

Political Liberalism and The Formal Rechtsstaat

Frank van Dun

Vous avez beau diviser les pouvoirs : si la somme totale du pouvoir est illimitée, les pouvoirs divisés n'ont qu'à former une coalition, et le despotisme est sans remède.
-Benjamin Constant, *Principes de Politique* (1815)

Introduction

Drieu Godefridi's "Critique de l'utopie libertarienne"¹ is not only an attempt to refute Rothbardian anarcho-libertarian theory but also an attempt to resurrect the idea of the formal Rechtsstaat.² I shall say a few words about the first topic and then present some arguments for resisting the introduction of that idea into classical liberal discourse. Contrary to Godefridi's suggestion, there is no logical or historical ground for considering the Rechtsstaat a necessary or even useful condition of freedom. I do not dispute that the Rechtsstaat was a central concept of the political liberalism that for a while held sway in Continental Europe in the nineteenth century, or that in some quarters there is considerable nostalgia for it. What I want to stress is that both in its logical definition and in its historical implementations it failed to support the classical liberal commitment to freedom, property and law. Indeed, it may

¹ Godefridi-2003, p.85-93

² I use this term to translate Godefridi's 'État de droit formel'. Neither the French nor the German term has a ready translation in English, but the German 'Rechtsstaat' appears to be more familiar to English readers. In this text, 'Rechtsstaat' is short for 'Rechtsstaat in the formal sense'.

have been a contributing factor in the decline of the prestige of classical liberalism.

Anarcho-libertarianism

Referring in particular to Rothbardian anarcho-libertarianism, Godefridi writes that '[t]he libertarian programme is exclusively negative. It consists in suppressing the State—and that's all.'³ That is an obvious caricature. The libertarian 'programme' touches the State only by implication, by demonstrating that States necessarily, because of what they do and how they do it, violate the principles of law and justice, even in those (surely hypothetical) cases in which a State defines its mission as no more and no less than upholding law. The essence of anarcho-libertarianism is not that it is against the State, but that it refers to a theory of law and justice that is based on real and objective characteristics of human existence and action, and not on merely formal or ideal concepts. The anarcho-libertarian bottom-line is that people ought to respect one another as they are⁴ and that persons who refuse to live up to that norm place themselves outside the order or law of conviviality—that is, outside the natural law of the human world.⁵

The libertarian critique deals with the activities of States in the same way as it does with other necessary violations of the principles of law and justice—that is, crimes, whether perpetrated by independent individuals, loosely structured

³ Godefridi-2003, p.86. (All translations from French or Dutch are mine.)

⁴ In this context, 'to respect' obviously is not the same as, for example, 'to esteem', 'to worship', 'to stand in awe', 'to obey', or 'to subsidise'.

⁵ I use the terms 'natural society' and 'convivial order' (literally, the order of living together) as distinct from 'social order' to avoid the connotations of purposive organisation, hierarchy and functional differentiation that attach to the English 'society' (and its derivatives such as 'social', 'socialisation', and 'socialism'). In Hayekian terms, 'society' or 'social order' here denotes a *taxis*, and 'convivial order' a *cosmos*. Hayek-1973, chapter 2. To avoid the ambiguities of 'law', I shall use 'legal rule' for what Hayek calls *thesis*, and 'law' as a synonym for 'order of things', in particular, 'respectable order of things'. Within this terminological system, 'a law' is not a legal rule but an objective principle or requirement of order.

gangs, or well-organised crime-syndicates. Thus, libertarians consistently maintain that, if it were feasible, one would be justified in suppressing the State no less than other sources of injustice. However, few if any anarcho-libertarians believe that it is feasible totally to suppress crime or, for that matter, each and every form of organisation of the ‘political means’⁶ (of which the State is currently the most obvious example). Nevertheless, they recognise that there is a significant difference between crime and politics. Whereas few people believe that crime has some sort of ‘higher justification’, many believe that States somehow are justified unilaterally to monopolise and otherwise regulate human activities and to tax and rule a person forcibly, without his consent (though perhaps with the consent of some other persons). The anarcho-libertarian critique, in so far as it concerns the State, consists in exposing those supposed justifications as myths. Its practical significance rests on the belief that, to the extent that ideology is a primary source of State power, it is possible and feasible to weaken the hold of statist mythologies by rational argument. That is ‘an exclusively negative programme’ only if educating people in the principles of law and justice is a negative programme.

In the following pages, I shall leave Godefridi’s critique of libertarianism for what it is, and concentrate on his attempt to present the Rechtsstaat as the necessary condition of individual freedom (as this is understood in the classical liberal tradition). As we shall see, neither logical analysis

⁶ Oppenheimer-1997. Oppenheimers distinction between ‘economic means’ and ‘political means’ (better, ‘methods of acting’) is but one formulation of a distinction that has had pride of place in political philosophy at least since Plato. In *The Republic*, Plato described the flourishing ‘natural’ or ‘economic society’ of the original Golden Age teeming with agriculture, industry, commerce and banking. As Plato tells the story, that economic society decayed because of a moral failing (the desire for unhealthy luxuries) and especially because of the appearance of professional warriors (specialists in the use of weapons and force), who criminally seek to satisfy that desire by violence and aggression. Plato, *The Republic*, Book II,369b-374d. Plato’s politics is essentially an attempt to pre-empt the pool of criminal talent by a special program of training and indoctrination that should transform the ‘wolves’ into ‘watchdogs’ of the State.

nor historical appreciation supports his attempt to fit the Rechtsstaat in the tradition of classical liberalism.⁷ Indeed, the Rechtsstaat is just one of those myths that for a while served to justify the subjection of human life and action to the regulatory authority of a ruling elite. It did so at a time when ‘Liberalism’ was said to be the ruling ideology. However, that ‘Liberalism’ was in many ways an obvious deviation from the classical liberal tradition, which is the historical source of today’s libertarian thought, whether of the anarchist or ‘minimal state’ variety.

The Rechtsstaat

What is this Rechtsstaat? Godefridi defines it as

“a state that functions by means of rules (general, abstract and permanent norms)—which are non-contradictory, possible, intelligible, certain, public, and not retroactive—and commands (individual norms). It consecrates the principle of hierarchy among norms and leaves the material sanction for rule-infringement to a power that is distinct and independent from the normative power. Moreover, one or more powers that are distinct and independent from the normative power control whether commands conform to the rules and whether the meta-rule (‘rules should be general’) is respected.”⁸

Thus, the expression ‘Rechtsstaat in the formal sense’ denotes a state that is committed almost exclusively to imposing its own legal system, which has peculiar formal and structural characteristics but no material limitations on what it may regulate. Godefridi does not even mention the legally circumscribed ‘fundamental rights’ to which modern

⁷ The historical appreciation is based on an admittedly limited sample of opinions from French sources at the time of the French Revolution and Dutch sources relating to the debates surrounding and following the Dutch Constitution of 1848. My aim is not to write a history but to illustrate the conceptual divide between eighteenth century classical liberalism and nineteenth century political liberalism.

⁸ Godefridi-2003, p.90.

constitutional texts invariably assign a prominent place. In this type of State, rules, legally produced, recognised or ratified by the appropriate legislative organs of the state, are—as law students learn to say—the ‘primary source of the law’. In short, the state pretends to be able to make law; the legal is the criterion of the lawful⁹; and the state is above the law. There is also the concept of a ‘Rechtsstaat in the material sense’. Such a Rechtsstaat is committed to maintain the law as it finds it. It does not pretend to be able to make law. Here, the lawful is the criterion of what may be legal. The State is under the law—at least, it is supposed to be in so far as this is possible given that it denies that individuals have a right to provide for their own defence against injustice. Although tradition has it otherwise, there is no logical basis for saying that a material Rechtsstaat must be a Rechtsstaat in the formal sense.¹⁰ Any State that strives to maintain the law as it finds it can claim to be a material Rechtsstaat.

