ModernLawReview

The MLR Forum

‘Sovereignty and the Persistence of the Aesthetic’: Some Thoughts on Academic Writing

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In moments of self-reflection, all legal academics must surely come to the realisation that much of the work they are obliged to read – and indeed write – is dense, obscure, monotonous, and repetitive. Surely our job is to clarify, to make complex topics more accessible. What makes ‘Sovereignty and the Persistence of the Aesthetic’ – on its face, a well-crafted article – an exemplar of poor academic writing is not its stylistic shortcomings: it is its ignorance about the position it seeks to correct.

Cite as: Martin Loughlin, ‘“Sovereignty and the Persistence of the Aesthetic”: Some Thoughts on Academic Writing’ [2024] MLRForum 001 (available from: http://www.modernlawreview.co.uk/loughlin-some-thoughts).

In moments of self-reflection, all legal academics must surely come to the realisation that much of the work they are obliged to read – and indeed write – is dense, obscure, monotonous, and repetitive. They may think this inevitable because of the complexity of their subject but this isn’t much of a defence. Surely our job is to clarify, to make complex topics more accessible. Yet it seems that this is not what much academic writing now seeks to do.

One obvious reason why there is so much bad academic writing around is that we are not generally motivated by some higher calling driving us to search for the truth. We mainly write to fulfil the terms and conditions of our employment contracts and this is hardly conducive to the development of a good writing style. But changes in higher education policy have also intensified the problem. With a rationalised career scale, there is now an expectation that those appointed as Assistant Professors in, say, their late twenties will be seeking promotion to Professor by their mid-forties. And since that depends on their research and publication profile, career advancement has become an

intense competition containing strong incentives to publish quickly. William James once commented that if there is anything good in his style of writing (and there is), it is the result of ceaseless rewriting.[1] That hardly holds the key to success in the contemporary academic world.

These changes in higher education have thrown up another perverse incentive. It is now imperative to write at length. No self-respecting legal scholar writes an article of less than 10,000 words. These are the papers that count. Case notes or comments on recent legislation are unlikely to rate highly unless dressed up as a review of the entire field (hats off, though, to the Cambridge LJ's case comments!), and therefore are expanded to a standard article length. This leads not just to repetition (the field must, of course, be 'reviewed') and cliché (how often does the author claim that some legal event is indicative of an 'opportunity missed'?), it also has resulted in a tremendous ballooning in the page runs of English law journals. Most published articles could be considerably shortened without loss. But this would require unprofitable work of Jamesian proportions by authors, and it would also require editors to do something that many (most?) no longer do: edit. Editing is hard and unrewarding work, and it eats into research time.

So bad academic writing exists not because authors are uninformed or perverse, though, of course, some might be. As Michael Billig explains, academics write badly because they have been taught to write in this manner. We have learned how to write badly by immersing ourselves in the ways in which esteemed scholars in our fields write.[2]

One of these ways is the cultivation of a tortuous academic style, often disguising an undigested argument. Academic writing often favours nouns over verbs and the abstract over the concrete. It is apparently not people who exert their will on the world, but things that impose a way of thinking and acting on people. We create metaphorical worlds in which theories rather than people are the key actors. Another form of obfuscation is the use of jargon, and especially of acronyms. These might help us express points concisely, but they too readily seduce us into 'thingification' in place of critical reflection.[3] Sometimes this involves bringing to legal analysis the methods, vocabularies and literature from a different discipline. And while these can offer new insights into old problems, the striving for originality too often tempts authors into making radical claims, generally under the label of 'critical theory', which rest on a paucity of evidence disguised by a carefully curated obscurity.

I was motivated to reflect on these stylistic matters because it was not immediately obvious why 'Sovereignty and the Persistence of the Aesthetic', recently posted in MLR's Early View is illustrative of poor academic writing. It is, on its face, a well-crafted article that reads well. It provides a useful summary of the role of appearance and perception in aesthetic experience and recognises that sovereignty must be 'staged' and presented 'in dramatic and stylised forms' so that the 'invaluable work of representing, making visible and felt, the otherwise invisible aspirations of unity and autonomy that underpin the political sphere' (at 7–8). Its main argument is that the claim I first made in 2013, that sovereignty should be thought of as forming a double helix in which its legal

and the political dimensions run as anti-parallel strands,[4] 'misses a third, and essentially important, dimension to the sovereignty concept', that of 'the aesthetic' (at 4). They commend an article I wrote in the MLR with Stephen Tierney in 2018 for being 'less fixated by legal doctrine, and more attentive to the political dynamics', but maintain that it falls short by being 'bound to a two-dimensional analysis' (at 28).[5]

Their argument then becomes more expansive, claiming that their approach 'opens the theorisation of sovereignty to a new terrain' (at 3). At this point they invoke in support an eclectic group of critical theorists who explain how 'myth, ceremony, images, representations, as well as ways of seeing and feeling all play an important role in the articulation of state power', and this encourages them to assert that constitutional theorists, having 'failed to thematise and theorise the aesthetic dimension of sovereignty', have been unable to provide an adequate account of the concept (at 5). What makes this article an exemplar of poor academic writing, I came to realise, is not its stylistic shortcomings: it is its ignorance about the position it seeks to correct.

