

Title Page

James Dundas (c.1620–1679) and Charles II: Religious Tolerance,
Freedom of Conscience, and the Limits of the Sovereign

Giovanni Gellera

ORCID IDENTIFIER 0000-0002-8403-3170

Section de philosophie, Université de Lausanne

giovanni.gellera@unil.ch

The Version of Scholarly Record of this article (in French) is published in:

“James Dundas (c. 1620-1679) et Charles II. Tolérance religieuse, liberté de conscience et limites de la souveraineté”, dans Yves Krumenacker, Noémie Recous (dir.), *Le Protestant et l'Hétérodoxe. Entre Eglises et Etats (XVIe-XVIIIe siècles)*, Paris, Classiques Garnier, 2019, pp. 39–58.

JAMES DUNDAS (C.1620–1679) AND CHARLES II:
RELIGIOUS TOLERANCE, FREEDOM OF CONSCIENCE, AND THE
LIMITS OF THE SOVEREIGN¹

INTRODUCTION

“Mitchel knew that [his prison wardens] thought him embittered, even deranged. But he saw through their weakness: he had only carried the principles that they all upheld – the right of God’s people to resist unholy rule, the duty of God’s Scotland to defend the Covenant against prelatial blasphemy – to their logical conclusion. What they shied away from was their own fear: they were afraid to strike the righteous blow, to be the sword of the Lord and of Gideon.”²

These words refer to the fictional character James Mitchel in the historical novel *The Fanatic* by the contemporary Scottish author James Robertson. The novel narrates the incarceration of the “justified sinner” Mitchel after he attempted to assassinate one of the great enemies of the Covenanters, archbishop James Sharp, in 1668. The novel builds on historical events. James Mitchell (d. 1678, spelled with double ‘l’), was a freelance presbyterian preacher and an insurgent during the Restoration. He was refused ministry probably because of lack of sufficient scholarship. In the 1650s he joined the remonstrants, the extreme wing of the covenanters but it was only after 1666 and the Battle of Pentland that he turned to armed insurgency. After the assassination attempt of archbishop Sharp in 1668, he was arrested in 1674 and hanged in the Grassmarket in Edinburgh in 1678.³

Sharp eventually died at the hand of a party of Covenanters in 1679, who declared that they were avenging James Mitchell. James Sharp (1618–1679), son of an Aberdeen merchant, studied at King’s College, Aberdeen, during the troublesome 1630s. He entered the college in 1633 so he must have graduated in 1637. The teacher responsible for the four-year curriculum of 1633–1637 in philosophy was David Leech (1600/1605–1657/1674) at that time sub-

¹ The research for this article was possible thanks to the generous support of the Swiss National Science Foundation for the project PP00P1_163751 *Tolerance, Intolerance, and Discrimination Regarding Religion* (2016–2020). I am especially grateful to Althea Dundas-Bekker of Arniston for the permission to work on the manuscript by James Dundas, the *Idea philosophiae moralis* (1679). Alexander Broadie and I are working on the critical edition and translation of the manuscript for Edinburgh University Press. I also thank Alexander Broadie, Christian Maurer, Roger Mason and Thomas Muncie for their kind help.

² James Robertson, *The Fanatic* (London: HarperCollins, 2001), 5.

³ John Coffey, ‘Mitchell, James (d. 1678)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/18838>, accessed 4 Oct 2017]

principal of the college.⁴ Unfortunately, Leech's *Theses philosophicae* defended by Sharp at the public graduation ceremony in 1637 have not come down to us. Leech graduated at King's College under John Forbes of Corse (1593–1648): his name is on the students' list in John Forbes, *Theses philosophicae* (Aberdeen: E. Raban, 1624). Forbes had studied under Andrew Melville in Sedan, and he was a leading member of the Aberdeen Doctors and Church of Scotland minister.⁵

In 1638 Sharp, Leech, and Forbes alike refused to sign the National Covenant. Sharp eventually did in 1642, while Leech found reconciliation with the Church of Scotland in the late 1640s. Forbes never changed his mind. The three men are representatives of the theological specificity of Aberdeen, which welcomed episcopacy, preached eirenicism, and accepted the magistrate's decisions in matters deemed indifferent to orthodoxy, such as the controversial kneeling at communion.

Mitchell and Sharp are two very different protagonists of the Restoration period in Scotland. Mitchell's words are fictional, but they could have well been pronounced by the historical Mitchell. They brilliantly convey the essence of some concepts central to Presbyterian political theology, which must have weighed heavily on James Dundas's mind: the unholy or heretic sovereign, individual or collective resistance and rebellion, and the limits of the right (if not the duty) of resistance. At the beginning of the Restoration, James Dundas was given an undesirable choice by Charles II: either to renounce the National Covenant and keep his post as judge, or to abide by his faith and withdraw from public life. Dundas chose faith over appeasement with the royal authority.

The structure of the paper is the following. Section 1 gives biographical information about James Dundas. Section 2 presents the negotiations between Dundas and Charles II in the years 1663–1664. Section 3 contextualises Dundas's thought, especially in relation with the political thought of the Restoration Covenanters. Section 4 is the first investigation of James Dundas's political philosophy in the *Idea philosophiae moralis* (1679), his recently discovered philosophical treatise.