Note the confusion of rules, commands, and norms in the quoted definition. Rules (in the non-Hayekian¹¹ sense in which Godefridi uses the term) and commands presuppose an organisational setting in which there are at least two positions: the ruling or commanding position, on the one hand, and a subordinate position, on the other hand. Norms do not presuppose such a setting. Rules and commands demand to be obeyed; norms set a standard that one is

⁹ See Van Dun-1995, p.555-579.

¹⁰ Godefridi repeatedly tries to enlist Hayek in his pleas for the formal Rechtsstaat. However, although Hayek’s theory of law and its connection to his theory of the State are far from unambiguous, there can be little doubt that he thought of a liberal State as a material rather than a merely formal Rechtsstaat. Thus, in *Rules and Order*, he wrote that “The understanding that ‘good fences make good neighbours’ [...] is the basis on which all known civilization has grown. Property, [...] the ‘life, liberty and estates’ of every individual, is the only solution men have yet discovered to the problem of reconciling individual freedom with the absence of conflict. Law, liberty, and property are an inseparable trinity.” Hayek-1973, p.107. The State should not break up that trinity, neither by general rules nor particular commands, but that is not the same as saying that a formal Rechtsstaat is necessary to preserve the integrity of the law.

¹¹ For Hayek, rules are basically ‘regularities’ or ‘propensities to act or not to act’—habits, customs. (Hayek-1973, p.43 and p.75).

supposed to respect or to take into account, or to which one is supposed to live up. One can disobey a rule or command, but not a norm. Disobeying a rule or command is insubordination; not to respect a norm is to do something wrong (either technically or ethically). To ascribe to the State, let it be ever so formal, ‘normative power’ is to raise it—and, therefore, the particular group of men and women who control it—to the position of an ultimate authority in all matters, technical and moral.

According to Godefridi’s definition, a Rechtsstaat is merely a particular rule-making machine. No substantial normative strictures apply to it. However, there are a few norms of a formal nature. The State’s legal rules should be general, abstract and permanent, non-contradictory, possible, intelligible, certain, public, and not retroactive; and the authority to issue commands in the name of the State must be grounded in a legal rule. A State that does not meet those norms is not a formal Rechtsstaat or at best, in a technical sense, a defective one. More importantly, Godefridi does not mention the political character of the State at all. He accepts, without comment or qualification, that the Rechtsstaat is a State, a more or less effectively enforced monopoly of the means of violence that serves to impose some intended social order on those within the State’s territory. Surely, anyone who wants to engage anarcho-libertarians in a discussion should recognise that their objections especially concern that political aspect of the State. The formal characteristics of its legal system are not particularly relevant. Lots of non-political associations and societies function by means of a system of rules of the kind that Godefridi eulogises—and no libertarian will care one bit whether they do or not. However, the libertarian critique evidently extends to any individual, organisation or society that uses ‘political means’, whether or not it succeeds in establishing itself as a State. If Godefridi missed that point, his reading of the anarcho-libertarian literature must have been very superficial indeed.

Liberty and freedom

Godefridi writes that “being formal, the Rechtsstaat is not a value, but the tool for realising a value: individual liberty of the so-called ‘negative’ sort.”¹² Why a merely formal tool would not or could not be used to realise other things that its controllers value, he does not say. It is utterly naïve to believe that the formal characteristics of a State can neutralise completely the ideology or particular interests of the ruling groups or elites. The structure of the State ensures the presence of political elites. It divides the population in two categories, those who rule and those who do not. This structural divide produces inequalities of power and influence, which inevitably bring forth competition for, and attempts to restrict and regulate access to, political power and influence.

Thus, Godefridi blithely assumes that the Rechtsstaat, as he defines it, is a necessary condition for the realisation of the ideal of liberty.¹³ As long as we think, with Godefridi, of liberty only as a legal status defined by general legal rules, no objection can be made. Then the argument is merely tautological. However, if we have in mind the freedom of actual human persons then there is no logical connection at all.¹⁴ Godefridi only partially recognises this when he writes that his Rechtsstaat is not a sufficient ‘guarantee of liberty’.¹⁵ However, apart from the fact that he does not say what liberty is or how much of it he has in mind, he fails to realise that his form of State also is not a necessary condition of freedom. It may be sufficient for slavery or servitude. Suppose all the duly separated legislative,

¹² Godefridi-2003, p.90. The qualification ‘negative’ refers to Isaiah Berlin’s distinction between ‘positive’ and ‘negative’ liberty.

¹³ Godefridi-2003, p.91

¹⁴ The ‘liberty’ of a French citizen is not the same as the ‘liberty’ of a citizen of the United States of America. The one is defined by the French legal system, the other by the American legal system. On the other hand, the conditions that determine whether a person is free or not, are the same everywhere, irrespective of that person’s legal status as ‘a national’ of this or that country. The citizens of the Roman Empire had the ‘liberty of the Roman Citizen’ long after the persons who could claim citizenship in the Empire had lost their freedom.

¹⁵ Godefridi-2003, p.91

executive, judiciary and administrative organs of the State are manned by Plato's perfect 'guardians' or Rousseau's perfect 'citizens', who will do everything that 'the law' commands and nothing that it prohibits. Now, suppose a Rechtsstaat with the following general rule: "Every year every citizen will pay 100% of his income to the State in taxes; tax receipts are then to be distributed according to general rules."¹⁶ How much freedom is left? If mentioning taxes is somehow inappropriate, suppose the salient general, abstract and permanent rule were that "no person is permitted to engage in any activity unless it be of a kind that has been permitted explicitly by the legislature." Or suppose it went like this, "No child shall be educated by persons that have not been certified in accordance with duly promulgated legal rules." As any reader of Rousseau will appreciate, all of those rules are compatible with the 'liberty and equality' of the citizens of a republic. However, none of them is compatible with the condition of 'freedom among likes' that characterises the order of conviviality (or 'natural society', as it used to be called). We do not have to wander into anarchocapitalist territory to understand that the claim that the Rechtsstaat is a necessary condition of freedom simply is absurd.

Whether the Rechtsstaat is in any way useful to protect or promote the freedom of human beings is a moot question. Unfortunately, Godefridi does not even attempt to answer it—and I am not aware that he has done so elsewhere.¹⁷ The Rechtsstaat, as Godefridi describes it, is merely a formal scheme. He does not say a word about its implementation.

¹⁶ If a tax rate of 100% is somehow inadmissible, at what rate above zero do we get a necessary condition of freedom? If the general, abstract and permanent rule were that "every year every citizen will pay in taxes whatever percentage of his income the 'normative power' will determine", would we be any nearer to a condition of freedom?

¹⁷ In this too, he faithfully follows Hayek, who also failed to distinguish clearly between liberty (as a legal status) and freedom (as an existential condition of human persons). Indeed, the great defect of Hayek's theory of social order, in so far as it was intended to be supportive of his liberal convictions, is that it eventually discarded the traditional basis of the philosophy of freedom, which is human nature, in favour of a view of man as an animal following 'social rules'.

As a matter of history, the attempts made in the nineteenth century to implement it proved to be a fast road to social unrest, political polarisation, and to a flood of special interest legislation, ‘social legislation’, mass democracy, and ultimately successful attacks on traditional institutions such as the family, property, contract, personal responsibility and liability, and a commodity standard for money.

