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## **Hannah Arendt and the glimmering paradox of constituent power**

Hanna Lukkari

### **The paradox of constituent power: politics *in medias res***

The paradox at issue here concerns the relationship between the ‘constituent power of the people’ to determine the political and legal terms of its collective existence, and the constitutional framework of political and legal institutions, or the ‘constituted power’, that offers the medium for such freedom. ‘The people’s’ autonomous power to determine the terms of their collective existence is mediated by institutional structures that by virtue of their very existence limit and pre-constitute such power. The paradox is that, on the one hand, in order to exercise its constituent power ‘the people’ needs institutional mediation – there is no ‘people’ capable of collective action without it – but on the other hand, all forms of such mediation are determinations of collective existence and thus are, in a constitutional democracy, held to derive their power from ‘the people’.

The paradox of constituent power can also be thought as the paradox of representation or mediation. On the one hand, ‘the people’ as a political collective, as a ‘we’ in action and not simply as an amorphous, plural multitude or population, ‘does not exist independently of its representation’.<sup>1</sup> It needs ‘shaping’ and ‘staging’ (Claude Lefort)<sup>2</sup>, so that it would meaningfully appear. ‘The people’s voice’ can only be heard as mediated by someone and by some framework of speech. On the other hand, such mediation itself calls for legitimation. It calls for ‘evidence’ that it derives its constituted power from ‘the people’ as its ‘true’, constituent subject. Ferdinando Menga puts the paradox succinctly: “‘before’ the event of representation, there is no represented at all; ‘after’ the act of representation, the represented is understood as

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<sup>1</sup> Lisa Disch, ‘How could Hannah Arendt glorify the American Revolution and revile the French? Placing *On Revolution* in the historiography of the French and American Revolutions’, *European Journal of Political Theory* 10:3 (2011), pp. 350–371, at p. 362.

<sup>2</sup> See Panu Minkkinen’s discussion of Lefort in this volume.

something which must have already been presupposed to representation itself, since the original event, which enacts representation, would otherwise plunge into nothingness'.<sup>3</sup>

There is no 'people' nor its constituent power before an initiative that represents it as this or that. No representation simply mirrors reality. Such an initiative thus lacks authorisation by a people already in place, but as representational it claims to be authorised constituted power, to truly speak on behalf of a people already there: what is yet to come is claimed to have already taken place. Constituent power presupposes constituted power it seeks to bring about. Whether the initiative succeeds, can only be seen retroactively through the stabilisation of the articulation of 'the people' the initiative proposes.<sup>4</sup> Constituent power can thus be observed only indirectly, by attributing the extant order to it as its agent.

Because of its retroactive, indirect confirmation, a representing initiative both opens the possibility of collectivity and remains a wager, always risking to remain an empty claim. While representation empowers individuals to recognise themselves as participants in 'action in concert', as Hannah Arendt would say, it also disempowers because every representation is selective: it identifies the collective as this kind of a collective rather than as that, and offers some determination, in exclusion to others, of who participates in the action in concert and what its purpose is. The articulation of a plurality of individuals into a collective acting in concert complicates that plurality, injects limits into it: '[A] "we" can be "I plus you" or "I plus they" or even "I plus they minus you"'.<sup>5</sup> The utterance spoken in 'our' name addresses a selected audience, more or less clearly defined, but there is no guarantee that the individuals interpellated as belonging to such audience recognise their political vision of the terms of collective existence in the representation that the interpellation claims to be theirs as well. There are also no guarantees that those who have not been addressed

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<sup>3</sup> Ferdinando Menga, 'The seduction of radical democracy. Deconstructing Hannah Arendt's political discourse', *Constellations* 21:3 (2014), pp. 313–326, at p. 321.

<sup>4</sup> See Hans Lindahl, 'Possibility, actuality, rupture. Constituent power and the ontology of change', *Constellations* 22:2 (2015), pp. 163–174, at p. 168.

<sup>5</sup> Carrol Clarkson, 'Who are "We"? Don't make me laugh', *Law and Critique* 18:3 (2007), pp. 361–374, at p. 369.

would agree to be so left out. For this reason, as Carrol Clarkson notes, ‘any use of “we” raises disturbing questions about the porosity of a contingent cultural [or indeed constitutional] limit, about acts of violence perpetrated against those *excluded from* the “we” and, in some instances, against those *coercively included within* it.’<sup>6</sup>

Democratic constitutionalism is, then, an ambiguous achievement. At stake is the contingency of representational limits, their ‘porosity’, the possibility of their modification in response to claims that exclusion from or inclusion within are violent and alienating. The only permanent ‘site’ and object of politics are the limits. Politics happens *in medias res*, always against and within some pre-determination. There is something ‘tragic’ in constitutionalism as thinking about mediated politics/politics as a struggle with mediation: politics that challenges extant mediation itself proposes another mediation that perpetuates the paradox rather than solves it for good. The paradox suggests that democratic constitutionalism is implicated in collective disempowerment to an equal measure with collective empowerment.

I take the paradox of constituent power as real and having important implications for democratic constitutional theory.<sup>7</sup> In this chapter, I present a reading of Hannah Arendt’s constitutional thinking from the perspective of the paradox and argue that it ‘glimmers’ in her work: it almost crystallises into an account of the tensions present in ‘the act of founding’, but the ambiguities are again obscured by her republican ideal of *constitutio libertatis*. I also trace an implication that, I think, comes with this obscuring of the paradox and lessens the value that Arendt’s work has for a constitutional thinking of political pluralism, namely that of her ‘civilisationalism’.

