論　説

HOBBES AND THE RULE OF LAW

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The subject of this paper is the political thought of the English philosopher Thomas Hobbes (1588−1679), as the terms of this are to be found set out in his famous treatise *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (1651).[1] The aspect of Hobbes's political thought that is focused on for particular attention is the account that he gave of the principles of the law as established, and enforced, within the state as a form of human association. In regard to this, it is explained how Hobbes conceived of the state as providing for the security of men, as to their person and their rights, as through its possessing an absolute and exclusive authority, and how he characterized this authority as being embodied in the various rights of sovereignty that are essential to the constitutional order of the modern state. It is also explained that while Hobbes understood the state to bear an absolute and exclusive authority, he was nevertheless clear that the state remained subject to certain limitations, as to its authority, and as where these limitations applied to the sovereign power as the embodiment of state authority. Central among the limitations at issue were the limitations that Hobbes saw as imposed through law and legal procedure as to the sovereign power and the exercise of the rights belonging to it, and with this being such as to ensure that the sovereign power would maintain, and act within, the framework of the rule of law. The recognition that Hobbes gave to the principles of the rule of law is a critically important feature of his political thought, and it is Hobbes in reference to the rule of law that stands as the substantive concern of the paper. As to structure and organization, the paper is in two parts. In Part 1, there is a summary of the main elements of Hobbes's account of the state, and as to its normative foundations and its origins in covenants. In Part 2, there is an examination of Hobbes on the institutional structure of the

1　Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil*, edited with an Introduction by Michael Oakeshott (Oxford: Basil Blackwell, 1946).

sovereign power within the state and the form of legal order that he saw as pertaining to this. Included, here, is a discussion of Hobbes's treatment of natural law, civil law, crime and criminal responsibility, and punishment, as in relation to what is taken to be his commitment to the rule of law and its essential principles.[2]

i.

In the history of political thought, Hobbes is to be counted among the thinkers who belong to the tradition of natural law theorizing. The position that Hobbes occupies in the natural law tradition is a prominent one. For he broke decisively with the terms of the pre-modern natural law philosophy of Aristotle and Aquinas, while he at the same time contributed significantly to the establishing of the modern line of natural law thinkers that includes, most notably, Hugo Grotius, Samuel Pufendorf, John Locke and Christian Wolff. The break that Hobbes made with the natural law standpoint of Aristotle and Aquinas is of crucial consequence, and it is everywhere reflected in the well-known argument that he set out as concerning what he took to be the specifically natural condition of the association obtaining among men. For Aristotle and Aquinas, the natural condition of association among men had been understood to be the condition of society, as this was embodied in the civil state. For Hobbes, in contrast, the natural condition of human association was not a condition of society at all, but was rather the condition of universal war: that is, the condition of the war of all against all. This condition of war was presented by Hobbes in terms such that there was implied an opposition between the condition of nature and the condition of the civil state, or, as for Hobbes, the commonwealth, and with this opposition being something that was to be overcome only by men instituting the civil state through their own will and agreement.

In the characterization that Hobbes provided of the natural state of universal war in *Leviathan*, men were assumed to be the bearers of a natural equality and natural freedom. Accordingly, men were understood to hold on equal terms the right and the liberty to do,

2 For discussion of Hobbes's political thought, see especially: Michael Oakeshott, *Hobbes on Civil Association* (Oxford: Basil Blackwell, 1975); Richard Tuck: *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), Introduction and Chapter 6; *Hobbes* (Oxford: Oxford University Press, 1989).

and to take, whatever was considered by them to be necessary so as to defend and preserve themselves, and in this being subject only to the actual limitations of their material strength and power. The natural right of self-defence, as so conceived, was the right of war, and the natural right of self-defence as involving the right of war was, for Hobbes, an inalienable right, and a right whose exercise by men was essential as given the inherent deficiencies of the natural condition of their mutual association. The latter deficiencies, as Hobbes explained them, were bound up with the absence from the natural condition of association among men of the normative order that was present as within the civil state. Thus in the natural state of universal war, there existed no common power to provide for the effective government of men, and with this being such that there could be no guarantee of security for men beyond what they were able to achieve for themselves through their own individual strength and initiative. At the same time, there existed no system of law that laid down determinate rules and principles of just and unjust conduct, and determinate rules and principles that related to the acquiring and possession of property.[3]

