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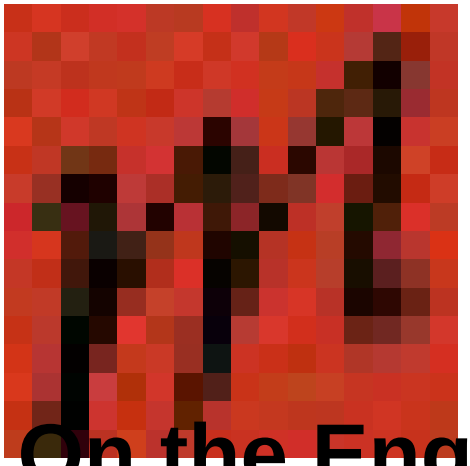

XI.6 On the English Constitution

- The Spirit of Law - Book XI. On the laws that constitute political freedom in their relation to the constitution -

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In every state there are three kinds of power : the legislative authority, the executive authority for things that stem from the law of nations, and the executive authority for those that stem from civil law.

Through the first, the prince or magistrate makes laws for a time or for all time, and amends or abrogates those that are in place. Through the second, he makes peace or war, sends or receives ambassadors, provides for security, and prevents invasions. Through the third, he punishes crimes or judges disputes between individuals. We will call this last one the authority to judge, and the former simply the executive authority of the state.

Political freedom in a citizen is the tranquility of mind that comes from the opinion each one has of his security ; and for him to have this freedom, the government must be such that one citizen cannot fear another citizen.

When in the same person or in the same body of magistracy the legislative authority is combined with the executive authority, there is no freedom, because one can fear lest the same monarch or the same senate make tyrannical laws in order to carry them out tyrannically.

Again there is no freedom if the authority to judge is not separated from the legislative and executive authorities. If it were combined with the legislative authority, power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were combined with the executive authority, the judge could have the strength of an oppressor.

All would be lost if the same man or the same body of principals, or of nobles, or of the people, exercised these three powers : that of making laws, that of executing public resolutions, and that of judging crimes or disputes between individuals.

In most of the kingdoms of Europe the government is moderated, because the prince, who has the first two powers, leaves to his subjects the exercise of the third. Among the Turks, where these three powers are joined on the head of the sultan, a horrible despotism reigns.

In the republics of Italy, where these three powers are combined, there is less freedom to be found than in our monarchies. The government, to maintain itself, therefore requires means as violent as the government of the Turks : witness the state inquisitors [1] and the box where any informer can at any time deposit his billet of accusation.

See what the situation of a citizen in these republics can be : the same body of magistracy has as executor of the laws all the authority it has assigned to itself as legislator. It can ravage the state with its general orders ; and as it also has the judicial authority, it can destroy each citizen with its individual orders.

All authority there is one ; and although there is no exterior pomp to identify a despotic prince, he can be felt at every moment.

And so it is that the princes who have wished to become despotic have always begun by combining all the magistracies in their person, as several European kings have done with all the important functions of their state.

It appears to me that the pure hereditary aristocracy of the Italian republics does not correspond precisely to the despotism of Asia. The multitude of magistrates sometimes mellows magistracy ; all the nobles do not always work together towards the same ends ; various tribunals are constituted which temper each other. Thus, in Venice the

great council has legislation, the *pregadi* execution, and the *quarantia* the power to judge. But what is wrong is that these different tribunals are made up of magistrates from the same body, which hardly adds up to anything but one single authority.

The authority to judge ought not to be given to a permanent senate, but exercised by persons drawn from the body of the people [2] at certain times of the year in the manner prescribed by law to constitute a tribunal that lasts only as long as necessity requires.

In this way the judicial authority, so formidable among men, being attached neither to a certain condition nor to a certain profession, becomes, so to speak, invisible and nonexistent. The judges are not continually in plain view, and it is the magistracy that is feared and not the magistrates.

It ought even to be the case that when the charges are serious, the criminal in conjunction with the law can chose his judges, or at least be able to recuse enough of them so that those remaining are assumed to be by his choice.

The two other powers could instead be assigned to magistrates or to permanent bodies, because they are not brought to bear upon any individual, one of them being but the general will of the state, and the other the execution of that general will.

But if the tribunals ought not to be fixed, judgments must be, to such a point that they are never anything but a precise text of the law. For them to be a private opinion of the judge's would be to live in the society without knowing precisely what engagements one contracts within it.

The judges must even be from the same station as the accused or his peers, so he cannot get it into mind that he has fallen into the hands of persons disposed to do him violence.

