

Hannah Arendt's and Leo Strauss's Retrospects on Constitution. Dissent and Beyond

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The declined project of drafting a European constitution has apart from its oft observed shortcomings also a set of noteworthy merits. It no longer allows the escalating unease of European constituents towards the further amplification of the project of constructing European polity and citizenry to be ignored, placing a bold question mark on the assumptions that have been made regarding the gradual withering away of the state and parochialism of politics. Due to the rejection of the draft, furthermore, a whole range of clashing visions of Europe's past and future have forced their way out of long oblivion, stimulating heated public debates on the ideas and practices of Europeanness. Also, although not raising as wide a polemic, the veto to the constitution gives us an occasion to reflect on the very idea and concept of constitution. It has given us a uniquely actual occasion to examine the question: what constitutes a constitution. Although history is hardly a dimension that the drafters wanted to make their way into the Treaty, the following reflections will nonetheless glance into the past. Without doubting the novelty of the challenges that today's Europe is facing or entertaining any hope (or fear) that these could even begin to be met by the means of ideas mainly, the following inquiry rather dwells on the interplay between ideas, experiences and histories on the arena of conceptualizing constitutions.

I considered it worthwhile to explore Hannah Arendt's and Leo Strauss's reflections on the political meaning of constitutions for mainly two reasons. Firstly, because both Arendt and Strauss had had a momentous encounter with a failed constitution, that of the Weimar Republic, as well as with the American one which is underlying one of the most stable and liberal regimes of Western modernity. Weimar liberalism was directly succeeded by a majority endorsement, or at least toleration, of the totalitarian regime that turned Strauss and Arendt as Jewish Germans into persecuted refugees. Only after years of exile, they found asylum in the United States and after more than a decade of statelessness, they were granted American citizenship. They conveyed their experiences into reflections upon the European political legacy, sometimes setting it against the American one. Secondly, despite the differences in their philosophical underpinnings of their interrogations into the modern predicaments, it was the *political* problem that always stood at the centre for both. Unlike for many other thinkers of the same generations or fellow-refugees, the crisis of our times culminated for Arendt and Strauss in a political crisis, even if reinforced by the *aporias* in modern theorizing. Since American constitutionalism had for both, albeit for different reasons, succeeded in tackling some of these difficulties, it became for them a noted contemporary example of resisting the specifically modern inclinations towards overwhelming ideologism or 20th century reactionary irrationalism. Thus I will begin by outlining and contrasting their explications of their European experience, and their reasons for appealing to the ideas of American foundation at the time when prevalent American scholarly interpretations still rendered it undemocratic (Zuckert 1999). Yet then I proceed to complicate the usually held view of Arendt and Strauss as political-philosophical antagonists, by pointing at some neglected similarities of the grounds and aims of their critiques.

Arendt: Constitution as enacting

When Arendt recalled her life in Germany in the 1920s, she admitted her lack of slightest interest in politics (Arendt 1964, 1994, pp. 1-23;), and this corresponded to the overwhelmingly apolitical or even anti-political mood that most of the intellectuals of her generation, German and Jewish alike, shared (cf. Lowith). Gone were the pre-1914 optimistic expectations of the ever-brighter future, its belief in ultimate human goodness and power of reason. In its stead reigned a profound disappointment regarding Western industrialism and rationalism. The intellectually framed crisis-discourse - be it an appeal to a cultural crisis, crisis in science or even crisis of the West - owed much of its force not only to the unforeseen atrocities of the Great War or the resentment arising out of the humiliating losing terms for Germany, but also to the steep economic and political crisis devastating the entire society (cf. Peukert 1987). Yet the reaction of the profoundly disillusioned young generation had not been to grab political arms, but on the contrary, to lay them down altogether and resort to acclaimed political indifference. In the newly founded democratic republic, politics was perceived at best as a dubious game played by whoever happened to be the scoundrels of the day and avoided by those with a "higher" calling (cf. Lowith; Gordon 2007). That matters did not remain explosive as they had been for years, but turned even much worse, that is, exploded into a political catastrophe did not exactly catch them by surprise, but left many of those intellectuals, Arendt herself included, politically helpless (Arendt 1994, p. 4).

