

## THE *CODE CIVIL* BETWEEN ENLIGHTENMENT AND RESTORATION. THE HERITAGE OF PORTALIS

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**Abstract.** The French *Code civil*, including the tradition of legal practice and scholarship it stands for, is the child of two parents: Enlightenment and Restoration. They came together in the person of Jean Etienne Marie Portalis (1746–1807), who was the main drafter of the code under Napoleon. I want to investigate which line of philosophical argument he followed in uniting the two and critically assess the value of this argumentation. In section 1 I briefly sketch the codification of civil law in the (post-)revolutionary setting of the time, as well as Portalis' philosophical background. Section 2 turns to the principled and wide-ranging discourse he delivered at the occasion of the formal presentation of the draft civil code to the legislature. This discourse, in turn, found its deeper roots in an extensive treatise that he wrote prior to the former, on the use and abuse of reason in times of Enlightenment (Section 3). I will focus, in particular, on the twin concepts of knowledge (section 4) and nature (section 5) in this treatise. From this vantage point, section 6 analyzes the eclectic way in which Portalis uses his philosophical godfathers Montesquieu and Rousseau, while section 7 shows why his preoccupation with the protection of established property rights can explain such eclecticism. Section 8 takes stock and submits that at least one of Portalis' arguments presents a real challenge to Enlightenment philosophy up until the present day.

**Keywords:** *Code civil*, Enlightenment, Revolution, J.E.M. Portalis, knowledge, nature, Montesquieu, Rousseau, property rights.

### 1. The Revolution and the *Code civil*

One of the most palpable remnants of the intellectual heritage we call Enlightenment is the French codification of civil law. Not only is the *Code civil*, basically, still valid in France as well as in large parts of its (former) empire. It also keeps exercising major influence on the conception of what legal practice and legal scholarship is about, both in a considerable number of national states and in

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supra-national legal orders like the European Union. Statutory civil law is where Enlightenment has not stopped to shape our daily life, starting with a neat registration of the day and the place we are born. However, the civil code also harbors large parts of a different tradition, one we may believe to have left behind. In important ways, the codification "completed the revolution" (as Napoleon would have it<sup>1</sup>) by restoring the legal thinking (though not the political divisionism) of the Ancien Régime. This concerned not only a return to the pre-revolutionary laws of goods, tort, contract, and commerce. It also pertained to the deeper thought of what law is about. Let us therefore start with a brief look at the setting of the code in 18<sup>th</sup> century France.

The post-revolutionary codification of civil law in France was not entirely new. Already during the Ancien Régime many an effort was made to bring various and diverging jurisdictions under the same regulations.<sup>2</sup> But codifying the whole of civil law had always been a bridge too far. It would have required, first and foremost, some sort of compromise between the South (based on Roman law) and the North (based on customary law). And, secondly, on either side of this divide there was a large variety of regional and local customs to deal with. Under the Ancien Régime central authority was not sufficiently powerful to force this heterogeneous lot into a single order of rules. The nobility and the clergy, the dominant estates, often found reason to preserve regional law with all their powers.

During the French Revolution plans for codification gained new momentum. In 1790 the *Assemblée Nationale Constituante* ruled that a civil code should be drafted. It assigned the task to a committee chaired by the prominent lawyer and revolutionary politician Cambacérès. This committee submitted no less than three consecutive drafts to the *Convention* (1793–1795), to which even a fourth one was added by yet another committee (Jacqueminot, 1799). But none was accepted, due to ever changing majorities in the legislative bodies.<sup>3</sup> After

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<sup>1</sup> "From 1799 until his death on the South Atlantic island of St. Helena, Napoleon spoke of himself as the man who had completed the Revolution. By this he meant that the basic goals of the Revolution enumerated above had been obtained and that now it was time to consolidate and institutionalize those gains." Holmberg [1998], accessed Oct 30<sup>th</sup>, 2013.

<sup>2</sup> Cf. Colbert's (1667–1681) Ordinances unified commercial law, civil and criminal law of procedure, Daguesseau's (1731–1747) Ordinances coordinated certain parts of civil law (donations, wills, and inheritances).

<sup>3</sup> The first one – drafted in a modestly revolutionary spirit – was rejected by a Jacobine majority, who insisted that a civil code should only express general revolutionary principles, and in a language that every citizen would understand. For them, this draft was too conservative and, above all, too complicated. So the committee down-sized the draft to just 297 paragraphs. Meanwhile, however, the leaders of the Jacobine party had been eliminated and now the draft was

Napoleon's rise to power, initially as First Consul (1799), the process of codification was resumed. His Second Consul (Cambacérès once more) convinced him to nominate a new committee of four lawyers,<sup>4</sup> to submit a draft as soon as possible. Within no more than four months they were able to send off the final draft of the *Code civil* to the *Conseil d'État*. It was presented by their most prominent and eloquent commissioner Portalis in a famous *Discours préliminaire* (*Preliminary Address*<sup>5</sup>), that was meant to explain the philosophical foundations behind the legal rules. During the ensuing debates much of the first part of the draft, formulating general principles of law in the spirit of Enlightenment, was deleted and reduced to six paragraphs. The *Code civil* was enacted on March 21<sup>st</sup>, 1804, emptied from any recognizable philosophical views.

Napoleon presented "his" Code as part of what he called "bringing the Revolution to its end," in the double sense of the word,<sup>6</sup> and Portalis chose to go along with this view in his *Discours*. To the extent that the Revolution came to be regarded in retrospect as the political manifestation of the Enlightenment, lending form and substance to its lofty commitments in actual socio-political life, the Code was increasingly seen as the most tangible and sustainable product of the Enlightenment, not only in France but also in the countries that came under its power or influence. Portalis's *Preliminary Address* is utterly written in the spirit and in praise of Enlightenment. It purports to present, to a highly political audience, a civil code "with a philosophy." But not unconditionally. There is this awkward phrase, thrown in after the contemplations on revolution, legislation, and judiciary decision making are completed and the exposition on the main topics of the draft is about to begin: "We have, in our modern times, loved change and reform too much; if, when it comes to institutions and laws, centuries of

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found too schematic and too revolutionary. The third draft, longer again and more nuanced, and the fourth one by the Jacqueminot committee (1799), met with disapproval from the new political leadership (the Directoire), for whom codification was not a priority.

<sup>4</sup> Two representatives from "le pays de droit écrit," Portalis (1747-1807) and Maleville (1741-1824), and two from "le pays de droit coutumier," Tronchet (1726-1806) and Bigot Prémeneu (1747-1823).

<sup>5</sup> A good English translation of the *Preliminary Address* is made available at Portalis [2004]. I use this translation in citations. However, as it features no page numbers, I refer to the pages of the original text Portalis [1836]. While I retain the title *Preliminary Address* in the main text, I use the siglum PA in the footnotes.

<sup>6</sup> Proclamation des Consuls de la République du 24 Frimaire an VIII (15 décembre 1799): "Citoyens, la Révolution est fixée [other sources give: s'est faite; BvR] aux principes qui l'ont commencée: elle est finie."

ignorance have been the arena of abuses, then centuries of philosophy and knowledge have all too often been the arena of excesses."<sup>7</sup>

Apparently, under the political circumstances, the philosophy of the time, "enlightened philosophy," is as pernicious as ignorance. For Portalis, philosophy that claims to enlighten a priori, does not deliver a suitable philosophy of law, neither necessarily nor obviously. Prior to being welcomed in the house of legislation, philosophy has to be subjected to critical appraisal. The philosophy of the Enlightenment has to be enlightened by a shining different from the one it claims to radiate.

