claims in negligence as a result of the MoD’s failure to provide available equipment and technology to protect servicemen killed in action in Iraq).

questions of war and peace.³¹ The fact that the judges give a serious hearing to these cases is significant. But it remains the case that few of them result in a decisive result in the claimant's favour. Even when they do win, victory is often pyrrhic or abnormal. *Abbasi* is an example of the former. The mother of a British citizen detained in Guantanamo Bay asked the court to compel the Foreign Office to make representations on his behalf to the United States Government. The court was willing in principle to impose a duty to consider making representations. In practice, though, no such order was made: first, because the Foreign Office had already considered *Abbasi's* request; second, being a 'delicate time', such an order 'would have an impact on the conduct of foreign policy'.³² *Bentley* is an example of the latter. In that case, the sister of a man executed for murder successfully challenged the refusal of a posthumous pardon. But no formal order was made. The Home Secretary was instead *invited* to look again at the matter. Cases of this sort underscore the impression that with prerogative we are still dealing with a space unusual in the extent of its legal informality and fuzziness. Despite its continued juridification, prerogative is still governed as much by the logic of *grace* as that of *right*.

II

But as far as reason of state is concerned, the prerogative is only part of the whole. While it once provided the central legal category in which claims of extraordinary executive authority were made and contested, developments led to the gradual displacement of prerogative.³³ The most obvious change was the severing of the direct link between prerogative and kingship as government ministers began to exercise almost all the important prerogatives. In addition, the trend has been for statute to replace prerogative even in areas most associated with special executive discretion. The move was driven by functional needs, since statute is a better form for complicated rule making. But changing patterns of legitimation also play a role. Examples range from war legislation (e.g. Defence of the Realm Act 1914) to emergency provisions (e.g. Civil Contingencies Act 2004) and anti-terrorism laws (e.g. the PATRIOT Act 2001).

Reserve and special powers were more often than not given constitutional or, more often, statutory form – or at least they were authorized and enabled by statute. Instead of an exceptional category for exceptional authority (prerogative), exceptional claims now operate largely through normal legal forms (statute, delegation, contract) that generate special powers or exemptions, which may create

³¹ *R (Gentle) v The Prime Minister* [2008] UKHL 20 (unsuccessful attempt by relatives of dead servicemen to claim that ECHR Art. 2 required the government to establish an independent public enquiry into all the circumstances surrounding the invasion of Iraq in 2003).

³² *Abbasi*, [107].

³³ The story was different in respect of the British state's colonial and imperial engagements, where prerogative remained a much more significant legal category.

‘carve-outs’ from the operation of the normal legal system. Prerogative continues to exist: not only in the concrete sense of providing an operative framework, albeit in a relatively small range of areas,³⁴ but also as a metaphor, offering a sense of legal shape or a juridical patina to claims for otherwise inchoate or legally shapeless extraordinary authority to act for the safety of the people (*salus populi*).³⁵ In this second sense, and to paraphrase Dicey, prerogative provides the residue of a residual category.

By way of illustration, let us consider some recent cases. Only the first is a prerogative case. The others involve claims of the sort that once would have fallen under prerogative but now implicate different legal categories.

1. *Bancoult (No. 2)* involved a challenge against the British government’s refusal to repatriate inhabitants of the Chagos Islands, a British Indian Overseas Territory.³⁶ The inhabitants had been removed to make way for a US naval base on the main island, Diego Garcia. A court had previously ruled the expulsion to be unlawful.³⁷ The decision not to resettle was defended on the basis of an adverse feasibility study and because the US government was concerned that it might compromise the security of the base. All relevant decisions were taken under the prerogative, here retaining its prominent status within colonial governance. The court decided, by a majority, that the decision not to repatriate was lawful. Historically, such prerogative legislation was ‘apt to confer plenary law-making authority’.³⁸ Legally, the court should not interfere with ‘what is essentially a political judgment’.³⁹
2. *Corner House* involved a challenge to a decision to suspend an investigation into allegations that British Aerospace had bribed Saudi Arabian officials while negotiating the sale of aircraft.⁴⁰ The Saudi government threatened to withdraw cooperation with the UK in countering terrorism if the investigation was not stopped. After consultation with government officials at the highest level, the Director of the Serious Fraud Office stopped the investigation. Challenged by a NGO, Corner House, the Law Lords held that national security and the risk to British lives was a relevant consideration in the exercise of the Director’s discretion, and that it was

³⁴ For a rigorous and careful taxonomy see Anne Twomey, ‘Pushing the Boundaries of Executive Power – Pape, The Prerogative and Nationhood Powers’ (2010) 34 *Melbourne University Law Review* 313.

³⁵ *Chandler v Director of Public Prosecutions* [1964] AC 763; *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60.

³⁶ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61. For analysis of the historical background, and the complex multi-levelled litigation that is still ongoing see Stephen Allen, *The Chagos Islanders and International Law* (Oxford: Hart Publishing, 2014).

³⁷ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

³⁸ *ibid.*, [50] (Lord Hoffmann).

³⁹ *ibid.*, [130] (Lord Carswell).

⁴⁰ *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, in which

lawful for the Director to defer to the Government on the nature of the risk.

3. *Charkaoui v Canada (Citizenship and Immigration)*⁴¹ concerned provisions of an Act⁴² which allowed specified government ministers to issue a certificate of inadmissibility declaring that a foreign national or permanent resident may not enter Canadian territory on grounds inter alia of national security, leading in most cases to the detention of the person named in the certificate. Although certification and detention were subject to judicial review, the process might deprive the named person of some or all of the information on the basis of which the certification was made. Once a certificate was confirmed, a foreign national could not apply for review for another 120 days (whereas detention of a permanent resident had to be reviewed within 48 hours). The Supreme Court of Canada found the certification process to violate section 7 of the Charter (fair process protections associated with the right to life, liberty and security), specifically because it failed to afford the named person an opportunity to meet the case against him or her.⁴³ The provision for the extended detention of foreign nationals also violated the guarantee of freedom from arbitrary detention contained within section 9 of the Charter.⁴⁴ The remedy for these violations was rather unusual. The Court issued a declaration that the procedure for judicial approval of certificates was inconsistent with the Charter and hence unlawful, suspended for one year from the date of judgment in order to give Parliament time to amend the law.⁴⁵
4. *Pape v Commissioner of Taxation of the Commonwealth of Australia* was a challenge to the constitutionality of the stimulus package devised by the Australian government in response to the global financial crisis of 2007-8.⁴⁶ The High Court of Australia, by a majority, held that the Act was valid, supported by section 51 of the Constitution as being incidental to the exercise by the government of its executive power under section 61 of the Constitution.⁴⁷ The Court decided this either on the basis (per French CJ) of an inherent and inchoate authority ‘derived partly from the Royal Prerogative and probably even more from the necessities of a modern national government’ which exists so as ‘to be capable of serving the proper purposes of a national government’;⁴⁸ or (per Gummow, Crennan and Bell JJ) because the power

⁴¹ 2007 SCC 9. The case has strong echoes of the Belmarsh case that had gone through British courts a few years previously: *A v Secretary of State for the Home Department* [2004] UKHL 56.