Most of the article is devoted to showing how this aesthetic dimension figures in the work of the political theories of Hobbes, Rousseau, Burke and Bentham (at 8–21). Having written several books on the conceptual foundations of public law that include an examination of sovereignty, I'm surprised to see that none are referenced or indeed show any sign of having been read.[6] Had these works been read, it should have been obvious that their basic argument against my position – that the legal, the political *and the aesthetic* should be treated as being 'co-constitutive of sovereignty' (at 26) – cannot be sustained.

Their initial weakness is in failing to offer a clear account of the concept they examine. They seem to accept my argument that sovereignty co-ordinates two forms of power (at 3), but they then fudge the distinction between the concrete and the abstract, that is, between the figure of the sovereign and the concept of sovereignty. Without a clear definition, their claim about the co-constitutive character of the aesthetic cannot easily be appraised, particularly as they also fail to explain the legal and political dimensions to sovereignty. At least, that is, until their concluding statement where they assert that: 'Sovereignty tends to either be reduced to a legal and administrative technicality, or else as a matter of a generative or coercive power' and only by inserting 'the aesthetic into a theory of sovereignty' can we can 'more carefully attend to the dynamic interaction' that sustains 'the concept's enduring relevance to the modern state' (at 29). In their understanding, it seems that law and politics are instrumental practices.

This is so far removed from my own account of the legal and political dimensions of sovereignty that they cannot seriously claim to be extending or amending my argument. For many years, I've been arguing that law and politics are products of what Nelson Goodman calls 'ways of world-making' and that their authority often rests on myths and symbols that invest them with meaning. I endorse Clifford Geertz's argument that a world 'wholly demystified is a world wholly depolicitised', highlight the power of images of order and disorder, recognise the important role literature plays in re-creating 'the collective dream

of civilisation', and explain the significance of iconography in bolstering the rule of law.[7] And I emphasise that public law itself rests on the principle of aesthetic representation.[8] On the very page of the article in which they cite my suggestion that sovereignty forms a legal-political double helix, I write that political power is 'power generated *inter homines*, power created as a result of the symbolic drawing together of a multitude into a "people" or a "nation" and harnessed through institutional forms' that lead to political meaning being 'generated through a willingness to sacrifice individual interest to the collective good'. What they are calling 'the aesthetic' is not a separate variable: it is already implicit in legal and political dimensions of sovereignty. Reason and emotion, thought and feeling, are equally implicated in the construction of law and politics.

The core of their article is on 'sovereign aesthetics' (at 8–21). Here, they present potted accounts of Hobbes, Rousseau, Burke and Bentham to show 'the persistence of the aesthetic across different articulations of sovereignty throughout the history of modernity' (at 8). Do these add to existing knowledge?

Hobbes's techniques of state-building, a product of what he called 'Powers Invisible', by which humans 'stand in awe of their own imagination',[9] is a topic on which I've written on several occasions.[10] They emphasise the iconography of the frontispiece to *Leviathan* where they detect 'a manifestation of the double helix structure of sovereignty, as evoked by Loughlin' (at 10). But, they reveal, the frontispiece 'hides the third strand of the triple helix in plain sight, precisely because the medium is the message' (at 11). My evocation is apparently a reference to be found in their footnote 14 which mentions my article on 'The Constitutional Imagination' and in which I not only offer an account of Hobbesian state formation but explain that 'the office of the sovereign is produced entirely through symbolic representation and is bolstered by skillful use of iconography'.[11] What they do not mention is the long footnote appended to that statement where I explain the significance of that iconography, referring especially to the work of Horst Bredekamp, the world's leading scholar of *Bildungswissenschaft*, the scholarly study of visual images. His book on Hobbes's 'visual strategies' is *the* classic study of that iconography. That, too, is overlooked.

