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# BOOK REVIEWS

*Reason of State: Law, Prerogative and Empire*. By Thomas Poole [Cambridge: Cambridge University Press, 2015. xii + 302 pp. Hardback £69.99. ISBN 978-1-107-08989-1.]

One of the perennial challenges of political theory is the tension between two apparently incompatible models of government that polities fluctuate between: the rule of law and the rule of men. The latter need not necessarily be a lugubrious model of government. Both may be deeply concerned with ensuring that the well-being of the citizen be the paramount concern of the state. It may well be that, for both models of government, in Cicero's words, *salus populi suprema lex esto*.

When polities sway towards the rule of law, they will endeavour to ensure citizens' well-being by constraining through law the powers of those who govern. Their hope is that, by making government accountable towards citizens, government will indeed respect Cicero's maxim. Most polities, even illiberal ones, will have tendencies to embrace the rule of law model. However, all polities, even the most liberal ones, will at some point sway towards the model of rule by men, especially when the safety or vital interests of the polity are at risk: this model will free government from the hard shackles of the law in the hope that unbounded discretion will enable government to ensure *salus populi*.

Several efforts have been made throughout the history of the British constitution to minimise the rule of men model of government. Thomas Poole's overarching thesis in *Reason of State* is that such efforts will never succeed in eliminating that model altogether. Rather than using the idiom of "rule of men", Poole uses that of "reason of state". He concludes his book by saying that "reason of state cannot be eliminated altogether or reserved for moments of real emergency. But it can be given greater legal specification and channelled through normal constitutional processes" (p. 289). If we are to believe him then, at least in the context of the British constitution, the struggle between the rule of law and the rule of men will never result in a total annihilation of the latter model of government.

While Poole's thesis is compelling and intriguing, not all of his probable audiences will be equally enthused about his execution of his argument. Three audiences whom Poole appears to address are students of the history of ideas, public lawyers and (legal and political) philosophers. The latter two will find only few nibbles throughout the book to whet their appetites. Students of the history of ideas are the most likely to be sated by Poole's book. In fact, out of the eight chapters of the book, chapters 2–7 provide a very helpful introduction to the political philosophy of several (and mostly) British theorists. The focus is on how these theorists have sought to resolve the tension between the rule of law and the rule of men.

Chapter 2 starts at the beginning of the seventeenth century with Hobbes. Of the theorists discussed in the book, Hobbes was perhaps the most sympathetic theorist to the idea of the rule of men or, in his case, the rule of the sovereign. We are reminded that the Hobbesian sovereign, while entitled to absolute obedience to his laws from his citizens, "must have at his disposal a spectrum of special legal and extra-legal capacities up to and including the power to dispense with particular laws and the power to act ruthlessly … where the public interest demands it" (p. 56). Most of the theorists whom we encounter in subsequent chapters seem to have been repelled by this – certainly, the Republican theorists writing towards the end of the seventeenth century whom we encounter in chapter 3 (Nedham,



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Sidney and Harrington). They argued for a strong rule of (Republican) law that would give Britain the ability to become a strong military polity and expand its dominion overseas. Chapter 4 focuses on the political theory of Hume who, unlike the Republicans of chapter 3, we are told, disdained the British commercial and military expansion of the early eighteenth century. This was because that expansion allowed the British Crown to enjoy considerable discretionary powers in overseas territories that sharply contrasted with the more and more limited form of government that was developing within the domestic sphere. This theme is continued in chapter 5, where we are told that both Adam Smith and Edmund Burke, writing towards the end of the eighteenth century, campaigned against the advancement of British commercial and military imperialism, which was fertile ground for non-domestic reason of state.