Those developments should not come as a surprise. The Rechtsstaat presupposes a sovereign legislative power that can make any ‘laws’ (general legal rules) it wants within the territorial domain over which it exerts jurisdiction. The moment it is implemented, it will become the focus of all sorts of interests that want to get a piece of the legislative action¹⁸—and they will not find it too hard to get the cooperation and advice of lawyers on how to cast their proposals in appropriately general rules. The historical Rechtsstaat rapidly engendered political parties, which, in most cases, in no time made nonsense of the intended separation of powers. Without overstepping the formal constitutional limits, the parties forming the majority coalition in the legislature changed the rules to ensure that they were also the governing parties. Even in the United States, where direct elections of the President permit a nominal separation of powers in the hands of different parties, the result is not particularly noteworthy as a support of freedom. Instead of a politically effective check-and-balance, the separation of powers became an organisational device—akin to, say, the separation between the financial and the sales department of a large corporation. A guarantee of any person’s freedom or natural right it was not, even if it retained most of the prestige and propaganda value it had gathered in earlier times.

¹⁸ W.G. Sumner-1905, p.321. ‘Every legislature [...] contains a set of men who are in politics for what they can make out of it.’ Also, from the same essay, “the parties to the several interests, if they are defeated in the economic struggle, have another chance in politics.” (p.323)

From ‘harmony of interests’ to ‘public interest’

The idea of the formal Rechtsstaat was a radical deviation from the classical liberal political philosophy of the eighteenth century. The latter had developed the concept of natural rights, which it had inherited via Locke from the late-medieval Scholastics. It did so by considering such rights as the basic elements of order in human relations rather than a mere rhetorical weapon in the struggle against absolutism and mercantilism. It thereby made it possible to develop the idea of a free market. According to this idea, the free market is not a ‘free for all’ that over time sorts itself out as individuals supposedly discover that ‘crime does not pay’. Rather, the free market idea presupposes adequate security of natural rights. From this presupposition, economists could develop the notion of the market as a purely economic phenomenon by abstracting from the question of how and at what costs natural rights could be secured. By far the most important theorem that the economists derived from the natural rights philosophy of the eighteenth century was that where natural rights are secure, lawful action (that is, action constrained by respect for such rights) tends to ‘a harmony of interests’.¹⁹ Interests

¹⁹ The concept was central to economic analysis from the late-Scholastics to the Scottish Enlightenment (Smith’s *Wealth of Nations*) and continued throughout the nineteenth century (Bastiat’s, *Harmonies économiques*, Menger’s Austrian School). Eventually, however, the majority of academic economists swept problems of order (‘harmony’) aside to concentrate on developing a scientific technology of want-satisfaction (utility-maximisation, wealth-maximisation) based on mathematical models. This transformation of the paradigm of economic analysis (see Kirzner-1976; and Rothbard-1995 for a detailed historical account) probably was a side-effect of the success of economics courses at the universities. There arose a need to teach economics to large numbers of young and often mediocre students, most of whom had little ability to reason logically from basic truths about the complexities of the human predicament. Working with ‘models’ allowed the teachers to pre-package insights in easy-to-memorise chunks of ready-to-use knowledge, and to substitute rule-governed computation for logical reasoning from undisputed general facts. Another factor was the ease with which descriptive models could be turned into technological schemes for making policy by identifying some ‘variables’ as policy-handles (causes) and other variables as policy-outcomes (effects). Thus, economics increasingly was presented as a technology of control, with an enormous market in the corporate sector (in business no less than in politics).

were ascribed only to real individuals, but it was recognised that different individuals could have common interests and that associations and other organisations often were appropriate means for realising those common interests. However, the organisation of the pursuit of common interests could not be imagined to give individuals a lawful pretext for disregarding the natural law.²⁰

If the classical liberals had a notion of ‘public’ or ‘general’ interest, it was little or nothing more than the protection of natural rights.²¹ This, however, is basically a common interest (a common good or *bonum commune*) of all in so far as it can be supposed that every individual has an interest in the security of his own natural rights. However, it does not follow that an individual has an interest in the security of the natural rights of others. That is why the classical liberals did not give up on natural rights in favour of a completely de-moralised notion of freedom as the

²⁰ In the eighteenth century, corporations were rightly seen as having received the privilege of a ‘legal personality’. Classical liberals did not consider such corporations as true persons, enjoying the same natural rights as natural persons. Therefore, incorporation was not a lawful way for individuals to evade, diminish or dilute their responsibility or liability as far as others were concerned (which arguably is the main advantage the organisers derive from incorporation). Modern liberals have deviated considerably from the classical norm by rising to the defence of the ‘corporate veil’ behind which organisers and managers of business and non-profit corporations can take refuge in ways similar to those politicians use when they invoke their ‘public mandate’ to escape personal responsibility and liability for their decisions and actions.

²¹ Norman Barry rather unfortunately and ahistorically proposed to reserve the term ‘classical liberalism’ for liberalism of the economic consequentialist kind and ‘libertarianism’ for the natural law and natural rights ‘mutation’ of that doctrine. Barry-1987, p.18. Arguably, however, classical liberalism was a natural rights doctrine before it ‘mutated’ into consequentialism. When Bastiat famously juxtaposed ‘les économistes’ and ‘les juristes’ (as he did in his tract *La Loi*), he did so because the former had their roots in the real world concerns of the natural rights tradition while the latter were already committed to the idea that it was the State’s task to legislate for ‘the public interest’ and ‘the general welfare’. The lawyers were preparing a formalistic framework within which the nineteenth century ‘police State’ legally could enact whatever wealth- or welfare-maximising policies (‘police’) it deemed expedient. They had abandoned the idea that the State should respect the order of natural rights within which individuals could pursue their own maximands. Leaving the problems of ‘order’ to the legislators and the lawyers, the economists began to develop an equally formalistic economics of maximisation (of happiness, wealth or utility) that would fit any institutional setting. See above, note 19.

ability to pursue any interest in any way whatsoever. A choice remains necessary between the lawful pursuits of lawful interests and the unrestricted pursuit of purely subjective self-interest. Respect for natural rights stayed in place as the fundamental norm, regardless of whether that norm was matched by a State-imposed legal rule or not. If the common interest rests on the fact that every individual has a lawful interest in the security of his natural rights but not necessarily in the security of the natural rights of others, then the security of their rights rests on their right of self-defence against injustice. In short, lawful political association must be based on the principle of voluntarily organised self-defence; it must recognise every individual's right to defend himself against injustice. Obviously, it is this implication that the anarcho-libertarians take seriously in developing their views on securing natural rights without having recourse to a monopoly of force and violence.

By the mid-nineteenth century, the centre of gravity in liberal discourse had shifted to political figures, statesmen and politicians at all levels of the Nation-State. Their primary interests were to finish off the Old Order once and for all by reconstituting the State and above all to entrench themselves in its positions of power, not only in the legislature but also in the government and its administration. They were among the first to replace the political separation of powers between the King and the Parliament by a functional separation of legislative and executive offices in the hands of the same ruling majority. Whatever their ideology, they were excellent illustrations of Constant's law of party politics:

Let his intentions be ever so good, such a party-man will always oppose a limitation of the sovereign power of the State. He looks upon himself as the successor of the present rulers; and even when these are his opponents he takes care not to diminish the power that one day will be his.²²

²² Constant-1815, p.10

The political liberals strongly identified with the State that they saw as their own creation and hoped to control indefinitely. However, they helped to expand the process of competition for political power and to entrench the sort of strategic and tactical amorality that Machiavelli had so well described in his *Il Principe*, that seminal account of political competition among the ‘new’ princes of the Italian city-states and their ever-present rivals. Thus, whatever pious statements the political liberals made about liberty and the rule of law, they helped to usher in an era in which politics became obsessed with getting power and using it to maintain one’s grasp on it. Only on rare occasions, whatever energy remained could be devoted to the grand pretexts under which power had been sought in the first place—if, when, and for as long as it was ‘politically opportune’ to do so. As Harold Macmillan would say, a century later: ‘Power? It’s like a Dead Sea fruit. When you achieve it, there is nothing there.’²³

The political liberals embraced the Rechtsstaat as the vehicle of choice for what was, in retrospect, a short and uneven reign. Disregarding the classical liberal philosophy and its key-concepts of natural rights and the harmony of interests, they reverted to a mystical notion of the ‘public interest’ as something completely divorced from, irreducible to, and always threatened by private or particular interests, including the common interests of groups of individuals. This was an inevitable consequence of the philosophical premises of the political liberals. These premises were a throwback to thinking in terms of ‘the whole and its parts’. Of course, for them, the whole always was ‘more than the sum of its parts’; it was far more important than—indeed, it was the precondition of the meaning and significance of—any part.