⁴² Immigration and Refugee Protection Act 2001, ss 77-84.

⁴³ *ibid.*, [55].

⁴⁴ *ibid.*, [93].

⁴⁵ *ibid.*, [139]-[140].

⁴⁶ *Tax Bonus for Working Australians Act (No 2) 2009 (Cth)*.

⁴⁷ (2009) 238 CLR 1; [2009] HCA 23.

⁴⁸ *ibid.*, [127]-[128].

of the executive ‘involves much more than the enjoyment of the benefit of those preferences, immunities and exceptions which are ... commonly identified with “the prerogative”’, so as to enable ‘the undertaking of action appropriate to the position of the Commonwealth as a polity created by the Constitution and having regard to the spheres of responsibility vested in it.’⁴⁹

In each case, we see the government making a claim of special authority to do something it couldn’t otherwise lawfully do. This claim comes in harness with another, more specifically jurisdictional claim: namely, that the government is better placed than the courts to assess (and so to warrant) that the situation in question necessitates the special authority that is claimed. We see, then, the same juridical structure as the old prerogative, played out in similar domains. But the legal form they take tends to be different. *Bancoult* now seems the anomaly – although even here the normalizing dimensions of the judgment are apparent – the others typical, whether questioning the exercise of statutory discretion in *Corner House* or challenging executive authority on constitutional grounds as in *Charkaoui* and *Pape*.

Some commentators continue to find value in talking about such cases in the old way. For instance, when Judith Butler talks about the ‘resurgent prerogative’, which she sees in post 9/11 developments in security politics, she uses the word in a metaphorical sense, aware that most of the developments she refers to take a different legal form.⁵⁰ While this use of the term is acceptable, I prefer to talk about this domain of constitutional politics, which covers public emergency (*Belmarsh*), the suspension of the normal operation of law (*Corner House*), neo-colonial prerogative cases (*Bancoult*) and also the standing practice of diplomacy (*Abbasi*), under the umbrella of reason of state. The term, like prerogative, has considerable pedigree. But, unlike prerogative, its history is not so restricted in time, jurisdiction or form. Reason of state takes us closer to the heart of the matter, in that it picks up what is perhaps most important about the category in question, namely a particular type of a certain type of authority claim that normally includes a plea for special measures, grounded in a principle (*salus populi*) that invokes the state’s capacity as protective agent. Reason of state thus draws our attention directly to what is perhaps most distinctive about the political idea to which it relates, which is the state acting in the persona of *custos*, as guardian or protector of the constitution. Inevitably, this type of claim involves dimensions of power and politics, and in fact these are often acute.

⁴⁹ *ibid.*, [214]. See analogously *Quake Outcasts v Ministry for Canterbury Earthquake Recovery* [2015] NZSC 27, where the New Zealand Government defended its decision to announce a ‘red zone’ in post-earthquake Christchurch where rebuilding would not occur, and to offer purchase of properties in that zone (at comparatively low rates), on the basis that it was made under the Crown’s power to enter into contracts as a natural person (at [112]). The Supreme Court held, on the contrary, that the Canterbury Earthquake Recovery Act 2011 ‘covered the field’ and that procedures specified by that Act should have applied. The Court did say, however, that a residual power was recognized, as long as it was not displaced by statute.

⁵⁰ Judith Butler, *Precarious Life: The Power of Mourning and Violence* (London: Verso, 2006).

But for all that, it remains a claim in public law – and not, for instance, purely an assertion of force. This is evidenced by the fact that the plea is generally made through normal (or near normal) legal channels – consent is asked of legislatures and courts and, through them, the public. And, if consented to, the special measures will operate for the most part under a regime that may be different in quality but still functions according to legal criteria.

Thinking in terms of the prerogative is outmoded, but also risks obscuring an important element of modern constitutional politics. A defining feature of prerogative was that it was arbitrary, as Dicey observed, in the sense that it was unstructured by law. Prerogative expresses the irreducibly personal aspect of the power and the sacerdotal element that it kept from medieval notions of kingship. But modern reason of state works through dense legal networks. This is not to say that personality no longer matters in politics – the opposite may be true in this area of state affairs, where the appeal of charismatic politics persists. But we have moved from a context in which the king and a few favourites can determine the affairs of state and decide questions of war and peace. More typical today is an expansive web of government departments, committees and agencies, each of which acts as a miniature legal order, complete with a bespoke regulatory structure and supervisory institutions. Reason of state is rarely now in the formal sense non-arbitrary. It largely mirrors the humdrum realities and bureaucratic shape of the administrative state and has, as such, lost much of its exceptional form.

Reason of state has become normalized then, at least to the extent that the exceptional is commonly camouflaged in standard administrative-state khaki. This does not mean that it is not *exercised* in a substantively arbitrary way, in a peremptory or draconian manner, for instance. Nor does it mean that these institutionalized reason of state practices are fully public and transparent. Reason of state retains much of its old connection with *arcana imperii*.⁵¹ As Jack Goldsmith observes, older conceptions of prerogative based on Lockean ideas of executive action in defiance of law are ‘no longer part of [an executive’s] justificatory tool kit.’ The real danger is secrecy, Goldsmith argues, specifically the ‘executive auto-interpretation of executive authorities, and in particular *secret executive branch interpretation of law*.’⁵² We see echoes of this concern in our illustrative cases. *Bancoult*, *Abbasi* and *Corner House* all involve matters that were withheld from the court⁵³ or were at the very limits of the courts’ cognitive abilities, such as diplomatic relations and security risk assessments.