Despite all this, it is to be emphasized that if Hobbes saw the natural condition of the relations among men as being devoid of the form of normative order specific to the civil state, he did not in consequence of this consider that men in the natural condition of their association were to be regarded as standing free from all normative restrictions as to their conduct as such. In fact, Hobbes held that men in the natural condition of their association were subject to the normative restrictions contained in what he identified as the laws of nature. These, for Hobbes, were the laws disclosed to the natural reason of men as the universal laws of peaceful association. In their status as the laws of peace, the laws of nature were the laws that Hobbes thought of as embodying the principles that were to set the containing normative framework for, and through this to set the normative limitations applying to, the exercise by men of the right that belonged to them in the natural condition of war: that is, the right of men to act to the end of securing their own defence and preservation. It is also to be observed here that, in Hobbes's account of them, the laws of nature served to identify the general principles of social order and the general principles of justice and political morality. In addition to this, the laws of nature, when taken together,

3 For Hobbes on the natural state of universal war obtaining among men as prior to the forming of commonwealths, see: *Leviathan*, Part I, Chapter XIII.

served to describe not only the prerequisites for peace among men, but also the basic form of the normative order that was to provide for the condition of peace as this was to be realized as within the civil state.

Hobbes laid down nineteen laws of nature in *Leviathan*. The first of these stated the fundamental law of peace, while it at the same time affirmed the natural right of men to defend and preserve themselves. Thus in specific terms, it was provided that men were bound to endeavour peace when it was reasonable to do so, but with this remaining subject to the reservation that in circumstances where peace was unobtainable, then men were permitted to use the means of war to secure their defence and preservation. The second law of nature stated the principle of reciprocity as in regard to restrictions on rights, and with the law providing that men were required to lay aside their natural right to all things, as on a mutual basis, and to be prepared to rest content with such liberty as they would allow one to another. According to Hobbes, the laying aside of rights was something that presupposed acts of agreement, or acts of covenant. Thus it was that he went on to present the third law of nature as the law of covenants, and with this law stating the principle that men were required to perform the terms of the covenants into which they entered. The principle of the faith of covenants was, as Hobbes understood and presented it, the foundational principle of justice as such. For the essence of justice consisted in the performing of covenants, while injustice, as to its essentials, consisted in the failure to perform valid covenants.

The fourth law of nature laid down in *Leviathan* was the law of gratitude, and it provided that men were to show gratitude for benefits received from others, and hence were to avoid ingratitude. The fifth law of nature related to the duty to reach mutual accommodations, and it stated the principle that men were to accommodate themselves one to one another as in line with the norms of sociability. The sixth law of nature concerned the duty falling on men to pardon those others who committed offences against them. Thus it was provided that conditional on proper securities being forthcoming as to the future time, then men were to be prepared to pardon those who repented of their offences and were desirous for pardon. The seventh law of nature was to do with the ends of punishment, and it provided that with acts of revenge, or retribution, as for offences done to them, men were to be guided not by consideration of the extent of their injuries as suffered, but rather by consideration of the extent of the good which would result from the exacting of retribution.

The eighth law of nature stated that men were to refrain from contumely: that is, they were to refrain from all actions, words, expressions and gestures that were indicative of hatred or contempt for others.

The ninth law of nature was a law that required men to avoid undue pride in their person, and it provided, as to its particulars, that men were to extend recognition to other men as being their equals by nature. The tenth law of nature was linked to the ninth law in its affirming of the natural equality of men: it provided that men were to refrain from arrogance, and it laid down, as a principle, that when men entered into the conditions of peace, then it was essential that no man was to demand to have reserved to himself any rights that he was not ready to allow to be reserved to other men. The eleventh law of nature affirmed the principle of equity, as this had application to the decision of disputes, and with the terms of the law being such as to exclude bias and partiality from the relevant decision-making procedures. Thus it was provided that in disputes where men were entrusted to act as judges, then they remained subject to the requirement that they were to deal with the parties to the disputes in question as on an equal basis.

The twelfth, thirteenth and fourteenth laws of nature stated the principles to do with rights as to the use and ownership of things. Hence the twelfth law of nature provided that things that were not capable of being divided among men were to be enjoyed in common use, as when this was possible, and, where the quantity of the things at issue permitted, without restriction, but that where things were not capable of being held in common, they were then to be allocated relative to the number of men with a legitimate claim to them. The thirteenth law of nature provided that where things were capable neither of being divided nor of being held in common, then it was required that the entire right to them, or the first possession of them if use was to alternate, should be determined through lots. Accordingly, the allotment of things was either to be through arbitrary allotment, as where allotments of things were settled by agreement among rival claimants; or it was to be through natural allotments as where, as Hobbes pointed to with the fourteenth law of nature, things were to be allotted to men as in line with the right of the first born or as in line with the right of first possession.