The classical liberal philosophy of the eighteenth century had begun to discard that mereological framework in favour of one that stressed open-ended networks of relations of

²³ Quoted in: Anthony Sampson, *The New Anatomy of Britain*, ch. 37 (1971).

conviviality and co-operation among human beings. That sort of thinking was beyond the grasp of the political liberals. They stuck to the view of the whole (variously described as the Nation, the People, or the State) as a subject existing on a higher plane than the parts (the individuals and their ‘civil associations’). Their public interest was the interest of the whole; particular interests should be subordinated to it, lest the hierarchical order of existence be destroyed. Legislation should trump any other arrangement because the public function ‘always is dependent on the will of the whole, and in performing that function the legislator does not care for the interests of individuals but only for the interest of the whole.’²⁴

As a consequence, the political liberals no longer could think of the common good except in terms of a mystical public good. All other interests were subject to the public interest of the whole—and this applied even to the case where all the parts of the same whole had the same interests in common. This is the exact opposite of the classical liberal position. For instance, Father Antonio Rosmini, the pre-eminent classical liberal Catholic writer of the 19th century, defined the common good as nothing but “*the good of all the individuals* who make up the social body and are subjects of rights”, as opposed to the “public good” which is in turn “*the good of the social body* taken as a whole or... taken in its organization”.²⁵ Rosmini specifically added that “public good is subordinated as a means to common good” and that “not a single right of an individual citizen (the complex of these rights is the common good) can be sacrificed for the sake of the public good”.²⁶

The political liberals’ reversal of the ranking of common and public interests is significant. Organised groups and

²⁴ Thorbecke as quoted in Poortinga-1987, p.118.

²⁵ Rosmini-1841, vol.6, par 1644. I thank Alberto Mingardi for letting me pre-view his paper “A Sphere Around the Person: Antonio Rosmini on Property” (Mingardi-2004) from which the quotations referred to in this and the next note have been taken.

²⁶ Rosmini-1841, vol.6, par 1660, and par.1661.

organisations also are wholes relative to their subdivisions and members. Thus, they too can claim to have something like a public interest, which, being the interest of the organisation as such, is different from the interests of the members. To salvage the supremacy of the perfect or absolute public interest of the State over the imperfect and merely relative public interests served by particular associations, the political liberals reverted to the medieval distinction²⁷ between the ‘societas perfecta’ (the political corporation of the State) and ‘imperfect’ societies (other corporations and associations). In this way, political liberalism occasionally came close to a protocorporatist view of society, reconstructing liberalism on the basis of a separation of State and civil society—that is, the collection of organisations within the State’s territory but outside the State’s formal apparatus of political power. According to this protocorporatist view, the State should not meddle in the internal affairs of the corporate entities under its jurisdiction. However, it was entitled to enforce its legal rules and to uphold the legal rights it had granted to individuals as subjects or citizens of the State itself. In this way, the State would protect the individual as a subject of the State against the demands of other corporations in civil society of which he might be a member. Note, however, that this protection required the State to redefine the rights of individuals as citizen rights, which had no other source than the legislative activity of the State itself. The natural human being dropped out of the picture—and so did his natural rights.

The political liberals’ separation of State and civil society obviously should not be confused with the classical liberals’ separation of State and natural society (individuals and their lawful associations). The classical idea required the State not to interfere with the law of natural society and to use the means put at its disposal only for protecting the integrity of

²⁷ In this matter, the medieval theologians followed Aristotle’s conception of the *polis* as a self-sufficient social entity, within which all, even the highest, needs and aspirations of man found satisfaction and fulfillment. Aristotle, *The Politics*, Book I.

the natural order. It implied no normative institutional hierarchy.

Unlike particular and common interests, which are rooted in the purposes, circumstances and psychology of real individuals, the so-called 'public interest' is no more than a fiction. It is, in fact, nothing but the stated purpose of a corporate entity; it exists only in its statutes or founding act. At the moment of the founding of such an entity, there probably is a close connection between the organisation's 'public interest' and the common interests of its founders, but there obviously is no guarantee that the correspondence will last. Once a discrepancy arises, the fictitious 'general will' of the corporate entity no longer corresponds to the 'will of all'—to use Rousseau's famous phrases. However, it remains tautologically true that, from the point of view of the *persona ficta* of the corporation itself, 'the general will is always right'. It must be—by definition—because the corporation, being an artificial person, has no other purpose than its basic rules specify.

For many corporate entities and associations, various provisions mitigate the problems of a divergence between the official purpose of the organisation and the interests of its members. These provisions include procedures for changing the stated purpose itself or the stated methods for achieving it; an easy, nearly costless exit of members; the admittance of new members. However, as Rousseau knew very well, the 'social contract' that founds the State does not provide for nearly costless exit. On the contrary, it provides for ways in which to 'force the citizens to be free'²⁸—that is to say, to force them to become better citizens. Thus, the State is assimilated to a prison, which does not permit the inmates to escape but should transform them by all means into model prisoners. Political liberalism inserted itself into that sort of thinking. Once the public interest is elevated to the status of a sacrosanct normative principle that binds not only the corporate fiction but also

²⁸ Jean-Jacques Rousseau, *Du Contrat Social* (1862), Book I, chapter 6.

the human beings that get trapped in it, the defence of 'civil liberty' and the defence of the freedom of individuals must part ways.

According to the Dutch political liberal Thorbecke, the 'father' of the Dutch Constitution of 1848, the State enjoyed 'an indefinite power over civil law attributed to the sovereign'²⁹. Nevertheless, he assured his readers, it was 'an organisation of law, not of the whole business of human life'³⁰.

Does this mean that the State should take care of everything, remedy every sickness and defect of Society? ... On the contrary. A first law is abstinence; abstinence from what lies beyond its calling as an association of law³¹

Thus, the liberal content of the State was reduced to a benign policy of self-restraint on the part of the State itself. Instead of rules of law that applied equally to all human agents, acting individually or in concert with others, the political liberals ended up endorsing a system of legal rules that was to be imposed by the State as the incarnation of the mystical 'People as a whole'—the keystone of their political philosophy. Consequently, only the State could resolve and determine what the public interest in any particular case is. For the political liberals, therefore, there should be no substantial limit to the State's sovereignty over any individual or group. The State always was to have the last word.

The State, having the right to limit individual freedom as far as the public interest requires, cannot tolerate any corporation or association among its citizens that obstructs his own power and development.³²

²⁹ Thorbecke-1844, p.269.

³⁰ Thorbecke as quoted in De Wit-1980, p.101.

³¹ Thorbecke-1870, blz. VIII.

³² Opzoomer-1854, p.23.

There should be limits only on the *modus operandi* of the State, which is directly controlled not by the State itself but by its human personnel, politicians, magistrates, and judges. Of course, this only raises the question, Who shall guard the guards? There was some naïve faith in constitutional devices such as the separation of power, various institutional checks and balances, including cumbersome procedures, tenure for judges and civil servants, and general elections. However, the human factor could not be subdued so easily. As mentioned before, the rise of political parties, party politics, and organised pressure groups swamped whatever good intentions may have inspired the formulation of the idea of a *Rechtsstaat*.

