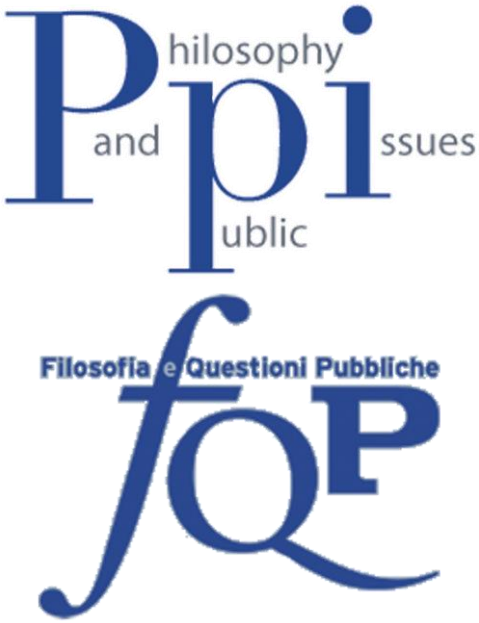
SYMPOSIUM

DEMOCRACY AND LAWMAKING



PENSER LA LOI
A RESPONSE

BY

DENIS BARANGER

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Penser la Loi
A Response

Denis Baranger

My warmest thanks go to the editors of "Philosophy and Public Issues" and to the three contributors for their comments. There is an inherent strangeness to the business of responding to response articles. I am spared, however, most of the travails pertaining to such an exercise by the intelligent empathy of my three reviewers. Their views on my book are perspicacious and fair. I can only say that they understood me well – possibly better than I can claim to have understood myself.

I

Law, history, metaphysics

Why history? What history?

Augustin Simard quotes me for saying (orally?) that I believe in the "idealism of forces". This puts to test my approach to history in general and the special role that I ascribe to the history of ideas. Let me try to express here some insufficiently elaborated ideas about this matter.

History as an intellectual pursuit is not so much concerned with bare facts as with the signification of the past. It is an investigation of the meaning of things that have happened and are not there anymore. Facts only make their way into our historical

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consciousness when we can attach a meaning to them. History is not a set of events. Rather, it is the name we attach to the meaning of the past, or more precisely to the past as a source of meaning. It becomes *our* past, *our* history. It remains with us because it means something to us. What takes place is a process of transaction between ourselves and what has been. History is the result of this transaction. Every historical event is an artificial construct, first in the mind (and discourses) of the actors, second in the mind (and under the pen) of the historian. The past as a whole, or a certain period or epoch, is the name we attach to a larger concatenation of such meanings. It is a response to a question we ask and to which the past is willing to respond. In fact, as Hans Blumenberg has shown, every age is better understood by the way it has posed certain questions even if – *especially if* – it has proved unable to give a satisfactory answer to these questions.

What is legislation? What is it to us? When it comes to the history of social institutions – and legislation belongs to that sphere – our access to historical meaning is made difficult, almost impossible in some cases, by several obstacles. We do not have access to the thought of all historical actors. Even less do we have documentary access to the collective thought of a certain era, or a certain generation of mankind. And yet this collective thought, this consciousness of an age, exists and deserves to be reconstructed.

In order to do so, the solution is more often than not to revert to the thought of those who have attempted to bring to light the meaning of those social institutions. As a result, history of ideas stands in many cases as our only guide, our only access to this sphere of social significations, intentions, meanings, etc. This has its drawbacks: the thought of a few is not necessarily an appropriate entry point into the thought of the greatest number. But it is at least a reflection of this thought, a "*miroir promené le long du chemin*", as every great philosopher is also a man or woman of

his/her age, especially when he/she struggles against it. It is, in any case, a feature of the history of ideas that it is necessarily incomplete. It cannot exhaust anything. It cannot even properly justify its own existence except by shedding some light on a historical problem that has an interpretative dimension to it.

