

# The Foundational Tenets of Johannes Althusius' Constitutionalism

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## Abstract

In his *Politica: Politics Methodically set Forth and Illustrated with Sacred and Profane Examples* published in 1603 Johannes Althusius' sets out his grand scheme of republican federalism. Soon, however, the final establishment of the territorial state and the paradigm of statism relegated grand federalism to the distant margins of constitutional theory.

Statism as concisely enunciated in this article, recognises only two entities namely the state as a centralised power apparatus and the abstract individual on whom a statist identity in the image of the state is enforced. Statism dispenses with communities.

Statism has been playing out on a continuum, with the statist-individualism on the one and statist-collectivism on the opposite extreme. Statist-individualism seeks to fend off the risks of supreme political power with strategies for the protection of individual rights. In contrast, statist-collectivism dispenses with the subtleties of statist-individualism and is distinctively more blatant in forging a homogeneous statist nation.

In the face of the rise of claims of communities, the emergence of communitarian thinking and increased evidence of the receding territorial state, new - post statist - constitutional thinking is gathering strength. This has unleashed considerable interest in alternative thinking such as that of Althusius.

Althusius' grand federalism should be viewed, however, within the context of his broader constitutional thinking, which on close analysis, is constituted by four interlinked aspects namely: piety, justice and community; covenant (or contract); supremacy of the commonwealth and of the law; and political authority and public office. These tenets are the main focus of the present discussion.

There is no room for a blanket transplantation of Althusian thinking into modern constitutional theory. However, it does provide a valuable source of communitarian theory for contemporary constitutional law. It brings to light that (individual) identity, morality, and a happy life and individual rights can only be conceived of within the framework of communities. Moreover, Althusius' convictions on (shared) popular sovereignty, in contrast to undivided (statist) sovereignty and his views on public office provided the framework for constitutionalism and limited government which could arguably improve on that of contemporary statist constitutionalism.

## Keywords

Territorial state, statist paradigm, statist-individualism, statist-collectivism, post statist constitutional thinking, piety, justice, community, covenant, public office, communitarian theory.

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## 1 Introduction: Statism and Althusius

Johannes Althusius' *Politica: Politics Methodically Set Forth and Illustrated with Sacred and Profane Examples*<sup>1</sup> was published in 1603. Soon, however, it was close to complete oblivion, seldom referred to and at best considered as of marginal importance. Yet in the present increasingly post-statist era in which communities – cultural, local, religious, and linguistic – are vigorously (re)-claiming constitutional recognition, Althusius has rightly re-emerged as a prominent figure whose views cannot be ignored. Althusius' thinking constitutes a comprehensive anticipatory alternative to the politics of the territorial state, which has dominated political and constitutional practice and theory for the past almost four hundred years. In our age, marked by the subsiding dominance of the territorial state<sup>2</sup> Althusius' thinking has become particularly relevant and is attracting considerable new attention.<sup>3</sup>

In dealing with Althusius' thinking one might distinguish between the general tenets of his constitutionalism and his grand scheme of republican federalism. He is best known for the latter. That is also the focus of most contemporary commentaries on Althusius' work. To my mind Althusius' federal scheme cannot clearly be understood without a clear grasp of the general tenets of his thinking, which are in fact the premise of his federalism. Precisely for that reason this discussion scrutinises the general tenets of his constitutionalism. What is referred to here as Althusius' constitutional thinking could aptly also be termed political thinking since political and constitutional thinking in many respects overlap to such an extent that it is well-nigh impossible to distinguish between the two. I prefer "constitutional thinking", since Althusius conceived of a comprehensive constitutional order in which core constitutional concepts (also within the contemporary constitutional discourse) such as justice, sovereignty, subsidiarity, federalism, control and balance of power, public office and community all enjoyed prominence. I state this preference fully realising that the terms constitution and constitutionalism were not known in the lexicon of the public, more specifically political, discourse in Althusius' times. That, however, is not to say that these notions as such were unknown at the time. On the contrary, some of the most crucial concepts and constitutional arrangements, such as the separation of powers and the balance between worldly and ecclesiastical power emerged from an era long before the

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<sup>1</sup> Althusius *Politica*; Elazar "Althusius's Grand Design".

<sup>2</sup> On the term, "territorial state" see Malan *Politiocracy* 8 fn 28.

<sup>3</sup> De Benoist 2000 *Telos* 26.

advent of modernity.<sup>4</sup> However, while acknowledging the overlap between political and constitutional theorising, I will at times refer to either as political thinking.

Althusius represents a mode of thinking – the beginning of a countertradition – which was sharply at variance with that which underpins the discipline of the modern (territorial) statist tradition (or paradigm) of political thought (statism) as articulated by the founders (and latter exponents) of the statist tradition, namely thinkers such as Jean Bodin, Thomas Hobbes, John Locke, Jean Jacques Rousseau, Karl Marx<sup>5</sup> and innumerable other followers who have been active within the confines of this paradigm.

The statist paradigm or statism encapsulates the dominant current in modern constitutional thinking since the advent of the territorial state<sup>6</sup> in the sixteenth and seventeenth centuries. Thus, the territorial state has defined the framework for thinking around politics not only in academic disciplines, such as constitutional law and political science, but also in public discourse in general. Statism also signifies that people adopt and cherish only one public identity, namely an individual identity in the image of the state, that is, statist identity.<sup>7</sup>

Statism recognises two entities, namely the state and the individual: the state as a centralised power apparatus maintaining the public peace among antagonistic individuals with no public identity other than their identity as citizens of the state; that is, other than their statist identity. Statism does not recognise or tolerate any other identity than statist identity and is antagonistic towards any community which is not a statist community; that is, the homogenised collection of all inhabitants of the state. By the same token it rejects any apparatus of political authority apart from the state, or more specifically between the individual and the state. Such non-statist authority would be anathema to the statist paradigm since it is inimical to the very stability of the statist order itself. Statism proceeds from the premises of the fundamental absence of any real human community and of fundamentally antagonistic relations between abstract atomistic individuals combined with the state, as the centralised sovereign political force,

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<sup>4</sup> See for example Berman *Law and Revolution* 213-214. Also see the relevant passage of the discussion on the rule of law by Fukuyama *Origins of Political Order* 245-289.

<sup>5</sup> See on this Hueglin *Early Modern Concepts* 201. Also see Malan 2014 *Tydskr Geesteswet* 477-470.

<sup>6</sup> See in this regard Malan *Politiocracy* 43-50 and the sources cited there.

<sup>7</sup> Hueglin *Early Modern Concepts* 201. Also see Malan *Politiocracy* ch 6.

encapsulated in the legislative, executive and adjudicatory apparatus which has to keep the public peace. All individuals are considered to be essentially the same; and any differences that might exist between them are held to be more apparent than real and politically of no moment.

Statism requires public identity to be monopolised for the benefit of the state. In consequence, only one community is recognised, namely a statist community comprising of all who find themselves within the boundaries of the territorial state and regardless of whether there exist any real bonds of culture, language, ethnicity or religion.<sup>8</sup> All the citizens, as Bikuh Parekh insightfully states:

... are expected to privilege their territorial over their other identities; to consider that they share in common as citizens far more important than what they share with other members of their religious, cultural and other communities; to define themselves and relate to each other as individuals to abstract away their religious, cultural and other views when conducting themselves as citizens; to relate to the state in an identical manner; and to enjoy an identical basket of rights and obligations. In short, the state expects of all its citizens to subscribe to an identical way of defining themselves and relating to each other and the state. This shared political self-understanding is its constitutive principle and necessary presupposition. It can tolerate differences on all other matters but not this one, and uses educational, cultural, coercive and other means to secure that all its citizens share it.<sup>9</sup>

Thus viewed the statist community is no real community at all but just a mass; any aggregate of persons or, in the words of John Locke,<sup>10</sup> *any number of men*. In pursuance of statism there is a strict intolerance against any non-statist community, that is, any community of a cultural, linguistic, ethnic or religious nature which claims public recognition. In terms of a raft of programmes of homogenisation such communities are liquidated into a single uniform statist mass-society. These programmes are often called programmes of nation building – a misnomer because nations and national, cultural, ethnic and language communities are not built but destroyed by such programmes. They should therefore rather be referred to as programmes of nation destruction and not nation building, as Walker Connor remarked.<sup>11</sup> To the extent that statism does tolerate such communities, they have to operate strictly in the private sphere, enjoying no public recognition or constitutional authority. In the final analysis the

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<sup>8</sup> See in this regard the incisive analysis by Nisbet *Quest for Community* especially part 71-187 - the state and community and Malan *Politiocracy* 127-172.

