
Executive – Legislative Relations: Learning from Locke

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One by-product of the celebrations surrounding the bicentennial of the American Constitution is the rediscovery of certain old and neglected works of political-theory. John Locke, for example is one of the founders of modern constitutionalism. Some of the most powerful principles underlying both American and British theories of government are found in his thought.

Edmund Burke, in his famous Commons speech moving resolutions for conciliation with the American colonies, revealed the basic unity of political purpose between England and the United States. The Americans, he said, are "not only devoted to liberty, but to liberty according to English ideas and on English principles". The influential source of English theory and American practice was John Locke.

Locke's ideas on legislative power were seized upon more eagerly by the Americans than by the English who, like Blackstone, greatly respected Locke but wondered whether he "perhaps carries his theory too far". English defenders of parliamentary government recoiled from the full logic of Locke's theory and domesticated it, fearful of what a liberated legislature might mean for traditional parliamentary executives. For Locke, the supreme political power is the legislative power. To understand what this means, we owe it to ourselves to rediscover what Locke originally intended for a healthy legislature, and to ponder why his English and American followers drew different conclusions from his classic theory of modern constitutionalism.

Locke's *Second Treatise of Government*¹ defended the parliamentary cause in the English Revolution of 1688 and influenced the cause of self-government in the American Revolution of 1776. His work is fundamental to the concept of limited government which operates on the basis of popular consent to protect individual rights and liberties. Although much of his writing did contribute to the case for an active legislature, Locke was not an advocate of either parliamentary sovereignty or legislative supremacy. His thought is useful precisely because it relates the legislature to

both popular sovereignty and executive power – like a ladder of political ascent from the people through the legislature to the executive. As a founder of limited or constitutional government, Locke understood much about the nature of the legislature, including its limitations. His thought encompasses both legislature and executive, and from him one can trace a source for two arguments which, over time, have loosened themselves from the control and unity of his original formulation. I refer to the cases for legislative supremacy and executive privilege, each of which claims Locke as authority.

Government by Consent

As part of his battle against the executive tyranny of the Stuart Kings, Locke fabricated the powerful image of a social contract. This contrived picture serves as a standard for judging political affairs. In Locke's hands, this idealized picture of the origin of government reinforced the revolutionary doctrine of consent-based, representative government. In place of the traditional emphasis on the discretionary prerogatives of the sovereign executive, the new teaching limited government to securing those conditions as agreed upon in the social contract. By the device of the social contract, Locke forced men to evaluate government primarily in terms of its adherence to the consent of the governed – as originally formulated in the social contract and continually represented and kept alive in the legislature. Under the social contract each individual agrees to the formation of a community under a government with responsibility "for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it" (95). The civil community arises out of general consent, but the institution and operation of government cannot afford the luxury of decision-making by consensus: government by consent means government established by majority rule.

The primary task of the social contract is to specify the political institutions required by civil society. To Locke, the key institution is the legislature because the legislative power is the fundamental one. Locke is not a legislative supremacist; one cannot believe in parliamentary supremacy *and* the social contract, for the latter is an expression of popular, rather than parliamentary, sovereignty. In Locke's scheme, the people are sovereign,

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and through the social contract they come together to construct a limited government which can represent the community. Should it fail repeatedly to represent their interests and degenerate into tyranny, the people may withdraw their consent. The important question probes the roles of the legislature and executive in maintaining popular consent. In the event that the two powers were to clash, which is meant to predominate? And who or what is meant to arbitrate in such an eventful clash?

Role of Legislature

The social contract can authorize any form of government which, in the circumstances, will further the aim of civil society i.e. to supply the law and order so absent from the pre-social state of nature. Absolute monarchy, where legislative and executive power rest in the same person, is unacceptable. Civil peace and popular security necessarily require a separate legislature, an institution in which the fundamental legislative power is "placed in collective Bodies of Men, call them Senate, Parliament, or what you please" (94). The precise form of the legislature will change with the agreed form of government, but its task is always to provide for the rule of law: "to govern by established *standing laws*, promulgated and known to the People, and not by Extemporary decrees" (131).

