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A Reply to Grotius's Critics. On Constitutional Law

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Abstract

It is not always easy to interpret Grotius's constitutional theory that lies hidden within his book on the law of war and peace. After a very concise discussion of this constitutional framework, this study turns to various interpretations and conclusions by contemporary scholars that sit awkwardly within the theory. The interpretations of Richard Tuck, Peter Borschberg, Knud Haakonson, Frank Grunert, Deborah Baumgold, Marco Barducci, Daniel Lee and Gustaaf van Nifterik are discussed critically.

Keywords

Constitutional law – *societas* – state of nature – civil state – sovereignty – natural rights – contractual theory – right to resist

Introduction

Hugo Grotius has influenced Western (legal) culture on many topics. One of the topics is what we today call 'constitutional law'. It is not a topic he specifically drew attention to; but he touched upon it, and sometimes even quite extensively, in his political texts and his works on the law of the sea and of war. His most influential work is of course *De iure belli ac pacis* (*IBP*), first published in 1625. According to his theory wars are fought by entities – be they individuals or groups of people – that are not hampered by the will of anybody else (*IBP*, 1.3.7.1); said differently, in a word not used by Grotius but by many of his critics: by sovereigns. 'Sovereigns' in their mutual relationships still live in the state of nature and war is a proper way to settle their disputes. Independent states and more specifically their supreme rulers seem obvious candidates to be qualified as such entities. But Grotius needed a somewhat more general

framework to identify his actors of war in a world that in many aspects had left the state of nature behind, as he also wanted private individuals to legitimately wage war under particular circumstances.

However, Grotius left much of the constitutional framework hidden in the discussions on specific topics. It is up to us to identify the framework, a query that can be summarized thus: who is labelled 'sovereign' in Grotius's theory on war and peace? Or, returning to Grotius's own words: who are the persons 'whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will' (*IBP*, 1.3.7.1)?¹

My focus here will be on *IBP*. Ever since the first publication of the three books on the law of war and peace, readers and scholars have tried to lay bare its constitutional framework, the principles and groundwork of the state. To name only a few of the old ones: the seventeenth-century German lawyer Johannes Felden, the English philosopher Robert Filmer from the same century and Jean-Jacques Rousseau. I will here focus on more recent scholars and more specifically on some of the more critical among them. My aim is to show that often modern scholars at some point go wrong in their interpretation of Grotius's ideas on constitutional law, which should not surprise us as Grotius discussed constitutional topics not as a subject on its own, but primarily to point out who could wage a war and when.

I hope to offer an interpretation of the scattered fragments and their interrelation that leaves the entire theory without contradictions. My emphasis in this contribution, however, is on what I think are mistaken scholarly conclusions concerning Grotius's theory.² Apart from some particular examples of erroneous interpretation (including one of my own), I will for that purpose discuss two more generally followed routes that I think lead to misinterpretations: one in which rights are transferred from individuals to the state and/or its ruler, and a second in which there is a permanent contractual relationship between the ruler and the subjects. I will start the discussion with Richard Tuck, and will end with him; I think doing so gives him the credits he deserves.

Before we turn to the miscellaneous misconstructions of Grotius's constitutional ideas, a short summary of what I think he actually said is in place. I suggest a reading which is in fact not very complicated if reduced to its core. Men in the state of nature, social and rational and naturally free, associate and thereby create a community (association, *societas*). The association is

1 I have used the translation of Francis W. Kelsey in the series Classics of International Law; Oxford/London, 1925 (also available at www.heinonline.org).

2 I hope to publish my interpretation much more extensively in the forthcoming Cambridge Companion to Grotius, publication foreseen in some years from now.

equipped with a right to rule over its members, a right that can subsequently be transferred to one or several rulers, or be kept for the people as a whole. If transferred, this can either be done completely, or partially, or under certain conditions; the ruler to whom the *ius regendi* is transferred can either acquire a property right in it, or an usufructuary right or only a precarious right.

If asked for the specific obligation of a subject towards his ruler in a specific situation within a specific community, Grotius's answer would probably be that one should look for the original intent of the first ones to associate and to institute the political state (cf. *IBP*, 1.4.7.2); for it turns out that their intent is decisive both for the scope of the *ius regendi* and for the terms of the transfer of the *ius regendi* to the ruler. Occasionally alterations might later have been made to the original institutions; if so, also these alterations must be taken into account (an example of this can be found in *IBP*, 1.4.8).

This prompts us to the first questions: from whom or what exactly does the ruler get the *ius regendi*? And if it is the association indeed, what is the source of the association's right over its members?

I No Transfer of Natural Individual Rights

Grotius's theory in *IBP* circles around the idea that in a situation of war the belligerents face each other in their 'natural' identity. Civic life, as opposed to a life in the natural state, means first of all to settle disputes by courts and according to established jurisdictions and procedures. War starts where and when there are no courts to go to; wars are fought beyond the civil state.³ This idea requires that in order to start and wage a war legitimately a belligerent – let us say a King – must both have a natural right the infringement of which might give cause for war, and a natural right to recover the damages suffered by the infringement in one way or another, and maybe also a right to prevent future damages (for instance by inflicting punishment on the offender). And of course a King, if he is indeed not hampered by the will of anybody else (*IBP*, 1.3.8), ex hypothesi cannot go to any court in order to settle the dispute; if he could, he would not be supreme since somebody else would have the power to sentence him and hamper him by his will. If peaceful settlement cannot be achieved, war is the way for Kings to settle their disputes, even in a world that is organized in civil states.

