UvA-DARE (Digital Academic Repository)

Sovereignty

van Nifterik, G.

DOI

[10.1017/9781108182751.013](https://doi.org/10.1017/9781108182751.013)

Publication date

2021

Document Version

Final published version

Published in

The Cambridge Companion to Hugo Grotius

License

Article 25fa Dutch Copyright Act

[Link to publication](#)

Citation for published version (APA):

van Nifterik, G. (2021). Sovereignty. In R. Lesaffer, & J. E. Nijman (Eds.), *The Cambridge Companion to Hugo Grotius* (pp. 178-197). (Cambridge Companions to Law). Cambridge University Press. <https://doi.org/10.1017/9781108182751.013>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

8 Sovereignty

Gustaaf van Nifterik

8.1 Introduction

Grotius' ideas on sovereignty in *De jure belli ac pacis* are often qualified as 'Janus-faced' and even contradictory, as his theory endorses both absolute monarchy and popular sovereignty, both unaccountability of the sovereign and the right to resist the sovereign in some extreme situations.¹ The conclusion often drawn is that the 'Grotian problem',² to admit rebellion while banning private warfare in society, is not solved satisfactorily in his main work, a conclusion that is backed up by pointing out that monarchists, republicans, revolutionaries and others all find useful arguments to support their position in Grotius' theory.³

Yet, the 'problem' itself was of acute interest. The Dutch Republic, Grotius' homeland, was the result of a recent and successful revolt of the people against their ruler, Philip II (1528–98), the king of Spain; its internal structure was still under construction. Meanwhile, Europe was on fire, with the Thirty Years War (1618–48) ruining Germany and killing about a third of its population. Rebellion, rights vis-à-vis a legitimate government, and war and peace were matters to be discussed profoundly. How did these topics relate to the idea of sovereignty, both internal and external?

In this chapter, Grotius' ideas on internal sovereignty will be analysed from a legal point of view. It will be shown that, from this perspective, there is no contradiction in the theory in *De jure belli ac pacis*, and that both absolute monarchy and popular sovereignty, both unaccountability of the monarch and the right of resistance, can be deduced from his legal assumptions; the situations in which resistance is allowed are not exceptions to the rule – i.e. 'the law of non-resistance' – but outcomes based on the same principles as the rule itself. Of course, one can question and criticise Grotius' legal assumptions as such, or criticise the outcomes of Grotius' legal reasoning and then point out that, apparently, his assumptions are wrong; we will do so in some concluding remarks. However, inconsistency is a false accusation.

In what follows, the focus will be on Grotius' ideas on internal sovereignty as set forth in his *De jure belli ac pacis*. This focus needs some justification, the more so since Peter Borschberg weaned 'modern researches from their overreliance on Grotius' best-known work'.⁴ Yet, also Borschberg considered this work to be 'the result of approximately two decades of intensive research on some of the most fundamental issues in politics, law, and the heritage of all mankind', the result of a long intellectual struggle.⁵ Legal reading reveals not just 'snippets of text' removed from their intellectual context and intentionally lacking intellectual coherence, as Borschberg says. It need not be the reader who gives coherence to these snippets.⁶ From a legal point of view, the constitutional theory in the treatise seems coherent enough.

However, it is not easy to grasp the coherence since the book was on the law of war and peace, not on constitutional law. Laying bare the underlying constitutional structure, its legal ground-rules and principles, is therefore all the more necessary. Grotius' earlier works can sometimes enlighten us here, if only we are aware that there are some important differences in legal reasoning between his earlier and his later work. Hence a caveat is in place if one tries to use earlier works in order to understand the later one.

8.2 Legal Assumptions and Legal Reasoning: Framing the State

By nature, so runs one of Grotius' basic assumptions, all men are free and no one is subject to (political) power (DJBP 3.7.1: 'Servi natura . . . nulli sunt'; 2.22.11: 'Nam libertas cum natura competere hominibus aut populis dicitur, id intelligendum est de iure naturae (. . .)'; 2.17.2.1: 'Natura homini suum est (. . .) actiones propriae'). But, people actually did and do live in states and under rulers who have political power over them. The highest ruler with supreme power is he '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' (DJBP 1.3.7.1). Grotius used the term supreme power (*summa potestas*), not sovereignty or sovereign power. Borschberg convincingly argued that Grotius wanted to avoid close association with Jean Bodin's (1530–96) ideas on 'souveraineté' (*jus maiestatis* in Latin).⁷ As we will see below, Grotius' 'sovereign' is not necessarily freed from the

laws, as his supreme power is not necessarily absolute; neither is sovereign power indivisible, according to Grotius, as it was for Bodin.

Obviously, there is a transformation from life in the natural state to life in the political or civil state, and it is also obvious that law ('legal control', *alterius jus*) somehow has to do with this transformation. Grotius' second assumption relevant to our subject says that *potestas*, that is power of man over man, is in fact not unknown in the law of nature. *Potestas* is one of the manifestations of *jus* (the others being *dominium* and *creditum*, DJBP 1.1.5). It can either be power over oneself, called freedom, or power over another. *Potestas in alios* is elaborated in chapter 2.5, where Grotius discussed the rights of parents over their children, the husband over his wife, the (majority in an) association over the individual members, the master over his slave and the state over its subjects. Generation (giving birth), consent and crime are listed as the origins of such powers; consent and punishment are pointed out as the two possible sources of political power (DJBP 2.22.13).