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<sup>6</sup> Clarkson, ‘Who are “We”?’’, p. 364. Emphasis mine.

<sup>7</sup> See, in particular, Lindahl, ‘Possibility, actuality, rupture’. For a critique of different versions of republican constitutionalism from the perspective of the paradox see Emiliios Christodoulidis, ‘The aporia of sovereignty. On the representation of the people in constitutional discourse’, *King’s Law Journal* 12:1 (2001), pp. 111–135.

## Participation *versus* representation

It is well known that Arendt's work is often difficult to interpret coherently, and this difficulty stems to a large extent from passages in her writings that seem to be incompatible with each other, if not in open contradiction.<sup>8</sup> It seems, for example, that she can be read just as well as a staunch critic of representation and a proponent of direct democracy as a republican elitist content of giving the status of authoritative representatives to those who are 'politically speaking' 'the best'.<sup>9</sup> Arendt's texts thus seem to call for a 'deconstructive' reading<sup>10</sup> that wants to maintain the passages in their tension – in a productive paradox – rather than make choices between them. There is no strict, principled opposition and hierarchy between participation and representation in Arendt's work. In the following sections, I seek to show that representation crops up in Arendt's account of direct participation and turns participation into a form of representation.

There are, however, passages in which Arendt clearly pits 'representation versus action and participation',<sup>11</sup> passages that support the reading that she is hostile to representation and identifies actual participation of individuals in the sheer presence of each other as the core of genuine politics. She argues, for example, that 'the political realm rises directly out of acting together, the "sharing of words and deeds"',<sup>12</sup> without any pre-existing mediation. 'The space of appearance comes into being wherever men are together in the manner of speech and action, and therefore predates and precedes all formal constitution of the public realm, [...] that is, the various forms in which the public realm can be organized'.<sup>13</sup> The constituted 'public

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<sup>8</sup> See e.g., Hauke Brunkhorst, 'Equality and elitism in Arendt', in Dana Villa (ed.) *The Cambridge Companion to Hannah Arendt* (Cambridge: Cambridge University Press, 2000), pp. 178–198; Margaret Canovan, 'The contradictions of Hannah Arendt's political thought', *Political Theory* 6:1 (1978), pp. 5–26.

<sup>9</sup> Cf. Arendt, *On Revolution*, p. 277–278.

<sup>10</sup> See also Menga, 'The seduction of radical democracy', and Rudi Visker, 'Beyond representation and participation. Pushing Arendt into postmodernity', *Philosophy & Social Criticism* 35:4 (2009), pp. 411–426.

<sup>11</sup> Arendt, *On Revolution*, p. 273.

<sup>12</sup> Arendt, *The Human Condition*, Second Edition. Introduction by Margaret Canovan (Chicago: The University of Chicago Press, 1958/1998), p. 198.

<sup>13</sup> Arendt, *The Human Condition*, p. 199.

realm' 'ultimately resides on action and speech'<sup>14</sup>; action 'is the one activity which constitutes it'.<sup>15</sup> Arendt is a praxis theorist for whom politics is something that needs to appear, to be actualised, in order to exist at all, and it can be actualised only when a plurality of individuals engage in action and speech together, recognising each other as equal. Arendt insists on the importance of 'the performance itself'<sup>16</sup>, on the importance of actual presence of actors to each other for the emergence of (constituent) power in its collective articulation.<sup>17</sup>

All this seems to suggest that legitimate forms of constitutional order emerge from the direct participation in the process of their formation of all those who will be bound by the order. 'The power of making promises'<sup>34</sup> is, for Arendt, the privileged way of keeping power in existence, as it ties actors together through expectations of conduct to which all have agreed and that mitigate some of the future's and actors' own unpredictability. '[P]ower [comes] into being when and where people [...] get together and bind themselves through promises, covenants, and mutual pledges,' she writes; 'only such power, which [rests] on reciprocity and mutuality, [is] real power and legitimate'.<sup>18</sup> It is this actual presence of the promisors to each other that is the normative source of the constituted order: all 'laws and constitutions [...] derive in the last instance from the faculty to promise and to keep promises in the face of the essential uncertainties of the future'<sup>19</sup>, and their legitimacy is expressed by the Roman principle of *pacta sunt servanda*.<sup>20</sup> The practice of promising expresses the constituent power to begin something new, to found a novel order unconditioned by any extant one.

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<sup>14</sup> Arendt, *The Human Condition*, p. 200.

<sup>15</sup> Arendt, *The Human Condition*, p. 198.

<sup>16</sup> Arendt, *The Human Condition*, p. 206.

<sup>17</sup> See Arendt, *On Violence*. In *Crises of the Republic* (San Diego: Harcourt Brace & Company, 1972), pp. 103–184, at p. 143.

<sup>18</sup> Arendt, *On Revolution*, p. 181.

<sup>19</sup> Arendt, 'What is freedom?' In *Between Past and Future. Eight Exercises in Political Thought* (New York: Penguin Books, 1961/1993 (first published by The Viking Press)), pp. 143–171, at p. 164.

<sup>20</sup> Arendt, *The Human Condition*, p. 243.