Another problem pertaining to the method of the history of ideas is that the discussion of great thinkers quickly acquires a certain propensity to become a purely 'ahistorical' and conceptual inquiry. In order to understand Rousseau's general will or Bentham's concept of legislation, one has to confront their ideas as such. There is no other option but that of joining the fray, of entering the theoretical battlefield. Eventually, no amount of contextualization, however useful, will spare us that necessity. There is no hope of achieving anything in the history of ideas without recreating a philosophical discussion of some kind between the author and ourselves – or maybe is it between their *texts* and our own ideas. In the history of ideas, the philosophical and the historical dimensions are inseparable. This is why history of ideas is two things at the same time: a historical undertaking (re-capturing the ideas of the past) and a philosophical investigation in its own right. Certain texts simply *happen* to be the appropriate axiomatic foundations of a certain line of philosophical inquiry. Taking them as the proper starting point appears to be a justifiable philosophical procedure, even for somebody who would be genuinely lacking in any historical interest whatsoever. There are, after all, many problems attached to the opposite method of approaching philosophical problems from a *tabula rasa*.

Metaphysics and law

If history is about meaning, we are bound – in our quest to recover it – to encounter some large-scale artifices, conceptual

structures, men have made for themselves and later perfected, and even later criticized and destroyed only to build new ones in their place. These constructs and artifices are made of ideas and reasonings. Many important moral and political problems are non-contextual, and many non-contextual philosophical debates have had immense repercussions on human affairs. This is the case of many of the founding controversies in the history of metaphysics in the West: rationalism vs voluntarism, inneism vs empiricism; continental idealism vs utilitarianism, etc. That these controversies should appear with some degree of prominence in *Penser la Loi* is far from accidental.

This raises the question, very well perceived by Lev and Simard, of the place of metaphysics in the book. My approach – as stated in the *précis* – was to say that "metaphysics matters", by which I meant that it matters for anyone interested in social and legal history. I have always been struck by Carl Schmitt's' comment – in his *Political Theology* – that the law of an age is clearly reflected in its metaphysics, i.e. that there was some sort of correspondence between actions, men's creations, and their metaphysical constructs. Some key positions in the history of metaphysics appear to have played a significant role in the making of our legal institutions. This is what the book tries to show regarding legislation. For instance, one of the book's claims is that the major shift in the cosmological view of the world that took place at the Renaissance is also one of the main factors explaining the move towards the modern legislative state. Also, one of the book's claims is that our modern understanding of legislation owes a great deal to the decisive changes in the history of moral philosophy that have been recorded under such themes as the "expansion of the moral world" (Reinhart Koselleck), the "government of conducts" (James Tully) or the "morality of daily life" (Charles Taylor).

Penser la Loi is certainly evidence of a desire to bring together these larger metaphysical constructs – as well as the controversies that they have generated - and our social "practices". One of the book's premises is that these practices and these broad metaphysical frameworks are very much connected. To understand the latter is necessary in order to shed some light on the history of the former. This is especially the case with regard to legislation. The kind of law that ends up in our statute book has been shaped in deep connection with the way in which men have envisaged the world as a whole. Should metaphysics and the sphere of human practice be kept entirely separate, neither these broad philosophical projects nor social "concreteness" can effectively be understood. The ongoing controversy between law and philosophy in the battlefield of legislation is ample evidence of this. This "conflict of the faculties" is one of the book's underlying themes.

Jurisprudence?

I have certainly – if altogether implicitly – envisaged *Penser la Loi* as a statement on how best to approach legal philosophy. Many of the strategic moves, conceptual statements, and ensuing controversies that the book envisages can be understood in that perspective. What "happens" in the field of jurisprudence does not only take place inside academic textbooks. It also "happens" in "the life of the law", its experience. As we have just seen, this concrete experience is in itself a philosophical undertaking. The law does not only "work itself pure". There is a constant process within the law of copying from, transferring from, struggling with other disciplines. At the same time law asserts its autonomy and cannot refrain from displaying imperialistic impulses. The same is true of philosophy. The history of legislation is just one example, if maybe a key one, of these phenomena. Law claims that it is a *vera philosophia* while Philosophy aims at legislating and governing men.

