Order, Authority, and Law:
On the Development of Modern Conceptions of Political Order, Legitimate Rule, and Law and How They are Challenged

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ABSTRACT

This essay examines the development of the Western conception of political order, which has changed considerably since its medieval origins. It has undergone a process of abstraction, secularisation, positivisation, and legalisation. In particular, the contemporary conception of political order, which I term Legalised Political Constructivism, emphasises the role of law as a means to structure political and social life. This essay shows that Legalised Political Constructivism is the result of historical attempts to justify political developments or to induce change, which leaves it open to challenge on empirical grounds. It concludes that normative political thought must engage with the social sciences in order to better understand the role that positive law can (and should) play as a constructive element in society.

INTRODUCTION

Since its medieval origins, the conception of political order has on its way to modernity changed considerably. It has undergone a process of abstraction, secularisation, positivisation, and legalisation. In particular, in its modern form it emphasises the role of positive law as a means to structure political and social life.

This contemporary conception of political order, which I term Legalised Political Constructivism, can be explained as the result of historical attempts either to justify political developments on normative grounds, or to actively

induce political change. In particular, philosophical conceptions of political order were often used instrumentally to legitimise or entrench transitions between papal or monarchical authority and popular sovereignty. It is unsurprising, then, that some of its core assumptions and concepts – for example, the notion that political associations are the product of rational choices to protect individual and collective welfare or the role of positive law in political order – are inconsistent with what we nowadays know about political behaviour. This leaves Legalised Political Constructivism, with its insistence on the role of law to circumscribe political structures, open to criticism on empirical grounds. This prompts the challenge to reconcile normative political thought with theories of social behaviour propounded by the social sciences.

I. MEDIEVAL ORIGINS: CATHOLIC ORDER AND THEOCRATIC GOVERNMENT

Many concepts underlying modern political thought emerged during the medieval period and must be seen against this background. Until the High Middle Ages, political philosophy was considerably shaped by the cosmovision and doctrines of Christianity, which had attained influence by its establishment as the official church of the late Roman Empire by Theodosius I in 380 AD and – following the Western Empire's decline – by the rise of the papacy to become a political player. Its underlying rationale of a divinely created world, structured in a natural and strictly hierarchical order (a 'Great Chain of Being'),[1] remained prevalent throughout much of the Middle Ages.[2]

The Structuring Force of Christian Theology

The main consequences of Christian theology for political thought were threefold. Firstly, political order was considered ancillary to heteronomous, transcendental objectives. Early Christian philosophers like St Augustine of Hippo (354–430), in his text *City of God*, suggested that government was made

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[1] See generally Arthur Lovejoy, *The Great Chain of Being: A Study of the History of an Idea* (HUP 1936).

[2] Michael White, *Political Philosophy* (2nd edn, OUP 2012) 124.

necessary only by the Fall of Man.[3] Hence, its main purpose was the achievement of salvation (and the suppression of forces working to the contrary).[4] This general rationale for political order was contrary to earlier Roman and Greek political thought, most prominently Aristotle (384–22 BC), who considered political life in the *polis* to be natural (and god-willed) human behaviour.[5]

Linking political order primarily to transcendental objectives meant that, secondly, any rightful political authority had to be divinely bestowed (see, for example, *Romans* 13:1–7).[6] Earthly authorities were therefore understood to be 'vicegerents of God' and to act in the exercise of His will.[7] This idea of delegated authority allowed for a certain abstraction of political power, as opposed to earlier pagan theories of kings as unchallengeable quasi-gods. At the same time, it contradicted those traditions which perceived political authority not as divinely bestowed, but rather derived from a compact between the ruler and his people, as for example in ancient Germania[8]

Thirdly, the structure of government – being part of a greater, inherently consistent order – was considered to be (at least in part) divinely predetermined, an idea encapsulated by the later 'Divine Right of Kings' theory.

Medieval Theory and Practice

In conformity with Christian theology and Germanic as well as late Roman governmental practice, ideas of theocratic kingship emerged in Western Europe in the Early Middle Ages.[9] One consequence of this development was that whereas God was considered to be the sole and omnipotent (or to put it in

[3] John McClelland, *A History of Western Political Thought* (Routledge 1996) 111.

[4] White (n 2) 158ff.

[5] Aristotle, *Politics* [4th c BC] bk. I.2, 1252b, 1253a, reprinted in Richard McKeon (tr), *The Basic Works of Aristotle* (Random House 1941). See further McClelland (n 3) 111; White (n 2) 79ff.

[6] 'Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. […]' (ESV). See also White (n 2) 119ff.

[7] Martin Loughlin, *Foundations of Public Law* (OUP 2010) 21ff.

[8] See Ken Pennington, 'Law, Legislative Authority, and Theories of Government, 1150–1300' in James Burns (ed), *The Cambridge History of Medieval Political Thought c.350–c.1450* (online edn, CUP 2008) 426.

[9] More precisely, this has been dated back to the 7th and 8th century: Loughlin, *Foundations* (n 7) 25; or even further to the 5th century: PD King, 'The Barbarian Kingdoms' in Burns (n 8) 127ff.

modern terms, 'sovereign') transcendental authority,[10] on earth such authority was shared with the monarch. The Church retained its position as both the mediator[11] and the ultimate interpreter of an all-ordering divine will from which royal power was derived and to which it was subject. The result of this form of theocratic kingship was a dualistic structure of authority, figuratively expressed in the 'Theory of the Two Swords',[12] according to which both the papacy and the royalty were divinely authorised to exercise spiritual and temporal authority, respectively.[13]

This intertwining of Christian theology and politics found its most elaborate application in the structure of the Holy Roman Empire.[14] In practice, however, there was no neat hierarchy in medieval politics. Rather, society was shaped by overlapping and competing jurisdictions, as well as by the interdependencies and power struggles between the main political actors: the Church, monarchs and local princes.[15] Tensions arising from and attempts to stabilise this volatile framework would drive many of the developments of modern political thought.

