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John Locke's Liberal Theory of Constitution

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Abstract

Modern constitutionalism concerns the constitution of political authority and the limitation of governmental power through law. These concerns also inform earlier theories of political founding, including contractarian accounts of the origins and legitimacy of political authority. This study aims to demonstrate that Locke's liberal theory of constitution provides the intellectual ground for the two principal tenets of modern constitutionalism: its democratic and liberal dimensions. It lies in Locke's revisions to Hobbes's theory of sovereignty. First, unlike Hobbes, Locke conceptualizes the people not merely as a form of sociality that exists only through the sovereign's representation and otherwise amounts to nothing more than a multitude, but as a constituent power capable of existing even in the absence of government. Second, the problem of sovereignty, which Hobbes formulates through the logic of infinite regress, leads, for Locke, to an unacceptable model of unlimited government. Such a government, for Locke, remains in the state of nature precisely because of its unlimited discretionary capacity, much like Hobbes's absolute sovereign. The principle of limited government—which alone renders the democratic principleof constitutionalism meaningful—reveals the distinctive character of Locke's liberal constitution. Finally, Locke's constitution also makes it possible to conceive the constitution beyond the principles of constitutionalism. Unlike Hobbes's sovereign, Locke's political universe allows us to conceive a political entity capable of limiting governmental power without itself becoming unlimited—as expressed incontractarianism, without becoming the judge in its own case. This, in turn, may leadus toward the idea of a written constitution grounded in Locke's inalienable rights.

Keywords: Locke; Hobbes; liberalism; constitutionalism; constitution.

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1. Introduction

Although constitution, rendered in Turkish as *anayasa*, is a term used to designate written constitutions in the aftermath of the French Revolution and the American War of Independence, the concept of the constitution carries a political significance that cannot be fully captured by its legal and juridical usage. Moreover, constitutionalism, translated into Turkish as *anayasacılık*, is the modern theoretical vehicle of the idea of the rule of law, which acquired its legal character through the written constitutions established in the wake of the two great revolutions of the 18th century. For this reason, it is argued that while *anayasacılık* is perhaps the most accurate Turkish equivalent of constitutionalism, *anayasa* is not so much an incorrect translation of constitution as an incomplete one, precisely because of the resonance of the latter with "the political," a dimension that the term *anayasa* tends to exclude. In other words, constitution predates constitutionalism, and/or politics itself, together with the idea of the contract, existed prior to the emergence of written constitutions. We may therefore assert that every constitution is a political constitution, but that, as the English case demonstrates, not every political constitution necessarily has a constitution. For this reason, it is more appropriate to render constitution as political constitution rather than *anayasa*. Indeed, modern written constitutions emerged historically in opposition to the British tradition of a political constitution grounded in common law.

In his recent work, *Against Constitutionalism*, the contemporary English legal scholar Martin Loughlin likewise argues that constitutionalism is a distinctly modern concept, one so deeply rooted in modernity that it excludes the pre-modern altogether. Unlike some American legal scholars, Loughlin maintains that constitutionalism did not emerge prior to the establishment of a foundational text defining the relations among the various loci of power (Loughlin, 2022, p. 27). Thus, adopting the concept of political constitution, rather than the mere constitution, would not merely allow us to examine theories of political constitution that predate the emergence of constitutionalism; it would also make it possible, in keeping with the aim of this study, to revisit these theories retrospectively from the lens of modern constitutionalism and its distinctive concern with the legality of the modern rule of law state. Contractarianism, and more specifically, John Locke's (1632–1704) idea of social contract, offers a particularly substantive point of departure for such a retrospective inquiry. As a mode of theorizing political constitution that predates the written constitutional tradition, it enables us to trace the liberal concern with legality to a conceptual terrain that precedes modern constitutionalism, while also allowing us to reconsider that terrain in light of constitutionalism's later development. Locke's writings are especially illuminating in this respect: they provide a conceptual vantage point from which the continuity between contractarianism and constitutionalism can be discerned, revealing how the concern with legality that becomes constitutive of modern constitutionalism is already articulated, in a different conceptual register, within contractarian thought.

Early modern theories of contract were, in fact, theories of political constitution is already apparent in the works of Thomas Hobbes (1588–1679), the first major figure in this tradition. At the end of Book IV of *De Cive* (1642), Hobbes states that the source of political constitution is a "decision" (*constitutione*); the political one that both marks a before and an after of the covenant and brings into being justice and property, both of which are institutions that have no existence prior to covenant. It is precisely on this point that Carl Schmitt (1888–1995) distinguishes Hobbes's theory of natural law from other 17th-century theories of the law of nature. For Hobbes, the source of the legal order, and the moment of its inception, lies in the decision itself, because no norm is carried over from the natural condition into the order established by the decision; that is, the norm (natural law) does not supply the decision with its substantive content (Schmitt, 2014, pp. 16–17). The legal order is therefore political in its origin.

