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The neo-roman theory of free states

I

When civil war broke out in England in 1642, the ideological initiative was at first seized by the opponents of Charles I's regime. Among the defenders of parliament's opposition to the crown, Henry Parker was perhaps the most influential of those who argued that, at least in times of national emergency, 'the supreame judicature, as well in matters of State as matters of Law' must lie with the two Houses of Parliament as representatives of the ultimately sovereign people.[1] 'The whole art of Soveraignty', Parker declares in his *Observations* of 1642, depends on recognising 'that power is but secondary and derivative in Princes'.[2] 'The fountaine and efficient cause is the people', so that the

[1] [Parker] 1934, p. 194. On Parker's argument see Tuck 1993, pp. 226–33 and Mendle 1995, esp. pp. 70–89.
[2] [Parker] 1934, pp. 208, 168.

people's elected representatives have a right to 'judge of publike necessity without the King, and dispose of anything' when the freedom and safety of the people are at stake.[3]

Parker's defence of parliamentary sovereignty was immediately countered by royalist affirmations to the effect that the king in person must be regarded as the sole 'subject' or bearer of sovereignty.[4] Denouncing the allegedly 'new-coyned distinction' between *'the King* and *His authority'*, Charles I's apologists insisted that God 'hath expressed in Scripture that both Soveraignty and the person clothed with Soveraignty are of him, by him, and from him immediately'.[5] Meanwhile a number of more cautious parliamentarians turned their attention to the actual workings of the British constitution and concluded that absolute or sovereign authority must instead lie with the body of the king-in-parliament. The anonymous author of *Englands Absolute Monarchy* declared in 1642 that 'King and Parliament' are 'firmly united to make one

[3] [Parker] 1934, pp. 168, 211.

[4] On the rise of this theory in early seventeenth-century England see Sommerville 1986, esp. pp. 9–56. For the description of the bearers of sovereignty as 'subjects' of sovereign power see [Parker] 1934, p. 210.

[5] See, for example, [Maxwell] 1644, p. 32. On Maxwell see Sanderson 1989, pp. 48–51.

absolute power',[6] while Philip Hunton maintained in his *Treatise of Monarchy* in the following year that 'the sovereignty of our kings' is limited by 'the concurrent Authority of the other two Estates in Parliament'.[7]

As the constitutional crisis deepened,[8] a new voice cut through these well-worn arguments. The true subject or bearer of sovereignty, it was claimed, is neither the natural person of the monarch nor any corporate body of natural persons, but is rather the artificial person of the state. There were precedents for this contention among the Roman lawyers,[9] and the argument was soon raised to a new peak of development by a number of natural-law philoso-

[6] *Englands Absolute Monarchy* 1642, Sig. A, 3v.

[7] [Hunton] 1643, pp. 38, 39. On this development see Judson 1949, esp. pp. 397–407 and Sanderson 1989, pp. 30–2.

[8] I assume that there was a constitutional crisis, not just a breakdown in management, but for a classic statement of the more deflating thesis see Elton 1974, vol. II, pp. 164–82, 183–9. For an account of how Elton's argument has been elaborated by so-called revisionist historians of the period see Adamo 1993. For a critical discussion of the claim that the crisis was revolutionary in a Marxist sense see MacLachlan 1996, esp. pp. 55–63, 231–51.

[9] The state is described as a union in which 'many doe knit in one power and will' in Hayward 1603, Sig. B, 3v. On the political theory of the English civilians in this period see Levack 1973, pp. 86–121. On the emergence during the same period of the idea of the state as an abstract entity distinguishable from both rulers and ruled see Skinner 1989.

phers in continental Europe, above all by Samuel Pufendorf in his account of the state as a compound moral person[10] in his *De Iure Naturae et Gentium* of 1672.[11] But within Anglophone political theory we can hardly avoid associating this move with the name of Thomas Hobbes.[12] Hobbes began to develop his view of state sovereignty in his *De Cive* of 1642,[13] but it was in his *Leviathan* of 1651 that he gave the definitive presentation of his case. There we read that the state or commonwealth 'is One Person, of whose Acts a great Multitude ... have made themselves every one the Author' and that 'he that carryeth this Person, is called SOVERAIGNE'.[14] It is here, in short, that we first encounter the unambig-

[10] Pufendorf uses the term *civitas*, but when his text was published in English in 1703 his translators rendered *civitas* as 'State'. See Pufendorf 1703, 7. 2. 13 and 14, pp. 151–2.

