

Liberalism, Loose or Strict

By Anthony de Jasay

presented by



www.cne.org

Introduction

The Centre for the New Europe (CNE) is proud to present its readers with “Liberalism, loose or strict”, a paper by Anthony de Jasay. The paper was originally presented at the Liberales Institut of Zurich in December 2003. CNE thanks Liberales Institut’s President Robert Nef for authorizing the present publication.

Anthony de Jasay is one of the few truly original minds in contemporary social science. He is well-known for combining analytical rigor with a realistic approach to social phenomena—a rare quality, given that the industry of political superstitions, which has no purpose but to dress the emperor, is still working at full capacity.

Jasay has been opposing such a tendency for some time. His acclaimed book, *The State* (1985), perhaps the finest treatise on the subject, has opened the eyes of more than a few readers to the true nature of *the* institution par excellence, in the realm of modern political philosophy.

His *Against Politics* (1997), a collection of penetrating essays, has illuminated the shortcomings of F.A. Hayek’s political philosophy, as well as cast new light on the weaknesses of limited government “libertarianism” and opened new perspectives in the examination of the emergence of social conventions.

His last book, *Justice and Its Surroundings*, is dedicated to justice and to the issues that typically surround it: freedom, sovereignty, distribution, choice, property, agreement, *et cetera*. Not only is Jasay’s treatment of justice *per se* original and groundbreaking - further, he provides insightful criticisms of the approaches used by scholars such as John Rawls, Robert Nozick, Brian Barry, and Thomas Scanlon. For any student of political philosophy, Jasay’s work is almost a *panacea* against the philosophical viruses still poisoning European academia.

CNE believes that this paper on “loose and strict liberalism” could greatly benefit readers, giving them a theoretical framework to better understand disputes and debates among so-called “classical liberals” and “libertarians”. Jasay’s paper envisions new solutions to ancient problems, and provides true intellectual excitement.

To complement this paper, we also thank Anthony de Jasay for having been so kind as to answer a few questions by CNE Visiting Fellow Alberto Mingardi.

MINGARDI: *You speak about the loose foundations of classical liberalism, which hasn't been a very “firm” and “strict” political doctrine, but rather an “inclusive” one, an umbrella-political thought under which many different ways of thinking found place. What do you think is the key issue to distinguish between “loose” and “strict” liberalism? The theory of private property? The issue of social justice?*

DE JASAY: Property and justice are certainly getting different treatments in the two liberalisms, - but I think this is not a primary element of their differences, but rather the consequence of a more fundamental contrast. At the deepest level, the “loose” and the “strict” doctrines differ because the first is value-based, the second logic-based. In loose liberalism, we start from the value we think people should, and do, attach to freedom. But

being liberals and tolerant, we also leave them freedom of choice: they are certainly entitled to like other values as well, and it is up to them to choose the tradeoffs between rival values that best suit their inclinations. Thus, value-based loose liberalism makes room for “social justice”, for equality, for security and any number of other values you can think of. It is a doctrine of tradeoffs; it can be all things to all men as tastes, fashions of thought, forms of political correctness come and go. This is why I keep saying that (loose) liberalism “has a weak immune system”. Its weak doctrine leaves it wide open to parasitic invasions (“rightsism”) and mutations of identity.

Strict liberalism has one cornerstone (you might even say it is its only cornerstone), namely the presumption of liberty, that is not value-based, is subject to no tradeoffs, but is simply a logical consequence of which kind of statement can be falsified and which kind verified.

MINGARDI: *What are the most relevant theoretical flaws that you notice in contemporary classical liberal / libertarian principles?*

DE JASAY: For greater clarity, it might be best to put a dividing line between classical liberalism and libertarianism though the division is far from sharp. My feeling is that classical liberalism suffers mainly from one “design fault”: along Lockean lines, it accepts the sovereignty of the state because it believes that our “life, liberty and property” can be exempted from this sovereignty. In other words, it tacitly postulates that if we, good liberals, wish government to be limited, it will be limited. I am afraid this is stark nonsense; it is of the essence of government that it is a tool that some people will use to exploit others and by doing so secure the control of government. It is no use to say that government ought to be limited, or that we wish that it should be. (Cf. ch.2 “Is Limited Government Possible?” in my book *Against Politics*.) Classical liberalism stands or falls with limited government. If I am right that government has intrinsic, built-in features that predestine it to expand and encroach upon the sphere of individual choices, classical liberalism rests upon a falsehood.