If we focus on consent as the origin of the right to rule, the picture we get is as follows: men are free by nature – they have *potestas in se* – and voluntarily enter into a contract to form an association; the most perfect association is the political, called the state. *Civitas* and *civilis societas* are used synonymously (inter alia DJBP 1.4.2.1 and 2.5.23 ff.); also, *respublica* is used (e.g. DJBP 2.5.24). The political community in its origin is a form of public association by consent (DJBP 2.5.8, 17 and 23).

Before we turn to Grotius' ideas on sovereign power within the state, a few remarks are appropriate on associations in general and on the state being a perfect association specifically. 'All associations have this in common, (...) that in those matters on account of which the association was formed the entire membership, or the majority in the name of the entire membership, may bind the individual members' (DJBP 2.5.17). The quote makes clear that an association is formed on account of something, and that an association may bind its members. The *raison d'être* for the political association, the reason for men to enter into this most perfect association, is to maintain public tranquillity. The *civilis societas* exists in the interest of public peace and order (DJBP 1.4.2.1: 'ad tuendam tranquillitatem instituta'). The association's power to bind its members is, of course, an important element of political power, to which we will return below.

Grotius used the words *consociatio* and *societas* interchangeably (e.g. DJBP 2.5.17 and 23). *Societas* is a legal institution known from Roman

law;⁸ something similar was known as ‘maetschap’ in the law of Holland.⁹ But, the *societas* in Roman law was not a legal person and would extinguish with the death of one of the *socii* (partners). Grotius wanted to avoid both implications, and mixed the well-defined legal concept of *societas* with the idea of the community as a *persona repraesentata* or *ficta* that had been familiar since the medieval legists and canonists. Apart from the ideas of the community as a *consociatio* that we also find in the works of Johannes Althusius (1563–1638) – who doesn’t figure at all in *De jure belli ac pacis* – there is the idea of the community of a people as a distinct *corpus*, prominent in the works of the Spanish late-scholastics, such as Francisco de Vitoria (c. 1480–1546), Domingo de Soto (1494–1560) and Francisco Suárez (1548–1617).¹⁰ According to Grotius, men, sociable and rational – as we read in the *Prolegomena* (DJBP Prol. 6–7), in which Grotius laid out his socio-philosophical foundations – associate and thereby create a moral or artificial body, the people (*populus*). This concept of the people as a moral body can be found in *De jure belli ac pacis* (DJBP 1.3.7.2), with a reference indeed to Vitoria.¹¹ Elsewhere, the *populus* is called an artificial body (DJBP 2.9.3.1) and, in the notes added to this passage, Grotius referred to Justinian’s *Digests*, 5.1.76 (Alfenus), 6.1.23.5 (Paulus) and 41.3.30 (Pomponius), to elucidate the idea of a people belonging ‘to the class of bodies that are made up of separate members, but (...) have “a single essential character” (...) or a single spirit (...)’.

Now, the very first ‘product’ of the associated people is supreme power (‘cujus prima productio est summum imperium’, DJBP 2.9.3.1; something similar can be found in DJBP 1.4.2.1, where it is said that the state ‘forthwith’ (*statim*) acquires a right over us and our goods), a power that is at the same time the spirit that holds the individuals together, that binds them into one body. We also find the phrase ‘jus regendi, qua populus sunt’ (DJBP 1.3.12.2); obviously the words ‘qua populus sunt’ are difficult to interpret, as the translations range from ‘in their totality as a people’, via ‘as they are a people’, to ‘by which they are a people’.¹² Should the last interpretation be correct – and, in fact, I think it is – the *jus regendi* of DJBP 1.3.12.2 is the same as the *summum imperium* of DJBP 2.9.3.1 and the creation of a political association is a two-sided event, creating both the body (association) and the power to rule and to hold the body together (*summum imperium* or *jus regendi*). The association and supreme power are two sides of the same coin; one cannot have the one without the other.

The idea of the creation of a moral body with sufficient power to hold it together is important, as the association's autonomous right to defend itself and its rights by making war is in fact the execution of the association's natural rights as a distinct legal entity. For, as we read in DJBP 1.5.1 on the question of the efficient cause for private and public wars, 'by nature everyone is the defender of his own rights'. As such, the association has the natural right that also human beings have: the right to defend itself and to foster its wellbeing. What there is to be defended – the precise end or scope of the association and thus of its public power – ultimately depends on the will of the persons associating, as we will see below.

In this line of thought, there is no need for any transfer of (natural) rights from the individual members to the association, state or its ruler(s). The associating individuals do not transfer rights; they create a new body, the association, and natural law provides this newly created body with the rights to defend itself.

This interpretation of Grotius' theory on the origin of sovereign power leads to conclusions that differ from those of various Grotius-scholars on two important points. First, since the individuals do not transfer their rights, there can be no question of how many or how completely the rights are transferred. And, since they don't lose any of their rights, there is no regaining them in situations of extreme necessity. The associates create an overarching association to take care of things, to bind its members by law and, if needed, to punish offenders against the law, including natural law. As soon as people live under state protection, their own individual natural rights to defend their *suum* and to punish, as a result of the mutual contractual promise, lie dormant in their breast, only to be woken up when the body politic is unable or unwilling to act. For, said Grotius, it is certain that much that had been licensed before the establishment of courts has been restricted afterwards (DJBP 1.3.2.1: 'Certe quin restricta multum sit ea quae ante judicia constituta feurat licentia, dubitari non potest'). Within the sphere of the political association, the members mutually agree to make use of the state's lawsuits and judicial settlements to protect and reclaim their rights. Once associated, they are no longer free to protect their own natural rights; this is, indeed, the whole idea of the political association. Only beyond the state do the individual's natural rights wake up and is private war the proper manner to settle disputes (cfr. DJBP 1.3.2.1 and 2.1.2.1: 'ubi judicia deficiunt incipit bellum').

