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The Provision of Law and Order in Political Theory

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(Draft)

“[The State] forbids private murder, but itself organizes murder on a colossal scale. It punishes private theft, but itself lays unscrupulous hands on anything it wants, whether the property of citizen or alien”.¹

1 The Rise of the Sovereign State: The Borders for Law and Order

The first myth one has to debunk in order to fully evaluate the relationship between the provision of law and order and the rise of the (modern) State is that this political institution is merely a natural and organic outgrowth of political power, as old as the history of mankind, or of organized societies. Actually, we should immediately dispose of the qualifier modern, because of its pleonastic sound: the State is only modern.² Whether we see its cradle in the Italian system of States after the Peace of Lodi (1454), or in western Europe

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¹ Albert J. Nock, *On Doing the Right Thing, and Other Essays*, (New York: Harper and Brothers, 1928), p.143.

² On the modernity of the State one of the best single book account is still Charles Tilly, ed., *The Formation of National States in Western Europe*, (Princeton: Princeton University Press, 1975). There is an immense body of scholarship on the subject, dating back to the early 20th century. Not surprisingly, most of the literature comes from the German-speaking world (Carl Schmitt, Otto Brunner, Otto Hintze, just to quote the most famous authors), and it can be considered a reaction against the work of the previous generation. It was in fact the somewhat unconscious and hidden “research program” of the German jurists of the 19th century (George Waitz, Max von Seydel, Paul Laband) to consider any form of political association a “State”. Unfortunately, most of the scholars of ancient history, and even some modern historians are not yet familiar with the broad consensus on the “modernity” of the State. Some of them talk carelessly about “sovereignty” in ancient Greece, or the birth of the “archaic State” in Mesopotamia. It is not totally their fault. As we noticed, this tradition has a long history: It has been part of the dream and the illusion of *jus publicum europeum* to call State any form of political association, jurist any political thinker, and to pigeonhole in the sovereignty paradigm every political community.

(Spain, France and England) in the 16 hundreds, one thing is for sure: “It gradually emerged in the course of the fifteenth and sixteenth centuries and found its first mature form in the seventeenth”.³ After a summary of the chief traits of the State - organization, sovereignty, coercive control of the population, centralization and the like - Gianfranco Poggi affirms: “strictly speaking the adjective ‘modern’ is pleonastic. For the set of features listed above is not found in any large-scale political entities rather than those which began to develop in the early-modern phase of European history”.⁴

The second myth we must immediately dispose of is the belief, shared by almost all historians, that the rise of the State significantly contributed to the general cause human liberty, in other words, that it has been a “progressive factor” in the history of mankind. It must indeed be seen as a revolution that upset the old order, granting privileges, immunities and rents for some and destroying them for the rest of society. “The European State-makers engaged in the work of combining, consolidating, neutralizing, manipulating a tough, complicated, and well-set web of political relations. ... They had to tear or dissolve large parts of the web, and to face furious resistance as they did so”.⁵

Liberty, as well as law and order, was guaranteed and secured, and in some cases much better, at different stages of European history, when a monopoly of violence over a given territory was simply out of reach, either by means of thought or by institutional developments. Although we are here primarily concerned with the State provision of law and order, one must never forget that the self-governing communities of the Middle Ages, in Northern Italy and central Europe, offer significant examples of a totally different way of guaranteeing peace and security to its members.

³ Heinz Lubasz, “Introduction”, in Heinz Lubasz, ed., *The Development of the Modern State*, (New York: Macmillan, 1964), p.1.

⁴ Gianfranco Poggi, *The State. Its Nature, Development and Prospects* (Stanford: Stanford University Press, 1990), p.25.

⁵ Charles Tilly, “Reflections on the History of European State-making”, in Charles Tilly, ed., *The Formation of National States in Western Europe*, pp.24-25

In the golden age of communal liberty (which lasted in most parts of Europe until the 15th century, but in certain areas, like Switzerland, much longer) merchants and citizens formed their own statutes regulating passage, immigrations, exchanges, in short everything related to self-government. During these times there was no clear-cut definition of power over a given territory, as there were no borders in the modern sense. An institutionalized power had always an antagonistic counter-power claiming allegiance from the same subjects. The result was that every medieval power was actually nothing more than a claim, subject to be opposed and contained in an institutional network of competing requests. The predatory effects of political power on the citizens were minimal (compared to other areas of the globe or to what happened later in the same continent) and in any case the citizens always retained their exit right. This right kept a check on political power and is singled out by many authors as one of the primary causes for the development of a “limited territorial predator” in the West.

Meanwhile there was no single source of law and order: the production of security was never considered a distinct institutional affair, but rather a concern of the whole society. For several centuries, customs, traditions and ancient roman laws, worked together in assuring a juridical order. Law in the Middle Ages was a way of resolving conflicts, but it was kept a more or less private business. There was no organic conception of the “social body”, so that a crime remained a private matter, to be taken care of with well-defined rules. In other words, a crime was never considered a social problem, a wound inflicted against the collective body. This, in turn, implied that the victims were always the center of any lawsuit; the redress was always done from the point of view of the victims, never of a supposed collectivity.

Even when feuds broke out, which was a quite common thing, the families involved were asked to re-establish the public peace, but very seldom the perpetrators of crimes were punished once peace was restored.