<sup>9</sup> Parekh *Rethinking Multiculturalism* 185.

<sup>10</sup> Locke *Civil Government* para 89. See the insightful comments on this by Van Dyke 1976-77 *World Politics* 343-369 and Van Dyke 1974 *Am J Pol Sci* 725-741.

<sup>11</sup> Connor 1971-72 *World Politics* 336.

operative concepts of statist identity are homogenisation and uniformity – voluntarily if it can and forcibly if it must.<sup>12</sup>

Since statism recognises but a single centralised power apparatus, no power should be vested in any institution other than the power apparatus of the centralised state. Federalism, devolution of power, communities or any mechanism that could dilute the centralisation of power is opposed. To the extent that such mechanisms might in limited circumstances be tolerated, it is basically an anomaly to statism. The public accommodation of diversity and of intermediary institutions with some political authority, existing between the state and the individual, is essentially anathema to the statist paradigm.<sup>13</sup>

The two elements of statism – the abstract individual with his statist identity and the centralised power apparatus of the territorial state – determine the way in which all matters of public life, including crucial concepts such as the constitution, constitutionalism, rule of law and the *Rechtstaat*, sovereignty, citizenship, democracy, rights, and power are conceptualised.

Statism is no monolith, however. Over time it has been playing out on a continuum with an individualist approach on the one extreme and a collectivist approach on the other. However, the homogenising territorial state remains essential all over the continuum, encompassing the full spectrum of important ideological currents – left, right and liberal.<sup>14</sup> Precisely for that reason the designations preferred are not individualistic or collectivist but specifically *statist-individualistic* and *statist-collectivist*.

Alongside the state, statist-individualism posits alongside the free ("sovereign") individual, perceived to be capable and at liberty to make free choices on his/her own personal identity and life style. The concept of freedom in this case is so-called negative freedom, that is, freedom or immunity from intervention or prescription by the state. The cultivation and enforcement of a statist public identity, on the basis of assimilating a multicultural and otherwise diverse society into a single statist society as prescribed in terms of any (statist) ideology, is less overt and more tacit and

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<sup>12</sup> It is significant to note that the onslaught on non-dominant communities prevails over the entire ideological spectrum – left, right and centre (liberal) as it were. The common denominator of all these anti-community trends is statism. See in this regard Malan 2014 *Tydskr Geesteswet* 462-480.

<sup>13</sup> This was dominant in the thinking of Rousseau and exponents of other trends of thinking in pre-revolutionary France. See the discussion by De Tocqueville *Ancient Regime* 158-168, and Malan *Politiocracy* 231-242.

<sup>14</sup> Malan 2014 *Tydskr Geesteswet* 462-480. See also McRae 1979 *CJPS* 681-682.

subtle. The statist-individualist current acknowledges the risks of supreme political power and seeks to fend that off with strategies for the protection of individual rights (currently most popularly in a bill of rights which is part of a "supreme constitution") most prominently by an independent and impartial judiciary in terms of the threefold separation of governmental power.

The opposite – the statist-collectivist approach – dispenses with the subtleties of statist-individualism. Any concern for the free individual is absent or at least much less pronounced. In contrast to statist-individualism, statist-collectivism is distinctively more overt and often brutal in forging a homogeneous statist nation. The state-nation is the collective agent for the sake of which all particular communities have to dissolve and individuals have to change and convert in order to be remade in the image of the homogenous statist nation. Ordinarily the mould of the state-nation is provided by the dominant faction of the state population into which all non-dominant communities have to be assimilated.

In terms of statist-individualism the state – Leviathan, the mortal god as Hobbes described it – is aloof. It is authoritarian but not absolutist and totalitarian. It insists on the obedience of its subjects and enforces the public peace. However, it does not insist on a flock – a statist nation – to be created in its image. In statist-collectivism, however, Leviathan is totalitarian, though not necessarily absolutist. This mortal god, historically a later outgrowth of an older and more aloof one, is much more caring and much more jealous. It insists on a flock in its own image, and tolerates no apostasy – membership of and public allegiance to a different community. When such non-statist apostasy occurs, punishment is sure to follow because no community other than the statist flock forged in the image of the state is tolerated.<sup>15</sup>

Between statist-individualism and statist-collectivism there is an array of variations.

Statist-individualism, for which John Locke was arguably the prototypical protagonist,<sup>16</sup> places the emphasis on individual rights to be acknowledged and guaranteed by the state. The contemporary liberal and social democratic states of Western Europe and North America may be viewed as the prime examples of statist-individualism. However, in view of the varying state-sponsored statist identities and wide-ranging social and economic

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<sup>15</sup> See Malan *Politiocracy* ch 6, 9.

<sup>16</sup> As set out in the second treatise of Locke *Of Civil Government*.

interventions of the state, none of these states will be found on the extreme end of statist individualism.

The collectivist extreme of statism (statist-collectivism) drew inspiration and found justification in two trends of thinking: on the one hand, that provided by the work of Jean Jacques Rousseau, and on the other, by utilitarianism incepted by Jeremy Bentham. Endeavouring to establish a totalitarian republicanism in which the closest possible bonds between a close-knit monolithic citizenry and their state should be forged, Rousseau could tolerate neither a multitude of communal identities, nor individualism, which to him was no genuine expression of freedom but rather a dreadful aberration of freedom. People have to be rescued from their wrong ways and "forced to be free",<sup>17</sup> that is, forced to be assimilated into a state-prescribed identity and way of life. That identity usually emanated from the dominant, usually the majority community within the state, which provided the mould within which all others – communities and individuals – have to be cast. Modern totalitarianism, most notably that of the Jacobins in revolutionary France, Bolshevism in Soviet Russia and Maoism in China, all drew inspiration from this mode of usually majoritarian-driven politics.<sup>18</sup> The spirit of Rousseau can also be detected in right-wing totalitarianism – Fascism and National-socialism.<sup>19</sup>

On close analysis utilitarianism, as for example conceived by Bentham, provides the other original impetus for statist collectivism. In the name of what is perceived to serve the interest of the majority best (which is identified with the public good) utilitarianism also disregards deviant communities and (the rights of) individuals and enforces on all<sup>20</sup> that which the majority would perceive to be most feasible. There are vast differences between the statist-individualism and statist-collectivism. The former may claim to have a keen concern for the dignity and the rights of individuals, specifically against the claims of the majority, in contrast to the latter which would be much more inclined to place individual integrity on the altar of the perceived *Volente Generale* as conceived and inspired by Rousseau,<sup>21</sup> or the perceived predominant interest of the majority of people as conceived by utilitarianism, originating from Bentham. Moreover, these differences are underscored by

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<sup>17</sup> Rousseau *The Social Contract* 64.

<sup>18</sup> See the lucid exposition of Nisbet *Quest for Community* ch 7. In this regard also see Hueglin *Early Modern Concepts* 170, 180-181.