Medieval Notions of Law

[10] The German jurist Carl Schmitt would hence consider the modern concept of sovereignty to be a secularised version of this omnipotent power: *Political Theology* (first published 1922, Georg Schwab tr, University of Chicago Press 2010) 36.

[11] This mediating function found its symbolic explication in meticulous coronation ceremonies in which a dignitary would formally invest the king with regal power: Loughlin, *Foundations* (n 7) 26f. See also János Bak (ed), *Coronations: Medieval and Early Modern Monarchic Ritual* (University of California Press 1990).

[12] This distinction between a 'spiritual sword' and a (subordinate) 'temporal sword' was first formulated by Pope *Gelasius (492–496?):* McClelland (n 3) 132f, and has famously been invoked eg by Boniface VIII (1294–1303) in his bull *Unam Sanctam* [1302], issued during his conflict with Philip IV of France. See Walter *Ullmann, 'A Medieval Document on Papal Theories of Government' (1946) 61* The English Historical Review *180.*

[13] The exact relationship between spiritual and temporal powers, however, was subject to constant dispute: HJA Watt in Burns (n 8) 367ff.

[14] John Neville Figgis, *The Divine Right of Kings* (first published 1896, Geoffrey Elton ed, Harper and Row 1965) 39. See also Loughlin, *Foundations* (n 7) 28ff.

[15] McClelland (n 3) 131-32. Kings had long relied on the Church's prestige and institutions to govern effectively, while exercising considerable factual authority over it within their own realms, see ibid 131, 135. At the same time, for the exercise of actual (military) power, they relied on local princes, who owed them only limited allegiance, see ibid 278-79.

Since medieval thought considered God to be the supreme legislator, any temporal law had to emulate or at least comply with His will.[16] Hence, Thomas Aquinas (1225–74) could claim that compliance with temporal laws also meant obedience to divine law, since every (rightful) temporal law at least partly embodied it.[17] Yet for a long time there was no clear conception of what 'law' actually was, or who made it.[18] During the Early and High Middle Ages legal propositions were mainly drawn from customary or adopted sources, and the exercise of legal authority amounted to little more than casuistically applying these propositions. Those sitting in judgment faced a mixture of overlapping and competing systems and sources of law, including traditional (for example, Germanic) practices, Christian Canon Law, and – following the rediscovery of Justinian's *Digests* in 1135 – Roman Law. In addition, the rediscovery of Aristotle's *Politics* in the thirteenth century led to a revival of natural law theories.[19] The cardinal 'project' of medieval legal scholarship was to reconcile these conflicting systems.[20]

It is not clear when people began to conceptualise that they could actually 'make' new law in the form of abstract rules. Terminologically, it was not before the late twelfth century that Canonists coined the term *ius positivum* to designate law promulgated by a human legislator.[21] However, even Civilians at that time were divided about the relationship between deliberately drafted and existing customary law.[22] And while Thomas Aquinas already clearly distinguished between divine and man-made law,[23] definitions by Marsilius of Padua (circa 1275–1342) only roughly resemble the modern categories of natural and positive law.[24] In actual fact, for much of the Middle Ages even promulgated legislation was considered merely a representation of divine will.[25] Before ideas of genuinely 'positive' law took hold, the concept of law hence retained a 'passive' role in both political thought and practice. Firstly, it was regarded to be an emanation of a divinely predetermined order rather than a product of

[16] McClelland (n 3) 133.
[17] ibid 118.
[18] ibid 133, 140.
[19] Loughlin, *Foundations* (n 7) 34.
[20] Pennington (n 8) 425ff.
[21] ibid 425.
[22] ibid.
[23] White (n 2) 183ff.
[24] McClelland (n 3) 140-41.
[25] ibid 140.

political will. It could therefore, secondly, play only a limited role as a means of governance.[26]

In the High Middle Ages, however, disputes about political power and its limits started to be expressed in legal terms. Canonists were among the first to make law central to their political theory.[27] For instance, Thomas Aquinas expressed the relationship between God-given, natural laws and promulgated laws – that is, the limits of governmental power – in terms of legal hierarchy: in the case of conflict, promulgated law would be invalidated as *leges corruptio*.[28] The exercise of political power was therefore subject to what would become known as 'fundamental laws' (*leges fundamentalis*). A similar use of legal terminology to express the limits to regal power can be seen in the writings of Henry de Bracton (1210–68).[29] This trend towards legalisation provided the language for subsequent debates about political right and order. While in medieval times law had not yet become the 'building blocks' of political order, it already supplied the terminology in which the contours of political power were described.

II. TRANSITION TO MODERNITY: AUTONOMISATION AND SECULARISATION OF THE POLITICAL

The transition from medieval to modern political thought is closely linked to changes in the political landscape occurring towards the Late Middle Ages. These developments questioned existing doctrines and set off a re-conceptualisation of both political order and law.

Decentralisation and Consolidation of Political Power

[26] Certainly, apart from theoretical constraints, low levels of literacy and limited means of communication set very practical limits to the rule-making capacity of early medieval kings.

[27] Pennington (n 8) 427.

[28] Thomas Aquinas, *Treatise on Law* Q 95, quoted in J Budziszewski, *Commentary on Thomas Aquinas's Treatise on Law* (CUP 2014) 316.

[29] *The Laws and Customs of England* Vol. II (first published 1235, Samuel Thorne tr and George Woodbine ed, HUP 1968) 33; Loughlin, *Foundations* (n 7) 50ff.