In a peculiar sense words, as crystallized ideas, have consequences: The medieval period is definitely over when, at the end of a long gestation, the word “State” is used in the modern sense by the political thinker Niccolò Machiavelli. The great Florentine, in fact states right at the beginning of his most famous work, *The Prince*: “All the states, all the dominions under whose authority men have lived in the past and live now have been and are either republics or principalities”.⁶ And the emergence, in political theory, of the cluster of ideas associated with the State is largely a Machiavellian legacy. As George Sabine put it: “Machiavelli more than any other political thinker created the meaning that has been attached to the state in modern political usage. Even the word itself, as the name of a sovereign political body, appears to have been made current in the modern languages largely by his writings”.⁷

However, in Machiavelli we find little concern for the public peace, tranquillity and security of the citizens. When the word security (*sicurtà*) is used, it is always in reference to the Prince’s possessions: “Among kingdoms which are well organized and governed, in our own time, is that of France: it possesses countless valuable institutions, on which the king’s freedom of action and security depend”.⁸ For our purposes, Machiavelli is important because - although a “republican” - he saw the king and the kingdom as the protagonists of a new era.

From the 16th century it was, in fact, up to absolutism to develop this notion of the organization of power through an artificial person, the State. The novelty of such a political

⁶ Niccolò Machiavelli, *The Prince*, (1516) translated with an introduction by George Bull, (Penguin Books, London: 1961), p.33

⁷ George H. Sabine, *A History of Political Theory*, (New York: Henry Holt, 1937), p.351

⁸ Niccolò Machiavelli, *The Prince*, p.105.

creature was that the entire political reality was reshaped through offices, entities, and laws. The new body politic transcended individuals as well as sovereign, it did not represent anybody, it simply existed and it was nurtured by myths produced by historians as well as politicians, first and foremost the myth of having always existed.⁹ As Luhmann has noted: “Following the proclamation of the sovereign State, especially in France during the second half of the 16th century, historians went to work. The present needs a past adaptable to it.”¹⁰

In this context of political modernity the problem of law and order arose as a specific State problem. The first and foremost duty of the State towards its subjects became the provision of security. Or, to be less naive,

The State has arrogated to itself a compulsory monopoly over police and military services, the provision of law, judicial decision-making, the mint and the power to create money, unused land (“the public domain”), streets and highways, rivers and coastal waters, and the means of delivering mail. (...) But, above all, the crucial monopoly is the State’s control of the use of violence: of the police and armed services, and of the courts - the locus of ultimate decision-making power in disputes over crimes and contracts.¹¹

1.1 Modern Political Thinkers: Sovereignty as Security

The rise of the centralized State apparatus that practically claimed a monopoly of the (legitimate) use of force within a given territory went hand in hand with the intellectual

⁹ One need only to think of the Latin phrase “ubi societas, ibi jus” (which clearly means that were there is organized society there must be some rules and nothing else) that is still translated by many jurists as “where there is a society there must be a State”. Most notably, the entire political works of Aristotle have been read using categories borrowed by the theory of sovereignty and the (modern) State. This timelessness notion attached to the State is also a peculiar aspect of the secularization of theological concepts. As Carl Schmitt put it: “all significant concepts of the theory of the modern state are secularized theological concepts”. Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (Munich: Duncker & Humboldt, 1922), p.49.

¹⁰ Niklas Luhmann and R. De Giorgi, *Teoria della Società* (Milano: Angeli, 1994), p.183.

¹¹ Murray N. Rothbard, *The Ethics of Liberty*, New York, New York University Press, 1998 (1982), p.162.

pursuit of describing such a novelty. “The *plenitudo potestatis* became the goal towards which the kings moved consciously. To reach it, a long road stretched before them, for it was necessary to destroy all authorities other than their own. And that presupposed the complete subversion of the existing social order. This slow revolution established what we call sovereignty”.¹²

The French thinker Jean Bodin in the late XVI century attempted to validate the power of the king against any other claim, and produced a work, which is considered the starting point for any history of “sovereignty”. The ruler was offered the gift of a totally new concept: that of the absolute authority over his kingdom, subject only to the divinely ordained natural laws. But, of course such an innovation had to be tailored in old clothes. “Sovereignty is the absolute and perpetual power of a commonwealth, which the Latins called *maiestas*; the Greeks *akra exousia*, *kurion arche*, and *kurion politeuma*; and the Italians *segnioria* [*signoria*] ... while the Hebrews call it *tomech shévet* - that is, the highest power of command.”¹³

His intellectual efforts, coupled with the institutional developments that were taking place in Europe at the time, brought about a break with the medieval political tradition. In relation to well known historical events (Bodin was writing in a period of intense religious conflicts in France, at the height of the religious wars that almost destroyed the country) and addressing social, cultural and political needs of his times, the French thinker “discovered” the notion of sovereignty and associated it with an institutionalized reality. Sovereign authority became the absolute power of the State, neither temporary, nor delegated, nor answerable to any particular power on earth. The only limitations to the power of

¹² Bertrand de Jouvenel, *Sovereignty. An Inquiry into the Political Good*, translated by J.F. Huntington, foreword by Daniel J. Mahoney and David Des Rosiers (Indianapolis: Liberty Fund, 1997) p.208. The first French edition (Génin: Paris) was published in 1955.

¹³ Jean Bodin, *On Sovereignty. Four chapters from The Six Books of the Commonwealth*, edited and translated by Julian H. Franklin (Cambridge: Cambridge University Press, 1992), p.1. The book first appeared in 1576, but modern translations rely on the 1583 edition.

sovereignty were the laws of God and Nature. There is no place for anything like a concurrence of the subjects in determining the course of the sovereign because, “La souueraineté n’est limitée, ny en puissance, ny en charge, ny à certain temps ... le point principal de la majesté souueraine ... gist principalement à donner loy aux sugets en general sans leur consentement”.¹⁴

But what is it there to perform? The first duty of the sovereign power is to find solutions for conflicts naturally generating within society. The first task is to show that the forces, which generated the conflict, are unable to provide any solution to it. Once this is accepted, and since a permanent state of war is intolerable, it follows that the rational deduction of “summa potestas” becomes a self-evident necessity.