It is not clear that libertarianism can be accused of the same fault. It does not seem to me that limited government is an inherent element in libertarian theory. If I am right that it is not, libertarianism is in some sense more truthful. It can postulate anarchy. It can also take government as it exists, and postulate opportunistic, step-by-step shavings-off from its scope, – a privatisation here, the repeal of a busybody law there – as part of the libertarian rearguard fight.

Putting it differently, the classical liberal sees the state as legitimate but regrettably overstepping its proper limits and hence in need of being cautioned. The libertarian by contrast sees the state not as an errant servant, but as an adversary.

MINGARDI: *How does the issue of Constitutionalism fit in your distinction between loose and strict liberalism?*

DE JASAY: In “loose” liberalism, the constitution is an essential ingredient of whichever kind of political order the particular version of liberalism happens to desire. A well-made constitution works rather like the auto-pilot of a passenger plane; it is an automatic device for ensuring that the plane will fly to the destination “we” have fixed for it. Given a good constitution, “we” are safe.

But of course society is not a unanimous “we”. There are many conflicts of interest where “we” confront “them”. If these conflicts must be resolved constitutionally, the constitution will become a locus of conflict, - indeed, perhaps, the central locus of most conflicts. It will accordingly be amended, or twisted and turned in interpretation, or circumvented. Its guardian (the Constitutional Court, the Supreme Court) will be unable to resist this; in some periods (the Warren Court) it will be its chief twister-and-turner. The constitution in its logical structure is a vow. Like a vow, it is up to “us” to keep it. It is also like a chastity belt whose key we have within reach. I believe constitutionalism, like its twin brother contractarianism, is a very dangerous strain of thought. It is illusion-mongering. It fosters a belief that we are on auto-pilot and safe from error or selfish deviation by the pilots. In strict liberalism, the constitution is (almost) irrelevant. Since government is not recognised as legitimate, the question of what it may legitimately do does not arise.

MINGARDI: *Why do you think “pious lies” are so successful in the intellectual environment? Why even so-called free market types do not go for strict liberalism, but rather worship some sort of alternatives, really indistinguishable from a theoretical standpoint from socialist (loose) liberalism?*

DE JASAY: Pious lies, e.g. the social contract, tell us that things went the way they did because at bottom we wanted them to go that way. The state of affairs has been chosen by a social choice rule that conforms to ethical axioms (e.g. majority rule). Laws are what they are because they maximise the common good, or maximise wealth (as in law-and-economics). A “veil of uncertainty” has made it rational for us consensually to adopt political institutions that in retrospect are proving to be redistributive and disadvantageous. And so on through the whole list of the social arrangements that systematically favour some at the expense of others.

Pious lies, in short, serve to reassure us that we are not silly suckers.

MINGARDI: *You write that, “Despite the logic of the thesis that the state is intrinsically unnecessary, and the attractiveness of ordered anarchy, it is hardly worth the effort to advocate the abolition of the state. But it is worth the effort to constantly challenge its legitimacy”. These are inspiring words, but how do you think that this effort to constantly challenge its legitimacy should take place in the contemporary world?*

DE JASAY: I am agnostic about civil disobedience and taxpayers’ strikes. When I speak of challenging the illegitimate state, I mainly mean waging a relentless intellectual battle against the attitude that approves the law because it is the law, because it has been enacted according to the rules. Docility, willing submission to the “lawful government” makes it far too easy for the latter steadily to enlarge its domain of decision. We have reached the stage where almost any policy measure, no matter how outrageous, is accepted as legitimate provided it can be traced to the majority will. Challenging this means hammering home that the measure is outrageous for good reasons despite the majority wanting it (i.e. in practice, despite its being “socially progressive”).