Schmitt, however, places Locke in opposition to Hobbes. For Locke, argues Schmitt, property rights constitute a point of reference grounded in the individual right of resistance in the face of which "all concrete powers are utterly irrelevant" (Schmitt, 2014, p. 19). Indeed, for Locke, no political decision can violate the right to property as a norm. On the contrary, the right to property, which already exists prior to the establishment of sovereignty, is carried over into the political order in such a way that it determines the contract from within before the contract. It is for this reason that Schmitt, although Locke seeks to incorporate the pre-political constitution into the post-contractual order, regards the exception as "incommensurable" with his "doctrine of the constitutional state" (Schmitt, 2005, pp. 13–14). Locke, Schmitt correctly concludes, performs this incorporation in the form of a right, that is, as a norm.

Contrary to Schmitt's claim, however, Locke devotes a brief five-page discussion in the *Two Treatises of Government* to the idea of an executive endowed with a special prerogative that allows exceptions to become visible within the legal order. As if heralding a new condition for liberal politics, Locke grants the executive a superiority over and beyond the legislative power, and at times even against it, because there will inevitably be crises or circumstances in which the law cannot anticipate the exigencies of the

moment, and which therefore cannot be resolved by "a strict and rigid observation of the Laws" (Locke, 2005, II;14;159).[1] Yet this prerogative is not a license for the arbitrary exercise of executive power. Rather, it is a discretionary power that is entrusted to the executive precisely because it is expected to be exercised scrupulously "for the publick good" (Locke, 2005, II;14;160).

At the same time, however, Locke demands from this very executive, in the exercise of its prerogative, a political conformity with the "common establish'd Law" already in force, which is "indifferent, and the same to all Parties" (Locke, 2005, II;7;87). Locke's liberal conception of political constitution thus acknowledges that the prerogative capacity of the executive may reach and regulate things "the Law can by no means provide for" and that these matters are consequently left to the discretion of the executive (Locke, 2005, II;14;159). The executive may therefore exercise its prerogative only within the legitimate limits defined by Locke in terms of the good of society and the laws of reason. Thus, even where the governor who possesses the prerogative is not bound by any determinate rule, Locke does not anticipate a crisis of legitimacy so long as the governor pursues nothing other than the "publick good" (Locke, 2005, II;14;166). Consider Locke's paradigmatic example concerning property: to put out a fire, one cannot simply sacrifice one's house who happens to be sitting quietly in his own house next door (Locke, 2005, II;14;159).

We can therefore see that Locke, as a philosopher of natural law, seeks to derive norm from norm just as he invokes the laws of reason as the normative ground for the legitimacy of written laws; so too does he seek to bring the management of unforeseen exceptions back within the legal domain by subjecting the exception to the normative demands of the public good and the laws of reason. From this perspective, Schmitt's claim concerning the incommensurability of Locke's liberalism is justified, insofar as it rests on the categorical distinction he draws between decision and norm in the constitution of the political order. The legitimacy Locke demands for the post-constitutional order from what precedes political constitution is itself normative. Locke's liberal theory of constitution can therefore be understood as a theory of natural right/law that seeks to carry the normative content of the pre-constitutional condition into the order established after political constitution.

But what, viewed from the perspective of contemporary debates on constitutionalism, does Locke's liberal theory of political constitution have to tell us? Did Locke, after Hobbes, make a distinctive contribution to the liberal project?

2. Political constitution, contractarianism, and constitutionalism

A retrospective movement from constitutionalism to contractarianism, or from the 18th to the 17th century, or from the Enlightenment back toward early modernity must begin, first and foremost, with an understanding of modern political constitution. The most efficient way of approaching modern political constitution is, of course, to examine how the contexts in which it first emerged were themselves theorized. The revolutionary experiences of two political figures who lived roughly a century after Locke, Emmanuel-Joseph Sieyès (1748–1836) and Thomas Paine (1737–1809), culminated, in both France and the United States, in the political constitution whose definitive form is given in a written constitution. From a liberal perspective, the written constitution marks the moment at which political constitution crystallizes. It is therefore with the emergence of a written constitution that political constitution can be understood along a clearly demarcated threshold separating what precedes its establishment from what follows it. In his revolutionary pamphlet *What Is the Third Estate?* written against the privileged orders of the *ancien régime*, Sieyès argues that the constitution is the result of the will of constituting power (*pouvoir constituant*), rather than that of the constituted power (*pouvoir constitué*) (Sieyès, 2003, p. 34). For Sieyès, then, the legitimacy of the constitution is determined by a political will that emerges from what precedes political constitution and crystallizes at the moment of its establishment in a certain political direction. In the context of the French Revolution, the political will is democratic in substance. The idea that an authority established based on a particular people has a beginning, of course, predates the French Revolution. What became a central concern of political philosophy in the revolutions of the 18th century, however, was whether that authority's legitimacy depends on being conferred by the people.

