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## Hobbes, civil law, liberty and the *Elements of Law*

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When he gave his first political work the title *The Elements of Law Natural and Politic*, Hobbes signalled an agenda to revise and incorporate continental Roman and Natural Law traditions for use in Great Britain, and from first to last he remained faithful to this agenda, which it took his entire corpus to complete. The success of his project is registered in the impact Hobbes had upon the continental legal system in turn, specific aspects of his theory, as for instance the right to punish, entering the European civil code through Pufendorf, and remaining to this day. This is a topic of considerable importance at a time at which the UK is considering scrapping the European Union, with all the attendant legal ramifications that entails. But strangely, despite some acknowledgement of Hobbes's contribution to European civil law, and specifically the German civil code, the larger legal context for his thought has not thus far been systematically addressed.

**Keywords:** Hobbes; civil law; common law; jurisprudence; artificial reason; natural law; sovereignty

### The common law, civil law context

The seventeenth century was the period in which common law, which since the Middle Ages had coexisted with civil law and the canon law of the Ecclesiastical courts, triumphed to become the definitive law of England. But it was not without an immense struggle, and indeed a civil war, which parliament, in its bid to curb royal power by upholding the common law principle of the right of judges to interpret fundamental law, eventually won. Nor was it foreordained. Continental Roman and civil law had already swept away indigenous, and particularly Germanic, law in most of Europe (Gilmore 1941); while English common law, as the monopoly of professional lawyers trained in the voluminous texts of late mediaeval commentary, had come under increasing criticism for its anachronism and unwieldiness, as well as for the judicial delays to which it gave rise.<sup>1</sup> So much so, that William Cavendish, first earl of Newcastle, dedicatee of Hobbes's *Elements of Law*, in his *Advice to Charles II* (Slaughter 1984), saw it as a major cause of the English civil war:

After the reformation, & Disolution of the Abyes, then the Lawe crepte upp, & att laste grew to bee so numerous, And to such a vaste Body, as itt swelde to bee

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to bigg, for the kindome, & hath been no smale meanes to fomente & Continue this late & unfortunate Rebellion.<sup>2</sup>

When the subject of Hobbes on law arises it is usually in the context of his *Dialogue between a Philosopher and a Student, of the Common Laws of England*, written in 1666, but unpublished until 1681, a late work that belongs with *Behemoth* and Hobbes's various treatments of the laws of heresy, his great preoccupation of the early 1660s when he was under threat of indictment by parliament. But *Behemoth* was also a work about the causes of the civil war, and Hobbes gives lawyers and parliamentarians almost equal treatment with preachers, among its instigators. Hobbes, like Bacon, had law reform on his agenda.

It is my thesis then that the common law/ civil law issue is far more central to Hobbes's project than generally acknowledged. We are cued to the centrality of law to Hobbes's entire corpus in the first instance by his titles. His first political treatise, the *Elements of Law Natural and Politic*, commissioned by Cavendish, Earl of Newcastle, to whom it is dedicated, to address the issues of the Short Parliament of 1640, echoes the title of Sir Francis Bacon's *Elements of the Common Lawes of England*, composed in the mid-1590s and first printed in 1630. Bacon's maxims are really meta-legal, 'generalisations about the law – "laws of laws" –' designed for law reform; and commentators are divided about whether this was a project that appealed to Hobbes or not, (Campbell 1958, p. 27, Cromartie 2005, p. xix). It is, nevertheless, no accident that Bacon, Lord Chancellor (1618–1621), who had also studied civil law, and for whom Hobbes briefly served as an amanuensis and possibly translator, should have been among the first to protest the anachronisms of common law; or that Hobbes's biographer, John Aubrey, should have claimed to have given him a copy of Bacon's *De legibus* (as it was known) as a prompt to elicit from him the treatise now known as the *Dialogue*, although referred to by Hobbes as his *De Legibus*.<sup>3</sup>

The title of the *Dialogue* (which may not have been chosen by Hobbes in the first instance) echoes in turn the work of the great Tudor common lawyer, Christopher St German, *A Dialogue betwixt a Doctor of Divinity and a Student of the Common Laws of England* (first Latin edition 1528), with which Hobbes was clearly familiar, and from whom in the *Dialogue* he quotes. St German set the agenda by declaring that the term common law had three different uses, each of which Hobbes addresses: (1) to distinguish 'the lawe of this realme of Englande dysceyeured [dissevered?] from all other lawes', i.e. to distinguish indigenous law from Roman law; (2) to refer to 'the kynges courtes of his benche or of the common place', i.e. to distinguish the work of the two great royal courts, the King's Bench and Court of Common Pleas, from that of other jurisdictions; and (3) to demarcate 'such thynges as were law before any statute made in that point that is in questyon', i.e. to distinguish unwritten law

from statutory law (Cromartie 2005, p. xxvi, citing St German, *Doctor and Student*, p. 180).

There was nothing in these claims that made common law necessarily hostage to parliament. Quite the contrary, what made common law sacrosanct in the eyes of its defenders was the fact that it had special status as the embodiment of reason that distinguished it from statute, or the laws that parliament might pass. And here Bacon and Hobbes were also in agreement, Bacon declaring ‘common law is common reason’<sup>4</sup>; and Hobbes conceding ‘that Reason is the life of the Law, nay the Common Law itself is nothing else but Reason’; and again that ‘Equity is a certain perfect reason, that interpreteth and amendeth the Law written, itself being unwritten’ (Hobbes *Dialogue*, 2/8, Campbell 1958, p. 30). As we shall see however, Hobbes only maintains this on a special reading of reason, and how laws of reason are generated.