Developments to increase the transparency and accountability of decision-making of the state’s reason of state activities have taken place on a number of fronts. In the legal arena, the rise of judicial review and the willingness of courts to

⁵¹ See, e.g., Blackstone, *Commentaries* I 230-1.

⁵² Jack Goldsmith, ‘The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation’ in Clement Fatovic and Benjamin A. Kleinerman (eds), *Extra-Legal Power and Legitimacy: Perspective on Prerogative* (New York: Oxford University Press, 2013).

⁵³ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158.

enter territory previously reserved for governments has led to the widespread acceptance of the need for such activities to be authorized by law. The result is that while we probably don't know all the state's 'dirty little secrets',⁵⁴ we probably have a fairer idea about what it is up to than at any previous moment. It seems far less common for the state to seek to operate within extra-legal scenarios – or 'legal black holes', in the vernacular. That is not to say that secrecy and pockets of executive discretion do not exist,⁵⁵ only that there are fewer sustained attempts to define those spaces as existing outside the law.⁵⁶ In Donald Rumsfeld's taxonomy, the primary juridical problem today is not so much the unknown unknowns – or, more likely, the half-guessed-at unknowns of state interest prosecution. What is perhaps more symptomatic is 'grey hole' secrecy: that is, a world of relatively 'known unknowns' typified by government attempts to carve out for itself various safe (or safer) spaces within the jurisdiction of the law.⁵⁷

At the core of this process of normalizing reason of state is the move away from extra-legal action, which is necessarily secret in that it operates in a zone of silence outside the apparatus of lawful action and public reason that is the normal life of the state, to a heightened demand for secrecy for the most part within the interstices of the law. In some institutions dominated by reason of state matters, such as the FISA court in the US or the UK's Investigatory Powers Tribunal, secrecy is the norm. But even in the ordinary courts, there has been more recourse to abnormal or secret proceedings. In the UK, the Justice and Security Act 2013 extended what had been specific provision for the inclusion of secret elements ('closed material proceedings') to any civil case where 'sensitive material' the disclosure of which would be damaging to the interests of national security is in issue.⁵⁸ The Act gives statutory authorization to a process that the Supreme Court had judged to be at odds with the common law principle of open and natural justice.⁵⁹

While reason of state may not look formally all that exceptional, it remains substantively distinctive. Not only on account of the exceptional quality of the powers usually claimed, which often include carve-outs from the normal law, secrecy in proceedings, special powers and exemptions. But also by virtue of what might be called its jurisdictional component. That is, reason of state is a claim for extra power that also involves a claim for special jurisdiction: that the wielder of

⁵⁴ Glenn Greenwald, *No Place to Hide: Edward Snowden, the NSA and the Surveillance State* (London: Hamish Hamilton, 2014), discussing the 'ubiquitous, secretive system of suspicionless surveillance' that may be the enduring legacy of the 'war on terror' (p.5).

⁵⁵ Gerald L. Neuman, 'Anomalous Zones' (1996) 48 *Stanford Law Review* 1197.

⁵⁶ For a juridical map of this terrain see Jack M. Balkin, 'The Constitution in the National Surveillance State' (2008) 93 *Minnesota Law Review* 1.

⁵⁷ David Dyzenhaus, 'Are States of Emergency Inside or Outside the Legal Order?' (2006) 27 *Cardozo Law Review* 2005, 2026: 'grey holes are more harmful to the rule of law than black holes'.

⁵⁸ Eva Nanopoulos, 'European Human Rights Law and the Normalisation of the "Closed Material Procedure": Limit or Source?' (2016) 79 *Modern Law Review* (forthcoming).

⁵⁹ *Al Rawi v The Security Service* [2011] UKSC 34.

power is, for the time being, in a stronger position to judge on whether the power is exercised legitimately. This jurisdictional element may in fact be the more distinctive feature of rule of law claims, in that it is this element that seeks more directly to deny the application of the normal logic of public reason. The essential claim is that this logic be superseded in whole or in part by the logic of reason of state, often on the basis that the matters at stake are so important or complex that the jurisdiction of ‘ordinary’ law is to be replaced by the ‘special’ jurisdiction of interest. To an extent, then, reason of state claims operate like ouster or privative clauses, which seek to shield particular government decisions from judicial oversight.⁶⁰ There is every reason for courts⁶¹ and other actors⁶² to treat reason of state claims with the same scepticism they show ouster clauses, a point that is developed later.

III

We return to contemporary matters shortly, but not before deepening the historical and conceptual analysis. Reviewing the argument so far, we might be tempted to conclude that there has been a historical move from prerogative to reason of state. That is, a general shift over time from older, quasi-sacerdotal notions of an exceptional, arbitrary and legally inchoate capacity vested in the ‘the Prince’ or ‘the Crown’ for use in times of turmoil, to a normalized, formally non-arbitrary and more heavily institutionalized reservoir of special executive authority. There is perhaps some truth to this reading. But, on balance, it is better to understand the course of development as a move from one mode of reason of state to another. We might say that the first phase corresponds to a model of ‘Princely’ reason of state while the second is structured according to a ‘polity’ model of reason of state. Whereas the juristic category of prerogative is a natural fit within, perhaps even intrinsic to, the former, to the latter it is anomalous. This perspective allows us to identify a family of practices (‘reason of state’) and to isolate what is continuous and contingent within it. It also avoids two potential anachronisms. Given that the terminology of reason of state and its synonyms (*raison d’état*, *ragione di stato*, *Staatsraison*) does not postdate prerogative,⁶³ it is odd to suggest that the defining move in this area has

⁶⁰ The classic case in English law on ouster clauses, *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, can be seen as a reason of state case, since it concerned claims arising from the appropriation of the property of British companies in the wake of the Suez Crisis.

⁶¹ The High Court of Australia has been particularly active on this front: see *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476; *Kirk v Industrial Relations Commission* (2010) 239 CLR 531.

⁶² For an account of the successful political opposition to a proposed ouster clause to restrict legal challenges to asylum decisions see Richard Rawlings, ‘Review, Revenge, Retreat’ (2005) 68 *Modern Law Review* 378.

⁶³ The classic work remains Friedrich Meinecke, *Machiavellism: The Doctrine of Raison d’État and Its Place in Modern History* (New Brunswick: Transaction Publishers, trans. Werner Stark, 1998).

been from the latter to the former.⁶⁴ And, as we have seen, the fact that some states still use prerogative indicates that the category is not entirely redundant.