<sup>19</sup> See the remarks by Hueglin *Early Modern Concepts* 206.

<sup>20</sup> Lucidly explained by Nisbet *Quest for Community* 156-160.

<sup>21</sup> Rousseau *The Social Contract* 69 and further. For a concise discussion of the relevant aspects of Rousseau's political thinking, see Malan *Politiocracy* 131-142.

the fact that the individualist and the collectivist currents provide the premise for the two great ideological struggles of the twentieth century, namely first the struggle between liberal democracy and fascism, and subsequently the struggle between liberal democracy and communism in the guises of Bolshevism and Maoism.

Yet, although opposing one another on account of their respective individualism and collectivism, they share fundamental assumptions. They are currents within statism, united in a common premise, rendering them opposing forces but *within* the same common tradition of political and constitutional theory.<sup>22</sup> That unity is to be found in their common statist premise. Precisely for that reason the two currents are not referred to here as individualist and collectivist but more specifically *statist*-individualist and *statist*-collectivist.

Premised on the same statist basis the territorial state takes centre stage in both currents of thinking on constitutional law to such an extent that political science has in fact become the *study or science of the state* (staatsleer/Staatslehre) whilst, by the same token, constitutional law has become the law of the state quite overtly implied by the Dutch and German names for the respective disciplines namely staatsreg/staatsregt/Staatsrecht. In consequence the statist tradition also does not take any particular interest in political and constitutional thinking that do not share statism's fundamental assumptions. It is fixated on the state and the individual thus ignoring, and often justifying even pernicious policies for the destruction of communities<sup>23</sup> and any other intermediary entity between the state and the individual or in place of the state. To the extent that it may be making concessions to such entities, it does so strictly within the confines of statist thinking.<sup>24</sup>

The statist tradition is distinctively positivist in that the existing territorial states have set the paradigm within which political and constitutional thinking have taken place over many centuries since the dawn of the territorial state.<sup>25</sup> Moreover, the dominant concepts and themes of reflection

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<sup>22</sup> This evidenced by the fact that all these trends have in common that they act against small languages and cultures in the states in which these ideologies have gained the upper-hand. See Malan 2014 *Tydskr Geesteswet* 462-480.

<sup>23</sup> Van Dyke 1974 *Am J Pol Sci* 726. See further Pestieau 1991 *Can J Law Jurisprud* 369-370.

<sup>24</sup> See for example the discussion of self-determination by Malan *Politiocracy* 246-267.

<sup>25</sup> This is one of the main themes of Nisbet's discussion in his 1990 *Quest for Community*.

in the field of constitutional law and political philosophy as well as in political practice are all statist in nature, that is, conditioned by and safeguarded for the territorial state. The accepted meaning of these concepts serves the specific needs of the territorial state. Thus, citizenship is citizenship of the *state*; democracy is *statist* democracy, that is, democracy made safe for the modern state - democracy converted from an unruly and incoherent master to a docile and dependable servant.<sup>26</sup> Human rights also presuppose the indispensability of the *state*. Dependent individuals now have no option but to resort to the state for protection since communal bonds have disappeared, leaving individuals with no choice but to seek protection from the state.<sup>27</sup> Moreover, both the statist-collectivist as well as the statist-individualist currents are united in their pursuance of forging a single public identity, namely a monolithic statist identity, out of the multitude of particularist communities within the boundaries of the territorial state in question which, as indicated, goes by the misleading name of nation-building. The collectivist current tends to go about this coercively and in a brazen and totalitarian way; the individualist trend is pursued more indirectly and subtly. However, they remain united in their efforts to allow only one single statist identity.<sup>28</sup>

The thinking of Althusius is a distinctive alternative to statism. His thinking represents a wide-ranging world view which is the subject matter of three equally valid perspectives on his constitutional thinking.

First, it is a compendium of pre-modern – Classical and Medieval – thought.

Secondly, it provides the first wide ranging response to the then germinating basic premises of statism, and in so doing established the basis for a countertradition in political and constitutional theory.<sup>29</sup>

Thirdly, it provides the basis for a post-statist, and in a sense post-modern, theory of federal republicanism<sup>30</sup> a theory for which Althusius is best known.

Concerning the first: Althusius is a political philosopher in the Reformist tradition who built a systematic political philosophy out of the Reformed

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<sup>26</sup> Dunn "Conclusion" 248.

<sup>27</sup> Diamond "Rule of Law" 124.

<sup>28</sup> See on this Malan *Politiocracy* ch 6.

<sup>29</sup> See Hueglin *Early Modern Concepts* 67, 106, 201-202.

<sup>30</sup> Elazar "Althusius's Grand Design" xxxv. All grand designs of federalism subsequent to Althusius, Elazar observes, until the mid-nineteenth century derived from Althusius. Arguably Althusius also provided the basis for what Hueglin *Early Modern Concepts* 228 called a model of cosmopolitan government.

experience.<sup>31</sup> Thomas Hueglin noted that the Aristotelian tradition of the active citizen provided the socio-philosophical logic for political participation. The convent idea of the Old Testament provided the constitutional logic of shared sovereignty and control of government and the Germanic tradition of communitarianism and fellowship provided the basic sociological structures of the political organisation of Althusius constitutionalism.<sup>32</sup> Daniel Elazar aptly commented that Althusius synthesised the experience of the Holy Roman Empire with the political ideas of the covenant theology of Reformed Protestantism.<sup>33</sup> In consequence he drew extensively from the Decalogue and other Biblical sources.<sup>34</sup> However, Althusius, does not limit himself to Reformist thinking. On the contrary, he drew extensively from philosophical, theological and juridical sources in the broader Roman Catholic tradition as it had emerged though the medieval era. His thinking is also profoundly informed by Classical (non-religious) sources. Hence he identified natural law with the second table of the Decalogue.<sup>35</sup> Having drawn considerably from Aristotle, Althusius is also an Aristotelian par excellence.<sup>36</sup> In the premises it may be asserted that Althusius is the quintessential Christian humanist, who amalgamated Christian doctrine and humanist thinking into a single (logically) comprehensive system of thought. The very title of his work bears the best testimony to that, because what he consistently and thoroughly does is in exact accordance with the title of his book, namely to *methodically set forth and illustrate his politics with both sacred and profane examples*.

Secondly, Althusius' Christian humanist view also accounts for his rejection (in anticipation) of the modernist, more in particular Hobbesian view of the essential absence of human community and, the assertion instead, of

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<sup>31</sup> He was a second generation political Calvinist and described as the one writer of the theory of the Dutch revolt against the Catholic Spanish king. See on this the remarks by Hueglin *Early Modern Concepts* 24, 25.

<sup>32</sup> Hueglin *Early Modern Concepts* 69. Elsewhere Hueglin encapsulated the most important influences on Althusius as follows: "Althusius derived his political convictions and theoretical strengths from three mutually reinforcing strands of political theory and practice that all converged at the time: political Calvinism as a newly developed survival doctrine for religious minorities, the *Politics* of Aristotle as a rediscovered historical affirmation of the co-operative sociability embedded in human nature and finally the living tradition of Germanic communitarianism and fellowship."

<sup>33</sup> Elazar "Althusius's Grand Design" xxxv.

<sup>34</sup> There are no fewer than two thousand quotations according to Hueglin's count. Hueglin *Early Modern Concepts* 56.

<sup>35</sup> Sabine *History of Political Theory* 416-417. Althusius is in step here with a broad phenomenon of his time. Hugo de Groot had the same convictions. Also see De Benoist 2000 *Telos* 47-48.