3 *IBP*, 1.3.2.1: *Certe quin restricta multum sit ea quae ante iudicia constituta fuerat licentia, dubitari non potest. Est tamen ubi locum nunc quoque habeat, nimirum ubi cessat iudicium; and II.1.2.1: ubi iudicia deficiunt incipit bellum.*

Richard Tuck, in his very influential 1978 study *Natural rights theories*, assumed that according to Grotius the King somehow acquired the appropriate rights for ruling the people from a transfer of natural rights by the subjects; he concluded with obvious dislike: '[o]ne such transfer which he [i.e. Grotius, GvN] now took to be possible was the total alienation of all their original liberty'.⁴ Tuck's references are to *IBP*, II.6.9 and II.9.8.2 (including the remarks added to the texts). However, there is no sign of a transfer of natural rights from individuals to their ruler in these paragraphs. Tuck next gave an extensive quote from 'one of the most famous passages of the book', *IBP*, I.3.8.1–2. There is indeed some talk of a transfer ('*transcribat*') of a right in this paragraph; not, however, of a transfer of natural rights from individuals, but the transfer of the right to govern from the community of people (the association) to the ruler it has chosen: *regendi sui ius in eum plane transcribat*. So our initial questions still stand: where did the community get this 'right to govern', or *ius regendi*, from? And is Tuck right in assuming that it is the outcome of a transfer of natural rights from the individuals?

Obviously the right to govern is a right over others, a subcategory of rights labelled *potestas in alios* by Grotius, of which natural law recognizes a few (*IBP*, I.1.5 and II.5): the rights of parents over their children, a husband over his wife, the (majority in an) association over the individual members, a master over his slave, and the state over its subjects. This is already an indication that it might not be a natural right of individuals that is transferred to the ruler. For the obvious candidate for an individual *potestas in alios* as the basis for the state's *ius regendi* would have been the rights of parents over their children; but of all rights, precisely the right of a father over his children (*ius patrium*) is portrayed as an example of 'inalienable things' (*inalienabilia*) in *IBP*, III.7.4, as something that cannot be acquired by anybody else.

If it's not a *potestas in alios* of individuals that is transferred to the ruler in *IBP*, I.3.8, it is indeed most probably the natural right of the state over its subjects, also mentioned in *IBP*, I.1.5. What then is the origin of this right of the state to govern (*ius regendi*) that we find in *IBP*, I.3.8 and I.1.5? This question is the more interesting since by nature all men are declared free and no one is subjected to (political) power (*IBP*, III.7.1 *Servi natura ... nulli sunt*; II.22.11 *Nam libertas cum natura competere hominibus aut populis dicitur, id intelligendum est de iure naturae* (...); II.17.2.1 *Natura homini suum est (...) actiones propriae*).

Unfortunately Grotius is not all too clear on this point. The most explicit statement on the origin of the state's political power is actually in the chapter

4 Richard Tuck, *Natural rights theories. Their origin and development* (Cambridge: Cambridge University Press, 1978), p. 77 ff.

on the termination of it, *IBP*, 11.9 called 'When sovereignty or ownership ceases'. There in paragraph 3.1 we read that *summum imperium* is the 'first product' of the full and perfect union of civic life.⁵ I assume that this *summum imperium* is in essence the same as the *ius regendi* that we find in *IBP*, 1.3.8 and the same as the state's natural *potestas in alios* that we find in *IBP*, 1.1.5, an assumption for which I refer to *IBP*, 1.3.12.2 where we read the phrase *ius perpetuum eos regendi, qua populus sunt*, 'the perpetual right of governing them in their totality as a people'.⁶ The existence of a 'people' is made possible by the creation of a supreme right to govern it, while at the same time the *ius regendi* is the very first product of the 'people'. A magical event in which cause and result fall together?

Not much of a problem for someone trained in law. Men, as social and rational beings (*IBP*, Prol. 6), organise themselves into a people, a *consociatio* or *societas* (the terms being used interchangeably in *IBP*, 11.5.17 and 23). The association is held together by the power to direct and govern them (*ius (...) eos regendi, qua populus sunt*), the first product of 'the full and perfect union of civic life', which itself is the result of 'the spirit or essential character' of the people (*IBP*, 11.9.3.1). And just as every other *societas*, also the state is created on account of something that the participants want to achieve together and in cooperation. The goal of the civil association, i.e. the state or *civilis societas*, is to promote public peace and order (*IBP*, 1.4.2.1: *ad tuendam tranquillitatem instituta*). To be able to do so, the association needs a certain say in, and power over the acts of its members. This is precisely what the associated men tried to establish: a unity held together by some common power to achieve a common goal. No magic, but the creation of a moral (*IBP*, 1.3.7.2, moral in the sense of not physical) or artificial body (*IBP*, 11.9.3.1), a body that exists in and by the (natural) law; a *persona ficta* in medieval jurisprudence, a *Rechtsperson* in German. It is natural law that provides the artificial body with the (legal) means to promote its own wellbeing and achieve its goal. For 'by nature everyone is the defender of his own rights' (*IBP*, 1.5.1), and this includes artificial entities.

