Introduction to the Field of Discussion

The French Declaration of Human and Civic Rights from 1789 is the first European legal document to ground state laws on the idea of individual human rights.[1] As is well known, the French constitutions built upon the original declaration did not succeed in creating a stable and peaceful French state in the 18.th century.[2] Nonetheless, it is under influence of this document that the conception of public rights of the individual has developed in the positive law of the states of the European continent. Modern France continues to pay tribute to the ideal of the Declaration as the fundament of the republic. It makes up the preamble of the constitution of the fifth and current French republic of 1958. Likewise, the declaration of human rights issued by the United Nations in 1948 relied on inspiration from the original French Declaration. A difference between the UN declaration of human rights and the French Declaration consists in the different legal roles ascribed to human rights. Article 16 of the 1789 Declaration pronounced that any society in which no provision is made for guaranteeing the rights mentioned in the Declaration has no constitution. Thereby the French Declaration thought of human rights as the fundament of any constitutional state. In contradiction hereto, the UN worded human rights as a standard of achievement.

I shall discuss two historically precedent philosophical sources to the French Declaration, namely Thomas Hobbes' *Leviathan* (1651) and Jean Jacques Rousseau's *Social Contract* (1762). The French Declaration cannot be said to have been inspired directly by Hobbes as it was by Rousseau. The exposition of Hobbes and Rousseau is undertaken in order to come to grips with two paradigmatic examples of how early modern European thought established a tradition of natural rights independent of divine authority. In their political philosophies both Hobbes and Rousseau developed systematic explanations as to the interconnection between natural rights, laws and justice. Hobbes expounded an original conception of natural laws as laws of reason without reference to divine commandment, whereas Rousseau ridiculed the concept of natural law as "established … on such metaphysical principles, that there are very few persons among us capable of comprehending them, much less of discovering them…," (Rousseau, 1755: 46).

A main difference between Hobbes and Rousseau consists in their view on justice. Hobbes expounded a conception of natural law that lead to the legitimation of an autocratic state power. The apparently paradoxical result of Hobbes' view is a rejection of the

meaningfulness of any conception of justice outside of positive law. Rousseau, on the other side, dispensed with the conception of natural law in order to argue for a humanly and thereby artificially established universal conception of justice that functions as a principle of justice to measure the justice or injustice of positive law in existing states. I shall point to central differences in their political philosophies but argue that these rest on important similarities in their argumentation. As ground-breaking thinkers of early modern political philosophy, Hobbes and Rousseau comprise an important philosophical background for the French Declaration of Human and Civic Rights as well as for the criticism launched against it.

First, I shall look at how Hobbes developed a refined differentiation between natural right and natural law as a foundation for his conception of just sovereignty as an absolute authoritarian state power over the populace. The next step will be to follow how Rousseau turned the tables on Hobbes' position offering an argument of an original social compact that lead to the sovereignty of the people and their rights. Thereafter the attention is turned to the French Declaration of 1789 and the criticism raised against it by the French feminist and girondist Olympe de Gouge (1748-1793) and the British utilitarian Jeremy Bentham (1748-1832). As a look at the year of death of de Gouge palpably displays, she was one of many victims of the reign of terror of the committee of public security (*comitée de salut publique*) with Maximilien Robespierre (1758-1794) as its active leader in the period of September 1793 to July 1794. Bentham, looking at the uproar in France from calm Britain, was horrified by the events. There is a slight but important time difference between Bentham's and de Gouge's texts. Whereas de Gouge wrote in 1791, as France officially was a constitutional monarchy, Bentham's criticism of the French Declaration for simply amounting to nonsense upon stilts was written in 1795 after the fall of Robespierre.[3] Thus, Bentham lived to evaluate the values and faults of the French Revolution whereas de Gouge lost her life to its cause. de Gouge, a keen supporter of the Revolution and ally of the girondist faction, was loyal to the idea of a constitutional monarchy. Her alternative Declaration of the Rights of Woman was addressed to the queen, Marie Antoinette. de Gouge argued to develop the revolution further to also encompass women's political rights by grounding her – at the time – controversial claims for gender equality within a tradition of thinking about human rights as inalienable divine rights. Bentham was a severe critic of almost all aspects of the Declaration. Had he known de Gouge's argumentation he would have opposed it just as vehemently as he opposed the Declaration of the national assembly.

Bentham took issue with the idea of founding juridical laws on a foundation of natural rights. His comprehensive rejection of the conception of natural rights makes him more radical than Thomas Hobbes who – as we shall – see did operate with a concept of natural right.

Two Types of Commonwealth in Hobbes' Leviathan

In *Leviathan* Hobbes set forth to explain two manners of transition from the state of nature to an established commonwealth with rule of law. One is "by natural force" which Hobbes called "a commonwealth by *acquisition*" thereby implying that some person or group had acquired enough power to subdue a people (Hobbes 1651: 121). The other he called "a political commonwealth or commonwealth by *institution*" (Hobbes 1651: 121). It was founded on the conceptions of natural right and natural law that Hobbes had explained beforehand in his discussion of the state of nature. According to this manner of arguing, human beings in a state of nature could by use of reason envision that they would be better off if they contracted to form a commonwealth ruled by a declared sovereign external to the covenant. We shall come back to the content of Hobbes' argument, but beforehand it is important to note that Hobbes equated the two ways of moving out of the state of nature into law governed society. According to Hobbes it is irrelevant for the evaluation of a law governed society whether it is founded on a voluntary social contract between all its members or the sovereign power has been acquired by force. The only difference, Hobbes argued, is "that men who choose their sovereign [by way of a social contract], do it for fear of one another, and not of him whom they institute. But in this case [where sovereign power is established by force], they subject themselves to him they are afraid of," (Hobbes 1651: 138).