What is Portalis' critique of enlightened philosophy, and what is his alternative? Indeed, what is philosophy for the enlightened lawyer, in particular for Portalis as a codifier? This question can be interpreted in at least two different ways: as a question about Portalis's favourite philosophy, and as an enquiry into the role he attributes to philosophy in its relation to law. These interpretations are not necessarily separate. One may imagine that the answer to the second question could be inferred from the first. But this track is closed for one simple reason: I was unable to discover a favourite philosophy in Portalis' works. Here are some dead allies.

a) It is tempting to look for a philosophical preference in his (early) educational years. Prior to legal training he took a genuine interest in philosophy. He chose to study philosophy without the intention to become a theologian – which was rather exceptional at the time in France. As his education was with the Oratorians, one would expect that Malebranche (1638–1715) would have had a great influence. At least two consequences would then have become perceptible. Firstly, via Malebranche the new philosophy of Descartes would have presented a powerful point of reference for him. Secondly he would have steered away from Jansenism, about which Malebranche was (in a thought-provoking way) critical; the more so since Jansenism and its many guises had become the meeting point of people adversary to both the pope of Rome and the king of France. But Portalis was not an admirer of the "new" Cartesian philosophy at all. He continued to find value in traditional, scholastic philosophy. Moreover, he was sensitive to the Jansenist inspiration in the Catholic Church.<sup>8</sup> André-Jean Arnaud's warning not to label Portalis a natural lawyer on the basis of

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<sup>7</sup> PA, p. 482.

<sup>8</sup> And it was "l'esprit janséniste et gallican qui faisait l'âme de la pensée juridique du temps." Arnaud [1989].

a few quotations may also pertain to other sources of philosophical inspiration.<sup>9</sup> There is little doubt that Malebranche is prominent in his two juvenile treatises from his time in the Oratorium, as Lydie Adolphe demonstrates.<sup>10</sup> But this influence has disappeared already in the rather early treatise on the protestant concept of marriage – an analysis that was so dear to Portalis that he made extensive usage of it in preparing the *Code civil*.<sup>11</sup>

b) Some other biographical details could explain why Portalis was exposed to, and in sympathy with, various philosophical schools. Marseille, where Portalis' Oratorium was based, had a deserved reputation of being everything but an intellectual *Reinkultur*. Apart from the Cartesianism of the Oratorium there were many monastic colleges where scholastic philosophy and Aristotelianism was quite alive, and the Oratorians were in permanent discussion with these centers. Portalis participated in these debates, as his son reports, acknowledging the force of arguments from either side. Moreover, as far as Jansenism was concerned, the Oratorians were not entirely in the other camp as they, too, referred to the ideas of St Augustine. On another note, that Portalis lost considerable eyesight at a young age would have inhibited his philosophical readings. During his years of exile in Germany, when he was in an inspiring intellectual environment, his main access to philosophical work was through lectures and debates.

c) It is tempting to think that he was a student of Montesquieu's and Rousseau's, given the large amount of overt and covered quotations from their works in the *Preliminary Address*. In the wake of the revolutionary era both authors were increasingly seen, in retrospect, as its ideological godfathers. But the inference would be unwarranted; firstly, because neither of them advocated anything near revolutionary politics; secondly, because the two authors defended well nigh incompatible positions; thirdly because Portalis' pursuit to combine them in one treatise was a rhetorical rather than a conceptual exercise, as I will argue in section 6. By quoting these *revolutionsfähige* philosophers extensively he made them say things he would like to say himself in the first place.

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<sup>9</sup> Arnaud [1969] p. 57.

<sup>10</sup> Adolphe [1936].

<sup>11</sup> This may signal the fact that his philosophical convictions were formed at a rather early stage of his academic career.

Having found no particular favourite philosophy in his work, let me turn to the other interpretation of our initial question and ask what role Portalis, as a lawyer, attributed to philosophy? On a thumbnail, the answer I am going to argue is this. If philosophy pretends to set human thinking at a distance from tradition, from well-established practice, from the wisdom of life-experience; if it presents itself as the light of critical reason thrown on these and other forms of ill-conceived facticity; then for Portalis philosophy just reflects the thoughtlessness as well as the intemperance of revolutionary violence. Then it is infected by the incapability of such violence to make even a first step towards a civil legal order. However, if philosophy fosters the immediate, intuitive attentiveness of the nature of things in social relationships, then it is a pre-eminent breeding ground for the kind of practical knowledge we call law.

The question, and the answer, is pertinent to deeper questions. Is Portalis' critique valid? Is it still valid, against the backdrop of our belief that the concept of Enlightenment philosophy has been paradigmatic of modern, and indeed contemporary philosophy in general? Do we have sufficient reason to reject it as driven only by the desire of lawyers to maintain closure and distance to philosophy? Was Portalis after the rhetorical effect of philosophical discourse, a tool that could be used in the political arena to forge and maintain a legal order? Is this a form of tactics we may perceive also in our day? Or are things even more complicated, and is it philosophy that puts a legal order under the challenge of explicit and ultimate accountability, in spite of all the disintegrating effects that root in it? Most of these questions, however, will have to stay in the background of my argument. In the last section I will argue why at least one important point of his critique is valid, and even relevant in our day.

## **2. Philosophy in the *Preliminary Address***

If we read the *Preliminary Address* with the question in mind how Portalis calls on philosophy in the presentation of his legislative project, what we will notice is that he extensively discusses law as an epistemic enterprise. Two characteristics are salient here. The first is a sustained inquiry about the structure of legal knowledge. What kind of knowledge should lie at the bottom of civil legislation? How is it generated? As it rules over types of cases in a general way, how does it relate to the legal knowledge of the judiciary, pertaining to singular cases? How will it spill over into the knowledge of magistrates who will have to apply and enforce a statute? And how is it to be distinguished from the knowledge of the legal scholars, who purport to enrich the general character of

statutory law by both systematization and refinement? Portalis's answers are typical of the Roman law tradition.

The function of the statute is to set down, in broad terms, the general maxims of the law, to establish principles rich in consequences, and not to deal with the particulars of the questions that may arise on every subject. It is left to the magistrate and the juriconsult, fully alive to the overall spirit of laws, to guide their application. Hence, in all civilised nations one always sees, alongside the sanctuary of laws and under the watchful eye of the lawmaker, the formation of a body of maxims, decisions and doctrine that is refined daily by practice and by the impact of judicial deliberations; that continually grows from all the knowledge acquired; and that has constantly been regarded as the true supplement of legislation.<sup>12</sup>

The second characteristic are the reiterated references to one and the same juridical source of knowledge: nature. The observations on marriage and the family are the most prominent example of this; but there are others, such as the ones on property and on the distinction between civil law and commercial law. Apparently, law is not just a set of volitions from the part of a competent legislator. It is, rather, the scattered but coherent manifestation of nature (and culture as a second nature) that precedes all willful acts and actions.