While Sieyès's theoretical contribution lies in identifying the constitutive element of modern political constitution, Paine provides us with a definition of political constitution itself. The republican context Paine brings into view is precisely the one in which modern political constitution

[1] Throughout the article, references to Locke's Two Treatises of Government will be given by book, chapter, and paragraph number, respectively.

and, concomitantly, modern constitutionalism emerges. This is the context in which there is, therefore, nothing conceptually mistaken about calling political constitution a constitution. For Paine, the clearest illustration of this context is perhaps the political constitution of the United States, the most consequential of liberal democracies, as embodied in a written constitution (Can, 2022, pp. 334–335). When Paine declares that the right of making and reforming constitutions depends on "the authority of the people," he stands in direct continuity with Sieyès insofar as he defines the constitution through its constituent element (Paine, 2000, p. 185). Paine, however, departs from Sieyès in political terms by distinguishing the constitution from government and, indeed, by defining the former as prior and superior to the latter, thereby grounding its legitimacy on a different political foundation:

> A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form there is none. A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government. It is the body of elements, to which you can refer, and quote article by article; and contains the principles on which the government shall be established, the form in which it shall be organized, the powers it shall have, the mode of elections, the duration of parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have; and, in fine, everything that relates to the complete organization of a civil government, and the principle on which it shall act, and by which it shall be bound. A constitution, therefore, is to a government what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make laws, neither can it alter them; it only acts in conformity to the laws made; and the government is in like manner governed by the constitution. (Paine, 2000, p. 89)

On Paine's account of the constitution, it is not merely a power temporally prior to the establishment of government; it is a real entity ontologically prior to government itself. The mode of its existence is determined by a written text. The constitutional code is thus ontological modus. Paine's theory of the constitution therefore presupposes a conception of sociality independent of government, for without such a conception, the limitation of government would be impossible. The question Paine bequeaths to us, then, unlike Sieyès, is not simply a question that can be posed within the familiar political dichotomies of people and government, constituent and constituted power, rulers and ruled, and so forth. Rather, it is the question of what kind of being the constitution is—what ontological status it can possess once it is understood as something that exceeds these political oppositions.

For Paine, the founding of the United States demonstrates that no government can be regarded as though it had existed since the beginning of the world. This political constitution, unfolding before our eyes, provides an ontological account of the origin of government. Paine confines government to the making and execution of laws (Paine, 2000, p. 185). Constitutionalism, then, rests on the disclosure of government's origin: the constituent power is the genuine author of the secondary, derivative, and constituted order. Political constitution occurs not through the action of government, but through the action of the people who constitute the government itself. Moreover, precisely because this point must, in Paine's view, be repeatedly reminded and remembered, the "defects of every government and constitution both as to principle and form, must, on a parity of reasoning, be as open to discussion as the defects of a law" (Paine, 2000, p. 160). If a government seizes power without an act of political constitution, it has acquired that power by unjust force (Paine, 2000, p. 184).

Modern constitutionalism, then, as articulated by Sieyès and Paine, incorporates two fundamental ideas into its very definition. The first is the idea of the people's power as constituent power. The second, and the one of vital importance for liberalism, is the principle that governments and administrations must remain subject to the constraints articulated in the constitutional text. The power of the people as constituent power, to which the constituted order owes its existence, is politically superior to the power exercised within that constituted order. Put differently, the constituent power of the people enjoys an ontological precedence over the power of the established order by the people's representatives. This, in turn, implies that those who exercise representative authority within government cannot claim sovereignty against the power of the people, even when that government is itself a constitutional government. Indeed, written constitutions and constitutionalism, as products of the republican revolutions of the 18th century, are intended to precisely secure this principle: the will of the people cannot be subordinated to, or placed under the control of, its own representatives. The American legal scholar Bruce Ackerman endorses this view. In his account of the United States Constitution, he argues that dualist democracy or, more precisely, a dualist constitutional order, is constituted through two distinct acts of political decision, one by the people and the other by government (Ackerman, 1991, p. 6). As Ackerman argues, this distinction gives constitutionalism its democratic dimension.

In contrast to the American legal scholar Ackerman, the Canadian liberal legal philosopher David Dyzenhaus argues

that, in a liberal rule-of-law state, there can be no place for any power that is not constituted by law, most notably, for a concept such as constituent power, which, prior to its incorporation into a legal order, amounts to naked power in relation to law. Once power is transformed into authority, a liberalism that speaks from within a normative legal framework has no reason to seek the source of that authority, that is, of the authority that delegates legal powers, outside the constitution, for beyond it lies a terrain fraught with political dangers (Dyzenhaus, 2007, pp. 144– 145). The political distinction between the institutional and legal modalities of sovereignty therefore highlights the difference between democratic and liberal approaches to constitutionalism. For liberal constitutionalism, what matters is the principle that government must be constrained by the constitution; this principle draws the boundary between legitimate and illegitimate government. In this way, this second idea becomes an indispensable institutional principle of constitutionalism.

