Subjects and Sovereigns

The Grand Controversy over Legal Sovereignty in Stuart England

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I

The shift in political thought

Two political ideologies shaped the political thought of Stuart England at mid-century: a political theory of order or an order theory of kingship and what is termed in this study a community-centered view of government. Both were utterly compatible with the outward forms of the traditional governmental structure with its emphasis on a king and two houses of parliament. Neither was completely new since elements of both ideologies were earlier present, but their full articulation and dominant characteristics are properly dated from the extended quarrel between Charles I and the long parliament in the months preceding and following the outbreak of civil war. The exchange of political ideas at this time provided the main inspiration for the pamphleteers whose reflections and speculations on government flooded the England of the 1640s. It is a major theme of this study that the rival ideologies emerging from this amalgam provided thereafter the intellectual framework of seventeenth-century political controversy and, further, that the success of one of them, the community-centered view of government, brought about the radicalization of Stuart political thought.

Each ideology had a distinctive cluster of ideas centering on issues crucial to the political thought of every age. How was a person's allegiance enjoined? Why was he obliged to obey one government rather than another? What ideas, in other words, justified and legitimated the exercise of political authority? Seventeenth-century royalists settled such issues in terms of the political theory of order, a subject on which the modern historian W. H. Greenleaf has shed much light.[1] As he pointed out, political theories of divine right and patriarchalism were frequently voiced in early modern England where the belief in a divinely ordered

world was ubiquitous, their advocates arguing that since God, the author of the universe, had ordained kings to rule as his vicars on earth, the English king was the human source of law and political authority generally. As such he exercised a reserve of power, a royal discretionary authority analogous to God's miracle-working power and the father's discretionary authority within the family. No legitimate ground existed for disobeying the kingly will. In elaborating this style of thought theorists of order relied on arguments of correspondence and analogy to prove, as Charles I put it, that subjects and sovereigns were 'clean different things'. The king was like God : both were the supreme governors of their respective universes. Or else he resembled the sun, the *primum mobile* of the heavens. Analogies were frequently invoked to illustrate the relationship between king and subject. The king was the head, the subject the member; the king the physician, the subject the patient; the king the master of the ship, the subject the deck hand, and so on. The king was, then, the supreme governor of the realm, the keeper of the kingdom, so to speak, to whom allegiance and obedience were properly due and as God's vicegerent his position was one of lofty eminence. He had no equal, no one shared his political authority, and as the human source of political power and authority he was the center of the body politic and political society, his position unrivalled by that of any other person, agency, or aggregate of powers within the kingdom. This meant that the rights of all political bodies including those of parliament flowed directly from him – a conclusion the more significant because a derived authority seemed to contemporaries in every way inferior to an original authority.

Not unexpectedly, the pattern of power in parliamentarian political thought was very different. The theory of order was rejected unequivocally in favor of the community-centered view that certainly political authority flowed from God to the king but only with community consent. Since the community (or people) determined the nature of the governmental system within which royal power was exercised and even chose the ruler or rulers, the community was the human source of political authority. Government in general was from God, the particular form or species from the community – here was the highly successful formula by which the parliamentarians and their intellectual successors legiti-

mated the government of their choice and conception.[2] The implications were subversive of the order theory of kingship. To differ from the royalists on so important a matter as the human source of political power and authority was also to reject a hierarchical relationship between the king and the two houses of parliament and to open the way for a substitute political belief, one intrinsically levelling in nature that could only weaken the king in relationship to the two houses. Here the parliamentarian theorists made a distinctively original contribution to Stuart political thought, the effect of which was to remove the king from the lofty political position envisaged in the theory of order and to place him firmly alongside the two houses on the same political plane. Whether he was now described as dethroned or as flanked by companions who shared his great power, the conception of a political parity among king, lords, and commons was new.

That conception arose when the parliamentarian theorists invented the thoroughly novel principle of a co-ordination in the legislative power – a principle which became the linchpin of the community-centered view of government. Dependent on the assumption that the community was the human source of political power, the revolutionary principle was gleaned from Charles I's vastly influential Answer to the Nineteen Propositions of June, 1642. Under its terms the king was no more than a single member of three co-ordinate estates of parliament, the others being the house of lords and the house of commons. Such a principle must affect the kingship, leading to encroachments by the two houses on royal power. Alarmed at the prospect, conservative theorists denounced co-ordination vehemently as conducive to confusion and even to civil war.[3] Equally to the point was a comment of Dr Peter Heylyn, the conservative theologian and devoted assistant to Archbishop Laud. His civil-war tract supporting the kingship was written 'to preserve the dignity of the supreme power [the king] . . . and fix his person in his own proper orb, the *primum mobile* of government, brought down of late to be but one of the three estates, and move in the same planetary sphere with the other two'.[4]

The divergent ideologies illuminate the major controversy of the Stuart century in the realm of politics and ideology. At its center was the single question: 'Who makes law?' It loomed

during the civil war when Englishmen concluded that law-making constituted the distinctive and pre-eminent mark of political sovereignty. For the first time the legislative power began to be treated consistently as subject only to the will of the legislator or legislators and as uncontrollable by any other person or agency in the state. That power was now said to be the final political authority, from which no appeal was possible. In an unprecedented and unparalleled fashion certain leading royalists agreed with the parliamentarians that law-making and political sovereignty went together. They agreed also that law-making took place only in parliament. No claim was advanced, for example, that the king was a law-maker who exercised the legislative function outside of parliament, in complete independence of the two houses. But disagreement did exist as to who made law within parliament, a matter of the highest practical importance because law-making was associated with political sovereignty. The remaining issue was this: did the king make law singly in parliament, acting with the advice and consent of the two houses but without actually sharing the legislative power with them, or was a law the shared product of three equal estates – king, lords, and commons – each member of the trinity meriting the description of legislator? That is, was law made by the king in parliament or by king, lords, and commons in parliament?