The form of government depends upon who holds "the Supreme Power, which is the Legislative." Legitimate forms may vary, but "the first and fundamental positive Law of all Commonwealths, is the establishing of the Legislative Power." The legislative is "the supreme power . . . sacred and unalterable in the hands where the Community have once placed it." The legislative power is supreme by virtue of its right "to make laws for all the parts and for every member of the society". Thus all other political powers are "derived from and subordinate to it" (132, 134, 150). The executive power is "visibly subordinate and accountable to it, and may be at pleasure changed and displaced."

Locke excuses the monarch from this chain of accountability, as in English limited monarchy that person has an active "share in the legislative", in the sense that he constitutes a distinct component of the legislature, proposed laws requiring his assent. But of "other ministerial and subordinate powers", Locke is emphatic that "they have no manner of authority any of them, beyond what is, by positive Grant, and Commission, delegated to them . . .". The legislature's supremacy extends to the power to resume executive power from ministers "when they find cause, and to punish for mal-administration against the Laws." Thus, "the Executive being both ministerial and subordinate to the Legislative" is far from a co-equal partner in government (152, 153).

Or so it seems, at least in times free from national emergency.

Legislative Limitations

The legislative power is the fundamental power of government, but this does not mean that the holders of this power enjoy unhampered political mastery. By "supreme", Locke means crucial or pivotal: depending on how this power is exercised, the whole scheme swing from free to despotic government. Locke envisages the possibility of an elected representative assembly, operating on majority rule yet subject to a set of constitutional reservations derived from the social contract.

The legislature is not omnipotent: it is constrained by its character as "a Fiduciary Power to act for certain ends." The sovereign people may "remove or alter the Legislative, when they

find the legislative act contrary to the trust reposed in them" (149). Locke explicitly specifies the limitations on legislative power. Among them are that the legislature shall rule only by "declared and received Laws, and not by extemporary dictates and undetermined Resolutions". The law must not confer on appointed officials unfettered discretions that require individuals "to obey at pleasure the exorbitant and unlimited decrees of [officials'] sudden thoughts, or unrestrained, and till that moment unknown wills without having any measures set down which may guide and justify their actions" (137). In addition, the legislature shall not delegate its power to others, for the people have themselves delegated their power to it as "being only to make *Laws*, and not to make *Legislators*" (141).

Executive Prerogatives

Locke sees an additional political challenge to the legislature from the executive. The separation of executive from legislative power is designed to bolster the impartial rule of law: the executive should concentrate on the formal execution of legislative will, and the legislature should not be tempted into selective enforcement of its laws. The legislature, with a watchful eye over its shoulder to the people, can then act as a check and balance on the diligence of the executive.

However, some element of executive discretion is unavoidable. First, the written law cannot foresee or provide guidance for all circumstances; and second, the law may have to be modified on account of the harms and defects of "an inflexible rigour" or "a strict and rigid observation" especially during times of national emergency. As Locke puts it: "This Power to act according to discretion, for the public good, without the prescription of the Law, and sometimes against it, is that which is called Prerogative". The traditional suspicion of the prerogative rule of "Kingly Government" is valid, in that history is full of awful examples of resort to "an Arbitrary Power to do things hurtful to the people" (159, 160, 163). But instead of denying the place of executive prerogative, Locke denies the name to the historical examples. A self-governing people would be right, in Locke's view, to confer prerogative power on their executive – conditional on its just exercise, as determined in the first instance by the legislature and ultimately by the people.

Can this be the same Locke, famous in the development of modern constitutionalism for the precept that "Where-ever Law ends Tyranny begins"? Does not this conditional grant open the door to selective civil disobedience, as individuals and groups play the executive off against the legislature, reducing majority rule to "Anarchy and Confusion" (202, 203)? Locke's answer implies that there is an equal danger that the legislature will betray its trust to the people, so that a people must be taught to be equally jealous of both powers. In general Locke sees the gravest danger in popular toleration of misgovernment, whether by executive or legislature. His task is to arouse the people to greater vigilance, which might well be a calculated effect of his open praise for the necessity of executive prerogative. To his critics who are fearful of new waves of popular sedition, Locke argues that his doctrine of people power is actually "the best fence against rebellion" in that it reminds both rulers and legislators of their proper place (226-7). Greater crimes have come from zealous rulers than from rebellious citizens.