Although Arendt's inquiry into the origins of totalitarianism is based on a more sweeping analysis of political-philosophical modernity, when accounting for the failure of Weimar or even post-First World War European constitutionalism in general, she points more concretely to the fact that the citizenry considered the new republics along with their constitutions anything but "their own". The mid-war constitutions in Europe, especially in the new states, often tended to be imposed by international arrangements and authorities or at best by new governments who seldom possessed sufficient political authority. Hence, these constitutions were perceived as artificial constructions founded on mere ideas and ideals that since long had ceased to convince anyone. At critical moments, it thus was alarmingly easy for the radical anti-liberals to either invalidate or simply ignore what had been merely one of too many legal documents, neither cherished nor taken as binding. As a matter of fact, in Arendt's hindsight, these constitutions had become what they had been to begin with and all along: a mere declaration that too few felt affiliated to, let alone obliged to defend (Arendt 1990, pp. 144-146).

Indeed, in Arendt's political-historical explications, the beginning or the origin of a constitutional regime seems to exercise decisive impact on its future destiny. Similarly to her accounts of the failures of constitutional liberalism mid-war period Europe, which refer to their ill-fated beginnings, Arendt's analyses of the stability of American constitutionalism relies on her interpretation of its inception: the American Revolution and the founding of the republic. She presents her argument, moreover, in the form of a comparative reconstruction of the French and the American Revolution - revolutions being the only "political events which confront us directly and inevitably with the problem of beginning" (*ibid.*, p. 21) - as each becoming paradigmatic, albeit in almost contradictory senses, for political modernity.

From the outset, Arendt distinguishes between two main aims of any revolution, that of liberation from oppression as liberty defined negatively, and that of founding a new regime to sustain political freedom in the positive sense. In her oft contested historical interpretation, Arendt asserts that initially both revolutions were driven by the twofold yearning of their actor to "liberate *and* to build a new house where freedom can dwell" (*ibid.*, p. 35, emphasis Arendt's). Yet in France, soon after the outset of revolutionary events, "desire for freedom as the political way of life" (*ibid.*, pp. 33, 24-25, 245-246) was superseded by what Arendt calls "the social question". The priority of liberation from oppression as a merely negatively defined freedom, and firstly the hope to liberate mankind from poverty, became "the turning point not only of the French Revolution but of all revolutions that were to follow" (*ibid.*, p. 61), and henceforth the aim of politically defined freedom fell into obscurity.

Arendt construes the American Revolution largely as an antipode of the European "event". That is, she argues that both the coining as well as the execution of the American Revolution continued to be driven by strictly political purposes, inspired and supported by the taste of political "acting together" familiar to the Founding Fathers already from the colonial times of relatively loose subjection (*ibid.*, p. 138). Notably, Arendt even reads the celebrated "no taxation without representation" with an exclusive emphasis on "representation", thus as in its essence not an economically, but a politically-minded protestation (*ibid.*,

pp. 179-180). Thus it was not merely or even primarily the desire to shed off the yoke of overseas power that triggered the joining of forces against a common enemy, but the shared "passion for public freedom", which could only be satisfied by "the foundation of freedom, that is, the foundation of a body politic which guarantees the space where freedom can appear." (*Ibid.*, pp. 125, 33, 118-119.)

The foundation of a new regime in modern terms means the sanctioning of a constitution, which is, in Arendt's wording, "like a correlative conjunction" to any revolution (*ibid.*, p. 126). However, among other factors that turned the French Revolution into an ongoing cycle of violence, the founders of the Republic also failed to summon sufficient authority and consensus to ratify a constitution. The writers of the French constitution, the Assembly Deputies, lacking former political experience and often intellectualist and emotive men of letters, were largely perceived as powerless experts, distant and aloof from their constituents. Although these "experts" continued drafting several consequent versions of constitution, none of their proposals resulted in consensus and ratification, "until, in an avalanche of constitutions lasting deep into our own century, the very notion of constitution disintegrated beyond recognition." (*Ibid.*, p. 125.) Trying to pinpoint a specifically European disappointment with constitutionalism, Arendt further notes that henceforth "the very notion of constitution came to be associated with a lack of reality and realism, with an over-emphasis on legalism and formalities." (*Ibid.*, p. 126.)