This second principle is reflected, for example, in the United States Constitution's Bill of Rights and its 10 amendments, which link the protection of fundamental rights and liberties directly to limiting governmental action. From a liberal perspective, moreover, constitutional government secures the freedom of its citizens precisely by governing in accordance with their fundamental rights, thereby making meaningful the constituent power of the people, which constitutes constitutionalism's democratic dimension. A constitutional government cannot deepen the democratic experience without responding to the liberal claims of the people as constituent power. Democratic constitutional government incorporates the conditions of social life into the legal order through law. Democracy, in other words, gives legal form to liberal demands. Otherwise, rather than appearing in the legal order as citizens endowed with rights and liberties, the people may confront that order as a form of naked power precisely by remaining external to it, and thus become a threat to the legal order itself. It is therefore along the lines of contemporary liberals such as Dyzenhaus that Locke's contribution to constitutionalism should be sought in this second principle. For Locke, even constitutional government can become tyrannical insofar as it violates individual rights and liberties: "*Where-ever Law ends, Tyranny* begins" (Locke, 2005, II;18;202). The second principle through which Locke's political constitution is to be examined can thus be read as a liberal corrective to both Robert Filmer's account of common law and Hobbes's contractarianism.

3. Hobbes *vs.* Locke

In 17th-century early modern political philosophy, Hobbes and Locke, as successive figures, were commonly conceived as establishing a legitimate political ground for power through their theories of the social contract, not least because their works coincide chronologically with major political upheavals. Hobbes's *Leviathan* (2005) was published at the end of the English Civil War. Thus, by the time Locke was born, Britain, the preeminent colonial power of early modern Europe, was passing through a period of extraordinary political upheaval. Locke's *Two Treatises of Government*, meanwhile, should be understood not simply as an intellectual justification articulated after the Glorious Revolution of 1688. If, following Laslett, we accept that at least the *First Treatise* was composed in 1682, before the Revolution, it was rather a text written in anticipation of, and in support of, revolutionary political change (Laslett, 2005, p. 47).

Indeed, Locke was so deeply involved in political opposition to the Crown before the Revolution that he was forced to flee to the Netherlands, the continental refuge of English political exiles. He opens his confrontation with the model of absolute monarchy, which derives the sovereign's rights from patriarchal origins, by invoking King William's intervention to rescue a nation standing on the brink of ruin. For Locke, the "right of fatherhood" defended by Filmer in *Patriarcha* is a "phantom" haunting political authority, while the "unlimited absolute Power" purportedly derived from it is merely a "story" that can be justified neither by scripture nor by reason (Locke, 2005, I;2;6). What Locke confronts, then, is no longer merely the persistence of an ancient tradition whose historical validity has expired; it is a political construction Filmer sustains through manipulative readings of scripture. In *Patriarcha*, Filmer seeks to ground political power patriarchally by selectively extracting biblical passages in which both mother and father are mentioned, effectively erasing the mother from the scriptural basis of his argument (Locke, 2005, I;2;6). For Locke, the problem with this argument lies precisely in its attempt to locate the most remote point in a chain of causation and elevate that point into the most comprehensive and authoritative cause. The so-called right of fatherhood is therefore not the discovery of an original political principle, but a political invention that must be left behind.

Locke's corrective to Hobbes concerns the same political problem at stake in his critique of Filmer. Although Hobbes, unlike Filmer, develops a theory of contract, he nevertheless leaves the sovereign as an absolute and unbounded power. This becomes apparent as early as the point at which Hobbes formulates the third of his 19 laws of nature, namely the law of justice. Justice requires that covenants be performed; it enjoins us both to enter into covenants and to fulfil what we

have covenanted to do (Hobbes, 2005, p. 100). Thus, although justice is itself a law of nature, it becomes possible only through the institution of the covenant. For Hobbes, only the violation of rights transferred through covenant constitutes injustice. For if injustice consists in an "unjust action" (*sine jure*) against another, then no injustice is possible in the state of nature, since, prior to the covenant, everyone possesses a natural right to everything (Hobbes, 2005, p. 93). Through the covenant, each person renounces her sole natural right, the right to everything, and transfers that right to the sovereign.