1. JAMES DUNDAS'S LIFE

⁴ Edward M. Furgol, 'Leech, David (1600x05–1657x64)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [http://www.oxforddnb.com/view/article/16318, accessed 4 Oct 2017]

⁵ David George Mullan, 'Forbes, John, of Corse (1593–1648)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2008 [http://www.oxforddnb.com/view/article/9836, accessed 4 Oct 2017]

James Dundas was born around 1620 in the noble family of the Dundas, landowners in Midlothian, south of Edinburgh.⁶ He entered St Leonard's College, in St Andrews, in 1635, aged 15. Further from his birthplace than the University of Edinburgh, St Andrews was the oldest and most prestigious of the Scottish universities, and also the one more clearly associated with the Reformation. There Dundas was schooled in a version of reformed scholasticism not very different from the Aberdeen curriculum, but the political and theological ideas were very much apart. His teacher James Guthrie (c.1612–1661), only few years his senior as it was customary for philosophy teachers, was a Church of Scotland minister, and himself a St Andrews graduate at St Leonard's College. His name appears on James Mercer *Theses aliquot logicae, ethicae, physicae et metaphysicae* (Edinburgh, A. Hart: 1632). Like Sharp's, unfortunately the 1639 theses defended by Dundas are now lost.⁷ Guthrie became a "zealous presbyterian at some point in the 1630s", perhaps because of the influence of Samuel Rutherford.⁸ He signed the National Covenant in 1638.

Dundas was likely influenced by both his family's presbyterian standing and by regent Guthrie, for he signed the National Covenant on 12 December 1639 after finishing university. His name appears right after Lords Ross, Dalhousie and Lothian – an indicator of Dundas's social standing.

Dundas became an Elder of the Kirk of Scotland in 1640. He was shortly a member of parliament for Edinburghshire in 1648. He signed the Solemn League and Covenant of 1643 only in 1650, along with declaring the 'Engagement' (the attempt by the Scots to negotiate the release of Charles I) as unlawful. Thus, in 1650 Dundas took a very strict anti-royalist Covenanting stance. Without a formal training in the law, he became a judge in 1660 and a member in 1662, as First Lord Arniston, of the High Court of Justice, Scotland's highest judicial body.

Then came the Restoration. Charles II had been crowned at Scone on 1 January 1651, after signing the covenants, but following the invasion of the Parliament army in 1651 and the

⁶ Biographical information is taken from Stuart Handley, 'Dundas, Sir James, Lord Arniston (*b.* in or after 1619, *d.* 1679)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/8252>, accessed 7 July 2017]; and George O. T. Omond, *The Arniston Memoirs; Three Centuries of a Scottish House, 1571-1838*. Edinburgh: David Douglas, 1887 [reprint Miami: HardPress Publishing, 2017]. Significantly, neither sources mention the existence of the *Idea philosophiae moralis*.

⁷ Assuming that Dundas actually graduated. It was not uncommon to attend classes without obtaining a formal degree. Broadie has uncovered evidence of payments made by the Dundas family to St Leonard's College until 1639: Alexander Broadie, "James Dundas (c.1620–1679) on the Sixth Commandment", in *History of Universities* XXIX/2 (2017), 143–165, 144.

⁸ K. D. Holfelder, 'Guthrie, James (c.1612–1661)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/11788>, accessed 4 Oct 2017]

Protectorate Scotland had lost its independence. On 4 April 1660 in England and on 14 May 1660 in Scotland, Charles II was restored on the throne, and the Scots welcomed the return of the king. The Scottish Parliament was summoned again in 1661.⁹ Dundas was not an MP, for his name does not appear in the *sederunt* of 1 January 1661, although he is mentioned in relation to some parliamentary commissions, as on 22 January and 5 July 1661.¹⁰ The Scottish Parliament quickly moved against the Covenanting movement. On 28 March 1661, the *Act rescinding and annulling the pretendit parliaments in the yeers 1640, 1641 etc.* blamed the “specious (but false) pretexts of reformation” for the civil war and accused the Covenanters of usurping royal prerogatives, and in the *Act concerning religion and church government*, the king:

declare[s] that it is his full and firm resolution to maintain the true reformed Protestant religion in its purity of doctrine and worship, *as it was established within this kingdom, during the reign of his royal father and grandfather [...]* And as to the government of the church, his majesty will make it his care to settle and secure the same in such a frame as shall be most agreeable to the word of God, most suitable to monarchical government and most complying with the *public peace and quiet of the kingdom*, and in the meantime his majesty, with advice and consent foresaid, does allow the present administration by sessions, presbyteries and synods (they keeping within bounds and behaving themselves, as said is) and that notwithstanding of the preceding act rescissory of all *pretended parliaments* since the year 1638.¹¹

The time between Charles I and Charles II became an ‘interregnum’. The aim was to erase from Scottish conscience what many believed was the cause of the civil war: the presbyterian-inspired National Covenant and the Solemn League and Covenant. In 1637 the events were precipitated by the so-called *Laudian reforms*: the attempt, orchestrated by Charles I and archbishop Laud to bring the churches of England and Scotland together by imposing a new

⁹ Gillian H. MacIntosh, *The Scottish Parliament under Charles II 1660–1685*. Edinburgh: Edinburgh University Press, 2007, especially 36–38 on the rescissory act. James Dundas is not mentioned.

¹⁰ See the Records of the Parliament of Scotland to 1707, a project by the University of St Andrews: <http://www.rps.ac.uk/>. Last access on 5 October 2017.

¹¹ “declare that it is his full and firme resolution to maintaine the true reformed Protestant religion in its purity of doctrine and worship, as it wes established within this kingdome, dureing the reigne of his royall father and grandfather [...] And as to the government of the church, his majestie will make it his care to satle and secure the same in such a frame as shall be most agreeable to the word of God, most suteable to monarchicall government and most complying with the publict peace and quyet of the kingdome, and in the mean tyme his majestie, with advice and consent forsaid, doth allow the present administration by sessions, presbetries and synods (they keeping within bounds and behaveing themselffs, as said is) and that notwithstanding of the preceeding act rescissorie of all pretendit parliaments since the yeer 1638.”