An apology for British imperialism and non-domestic rule of men is provided in chapter 6, first by James Mill and then by John Stuart Mill, the father of contemporary liberalism. Poole tells us that, for J.S. Mill, the idea of freedom developed in *On Liberty* (which may be read compatibly with the rule of law) was only suitable for civilised nations, the Indians not being one of them. Similarly, Finlason provided an apology for the use of martial law in the 1865 uprising in Jamaica as the prerogative of the Crown to restore peace. Dicey offered a similar apology for martial law but contended that, rather than being an expression of the Crown's prerogative, it is "just another name for the common law right and duty [held by officials and ordinary citizens alike] to suppress breaches of the peace" (p. 201). Dicey is used here to foreshadow Poole's thesis that reason of state, martial law being one of its expressions, cannot be eliminated but "can be given greater legal specification and channelled through normal constitutional processes" (p. 289).

Chapter 7 treats the theories of Schmitt, Hayek and Oakeshott on reason of state in the early twentieth century. For Schmitt, "reason of state offers a source of redemption and escape from the humdrum realities of the bureaucratic state" (p. 243). Hayek's ideal constitution, which highly prizes individual liberty, would seek to eliminate the rule of men altogether by embracing the evolutionary and depersonified wisdom of the common law. Poole is not convinced that Hayek's theory would succeed, as he was forced to readmit reason of state in his theory to accommodate situations of public emergency. For Oakeshott, reason of state "is built into the institutional structures and pathways of government … [It] may be impossible to eradicate but we may be able to check its more dangerous excesses" (pp. 243–44).

Chapter 8 is devoted to Poole's reflections on the development of reason of state from after WWII to the present day. So far, it is likely that the student of the history of ideas will have benefited from Poole's encyclopaedic knowledge and his enviable skill in bringing into a single narrative the ideas of the various theorists which are often in scattered writings (monographs, pamphlets, etc.). A student new to the theorists will cherish the first seven chapters, as they provide a useful overview and a guide to finding the materials needed for deeper study. A student who is already familiar with the theorists under examination may be alienated by the descriptive nature of some chapters. In fact, with the exception of chapter 2 on Hobbes and chapter 7 on Schmitt, Hayek and Oakeshott, Poole lets the theorists speak on their own terms and does not try to evaluate or criticise their ideas.

Even in the chapters where Poole critically analyses the theorists under consideration, he tends to focus mainly on the internal coherence of the theories under scrutiny. This is one of the reasons why public lawyers and especially philosophers may not engage with Poole's book. They may find that merely learning about all these theories on reason of state is insufficient. They want to know whether these theories

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help to resolve the perennial tension between the rule of law and the rule of men. Poole's first seven chapters, given their detached nature, will not help them in that normative enquiry.

However, Poole's last chapter has the potential really to draw in the public lawyer and the philosopher. Here, Poole focuses on the post-WWII international rise of human rights norms, including the UK's Human Rights Act, and seeks to ascertain how that has curtailed, if at all, reason of state within the UK constitution. As stated already, his argument is that reason of state will survive the expanding empire of the rule of law. To the public lawyer's satisfaction, he shows, with reference to four seminal cases (including *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2009] 1 A.C. 453 and *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 668 (the *Belmarsh* case)), that, although courts claimed the ability to review the executive prerogative in extraordinary circumstances, they were unable to eliminate reason of state. Poole then offers, to the philosopher's satisfaction, a Schmittian apology for the persistence of modern reason of state. The state's mission is to ensure *salus populi* which will ordinarily require legal constraints on government. However, the survival of the state may necessitate that government act as guardian of the state and employ extraordinary powers under extraordinary circumstances. But no one else is to be the judge of whether circumstances are truly extraordinary other than those same state agencies, above all the executive, which have been granted the power to work within the exceptional category.

Poole is confident that the excesses of modern reason of state can be curtailed by insisting that the exercise of state power be subject to, among other things, intervention by courts in pursuit of accountability, compliance with citizens' rights and transparency. We may, however, be sceptical of Poole's confidence. As he acknowledges, judicial intervention is unable to be an absolute shackle on executive discretion during extraordinary situations. The real risk is one which Poole does not acknowledge in his book: inadequate judicial interventionism in reason of state matters (e.g. war and terrorism) will provide a veneer of legalism and legitimacy to the embarrassments of essentially unbounded executive discretion.