But what does the shift from princely to polity modes of reason of state involve? We can take Locke's theory of king's prerogative as a paradigmatic expression of princely reason of state.⁶⁵ This is not to say that it offers an accurate account of contemporary juridical realities. Seventeenth-century practice in this area was both more confused and contested,⁶⁶ and also more intensely *legal* than Locke seems to allow.⁶⁷ Jurists were also more inclined to speak in terms of specific prerogative *powers* rather than one open-ended prerogative power.⁶⁸ Locke's theory nonetheless offers a clear account of the princely model, one moreover that is written from a liberal perspective. Strangely given his politics,⁶⁹ Locke retains much of the older conceptual structure of prerogative. While insisting that government ought to be exercised both through and under established laws,⁷⁰ he also acknowledges the existence of extraordinary powers. These are discretionary powers, existing beyond the realm of ordinary law, to be exercised by the king for the public good. They operate *extra et contra legem*. As such, prerogative is on this account beyond classification in two key senses. It has no juridical shape or structure of its own, but takes shape *against* the normal system of civil law. And, unlike other exercises of lawful authority, prerogative is invested in a *person* as much as an *office* – that is, the king (man) as well as the King (Crown).⁷¹

We must be careful when discussing the legally unbound quality of the princely mode of reason of state. The Prince in the exercise of his prerogative may be unbound by the law in the sense of being unaccountable for his actions to any earthly authority. But he was not in all senses unbound by Law. For Locke as much as for his contemporaries, the Prince remained subject to natural law and, as such, answerable to God. Indeed, we might go further by saying that it was precisely the juridical thinness of prerogative that made the Prince acting in respect of prerogative so very close to God. But Locke gave the familiar account a Machiavellian twist (or at least made explicit what had previously been implied). He linked the king's

⁶⁴ Margaret McGlynn, *The Royal Prerogative and the Learning of the Inns of Court* (Cambridge: Cambridge University Press, 2003).

⁶⁵ John Locke, 'Second Treatise of Government' in Locke, *Two Treatises of Government* (Cambridge: ed. Peter Laslett, 1988), chap. XIV.

⁶⁶ Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (London: Macmillan, 1992).

⁶⁷ Although the late Stuart period in which Locke wrote the *Two Treatises* saw perhaps the highpoint of 'princely' prerogative as recognized by the courts: see *Godden v Hales* (1686); *East India Company v Sandys* (1683).

⁶⁸ Sir Matthew Hale, *The Prerogatives of the King* (London: Selden Society, ed. D.E.C. Yale, 1976).

⁶⁹ Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (Princeton: Princeton University Press, 1986).

⁷⁰ *Second Treatise*, s.131 (p.353): 'And so whoever has the Legislative or Supream Power of any Commonwealth, is bound to govern by establish'd *standing Laws*, promulgated and known to the People, and not by Extemporary Decrees.'

⁷¹ Clement Fatovic, *Outside the Law: Emergency and Executive Power* (Baltimore: John Hopkins University Press, 2009), 65.

exercise of prerogative purportedly for the good of the public to the people's right to rebel against illegitimate rulers. Princely prerogative now has its plebeian mirror image in the right of rebellion. When a political actor endeavours to set up absolute power or their own arbitrary will 'as the law of society', Locke wrote, 'they put themselves into a state of war with the people'. The latter 'are thereupon absolved from any farther obedience' to that actor.⁷² On this account, prerogative becomes a site of contestation, a normatively unstable and legally unanchored space in which the most basic authority claims are made and tested. In that sense, prerogative is both post- but also pre-political, in that it both assumes the existence of an existing framework of authority but also moves beyond it in a way that opens it up to contestation and potential subversion. Prerogative is intimately connected, on this account, to death and rebirth of constitutional orders, hence the immanence of God in the resolution of conflict over prerogative:

But if the prince, or whoever they be in the administration, decline that way of determination, the appeal then lies no where but to heaven; force between either persons, who have no known superior on earth, or which permits no appeal to a judge on earth, being properly a state of war, wherein the appeal lies only to heaven; and in that state the injured party must judge for himself, when he will think fit to make use of that appeal, and put himself upon it.⁷³

The normative open-endedness of the prerogative zone in Locke's theory, its emphasis on sovereignty and trials of political strength had precursors, not least Machiavelli's advocacy of the Roman model of dictatorship,⁷⁴ and successors, notably Carl Schmitt's work on 'the exception'.⁷⁵ But it became increasingly a minority approach, its princely aspects and assumptions gradually displaced in favour of a more integrative and polity-based approach to exceptional executive powers. On this front, it was some of Locke's contemporaries who showed the way forward. Perhaps the greatest work of political philosophy in that period, Hobbes's *Leviathan*, does not mention 'prerogative'. Nonetheless, it can be read as an attempt to repudiate fashionable reason of state thinking.⁷⁶ The argument seems to be this. It is true that authority ('Law') rests on untrammelled power ('sovereignty'). This means that there must be an open-ended reservoir of power underlying law, which the sovereign may in principle tap into as it sees fit.⁷⁷ (In his more applied writings, Hobbes elaborates on the extent of these prerogatives. His analysis in the *Dialogue* puts him on the far royalist end of the spectrum when it comes to what the king is allowed to do through prerogative.⁷⁸) Law needs prerogative for its actualization;

⁷² *Second Treatise*, ss 151, 222.

⁷³ *ibid.*, s.242. On the theological aspects of Locke's political theory see Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge: Cambridge University Press, 2002).

⁷⁴ Niccolò Macchiavelli, *The Discourses* (Harmondsworth: Penguin, ed. Bernard Crick, 1983), I.34.

⁷⁵ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, trans. George Schwab, 1985).

⁷⁶ Noel Malcolm, *Reason of State, Propaganda, and the Thirty Years' War: An Unknown Translation by Thomas Hobbes* (Oxford: Oxford University Press, 2007), 119.

⁷⁷ Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, ed. Richard Tuck, 1996), 153.