## Participation as representation

This immediacy of equals to each other, their deliberating and binding themselves to each other through the practice of promising is often taken to be what is most valuable in Arendt's work. For Andreas Kalyvas, for example, '[t]he political and constitutional order is based on the reciprocal recognition of cooperating persons who voluntarily decide to become coassociates in the institution of a new political community',<sup>21</sup> and Arendt leads the way in theorising constitutionalism in these terms. Representation, as it suggests making present something that is absent, seems incompatible with this emphasis on actualised reciprocity.

And yet, representation crops up. It does so in at least two ways. The first relates to the problem of non-contemporaneous participation. If the legitimacy of the public realm and laws are sourced in 'mutual promise', and this promise is to hold through time, then what about those who are not 'the founders' but come after, therefore being bound by promises they did not make? Arendt calls the 'chief perplexity' of modernity the problem whence 'to derive authority for law and power'<sup>22</sup> when the traditional frameworks of theological legitimation are no longer plausible, but in a way that does not destroy freedom in its quintessential modern sense of contingent newness. The constitutional order that is to be traced ultimately back to the practice of promising needs to be 'valid for all, the majorities and the minorities, the present and the future generations'.<sup>23</sup> Those who act now to bring forth an order seek to bring it into being for their posterity,<sup>24</sup> Arendt insists, that is, they include into the polity — the contours of which they determine by giving content to their mutual promise — those who are not present and cannot therefore themselves act. The speaking positions and freedom to begin of those who are not, and cannot possibly be, present are by necessity represented by those who actually speak and act.

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<sup>21</sup> Kalyvas, Andreas *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*. (Cambridge: Cambridge University Press, 2008), p. 238.

<sup>22</sup> Arendt, *On Revolution*, p. 161.

<sup>23</sup> Arendt, *On Revolution*, p. 182.

<sup>24</sup> Arendt, *On Revolution*, p. 229.

Arendt's problem is sometimes understood to be that future generations are no longer as free as the generation of the revolutionaries, because they are forced to simply 'augment' the extant constitutional order. Freedom splits into revolutionary freedom to begin and conservative freedom to augment.<sup>25</sup> The freedom of subsequent generations is curtailed, in so far as their freedom is no longer the radically unconditioned freedom to begin a novel order, but only the freedom to augment and modify what already is. Therefore, revolution as the foundation of a new order seems, Arendt herself says, 'self-defeating'<sup>26</sup>: it locks political freedom within an established order, thus undermining the constituent agency of those who come after.

But the problem is more radical than this 'lessening' of freedom in time, this freedom-degenerating sequence from its unconditioned to conditioned actualisation. For already the very 'first' act of freedom needs to show itself as fitting into an established framework that secures its meaning and authority as a collective act, that is, as an act that can be attributed to a collective – this is what the paradox of constituent power shows. Here we come to the second way in which representation crops up in Arendt's thinking of actualised collective power as the normative source of constitutional order.

Note first what Arendt says about the seemingly self-defeating character of the revolutionary constitution of freedom. She begins by describing the American revolutionaries' 'feeling of outrage about the injustice that only [their] generation should have it in their power to "begin the world over again"'.<sup>27</sup> They understood political freedom exclusively in terms of 'tearing down and building up',<sup>28</sup> and it was this experience that, says Arendt, they wanted their posterity to have as well (lest revolutionary freedom be self-defeating). But Arendt then goes on to suggest that this self-understanding was actually 'a fallacy'<sup>29</sup> as a description of 'the revolutionary

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<sup>25</sup> For a reading of Arendt along these lines see Mark Wenman, *Agonistic Democracy. Constituent Power in the Era of Globalisation* (Cambridge: Cambridge University Press, 2013), p. 59.

<sup>26</sup> Arendt, *On Revolution*, p. 232.

<sup>27</sup> Arendt, *On Revolution*, p. 233.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

spirit': the founders had become blind to 'all notions of a freedom which was not preceded by liberation, which did not derive its pathos from the act of liberation'.<sup>30</sup> Their conceptual error was to identify the act of liberation and the act of foundation. To think that political freedom is equal to the freedom to overthrow a constitution, she says, 'sounds too fantastic'<sup>31</sup> to be attributed to the Founding Fathers: 'it is rather unlikely that Jefferson, of all people, should have granted the coming generations the right to establish non-republican forms of government'.<sup>32</sup> It is a misunderstanding of the 'revolutionary spirit' to think that it is necessarily preceded by an overthrow of an extant order. This is a mistake, because, Arendt thinks, it leads to understanding political freedom as needing no conditions at all, as necessarily acting in a void, emerging *ex nihilo*, like a divine force. To establish a republican form of government is precisely to establish *constitutio libertatis*, a lasting foundation for freedom: a republican constitution enables political freedom to actualise itself in a permanent manner that, if successful, makes revolutionary freedom as liberation inconceivable and obsolete.