If the legislative authority leaves to the executive the right of imprisoning citizens who can put up security for their conduct, that is the end of freedom, unless they are held to answer without delay to a charge which the law has made capital, in which case they are really free, since they are subjected only to the authority of the law.

But if the legislative authority believed itself in danger from some hidden conspiracy against the state or some connivance with outside enemies, it could for a brief and limited time allow the executive authority to have suspected citizens held, who would lose their freedom for a time only to preserve it forever.

And that is the sole means consistent with reason of complementing the tyrannical magistracy of the ephors and the state inquisitors of Venice, who are equally despotic.

Since in a free state every man who is assumed to have a free soul must be self-governing, the people as a body ought to have the legislative authority ; but as that is impossible in large states, and is subject to many disadvantages in small ones, whatever they cannot do themselves the people must do through their representatives.

One knows the needs of his city much better than those of other cities, and judges the abilities of his neighbors better than that of his other compatriots. The members of the legislative body therefore ought not to be chosen generally from the body of the nation ; but it is appropriate for the residents in each principal location to choose a representative.

The great advantage of representatives is that they are able to debate matters. The people are not at all suited for that, and this constitutes one of the great disadvantages of democracy.

It is not necessary for the representatives who have received general instructions from those who have chosen them to receive specific instructions on each piece of business, as is practiced in the diets of Germany. It is true that in this way the word of the deputies would be more nearly the expression of the voice of the nation, but that would necessitate endless delays, would make each deputy the master of all the others, and in the most urgent situations the whole strength of the nation could be blocked by a whim.

When, as Mr. Sidney puts it quite well, the deputies represent a body of people, as in Holland, they must give an account to those who have commissioned them ; it is a different matter when they are dispatched by villages, as in England. [3]

All the citizens in the various districts must have the right to contribute their vote to the choice of representative, except those who are in such a state of subservience that they are deemed to have no will of their own.

There was a great vice in most of the ancient republics, which was that the people were entitled to make active resolutions which required some execution, a thing of which they are entirely incapable. They should take part in government only to choose their representatives, which is very much within their means. For if there are few who know the precise degree of men’s ability, each one is nonetheless capable of knowing in general whether the one he chooses is more enlightened than most of the others.

Nor ought the representative body to be chosen to take some active resolution, something it would not do well, but to make laws, or to see whether the ones it has made have been well executed, something which it can do very well, something even which it alone can do well.

In a state there are always persons distinguished by birth, wealth, or honors ; but if they were mixed among the common people, and if there they had only one vote like the others, the common freedom would be their slavery, and they would have no interest in defending it, because most of the resolutions would be against them. The role they have in legislation ought therefore to be in proportion to the other advantages they have within the state, which is what will happen if they form a body that has the right to prevent the enterprises of the people, as the people have the right to prevent theirs.

Thus the legislative authority will be entrusted both to the body of the nobles and to the body that will be chosen to represent the people, each of which will have its own assemblies and deliberations, and distinct purposes and interests.

Of the three authorities which we have discussed, the judicial authority is in some sense null. There remain only two ; and as they need a limiting authority to temper them, that part of the legislative body which is composed of nobles is quite capable of producing this effect.

The body of nobles must be hereditary. It is so in the first instance by its nature ; and moreover it must have a very great interest in preserving its prerogatives, odious in themselves, and which in a free state must always be endangered.

But as an hereditary authority could be led to follow its private interests to the neglect of the people’s, it is mandatory that in matters where one has a singular interest in corrupting it, as in laws pertaining to the raising of funds, its only

role in legislation should be its faculty of prevention, and not its statutory faculty.

I call *statutory faculty* the right to decree by itself, or to amend what has been decreed by another. I call *faculty of prevention* the right to annul a resolution taken by some other, which was the authority of the Roman tribunes. And although he who has the faculty of prevention may also have the right of approval, at that point such approbation is nothing more than a declaration that he is not invoking his faculty of prevention, and derives from that faculty.

The executive authority must be in the hands of a monarch, for this part of the government, which almost always requires immediate action, is better administrated by one than by several, whereas that which depends on the legislative authority is often better organized by several than by one person alone.

If there were no monarch, and the executive authority were entrusted to a certain number of persons chosen from the legislative body, that would be the end of freedom, because the two authorities would be combined, the same persons sometimes having, and always in a position to have, a role in both.

If the legislative body went for a considerable time without assembling, that would be the end of freedom. For one of two things would happen : either there would be no more legislative resolutions, and the state would fall into anarchy ; or those resolutions would be taken by the executive authority, and it would become absolute.