My emphasis.

http://www.rps.ac.uk/search.php?action=fetch_jump&filename=charlesii_ms&jump=charlesii_t1661_1_159_d7_trans&type=ms&fragment=m1661_1_159_d7_ms. Last access on 12 October 2017.

Book of Canons and a modified version of John Knox’s *Book of Common Prayer*. For those who believed in presbyterianism and in the primacy of the synods of the church in matters religious, the king-driven and parliament-sanctioned ‘restoration’ sounded like ‘imposition’ – all the reasons that were there to reject it in 1638 were still there in 1660.

James Guthrie was arrested in August 1660 “while drafting a letter to the king [Charles II] congratulating him on his return and reminding him of his sworn obligation to uphold the covenants.”¹² Compatibly with the words, not the spirit, of the parliament act of 1661 “true reformed Protestant religion in its purity of doctrine and worship, as it was established within this kingdom, during the reign of his royal father and grandfather”, Guthrie argued for presbyterianism, in keeping with the Negative Confession of 1581 signed by the Stuarts and the National Covenant of 1638. The documents are both doctrinal and political. The boundaries of orthodoxy are precisely defined. But it is at the intersection of faith and politics that we find Guthrie’s remonstrations against Charles II. In 1638, the Stuart dynasty is reminded that “The confession of faith of the Kirk of Scotland, [was] subscribed at first by the King’s Majesty and his household in the year of God 1580”, and that subsequent “Acts of Parliament are conceived for maintenance of God’s true and Christian religion, and the purity thereof in doctrine and sacraments of the true Church of God, the liberty and freedom thereof in her national synodal assemblies, presbyteries, sessions, policy, discipline, and jurisdiction thereof.” Finally, “all Kings and Princes at their coronation and reception of their princely authority, shall make their faithful promise” to defend the kirk of Scotland and its doctrine.

The concluding warning is crucial: “we have no intention or desire to attempt anything that may turn to the dishonour of God or the diminution of the King’s greatness and authority; *but* on the contrary we promise and swear that we shall to the utmost of our power, with our means and lives, stand to the defence of our dread Sovereign the King's Majesty, his person and authority, *in the defence and preservation of the aforesaid true religion*, liberties and laws of the kingdom.” [My emphasis]

According to many, the Stuart dynasty was bound to defend presbyterianism but in 1661 had forefaulted on their promise. According to some, the loyalty to the king was then null.

2. DUNDAS’S NEGOTIATIONS WITH CHARLES II

On 7 August 1663 the Scottish Parliament passed an Act that no one who had not offered a formal renunciation of the Covenant shall “exerse any publick trust or office”. This directly

¹² Holfelder, ‘Guthrie, James (c.1612–1661)’, *Oxford Dictionary of National Biography*.

concerned Dundas as a judge. Negotiations ensued between Dundas, represented by his friend James Dalrymple (1619–1695), Viscount Stair, the famous author of the *Institutions of the Law of Scotland* (1681), and Lord Lauderdale, delegate of the king.

Charles II's strategy and the overall national sentiment was to curb religious dissent and re-instate episcopacy and the magistrate's authority in matters religious. The negotiations were between peers and remained polite in tone.¹³ As an ultimately non-rebellious aristocrat, Dundas was spared the gallows. Nevertheless, Charles II could be ruthless in dealing with dissent. Dundas negotiated during the years 1663 and 1664 with the vivid memory of his university teacher James Guthrie being hanged in 1661 and his head displayed on the city walls at the Netherbow Port in Edinburgh for several years after the execution. And of Archibald Johnston of Wariston, co-author of the National Covenant, executed in the same year of 1663.

Dundas and Dalrymple refused to sign a declaration that “the National Covenant of 1638 and the Solemn League and Covenant were unlawful oaths”. Dalrymple proposed to qualify the renunciation “in so far as they were against the law, and against the oaths and obligations aforesaid, as they are construed to import any obligations to act or endeavour against law.”¹⁴ Meaning, active rebellion against the king. Charles II firmly refused this qualification because it seemed to hinder the full meaning of the renunciation with the distinction between ‘unlawful tout court’ and ‘unlawful when it was promulgated’, and because the remark about active rebellion was conditional and not absolute.

On 7 November 1663 Dundas did not take his bench in the High Court of Session. On 7 January 1664 he wrote to the High Court that “I did some weekes ago send a demission of my place in the Session of the Court [...] I shall noe longer be able to serve as a publick minister, yet I shall never omitt anything shall be in my powers as a private man”.¹⁵ Further negotiations followed. While in London, Dalrymple, who had not yet signed the renunciation, managed to grant Dundas and himself the concession to sign the renunciation without written qualification but with an oral qualification. In June 1664 Dalrymple signed whereas Dundas, despite further insistence by the other members of the judiciary especially Alexander Hume, stood firm on his original decision.¹⁶

¹³ The reconstruction of the negotiations is in Omond, *The Arniston Memoirs*, 25–37 with trascripts of the original letters. On a note on page 37, Omond writes that the exchange is “somehow tedious, but of considerable historical value”.

¹⁴ *Ibid.*, 27.

¹⁵ *Ibid.*, 32.

¹⁶ *Ibid.*, 36–37.