The issue on which the case for common law was being debated in the seventeenth century was less the importance of precedent, or *stare decisis*, defended on the grounds that the common law embodied common wisdom, the position of earlier advocates like William Fleetwood (c. 1525–1594), Edmund Plowden (1518–1585) and John Doddridge (d. 1626), for which most common lawyers now made only moderate claims; but rather the principle that it embodied ‘artificial reason’. And here artificial had a special sense, as the product of an *artifex* or artificer, that is to say, the common law as a craft or the monopoly of professional lawyers belonging to a guild. Asserted already by Sir John Fortescue (c. 1394 – c. 1480), Chief Justice of the King’s Bench, in *De Laudibus Legum Angliae* (1543), the claim to ‘artificial reason’ was famously stated by Sir Edward Coke in the *Case of Prohibitions* (1607), in a way that clearly differentiates it from the old view of the common law as the embodiment of common wisdom:

causes which concern the life, or inheritance, or goods, or fortunes of [the king’s] subjects, are not to be decided by natural reason, but by the artificial reason and judgement of the law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it.<sup>5</sup>

Coke, long taken to be Hobbes’s nemesis in the *Dialogue*, staked out extreme ground. Borrowing Cicero’s phrase, he referred to common law as ‘the perfection of reason “(*ratio perfecta*) ... . to be understood as an artificial perfection of Reason gotten by long studie and experience ... for, *Nemo nascitur artifex* [no one is born a craftsman]”’.<sup>6</sup> Hobbes organised the *Dialogue* around Coke’s *Institutes of the Lawes of England*, written between 1628 and 1644 and widely recognised as a foundational document of the common law to this day.<sup>7</sup> Addressing remarks to all four parts, he paid particular attention to the claims of the first part, that ‘common law is “an artificial perfection of reason”’; and ‘that Equity is a certain perfect Reason that interpreteth and amendeth the Law

written' (Coke, *First Institute*, p. 24b, Cromartie 2005, p. xxiii). Hobbes reproduces Coke's argument:

This [reason] is to be understood of an artificial perfection of Reason gotten by long Study, Observation and Experience, and not of every Mans natural Reason; for *Nemo nascitur Artifex*. This Legal Reason is *summa Ratio*; and therefore if all the Reason that is dispersed into so many several heads were united into one, yet could he not make such a Law as the Law of *England*, is because by many successions of Ages it hath been fined and refined by an infinite number of Grave and Learned Men. (Hobbes *Dialogue*, 3–4/9, Cromartie 2005, p. xxxii)

Here Hobbes pushed Coke even further than he wanted to go, claiming on his behalf not just regal reason, but *law-making* powers, for common lawyers. But in a sense he was not wrong, for, by throwing in Equity, as the 'perfect [i.e. artificial] reason applied to statutory interpretation' (i.e. 'that interpreteth and amendeth the Law written' (Coke, *First Institute*, p. 24b; Cromartie 2005, p. xxiii), Coke was doing just that. To which Hobbes responded: first, 'It is not Wisdom, but Authority that makes a law'; and second, 'the laws of England have been made by the Kings of *England*, consulting with the Nobility and Commons in Parliament, of which not one of twenty was a Learned Lawyer' (Hobbes *Dialogue*, 4–5/10).

Over and over again we hear from the advocates of common law the phrase 'artificial reason', meaning that it is the monopoly of professional lawyers, or those belonging to the guild system of the Inns of Court. It may also find its echo in Hobbes's innumerable references, possibly satirical, in the Introduction to *Leviathan* to the state as an 'artificial animal', *civitas* as an 'artificial man', sovereignty as an 'artificial soul', and 'equity and laws an artificial reason and will' (*Lev. Intro*, §1, ix/3). Hobbes himself would have heard 'artificial reason' as the mantra of common lawyers not only from Coke, but also from his imitators, among them none more prominent than Virginia Company Treasurer, Edwin Sandys, whom he had the opportunity to hear in some of the 37 meetings of the Company's courts that he attended. Noel Malcolm, in his essay on 'Hobbes, Sandys and the Virginia Company', comments perspicuously that Sandys's view of Common law, as 'an historically-formed index of [ethical] judgement, which was itself derivable directly from "reason", or intuitions of Natural Law ... is the view taken by the "Lawyer" in his defence of Coke in Hobbes' *Dialogue of the Common Laws of England*, and ... the main focus of Hobbes' attack' (Malcolm 1981, pp. 302–303, citing Hobbes's *Dialogue*, 27):

- Philosopher: It followeth then that which you call the Common-Law, Distinct from Statute-Law, is nothing else but the Law of God.  
 Lawyer: In some sense it is, but it is not Gospel, but Natural Reason, and Natural Equity.

Philosopher: Would you have every Man to every other Man alledge for Law his own particular Reason? (*Dialogue* 2005, p. 27/25–6)

Malcolm shows Sandys to be an outspoken ‘rights’ theorist, defender of ‘the natural right to property’, who consorted with Sir Edward Coke, believing both that common law was ‘derivable directly from “reason” or intuitions of Natural Law’ and that ‘individuals (and hence a fortiori the whole body of citizens) were competent to condemn actions of government as contrary to their natural rights’ (Malcolm 1981, p. 302). In the Parliament of 1621, Malcolm claims, ‘we find Sandys working hand-in-hand with Coke’. Noting the copious source of evidence in the records of the parliament of 1621, he qualifies his remark about Coke and Sandys being ‘hand-in-hand’, by observing: ‘but whilst Coke criticised actions on the grounds that they were unsupported by or contrary to precedent, Sandys framed his criticisms in terms of Natural Law’ (Malcolm 1981, p. 301, citing *Commons debates 1621*). Indeed, in the parliament of 1621, Virginia Company members touched on fundamental questions of jurisprudence, foreshadowing many of the issues of the Long Parliament concerning subsidies, property rights, and limits to the royal prerogative that brought on the constitutional crisis and ultimately, civil war, often in the context of Company business. It is my contention that much of what Hobbes has to say about subordinate ‘political systems’ and corporations, of which the Virginia Company was one, in *Leviathan*, chapters xxii, xxiv, and xxix, and particularly chapter xxiv ‘Of the Nutrition and Procreation of a Commonwealth’, may well have drawn on his Virginia Company experience (Springborg 2015).