Knud Haakonssen labels the rights that lie dormant ‘second-order rights’ and focuses exclusively on the ‘right to punish’.¹³ However, not only the right to punish, but all legitimate titles for war seem relevant here. When the political association is established, men preserve all their natural rights and are bound mutually by contract not to make use of their (second-order) rights to defend their (first-order) rights in the civil state. Grotius meant the natural law *pacta sunt servanda* (DJBP Prol. 8 and 15), where he mentioned that ‘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’ (DJBP 1.3.2.1). We will see below that, in questions concerning the rights that lie dormant and the situations in which they wake up, Grotius himself did not turn to ‘interpretative charity’, but to the will of the people who had originally associated. This reading is at odds with Tuck’s, who criticises Grotius’ theory for the unnecessary renunciation of liberty and the right to self-defence; ‘the only thing necessary to create civil society successfully would thus be a transfer of that right [to punish]’.¹⁴ There are, however, no rights transferred at all; a greater body is created, with the natural rights necessary to achieve its end. Its end is the promotion of public order and peace.

The second point of difference that follows from my interpretation is that we can detect a change of mind between the young Grotius writing *De jure praedae commentarius* (around 1604) and the mature man writing *De jure belli ac pacis* (1625). In *De jure praedae*, Grotius indeed talked of rights being transferred (‘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,’ DJPC 8, 137) and of the *nemo plus* rule known from Roman law, saying that one cannot transfer to another a greater right than he himself has.¹⁵ By that time, Grotius argued that, since the state has a right to punish transgressors of the law, necessarily the individual members must have (had) this right in the state of nature (DJPC 8, 91 and 137). But, Grotius no longer needed the *nemo plus* rule by the time he was writing his magnum opus, since the rights of the association no longer had to come from its members, as the newly created body or *persona ficta* was provided with its own rights by natural law. The suggestion of Borschberg that reading Grotius’ early works might help to better understand *De jure belli ac pacis* is, therefore, questionable, or at least should only be carried out keeping in mind the fundamental difference between the early and the later works.¹⁶

It is, in fact, specifically on this subject that Grotius' aforementioned long intellectual struggle comes most clearly to the fore. Despite his reliance on the *nemo plus* rule, by the time of writing *De jure praedae*, Grotius was already strongly inspired by the Spanish neo-scholastics, who defended the idea that men cannot survive solitarily and, therefore, given their specific nature, need to associate. Since a body such as an association cannot exist without a head, so ran their argument, also the head of the association and political power as such must be an ordination of God: if, by God's creation, men need to associate and if an association needs a head, the head must be ordained by God also. Therefore, the commonwealth itself and its powers are part of God's creation and have their origin in God and natural law.¹⁷ These Spanish writers consequently didn't need the *nemo plus* argument to derive political power from individual men. In their theories, it is a God-ordained power that is subsequently transferred from the community to the ruler: 'Qui resistit potestati, Dei ordinationi resistit'.¹⁸ Around 1605, Grotius obviously didn't follow the Spaniards all the way to this conclusion.

And he still didn't in 1625. It might have been his familiarity with the ideas of yet another Spanish author, Fernando Vázquez de Menchaca (1512–69), that inspired Grotius not to focus on God and nature only, but to focus more strongly on the will of the associated individuals.¹⁹ Vázquez explicitly attacked neo-scholastic political thought as described above in its fundamentals by denying the community the status of an independent, natural entity created by God.²⁰

In *De jure belli ac pacis*, Grotius seemed to have come to peace with his intellectual struggle, and combined the ideas of Vitoria, Soto and Suárez with those of their antagonist, Vázquez. Put simply: men come together, establish by contract the kind of association they agreed on and, by doing so, create a body that fits their wishes; nature provides this body with the rights to protect its existence and enable it to foster the end(s) set for it by the (original) associates; or – so Grotius added in DJBP 1.4.8.1 – what they might have arranged at a later moment. Much emphasis is thus laid on the presumed will of the associates. Obviously, Grotius in 1625 didn't go all the way with Vázquez either, who denied the community its status as legal *persona ficta*.

One last point needs to be made before we turn to the substance of the 'sovereign's' right to govern. Since an association is a composed entity, the dangers that possibly threaten its existence can come both from

within the association – its members – and from without – all others, especially ‘foreign’ peoples or rulers. Hence the state’s license to use the *jus gladii* against its own citizens, and to make war against other states. It can do so on any of the legitimate causes for war: to defend what is the state’s property, to obtain what is its due and to inflict punishment (DJBP 2.1.2), both for its own sake and for the sake of any of its members – or for the sake of natural law itself. For, even if it is not correct to say that the members have transferred their natural rights to the political association, we have already seen that living in a state does limit their liberty (*jus*, as what is not unjust) to make private wars in order to protect or reclaim their subjective rights (see DJBP 1.1.3 ff. for the uses of the word *jus* as right and as law). This is the price they pay for being a member of the *societas*, a citizen.

8.3 The Ruler’s *Jus Regendi*

Let us now take a closer look at political power, the faculty of governing the *civitas* (DJBP 1.3.6.1: ‘*Facultas (...) moralis civitatem gubernandi*’). Grotius used the terms *summa potestas*, *jus regendi* (both can be found in DJBP 1.3.8.1), *potestas civilis* (1.3.6.2) and *jus imperandi* (1.3.8.3), and all point to the same power. We have already seen that this power is the ‘spirit’ of the association, the immaterial element that binds the individuals together and enables them to act as one body, as a people. Grotius also defined the main competences and powers of the highest ruler – legislation; the making of peace, war and treaties, the right to levy taxes, and so on; and the branch called the judicial – and the ways to carry these out (DJBP 1.3.6). We, however, need to move up to a more abstract level, to the level of what political power essentially is.