After the fateful year of 1664, Dundas retired to private life. He eventually died in October 1679. The recent discovery is that his exile from public life bore a philosophical fruit. During the final six months of his life Dundas wrote his philosophical testament: the *Idea philosophiae moralis*, a 313-page unfinished treatise in Reformed scholastic moral philosophy. As Alexander Broadie wrote, “there are very few moral philosophical books known to have been written in Scotland in the seventeenth century” and Dundas’s *Idea* “is therefore a particularly significant source of information about the intellectual life of Scotland”.¹⁷

3. THE CONTEXT OF JAMES DUNDAS’S PHILOSOPHY

Among the best known works of the early Restoration are John Locke’s first published works, the *Two Tracts on Government* (1660). There, John Locke, the philosopher of the *Epistola de Tolerantia*, sounds rather *un-Lockean*. The devastation inflicted by the civil war was well present to the young Locke, who argued for the right of the magistrate and of the sovereign to regulate indifferent matters in worship. He maintains that belief cannot be imposed by force and that the magistrate has no authority on beliefs; yet, on political grounds it is legitimate to impose uniformity – for fear of social and civil chaos. Locke laments that all sorts of political and civil rebellions are justified by their proponents with preposterous appeals to ‘cases of conscience’ and ‘freedom of conscience’. As in the *Act concerning religion* of 1661 by the Scottish Parliament, great is the sentiment for “public peace and quiet of the kingdom”.

The rationale for the exception of Catholics and atheists from tolerance is that they cannot be relied on for the loyalty to the state. Toleration is constrained by the need to preserve the integrity of the state and of the principle of authority, whose ultimate source is god. Unity of political power and religious orthodoxy go together. Religious heterodoxy could be quickly labelled as political dissent, in England as well as in Scotland.

So, the Locke of the *Two Tracts* makes a clear distinction between internal and external spheres. The internal sphere is beyond the reach of the magistrate, religious belief cannot be

¹⁷ Alexander Broadie, “James Dundas on the Hobbesian state of nature”, *Journal of Scottish Philosophy* 11.1 (2013): 1–13, 3. Hobbes is an important critical reference for Dundas, see below section 4.

enforced. The external sphere is within the reach of the magistrate: the magistrate has the right to impose religious uniformity in the name of social peace.¹⁸

Like many Covenanters, Dundas arguably felt betrayed by history. The National Covenant of 1638 and the Solemn League and Covenant of 1643 had given shape to the dream of a presbyterian Britain, only for it to collapse in the civil war and in the Restoration of an episcopalian (and Catholic-leaning) dynasty. The central political consent that mattered to him was the decisions of 1638 and 1643 – their obligation was perpetual. After 1660, the reactions within the Covenanting camp varied greatly. Many, like Dalrymple, bowed to the new regime. For others, the very identity of the Covenanting movement had to change in order to preserve orthodoxy: after being the majority party with a national vision and projection of power, the inevitable consequence was military insurgence and clandestinity within their own country. “The late covenanting movement was one in which unwillingness to compromise was cultivated as a fundamental virtue.” It became a movement “narrow and localised, fanatical and extreme”,¹⁹ unable to express a national vision because it was obsessed with a ‘history of oppression’, “glorification of persecution and suffering”, and resistance to the king.²⁰ No wonder that the Covenanters’ political thought remained confined to a specific context.

The Restoration Covenanters do not have a positive record in matters of tolerance either. They issued public statements against toleration in 1649 and again in 1658, including Samuel Rutherford and Dundas’s teacher, James Guthrie.²¹ In their view, only a covenanted Scotland was an acceptable Scotland – that is, an orthodox Scotland. They seem to fit the French reformer Sébastien Châteillon’s warning about the oppressed becoming the oppressor, as soon as they are given the chance.²²

The tendency towards antinomianism was strong. The Covenanter John Brown of Wamphray (1610–1679), presbyterian minister and theologian, argued that “Believers are forgiven of their law-breaking and declared righteous by union with Christ [...] The guilt of

¹⁸ Rainer Forst, *Toleration in Conflict. Past and Present*. Cambridge: Cambridge University Press: 2013, 211–214. See following pages for Locke’s later thought.

¹⁹ Caroline Erskine, “The political thought of the Restoration Covenanters”, in Sharon Adams – Julian Goodare (eds), *Scotland in the Age of Two Revolutions*. Woodbridge – Rochester [NY]: Boydell & Brewer, 2014, 155–172, 156 and 157.

²⁰ *Ibi*, 160.

²¹ *Ibi*, 170.

²² Sébastien Châteillon, *De haereticis, An sint persequendi*. Basel: 1554.

elect sinners was imputed to the sinless Christ.”²³ The only duty of the individual Christian is the law of god, whereas obedience to the positive law of men is conditional on its coherence with the law of god. Lacking this, the law has lost the sole source of authority: god.

Remember the words by the fictional character James Mitchel: to carry out “the principles that they all upheld – the right of God’s people to resist unholy rule, the duty of God’s Scotland to defend the Covenant against prelatic blasphemy – to their logical conclusion.” For many Restoration Covenanters the logical conclusion was armed resistance to the king, head of the church.