From the mid-thirteenth century onwards, regional principalities and republics successfully began to claim political autonomy.[30] Notably the French and English royalty – declaring themselves to be 'emperors within their own kingdom' (*imperator in regno suo*) – opposed both papal and imperial authority.[31] As was foreshadowed by the eleventh and twelfth century Investiture Controversy between the papacy and royalty over the power to appoint Church officials, monarchs increasingly attempted to control the Church within their own realms.[32] These power struggles overlapped with and were closely related to the Protestant Reformation.[33] The Reformation and subsequent religious wars led to increased political fragmentation (especially among the German principalities), and this decentralisation further impaired papal authority.[34] The overall effect of these developments was a gradual dispersion of political power towards the regional polities and a concomitant increase in royal over religious authority. At the same time, within a given territory, governmental power was consolidated more and more in the royalty, at the expense of inferior feudal lords.[35]

The political authority exercised by an increasingly independent royalty found its conceptual expression as 'sovereignty'. The term – formerly synonymous with suzerainty[36] – was used to describe a consolidated and independent political power, in contrast to the patchwork of competing authorities and jurisdictions that had shaped feudal systems.[37] This modern notion of sovereignty is mainly attributed to Jean Bodin (1530–96), who defined sovereign power, held by the king, as 'the absolute and perpetual power vested in a commonwealth'.[38] Many commentators consider this idea of sovereignty to

[30] With a focus on northern Italy, Quentin Skinner, *The Foundations of Modern Political Thought Vol. 1* (CUP 1978) ch 1; further Chris Thornhill, *A Sociology of Constitutions* (CUP 2011) 40ff.

[31] Martin Loughlin, The *Idea of Public Law* (OUP 2004) 74.

[32] McClelland (n 3) 131.

[33] This is perhaps most evident in the case of Henry VIII's disengagement from the Catholic Church in the 1530s. On the Reformation's political implications, see Quentin Skinner, *The Foundations of Modern Political Thought Vol. 2* (CUP 1978).

[34] This loss of authority was ia explicated by the principle "'Whose realm, his religion"' (*cuius regio, eius religio*) in the Peace of Augsburg in 1555 as well as the Peace of Westphalia in 1648.

[35] Loughlin, *Idea* (n 31) 74. See also Skinner, *Foundations Vol. 2* (n 33) ch 4 on the connection of Lutheran thought and absolutism.

[36] Loughlin (n 31) 73ff.

[37] See generally ibid ch 5; Loughlin, *Foundations* (n 7) 184ff.

[38] Bodin, *Six Books of the Commomwealth* bk I ch 8 (first published 1576, MJ Tooley tr, Blackwell 1955) 25. However, he recognized certain 'fundamental laws' (eg the *Lex Salica*, natural law and self-constraints), ibid 28ff; Loughlin, *Foundations* (n 7) 67ff.

be a linking element between medieval and modern political thought.[39] Indeed, since it is agnostic as to where such authority was derived from,[40] the concept paved the way for an abstract description of and theorising about political power.

The decentralisation and consolidation of political power in the Early Modern Age also saw the emergence of the 'state' as a new form of political entity and object of theoretical discourse.[41] As a type of political entity, it marked a scholarly shift of focus from a universal Christian *ecclesia* towards the individual polity and by the early seventeenth century had become the major object of political philosophy.[42] This shift led to the re-emergence of comparative inquiry and the development of relative theories of political right.[43] As a concept, the 'state' was the result of an abstraction and institutionalisation of sovereign political power. As can be seen, for example, in Thomas Hobbes' *Leviathan*, the state is conceived as an entity independent both from the people who established it and from the person(s) ruling it.[44]

Explaining Political Order Anew

The idea of sovereign states, independent especially from papal authority, could hardly be reconciled with existing Christian theology and feudal doctrines of political philosophy. Hence, new answers were needed as to (1) how political authority was legitimised; (2) what the rationale or function of political order was; and (3) where the principles of political order could be derived from.

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[39] Notably Figgis (n 14) 258.

[40] 'Sovereign' authority could be conceived as divinely bestowed, as by Bodin (n 38) bk I ch 10 (p 40), or derived from a 'social contract' as by Hobbes, *Leviathan* (first published 1651, CB Macpherson ed, 58th edn, Penguin Books 1985) pt II ch 18 .

[41] On the concept of 'state' see Loughlin, *Foundations* (n 7) 183ff; Oliver Beaud, 'Conceptions of the State' in Michael Rosenfeld and Andreás Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 269, 278ff. See also McClelland (n 3) 280ff on the historical development of the concept. On the peculiarities in the Anglo-American tradition see Beaud 280-81.

[42] Skinner, *Foundations Vol. 2* (n 33) 349; Loughlin, *Foundations* (n 7) 161.

[43] See eg Bodin (n 38) bk II. See also the works of the French Legists (see n 73) and Niccolò Machiavelli, *The Prince* (first published 1532, Peter Bondanella tr, OUP 2005) 7ff or Niccolò Machiavelli *Discourses on Livy* (first published 1531, Julia Bondanella and Peter Bondanella trs, OUP 1997).

[44] Hobbes (n 40) pt II ch 17.

From Descending to Ascending Delegation of Power

Within the power struggles between the royalty and papacy, the question of how to legitimise political authority gained new significance. For the king to achieve substantive independence from the papacy, it was necessary to displace the notion that the Church was the medium through which divinely authorised authority was bestowed. While the Divine Right of Kings theorists reconciled theocracy with the idea of a sovereign monarch, the idea that would ultimately prevail in Western political thought and pave the way to a positive conception of political order was that of 'popular sovereignty'.[45]

The Divine Right of Kings theory subordinated clerical power to the king, who claimed supreme authority (*plenitudo potestatis*) in both political and spiritual matters.[46] While the theory has its origins in Bodin's idea of the monarch being divinely bestowed with sovereign power,[47] it was discussed most extensively in England, where the theory was first explicitly set out by James VI and I (1566–1625).[48] Although it was a post-Reformation theory – defending increased royal power against the papacy and the Presbyterians[49] – it drew on the medieval notion of an inherently consistent and hierarchical natural order to justify the monarchy as the God-willed form of government.[50] The theory sparked fierce debate in England: it was opposed amongst others by John Locke,[51] and defended by Edward Forsett and Robert Filmer.[52] Yet its influence in this

[45] In this essay, the term 'popular' sovereignty will denote legitimisation of political authority 'from below' instead of by way of an external authority. For a discussion of the term's conceptual ambiguities, see Loughlin (n 7) 186.