There would be no need for the legislative body to be always assembled. That would be inconvenient for the representatives, and would moreover occupy the executive authority too much, making it think not about execution, but about defending its prerogatives and the right it has to execute.

Moreover, if the legislative body were continually assembled, it could occur that new deputies would simply be sent to replace those who died ; and in that case, if the legislative body were once corrupted, the damage would be irremediable. When different legislative bodies succeed each other, the people who have a poor opinion of the sitting legislative body rightly direct their hopes toward the one that will come next. But if it were always the same body, the people, seeing it once corrupted, would no longer place any hope in its laws ; they would become furious or fall into apathy.

The legislative body should not assemble on its own. For a body is not supposed to have intentions except when it is assembled ; and if it did not assemble unanimously, it would not be clear which part would be authentically the legislative body, the one which was assembled or the one which was not. And if it had the right to adjourn itself, it could happen that it would never adjourn, which would be dangerous in cases where it might wish to conspire against the executive authority. Besides, some times are more suitable than others for the assembly of the legislative body : it must therefore be the executive authority that determines the time and duration for holding these assemblies in function of circumstances it knows.

If the executive authority does not have the right to block the enterprises of the legislative body, the latter will be despotic ; for as it will be able to grant itself all the power it can think up, it will reduce all the other authorities to nothing.

But the legislative authority must not have the reciprocal faculty of blocking the executive authority. For execution being by its nature circumscribed, there is no need to limit it, besides the fact that the executive authority is always exercised on things of the moment. And the authority of the Roman tribunes was flawed in that it blocked not only legislation, but execution as well, which caused great harm.

But if in a free state the legislative authority should not have the right to block the executive authority, it has the right and should have the faculty of examining in what manner the laws it has passed have been carried out. And that is the advantage this government has over that of Crete and Lacedæmon, where the *kosmoi* and the ephors gave no account of their administration.

But whatever that examination may be, the legislative body must not have the power to judge the person and consequently the conduct of the executor. His person must be sacred because, being essential to the state to prevent the legislative body from becoming tyrannical, the moment he could be accused or judged would be the end of freedom.

In those cases the state would not be a monarchy but an unfree republic. But as the executor cannot execute poorly unless he has feckless counselors who hate the laws as ministers even though they favor them as men, these can be called out and punished. And that is the advantage of this government over that of Gnidus, where the law, not allowing the *amimones* [4] to be called into judgment even after their administration, [5] the people could never compel an explanation of the injustices committed against them.

Although in general the judicial authority ought not to be combined with any part of the legislative, this is subject to three exceptions, based on the individual interest of the person who is to be judged.

The great are always exposed to envy, and if they were judged by the people they could be in danger, and would not enjoy the privilege of the least of the citizens in a free state of being judged by their peers. Therefore nobles must be called, not before the nation’s ordinary tribunals, but before that part of the legislative body which is composed of nobles.

It could occur that the law, which is at once clairvoyant and blind, would in certain cases be too severe. But the judges of the nation are, as we have said, merely the mouth that pronounces the words of the law, inanimate beings who can moderate neither their force nor their severity. It is therefore the part of the legislative body that we have just called, on another occasion, a necessary tribunal, which it is again on this occasion ; it is up to its supreme authority to moderate the law in favor of the law itself, by pronouncing less severely than the law does.

It could also occur that some citizen, in public affairs, could violate the rights of the people and commit crimes that the established magistrates would be unable or unwilling to punish. But in general the legislative authority cannot judge, and it can do so even less in this particular case, where it represents the interested party, which is the people. It can therefore only accuse. But before whom shall it make its accusation ? Shall it go demean itself before the tribunals of the law, which are beneath it, and are moreover composed of persons who, being likewise of the people, will be swayed by the authority of such a great accuser ? No, in order to preserve the dignity of the people and the security of the private citizen, the legislative portion of the people must accuse before the legislative portion of the nobles, which has neither the same interests nor the same passions as the plaintiff.

That is the advantage this government has over most of the ancient republics, where there was this abuse, that the people were at once judge and plaintiff.

The executive authority, as we have said, should take part in legislation through its faculty of prevention, without which it would soon be stripped of its prerogatives. But if the legislative authority participated in the execution, the executive authority will equally be undone.

If the monarch participated in legislation through the faculty of decreeing, that would be the end of freedom. But as he must nonetheless have a role in legislation in order to defend himself, he must participate through the faculty of

prevention.