The theme of resistance is embedded in the history of national strands of Calvinism, like Scottish presbyterianism. From this perspective, the Covenanters could rely on a long tradition to support their positions, from moderate to extreme. John Knox and Samuel Rutherford allowed for a limited resistance theory, centred on the nobility. Knox in particular was arguing for the moral obligation of resistance. George Buchanan in the *De iure regni apud Scotos* instead allowed for the individual’s action against the undeserving sovereign, all the way to the right to kill the tyrant. Let us recall Buchanan’s argument of the “egregious tyranny” to justify the deposition of Mary Queen of Scots.²⁴ Buchanan’s friend Andrew Melville was on more moderate ground: a king who does not work for the church becomes a tyrant, but following St Paul (*Romans* 13), he “never reconciled himself to the idea of deposing a monarch.”²⁵

Parallel to these debates is the Scottish tradition of a limited monarchy. Scottish constitutionalism was the idea that “the king was constrained by law in principle, and in practice by specific, identified laws. [...] The coronation oath and covenant oaths were used in ways designed to bind the king and nation in a contractual relationship with a mutual obligation to uphold specific laws. This might be termed ‘confessional constitutionalism’”,²⁶ as in the Negative Confession of 1581 and National Covenant of 1638. The use of constitutional argument in Scotland is intertwined with the presbyterian perceptions of royal

²³ Joel R. Beeke, “John Calvin and John Brown of Wamphray on justification”, in Aaron C. Denlinger (ed.), *Reformed Orthodoxy in Scotland. Essays on Scottish Theology, 1560–1775*. Bloomsbury: T&T Clark, 2014, 191–209, 207.

²⁴ Roger Mason, “Beyond the Declaration of Arbroath: kingship, counsel, and consent in late medieval and early modern Scotland”, in Steve Boardman – Julian Goodare (eds), *Kings, Lords and Men in Scotland and Britain, 1300–1625: Essays in Honour of Jenny Wormald*. Edinburgh: Edinburgh University Press, 2014, 265–282, 274.

²⁵ Steven J. Reid, “Andrew Melville and the Law of Kingship”, in Roger A. Mason and Steven J. Reid, *Andrew Melville (1545–1622): Writing, Reception, and Reputation*. Farnham, Surrey: Ashgate, 2014, 47–74, 50.

²⁶ Karin Bowie, “‘A legal limited monarchy’: Scottish constitutionalism in the Union of Crowns, 1603–1707”, in *Journal of Scottish Historical Studies* 35.2 (2015): 131–154, 135.

impositions on the church both before 1638 and after the Restoration,²⁷ whereas the “royalists argued that the Covenant presented [...] an illegitimate constraint on loyalty to the king.”²⁸ The very point Dalrymple’s ‘written qualification’ wished to minimise.

Further important elements are the idea of the absent king and of the kingless kingdom. After the monarchy moved southwards with the Union of Crowns in 1603 with James VI and I, the power void was filled by Scottish counciliarist views. Hence, the tension between the two bodies of the Scottish king: the king anointed and the king as expression of “popular”, constitutional will. The divine right and divine command theories were always in dialectics with forms of contractualism and representative theories of the sovereign, going back to John Duns Scotus. These tensions are already manifest in the Declaration of Arbroath of 1320 which acknowledged the right of Robert Bruce to the throne of Scotland.²⁹ The king is said to rule “by divine providence, rightful succession, and the due consent and assent of us all” (with the popular will being that of the clergy and nobility). The condition for the legitimacy of the king is that he does not “subject us or our kingdom to the king of the English or to the English people”, which would make him a “subverter of right”. There is no direct evidence that the Scottish reformers and the Covenanters appealed to the Declaration of Arbroath for their political views.³⁰ But some principle akin to that of 1320 – that the Scottish monarchy is founded on a contract that rendered the crown accountable to the people – is arguably behind documents like the National Covenant of 1638 and the 1689 Scottish Claim of Right, which declared that James VII had “forefaulted the Right to the Crown and the Throne is become Vacant”. Clearly, to many Scots the king’s right was based on something external to him: the king was not the same as the crown.

4. THE POLITICAL PHILOSOPHY OF JAMES DUNDAS

James Dundas’ *Idea philosophiae moralis* can be regarded as a philosophical reflection on the events of 1663–1664. It reveals the tensions in Dundas between the presbyterian, the philosopher, and the judge on religious conscience and positive law, on church and king. His political philosophy is an entirely new source for the study of Restoration Scotland. Dundas presents a more moderate position than the Restoration Covenanters, despite the same commitment to the National Covenant and suffering from persecution during the Restoration.

²⁷ *Ibi*, 139 and 145.

²⁸ *Ibi*, 141.

²⁹ On Scotus and the Declaration of Arbroath, Alexander Broadie, *A History of Scottish Philosophy*. Edinburgh: Edinburgh University Press, 2009, 25–31.

³⁰ Roger Mason, “Beyond the Declaration of Arbroath”, 267–268.

Unlike them, Dundas sought to harmonise a presbyterian faith and universal political principles. This is the first attempt to investigate his natural law theory.

Dundas mentions Charles II only once in the *Idea*, in passing: “Regi serenissimo Carolo 2ndo” (p. 213). The private nature of the manuscript seems to suggest that Dundas was not personally hostile to the king: the hostility was religious and, as a consequence, political. In line with a shared sentiment in Scotland,³¹ and pivotal in Thomas Hobbes, Dundas considers civil war as the worst possible evil to affect a society, and places its origin in disobedience: “that which originates from disobedience is civil war among the citizens, insofar as its effect is exceedingly uncivil”.³² He grounds this position in the teaching of St Paul, with an Aristotelian bent: “human law binds only in virtue of the positive natural divine law, which prescribes obedience in those who are superior in power and which prescribes to pursue those things maximally conducive of the final end, happiness.”³³ The famous passage is *Romans* 13, a traditional source in the “two kingdoms” theory.³⁴ Dundas’s understanding of natural law is informed by the scholastic tradition. He identifies the natural law with the perfectly rational divine nature, and he is a voluntarist because natural law is the effect of divine will. Positive law is deduced from the principles of natural law which are naturally known to human beings.³⁵ Striking a Calvin’s note, this natural knowledge makes us inexcusable. The normative power of the divine will/natural law lies in the authority of the source. Unlike in contractualism, famously defended by Hobbes, natural law is prior to and independent from society or mutual agreement between parties.³⁶ The extension of natural and positive law are not the same.