The essence of the *jus regendi* – I prefer this term as it expresses best what it is about, the right to rule – apparently consists of several inter-related powers, that are for that matter insufficiently distinguished analytically by Grotius himself (see for instance DJBP 1.3.6.2). One faculty, a consequence of the state being an overarching association, is the superior right over the persons comprising the association and their property, a *jus* (in the sense of *facultas*) *eminens*, that is an eminent *potestas* and *dominium*, for the sake of the association’s end: to maintain public tranquillity (DJBP 1.1.5 and 6, 1.3.6.2 and 1.4.2.1). A second faculty, as already

indicated above, is the natural right to make (public) war on behalf of the association as a distinct body or entity to defend its *suum*, both externally and internally, on any of the natural titles (or causes) of war (see DJBP 2.1.2). Later in the treatise, we read that a king may deprive his subjects of their rights either by way of punishment, or by virtue of his eminent *dominium* (DJBP 2.14.7: ‘sciendum est, posse subditis jus etiam quaesitum auferri per regem duplici modo, aut in poenam aut ex vi supereminentis domini’). And, finally, the state as an association has the right to make and execute laws that bind its members and to take care of the administration of justice (DJBP 2.5.17, quoted above), to the advantage of its members, the citizens.

The next move in Grotius’ theory is that the *jus regendi*, the supreme power over the association and its members, can be wielded by the members collectively – that is, by the entire people – or be transferred to a few, or to one man. It is for the people to decide, and the outcome of this choice leads to one of the *tres gubernandi formas* (DJBP 1.3.8.9),²¹ systems of government, that we may call democracy, aristocracy and monarchy. The *civitas*, as a moral body or legal entity, will always be the common subject (*subjectum commune*) of the state’s power; the many, or some, or one person to whom the right to rule is transferred, its special or proper subject (*subjectum proprium*). To elucidate the sense of common and proper, Grotius used the parable of the body: the body is the common subject of sight, the eye is the proper subject (DJBP 1.3.7.3).

Grotius suggested several legal forms for the transfer of the association’s supreme power to the ruler(s) (DJBP 1.3.11). If the right to wield this power is transferred to a few or to one man, they or he can either receive a revocable right (*jus precarium*) in the *summa potestas*, or a usufructuary right or ownership of it. The difference between the last two is the transferability of the power received: according to law, a property right may be sold and transferred, whereas a usufructuary right may not. The difference between these two rights and a *jus precarium* is more substantial, since the people can at all times revoke a precarious right, but not a property or usufructuary right; consequently, he who has a precarious right does not have genuine supreme power, as the persistence of his position depends on the will of those who can revoke the precarious right (DJBP 1.3.11.3).

Except in cases where the right to rule is the execution of punishment imposed on the people over which it is wielded, the legal form of the ruler’s right – a precarious, usufructuary or property right in the supreme

power – ultimately depends on the pact underlying the transfer of power from the people (association) to the ruler. Although, according to Grotius, some kings do have a property right in sovereign power, either transferred to them or acquired in a lawful war against the people they rule over, most kings hold their right as a usufruct (DJBP 1.3.11.1). It is at this point that Daniel Lee goes wrong in his defence of Grotius' theory against republican critique, attributing the weak and indeed 'non-sovereign' position of a ruler with a precarious right to the typical king with a usufructuary right.²² Lee's account of Grotius' ideas as a theory of a free and sovereign people under monarchical rule is consequently unsustainable: if the monarch is a king with a usufructuary right in the *jus regendi*, only he, and not the people, has supreme power to rule. Generally speaking, the people under a king are not free; even less could it be considered 'sovereign'.

There are yet a few other 'constitutional' varieties, in addition to the legal variations mentioned above, with regards to the right that is transferred and the quantity of persons to whom it is transferred. For the right to rule can be transferred either completely or partially. The people might well have wished to transfer only one part of the power and to preserve another for themselves to be wielded collectively, for instance the power to approve or reject taxes. Or the transfer might have been conditional and a right of resistance against the ruler included, for instance if he should violate the laws of the land. We find these and a few other 'constitutional' varieties in chapter 4 of the first book of the treatise. They lead to the conclusion (made explicit in DJBP 2.5.31) that the subjection of the people to the king might very well be a complete subjection (*perfecta subjectio*), but that degrees of subjection less complete are also conceivable, either in the manner of holding power or in the plenitude of it ('aut habendi modo, aut quoad imperandi plenitudinem'). Notwithstanding the conclusion in the chapter that, generally speaking, resistance cannot legitimately be made against those who hold supreme power, the so called 'law of non-resistance', constitutional varieties do mitigate this 'law' (DJBP 1.4).

We can deduce that subjection in the Grotian approach to constitutional law does not necessarily entail a lasting contractual relationship between the people and the ruler after the transfer of the *jus regendi*. One should, therefore, not read the principle of *pacta sunt servanda* into the relationship between the people and its ruler unreservedly.²³ Based on a preliminary contract by which the right – precarious, usufructuary or property – is determined and the exact scope of it defined, an absolute right – absolute

in the legal sense of being enforceable against everyone – is transferred to the ruler. After the transfer, the contract dissolves as the parties have fulfilled their contractual obligations. Things were different in Grotius' early work, *Theses LVI* (first decade of the seventeenth century), where we find the possibility that the power is mandated to the republic's ruler, alongside the possibility of a transfer of power (*Theses LVI* 40: 'Potest autem respublica aut mandare totum imperium alieni, aut transferre').²⁴ In case of a mandate, there would indeed be a lasting contractual relationship between the prince and the associated people, but not in case of a transfer. But, ruling by mandate is no longer found in *De jure belli ac pacis*; the precarious right in supreme power has taken its place. In the later treatise, the adage *pacta sunt servanda* only plays a role when promises are made between the ruler and the people concerning the exercise of the power transferred; then, indeed, the ruler might be bound to 'certain rules, to which kings would not be bound without a promise' (DJBP 1.3.16.2).