What caused the government to change in Rome was that the senate, which had a part of the executive authority, and the magistrates, who had the other part, did not, like the people, have the faculty of prevention.

Here, then, is the fundamental constitution of the government we are describing. The legislative body being composed of two parts, one will enchain the other through its mutual faculty of prevention. Both will be bound by the executive authority, which will itself be bound by the legislative one.

These three authorities ought to constitute a rest or inaction. But as by the natural movement of things they are forced to function, they will be forced to function in concert.

The executive authority being part of the legislative only through its faculty of prevention, it cannot enter into the debate over issues. It is not even necessary for it to propose, since being always able to disapprove resolutions, it can reject decisions on propositions it would rather had not been made.

In some ancient republics where the people as a body held the debate over issues, it was natural for the executive authority to propose them and debate them with the people, for otherwise there would have been a strange confusion in the resolutions.

If the executive authority decides on the levy of public funds other than by its consent, that will be the end of freedom, because it will become legislative on the most important point of legislation.

If the legislative authority decides, not year by year but permanently, on the levying of public funds, it risks losing its freedom, because the executive authority will no longer depend upon it ; and when one holds such a right permanently, it is rather indifferent whether it was conferred by oneself or by someone else. The same situation obtains if it decides not year by year but permanently on the land and sea forces it must entrust to the executive authority.

For the person who executes to be unable to oppress, the armies entrusted to him must be of the people, and have the same spirit as the people, as was the case in Rome until the time of Marius. And for this to be so, there are but two means : either for those who are employed in the army to be well enough off to answer to the other citizens for their conduct, and be enrolled only for a year, as was practiced in Rome ; or, if there is a permanent corps of troops of which the soldiers are one of the basest portions of the nation, the legislative authority must be able to dissolve it the minute it so desires ; soldiers must live with the citizens, and there must be neither a separate camp, nor barracks, nor fortress.

The army being once established, it must be a dependency not immediately of the legislative body, but of the executive authority, and this by the nature of the thing, its purpose consisting more in action than in deliberation.

It is in the human manner of thinking that more be made of courage than of timidity, of activity than of prudence, of strength than of counsel. The army will always scoff at a senate, and respect their own officers. They will pay little attention to orders sent to them by a body composed of men who to them are timid and hence unworthy of commanding them. Thus, the minute the army becomes solely dependent on the legislative body, the government will become military ; and if the reverse has ever occurred, it is the effect of some extraordinary circumstances. For the army is always separate ; it is composed of several corps, each of which is dependent on its particular province : for the capital cities are excellent strongholds which are defended by their situation alone, and where there are no

troops.

Holland is even more secure than Venice : she would submerge troops in revolt ; she would make them die of hunger ; they are not in the cities, which could give them subsistence ; that subsistence is therefore precarious.

It suffices to read the excellent work by Tacitus on the customs of the Germans [6] to see that the English got from them the idea of their political government. This elegant system was discovered in the woods.

As all human things have an end, the state we are describing will lose its freedom and perish. Rome, Lacedæmon, and Carthage have indeed perished. It will perish when the legislative authority has become more corrupt than the executive.

It is not for me to examine whether the English presently enjoy this freedom or not. It is enough for me to say that it is established by their laws, and I inquire no further.

I do not pretend thereby to disparage other governments, nor to say that this extreme political freedom should mortify those whose freedom is only moderate. How could I say that, I who believe that excess even of reason is not always desirable, and that men almost always adapt better to moderation than to extremes ?

Harrington, in his *Oceana*, also examined what was the highest point of freedom to which the constitution of a state can be raised. [7] But we can say of him that he sought this freedom only after failing to recognize it, and that he built Chalcedon with the shores of Byzantium in plain sight.

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[1] In Venice.

[2] As in Athens.

[3] [Algernon Sidney, *Discourses Concerning Government*, 1698.]

[4] These were magistrates elected annually by the people. See Stephanus of Byzantium.

[5] Roman magistrates could be accused after their magistracy. See in Dionysius of Halicarnassus, book IX, the affair of the tribune Genutius.

[6] *De minoribus rebus principes consultant, de majoribus omnes ; ita tamen ut ea quoque quorum penes plebem arbitrium est apud principes pertractentur* [‘On minor matters the chiefs deliberate, about the more important ones the whole people. Yet even when the final decision rests with the people, the matter is always thoroughly considered by the chiefs’ (Tacitus, *De moribus Germanorum*, [ch. 11].)

[7] [James Harrington (1611-1677), *The Commonwealth of Oceana*, 1656.]