It would doubtless be desirable for all matters to be provided for by laws. But, in the absence of a specific enactment on every subject, an old, consistent and well-established custom, an unbroken succession of similar rulings, a received opinion or maxim serves as law. When not guided by anything established or known, when faced with an entirely new occurrence, one returns to the principles of natural law. For while the foresight of lawmakers is limited, nature is limitless; it applies to every thing that may be of interest to men. All this assumes compilations, compendia, treatises, numerous volumes of studies and dissertations.<sup>13</sup>

At a first hearing, these phrases sound remarkably convincing, even up-to-date, in spite of the somewhat archaic intonation. Together with the well-known passage on the "thousands of unexpected questions"<sup>14</sup> that the judge has to face as

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<sup>12</sup> PA, p. 470.

<sup>13</sup> Ibidem, p. 471.

<sup>14</sup> Ibidem, p. 469.

soon as a general rule of law has been enacted, they belong to the most quoted phrases of the *Preliminary Address*. But do these sentences really harbor feasible theses? We may just notice a third salient characteristic now that we have amply illustrated each of the previous ones by extensive quotations. The two citations converge. They come together in a plea for the indispensability of "learned law" in both legislative and judicial decision-making. In the first quote, the learned law is conceived as the supplement of the laws. In the second one, this supplement appears to be nothing more or less than a form of substitution: it is the task, indeed the vocation,<sup>15</sup> of learned law to substitute laws by ever "higher" laws, ultimately by the highest law of them all, nature. The legal scholar should see to it that, on the final count of things, each and every statute appears to represent this supreme law. In other words, that each and every statute acquires legal meaningfulness solely by virtue of tacit higher law brought to the surface, in so far as it embodies the normative force of nature. That such legal meaning would be established in a process of critical interrogation of statutory rules, and that there would be a role here for judges, legal scholars, social scientists, and philosophers – this is something that Portalis seems to exclude *a priori*. That socio-political order in society could precisely emerge in and through this critical interrogation of statutory rules in the first place, is something beyond his imagination. For him, the apex of philosophical wisdom is that one should not put law under the challenge of enlightened philosophy.

Therefore, there is reason to ask whether these "remarkably modern" phrases are really convincing. The question ranges wider than it looks. It demands an explanation why in our time Portalis' wordings have not lost their appeal. Are we unable to think otherwise? Don't we underestimate this inability if we think we can adorn our contemporary legal convictions by well-selected quotes from Portalis' work? Wouldn't we fool ourselves if we would shake our heads at his outdated ideas on marriage and the family, but nod assent to the core of his approach to law? Are legal scholars able to put themselves in a position different from Portalis'? Hence, to inquire about the alleged modernity of Portalis' concept of law, we should pause and dig deeper into his conception and assessment of Enlightenment and its philosophy.

### 3. "Esprit philosophique" and philosophy

Portalis' critical considerations regarding philosophy's pretension to "enlighten" the human mind are more than a chorus suitable for the political

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<sup>15</sup> Cf. Von Savigny [1967].

occasion of presenting a draft of the civil code. He explained them in a lengthy treatise that was already completed (though not published) at the time he was called to the stand of the legislative committee: *On the Use and Abuse of the Philosophical Spirit During the Eighteenth Century*.<sup>16</sup> Indeed, it sheds light on how he sees philosophy with regard to law in principle, quite apart from the political circumstances of the *Preliminary Address*.

Importantly, he speaks of the "esprit philosophique." We may translate it as "the philosophical mindset" as distinct from "philosophy." Philosophy for Portalis is either practical wisdom in life or an academic amalgam of disciplines like logic, metaphysics and ethics. The philosophical mindset, in the sense of a by and large shared attitude of thought, encompasses much more. The first feature he mentions (to be followed by many more) is this: it is "a way of looking at things, a maturity of judgment, that distinguishes enlightened people from non-enlightened people."<sup>17</sup> In this sense, the philosophical mindset is not the name of an exercise practiced by virtually everyone every now and then when one is in the mood for it; nor is it the name of an academic enterprise practiced by a few professional freaks. No, it is a predicate that divides people (all people) into two categories: those who have seen "the light" and those who are (still) in darkness. It is clarifying to read a few lines here:

The philosophical mindset as I take it is the glance of trained reason. It is for understanding what conscience is for the heart. I define it as a spirit of freedom, of investigation, and of enlightenment: A spirit that desires to see everything and take nothing for granted; that proceeds methodically, moves about with distinction, assesses each thing on the basis of its proper principles, regardless of established beliefs and habits; a spirit that does not regard consequences only, but goes back to the root causes; that traces all relevant relations in every matter to see what follows from them; that combines all parts and encompasses them into a whole; a spirit, finally, that indicates the purpose, the scope and the limits of all forms of human knowledge, and that is the only one to guide them to the highest degree of utility, dignity and perfection.

The philosophical mindset differs crucially from philosophy in the strict sense. Philosophy in the strict sense is limited to an order of well-defined objects. The philosophical mindset applies to everything. It is not a science but the result of

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<sup>16</sup> Portalis [1827]. In the notes I use the siglum USA, plus volume (I or II) and page number. The translation is mine, as there is no official English translation available, to my knowledge. Portalis' book is adequately discussed in English by Damiano Canale in: Canale et al. [2009] p. 155ff.

<sup>17</sup> USA I, 2.

comparative sciences. It is a sort of universal spirit, not by virtue of the knowledge acquired but by virtue of the way it is acquired. It does not pertain to some particular truth but pursues truth as such in all matters.

The philosophical mindset transcends philosophy itself, like the mathematical mindset transcends mathematics and like knowledge of the spirit of the laws transcends knowledge of the laws themselves.<sup>18</sup>

For Portalis, this philosophical mindset is the mindset of his own era – a heritage that is the result of a long history in which thinking has emancipated itself from the suffocating grip of secular and religious authority, traditional opinions and customs, but also from the purely constructivist thought contents by which Descartes and his fellow travelers sought to attain truth. The philosophical mindset may regard Descartes as the pioneer who abandoned the arid lands of Mediaeval philosophy; but its genuine founder is someone like Newton – the father of modern physics. Observing and comparing factual evidence, framing law-like relationships and testing them on the basis of empirical data, not building grand theories but mapping every abstraction on to the perception of concrete things – these are the pursuits to which the era of Enlightenment owes its heritage in all areas: sciences, technics, arts, politics, ethics, and also law. Through commerce with new continents all this observing and comparing has gradually focused on the ways in which people live together. Here Portalis simply follows Montesquieu in saying: the compass – an invention of science and technology – has opened up the universe; and commerce has socialized it.<sup>19</sup> Commerce brings people together, offers incentives for observations and comparisons of differences that may be used for mutual profit. It deploys an attitude that had been already present in rudimentary form from the times of the Reformation: the capability to argue, discuss, critique and justify one's basic beliefs.

So, at first sight, Portalis' observations come in praise of the philosophical mindset. But soon enough it appears that his wider intentions are utterly critical. As the title of the book indicates, the philosophical mindset is not only used but also abused. How to distinguish between use and abuse? To set the criteria, he firstly joins the camp of the Enlightenment. He accepts its premises, to then show that these premises should lead to conclusions different from the ones drawn by

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<sup>18</sup> USA I, 2–3. The text says "l'esprit des lois" – doubtlessly referring to the title and the topic of Montesquieu's famous treatise.