This raises the question of what "jurisprudence" is. We need to envisage how the disciplinary field itself is constituted. "Jurisprudence" or "legal philosophy" is not a neutral term describing a given academic discipline. It is a battlefield. Its history is a "*histoire-bataille*" (as the French historians of the *Ecole des Annales* used to say dismissively). A more suitable name for that academic discipline would in fact be "Law *and* Philosophy"[1], instead of "philosophy of law". The contemporary transformation of jurisprudence into what is really a *legal theory* is due to the oblivion of this confrontational nature. Jurisprudence is, above anything else, a *conflict of the faculties*. The essence of the discipline lies in a confrontation between philosophy and legal culture. We do not know what the philosophy of law *is*. In a certain sense, it does not exist, at least as a "positive" and neutral field of knowledge. "Lawyers' law" has its own philosophy and in turn the "philosophy of philosophers" has constantly tried to absorb legal science. History of ideas appears as an adequate procedure in order to understand this long-term altercation between lawyers and philosophers. It does not pass *a priori* judgment on the respective values of the respective claims of Law and Philosophy. It is a clean slate – not perfectly clean of course, but as good as it gets. It is a chessboard on which one is able to lay out the pieces and see how they have interacted over time.

II

Hobbes: *imperium rationis*

Thomas Poole bewails the book's obscurity about several aspects of its treatment of Hobbes. He questions the way in which

[1] Which, by the way, is the name given to the academic journal Olivier Beaud, Mélanie Plouviez and myself have founded at the *Institut Michel Villey*: http://www.droitphilosophie.com/

the Hobbesian model of legislation combines will and reason. He also puts to test my ability to explain in what way the Hobbesian state is rational. He insists on the role of judge's as "equity experts" Finally, Poole says that "the connection Baranger wants to make between Hobbes, so influential in laying the intellectual groundwork of the modern state and our current dissatisfaction with legislation is unclear". I have devoted two pages to Hobbes in the entire book. He was not central to my narrative. Nevertheless, the way in which I have approached him deserves certain clarifications. I am grateful to Thomas Poole for giving me the opportunity to do so. A detailed response to Poole's questions and criticisms would take me beyond the reach of the present article. It would require a discussion of the Hobbesian concept of reason, of his ideas on the relation between divine law and law of nature, and also of his views on the adequate procedures to reach a rational outcome and also of his theory of language, and of the truthfulness thereof. It would also require to pay attention to other central evaluative concepts in his vocabulary, such as equity/iniquity, justice/injustice and prudence. I can only hope to provide a few hypotheses in the following paragraphs.

The few paragraphs devoted to Hobbes in *Penser la Loi* were not meant to fully reconstruct his position on legislation or on law as a whole. My purpose, in the limited space that I could devote to that topic, was to identify the origins of a "public" concept – or maybe should I say, with the inevitable oxymoronic connotation - a "concrete" concept: that of a thing that exists in the practical life that we live in common – what the Greeks called "*ta pragmata*": human affairs. Legislation is one of those concepts that are of use when it comes to acting in the public sphere. As far as our idea of "law" is concerned – I should say "of law *as legislation*" in the modern sense as opposed to the concept of law that was in use at the time of the Twelve Tables, the barbaric laws or even Louis the Fourteenth's ordinances – a clear turn is taken with Hobbes,

whatever else he wrote and in whatever larger framework he has inserted this specific concept. My concern, therefore, was his legacy to our collective understanding of written law. In this regard, I saw Hobbes as more than someone living a mere *vita contemplativa*, if there is such a thing. Maybe this is because a successful political philosopher is never exactly that: she lives at the perilous crossroads between *vita contemplativa* and *vita activa*. She contemplates political action and, based on what she sees, she prescribes certain changes to it. This is, to my mind, the *locus* of political philosophy, which renders inapplicable, in its case, any clear-cut opposition between "describing" and "prescribing", and between "descriptive" theory and "normative" theory. Moreover, Hobbes belongs to the rare category of men who have been able to give shape to the actions of others, to create a certain human practice grounded in a certain conceptual framework. What I have focused on in the book is how he has framed this "public" or "concrete" concept of legislation concept which covers so well our own intuitive understanding of statute law. I have not ventured beyond that point, as my purpose was not to write a chapter on Hobbes' legal philosophy. I may have been wrong and Poole is right to call me to account.