Consider the actions that followed the decision in *Belmarsh* that alien terrorist suspects (but not UK citizens) could not be detained without trial, as that was discriminatory. The Government instituted control orders that allowed the home secretary to essentially confine suspects (aliens and citizens alike) to house arrest without charge nor conviction of terrorist activity. Although judicial review of these control orders was available, the review process failed normal standards of legality. The whole of the evidence on which the home secretary's suspicion was based could not be disclosed to the detained individual, who could therefore not provide useful information to his advocate to contest the basis of the control order in closed proceedings. Also, once the advocate had had access to the totality of the evidence, he could no longer communicate with his client.

Poole's apology for reason of state in this situation may well congratulate the flurry of legal cases, including some from the European Court of Human Rights, seeking to restrict the excesses of the control orders scheme. But no measure of tinkering in the edges through legal doctrines can justify a measure that deprived individuals of their liberty on the basis of suspicions that they could not adequately challenge. No commendation of judicial interventionism should be offered here, as that could allow the executive to justify its action by stating that it is acting in accordance with judicial rulings. Closer analysis, however, reveals that judges are at best playing catch-up with the incessant expansion of reason of state.

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Albeit only in the last chapter, Poole's book provides the occasion for public lawyers and philosophers to scrutinise the challenges that reason of state poses to the rule of law. Poole's apology for the model of rule of men should remind those who cherish the rule of law that it may be suspended to ensure *salus populi*. The challenge is to acknowledge the limits of the rule of law while not allowing it to be used as a fig leaf by the model of rule of men.

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*Public Law Adjudication in Common Law Systems: Process and Substance*. By JOHN BELL, MARK ELLIOTT, JASON N.E. VARUHAS and PHILIP MURRAY (eds.) [Oxford: Hart Publishing, 2016. liii + 390 pp. Hardback £75. ISBN 978-1-849-46991-3.]

Comparative law comes in a variety of forms. This excellent publication comprises a set of essays on administrative law by distinguished writers from a range of countries in the common law world.

The papers were first presented at an inspiring conference organised by public lawyers from the University of Cambridge with the support of the publisher, Hart Publishing, in September 2014. A second conference in the proposed series will have been held by the time this review is published. Nevertheless, the papers in this book will undoubtedly hold their value for many years to come.

The subtitle of the book refers to "Process and Substance": there is an irony underlying that juxtaposition. Much of the growth in the reach, and in the uncertainty as to the scope, of judicial review has flowed from unsatisfactory distinctions between merit review and judicial review, and between error of law and error of fact. The book's title invites a discussion of another pair of contrasting concepts. Most of the authors agree that there is no bright-line distinction between process and substance.

Like private lawyers, public lawyers are accustomed to think in terms of Sir Henry Maine's aphorism that substantive law appears to be secreted in the interstices of procedure, which, in the case of public law, used to be found largely in the common law prerogative writs. Nevertheless, Jason Varuhas is keen to emphasise the separation of public law from private law in the UK. He argues that procedural change has continued the regulation of public power in the public interest and according to precepts of good administration. Varuhas locates a critical impetus in procedural reforms in the 1970s – a process that finds reflection in Australian statutory law reform. He is anxious to maintain an understanding of the history (developed in a separate essay by Philip Murray) to resist public law being diverted by superimposed measures providing for compensation to affected individuals. At the same time, he points to the diversity of the fields subject to public administration. The arguments are well made, but may not give sufficient weight to the drivers of case law development: generally judicial review cases are brought by individuals seeking to maintain their own interests; the courts' job is to apply public law principles to the individual claim.

Phillip Murray's historical approach remarks on the differential developments of certiorari as a procedure for reviewing the criminal jurisdiction of justices of the peace (seen as a derogation from trial by jury) and for reviewing administrative orders made by justices. This functional analysis is reflected in current developments.

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