Dundas arranges the duties in the traditional tripartition of duties towards god, oneself, and the neighbours (*proximum*). They respectively lead to the main virtues: piety, temperance, justice (pp. 172–173). Dundas’s natural law is deontological: duties have priority over individual rights because duties are a direct consequence of the emanation of the law by god, to whom we owe by law of gratitude. Hence, the highest duty is towards god. Unlike in Hobbes, the principle that ‘fides non est violanda’ is not the foundation of civil society but

³¹ Keith Brown’s and Claire Jackson’s works cited in Bowie, “A legal limited monarchy”, 144.

³² “Quod oritur ex inobedientia nempe bellum civile inter cives quoad effectus admodum incivile”, 198. Hobbes is a fundamental critical reference for Dundas. See Broadie, “James Dundas on the Hobbesian state of nature”, *passim*.

³³ “lex humana obligat tantum virtute legis divinae naturalis positivae quia praecipit obedientiam in superioribus in dominio et omnia prosequi quae maxime conducunt ad finem ultimum nempe faelicitatem”, 196.

³⁴ George Buchanan argued for tyrannicide by interpreting the passage as historically determined: Reid, “Andrew Melville and the Law of Kingship”, 50.

³⁵ “Datur lex naturae, (id est luce naturae innotescens et obligans) moraliter agendorum principiorum regulativum directivum immortalibus cordis humanis tabulis insculptum”, 163.

³⁶ “Ex Aristotele datur lex naturae independens a pacto vel societate, [...] manet et immutabile”, 163.

certainly is a fundamental principle directly derived from justice. Dundas appeals to Hugo Grotius’s consequentialist argument that without faith and trust, civil society could not endure. Hobbes is wrong to believe that it is the public sword which can keep society together.³⁷ The argument is repeated few pages later, with an interesting addition: if there is no trust, there are no safety, no peace, and no commercial society, and if the words are not assigned a stable and proper meaning, then even promises do not bind anymore.³⁸

The stress on duty and consequentialist arguments for social peace are common in the *Idea*. Dundas seems to adhere to general features of the natural law tradition in the Protestant world, such as the stress on individuality, the discontinuity between God and man, and the overwhelming emphasis on duty.³⁹ Additionally, his anthropology regards human beings as authority-seeking creatures, rather than autonomous moral agents. What is conspicuously absent is any sustained discussion of kingship. Dundas speaks of *magistratus* in general as the guarantor of a divinely sanctioned social and religious order,⁴⁰ whose authority is derived from the sole authority, god. The magistrate is god’s vicar because the world is god’s community.⁴¹ The specific domain of the magistrate is distributive justice: the distribution of rewards and punishments according to one’s own conformity with the law (p. 312). The arguments always refer to the individual moral agent undifferentiated before God: hence, all equally bound to the very same laws and duties.

One might argue that precisely one of these duties was infringed by Charles II’s restoration of the episcopacy: the duty to keep one’s own promise. Dundas’s “contractualism” is three-fold: when the moral agent promises something to someone else, she also enters in a binding relation with God.⁴² To break a promise is to infringe on eternal justice, the honour of God,

³⁷ “...ut Grotius optime [...] fides est servanda vel inter Reges et populos diversos, nullus esset pactorum vel iudiciarum usus, et sic nec pacis nec commercii tuta possibilitas, nec alter alteri paciscenti credere. Nunc falsa et inconsequentia sunt Hobbii illa (21 Lev:) quod pacta nullam vim habent obligativam praeter eam quod a publico nacta sunt gladio”, 181.

³⁸ “nulla fides nulla tuta Societas, commercium nullum tutum; nulla pax; et non instituta verba ut sint signa conceptuum et sic voluntatis et si promissa non obligarent”, 205.

³⁹ Knud Haakonssen, “Divine/Natural Law Theories in Ethics”, in Michael Ayers and Daniel Garber (eds), *Cambridge History of Seventeenth-century Philosophy*, Cambridge: Cambridge University Press, 2008, 1317–1357, 1325–1326.

⁴⁰ “Hobbes also rejected the Calvinist conception of the state as the political trustee for individual subjective rights. he viewed it instead as the institution of a sovereign power for the purpose of achieving social peace.” Ian Hunter, “Natural law as Political Philosophy” in Desmond M. Clarke and Catherine Wilson, *The Oxford Handbook of Philosophy in early Modern Europe* (Oxford: Oxford University Press, 2011), 475–499, 481.

⁴¹ “...deus eiusque vicarius, magistratus, ita ut cum mundi sit dei civitas (ut loquitur August:)”, 295.

⁴² Dundas’s friend James Dalrymple, Viscount Stair, holds a similar view in the *Institutions of the law of Scotland*: see Hector L. MacQueen and Stephen Bogle, “Private Autonomy and the Protection of the Weaker Party: Historical”, in S. Weatherill, S. and Vogenauer, S. (eds) *General Principles of Law: European and Comparative Perspectives*. Oxford: Hart, 2017, 269–296, 279.

and the good of mankind.⁴³ On a presbyterian interpretation of the narrative between 1581 and 1643, Charles II had defaulted on the promise by his Stuart predecessors to rule Scotland according to Scotland's law. Charles II had also placed himself outside orthodoxy because episcopacy was incompatible with the presbyterian settlement of the Scottish church. As the nominal head of the church, his sin was even greater. Nonetheless, there is no evidence in the *Idea* that Dundas subscribed to the "Lockean view" that a king who abuses of his power ceases to be a king.