8.4 Law of Non-Resistance and the War of Subjects against Their Superiors

Chapter 1.4 of the *De jure belli ac pacis* deals with the question of whether the subjects may rebel against their superiors (*De bello subditorum in superiors*). The fact that Grotius here thought of war (*De bello . . .*) already indicates that, to him, 'resistance' has its place beyond the civil state, when judicial settlement is no longer possible and war begins, where parties face each other in their natural condition. 'Legitimate resistance' is, accordingly, a *contradictio in terminis*: if it is legitimate, it is no longer resistance to a ruler, but a 'war', private or public, to curb illegal behaviour. Grotius himself was aware of this as he remarked that we are, in fact, dealing with situations in which the rule of non-resistance simply does not apply, for reasons that the ruler has not acted within his right (DJBP 1.4.7.15). This, of course, doesn't solve questions of who is to decide on the legitimacy of the ruler's actions, which is crucial for the legitimacy of the war by the people against him as well. Robert Filmer (1588–1653), in his *Observations upon H. Grotius de Iure belli ac Pacis* (1652), already pointed out that Grotius is not all too clear on this particular question.

This being said, in chapter 1.4, at the end of the long seventh section, Grotius came to the conclusion that resistance cannot rightfully be made to

him who holds supreme power, the aforementioned law of non-resistance (*lex de non resistendo*, DJBP 1.4.7.1). Although, by nature, all men have the right to resist in order to ward off injury, the moment that the civil association was instituted, the association or *civitas* acquired a greater right over the associates and their goods – Grotius obviously referred to his idea of the state's *jus eminens*. The state can limit the 'unregulated' (*promiscuus*) right of resistance for the sake of public peace and order, which should not surprise us, since peace and order are the very *raison d'être* of the state. And it will limit this right indeed, for otherwise the state would, presumably, not be able to achieve its end (DJBP 1.4.2). As Grotius explained, the order of bearing rule and rendering obedience necessary for securing peace cannot coexist with the individual license to offer resistance (DJBP 1.4.4.5).

This prompts us to delve a little deeper into the question of the precise end of the state. This is an interesting question indeed, and Grotius answered it prudently, triggered by the question on the force of the law of non-resistance in cases of extreme or eminent peril (DJBP 1.4.7.1). The answer to this question is pre-digested in a statement that is crucial for understanding Grotius' theory of sovereignty: 'Now this law which we are discussing – the law of non-resistance – seems to draw its validity from the will of those who associate themselves together in the first place to form a civil society ('pendere videtur a voluntate eorum, qui se primum in societatem civile consociant'); from the same source, furthermore, derives the right which passes into the hands of those who govern.' (DJBP 1.4.7.2) The end of a specific state, and thus – since the power over others is related to the end of the association – of the exact scope of the state's power, and consequently also of the range of the law of non-resistance in situations of extreme or eminent peril, ultimately depend on what the people had wished for at the time the association was instituted, or might have arranged at a later moment. Were we in a position to ask them whether they had unconditionally wanted the obligation to prefer death rather than to take up arms to ward off an injury by their sovereign, Grotius was not quite so sure on the answer we would get: 'nescio' (DJBP 1.4.7.2).

Notwithstanding the conclusion in chapter 1.4 that, generally speaking, resistance cannot legitimately be made to him or them who hold(s) supreme power, the constitutional varieties discussed above can lead to grounds for resistance in several situations, since they might limit the supreme power of the ruler. The key to the puzzle of the idea of 'limited

supreme power' lies hidden in DJBP 1.3.16.2: according to Grotius, power can be supreme (*summa*), that is not subject to the legal control of another, even if it is limited. The limitation can concern the exercise of power, or the power itself. The first is the case when a promise was made (not) to make use of power in a certain way; an act contrary to the promise is unjust. But, as we have seen, also the power itself can be limited, in the sense of not being complete. In fact, the typical situation of a king with a usufructuary right in the association's power is an example of limited supreme power, since this king may not alienate his power. Should he do so, it would implicate a change in the manner of holding power, a competence that is usually not comprised in the supreme power transferred to a king; therefore, the people are licensed to resist him should he try to sell and alienate his power (DJBP 1.4.10). In either situation – the limitation concerns the exercise of power, or the power itself – if the subject of limited supreme power acts beyond the limits, Grotius would say that it's not 'the legal control of another' that nullifies the act, but law itself (*ipso jure*): the act will be unjust (*injustus*) or void on account of lack of power ('nullus defectu facultatis', DJBP 1.3.16.2). Therefore, the power that is thus limited might still be called 'supreme', since it was exclusively the absence of 'the operation of another human will' (DJBP 1.3.7.1) that marked supreme power.

Apart from stipulated situations in which resistance might be legitimate, there is still one important general restriction on the power of any ruler and any government. It says that, if the ruler openly shows himself as an enemy of the people, he may be resisted, irrespective of whatever right he may have in the supreme power (DJBP 1.4.11). By showing himself as an enemy of the people, said Grotius, he has already renounced and forfeited his kingdom. The will to rule, that is to foster the association's goal of public peace and order and to defend the association in its being and its rights, logically cannot coexist with the will to destroy the association or its members, the people.