The American authors, on the contrary, succeeded in reaching rather shortly a basic political consensus among the thirteen States, all of them already drafting their own constitutions. The ratification of the Union constitution was achieved by striking at a satisfactory balance of powers and functions between the federal and the state level. Arendt highlights the pragmatism, the concreteness of the representation and above all acceptance of the diversity of interests and opinions in a wide range of matters as the key factors in the speedy founding of the republic. Yet perhaps more importantly, she insists that the constitution was made possible primarily by the virtue of trust and mutual promise: "what had happened in colonial America prior to the Revolution... was, theoretically speaking, that action had led to the formation of power and that power was kept in existence by the then newly discovered means of promise and covenant." (*Ibid.*, pp. 175-176.) It is the acts of "binding and promising, combining and covenanting" in which not only the founders, but also their constituents partook that underlies "the difference between a constitution that is the act of government and the constitution by which people constitute a government." (*Ibid.*, p. 146.)

It is precisely the foundation on covenanting wherein the unprecedented continuity of American constitutionalism lies - according to Arendt's rather original interpretation (cf. Villa 1996; Honig 1991) - offering furthermore a novel solution of the predicament of authority, a problem which became fatal for many modern European regimes (Arendt 1990, pp. 156-158; 1993, pp. 91-143, 140). Whereas in Europe, one never ceased to frame political legitimacy in terms of the absolute, that is, merely replacing the sovereign will of the monarch with the will of the people or with the nation, Arendt insists that in American constitutionalism the problem of the absolute was re-conceptualized in a uniquely modern manner. The newly founded republic's permanence was not anchored in some divine or some other eternal truths, despite the fact that the Founders themselves occasionally and mistakenly believed so, and instead, as Arendt confidently asserts, it lies in the "authority which the act of foundation carried within itself." (Arendt 1990, p. 199.) That is, Arendt frames American foundation and constitutionalism in purely performative terms: whereas other modern revolutions and foundings desperately sought the "absolute," for the Americans, it comes to be contained in the very act of beginning, in the act of the foundation of the Republic (*ibid.*, p. 204). The authority of the act of foundation, sealed in the framing of the constitution, makes all further appeals to transcendent sources of legitimacy unnecessary, and finds its confirmation in the reverent attitude of the Americans towards their constitution until this very day (*ibid.*, pp. 198-199). Also, for the Americans, "constitution" has maintained its "original" twofold meaning: it means both the act of foundation as well as the basic legal document (*ibid.*, pp. 203-204).

A concrete example of Arendt's rather unconventional interpretation is her exclusively performative-political reading of the celebrated "We hold these truths to be self-evident..." Namely, she shifts the usual emphasis from the "self-evident truths" to the "we hold", arguing that it is precisely by the virtue of the citizen's common judgment and not divine authority that these truths are normative (*ibid.*, p. 193). Again, unlike the French Declaration of the Rights of Man, which appealed to a "natural" basis of rights of man and proclaimed universal human rights, the Americans maintained the necessity of a constitutional government for all humankind, asserting thus the civil character of all rights. Only by virtue of belonging to a polity

and of civil laws could one's rights be secured (*ibid.*, p. 149), whereas any appeal to the "divine" or the "natural" remained ultimately of mere declarative value (Arendt 1994, pp. 290-305).