[46] According to Figgis, the claim for consolidated and independent power expressed in the Divine Right of Kings was a transition towards the modern conception of sovereignty, (n 14) 237ff; contra Gless Burgess, 'The Divine Right of Kings Reconsidered' (1992) 107 *The English Historical Review* 838ff.

[47] Bodin (n 38) bk I ch 10 (p 40).

[48] See James VI and I, *The True Law of Free Monarchies* (written 1598) in Joseph Tanner (ed), *Constitutional Documents of the Reign of James I, A.D. 1603–1625* (CUP 2015).

[49] Burgess (n 46) 837.

[50] W Greenleaf, 'The Divine Right of Kings' (1964) 14 *History Today* 642, 646. A similar methodology is already underlying Bodin's argument for monarchy, see his (n 38) bk V ch 1.

[51] John Locke, *First Treatise of Government* (first published circa 1681) ch 9 in Davit Wootton (ed) *John Locke: Political Writings* (Hacket 2003); *Second Treatise of Government* (first published circa 1681) ch 1 in Wootton.

[52] Edward Forsett, *A Defence of the Right of Kings* (first published 1624) <http://quod.lib.umich.edu/e/eebo2/A10151.0001.001?view=toc> accessed 30 December 2016; Filmer, *Patriarcha, or The Natural Power of Kings* (first published 1680) in Johann Sommerville (ed), *Patriarchia and other Writings* (CUP 1991).

country came to an effective end with the Glorious Revolution of 1688-89, after which supreme authority shifted from the king to Parliament.[53] On the continent, however, it would be adopted by divine-right absolutists like Louis XIV (1638–1715).

Instead of conceiving of political authority as being divinely bestowed, theories of popular sovereignty – emerging in the sixteenth and seventeenth centuries – see it as originating from the uniting of a people under a commonwealth and subsequently commissioned by the populace to the ruler. Similar ideas of ascending delegation of authority existed since antiquity[54] and had frequently been invoked in medieval practice, both to bolster a king's authority (in elective or popular monarchies) or to oppose royal claims to absolutism.[55] The modern idea of popular sovereignty is primarily attributed to the work of social contract theorists – notably Hobbes, Lock and Jean-Jacques Rousseau – which dominated political thought from the Reformation up until the mid-eighteenth century.[56] Contractual language had been used before to describe governmental arrangements, either between political authorities[57] or between a ruler and his subjects.[58] However, such covenants were generally made within an existing political order.[59] In contrast, modern contractual theories depict the very existence of political order as the product of a (hypothetical) contractual arrangement. Hence, despite considerable differences in their political thought,[60] all contract theorists posit a pre-contractual, apolitical 'state of nature'.[61] The establishment of government, marking the transition to

[53] See Burgess (n 46) 842ff on the theory's development in England.

[54] Including in Germanic theories of kingship (see n 8).

[55] McClelland (n 3) 134; Greenleaf (n 50) 643 on the invocation of medieval notions of popular sovereignty by the Church to oppose the Divine Right of Kings doctrine in England. Similarly, on the continent, Protestant Monarchomachs like François Hotman and Juan de Mariana invoked popular sovereignty, exercised by the *Estates General*, to oppose claims to absolute royal power.

[56] McClelland (n 3) 172.

[57] E.g. royal coronation in exchange for military protection, ibid 172.

[58] See n 54; McClelland (n 3) 172.

[59] ibid 173. One notable exception is the Jewish narrative of the Israelites contracting with *Yahweh* to obey His will in exchange for habitable land: ibid 174f. However, here the content of the laws in question was not subject to bargaining: ibid 175.

[60] ibid ch 10–13 for an exhaustive comparison of the theories of Hobbes, Locke and Rousseau.

[61] Hobbes (n 40) pt I ch 13; Locke, *Second Treatise* (n 51) ch 2; Jean-Jaques Rousseau, *The Social Contract* (first published 1762, Maurice Cranston tr, 25th edn, Penguin Books 2004) bk I ch 8 . Yet, these theorists differ on how human life in such a state of nature would look. Notably Hobbes depicted life in the state of nature to be 'solitary, poore, nasty, brutish, and short', (n 40) pt I ch 13. Later writers were more optimistic, including Jean

the 'civil state', is achieved through a multilateral agreement between the people.[62] As the institutors of political order, any political authority has to stem from the people and is either conferred or commissioned 'upwards' to the governmental entity. Therefore, social contract theories break with the assumption that political authority is derived from an external authority (God). It should be noted, however, that such theories are not necessarily secular: religion and divine law (or natural law) still played a role in some versions of the model, but only as a constraint on political power and not as its foundation.[63]

An Immanent Rationale for Politics

As discussed above, both the Reformation and the religious wars called into question the notion that government exists to serve transcendental aims. The tendency of governments in the Early Modern period to regulate subjects' everyday lives further undermined the perceived connection between government and religion.[64] At the same time, the consolidation of political power in governments and an increase in their regulatory capacity meant that claims at that time for a centralised (and often absolutist) government were at least partially catalysed by actual existential threats to the political order. For example, Bodin's *Six Books* were written following the French Wars of Religion, Forset's *Defence of the Right of Kings* in the aftermath of the 'Gunpowder Plot' of 1605, and Hobbes' *Leviathan* as a reaction to the English Civil War (1642–51).[65]

Calls for a particular political order were thus framed not as a means of achieving salvation but as a means of offering protection against internal and external threats. While it might be argued that the desire for protection has always accounted for the emergence of governmental structures, social contract theorists were the first to declare the protection of citizens to be not only a government's duty but the very reason for its establishment. They conceived of political association neither as an inevitable human impulse[66] nor as divinely

Jacques Rousseau in his *Discourse on Inequality* (first published 1755, Maurice Cranston tr, Penguin 1984).