To complete the picture, we must read Grotius' ideas on resistance in connection with his general maxim on the right of war and peace, which reads that 'War begins where judicial settlement fails' (DJBP 2.1.2.1). This goes for international public wars, and it goes for private wars in the state of nature. It also goes for civil wars. If the association is in great danger, or the supreme ruler fails to defend the mere existence of the people, or doesn't provide for proper and appeasing law and justice, or acts beyond his competences, there is in fact no longer a *civil* order, since there is no

effective court or institution one could turn to in order to settle the dispute or issue. The association and its members then – temporarily – fall back into the state of nature, the natural order. In this situation, the people can lawfully begin a war against their superior, ‘subditorum in superiores’. Not entirely clear is exactly *who* may offer resistance to the superior in a situation as described: any individual member of the association, or only the people collectively? The argument itself seems to entail that the association as such is entitled to fight the tyrant, for the associated individual members are still reciprocally bound by their collective will to act as one body.

8.5 Conclusion: How to Appreciate Grotius’ Theory

Individual men associate, whereby a moral entity or body is created with the power to bind its members, with an eminent *dominium* and with the natural rights to defend itself. What there is to defend depends on the kind of association the individuals have willed for themselves, on how thoroughly they want their life and existence to be ruled by the association. The next move is that the association chooses who should wield the association’s power and on which legal title they should do so; the choice of the association is decisive for the power of the ruler(s). Grotius’ ruler is bestowed with absolute power if the people so wished, bound to the laws if they wished otherwise; bestowed with all the power needed to protect the association, or only a part of it; with unrestricted or conditional power. But, whatever the scope of power and whatever the form of government, the legitimacy of the government’s rule depends on the will and ability to strive for the ultimate end of the association, that is: public peace and order.

Is this the ruler ‘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’ (DJBP 1.3.7.1)? It seems proper to say that not so much the subject, but only the power itself, could possibly be called ‘supreme’ – as Grotius himself indeed did (DJBP 1.3.7.1). Power can be supreme (*summa*) even if it is limited (DJBP 1.3.16.2). If the subject of limited supreme power acts beyond the limits, the act will be void on account of lack of power. On the other hand, limited supreme power can be held ‘absolutely’ (*pleno jure*), DJBP 1.3.17.1).

The theory might be legally consistent, but how to appreciate it? After all, it does make room for absolute power and, as is often pointed out, political enslavement of a people. Grotius (in DJBP 1.3.8) attacked the opinion of many that the supreme power always resides in the people. In order to get there, he used the analogy of the people and the individual: as it is permitted for any person to enslave himself, why would it not be permitted for a people to enslave themselves?

Jean-Jacques Rousseau (1712–78) is well known for his fierce critique on Grotius' ideas concerning this issue in his *Du Contrat Social* (1762). An act by which a man gives himself for nothing – that is, enslaves himself – said Rousseau, is null and illegitimate for the simple reason that this man must be out of his mind; and madness, he added, does not confer rights. John Locke (1632–1704), too, without reference to Grotius, denies man the possibility to enslave himself to anyone, to part from his freedom and subject himself to the absolute, arbitrary power of someone else. The 'fundamental, sacred, and unalterable law of self-preservation', said Locke, stands between a man and anyone who invades his means of preservation.²⁵

According to Grotius, however, individual voluntary slavery is not a form of submission 'for nothing', as Rousseau said, since he calculated a serious repayment: a lasting certainty of support (DJBP 2.5.27.2). The exchange of lifelong services in return for nourishment and other necessities of life in itself does not seem a sign of insanity. Moreover, just as Locke would do some decades later,²⁶ Grotius held that a man's life, body and limbs are his own (*suum*) 'not to destroy, but to safeguard' (DJBP 2.17.2.1 and 2.21.11.2). One can think of situations in which voluntary enslavement might be the only way to safeguard one's life. The more so if we take into account that, according to Grotius, a master does not have the right of life and death over his slaves (notwithstanding that the master might often go unpunished according to the laws of some people if he killed his slave for whatever reason, DJBP 2.5.28). The same goes for the ruler and his people, however unrestrained the ruler's power might be (DJBP 2.5.28). Voluntary slavery might, according to Grotius, be a reasonable option in situations of threats to one's preservation, and this is precisely the situation in DJBP 1.3.8.3, where Grotius discussed the option for a people to transfer its *jus imperandi* completely and unrestrictedly to a ruler, thereby creating absolute power and subjection, a form of political slavery.

However, Grotius, in the same paragraph, also discussed the possibility that a people are so constituted that they understand better how to be ruled than to rule, a reminder of Aristotle's account of slaves by nature.²⁷ Another people might be impressed by examples of men living happily and prosperous under their absolute rulers (DJBP 1.3.8.4–5). Complete voluntary submission might seem attractive to such peoples even without being in a situation of eminent threat – and Grotius, former spokesman of the VOC, would not withhold them. In addition to these voluntary forms of slavery, there is (political) slavery as a result of being conquered in a war that had been legitimate on the side of the conqueror (DJBP 1.3.8.6, against which Rousseau likewise objected in *Du Contrat Social* 1.4).

What Grotius tried to refute in DJBP 1.3.8 was the opinion that the *summa potestas* always resides in the people. The possibility of a complete and absolute submission, that is political slavery, is one of his arguments against it. Indeed, it might not convince us, but it seems too severe to say with Rousseau that all constitutions in which the people are not sovereign are a definite sign of madness.