At the meantime the sovereign need not be an extraordinary gifted man. Here we see the modernity of Bodin vis-à-vis Machiavelli: the only important thing is that someone has the power to decide for everybody without restrictions. The logical functions attributed to the sovereign power, and not the qualities of the prince, will render his actions just and fortunate. It is the birth, in political thought, of the institutional reality.

Some contemporary political philosopher’s far-reaching vision notwithstanding,¹⁵ sovereignty remains very much a State concept, as in the days of Charles L’Oyseau who stated: “Sovereignty is entirely inseparable from the State. ... For sovereignty is the form which causes the State to exist; indeed, the State and sovereignty in the concrete are synonymous. Sovereignty is the summit of authority, by means of which the State is created and maintained”.¹⁶

¹⁴ Jean Bodin, *Les six livres de la Republique* (Paris: Jacques du Puys, 1577), I, 8.

¹⁵ “I now accept ... that the link between the two [State and sovereignty] can and must be severed, and that, when this is done, the concept of sovereignty can be reformulated and reclaimed”. John Hoffman, *Sovereignty* (Minneapolis: University of Minnesota Press, 1998), p.2.

¹⁶ Charles L’Oyseau, *Traicté des Seigneuries* (Paris, 1609), p.24, quoted in Bertrand de Jouvenel, *Sovereignty*, p.215.

It was up to Thomas Hobbes to reinterpret the same category discovered by Bodin, in times of social and political strife for England that parallel those in which the French thinker wrote. As Hoppe aptly put it: “the myth of collective security can also be called the Hobbesian myth. Thomas Hobbes, and countless political philosophers and economists after him, argued that in the state of nature, men would constantly be at each other’s throats. *Homo homini lupus est*. Put in modern jargon, in the state of nature a permanent underproduction of security would prevail”.¹⁷

Hobbes accentuated the institutional characteristics of the sovereign power, as well as the necessity of preserving the public peace (in fact, the only times when the citizens *seem* to have some rights vis-à-vis the sovereign is when the latter does not perform his duty to provide law and order). The supreme power (be it vested in an omnipotent assembly or a king) has a right to the obedience of its subjects.

And because the End of this Institution is the Peace and Defence of them all [the citizens], and whosoever has right to the End has right to the Means, it belongeth of Right, to whatsoever Man, or Assembly that hath the Sovereignty, to be Judge both of the meanes of Peace and Defence, and also of the hindrances and disturbances of the same; and to do whatsoever he shall think necessary to be done, both beforehand, for the preserving of Peace and Security, by prevention of Discord at home, and Hostility from abroad; and when Peace and Security are lost, for the recovery of the same.¹⁸

The great antagonist of Hobbes, in 17th century England was John Locke. As far as we are concerned in this introduction only one difference must be kept in mind: Hobbes defends government as a peacemaker, Locke as a rights-protector.¹⁹ His concept of the State as a manmade artifact for the protection of life, liberty and estate, (in a word *property*) puts him in a different class of thinkers. The State is still the provider of law and order, and social peace; however it is limited by several constraints: In the first place, the protection of the

¹⁷ Hans-Hermann Hoppe, *The Private Production of Defense*, Auburn, Ludwig von Mises Institute, 1999, p.1.

¹⁸ Thomas Hobbes, *Leviathan*, (1651), edited and with an introduction by Crawford B. Macpherson, (Penguin Books: Harmondsworth, 1968), pp.232-33.

individual's natural and inalienable rights. This is the peculiar Lockean notion of law and order: property (i.e. the sum of the individual rights in the state of nature minus the individual right of self-defense which is to be forfeited upon entering into civil society) must be guaranteed by the State monopoly of force. However obedience is not granted unconditionally:

The reason why men enter into society is the preservation of their property; and the end while they choose and authorise a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the society, to limit the power and moderate the dominion of every part and member of the society. For since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which every one designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making: whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge which God hath provided for all men against force and violence.²⁰

The intellectual pursuit of an almost non-sovereign State, or at least of a limited State, constrained by consent and natural rights, which is actually what the work of Locke is about, gave birth to the traditions of classical liberalism and constitutionalism.

But the quest for sovereignty of the body politic did not end with the Locke's *Second Treatise*, which actually was of little importance at the time, and went almost unnoticed. For Jean Jacques Rousseau sovereignty resides in the general will and accordingly individuals must be forced to be free. In the *Social Contract* (1762), he wrote:

In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free; for this is the condition which, by giving each citizen to his country, secures him against all personal dependence. In this lies the key

¹⁹ Considering how in the past three centuries States have managed to maintain peace and protect individual rights the failure of both the Hobbesian and Lockean framework must be acknowledged.

²⁰ John Locke, *Two Treatises of Government*, edited with an introduction and notes by Peter Laslett, (Cambridge: Cambridge University Press, 1988), p.412. Although published anonymously in 1690, this work was actually written almost a decade earlier, as Peter Laslett has definitely demonstrated, and thus it cannot be considered a rationalization of the "Glorious Revolution" and the triumph of the bourgeoisie, as the Marxist school has always maintained.

to the working of the political machine; this alone legitimises civil undertakings, which, without it, would be absurd, tyrannical, and liable to the most frightful abuses.²¹

In spite of the war on individuality declared both by Rousseau and his Jacobin followers, classical liberalism did not completely die out on the continent. Frédéric Bastiat in the middle of the 19th century was one of the few political theorists to revive the natural rights tradition. In a famous pamphlet he stated that:

Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place. ... What, then, is law? It is the collective organization of the individual right to lawful defense.

Each of us has a natural right - from God - to defend his person, his liberty, and his property. These are the three basic requirements of life, and the preservation of any one of them is completely dependent upon the preservation of the other two.²²

Just a year earlier another French economist, Gustave de Molinari, published an article in the *Journal des économistes*,²³ which for the first time challenged the State in its most vital monopoly function: the production of security.