In Hobbes's political universe, the third law of nature occupies a peculiar position. If this law were genuinely binding in the state of nature, it would imply that injustice could be committed there and would thereby expose the absence of any determinate binding force in the laws of nature as such. In the state of nature, the laws of nature are binding *in foro interno*—that is, inwardly, as dictates of conscience—but they have no determinate *in foro externo* force: they do not bind action outwardly unless and until the conditions for their external enforcement have been established (Hobbes, 2005, p. 110). In other words, in the state of nature, everyone is justified in conscience in whatever particular judgment they make in response to whatever danger they may encounter. By virtue of the natural right implied by the first two laws of nature, each person may do whatever is necessary for self- preservation in the state of nature, and no one is bound by any obligation to another. What is transferred through the covenant, therefore, is ultimately the capacity to judge who constitutes a threat to one's life. To enter the covenant is to relinquish the right to make such judgments according to the first two laws of nature. Political constitution, accordingly, demands everyone "to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will" (Hobbes, 2005, p. 120).

But does the government headed by the sovereign appeal to the laws of nature as a political limit upon its own power? To put the question in terms of the second principle of liberal constitutionalism identified above: can government itself be subject to limitation? Hobbes's covenant is a covenant made by everyone with everyone else. Since the sovereign is therefore not a party to the covenant, "there can happen no breach of Covenant on the part of the Soveraign" (Hobbes, 2005, p. 122). Hobbes effectively renders the sovereign logically exempt from the covenant by recasting the problem of sovereignty as a version of philosophy's ancient problem of infinite regress;

> It is true, that Soveraigns are all subject to the Lawes of Nature; because such lawes be Divine, and cannot by any man, or Common-wealth be abrogated. Bu to those Lawes which the Soveraign himselfe, that is, which the Common-wealth maketh, he is not subject. For to be subject to Lawes, is to be subject to the Common-wealth, that is to the Soveraign Representative, that is to himself; which is not subjection, but freedome from the Lawes. Which errour, because is setteth the Lawes above the Soveraign, setteth also a Judge above him, and a Power to punish him; which is to make a new Soveraign; and again for the same reason a third, to punish the second; and so continually without end, to Confusion, and Dissolution of the Common-wealth. (Hobbes, 2005, p. 224)

We can see, then, that Hobbes does not subject the sovereign to the laws of civil society; rather, he expects the sovereign, in making law, to remain attentive to the laws of nature; "the Interpretation of all Lawes dependeth on the Authority Soveraign" (Hobbes, 2005, p. 190). The sovereign power is therefore the covenant-authorized interpreter of the laws of nature. Yet if the sovereign legislates independently of the people who authorized her, that is, of the constituent power, and remains exempt from the civil laws that are themselves the product of her legislation, she is, in effect, like an individual in the state of nature who is bound only by her own conscience. Within Hobbes's theory of constitution, the sovereign is subject to no determination other than the conscience that we may hope is itself guided by the laws of nature. On the other hand, if we take the covenanting subjects to constitute the substance of sovereignty, we arrive at the idea of a constituent power acting through the mediation of the majority. Yet, much like representative sovereign power, this constituent power is likewise left face to face with the laws of nature. The determining force of the laws of nature thus remains contingent. The sovereign, now understood as constituent power, is once again left without any determinate political limitation.

For Hobbes, there is no moment in which the people can be sovereign in any final sense without passing through the mediation of the majority. There is, to be sure, a condition in which each person individually interprets the first two laws of nature according to his own reason and conscience; but for Hobbes, this is not the establishment of a legal order. It is a return to the state of nature. Hobbes therefore distinguishes the multitude (*multitudo*) from the people insofar as they have become a single will in the sovereign power: "*a crowd of men is the same as many men,*" such that no "*single action* [*uno actio*]" can be attributed to it (Hobbes, 2012, p. 76).

For Hobbes, then, there is no alternative between a sovereign who, in either of these forms, remains ultimately undetermined by the laws of nature and a state of nature in which everyone lives according to her own will. Since the sovereign, by definition, can be subject to constraint only insofar as she wills to be constrained, sovereignty remains,

from a liberal perspective on law, ultimately irreducible to anything but arbitrariness. The legal order presided over by sovereign power is constituted from outside and maintained by remaining outside the order it constitutes. Conversely, without sovereign power, whether representative or direct, there can be neither a political nor a civil society.

On Hobbes's account of constitution, the people have no existence independent of their representatives once these representatives are embodied in sovereign power. If the people do exist independently, they are themselves sovereign and consequently face precisely the same problem of limitation. At this point, a closer examination of Hobbes's account of political constitution reveals that it satisfies neither of the two principles constitutive of modern constitutionalism: it fails to accommodate the liberal principle of limiting governmental power, but it also fails to sustain its democratic principle of constituent popular power. If what exists in the Hobbesian state of nature is not sociality but merely a multitude, then what happens in the transition to the civil condition is almost as though isolated individuals, possessing no protection other than their own reason, migrate *en masse* from the state of nature into civil society, only to emerge as subjects burdened with extensive obligations and, before the sovereign, reduced ultimately to the claim of a right to life.