[62] See Hobbes (n 40) pt II ch 17; Locke, *Second Treatise* (n 51) ch 8; Rousseau, *Social Contract* (n 61) bk I ch 6. These writers differ however, as to whether the governmental institution created is also a party to this contract and hence subject to its conditions.

[63] Locke, *Second Treatise* (n 51) ch 11.

[64] Loughlin, *Foundations* (n 7) 63.

[65] ibid 64; Greenleaf (n 50) 646; McClelland (n 3) 193. Likewise, texts written during times of relative peace exhibit more sympathy for limited government, eg Locke's *Second Treatise* (n 51), written after the Glorious Revolution.

[66] Contra eg Aristotle, see n 5.

prescribed, but as an act of deliberate, self-interested choice in order to secure individual rights, liberty, and property.[67] In order to recognise such rights antecedent to the state, social contract theorists had recourse to natural law theories, which had become increasingly prominent ever since the rediscovery of Aristotle's writings. Political order thus became orientated towards serving the individual as a bearer of rights.[68] This marked a shift from an heteronomous and transcendental rationale for political order towards one which was endogenous and immanent, subservient to individual members and to the furtherance of the general good (*salus populi*).[69]

Inherited and Designed Constitutions

The emergence of individual polities further raised questions as to how – and by reference to which discourses – to derive principles according to which the polities were governed. After all, acceptance of a general notion of 'public sovereignty' neither prescribes a certain political structure nor necessitates that such a structure is open to deliberate design.[70] Further, social contract theories, starting from a (hypothetical) 'state of nature', may be interpreted as merely describing social evolution or be disregarded as a purely theoretical construct.[71] In the eighteenth and nineteenth centuries, the word 'constitution' was revived to refer to the political order of a given polity,[72] and was used instrumentally, as a means of deriving the 'proper' principles of political order.

One such attempt to reveal principles of political order by reference to the concept of a constitution was that of the sixteenth century school of the French 'Legists'. The Legists proposed that these principles should be drawn not from a

[67] White (n 2) 231. See eg Hobbes (n 40) pt II ch 30; Locke, *Second Treatise* (n 51) ch 9; Rousseau, *Social Contract* (n 61) bk I ch 8.

[68] Loughlin, *Idea* (n 31) 86; White (n 2) 230f.

[69] eg Locke's use of the phrase '*salus populi suprema lex esto*' as an epigraph for his *Second Treatise*. Immanuel Kant went even further and elevated the good of the state to being an end in itself in *The Metaphysics of Morals* (first published 1797) pt II sec 49 in HB Nisbet (tr) and Hans Reiss (ed), *Kant: Political Writings* (2nd edn, CUP 1991) 142: '*Salus republicae suprema lex*'.

[70] McClelland (n 3) 146, 172.

[71] White (n 2) 228; McClelland (n 3) 180f. Kant, for instance, considered the 'social contract' as a hypothetical construct of reason (while accepting its normative propositions): *Theory and Praxis* (first published 1792) in Reiss and Nisbet (n 69) 79.

[72] Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *The American Political Science Review* 853. See Schmitt's notions of 'constitution' in his *Constitutional Theory* (first published 1928, Jeffrey Seitzer tr, Duke University Press 2008) ss 1–4.

close interpretation of Roman Law, but from examining existing legal and political practices.[73] Such an approach gave normative priority to custom and tradition over *a priori* reasoning about political right and order.[74] It led to the emergence of *lex terrae* – a systemised 'law of the land' (rather than fragmented legal customs) elucidated through historical inquiry – alongside Roman and Canon Law.[75] This historiographic methodology led to the development of the concept of 'ancient constitution'— a set of traditional laws to which all governmental power was subject.[76] Being derived from human customs and traditions, the idea of an ancient constitution positions political order as something essentially positive and man-made, thereby stripping it of its 'theological colouring'.[77] However, the governmental arrangements so derived were not open to deliberate design but seen as the immutable product of (potentially immemorial) custom. Due to its inherently conservative attitude, the ancient constitution has often been invoked by writers in opposition to revolutionary developments, including Edmund Burke and Joseph de Maistre.[78] The concept took root in England especially, where similar historiographic methods had already been used to challenge the power of the Crown by invoking the (myth of an) ancient Anglo-Saxon constitution preceding Norman government.[79] It would ultimately be superseded by the concept of parliamentary sovereignty, which retained the primacy of customary common law, but subjected it to Parliament's power to amend.[80] However, the notion of an ancient constitution survives in contemporary discussions regarding a 'common law constitution'.[81]

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[73] See eg François Hotman, in his *Anti-Tribonian* (first published Jeremie Perier ed 1603, Universite de Saint-Etienne ed 1980).

[74] Loughlin, *Foundations* (n 7) 53.

[75] ibid 53.

[76] ibid 54.

[77] ibid 53.

[78] Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Frank Turner ed, Yale University Press 2003) 27; Joseph de Maistre, *Considerations on France* (first published 1797, Richard Lebrun tr, CUP 1994) ch 8.

[79] Loughlin, *Foundations* (n 7) 61f. See also the reasoning of Edward Coke in *Dr. Bonham's Case* [1610] 8 Co. Rep. 107, according to whom the common law may 'controul acts of parliament when they are against common right and reason.'

[80] See William Blackstone's early claim for parliamentary sovereignty in his *Commentaries on the Laws of England* (Claredon Press, 1778); AV Dicey, *The Law of the Constitution* (first published 1885, JWF Allison ed, OUP 2013) 27ff. On the development of the concept of parliamentary sovereignty see eg Norman Barry, 'Hayek's Theory of Law' (1999) 9 *Journal des Economistes et des Etudes Humaines* 371, 376-77.

[81] Mark Elliot, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional and Political Perspective' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (OUP 2015) 54ff.