Molinari begins by quoting Dunoyer, a classical liberal who believed that a State monopoly on law and order was a necessity: “Un des économistes qui ont étendu le plus loin l’application du principe de liberté, M. Charles Dunoyer, pense «que les fonctions des gouvernements ne sauraient jamais tomber dans le domaine de l’activité privée»”.²⁴ And then he poses the crucial question: “Mais quelle est la raison d’être de l’exception relative à la sécurité? Pour quelle raison spéciale la production de la sécurité ne peut-elle être abandonnée à la libre concurrence? Pourquoi doit-elle être soumise à un autre principe et organisée en vertu d’un autre système? Sur ce point, les maîtres de la [economic] science se

²¹ Jean Jacques Rousseau, *The Social Contract and Discourses*, translated with an introduction by G. D. H. Cole (New York: Everyman’s Library, 1950), p.18.

²² Frédéric Bastiat, *The Law and Clichés of Socialism*, (Whittier: Constructive Action, 1964), p.10. *La Loi* was first published in June 1850 as a pamphlet.

²³ Gustave de Molinari, “De la production de la sécurité”, *Journal des économistes*, VIII, March 1849, pp.277-290. This article has been translated by J. Huston McCulloch, “The Production of Security”, (New York: The Center for Libertarian Studies, 1977).

taient, et M. Dunoyer, qui a clairement signalé l'exception, ne recherche point sur quel motif elle s'appuie".²⁵ Molinari's argument for freedom is simple and very appealing:

Il répugne à la raison de croire qu'une loi naturelle bien démontrée comporte aucune exception. Une loi naturelle est partout et toujours, ou elle n'est pas. Je ne crois pas, par exemple, que la loi de la gravitation universelle, qui régit le monde physique, se trouve en aucun cas et sur aucun point de l'univers suspendue. (...) Mais, s'il en est ainsi, la production de la sécurité ne doit pas être soustraite à la loi de la libre concurrence; et, si elle l'est, la société tout entière en souffre un dommage. Ou ceci est logique et vrai, ou les principes sur lesquels se fonde la science économique ne sont pas des principes.²⁶

His analysis goes on to show that there are two logical non-competitive solutions: monopoly (the old monarchy) and communism (that he believed was on the rise and gaining ground everywhere). If Communism will prove itself to be a good provider of protection, then it should work also in any other field of economics. "Communisme complet ou liberté complète, voilà l'alternative".²⁷

What if someone accepts neither monopoly nor communism? For these unlucky few there is only violence.

Monopoleurs et communistes ont, du reste, parfaitement compris cette nécessité. Si quelqu'un, dit M. de Maistre, essaye de se soustraire à l'autorité des élus de Dieu, qu'il soit livré au bras séculier, que le bourreau fasse son office. Si quelqu'un méconnaît l'autorité des élus du peuple, disent les théoriciens de l'école de Rousseau, qu'il soit puni comme criminel envers le peuple souverain, que l'échafaud en fasse justice.²⁸

Molinari ends his essays with a vision of a free society that even a century and a half later still inspires libertarians all around the world.

Sous un régime de liberté, l'organisation naturelle de l'industrie de la sécurité ne différerait pas de celle des autres industries. Dans les petits cantons un simple entrepreneur pourrait suffire. Cet entrepreneur lèguerait son industrie à son fils, ou la céderait à un autre entrepreneur. Dans les cantons étendus, une compagnie réunirait seule assez de ressources pour exercer convenablement cette importante et difficile

²⁴ Gustave de Molinari, "De la production de la sécurité", p.279. We take the liberty of quoting the original French version, as you are all familiar with the English translation.

²⁵ Gustave de Molinari, "De la production de la sécurité", p.280.

²⁶ Gustave de Molinari, "De la production de la sécurité", p.280.

²⁷ Gustave de Molinari, "De la production de la sécurité", p.284.

²⁸ Gustave de Molinari, "De la production de la sécurité", p.287.

industrie. Bien dirigée, cette compagnie pourrait aisément se perpétuer, et la sécurité se perpétuerait avec elle. Dans l'industrie de la sécurité, aussi bien que dans la plupart des autres branches de la production, ce dernier mode d'organisation finirait probablement par se substituer au premier. D'une part, ce serait la monarchie, de l'autre la république; ma la monarchie sans le monopole, et la république sans le communisme. Des deux parts ce serait l'autorité acceptée et respectée au nom de l'*utilité*, et non l'autorité imposée par la *terreur*.²⁹

2 The Contemporary Age and the Crisis of the State

2.1 Lessons from European Realism

The constitutionalist claim to justify the State's monopoly of violence has been refuted not only by the radical libertarian tradition (Molinari) or by individualist anarchists (Spooner). An important role in bring the modern State into perspective has also been played by European political realism and, in particular, by Carl Schmitt and Italian elitist scholars (Gaetano Mosca and Vilfredo Pareto).

Schmitt's importance rests very much on his intuition that in every State there is first a *political* dimension and then, a *decision*, which cannot be negated by the "impersonality" of law and the "super-individuality" of orders.³⁰ Beyond the apparent abstraction of the State (as described by Hans Kelsen and other positivists), Schmitt uncovered choices, interests and, in short, physical *people* that impose their *will* on others.