The parliament of 1621 was not yet ‘an assertive institution fighting its way towards sovereignty, but rather a site where local interests were negotiated against each other and against the Crown’ (Baldwin 2004, p. 625). It is an indicator of the fluidity of party politics at this time that in this parliament Hobbes’s patron Cavendish, second earl of Devonshire, should be found among the Sandys’ party; while Hobbes is recorded on at least one occasion voting with them in the Virginia Company courts.<sup>8</sup> Sandys was an outspoken critic of the king and James referred to him as one of the ‘few giddie Headis’<sup>9</sup> responsible for the his voicing a ‘Mislike of the Proceedings of the House in general’.<sup>10</sup> But Sandys was not Coke, who argued as a common lawyer, from precedent. Sandys, in his defence of parliamentary right, rather ‘framed his criticisms in terms of Natural Law’ (Malcolm 1981, p. 301), a jurisprudence based on Roman Law of the sort that Hobbes was precisely reaching for to argue to the contrary, in support of the king’s case. As the legal historian, Sir Frederick Pollock has pointed out ‘the Law of Nature, by that name, seldom appeared in the literature of the common law’, which he ‘attributes to the general unpopularity of ecclesiastical courts and jurisprudence in England’, (Pollock 1922, p. 53, Campbell 1958, p. 34). And even when ‘the Law of Nature’, was once again invoked after the dissolution of the Ecclesiastical courts, it was in an emasculated sense, as ‘an innocuous expression which could be

employed to adorn legal argument' (Pollock 1922, pp. 57–58, Campbell 1958, p. 34).

So much for the common lawyers. Hobbes was not deterred from reviving the Roman Law distinction between natural law (*ius naturale*) and the law of nations (*ius gentium*) by the mere fact that it was incorporated into canon law promulgated by the ecclesiastical courts, which in any event he admitted as law as long as it was sanctioned by the sovereign (*Dialogue* 2005, p. 18/19; *Lev.*, xlv, §8, 336/415). In staking out the grand claim that 'The law of nature and the civil law contain each other, and are of equal extent' (*Lev.*, xxvi, §8, 138/174), Hobbes simply bypassed the common lawyers, claiming that *Leviathan* was about 'civil law in general ... . My design being not to show what is law here and there, but what is law [as such]' (*Lev.*, xxvi, §1, 137/172–3). But in declaring that 'Unwritten Laws are all of them Laws of Nature' (*Lev.*, xxvi, §12, 140/177, marginal note), Hobbes was able to fold common law into his system with a clever argument that also accounted for its prolix nature and the unreliability of precedent. 'All laws, written and unwritten, have need of interpretation' (*Lev.*, xxvi, §21, 143/180), he declared, but the impartiality of judges cannot be presumed, and for that reason the reliability of 'artificial reason' is put in question:

The unwritten law of nature, though it be easy to such as without partiality and passion make use of their natural reason, ... yet considering there be very few, perhaps none, that in some cases are not blinded by self love or some other passion, it is now become of all laws the most obscure, and has consequently the greatest need of able interpreters. (*Lev.*, xxvi, §21, 143/180)

Human frailty is such that it rules out *stare decisis* or the law of precedent, because 'there is no judge, subordinate nor sovereign, but may err in a judgment of equity', and so, '[t]he Sentence of a Judge does not bind him, or another Judge to give like Sentence in like Cases ever after' (*Lev.*, xxvi, §24, 144/181). Hobbes's scepticism echoes Bacon's deflationary argument that equity was no more than the jurisprudence of the Court of Chancery (Campbell 1958, p. 39n.), and Selden's cynicism that the jurisprudence of Court of Chancery was nothing more than the 'Chancellor's conscience':

Tis all one as if they should make ye Standard for ye measure wee call A foot, to be ye Chancellors foot; what an uncertain measure would this be; One Chancellor ha's a long foot another A short foot a third an indifferent foot; tis ye same thing in ye chancellors Conscience. (Selden [1689] 1927, pp. xi–xii, 177).<sup>11</sup>

How 'the law of nature and civil law contain each other' is disarmingly simple, and Hobbes argues it along lines that are analogous to the Roman Law *ius naturale*, *ius gentium* distinction, or the distinction between fundamental legal norms and positive law. The law of nature and civil law are mutually entailed because of the very nature of the laws of nature:

A LAW OF NATURE (*lex naturalis*), is a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life or taketh away the means of preserving the same. (*Lev.*, xiv, §2, 64/79)

It follows that the content of the laws of nature must specify these terms: ‘The Fundamental Law of Nature: to seek peace’ (*Lev.*, xiv, §4, 64/80), entails the ‘second Law of Nature’, which is to ‘Contract in way of Peace’ (*Lev.*, xiv, §5, 64/80), and all further laws of nature are stipulated by this contract. ‘The Third Law of Nature, Justice’, commands simply ‘that men perform their covenants made’ (*Lev.*, xv, §1, 72/89). And, Hobbes insists, ‘in this law of nature consisteth the fountain and original of JUSTICE. For where no covenant hath preceded, there hath no right been transferred, and every man has right to everything; and consequently, no action can be unjust’ (*Lev.*, xv, §2, 72/89). And since the contract can only be guaranteed by a sovereign enforcer, natural laws are superseded by positive, or civil laws, as the sovereign enacts them. In a section of *Leviathan*, chapter xxvi, entitled ‘Some foolish opinions of Lawyers concerning the making of Laws’, Hobbes chides them:

Seeing then all laws, written and unwritten, have the authority and force from the will of the commonwealth, that is to say, from the will of the representative (which in a monarchy is the monarch, and in other commonwealths the sovereign assembly), a man may wonder from whence proceed such opinions as are found in the books of lawyers of eminence in several commonwealths, directly or by consequence making the legislative power depend on private men or subordinate judges. As for example, *that the common law hath no controller but the parliament ...* . [But] the controller of laws is not *parliamentum*, but *rex in parlamento*. (*Lev.*, xxvi, §10, 139/176)

Pointing the finger at Coke, Hobbes goes on to argue, ‘it is not that *juris prudentia*, or wisdom of subordinate judges, but the reason of this our artificial man, the commonwealth, and his command that maketh law’ (*Lev.*, xxvi, §11, 140/176). And citing Coke upon Littleton, Lib. 2, Ch. 6, fol. 97b, Hobbes drives the point home:

nor yet (as Sir Edward Coke makes it an ‘artificial perfection of reason gotten by long study, observation, and experience’ (as his was). For it is possible long study may increase, and confirm erroneous sentences, and where men build on false grounds, the more they build the greater the ruin. (*Lev.*, xxvi, §11, 140/176)