There is, however, a sense in which the American Revolution truly was self-defeating in Arendt's view: its failure to constitutionalise the revolutionary spirit expressed in the organised and ordered 'elementary republics' that were the site in which the revolution itself unfolded and the process of founding a new republic was initiated. It is thus not that an unconditioned constituent power founds a constitutional order for freedom that then denies the freedom that brought it about. There is no such sequence from the constituent to the constituted leading to a lessening of freedom. The failure in Arendt's eyes was instead that the form in which political freedom was organised in the course of the Revolution itself did not find proper recognition in the constitutional order of the republic. The revolutionary spirit was most fully actualised in those local 'revolutionary councils' of 'townhalls' that were already elementary republics in which common matters were freely debated. At no point, in her interpretation, did the American Revolution unfold in an unordered way: 'The councils

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<sup>30</sup> Arendt, *On Revolution*, p. 234.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

[...] were always organs of order as much as organs of action'.<sup>33</sup> It was, she claims, 'their aspiration to lay down the new order'<sup>34</sup> for the posterity, for others to pick up as well, that remained without proper acknowledgment in constitutional terms. This was the true tragedy: not maintaining the order of freedom that the Revolution itself exemplified.

Regardless of its historical (in)accuracy or even plausibility as a historical fable,<sup>35</sup> Arendt's ideal of the revolutionary councils suggests a conceptual view precisely opposite to the idea that the public realm arises directly out of plurality of individuals acting and speaking. The example of the revolutionary council rather suggests that acting and speaking always require some form of mediation in order to take place. The performances of promising take place within a framework already set in place. This seems to fit with Arendt's remark that '[t]he mutual contract by which people bind themselves together in order to form a community is based on reciprocity and presupposes equality'.<sup>36</sup> Equality is not, on Arendt's own account, a natural property of human beings but only emerges as they organise themselves politically — and yet all acts of explicit organisation already presuppose it.<sup>37</sup> Here participation is not in opposition to representation, but it is representation: it is about acting as a member of an established (even if informal) order, as empowered by a status provided by that order. One's actions can be attributed to 'the council', to a collective that distributes membership and possibilities of action in specific ways.<sup>38</sup>

In so far as it is Arendt's claim that promising illuminates the setting-of-the-terms-of-collective-life, her argument begs the question. No performance of promising can arise without a prior determination who the promisors are, who counts as relevant to the process of bringing about a novel polity: who belongs to 'the we' that self-founds. Arendt's normative account of the origins of 'a we' presupposes a representation of

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<sup>33</sup> Arendt, *On Revolution*, p. 263.

<sup>34</sup> Arendt, *On Revolution*, p. 263.

<sup>35</sup> See Disch 2011.

<sup>36</sup> Arendt, *On Revolution*, p. 170.

<sup>37</sup> See also Bonnie Honig, 'Declarations of independence. Arendt and Derrida on the problem of founding a republic', *The American Political Science Review* 85:1 (1991), pp. 97–113, at p. 103.

<sup>38</sup> For Arendt, also the French Revolution at one point happened through orderly republican societies, like the Parisian commune. *On Revolution*, p. 242–243.

‘a we’: the constituent power of promisors is necessarily constituted in some way or other. The question ‘who are the ‘cooperating persons’ (Kalyvas) cannot be left wholly indeterminate, for otherwise no deliberation occurs in the first place.<sup>39</sup>

### **Against representative democracy**

I thus agree with Emily Zakin who argues in her contribution to this book that Arendt is, first and foremost, a republican thinker who argues against reducing the constitutional order to some amorphous, immediate ‘will of the people’. I also agree with Lisa Disch who argues that ‘Arendt’s “council” form is misunderstood as an exemplar of direct democracy: it is democratic republicanism – participatory but federated, representative and hierarchical. She presents council governance as a “new type of republican government”, one that poses an “alternative for representative government” in its hegemonic form, which is the party system.’<sup>40</sup> Arendt is not against representation *per se* – indeed her core claims presuppose it – but against a specific form of representation. Arendt’s critique of representative democracy of the nation-state boils down to a critique of immediacy. For Arendt, representative democracy relies on the idea of representation as mirroring a ‘general will’ that exists prior to any institutional mediation and somehow ‘automatic[ally] articulat[es]’<sup>41</sup> the public interest. It attributes to ‘the people’ ‘the unanimity of the citizenry’, takes it as a homogenous unit holding ‘the same’ ‘public opinion’<sup>42</sup> that the spokesperson claims to know through compassion and independently of all public exchange of opinions.<sup>43</sup> Arendt sees representation here as fictionalising and absolutising ‘the people’ into a divine-like entity that serves the strategy of legitimating the centralisation of state power and marginalisation of those public fora in which citizens may gather for the purpose of opinion-formation.<sup>44</sup>

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<sup>39</sup> See also Lindahl, ‘The paradox of constituent power. The ambiguous self-constitution of the European Union’, *Ratio Juris* 20:4 (2007), pp. 485–505. I think Lindahl does not fully appreciate how much Arendt’s republican account presupposes representation, although her own remarks disorient the reader easily on this point.

<sup>40</sup> Disch 2011, 352; referring to Arendt, *On Revolution*, pp. 278, 267, 263.

<sup>41</sup> Arendt, *On Revolution*, p. 78

<sup>42</sup> Arendt, *On Revolution*, p. 225.

<sup>43</sup> Arendt, *On Revolution*, p. 75.

<sup>44</sup> Arendt, *On Revolution*, p. 244.