The political liberals were not inclined to incorporate the wisdom of history or even a commonsensical understanding of human nature in their worldview. The problem of politics, as they saw it, was at once simple and purely formal: how to disentangle particular and public interest. The confusion of those interests—not the vulnerability of the natural rights of freedom, property, and contracts to the effects of concentrated political power—was what had been wrong with the Old Regime. As Thorbecke expressed it, the State of the Old Regime was

a collection, not a system or body, of particular societies or households, under one sovereign. However, sovereignty was [...] not a general concept, from which one could deduce rights that had not been exercised before. It was a crown made not of one metal or in one cast but composed of many pieces, put together at different times and for different reasons. As long as public law was cloaked in, and dominated by principles of civil law, it could not achieve a clear consciousness of its own essence.³³

What we have here is a reprise of Jean Bodin's idea that traditional political society should be replaced by a system

³³ Thorbecke-1844, p.267-68.

integrated by the principle of absolute sovereignty.³⁴ For the political liberals, of course, that principle was to be linked to the idea that ‘the majesty of the State rested with the collectivity of the people.’³⁵ However, in historical terms, the people or nation also was composed of many pieces, put together at different times and for different reasons. Therefore, it was illogical to consider history or indeed anything other than the State itself in determining which people constituted which political collectivity. In so far as no such collective entity existed, the State’s primary duty was to create it. This is not just a whiff of Hegel, for we also should note the Hegelian flourish at the end of the quotation. Liberalism as the self-consciousness of the State? Nothing could be further from the thought of the classical liberals. Indeed, the whole of idea of legal political sovereignty was foreign to their thinking. Already in 1789, during the debates in the National Assembly over the Declaration of the Rights of Man and Citizen, the revolutionary leader Sieyès had warned against the implications of the concept:

Sovereignty, even popular sovereignty, is a royalist and monkish notion that threatens freedom and destroys not only private property but the republic itself.³⁶

Sovereignty, in practice, transmogrifies the ‘res publica’ in an all-encompassing whole, seeking its fulfilment in a total State managing every person’s life, happiness and housekeeping. The political liberals, however, were not interested in the practical implications of political sovereignty. To them, it was a purely formal concept capturing, at last, the majesty of a self-conscious public interest and its absolute supremacy over everything else.

³⁴ Jean Bodin, *Les Six livres de la République* (1594), Book I, Chapter VIII. Bodin had presented his doctrine of absolute sovereignty as a rational foundation for the unlimited political power of the king. It became the intellectual tool of choice for discarding the medieval patchwork of particular royal prerogatives (regalia), which had required the ruler to justify his claims to power in terms of history and tradition.

³⁵ Thorbecke-1828, p.14.

³⁶ Quoted in Rials-1988, p. 401.

To sum up, the political liberals turned the defence of natural rights into a mere policy option. If and when that option fits the ‘public interest’, defend natural rights; if not, do not. As liberals they may have continued to associate the public interest with the security of natural rights, but in their formal legal thinking those rights had no place. Consequently, there was to be no freedom for individuals, only liberty for citizens. The political liberals effectively sought to legalise the law. In doing so they provided the pretext for socialising convivial (including market) relations under the aegis of the State, and eventually for the politicisation of society and its inevitable counterpart, the socialisation of politics. That was not the clear separation of public and particular interests that they had invoked as their motto, but it was an inevitable consequence of their metaphysical premise that ‘the public’ stands above ‘the particular’.

Classical liberalism and the Declaration of the Rights of Man and Citizen

As noted before, the classical liberals, in so far as they were interested only in economics, could not care less how and at what costs the natural order (natural law and natural rights) would be secured. If, as the political liberals maintained, the formal Rechtsstaat would do the trick, then that would be fine. If not, some other arrangement would have to be presupposed to enable one to view the ‘economy’ as an autonomous order of the human world. However, not all classical liberals were prepared to abstract from the question of how to secure the natural law and natural rights of the human world. Yet, few of them embraced the proposition that a formal Rechtsstaat would be adequate for the purpose. Indeed, to the extent that they were loyal to the idea of the State, they would have stuck to the Declaration of the Rights of Man and Citizen of 1789, which stated the principles of a material Rechtsstaat, not a merely formal

one. Even in France, the political liberals' doctrine was not a part of the classical liberal philosophy.³⁷

The Declaration of 1789 had stated unambiguously that 'the citizen' and his 'legal rights' were tools to safeguard the real human persons and their natural rights. However, as is usually the case with political documents that are essentially compromises,³⁸ its language is in places somewhat confusing. Among the delegates to the National Assembly, there was considerable confusion about the significance of the declaration itself. Was it a set of universal philosophical principles or a set of guidelines for the constitutional reforms envisioned for France? The text does not distinguish clearly between the general convivial order ('natural society', which involves human persons as such), particular societies (organisations, which involve human persons only as members and occupants of positions defined by organisational rules) and political societies (states, territorially dominant organisations of the means of force and violence). It also indiscriminately used the term 'law' ('loi') to refer to principles of convivial order (natural society) and to legal rules defining a political society and the powers, privileges, and immunities of its various parts. Nevertheless, we easily can construct a classical liberal reading of the Declaration's basic articles.³⁹

³⁷ Among others, Charles Comte, Charles Dunoyer, Frédéric Bastiat, and Gustave de Molinari were radically opposed to it. F. Bastiat, *Propriété et loi*, (*Journal des Economistes*, 15 mai 1848) in *Œuvres complètes de Frédéric Bastiat* (1863), volume IV, pp. 275-297. See also Liggio-1977, and Hart-1981.

³⁸ In this case, the compromises were mainly among classical liberals (Locke) and republican nationalists (Rousseau), as far as ideology was concerned, and, in other respects, various strata of the Tiers État (office holders, lawyers, merchants, and so on). In the debates of the Assembly, conservatives and clergy were not silent—but they were not effective in getting their views into the final text.

³⁹ Obviously, because the Revolution was becoming more violent and chaotic while the National Assembly was preparing the declaration, most people at the time understandably interpreted its articles in the light of what was happening in France. However, it was not a hastily concocted 'tract for the times'. See Rials-1988.

1. Human persons are born and remain free and equal in [natural] rights.⁴⁰ [Non-natural, artificial] social distinctions [in any political society] may be founded only upon the general utility [of that society. That is to say, such distinctions must serve the purpose of that society.]

2. The [only legitimate] aim of any political association is the preservation of the natural and imprescriptible rights of man. These rights are freedom, property,⁴¹ security, and resistance to oppression [that is, self-defence].

3. The principle of all [political] sovereignty resides essentially in the nation. No corporate entity or individual may exercise any [legal] authority [in a

⁴⁰ In his *Exposé de la conduite de Monsieur Mounier dans l'Assemblée nationale et des motifs de son retour en Dauphiné* (Desenne, Paris, 1789), Jean-Joseph Mounier, a liberal, royalist and active participant in the debates leading up to the Declaration, complained about the omission of the word 'natural'. Commenting on the first article which stated that men are born and remain ('demeurent') free, he wrote:

"Je m'opposai vainement à l'addition du mot 'demeurent'. Il faut croire qu'on a voulu parler des droits naturels; mais alors il eût été prudent de l'expliquer; car si l'on entend par le mot 'droits' la définition donnée par les publicistes, suivant laquelle un droit est la faculté de réclamer ce qui est dû, les droits sont différents suivant les fonctions et les emplois; et j'ai déjà entendu plusieurs fois des hommes ignorants concevoir des prétentions bien extravagantes d'après 'l'égalité des droits', telle qu'elle est exprimée dans la déclaration..."