The last five of the nineteen laws of nature that Hobbes set out in *Leviathan* concerned the principles to do with the procedures for the maintenance of peace as through the

resolution of disputes. Thus the fifteenth law of nature stated that men charged with the mediation of peace were to be granted safe conduct. The sixteenth law of nature had application to the settlement of disputes about questions of fact and questions of right, and it laid down the principle that the parties to disputes were to submit their claims of right to judgment by independent arbitrators. Related to this, there was the principle that Hobbes stated with the seventeenth law of nature. This was the principle that provided, as in line with the rule of equity applying to the parties to disputes, that no man was to act as arbitrator in his own cause or interest. It was the view of Hobbes that the integrity of procedures established for the independent arbitration of disputes presupposed that the arbitrators were to be trusted to render impartial judgment. Hence the eighteenth law of nature stated the principle that no man was to be accepted, as the arbitrator in a dispute, in circumstances where he had some natural cause or interest that inclined him to show bias or partiality towards some one or other of the parties to it. Finally, there was the consideration that the arbitration of disputes should be fair. Accordingly, the nineteenth law of nature provided that in disputes that were directed towards questions of fact, the arbitrators of these were to give equal credit to the arguments of the different parties and to base their judgments on the balance of the testimony as submitted by independent witnesses.[4]

The statement of the nineteen laws of nature in *Leviathan* may be taken as the definitive statement that Hobbes gave as to the matter. Nevertheless, it is to be noted that in the treatise *The Elements of Law, Natural and Politic* (1640), Hobbes identified a law of nature to which he made no reference in *Leviathan*, and which is of some considerable significance. This was the law of nature that provided that men were required, as a condition for peace, to permit trade and commerce among one another as on a non-discriminatory basis.[5]

As it has been observed, the laws of nature, for Hobbes, were the laws of peace, and, as such, they were understood by him to possess the normative force specific to law. Thus it was that he wrote of the laws of nature as being always binding on men in conscience (*in*

4 For Hobbes's statement and explanation of the nineteen laws of nature, see: *Leviathan*, I.XIV-XV.

5 Thomas Hobbes, *The Elements of Law, Natural and Politic*, edited with a Preface and Critical Notes by Ferdinand Tönnies (1889), 2nd edition with a new Introduction by M.M. Goldsmith (London: Frank Cass, 1969). For the statement and explanation by Hobbes in this work of freedom of commerce and traffic among men as a law of nature, see: *The Elements of Law*, Part 1, Chapter 16, Section 12.

foro interno), in which sense of it the laws of nature stood as laws such that they were always binding on men as to the desire that the requirements that they stated were to be fulfilled. However, Hobbes also underlined that the laws of nature were not always to be thought of as being binding in effect (*in foro externo*). By this he meant that the laws of nature were to be thought of as binding on men, as a matter of obligation, to act in fulfilment of their terms only in circumstances where it was safe and prudent for them to do this; and with this being so, as he explained it, in the circumstances of material security sufficient for men to be assured that there would in fact be maintained a general conformity with the principles of peace which the laws of nature described.[6]

The condition for the provision of the material security appropriate for the effecting of the laws of nature, as in Hobbes's account of it, lay in the existence of some common power that was adequate to enforce the terms of peace as given in the laws of nature, and hence adequate also to compel men to the performance of their obligations as embodied in the natural law. The power that, for Hobbes, was in this respect crucial was the sovereign power as established in the civil state or commonwealth. In line with this, it was the civil state or commonwealth that he saw as comprising the objective institutional structure essential for the giving effect to of the laws of nature and, through this, for the full realization of the terms of peace that they set out. The relationship as presented by Hobbes as between the principles of natural law and the principles pertaining to commonwealths was a complex matter. Thus it was that the institution of the commonwealth was understood to give effect to the laws of nature; while the principles of natural law were themselves understood to point to the form of the normative order as brought into being with the commonwealth, and hence also to determine the normative limitations which were to apply to the sovereign power therein. In addition, it is to be emphasized that it was the natural law that Hobbes took to direct men to the establishing of commonwealths, as such, and that it was the natural law, as he expounded it, that contained within itself the principle that was critical as for this purpose: that is, the principle that covenants were to be performed by the parties to them.