<sup>19</sup> Ibidem, I, 21. The same passage appears in PA, p. 507, referring to Montesquieu [1979]. Book XXI, ch. 21.

Enlightenment. He plays off the philosophical mindset against the same. He pursues an enlightenment of Enlightenment.

It is quite clear from which directions Portalis expects the greatest danger for the philosophy of Enlightenment and for a society that fosters a philosophical mindset. The greatest threats come from atheism and materialism, where atheism comes in the wake of materialism rather than the other way around.<sup>20</sup> To curb these dangers, he aims his critique right at the heart of the philosophical mindset, namely its theory of knowledge. In this very area he tries to show that it is unreasonable by its own standards of reasonableness. The philosophical mindset, or rather its representatives, stipulate that in the acquisition of knowledge they want to proceed step by step on the basis of the perception of reality. But in point of fact, Portalis says, they prematurely reach beyond the confines of experience towards a system of thought constructions they claim to be "reality." In other words, although the "esprit de système" is essentially foreign to the "esprit philosophique," it is indeed its very epiphenomenon.<sup>21</sup>

#### **4. Knowledge, critical and reliable**

As said, the most prominent area where Portalis wants to show how this works is the theory of knowledge. Obviously, this choice is far from arbitrary. Epistemology is the keystone of philosophy in Modernity since Descartes and the very basis for a philosophy of Enlightenment in Kant. I will first briefly summarize his general concerns in this area, and then go into the details when the foundations of law and state are at stake. There, many of his epistemological ramifications return in a more contextualized and therefore more tangible form.

The basic elements of our knowledge,<sup>22</sup> according to Portalis, are solely the immediate impressions and traces that particular things leave in our senses. We have the capability to hold on to these simple impressions (*idées simples*) and to operate on them by our reason.<sup>23</sup> Via analysis, abstraction, and combination we

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<sup>20</sup> Cf. USA II, ch. XXIV: society cannot exist without an "esprit religieux." In hardly covered wordings Portalis objects against Rousseau's version of a "religion civile," although perhaps not against the idea as such. Rousseau's civil religion serves "the spirit of sociality" and is based on a rejection of Christianity. Portalis considers Christian belief as "une saine philosophie."

<sup>21</sup> The first passage where this argument appears (although slightly concealed) is *ibidem*, I, p. 36: the "esprit philosophique" protects us from the "esprit de système." Then at *ibidem*, I, p. 73ff. he warns us not to confuse "esprit de système" with "esprit systématique." This is the basis of the critical appraisal of Kant, whom Portalis believes to be the greatest will-o'-the-wisp of Enlightenment.

<sup>22</sup> *Ibidem*, I, p. 26ff.

<sup>23</sup> *Ibidem*, I, p. 88.

arrive at more general and compound ideas.<sup>24</sup> The latter, however, are never more than summarizing labels for sets of sense data. Reliable knowledge, therefore, finds its basis in nothing but sensations. On these our mind may apply operations we call thinking and willing, and these operations, in turn, may be more or less regimented, ushering in full-blown "method." But all methods of knowledge acquisition have to start out from sensations and they consist in patient and disciplined observation of sense data. They do not root in evidence that would come to us as clear contents of pure thinking (as Descartes would have it), or in formal principles of ordering (as Kant seems to think).<sup>25</sup> In short, Portalis departs from empiricism in a strict sense: experience is an ultimately passive sensation, even though this passivity can be manipulated methodically.

But no sooner has he established this point of departure than Portalis turns into an unexpected direction. Starting from sensations? By all means, but then from all sensations; not only from those that derive from the senses, but also from the "sentiments intimes," the inner feelings.<sup>26</sup> In ways similar to those by which the outer world invades conscience via the senses, so inner life invades this very conscience via feelings – as if it were a world outside. Only through these inner feelings do men perceive themselves as thinking and willing (free) beings.<sup>27</sup> Thus, Portalis distinguishes between two registers of sensations: sensations through the senses and sensations through the sentiments. The former pertain to the material world outside, the latter to the inner world of the mind. He presents this as an implication of the vantage point privileged (and rightly so) by the philosophical mindset: all knowledge has roots in sensation. It allows him to prepare the ground for a critique of materialism (that reduces everything to the material world outside) and of atheism (which allegedly is the consequence of materialism).

Already at this general level, these are curious arguments. Portalis does as if he is in a debate with the great philosophers of Modernity: Descartes, Leibniz, Spinoza, Helvetius, Kant. But in fact he passes by *the* great problem these thinkers wrestled with: how to know our knowing? Of course we can investigate our knowledge activities as if they were some sort of object in front of us. But what

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<sup>24</sup> See also the summary at *ibidem*, I, p. 164ff.

<sup>25</sup> Cf. *ibidem*, I, p. 87. "Descartes said: 'I think, therefore I am'. The modern metaphysician says: 'I experience'." In *ibidem*, I, ch. VII it appears that for Portalis Kant has brought nothing but a reiteration of Descartes' innate ideas. Lydie Adolphe is right that Portalis has not understood the German philosopher, i.e., not in this regard. Adolphe [1936] p. 108, n. 2.

<sup>26</sup> USA I, pp. 79–80 and 132–135.

<sup>27</sup> *Ibidem*, I, p. 80: "I know through experience the existence of feeling since I feel to exist. Will, Freedom, Thinking are phenomena that come to me in daily experience and that prove that I am a thinking, free and willing being."

warrants that what we come to know also applies to the act by which we know these activities? How can knowledge be conceived at both sides simultaneously, the side of the object and the side of the subject? Portalis pretends there is no problem here. As Kant did, he regards Newtonian physics as the proof that knowledge is not only possible, but also methodically expandable and socially important. However, he diverts from Kant in his refusal to embark on a transcendental journey and ask for the general and necessary conditions of knowledge. Instead, he argues that we "feel" ourselves to exist as thinking and willing beings intertwined with nothing less than reality. For Portalis, "If I know that p, then p is the case" is not an implication at the level of epistemology, but at the level of ontology. Indeed, he tacitly hovers between two conceptions of thinking and willing; now he treats them as operations on sensations, now as sensations in their own right.

I submit that the main reason for this is that Portalis took a rather instrumental view of a philosophy of knowledge. What interests him is the question how such knowledge may be applied in matters of law, morals and politics. Hence he selects the picture of philosophy that is best suited to achieve the goal he has targeted for reasons that do not derive from philosophical but from politico-legal considerations. From there he works his way back to his philosophical theses. His ultimate goal is to expel atheism, therefore he has to ban materialism, therefore there has to be a separate spiritual world. But in order for this world to be acceptable in times of Enlightenment it has to be accessible via sensations. So perception has to encompass inner sentiment too. I will come back to this inverted, and in fact eclectic, style of argumentation below.

## **5. Sound philosophy: nature**

The philosophical mindset, as we saw, often falls victim to systems thinking. Therefore it has to be guided by what Portalis, throughout his book, calls "sound philosophy." What makes philosophy "sound"? In the final analysis we are confronted with two evasive terms in the epistemic relation; at the end of the knowing subject the key word is "bon sens," while at the end of the object known the key word is "nature." Both terms need to be elucidated.