In short, Mounier condemned the confusion of natural and legally defined social rights, and with it the misinterpretation of the notion of equality that would bring so much social and political ferment in later years (as well as scorn from conservatives such as Edmund Burke).

⁴¹ The delegates were well aware of the distinction between property in the sense of natural law and feudal property, which they considered illegitimate (in a decision on August 4th, 1789). However, there was also the category of legal private property, which consisted in having legal proprietary title to, among other things, a judicial, administrative or fiscal office (bought directly from the Prince or perhaps from a previous owner). This was not considered feudal property, but it certainly was not property under natural law. However, a great many of the delegates derived much or most of their income from such legal property. It is no wonder that they did not want to make an issue of it.

political society] that does not proceed directly from the nation.⁴²

4. [The natural right of] Freedom is the right to do everything that injures no one else; hence the exercise of the natural rights of each man has no limits except those that assure to the other members of [natural] society the enjoyment of the same rights. Only the [natural] law can determine these limits.

5. [Therefore, in any particular political society,] legal rules can prohibit [to human persons] only such actions as are injurious to [natural] society. [As far as the citizens of a particular political society are concerned,] nothing may be prevented which is not forbidden by the legal rules, and no one may be forced to do anything not provided for by the legal rules [of that society].

6. Legal rules are the expression of the general will [of a particular political society]. Every citizen has a right to participate personally or through his representative in the making of such rules. They must be the same for all, whether the rules protect or punish. All citizens, being equal in the eyes of the [political society's legal authority], are equally eligible to all dignities and to all public positions and occupations,

⁴² In its historical context, the reference to the nation merely disguises the fact that the French Assemblée Nationale arrogated to itself the right to act as if it was the assembly of all individual Frenchmen.

“Mais toujours est-il vrai qu'une représentation extraordinaire ne ressemble point à la législature ordinaire. Ce sont des pouvoirs distincts. Celle-ci ne peut se mouvoir que dans les formes et aux conditions qui lui sont imposées. L' autre n'est soumise à aucune forme en particulier: elle s'assemble et délibère, comme ferait la nation elle-même, si, n'étant composée que d'un petit nombre d'individus, elle voulait donner une constitution à son gouvernement.” E. Siéyès, *Qu'est-ce que le tiers état ?* (Chapter V).

Within this context, then, 'the nation' is the Assembly's name for itself. Article 3 is a blatant self-referential assertion of absolute political sovereignty by a corporate entity that seemingly denies independent legal authority to any corporate entity.

according to their abilities, and without distinction
except that of their virtues and talents.

.....

16. A [political] society in which [natural] rights are
not guaranteed nor the separation of powers⁴³ defined
has no constitution at all.

The text is clear enough. Unless one wants to read a mereological metaphysic in the reference to ‘the nation’, political association is voluntary association; it is not some pre-existing whole. Political association is legitimate only if it serves the security of the natural rights of persons. Consistent with Lockean liberalism, political obligation is undertaken voluntarily and applies therefore only to those who have chosen to be members of a particular association.⁴⁴ The obligation to respect natural rights, in contrast, applies to every human person, regardless of membership in any society (be it political or not). Membership in a political association—that is, citizenship—gives no one a right to disregard the natural rights of any person. Again unless one wants to read more in the reference to ‘the nation’ than the text justifies, there is nothing in the Declaration of 1789 that warrants the conclusion that a political society should be a territorial monopoly with respect to either the legislative or the executive power. The ‘territorial principle’ is not even mentioned. In any case, the traditional meaning of ‘nation’ corresponded far more closely with the ‘personal principle’ than with its modern territorial counterpart—a point that was not lost on Sieyès.⁴⁵ As for the formal Rechtsstaat, one can see its contours in the articles 3 and 6, but one should

⁴³ The separation of powers, one of the great constitutional principles, was already breached in the Constitution of 1791, which empowered the legislature to bring accusations for crimes against the State.

⁴⁴ John Locke, *Second Treatise of Civil Government*, §§119-122.

⁴⁵ In his interpretation, the Assembly acted as if it was the nation—and the nation was nothing but a collection of individuals. See note 42, above.

not assume that the other parts of the text were merely rhetorical embellishments.

The independence of the judiciary

The text of the Declaration does not mention the judiciary as one of the powers of political society. This, again, follows Locke (and Montesquieu⁴⁶) and strengthens the interpretation that in 1789 ‘the law’ still was seen as a function of natural society rather than a function of political society. In short, the independence of the judiciary was not considered a constitutional requirement concerning the organisation of the State but a pre-constitutional fact that the State, to be legitimate, should respect as much as every other aspect of the natural order of convivial relations.⁴⁷ The nationalisation of the judiciary function was not yet a *fait accompli* in 1789; it was one of the ‘accomplishments’ of the subsequent revolutionary regimes that attempted to enforce the Revolution (especially in the provinces, where the people kept electing the ‘wrong’ judges).⁴⁸ It should be noted that the famous French codifications were intended as

⁴⁶ For Montesquieu, the judiciary power belonged to natural rather than political society, and certainly in cases where imprisonment or another punishment was a possible outcome, to juries rather than officials. Indeed, in the perspective of political society, “la puissance de juger, si terrible parmi les hommes, n’étant attachée ni à un certain état, ni à une certaine profession, devient, pour ainsi dire, invisible et presque nulle.” Montesquieu, *De L’Esprit des lois*, Book XI, Chapter VI.

⁴⁷ This attitude, rejecting the establishment of a permanent, state-empowered judiciary power and desiring to prevent ‘les crimes par la justice’ (Mirabeau), was enacted in the Law of August 16 and 24, 1790, which made conciliation and the appeal to freely chosen arbiters (private persons) the basis of the new system of conflict resolution. As a last resort, elected judges would be available to render verdicts. However, they were seen as an exception to the basic principle of restituting justice to the people.

⁴⁸ Under the ‘revolutionary government’ (1793-94), the power to release prisoners was reserved exclusively for the national Convention and the ‘comités de salut public et de sûreté générale’. (Décret du 14 frimaire). Every ten days, the courts were obliged to give accounts to the executive council, which would then report to the Comité du Salut Public. The Convention could remove judges, punish them for negligence, change or annul their verdicts. The courts simply became organs of the State. The Convention, in fact, was an Absolute Sovereign—which could not and would not tolerate a separate power, least of all an independent judiciary.

scholarly systematisations of existing jurisprudence, amended according to the natural law principle of freedom among likes. They were not intended as legislative initiatives.⁴⁹

The absence of a reference to a judicial power of the State is important for the interpretation of the final article of the Declaration.

17. Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.⁵⁰

Expropriation can be condoned only by an appeal to ‘necessity’, but even so, the owner must be compensated previously and equitably—that is, not according to legal criteria determined by a ‘sovereign’ political organisation but according to the normal criteria of law by an independent judge. Although contemporaries⁵¹ were concerned that the article ultimately would lead to the destruction of the principle of property, the text—if read with the understanding that judges are not part of the apparatus of the State—indicates that even in cases of ‘necessity’ the State is not at liberty to step outside the requirements of natural law. After all, ‘necessity’

⁴⁹ Writing specifically about Belgium, Hanssens opined that the prestige of the codes was due in no small part to the fact that they were seen as inspired by the anti-legalistic tradition of Germanic customary law. Hanssens-1904, p.684.

⁵⁰ No compensation was due for loss of feudal property. However, again, there is no mention of the difference between natural and legal property. (See above, note 41.) Rather than simply abolishing the monopolies that gave legal property its value, and without which ‘venal offices’ were quite harmless, the delegates chose to entitle themselves to large compensations for allowing themselves to be expropriated. The Assembly, early in August 1789, decreed that offices could not be sold and that justice would be supplied free of charge—‘la gratuité de la justice’! Note, however, that in 1789 the intention still was to return, among other things, the judicial function to the people. In later years the State acquired enormous monopoly powers and became an employer of an ever-expanding army of ‘public’ servants and magistrates, most of whom were to be paid out of taxes.