<sup>36</sup> Sabine *History of Political Theory* 417.

people being basically atomist, pursuing only their own interests and finding themselves fundamentally in a relationship of animosity with all other individuals. Althusius strongly rejected nominalism, the precursor of liberalism, according to which there was nothing ontologically real outside the lone individual.<sup>37</sup> In contrast to (individualist) nominalism, communities are in Althusius' view prior to individuals (individual members).<sup>38</sup> Society does not consist primarily of vying abstract individuals but rather of people living together and cooperating within communities. His outlook is not the Hobbesian one of *bellum omnia contra omnes* but rather of *consociatio symbiotica*. This view allowed Althusius to be a communitarian, pluralist and federalist instead of a liberal, uniformist and centralist, who developed a compound bottom-up federalism instead of providing an apology for the sovereign territorial state as Hobbes did.<sup>39</sup>

Thirdly, apart from being an exponent of the late medieval vision of society, Althusius may be viewed as an exponent of post-modern and post-statist federalism which accounts not only for individual rights but also, very importantly, for the existence and claims of communities to which juridical and political rights must be attributed in the public sphere.<sup>40</sup> Althusius exerted influence between the medieval and modern eras. He is quite justifiably considered as the person who discovered most of the key elements of federalism.<sup>41</sup>

The domination of statism has just about silenced the voice of Althusius for more than three centuries, but now that intellectual and material forces are causing increased pressure to come to bear upon the territorial state and on statism, Althusius is once again enjoying prominence on the stage of constitutional and political theory. Thus Daniel Elazar quite aptly states:

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<sup>37</sup> De Benoist 2000 *Telos* 32.

<sup>38</sup> De Benoist 2000 *Telos* 32.

<sup>39</sup> Huegin *Early Modern Concepts* 44 noted that Althusius' thinking, in contrast to that of Hobbes (and Bodin) was informed by his more positive experience with his immediate environment. "Unlike Bodin and Hobbes whose circumstances of life were marked by negative experiences (such as those brought about by the sharp religious divisions in France and the Massacre of St Bartolomew, and the English civil war, respectively) Althusius' experience was still positive. He could still subscribe to the notion of active citizenship and shared sovereignty. Bodin and Hobbes rejected the notion of multiplicity of communities as gravely dangerous for the survival of political society. They also regarded undivided state sovereignty and absolutism over aloof, detached and passive subjects (as against active citizens) to be a prerequisite for the survival of the political society - political society in the form of monolithic state."

<sup>40</sup> De Benoist 2000 *Telos* 54.

<sup>41</sup> De Benoist 2000 *Telos* 54.

To read Althusius is to discover how important his ideas are for our times. Eclipsed for three centuries by the major thrust of the modern epoch towards the homogeneous nation-state built around the individual citizen, standing politically naked before the state machinery, Althusian ideas seem much more in place in the postmodern epoch, with its more modern networks, its renewed recognition of primordial groups and political associations as part and parcel of contemporary political life, and the federalist striving for both universalism and particularism, ecumene and community.<sup>42</sup>

However, Althusius represents much more than that. His ideas set the basis for a tradition of constitutional thinking in direct opposition to the statist tradition in general. Not only were his ideas partly in direct opposition to those of Jean Bodin<sup>43</sup> but they also assumed the nature of a wide-ranging anticipatory response and present an alternative to the concepts that in time became fundamental traits of statism.

Althusius was born in 1557 in Diebenschhausen in Westphalia. He studied theology and law in Cologne and Basel, and eventually graduated as a doctor in law. He was attached to the Reformed Academy at Herborn in Nassau, of which he became the rector in 1597. From 1604 he occupied a position on the Syndic of Emden in East Friesland, a leading Calvinist city, which enabled him to play a leading role in the leadership of the city until his death in 1638.<sup>44</sup> Apart from a number of other works he published his greatest work, his *Politica*, the subject matter of the present discussion, in 1603. His work was prominently inspired by his experience of the leading city politician of Emden (at that stage also known as the Geneva of the North<sup>45</sup>) who sought to justify the autonomy of Emden (and of cities in general) in order to avoid the absorption of the city of Emden, in the face of the rising territorialism of his time, into the province in which Emden was located.<sup>46</sup>

Althusius dealt with many issues in his *Politica*, all, however, forming part of his comprehensive and in my view strikingly coherent federal constitutionalism. Some issues such as those relating to democracy,<sup>47</sup> language and community,<sup>48</sup> legal effectiveness,<sup>49</sup> matters pertaining to

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<sup>42</sup> Elazar "Althusius's Grand Design" xlv.

<sup>43</sup> Althusius is in debate with Bodin at various places, eg at Althusius *Politica* 72, 105, 130, 149, 173.

<sup>44</sup> Carney "Translators Introduction" xi-xii.

<sup>45</sup> Hueglin *Early Modern Concepts* 33.

<sup>46</sup> Hueglin *Early Modern Concepts* 32-37, 44, 60, 164.

<sup>47</sup> Althusius *Politica* 206.

<sup>48</sup> Althusius *Politica* 85.

<sup>49</sup> Althusius *Politica* 177.

criminal law,<sup>50</sup> just war<sup>51</sup> and a number of others, were not dealt with in depth. They will also not feature in the present discussion. On reading the *Politica* the following five primary themes, comprising his constitutional thinking, come to the fore:

- a) piety, justice and community;
- b) covenant (or contract);
- c) supremacy of the commonwealth and of the law;
- d) political authority and public office; and
- e) Althusius's scheme of federalism.

The first four of these constitute the general tenets of Althusius' constitutionalism that will now be discussed. The first four: piety, justice and community; covenant (or contract); supremacy of the commonwealth and of the law; political authority and public office, are the general tenets of Althusius' constitutionalism, that is, the ideal elements. The fifth theme referred to above, namely the system of republican federalism, outlines the real elements, that is, the main structures and mechanisms, for the equitable accommodation of all individuals and communities, the just exercising of authority and for the control and balance of power. It falls outside the present discussion.

## **2 The foundational tenets of Althusius' constitutionalism**

### **2.1 *Piety, justice and commonwealth (community)***

Althusius' thinking on these three aspects is closely interlinked and therefore needs to be assessed as a whole. Althusius is a communitarian par excellence for whom human beings as symbiotes ideally live in a community of piety under God and as a community of justice under an encompassing federal republican constitution. Althusius took a view diametrically opposed to that of Hobbes for whom, save for the worldly Leviathan, the human condition is God-forsaken and devoid of the bonds that make up human community, and is finally no more than a mechanical social compact based on the rational choice of isolated individuals solely directed towards the achievement of personal individual gain in the face of all other individual adversaries. For Althusius human life is not merely this

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<sup>50</sup> Althusius *Politica* 83, 139-140, 144, 146, 177, 179, 180.

<sup>51</sup> Althusius *Politica* 88-89.

artificial body as Hobbes viewed it.<sup>52</sup> In contrast to Hobbes and Rousseau, Althusius is of the view that the social pact is not an event which for the first time entailed the artificial establishment of a society comprising basically of antagonist individuals. For Althusius, according to the summary by De Benoist, there is a progressive organisation of organic communities of various sizes in which communities, not individuals, are the composite parts: If people enter into a contract, "(t)hey do so as members of an already existing community..."<sup>53</sup> In Althusius' view symbiotic association is much more than merely existing together. As Frederick Carney correctly points out, it indicated the quality of group life characterised by piety and justice without which, Althusius believed, neither individuals nor societies could endure.<sup>54</sup>

The most comprehensive community is religious – a community of piety to the glory of God. At the same time there is a community of justice towards fellow human beings – symbiotes – to secure for each her/his due. In pursuance of this conviction Althusius states that we should live temperately towards ourselves, justly towards our neighbour, and piously towards God.<sup>55</sup> The communities of piety and justice result from the very nature of mankind as ordained by God. Thus Althusius declares:

The universal symbiotic communion is both ecclesiastical and secular. Corresponding to the former are religion and piety, which pertain to the welfare and eternal life of the soul, and the entire first table of the Decalogue. Correspondingly to the latter is justice, which concerns the use of the body and of this life, and the rendering to each his due, the second table of the Decalogue. In the former, everything is to be rendered immediately to the glory of God; in the latter to the utility of the welfare of the people associated in one body. These are to functions of every good association. Whenever a turning away from them has begun, the happiness of the realm or universal association is diminished.<sup>56</sup>

In the premises, in Althusius' view justice and community are mutually implied. A (sound) community is a prerequisite for and the embodiment of justice. Justice protects the integrity of the community by giving to all parts, including all individuals, their due in accordance with the particular

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<sup>52</sup> Sabine *History of Political Theory* 417; Hueglin *Early Modern Concepts* 44.