A general presupposition of Hobbes' political philosophy is that the state of nature is worse than any functioning commonwealth. The state of nature entails a "war of every man against every man … [in which] nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice. Force and fraud are in war the two cardinal virtues. Justice and injustice are none of the faculties neither of the body nor mind," (Hobbes 1651: 90). Hobbes' conception of the state of nature involves two strong claims about human nature. Firstly, human beings are naturally enemies. Secondly, the animosity between humans cannot be

controlled by any other means than domination and concentration of power in the hands of the sovereign (let it be a monarch, an aristocracy or parliament). The equation between the two manners of establishing a commonwealth amounts to an argument that maintains that in order to create peace force is necessary. The origin of the commonwealth does not alter the fact that laws need force in order to be effectively steering human actions.

Therefore, Hobbes argued the important differentiation is between the state of nature and any established commonwealth. The meaning pertaining to words such as justice, good and evil, right and wrong only arises out of the civil laws of the commonwealth and are incomprehensible in the state of nature. The erection of the commonwealth Hobbes compared to the creation of an artificial man. The individual members tie themselves to a commonwealth in order to attain peace and conserve themselves. In the commonwealth individuals "made artificial chains called *civil laws* which they themselves by mutual covenants have fastened at one end to the lips of that man or assembly to whom they have given the sovereign power; and at the other end to their own ears. These bonds in their own nature but weak may nevertheless be made to hold, by the danger, though not by the difficulty of breaking them," (Hobbes 1651: 147). Hobbes argued that the individuals living in a commonwealth had consentingly subjected themselves to the civil laws of the sovereign. This subjection amounts to the same regardless whether the sovereign power had been attained through a mutual covenant between all members or by force.

Only in the artificial state of a commonwealth do concepts such as justice, right and wrong obtain any discernible meaning, namely the meaning ascribed to them by civil law. In modern wording Hobbes can be said to argue from a legal positivist point of view. In accordance with the terminology of his times, Hobbes maintained a nominalist understanding of law and justice. There is no such thing as a measure of justice or rightness apart from the civil law of a given society. Predicates such as 'justice', 'right' and 'wrong' *obtain their meaning* from the formulation of the civil laws in the specific commonwealth. Actions are right or wrong in accordance with positive, civil law, which amount to being right or wrong in accordance with a dominant power that punishes the wrong deed and permits the right. Therefore, it is impossible to compare the relative justness or rightness of different societies. As long as the sovereign power is able to uphold its civil laws, it is legitimate. Justice is an internal feature of actual positive law of a given society.

From a traditional perspective of natural law, the result of Hobbes' analysis is highly astonishing. Typically, natural law would imply a universal and definite standard of justice by reference to divine commandments. Thus, in order to understand how Hobbes could assert such a position, we need to look closer at his understanding of natural right and natural law.

Natural Right and Justice according to Hobbes

Despite the fact that Hobbes denied any universal measure of justice or rightness across different sovereign states, he did advocate for a conception of natural right. In the first part of *Leviathan* Hobbes introduced a differentiation between natural right (*jus naturale*) and natural law (*lex naturalis*). He defined natural right as "the liberty each man has to use his own power as he will himself for the preservation of his own nature," (Hobbes 1651: 91). Natural law Hobbes characterized as "a precept or general rule found out by reason by which a man is forbidden to do that which is destructive of his life or takes away the means of preserving the same," (Hobbes 1651: 91). Hobbes' definitions entail a disparity between natural right and natural law. The natural right is singular and consists in the liberty to self-preservation. Natural law, on the other hand, amounts to an instruction it would be wise to follow. Natural laws are rational guidelines thought up by human reason. Reason obliges the individual human to abstain from self-destructive behaviour and thus the natural laws can be said to unfold and elaborate on the natural right to self-preservation. According to Hobbes the main challenge consists in how to make mutual obligations between people constrain their individual actions.

The natural right to self-preservation is inalienable and constant in the state of nature as well as in any commonwealth. Thus, if the sovereign power of a commonwealth accuses or condemns a citizen to death, the sovereign power is right to do so. But the citizen is "not obliged not to resist," (Hobbes 1651: 98). Natural right implies for each person "the right to save himself from death, wounds, and imprisonment, … and therefore the promise of not resisting force in no covenant transferred any right; nor is [it] obliging" (Hobbes 1651: 98). Hobbes thus argued that the natural right to fight for one's own self-preservation overrules the obligation to obey the law. The natural right to self-preservation is inalienable. It implies that "there be some rights which no man can be understood by any words or other signs to have abandoned or transferred," (Hobbes 1651: 93). In a functioning commonwealth the

power of the sovereign is so much greater than the power of the single subject. The sovereign, consequently, can force its will upon the subject. However, if the sovereign power – as is the case in modern Western democracies – abides to a rule of law according to which an accused is innocent until proven guilty, it implies that a guilty citizen may be acquitted if evidence of his guilt has not been proven because he is "not bound to give" truthful testimony to a court (Hobbes 1651: 98).