As things stand, this is merely a rearguard fight. However, for reasons we cannot really foresee, the tide may turn one day and the rearguard fight may become an advance.

Liberalism, loose or strict

By Anthony de Jasay

Political doctrines can be understood and interpreted in many ways, but in order to survive and prosper, each doctrine needs some irreducible, constant element that represents its distinct identity and that cannot change without the doctrine losing its essential character. Nationalism must hold out sovereignty, the safeguarding and if possible the expansion of a territory, a language and a race as the chief goals of policy. If it did not, it would no longer be nationalism but something else. Socialism appears in many guises, but all its versions have at least one common, inalterable feature, namely the insistence that all wealth is created by society, not by individual members of it. Society is entitled to distribute wealth in whatever way fits its conception of justice. Common ownership of the means of production and equality of wellbeing are derivatives of this basic thesis. It is my contention that liberalism has never had such an irreducible and unalterable core element. As a doctrine, it has always been rather loose, tolerant of heterogeneous components, easy to influence, easy to infiltrate by alien ideas that are in fact inconsistent with any coherent version of it. One is tempted to say that liberalism cannot protect itself because its "immune system" is too weak.

Current usage of the words "liberal" and "liberalism" is symptomatic of the Protean character of what the names are meant to signify. "Classical" liberalism is about the desirability of limited government and what goes by the name of *laissez faire* combined with a broad streak of utilitarianism that calls not for limited, but for active government. American liberalism is mainly concerned with race, homosexuality, abortion, victimless crimes and in general with "rights". In mid-Atlantic English, a liberal is what most Europeans would call a social democrat, while in French "liberal" is a pejorative word, often meant as an insult, and "liberalism" is a farrago of obsolete fallacies that only the stupid or the dishonest have the audacity to profess. These disparate usages do not have much in common. It should not surprise us that they do not.

Loose doctrine on loose foundations

Much of its lack of a firm identity is explained by liberalism's foundations. At its deepest, the doctrine seems to spring from the love of liberty. In more philosophical language, liberty is a value - final or instrumental - that we hold dear. All the superstructure of liberalism is made to rest on this easily acceptable value judgment. However, liberty is not the sole value, - not even the sole political value. It has many rivals; security of person and property, security of subsistence, equality of all kinds, protection for the weak against the strong, the progress of knowledge and the arts, glory and greatness spring to mind, and the list could be virtually endless. Many if not most of these values can only be realised at the cost of curtailing freedom. It is contrary to the liberal spirit of tolerance and love of liberty to try and reject these values and to dispute anyone's freedom to cherish some of them even at the expense of freedom. The love of liberty allows tradeoffs between it and other things. How much freedom should be given up for how much security or equality or any other worthy objective that at least some people want to achieve, is obviously a subjective matter, my value against your value, my argument against yours. Disagreement is legitimate. From this foundation, therefore, the evolution of the doctrine tends towards allowing rival values

more and more *Lebensraum*, to incorporate and co-opt them. What surfaces is a variable mish-mash, all things to all men.

Utilitarianism and the Harm Principle

This evolution, almost predestined by the dependence of the doctrine on value judgments, was pushed further forward by the teachings of the three most influential theorists of classical liberalism, Bentham, James Mill and John Stuart Mill.

They made one-man-one-vote and the good of the greatest number into an imperative of political morality, establishing a wholly arbitrary, if not downright self-contradictory, linkage between democracy and liberalism. This linkage has since achieved the status of a self-evident truth. It is being repeated with parrot-like docility in modern political discourse, and is doing much to empty liberalism of any firm identity.

They also bear much of the responsibility for endowing liberalism with a utilitarian agenda. Liberal politics became a politics of betterment in all directions. There is always an inexhaustible fund of good ideas for improving things by reforming and changing institutions, making new laws, new regulations and perhaps above all by constantly adjusting the distribution of wealth and income so as to make it yield more "total utility". John Stuart Mill has quite explicitly laid down that while the production of wealth was governed by economic laws, its distribution was for society to decide. Utilitarianism made this not only legitimate, but actually mandatory, for failing to increase total utility by redistributing incomes is to fail doing the good that you could do. A mandate for overall betterment is, of course, a sure recipe for unlimited government.