5 *IBP* 11.9.3.1: *cuius prima productio est summum imperium*. My anonymous reviewer, who gave many useful suggestions for which I am very grateful, prefers 'foremost manifestation' as translation for *prima productio*. I however hold on to Kelsey's translation 'first product' and refer to *IBP*, 1.4.2.1 (*statim civitati ius quoddam maius in nos et nostra nascitur*, 'the state forthwith acquires over us and our possessions a greater right') to underscore the immediate birth of civil power. The translation edited by Richard Tuck from the edition of Jean Barbeyrac (Indianapolis, Liberty Fund 2005) has 'the first and immediate Effect' for *prima productio*.

6 Jan Frans Lindemans, *Het recht van oorlog en vrede. Prologemona & Boek I*, (Baarn: Ambo, 1993) translates *qua populus sunt* as 'waardoor zij juist een volk zijn' (by which they are a people), which I think expresses Grotius's thoughts correctly.

We can now conclude that it is not individual natural rights that the King acquires by the transfer of rights. Men come together and create a *societas*, a moral or artificial body that is upheld by a *sumum imperium*, a natural power of the entity over its constituent parts or members. If the *societas* is a state ('the most perfect society', *IBP*, 11.5.23) this power is the aforementioned natural *potestas* of the state *in alios*, i.e. over its subjects. It is this power that can subsequently be transferred to a specific ruler (or not), and it is in this vein that we must understand the words of *IBP*, 1.3.8.1–2 Tuck quoted: the people as an artificial entity (*societas*) transfer the right to govern this entity (i.e. the *ius regendi*, a natural *potestas in alios*) to the ruler they have chosen.

From this angle, Tuck's saying that 'central among the rights which people renounce when they set up a sovereign (...), is the right of self-defense'⁷ can only be interpreted thus: men by setting up an association mutually promise to each other not to make use of their natural right of self-defense as long as the association can and will provide for other, i.e. civic means of defense (including of course dispute settlement); that is, as long as they live in the civil state. Grotius in *IBP*, 1.4 makes abundantly clear that there are many situations in which men may still defend themselves, even when there is a ruler set over them. In addition to some stipulated situations in which the ruler and courts have no jurisdiction and resistance might occasionally be legitimate (to be found in *IBP*, 1.4.8 ff.), there is the situation that the ruler openly shows himself an enemy of the people. By showing himself an enemy of the people, said Grotius in *IBP*, 1.4.11, the ruler has already renounced and forfeited his kingdom and resistance is legitimate self-defense of the people against their ruler. The will to rule, that is: to wield the *ius regendi* in order to promote the association's end of public peace and order and to defend the association in its being and its rights, cannot logically coincide with the will to destroy the association or its members, the people. Beyond the *ius regendi*, the King acts as an individual; therefore the people may defend itself even against him, since there is no court they could turn to (for if there was, the King would not have supreme power). It is however questionable whether or not according to Grotius also individuals may rebel against their King. After all, individuals are still mutually bound to their original promise to let the association take care of their defense. Precisely this was the incentive to associate in the first place.

Of course, ruling the people is something of a complex nature. It includes legislation, execution of the law, foreign politics, and more (see *IBP*, 1.3.6). It is therefore not entirely clear what Tuck wanted to say when he insisted that 'Grotius accepted in *De Iure Belli* (...) a natural right to punish: the only thing

⁷ Tuck, *Natural rights theories*, p. 78.

necessary to create civil society successfully would thus be a transfer of that right to some common authority'.⁸ I would say that punishment is an important element of power within the civil society. It is however far from being the only one, and the other powers that are included in the right to rule cannot be deduced from it. Besides, of course, the creation of the civil society is not effected by a transfer of rights; it is effected by a mutual promise.

In later works as *Philosophy and Government* (1993) and *The Rights of War and Peace* (1999) Tuck is less outspoken on the subject.⁹ He focusses on Grotius's *De iure praedae* (written around 1605, and called *De Indis* by Tuck) and points out the similarities between the work of 1625 and this earlier work. The focus is on man's sociability. But the alleged similarities between *De iure praedae* and *De iure belli ac pacis* are misleading if it comes to 'constitutional law', a problem we also face in some of the works of Peter Borschberg, who in 1994 and in 2006/7 did extremely valuable work drawing our attention to two unpublished early treatises of Grotius on sovereignty, the *Commentarius in Theses XI* (written 1603–1608) and *Theses LVI* (first decade seventeenth century).¹⁰ For whatever the similarities between the early and the later works, there also is at least one major difference that is particularly relevant in the subject we are discussing.

In *De iure praedae*, chapter 8, we read that 'just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals'.¹¹ Here indeed we find a transfer of natural individual rights to the state, with a focus on the right to punish. Writing in this vein, Grotius used the *nemo plus* rule known from Roman law that one cannot transfer to another a greater or more right than he himself has (Digest 50.17.54) and

8 Tuck, *Natural rights theories*, p. 79 ff. See also Knud Haakonssen, 'Hugo Grotius and the History of Political Thought', *Political Theory* 13 (1985), 239–265, at p. 246.

9 Richard Tuck, *Philosophy and Government 1572–1651* (Cambridge: Cambridge University Press, 1993); idem, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: OUP, 1999) (the chapter on Grotius is also published in: Larry May and Emily McGill, *Grotius and Law*, (Farnham / Burlington: Ashgate, 2014), 1.2, pp. 37–67).

10 Peter Borschberg, *Hugo Grotius "Commentarius in Theses XI". An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt* (Berne: Peter Lang, 1994); idem, 'Grotius, the Social Contract and Political Resistance. A study of the Unpublished *Theses LVI*', *ILJ Working Paper 2006/7. History and Theory of International Law Series*.