The natural right to self-preservation legitimises the individual's attempts to resist force. At the same time, it follows from the absolute power of the sovereign that "whatsoever he [the sovereign] does it can be no injury to any of his subjects; nor ought he to be by any of them accused of injustice," (Hobbes 1651: 124). The sovereign produces the law and it is by the force of the law that the individual members of the commonwealth have escaped the state of nature with its condition of war. This entails that in order to obtain peace the individual subjects in a commonwealth have themselves authorised the demands of the sovereign. Being subject in a commonwealth amounts to "acknowledge himself to be author of whatsoever he [the sovereign] … shall act or cause to be acted in those things which concern the common peace and safety and therein to submit their wills everyone to his will," (Hobbes 1651: 120). Hence, no actions of the sovereign can be unjust or an injury to the subject. Subjects may hold that the sovereign "commit[s] iniquity" (Hobbes 1651: 124) but they cannot charge the sovereign of injustice since the meaning of justice is defined by the sovereign's law making.

Natural laws and the Political Contract

Natural law being only a precept or general rule does not contain the same permanence as natural right. Natural law indicates that the individual rationally carries an obligation to comply. From the general precept that it is forbidden to do that which is destructive of one's own life Hobbes deduced nineteen laws of nature. The first law declares: "*that every man ought to endeavour peace as far as he has hope of obtaining it; and when he cannot obtain it that he may seek and use all helps and advantages of war*," (Hobbes 1651: 92). Seeking peace is conducive to self-preservation. If there is no prospect of peace it is, however, rational for the individual to use all means of war. As we have seen, Hobbes held force and fraud to be cardinal virtues in war. Therefore, humans in the state of nature are left in a deadlock that can only be overcome by a common commitment to seek peace but peace

seeking needs to be mutually obliging to be beneficial.

The second law of nature says "*that a man be willing when others are so too as far as for peace and defence of himself he shall think it necessary to lay down this right to all things and be contend with so much liberty against other men as he would allow other men against himself,*" (Hobbes 1651: 92). By way of the second law of nature the individuals in the state of nature can rationally establish a way of overcoming the condition of war. By reciprocally giving up on the natural right to everything the contracting individuals reciprocally win the possibility of peace and cooperation. In this act the individuals oblige each other. Thus the second law of nature points to the possibility of individuals reciprocally entering into a contract. The only problem is that there is no guarantee that the individuals fulfil their part of the contract. Only if individuals actually fulfil the contracts they enter can they gain from them. Therefore, Hobbes' third law of nature says "*that men perform their covenants made*: without which covenants are in vain and but empty words and, the right of all men to all things remaining, we are still in the condition of war," (Hobbes 1651: 100).

By rational thought it is possible to come to realise the beneficial outcome of mutual and reciprocal contracts. But reason only compels rational thought. Through reason we come to realise that we ought to comply with the obligations we freely have entered: "when a man had … granted away his right then he is said to be **obliged** or **bound** not to hinder those to whom such right is granted … from the benefit of it. And that he *ought* and it is his **duty** not to make void that voluntary act of his own. And that such hindrance is **injustice** and **injury** as being *sine jure*," (Hobbes 1651: 92-93). Thus we realise that breach of a contract is unjust because it is – as Hobbes calls it – "an absurdity to contradict what one maintained in the beginning," (Hobbes 1651: 93). Not to fulfil a contract one has freely committed oneself to, is to act against one's own rationality; it amounts to a simple contradiction and as such it is absurd and irrational.

But reason is weak in comparison to the passions and physical actions. Hobbes discussed this difficulty by setting up a distinction between obligations that bind the inner court of the individual's rationality or conscience (*in foro interno*) and obligations that bind the outer court of the individual's actions or public conducts (*in foro externo*). Hobbes point was that "the laws of nature oblige *in foro interno*, that is to say, they bind to a desire they should take place. But *in foro externo*, that is, to the putting them in act not always. For he that

should be modest and tractable and perform all he promises in such time and place where no man else should do so, should but make himself a prey to others and procure his own certain ruin contrary to the grounds of all laws of nature which tend to nature's preservation," (Hobbes 1651: 110). Even as a law of reason it cannot be required at all time to perform one's duty and act in agreement with obligation. For in the state of nature others might not perform their part. If others do not comply, it turns my promise keeping into a self-delimitating or even self-destructive act not supported by the first law of nature. If everybody complies, the laws of nature are indeed "immutable and eternal. For injustice, ingratitude, arrogance, pride, iniquity … can never be made lawful. For it can never be that war shall preserve life and peace destroy it," (Hobbes 1651: 110). But if men "call [these dictates of reason] by the name of laws, [they do it] improperly. For they are but conclusions or theorems concerning what conduced to the conservation and defence of themselves. Whereas law properly is the word of him, that by right had command over others," (Hobbes 1651: 1651). For a precept to be a law it needs a force to back it.