⁷⁸ Thomas Hobbes, *A Dialogue Between a Philosopher and a Student, of the Common Laws of England* in Hobbes,

but prerogative threatens the stability of a regime of law and is, as such, a threat to peace. So how does Hobbes square the circle? If you follow the postulates of Hobbesian ‘civil science’, a central feature of which is the replacement of open-ended discretionary and personal authority (the Prince) by an architectonic structure of legal rule (the commonwealth or state) which acts with the full authorization of each subject, the only rational thing for the sovereign to do is to exercise its power through law. This rule by law structure has its own formal requirements, such as rules relating to the promulgation of legislation, and systemic constraints, such as the obligation on judges to interpret law against standards sourced in natural law or equity. Moreover, in foreign affairs – the sphere in which prerogative is most frequently invoked – the Hobbesian commonwealth is not expansionary and seeks to avoid conflict.⁷⁹ The net result is that the sovereign (which is rational and whose overriding priority is to seek peace) will consistently rule through law and not prerogative. In fact, Hobbes pushes the point, or flips it: it is precisely the existence of unqualified and unquestioned reservoir of exceptional authority that makes recourse to it unnecessary, other perhaps than at moments of true crisis.

Hobbes may have written its basic script, but it was the English republicans, Locke’s fellow travellers, who provided most of the contours and colouring of the polity model of reason of state, at least as far as Anglophone constitutional theory is concerned. It was they who filled in two important dimensions of the model about which Hobbes was either lukewarm or hostile: liberty and constitutional design. The consideration given these topics in the work of writers such as Marchamont Nedham, Algernon Sidney and James Harrington makes them closer to modern sensibilities than Hobbes, at least when stripped of their profound, pervasive religiosity and militarism. They built from the core of Hobbesian state theory, while antagonistic to many of Hobbes’s prescriptions. They went further than Hobbes in sketching the demands made of law within the commonwealth.⁸⁰ And they were far more vigorous about the need to control and disperse power through strategies of separation and rotation.

Like Hobbes, who wrote that the state ‘does not want to take anything away from the citizen in underhanded ways, and yet is willing to take everything from him in an open fashion’,⁸¹ the republicans sought a political solution in which openness

Writings on Common Law and Hereditary Right (Oxford: Oxford University Press, ed. Alan Cromartie and Quentin Skinner, 2008), 18, 22, 55, 91, 127-9.

⁷⁹ Noel Malcolm, ‘Hobbes’s Theory of International Relations’ in Malcolm, *Aspects of Hobbes* (Oxford: Oxford University Press, 2002).

⁸⁰ See, e.g., Algernon Sidney, *Discourses Concerning Government* (Indianapolis: Liberty Press, ed. Thomas G. West, 1990), 225, 394: (1) Magistrates possess no original authority: there is ‘no such thing as a right universally belonging to a name; but everyone enjoys that which the laws, by which he is, confer upon him. The law that gives the power, regulates it.’ (2) Magistrates have no extra-legal authority: ‘They are under the law, and the law is not under them; their letters or commands are not to be regarded: In the administration of justice, the question is not what pleases them, but what the law declares to be right’.

⁸¹ Thomas Hobbes, *On the Citizen* (Cambridge: Cambridge University Press, ed. Richard Tuck and Michael Silverthorne, 1998), 86. Compare Jonathan Scott’s interpretation of Harrington: ‘Nobody is autonomous in Oceana, for everyone is enslaved to the state.’ ‘The Rapture of Motion: James Harrington’s

and honesty trumped secrecy and scheming. Unlike Hobbes, though, they were troubled about extensive executive authority, whether vested in kings like the Stuarts or popular autocrats like Cromwell. As such, reason of state was a central concern. Republicans were swingeing in their criticism of the *ragione di stato* practices of contemporary European princes.⁸² But for all this, their plan was not so much to wish reason of state into nonexistence, but to transform and suborn it. With the arrival of a republic, the interest of government will align with interest of the nation, they claimed, as princely reason of state is replaced by polity reason of state. Harrington, as so often, was the most astute of republican writers here. The essence of republican government, he insisted, was the substitution of private interest government, whether monarchical or aristocratic or (as under Cromwell) authoritarian democratic, with public interest government. He distinguishes between private reason ('the interest of the private man'), 'reason of state' (the interest of the ruler or rulers), and 'that reason which is the interest of mankind or of the whole' – 'right reason' or what we might call public reason: 'if reason be nothing else but interest, and the interest of mankind be the right interest, then the reason of mankind must be right reason. Now compute well, for if the interest of popular government come the nearest unto the interest of mankind, then the reason of popular government must come the nearest unto right reason.'⁸³ A move from monarchy to popular government is good precisely because it represents a shift from private interest to public interest government and thus a move in the direction of justice and right reason.⁸⁴

Whereas Hobbes in his more theoretical works tended to avoid the language of prerogative, Harrington went further. Previously reserved for kings and princes, the term is now reserved for the *people*. Sovereignty in the republic resides with 'King People', where the people are transformed into the 'prerogative tribe'⁸⁵ wielding two main 'prerogative powers': the legislative power and the power of judicature. The executive is firmly under the law, officials being 'answerable unto the people that his execution be according unto the law; by which Leviathan may see that the hand or sword that executeth the law is in it, not above it.'⁸⁶ But what appears to be the simple equation of reason of state with government in the private interest turns out to be rather more complicated. One reason why this is so relates to the republicans' belligerent stance on foreign policy. They recognized that private interest has most often arisen in reason of state context, especially international affairs (including war

Republicanism' in Nicholas Phillipson and Quentin Skinner (eds), *Political Discourse in Early Modern Britain* (Cambridge: Cambridge University Press, 1993). 150-1.

⁸² Marchamont Nedham, *The Excellencie of a Free State Or, The Right Constitution of a Commonwealth* (Indianapolis: Liberty Fund, ed. Blair Worden, 2011), 105-6 said that reason of state was a 'strange pocus' which 'can rant as a Souldier, complement as a Monsieur, trick as a Juggler, strut it as a States man, and is changable as the Moon, in the variety of her apperances.'

⁸³ James Harrington, *Oceana* in *The Commonwealth of Oceana and A System of Politics* (Cambridge: Cambridge University Press, ed. J.G.A. Pocock, 1992), 22.

⁸⁴ *Oceana*, 61.

⁸⁵ *Oceana*, 147.