Will and reason

Hobbes' understanding of legislation can certainly be understood in the light of the interaction between will and reason. It is because of a requirement of natural reason that men leave the state of nature and enter civil society. It is a law of nature – that is, according to Hobbes, of natural reason (Hobbes 1991, *De Cive*, XIII, 275) – that enjoins men to have a sovereign. And the same law of nature "commands us to keep all the civil laws" (*ibid.*, 278).

Sovereignty – the first mark and exercise of which being lawmaking, which consists in manifestations of the legislator's will – is thus a requirement of reason. It is reason that makes us conform to a certain political arrangement – civil society - into which we obey the will of the sovereign, as expressed primarily by way of legislation. This arrangement is based on a submission of the subjects' will to the will of the "common power" and "their judgments to his judgment". Therefore "Authorization" requires a process by which certain wills submit to one will only – the sovereign's - and certain private reasons give precedence to the newly established public reason. The scope of this newly formed power extends to "opinions and doctrines", which includes the meaning of civil laws. Law is command. This concept of law as command unites reason and will: "command is where a man saith, Doe this or Doe not this, without expecting other reason than the will of him that sayeth it" (Hobbes 1996, 176). The only reason subjects have for acting in accordance with the law is that to do so is to act in keeping with the sovereign's will.

Reason also plays a decisive role in "government", by which Hobbes means both "the [political] power" as such and the way it is exercised ("the administration" or "the actions and motions of a commonweal"). The state is, in Hobbes' own words, an *imperium rationis* (Hobbes 1983-2004, 171): a "dominion of reason", or maybe a "rational dominion"."[2]. The core of Hobbes' argument seems to be that the stronger and more unified the sovereign's will happens to be, the more rational the government will become.

Therefore, if as Poole says, "Hobbes expects the sovereign to act rationally, most obviously in the exercise of its legislative

[2] One can also perfectly well translate the same Latin expression, as did Samuel Sorbière in his French translation, as "[a state] where reason exercises its empire" (Hobbes 1993, 195).

capacity", this requirement is best satisfied in a State where sovereignty is properly established and where the will of the sovereign prevails (Hobbes 1996, 227-8). Will and reason are not incompatible and they are not even really in tension. The requirement of rationality is not absent in Hobbes' frame of government but it can only be satisfied if and when the sovereign's will has been given pride of place. It is reason itself that prescribes that the sovereign's will be obeyed, and that this will should express itself in the best possible form. The formal requirement that lawmaking is subjected to are, to sum up, those dictated by the need for the sovereign's will to be cognoscible: "by word, writing, or other sufficient sign of the will" (*ibid.*, 183). For instance, as there is only one person in command, "the most absolute monarchy is the best state of government" (Hobbes 1991, 233). Hence the disqualification of deliberation as the preferable mode of identifying "all things conducive to the preservation of a commonweal": in great assemblies men, "though they reason, yet take they not their rise from true principles, but from vulgar received opinions (…)" and they fail to "fit their speech to the nature of the things they speak of". When government is left to such assemblies, the quality of legislation is impaired (*ibid.*, 232).

The sovereign's will and his reason thus tend to converge. They are not far from being one and the same thing. In the *Dialogue of the Common Laws of England*, the philosopher insists that "the King's reason, when it is publicly upon advice, and deliberation declared" that is, when it takes the form of a law, "is (…) *anima legis*" (Hobbes 1997, 17). The philosopher also emphasizes that the king should be both supreme judge and supreme legislator, as otherwise "there would be no congruity of judgments with the laws" (*ibid.*, 28). This convergence of will and reason is not however, perfect, and their conceptual relation is not one of equality or equivalence. Certainly, in the Hobbesian framework, reason is not allowed to reign supreme, either in the form of every subject's natural reason (as

this would entail disobedience and civil war) or in the form of Coke's artificial reason of the law. In the commonwealth, the sovereign's will should prevail, and his natural reason should trump the subjects' "private reason" *because* he acts as the ruler in the kind of arrangement that Hobbes recommends, and not because of some inherent qualities pertaining to his rational faculties: "Law, for Hobbes, provides a *public reason*, authoritative over the private reason of each individual" (Gauthier 1993, 326).