From the perspective of constitutionalism, the *Leviathan* as an unlimited political entity remains a problem within Hobbes's philosophy, since every path through which the *Leviathan* is conceptually explicated ultimately leads to "absolutism" (Kardeş, 2015, s. 68). The *Leviathan* is not amenable to comparison with any other form of "transcendence" (Kardeş, 2021, p. 99). It is therefore difficult to locate, within Hobbes's account of political constitution, the two principles indispensable to constitutionalism: the existence of a people independent of the sovereign as constituent power, and the limitation of sovereign power itself. It is precisely at this juncture that Locke's thought becomes particularly significant. Locke may well have been profoundly shaped by the impasses internal to Hobbes's theory of sovereignty, for some of the rectifications he introduces in response to the deficiencies identified by Hobbes already contain the premises of his own conception of liberal political constitution. Indeed, it is possible to read the *Second Treatise* as, at least in part, an attempt to provide an answer to the problems implied by Hobbes's theory of sovereignty.

4. Locke, liberalism, and constitutionalism

As Paine's (2000) formulation of constitution reminds us, constitutionalism fundamentally requires the people, as constituent power, to occupy a position independent of and prior to the constituted power of government. The central problem, then, is to determine the nature of this constituent power, that is, to establish its political- ontological status. We know that, for Hobbes, constituent power prior to political constitution is effectively null because the people, in that condition, exist only as a multitude, that is, as multiplicity rather than unity. What, then, becomes of the pre-contractual condition in Locke's liberal universe? How is what precedes the contract carried over into the order that follows?

Leo Strauss argues that, to the extent that Locke breaks with the traditional doctrine of natural right, he is in fundamental agreement with Hobbes's conception of natural right. Contrary to Strauss's claim, however, a closer examination of the overlap between these two contractarian philosophers is limited to the proposition that, in the state of nature, one individual is left to determine for oneself how the law of nature is to be enforced (Strauss, 2011, ss. 256–257). Indeed, in a distinctly Hobbesian vein, Locke raises in the *Second Treatise* the question, "Who shall be Judge?" and answers that, in the absence of a common earthly judge, one must ultimately appeal to God. Whoever finds himself in a state of war with another, that is, in the state of nature, makes judgment under the authority of her own conscience, just as each person will ultimately answer before God, the supreme Judge, according to the judgment of her own conscience on the Day of Judgment (Locke, 2005, II;3;21). Where there is no earthly judicature, God is the sole judge, or each individual is her own judge (Locke, 2005, II;19;241). Locke thus places the highest Judge, God, and the sole judge, conscience, in a relation of functional equivalence within the state of nature. The identity of the judge, then, is not in question for Locke: the question of who is to judge, and ultimately who is to render the final judgment, already has its answer.

In a similar vein, Locke asks who is to be the judge when the exercise of prerogative power becomes necessary. In such an exceptional circumstance, which component of government has exercised power legitimately? Interestingly, Locke gives the same answer here as he does with respect to the state of nature and the Day of Judgment: there is no earthly judge between the executive vested with prerogative power and the legislative power to which the executive is ordinarily subject. More importantly, there is no earthly judge not only in disputes between the legislative and executive powers, but also in any conflict between the people and either branch of government. In such circumstances, the people must appeal to God, the sole judge, and thus to

the laws of God, that is, the law of nature. For Locke, the people cannot consent to a government that acts against them, that is, to a government acting contrary to the law of nature.

Accordingly, when the executive exercises its prerogative against the people, it exercises a power that is "a Power the People never put into their hands" and whose illegitimate exercise can therefore become an object of public judgment (Locke, 2005, II;14;168). For Locke, the people possess, "by the Constitution of that Society," the power to render the final judgment (Locke, 2005, II;14;168). Here Locke resolves, in an explicitly non-Hobbesian manner, the question of who is to be the ultimate judge by assigning the vital function to the people. Indeed, for Hobbes, determining the content of religious faith, or in the language of liberal political theory, the freedom of conscience or belief, falls among the rights of the sovereign (Kardeş, 2021, p. 90). Locke must have recognized that, were he to accept the Hobbesian theory of sovereignty, the subject could never possess a right against constituted authority and would therefore have no meaningful recourse to God or to conscience. It is precisely at this point that Locke can conceive of the people as a political unity capable of judgment and, ultimately, of making a binding political decision without a sovereign figure.

In the *Second Treatise*, where Locke formulates the three fundamental natural rights to life, liberty, and property, he gives Chapter VII the title "Of Political or Civil Society" (Locke, 2005, II;7). While Locke uses the term community to designate the form of sociality that obtains before the covenant, he conceptualizes political society as the form of unity constituted by that covenant (Locke, 2005, II;19;211). Thus, although political and civil sociality constitutes, for Locke, the internal counterpart of constituent power, such sociality is not necessarily grounded in a covenant. It is precisely at this point that one finds the most consequential difference separating Locke not only from Hobbes but also from Grotius and Pufendorf, despite their shared commitment to natural law theory: Locke does not accept the "necessity of the consent of natural commoners" when it comes to property (Murteza, 2012, p. 382). The clearest indication of the dispensability of consent, for Locke, lies in the possibility of property prior to the covenant: "If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him" (Locke, as cited in Murteza, 2012, p. 382). Likewise, the person who bears property in the sense of ownership is grounded, in Locke's theory of personal identity, not in the covenant but in consciousness of the continuity of distinct experiences, that is, in self-consciousness, even if the concept of personhood carries implications of status (Rızvanoğlu, 2020, p. 964).