<sup>53</sup> De Benoist 2000 *Telos* 52.

<sup>54</sup> Carney "Translators Introduction" xv. Quite clearly, there is no such thing in Althusius' thought as a self-made man. See for example Althusius *Politica* 17-18.

<sup>55</sup> Althusius *Politica* 74.

<sup>56</sup> Althusius *Politica* 75.

characteristics of each part, thus securing the corresponding happiness of all – of the community and all its parts.<sup>57</sup>

Althusius' views on community and the individual are in sharp contrast with the modernist outlook, especially the extreme version as articulated by and modified since Hobbes. In Althusian thinking there is no radical atomist individualism and extreme liberalism which proceeds from a sharp disavowal of the (existence of) communities.<sup>58</sup> There is no understanding of society as anything more than an arbitrary aggregate of people,<sup>59</sup> that is, a conglomerate of fundamentally isolated individuals who contracted into an artificial society purely for the sake of public peace, controlled conflict resolution and the attainment of personal gain. Althusius holds directly opposite views. Writing about the city, Althusius highlights the notion of community based on the *ius symbioticum*, which stands in stark contrast to a crowd, gathering, multitude, assemblage or throng, which is not a community and which lacks *ius symbioticum*.<sup>60</sup> For Althusius, harking back to Aristotle, communal life manifesting in a wide variety of communities is a

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<sup>57</sup> This brings to mind the Aristotelian notion of justice and fairness, which is also inextricably related to the notion of community. A community is a community because everyone shares in it: by contributing, each according to his/her specific abilities and characteristics, each member has the benefit of mutual exchange and of satisfying the full variety of needs of every member thanks to the availability of the full spectrum of "products" forthcoming from the activities of all the members. See Aristotle *Nicomachean Ethics* 111-145. Injustice and a breach of law would occur when there was disproportionality, that is, when someone received more or less than what was due to him/her (Aristotle *Nicomachean Ethics* 112-113, 120). This would not only be unjust to the individual members immediately concerned but also a violation of the integrity of the community.

<sup>58</sup> As most blatantly encapsulated in the thinking of Thomas Hobbes' notorious description in *Leviathan* 186 of the state of nature: "In such condition, there is no place for Industry, because the fruit thereof is uncertain: and consequently no Culture of the Earth, no Navigation, nor use of the commodities that may be imported by Sea, no commodious Building, no Instruments of moving, and removing such things that require much force, no Knowledge of the face of the Earth, no account of Time, no Arts, no Letters, no Society, and which is worst of all continual fear, and danger of violent death, And the life of man, solitary, poor, nasty, brutish and short."

<sup>59</sup> Locke's depiction of the state of nature is rather dreadful. See Malan *Politiocracy* 88-92. He also does not accept community as a basic reality. Later thinkers in this same tradition such as Jeremy Bentham also blatantly rejected the existence of community. Bentham answered as follows the question as to what a community is in his 1789 *Principles of Morals and Legislation*: "The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then – is what? The sum of the several interests of the members who composed it." Bentham *Principles of Morals and Legislation* ch 1 iv.

<sup>60</sup> Althusius *Politica* 39.

natural given of the human condition. Justice encapsulates, expresses and regulates this natural communal (symbiotic) reality.

The paired concepts of commonwealth and justice encapsulated in the notion of the *ius symbioticum* also account in one breath for both the integrity of communities and the recognition and protection of all individuals, including each individual within the commonwealth. Drawing on Plutarch (and Biblical authority) Althusius declares that the commonwealth is "(b)est and happiest when magistrates and citizens bring everything together for its welfare and advantage, and neither neglect nor despise anyone who can be helpful to the commonwealth".<sup>61</sup>

However, as noted, for Althusius community was not only an immanent reality of the human condition, that is, a condition of people as symbiotes living together in this world. It was also transcendental, because it was communion between God and humanity (the human community). The transcendental (the community) found expression in human piety towards God in accordance with the first table of the Decalogue.

The immanent community was equally divinely ordained in the second table of the Decalogue. Hence, Althusius could view the Decalogue as political in nature "(i)nsofar as it directs symbiotic life and prescribes what ought to be done therein."<sup>62</sup> Thus he declared as follows about this encompassing (transcendental and immanent) ontology:

For the Decalogue teaches the pious and just life; piety towards God and justice towards symbiotes. If symbiosis is deprived of these qualities it should not so much be called a political and human society as a beastly congregation of vice-ridden men.<sup>63</sup>

Althusius' views on justice based on the second table of the Decalogue were reinforced by non-religious sources, most importantly by the views of Aristotle. The second table teaches justice among symbiotes. There is justice precisely for the purpose of universal symbiotic communion for "... the utility and the welfare of the people ..." that ensures to each his due.<sup>64</sup>

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<sup>61</sup> Althusius *Politica* 22.

<sup>62</sup> Althusius *Politica* 147.

<sup>63</sup> Althusius *Politica* 147. Althusius reflects here the views of St Augustine. This view of the dual and combined religious and worldly union is a golden thread resonating through Althusius' thinking.

<sup>64</sup> Althusius is not concerned only with justice but also with piety, that which pertains to eternal life, the basis of which to be found in the first Decalogue. Althusius *Politica* 75.

Thus law should be there for the conservation of justice and universal association – the bond that holds the commonwealth together.<sup>65</sup>

Illuminating his firm conviction on the natural and God-ordained basis of community, Althusius emphasised that God did not give everything to one person, but he distributed gifts among human beings. In consequence, single human beings are weak and dependent on others<sup>66</sup> and must therefore live together in communities and finally in an encompassing community of mutually dependent people<sup>67</sup> all of whom contribute their "specialised" gifts and thus enable genuine and wholesome human life, which is life within a commonwealth.

Althusius declares:

Correspondingly, while some persons provided for others and some received from others what they themselves lacked, all came together into a certain public body that we call the commonwealth, and by mutual aid devoted themselves to the general good and welfare of this body.<sup>68</sup>

For Althusius, resonating with Aristotle, civil society (the commonwealth) is as natural and fundamental as individuals. Man is by nature a gregarious animal born for cultivating society with other men. People are not inherently separated from one another and therefore incapable of being to the advantage of others.<sup>69</sup> On the contrary, people by their very nature eagerly strive for association. Echoing Aristotle, Althusius states that those who do not wish to live in society or are not in need of anything because all their needs are satisfied in abundance, are not part of the commonwealth. Any person meeting this description is either a beast or a god.<sup>70</sup>

On this score community (the commonwealth) and individuals can be viewed as fundamentally equal in human life. It is significant to note that Althusius, unlike Hobbes and Locke and the proponents of the ensuing liberal tradition, does not use the term "individual", or phrases such as "an aggregate of men" or "any number of men" that discounts community. Instead, he speaks of symbiotes and symbiotic life, namely people living

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<sup>65</sup> Althusius *Politica* 80.

<sup>66</sup> Althusius *Politica* 18.