11 *Commentary on the Law of Prize and Booty*, ed. by Martine Julia van Ittersum. Based on the translation and edition by Gwladys L. Williams and Walter H. Zeydel (Indianapolis, 2006), p. 137; in the edition *De iure praedae commentarius*, ed. by H.G. Hamaker (Hagae Comitum, 1868), p. 91.

argued that since the state has a right to punish transgressors of the law, obviously individuals must have this right in the state of nature. Hence the right of Dutch privateers to punish transgressions of (natural) law by the Spaniards and Portuguese around the globe – the main argument in the commentary on the law of booty. As the early works on sovereignty that Borschberg has drawn our attention to are written in roughly the same period as *De iure praedae*, I think it wise to wean modern readers from a reliance on Grotius's early works in order to (better) understand his *De iure belli ac pacis*.¹² As I have tried to show above, the *nemo plus* rule has no relevance in the constitutional theory on the origin of the civil society and the state in Grotius's magnum opus of 1625.

To conclude on Tuck and Borschberg, I think they mistakenly assume that there is a transfer of rights from the individual to the state or its ruler in *IBP*; since there is none, *De iure praedae* and other works from the same period seem unreliable sources to help us better understand the constitutional theory in *IBP*.

In his 1985 study on Grotius's political thought Knud Haakonssen draws our attention to two orders of rights in Grotius's texts, even though Grotius himself did not make the distinction.¹³ Whereas first-order rights directly concern one's own (*suum*, see *IBP*, II.17.2.1), second-order rights see to the implementation of such rights; the right to punish is central among these second-order rights. The legal sovereign, so runs Haakonssen's interpretation of Grotius's constitutional theory, is '[t]he sovereign authority to which they surrender their general right to resistance', thereby retaining 'the full complement' of first-order rights, 'as well as a minimum of rights of resistance'. A rather complicated description of the theory and hardly enlightening for being vague. It is not easy to understand how people can 'surrender' a right to resistance and retain a minimum of it. And if they would only 'surrender their general right to resistance', wherefrom does the 'sovereign' get all the facets of the *potestas in alios*, for instance his right to legislate and enforce compliance?

Again, I believe that Grotius's people do not 'surrender' any rights to the 'sovereign'. They mutually promise by contract (viz. the contract by which they agree to set up a *societas*) not to make use of any of their individual 'second-order rights' (to use Haakonssen's terminology) as long as there are civic ways to settle their disputes in peace and relative harmony – said differently: as long as there are courts, *judicia*, to turn to. For that is the essence of the civil state;

12 In answer to, and with a nod to the author's afterthought, Borschberg, 'Grotius, the Social Contract and Political Resistance', p. 70. Ibidem, p. 29 where we read of transfer, or alienation of rights to civil society. At ibidem p. 41: 'the commonwealth (*respublica*) is given the right over its citizens to direct civil society'; *given* – the question is: by whom?

13 Haakonssen, 'Hugo Grotius', p. 246.

beyond that there is the state of nature, and war is the proper means to settle disputes.¹⁴ This initial promise of the associates is the pivotal element of the contract by which they organize themselves in a *civilis societas*; and this contract is of course a *pactum* to which they are mutually bound by natural law. It is the natural law principle of *pacta sunt servanda* (*IBP*, Prol. 8 and 15) that is meant in *IBP*, 1.3.2.1 where we read of 'the law which forbids a man to seek to recover his own otherwise than through judicial process' (this law being applicable only 'where judicial process has been possible'). Contracting thus, they created an entity, a body, larger than themselves with the preservation of peace and order as its goal (*IBP*, 1.4.2.1: *ad tuendam tranquillitatem instituta*) and provided by nature with the rights needed to accomplish that purpose – taken together: the right to govern the subjects and to protect its very being against dangers, both from within and from without. In general one could expect the association to transfer the right to govern (including dispute-settlement) to the 'sovereign'.

As said above, the transfer of power to the ruler is not necessarily unconditional and the right to govern is not necessarily complete, let alone absolute. It is here that we find the legitimations for resistance. Not an undetermined 'minimum of rights of resistance', as Haakonssen believed, but well described limits of sovereign power beyond which the King would no longer act as civic agent, but as a natural being. As every natural being the King could be resisted (by waging war against him) if he would infringe on others' rights and if indeed there is no court to decide over the King the victim could turn to. After all, war is the natural way to settle disputes.

The limits of power are partly drawn by natural law (see esp. chapter 4 of book I *IBP*), partly by the limits and scope of the specific *societas*, and partly by the contract underlying the transfer of the right to govern from the *societas* to the ruler. Should the ruler exceed the limits, there is not a *minimum* of rights of resistance, but a full and complete natural ('second order') right to settle the disputes arising from it. Indeed, by a war of the subjects against their superior (as runs the title of chapter *IBP*, 1.4), said differently: by resistance. That the limits might in actual politics often have been unclear and disputed is a matter altogether different from alleged failures in the theory.