The constitutional thought of classical and modern liberalism has constantly tried to neutralize politics, but it has failed. In Schmitt's opinion, the real sovereign is the political

²⁹ Gustave de Molinari, "De la production de la sécurité", p.290. Hoppe recognizes the paramount importance of Molinari's vision in a recent critique of classical liberalism: "If liberalism is to have any future, it must repair its fundamental error. Liberals will have to recognize that no government can be contractually justified, that every government is destructive of what they want to preserve, and that protection and the production of security can only be rightfully and effectively undertaken by a system of competitive security suppliers. That is, liberalism will have to be transformed into the theory of private property anarchism (or a private law society), as first outlined nearly 150 years ago by Gustave de Molinari and in our own time fully elaborated by Murray Rothbard". Hans-Hermann Hoppe, "The Future of Liberalism. A Plea for a New Radicalism", *Polis*, 1, 1998, p.140.

group, which “has the decision about the critical situation, even if it is the exception”.³¹ The *locus* of sovereignty thus becomes the political entity (which in our time is the State), and the decision on the state of emergency is the ultimate test of sovereignty. Judicial positivism tried hard to refute the importance of this notion, but critical decision-making is paramount in the effective development of human relations.

Therefore, the “liberal” neutralization of politics (sought by classical constitutionalism) is impossible. When the State - *every* State - is recognized as a structure of decisions and an instrument of domination wielded by some *rulers*, political modernity displays itself with no clothes and one can understand the illegitimacy, as well as the irrationality, of the monopoly of protection.

There is nothing “neutral” or “innocent” in the power of a group of men that Italian elitists called the *ruling class*. Hobbes was wrong (as a philosopher) when he asserted that law comes from authority. However we can agree with political scientists using Hobbesian theory to point out that State decision was the result of certain conflicts of interests and opposing views. In statist societies, where law is totally controlled by a monopolist institution, it is force that dictates the law.

This is especially true in democratic countries, where social life is marked by the competition for the control of the political “center”, namely of the power to distribute resources, favors and privileges.

Schmitt’s critique of the hypocrisy of liberal democracy, are strongly confirmed by the analysis of Italian elitists. These thinkers were convinced that in every political system there is a small group of men (an organized elite) dominating the large disorganized mass. As Pareto noted, “the corruption of the parliamentary system meant that the interests of the

³⁰ See Carl Schmitt, *The Concept of the Political*, (1932) translation, introduction and notes by George Schwab, (Chicago: The University of Chicago Press, 1996).

³¹ Carl Schmitt, *The Concept of the Political*, p.38.

majority were seconded to the interests and passions of a small and highly organized group. These were ready to use any means to extend their influence and dominate the country”.³² For this reason, democracy existed only as a political ideology devoted to protect and legitimate the power of a minority capable of taking advantage of its higher organization.³³ In juridical and political philosophy, the hypothesis of a *neutral* State is often supported by the suggestion that this political institution is eternal. However, European political realism refused this arbitrary identification between State and politics. Social orientations generally support contemporary democracy, defining all forms of juridical organization as part of the all too encompassing category “State”. A major contribution of Schmitt was in his *historiography* of the State. He believed that the State is modern (and exclusively modern) and does not fill all possible political and judicial relationships.

For all these reasons, “European realism” has contributed to uncovering the falsehoods of constitutionalism, the conceptual frauds of democracy and the fallacious idea that State is an institutional reality as old as mankind. Schmitt understood some essential concepts of the present crisis of the State, but he did not identify a solution.

Another, more focused protagonist of “European realism”, the Lombard scholar Gianfranco Miglio, tried to overcome the contradictions of modernity. Indeed in some of his writings, he has explained and anticipated the crisis of the Soviet State model. This was the collapse of the modern political system which most believed in the rationality of orders imposed with violence. Given that the Soviet Union has broken up, Miglio asserted, the other State systems (especially the ones governed by democratic parliaments) would suffer growing criticism and dissent, and might also collapse in the near future.

The State is declining also because of its internal contradictions. In its attempt to appear as a non-aggressive provider of individual rights, the State has created a hypocritical

³² Vilfredo Pareto, *Libre-échangeisme, protectionnisme et socialisme* (Geneva: Droz, 1965), p.33.

contractualism, which is continually sapping its existence. From a theoretical point of view, as Miglio observed, “the modern State is a construction entirely based on the contract. It has extended into the non-political area of “private-life”. Therefore, the State is historically a complex of services and provisions, a gigantic entity of contractual relationships”.³⁴

In spite of this ideological self-representation, the democratic State is an illustration of violence and monopoly. It exists because it is the only institution, which is authorized to use force in any given territory. However, it is the very concept of *political obligation* that has lost strength and consistency, while the economy and communications are growing together with the rationality of free exchange, free markets and free discussions.

2.2 In Search of Libertarian Realism

The force of Miglio’s arguments comes from the fact that it brings together the *pars destruens* of European realism and the *pars construens* of American libertarian theories (although somewhat unconsciously). For Miglio, political communities are primary entities, while contemporary libertarians, as Rothbard, accept Molinari’s theory about the privatization of security and imagine a complete liberalization of law and order: “The State indeed performs many important and necessary functions: from provision of law to the supply of police and fire fighters, to building and maintaining the streets, to delivery of the mail. But this in no way demonstrates that *only* the State can perform such functions, or, indeed, that it performs them even passably well”.³⁵

³³ Gaetano Mosca, *Saggi politici* (Torino: Utet, 1980), p.621.

³⁴ Gianfranco Miglio, *Le regolarità della politica* (Milano: Giuffrè, 1988), p.757.

³⁵ Murray N. Rothbard, *The Ethics of Liberty*, (1982), (New York: New York University Press, 1998), p.161.