⁸⁶ *Oceana*, 25.

and empire); but argued, in contrast to Hobbes, in favour of a ‘republic for expansion’ on a scale and with an intensity that would have made even Machiavelli blanch.⁸⁷ The republicans claimed as a result that reason of state did not cease to exist with the coming of the republic as it was a function of every state, but argued that it varied according to each state’s constitution. What is essentially a good thing when practiced by a republic is problematic when used by governments geared to private interest, where ‘that which is reason of state with them is directly opposite to that which is truly so’.⁸⁸

How, in practice, republican government was to avoid degenerating into private interest rule was a matter on which republican writers differed. Some believed that it was necessary to cultivate virtuous citizens (Milton, Sidney), while others emphasized institutional solutions (Nedham, Harrington).⁸⁹ But all paid real attention to reason of state, seeing it as a potential blind spot within the republican constitution. They carried the logic of republican constitutionalism, with its strategies of diffusion and rotation of power and its attachment to accountability and the rule of law, into the prerogative zone: right, that is, into what had been the holy of holies of the princely state. This process was advanced on two levels, the constitutional and institutional. At the constitutional level, republicans insisted on the completeness and sanctity of the constitution, understood as an expression of public reason, and denied (contra Locke) the existence of any real executive power outside the laws. As Sidney wrote, magistrates have ‘no other power but what is so conferred on them’ by the constitution and ‘are to exercise those power according to the proportion and the ends to which they were given.’⁹⁰ This is the Leviathan state, given a strong republican twist.

The institutional level saw, if anything, even greater innovation, the republicans here pursuing Machiavelli’s principle, a rider to his defence of Roman dictatorship, that ‘[n]o republic is ever perfect unless by its laws it has provided for all contingencies, and for every eventuality has provided a remedy and determined the method of applying it.’⁹¹ All executive actions were accountable to the law and to the popular assembly, naturally. But republican writers gave considerable thought as to how this could be institutionally finessed. Nedham, for instance, distinguished two categories of reason of state, ‘Acts of State’ (*Acta Imperii*) and ‘Secrets of State’ (*Arcana Imperii*). The former, involving general matters of strategy and common sense, he made subject to the legislative assembly in the ordinary way. The people

⁸⁷ Not least because for the English republicans expansion was not just a necessity – the best form of defence – but also a moral (and religious) obligation. Just as Rome ‘in confirming her liberty propagated her empire, so too must Oceana, Harrington insisted, become ‘an holy asylum unto the distressed world’, acting as ‘a minister of God upon earth’: *Oceana*, 221.

⁸⁸ Harrington, *A System of Politics*, Chap. X.

⁸⁹ Republicans of this period all believed, taking their cue from Machiavelli, that an armed citizenry was essential for the maintenance of liberty.

⁹⁰ *Discourses Concerning Government*, 99. (And yet scholars keep recycling the claim that proportionality has its origins in Prussian administrative law!)

⁹¹ *Discourses*, I.34 (p.195).

were best placed to decide such matters, as they ‘best know where the shoe pinches them’. The latter should be delegated, he argued, to ‘Peoples Trustees’, small groups of assemblymen who had permission to operate (for the time being) in secret but remained at all points accountable to the assembly. This body of Trustees should not be thought of as a standing senate. Ideally, it should operate on a temporary and ad hoc basis, its members returning to the ranks of legislators once their particular task was finished.⁹² Harrington’s disciple Henry Neville came up with a proposal for the creation of special parliamentary committees to integrate reason of state matters within a constitutional structure. The plan involved splintering the royal prerogative into four categories of ‘state-affairs’: foreign affairs (peace and war, treaties and alliance); police (armies, militia, and the ‘country force’); the appointment of officials; and fiscal management. In relation to each, the king ought to be required to act through the agency of a bespoke parliamentary committee, the members of which are subject to quick rotation (a third of members to be replaced each year) and answerable to parliament.⁹³

The detail is important, not necessarily on account of its later influence, but because it illustrates the move out of the old world of princely reason of state, still dominated by prerogative, to the new world of polity-based reason of state. In this respect, Hobbes and the other early-modern state theorists provided the hardware, that is, the foundational logic of the polity model. The republicans and those they influenced accepted much of this structure, but provided a much clearer blueprint of the constitutional and institutional software that over time came to shape thinking about exceptional power in liberal constitutional orders. Whereas Hobbes’s basic script could lead in a variety of directions, including both authoritarianism and liberalism, the republicans were concerned with the design of one type of polity, a rule-bound state where government was for the interest of the public and where the interests of government and governed were aligned through sophisticated constitutional techniques. Although they worked on different aspects of the problem, both Hobbes and the republicans sought to fold reason of state into the juridical structure of the polity. The point was to eradicate if at all possible the freewheeling or open-ended prerogative. This move was at once constitutionalizing and secularizing. There was no space in the modern constitution for the prerogative

⁹² *Excellencie*, 55-6: the authority of the Peoples Trustees continues ‘of right, no longer than mere Necessity requires, for their [the people’s] own redress and safety; which being provided for, they [the Trustees] are to return into a condition of Subjection and Obedience, with the rest of the people, to such Laws and Government as themselves have erected.’

⁹³ Henry Neville, *Plato Redivivus, or A Dialogue Concerning Government* [1681] in Caroline Robbins (ed.), *Two English Republican Tracts* (Cambridge: Cambridge University Press, 1969), 184-90. Problematically, the plan allows the king to retain a free hand in imperial and mercantile matters. The same dialogue also contains a clear exposition of what (moderate) republicans saw as a basic fault in late-Stuart England, namely the ‘inexecution of our laws’ – or the insidious nature of princely discretion through the misuse of prerogative: ‘Now when you have thought well what it should be that gives the king a liberty to choose whether any part of the law shall be current or no; you will, that it is the great power the king enjoys in the government: when the parliament has discovered this, they will no doubt demand of his majesty an abatement of his royal prerogative in those matters only which concern our enjoyment of our all, that is our lives, liberties and estates’ (184-5).

operating in the Lockean style as a kind of *deus ex machina*,⁹⁴ popping up like a superhero to save the people, or else to test their faith to destruction (and possible rebirth).

