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978-0-521-28547-6 - John Locke and the Theory of Sovereignty: Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution

Julian H. Franklin

Excerpt

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I

The background of the problem

IN THE COURSE of the English civil wars a new dimension was added to the constitutionalist theory of sovereignty which entered the main tradition through the work of Locke. In the last chapter of the *Second Treatise*, entitled 'Of the Dissolution of Government,' Locke insists on the right of the people, acting for just cause, not only to replace its governors but to change the form of government itself. By the people, furthermore, he does not mean the Parliament, or even the House of Commons within Parliament, but the general political community considered as a separate legal entity. This idea seemed radical at the time it was published, and was repudiated by the Whigs. But it did not originate in any particular zeal for political democracy. In the form in which Locke encountered it, and as he used it, it seemed to be the only principle of resistance consistent with the relationships of sovereignty in a mixed constitution.

In earlier constitutionalist theory, which had attained definitive elaboration in the monarchomach writers of the sixteenth century, the right of resistance and of deposition had also been based on the constituent power of the people. Since all legitimate authority derived from the consent of the community and was thereby subject to conditions, the people had the right to depose a king if these conditions were flagrantly transgressed.¹

¹ The basic themes of monarchomach theory are treated in many places. My own view is presented in Julian H. Franklin, *Constitutionalism and Resistance in the Sixteenth Century* (New York, 1969).

For general surveys of European political thought in this period, see J. W. Allen, *Political Thought in the Sixteenth Century* (London, 1957);

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But in this monarchomach tradition, the constituent power of the people was almost always equated with the right of the Three Estates or other body in which the people were considered to be represented. In other words, the right of the people's representative and that of the general community were assumed to be legally equivalent and interchangeable – by substitution, as it were.² Hence the right of the Estates to act against a tyrant was thought to be inherent in their capacity as representatives, and the original contract by which the king was constituted was portrayed as an act of the Estates on behalf of the community.

Among most of the best known monarchomachs, indeed, the very constitution of the people as a corporate association was in the form of an Estates assembly. Given the fear of democratic revolution in this period, this interpretation rapidly became predominant. The right of resistance could be confined to the established representative, and, where the Estates were incapable of acting, to the higher magistrates and nobles of the kingdom whom the Estates had supposedly instituted to restrain the king on their behalf. Initiation of resistance by ordinary subjects, and so by the populace at large, was forbidden as anti-social and anarchic.

Yet even those who admitted individual initiative did not and Pierre Mesnard, *L'essor de la philosophie politique au XVI^e siècle* (2nd ed. Paris, 1951). Still lacking is a detailed and comprehensive study not so much of the 'systems' of individual thinkers as of the main intellectual trends as they develop in response to political issues and institutional changes. But that need will soon be fully supplied by Quentin Skinner in his forthcoming book, *The Foundations of Modern Political Thought*, 2 vols. (Cambridge, 1978).

² The assumption of full substitution is especially articulate in the *Vindiciae contra tyrannos*. And it is used to describe not only the Estates but the magistrates who are assumed to hold of the Estates either by election or a tenure created by the Estates in the past. 'When we speak of the people collectively, we mean those who receive authority from the people, that is, the magistrates below the king who have been elected by the people or established in some other way. Those take the place of the people assembled as a whole and are ephors to kings and associates in their rule. And we also mean the assembly of the Estates, which are nothing less than the epitome of a kingdom to which all public matters are referred.' (Franklin, *Constitutionalism*, p. 149.)

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intend thereby that freedom to act by the Estates should be restricted. Individual acts of tyrannicide, or a rising by ordinary subjects, were but remedies of last resort, when the Estates were unwilling or unable to take action, and the higher magistrates and nobles had failed to do their duty.³ Hence the right of the Estates to act against a tyrant as the people's substitute was the common assumption of all constitutionalist commentators.⁴

Thus understood, however, the right of deposition was technically incompatible with a mixed or limited monarchy. In a limited monarchy the king, although circumscribed by law, has a legal monopoly of all constitutional initiatives; in a mixed monarchy constitutional initiative is shared by the king and the Estates. In either form the king is vested with a large sphere of independent power which the representative body must be forbidden to assume.⁵ Where the Estates hold constituent authority, however, no such independence is allowable.

³ Appeal to individual resistance in first instance was sometimes allowed by medieval writers. But this had been regarded by most as dangerously anarchic. With the growth of representative institutions, individual resistance (when admitted at all) tends to be reduced to the status of a last resort.

⁴ The only exception to this rule is George Buchanan, *De jure regni apud Scotos* (1578), in *Opera Omnia* (Edinburgh, 1715), vol. 1, who holds (p. 13) that acts of the Estates do not obtain the force of law unless they have been ratified by the (tacit) consent of the general community. There is thus some conception in Buchanan of the people as a corporate entity distinct from the Estates, and having powers of its own. I am indebted to Quentin Skinner for calling this point to my attention.