⁵¹ For example, Desmontiers de Mérimville, the Bishop of Dijon, as reported in Barère de Vieuxac’s *Point du Jour*, volume 3, p.220.

exculpates, but does not necessarily remove the obligation to make restitution or to provide compensation.

The scope of legal obligation

It is pointless to question the legal or political obligations of the citizen, because the citizen is defined by the legal rules. Consequently, citizens ought to obey the legal rules—by definition. However, human beings are not under an obligation to obey the legal rules unless they have freely, voluntarily undertaken to become citizens. The legal rules only touch the rule-defined artificial person, the citizen. People—human beings—are not touched by the legal rules. This makes eminent sense from a classical liberal point of view. The purpose of a political association is not to substitute legal rules for the relations of [natural] law among human beings but to organise for the protection of natural rights. The objective of legal rules is primarily to make sure that the officials of the political association not only do not infringe upon those rights but also actually protect them in ways that have the approval of the members. The secondary objective is to ensure that control over the association stays with the members and does not pass into the hands of a handful of oligarchs.

This is the fundamental, truly revolutionary axiom that emerged from the classical liberal political philosophy of the eighteenth century: people (human beings) should be shielded from legislation; the officials and agents of the State should be subject to legislative control.⁵² Here we have a radical ‘separation’ of political and natural society, legislation and law, legality and justice—an unambiguous subordination of the requirements of any political society to the requirements of justice (which serve to maintain the law of the convivial order or natural society). Rather than a State in which the legislature rules as an undisputed

⁵² Apart from the articles 4 and 5 of the Declaration, we may refer here to the American Constitution (the doctrine of enumerated and delegated powers) and its radical formula ‘Congress shall make no law..’.

‘normative power’, the classical liberals opted for a political organisation in which the People’s representatives have authority to dictate to the executive power and its agencies the rules they ought to follow in maintaining law. The representatives would have no power over the people they represented because their rulings did not apply to them (except, obviously, on those occasions when individuals acted as citizens, for example as voters). Not ‘the State is the people’ but ‘like any person or other organisation, the State is bound to the law’ was the classical liberals’ political axiom.

The Jacobins’ reaction, which reinstated the principle of absolute political sovereignty, was anxious to get rid of that axiom. Their objective, as formulated by Billaud-Varenne, was to ‘leave no gap between the legislator and the people’.⁵³ Obviously, the ‘no gap’ condition worked both ways: unrestricted popular control over the legislature and unconditional subjection of every individual to legislative decisions. In short, the categories of the natural and the artificial, the real and the fictional, were fused, as the ‘man’ and the ‘citizen’ of the declaration became one and the same thing. In fact, the categories often were rearranged so as to make ‘the citizen’ the norm for any human person. Hegel, for one, immediately grasped the potential of this view for raising the State to the status of ‘objective morality’, superseding the subjective morality of independent individuals.⁵⁴ Respect for the nature of things and persons ‘as they are’ gave way to the modern view that only ‘ideals’ have normative value. Hume’s logical gap between ‘is’ and ‘ought’ was thereby transformed into an ontological abyss between the common man’s ‘world of appearances’ and the intellectual’s true ‘ideal reality’. The rule of law gave way to the absolutist rule of an omnipotent legislature, set up to protect not the natural rights of human beings but ‘the Revolution’ itself. It might have delighted

⁵³ “[N]e plus laisser une séparation entre le législateur et le peuple.” In his report, dated 28 brumaire an II, to the Convention. Quoted in Monnier-1989, p.166.

⁵⁴ Hegel, *Grundlinien der Philosophie des Rechts*, §258.

Rousseau, if it had not consecrated the tyranny of elected representatives against which he had warned so passionately. Indeed, it came with legislative powers to determine every aspect of the state-machinery, and every aspect of the life and work of every person.

Unfortunately, it was this absolutist set-up that the political liberals of the nineteenth century embraced. If the representative organs of the Old Regime had harboured a mere collection of ‘particular interests’, the representative organ of the People in the liberal Rechtsstaat no longer would be ‘an association of procurators...; no, it should be the State itself.’⁵⁵ Unless the constitution specifically said otherwise, the legislature had both *plena potestas* and *plenitudo potestatis* with respect to the people it represented.⁵⁶ That is why the political liberals drew fire from both classical liberals and conservatives,⁵⁷ who respectively perceived the Rechtsstaat as a threat to the natural rights of human persons and the historical order of a multitude of particular, mostly non-political societies.⁵⁸

To the Jacobins’ designs for a popular government dedicated to the realisation of the revolutionary idea, the political liberals added nothing but pious invocations of formal ‘constitutional guarantees’.⁵⁹ However, the one political guarantee that they envisioned involved them in a battle about representation that they could not win. On the

⁵⁵ J.T. Buijs-1895, p.497.

⁵⁶ *Plena potestas*: the legislature could bind the people unilaterally; *plenitudo potestatis*: it could bind the people in any matter not explicitly and specifically withheld in the constitution.

⁵⁷ Indeed, the Dutch anti-revolutionary conservative Groen van Prinsterer vociferously attacked the political liberal Thorbecke for re-instating absolutism in the constitution of 1848. See Verberne-1957, p.179.

⁵⁸ In addition, the medieval corporatism that was being advanced by the Church and its neo-Thomist intellectuals as its answer to the quest for a political ideology, threatened the political liberals’ dreams of hegemony. They responded by abandoning the doctrine of religious freedom in favour of a thorough and enforced laicisation of the State and its political functions that before long would include education. Whatever remained of the political liberals’ commitment to freedom lost its focus when the advocates of anticlericalism and secularisation became the standard-bearers of liberalism.

⁵⁹ On the significance of these guarantees, see for example Jasay-2002, p.4-18.

one hand, they justified their claim that the State itself was ‘the Representative of the People’ by pointing to the fact that its legislative organ was an elective body; on the other hand, their programme denied the right to vote to most subjects of the State. On this matter, the political liberals were caught in a dilemma from which they could not extricate themselves when the idea of ‘the People as a whole’ was thrown back at them in its Jacobin democratic form. Having first transformed the natural common interest of every person in the security of his natural rights into the public interest of the Sovereign People as a whole, and having presented themselves as the true representatives of that mythical People, they were reduced to delaying tactics in the face of the Jacobins’ challenge. Democracy? In principle, yes, by all means—but only after the people had been educated as selfless guardians of the ‘public interest’. Thus, the political liberals were driven to accept in full the logic of Rousseau’s ‘Republic’ and to claim for their State the exclusive right to educate the people.

Rousseau had recognised that the idea of a legitimate State was contrary to human nature. He saw that the logical solution to this problem of justification was to stand the whole frame of reference on its head. If the idea of a legitimate State is contrary to human nature then changing human nature to make it suit the requirements of the State will solve the contradiction. If the mask does not fit the face, adapt the face. That is why Rousseau insisted that education is the foundation of politics. The goal of a republican education is to transform natural man (“la personne physique”) into an artificial creature (“une personne morale”, a citizen) of the State. The citizen, of course, is essentially a legal fiction, but a republican education should try to make it a reality by so sapping the natural forces of real individuals that they no longer find in themselves the resources to act on their own principles, to question or criticise, much less oppose, the State. The citizen, like the King or the Queen in a game of chess, is a rule-defined position or function that is and can do only what the appropriate rulebook prescribes. Obviously, as

long as the human occupants of such positions do not completely identify with the positions, there is the risk that *they* will act illegally. Thus, perfect 'socialisation' is a necessary condition. Unless 'the natural forces of human nature' are totally eliminated, the State is threatened. However, because every child is born as a natural person, not as an artificial citizen, 'socialisation' must be relentless as well as faultless. Rousseau knew that nothing of the sort should be expected to endure. Like Plato, his model as far as civic education is concerned, he fully acknowledged the inevitability of the decay of even the best political institutions.