Imbued with the theory of order, the royalists placed that power, undivided and unshared, in the king alone. He was the sole law-maker because he was the human source of political authority while parliament's power and authority were at best derivative. Granted that the king performed certain functions in parliament, indeed that if law were made at all, it was made there with the two houses' assistance. Still he was properly the sole legislator because he acted of his own volition whenever law was being made. And other reasons could be mustered to support this view of law-making. The king's assent converted parliamentary measures into law, and parliament's very existence was dependent on his will. His writs of summons assembled the two houses, and only he might end their sitting. As one royalist declared, 'The king is *caput, principium,* and *finis parliamenti*, as confesseth Sir Edward Coke.'[5] A king who was the exclusive law-maker in parliament must in ordinary times occupy the heights in relation-

ship to the two houses; and the prerogatives intertwined with law-making such as summoning, dissolving, and proroguing parliament, vetoing parliamentary measures, and dispensing with statutes must rest secure and uncontested in a general esteem, to be exercised at his discretion. Moreover, the problem of allegiance if raised would be settled in his favor. Finally, the royalist who viewed law-making as the supreme power in the state was likely to assign legal sovereignty to the king; and under these circumstances it was the king in parliament who was sovereign.

The more radical community-centered ideology afforded a sharp contrast when its advocates placed law-making in king, lords, and commons in parliament. Since they too placed a high value on the law-making power, their theory of legal sovereignty was actually the modern theory of parliamentary sovereignty. From the seventeenth-century standpoint, its distinctive characteristic was the stress placed on a shared law-making power; and it will appear repeatedly during this study that to apply the adjective 'shared' to the legislative power was to impart a distinctive tone to a political tract or argument. According to the community-centered ideology, parliament as the representative of the community was the primary law-giver; and the law made there was the shared product of king, lords, and commons legislating as three co-ordinate estates. Not all parliamentarians were equally generous, however; and some of them thought in terms of a supremacy in the two houses. This appeared when they opposed a royal veto in law-making. The new reasoning was clearly conducive to denying this important power to the king since as only one of three co-ordinate estates he might be termed subordinate to the two houses together. After all, the political authority of the three estates was said to flow from the same human source, the community; and one estate was numerically less than two. Surely, this situation demanded that the king assent to measures said by the two houses to be of common right and justice and for the public good. Presumably such considerations underlay the warning from John Selden in his famous *Table Talk*: 'The king is not one of the three estates, as some would have it. Take heed of that for then if two agree, the third is involved.'[6]

Here was a more radical version of co-ordination, but whatever its form the principle was full of danger to the kingship. Besides

menacing the king's veto in law-making, it jeopardized the dispensing power, earlier exercised on a broad scale with relative impunity. Any idea of a discretionary authority in the king above the law must become anachronistic should the idea gain ground that he was no more than a single member of three co-ordinate estates who shared equally in law-making. Why should one legislator set aside the work of three? Or, to put the matter differently, the law enacted by three co-ordinate estates was the measure of royal power. As one prominent parliamentarian theorist asserted roundly, no almanac was needed to reckon that one was less than three.[7] Questions might also be raised about the king's discretion in summoning, proroguing, and dissolving parliament and the problem of allegiance in a civil war or revolution be settled against him and in favor of the two houses. The latter was no small consideration in a century as troubled as the seventeenth, and it goes far to explain the great appeal of this ideology after 1642. Even a staunch royalist would grant that resistance to the king was legal if the two houses were indeed co-ordinate with him in law-making.

It was the community-centered view of government that prevailed in the course of the seventeenth century although the political theory of order had stout advocates as late as the Glorious Revolution. The shift in thought was momentous for the political system and the development of the English state. It meant among other things that just as the theory of parliamentary sovereignty became ascendant, a sudden twist was imparted by which that sovereignty was seen as shared. Whereas earlier the view taken of the king as law-maker pointed to a parliamentary sovereignty vested in the king in parliament, it was the parliamentarian version that proved successful. Public understanding of the lines of political authority altered irrevocably when the community-centered ideology became popular during the civil war, and the process of intellectual erosion continued unabated after 1660 despite the best efforts of apologists for the Stuart monarchy. Unmistakably, this ideology, with its emphasis on a co-ordination in law-making, the highest power, occupied a central place in the political thought of Charles II's reign, its tenets accepted in whig and tory camp alike. There also appeared in whig writing a coherent and articulated common-law argument for early parlia-

ments that added a new dimension to Stuart political thought. It strengthened the already widespread conviction that the community but not the king constituted the human source of law and political authority, promoting the political idea indispensable to the co-ordination principle that the two houses were in fact independent of the king.

The transformation in national outlook had virtually run its course by 1689, being so far advanced by that time as to make possible the conclusion that the Glorious Revolution marked in ideological terms the completion of an intellectual process at work since 1642. The principle of a co-ordination in law-making held the most conspicuous place in the triumphing parliamentarian ideology. Providing the ideological axis that joined the civil war to the Glorious Revolution, this principle more than any other in Stuart political thought fostered the growth and spread of the modern theory of a parliamentary sovereignty in king, lords, and commons and by radicalizing Stuart political thought effectually destroyed the substance of the kingship.[8] The history of the acceptance of such a theory by the seventeenth-century political nation affords not only a substantial explanation for the Glorious Revolution but also an important means of assessing the significance of that remarkable event.