Arendt, in a gesture of drawing a distinction so characteristic of her writing,<sup>45</sup> insists on the difference between political power and legal authority<sup>46</sup> and is critical of the language of two, constituent and constituted, powers. She holds that law and legal authority (or constituted power) do not emerge from popular sovereignty (constituent power), understood as a unified will of the unorganised multitude, in the way that has been thought in the tradition of democratic thinking dating back to the French Revolution and its theoreticians.<sup>47</sup>

Her republicanism manifests in her critique of such unmediated collective agency and in her insistence on the importance of ‘public things’, those ‘worldly’ structures and institutions, legal and constitutional ones in particular, that sustain a public space capable of hosting a plurality of different-minded and non-contemporary political actors and their political debates. She finds that what is often endangered in the democratic tradition is the ‘public representation’ of differing opinions.<sup>48</sup> Democracy looks, from the republican perspective, as the ‘rule [of] public opinion’ that presumes unanimity, and, for Arendt, ‘no formation of opinion is ever possible where all opinions have become the same’.<sup>49</sup> Presuming a unified popular will means that ‘the public realm has vanished’ and ‘government has degenerated into mere administration’ of the population.<sup>50</sup> The ‘great good fortune’ of the American Revolution, in contrast to the French, was to locate the ‘seat’ of its power in a ‘people’ that was not ‘a fiction and an absolute’ but ‘a working reality, the organised multitude whose power was exerted in accordance with laws and limited by them’.<sup>51</sup> If the constitutional order is thought of as a self-binding of a pre-existing collective will, order can be, Arendt thinks, only of a limited duration, for will is ever-changing.<sup>52</sup> It is ‘the republican form of government’ that ‘promise[s] great durability’.<sup>53</sup>

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<sup>45</sup> See Arendt, ‘Authority in the twentieth century’, *The Review of Politics* 18:4 (1956), pp. 403–417, at p. 413.

<sup>46</sup> For example Arendt 1990, 179; see also Zakin’s essay in this book.

<sup>47</sup> Arendt, *On Revolution*, pp. 76–79, 155–156.

<sup>48</sup> Arendt, *On Revolution*, p. 226.

<sup>49</sup> Arendt, *On Revolution*, p. 225.

<sup>50</sup> Arendt, *On Revolution*, p. 236.

<sup>51</sup> Arendt, *On Revolution*, pp. 165–166.

<sup>52</sup> Arendt, *On Revolution*, p. 163.

<sup>53</sup> Arendt, *On Revolution*, p. 224.

Arendt's ideal is the republican constitution that offers stable (although not immutable, of course; I come back to this) institutions within which the 'public representation', or 'purification', of political opinions is a durable possibility.<sup>54</sup> She argues that democracies have often in the European political history been 'swayed by public opinion and mass sentiment', and thus been unstable, suggesting that their institutionalisation of representation has poorly managed the task of conflict-resolution. A republican constitution, with a federal and hierarchical structure ranging from local 'elementary republics' and state autonomy to the Senate and the Supreme Court, would, she thinks, offer better mechanisms for a genuine public display and resolution of disagreements before they turn antagonistic and end up in violence. It would prevent 'the chaos of unrepresented and unpurified opinions'<sup>55</sup> by offering a better medium for 'collect[ing] the voice of the people'<sup>56</sup> and filtering from amongst a plurality of opinions those that become authoritative for all members.

### **The glimmering paradox of constituent power**

That there are passages in Arendt's writings are in tension with each other, some passages insisting on constituted order emerging directly from politics, others insisting on politics being mediated by order, could be read as Arendt struggling to express the paradox of constituent power. Arendt insists that novelty, or constituent power, and permanence, or constituted power, ought not be seen as simple opposites, or contradicting each other, but proposes to see them as 'two sides of the same event': 'the act of foundation'.<sup>57</sup>

In several passages of her work she also struggles to articulate the paradoxical temporality of founding. Consider first the following passage: 'every action, accomplished by a plurality of men, can be divided into two stages: the beginning which is initiated by a "leader," and the accomplishment, in which many join to see

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<sup>54</sup> Arendt, *On Revolution*, p. 226–228.

<sup>55</sup> Arendt, *On Revolution*, p. 228.

<sup>56</sup> Arendt, *On Revolution*, p. 254.

<sup>57</sup> Arendt, *On Revolution*, p. 223–224.

through what then becomes a common enterprise'.<sup>58</sup> This characterisation of action does not rest on togetherness but shows how togetherness may arise. Arendt also claims that: 'What saves the act of beginning from its own arbitrariness is that *it carries its own principle within itself*, or to be more precise, that beginning and principle, *principium* and principle, are not only related to each other, but are coeval'.<sup>59</sup> If 'principle' can be read here as order, something that aides a plurality to cohere in their actions, Arendt is saying that the beginning and order are contemporaneous. The beginning is a paradoxical event of representing something, an ordered collective, that the initiative, however, only seeks to bring about. In Arendt's terms, the founding of a republic presents itself as an augmentation of what already is to avoid arbitrariness, although before founding there is nothing to augment. The new, in order to appear as authoritative, needs to show itself as fitting with the old, as re-presenting, presenting again and presenting in a new light, a collective already there, all the while it truly seeks to bring forth something that was not there already.