Others claimed that a polity's constitution did not need to be derived from custom, but could be deliberately designed by (or on behalf of) the sovereign populace. The (revolutionary) thinking was that popular sovereignty could be exercised in one deliberate act of 'constitution-making'. In doing so, the sovereign people would both constitute a political order and authorise political power. A constitution thus established would not be a bundle of habits and customs but a very concrete set of rules, often codified in a single constitutional document which derives its binding force not from metaphysical or historical authority but from being the product of a rational act of self-determination. This (capital-C) 'Constitution' would gain the status of fundamental law against which the legality of all governmental activity was to be measured.[82] This notion – driven by political liberalism – became a tenet of eighteenth century 'constitutionalism'.[83] The claim of a deliberately drafted Constitution to be supreme law, regulating a state's political order and constraining even legislative authority, was first put into practice in 1789 in the United States' Constitution.[84] It lay at the heart of the European revolutions of the eighteenth and nineteenth century, in the course of which numerous further constitutional documents were drafted. Furthered by their success, constitution-drafting became, for all intents and purposes, a necessity whenever political order was meant to undergo considerable change. It resulted in several 'waves' of constitutionalisation over the last centuries, making it the predominant model of political order at least in Europe.

These ideas were closely connected with theories about legitimate resistance against established governments.[85] The people's prerogative to disobey a government acting illegitimately was not a necessary incident of theories such as popular sovereignty or of the social contract. According to Hobbes, for example, sovereign power is permanently alienated from the people and is identical with (absolute) governmental power.[86] The social contract is thus

[82] See Thomas Paine, *Rights of Man* pt II ch 4 (first published 1791-92, Ronald Herder ed, JM Dent 1993) 125ff. Rousseau already referred to 'political' or 'fundamental laws' regulating the relationship between the sovereign and the state in *Social Contract* (n 61) bk II ch 12.

[83] Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (OUP 2010) 55ff.

[84] Additionally, the normative priority of the Constitution was safeguarded by the power of the United States Supreme Court to engage in constitutional review, claimed in *Marbury v Madison*, 5 US 137 (1803).

[85] Raffaele Laudani, *Disobedience in Western Political Thought: A Genealogy* (CUP 2013).

[86] Hobbes (n 40) pt II ch 17; Loughlin, *Foundations* (n 7) 189.

irreversible and creates an unchallengeable sovereign.[87] The notion of legitimate resistance to government, on the other hand, requires a conceptual distinction between government and sovereignty. Locke, for example, understood sovereign power to remain with the people, who merely delegate political authority but reserve the right to reclaim it if a government becomes corrupted.[88] Similarly, Rousseau makes it clear that sovereignty is 'inalienable' and remains at all times with the people.[89] This distinction was later elaborated by Emmanuel Joseph Sieyès, who distinguished between constituent power (*pouvoir constituent*) residing with the people and constituted power (*pouvoir constitute*) exercised by government.[90]

Positive Law and the Activation of Legal Discourse

The changes which led to a re-conceptualisation of political order also impacted on the conception of law. This resulted in law's positivisation and in what can be called an 'activation' of law and legal discourse.

Positivisation of Law

The decline of religion as a source of political authority meant that 'divine law' ceased, without more, to be automatically binding. Kings were now able to promulgate rules that were the products of political will as opposed to simply emulations of divine law or a codification of existing customary rules. This separation of political will from divine revelation could already be seen in the writings of Marsilius of Padua, who distinguished 'law' (man-made commands) from 'justice' (according to divine law).[91] By the Late Middle Ages, promulgated law had generally become recognised as a source of law distinct from theological rules.[92] The social contract theorists, for example, advocated a positive

[87] Hobbes (n 40) pt II ch 18. Though he acknowledges an individual and inalienable right to self-defence, ibid ch 21 (pp 268ff). See also Susanne Sreedhar, *Hobbes on Resistance: Defying the Leviathan* (CUP 2010) ch 1.
[88] Locke, *Second Treatise* (n 51) ch 11, 19.
[89] Rousseau, *Social Contract* (n 61) bk I ch 6; bk II ch 1.
[90] Emmanuel Joseph Sieyes, *What is the Third Estate?* (first published 1789, Samuel Finer tr, Pall Mall 1963) ch 5. See also Loughlin, *Idea* (n 31) ch 6.
[91] McClelland (n 3) 141.
[92] See eg Bodin (n 38) bk I ch 8 pointing out that 'laws of a sovereign prince, even when founded on truth and right reason, proceed simply from his own free will.'

conception of law, promulgated either by the populace[93] or the government.[94] While ideas of divine law survived in the form of natural law theories,[95] such laws were no longer considered to impede the validity of temporal laws. The case for the normative priority of promulgated law was especially strong once these laws were seen as expressions of popular sovereignty; a sentiment captured in Rousseau's assertion that 'the general will is always rightful and always tends to the public good.'[96]

With positivisation, law became employable as an instrument of government.[97] The ability to proclaim law that was independent from both external authority and material constraints marked an important step towards the autonomisation of the political. Michael Oakeshott therefore considers both the supremacy of positive law and its employment as an element of government to be essential characteristics of the modern European state.[98] Simultaneously, since the legitimacy of positive law was no longer assessed by reference to its conformity with an external standard provided by divine or natural law, but by its quality as an expression of political will,[99] rules of competence and procedure gained crucial importance.[100]

Activation of Legal Discourse

As discussed above, legal terminology had played a role in political discourse since the High Middle Ages. Hence, political changes were closely linked with developments in legal scholarship, which was deployed to provide theoretical justification for conflicting claims to power. Jurisprudence went from being a passive and descriptive discipline to one which was employed instrumentally to