II No Lasting Contractual Relationship with the Ruler

Let us now turn to another misunderstanding of Grotius's constitutional thoughts, one that could easily arise when someone studies *De iure belli ac*

14 Once more *IBP*, 11.1.2.1: *ubi iudicia deficiunt incipit bellum*.

pacis, i.e. the thought that there is a lasting contractual relationship between the ruler and the subjects, a relationship governed by the natural law-rule that *pacta sunt servanda*. Plainly Frank Grunert wants to read this natural law principle into the public relationship between the government and the governed.¹⁵ But the thought is also at hand when we read the studies of scholars who ascribe a contractual theory of (absolute) sovereignty to Grotius, with a right to resistance in some situations.¹⁶ What's more, Grotius himself said that the mother of the civil law is the obligation which arises from mutual consent, an obligation that derives its force from natural law (*IBP*, Prol. 15 and 16).

Grunert grounds his reading upon the idea of double sovereignty that we find in *IBP*, 1.3.7, saying that there are two subjects of the supreme power (*summa potestas*), the association or the *civitas* as the common subject (*subiectum commune*), the one or several persons that rule the state as its proper subject (*subiectum proprium*). The relationship between these two subjects is the result, so Grunert, of contractual arrangements.¹⁷

As such, this is not an incorrect reading of Grotius; but as said it can easily lead to misunderstandings. Grotius's general idea is indeed that there is a contract between the association and the one or several persons chosen for the task of ruling the people. This is the contract underlying the transfer of the supreme power from the association (common subject) to the ruler (proper subject). By this contract the scope of the ruler's power (complete or not) and the legal title by which he will hold his right are determined.

But it is important to point out that after the transfer of power it is no longer the contract that determines the relationship between ruler and subject, but the (legal) character of the right in the *ius regendi* the ruler has received. For this right is either ownership of the right to rule, or a usufructuary right in it or just a precarious right (*IBP*, 1.3.11). In the first two cases the people has no longer any legal control over the right to rule; only in the case of a precarious right the people can at all times decide to take the supreme power back again

15 Frank Grunert, 'Der Vertrag als rechtliches Medium sozialer Gestaltung: Zum Kontraktualismus bei Hugo Grotius', in N. Konegen and P. Nitschke (eds.), *Staat bei Hugo Grotius*, Staatsverständnisse 9 (Baden-Baden: Nomos, 2005, pp. 125–137 at pp. 129/130 and 133/4.

16 Haakonssen, 'Hugo Grotius', p. 244; Deborah Baumgold, 'Pacifying Politics. Resistance, Violence, and Accountability in Seventeenth-Century Contract Theory', *Political Theory* 21 (1993), 6–27 [also published as chapter 11 in Idem, *Contract Theory in Historical Context. Essays on Grotius, Hobbes and Locke* (Leiden: Brill, 2010)], p. 10: 'contractarian defense of absolutism' and others.

17 Grunert, 'Der Vertrag', p. 133: 'Die daraus erwachsenden faktischen rechtlichen Kompetenzen beider Instanzen sind Gegenstand vertraglicher Übereinkünfte'.

(Grotius indeed says that the position of a ruler with a precarious right in the *ius regendi* is altogether different from the other two positions, *IBP*, I.3.11.3). But in neither case is the relationship defined by the law of contracts. Should the ruler not comply with what had been agreed in the contract underlying the transfer, his act would fall beyond his right and the ruler might in some cases be resisted. It is not the contractual relationship between the people and the ruler that legitimizes resistance, neither is it in any other way the fact that he promised to stick to the contract. Resistance in situations as described is legitimized by the fact that the ruler simply does not have the right to act that way, and if he does he does not act as ruler but as a natural person. And since, inevitably, there is no court a victim could turn to if the lawbreaker is the supreme ruler, it can only be natural law that provides the victim with the means to defend himself: war.

This understood, we can return to Grunert, who rightly underlines the weight of the contract as a legal tool for Grotius's social and political theory. We can now concede that it is indeed possible that one or more additional clauses had been added to the contract between the association and the ruler, for instance the clause that the ruler should (not) use his right to rule in this or that way. Said otherwise, promises might have been made between the ruler and the people concerning the *exercise* of the power transferred. Then, indeed, the ruler will be bound to 'certain rules, to which kings would not be bound without a promise' (*IBP*, I.3.16.2) and can eventually be forced to abide by the contract (more specifically: by the clauses added to the contract), ultimately probably even sentenced if he does not. Because *pacta sunt servanda*.

There is a subtle distinction between agreements concerning the right to be transferred, and other agreements concerning the exercise of the right. *Pacta sunt servanda* only plays a lasting role in case of a breach of the contractual agreements concerning the exercise of the right that is transferred.

III Reading the 'Contradictions'

Several interpreters of Grotius's ideas have come to the conclusion that his texts are contradictory. I hope that the reading suggested in the Introduction shows a way out of the textual problems and contradictions. I will discuss two cases of assumed contradictions, and turn to Deborah Baumgold first and to Marco Barducci afterward.

In her article (subsequently chapter) on politics and resistance in Grotius, Hobbes and Locke, Baumgold refers to the 'Grotian project', which

soon afterwards turns out to have been a 'Grotian problem'.¹⁸ The project was to admit some violent resistance within a political society, i.e. a constitutional right of resistance; the problem was to specify the scope and limits of the ban on violence and resistance within the state, a problem not solved sufficiently by Grotius, according to Baumgold.

Baumgold approaches Grotius's texts on the project using two concepts 'relevant to specifying when force may legitimately be used by private individuals against the government': popular sovereignty and governmental accountability. Grotius himself did not approach the problem of legitimate resistance from these angles. Faced with the question of legitimate resistance, Grotius would look for the exact sort of right the specific ruler possesses, and then ask whether he used his particular right according to its specific terms.