The conclusion of Hobbes' exposition is that laws of nature cannot be called laws in the proper sense of the term *if* they are not backed by force. Thus, there is no way that rational thinking alone can oblige humans to act in accordance with their promises or freely entered contracts. This further entails that the civil laws founded on the monopoly of force of the sovereign are the only possible representations of natural law. It is through the act of sovereign power that the "rules of property (or *meum* and *tuum*) and of *good*, *evil*, *lawful*, and *unlawful* in the actions of the subjects" are determined, (Hobbes 1651: 125). The right of the sovereign to judge good and evil, right and wrong implies that only the sovereign can resolve "controversies which may arise concerning law either civil or natural or concerning fact," (Hobbes 1651: 125). At the end of the day it is the sovereign who decides the content of even natural law because natural law would be vain if its only trial took place in the inner conscience of each individual – the obligation *in foro interno*. As Hobbes plainly puts it: "covenants without the sword are but words and of no strength to secure man at all," (Hobbes 1651: 117).

The transition from the state of nature to a commonwealth where civil laws can be enforced by threat of punishment requires the concentration of power in the hand of the sovereign. The rational manner of erecting such a sovereign power is through a reciprocal contract: "*I authorise and give up my right of governing myself to this man or to this assembly of men*

on this condition that thou give up thy right to him and authorise all his actions in like manner," (Hobbes 1651: 120). The contract will be enforced because all individuals give up their rights and transfer them to the external man made sovereign who thereby "had the use of so much power and strength conferred upon him that by the terror thereof he is enabled to conform the wills of them all to peace at home and mutual aid against their enemies abroad," (Hobbes 1651: 120-21). Thus the contract brings about a transformation of the multitude of individuals into one person governed by the will of the sovereign. This association between all individuals through the law is what Hobbes calls the *Leviathan*, the mortal god of law ruled society.

According to Hobbes the only inalienable natural right is the right to self-preservation that, nonetheless, may justly be subdued by the sovereign. Any rights the individual subjects of a commonwealth may enjoy are only bestowed upon them by the civil law. The laws are the making of the more or less capricious will of the sovereign. Hobbes put forward a political philosophy that rests on the natural right to self-preservation as an inalienable right and at the same time delivers all possible power to the sovereign who establishes right and wrong, just and unjust. The autocratic rule of the sovereign is normatively legitimised by the contra-factual reference to the much worse situation of living under the condition of war in the state of nature. The civil law enables subjects to be accountable to each other and leaves them in a state of constraint. The only real liberty in the commonwealth according to Hobbes "depends on the silence of the law. In cases where the sovereign has prescribed no rule, there the subjects have the liberty to do or forebear according to his own discretion," (Hobbes 1651: 152).

In connection with the question of the normative validity of human rights Hobbes' political philosophy only accepts one human right, namely the inalienable right to self-preservation. It is inalienable because a negation of the right to self-preservation implies a negation of the nature of the human being by simple annihilation of the possibilities of continuous living. This is the meagre positive result. Hobbes' political philosophy clearly does not have its main significance as proposing positive arguments for human rights. It has, however, immense significance by posing the problem. Hobbes discussed the meaning of natural rights, natural law and obligations exempt from the idea that these are binding *because of divine commandment*. Consequently, reading Hobbes' political philosophy forces us to consider what source of authority rights, laws and obligations might have. If we are not

satisfied with Hobbes' answer nor the tradition of natural law reaching back to Augustin that the final source of authority rests in the divine commandments of God, an alternative argument as to why humans comply with promises and laws should be supplied. Rousseau tried to formulate such an alternative.

Rousseau turns the Table on the Relation between Power, Obligation and Right

In the *Social Contract* Rousseau famously declared "Man is born free; and everywhere he is in chains," (Rousseau 1762: 181). Human existence in societies paradoxically amounts to the enslavement of the naturally free human being. Hobbes' recommendation that social order be established by instituting a monopoly of force in the hands of the sovereign amounts in Rousseau's mind to simply enslaving individuals: "Force is a physical power, and I fail to see what moral effect it can have. To yield to force is an act of necessity, not of will – at the most an act of prudence. In what sense can it be a duty?" (Rousseau 1762: 184). Rousseau was trying to answer the same question as Hobbes, namely how humans come to adhere to laws and what impels us to comply with obligations. But to answer that someone met the terms of a law or complied with an obligation because she was forced to do so or feared punishment was not adequate according to Rousseau: "force does not create right" and furthermore, "we are obliged to obey only legitimate powers," (Rousseau 1762: 185). Thus the question Rousseau posed was how legitimate authority can be established. And thereby he maintained that justice and legitimacy amount to more than merely civil laws backed by sufficient physical enforcement: "it is an empty and contradictory convention that sets up, on the one side, absolute authority, and, on the other, unlimited obedience," (Rousseau 1762: 186). There must be a standard of justice and legitimacy to discern the "difference between subduing a multitude and ruling a society," (Rousseau 1762: 189). This standard Rousseau found in the original social compact which transformed the aggregation of subdued individuals into the association of a people working for the public good.