Much in the same vein, Arendt problematized the post-World War attempts to introduce to international law the concept of universal human rights and human dignity, characterizing these attempts as an "abstraction" and accusing their writers of "lack of reality" (Arendt 1949, pp. 31, 37). She sceptically points at the theoretical difficulties that any universal normative account is bound to face in our post-metaphysical era, perhaps more importantly to the mid-war period experience of the collapse of not only ethnic minority rights, but also individual rights all over Europe. Although at the time of the emergence of tens of new national states in Eastern Europe, their minorities were ceremonially granted extensive legal rights to compensate for the impossibility of drawing the borders strictly along national lines, the Wilsonian generosity proved inconsequential during the times of political trouble. Not only were minorities under threat as communities, but also their basic individual rights too often dissolved into mere rhetoric - and soon even the rhetoric was given up - as soon as the non-ethnic nationals were stripped of their citizenship (Arendt 1994, pp. 267-305). It is hardly the declarations of universal human rights, but only concrete citizenship, political rights *and* their active exercise - that is, the unceasing "intersubjective validation and confirmation" of our rights (terms cited from Menke 2007) - that can counteract our vulnerability as mere individuals (Arendt 1949, p. 34). The foundation of civil and political rights on the incessantly enacted constitution was for Arendt the only guarantee of "human rights" and "human dignity" in the modern world.

Strauss: Re-opening the case for natural right

Strauss's views on constitutionalism allow only a more limited explication as he was considerably less outspoken in giving his explicitly political judgment in this matter, and neither was he engaging in urgent political debates in general, with only rare exceptions. His elusiveness is nevertheless not so concealing as to make it impossible to defy the gross misreading of numerous recent critics who have taken it to conceal his "genuine" face as the archenemy of Western liberalism (Altaian 2007). To contrast his discourse with Arendt's, will, however, be here the more material aim.

Also Strauss, as briefly as he discusses constitutionalism in frankly political terms, tends to set the American experience against the European, or more specifically, the German one. Strauss as well appeals to the American Declaration of Independence in most praising terms, whereas Weimar constitutionalism, due to its lack of political authority and power to assert itself seems to his mind rather have helped preparing the way for the coming calamities rather than to have entailed a possibility of preventing them. He even pronounced that the Jewish minority in Germany had never before been as insecure and object of general suspicion as in the weak liberal Republic, which at least in legal terms should have guaranteed ethnic minorities formerly unprecedented rights and equality (Strauss 1997, p. 139). That the American constitutionalism did so not only *in jure*, but also *de facto*, that is all its citizens' both political and legal equality, Strauss appears to affirm (*ibid.*, pp. 143-144, 314).

Although Arendt and Strauss shared an admiration for American constitutionalism and appealed to its foundational documents at the time which was characterized by a relatively indifferent attitude among the political scientists (Zuckert 1999), the two thinkers in fact interpreted its grandeur in almost opposite terms. In the introduction to his series of public lectures, entitled *Natural Right and History*, later to be published and to become his most widely read book, Strauss quotes the very same passage in the Declaration of Independence which had been so central to Arendt's argument: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." (Strauss 1970, p. 1) However, whereas the thrust of Arendt's interpretation was that the "greatness" of the Declaration of Independence "owes nothing to its natural-law philosophy - in which case it would indeed be "lacking in depth and subtlety" - but lies in the "respect to the Opinion of mankind"" (Arendt 1990, p. 129), for Strauss its political meaning lies, on the contrary, precisely in its appeal to natural right.

Strauss reinforces his praise by asserting that "[t]he nation dedicated to this proposition has now become, no doubt partly as a consequence of this dedication, the most powerful and prosperous of the nations of the earth." (Strauss 1970, p. 1.) Again, he gives here both the "dedication" as well as its political momentum

an entirely different meaning from Arendt's performative-intersubjective one. For Strauss, the founding of American government on these principles represented a unique modern example of combining reflection and choice, rather than of accident and force, and an affirmation of a specifically modern natural right doctrine. Although he expressed doubt whether Americans indeed still, in 1949 when the lectures were held, held these truths to be self-evident, he nonetheless took the hesitation to be a recent phenomenon.

The polemical intention of Strauss's quotation and praise - which are brief and to which he does not return in the course of the book - is more clearly revealed in the counterexample that follows. Notably, he sets the American natural right thought against the prevalent ideas of pre-War Germany. In more concrete terms, Strauss has in mind the historicist turn that had had a profound effect on all disciplines of human and social sciences since the mid-19th century and especially in Germany. Even more concretely, his entire subsequent inquiry can be seen as a dispute with the grand figure of German social science, Max Weber, who embodied for Strauss the culmination of German historicist thought (*ibid.*, pp. 2-81). It is noteworthy that Weber also served as a consultant to the commission in charge of drafting the Weimar constitution, a fact over which Strauss, however, passes in silence.