Buchanan, however, does not deny the rights of the Estates to substitute for the people in all respects so long, presumably, as their acts were not flagrantly neglectful of the public interest. That this substitution by the Estates also extended to the constituent functions of creating and deposing kings is clearly indicated by many passages in Buchanan's slightly later work, *The History of Scotland* (1582), trans. J. Fraser (London, 1689). See especially I, 114, 269, 331; and II, 215, 216, 222.

⁵ This distinction between limited and mixed is presented from a modern point of view. Most European writers, in so far as they are able to recognize an independent but qualified kingship, do not distinguish different modes. The distinction between limited and mixed is embryonic in many English writers of the seventeenth century and these terms are used by Philip Hunton (see below, pp. 41ff.). But Hunton's distinction does not exactly correspond to the one offered here.

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Since the powers of the king are granted to him on condition, he is obliged to use them in the public interest. And if the Estates have all the powers of the principal by which that agency was constituted, there can be no power in the king that restricts their scope of judgment. The deliberate opinion of the Estates, when actually assembled, must define the public interest authoritatively.

In monarchomach theory, then, there was no sphere of public power that the Estates could not assume. Thus in all European monarchies the power of declaring war was wholly or partly vested in the king. But if, in a given situation, the Estates were assembled and requested war, the king would be obliged to yield, even against his better judgment. This would apply to every other area of executive and legislative power, for on the premise we have just described all powers of the king had to be temporarily suspended in the presence of the assembled representative. The same consideration can be stated in another way. A king could not presume to refuse, or veto, a persistent request of the Estates, or order them dissolved against their will, without appearing to assert that his power to define the public interest was unconditional and arbitrary. A king who adopted such a course would *eo ipso* be culpable of tyranny, and he would become liable to resistance or removal by those who had granted him his office.

The monarchomach theorists do not always stress this outcome, and often write of any given monarchy as though it were limited or mixed.⁶ But all of them, at some point or another,

⁶ Thus François Hotman, in the *Francogallia*, puts the entire control of public affairs in the Estates Assembly and thinks of the king as properly but the presiding officer therein (Franklin, *Constitutionalism*, pp. 71, 73). Yet he lavishly praises the French constitution as a 'mixture' (*ibid.* pp. 66–8). 'Mixture' is thus not used in a strictly legal sense but only to show that the government of France is somehow composed of three elements cooperating harmoniously. A strict juridical distinction between the sharing of sovereignty and the sharing of subsidiary governmental functions by several components is introduced only with Bodin, who denies the possibility of the former while admitting the latter. But even after Bodin the confusion lingers on. See Julian H. Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge, 1973), pp. 29ff.

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explicitly observe or clearly imply that the assembled representative can assume all the powers of the central government whenever it sees need to do so.⁷ The essence of monarchy, in the monarchomach perspective, is the right of the king to govern in conformity with law when the representative is not in session. Since the Estates of the sixteenth century were not assembled continuously or even frequently, there is a certain common sense in this idea of monarchy, and it could go hand in hand with a large degree of effective power in the king. Yet in strict juridical terms, the king in this conception is not an

⁷ This tendency is beautifully illustrated by the following passage from Johannes Althusius, whose *Politica methodice digesta* is the academic *summa* of monarchomach thought. 'Therefore, the estates and orders taken together prevails over the opinion of the presiding officer or supreme magistrate. For there is more authority and power in a group of many persons than in one individual who has been constituted by that group of many and is inferior to them. Several persons can understand, see, and judge better than one; and one is more likely than many to err and be deceived, or to be driven by his passions into wrongful acts. What many seek is more readily found, and what has been decided by the authority of many is observed and maintained with greater harmony, authority, and good faith. Furthermore, if the magistrate's own opinion, being opposed to the opinion of the orders and estates taken both separately and together, should be promulgated as the opinion of the general council, the council would be meeting in vain. The example of Theodosius is presented in *l. humanum. C. de legib.* [Code 1, 14, 8] where that pious Emperor says that general law is to be that only which has been approved by the common consent of all and the council of all estates together and then promulgated by the Emperor's authority. . . On the authority of councils there is much to be found in Hotman, the *Antimachiavel* [Gentillet], . . . and Bodin, who does not believe, however, that the decrees of assemblies are valid and ratified unless they are approved by the king. . . But in modern times all difficulty [on this question] is removed by the articles, sworn to by the king at the time of his installation, in which he promises that he will do nothing in important matters without the council of the kingdom's leading men' (*Politica methodice digesta* (Cambridge, Mass., 1932), ch. xxxiii, 20, pp. 32-4).