The social compact consists in its essence in a reciprocal contract between individuals in accordance with the following: "*Each of us puts his person and all his power in common*

under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole," (Rousseau 1762: 192). The idea of contracting in Rousseau's original compact is parallel to Hobbes' social contract. The main difference being that Hobbes thought the contracting individuals should hand over the sovereignty to an external ruler, where Rousseau argued that the social compact establishes legitimate authority by handing over the sovereignty to the general will of the people produced by all contracting individuals. For Hobbes the social contract entailed the establishment of a society which he thought of as an artificial and mortal god, that constituted its own standard of justice and was legitimated because it freed the individuals from the state of nature. The social compact for Rousseau created "a corporate and collective body, composed of as many members as the assembly contains voters and receiving from this act its unity, its common identity, its life, and its will," (Rousseau 1762: 192). As such it contained the answer to the question of how to legitimate authority: "the sovereign, being formed wholly of the individuals who compose it, neither has nor can have any interests contrary to theirs," (Rousseau 1762: 194).

Sovereignty in the social compact amounts to the establishment of a general will of the people. And this implies that "those associated in it take collectively the name of *people*, and severally are called *citizens*, as sharing in the sovereign authority, and *subjects*, as being under the laws of the state," (Rousseau 1762: 193). Thus, Rousseau argued that we are obliged to comply with laws and obligations that are in conformity with the general will. The legitimacy of state authority, of sustaining civil laws, depends upon the double role of the individual members of the state being both lawgivers as part of the sovereign expressing the general will and subjects who are forced to comply with the law. The standard to measure the justice and legitimacy of a given state is thus to ask whether the individuals living under state rule also themselves have formulated the ideal of its laws.

Rousseau turned Hobbes argument for grounding the autocratic rule of the sovereign on a social contract upside down. For Rousseau it was clear that "since no man has a natural authority over his fellow, and force creates no right, we must conclude that conventions form the basis of all legitimate authority among men," (Rousseau 1762: 185). Therefore, Rousseau's argument for the social compact amounted to establishing a moral standard to judge whether state authority in any given society lives up to the standard of justice. Legitimate authority stems from the social compact because it assures the self-government

of the people. In order to pull such an argumentation through, Rousseau presented an alternative view of the state of nature. His political philosophy rested on the assumption that humans in a state of nature were more or less indifferent towards each other and only the want of plenty of natural resources made them find together in societies. Where Hobbes operated with two possible circumstances under which humans could exist, namely the condition of war in the state of nature and rule governed society, Rousseau projected three: the state of nature and the different states of illegitimate and legitimate societal life. He imagined the state of nature as a state of "indolence … the happiest and most stable of epochs," (Rousseau 1755: 91) and argued that the real predicament was the state of enslavement of human beings under illegitimate states. According to Rousseau the passage from the state of nature to societies indicated a thorough transformation: "the voice of duty takes the place of physical impulses and right [takes place] of appetite … [so that the human being] find that he is forced to act on different principles, and to consult his reason before listening to his inclination," (Rousseau 1762: 195). However, this transformation of the human being from a "stupid and unimaginative animal" into "an intelligent being and a man" (Rousseau 1762: 196) was abused in the authoritarian rule of most states where the free human being "everywhere … is in chains" (Rousseau 1762: 181).

Rousseau's main ambition consisted in producing an argument that could make the states legitimate. His argumentation was directed at a future social contract which should remedy the faults of existing states where force overrules civil and moral rights. According to Rousseau it was simply nonsense to assume that force in itself could explain what a right is, since force cannot explain obligation: "As soon as it is possible to disobey with impunity, disobedience is legitimate … But what kind of right is that which perishes when force fails? If we must obey perforce, there is no need to obey because we ought; and if we are not forced to obey, we are under no obligation to do so," (Rousseau 1762: 184).

Rousseau's ideal of the original social compact which would create an association of citizens who by self-governance attained civil and moral liberty was built on a completely different conception of justice, law and right than Hobbes had purported in *Leviathan*. According to Rousseau moral liberty is generated by the ability to comply with self-imposed laws that correspond with the collective justice and utility of an associated people. The collective justice involves basic rights of all citizens to partake in producing the law under which the same citizens as subjects are subdued. Thus, Rousseau's ideal of justice is procedural and

his conception of rights relates to the formal roles of the citizens as participants in the production of laws. An important insight from Rousseau which spurred the French Revolution and was carried over to the French Declaration of Human and Civic Rights was that rights germinate out of a people's free self-governance and sovereignty.

The French Declaration and its Ambiguous Conception of Law

In the beginning the *Social Contract* Rousseau pointed out that he was no legislator for had he been that "I should not waste time in saying what wants doing: I should do it, or hold my peace," (Rousseau 1762: 181). The idea of changing the fundamental laws in order to make society adhere to the ideals of justice mounted by Rousseau can be read as the slogan for numerous subsequent political changes in Europe and Northern America. However, I do not want to argue that Rousseau's *Social Contract* was the prime mover of the political changes.[4] Rather I should like to point out how aspects of Rousseau's political philosophy were incorporated in the French Declaration of Human and Civic Rights along with other –and sometimes – conflicting conceptions.

Firstly, the formation of the National Assembly in July 1789 can in itself be seen as an attempt to change the French state from authoritative monarchical sovereignty to self-governance of the people thereby changing the political system in accordance with Rousseau's ideal of legitimate political authority. As the "representatives of the French People … [the] National Assembly … resolved to set forth, in a solemn Declaration, the natural, unalienable and sacred rights of man …," (French Declaration). However, already in the description of the rights of man the National Assembly departed from a strict Rousseauian position. For Rousseau, legitimate political law was based on human artificially construed conventions and thereby neither natural nor sacred. According to Rousseau the rights of man could be understood as inalienable in the sense that any breach with these would make the political authority illegitimate. As the National Assembly described the rights of man as natural and sacred they might have wanted to point to the tradition of divine natural law. As we shall see in the case of Olympe de Gouge this tradition was reinterpreted by proponents of the French Revolution as a justification of the changes in state rule. Divine natural right was thus interpreted as a standard of justice which buttressed the revolutionary political actions. The reference to natural and sacred rights can be understood as way of broadening the scope of the possible source of legitimacy within

the Declaration.