Baumgold, without discriminating the different types of right a ruler could have in the *ius regendi*, discerns three lines of argument in Grotius's project: an analytical proposition, that a 'promiscuous right of resistance' is per se incompatible with civil society; a contractarian argument, contradicting the former and saying that sovereignty is not necessarily unconditional; and a natural law argument, based on self-defence with a license of defensive violence in extreme and imminent danger. 'Grotius' mistake lay in conflating several different issues under the single heading of the resistance question' (p. 11). He failed to see, says Baumgold, that civil society can entail a ban on violence, and accountability of government (this would be Locke's achievement), and a private right of self-defence, without a political right to resist (a thought afterwards spelled out by Hobbes).

What Baumgold fails to see, in turn, is the demarcation line between the association and the civil or political state in Grotius's theory. It is the association that entails a ban on promiscuous violence, based on the contract of *societas* between its members. The members of the *societas* should respect this ban on violence, which is the *raison d'être* of the association, on the natural law principle that *pacta sunt servanda*. So far the state of nature has not yet been left behind. Only the transfer of the right to rule (*ius regendi*), the right that results from the contract of *societas*, to the ruler is an act of framing the political. Therefore, if a ruler should act in disregard of the contracted restrictions on his political power, this act cannot strictly speaking be taken for a political act; it is an act of an individual acting *beyond* his political power and for that reason – since ex hypothesi there is no political power above the supreme ruler – an act of a human being in the state of nature.

18 See f. 15.

Consequently, it makes no sense to speak, as Baumgold does, of a *political* right of resistance based on an individual right of self-defence; a political right of resistance is in fact a *contradictio in adiecto*.¹⁹ In the situations where resistance is legitimate, parties face each other as natural beings and act beyond the political. An individual citizen, i.e. each member of the *societas*, will still be bound to the *pactum* that included a ban on promiscuous violence; but this is an obligation towards the *societas* and every other member to the contract of *societas*. The *societas* as such is in no way bound to endure the tyrannical use of the right it had previously transferred to the ruler, to endure a use of the *ius regendi* beyond its limits or deviating from how it was meant to be used. Many questions of course arise, such as who is to decide and who is to act on behalf of the *societas*. But such questions, important as they are, are altogether different from the problem Baumgold tried to lay bare.

Similar critique can be formulated in response to the recent study of Marco Barducci.²⁰ Barducci criticizes Grotius on the theory's outcomes, apparently without taking proper notice of its fundamental (legal) principles. We find an example on p. 30: 'people irrevocably renounced to (sic) their right of self-government upon entering society'. I think Grotius tried to say that the people who enter society mutually promise (to their co-members) not to make use of their natural right of 'self-government' (a term not used by Grotius) as long as society exists, or, more precisely, as long as they are a member of it. Indeed, they are mutually obligated by this promise, for natural law says that *pacta sunt servanda*. But all this is of course far from an irrevocable renouncement.

On p. 48 Barducci mentions 'a list of cases in which resistance was permitted' according to Grotius. This list is presented, once more, as a Grotian problem, as a Janus-faced element in the theory of Grotius, who had also pointed out that allowing the promiscuous right of resistance would destroy the state – the same problem Baumgold had discussed. An intellectual problem it might have been for Grotius, but an 'apparent contradiction' (*ibidem*) it is not. Neither Grotius's state, nor the right of Grotius's ruler in the *ius regendi*, is necessarily all-embracing; it depends on the specific situation, the specific *societas*, the ruler's specific right in the *ius regendi*. Within the specific state of political arrangements, i.e. within the political, there is no room for resistance;

19 See also Frank Grunert, 'Sovereignty and Resistance: The Development of the Right of Resistance in German Natural Law', in *Natural law and Civil Sovereignty. Moral Right and State Authority in Early Modern Political Thought*, ed. by Ian Hunter and David Saunders (Basingstoke: Palgrave MacMillan, 2002), pp. 123–138, on p. 127.

20 Marco Barducci, *Hugo Grotius and the Century of Revolution 1613–1718. Transnational Reception in English Political Thought* (Oxford: Oxford University Press 2017).

only *beyond* the state, i.e. in the state of nature, there is. The state, its ruler, and his hold on supreme power, are civic institutions. If the ruler acts beyond his right, he acts beyond the civil state; and then the law of non-resistance does not apply. And since there is presumably no court one could turn to if illegitimately attacked by (the person of) the ruler, natural defense (i.e. resistance) might be the only way to protect oneself.

Only now we can correctly understand what Barducci labelled the list of cases in which resistance was permitted, introduced by Grotius as ‘certain points which we now ought to bring to the reader’s attention, in order that he may not consider those guilty of disobeying this law [i.e. the law of non-resistance, GvN] who in reality are not guilty (*revera non delinquent*)’, *IBP*, I.4.7.15. If framed, with Barducci, as ‘cases in which resistance is permitted’, permitted can only mean ‘permitted by natural law’, not ‘permitted by civil law’ or ‘permitted in the civil state’. Precisely because, indeed, in such cases the civil state had already been left behind.