Such a paradoxical beginning offers the occasion for others to act as well: 'The way the beginner starts whatever he intends to do lays down the law of action [its principle, its order] for those who have joined him in order to partake in the enterprise and to bring about its accomplishment'.<sup>60</sup> The beginning is not simply the first step in a temporal sequence, but presupposes, represents, its end, that what it seeks to bring about — and requires the recognising joining-in by others to receive evidence as non-arbitrary and authoritative, to count as an act that can be attributed to the collective and thus expressive of political, collective freedom and 'our' constituent power. Only retroactively may a 'beginner' be seen as such; 'either they were founders and, consequently, would become ancestors, or they had failed'.<sup>61</sup> Perhaps Arendt's revolutionary 'elementary republics' can also be seen as exemplifying this paradoxical temporality: already representing in their functioning the order that they

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<sup>58</sup> Arendt, 'Personal responsibility under dictatorship', in Jerome Kohn (ed.) *Responsibility and Judgment* (New York: Schocken Books, 2003), pp. 17–48, at p. 47. See also *The Human Condition*, pp. 177, 189.

<sup>59</sup> Arendt, *On Revolution*, p. 212.

<sup>60</sup> Arendt, *On Revolution*, p. 212–213.

<sup>61</sup> Arendt, *On Revolution*, p. 203.

sought to bring about. And the tragedy was that their initiative was not picked up and constitutionally recognised and confirmed as authoritative, and in this sense the revolutionaries did not become ‘ancestors’ and constituent power, and the American Constitution adopted in Arendt’s eyes a less republican form of representation.<sup>62</sup>

Paradoxically then, at the moment of founding, constituent power presents itself as a constituted one, and only within a constituted order may that event be confirmed to have been constituent. Zakin also interprets (what I call) the temporal paradox of constituent power as the ‘recursive temporality of the future anterior’ of the American founding event. She notes how, for Arendt, this event was ‘an appeal to future generations to sustain a temporal loop that would confer the status of founders on the framers by holding past and future together’. Arendt sees the legal order as guaranteeing a common political space for a plurality of non-contemporaneous, equal individuals, as forming an ‘in-between’ that is, in Zakin’s words, ‘sturdy enough to sustain conflicting interpretations, heterogenous points of view, dissent, and disagreement’. Acting now on the political possibilities offered by the constitutional order effectively is an act of recognition of oneself as an heir and of the framers of the constitution as one’s authoritative ancestors, thus binding non-contemporaneous individuals into the same political-constitutional tradition and collective.<sup>63</sup>

Thus it is not that political action and legal authority simply have ‘different lineages’<sup>64</sup> as Zakin suggests, following Arendt, but as Zakin’s own analysis of the temporal loop suggest, the lineages paradoxically bend over each other. The ‘transtemporal’ political collective is already presupposed by the acts of setting the legal order that thus claim to simply re-set, augment, what already is, although bringing forth a novel order, and by acting on the possibilities opened up by this initiative/order, political actors recognize it as ‘theirs’ as well and therefore as authoritative, non-arbitrary law.

But can politics be neatly located within the constitutional frame, as both Arendt and Zakin seem to suggest? Is not the retroactive recognition of the framers as ancestors

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<sup>62</sup> See Arendt, *On Revolution*, p. 251.

<sup>63</sup> Zakin, ‘Public space, public time’, p.

<sup>64</sup> Zakin, ‘Public space, public time’, p.

and oneself as an heir a contingent one, implying the possibility of nonrecognition? If the framers require heirs to become founders, it is certainly also possible that not all whom the legal order claims to include as members recognize themselves as such and, by the same token, the framers as authoritative founders. What about those who *disidentify* from the status of 'heirs' of the founders that the constitution seeks to impose on them?

Arendt never goes as far as to explicitly assume the paradox as her position, nor to explore its difficult implications,<sup>65</sup> which would have complicated her republican ideal of representation as the promise of an unambiguously authoritative *constitutio libertatis*. In this sense the paradox of constituent power only 'glimmers' in her work, almost surfaces in its full tension only to find this tension obscured by the insistence on the ideal of containing political freedom and constituent power within republican institutions and their augmentation.

### **Blind spots of republican *constitutio libertatis***

For Arendt, there is a form of mediation, a form of constituted order, that allows for political freedom as a durable possibility. However, all mediation is necessarily an ambiguous achievement: a republican order offers a certain frame for the actualisation of political freedom, while marginalising other possibilities. It empowers and disempowers. As Arendt herself suggests, it excludes political possibilities that are seen by the judging authorities (who hold the task of 'purification' of opinions, as she puts it<sup>66</sup>) as anti-republican. Republican politics is limited politics.

Arendt thinks of the contingency and modification of the frame in terms of amendment and augmentation, and federation. A constitutional order does have a contingency of its own as it may be debated upon and amended in response to new

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<sup>65</sup> See also Menga, 'The seduction of radical democracy', p. 326 note 82.