The distinction between these two forms of sociality in Locke's thought becomes most explicit in Chapter XIX of the *Second Treatise*, where he addresses the dissolution of government. Locke carefully distinguishes the dissolution of society from that of government, arguing that once society is dissolved, government must necessarily dissolve with it (Locke, 2005, II;19;211). The priority Locke accords to society is made particularly clear by the analogy he himself employs; just as "the Frame of a House" cannot remain standing once all its "materials" have been scattered by a violent storm or earthquake, government cannot survive the dissolution of the society that constitutes its material basis (Locke, 2005, II;19;211).

The people, once again, are the substance of a determinate form whose particular shape is constituted by the decision of the people themselves. Yet the converse does not necessarily hold. A form of sociality without government is possible; a government without the society that sustains it, by contrast, appears impossible. The contrast, therefore, between Hobbes's conception of a people that acquires existence only through its representation by the *persona civitatis* and is otherwise nothing more than a multitude, and Locke's conception of a sociality that can persist even in the absence of government, reveals what is ultimately distinctive about Locke's liberal account of political constitution from the perspective of constitutionalism.

On Locke's account of constitution, the people, understood as a political unity, can thus enter conflict with government. It is the body of the people who are to determine whether the legislature or executive has acted contrary to the prerogative power entrusted to it (Locke, 2005, II;19;240,242). Although no determinate rule governs the exercise of prerogative beyond the requirements of natural law, it is ultimately the people who judge whether that power has been exercised beyond the bounds of the public good and, consequently, whether the government itself is to be discarded; for it is the people who authorized the government in the first place (Locke, 2005, II;19;240).

Nevertheless, two paragraphs later, Locke presents the conflict between government and the people as more likely to arise between the executive and the people than between the legislature and the people. In a possible conflict between the Prince and a part of the people (what we might call the organized majority) over a matter "where the Law is silent, or doubtful," it is the people who serve as the umpire in judging the government's action (Locke, 2005, II;19;242). As we can see, while Locke acknowledges that the conflict may arise not with the people as a whole but with only a part of

them, he nevertheless identifies the people as a whole as the arbiter of that conflict. Thus, in Locke's liberal universe, the people should not be understood as an organized unity encompassing, in the strictest sense, every individual member of the community. Rather, what can properly be called the people is a majority that has consented to the covenant and thereby rendered the decision constitutive of political society (Locke, 2005, II;8;96). Yet individuals taken separately cannot serve as the judge;

> Whereas he that has once, by actual Agreement, and any express Declaration, given his Consent to be of any Commonweal, is perpetually and indispensably obliged to be and remain unalterably a Subject to it, and can never be again in the liberty of the state of nature; unless by any Calamity, the Government, he was under, comes to be dissolved. (Locke, 2005 II;8;121)

At first sight, this passage may seem amenable to a Hobbesian reading. Yet, if we set aside an external cause such as foreign invasion as the "calamity" that brings government to an end, Locke is, I think, making a distinctly logical argument: it is not much of the people, but the individual members of civil society who cannot dissolve the covenant. Thus, so long as the conflict, or, in Locke's terminology, the dissolution, has not spread throughout the society, that is, so long as individuals have not turned against one another and the unity of society has not been disrupted, individuals cannot withdraw from their consent and return to the state of nature. The legislature established by the majority of the society is, rather, the declaration and uninterrupted continuation of "the Essence and Union of the Society consisting in having one Will" (Locke, 2005, II;19;212).

Likewise, if government is dissolved from within through the dissolution of the legislature, this does not mean that everyone necessarily returns to the state of nature, where each one is once again subject only to one's own will. Rather, the people "may constitute themselves a new Legislative" (Locke, 2005, II;19;212). Locke does not necessarily mean by a "new Legislative" a change of regime. The people may instead preserve and continue the existing form of government if they judge it to be the best. Its form, in any case, will be determined by the people themselves (Locke, 2005, II;19;243).

For Locke, political society is constituted, at its foundation, through "the Agreement which everyone has with the rest to incorporate and act as one Body" (Locke, 2005, II;19;211). The Lockean covenant, therefore, need not, as it does for Hobbes, find its representation at that absolute zero-point of political constitution in a single person to bring society into political being. Thus, Locke's theory of political constitution preserves the first principle of constitutionalism: the existence of a people independent of the sovereign, existing as a constituent power capable of constituting itself as the legislative authority.