This approach might not satisfy our ideas on the state, the political and sovereignty; one may even consider in it a reason to abandon Grotius’s theory of the state altogether. But a theoretical contradiction there is not.

iv Miscellaneous Inaccuracies

Apart from the rather general approaches dealt with above that fail to do justice to Grotius’s principles, there are various mistakes interpreters of the text have made. I again discuss two such miscellaneous inaccuracies relevant to the subject, one of which is my own. But I will start with Daniel Lee, whose error has already been discussed by Barducci.²¹

Daniel Lee enthusiastically tries to show that Grotius in his constitutional theory worked out a union of monarchical government and popular sovereignty.²² To substantiate this union Lee somewhere at the end of his chapter (p. 270) claims that the ‘nature of the usufructuary prince’s grip on sovereign power is, thus, a “revocable right” [*ius revocabile*] and could be nothing more than what in Roman private law was classified a precarious tenure

²¹ Ibid., p. 30/1.

²² Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press Scholarship Online, 2016), chapter 8 called ‘Popular Liberty, Princely Government, and the Roman Law in Hugo Grotius’s *De Iure Belli ac Pacis*’, previously published as ‘Popular Liberty, Princely Government, and the Roman Law in Hugo Grotius’s *De Iure Belli ac Pacis*’, *Journal of the History of Ideas* 72 (2011), 371–92.

[*precarium*]. His mistake is that he takes for the entire theory of the state what is in fact only one of the three possible rights ('grips') that a ruler can have in the *ius regendi* ('sovereign power'), a precarious right. A precarious right in the *ius regendi* is indeed revocable, and precisely for that reason it is expressly set apart from the two other modes of possessing the *ius regendi* by Grotius himself (*IBP*, 1.3.11.3, see above). A property right and an usufructuary right of course are not revocable, according to the same Roman law that Lee is invoking; neither are they according to Grotius. Lee's main argument instantly collapses.

Let us now turn to my own error. In an effort to summarize Grotius's ideas on the rulers' right to use the sword in *De iure belli ac pacis*, I quoted from Hobbes' *Leviathan*, chapter 28, a passage in which Hobbes formulated his own ideas on the right to punish. I did so, because by that time I thought that Hobbes' formulation of his own theory could also be used to explain Grotius's thoughts on the subject. My (somewhat adapted) quote from *Leviathan* ran as follows: 'the subjects did not give the sovereign that right to punish; but only in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all; so that it was not given, but left to him, and to him only; and (within the limits set him by natural law) as entire, as in the condition of mere nature.'²³

By now I see that the formulation with which Hobbes described his own theory are not entirely appropriate to describe Grotius's. For although it is true that Grotius's subjects did not give their right to punish to the sovereign, and although it is true that they so to speak lay down their (natural) right to punish when they enter society, they thereby do not strengthen the sovereign to use his own. For Grotius's sovereign does not use his 'own' natural right to punish, but society's. Society as a separate entity, erected by the associated persons in accordance with natural law, has its own natural right to defend itself and to promote its well-being, including indeed the right to punish transgressors of the (natural) law. The ruler's right to punish is an element of the *ius regendi*, and the *ius regendi* is something that initially pertained to the community, to society. It is society's *ius regendi* that is subsequently transferred to the ruler.

23 Gustaaf van Nifterik, 'Grotius and the Origin of the Ruler's Right to Punish', *Grotiana* 26–28 (2005–2007) (also published as in *Property Piracy and Punishment. Hugo Grotius on War and Booty in De Iure Praedae – Concepts and Contexts*, ed. by Hans W. Blom (Leiden: Brill, 2009), pp. 396–415, at p. 411.

v Tuck's Sleeping Sovereign

I promised to close this paper with Richard Tuck and turn to his most recent book, *The Sleeping Sovereign*.²⁴ Tuck's main argument in this study is that modern democracy is built around the distinction between 'sovereignty' and 'government', a distinction already insisted upon by Jean Bodin, but only sufficiently explored by Jean-Jacques Rousseau, with whom 'modern democracy' begins. After mapping out the constitution the sovereign can fall asleep and leave it to the government to govern. Democratic citizens from time to time vote their representatives and let them discuss on politics. What is the position of Grotius within this story, who lived after Bodin and prior to Rousseau?

Important in this context is Grotius's distinction discussed above between the common subject of supreme power (the sovereign people, the one sleeping) and the proper subject (the ruler, the one governing). I think Tuck is right in drawing attention to this distinction of Grotius in the story he is telling. But I think he underestimates the importance of the common subject, pointing out on p. 78 that power is 'only virtually in the people; there was no institutional means by which it could express itself'. Under normal circumstances the common subject of sovereignty is asleep indeed; and it is a deep sleep, almost as being in coma. And as far as Grotius is concerned the common subject continues sleeping; Grotius's citizens not even necessarily vote their representatives from time to time. But at times the common subject's influence is most important, even decisive, not only when the constitution of the state is established (and maybe even drafted) but also when the ruler is not willing or unfit to govern. Its means are natural, not indeed 'institutional', as Tuck rightly says on the same page. For the common subject's rights are not political or civil, but natural and predating the civil state.

It is the association's members *before* they turn into an identifiable collective subject who decide on the nature of the association and it is the common subject that decides on its constitutional and political form. Doing so, the people have shaped the association's 'spirit or essential character', the drive or force that makes them into one people and holds them together. Only after having decided thus they turn to the question of who is to rule, the question of who will be the proper subject of sovereignty. Whereas for both Hobbes and Rousseau it is the sovereign who creates the requisite unity, for Grotius this is achieved by the spirit, by the collective will of being a common subject of power. The *ius regendi* is the first product of this spirit.