"Bon sens" does not just mean "common sense" but rather "pure" (in the sense of "unspoiled" or "immaculate") intuition. It is a sensitivity towards reality that can be developed by the philosophical mindset but that in fact precedes and conditions it. It is tied up with individual personality, and signifies a psychic

capability more than a philosophical concept.<sup>28</sup> Pure intuition works not only with great incisiveness, depth, and scope; it transcends all of that by spanning the widest gaps "by a *sudden* flash of light"<sup>29</sup> or by a sort of instinct. It captures various things in *one* glance, *immediately* seizes the links between theses that seem far apart. It does not inquire but bets, senses, and sees.<sup>30</sup> Moreover, it knows how to keep good measure in everything, anywhere, any time.<sup>31</sup> No wonder that Portalis believes that this "esprit juste"<sup>32</sup> is of the utmost importance in matters where one must proceed by groping one's way along, such as in medicine, politics, and law. No wonder either that he opposes it, towards the end of the book, to what is called there "the false philosophical mindset," which casts doubt upon and overthrows everything. The "bon sens," Portalis concludes, "preserves," "remains within the boundaries of the tradition." By definition it is anti-revolutionary.<sup>33</sup> It has to be, since by unfolding our intuition we will soon learn that "we ought not to create a world but rather study the world we live in."<sup>34</sup> A pure intuition is the first and most fundamental step in that pursuit. And in a way, with this first step, all the others are given, too. Nothing compares to this immediate, total, sudden grasp of reality in its pre-established orderings. Again, this should not wonder. It is the definition of knowledge writ perfect, a mode of experience that Genesis attributes to mankind prior to their original sin.<sup>35</sup>

If this original intuition is the source of all knowledge, the totality of all that is to be known via this intuition is called *nature*. In the final analysis all science – says Portalis – is "natural" science,<sup>36</sup> not only physics and chemistry, but also the "arts" of politics, law, and morality. It is knowledge of the true nature of these practices: what it "really" means to act politically, legally, morally. This does not entail, for him, that nature is cognizable *in toto*. In the end it remains a riddle,<sup>37</sup> as

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<sup>28</sup> On a scale from total madness to super-intelligence a person with pure intuition ranks higher than the talented and the genius. Ibidem, I, p. 86.

<sup>29</sup> "[...] par une soudaine illumination," ibidem, I, p. 39. The expression refers to Bossuet.

<sup>30</sup> The italics in the previous phrases are mine [BvR]. In the last one, the verbs are typically what Ryle called "achievement verbs" (e.g., to hear) rather than "task verbs" (e.g. to listen). Ryle [1963].

<sup>31</sup> USA I, p. 40–41.

<sup>32</sup> Or "l'esprit juste;" cf. ibidem, I, pp. 40 and 86.

<sup>33</sup> Ibidem, II, p. 509.

<sup>34</sup> Ibidem, I, p. 48: "Peut-il donc jamais être question de créer un monde? Ne s'agit-il pas uniquement d'étudier celui qui nous habitons?" This is Portalis' question to Descartes.

<sup>35</sup> Many of the features of "bon sens" remind one of John Henry Newman's concept of "illative sense" in his *Grammar of Assent* (1870).

<sup>36</sup> USA I, p. 45.

<sup>37</sup> "Le mot de ce grande énigme, que nous appelons la nature, nous échappe." Ibidem, I, p. 46.

we never come to know reality itself.<sup>38</sup> This may sound familiar to modern ears. Kant convinced us that our epistemic capabilities are a sort of colored and indeed distorting spectacles and that what we label as "reality" is always partly the effect of these spectacles. But Portalis means something different. He concedes that we know only specific properties of nature, not the bearer of these properties, nature itself.<sup>39</sup> He also admits – which amounts to the same thing – that we can only have limited conceptions of nature. But these properties are objectively real in the non-Kantian sense: properties of nature as a thing in itself. And the more we learn to see the relationships between particular properties, through "bon sens" as well as through the more regimented methods of science, the stronger will be our appeal to nature, even if the whole of it is hidden from our eyes.

We know nothing completely, but I add that what we know of each whole, i.e., of each object, exists really in the object itself. Our knowledge is limited, but it is not fictive.<sup>40</sup>

How does Portalis know? Well, from his viewpoint this is the wrong question. A sound philosophy is characteristically certain of this. Who wants to know how we acquire this certainty is already possessed by the "faux esprit philosophique." In the last instance this certainty is an inner feeling; and a sound philosophy is precisely a philosophy that takes this feeling as a signal that one should stop any further questioning and reasoning.<sup>41</sup> It is a sign that we are consonant with reality.

The picture I suggested at the beginning of this section is therefore a false one for Portalis. In the end, the knowing subject ("bon sens") and the known object ("nature") are not opposed to each other: "In some sense, experience and nature are two synonymous words," says Portalis, "for experience is the association of man with nature."<sup>42</sup> Sound philosophy, i.e., philosophy at the service of man and society as they are by nature, cannot be anything less than the deployment of this experience. Its unbiased character can only exist in its effort to make the order that is already present in nature as clear and understandable as

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<sup>38</sup> "Nous connaissons n'étant que le produit de nos sensations, l'origine et l'essence des êtres sont nécessairement inaccessible à notre intelligence. De là, nous nous sommes résignés à ignorer ce que c'est que la matière en soi. Nous avons cru devoir nous réduire à étudier les qualités et les rapports qui nous la rendent sensible." Ibidem, I, p. 54; cf. I, p. 131.

<sup>39</sup> Thus he makes the classical distinction between substance and accidents.

<sup>40</sup> Ibidem, I, p. 131.

<sup>41</sup> "La certitude peut être préparée par le raisonnement; mais elle la termine." Ibidem, I, p. 134.

<sup>42</sup> "[...] car l'expérience est la société de l'homme avec la nature." Ibidem, I, p. 136.

possible, without any additions of its own making. Time and again Portalis stresses the dangers of generalization and systematization. In curbing these threats "nature" and "pure intuition" have two roles to fulfill: (a) to disarm every claim to absolute knowledge regarding the final end and the true cause of society, as premature; (b) to refer to the inevitable basis on which any claim regarding the final end and the true cause of society ought to be built.

These two roles are not easily reconciled. The former one intends to assault what the latter one wants to attain. But they are perfectly understandable against the backdrop of Portalis' resistance against "the revolutionary spirit" and its tyrannical features. He describes the revolutionary spirit as

[...] the over-excited desire to sacrifice all rights to a political goal by the use of violence, and to take nothing into consideration but a mysterious and volatile state interest.<sup>43</sup>

On the one hand, every claim to absolute political truth has to be banned from the political arena, since such a claim justifies revolution. On the other hand, the claim that absolute claims should be banned, should itself be upheld as an absolute claim. If not, any claim would be relatively equal to all others and there would be no critical objection possible against the partisans of any of them starting a revolution. Portalis' philosophical predicament is clear, and it is a classical one. Criticizing any claim to absolute knowledge about the good society on the basis of a claim to absolute knowledge about the good society is a difficult gambit. It can only be evaded by rephrasing the predicament. But this is not what Portalis does. He uses philosophy to have it both ways, depending on what is best suited to achieve the desired anti-revolutionary effect. Those who preach a "true societal order," as the just cause of a revolution, he opposes with the argument that this true order is not cognizable. Those who want to launch their own revolution because the true order is not cognizable he confronts with the thesis that pure intuition will reveal true, unsurpassable, and indispensable order. Typical in this regard is his emphasis on the trial-and-error character of our knowledge claims in matters of law, politics, and morality, while at other times he maintains that our knowledge claims in these matters are much more solid than those in empirical sciences, as they are warranted by an inner certainty of sentiment that is much more reliable than what has to go via the detour of our senses. The immediate presence of man to reality and reality to man is what will drive law.