The examples in the previous section can now be seen as illustrations of a structural shift from a princely (or prerogative-based) to polity (or law-based) model of reason of state. Analyses of reason of state that pay too much attention to the arbitrary or extra-legal character of reason of state – ‘the exception’, in Schmitt’s formulation – miss these constitutionalizing dynamics,⁹⁵ which involve a series of developments: the juridification of governmental action; the transfer of reserve powers from kings (prerogative) to government ministers (executive powers); the depersonalization of exceptional activity; a profound and dispersed institutionalization of reason of state, in part a result of the expansion in the range of state activities; the subjection of reserve powers to a variety of forms of legislative oversight; and constitutional architecture – notably (outside the UK) written constitutions, policed by constitutional and supreme courts, which structure and can limit reason of state and emergency action. These are not just lawyers’ structures and processes. They reflect and serve in turn to structure our expectations as citizens about the practical operation of reason of state.

IV

The move from princely to modern models does not mean that reason of state has disappeared either as a practical or a juridical problem. In fact, it is possible to argue that such problems have become more pronounced. For one thing, the same state-building dynamics that led to the domestication of reason of state also enabled the state to operate effectively on a hitherto unknown scale, vastly increasing its capacity to operate in spheres of activity traditionally occupied by reason of state, including war and international competition.⁹⁶ For another, the increase in the number of legal and political avenues through which to oversee executive action, and the increased effectiveness of such scrutiny, is likely to drive an increase in reason of state

⁹⁴ This does not mean that, at least on the initial formulations of this model, there was any less room for God. It was precisely the point of the law-bound and public interest-based conception of the polity advanced by republicans that the result would be a more moral, that is, more Godly, commonwealth.

⁹⁵ An alternative perspective, branded as ‘Schmittian’ but not so in my view, accepts the importance of many of these trends, but argues that the constraints on executive power coming from the legislative and judicial branches is all but redundant, leaving the executive unbound by these institutions but checked internally through the complexity of its own multifarious operations and externally by the popular will as exercised in periodic elections. See Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2010). In my view, the authors vastly overstate the weaknesses of legislative and judicial checks on executive power.

⁹⁶ This was entirely in line with early-modern republican thinking, which as we have seen favoured both liberty at home *and* expansion overseas.

litigation. So, as we saw earlier, the rise in judicial review would seem to entail both more frequent and more significant reason of state cases. Problematic instances connected with reason of state thus now more commonly occur *within* the interstices of law, as opposed to targeting directly the boundary between law and power.

There is some uncertainty about what the best liberal response is to this scenario. Some seem to think that the best strategy is one of avoidance. Wojciech Sadurski argues that the concept of reason of state is either otiose in that it can be subsumed within the more familiar and less tarnished framework of public reason as modeled by John Rawls, or it is pernicious: understood as applying to the security and survival of the state and ‘based on the insight that, “if the political order is assumed to an essential condition of free moral existence, the survival of this order becomes crucial”’, reason of state fails to provide a useful working concept since it is not ‘something that people of diverse viewpoints and ideologies may agree on.’⁹⁷ There is something initially attractive about this argument, in that it seems to hold out the prospect of the eradication of what has always been a problematic category. The problem is that it secures the purity of liberal theory at the expense of descriptive accuracy and normative plausibility. To develop the argument, I turn to Friedrich Hayek, who provided a sophisticated version of this argument.

Hayek’s response to the pathologies of the modern administrative state, with its creeping bureaucratization and interest-driven mass politics, was to level it. He sought in particular to foreclose any sites of sovereignty, and his constitutional analysis can be seen as a systematic attempt to do away with reason of state altogether. The image of common law as the epitome of law understood as *nomos* (the law of liberty) is crucial, for it demonstrates how ‘rules that have never been deliberately invented but have grown through a gradual process of trial and error in which the experience of successive generations has helped to make them what they are.’⁹⁸ The common law shows how an order of laws can develop largely in the absence of design. Seen as a collective intelligence device, a vast system of trial and error on matters of law and coordination, it is a near perfect way, so Hayek argues, of aggregating experience and of transmitting accumulated stock of knowledge through time.

Reason of state, from Hayek’s perspective, is doubly flawed. First, conceived as the reflection of the reason of the individual or small group who happen to control the state, it is necessarily limited, certainly when set against the accumulated knowledge gains of generations embodied in the evolved law (*nomos*). It is even more limited than the law of legislation (*thesis*), which is at least refracted through a series of institutions (that is, more and larger groups) before becoming law. Second, reason of state is often presented as in a sense operating outside time. The moment of decision interrupts the normal flow of social intercourse and development. The sort of intelligence that this kind of action presupposes is antithetical to Hayek: ‘any

⁹⁷ Wojciech Sadurski, ‘Reason of State and Public Reason’ (2014) 27 *Ratio Juris* 21, 26-27, quoting Carl J. Friedrich, *Constitutional Reason of State* (Providence: Brown University Press, 1957), 6.

⁹⁸ F.A. Hayek, *The Constitution of Liberty* (London: Routledge, 2010), 138.

attempt to use reason to control or direct the social process threatens not only to impede the development of our powers of reason but also to bring the growth of knowledge to a halt.⁹⁹ The exception, understood as a kind of caesura in constitutional time threatens, for Hayek, the evolution of the spontaneous order of freedom and is deeply problematic.

Hayek's interpretation of the maxim *salus populi suprema lex esto* is also illuminating. The maxim links to reason of state, as we have seen, providing a justification for agents of government to act on their own initiative outside and sometimes against the requirements of the law. Hayek turns the usual reading of the maxim on its head. Correctly understood, he argues, *salus populi* 'means that the end of the law ought to be the welfare of the people, that the general rules should be so designed as to serve it, but *not* that any conception of a particular social end should provide a justification for breaking those general rules.'¹⁰⁰ There is nothing either special or mysterious about the state – it is just the structure through which social cooperation under rules tends to take place. So there is no cause to personify the state, and no justification for imbuing it with any special notion of agency. The rules that are contained within the state's legal order (or, perhaps better, the rules that as a system define the state) ought to serve the welfare of the people, and should do so where law-making operates as *nomos*. Breaking these rules is unlikely to benefit the public, as opposed to a powerful group within it.