24 Richard Tuck, *The Sleeping Sovereign. The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2015), esp. ch. 2.

Assuming that this reading is correct, I respond to Tuck that in fact there is substantial difference between Grotius's common subject of sovereignty and 'the vaguely specified people or *respublica* of Vitoria' (p. 253). Whereas in Vitoria's political writings the general constitutional scheme is ordained by God, in Grotius's theory it is the people who decide on the most important topics at the most constitutive moments.

Tuck rightly says (p. 84) that 'Grotius' common subject of sovereignty was not a Bodinian sovereign'. But his next saying that '[o]nly in a quasi-revolutionary moment (...) could it act collectively' is too narrow. Apart from its constituent role, Grotius's common subject can keep 'marks of sovereignty' (to speak in Bodinian language) to itself; it can also bind the ruler contractually and keep him to the contract. Tuck's subsequent remark that even in a quasi-revolutionary moment 'its actions are limited to a decision over a new proper subject' cannot be founded on Grotius's theory, even if Tuck's idea of 'a decision over a new proper subject' might be the most likely outcome should the situation actually occur in practice. 'It was not sovereignty but government, in Bodin's sense of the terms, that in Grotius' view was critical to an understanding of politics' (p. 85). Unsurprisingly so, for sovereignty (a term Grotius did not use), i.e. not being hampered by the will of anybody else, belongs to the natural order and the natural law, whereas government is an element of the political; sovereignty is natural, the sovereign and government are civic.

VI Concluding Remarks

It is easy to go off course in Grotius's complex theory in which he needed 'constitutional law' primarily to identify the actors within the field of war and peace. I suggested a reading of the text that might not satisfy all our expectations – let alone our own constitutional ideas and preferences – but that leaves Grotius's story without contradictions. At least I hope to have solved a few of them, especially contradictions arising from reading a transfer of individual rights and the *nemo plus* rule, or the famous adagium *pacta sunt servanda* into Grotius's central ideas on the origin and exercise of supreme power. The *ius regendi* is a natural *potestas* derived from natural law and by nature attached to the state as a perfect *societas*. The association's *ius regendi* can be transferred to its ruler whereby the ruler acquires either a property right in the *ius regendi*, or a usufructuary right, or a precarious right. Restrictions can be added regarding the exercise of the ruler's right; then indeed, the ruler has to live after the contract between him and the association.

Bibliography

- Barducci, M., *Hugo Grotius and the Century of Revolution 1613–1718. Transnational Reception in English Political Thought*. Oxford: Oxford University Press, 2017.
- Baumgold, D., *Contract Theory in Historical Context. Essays on Grotius, Hobbes and Locke*. Leiden: Brill, 2010.
- Borschberg, P., *Hugo Grotius "Commentarius in Theses XI". An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*. Berne: Peter Lang, 1994.
- Borschberg, P., 'Grotius, the Social Contract and Political Resistance. A Study of the Unpublished *Theses XVI*', *IILJ Working Paper 2006/7. History and Theory of International Law Series*.
- Grotius, H., *Commentary on the Law of Prize and Booty*, ed. by Martine Julia van Ittersum. Based on the translation and edition by Gwladys L. Williams and Walter H. Zeydel. Indianapolis: Liberty Fund, 2006.
- Grotius, H., *De jure belli ac pacis*. Vol II, the translation by Francis W. Kelsey, *Classics of International Law*. Oxford: Clarendon Press, 1925.
- Grotius, H., *Het recht van oorlog en vrede. Prologemona & Boek I*. Transl. and ann. by J. F. Lindemans. Baarn: Ambo, 1993.
- Grotius, H., *De iure praedae commentarius*, ed. by H.G. Hamaker. Hagae Comitum: Nijhoff, 1868.
- Grunert, F., 'Der Vertrag als rechtliches Medium sozialer Gestaltung: Zum Kontraktualismus bei Hugo Grotius', in N. Konegen and P. Nitschke (eds.), *Staat bei Hugo Grotius*, *Staatsverständnisse* 9 (Baden-Baden: Nomos, 2005), pp. 125–137.
- Grunert, F., 'Sovereignty and Resistance: The Development of the Right of Resistance in German Natural Law', in *Natural Law and Civil Sovereignty. Moral Right and State Authority in Early Modern Political Thought*, ed. by Ian Hunter and David Saunders (Basingstoke: Palgrave MacMillan, 2002), pp. 123–138.
- Haakonssen, K., 'Hugo Grotius and the History of Political Thought', *Political Theory* 13 (1985), 239–265.
- Lee, D., *Popular Sovereignty in Early Modern Constitutional Thought*. Oxford University Press Scholarship Online, 2016.
- Nifterik, G. van, 'Grotius and the Origin of the Ruler's Right to Punish', *Grotiana* 26–28 (2005–2007) (also published as Hans W. Blom (ed.), *Property Piracy and Punishment. Hugo Grotius on War and Booty in De Iure Praedae – Concepts and Contexts* (Leiden: Brill, 2009), pp. 396–415.
- Tuck, R., *Natural Rights Theories. Their Origin and Development*. Cambridge: Cambridge University Press, 1978.
- Tuck, R., *Philosophy and Government 1572–1651*. Cambridge: Cambridge University Press, 1993.

Tuck, R., *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*. Oxford: Oxford University Press, 1999.

Tuck, R., *The Sleeping Sovereign. The Invention of Modern Democracy*. Cambridge: Cambridge University Press, 2015.