As such, Rothbard's demystification of the State is very interesting. In fact, he underlined a methodological integration of State and civil society and he pursued a *reductio ad unum* that eliminates every artificial border between men operating within the private and the public sectors. In his noted statement of the tenets of the libertarian creed, he asserted:

The libertarian refuses to give the State the moral sanction to commit actions that almost every-one agrees would be immoral, illegal, and criminal if committed by any person or group in society. The libertarian, in short, insists on applying the general moral law to everyone, and makes no special exemptions for any person or group.³⁶

For libertarians, it is impossible to accept this behavior if carried out by the lawmakers: It must be condemned exactly as when simple citizens act this way. Rothbard remarks that

All other persons and groups in society (except for acknowledged and sporadic criminals such as thieves and bank robbers) obtain their income voluntarily: *either* by selling goods and services to the consuming public, *or* by voluntary gift (e.g., membership in a club or association, bequest, or inheritance). *Only* the State obtains its revenue by coercion, by threatening dire penalties should the income not be forthcoming.³⁷

Albert Jay Nock analyzed the consequences of this situation in the 1930s. "Taking the State wherever found, striking into its history at any point, one sees no way to differentiate the activities of its founders, administrators and beneficiaries from those of a professional-criminal class".³⁸ When the modern State exercises a monopoly of violence and punishes criminal behavior committed by ordinary citizens, it must legitimize itself and its own criminal behavior. For the libertarians, Schmitt was right when he said that in societies controlled by the State there is always a *decisional* dimension (political and arbitrary) that nobody can ignore and no institution can eliminate.³⁹

³⁶ Murray N. Rothbard, *For A New Liberty. A Libertarian Manifesto*, (1973) (Lanham: University of America, 1985), p.24.

³⁷ Murray N. Rothbard, *The Ethics of Liberty*, p.162.

³⁸ Albert J. Nock, *Our Enemy, the State*, (1935), (San Francisco: Wilkes & Fox, 1992), p.22.

³⁹ The consequences of this analysis are that "the State is a coercive criminal organization that subsists by a regularized large-scale system of taxation-theft, and which gets away with it by engineering the support of the majority (*not*, again, of everyone) through securing an alliance with a group of opinion-moulding intellectuals whom it rewards with a share in its power and pelf"; Murray N. Rothbard, *The Ethics of Liberty*, p.172.

Murray Rothbard also accepted the main points of elitist realism. His opinion is that “the normal and continuing condition of the State is *oligarchic* rule: rule by a coercive elite which has managed to gain control of the State machinery”. His thesis is that another important argument “for the oligarchic rule of the State is its parasitic nature - the fact that it lives coercively off the production of the citizenry. To be successful to its practitioners, the fruits of parasitic exploitation must be confined to a relative minority, otherwise a meaningless plunder of all by all would result in no gains for anyone”.⁴⁰

So, Rothbard gave us a strong and logical justification of the fact that a minority controls the State. And he often used Oppenheimer’s distinction between *economic means* and *political means*:

There are two fundamentally opposed means whereby man, requiring sustenance, is impelled to obtain the necessary means for satisfying his desires. There are work and robbery, one’s own labor and the forcible appropriation of the labor of others. (...) I propose in the following discussion to call one’s own labor and the equivalent exchange of one’s own labor for the labor of others, the ‘economic means’ for the satisfaction of needs, while the unrequited appropriation of the labor of others will be called the ‘political means’.⁴¹

If the State exists to exploit the great mass of the population, then a small minority must control the “loot” of this act. It is here that libertarianism underlines the fragility of modern politics, often unable to justify the different conditions of the governing and the governed. It is obvious that this situation can only be justified by understanding the historical evolution of the State. It should be by now quite clear that this predominance has been imposed to the disadvantage of all types of social and institutional autonomy.

The solid realism of the libertarians helps us to understand the important link between their ideas and “European Realism”. The realists, following Schmitt, consider that sovereignty is “an abstract and impersonal concept totally estranged from reality as well as unknown by

⁴⁰ Murray N. Rothbard, *For A New Liberty*, p.50.

⁴¹ Franz Oppenheimer, *The State* (1924), (San Francisco: Fox and Wilkes, 1997), p.14.

medieval political doctrine”.⁴² Thus, there is nothing to be surprised by a stream of contemporary libertarian thought that is trying to re-establish a sort of pre-modern past, which the concept and the reality of State institutions tried to cancel.

It would be useful to look at the great historians of institutions to find the key to the rise of the State. In his studies on the “personal feuds” of medieval Germanic populations and the gradual abolition of this practice by institutions, Otto Brunner showed that the modern political-judicial “rationalization” implied firstly the disarming of citizens and also the creation of an increasingly armed bureaucracy. The disarming of individuals and the abolition of their possibility to act in self-defense of their own rights opened the way to the creation of a monopoly of legal production and of order which lead to the submission of the entire society.⁴³

What was this ancient “feud”? It was above all an action to correct a wrong and therefore was construed as a right. “The legitimacy of a feud depended above all on a Just claim; for feud and enmity were at heart a struggle for Right that aimed at retribution and reparation for a violation of one’s right”.⁴⁴ Within medieval judicial order and indeed within their institutions, “we see sovereigns and subjects declare war and conclude peace with each other “as if” [als ob] each were subject to international law”.⁴⁵

The feud was not an arbitrary initiative. Its essential presupposition was the *existence of a judicial foundation*. Without a wrong being committed, there was no feud, but simply brute

⁴² Pierangelo Schiera, “Introduzione” to the Italian translation of Otto Brunner, *Terra e potere. Strutture pre-statali e pre-moderne nella storia costituzionale dell’Austria medievale* (Milano: Giuffrè, 1983), p.XXIV.

⁴³ The English-speaking world has been very suspicious of both Carl Schmitt and Otto Brunner, in part because of their intellectual ties with the Nazi regime, so that serious studies of their theories begun quite late compared to other western countries like Italy and France. The 1939 edition of Brunner’s *Land und Herrschaft*, for instance, is full of “Volksgeschichte”, “Volksordnung”, and nazi jargon; however in 1959 he “cleaned up” his book and published a quite denazified fourth printing. The English and Italian translations were based on the 1965 expanded edition. See Otto Brunner, “*Land*” and *Lordship: Structures of Governance in Medieval Austria*, trans. by Howard Kaminsky and James Van Horn Melton (Philadelphia: University of Pennsylvania Press, 1992). See also the translators’ introduction (pp.iii-lxiv) for a good discussion of Brunner’s Nazism.