As this passage indicates, the obligation of the king to obtain the consent of an assembly is not distinguished from an obligation to follow its advice, and evidence of the first is taken to indicate the second also. This error is widespread in the period and is found among absolutists as well, who, of course, often use it for different purposes. On Bodin, see Franklin, *Bodin*, p. 68. For Pufendorf, see *On the Law of Nature and Nations*, trans. C. H. and W. A. Oldfather (Oxford, 1934), vii, ch. vi, 12, p. 1076.

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independent power. He is better described as an agent charged by the Estates, who is bound to carry out their will and holds office during good behavior.

The monarchomach theory of resistance was thus at odds with existing constitutional realities. But the specific difficulty was never pointed out by its opponents. Those who rallied to the prince's side in the conflicts of the time were unwilling to defend their cause on the premise of limited supremacy.⁸ The aim of the royalists was to invalidate resistance altogether; to acknowledge binding limitations on the king was to admit that resistance in some form or other must be licit if these limits were transgressed. In the sixteenth century, accordingly, and in the seventeenth as well, the royalist argument tended to be absolutist, and was as much, or more, at odds with constitutional realities as the doctrine it attempted to refute.

On the other hand, those who took up arms against the king were never driven to reassess their theory of monarchy in response to pressures from within their ranks. The monarchomach doctrine of resistance was no doubt republican in tendency. But this did not become a source of political embarrassment.⁹ In the organized resistance movements of the time, the idea of an aristocratic republic with a princely chief often seemed a congenial solution to their grievances. And we have already seen that they were not required logically to press their claims to that extreme. Their actual demands for day-to-

⁸ This is mainly true of royalist thought on the continent. The English royalist position of the 1640s is more complex. See below, pp. 34ff.

⁹ In all monarchomach theories the normal and continuing checks on the king are the high nobles and corps of magistrates like the Parlement of Paris whose power is to limit rather than control the king (except when they initiate resistance). In some versions, as in the *Vindiciae contra tyrannos*, the emphasis on these 'lesser magistrates' beneath the king is so great as to eclipse the role of the Estates. Generally speaking, the right of the Estates, or people, is usually little more than a general principle to explain the right of resistance in the magistrates. The theory of these magistrates – who are virtually independent powers in the monarchomach theory of the state – is lucidly worked out in the first part of Richard Roy Benert, 'Inferior Magistrates in Sixteenth Century Political and Legal Thought,' unpublished doctoral dissertation, University of Minnesota, 1967.

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day control of affairs by the Estates could be expanded or contracted in any given situation without alteration of the basic premise on which their theory of resistance was established. In the sixteenth century, accordingly, the inability of constitutionalist theory to account for a limited or mixed monarchy was passed over virtually unnoticed.

But at the time of the English civil wars, which began in 1642, the entire question of resistance was transformed. For reasons soon to be considered, the leaders of the English opposition were unwilling to claim a right of deposition against Charles I, and strenuously denied that such a right existed. They attempted, rather, to justify a war against the king while still acknowledging his title and authority. As a result of this decision, the incompatibility, characteristic of the older theory, between the ultimate supremacy of the people's representative and the independence of the king, was transformed into a contradiction in the theory itself. The leaders of the opposition were conceding that a king of England was somehow independent in his status. But in order to justify resistance, they were required, in one way or another, to invoke the supremacy of Parliament against him.

Sooner or later, then, despite all efforts at evasion, this fundamental inconsistency would have to be noted, not only by the royalists, but by the constitutionalists themselves. It thus prepared the way, in some of these at least, for a reconstruction of the theory of sovereignty. Given the attachment of the English to the principle of royal independence, return to monarchomach conceptions was no longer feasible. The only reasonable solution to the problem of resistance was the location of constituent authority in the people as distinct from Parliament.

The theoretical difficulties of the Parliamentary position in the early 1640s did not result, at least initially, from any particular concern to preserve the balance of the English constitution. They were engendered rather by a compromise in political strategy. The dominant aim of the Parliamentary leadership was to guarantee the constitution against any new

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attempt by Charles I to rule without a Parliament. In the first half of 1641 the Long Parliament, which had been convened in November 1640, passed a number of important measures that seemed sufficient to achieve these goals.¹⁰ These proposals had become law with Charles' consent. But since Charles could not be trusted personally, no guarantees were calculated to give real assurance, short of virtually complete control of the entire executive establishment, to which Charles would not agree.¹¹ By the time of the Irish rebellion that began in October 1641, the leaders of the opposition had become fully persuaded that Charles was planning a military coup against the Parliament, and they now began to prepare their supporters in and out of Parliament for civil war. At this point it might seem that their only sensible course was deposition. If Charles could not be trusted, and if he would not consent to surrender his control of the executive, there was no security for Parliament unless he were driven from the throne.