Another possible attack on Grotius' theory is that not necessarily everything is open for trade. A free man (*homo liber*) was sometimes explicitly said to be *extra commercium*, for instance by the aforementioned Spaniard, Fernando Vázquez,²⁸ and by Frenchman Francois Hotman (1524–90),²⁹ with reference to D. 45.1.103. Grotius refers to the latter (DJBP 1.3.12.1–2). But, for both Hotman and Grotius, the point of saying that men are or are not *extra commercium* concerns the question of whether or not the right to govern can be sold and transferred by the ruler without the subjects' approval; it is not on the relation between the ruler and individuals he rules over – in fact, Vázquez's ideas on this topic were more promising. For Grotius, the question of sale and transferability is settled by the right the ruler has in the *jus regendi*: property or an usufructuary right; in the first case, the right may be sold and transferred, in the second case not. Still, Grotius answered to Hotman, even if the ruler holds the *jus regendi* in property and would thus be authorised to sell and transfer this right, it is not the people who are subject to trade, but only the right to govern them. This *homo liber* discourse doesn't lead us anywhere.

One could object to Grotius that not all natural rights of man – or of the people as a legal *persona ficta* in natural law – necessarily are for sale or trade. This, of course, is the idea that some such rights might be inalienable, the theory ascribed to John Locke and found in the American

Declaration of Independence (1776) and the French *Déclaration des droits de l'homme et du citoyen* (1789). With respect to the rights, not of the individual but of the people, the inalienability of power had a strong defender in Johannes Althusius, who insists that the power of the people was *proprium & incommunicabile* and that the king's power was only a *precarium* given by contract to the commissioned king, and undertaken by him ('*precarium ex contractu mandate regi datum & susceptum*').³⁰

Grotius himself, at first sight, came close to the very idea of inalienable rights when he, in *The jurisprudence of Holland* (written around 1619, published 1631), differentiates between alienable and inalienable things (IHR 2.1.41–8, '(on)wandelbare zaken', in Latin in the margin to the text: (*in*)*alienabiles*). Life, body, freedom and honour are inalienable. But, what Grotius meant by a thing being 'inalienable' is that a thing can belong to one man in a way that it cannot possibly belong to anybody else. When I give up my life, or my freedom, there cannot be somebody else who acquires it. In *De jure belli ac pacis*, we find another example of an inalienable right, the right of a father over his children (*jus patrium*; DJBP 3.7.4); it is striking that, in the only section in the *Two treatises* in which Locke came close to the term 'inalienable',³¹ we also read that 'a father cannot alien the power he has over his child'.

Even if we take into account that, according to Grotius, people do not 'alienate' their natural rights when they enter the association, he was definitely not looking for a theory that would exclude slavery, or indeed absolutism or political slavery. Quite the opposite, as Annabel Brett has pointed out, focusing on the political: 'Individual right was conceived in an almost commercial vein as natural man's original capital, to be spent on advantage: and the man who bought citizenship with his rights could not then claim those same rights against the city.'³²

It was not Grotius' aim to prescribe one form of government or another – his theory was analytical, rather than normative (cfr. DJBP 1.3.8.1). Instead, he provided the legal ground for a whole spectrum of constitutional arrangements, from a free people ruling themselves to complete political slavery under an absolute ruler.

Translation of Grotius' Work Used

Het recht van oorlog en vrede, transl. J.F. Lindemans (Baarn, 1993). *The Rights of War and Peace*, ed. R. Tuck (Indianapolis, 2005)

Further Reading

- Barducci, M., *Hugo Grotius and the Century of Revolution 1613–1718. Transnational Reception in English Political Thought* (Oxford, 2017).
- Baumgold, D., *Contract Theory in Historical Context. Essays on Grotius, Hobbes and Locke* (Leiden and Boston, 2010).
- Brett, A.S., 'The development of the idea of citizens' rights', in Q. Skinner and B. Strath (eds.), *States and Citizens, History, Theory, Prospects* (Cambridge, 2003), 97–112.
- Brett, A.S., *Changes of State. Nature and the Limits of the City in Early Modern Natural Law* (Princeton and Oxford, 2011).
- Brett, A.S., 'The subject of sovereignty: law, politics and moral reasoning in Hugo Grotius', *Modern Intellectual History* 4 (2019) 1–27.
- Feenstra, R., 'Expropriation et *dominium eminens* chez Grotius', in *l'Expropriation/Expropriation* (Recueils de la société Jean Bodin pour l'histoire comparative des institutions/Transactions of the Jean Bodin society for comparative institutional history 66.1; Brussels, 1999), 133–53.
- Grunert, F., 'Sovereignty and resistance: the development of the right of resistance in German natural law', in I. Hunter and D. Saunders (eds.), *Natural Law and Civil Sovereignty. Moral Right and State Authority in Early Modern Political Thought* (Basingstoke and New York, 2002), 123–38.
- Haakonssen, K., 'Hugo Grotius and the history of political thought', *Political Theory* 13 (1985), 239–65.
- Hinshelwood, B., 'Punishment and sovereignty in De Indis and De iure belli ac pacis', *Grotiana N.S.* 38 (2017) 71–105.
- Konegen N., and P. Nitschke (eds.), *Staat bei Hugo Grotius* (Baden-Baden, 2005)
- Lee, D., 'Popular liberty, princely government, and the Roman law in Hugo Grotius' *De Jure Belli ac Pacis*', *Journal of the History of Ideas* 72 (2011) 371–92.
- Straumann, B., 'Early modern sovereignty and its limits', *Theoretical Inquiries in Law* 16 (2015) 423–46.
- Van Gelderen, M., 'From Domingo de Soto to Hugo Grotius: theories of monarchy and civil power in Spanish and Dutch political thought, 1555–1609', *Pensiero Politico* 32 (1999), 186–205.
- Van Nifterik, G., 'Hugo Grotius on slavery', in H.W. Blom and L.C. Winkel (eds.), *Grotius and the Stoa* (Assen, 2004), 233–43.
- Van Nifterik, G., 'Grotius and the origin of the ruler's right to punish', in H.W. Blom (ed.), *Property, Piracy and Punishment* (Leiden and Boston, 2009), 396–415.