Article 6 contains the most conspicuous reference to Rousseau's political philosophy as it states that "the law is the expression of the general will." The National Assembly follows Rousseau in claiming that the legitimacy of the law stems from the people's "right to take part, personally or through their representatives, in its making," (French Declaration: art. 6). The mirror image of article 6 is article 12 that declares the necessity of "a public force" to guarantee the rights of man. The public force is "established for the benefit of all, and not for the particular use of those to whom it is entrusted," (French Declaration: art. 12). Thus, the Declaration solves the problem of the legitimacy of public force by underlining that force should only be used in ways that corresponds to the public good and the command over the public force should be placed in the hands of the lawgivers. Thereby the Declaration underscored that the use of force needs to have public acceptance as its legitimating source. This is clearly in keeping with Rousseau's conception of how laws become morally binding by the act of self-governance. The legitimacy of laws makes it legitimate to utilise force to uphold the same laws. Thus, the Declaration, Hobbes and Rousseau all agreed that public force is a necessary element of any law governed state. The difference consists in the emphasis Rousseau and the Declaration put on the procedure of law making. If laws stem out of the self-governance of the people – or according to the Declaration their representatives – it is justified to use force to compel the subjects to abide to the laws. Hobbes thought, on the other side, that force was a necessary prerequisite of any laws and the ability to create a power monopoly granted any ruler legitimacy.

The article which poses the greatest difficulty to align with Rousseau's political philosophy is article 4. It states: "Liberty consists in being able to do anything that does not harm others; thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law," (French Declaration: art. 4). This definition of liberty could have been taken directly from Hobbes as he stated that liberty amounts to the silence of the law. In contradiction hereto Rousseau differentiated between "the natural liberty and an unlimited right to everything he [the human] tries to get and succeeds in getting" in the state of nature, on the one hand, and the "civil liberty and the proprietorship of all he possesses" which is gained in society, on the other. If the society is just Rousseau claimed that the human being also "acquires moral liberty, which alone makes him a truly

master of himself; for the mere impulse of appetite is slavery, while the obedience to a law which we prescribe to ourselves is liberty," (Rousseau 1762: 196). For Rousseau moral and civil liberty were tied up to the procedure of law making of the general will which all subjects take part in. Thus, to be free, according to Rousseau, is to live in accordance with one's own laws. Liberty is not contrary to law, rather just laws are the expression of human liberty. The Declaration, on the other hand, seemed to follow the tradition of thinking about liberty to which Hobbes belonged. Hobbes' view was that "in all kinds of actions by the law pretermitted men have the liberty of doing what their own reasons shall suggest for the most profitable to themselves," (Hobbes 1651: 147). The only addition hereto by the Declaration was that these free actions that concern matters which the law has not regulated should not harm others. This conception of liberty, the absence of coercion from the law, is in blatant opposition to Rousseau's ideal of moral liberty being the act of making one's actions conform to the law articulated by one self and all other members of the general will. Rousseau thought of moral liberty as a rational ability to be self-governing and to be in accordance with the other self-governing citizens, whereas Hobbes and the National Assembly thought of liberty as free choice outside of the reach of any law.

The discussion of articles 6 and 4 points to an ambiguous conception of law in the Declaration. On the one hand the law is viewed as an expression of the general will and thereby legitimised as a law which justly obliges all subjects because the same subjects are citizens who partake in the process of law making by the general will. On the other hand, liberty is viewed as the exemption from the ruling of the law. This implies an understanding of the subjects of the state as individuals who are coerced by the law and free in those actions that stand outside of the scope of the law. Hobbes would agree with this view. But it is difficult to unite it with the ideal that laws are obliging because the subjects themselves are the authors of these laws. It is, of course, possible to argue that human beings simultaneously can be subjects and citizens who produce and oblige themselves to the law by taking part in the sovereignty of the state and individuals concerned with their private interests in all those matters of life where the law is silent. Such a view implies a combination of the procedural understanding of justice put forth by Rousseau, namely that laws become just if they are in concordance with the general will of the people, with an understanding of the human being as more than a political law maker and law abider, namely an individual with private ideas of how to live. These private ideas are protected as individual rights as long as they do not harm others. Though it might be possible to conjoin

these views the Declaration was not exempt from harsh criticism.