According to Hobbes, the civil state or commonwealth stood as a form of association that was founded in agreements, or covenants. This was so for the reason, as explained, that

6 Hobbes, *Leviathan*, I.XV, p. 103.

Hobbes thought of the natural condition of the association among men as that of war, and thus as being opposed to the condition of the association among men that was particular to the civil state. The form of the covenant establishing commonwealths was, for Hobbes, quite specific: and it involved, as to its details, an agreement among a multitude of men, and as thereby engaging their will and consent, to authorize, establish and subordinate themselves to some person or persons who would exercise the rights integral to sovereignty as to the end of their common defence and preservation, and in relation to which sovereign power they would acquire for themselves the status of subjects. The sovereign power stood as the bearer of an artificial personality, and, as such, the sovereign power embodied representative functions and capacities in respect of subjects, and with these being functions and capacities that were to be discharged through offices and hence exercised as official powers. The rights of sovereignty comprised an authority structure, and with this being so because the sovereign power was based in covenants of authorization and so, in consequence of this, based in, and deriving from, the rights of subjects as the authorizing parties.[7]

ii.

The focus of concern as for the rights of sovereignty was the maintenance of peace within commonwealths. As Hobbes identified them, the rights of sovereignty were such that they served to establish the absolute and exclusive authority of the sovereign power as in regard to those persons subject to it. This was so particularly with the rights of sovereignty that related to the legislative, judicial and executive authorities that are recognized to comprise the basic constitutional structure of modern state government. Thus the sovereign held the legislative or law-making power, and with this, for Hobbes, consisting in the right of sovereigns to prescribe the rules of just conduct and property within commonwealths which were to be observed by their subjects. The rules prescribed by the sovereign power as in its legislative capacity were the civil laws, which laws stood as the laws particular to commonwealths. In consequence of possessing the right of legislation, the sovereign possessed also the right of judicature. This right related to the judicial authority as exercised

7 Ibid., II.XVII, pp. 112–13.

by the sovereign power, and it consisted in the right of deciding controversies among subjects that concerned matters to do with the laws. The executive powers that Hobbes pointed to as being among the rights of sovereignty were powers relating to the business of government and public administration. Thus the sovereign held the right of making war and peace as in respect of other commonwealths, and the right of maintaining and commanding armed forces such as were essential for the defence of the commonwealth and its subjects. Again, the sovereign held the right to appoint ministers and public officials within the commonwealth, both in peace and in wartime. Yet further, it was the right of the sovereign to reward subjects and to impose punishments upon subjects who were in breach of the laws.[8]

As to the different aspects of sovereignty that Hobbes picked out, it is to be noted that the rights of sovereignty were presented such that the sovereign power was to be thought of as unimpeachable as to its authority. Thus it was that, for Hobbes, there could be no legitimate grounds for the subjects of commonwealths to act so as to change or to depose the sovereign; and, similarly, the sovereign was not legitimately to be accused of injustice or to be made liable to punishment. It is to be noted also that Hobbes held that the rights of sovereignty were essential to the sovereign in commonwealths, as in the respect that these rights were held by the sovereign regardless of the actual constitutional form of sovereignty: and hence without regard as to whether the sovereign power was based in the monarchical, the aristocratic or the democratic form of state constitution.[9] As a final consideration, here, the absolutism and exclusivity of the authority belonging to the sovereign were understood by Hobbes to be such that the rights of sovereignty carried with them the extension of the jurisdictional control of the sovereign to all facets of civil life, and as in the sense of this extending to all the various aspects of the external conduct of individual subjects. Certainly, Hobbes allowed that there was a sphere of real liberty that pertained to the subjects of commonwealths. So, for example, the subjects of commonwealths were free to determine for themselves much of the circumstances of their participation in society: as so with their freedom to buy and sell and to enter into contracts with one another, and as with their

8 Ibid., II.XVIII, pp. 117–18.

9 For Hobbes on these various aspects of sovereignty, see: *Leviathan*, II.XVIII, pp. 113–14, 115–16; II.XIX, pp. 121, 122–5.

freedom to choose their place of domicile, their form of work and the mode of their family life. There was also the fact of the possession by subjects, as within the condition of commonwealths, of the natural right of self-defence as an inalienable right, and one that was permissibly exercisable even in opposition to the lawful application of sovereign power.[10] Nevertheless, the liberty of subjects, as in Hobbes's view of it, was such that it remained liable to restriction by, and qualification through, the limitations on conduct such as were set in the civil laws, and with this being so as to the effect that the rights and liberties of subjects, as in regard to their extent and their character, remained entirely dependent on the sovereign power and the form of jurisdiction which it exercised.[11]