### **Problematising the *Elements of Law***

Whether it is a nod to Bacon or not, it is by no means accidental that Hobbes’s first political work should have been entitled *Elements of Law*, indicating that questions of law and jurisprudence were from the beginning central to his thought. This work has recently seen renewed interest as the first of the three successive statements of his system but standing in a problematic relation to



the other two, *De cive* and *Leviathan*. Baumgold (2004) has raised again the question whether Hobbes might not have had a substantial text already prepared when the Earl of Newcastle called upon him to produce a brief in support of undivided sovereignty, the matter under debate in the Short Parliament of 1640, and the subject of the policy document which we now know as the *Elements*. To answer this question she has undertaken an analysis of the text in terms of those parts that appear more complete, and might well have been written in advance, and those that Hobbes seems to have prepared in the heat of the moment. The unevenness of Hobbes's text, Baumgold (2004) argues, is due not only to its being a *pièce d'occasion*, but also to Hobbes's method of serial composition and his tendency to lay out a skeleton argument (in the case of the *Elements*, indicated by headings in bold) and then elaborate it by inserting material, often in the form of notes made while walking. Curiously, it is the sections of the text on undivided sovereignty, the very topic on which he was called upon to write, that in Baumgold's view are the least thought through, while the more fundamental elements of his theory, the sections 'Concerning men as persons natural' and 'Concerning men as a body politic', on the power of masters and fathers, and of the 'patrimonial kingdom', are more coherent and more complete. Hobbes, in his hurry, almost does not get to his subject, the *Elements of Law*, and then has little to say about it, she concludes.

Baumgold's is a fertile approach and by introducing 'the history of the book', it is indispensable. It brings to the analysis of Hobbes's substantive arguments critical contextual considerations about his method and manner of composition as sources of ambiguity and inconsistency. It advances the early work of Karl Schuhmann, the great Hobbes scholar who, having turned from the critical editions of Husserl, applied his insights to working out how Hobbes cobbled together manuscripts to produce texts that would impress the philosophers on the Continent, Mersenne and Gassendi, into whose company Hobbes in effect successfully insinuated himself. Noel Malcolm, often in response to Schuhmann, has greatly advanced the 'history of the book' approach (Malcolm 2012, c.f. Springborg review 2014); and so has Jeffrey Collins (2005). But Baumgold is the first to come up with a specific set of proposals about Hobbes's manner of composition and to test them against the texts themselves, first with the *Elements*, and now more recently with all three works (Baumgold 2004, 2008). The method is not easy to apply, however, due to the paucity of evidence. Hobbes destroyed most of his correspondence, and many of his manuscripts have still not been given the careful scrutiny they require. There is not yet an intellectual biography of Hobbes or even a definitive account of his intellectual development. Nor are there critical editions of major works that would set out their textual basis and the relation between them. But even granted these deficiencies, and accepting Baumgold's methodology, I think it is possible to show that there are factors over and above his writing technique that generate inconsistency in Hobbes's thought.

Hobbes is a deeply paradoxical thinker, due in part to the fact that he was fighting battles on all fronts. He both belonged to circles in which the 'new science' was being propagated, on the basis of a new Epicurean metaphysics and atomistic physics, but as a man of action and secretary to a powerful baronial family, he was engaged in the immediate political debates of his day. At the level of metaphysics, his first philosophy, Hobbes was committed to a form of determinism that put him at odds with the prevailing Aristotelianism but, at the same time, did not allow a lot of scope in resolving most of the immediate questions with which he was required to deal (Springborg 2009, 2010). Furthermore, Hobbes, who was an Englishman and nominally an Anglican, tended to reject the 'gothic' vernacular in favour of continental Latin traditions of *dominium* and *imperium*.

Consistent with this cosmopolitanism and predilection for empire, I argue, it was to the continental legal, and specifically Roman Law, tradition that Hobbes naturally turned for his theory of sovereignty and political obligation. But the peculiar syncretism of his arguments, both at the metaphysical and political levels, gives a shock to our expectations, sometimes leading to confusion, and the same was true for his contemporaries (see, Parkin 2007). Sometimes this is because Hobbes intends to shock us, but at other times it simply registers the fact that he himself finds this syncretism difficult to manage. There is a certain amount of telling slippage, both in his terminology and his arguments, that leads to further ambiguity and inconsistency. For instance, Hobbes's commitment to Epicurean atomism and determinism leaves little scope for free will, a doctrine to which he is not disposed to be favourable for other, mainly religious or anti-religious, reasons (see, Springborg 2010). In his debate with Bramhall, conducted in 1645, but published only in 1655, he makes this clear. As one who dedicated his life to the rejection of Aristotelian metaphysics and the doctrine of essences, the mainstream metaphysics of Catholic Europe, Hobbes nevertheless allied himself with continental thought on the issues of sovereignty and law.

The antinomies in Hobbes's philosophy caused by his metaphysical commitments, sometimes pushed aside by immediate demands placed upon him by his patrons, may explain why, in Baumgold's view, he seems not to address the specific topic he set himself, the *Elements of Law*. But I suggest rather that Hobbes probably did consider that he had discussed the *Elements of Law*, by letting the title stand in the published version, if it was he who was responsible for the publication, and if not, whoever published it also believed so. Hobbes's treatment of sovereignty and law may appear sketchy, and it is indeed likely that it was at the point of writing less well developed than his metaphysics and physics and even than his psychology. For, the *Elements* sets the frame for a fundamental jurisprudence along Baconian lines, although no work of commentary has so far analysed it in these terms. In retrospect, to quote Hobbes's own words: 'the little treatise in English' that circulated among the gentlemen of the Short Parliament, 'wherein he did set forth and demonstrate, that the

said power and rights were inseparably annexed to the sovereignty' (Hobbes 1840, p. 414), was seen to be the vehicle that first introduced the topic that took the scope of his entire project to treat. Hobbes addresses undivided sovereignty in the *Elements* with a rare acknowledgement to Jean Bodin, as Baumgold and Skinner have noted (Hobbes 1969, II 8.5, Skinner 2008, p. 38); and Bodinian sovereignty is nested in a civil law context. Bodin drops out of the later works, but the civil law context remains.