These are some of Dundas's reflections on natural law which can be used against Charles II's restoration policies, although Dundas never draws this conclusion explicitly in the *Idea*. Nonetheless, two other sets of arguments lean in the opposite direction of urging for (political) moderation: the limitation on the right to bear arms, and the conditions for 'just war'.

In the discussion on the right to bear arms, the main target is, again, Thomas Hobbes. Dundas criticises the view that self-preservation is the main principle/necessity behind the social contract.⁴⁴ Hobbes would then be committed to the counterintuitive view that criminals can not only resist the authorities, but even have the right to do so.⁴⁵ The reason lies in Hobbes' implication of self-preservation and obedience at the origin of the social contract which ends the state of natural war of all against all. If self-preservation is the only reason behind obedience, once self-preservation is threatened, the duty of obedience disappears.⁴⁶

Dundas's theory of just war has been recently investigated by Alexander Broadie. Dundas is in dialogue with Grotius but, unlike him, he does not aim at a secular theory of just war. His discussion is on whether just war is possible for Christians. After decades of civil war in England and Scotland, the historic import of these reflections is evident. Dundas's view is that war is sometimes appropriate, nor is it always the worse evil. Broadie sums up the view that "there are kinds of peace, such as those imposed by an evil tyrant, that are unjust through and through, whereas the Christian objective is peace with justice, not peace *simpliciter*." There are limits to just war: the unjust war, and here Broadie translates Dundas, occurs "if the injustice is not a grave one that merits going to war, and if, as against justice and fairness, force is used by carrying out a punishment, namely war, which is worse than the crime [sc.

⁴³ "Ratio ergo primogenia praestanti promissa, et superioribus obediendi est ab aeterna iustitia, ad honorem dei, et bonum generis humani." 218.

⁴⁴ "Iuris naturalis summa, non est ut vult Hobbeus 14 *Leviathan* unicuique ius esse omnibus viis et modis seipsum conservandi." 212, cited in Broadie, "James Dundas on the Hobbesian state of nature", 3.

⁴⁵ "Nam sic non modo liciti possit omnes malefactores auctoritati resistere, sed et debent legem filautias, et conservationis propriae." 214.

⁴⁶ "si propria conservatio sit obedientiae ratio unica, ergo ea sublata, tollenda est obedientia", 213.

the original injustice], then the remedy is worse than the evil deed.”⁴⁷ Proportionality between crime suffered and retaliation defines the justness of war.

We can now draw some tentative conclusions on the unity of Dundas’s philosophy and political actions. As an aristocrat and as an individual, Dundas resisted the king but did not rebel. The struggle is between two universal pretensions: that of the presbyterian Covenant to rule Scotland under one church – and that of the state to maintain unity and peace, also by means of religious enforcement. With the restoration, these two universals were in direct conflict for many in Scotland. For Dundas, the king was in the ultimate legitimacy crisis. With the Restoration, the king twice broke a *promissio*: he took his predecessors’ word back and usurped his role of guarantor of the Scottish kirk by trying to impose uniformity not in agreement with the National Covenant. The problem was, of course, a *heterodox* imposition – not imposition tout court.

Dundas’s principled stand was to assert the freedom of conscience from the magistrate. In matters religious, he did not accept that a non-presbyterian (therefore heterodox) king had the authority to legislate on conformity. Inspired by conciliarism, views of popular sovereignty and consent, Dundas only acknowledged the authority of the synods of the church of Scotland. The compelling truth was in the National Covenant of 1638, a stable principle in Dundas’s life. He did not feel free to recede from it. The limits of the sovereign are that the king cannot instruct the church on matters orthodox because the king’s appointment – as in the Declaration of Arbroath – is sanctioned divinely and by popular consent crucially *for* the service and protection of the people and of the established church – both of which are part of the source of the authority of the appointed king.⁴⁸

Politically though, Dundas yielded to the king’s material power to impose his will. A competing principle compelled him to accept the “Lockean view” that the magistrate had authority to impose uniformity: the need for social peace. The limitations on presbyterianism imposed by Charles II did not qualify as a cause for ‘just war’.

CONCLUSION

⁴⁷ Alexander Broadie, “James Dundas (c.1620–1679) on the Sixth Commandment”, 158.

⁴⁸ Roger Mason, “Beyond the Declaration of Arbroath”, *passim*, presents three constitutionalist traditions in Scotland: church conciliarism, classical republicanism, aristocratic conciliarism. Evidence in the *Idea* points at church conciliarism as Dundas’ constitutionalist tradition.

In the fateful year of 1663 Dundas was made dramatically aware that a heterodox and usurper king was there to stay, and that arms had not been, and would not be, the solution. The dream of a presbyterian Scotland was shattered. The two bodies of the Scottish king were more apart than ever. This tension can be built around the private and public sphere of the political dimension religious orthodoxy.

On the private side, Dundas's religious conscience was bound to the National Covenant, the mark of orthodoxy. His conscience ("Dei vicaria") commanded the duty to resist a king who was putting himself outside of orthodoxy when re-introducing episcopacy and trying to enforce uniformity. On the public side, the awareness of heterodoxy did not simply imply rebellion to the king. Dundas's political conscience allowed for a limited version of individual resistance, and argued against rebellion in the name of social peace. In the presbyterian camp, Dundas is a moderate with respect to the Restoration Covenanters. He rejected the belief that orthodoxy ought to be defended or imposed with violence. Dundas's moderate stance is the result of his reading of *Romans* 13, his formation as a natural lawyer, but also historical contingencies: the dramatic awareness of the presbyterian defeat and of the horrors caused by the civil war, shared by many in England and Scotland at the time.