[11] Pufendorf 1672, VII. 2. 13, p. 886 defines the state as 'a compound moral person whose will, united by the covenants of many individuals, is taken to be the will of all' ('Persona moralis composita, cuius voluntas, ex plurium pactis implicita & unita, pro voluntate omnium habetur'). At the same time he praises Hobbes for having ingeniously portrayed this person and adds in Hobbesian vein (VII. 2. 14, p. 887) that sovereign individuals and assemblies merely exercise the will of the state ('Voluntas civitatis exserit vel per unam personam simplicem, vel per unum concilium').

[12] Gierke 1960, pp. 60–1, 139; cf. Runciman 1997, esp. pp. 4–5.

[13] Hobbes 1983, V. IX–XII, pp. 134–5.

[14] Hobbes 1996, p. 121.

uous claim that the state is the name of an artificial person 'carried' or represented by those who wield sovereign power, and that their acts of representation are rendered legitimate by the fact that they are authorised by their own subjects.

At the same time, there rose to prominence an associated view of the relationship between the power of the state and the liberty of its subjects. To be free as a member of a civil association, it was urged, is simply to be unimpeded from exercising your capacities in pursuit of your desired ends. One of the prime duties of the state is to prevent you from invading the rights of action of your fellow-citizens, a duty it discharges by imposing the coercive force of law on everyone equally. But where law ends, liberty begins. Provided that you are neither physically nor coercively constrained from acting or forbearing from acting by the requirements of the law, you remain capable of exercising your powers at will and to that degree remain in possession of your civil liberty.

This doctrine can also be found in the law of Rome,[15] and was taken up by a number of legally

[15] *Digest* 1985, I. 1. 1, vol. I, p. 1, cites Ulpian for the view that the law chiefly makes us good by inducing fear of punishments ('metu

minded Royalists immediately after the outbreak of the English civil war, including Griffith Williams, Dudley Digges, John Bramhall and, soon afterwards, Sir Robert Filmer.[16] As before, however, the clearest formulation of this argument in mid-seventeenth-century England can be found in Hobbes's *Leviathan*. Hobbes's presentation of the case is especially stark in its simplicity, since he maintains that even the coercive force of law leaves your natural liberty unimpaired. 'Generally all actions which men doe in Common-wealths, for *feare* of the law, are actions, which the doers had *liberty* to omit.'[17] This paradoxical doctrine is rooted in the fact that, as a materialist and a determinist, Hobbes believes that matter in motion constitutes the only reality.[18] The freedom of a man accordingly consists in nothing more than the

poenarum'). See also *Digest* 1985, I. 5. 4, vol. I, p. 15, where Florentinus is cited for the view that 'liberty is the natural faculty of doing whatever one wants, unless the action in question is ruled out by physical force or law' ('Libertas est naturalis facultas eius quod cuique facere libet nisi si quid vi aut iure prohibetur').

[16] Williams 1643, esp. pp. 82–4; [Bramhall] 1643, esp. p. 70; [Digges] 1643, esp. p. 14; Filmer 1991, esp. pp. 267–8. Similar arguments were used to insist that, despite their apparent subjection, wives are not unfree. See Sommerville 1995, pp. 79–113.

[17] Hobbes 1996, p. 146.

[18] For this assumption and its effect on Hobbes's doctrine of the will see Gauthier 1969, pp. 5–13.

fact that his body is not hindered from acting according to its powers. *'A* FREE-MAN, *is he, that in those things, which by his strength and wit he is able to do, is not hindred to doe what he has a will to.'*[19] When we say of someone that they have acted freely, this is simply to say that they have performed an action which they had a will to perform, and have done so without external let or hindrance. When, by contrast, we say of someone that they lack the freedom to act in some particular way, this is simply to say that an action within their powers has been rendered impossible by the intervention of some external force.[20]

As this account reveals, Hobbes has no objection to speaking in traditional terms about the faculty of the will in relation to human actions. When he invokes this terminology, however, he always insists that the will is nothing more than *'the last Appetite in Deliberating'*, and thus that the operations of the will are always caused by the factors affecting the agent's deliberation as well as being the eventual cause of the agent's action.[21] This in turn means that it makes

[19] Hobbes 1996, p. 146.
[20] If the action is not within their powers, what they lack is not the freedom but the ability to act. See Hobbes 1996, p. 146 and cf. Skinner 1990a, esp. pp. 123–8.
[21] Hobbes 1996, p. 45.

no sense to speak of being coerced into acting against your will, since the will lying behind your action will always be revealed by your action itself.