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<sup>43</sup> Ibidem, II, p. 495 (towards the end) and PA, p. 465 (at the beginning). Re "mysterious state interest," cf. also USA II, p. 108.

## 6. At the roots of law: Portalis, Montesquieu, and Rousseau

All this gains wider importance when in the *Preliminary Address* we find references to nature and natural law that make a rather apodictic impression. The most salient one is this.

When not guided by anything established or known, when faced with an entirely new occurrence, one returns to the principles of natural law. For while the foresight of lawmakers is limited, nature is limitless; it applies to every thing that may be of interest to men.<sup>44</sup>

Natural law, in this understanding, is neither a derivative of divine law, nor of a human *telos*, nor of a pattern of needs, nor of a contract of association, nor of a division of labour. In essence, it is nature itself in the sense of reality, talking through nature itself in the sense of pure intuition.

Which ancillary services philosophy has to deliver to Portalis' concept of law becomes even clearer if we focus on the question "What makes law binding?" In the *Preliminary Address* this question is answered in general terms that strongly remind one of Rousseau's *Social Contract*. Thus, the statutory law is called "a solemn declaration of the will of the sovereign in a matter of general interest;" also, there are the observations on the genius of the legislator,<sup>45</sup> the distinction between laws and directives, the coherence of the laws - all of this reminiscent of Rousseau's argumentation. Apparently, at the occasion of presenting a draft Civil Code in post-revolutionary France, it was important to speak Rousseau idiolect. Indeed, this vernacular was already official parlance, to such a degree that even an *Anti-Rousseau* as the *Preliminary Address* is in the end, could be cast in this mold.

However, when it comes to specific forms of bindingness, the tributes to Montesquieu leap to the eye, in the *Preliminary Address* by virtue of numerous more or less exact quotations, in *Use and Abuse* through an explicit discussion of the merits and fallacies of Montesquieu and Rousseau, respectively. The binding force of law is at issue in Chapter XXVI, after two-third of the book. Portalis has already explained his philosophy of knowledge; and he has established the vantage points of an enlightened philosophy of Enlightenment. Also, he has demonstrated that philosophy is able to assign a place to the fine arts; to make a distinction between good and bad historiography, to find access to a form of

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<sup>44</sup> PA, p. 471.

<sup>45</sup> I.e., the "législateur" of chapter II, 7 of Rousseau [1964].

natural morality; and to characterize Christianity as the religion that is most akin with "sound philosophy." Now he starts out to describe the salutary effects of the philosophical mindset in matters of legislation, law, and politics.

After he has established that in this area clear and articulate knowledge has been absent from society well into his days (legislation, governance, and judicial decision-making were lost in the darkness of pure habits or pure customs<sup>46</sup>) he shows his colors right away.

The true science regarding legislation and governance is nothing but the knowledge of the rights of man, combined in wise manners with the needs of society.<sup>47</sup>

The phrase "the rights of man" ("man" in the singular) is easily misunderstood. Portalis does not refer to what we now call "human rights." He does not take human rights seriously, in spite of the revolutionary slogans of the time. They are the upshot of "exaggerated principles,"<sup>48</sup> that do not take us far. "Rights of man" have to be conceived, rather, as positive legal rights that "men" (in the plural<sup>49</sup>) have acquired over time, and that need to be warranted by sound legislation, taking into account lots of variables.

Montesquieu is the true founder of this knowledge, but he was ahead of his time and was not understood, Portalis says.<sup>50</sup> Yet, he is critical of Montesquieu in at least one respect. The very thing that we find most striking in our time in *L'Esprit des Lois* – the hypothesis of a contingent, law-like correlation between a political rule, societal values, and a number of factual circumstances as the most sustainable basis for law and policy-making – this is also what arouses Portalis' suspicion as too strong an exercise in systems thinking. But for this flaw, he praises Montesquieu as the Newton of legal science.<sup>51</sup> This is not to say that he goes to great pains to follow his loadstar at all costs in the PA. He manages to quote from his work wherever he sees the opportunity to do so, but mainly to undergird his own political agenda.

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<sup>46</sup> USA II, pp. 261–267, continued to p. 275.

<sup>47</sup> Ibidem, II, p. 267.

<sup>48</sup> Ibidem, II, p. 299.

<sup>49</sup> In this regard, Portalis could have cited Burke [1971].

<sup>50</sup> Cf. USA II, p. 276, where one also finds the definition of "science" in this context: "une suite des verities liées les unes aux autres, déduites des premiers principes, reunites en un corps plus ou moins complet de doctrine ou de système, sur quelqu'une des branches principales de notre connaissance."

<sup>51</sup> Ibidem, II, p. 283.

With Rousseau, however, in particular the Rousseau of the *Social Contract*, he has different fish to fry. Although he pays tribute to the Rousseauist idiom in the *Preliminary Address*, in *Usage et Abus* he is explicitly negative and rejects the treatise as a "sterile and turbulent metaphysics."<sup>52</sup> Rousseau is one of the adepts of the "esprit de système," that has wrought so many "dangerous errors" at the dawn of the young science of law and state, and that has overshadowed the wise lessons of experience with "exaggerated and absurd theories." Portalis has a short way with it on behalf of "sound philosophy." His critique may be summarized as follows.

a) *The state of nature*. The idea of the state of nature is a hypothesis without any support in the facts of experience. By contrast, there is a host of facts in support of the thesis that the natural condition of man consists of living together with other human beings, even if the mode of coexistence is liable to development (i.e., progress, civilization).<sup>53</sup> Quickly enough it becomes clear why Portalis rejects the state of nature so vehemently: he regards it as the source of exaggerated ideas regarding the rights of man, individual independence, resistance against civil and political institutions. In short, he sees it as the malicious seed of an absolute claim in matters political and legal.

b) *The social contract*. This is a mere thought-construct that ignores the true nature of society. "Society is not a contract, it is a fact."<sup>54</sup> It is not established by a singular and formal act but by encounters and developments over time, as inevitable as they are coincidental. Here again the reasons for Portalis' negative response are clear enough. The idea of the social contract in Rousseau backs up a much more radical idea: the sovereignty of the people.<sup>55</sup> For Portalis this idea is ill-conceived in the extreme. He is "enlightened" enough not to revert to the model of a direct "droit divin" as a basis for a sovereign ruler. But nature not only makes people live together, it also necessitates them to take authoritative guidance from an agent with supreme power. Even so, Rousseau and Portalis concur in one

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<sup>52</sup> Ibidem.

<sup>53</sup> Portalis therefore eschews the idea of the state of nature as a paradise lost. Cf. Ibidem, II, p. 298ff. Elsewhere (II, p. 338n) it becomes clear that he is very much aware of the fact that the state of nature is a thought experiment.

<sup>54</sup> Ibidem, II, p. 300.