For Hobbes, then, the sovereign power in commonwealths comprised an absolute and exclusive authority structure. However, and as it is argued in the present paper, the sovereign power, while absolute and exclusive as to its authority, was not something that Hobbes thought of as being an arbitrary or an unlimited power. On the contrary, Hobbes saw the sovereign power as being subject to certain limitations applying to itself, which limitations were bound up with an ideal that is everywhere apparent in his discussion of the rights of sovereignty. This is the ideal of the rule of law. The essential consideration with this is that, as Hobbes presented it, the sovereign power was not an arbitrary power but a power that was embodied in offices, and, as a construct of offices, a power that was established and validated through and in accordance with law. Hence the sovereign power was a power that was to be thought of as being subject to such limitations as were appropriate to it in its character as a power that was based in law, and as a power that was directed towards the maintenance of the rule of law as in the form that this obtained within the condition of commonwealths. For and to repeat, Hobbes identified the rights of sovereignty as including the right of legislation, the right of adjudication, and the executive rights to do with government and public administration that, as with punishments, bore on the enforcement of the laws. At the same time, and as it is now explained, the exercise of the powers relating to

10 Regarding these aspects of the liberty that Hobbes saw as belonging to the subjects of commonwealths, see: *Leviathan*, II.XXI, pp. 139, 142.

11 Hobbes maintained that the greatest liberty of subjects depended on the silence of the laws, although, as he explained, the actual extent of this liberty within commonwealths remained conditional on the determinations made by the sovereign power as to the applicable civil laws. *Leviathan*, II.XXI, p. 143.

these various rights pertaining to the sovereign power was, for Hobbes, something that was intended to remain subject to the principles of justice in procedure such as are integral to the rule of law as an ideal and as in respect of its practical application.

In connection with this, it is to be observed that certain of the basic principles of just procedure as relating to the rule of law are given expression to with the laws of nature as Hobbes elaborated them in *Leviathan*. Indeed, it is clear that the laws of nature, taken as a whole, may be interpreted as setting out what are most appropriately to be described as the general principles of legal order. Thus it is that the principle of the endeavouring of peace, as stated in the first law of nature, stands as a principle essential to the possibility of law as such, as given that the rule of law must depend on men being prepared to act to maintain the order of peace among themselves that is the ultimate object and purpose of law. The same is true of the principle concerning reciprocity in the restriction on rights as stated in the second law of nature, as given the necessity for the rule of law to have a uniform, and hence fully reciprocal, application to all its subjects. The principle of good faith in covenants as laid down in the third law of nature points directly to the principles pertaining to contractual agreements, and to the binding force of promissory obligations, that would appear to be common to all legal systems which are recognizable as being such. There are related principles of good faith as bearing on the preservation of legal order among men pointed to in the rules on gratitude, mutual accommodation and facility to pardon as stated in the fourth, fifth and sixth laws of nature. The rule on punishments, as stated in the seventh law of nature, is such that it implied that punishments are to be distinguished from mere acts of revenge or retribution; while the rule on contumely, as stated in the eighth law of nature, possesses an evident relation to principles of the sort that are to be found lying at the foundations of the law of defamation.

The ninth and tenth of the laws of nature laid down in *Leviathan*, as providing for the natural equality of men and for equality as to their rights, serve to express and confirm the essential meaning of the general principle of legal order as guaranteeing the formal equality of persons in their status as the subjects of the laws that have application to them. A core principle of procedural justice was affirmed with the principle of equity stated by Hobbes as through the terms of the eleventh law of nature, and with this pointing to the requirement for equality of treatment for the different parties of interest as in the settlement of disputes

between them. There were basic principles relating to property and property rights identified with the twelfth, thirteenth and fourteenth laws of nature: as was so, for example, with the rules on common use, and the rights to do with the rights of the first born and with the rights based in first possession. At the same time, and crucially so as in regard to the question of the rule of law, there were the further core principles of justice in procedure as affirmed with the fifteenth, sixteenth, seventeenth, eighteenth and nineteenth laws of nature. Thus the fifteenth law of nature relates, among other things, to the conditions for mediation as a process for dispute resolution. The sixteenth law of nature states the essential principle of the rule of law as to the effect that men are bound to seek to resolve their disputes through submitting to procedures of adjudication that are independent. Then again, the seventeenth and eighteenth laws of nature state principles that are properly to be understood to be fundamental for justice in adjudication, and fundamental for the integrity and independence of adjudicative procedures: the principle that no man is to be judge in his own cause, and the principle that no man is to act as judge in disputes where he is open to bias through having some interest in the outcome. Finally, there is the nineteenth law of nature as concerning the testimony of witnesses in dispute resolution, which law serves to underline the principle that adjudicative procedures have to provide for, and to be based in, fair rules of evidence.