<sup>67</sup> Althusius *Politica* 23

<sup>68</sup> Althusius *Politica* 23.

<sup>69</sup> Althusius *Politica* 22-23. Goosen *Oor Gemeenskap en Plek* developed a wide-ranging apology for a communitarian politics in which he rejects the absence of community as essentially an anomaly. See specifically section A of the book under the heading "Monsters en mense".

<sup>70</sup> Althusius *Politica* 25. Also see Goosen *Oor Gemeenskap en Plek* section A, who expands on this question in considerable detail.

together in a commonwealth, that is, in mutual dependence, each making a valuable contribution, by way of gifts received by him or her, thus enabling a plausible and happy existence of all.<sup>71</sup> This mode of thinking acknowledges the equal originality, significance and value of the individual and the community in the same breath, and thus overcomes the extreme choices for either hyper individualism or hyper collectivism, something which one encounters in statist-individualism and statist-collectivism.

Justice and the legal order have to account for this natural reality of community life, (and would on that score be viewed as natural law). The (just) legal order maintains the integrity of community by due recognition of all parts and by keeping them in balance. It satisfies the needs of each symbiote and the self-sufficiency and mutuality of the whole.<sup>72</sup> Althusius states:

Then, this world has so great and so admirable a diversity ... that unless it be held together by some order of subordination, and regulated by fixed laws of subjection and order, it would be destroyed in a short time by its own confusion. Nor can the diverse parts of it endure if each part seeks to perform its own function indifferently and heedlessly by itself.<sup>73</sup>

## **2.2 Covenant (or contract)**

In the discussion above the distinction between the modernist conception of the social contract and the communitarian outlook of Althusius that resonates the views of Aristotle has been highlighted. The former, as articulated in the most extremist form by Hobbes, is radically atomist. It rejects the notion of human community/ties as a fundamental fact of the human condition.<sup>74</sup> The lone individual (fundamentally a mirror-image of all other individuals) is the sole raw material within the human condition and associations can be conceived only as a derivative, that is, as an artificial offshoot which is a product of a social contract concluded among human beings in pursuit of private (and personal, specifically materialistic) gain. In terms of the contract the dismal state of nature in which conflict prevails is brought to a close. This paves the way for the civic (political) state organised by the refereeing sovereign force of the statist Leviathan. The contract does not reflect the existence of a community in any real sense; it is merely a mechanism in terms of which a mass of basically mutually antagonistic persons is organised in terms of legal rules to keep the peace, thus enabling individuals to achieve their private ends. Political society is therefore nothing

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<sup>71</sup> Althusius *Politica* 23.

<sup>72</sup> Althusius *Politica* 19.

<sup>73</sup> Althusius *Politica* 25

<sup>74</sup> A synopsis of Hobbesian political thought is given in Malan *Politiocracy* 75-85.

more than a society of individual rights-bearers and not a society aimed at pursuing a common good. To the extent that a common good can be attributed to this state, it is limited to a common understanding of the claims that individuals enforce against one another in terms of their individual entitlements.

There is also a pre-modern strand of contract theory dating back to the thirteenth century. In this tradition the notion of contract is encapsulated in government compacts that circumscribe the rights of office bearers invested with political authority and the loyalty and obedience that the citizenry owe them in return for a solemn undertaking of good government. This strand of contract theory is closely related to the notions of sovereignty of the law and popular sovereignty<sup>75</sup> because the contracting parties bind themselves to the law and the customs of the populace. This approach found expression in the then existing political communities. It is clearly far removed from the fictitious Hobbesian contract in terms of which society was for the first time established as part of the war believed to be raging in the state of nature. Althusius' thinking builds on this pre-modern view of contract and must be clearly distinguished from the modernist contract theory of Hobbes. More specifically, Althusius explains the existence of political community in terms of its various underpinning causes.<sup>76</sup> Althusius' contractual politics are in nature federative, as it were, and in terms thereof sovereignty is defined as the co-sovereignty of a people organised in a plurality of partially autonomous spatial as well as social constituencies.<sup>77</sup> Thus, Althusius states that the efficient cause of political association is consent and agreement among the communicating citizens. Althusius deals with the formal cause of political association as follows:

The formal cause is indeed the association brought about by contributing and communicating one with the other, in which political men institute, maintain and conserve the fellowship of human life through decisions about those things useful and necessary to this social life.<sup>78</sup>

This "formal cause" of political association is distinguished from the final cause of politics explained by Althusius as follows:

The final cause of politics is the enjoyment of a comfortable, useful and happy life, and the common welfare – that we may live with piety and honour a peaceful and quiet life, that while true piety toward God and justice amongst the citizens may prevail at home, defence against the enemy from abroad may

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<sup>75</sup> Hueglin *Early Modern Concepts* 177

<sup>76</sup> The various causes reflect Aristotelian metaphysical explanation, see Goosen *Oor Gemeenskap en Plek* 231-257, which deals with these causes in detail.

<sup>77</sup> Heuglin Hueglin *Early Modern Concepts* 87, 183.

<sup>78</sup> Althusius *Politica* 24.

be maintained, and that concord and peace may always and everywhere thrive ...The material politics is the aggregate of precepts for those things, services and right that we bring together, each fairly and properly according to his ability for symbiosis and the common advantage of the social life.<sup>79</sup>

(Althusius' notion of the virtuous citizen also comes to the fore in this context. The best members of a community are those who meet their own needs and who are also able to help others. "The greater the good he communicates with others, the better and more outstanding the member is."<sup>80</sup>)

In Althusius' discussion of the constitution of the supreme magistrate, the concept of contract once again surfaces prominently. Referring to appropriate authority, Althusius first asserts, as he does in a number of other places in his work, that the commonwealth (as an institution) is older and more important than the magistrate. The commonwealth in fact constitutes the magistrate.<sup>81</sup> Althusius then proceeds as follows:

And so no realm or commonwealth has ever been founded or instituted except by contract entered into one with the other, by covenants agreed upon by subjects and their future prince, and by an established mutual obligation that both should religiously observe. When this obligation is dishonoured, the power of the prince loses its strength and is ended. Whence it follows that the people can exist without a magistrate, but a magistrate cannot exist without the people.<sup>82</sup>

This illustration in broad outline of the difference between the modernist (specifically Hobbesian) views on social contract and those held by Althusius can now be examined further. The first difference appears from Althusius' view that the commonwealth precedes the covenant (the contract). The commonwealth is not created by a contract but it is a *prerequisite - a conditio sine qua non* - for a contract. This (first) difference gives rise to the second one, namely: the purpose served by the contract in terms of the modernist view is totally different from the purpose served by the contract in terms of Althusius' view. Whereas in the modernist concept the contract creates society, the Althusian view is that communal life is Godly ordained and a natural given, thus allowing symbiotes to enter into agreements not to create communities but to refine organisation within existing communities. As to his belief that community is a product of nature, Althusius draws on the well-known Aristotelian view, which is advanced in the *Politeia*, when he asserts that the commonwealth or civil society is a

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<sup>79</sup> Althusius *Politica* 24.

<sup>80</sup> Althusius *Politica* 25.

<sup>81</sup> Althusius *Politica* 122.

<sup>82</sup> Althusius *Politica* 122.

product of nature, and that man is by nature a civil animal who strives eagerly for association.<sup>83</sup> Althusian covenants merely refine the mechanisms of governance within the existing commonwealth (which in Althusius' view should be done on the basis of popular sovereignty and sovereignty of the law, the details of which are described in 2.3 below). The third difference, which also pertains to the purpose of the contract, is that the modernist contract merely serves as a means for regulating conflict amongst isolated and antagonistic individuals; in contrast, the Althusian covenant, encapsulated in his views of the final cause of politics, facilitates and promotes a life of happiness and justice among people, not only as individuals, but more specifically as citizens in the encompassing and common enterprise, which is their (the citizens') commonwealth.