<sup>55</sup> While the social contract was a widely shared idea, the idea that it entailed popular sovereignty was not.

point: society cannot be thought as a *real* (existing) society unless it is thought as a politically organized society. This political organization has to be conceived, first and foremost, as the constitution of public supreme power, charged with maintaining the unity among the members of society.

c) *Sovereignty*. Rousseau says that sovereignty is all-inclusive, inalienable, indivisible, and infallible.<sup>56</sup> Portalis uses similar predicates, but with a different meaning.<sup>57</sup> Precisely because sovereignty is all-inclusive, inalienable, indivisible and infallible, it should be basically conceived as *government*. It cannot be what Rousseau wants it to be: sheer constituent power; and for one obvious reason. In terms of the early Habermas: sovereignty as constituent power is "*the anti-institution.*"<sup>58</sup> But an anti-institution cannot be an agent. Sovereign power cannot reside in the gathering of citizens, where there is conflict, compromise, pluralism, and difference. Rousseau's ideas are dangerous since they deliver socio-political relations to permanent antagonism, hence decomposition and decline. Government cannot take orders from such a non-institutionalized and divided agent, as Rousseau would have it. To put it in another way, sovereignty is public power, and public power without institutional hands and feet is no power, it is "a metaphysical entity."<sup>59</sup> Government should be regarded as nothing but the institutionalized counterpart of the sovereign: sovereignty in action.<sup>60</sup> Sovereignty is primarily power over society, not power of society.<sup>61</sup> According to Portalis, the power to legislate should be attributed to this double-faced ruler, the unity of sovereign and governor. In exercising this power the people can be involved to a greater or lesser extent by representatives. For, indeed, no legislation will come about or be enforceable without the co-operation of "the population" altogether.<sup>62</sup> But there is no such thing as "the will of the people" laid down in legislation, as the Preambles to the revolutionary constitutions used to put it. For, in still

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<sup>56</sup> Ibidem, II, pp. 1-3.

<sup>57</sup> In passing he admits that sovereignty cannot be thought in partitions that should find their own equilibrium (as Montesquieu famously wrote).

<sup>58</sup> This is how Habermas characterizes "Diskurs" in his early writings on the theory of communicative action: "Gegeninstitution schlechthin." Habermas [1971].

<sup>59</sup> USA II, p. 318.

<sup>60</sup> Ibidem, II, p. 317.

<sup>61</sup> 'La société n'existe pas avant que le pouvoir souverain soit réunit en de certaines mains; car il ne sauroit y avoir de faisceau sans lien et le gouvernement est ce lien.' Ibidem, II, pp. 320-321.

<sup>62</sup> Ibidem, II, pp. 325 and 327.

other words, sovereignty cannot be conceptually captured by the category "people," since the people as a unity can only be conceptually captured by the category of public power, i.e. sovereignty. From the very first moment of its existence, "the people" conceive of themselves as from a point of origin outside or beyond themselves, a founder or a liberator.<sup>63</sup> Only on account of this exteriority can they be said to be "one." On their own account they are unable to see themselves as a unity. This does not exclude the possibility that they may act in great unanimity, for instance to expel a tyrant. Nor does it ignore the fact that "the spirit of a nation" is, tacitly, in permanent flux, and that any legislator has to take these changes into account.<sup>64</sup> What it says is that a people cannot institute themselves as the agent they ask for. What they ask for is the power that should back up the law behind all laws: the law that all law is to be complied with.<sup>65</sup> Elsewhere Portalis submits that this law of all laws is tantamount to public order or peace.<sup>66</sup>

d) *Liberty and equality*. Portalis chooses to steer away from Rousseau's plea for freedom and equality, as it leads to misunderstandings and abuse as long as one does not acknowledge that the core of political liberty is the certainty that one will be able, by and large, to realize one's will and pursue one's interests. Equality is nothing but this very certainty warranted *for everyone*. Only in a derivative sense does freedom have to do with "independence," as one is always dependent on others. And only in an equally derivative sense does it have to do with participation in the exercise of public power, as the certainty mentioned is possible only under the rule of law preceding such participation.

## 7. Certainty, possession, and property

With Rousseau philosophically put aside in *Use and abuse*, Portalis embarks on a massive defense of private ownership. Freedom, he argues, revolves around two things. The first one is certainty for everyone that one can pursue one's interests. The second one, trivial as it may sound, is that one has an interest

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<sup>63</sup> Ibidem, II, pp. 325–330.

<sup>64</sup> This view (ibidem, II, p. 333) can be found, in almost the same wordings, in Von Savigny's *Berufsschrift*.

<sup>65</sup> "[...] la loi supreme est de respecter les lois." (Ibidem, II, p. 332.)

<sup>66</sup> "La première de toutes les lois, celle de la paix et de la tranquillité." (Ibidem, II, p. 320; cf. p. 334.)

to pursue in the first place, i.e., property. Those who have no property to lose will not care for legal certainty, and those who enjoy no legal certainty might as well have no property.<sup>67</sup>

Behind this apparent triviality Portalis hides from an important philosophical choice. In the term "self-preservation" he substitutes "property" for the word "self." Concerning self-preservation as a basic level of political freedom one may ask if "self" is not a gratuitous term if people do not possess the freedom to articulate it in some way or other. One is inclined to demand that it takes political self-determination to work towards self-preservation in the first place. But if "property" or "what is mine" comes to take the place of the self, self-determination seems to evaporate into thin air. Then the political order becomes an instrument to maintain property, thus an instrument to maintain whatever order of inequalities is declared "natural."

Hence, for Portalis, governmental power has to respect and protect property if it claims to warrant self-preservation. This is why it has to be forceful and moderate at the same time; forceful to keep peace, moderate to keep off from property.

The republican constitution that warrants freedom most is the one under which the mere robustness of the institutions make citizens obey governmental authority and governmental authority the law; and where law's empire is so strong that no citizen is able to oppress another and no pressure group is able to disturb the state [...].<sup>68</sup>

This freedom is also the only feasible content of the term "equality." Basically, equality means that nobody has to fear an arbitrary assault on his property in spite of the inequalities that exist between people by nature. A just political order will reduce too gross consequences of inequality, but not try to eradicate inequality itself. Inequality in talents, powers, desires as well as in riches<sup>69</sup> are natural, and they are the drivers of social vitality. Everybody should be protected by the law according to his position as defined in terms of property. And with regard to the very poor, the law should lessen their hardship by a good system of aid.<sup>70</sup>

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<sup>67</sup> Ibidem, II, p. 345.

<sup>68</sup> Ibidem, II, p. 349: "où la loi a un tel empire." Dworkin's title does not come out of the blue; cf. Dworkin [1986].

<sup>69</sup> USA II, p. 355.

<sup>70</sup> Ibidem, II, pp. 360–361.

The idea of an original equal worth among humans, joined with the idea of an original common property of the earth, is for Portalis quite absurd. In contrast to Kant<sup>71</sup> he argues that nobody needs prior consent from someone else "to fulfill the duties entailed in our natural destination,"<sup>72</sup> i.e., everybody's concern with self-preservation and the right to, indeed the duty of, appropriation. The laws and the state only have a warranting function here, not an allocating one. He goes even further in emphasizing ownership and asserts that it precedes the formation of any polity.<sup>73</sup> A remarkable thesis, this one, as it brings him rather close indeed to the advocates of a (Lockean) "state of nature" – a model of thought he rejected. Nature, in this context, is supposed to allocate rights and duties prior to any public order (i.e., sovereignty). One may even ask if Portalis does not embrace, at least at suitable occasions, social contract theory. For he writes:

[...] we cannot repeat enough: human beings only for a society to warrant each other the security of their property.<sup>74</sup>

Surely this is more reminiscent of Locke than of Rousseau. But even Rousseau is convinced that mutual recognition of interest in security of property is the core issue of the social contract. What he denies is that this property and its allocation, properly speaking, precedes this mutual recognition.