### Sovereignty and the *Elements of Law*

It is my thesis, then, that Hobbes, who often stepped back from local debate in favour of grand theory, was more committed to the Roman Law and civil law traditions than is usually credited. He formulated a systematic rebuttal of the Greek and Israelite traditions of democratic republicanism in favour of the Roman Law tradition of power (*imperium*) and dominion (*dominium*); and he systematically employed the Latin terminology of *imperium*, in his reference to the state as *civitas*, employing countless examples from historical commentaries on the Roman Republic and Empire, to gain maximum impact in continental Europe where the civil law tradition thrived. Preoccupied with *dominium*, like Machiavelli, Hobbes was an anti-humanist (Skinner 2002, p. 60). He defended absolute monarchy against all forms of constitutionalism, including Bodinian constitutional monarchy, and especially the 'mixarchy of Great Tew', as allowing citizens retain their liberty even as subjects of sovereign power (Tuck 1993, pp. 272, 305, Parkin 2007, pp. 24–25, Skinner 2008, p. 105). He out-Bodins Bodin in his claim to be the first to see the state as a species of corporation, but at the same time disallows Bodin's distinction between 'lawful' and 'lordly' monarchy (Skinner 2008, p. 78) that would permit men to distinguish between lawful government and tyranny.

Bodin's *Republic* was a Roman Law corporation, but he allowed that natural liberty was compatible with absolutism as long as absolutism was consistent with the law, which Hobbes denied (Skinner 2008, pp. 38–39).<sup>12</sup> In so doing, Bodin had targeted Machiavelli, whose *Principe* is a tyrant by another name (Bodin 1576, 2.1, p. 219, Skinner 2008, p. 68, Giorgini 2008). It may also have been Machiavelli whom Hobbes had in mind, but this time with reference to the republican *Discorsi*, when he noted in the *Elements*, that there were political writers who believe 'that there is one government for the good of him that governeth, and another for the good of them that be governed', insolently declaring that only the latter can be termed 'a government of freemen' (Hobbes 1969, 22.1, p. 138, Skinner 2008, p. 68), only to place himself firmly on the side of 'him that governeth' as compared with him that 'be governed'.

Hobbes rejects Bodin's distinction between 'lawful' and 'lordly' monarchy as simply incoherent. If the people are genuinely sovereign 'no command can be a law unto them'; and if that is so: 'How can he or they be said to be

subject to the laws which they may abrogate at their pleasure, or break without fear of punishment?’ (Hobbes 1969, 27.6, p. 172, Skinner 2008, p. 78). In fact, Hobbes declares in the *Elements*, ‘the subjection of those who institute a commonwealth is no less than that of servants’ (Skinner 2008, p. 88) and the subjection of servants is no less than that of slaves. It is a feature of monarchies, not only of tyrannies (*pace* Bodin), that rulers have property in their subjects: ‘Propriety, being derived from the sovereign power, is not to be pretended against the same’ (Hobbes 1969, 24.2, p. 140, Skinner 2008, p. 79). Projects to turn absolute monarchy into constitutional are either demands by subjects ‘to have the sovereignty’, or ‘to have monarchy changed into a democracy’; and Hobbes at this point is among ‘the most intransigent proponents of divine right’ (Hobbes 1969, 27.3, p. 170, Skinner 2008, p. 79).

In the *Elements* Hobbes specifically resorts to Bodin against the constitutionalists of the Tew Circle and their representatives in the Short Parliament (Parkin 2007), who were in favour of the ‘mixed constitution’ of classical republicanism, noting:

If there were a commonwealth, wherein the rights of sovereignty were divided, we must confess with Bodin, Lib II. Chap. I. *De Republica*, that they are not rightly to be called commonwealths, but the corruption of commonwealths. For if one part should have power to make the laws for all, they would by their laws, at their pleasure, forbid others to make peace or war, to levy taxes, or to yield fealty and homage without their leave; and they that had the right to make peace and war, and command the militia ... would forbid the making of other laws, than what themselves liked. (Hobbes 1969, II 8.5; Tuck trans., p. 173)

Hobbes makes the bold boast to be the first to apply Roman corporation theory, based on the union of the represented personified by a representative, to the Commonwealth as a whole, a boast on which he only fully delivers in *Leviathan*:

The error concerning mixed government hath proceeded from want of understanding what is meant by this word *body politic*, and how it signifieth not the concord, but the union of many men. And though in the charters of subordinate corporations, a corporation be declared to be one person in law, yet the same hath not been taken notice of in the body of a commonwealth or city, nor have any of those innumerable writers of politics observed any such union. (Hobbes 1969, II 8.5; Tuck trans., p. 173)

When it comes to *De cive*, written in Latin to address a continental audience that was civil law focussed, Hobbes makes constant resort to Roman Law terminology: *civitas*, *societas civilis*, *persona civilis*, etc.:

A union so made is called a *commonwealth* [*civitas*] or *civil society* [*societas civilis*] and also a *civil person* [*persona civilis*]; for since there is *one will* of all of them, it is to be taken as *one person*; and is to be distinguished and

differentiated by a *unique* name from all particular men, having its own rights and its own property [*res sibi proprietatis*]. Consequently no single citizen nor all together (except him whose will stands for the will of all) are to be *regarded as the commonwealth*. A COMMONWEALTH, then, (to define it) is *one person*, whose *will*, by the agreement of several men, is to be taken as the *will* of them all; so that he may make use of their strength and resources for the common peace and defence. (Hobbes 1998, *De cive*, V.4; see Tuck, trans., p. 174)

Richard Tuck (2006) is right to see elements of radical democratic theory in this, the first theory of the General Will of the early modern era, and certainly the precursor to Rousseau's more famous version. The transition from the state of nature to society takes only one route, by the creation of a people out of a multitude, and the vehicle of that union is popular consent producing a single will out of many. Hobbes stated his position nowhere more clearly than in *De cive* where, addressing Aristotle's argument that in a tyrannical or extreme democracy the people was prince (*princeps populus sit*), whereas in a true commonwealth the king is the people, he insisted:

[M]en do not make a clear enough distinction between a people and a crowd. A people is a single entity, with a single will; you can attribute an act to it. None of this can be said of a crowd. In every commonwealth the People reigns; for even in Monarchies the People exercises power [*imperat*]; for the people wills through the will of one man. But the citizens, i.e. the subjects, are a crowd. In a Democracy and an Aristocracy the citizens are a crowd, but the council is the people; in a Monarchy the subjects are the crowd, and (paradoxically) the King is the people. (Hobbes 1998, *De cive*, XII.8; Tuck trans., p. 183)

As Tuck acutely observes, Hobbes was responding to a line of argument initiated by Bodin against extreme democracy in all its forms, and in particular the Roman form of democracy by plebiscite. Bodin had made a point similar to that of Hobbes in *De cive*, that too many authors confuse the nature of sovereignty with forms of regime (a distinction that arose from a certain reading of Aristotle). The fact that sovereignty originates in the power of the people does not mean, he insisted, that its exercise should be the prerogative of the people. Quite the contrary, once a people is constituted it becomes subject to the union it has contracted to bring into being, that is to say to a single will, exercised by a representative (or council of representatives).

Tuck had already prefigured his argument about Hobbes and popular sovereignty in his book on natural rights (Tuck 1979), when he noted that Hobbes's doctrine, like that of Grotius, and Locke in the *Second Treatise*, on the popular origins of power put them closer to the late scholastics than to the humanists, the latter for the most part servants of absolute princes. But the case of Hobbes, I believe, is argued the wrong way, and Hobbes, the courtier's client, is ultimately closer to the humanists than the second scholastic, to the extent that this comparison holds at all. Tuck is right to claim that Grotius and Locke followed the path of active natural rights theory established by Gerson in Paris

(Tuck 1979, pp. 46–47) that was later to spread to centres of Gersonian nominalism like Tübingen (Tuck 1979, p. 27). Gerson, like Ockham, saw man's *dominium* as an extension of God's, which meant that the freedom of God and the freedom of man were continuous rather than in conflict (Tuck 1979, p. 30). Perhaps this could be construed as the source of Hobbes's 'mortal God'. It was a freedom for which in the case of mortal men there was no possible ontology. But it might characterise the Leviathan, that artificial person who inhabited a timeless zone as sovereign inaugurated in perpetuity and whose immortality, as an institution given life by its incumbents, allowed it to escape the ontological constraints of mortal men, to whom freedom is in Hobbes's view denied. *Ius*, for Gerson, Tuck argues, was dispositional, a *facultas* or power in accordance with right reason, whereas the Romans saw *libertas* conflicting with *ius* (Tuck 1979, p. 25). Hobbes, in his effort to break with scholasticism and as part of his strategy of applying Occam's razor to superfluous entities, tried to avoid ascribing faculties to human beings; but not always successfully.

Liberty is sovereignty's flip side, and it is almost certainly in the context of Roman Law and its reformulation in national civil codes that the question of liberty first comes to Hobbes's attention. Hobbes's theory of liberty in the *Elements* is, I suggest, a highly original, but still recognisable, gloss on civil law, and in particular the development of the theory of sovereignty that dates from the *merum imperium* debate between the Glossators and Postglossators (Gilmore 1941), to which Bodin had so significantly contributed.

### Sovereignty and liberty

It is my general thesis that, just as Hobbes's commentary on Thomas White's *De mundo* was designed to insinuate himself into the company of the French savants as a philosopher, so the point of *De cive*, and Hobbes's translation of the *Elements* into Latin was a bold bid to be the new Bodin with a 'civil science' that is Roman Law, or civil law, based. Hobbes's theory of freedom is much closer to the civil law conception of Justinian's *Digest* than is usually understood. It represents a close reading of the maxim 'liber non servus' which was precisely designed in Roman Law to contest the notion of freedom as 'freedom from domination', the basis of what the Romans termed 'the freedom of the Greeks', or the idea of direct or plebiscitary democracy. Hobbes's ruling dichotomies: protection/obedience, and freedom/slavery are precisely consistent with Roman Law. They simply follow from the principle 'liber non servus' of the Law of the Twelve Tables, which went on to specify all relations between *liberi homini* as governed by a grid of patron/client relations, which at the same time were relations of domination/subordination.

The *Elements of Law*, a work intended to reorient the constitutional debates of the Short Parliament concerning the royal prerogative, was perhaps unsurprisingly also Hobbes's first, and in some ways most startling, work on liberty.

Hobbes treats liberty in the framework in which it is most tractable, and that in which both Bodin and Grotius treat it, namely Roman civil law. Roman Law distinguished between the condition of natural liberty enjoyed by all human beings regardless of status, age, race, or gender, *ius naturale*, compared with their condition under civil law and the regimes of *ius gentium*. The distinction between freemen and slaves is of paramount importance in Roman Law, like the earlier Law of Twelve Tables, designed for a society divided by rigid class orders. Hobbes restates the primary distinction of the *Digest*, ‘*liber non servus*’, as his point of departure, locating the in-principle ‘natural freedom’ of Roman Law, *ius naturale*, in the state of nature, departure from which by way of contract, is necessarily to enter a state of subjection and the regime of national *lex* – in Roman Law, *ius gentium*.

By conquest and by contract, Hobbes declares in the *Elements*, the sovereign acquires ‘a right of absolute dominion over the conquered [and] may say of his servant, that he is his, as he may of any other thing’ (Hobbes 1969, 22.2, p. 128, Skinner 2008, p. 52). He says of the state of subjection enjoyed by the vanquished, ‘in the case of subjects by contrast with slaves, two elements of natural liberty remain’: (1) freedom of movement, so that the vanquished should not be ‘imprisoned or confined with the difficulty of ways, and want of means for transportation of things necessary’, and ought to be provided with ‘commodious passage from place to place’ (Hobbes 1969, 28.4, p. 180, Skinner 2008, p. 53); and (2), residual rights to the satisfaction of basic needs that follow from covenanting for peace, comprising: rights to ‘all things necessary for life’: ‘fire, water, air, and place to live in’ (Hobbes 1969, 17.2, p. 88, Skinner 2008, 54).