The place and function of covenant in Althusian constitutionalism is nothing new. It has a long tradition in political philosophy – an established pre-modern lineage of contract theory – that differs fundamentally from the Hobbesian lineage. This traditional covenant theory in fact occupies a crucial place in pre-modern constitutionalism.<sup>84</sup> Althusius draws on this lineage.<sup>85</sup>

### **2.3 The sovereignty of the commonwealth and of the law**

Sovereignty is a core notion in Althusius' thinking. It is a guiding principle running through the whole of the *Politica*. Althusius subscribes to the sovereignty of the commonwealth and to sovereignty of the law, which in step with a long-standing tradition were not conflicting notions, as they now are in terms of contemporary constitutional doctrine, but a single coherent system.<sup>86</sup> Moreover, Althusius' views on popular sovereignty are conceived

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<sup>83</sup> Althusius *Politica* 25. This view runs through all of Althusius' work. See further for example Althusius *Politica* 19, 40.

<sup>84</sup> Dealt with in Malan 2015 *THRHR* 248-266.

<sup>85</sup> The way in which the (individual) right to association is conceived is also informed by the Althusian, in contrast to the modernist, view of contract. In terms of the modernist view, human association would be viewed as a consequence – a creature – of individual action. The Althusian view would hold that association is a fact of existing common human bonds among people already sharing such bonds, which is the necessary *conditio sine qua non* for such individual action, which once again does not really create but merely refines the association in question. Hence, association is not the consequence of individual action alone, but rather the consequence of already existing community bonds, which are refined by individual action. Protection of the right of association would therefore not only require individual choice (to associate or to disassociate) to be protected, but also that the integrity of the communities be protected, because without the latter the former would not be possible.

<sup>86</sup> In pre-modern society, communal custom, which may be viewed as an expression of the popular (commonwealth/community) sovereignty, constituted the law – also

in such a way that they form the basis for the federal dispensations of limited (constitutional) government and not a justification for absolutist popular power in terms of the *Volente Generale* as advocated by Rousseau. Althusius' views on sovereignty are of crucial importance with regard to his views on constitutionalism, which together with his republican federalism and his explanation of the role of the office of the *ephores* constitute the most important structures of Althusian constitutionalism.

In Althusius' view political authority, or the right to sovereignty as he calls it, vests inalienably in the commonwealth. The commonwealth is the totality of Althusius' compound constitution, made up by particular sovereignty-sharing communities organised on a federal basis of the principle of subsidiarity. The "owner and usufructuary of sovereignty is the total of all the people..." associated in one symbiotic body from many smaller associations.<sup>87</sup> The commonwealth lives by its sovereignty, failing which the commonwealth crumbles and dies and is unworthy of the name commonwealth.<sup>88</sup> As long as the commonwealth remains commonwealth it is incapable of parting with its sovereignty and cannot transfer it even if it wants to renounce it.<sup>89</sup> Although the administration of sovereignty may be assigned to a prince (or a collection of office-bearers), it remains immortally and perpetually with the commonwealth. Hence, when the prince dies, sovereignty still vests with the commonwealth, which may then entrust the administration of such sovereignty to another.<sup>90</sup> The administration of sovereignty by the prince, rector or other functionaries can legitimately be entrusted only to the whole of the commonwealth and not to only a part of it. Hence, it would be foolish and arrogant for one or more persons to appropriate for themselves so much power as to lay down binding law for all.<sup>91</sup> Referring to the Digest L 17 32 (in the Justinian Code) as authority, Althusius argues as follows:

For by natural law (*ius naturale*) all men are equal and subject to the jurisdiction of no one, unless they subject themselves to another's imperium by their own consent and voluntary act, and transfer to another their rights, which no other person can claim for himself without a just title received from their owner.<sup>92</sup>

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the supreme law (the constitution). Hence, popular sovereignty and sovereignty of the law were not adversaries (as they are in terms of modern constitutional doctrine) but were unified in a single system. See Malan 2015 *THRHR* 248-266.

<sup>87</sup> Althusius *Politica* 13.

<sup>88</sup> Althusius *Politica* 7.

<sup>89</sup> Althusius *Politica* 13.

<sup>90</sup> Althusius *Politica* 7.

<sup>91</sup> Althusius *Politica* 176.

<sup>92</sup> Althusius *Politica* 95.

Government is a natural phenomenon in Althusius' view. It is natural to rule and to direct, as it is natural to be ruled and be directed. Althusius' Christian humanism is once again prominent in this context since it is authorised in terms of natural, divine and human law.<sup>93</sup> In accordance with his view on the sovereignty of the commonwealth, Althusius teaches that government – the administrators – are not more but less important than the commonwealth. They have less authority and power than those who constituted them and from whom they have received their power, because the imperium and the power conceded to them are always less than the residual power of the commonwealth.<sup>94</sup> In terms of Althusius' view of the sovereignty of the commonwealth, such residual power will always be sufficient to remedy whatever wrongs may have been committed by a political order.<sup>95</sup> The administrators are nevertheless called superiors. Yet this superiority applies vis-a-vis the individual symbiotes over whom they exercise authority and not over the commonwealth as a whole.<sup>96</sup>

Sovereignty, however, does not mean unrestrained supreme power. It is not final and conclusive power, that is, power finally free from checks and balances in a contemporary sense. On the contrary, Althusius emphasises that sovereignty does not denote supreme power without any constraints of the law. Such unconstrained supreme power would degenerate into tyranny, constituting an affront to law.<sup>97</sup> This view brings us to the second aspect of Althusius' view on sovereignty, namely the sovereignty of the law. Reflecting a long-standing tradition of supremacy of the (fundamental) law predating Althusius' times,<sup>98</sup> Althusius also strongly subscribes to the sovereignty of the law as part of the essential basis for the constitutional order.<sup>99</sup> He declares as follows:

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<sup>93</sup> Althusius *Politica* 97.

<sup>94</sup> Althusius *Politica* 97.

<sup>95</sup> Althusius *Politica* 119.

<sup>96</sup> Althusius *Politica* 97. Also see 111, where Althusius expressed similar views in response to the absolutist views of William Barclay, which he was at great pains to reject. Also see 120.

<sup>97</sup> Althusius *Politica* 71. This view of Althusius' is in line with a longstanding view of both classical and medieval political thought that distinguished between the true king, who was subject to the law, as opposed to the tyrant, who was absolved from the controls of the law. See for example Carlyle *History of Medieval Political Theory* 115-116, 184. Interestingly, in typical medieval fashion, Bodin's sovereign is still not as powerful as that of Hobbes, as the former's sovereign is still subject to certain principles of divine and natural law. See Sheppard 1930 *Polit Sci Q* 586-596.

<sup>98</sup> For a discussion and reference to the relevant sources on sovereignty on the supremacy of the law, see Malan 2015 *THRHR* 248-266.

<sup>99</sup> Althusius *Politica* 111, 115, 123, 128.