Only the very last chapters of *Use and Abuse* provide an explanation for Portalis' eclectic philosophy, picking theories that suit him best for the political issue at hand. There he asks "under which circumstances the philosophers have become a power in our administration."<sup>75</sup> His answer testifies to a rather paranoid suspicion of conspiracy against the authority of the state. At first, the government welcomed the philosophers: they were able to deprive the clergy of their political authority in the name of reason. When it was (almost) too late, public authority finally understood how pernicious these philosophical criticisms were. More and more science in general and philosophy in particular (sic) came to undermine the political process and its legislative outcomes. It brought disorder rather than order. What annoys him most is the "fanatisme philosophique"<sup>76</sup> that has this intolerant way of preaching tolerance; that always wants to hear more arguments

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<sup>71</sup> For arguments and references cf. Kühl [1984].

<sup>72</sup> USA II, p. 367.

<sup>73</sup> Ibidem, II, p. 368.

<sup>74</sup> Ibidem, II, p. 385.

<sup>75</sup> Ibidem, II, p. 431.

<sup>76</sup> Ibidem, II, p. 447.

and never takes authority for granted. Surely he acknowledges the other side of the medal: it is the lax spirit of the times that has opened the libertarian philosophical loopholes.<sup>77</sup> But this makes things even worse. Interdependence granted, it is the immoderate<sup>78</sup> character of the times *and* of philosophy – this idea that everything sacred can be undermined by smart comments on behalf of reason; that perennial discussion is the only pertinent manifestation of reason and that this builds up to “public opinion”<sup>79</sup> – which seriously worries Portalis. Philosophy is “a very active force that should always be applied with some form of measurement.”<sup>80</sup> Without prudent measurement it becomes a raging passion. For Portalis, the dangerous passion of “philosophism”<sup>81</sup> in matters legal and political is a major factor in the horrors of the revolution. It has to be curbed and indeed codified, no less than legal practices that have grown rampant. The *Preliminary Address* may be regarded as, to a considerable extent, a codification of the philosophy that is suited to the *Code civil*.

## 8. Enlightened Enlightenment: Taking Stock

I have tried to substantiate the claim that Portalis’ effort to enlighten Enlightenment is less driven by philosophical views than by politico-legal concerns. As a consequence of such an instrumentalist approach his philosophical argumentation is rather eclectic, cyclic, and (therefore) often question-begging. The Code civil is less a product of Enlightenment than of politico-legal compromises between ancient property rights and post-revolutionary governance strategies. Portalis’ idiom does more to obscure than to enlighten these compromises.

Having said that, however, there are some important anchor points in his argument that are of pertinent and permanent value to a philosophical pursuit that acknowledges Enlightenment as being at the root of our account of a polity under the rule of law, whether national, infra-national, or supra-national. I would like to present three topics, all of them related to Portalis’ reading of Rousseau. Let me put aside the question whether I would support this reading. Though I would most certainly not,<sup>82</sup> it should not concern us here. Portalis’ critique of “the state of

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<sup>77</sup> Ibidem, II, p. 469.

<sup>78</sup> Ibidem, II, p. 476.

<sup>79</sup> He points to the change in the meaning of this concept. It does no longer refer to the homogeneous convictions of a people, but to the wisecracks of big mouths.

<sup>80</sup> Ibidem, II, p. 476.

<sup>81</sup> Ibidem, II, pp. 482 and 485.

<sup>82</sup> As I argue elsewhere, e.g., Van Roermund [2003].

nature," "the social contract," and "popular sovereignty" goes against the grain of many a contemporary account of state and law, whether it believes to find shelter in Rousseau's work or not. While each of them would deserve a lengthy paper, I can only briefly indicate what is at stake.

a) The state of nature arguments today come under the guise of the social choice theory, either in the economic, or in the evolutionary, or in the normative sense of the word. How human beings transform self-interest into public interest, thus transforming themselves from non-social to social, is one way of reading intricate settings of the prisoner's dilemma or the Rawlsian "original position." Portalis' heritage here could be paraphrased in a critical slant that is in fact twofold.

a. Self-preservation is a non-starter for a concept of law as long as agents are not attributed an idea of themselves in relation to others, apart from what they can infer from their needs.<sup>83</sup> One may impose conceptions of a "flourishing human life" on them as part of what defines their "original position." But then one projects such views on to their situation without warranting that they can take them.

b. The real conceptual problem anyway is not to capture a transition from the non-social to the social relationship, but from an unjust to a just social relationship. E.g., "How to live together with one's former oppressors?" - rather than "How to live together in the first place?"

b) The social contract theory today appears either as a conventionalist theory à la Hart or as a discourse theory in an Habermasian vein. Both theories risk to beg the question they pretend to solve. This comes to the fore in Habermas' Discourse Principle, when he says that, as a matter of shared practical reason, decisions should be acceptable "for all those involved" while it is precisely a matter of decision who will count as "involved." It also emerges in Hart's Rule of Recognition, which is made dependent on the behavior of officials, while it is made dependent, in turn, on the Rule of Recognition who will count as an official. The problem is the so-called membership issue: the problem of self-inclusion and -exclusion.<sup>84</sup> Or in classical social contract terms: by the social contract one cannot establish who are to be parties to the social contract. Either this presupposes

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<sup>83</sup> USA II, p. 298: "À côté de l'instinct grossier du besoin, il [= l'esprit social; BvR] crée l'instinct délicat de l'honneur."

<sup>84</sup> For in-depth discussions see Lindahl [2013] and [2009].

another contract (ad infinitum), or it presupposes something other than a contract (making the contract secondary), or it assumes that we have to start from a factual rather than a normative inclusion. The latter seems to be Portalis' idea when he says that society is a fact rather than a contract.

c) Sovereignty of the people today appears as a topos in the theory of democracy. Typically it argues that "direct democracy" is the ideal picture of democracy. Then it submits that one should be realistic about it and concede that the conditions of contemporary society prompt to representative democracy as a second best solution. Finally it adds that the same conditions (e.g, social media) should be put at work to approximate the ideal as close as possible. Portalis, however, points out that "direct democracy" is not an ideal, and that it cannot be one. This is due to the fact that there are always autocratic elements in a democracy.<sup>85</sup> As a shared process of decision-making, democracy has to deploy through dialoguing; and one cannot open or conclude a dialogue through dialoguing. It presupposes chairmen, spokesmen, in short, representatives. Or in a similar vein: To act as a constituent power, also popular sovereignty has to take on an institutional form and place itself under the law yet to be constituted.

In brief, Portalis' legacy is not only a civil code; it is also a set of pertinent questions that are critical of Modernity and its conception of law and state.

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<sup>85</sup> As Kelsen saw. Kelsen [1953, 1926, and 1968].

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