We can now see the sense in which you remain free according to Hobbes when you act in obedience to law. When the law coerces you into obeying by activating your fears about the consequences of disobedience, it does not do so by causing you to act against your will, thereby causing you to act less than freely. It always does so by inducing you to deliberate in such a way that you give up your will to disobey, acquire a will to obey, and thereafter act freely in the light of the will you have acquired.[22]

Hobbes is no less emphatic, however, that the threat of punishment embodied in the law does of course serve, as he carefully puts it, to 'conforme' your will, and that the usual reason for your conformity will be the terror you feel when you envisage the consequences of disobedience.[23] So the 'artificial

[22] But as Brett 1997, pp. 228–32 has perceptively shown, there is a confusion in Hobbes's argument at this point. The possession of your corporeal liberty (freedom from external impediments) obviously presupposes the possession of your natural liberty (the natural right of using your powers at will). But according to Hobbes 1996, p. 120, you give up your natural liberty when you covenant to become a subject.

[23] Hobbes 1996, pp. 120–1. Hobbes originally wrote 'performe'. Later

chains' of the civil law are similar to real chains, and can be made to constrain you; they differ only from real chains in being 'made to hold, by the danger, though not by the difficulty of breaking them'.[24]

Hobbes is thus led to two contrasting conclusions about the liberty of subjects that bring his doctrine fully into line with that of other royalists such as Digges, Bramhall and Filmer. First he insists that the extent of your civil liberty basically depends upon 'the Silence of the Law'.[25] If the law wishes you to act or forbear from acting in some particular way, it will take good care to terrify you into conformity. But Hobbes's contrasting conclusion is that, so long as there is no law to which your will must conform, you remain in full possession of your freedom as a subject.[26] 'In cases where the Soveraign has pre-

he inserted 'conforme' by means of a cancel pasted over the original word after the correction of the proofs. He evidently found the point at once important and hard to formulate. Tuck notes the use of the cancel in Hobbes 1996, p. 120 note.

[24] Hobbes 1996, p. 147.

[25] Hobbes 1996, p. 152.

[26] To complete Hobbes's argument, however, we need to add the further claim emphasised in Hobbes 1996, pp. 150–3: that because there are some natural rights of action which 'can by no Covenant be relinquished', there must be certain actions which 'though commanded by the Soveraign' a subject 'may neverthelesse, without Injustice, refuse to do'.

scribed no rule, there the Subject hath the Liberty to do, or forebeare, according to his own discretion.'[27] You remain free as a subject so long as you are neither physically nor legally coerced.

As Hobbes himself always emphasised, one of his aims in putting forward this analysis was to discredit and supersede a strongly contrasting tradition of thought in which the concept of civil liberty had instead been associated with the classical ideal of the *civitas libera* or free state.[28] This rival theory had also been a prominent feature of Roman legal and moral argument, and had subsequently been revived and adapted by the defenders of republican *libertà* in the Italian Renaissance,[29] above all by Machiavelli in his *Discorsi* on Livy's history of Rome.[30] As soon as the theory I have been describing was put forward by Digges, Hobbes, Filmer and other royalists in the

[27] Hobbes 1996, p. 152.

[28] Hobbes 1996, pp. 149–50; cf. Hobbes 1969, pp. 26, 28, 30–1, 43.

[29] On the evolution of this tradition the classic study is Baron 1966. See also Pocock 1975, pp. 83–330 and Skinner 1978, vol. I, pp. 3–48, 69–112, 139–89. For Machiavelli on the *vivere libero* see Skinner 1981, pp. 48–77 and especially Viroli 1992, esp. pp. 126–77. For citations of Machiavelli in seventeenth-century England see Raab 1964, pp. 102–217.

[30] Machiavelli began his *Discorsi* *c.* 1514 and completed the work in 1519. See Skinner 1978, vol. I, pp. 153–4.