Two Different Criticisms by Olympe de Gouge and Jeremy Bentham

Bentham was no supporter of the Declaration of Human and Civic Rights. Concluding his overview Bentham wrote that the fundamental principles of government put forth in the Declaration amounted to "execrable trash," (Bentham 1795: 66). He compared the misconception of French politics in the Declaration with the leading role of French chemistry at his time. Bentham did not develop further why he thought France leading in chemistry but probably he hinted at the revolutionising discoveries of Antoine Lavoisier (1743-1794). Bentham wanted to underline a procedural difference between chemistry and politics in France. So apart from the fact that the rest of Europe unanimously credited France and Lavoisier for important discoveries within the field of chemistry, while the French Revolution and its Declaration of Human and Civic Rights were greatly disputed across Europe, Bentham pointed to a problem of how the French approached the questions of politics. Bentham wrote: "Comparatively speaking, a select few applied themselves to the cultivation of chemistry – almost an infinity, in comparison, have applied themselves to the science of legislation. … In chemistry there is no room for passions to step in and to confound the understanding – to lead men into error, and to shut their eyes against knowledge: in legislation, the circumstances are opposite," (Bentham 1795: 66-7).

According to Bentham it was a serious mistake to let political decisions and the writing of legal documents be in the hands of the people: "What, then, shall we say of the system of government, of which the professed object is to call upon the untaught and unlettered multitude (whose existence depends upon their devoting their whole time to the acquisition of the means of supporting it,) to occupy themselves without ceasing upon all questions of government (legislation and administration included) without exception – important and trivial, – the most general and the most particular, but more especially upon the most important and most general – that is, in other words, the most scientific – those that require the greatest measure of science to qualify a man for deciding upon, and in respect of which any want of science and skill are liable to be attended with the most fatal consequences?" (Bentham 1795: 67).

Bentham put forth an ideal of politics, legislation and administration as a science in need of

skilled and learned scientists to perform it. This ideal stands in profound opposition to the ideal of self-governance of the people. The Rousseauian ideal claims that a law attains legitimacy and is thus normatively binding if the subjects of the law also – as citizens – are the authors of the law. Bentham, in contradistinction, argued that National Assembly, being mere amateurs and an "untaught multitude", was not equipped to formulate laws. Thus Bentham argued that he did not "mean to attack … this or that country – not this or that citizen – not citizen Sieyes or citizen anybody else, but all anti-legal rights of man, all declarations of such rights. What I mean to attack is, not the execution of such a design in this or that instance, but the design itself," (Bentham 1795: 68).

The criticism of Bentham can be boiled down to two main faults in the design of the rights of man: (1) they were not formulated by the legal expert, or as he called it, "the rational censor", but by an "anarchist", (Bentham 1795: 50) and as such they amounted to various verbal inconsistencies; (2) the conception of natural rights anterior to the establishment of governments is nothing but "nonsense upon stilts," (Bentham 1795: 53). In the following I shall focus on (2). Bentham almost echoed Hobbes as he pointed out that "we know what it is for men to live without government … we see it in many savage nations, or rather races of mankind … no habit of obedience, and thence no government – no government, and thence no laws … liberty, as against regular control, the control of laws and government – perfect; but as against all irregular control, the mandates of stronger individuals, none … In this state …, judging from analogy, we, the inhabitants of the part of the globe we call Europe, were [at a time]; – no government, consequently no rights … no legal security – no legal liberty: security not more than belongs to the beasts – forecast and sense of insecurity keener – consequently in point of happiness below the level of the brutal race," (Bentham, 1795: 53). What Bentham depicted was similar to the state of nature envisioned by Hobbes. In accordance with Hobbes, Bentham underlined that right was established by law which attained its power from government that rests upon the monopoly of force: "All governments that we have any account of have been gradually established by habit, after having been formed by force," (Bentham 1795: 55).

In his rejection of natural rights Bentham also came to reject the natural right to self-preservation which Hobbes had maintained. According to Bentham "the language of reason and plain sense" claimed that "as there is no *right*, which ought not to be maintained so long as it is upon the whole advantageous to the society that it should be maintained, so

there *is* no right which, when the abolition of it is advantageous to society, should not be abolished," (Bentham 1795: 53). Thus, the formulation of rights and the decision whether a right should be maintained is flexibly judged in connection with the advantage of the specific right to society. But the question, which Hobbes and Rousseau were both struggling with, remains unanswered by Bentham: who decides what is advantageous to society? Bentham hints at an answer by pointing out that the legal scientists should formulate the law. But do they know what will be more advantageous for society? According to Hobbes the responsibility of deciding what is advantageous to society was – in the political commonwealth – delivered to the sovereign by the people who rationally subdued themselves. But at the same time the individual kept her natural right to self-preservation. Even though this right could be overruled by the sovereign it still posed a restrain to the rightfulness of society's usage of the individual. Rousseau, on the other side, answered the question of what rights are indispensable by pointing out that rights can only legitimately be obliging if they are formulations of the general will of a sovereign people. Therefore, "as soon as [a people] can shake off the yoke, and shakes it off, it does even better," (Rousseau 1762: 181). It is apparent for Rousseau that most governments succeed in forcing the people, but as long as they only do this by way of force, the individuals are not morally obliged to compel – they are simply forced to do so.

Rousseau would probably have applauded the Declaration for formulating the requisite basic rights that enable the general will of any sovereign people to act as law maker. But, as Olympe de Gouge pointed out in her Declaration of the Rights of Woman, there was a discrepancy between the universally formulated ideals of the Declaration and its actual scope. Despite the fact that the Declaration was meant to construe a just foundation for government, de Gouge started her alternative declaration with the question: "Man, are you capable of being just? It is a woman who poses the question," (de Gouge 1791: 89). The injustice pointed out by de Gouge was the manifest inequality between men and women. The National Assembly was an assembly of men and it was only upon men that political rights were bestowed – and only those of economic independence and mature age.