In *De cive* Hobbes takes an even tougher line. While acknowledging in the *Elements* ‘in remarkably respectful tones’ (according to Skinner 2008, p. 107), that ‘Aristotle saith well’ that ‘the ground or intention of a democracy, is liberty’, in *De cive* he claims this to be a categorical error ‘of giving the name of liberty to what is in fact sovereignty’ (*‘libertatem pro imperio nominans*’, Hobbes 1983, 10.8, p. 176, Skinner 2008, p. 107). Aristotle’s claim that ‘in a popular state there is liberty by supposition’ (*‘in statu populari libertas est ex suppositione*’, Hobbes 1983, 10.8, p. 176, Skinner 2008, p. 107), was in fact no more than the uncritical acknowledgement of the customs of his day (*‘ipse quoque consuetudine temporis*’, Hobbes 1983, 10.8, p. 176, Skinner 2008, p. 107).

Hobbes, with the importation of the Roman Law terminology of *ius* and *lex*, employed in the long history of debate about constitutionalism between the Glossators and Postglossators in France, had shifted specific English parliamentary debate about the king’s prerogative, cast in the language of common law and historical constitutionalism, to a higher plane of abstraction, opening up possibilities dangerous even for him. Arguing against divine right, Hobbes had set out the distinction most clearly at the end of Part II of the *Elements*:

The names *lex*, and *jus*, that is to say, law and right, are often confounded; and yet scarce are there any two words of more contrary signification. For right is that liberty which the law leaveth us; and laws those restraints by which we agree mutually to abridge one another's liberty. Law and right therefore are no less different than restraint and liberty, which are contrary. (Hobbes 1969, 2.10.5, Parkin 2007, p. 30)

Hobbes formulated the distinction more succinctly in *De cive* (14.3), declaring:

'They confound Lawes with Right, who continue still to doe what is permitted by divine Right, notwithstanding it be forbidden by the civill Law'. Dudley Digges (1644, p. 14; Parkin 2007, pp. 30–31), for instance, was willing to employ Hobbes's distinction between *ius* and *lex* of the *Elements* in his campaign against Henry Parker, also building his position on consent theory, but in a manner compatible with divine right theory, as Parkin (2007, p. 31) notes: 'it is God who validates that consent and God alone who can impart to the magistrate the *jus gladii*, or the right to take away life'.

*Jus gladii*, the right to punish or, in the last instance, to take away life, follows from the distinction between a free man and a slave, which is the first principle of Hobbes's doctrine of liberty; and by *De cive*, Hobbes has already adopted an extreme view of the restrictions that absolute sovereignty can place on citizens, whose scope for movement is only superior to that of slaves in that they are not shackled, and who are still technically free as long as they are not imprisoned. As Skinner notes, the freedom of free men is scarcely greater than that of slaves, and the unfreedom of slaves is scarcely greater than that of citizens (Skinner 2008, p. 122, citing Hobbes 1983, 9.9, p. 167). Skinner finds Hobbes's doctrine of liberty in *De cive* a more palatable doctrine than the version that precedes it in the *Elements*, but I cannot agree. What is unique and problematic is Hobbes's adaptation of this civil law tradition of freedom to a notion of freedom as unrestricted bodily movement governed by the will, understood as the last appetite catalysing action. As Bramhall (1655) astutely observed, Hobbes believed himself to have found a Stoic reconciliation of freedom and necessity in the notion that no act is uncaused. Consent is critical in the demarcation between the submission of the vanquished and that of the slave to a master: the 'consent of the subject to sovereign power means that there is no restriction on his natural liberty' (Skinner 1990, pp. 135–136). But this puts a burden on 'consent' that Hobbes's ontology does not allow. More importantly, it allows freedom to cohabit with coercion.

The development of Hobbes's theory was in the direction of ever greater scope for coercion under the rubric of freedom, which turns on the 'right to punish'. The right to punish, or *ius gladii*, was the very fulcrum on which *merum imperium*, the sovereignty of the *princeps*, rested, as established by the prehumanist Glossators and Postglossators, who employed Roman Law to establish the powers of the Holy Roman (German) Emperor against the Pope, and against the lesser powers of vassal princes (Gilmore 1941). Accordingly,



by the time he comes to writing *De cive*, his reformulation of the *Elements* in Latin for a continental audience, Hobbes is already insisting that the sovereign must ensure ‘the punishments ordained for every individual breach of the laws are so great as to make it obvious that greater evil will arise from breaking them than from not breaking them’ (Skinner 2008, p. 114, citing Hobbes 1983, 6.4, p. 138). This way the sovereign ensures that ‘we are coerced by our common fear of punishment in such a way that we are prohibited by fear’ from disobedient and defiant acts (Skinner 2008, p. 114, citing Hobbes 1983, 5.4, p. 132), in the same way that the schedule of rewards and punishments attached to divine law prevents us from disobedience because our freedom to resist ‘is taken away’ (Skinner 2008, p. 115, citing Hobbes 1983, 15.7, p. 223: ‘libertas ... tollitur’).

Although the apparent rationale for civil law is to make possible the conditions for the maximisation of self-preservation and the right to bodily freedom,

this is not the reason why the generality of men obey the law, moved as they are by considerations of wealth, command or sensual pleasure. The only mechanism by which they can be brought to obey is by making them more terrified of the consequences of disobedience. (Skinner 1990, p. 135)

For ‘covenants without swords are but words, and of no strength to secure a man at all’ (*Lev.*, xvii, §2, 85/106), without a ‘common power to keep them in awe’ (*Lev.*, xvii, §4, 85/107). ‘This is the generation of the great LEVIATHAN, or rather (to speak more reverently) of that *Mortal God* to which we owe, under the *Immortal God*, our peace and defence’ (*Lev.*, xvii, §13, 88/109).

## Conclusion

Scholars continue to debate whether Hobbes’s concept of natural rights (as a translation of Roman Law *ius naturale*) was primarily indebted to the Frenchman, Bodin, or the Dutchman, Hugo Grotius (Tuck 1993, pp. 304–306, Skinner 2008, p. 39), but more important is the fact that Jean Bodin and Hugo Grotius were both civil lawyers, and this is the tradition to which Hobbes’s notion of liberty owes the most. A recent essay by Dieter Hüning (2007) on ‘Hobbes on The Right to Punish’, demonstrates that Hobbes’s construal of this right, as transmitted by Pufendorf, is the version that stands in the German civil code to this day, flagging the centrality of ‘the right to punish’ to the concept of sovereignty in Roman Law. Grotius even spoke of a ‘natural right to punish’ (Tuck 1979, p. 62), possibly Locke’s source for his notion of the ‘executive power of the Law of Nature’.