This conception of state and law is remarkable for the extent to which it seeks to deny agency on the part of the state or its officials. But the escape from reason of state is not complete. Hayek recognizes that the laws may have to be suspended when the preservation of a society is threatened:

Though normally the individuals need be concerned only with their own concrete aims, and in pursuing them will best serve the common welfare, there may temporarily arise circumstances when the preservation of the overall order becomes the overruling common purpose, and when in consequence the spontaneous order, on a local or national scale, must for a time be converted into an organization.¹⁰¹

This way of conceptualizing emergency action is unconvincing. The shift in register from *nomos* to reason of state is presented as a natural phenomenon, like 'a wounded animal in flight from mortal danger'. Elsewhere, Hayek is critical of the application of animistic imagery to describe political action. Developed societies are complex and do not correspond to a model of intimate fellowship.¹⁰² Hayek steps here into Schmitt's territory, even adopting the conceptual logic of 'the exception'. But whereas Schmitt had extensively laid the groundwork for this position, Hayek has done the opposite, denying the conditions that make the Schmittian exception

⁹⁹ Chandran Kukathas, *Hayek and Modern Liberalism* (Oxford: Oxford University Press, 1989), 61.

¹⁰⁰ *Constitution of Liberty*, 139.

¹⁰¹ F.A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge, 1982), Vol. I: *Rules and Order*, 124.

¹⁰² F.A. Hayek, *The Fatal Conceit: The Errors of Socialism* (Chicago: University of Chicago Press, 1988), 113.

possible. For Hayek, there is no sovereign, little by way of individual or small-group political agency, and only an attenuated role for the state. As Renato Cristi observes,

[w]hat Hayek reveals in his account of emergency constitutionalism is a failure to supersede Schmitt's position. He ends up instead providing the exact counterpart of that theory. 'What generally happens when one proceeds in this manner is that the position one is attacking is not transcended but tends to be preserved as an obverted mirror-image. Something like this has happened to Hayek.'¹⁰³

Hayek's failure to incorporate a plausible account of reason of state into his constitutional theory is instructive and warns against taking the path that seeks to be rid of the concept altogether. Such an approach blinds us towards some of the defining and perennial juridical questions of the modern state. Unfortunately for liberals, more liberalism does not correlate to a simple reduction in reason of state, let alone the eradication of the practice. In a sense, the opposite might be true, as the liberal constitution tends to see more reason of state matters appear before supervisory institutions and also to present more frequently as juridical questions. The constitutional dynamics that ensue, in which there is an undeniable risk that normal law and legal process might become contaminated or even cannibalized by reason of state practices, is nonetheless part of a now very old liberal tradition that aspires to see the more questionable and marginal of state actions brought within and hopefully tamed by the piecemeal extension of law's domain. This approach is realistic at least to the extent that it recognizes that even if the state were to model itself on pure Rawlsian principles, reason of state questions would still arise. Unless the state cut itself off from the outside world, which is not an option for a liberal state,¹⁰⁴ it would still have to engage with other polities, including less perfectly liberal and illiberal states. Even if conflict or problematic entanglements with those states were avoided, the liberal state would still engage in some diplomatic and intelligence-gathering activities. But even these are best understood as 'standing' or 'ordinary' reason of state practices to which legal principles can never straightforwardly apply.

V

This paper has offered an articulation and partial defence of the concept of reason of state. It has argued that reason of state provides an explanatory category through which a vital but troublesome dimension of state action can be analysed. That dimension is otherwise glimpsed through a disparate variety of forms and scenarios:

¹⁰³ F.R. Cristi, 'Hayek and Schmitt on the Rule of Law' (1984) 17 *Canadian Journal of Political Science* 521, 523.

¹⁰⁴ John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2001).

prerogative, emergency, exception, necessity, national security and so on. Reason of state provides a framework in which many of these claims can be bundled into a coherent whole. But its explanatory strength derives from the fact that it highlights what is most germane about the category from the jurist's perspective, namely the claim made by an agent of the state to be recognized as having special jurisdiction over a sensitive area of activity or special authority over a particular problem, authority that the law in the normal course of things would not provide.

This bare definition was elaborated by way of a historical argument, a principal feature of which was the steady transformation of the sort of 'arbitrary' power that most troubled jurists from Coke to Dicey: legally unlimited, personal power sourced in reserve powers and prerogatives. But when combined with the increase in state activities, that process of transformation, which normalized reason of state through the establishment of constitutional principles, reintroduced a not altogether dissimilar problem: wide reserve powers, containing broad discretionary authority, not so much now as an exception to the law – outside and against the law, in Locke's phrase – but within the interstices of the law and its institutional processes.

Layered into this analysis was a more normative argument that takes a stance against liberal dreamers like Hayek, who were read as aiming at the eradication of reason of state. But they do not – I would say cannot – escape the problem, since their solution (more liberalism, more law) is a variation on an old story. True, we might hope to tame the excesses associated with the invocation of reason of state in this way. But it will hardly serve to remove the concept from constitutional politics – in fact the opposite seems more likely to be true. The only possible way of escaping from reason of state altogether would be to rid ourselves of the state (and any similar political structure). Hayek sometimes seems tempted to think in such terms.¹⁰⁵ Irrespective of the plausibility of such a move, this scenario is outside the scope of constitutional law and the boundaries of this study.

But focusing on reason of state has wider theoretical benefits. The concept reflects, for better or worse, the 'unpurged relic of lordship' within the modern state.¹⁰⁶ As such, it draws our attention to what might be called the imperial dimension of constitutional law. 'Imperial' not just because of the historical connection between reason of state and the imperial expansion of the state both outside and within its own borders, but also because of the relatively stark connection between reason of state and authority (*imperium*). This is a side of constitutional politics that jurists often overlook. Lawyers tend to focus on the negative or constraining function of the constitution,¹⁰⁷ especially checking institutions such as the legislature (as opposed to the executive), constitutional rights (as opposed to the enabling provisions of constitutions) and judicial review (as

¹⁰⁵ See Chandran Kukathas, 'Hayek's Theory of the State' in Dyzenhaus and Poole, *Law, Liberty and State*.

¹⁰⁶ Michael Oakeshott, *On Human Conduct* (Oxford: Oxford University Press, 1975), 268.

¹⁰⁷ Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

opposed to administrative action). This tendency is perhaps even stronger among constitutional theorists. The constitutional politics surrounding reason of state certainly brings into play these institutions – in fact, reason of state can be seen as a particularly hard testing ground for the idea of checks and balances. But to focus too much of attention on the constraining side of constitutions is to leave an incomplete and unreal impression. Reason of state is a fairly immediate reminder that constitutions are as much about how power is sourced and operationalized as about how power is checked and constrained. It also shows us that law's empire is often a motley affair. Normal law normally includes exceptional powers. Or, better, normalizing the exception is a process whose goal is never reached.