In late seventeenth century Britain, tolerance is a top-down power relation from strong to weak.⁴⁹ As a matter of fact, Dundas was not in the position to tolerate. What Dundas was granted, on the promise not to rebel, was the permission to (limited) resistance to the king and to his presbyterian faith as a private matter.⁵⁰ Dundas rejected the principle of rebellion increasingly associated with the Covenanters, and ultimately accepted royal authority, though only in the positive law. "True religion is primarily pure, and then peaceful. He who fears that he sins against conscience, god's vicar in the soul, he will fear also to sin against the king, god's vicar in the republic."⁵¹ In the words of Roger Mason: "It was only in extremis that ideas of elective monarchy would be invoked or that the nobility would seriously consider their rights as active citizens to trump their duties as loyal subjects."⁵² Though, for many, Restoration policies were exactly such an extreme.

Today, Dundas's choice of disengagement from public life hardly looks like a universally applicable political principle. In Restoration Scotland, arguments such as Dundas's gradually contributed to the awareness of the need for separation of religion and politics at least in terms

⁴⁹ Forst, *Toleration*, 27–28.

⁵⁰ "de occultis non iudicat ecclesia, nedum civilis respublica", 219.

⁵¹ "Vera religio est primo pura, dein pacifica. Qui veretur ne contra conscientiam peccet dei vicariam in anima verebitur etiam peccare contra regem dei vicarium in republica", 219.

⁵² Roger Mason, "Beyond the Declaration of Arbroath", 281.

of toleration as permission to coexist. That this sentiment grew stronger, was a step towards the Scottish Enlightenment.

BIBLIOGRAPHY

Joel R. Beeke, “John Calvin and John Brown of Wamphray on justification”, in Aaron C. Denlinger (ed.), *Reformed Orthodoxy in Scotland. Essays on Scottish Theology, 1560–1775*. Bloomsbury: T&T Clark, 2014, 191–209.

Karin Bowie, “‘A legal limited monarchy’: Scottish constitutionalism in the Union of Crowns, 1603–1707”, in *Journal of Scottish Historical Studies* 35.2 (2015): 131–154.

Alexander Broadie, *A History of Scottish Philosophy*. Edinburgh: Edinburgh University Press, 2009.

Alexander Broadie, “James Dundas on the Hobbesian state of nature”, *Journal of Scottish Philosophy* 11.1 (2013): 1–13.

Alexander Broadie, “James Dundas (c.1620–1679) on the Sixth Commandment”, in *History of Universities* XXIX/2 (2017), 143–165.

Sébastien Châteillon, *De haereticis, An sint persequendi*. Basel: 1554.

James Dundas, *Idea Philosophiae Moralis* (1679). Unpublished manuscript. Critical edition and translation by Alexander Broadie and Giovanni Gellera, Edinburgh University Press (forthcoming).

Caroline Erskine, “The political thought of the Restoration Covenanters”, in Sharon Adams – Julian Goodare (eds), *Scotland in the Age of Two Revolutions*. Woodbridge – Rochester [NY]: Boydell & Brewer, 2014, 155–172.

John Forbes, *Theses philosophicae* (Aberdeen: E. Raban, 1624).

Rainer Forst, *Toleration in Conflict. Past and Present*. Cambridge: Cambridge University Press: 2013.

Knud Haakonssen, “Divine/Natural Law Theories in Ethics”, in Michael Ayers and Daniel Garber (eds), *Cambridge History of Seventeenth-century Philosophy*, Cambridge: Cambridge University Press, 2008, 1317–1357.

Ian Hunter, “Natural law as Political Philosophy” in Desmond M. Clarke and Catherine Wilson, *The Oxford Handbook of Philosophy in early Modern Europe* (Oxford: Oxford University Press, 2011), 475–499.

Gillian H. MacIntosh, *The Scottish Parliament under Charles II 1660–1685*. Edinburgh: Edinburgh University Press, 2007.

Hector L. MacQueen and Stephen Bogle, “Private Autonomy and the Protection of the Weaker Party: Historical”, in S. Weatherill, S. and Vogenauer, S. (eds) *General Principles of Law: European and Comparative Perspectives*. Oxford: Hart, 2017, 269–296.

Roger Mason, “Beyond the Declaration of Arbroath: kingship, counsel, and consent in late medieval and early modern Scotland”, in Steve Boardman – Julian Goodare (eds), *Kings, Lords and Men in Scotland and Britain, 1300-1625: Essays in Honour of Jenny Wormald*. Edinburgh: Edinburgh University Press, 2014, 265–282.

James Mercer *Theses aliquot logicae, ethicae, physicae et metaphysicae* (Edinburgh, A. Hart: 1632).

George O. T. Omond, *The Arniston Memoirs; Three Centuries of a Scottish House, 1571-1838*. Edinburgh: David Douglas, 1887 [reprint Miami: HardPress Publishing, 2017].

Steven J. Reid, “Andrew Melville and the Law of Kingship”, in Roger A. Mason and Steven J. Reid, *Andrew Melville (1545–1622): Writing, Reception, and Reputation*. Farnham, Surrey: Ashgate, 2014, 47–74.

Records of the Parliaments of Scotland to 1707. University of St Andrews, <http://www.rps.ac.uk/>

James Robertson, *The Fanatic*. London: HarperCollins, 2000.