As it was made clear in the first part of this paper, it was the view of Hobbes that the laws of nature could be given effect to only in the condition of commonwealths, and as where there was established a sovereign power that was capable of enforcing the provisions of the natural law and the obligations which were inherent within it. In this sense, the presence of the sovereign power, and with this up to and including the capabilities for the application of force and coercion as through the rights of punishment, was something that was considered by Hobbes to be essential not only for the effecting of the laws of nature, but also for the full institutional realization of the general principles of legal order to which the laws of nature pointed. At the same time, however, it is to be emphasized that the sovereign power was also something that Hobbes thought of as acting, and functioning, only within a framework of offices and as through the exercise of the rights to do with the making, the judicial application and the executive enforcement of the laws: and with the sovereign power, in the sphere of its official operations and engagements, remaining everywhere subject to the constraints and limitations imposed through the requirements of

justice in procedure such as are central to the ideal of the rule of law.

That this is so is brought out through examination of what Hobbes wrote regarding the principles of civil law, the principles of crime and criminal responsibility, and the principles of punishment: and with these principles being, as in his treatment of them, informed by the more general principles of natural law as their presupposed foundation.

As to the civil law, Hobbes presented the civil law as pertaining to the sphere of positive law, as in the respect that it stood as law that was commanded through the will of the sovereign power as bearing the legislative authority within commonwealths. The civil laws, as issued on the command of the sovereign power, were continuous with, or rather contained, the laws of nature as one to the other. For it was through their embodiment within civil laws that the laws of nature became laws as such, and so fully enforceable, whereas the obedience of subjects to civil law was itself enjoined under the terms of natural law. In accordance with these considerations, Hobbes maintained that it was necessary to the character of civil law that it had to be capable of being made known to the persons to whom it was addressed, and with this being to the effect that there had to be the adequate declaration and verification of it as law as in reference to the sovereign by whose will and authority it was made. It was likewise Hobbes's position that civil laws always stood in need of their being interpreted, if they were to be properly applied. Hence the authentic interpretation of the civil law was to be rendered by judges authorized by the sovereign, which judges were, in exercising the right of adjudication, to be guided by the laws of nature: as was so, most particularly, with the principles of equity.[12] In the matter of crime and criminal responsibility, Hobbes insisted that crimes, as distinct from sins, depended on the presence of civil laws, and so also on the presence of an established sovereign power. In line with this, he affirmed what stands out as a fundamental principle of the procedural justice relating to the rule of law, as in the respect that he excluded the *ex post facto* attribution of criminal responsibility in positive law contexts. Thus it was that, for Hobbes, there could be nothing capable of being made a crime under positive laws that were laid down after the fact to which they were supposed to have application.[13]

It is with the principles of punishment that there is underlined most clearly how Hobbes

12 Hobbes, *Leviathan*, II.XXVI, pp. 172–3, 174–5, 176–7, 178–9, 179–85.
13 Ibid., II.XXVII, pp. 190–1, 192.

saw the sovereign power as being subject to procedural limitations on itself, as consistent with the ideal of the rule of law. As Hobbes explained it, the right of the sovereign within commonwealths to impose punishments for breaches of the law, as through the application of coercive sanctions, functioned as the essential form in which the material power of the sovereign was to be brought to bear against subjects. Thus as in Hobbes's terms, the right of punishment served to establish the principal institutional context in which the sovereign was to act in order to ensure that the obligations of men under natural law would be enforced, and so rendered effective, as these were embodied and expressed through the regime of civil laws. In accordance with this, Hobbes presented the right of punishment as a public right involving official powers, which powers were free from arbitrariness in being limited by the formal procedure as applying to their exercise. The limitations of procedure, at issue here, were pointed to in the principles of punishment that Hobbes picked out and that rank as framework principles of the rule of law as such. Among such principles were included the following: the principle that there could be no punishment, and no proper exercise of the right of punishment, as on the part of the public authority in conditions where there had taken place no prior judicial determination establishing actual breaches of the law; and the principle that punishments were not to be applied in respect of acts that were performed prior to the enactment of the laws which prohibited them as criminal. As to the latter principle, it is to be emphasized that, in Hobbes's account of the matter, there existed an internal connection as between the right of punishment and the injustice, as according to law, of those persons in respect of whom the right was applied. Hence there followed what Hobbes pointed to as the fundamental principle of natural law, as to the effect that the punishment of innocent subjects on the part of the sovereign power was to be excluded on an unconditional basis.[14]