The philosophical pessimism of Plato and Rousseau was lost on the political liberals. They believed their own rhetoric, that the State they had created was Reason Incarnate. As Thorbecke put it:

One asked for the principle, the legal ground of existing institutions and found that it was no more than a heritage of a past that no longer could pass muster in present times. Therefore, one turned to theory to formulate a critique. This critique, which substituted general rules of reason for traditional institutions, succeeded to occupy the position of Power and to create the State as if de novo. The principle of these rules was that the majesty of the State rested with the collectivity of the people.⁶⁰

Before long, the 'public education' that they had sought swept away the liberal public opinion that was their only political asset. It brought forth huge cohorts of intellectuals, armed with loads of 'theory' and eager for a social command post from which to begin to create their own worlds 'as if de novo'.

Reason and human nature

The political liberals drifted further from the naturalistic outlook of the classical liberals by succumbing to the lure of 'social' Darwinism. For the classical liberals, the

⁶⁰ Thorbecke-1828, p.13-14.

objective distinctions between human persons and other things, and between one person and another, had defined the natural conditions of order in the human world, its natural law, within which human action tends to a harmony of interests. For the political liberals, the natural order became 'nature red in tooth and claw', a battlefield. In contrast, the artificial construction of the Rechtsstaat appeared to them, as blueprints usually do, as a perfectly rational order. It made the State appear as a sort of God, fully aware of the fickleness of human nature but not subject to its passions and weaknesses. Without the State, economic action would give rise to a relentless 'struggle for life' or dog-eat-dog competition.

With this worldview, we were sent back to the basic Hobbesian alternatives of absolute chaos or absolute control. The political liberals turned on its head the central premise of classical liberalism, that 'economic action' (production and exchange within the framework of respect for natural rights) is the mode of civilisation, and that 'political action' (unilateral takings by means of violence and fraud) is the mode of barbarism. For the classical liberals, 'economics' had been the master science of the principle of peaceful human coexistence. The political liberals restored politics as the master science, making the primacy of the whole and the implied hierarchy of public over private interest, the centrepiece of their thinking.

As self-proclaimed heirs of the Enlightenment, they did not doubt that the gains of Reason could not be undone. Reason—objective reason—was embodied in the State, and Reason taught that only the State could secure rights. After all, the citizens,

taken individually, lack the force to do so. In this way, Society assumes the aspect of a State, an institution... that... acts as an independent, autonomous power,

elevated above each one of them, and to which each one of them owes subjection.’⁶¹

Owes subjection? Yes, because subjection to the State ensures that ‘all subjects... are free and all free persons are subjects.’⁶² That is just another echo of Rousseau—and, at this stage in the argument, it should no longer come as a surprise.

Godefridi’s claim that subjection to the formal Rechtsstaat is a necessary condition of freedom fits in a long tradition, but it is not the tradition of classical liberalism, even on the most ‘liberal’ interpretation of that term. His abstract rationalism remains silent about every political aspect of the State. With reality, human nature and history safely out of the way, what ground is left from which to criticize the formal Rechtsstaat? However, as Sumner noted, “[t]he fallacy of a great many doctrines in social science and the philosophy of a great many errors in social policy, is that they divorce the action from the reaction.”⁶³ Like the political liberals before him, Godefridi presents us with a concept of a State that resides in a logical space of ‘universal reason’, far above the real world where the law of action and reaction holds sway. That is the world where many trust the State’s monopoly only in so far as they can make it serve their purpose.

References

- Barry N. (1987) *On Classical Liberalism and Libertarianism*, New York: Saint Martin’s Press
Boucher Ph. (1989) (ed.), *La Révolution de la Justice*, Jean-Pierre de Monza

⁶¹ Opzoomer-1854, p.6.

⁶² Buys-1895.

⁶³ Sumner-1889, p.121.

Buijs J.T. (1895) De zelfstandigheid van het staatsrecht, in J.T. Buijs, *Studiën over Staatskunde*, Arnhem: Gouda Quint

Constant B. (1815) *Principes de Politique*, Part I, *Cours de politique constitutionnelle*, republished Paris: Editions Guillaumin, 1872

De Wit C.H.E (1980) 'Thorbecke, Staatsman en historicus', in *Thorbecke en de wording van de Nederlandse Natie*, Nijmegen: SUN

Godefridi D. (2003), "Critique de l'utopie Libertarienne", *Journal des économistes et des études humaines*, XIII, 1, 2003, p.85-93

Hanssens (1904) "Le code Civil en Belgique", in Société d'Études législatives, *Le Code Civil. Livre du Centenaire*, Volume II, Paris: Rousseau

Hart D.M. (1981) Gustave de Molinari and the Anti-statist Liberal Tradition, in *Journal of Libertarian Studies*, Volume 5, nrs 3 & 4

Hayek F.A. (1973) *Law, Legislation, and Liberty*, Volume I: *Rules and Order*, Chicago: University of Chicago Press

Jasay A. de (2002) "Who Gave Us Order? On Exclusion, Enforcement and Its Wherewithal", in A. de Jasay, *Justice and Its Surroundings*, Indianapolis: Liberty Fund, Indianapolis

Kirzner, I. (1976) *The Economic Point of View*, Kansas City: Sheed & Ward Inc., second edition.

Liggio L. (1977), Charles Dunoyer and French Classical Liberalism, in *Journal of Libertarian Studies*, Volume 1, nr. 3, 1977, p.153-178

Mingardi A. (2004) "A Sphere Around the Person: Antonio Rosmini on Property", forthcoming in *Markets & Morality*, Spring 2007, vol.7, nr.1

Monnier R. (1989) "Le Peuple Juge", in Boucher Ph. (1989)

Oppenheimer F. (1997) *The State Fox & Wilkes*; reprint edition.

Opzoomer C.W. (1854) *Staatsregtelijk onderzoek*, Amsterdam

- Poortinga E. (1987) *De scheiding tussen publiek- en privaatrecht bij Johan Rudolph Thorbecke (1798-1872)*, Nijmegen: Ars Aequi
- Rials S. (1988) *La Déclaration des droits de l'homme et du citoyen*, Paris: Hachette
- Rosmini A. (1841) *Filosofia del diritto*, vol.6, English translation by Denis Cleary and Terence Watson, *The Philosophy of Right*, Durnham: Rominian House, 1995
- Thorbecke J. (1828) *Staatsinrigting en Staatsbestuur*, edited by J.P. Duyverman, Arnhem: Gouda Quint-Brouwer en Zn., 1968
- Thorbecke J. (1844) Over het hedendaagsche Staatsburgerschap, in *Thorbecke en de wording van de Nederlandse Natie*, Nijmegen: SUN, 1980
- Thorbecke J. (1870) Narede, in *Parlementaire redevoeringen*, Deventer
- Rothbard M.N. (1995) *An Austrian Perspective on the History of Economic Thought*, Volumes I & II, Aldershot: Edward Elgar
- Sumner W.G. (1905) Economics and Politics, in Sumner W.G. (1914)
- Sumner W.G. (1889) What is civil liberty? in Sumner W.G. (1914)
- Sumner W.G. (1914) *Earth-Hunger and other Essays*, edited by Albert G. Calloway, New Haven: Yale University Press
- Van Dun F. (1995) "The lawful and the legal", *Journal de économists et des etudes humaines*, VI, 4, 555-579.
- Verberne L.G.J. (1957) *Geschiedenis van Nederland in de jaren 1850-1925*, Utrecht: Het Spectrum, deel I