<sup>66</sup> See Arendt, *On Revolution*, p. 227.

political claims. Its authority rests on people's consent, and dissent, or 'civil disobedience', is a signal of a crisis of authority that calls for a legal and even constitutional response through legal innovations. Arendt herself proposes, notably, two constitutional amendments: legal recognition of civil disobedience as a political right, and of the political and legal equality of the African-American population. The first of these amendments would, she thinks, recognise that the polity and its authority rest on people's consent by allowing for the expression of its lack, thereby helping to prevent political conflicts from escalating into civil strife and revolution.<sup>67</sup> The constitutional recognition of dissent is important precisely because participation is representation: '[w]hoever participates in public life at all [...] is implicated in one way or another in the deeds of the regime as a whole',<sup>68</sup> and so not dissenting counts as consenting. The constitutional right to dissent would include dissensual acts within the scope of those acts that express in their very performance the recognition of the authority of the extant constitutional order, by allowing at least some disagreements concerning this order to fall within its purview, rather than presenting fundamental challenges to it. The second amendment would both function as a corrective to the historical wrong of slavery and respond to contemporary debates concerning the status of African-Americans, by including them as full-fledged members.<sup>69</sup>

Another form of combining newness and durability, constituent power and constitutional stability, is, for Arendt, through a federal unification of separate powers. Federation is the principle of bringing together, within a shared larger framework, loci of political power without effacing their differences and their 'original power to constitute': 'the federal principle', Arendt holds, 'the principle of league and alliance among separate units, arises out of the elementary conditions of action itself'.<sup>70</sup> Indeed, she sees the initiative of elementary councils as pointing to other power centres at different levels (local, state, national, international) joining in to an augmenting alliance that secures both plurality and unity.

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<sup>67</sup> Arendt, *Civil Disobedience*, In *Crises of the Republic* (San Diego: Harcourt Brace & Company, 1972), pp. 49–102, esp. at pp. 82–83. See also Arendt, *On Violence*, p. 140.

<sup>68</sup> Arendt, 'Personal responsibility under dictatorship', p. 33.

<sup>69</sup> Arendt, *Civil Disobedience*, p. 91.

<sup>70</sup> Arendt, *On Revolution*, p. 267.

In Arendt's republican-federal vision, then, limited 'spaces of appearances' or 'oases in a desert'<sup>71</sup> have porous limits that can include always new beginnings, individuals and political collectives, within an ever-growing shared world of freedom. The blind spot of this vision is the ambiguity of such porosity: the renewal is precisely *republic-preserving* renewal, which means that not all kinds of novelty can register. It is too optimistic to hold, as one reader of Arendt's republican constitutionalism does, that '[l]aw, for Arendt, must be understood both as an ordering and stabilising force in politics, and also as a *radically open* and revisable ongoing practice, which is open to intervention and interruption through political contestation'.<sup>72</sup> For clearly republican constitution cannot be 'radically open' to political contestation: it ultimately only hears political claims that authorities can come to see as *constitutional*, as a modification, and re-entrenchment, of the extant order. A *constitutio libertatis* is 'a framework of stability [that] provide[s] the wherein for the flux of change'.<sup>73</sup> Arendt's republican constitution of freedom excludes every political disagreement that is deemed, by the relevant authorities (ultimately the judges of the Supreme Court), to propose non-republican and non-constitutional terms of collective life.

Arendt's blindspot is the ambiguity of the initiative. While others may join in and recognise the initiative as a legitimate beginning of their joint action, it never fully overcomes its arbitrariness. It remains a *claim to* representativeness and authority. Others may also *not recognise* themselves as 'the heirs' of the constitutional tradition into which they see themselves as forcibly included. Arendt does not entertain the possibility that some individuals and groups (in her paradigmatic case of the US, the First Nations and groups promoting black nationalism), who were included in 'a people' by a successful foundation and distribution of membership might come to hold their inclusion as an injustice that cannot be repaired by an inclusion in new terms. Or, more precisely, she does not view such anti-republican claims as genuine political disagreements and is prone to view them as irrational and leading to violence.<sup>74</sup>

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<sup>71</sup> E.g. Arendt, *On Revolution*, p. 275.

<sup>72</sup> James Muldoon, 'Arendt's revolutionary constitutionalism: Between constituent power and constitutional form', *Constellations* 23:4 (2016), pp. 596–607, at p. 596. Emphasis mine.

<sup>73</sup> Arendt, *Civil Disobedience*, p. 79.

<sup>74</sup> Arendt, *On Violence*, p. 122–123.

Furthermore, for Arendt the possibility of political action within a shared world, and the renewal of this world through politics, is what counts as *the most human*. The space of freedom is ‘the space where I appear to others as others appear to me’ and ‘where men exist not merely like other living or inanimate things but make their appearance explicitly’<sup>75</sup>, that is, as ‘men’. Not to appear on such a stage ‘means above all to be deprived of things essential to a truly human life: to be deprived of the reality that comes from being seen and heard by others, to be deprived of an “objective” relationship with them that comes from being related to and separated from them through the intermediary of a common world of things, to be deprived of the possibility of achieving something more permanent than life itself.’<sup>76</sup> In brief, as Rudi Visker puts it, ‘[t]o be deprived of such a space is [...] to lack that without which one cannot be human’.<sup>77</sup>

Such ‘civilisationalism’<sup>78</sup> means then that political change can only be understood as the inclusion into a constituted order of republican freedom: inclusion into such an order counts as inclusion into fully human humanity. It is this identification with the *constitutio libertatis* and the humanness of humanity that shows itself in key moments of Arendt’s narrative, like in the notorious passing over in silence the violence that the British settlers exercised toward the First Nations that Arendt describes as ‘worldless’, as ‘isolated tribes [...] vegetating their lives away when first discovered on new continents by European explorers, tribes that the Europeans then either *drew into the human world* or eradicated without ever being aware that they too were human beings’.<sup>79</sup> The violence the colonialists exercised does not appear as an act of injustice, in so far as Arendt sees the inclusion of the First Nations as a civilisational upgrade, as a movement from a state of not-being-fully-human into a *constitutio libertatis* of full humanity.<sup>80</sup>

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<sup>75</sup> Arendt, *The Human Condition*, p. 198–199.