If the *Elements* was written as a brief for the Earl of Newcastle in the circumstances of the Short Parliament, *De cive* was probably written for Hobbes’s charge in Paris, the Prince of Wales and future Charles II. It tested the limits

of absolutism as a policy manual for the Prince, and what he might learn about the advantages a civil law based system could furnish him. That is precisely what Hobbes's system comprises, and its development from the *Elements* to *De cive* to *Leviathan* is always in the direction of testing the limits of restrictions upon liberty consistent with the status of the freeman as opposed to the slave, which become more and more extreme. I believe that my interpretation can be vindicated in terms of the increasing outrage with which Hobbes's doctrine was received as it progressed through the three works.

Context is of paramount importance in reading Hobbes on liberty. For Hobbes himself belongs to the grid of patron/client relations familiar from Roman Law, and both Hobbes and Locke, as baronial secretaries, were essentially writers of 'policie'. That means that it is from the point of view of the governor and not of the governed that they write. Baumgold (2005, pp. 294–296), discussing Hobbes's and Locke's theories of social contract, argues that they were political rather than metaphysical. Hobbes and Locke were still preoccupied with ancient regime questions about resistance, despite their universalist rhetoric, she declares, and so for instance, Hobbes's concept of 'author' was no more than a fiction to maintain sitting governments (Baumgold 2005, p. 295).

This essay tries to develop this thesis by specification, to argue that Hobbes, the courtier's client, who spent his entire career in the service of the baronial Cavendishes, was occupationally disposed to be as trimming as Laslett's Locke, the Whig pamphleteer who wrote to promote Shaftesbury's purposes (Baumgold 2005, p. 305 n. 18). Specifically, I try to show that the very power and urgency of Hobbes's theorisation of human nature, responded to specific, but changing, circumstances and their challenge. But even if Baumgold's thesis is generally true that Hobbes's doctrines, like Locke's, were political rather than metaphysical, it must be pointed out that Hobbes's mechanistic ontology was probably worked out before his politics took their final form. And always with the stated purpose of demonstrating the fundamentals of human behaviour, necessary for any statesman to understand. So Baumgold's thesis (2005), is complicated by the fact that in the case of Hobbes his metaphysics is privileged, formed under the early impact of Galileo and Mersenne, as we know from his poem and prose *Vitas*, as well as from secondary sources.

It is hardly surprising, given his predilections and those of his patrons, that in seeking a sure foundation for his political absolutism Thomas Hobbes should have turned to the Roman civil law tradition. The late mediaeval Glossators and Post-glossators of Roman Law were not only harbingers of Renaissance political thought, but they had crafted concepts of sovereignty and political obligation that were to underpin the early modern state. Hobbes shows himself attuned to their debates, and specifically the debate over the *merum imperium* which was to feature so large in the thought of the French jurist Jean Bodin, whom he carefully references (Hobbes 1969, II 8.5). That Hobbes should have proven to be an opponent of Classical Republicanism, or Roman

concepts of liberty, the case that Quentin Skinner (1998, 2008) has made so well, points to Hobbes's particular theory of liberty remaining one of the most enduring paradoxes in an apparently systematic thinker.

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### Notes

1. Campbell (1958, p. 22). For an overview of the seventeenth-century legal context see, Holdsworth (1903–1966), Maitland (1907), Vinogradoff (1908).
2. Cromartie (2005, p. xiv), citing Newcastle's *Advice* ed. Slaughter (1984, p. 24).
3. See Bodleian Library, Aubrey MS 9, fol. 14. Cromartie (2005, p. xx), notes that the 'capital D perhaps suggests that the amanuensis believed "De Legibus" to be a title'.
4. Bacon, *Reading on the Statute of Uses*, in *Works*, vol. 14, p. 415, cited Campbell (1958, p. 30).
5. Coke's famous judgement, *Prohibitions del Roy* (1609), 7, co. 63-5; cited Campbell (1958, p. 23).
6. Cromartie (2005, p. xxxi), citing Coke (1628–1644), *First Institute*, 97b.
7. Coke's *Institutes* have been cited in many US Supreme Court judgements, including landmark cases such as *Roe v. Wade*, 410 U.S. 113, 134 (1973). See [http://en.wikipedia.org/wiki/Institutes\\_of\\_the\\_Lawes\\_of\\_England](http://en.wikipedia.org/wiki/Institutes_of_the_Lawes_of_England) downloaded 26.07.2014.
8. In the only case that I can find in the Virginia Company records of a formal division, and this on the important matter of 'Indenture' contracts, Hobbes's vote is noted among the 21 voting with Sandys and Cavendish, including 5 other aristocrats and Deputy John Ferrar, in a close vote against 20 gentlemen. See *Records of the Virginia Company of London, 1906–1935*, ed. Susan M. Kingsbury (Washington, DC: Library of Congress), 4 vols, at 2.157-9, which reports the vote of the Virginia Company court of November 27, 1622, as follows: '21 in the affirmative', including 'Lo: Cauendish Gouvernor, Ea: of Southampton, Lord Padget, Sir Edward Sackvill, Sir Io: Danvers, Sir Edw. Sandys, Mr Iohn ffarrar Deputy, Mr. Nick ffarrar ... and Mr Hobbs'; '20 votes in the negative and all gentlemen only'. See Springborg (2014, 2015).
9. Rabb (1964, p. 653), citing *House of Commons Journals*, 1.194.
10. Rabb (1964, p. 653), citing *House of Commons Journals*, 1.230, 984.

11. Campbell (1958, p. 39), notes that Selden's *Table Talk* was a compilation of notes made by his former secretary, the Rev. Richard Milward, published only in 1689, after the deaths of both Selden and Hobbes, but that Hobbes may have seen the MS 'since it was a literary custom of the time to circulate MSS among friends and acquaintances'.
12. On Hobbes and Roman Law corporation theory, see also Springborg (1976).

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