With regard to Rousseau the authors focus understandably on his figure of the Lawgiver. Rousseau's writing is comprehensively examined in my book, *Foundations of Public Law*, where he is the pivotal scholar analysed in Part II, on the intellectual formation of the subject, and where the fiction of the Lawgiver is explained.[12] The authors may not have read this book but they have, apparently, read 'The Constitutional Imagination' where I directly address the question of whether modern constitutions permit us to move beyond earlier forms of symbolic representation. And, in offering a sceptical answer there, I invoke not only Hobbes's use of the image of the sovereign as a 'mortal God', but also recognise that Rousseau 'was obliged to invent the remarkable figure of the Lawgiver as a surrogate for a divine source of authority, thereafter advocating the necessity of instilling a "civil religion" among the people'.[13]

I can be brief on Burke and Bentham because although the former impresses on us the majestic power of the sovereign and the latter the significance of obedience to government, neither is particularly interested in sovereignty as such.[14] But our authors do present an interesting argument that, by dwelling on everyday habitual obedience, Bentham forces us implicitly to grasp sovereignty as an affective practice. A pity, then, that they did not pick up the reference to Gorski's work which I mentioned in the same footnote as Bredekamp because here Gorski makes a similar point but strengthens its aesthetic significance, arguing that the *Leviathan* frontispiece should be read bottom-up rather than top-down to present a picture which 'now appears as a metaphor for the constitution of civil government *out of* the institutions of civil society'.[15]

Perhaps the most unconvincing aspect of their overview of 'sovereign aesthetics' is that, notwithstanding their assertion of the necessary '*persistence* of the aesthetic', their evidence only covers the period from the mid-17th century to the early 19th century.[16] Hobbes, Burke and Bentham all focus on the office of the sovereign, albeit in the guise of mortal God, majesty, and supreme power and it is only Rousseau who confronts the modern challenge of sovereignty without a subject. The authors complain that 'dominant approaches within constitutional thought … have either ignored, downplayed or obscured' the aesthetic element in writing about sovereignty. This position is maintained notwithstanding my argument in 'The Constitutional Imagination' that political action 'is already mediated and expressed in symbolic form' such that there can be 'no pre-ideological reality with respect to the constitution of political authority'.[17]

But their main problem is that they offer no new insight into what 'the aesthetic' contributes to understanding sovereignty today. The Loughlin/Tierney article was, after all, a specific intervention intended to provoke discussion about contemporary British constitutional discourse. Perhaps they are alluding to the continuing significance of the Crown,[18] or to Parliament as 'the mirror of the nation',[19] or to the restoration of the Leveller claim of 'the universality of the people'[20] as authentic expressions of sovereignty? Or perhaps the point is that Britain now needs a modern constitution which must be invested with the power of a civil religion?[21] All we get is the vague conclusion that only by positing an 'aesthetic constitution' sitting in dynamic relation to the 'legal' and 'political' constitutions might we 'understand the nature of our current constitutional condition, as well prospects for constitutional change' (at 29).

The authors finish with three theses. In their second thesis they stress the necessity of appreciating how sovereignty is perceived through images and representations, a consistent theme in my writing on sovereignty. Their third thesis, the claim that the legal, the political, and the aesthetic should be treated as being co-constitutive of sovereignty, is misconceived because it fails to recognise the degree to which there is already an aesthetic element built into the construction of the legal and the political. And this point undermines their first thesis, the assertion that there is a danger in over-emphasising the

importance of any one of these three strands. Indeed, their article actually propagates the cause that its first thesis ostensibly rejects. It advocates raising the aesthetic above its valuable supporting role in the construction of the legal and the political and seeks to elevate it into a co-constitutive status. Contrary to their assumption, this can only lead to an 'aestheticization' of sovereignty which in turn threatens ultimately to embrace a fascist ideology (at 23). Their over-emphasis on the visual and its affective power is evident in their fixation with the *Leviathan* frontispiece. Bredekamp's work shows how this type of iconography has been extensively employed to bolster the authority of modern totalitarian regimes, while also highlighting the dangers. Maintaining the concept of sovereignty now requires less aesthetic representation and more reasoned analysis, not least because the special mark such aestheticization carries on its brow is the hatred of law.

This article could easily impress the impressionable through the extravagance of its claims – it has certainly succeeded with respect to the MLR's reviewers and editors. But an article on sovereignty that aspires to engage critically with my account in apparent ignorance of most of my writing, and that of others of high standing on that subject, must surely fail the tests of both rigour and significance.

References

[1] William James, *The Letters of William James* (Boston: Atlantic Monthly Press, 1920), vol.1, 297 (to Mrs Henry Whitman, 24 July 1890): 'If there is aught of good in the style, it is the result of ceaseless toil in rewriting. Everything comes out wrong with me at first; but when once objectified in a crude shape, I can torture and poke and scrape and pat it till it offends me no more.'