<sup>76</sup> Arendt, *The Human Condition*, p. 58.

<sup>77</sup> Visker, ‘Beyond representation and participation’, p. 413.

<sup>78</sup> See A. Dirk Moses, ‘*Das römische Gespräch* in a new key: Hannah Arendt, genocide, and the defense of republican civilization’, *The Journal of Modern History* 85 (2013), pp. 867–913.

<sup>79</sup> Arendt, *The Promise of Politics*, p. 176. Emphasis mine.

<sup>80</sup> See Juho Turpeinen’s essay (at p.) in this volume for an account of the complex contemporary situation in which the Native Americans both “assert their claim over the land both as exclusively theirs” – a claim presented against the inclusivism of the colonialist state – “and as inclusively public” – a claim made in defence of the state and its “public things” against neoliberal privatisation.

A porous *constitutio libertatis* is about augmenting the sphere and the scope of what is truly human: it thus is structurally blind to the possibility of inclusion as a political problem, as unjust domination and political alienation.<sup>81</sup> Exclusion from the constituted order does not make sense as a political possibility. All claims to exclusion by individuals and groups who find themselves included without their consent can only be heard as violent, non-political claims. This is indeed how Arendt treats claims of black nationalists in her essays on civil disobedience and violence. She refuses to see that racism in the US is perhaps not merely an internal affair and an injustice that can simply be rectified with full inclusion of the African-American population as equals. She refuses to see that it also has a transnational colonial dimension. Arendt reviles black student movements of the 60s as violent and non-political (because anti-republican), but they saw themselves as taking part in transnational anti-colonial political struggles and thus against inclusion as an unambiguously only normative answer to the history of slavery.<sup>82</sup> Because they saw the extant constitutional order as colonial, and hence did not see themselves as its 'heirs', inclusion (even if in modified terms) was not the answer *but the problem*.

A federation in Arendt's narrative understands difference only as plurality within a common frame and conceives of radical strangeness that lies beyond its limits only as the non-human, non-political and violent. What Arendt does not see as a possible question of justice, is the federation's response to claims that legal inclusion dominates rather than liberates, misrecognises the political identity of a people rather than opens a stable order for its political freedom.

For Arendt, the 'elementary republics' exemplified a constituted order where "the voice of the whole people would be fairly, fully, and peaceably expressed, discussed, and decided by the common reason" of all citizens',<sup>83</sup> and a federation expresses this

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<sup>81</sup> My account is indebted to Hans Lindahl, 'Recognition as domination. Constitutionalism, reciprocity and the problem of singularity', in Neil Walker and Jo Shaw (eds) *Europe's Constitutional Mosaic* (Oxford: Hart Publishing, 2011), pp. 205–229.

<sup>82</sup> See Patricia Owens, 'Racism in the theory canon: Hannah Arendt and "the one great crime in which America was never involved"', *Millenium: Journal of International Studies* 45:3 (2017), pp. 403–424.

<sup>83</sup> Arendt, *On Revolution*, p. 250, Arendt cites Jefferson.

same ‘revolutionary spirit’ on a larger scale.<sup>84</sup> This ‘republican optimism’<sup>85</sup> prevents her from seeing that no amount of participation and augmentation will authentically express ‘the voice of the whole people’, since ‘the people’ as a unity is not reducible to any number, big or small, of gathering individuals, nor to any augmentation of that number. This is not to deny the normative importance of securing equal access to participatory institutions – Arendt’s famous ‘right to have rights’ – but only to remind that ‘the whole people’ is not a sum of its members but a represented unity that does not correspond to any actual reality and thus is irreducibly conflictual. Political claims may also be made for the right *not* to have the rights<sup>86</sup> that a legal order endows, for the right not to be included within an order that is ‘not ours’ and that ‘we’ see as making ‘our’ political freedom impossible. Arendt does not see that sometimes, at least, politics is not, in Rancière’s words, ‘based on right but wrong’.<sup>87</sup>

The paradox of constituent power challenges the idea that political freedom and power can find a locus in the ‘common world’ *in the singular*. It manifests as the difficulty of voicing political claims in institutional settings that do offer the framework of audibility and visibility for claim-making, but simultaneously curtail what novelty can be heard. Politics cannot, therefore, be thought as unambiguously actualising itself within a *constitutio libertatis*. The radical, incommensurable and ‘non-federable’ plurality of possible political collectives offers the point of departure for constitutional thinking of plurality that goes beyond civilisational hierarchies.

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<sup>84</sup> See Arendt, *On Revolution*, p. 266.

<sup>85</sup> Compare Emiliios Christodoulidis, ‘Constitutional irresolution. Law and the framing of civil society’, *European Law Journal* 9:4 (2003), pp. 401–432, at p. 403.

<sup>86</sup> I owe this expression to Nanda Oudejans, ‘The right not to have rights. A new perspective on irregular immigration’, *Political Theory* 47:4 (2019), pp. 447–474.

<sup>87</sup> Jacques Rancière, *Disagreement*, translated by Julie Rose (Minneapolis: University of Minnesota Press, 1999) at p. 78.