93 Rousseau, *Social Contract* (n 61) bk II ch 12 referring to 'civil' and 'criminal laws'.
94 Hobbes, *Leviathan* (n 40) ch XVIII and Locke, *Second Treatise* (n 51) ch 11.
95 Rainer Grote, 'Rule of Law, Rechtsstaat and "Etat de droit"' in C Starck (ed), *Constitutionalism, Universalism and Democracy: A Comparative Analysis* (Nomos 1999) 272; McClelland (n 3) 177. See also Bodin (n 38) bk I ch 8 defining 'sovereignty as a power to override positive law … [but not to] set aside divine and natural law'; Locke, *Second Treatise* (n 51) ch 11.
96 Rousseau, *Social Contract* (n 61) bk II ch 3.
97 Bernard Durand, 'Royal Power and its Legal Instruments in France 1500–1800' in Antonio Padoa-Schioppa (ed), *Legislation and Justice* (Claredon Press 1997) 291, 293.
98 'The Character of a Modern European State' in Michael Oakeshott and Luke O'Sullivan (eds), *Lectures in the History of Political Thought* (Imprint Academic 2006) 366.
99 White (n 2) 229.
100 McClelland (n 3) 176f. See eg the emphasis put on process by Locke, *Second Treatise* (n 51) ch 12.

buttress assertions of political authority. In doing so, legal scholarship would initially still draw on customary and inherited sources and not tamper with the overall premise of divine authorisation. For instance, during conflicts in the fourteenth century between the Empire and Northern Italian cities, the *Codex Iuris Civilis* was relied on by the Emperor's jurists to justify imperial supremacy over the papacy. [101] At the same time, 'post-Glossators' challenged the literal interpretation and intellectual authority of the *Codex Iuris Civilis*[102] and clerical scholars invoked customary authorities to oppose royal claims to absolute power.[103]

As the importance of religion and customary law faded and the authority of positive law became acknowledged, political and legal scholarship adopted a truly prescriptive role, making claims for political order based on a priori reasoning. Accordingly, discussions now turned towards questions of governmental structure, revolving around (*inter alia*) the merits and detriments of elective and hereditary monarchy,[104] limited and unlimited government and democratisation.

III. MODERN CONSTRUCTIVISM AND ITS CRITIQUE

As can be seen, the evolution of political theory from the medieval period through to modernity comprised a gradual process of secularisation, positivisation, abstraction, and legalisation. Initially, the decline of religious authority led to political order becoming perceived as a temporal as opposed to transcendental matter, detached from theological prescriptions and conceptualised in the institution of a sovereign state. Secularised rationalism and ideas of popular sovereignty – both of which were encapsulated in the concept of a social contract – led to a complete secularisation of political thought. Hence, by the eighteenth century religion was no longer a structuring force for political order.[105] This allowed for a positive conception of the political. Due to the normative priority ascribed to rules which were deliberately drafted as opposed to gleaned from custom and tradition, formal 'constitutional law' (at least on the continent) was regarded as the essential constructive element of political order and a means to 'elevate the [political] consensus … above the

[101] Loughlin, *Idea* (n 31) 75.
[102] Loughlin, *Foundations* (n 7) 52.
[103] Greenleaf (n 50) 643.
[104] ibid 188.
[105] Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion* (first published 1985, Oscar Burge tr, Princeton UP 1997) 164.

fleetingness of the moment'.[106] This concurred with a general trend towards positivism in European philosophy,[107] which gave normative priority to rational deliberation over tradition and to deductive over inductive reasoning. This normative priority also found expression in an increased trust in positive law as a constructive force for society. Not only were ideas of political order expressed in terms of formal constitutional law: under a constructivist influence and equipped with enhanced rulemaking capacities, modern European states engaged in projects of comprehensive legal codification aimed at governing ever more aspects of their citizens' lives.[108]

Four Tenets of Legalised Political Constructivism

The trajectory of Western conceptions of political order has culminated in a contemporary political philosophy which exhibits four main characteristics. Firstly, it is understood that political associations are founded on a rational choice to protect and enhance individual and collective welfare. Secondly, political authority is derived from the people (that is, through constituent power) and delegated from them to an instituted government. Thirdly, the emanations of government – its bureaucracy and institutions – are understood to be the product of deliberate design by or on behalf of the people. Lastly, positive (constitutional) law is employed as the primary means to create the political order and to regulate social affairs. Combined, these traits form an understanding of political power which I term Legalised Political Constructivism.

Criticism of Legalised Political Constructivism

[106] Dieter Grimm, 'Can the "Post-National Constellation" be Re-Constitutionalized' (2004) *TransState Working Papers No. 2*, 6 <https://www.econstor.eu/bitstream/10419/28283/1/511124929.PDF> accessed 2 March 2017.

[107] A trend which Friedrich Hayek labelled 'Cartesian Constructivism', see 'Rules and Order', vol I of his *Law, Legislation and Liberty* (Routledge 2013) ch 1 (pp 10f).

[108] See e.g. (anecdotally) the stipulations in pt II ss 2, §§ 67, 68 of the 1794 *General State Laws for the Prussian States* regulating a mother' obligation to breastfeed, reprinted in Hermann Rehbein and Otto Reincke (eds), *Allgemeines Landrecht für die Preussischen Staaten* (5th edn, Berlin 1894).

While Legalised Political Constructivism is today widely endorsed, its four tenets do not reflect one coherent theory. For one thing, they are a mix of both normative and descriptive features. This is unsurprising, given that the tenets are the result of multiple philosophical and jurisprudential 'projects' which may or may not tessellate. For another, since most of these projects were aimed at providing theories on how political order and authority can be legitimised, they cannot be expected to have exhaustive explanatory value. Disciplines such as sociology, political science and social psychology, whose focus is the empirical study of human behaviour, are more suited to explain political developments.