Notes

- 1 Most influential has been R. Tuck, *Natural Rights Theories. Their Origin and Development* (Cambridge, 1978), 79: 'The book is Janus-faced, and its two mouths speak the language of both absolutism and liberty.'

- 2 D. Baumgold, 'Pacifying politics: resistance, violence, and accountability in seventeenth-century contract theory', *Political Theory* 21 (1993) 6–27. The text is also published as chapter 2 in D. Baumgold, *Contract Theory in Historical Context. Essays on Grotius, Hobbes and Locke* (Leiden and Boston, 2010).
- 3 Recently in this sense M. Barducci, *Hugo Grotius and the Century of Revolution 1613–1718. Transnational Reception in English Political Thought* (Oxford, 2017).
- 4 P. Borschberg, 'Grotius, the social contract and political resistance. A study of the unpublished *Theses LVT, ILLJ Working Paper 2006/7. History and Theory of International Law Series*, 70.
- 5 P. Borschberg, *Hugo Grotius 'Commentarius in Theses XI'. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt* (Berne [etc.], 1994), 199 and Borschberg, 'Grotius, the Social Contract and Political Resistance', 59.
- 6 See Borschberg, 'Grotius, the Social Contract and Political Resistance', 28.
- 7 Borschberg, *Hugo Grotius*, 116 ff. and Borschberg, 'Grotius, the Social Contract and Political Resistance', 49 ff.
- 8 D. 17.2.
- 9 See H. Grotius, *Inleidinge tot de Hollandsche rechtsgeleerdheid* (1631) 3.21 on 'maetschap'.
- 10 The topic is discussed by A.S. Brett, *Changes of State. Nature and the Limits of the City in Early Modern Natural Law* (Princeton and Oxford, 2011), 122 ff. See for instance F. de Vitoria, *De potestate civili* (1528): 'respublica, societas, corpus humanum, communitas'; D. de Soto, *De iustitia et iure* (1556) 4.4.1: 'congregatio, respublica, corpus & membra reipublicae'; F. Suárez, *De legibus ac Deo legislatore* (1612) 3.1: 'communitas (perfecta / politica), corpus', 3.3: 'corpus politicum hominum, communitas humana/hominum, respublica'.
- 11 F. de Vitoria, *De iure belli* 7.
- 12 These phrases are taken from Kelsey in his translation of DJBP; the translation in the edition by R. Tuck (Indianapolis, 2005) and by Jan Frans Lindemans in his Dutch translation. In Dutch it reads: 'waardoor zij juist een volk zijn'.
- 13 K. Haakonssen, 'Hugo Grotius and the history of political thought', *Political Theory* 13 (1985) 239–65, at 246.
- 14 Tuck, *Natural rights theories*, 79 ff. Interpretative charity at 80.
- 15 D. 50.17.54.
- 16 Borschberg, 'Grotius, the social contract and political resistance', 40.
- 17 Vitoria, *De potestate civili*, esp. par. 7 ff; Soto, *De iustitia et iure* 4.4.1; Suárez, *De legibus ac Deo legislatore*, 3.3.
- 18 Romans 13.2.
- 19 Yet, other authors that might have influenced Grotius on these issues also come to the fore, as the Jesuit Luis de Molina (1535–1600). According to Hasso Höpfl, *Jesuit Political Thought. The Society of Jesus and the State, c. 1540–1630* (Cambridge, 2006) 229 Molina 'asserted that the extent of any prince's *potestas* depended on the decision of the commonwealth "at the first creation of the kingdom"'.

- 20 He did so most clearly in *Controversiae illustres* (1564) 1.13.2 and 16, an 1.21, with reference to, and extensively quoting from D. de Soto, *De justitia et jure* 4.4.1.
- 21 With reference to Seneca, *Moral letters to Lucilius*, Letter 14.
- 22 D. Lee, 'Popular liberty, princely government, and the Roman law in Hugo Grotius' *De Jure Belli ac Pacis*', *Journal of the History of Ideas* 72 (2011) 371–92; also published as chapter 8 in his *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford, 2016), at 387.
- 23 As does F. 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, 2005), 125–37, at 130.
- 24 The text can be found in P. Borschberg, 'Grotius, the social contract and political resistance', 55.
- 25 J. Locke, *Two Treatises on Government* (1689) 2.4.23 and 24, 2.13.149.
- 26 Locke, *Two Treatises* 2.2.6.
- 27 *Politics* 1.5, 1254a17.
- 28 F. Vázquez de Menchaca, *Controversiae illustres* (1564) 2.82.13.
- 29 F. Hotman, *Questionum illustrium liber* (1573), q.1.
- 30 *Politica* 18.104; transl. F.S. Carney, *The Politics of Johannes Althusius. An Abridged Translation of the Third Edition of Politica Methodice Digesta* (London 1964), 109.
- 31 Locke, *Two Treatises* 1.100.
- 32 A.S. Brett, 'The development of the idea of citizens' rights', in Q. Skinner and B. Strath (eds.), *States and Citizens, History, Theory, Prospects* (Cambridge, 2003), 97–112, at 104–5.