It is readily to be explained how these various principles pertaining to civil law, crime and criminal responsibility and punishment were based in, and served to give concrete form to, the laws of nature as Hobbes specified them. As to the civil law, the principle that the laws were to be declared to their subjects relates to natural law in the respect, among others, that it is to be read, in Hobbes's terms, as a condition for covenants within commonwealths:

14 Ibid., II.XXVIII, pp. 203, 204, 207.

since in the absence of declared laws there could be no laws for men to undertake to follow. As to matters of crime and punishment, the exclusion of crimes without civil laws, punishments without prior judicial determinations, and punishments applied in the enforcement of retroactively binding laws are to be read, most of all, in relation to those of the laws of nature that required that arbitration procedures for disputes were to be independent and impartial, and with this extending to the disputes between the sovereign power, as the enforcer of laws, and subjects as where punishment was the intended outcome. Then again, there is the principle as to the exclusion of the punishment of subjects who were innocent. Here, Hobbes was explicit that the punishing of the innocent went against the laws of nature that restricted punishment to the promoting of the future good, that required men to avoid ingratitude, and that enshrined the rule of equity such as this provided for the equal distribution of justice among men.[15] The principles applying to civil law, crime and criminal responsibility and punishment stand as principles essential to the rule of law, and to its procedural integrity. In the sense that Hobbes saw these principles as based in the laws of nature, then in doing so he conferred the status and sanction of natural law on the principles of the rule of law. At the same time, it is to be observed that in the sense that Hobbes saw the sovereign power in commonwealths as subject to the procedural disciplines bound up with the rule of law, then in this sense he also accepted that the sovereign power stood subject to the laws of nature as serving to establish normative constraints and limitations on itself.[16]

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15 As Hobbes put it: 'All punishments of innocent subjects, be they great or little, are against the law of nature; for punishment is only for transgression of the law, and therefore there can be no punishment of the innocent. It is therefore a violation, first, of that law of nature, which forbiddeth all men, in their revenges, to look at any thing but some future good: for there can arrive no good to the commonwealth, by punishing the innocent. Secondly, of that, which forbiddeth ingratitude: for seeing all sovereign power, is originally given by the consent of every one of the subjects, to the end they should as long as they are obedient, be protected thereby; the punishment of the innocent, is a rendering of evil for good. And thirdly, of the law that commandeth equity; that is to say, an equal distribution of justice; which in punishing the innocent is not observed.' *Leviathan*, II.XXVIII, p. 207.

16 Hobbes saw the sovereign power in commonwealths as subject to natural law in the further respect that he considered that sovereign rulers were bound by the terms of the natural law in the sphere of their mutual relations, and with the laws of nature, as in this context for their application, comprising the substance of the law of nations. Thus: 'Concerning the offices of one sovereign to another, which are comprehended in that law, which is commonly called the *law of nations*, I need not say any thing in this place; because the law of nations, and the law of nature, is the same thing. And every

Conclusion

Regarding the subject of Hobbes and the rule of law, the present discussion may be brought to an end by noting that it is has become customary for jurists and political theorists, among others, to think of the rule of law as going together with democracy and free markets to constitute the basic elements of the institutional framework essential for the forward course of political development as within contemporary states and societies. As a reflection of this, there is the prominence of the principles to do with the rule of law as within the current international law of human rights, and with these including the principles of justice in procedure of the sort that Hobbes affirmed: such as the recognition of persons, and their right to equality and equal protection, under the law, the right of parties to a fair and public hearing as before independent and impartial tribunals, the presumption of innocence, and the exclusion of retroactively applicable laws and punishments.[17] In this connection, it is to be accepted that Hobbes stands out as a defender of the rule of law, and as one who based the rule of law in natural law and who, in doing this, served to underline the respects in which the rule of law remains critical for the establishing and maintenance of states and, hence, for the establishing and maintenance of peace among men as such. However, it must at the same time be acknowledged that there are certain limitations belonging to the rule of law, as in the form in which Hobbes picked out its core principles. The crucial consideration, here, is that while Hobbes successfully identified the principles of procedure that relate to

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sovereign hath the same right, in procuring the safety of his people, that any particular man can have, in procuring the safety of his own body. And the same law, that dictateth to men that have no civil government, what they ought to do, and what to avoid in regard of one another, dictateth the same to commonwealths, that is, to the consciences of sovereign princes and sovereign assemblies; there being no court of natural justice, but in the conscience only....' *Leviathan*, II.XXX, pp. 231–2. For discussion by the present author of the international law dimension of Hobbes's political thought, see: Charles Covell, *Hobbes, Realism and the Tradition of International Law* (Basingstoke, Hampshire and New York: Palgrave Macmillan, 2004); *The Law of Nations in Political Thought: A Critical Survey from Vitoria to Hegel* (Basingstoke, Hampshire and New York: Palgrave Macmillan, 2009), Chapter 2.