Consequently, the tenets of Legalised Political Constructivism have been criticised on the ground that they fail to adequately explain actual political behaviour.[109] In particular, the notion that political association is an act of reason, an idea which each of the tenets presupposes, was challenged by David Hume in the eighteenth century. Hume, an empiricist, dismissed the ideas of divine creation and a social contract, doubting the latter's explanatory value due to a lack of empirical substantiation.[110] Since apolitical 'states of nature', from which people consciously proceed to establish polities, have existed (if at all) since prehistoric times, Hume considers the concept irrelevant for the study of modern societies. Similarly, Immanuel Kant conceived of the social contract as a mere hypothetical construct of reason.[111] As opposed to the contractualists, Hume considered self-interest to be a mere 'secondary … principle of government',[112] holding that political power could never rest entirely on consent.[113] In fact, modern social sciences have shown that human beings are naturally sociable beings who band together not in a deliberate act of pure reason but more or less impulsively.[114] Hume's scepticism about human rationality also leads him to question the assumption that the structure and institutions of government are completely open to deliberate design. He adopts instead the view that government structures evolve more or less naturally, in an

[109] This is the critique that I will focus on. On challenges to the concept of sovereignty and esp Carl Schmitt's reworking of the concept see eg Lars Vinx, in David Dyzenhaus and Thomas Poole (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (CUP 2015) ch 5.

[110] David Hume, 'Of the Original Contract' in *Essays: Moral, Political and Literary* (first published 1777, Eugene Miller ed, Liberty Fund 1994) esp. 468.

[111] Kant, *Theory and Praxis* (n 71) pt II (p 79).

[112] David Hume, 'Of the First Principles of Government' (n 110) 34.

[113] David Hume, 'Of the Original Contract' (n 110) 474.

[114] See Francis Fukuyama, *The Origins of Political Order* (Profile Books, 2012) 24ff.

iterative process, over time, which leads him to once again assign normative value to evolved structures of government.[115]

The most comprehensive critique of modern positivism, however, was formulated by Friedrich Hayek, based on the behavioural insight that human rationality is limited and that people rely instead on cultural rules of conduct.[116] In accordance with his general distinction between spontaneous (*cosmos*) and made order (*taxis*),[117] he develops a conception of law and political order in which human behaviour is not predominantly guided by positive norms ('legislation', *thesis*) but instead by evolved cultural rules ('law', *nomos*).[118] As such, the potential for positive constitution-making is limited, since structural constraints on governmental power are ineffective unless they are backed by cultural rules.[119] At best, formal constitutional laws describe a 'superstructure' erected over an already existing legal system.[120] Like Hume, Hayek's critique gives primacy to evolved over positive rules.[121] While the latter may interact with evolved rules,[122] culturally evolved norms ultimately determine the contours of political order.[123]

CONCLUSION: CONSTRUCTIVISM CHALLENGED?

Starting from a medieval conception of divine prescription, the perception of political order has undergone a process of secularisation, positivisation, abstraction, and legalisation. In modernity, political order is conceived as a positive and legalised concept, detached from metaphysical influence and embodied in the institution of the state.

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115 'Let us cherish and improve our ancient government as much as possible, without encouraging a passion for such dangerous novelties.' Hume, 'Of the First Principles of Government' (n 112) 36.

116 See Hayek, 'Rules and Order' (n 107) ch 1 (pp 10f).

117 ibid ch 2 (pp 34ff).

118 ibid ch 1 (pp 12, 18ff). Hence his general criticism of legal positivism: 'Law is older than legislation', ibid ch 4 (p 69).

119 Scott Boykin, 'Hayek on Spontaneous Order and Constitutional Design' (2010) 15 *The Independent Review* 19, 20. Hayek's distinction between nomos and thesis resembles that of Carl Schmitt's between a material constitution and formal constitutional laws: Schmitt, *Constitutional Theory* (n 72) ss 1–2.

120 Hayek, 'Rules and Order' (n 107) ch 6 (pp 127ff).

121 Hayek, 'The Political Order of a Free People', vol III of his *Law, Legislation and Liberty* (n 107) ch 17 (pp 441ff). On Hayek's Model Constitution see Boykin (n 119) 22ff.

122 Hayek (n 121) ch 17 (pp 441ff).

123 Boykin (n 119) 19.

This abstraction, however, has led to a partial alienation of the political from the social. Since many of the assumptions underlying modern political thought were originally aimed at providing normative foundations for actual political events, they suffer from a moralistic fallacy: they purport to be descriptive when they are in fact normative. As such, they cannot adequately explain actual political behaviour. The critique offered by Hume and Hayek suggests that cultural rules have a profound impact on political behaviour and order. By way of example, the relevance of cultural codes of behaviour might go some way towards explaining the problems faced by projects which aim to promote the 'rule of law' by emulating Western institutional structures.[124] The current authoritarian 'backlash' witnessed in some Central and Eastern European Countries[125] further shows the limits of formal (constitutional) law for structuring political and social processes. While these insights are not overly surprising, they may – as it is most clearly expressed by Hayek – impact on existing assumptions about the relationship between positive law and political order. This is also true if one does not in reverse fall for a naturalistic fallacy by elevating actual political behaviour to a normative standard.

Such tensions between established normative assumptions and modern empirical insights, however, are not unique to political philosophy. Similar challenges are faced by normative economics, which is to a great extent equally based on rationalist assumptions.[126] At times, scholars' attempts to construct governmental systems without paying due attention to existing social structures risks overlooking what Karl Polanyi describes, in an economic context, as 'embeddedness'. This is the notion that conventional economic activity is secondary to, and embedded within the confines of, existing social behaviour.[127] In the same way, in the political sphere, normative conceptions of political order may be subsumed by social codes of behaviour. When attempting to determine the role that positive law can (and should) play as a constructive element in politics and society, we might therefore be encouraged to look 'over the rim of the tea cup' and engage in an exchange with other disciplines.

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[124] Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace 2006).

[125] Jacques Rupnik, 'From Democracy Fatique to Populist Backlash' (2007) 18 *Journal of Democracy* 17; Ivan Krastev, 'The Strange Death of the Liberal Consensus' (2007) 18 *Journal of Democracy* 56.

[126] Ben McQuillin and Robert Sugden, 'Reconciling Normative and Behavioural Economics: The Problems to be Solved (2012) 38 *Social Choice and Welfare* 553.

[127] Karl Polanyi, *The Great Transformation* (Gower Beacon Press 1957).

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