Sovereignty is the political model in which the reason of the ruler prevails absolutely: "it is not that *juris prudentia*, or wisedom of subordinate judges, but the reason of (…) our artificial man the commonwealth, and his command, that makes law" (Hobbes 1996, 187). The very nature of the sovereign is such that his own reason is identified, in the frame of government, as "reason" itself, or "right reason". Individual reason should give way or should aim at understanding what the sovereign meant in his laws. Legal rationality becomes an exercise aiming at clarifying the content of the sovereign's will: "law can never be against reason" so understood (*ibid.*, 186).

This primacy of the sovereign's reason is not entirely separable from the superiority granted to his will because of his being chosen as sovereign. And this is in turn related to the role Hobbes ascribes to rights in his entire system. Hobbes' state is not entirely rational insofar as it is founded on "rights, not reason" (Strauss 1963, 106). The state, as well as law and morality, is based on "a natural claim" and therefore not on a natural (i.e. rational) obligation. There is an inherent limit to the authority of reason, both in the natural and in the civil sphere. Reason cannot govern us entirely, and civil law is something else than right reason or the perfection of reason. It is based on the superiority of the sovereign's rights over that of individuals', on the corresponding superiority of his will over theirs, and thus on the acknowledgment of a certain degree of

arbitrariness. Hobbes' jurisprudence is one that sets out the proper limits of reason in the civil sphere.

Hobbes and modern legislation

This may indicate an important reason why Hobbes was a framer of our formal pattern of legislation but has not influenced, with the egregious exception of the need to legislate for safety and preservation, the *substance* of our legislative agenda. Hobbes was "consciously setting aside the content of religious and political projects" and did not "question the *legibus speciatim* but the *quid sint leges*" namely "not the content of the laws …but their function" (Koselleck 1979, 29). The reason may lie in the way Hobbes envisages law – and more generally "the businesse of a Commonwealth" (Hobbes 1996, 180) – as aiming at "peace, "justice"" and "defence" (Hobbes 1997, 56-7). While he also envisages that laws aim at "safety and well being" and "preservation and improvement" (*ibid.*, 9-10), the weight of the structure he has built leans heavily in the direction of preservation and peace. Hobbes' framework does not appear to be built for a developed elaboration of the relation between the content of the laws and the development of individual and collective well-being. Hobbes' concept of welfare[3], and his correlative idea of government remain in the orbit of his overarching concern for violence, death, and war in the "present world" (*ibid.*, 58).

While England, during Hobbes' lifetime, has known a flurry of legislative innovations in many fields, he seems indifferent to them. This is not to say, however, that there is not already in his writings a lot of what will later give rise to an important theme of *Penser la Loi*: namely, the empirically-based government of conduct by way

[3] Hobbes 1997, 61. "Welfare" means to be "defended from (…) domineering", protected from "destruction" arising from civil wars and factions, etc.

of legislation. Hobbes says important things to this regard, as when he famously states that "the common-people's minds (…) are like clean paper, fit to receive whatsoever by public authority shall be imprinted on them" (Hobbes 1996, ch. XXX, 233). Also, Hobbes makes clear that law, being made of commands and thus relying on obedience, governs outer actions and not conscience: "if the law is declared [the subject] undertakes to obey it [is bound] to obey it, but not bound to believe it". There is at least, thus, to be found in Hobbes the skeleton of the pattern of "government of conduct" that will develop at a later stage (*ibid.*, ch. XXVI, 198). But his insistence on the making and operating of sovereign power severely restricts the possibility for him to anticipate the future of the legislative state.

Judges

Hobbes' expectation that government should be rational, says Poole in his review, "is reinforced by the judges" who act as "independent-minded" interpreters of the sovereign's law, "adept in moral reasoning" and are expected to bring in reason in that process by way of their command of "equity", that is of natural reason". This is absolutely correct. Yet this does not detract from the fact that, in English law, the king is (or, rather, says the *Phylosopher,* "should be") both "sole legislator" and "supreme judge" (Hobbes 1997, 68) while subordinate judges are only "secondary causes" by which he acts indirectly: "all judgments and wars depend upon the will and pleasure of him who bears the supreme authority" (Hobbes 1991, *De Cive*, 238, 258).