[2] M. Billig*, Learn to Write Badly: How to Succeed in the Social Sciences* (Cambridge: CUP, 2013).

[3] One illustration: I recently came across a paper in a peer-reviewed journal whose subtitle was 'A critique of Martin Loughlin's state-centred approach to public law'. Flattering I thought, but the author immediately reduced that subtitle to an acronym: LSCAPL. Then, having failed to recognise the concept of the state I thought I had painstakingly explained, what followed was a rather tortuous analysis rendered opaque in many places as a result of employment of the acronym an astonishing 130 times in a 16-page paper.

[4] M. Loughlin, 'Why Sovereignty?' in R. Rawlings, P. Leyland and A.L. Young eds, *Sovereignty and the Law: Domestic, European, and International Perspectives* (Oxford: OUP, 2013). 35-49, at 44-45. The authors, however, refer to a later paper in which the point was reprised:

M. Loughlin, 'The Erosion of Sovereignty' (2017) 45 *Netherlands Journal of Legal Philosophy* 57-81, 60.

[5] M. Loughlin and S. Tierney, 'The Shibboleth of Sovereignty' (2018) 81 MLR 989-1016.

[6] These are not esoteric works: according to Google Scholar, *The Idea of Public Law* (Oxford: OUP, 2003) [IPL] and *Foundations of Public Law* (Oxford: OUP, 2010) [FPL] have between them been cited over 1,300 times.

[7] M. Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart, 2000), chs 2 and 4 [S&S].

[8] Loughlin, IPL, ch 4 (Representation).

[9] Hobbes, *Leviathan*, 75: cited in M. Loughlin, *Against Constitutionalism* (Cambridge, MA: Harvard University Press, 2022), 51.

[10] S&S ch 9; IPL ch 4; FPL chs 2, 3; *Political Jurisprudence* ch 2.

[11] M. Loughlin, 'The Constitutional Imagination' (2015) 78 MLR 1-25, 6.

[12] Loughlin, FPL, chs 4 and 5; the Lawgiver is discussed on pp.116-117.

[13] Loughlin, 'The Constitutional Imagination', 10.

[14] See M. Loughlin, 'Burke on Law, Revolution, and Constitution' in *Political Jurisprudence*, ch 4. If we are searching for literary representation of constitutional order, we might look to Kenneth rather than Edmund Burke: see K. Burke, *A Grammar of Motives*, cited in 'The Constitutional Imagination', 13 n 55, 15 n 63.

[15] Philip S. Gorski, *The Disciplinary Revolution: Calvinism and the Rise of the State in Early Modern Europe* (Chicago: University of Chicago Press, 2003), 2 (emphasis supplied).

[16] I leave to one side the random insertion of a section on 'cartographies of early modern sovereignty'. To claim that the shift from personal to institutional power 'would have been *impossible* without the work done by modern cartography' (at 11: emphasis supplied) is thoroughly extravagant. That the 'production and circulation of maps' increased at the same time as a shift from medieval feudal orders to the emergence of the modern state might show a correlation but it hardly demonstrates any causal connection. Maps may have enabled rulers to perceive the nature of their rule in new ways but that they achieved 'an affective charge within the populace at large' (at 5) is fanciful. Just how many of their subjects actually caught sight of any of these elaborately and expensively sketched maps? Rulers regarded them as aesthetic objects, often hung with the rest of their art collection. Armies certainly needed maps once modern techniques of warfare evolved but in this context they were used as technical instruments of empire-building, not aesthetic representations that bolstered the sovereign authority of rule. There is a much more nuanced story to be told. See, e.g., D. Buisseret, *The Mapmakers' Quest: Depicting New Worlds in Renaissance Europe* (Oxford: OUP, 2001).

[17] Loughlin, 'The Constitutional Imagination', 12.

[18] See M. Loughlin, ‘The State, the Crown and the Law’ in M. Sunkin & S. Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: OUP, 1999), 33-76.

[19] M. Loughlin, *The British Constitution: A Very Short Introduction* (Oxford: OUP, 2nd edn. 2023), ch 4. Note, e.g., p 44: ‘Parliament was the primary means through which the English forged both a sense of political unity and a national identity. To an unusual extent, Parliament came to symbolize the “political nation”.’

[20] M. Loughlin, ‘Leveller Legacies’ in *Political Jurisprudence*, ch 3.

[21] M. Loughlin, ‘The Constitution as Civil Religion’ in *Against Constitutionalism*, ch 8.

Published 18.04.2024