17 As to the principles of the rule of law and the international law of human rights, see particularly Articles 6 to 11 of the Universal Declaration of Human Rights (1948). For the text of the Universal Declaration, see: *Basic Documents in International Law*, ed. Ian Brownlie, 4th edition (Oxford: Clarendon Press, 1995), pp. 255–61.

what may be referred to as the formal justice of law,[18] there is rather less to be found in Hobbes that relates to the substantive concerns of what is now understood to comprise the sphere of social justice and as including the schedule of material rights associated with this.[19] The substance of justice is, of course, as fundamental as the formal justice of the rule of law for the development of the framework institutions of state and society in the modern world; and it is to be concluded from this that, in the condition of actually existing law and politics, it is vital that the commitment to the cause of the rule of law, and in its relation to democracy and free markets, should never be such that this results in the diverting of

18 Hobbes is a cardinal point of reference back for the jurists and political theorists of the twentieth century, such as Lon L. Fuller and Michael Oakeshott, who sought to explain the normative basis and character of the rule of law in terms of the relation of law to the principles of procedural or formal justice. Thus it was that Fuller focused on the morality that he saw as being internal to law: and with this internal morality of law being elaborated by him as consisting in the principles that laws should be general, promulgated, non-retroactive in their application, clear, free from mutual contradiction, allowing for the possibility of compliance, constant through time, and manifesting a congruence between the acts of officials and the laws as actually declared. *The Morality of Law* (1964), 2nd revised edition (New Haven and London: Yale University Press, 1969), especially Chapter 2, pp. 46–91. As for Oakeshott, he wrote of the justice inherent in the form of association in terms of law that he saw as embodied in the modern European state: and with this sense of justice being explained by Oakeshott through his pointing to such principles essential to legal order as that rules of law should not be arbitrary, secret, retroactive, or involving the conferring of benefits on particular interests, that judicial proceedings should be independent, and that there should be no offences in the absence of prescribed rules of law, and no penalties imposed in the absence of actual specific offences. *On Human Conduct* (Oxford: Clarendon Press, 1975), Essay 2: On the Civil Condition, pp. 152–3, footnote 1.

19 For a work that has been of central relevance, for the past four decades or so, as in regard to the question of social justice in its legal, political and economic dimensions and applications, see: John Rawls, *A Theory of Justice* (1971), revised edition (Oxford and New York: Oxford University Press, 1999). Rawls here set out a theory of justice, that is, justice as fairness, in which he emphasized the necessity that the rule of law should comprise a legal system giving effect to the principles of what he referred to as justice as regularity: such as the principle of treating like cases alike, the principle that there are to be no offences without laws (and hence that laws should be known and promulgated, clear and general, and non-retroactive), and the principles of fairness and due process essential to adjudication. However, Rawls also expounded the theory of justice as fairness as to the effect that justice was understood to go beyond the confines of justice as regularity, and to comprehend principles pertaining to the constitutional structure of government and political institutions, as well as comprehending principles pertaining to the proper distribution of social and economic goods. (For Rawls as concerning the rule of law, see: *A Theory of Justice*, especially Chapter 4, Section 38, pp. 207–10.) In consideration of Rawls, it may be observed, in passing, that the discussion of the rule of law is sometimes conducted without any specific reference being made to the law in its relation to issues as to do with justice within the social and economic order. As a case of this, see: Tom Bingham, *The Rule of Law* (2010; London: Penguin, 2011).

attention away from the ends of justice, as these are bound up with the provision of a fair and equal allocation of substantive benefits and opportunities among men as within the social order.[20]

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20 For a detailed account by the present author of the principles of justice, and as where the formal justice of the rule of law is considered in relation to the substantive ends of social justice, see: Charles Covell, *The Defence of Natural Law: A Study of the Ideas of Law and Justice in the Writings of Lon L. Fuller, Michael Oakeshott, F.A. Hayek, Ronald Dworkin and John Finnis* (London: Macmillan; New York: St Martin's Press, 1992), especially Chapters 3–4.