But the majority of the House of Commons, to say nothing of the Lords, were as much or even more alarmed by the revolutionary menace attendant on protracted civil war, as by the threat from Charles. In France, and even in the Low Countries, the military resistance of the sixteenth century had centered, at least initially, on the fighting nobles of the countryside. The towns made financial contributions that were often used to hire mercenaries and to pay for the importation of auxiliaries. But the core of the resistance effort normally lay in clienteles

¹⁰ Among these were the Triennial Act, the Act of Continuance (by which the Long Parliament could not be dissolved without its own consent) and the dismantling of the prerogative courts.

¹¹ Charles was repeatedly asked to appoint and retain such officers and counsellors as enjoyed the confidence of Parliament. This demand, which is almost constant, became more specific, all-encompassing, and insistent as the conflict deepened. A fairly early and relatively mild statement is a resolution adopted by the House of Commons on June 23, 1641 'that his majesty may be humbly petitioned to remove such evil counsellors against whom there be any just exception, and for the committing of his own business and the affairs of the kingdom to such counsellors and officers as the Parliament may have cause to confide in...' (William Cobbett (ed.), *Parliamentary History of England*, vol. 11 (London, 1807), col. 847).

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of local nobles attached to great princes or to local magnates with national, or even international, connections. In England, on the other hand, the rural fighting noble and the network of quasi-feudal clienteles had long been obsolescent. The English opposition, furthermore, was unique among European resistance movements in that it clearly centered in a House of Commons. And in part for this reason, what quasi-feudal elements remained tended to rally to the cause of Charles. By 1641, indeed, there were serious defections from the House of Lords to join the king when he departed London. Many who left had been virtually driven from the city by the crowds that had been used, or at least permitted, by the House of Commons to intimidate the other House.

Hence any Parliamentary army, although it might be led by gentlemen and sympathetic Lords, would have to recruit its rank-and-file – and many of its officers too, as it turned out – from social strata not represented in the House of Commons. It would thus be drawn from artisans and yeomen, numbers of whom attended congregations illegally separated from the state in which sectarian radicalism often flourished. And this sectarianism often went hand in hand with alarming notions of political and social revolution. In all the great European conflicts occasioned by the Reformation, the official resistance inevitably inspired, and sometimes exploited, radicalism of this sort. But the continental radicalism of the sixteenth century had most often been inchoate, naive, and easily kept on the fringes of the military struggle. In England of the seventeenth century the radicals were better organized and often quite sophisticated in their ideas of secular reform; above all, they could not be easily excluded from the army. As the most eager and most militant members of the strata from which it was recruited, they could hardly be denied participation, even though attempts were made to do so.¹²

The official Parliamentary opposition was thus inclined to

¹² See Christopher Hill, *God's Englishman, Oliver Cromwell and the English Revolution* (New York, 1972), ch. III.

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caution. In 1640 its leaders believed, or affected to believe, that their constitutional objectives could be accomplished short of war. They could hardly have done otherwise and kept their majority together.¹³ During the ‘paper war’ of 1642 – which took the form of Remonstrances and Addresses by the Parliament on the one side, Answers to remonstrances and addresses by the king on the other, and Declarations by both, all designed to win support among the public – both the rank-and-file of the moderate opposition, and probably the leadership as well, hoped that Charles would finally yield to a determined threat of military force. Even after August 1642, when Charles was artfully maneuvered into the first open breach of civil peace, they believed that the war could be ended speedily by compromise. In 1645, Charles was defeated after a bitter and protracted struggle. But by this point the official opposition had even greater reason to insist that he was still the king. Threatened with the growth of radicalism in the army, its members pressed for a negotiated settlement before the menace could mature. They clung to this strategy tenaciously, until the more moderate wing was driven from the House of Commons in the military purge of December 1648.

Hence at no point, so long as it was free, did the Long Parliament move toward deposition, or even think of it, at least officially. The closest that it came was the Vote of No Addresses of January 1648, which declared that the two houses would settle the constitution unilaterally in view of Charles’ obstinacy. Even this preliminary step was but a momentary and half-hearted deviation.

Throughout the 1640s, therefore, Parliament was bound to insist on the sacrosanctity of Charles, not only in his person but also in his official status. Having repeatedly declared the existence of a grand conspiracy centering on Charles, to subvert the constitution and to introduce an arbitrary government, Parliament could hardly say that Charles was morally innocent

¹³ See Jack H. Hexter, *The Reign of King Pym* (Cambridge, Mass., 1961), ch. 1.