The Three Supremes

It is one thing to confuse the supremacy of legislative *power* with supremacy of the legislative *institution*. But Locke forces us to

think much harder by referring to *three* supreme powers. We have learned something of the supremacy of the legislative power, but Locke also says that the executive "in a very tolerable sense may also be called supreme" (151); and elsewhere that the community "perpetually retains a supreme power" against foolish or wicked rulers (149). Proponents of greater parliamentary power neglect or ignore Locke's emphasis on executive prerogative. Defenders of prerogative stray far from the rebellious borders Locke erected to fence in its unsound use. Both sides underestimate the logic of popular sovereignty and tend to treat popular trust as an entitlement to, rather than a condition of, political power.

The most dramatic illustration of Locke's doctrine of popular sovereignty is the 1776 Declaration of Independence by the United States. It states that governments exist to secure "certain unalienable rights . . . among these are Life, Liberty and the pursuit of Happiness." Governments derive "their just powers from the consent of the governed" and, most striking of all: ". . . whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it . . .".

The ultimate power is that of the people. It is they who through the social contract authorize the form of government. It is they who delegate their natural legislative power to the legislature, which enjoys supreme political power so long as the form of government is faithful to its original purposes. During times of good government, supreme power is vested in the legislature and remains latent in the people. Paradoxical as it may sound, the people have no right to civil disobedience – or to selective adherence to the will of the legislature – but they do have the right to dissolve government and to revise the social contract whenever the form of government, and not merely its occasional exercise, becomes destructive of their liberties. They have an ultimate right to resist tyranny but not an everyday right to disobey law.

If the sovereign people may not disobey the law, by what right may the executive resort to prerogative in defiance of the legislature? Locke's answer is loud but unclear: indeed, his very insistence on executive prerogative alarmed the framers of the American Constitution, who made every effort to confine the exercise of executive power within written constitutional channels. At the same time, the framers shifted much of the political burden from the people to the legislature. They were suspicious of popular judgment and feared for the rights of minorities under the tyranny of majority opinion. The relationship between the

Declaration and the Constitution illustrates the relationship between the *legitimizing* consent of the original social contract and the *operational* consent as provided for in constitutional majorities. The right of revolution is a power the people have in extreme circumstances to withdraw their legitimating consent and to dissolve government. Following Montesquieu's adaptation of Locke, the American framers devised constitutional procedures capable of taming and harnessing executive, legislative and popular power. Neither for Locke nor for the framers did popular sovereignty mean daily rule by simple majorities. Locke was prepared to tolerate a wide range of legitimate forms of government, each of which would have to establish its own balance between executive and legislative powers. In this he is much more daring and open than the American framers who, for the most prudent of reasons, tended to focus on practical institutions rather than theoretical powers.

The history of modern constitutionalism has been one of experiments in balancing these three supremes. The black letters of constitutional law have generally bolstered the legislature's rights against executive privilege, but executives have discovered plenty of harbours of "exceptional circumstances" to which they can retreat in secrecy and safety. The balance between executive and legislature will continue to oscillate, although the bias in representative governments must favour the legislature, which "is the soul that gives Form, Life, and Unity to the Commonwealth" (212). The measure of Locke's achievement is that his treatment of executive – legislative relations laid bare the political foundations which subsequent theorists tended to cover over and obscure with a legal superstructure. However grateful we might be for that constitutionalizing apparatus, we should always return to Locke for lessons on the fundamentals of representative government – including the perennial tension between executive and legislature.

Note

¹The primary source is Locke's *Second Treatise of Government*, as edited by Peter Laslett, Mentor Books, New York 1965. Bracket numbers refer to paragraphs of the *Second Treatise*. Relevant secondary sources are Julian H. Franklin, *John Locke and the Theory of Sovereignty*, Cambridge, Cambridge University Press 1981; W.B. Gwyn, *The Meaning of the Separation of Powers*, New Orleans, Tulane University Press, 1965.