⁴⁴ Otto Brunner, “*Land*” and *Lordship*, p.36.

force, rebellion and aggression. On the other hand Brunner showed that “in a “legitimate” feud the parties were required to “offer justice” in some sort of preliminary negotiations”⁴⁶. In many cases, feud was not simply a *right* but also a *duty* that took priority over “an individual’s obligations to a third party”,⁴⁷ a creditor in particular.

The major step towards political modernity is the State. This therefore canceled the polycentric juridical order - without a monopoly on the law - where each vassal could use violence against his own lord to have his reasons recognized. As Otto Brunner noted, “prohibiting feuds was not a matter of a simple act of state; it entailed a fundamental change in the structure of law and politics”.⁴⁸

Of course, most historians are very content with the category of ‘feudalism’, which they adopt to explain pretty much everything that was going on in Europe from the fall of the Roman Empire to the Renaissance. We concur with Brunner that this is “a convenient cover for everything that one does not understand about the Middle Ages”.⁴⁹

Another consideration should also be made. Up till today, libertarian scholars have developed historical-institutional analysis to show the historicity of the State and the fact that it is only one means (and not necessarily the best) of many possible forms of social cooperation. There are a number of non-state juridical organizations that, although marginal, are still important for our historical comprehension of the problem (typical societies without government that have been studied by libertarians include pre-historic civilizations, ancient Iceland, ancient Ireland and the American Far West). However these are indeed very minor realities. In the future we need to look at the medieval period again and in particular at the later stages of its peak between the 11th and 15th century. It is from

⁴⁵ Otto Brunner, “*Land*” and *Lordship*, p.14.

⁴⁶ Otto Brunner, “*Land*” and *Lordship*, p.41.

⁴⁷ Otto Brunner, “*Land*” and *Lordship*, p.42

⁴⁸ Otto Brunner, “*Land*” and *Lordship*, p.29.

⁴⁹ Otto Brunner, “*Land*” and *Lordship*, p.93.

the medieval polycentric and self-regulated juridical order, which preceded the State that many useful suggestions could come to widen our concept of liberty.

One of the most innovative libertarian jurists, Bruno Leoni, created his theory based on a re-examination of *common law* and its remote origins. There were two levels of law within medieval society, - *lex divina* and *lex humana*. The latter was never intended as an act of free will but rather as a constant and imperfect attempt to impose divine rationality on nature and society.

Before the rise of the State, law and its intermediaries had to recognize the existence of traditions, ethnic and family ties as well as customs and culture. Law was unwritten, and therefore it existed in a series of concrete cases that were outside the control of any political authority. It existed in the realms of jurisdiction and in the theoretical debates made by theologians and jurists. In the medieval period, the law was not all encompassing. In the tensions that united and divided *lex divina* and *lex humana* an extraordinary intellectual work emerged, testified by the scholastic *quaestiones*. In St. Thomas, therefore, law was “*est quoddam dictamen practicae rationis*”: an expression of practical reason.⁵⁰ The greatest effort consisted of finding the strength and limits of the historical laws to be able to recognize laws necessary for society that were coherent for how God had ordered the world: “*Tota communitas universi gubernatur ratione divina. Et ideo ipsa ratio gubernationis rerum in Deo sicut in principe universitatis existens, legis habet rationem*”.⁵¹

2.3 Communities by Consent, Market for Protection and the New World Order

One of the more characteristic aspects of the medieval period was the dimension of the usual judicial community. The “isolated individual” did not exist socially or politically in the

⁵⁰ St. Thomas, *Summa Theologica*, q.91, art.3.

medieval period, such an individual – free from any social ties – was most deceitfully considered essential for a construction of law, which respected liberty.

The voluntary characteristic of modern law and the centrality of an individual *without relations, without a history or identity* (completely abstract and simply an object of care by the all too kind *Welfare State*) are therefore closely linked. It is therefore interesting to see the emphasis that contemporary libertarianism puts on a “strong” notion of the individual, as a subject capable of entertaining a variety of social and communal relations. Furthermore, the free market can be appreciated fully for its ability to connect individuals, thereby favoring community as well as communications.

The free market order allows the emergence of relationships based on *trust*. This is essential for the birth of a society, which is capable of minimizing violence. Protective and competing “agencies” called to create consensus and trust for whoever “demands” security is certainly a prelude to a revitalization of interpersonal relationships and the spread of the means to protect the credit of parties.

Economic analyses of State redistribution and studies on *rent seeking* have shown that in its terminal and welfare State, politics is a bitter struggle of everyone against everyone in search of privileges. The triumph of the Hobbesian state occurs in the sign of bitter tribalism. At the beginning of the XXI century, the leviathan of Hobbes seems to be closed within its own parabola in a society dominated by conflicts without frontiers or rules.

Today’s conflicts have seen the abstract liberal universalism and the particular aims of communitarians break against the ideologies used in defense of the State order. The question that arises from these conflicts could be put like this: Should the State protect individuals as individuals or should it consider men as members of a group? If it opts for the former it must ignore identity and culture to the point of canceling such traditions in the

⁵¹ St. Thomas, *Summa Theologica*, q.91, art.1.

name of the commonwealth of *les valeurs républicaines* (the republican values). On the other hand, the State must accept the Balkanization of political society. This in turn implies that power becomes the fulcrum of a cartel of ethnic, religious or cultural groups that look after their own interests even to the detriment of individual rights. Indeed, within the State, each difference becomes an excuse for conflict and contrast.