As I said earlier, Hobbes' jurisprudence is first and foremost one that sets out the proper limits of reason in the civil sphere. One should not present the judges as guardians of an absolute reason that could have precedence over that of the sovereign.

Hobbes' state is not one where reason *as such* reigns supreme. In his jurisprudence, reason, justice and equity, are redefined in such a way as to prevent this from happening, or else all would be lost: "the king's reason, when it is publickly upon advice, and deliberation declared, is that *Anima Legis*, and that *Summa Ratio*, and that equity which all agree to be the law of reason (…)" (Hobbes 1997, 62). It is central to what Hobbes does in this regard that he retains the concepts of his predecessors and adversaries but redefines them. And he does so in such a way as to make them become nearly synonymous. For instance, Hobbes' 'equity' is not, as it is in English law, a body of rules distinct from the common law. Equity is "the king's reason". And, as far as customs are concerned, "the judgement of what is reasonable (…) belongs to him that maketh the law" (Hobbes 1996, ch. XXVI, 184-5). The existence of the commonwealth transforms the evaluative concepts of moral philosophy ("equity, justice, gratitude, …") into legal concepts of which the scope and content are determined by the sovereign. This is one of the reasons why "the law of nature and the civill law contain each other" (*ibid.*).

The rational structure of the state is, as we have seen, based on the will of the sovereign, and so is civil law. Laws are a "certain rule" by which the sovereign "hath declared (what) he would do" (Hobbes 1991, 246). Civil law is *his* law: "the command *of him* (…) who is endued with supreme power in the city" (*ibid.*, 274). The rationality of law is thus dependent upon the sovereign legislator's will (in lawmaking) and then upon his natural reason: "they seem to have looked very shallowly into the nature of government, who thought that the constraining powers, the interpretation of laws, and the making of laws, all which powers necessarily belonging to government, should be left wholly to the laws themselves" (*ibid.*, 247). A government of law is always a government of *someone's* laws: "When by any law the judges sit upon the life of a subject, the question is not whether the magistrate could by his absolute right

deprive him of his life; but whether by that law his will was that he should be deprived of it (…) However, by the ambition of lawyers, it is so ordered, that the laws to unskillful men seem to not to depend on the authority of the magistrate, but their prudence" (*ibid.*, 247-8). However, as Hobbes also says in the Latin version of the *Leviathan*: "It is not the prudence of subordinate judges, but that of the city, that is of he who has supreme power in the city, that makes the prudence of laws"[4].

Therefore the "prudence of the city" always supersedes that of individual judges, however skilled in equity they may appear to be. And if judges are to interpret laws, they can only do so as "authorized by the sovereign" (Hobbes 1997, 193). In the process of adjudication, the working of reason itself is submitted to the logic of sovereignty. This is clearly laid out in the *Dialogue of the Common laws*: "there is not among men a universal reason agreed upon (…)" besides that of the sovereign, as though "his reason be but the reason of one man, yet it is set up to supply the place of universal reason". And, as a result, "in all controversies, judicature belongeth to the king" who his "supreme judge" (*ibid.*, 67-8, 77). Equity itself is nothing else but "the reason of the sovereign". The subordinate judges' equity is guided by this sovereign reason, as "the intention of the legislator is always supposed to be equity" (*ibid.*, 194). Judges as "equity experts", in the Hobbesian model, are versed into understanding the sovereign's reason and how he has expressed it in the laws he has enacted. They are those who can ascertain "what will be commanded us" (Hobbes 1991, 278).

[4] « *Non ergo judicum subordinatorum, sed civitatis, id est, ejus qui habet in civitate summam potestatem, prudentia prudentiam facit legis".* Hobbes 1966, III, 199.