All power is limited by definite boundaries and law. No power is absolute, infinite, unbridled, arbitrary and lawless. Every power is bound to laws, right and equity. Likewise, every civil power that is constituted by legitimate means can be terminated and abolished.<sup>100</sup>

According to Althusius the supreme magistrate has only the power assigned to him by the populace and he is therefore no absolute ruler at all. In his chapters on the supreme magistrate (dealt with in chapters 10 and 20 of the *Politica*), Althusius states as follows:

Such is the nature of the contractual mandate. The less the power of those who rule, the more secure and stable the imperium remains. For power is secure than places a control upon force, that rules willing subjects, and that is circumscribed by laws, so that it does not become haughty and engages in excesses to ruin the subjects, nor degenerate into tyranny... . Absolute power, or which is called the plenitude of power cannot be given to the supreme magistrate. For first, he who employs a plenitude of power breaks through the restraints by which human society has been contained. Second, by absolute power justice is destroyed, and when justice is taken away realms become bands of robbers as Augustine says. Thirdly, such absolute power regards not the utility and welfare of subjects, but private pleasure. Power, however, is established for the utility of those who are ruled, not for those who rule, and the utility of the people or subjects who are ruled does not in the least require unlimited power. Adequate provision has been made for them by laws. Finally, absolute power is wicked and prohibited. For we cannot do what can only be done injuriously. Thus even almighty God is said not to be able to do what is evil and contrary to nature.<sup>101</sup>

#### **2.4 Political authority and public office**

In step with a long-standing tradition of political thought in classical and medieval political thought,<sup>102</sup> Althusius teaches that political authority can be exercised legitimately only within the constraints of the law<sup>103</sup> and to the benefit of the whole of the political community - all subjects individually and collectively.<sup>104</sup> These perspectives are closely intertwined with and logically implied in Althusius' convictions on community, sovereignty of the law, popular sovereignty, and covenant, as discussed in 2.1 to 2.3 above. Althusius explains that the administration of the king (the supreme

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<sup>100</sup> Althusius *Politica* 115.

<sup>101</sup> Althusius *Politica* 121-122 (footnotes omitted).

<sup>102</sup> Political philosophy since Plato's Republic has asserted the principle that genuine political office is exercised for common good, that is, for the whole of the political community and not only for part of it. Political office exercised to the benefit of only one section of the political community is by definition not political office any more. It is either faction rule or outright corruption.

<sup>103</sup> See for example Althusius *Politica* 98, 120.

<sup>104</sup> This is asserted at Althusius *Politica* 20, 93 but runs through all of Althusius' argumentations.

magistrate) is not plenary, absolute and unrestricted; it does not allow the detriment and ruin of the subjects. The law and the welfare of the subjects set the boundaries of limited government within which political authority must be exercised.<sup>105</sup> If an administrator oversteps the limits and no longer serves the commonwealth, he is not a public office bearer any more. He then becomes a private person to whom obedience is no longer owed in relation to any action which exceeds the limits of his authority.<sup>106</sup> In a passage that encapsulates the close affinity of his views on public office with community, the sovereignty of the law and of the commonwealth and the notion of covenant, Althusius declares:

Nor did the commonwealth, in constituting administrators for itself, deprive itself of the means of self-protection, and thus expose itself to the plundering of administrators. Besides, whatever power the people did not have it could not transfer to the administrators. Therefore, whatever power and right the administrators did not receive from the people, they do not have, they cannot exercise over the people, nor ought they be able to do so.<sup>107</sup>

Public office bearers are by virtue of the power vested in them by law entitled to exercise their authority, but their authority is primarily associated with the notion of service and not with power. They must therefore exercise their authority in the interest of the public good of the commonwealth, which means that they are essentially servants of the commonwealth. They (including the supreme magistrate) are there for the commonwealth and not vice versa, the commonwealth is not there for them. Accordingly, in the words of Casey "(l)eadership is service which one renders for the good of others and not a status to be had for one's own gratification or aggrandisement".<sup>108</sup>

Althusius subscribes to the long-standing distinction between the true king – the true public office-bearer – who acts according to the law and to benefit the commonwealth, and the tyrant who acts outside the law and to his own private benefit.<sup>109</sup> Althusius also subscribes to the equally long-standing duty to obey the (law-abiding) king in contrast to the (law-defying) tyrant.<sup>110</sup>

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<sup>105</sup> Althusius *Politica* 111, 121.

<sup>106</sup> Althusius *Politica* 98, 111, 112. This view is in step with a long-standing tradition of medieval political thought and is articulated in the well-known Calvinistic tract entitled the *Vindiciae Contra Tyrannos* published in 1579, discussed by Sabine *History of Political Theory* 378-384.

<sup>107</sup> Althusius *Politica* 98-99.

<sup>108</sup> Casey *Freedom's Progress* 403.

<sup>109</sup> For this longstanding distinction see fn 97.

<sup>110</sup> See Malan 2015 *THRHR* 248-266 and the sources referred to there.

Public office-bearing is an august duty. The highest public office-bearers have great authority. Affluence may accompany the heavy responsibilities of highest public office-bearers. That, however, is dependent on the office-bearer's acting under the law and to the benefit of the commonwealth. Moreover, public office-bearing is associated with close cooperation between office bearers and the commonwealth – between the governors and the governed – in accordance with the appropriate role for each in contributing to the well-being of the polity. In this regard Althusius declares:

The right of the king consists in the faithful and diligent care and administration of the commonwealth entrusted to him by the people. For this reason the people transfers to him as much and authority it judges necessary. By the communication, sharing and contribution of individual persons from the people, the king becomes rich and powerful. By their counsel he becomes wise. By the aid of his subjects he exercises strength, vigor and might. If the people deny this to the king, he again becomes weak, poor needy and a private person ...<sup>111</sup>

In the final analysis, government must be limited in order to ensure the benefits enunciated as follows by Althusius:

The less the power of those who rule, the more secure and stable the imperium remains. For power is secure that places a control upon force, that rules willing subjects, and that is circumscribed by law, so that it does not become haughty and engage in excesses to the ruin of the subjects, nor degenerate into tyranny ...<sup>112</sup>

### 3 Conclusion

This concludes the discussion of the foundational tenets of Althusius' constitutionalism. A constitutional order based only on principles without accompanying structures and mechanisms is clearly not really viable. On the other hand, a constitutional order restricted to mechanisms and structures but without principles is equally inconceivable. Althusius' foundational tenets combine Biblical, classical (more specifically Aristotelian), Medieval and pre-modern political thinking and political experience into a coherent political and constitutional theory. On that score it is historically illuminating.

This, however, does not exhaust the significance of these tenets. They are also of importance for present-day constitutionalism. That is not to say that they can simply be transplanted into our modern-day constitutional law. For that they are clearly inadequate, for two specific reasons. First, they do not

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<sup>111</sup> Althusius *Politica* 114.

<sup>112</sup> Althusius *Politica* 121. This is to my mind a striking formulation of constitutionalism.

account for the emergence and the domination of the territorial state, which came about after Althusius. Secondly, Althusian thinking was conceived before the advent of the individual and of individual rights which came to full fruition only in the twentieth century.

Still, however, there are important aspects of Althusius' foundational tenets which are of value for our present-day political and constitutional discourse.

The following aspects may be highlighted. First, Althusius provides a valuable source for modern-day communitarian theory, which has become an increasingly important theme of contemporary politics and constitutional law. Communitarianism dispenses with the notion of the abstract individual. It highlights the truth that (individual) identity, morality and a happy life can be conceived of and achieved only within the framework of communities. This leads to the second point, which is that individual rights are quite often meaningful only within a communal framework. In the absence of communities, individual rights can often not be exercised at all. To the extent that communities are not recognised, individual rights are therefore quite often impoverished.<sup>113</sup> Althusian communitarianism is therefore an important source for a politics of recognition from which not only communities, but also individuals stand to benefit.

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<sup>113</sup> See generally Réaume 1988 *UTLJ* 1-27; Stavenhagen "Cultural Rights" 63-77.

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## List of Abbreviations

Am J Pol Sci	American Journal of Political Science
Can J Law Jurisprud	Canadian Journal of Law and Jurisprudence
CJPS	Canadian Journal of Political Science
Polit Sci Q	Political Science Quarterly
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg

Tydskrif Geesteswet  
UTLJ

Tydskrif vir Geesteswetenskappe  
University of Toronto Law Journal