The liberal principle of limited government that gives substantive force to the democratic principle of constitutionalism already lies at the heart of Locke's account of political constitution. Locke, within the political thought of the 17th century, transforms the prevailing form of political constitution, the absolute monarchy formulated by Hobbes, into a constitutional monarchy. From the perspective of Locke's liberal theory of political constitution, the sovereign whom Hobbes exempts from the covenant becomes a form of government that possesses "the Liberty to be Judge his own Case" and, precisely for that reason, can "do to all his Subjects whatever he pleases" (Locke, 2005, II;2;13). For Locke, such a government remains in a state of nature by virtue of its unlimited capacity to judge, and is therefore, in effect, a Hobbesian sovereign. It would be better, perhaps, for such a government not to exist at all, since a war of all against all may prove preferable to a government that acts arbitrarily and stands in hostility toward everyone (Locke, 2005, II;2;13).

The government Locke has in mind when he describes this conflict between ruler and ruled is, more precisely, the executive rather than the legislature. This is because the legislature is "declaring of the publick Will" (Locke, 2005, II;19;212). In other words, the legislature is the people's own self-constitution through the mediation of the majority that emerges from within the people themselves (Tully, 1993, p. 33). For the people to come into conflict with the legislature would therefore be an exceptional occurrence, akin to coming into conflict with themselves. Accordingly, for Locke's constitutional government, particularly in the exercise of executive power, the protection of fundamental rights constitutes an indispensable liberal condition, one from which government cannot legitimately derogate.

A retrospective reading of Locke's liberal theory of constitution through the lens of modern constitutionalism allows us to discern within it the two principles constitutive of constitutionalism. The possibility of such a reading is, of course, grounded in Locke's status as one of the principal sources of inspiration for modern constitutionalism. But where, within the tradition of written constitutionalism, should we locate Locke's contractarianism as a mode of thinking about political constitution developed prior to the emergence of the written constitution?

Put differently, where, in Locke's theory, might we locate the traces of the written constitution that steps outside the familiar political dichotomies of the two principles of constitutionalism—the dichotomies of people and sovereign, people and government, constituent and constituted power, ruler and ruled, and so forth—and

thereby assumes a third and distinct ontological status, as Paine put it?

The answer to this question must again be sought in Locke's corrective to Hobbes. If the problem of sovereignty that Hobbes resolves through the logic of infinite regress leads, for Locke, to an unacceptable conception of government, then the possibility of a political being that can limit other powers—legislative, executive, and judicial— "without being itself an unlimited power," that is, without becoming the judge in its own case, points us toward the idea of the written constitution (Spitz, 2014, p. 155). This political being, undoubtedly, would be determined by the fundamental rights that Locke regards as inalienable through the covenant.

5. Conclusion

Locke is rightly regarded as one of the founding figures of 17th-century liberalism, not least for articulating concepts that would become universal foundations of liberal thought, most notably in relation to fundamental questions such as constitutional government, private property, the right to life, and freedom of conscience. In modern political thought, the constitution is conventionally understood as a text that defines the authority of the state and the scope of its powers, establishes the fundamental rights of citizens, regulates the relations between state institutions and citizens, and, ultimately, derives its legitimacy from its adoption in the name and by the will of the people. Yet before the constitution took the form of a written text, political philosophy had already conceived it as a problem of political constitution and, particularly within the liberal tradition, had given it its determinate form through a long process of intellectual elaboration.

As a canonical figure of this tradition, Locke conceptualizes political constitution through a series of fundamental oppositions and potential antagonisms: ruler and ruled, power and people, sovereign and people, and government and people. His distinctive contribution lies not simply in positing these divisions, but in establishing a relation among them through which sovereignty can be constituted without becoming absolute. Locke's liberal account of political constitution thus brings these political oppositions into a configuration in which the two constitutive principles of modern constitutionalism can already be discerned: the people as constituent power and government as constituted and limited power. It is precisely in this sense that Locke's political constitution allows us to trace, within a pre-constitutional conceptual terminology, the intellectual premises of modern constitutionalism.

For Locke, civil rights acquired with the covenant are ultimately grounded in the individual's natural rights that precede the covenant. More importantly, by recognizing these rights as prior to political authority and declaring governments that fail to acknowledge and protect them illegitimate, Locke opens, after Hobbes, a different horizon for liberalism. In Locke's classical liberalism, forms of sociality remain possible even in the absence of government. We are not, in other words, indebted to politics alone for our capacity to live together as a society. This democratic dimension of Locke's liberal political theory, together with its liberal rejection of the sovereign as an unlimited power, constitutes the two principles of constitutionalism identified in this study. However, beyond these two principles, and distinct from them, Locke's political philosophy also contains the conceptual resources from which we can trace the emergence of an understanding of political constitution as constitution, or, more precisely, as written constitution.

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