Contrary to what the critics of libertarianism maintain, the *commercialization* of protection would not lead to the disorder of endemic conflict and war without solutions. Once again, the medieval period shows that conflicts were less frequent and their consequences less bloody. Furthermore, the inability to reach the law making process, as this was placed in no particular center, (and the prize which fatally comes with this control), made the risks associated with waging war not worthwhile taking.

The fragmentation of medieval politics had the merit of making all institutions weak and each army small. As Jean Baechler showed in his famous work, it was medieval anarchy that helped create the creative dynamism of the first capitalism, both in the central-northern Italian and Flemish communes and in the markets of France.⁵² The weakness of politics was the strength of the merchants (and vice versa).

Most libertarians believe that a careful re-examination of the past can be a means of regaining efficient strategies for liberty. The failure of public monopolies in facing crime has already aided the spread of private security agencies to protect banks, companies and residential areas. It is reasonable to imagine that the number and size of these activities will continue to grow in the future as it has done extraordinarily over the past 30 years.⁵³

There are no contradictions furthermore, between the libertarian defense of secessionist processes (which might lead to the development of smaller territorial monopolies) and the

⁵² See Jean Baechler, *Les origines du capitalisme* (Paris: Gallimard, 1971). English translation: *The Origins of Capitalism*, (Princeton: Princeton University Press, 1975).

⁵³ See Bruce L. Benson, *To Serve and Protect: Privatization and Community in Criminal Justice*, (New York: New York University Press, 1998).

hypothesis of a market where protection is assured by insurance companies and private police forces.⁵⁴ Both strategies are closely correlated; when secessionist processes are able to question State control of the territory there might be a tendency to create new and smaller protection monopolies. However, these small monopolies are less capable of oppressing their own citizens thanks to reduced exit costs and to the widening supply of governmental services.

The break-up of the State, which appears to be coming, is not able though to insure a libertarian future. We only need to see what is happening on an international level to perceive that a new concept of law-enforcement is quickly developing. It is within such logic that we could envision the old Nation-States abandoned to their fate, and the new statist thinkers and builders bottling the same old wine in new flasks. We are clearly talking about the intellectual and political favor, sometimes verging on the edge of fanatic excitement, that mantles the creation of world institutions. Given the great difficulty within national frontiers, State law-enforcement is trying to relegitimize itself within a new World Order which, thanks to the UN, NATO and other such international organizations, would want to assure maximum protection to all our rights. This project is very dangerous, because public opinion only vaguely understands the risks connected to the construction of a World State and to the humanitarian interventionism, which is opening the path towards this goal.

What is already happening in Europe is very significant. The different European peoples, who are daily wrapped up in conflicts and difficulties caused by individual nations, are about to be subject to the authority of a continental Super-State without even realizing it. The European Union will try to “harmonize” fiscal policies and every other type of control of

⁵⁴ See Hans-Hermann Hoppe, “Small is Beautiful and Efficient: The Case for Secession”, *Telos* 107, (Spring 1996), pp.95-101.

individual resources, until Brussels ultimately controls every political decision and succeeds in building a new “imperial” State (along side the United States).

Today’s epochal struggle, marked by the crisis of the State appears to be trapped in a dilemma, which could be stated as follows: On one side there is the emergence of theoretical hypotheses and business solutions which redirect an ever increasing amount of power and free choice into the hands of individuals. The liberalization processes of industrial sectors and the globalization of markets has favored this. Secessionist pressure and the increasing demand for private protection are other signs of this tendency.

However, against these overall positive tendencies, there is the zealous attempt of the monopolistic classes to preserve their privileges by the preparation of “universal” institutions, created to abolish all types of dictatorship, protect civilian populations in all corners of the world, spreading liberal culture and practices.

The struggle against poverty, sufferance and ignorance, which have in the past been the excuse to justify social-economic intervention by governments and the domination of political classes, has now reappeared as planetary *welfarism*.⁵⁵ This is possible motivated by so many “good intentions”, but is aimed at creating a technical-structural monopoly capable of imposing on everyone its own wishes.

The contemporary liberal humanitarianism, which has caused the more recent conflicts, is something truly paradoxical and contradictory.

The attempt to justify war by the political classes of imperialist NATO (in Kosovo for example) was shielded by the championing of individual rights. The crimes committed by those who bombed the civilian Serb population were justified with constant referral to the Kosovian civilians’ situation. Thus, States disappeared and the war came into view to be

⁵⁵ A recent and influential formulation of the thesis that universal juridical institutions are needed in order to avoid the demise of the social protection apparatus, one of the casualties of economic globalization, is: Jürgen Habermas, *Die postnationale Konstellation. Politische Essays*, (Frankfurt: Suhrkamp Verlag, 1998).

what it actually was, a conflict between individuals, groups and coalitions. War returned to being something similar to the medieval feud, even if it was less legitimate. It showed itself to be a conflict between individuals. By refusing to grant Milosevic's Serbia the traditional dignity of States, the western allies showed the very nature of their own institutions.

In its hypocritical appeal for individual rights of Kosovo's citizens, NATO was forced to ignore the rights of Yugoslavia as a State and so to accept the view of European realism and American libertarianism. By unmasking the face of Yugoslavia's power, the war machine prepared by the US and its allies showed that all State institutions have the same characteristics.

This meant that the same logic, which could lead to a world State directed by the technocracy of the UN, could also eventually lead in the opposite direction. The return of individual and ethnic rights, even only as a pretext for political imperialism, could favor the dissolution of Nation-States, of large continental empires (either already existing or under construction), and of mainstream political culture.

What is certain is that in any case the conflict between liberty and coercion will continue to make its mark on human history in the future. Once again the outcome of such a conflict remains uncertain.