Legislation and interest

While I do not deny that some of Poole's other criticisms are certainly justified – for instance the insufficient interest I have paid to Victorian legislation[5] – I would wish to enter a plea of not guilty on the charge of failing to "notice the importance of the concept of interest". Poole's paragraph on the role of the concept of interest in the larger history of legislation is very illuminating. Yet I would submit that, while *Penser la loi*'s account of the intellectual history of legislation is indeed not one that is centered on that concept, the book does not fail to take notice of it. In the *Introduction*, I point to the role of legislation as a mediator between diverging interests in modern society (Baranger 2018, 12). The book also refers to the various uses of the concept of interest in the French Enlightenment from "*intérêt commun*" (*ibid.*, 58) to "*intérêt general*" (*ibid.*, 116). Indeed, the chapters on Rousseau insist on his critique of the "*société commerçante*" and its misguided focus on self-interest (see *ibid.*, 129). Conversely, I do not fail to identify the empiricist version of the sciences of legislation as one that is based on self-interest (*ibid.*, 148). This is for instance one of the main themes I identify in the writings of Helvétius (*ibid.*, 190) or Beccaria (*ibid.*, 216). And of course, I have insisted on the role of interest in Bentham's thought. The chapters devoted to Bentham contain a relatively detailed analysis of his concept of interest, as in the expression "duty and interest" that appears frequently in his writings (see *ibid.*, 208 and also 227, 245, etc.). I also analyze the role of interest in the "felicific calculus" (*ibid.*, 223f) and I comment on Bentham's famous phrase that "individual interests are the only real interests" (*ibid.*, 225f and esp. 227), and his concept of "sinister interests" is examined in the following chapter (234f). The book also points to Bentham's approach in terms of an artificial

[5] I might plead that this period was not included in my period of reference, although I acknowledge it would have been justifiable for me to do otherwise.

harmonization of interests, etc. Finally, there is a discussion of the role of interest in Adam Smith's "art of the legislator" in the book's final chapter (see *ibid.*, 292f). There are many more references to interest in the book and it is probably not necessary to take an inventory of all of them. But in any case, I am far from denying, as Poole seems to think, that the concept of interest has played a significant role in the history of legislative ideas.

Yet what *Penser la Loi* does is to incorporate interest in a conceptual framework which, I would hope, better explains the rise of modern legislation. As such, it does not focus on interest in the same way as, for instance, Knud Haakonssen's remarkable *Science of a Legislator* (Haakonssen 1981). The reason is that, however valuable Haakonssen's book was, it was not so much – despite its title – a work on legislation as one concerned with the moral theories and the theories of justice of certain important Enlightenment philosophers such as Hume and Smith. While they insisted on interest and sympathy in their account of justice, one had to explain in what way this account contributed – if at all - to our "public" and "concrete" concept of legislation (to use the two adjectives I have suggested earlier). This is what I have tried to achieve and this is why, inasmuch as I take interest into account, I have incorporated it into a larger theme which is not so much "reason" as *rationality*. Self-interest is a horizon of individual rationality. The sciences of legislation offer a model of legislation that uses our tendency to pursue our own interest with a larger purpose which is to maximize collective utility. In fact, in order to do so, they try to induce men to seek their self-interest. This is what *Penser la Loi*'s chapter 11 on Bentham's "Crusade against the Irrational" has tried to show. The utilitarian model treats men as insufficiently rational agents – that is: agents insufficiently pursuing their self-interest. The utilitarian model of legislation tries to mould individual behavior according to that pattern. This is what Bentham's *Complete Code of Laws* – which breaks down into a myriad

of special codes applicable to certain types of individuals engaged in various activities – achieves. Hence also Bentham's concern with formal values such as the law's "cognoscibility", its previsibility, etc.

This is also what I have tried to show in chapter 15 ("*La Cécité des Libéraux*"). If I blame the classical liberals for a certain degree of "blindness" (*cécité*), this is precisely because they seemed to think that self-interest would be strong enough a force to build the kind of society they supported: an individualistic and commercial one, based on a market economy and a concern for individual liberty. This concern is in a sense misleading as this model – which is also the model of the *homo economicus*, primarily concerned with the fulfillment of his self-interest – requires a great deal of collective management and a substantive law that seems to infringe upon individual liberty in order to encourage the agents' pursuit of their self-interest. If there is one single idea I have tried to emphasize in *Penser la loi*, it is this one: it took a great deal of legislation – and therefore a strong state – to bring about our liberal, capitalist and individualistic society. It took more laws, and not less.

Université Panthéon Assas Paris II

Institut Michel Villey

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