It was not only Weber's ideal of value-neutral science that Strauss challenged as erroneous in the factual-logical as well as in the normative sense. Perhaps what Strauss disdained even more strongly, not to say, abhorred, was Weber's conviction that not only science, but reason more generally, can in practical-ethical matters offer only instrumental, but never normative guidance. Reason, and science even more efficiently than reason, can instruct us about the more effective tools to employ in order to achieve the aims we have set ourselves, but their role remains limited when we are confronted with a decision about the ultimate aims of our actions. In deciding what is good life and what are the things I should pursue, reason's council can only be limited. This ultimately means that man's decision about the good life, the right and the virtues worthy of pursuit remain not only subjective but from the point of view of reason, in blunt terms, arbitrary. There are no objectively, or rationally demonstrable, good or poor ways of living, not even worthier or less dignified human aims and pursuits.

The political-legal inheritor of the ideal of *wertfreie Wissenschaft* was for Strauss also Hans Kelsen and the school of legal positivism. Already in his youth Strauss had repeatedly embarked on a philosophical critique of Kelsen, who had claimed his *reine Rechtslehre* to be devoid of any subjective value-judgments and argued for a purely formal institutionalism or the ideologically neutral state. Although Kelsen held his theory to be the first entirely pure or un-ideological legal doctrine, he conceded that the norms of the positive system are nevertheless "valid only on one assumption: that there is a basic norm which establishes the supreme, law-creating authority." Furthermore, "the validity of this basic norm is unproved and must remain so within the sphere of positive law itself," (Kelsen 1999, p. 395) it remains "hypothetical", whereas it is precisely this „basic norm" that renders „meaningfulness" and "comprehensibility" for the whole system of positive legal norms (*ibid.*, p. 402).

Like Weber, Kelsen was a Social Democrat, which gives Strauss's critique of Kelsen, which he summarizes in a footnote in the same introduction, an astutely sarcastic taste. Strauss cites Kelsen's political opus from 1925 where Kelsen had additionally argued that also despotism is a legal order or rule of law (*Rechtsordnung*), and not just an arbitrary rule of the despot, and that the denial of its legality or its political legitimacy is only a misunderstanding of the naive natural right thought (Kelsen 1925, p. 335-336). Now, after the Second World War, Strauss adds ironically: "Since Kelsen has not changed his attitude toward natural right, I cannot imagine why he has omitted this instructive passage from the English translation." (Strauss 1970, p. 4)

That legal positivism, as well as of any allegedly value-neutral political or social science, is unable to distinguish between the right and the legal, between the rule of law and a tyranny, is the kernel of Strauss's political critique of both Weber and Kelsen. If reason and political science are unable or unwilling to make a normative difference between regimes, one is facing as if an "arbitrary" and "blind" political choice (*ibid.*, p. 4). Decision is required, but strictly speaking, no choice can be "better" or more "right" than any other. Strauss's argument in 1949 is strikingly similar to his critique of Carl Schmitt's political decisionism two decades earlier (on the latter, cf., Meier 1995 and 1996). Indeed, also in his lectures Strauss quite unmistakably, albeit implicitly (cf., Strauss 1970, pp. 5-6), contends that there is no difference in principle between legal positivism and political decisionism: both posit an ultimately irrational, or at least a-rational decision as the primary political fact.

Strauss by no means considered Weber an undemanding or negligible adversary, but on the contrary, held his work in exceptionally high esteem. After all, Weber had articulated with extraordinary force and meticulousness some of the most basic modern predicaments that also Strauss was acutely aware of (cf., Benhegar 2003). Yet for Strauss, the conclusions that Weber, a man of the older generation who had died in 1920, drew from these theoretical *aporias* acquired an entirely different practical meaning after the wide support that the Nazi regime had received in Germany. Strauss saw Weber along with historicists to have prepared the ground for legal positivism and political decisionism, both in the last analyses relativist theories, of which the former proved incapable of defying the Nazi onslaught and the latter had proponents who turned out even endorsing it.