Many defenders of classical liberalism interpret Mill's famous Harm Principle as the safeguard against precisely this tendency of utilitarian thought. The principle looks like a barrier to the state's boundless growth. "...the only purpose for which power can be rightfully exercised over any member of a civilised community against his will" – states Mill - "is to prevent harm to others".¹ However, what constitutes harm and how much harm justifies the use of state power, are inherently subjective matters of judgment. There is a vast area of putative or real externalities which some regard as grounds for government interference while others consider that they are simply facts of life, to be left to sort themselves out. The harm principle, being wide open to interpretation, is progressively expanding its domain. Today, omission is amalgamated with commission. "Not helping someone is to harm him"; the harm principle is invoked by certain modern political philosophers to make it mandatory for the state to force the well off to assist those who would be harmed by the lack of assistance. There may well be strong arguments for forcing some people to help others, but it is surprising to find one that is supposed to be quintessentially liberal.

Observing the effects of good intentions is often a matter for bitter irony. Locke tried with his innocent-looking proviso to prove the legitimacy of ownership and succeeded in undermining its moral basis. J.S. Mill thought that he was defending liberty, but what he achieved was to shackle it in strands of confusion.

¹ J.S.Mill, *On Liberty*, ch.I., para 9.

Strict Liberalism

In order to prevent it from becoming indistinguishable from socialism, unprincipled pragmatism or just plain ad-hockery, liberalism must become more strict. It needs different foundations, and its structure must be made minimal and simple, so as better to resist the penetration of alien elements.

I suggest that two basic propositions, one logical and one moral, suffice to construct a new, stricter liberal doctrine capable of defending its identity. One is the presumption of freedom, the other the rejection of the rules of submission that imply the obligation of political obedience.

The Presumption of Freedom

The presumption of freedom should be understood to mean that any act a person wishes to perform is deemed to be free – not to be interfered with, regulated, taxed or punished – unless sufficient reason is shown why it should not be free.

Some deny that there is, or ought to be, such a presumption². However, the presumption is not a matter of opinion or evaluation that can be debated and denied. It is a strict logical consequence of the difference between two means of testing the validity of a statement, namely falsification and verification.

There may be an indefinite number of potential reasons that speak against an act you wish to perform. Some may be sufficient, valid, others (perhaps all) insufficient, false. You may falsify them one by one. But no matter how many you succeed in falsifying, there may still be some left and you can never prove that there are none left. In other words, the statement that this act would be harmful is unfalsifiable. Since you cannot falsify it – putting on you the burden of proving that it would be harmless is nonsensical, a violation of elementary logic. On the other hand, any specific reason objectors may advance against the act in question is verifiable. If they have such reasons, the burden of proof is on them to verify that some or all of them are in fact sufficient to justify interference with the act.

All this seems trivially simple. In fact, it is simple, but not trivial. On the contrary, it is of decisive importance in conditioning the intellectual climate, the “culture” of a political community. The presumption of liberty must be vigorously affirmed, if only to serve as an antidote against the spread of “rightsism” that would contradict and undermine it, and that has done so much to distort and emasculate liberalism in recent decades. “Rightsism” purports solemnly to recognise that people have “rights” to do certain specific things and that certain other things ought not to be done to them. On closer analysis, these “rights” turn out to be the exceptions to a tacitly understood general rule that everything else is forbidden; for if it were not, announcing “rights” to engage in free acts would be redundant and pointless. The silliness that underlies “rightsism”, and the appalling effect it exerts upon the political climate, illustrates how far the looseness of current liberal thought can drift away from a more strict structure that would serve the cause of liberty instead of stifling it in pomposity and confusion.