In her argument for the injustice of the exclusion of women from political rights, de Gouges brought a conception of divine natural rights into play. She asked men "what gives you sovereign empire over my sex? Your strength? Your talents? Observe the Creator in his wisdom; survey in all her grandeur that nature with whom you seem to want be in harmony

with, and give me, if you dare, an example of this tyrannical empire. Go back to animals, consult the elements, study plants … and distinguish, if you can the sexes in the administration of nature. Everywhere you will find them mingled; everywhere they cooperate in harmonious togetherness … Man alone has raised his exceptional circumstances to a principle. … He wants to command as a despot a sex which is in full possession of its intellectual faculties; he pretends to enjoy the Revolution and to claim his rights to equality in order to say nothing more about it," (de Gouge 1791: 89).

de Gouge's argument by way of the conception of natural and divine rights can be read to underline and point out that the injustice of keeping women exempt from political rights amount to a blatant contradiction within the aims of the French Revolution. If the National Assembly thought of itself as restoring or creating justice in an unjust political order, they themselves instituted injustice by way of their suppression of women. This inequality between the sexes was, so seems de Gouge's argument to run, not part of the natural, inalienable and sacred rights of humanity. Thus it is important for the weight of de Gouge's argument that it is not only a question of construing a general will of the people to be producers of the law. If this was the only normative source of political rights it would be possible – as have conservatives throughout history done – to create an argument that would have women represented in political deliberations by their fathers or husbands. Therefore, it was more transparent that the lack of women's political rights was unjust, as de Gouge argued, if this lack was a corruption of the order of the Creator and of Nature.

However, as de Gouge wrote her alternative Declaration of the Right of Woman as a mirror image of the Declaration of the National Assembly, she furthermore pointed out how the exclusion of women from law making amounted to a contradiction within the concept of law. Article 10, which in the Declaration of the National Assembly declared the right to free speech ("No one may be disturbed on account of his opinions…"), de Gouge formulated so that it displayed inconsistency in the Declaration of the National Assembly: "No one is to be disquieted for his very basic opinions; woman has the right to mount the scaffold; she must equally have the right to mount the rostrum, provided that her demonstrations do not disturb the legally established public order," (de Gouge 1791: 91). To force a man to comply with a law he has no possible occasion to influence is the basic definition of illegitimate ruling according to Rousseau. de Gouge pointed out that this was exactly the situation of women as long as they were not equal citizens.

The criticisms of Bentham and de Gouge point to an underlying issue of how to argue for the normative validity of human rights that has continuous importance. If we reject the idea that human rights can be more than legal restrictions construed by existing political powers, as results from Bentham's line of reasoning, it becomes difficult to block arguments that claim it to be advantageous for nation states to discard with international law concerning human rights of, for example, refugees. If, on the other hand, we amplify our arguments as to the inalienability of human rights by reference to a divine order of either Nature or God, then the argument might have the opposite effect. It is easy for nonbelievers to discard the argumentation of believers as metaphysics. And the discussion within believers can be moved from the question of rights to the right interpretation of the commandments of the Creator, just as the discussion of the order of Nature can be bent to concern whether there really is harmony between animals or other parts of nature. Therefore, I want to argue that the only feasible route to defend human rights is procedural. By pointing out that we through the procedure of collective deliberation can construe arguments for certain restraints and certain rights as the result of weighing between principles of justice, equality and utility for all humans we can also give an explanation and justification of human rights as the best possible explanation of the source of obligation of laws, if it is not simply force. Laws are morally obliging and can be stated as human rights, if everybody can agree to their justice seen from the perspective of the common good they further while acknowledging personal autonomy.

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Endnotes

[1] The American Declaration of Independence from 1776, of course, precedes the French Declaration as a legal document built on the idea that unalienable rights of humans make up the fundament for the state and its legislation.

[2] The self-appointed national assembly drafted and confirmed the Declaration of Human and Civic Rights in August 1789 as a legal document to steer the fundamental rights of the French people and legitimate a new parliamentary system of state legislation. The Declaration became the preamble of the constitution of the French constitutional monarchy lasting from October 1791 to September 1792. With the announcement of the French republic in 1792 and the abandonment of the monarchy the Declaration underwent small changes but remained an important legal document. However, the 1793 reign of terror, the increasing number of executions, and the incessant political turmoil undercut the Declaration as well as parliamentary rule and as Napoleon finally in 1804 announced himself emperor of France the Declaration of Human and Civic Rights was completely abandoned.

[3] The text was not published until 1816 but is expected to have been written in 1795 – see Jeremy Waldron, *Nonsense upon Stilts*, Methuen, New York, 1987, p. 4.

[4] In his famous 1895 study Georg Jellinek argued that "the Declaration of August 26, 1789, originated in opposition to the *Contrat Social*. The ideas of the latter work exercised, indeed, a certain influence upon the style of some clauses of the Declaration, but the conception of the Declaration itself must have come from some other source," Jellinek, *The Declaration of the Rights of Man and Citizen. A Contribution to Modern Constitutional History*, transl. Max Farrand, New York: Henry Holt and Company, 1901, p. 12. Jellinek

successfully proved the immense impact of various North American sources on the wording of the French Declaration of Human and Civic Rights.