It is against this experience that Strauss appeals to the American declaration and attempts to revive the natural right debate. Politically, as Strauss indeed concludes, conventionalism as a doctrine about norms has proved disastrous, and we seem to need a standard of right and wrong which would not confine one to judge only according to the ideals of one's society, but to evaluate also those ideals (Strauss 1970, pp. 2-3). But Strauss also admits that "the seriousness of the need of natural right does not prove that the need can be satisfied", and that by proving only the indispensability of natural right, "one does not prove it to be true." (*Ibid.*, p. 6.) Strauss does not claim to have provided conclusive proof, and his endeavor - he first embarks on a critical dissection of contemporary arguments against natural right and then develops a genesis of natural right theories from the classical to the modern, demonstrating that the former are not more plausible or more consistent than the latter - should rather be understood as an attempt to revive the *question* about natural right, and thus as an argument against the conviction that the case has been cogently resolved.

Antithetical contentions?

When Arendt's and Strauss's works became known among the larger academic public, in the mid-decades of the previous century, they allowed no easy categorization within the conventional disciplinary boundaries of the time. Both political philosophy and history of philosophy were considered outdated enterprises and their work also falls far outside the domain of contemporary orthodox political and social sciences which took pride in its reliance on increasingly empirical-quantitative methods. Going against the current, both disputed the dominant paradigms of the political thought of the time and often pointed at its inability to understand or to adequately judge the political disasters of the century. Both questioned the idea that the political problem is in fact a technical problem, preferably to be eliminated by the so-called value-neutral technical or institutional solutions. Hence both also dismayed the prevalent idea of political theory as a science of social engineering based upon a rigorous calculation of the balance of interests, desires and needs.

Thus on the one hand, against what they saw as reduction of citizens to reactive, calculable members of a mass society unable to act or to think outside of the established ideology, both Arendt and Strauss sought to retrieve a richer concept of human agency underlying the political phenomena. Their interpretations of American constitutionalism provided them an occasion to dispute not only an institutional or instrumental understanding of politics, but also to go beyond the voluntaristic- decisionist theories, which conceptualized politics in terms of sovereignty and power as exercise of will and force.

For Arendt, the founding act of the American republic represented the actualization of what she calls the human capacity for a new beginning, the moment of freedom as political acting in common. In contemporary interpretations Arendt often comes forth as the thinker of action who elevates the political agony to the status of an end in itself (Villa 1996). Unpredictability, plurality, natality and beginning as a miracle are the hallmarks of the Arendtian political realm. Albeit performatively framed, her narrative of American constitutionalism as the success story of political modernity, however, brings forth the importance she gave also to the permanence of worldly structures and authority as safeguarding the "house where freedom can dwell", that is, as keeping politics from turning into mere violence and voluntarism - the very opposite of political action in the Arendtian sense. By no means purporting an arbitrary or a decisionist theory of politics, Arendt attempts to ground an inter-subjective normativity, which, in order to have a genuine political impact, needs ceaseless enacting (*ibid.*, p. 277).

For Strauss, not only pre-war European political thought but also politics bordered between relativism, nihilism and decisionism, and it is in this context that the American Declaration of Independence represents

for him a modern reliance on rationality. The stability and success of American constitutionalism allows him to appeal to its underlying principles, opening a path for his revival of the question of natural right. Yet Strauss does not claim that there are any perpetual answers for right and wrong, but at most that the question itself is valid at all times and that to suppress it under the guise of neutrality would mean to suppress our humanity.

Apart from their differences, what Arendt and Strauss both admired in American constitutionalism was that it had established and preserved the possibility of enacting human freedom, be it the "free deeds and living words" of men or the quest for human standards of right and wrong. Also, neither of them underestimated the continuity and authority that the principles of the constitution still enjoyed among the citizens, largely due to their unequalled correspondence to the political phenomena and issues at stake in political life.

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