² Notably Joseph Raz, *The Morality of Freedom*, Oxford 1986, The Clarendon Press, pp.8-12

The Rule of Submission

“The king in his council has expressed his will, and his will shall be obeyed by all” is a rule of submission. So are the rules that required the citizens of Venice to obey the *Signoria*, that gave the power to make laws to a majority of a legislature and the power to elect legislators to a majority of voters. The latter of these rules are more “democratic” than the former, but they all share the same essential feature: the obligation of all in a community to submit to the decisions of only some of them. Moreover, every such rule imposes the obligation to submit to decisions reached by certain persons in certain ways so to speak in advance, before knowing what those decisions are in fact going to be.

Reasons of practical expediency can be found why this must be so if the business of government is to be transacted. The reasons may be good ones, but the rule they call for is no less outrageous for all that. Submission can be morally acceptable if it is voluntary, and voluntary submission by rational individuals is conceivable on a case-by-case basis, on the merits of particular propositions. As a general rule, that amounts to signing a blank cheque, however, it can hardly be both voluntary and rational. If a general rule of submission is necessary for governing, - which it might well be - then the legitimacy of government, any type of government, turns out to be morally indefensible.

Does this mean that strict liberals cannot loyally accept the government of their country as legitimate, and are in effect advocating anarchy? Logically, the answer to both questions must be “yes”, but it is a “yes” whose practical consequences are necessarily constrained by the realities of our social condition.

Orderly social practices that coordinate individual behaviour so as to produce reasonably efficient and peaceful cooperation, can be imposed by law and regulation. Today, many of our practices are in fact so imposed, - many, but not all. Some important and many less vital yet useful ones are matters of convention.

Unlike a law that must rely on the rule of submission, a convention is voluntary. It is a spontaneously emerging equilibrium in which everybody adopts a behaviour that will produce the best result for him given the behaviour that he anticipates everybody else to adopt. In this reciprocal adjustment to each other, nobody can depart from the equilibrium and expect to profit from it, because he will expect to be punished for it by others also departing from the equilibrium. Unlike a law that depends on enforcement, a convention is thus self-enforcing. Its moral standing is assured because it preserves voluntariness.

David Hume was the first major philosopher systematically to identify conventions in general, and two particularly vital conventions, that of property and of promising in particular. Hayek’s fundamental idea of the “spontaneous order” can best be understood in terms of conventions. We owe the rigorous explanation of the self-enforcing nature of conventions to John Nash, and more recent developments in game theory show that conflict-ridden social cooperation problems formerly believed to be “dilemmas” requiring state intervention, in fact have potential solutions in conventions.

The Strictly Liberal Agenda

It is easy to describe plausible scenarios in which spontaneous conventions emerge to suppress torts and protect life and limb, property and contract³. However, such scenarios are written on a blank page, whilst in reality the page is already covered with what the past has written on it. In the West, at least two centuries of ever more elaborate legislation, regulation, taxation and public services, - in short, recourse to the rule of submission – have bred a reliance on the state for securing social cooperation. Society has therefore less need for the old conventions, and its muscles for maintaining old conventions and generating new ones have atrophied.

In the face of this reality, it is probably vain to expect the collapse of a state to be followed by the emergence of ordered anarchy. The likeliest scenario is perhaps the emergence of another state, possibly nastier than its predecessor.

This limits the practical agenda of strict liberalism. Despite the logic of the thesis that the state is intrinsically unnecessary, and the attractiveness of ordered anarchy, it is hardly worth the effort to advocate the abolition of the state. But it is worth the effort constantly to challenge its legitimacy. The pious lie of a social contract must not be allowed to let the state complacently take the obedience of its subjects too much for granted. There is a built-in mechanism in democracy for the state to buy support from some by abusing the rule of submission and exploiting others. Loose liberalism has come to call this social justice. The best strict liberalism can do is to combat this intrusion of the state step by step, at the margin where some private ground may yet be preserved and where some public ground may perhaps even be regained.

30 October 2003

³ Cf. Jasay, *Against Politics*, London 1997, Routledge, Ch.9, “Conventions: Some Thoughts on the Economics of Ordered Anarchy”.