

The London School of Economics and Political Science

**ARENDTIAN CONSTITUTIONAL THEORY:
AN EXAMINATION OF ACTIVE CITIZENSHIP IN
DEMOCRATIC CONSTITUTIONAL ORDERS**

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DECLARATION

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ABSTRACT

In this thesis, I draw on Hannah Arendt's extensive body of work, encompassing her constitutional and non-constitutional writings, to present an Arendtian constitutional theory. I suggest that active citizenship is the normative and critical focal point of an Arendtian understanding of democratic constitutionalism as a system of governance. I examine and develop citizenship as a freedom that is experienced in collective action and in taking responsibility for collective action. Sourcing insights from Arendt's discussion of the Greek and Roman conceptions of law, I argue that for Arendtian constitutional theory, democratic constitutionalism requires the establishment of structures for citizens to experience political freedom and to take responsibility for the preservation of the constitutional order.

I conduct an examination of Arendt's discourse on freedom, power, and authority to reveal how, in a constitutional democracy, active citizenship is intrinsically connected with the maintenance of a constitutional order. Citizens act and judge through participation in ordinary politics to generate and preserve constitutional principles. I conclude the thesis by emphasising the significance of civil disobedience in a democratic constitutional setting. In my reading, Arendt views civil disobedience as the citizens' attempt at creating a temporary, extra-institutional political space to preserve constitutional principles in the face of a loss of power and authority of the constitutional institutions. I propose that an Arendtian emphasis on theorising civil disobedience as an intrinsic part of the ordinary politics of a democratic constitutional order implies, on the part of the institutions, a duty to establish structures and platforms for citizens' right to action and dissent, and on the part of the citizens, a duty to preserve and maintain the constitutional order. Such a conceptualisation, I argue, contributes a unique and nuanced understanding of how citizens actively contribute to and interact with the foundations of democratic constitutional governance.

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INTRODUCTION

In recent decades, Hannah Arendt has entered the public imagination as a controversial, yet astute political thinker who coined the term ‘the banality of evil’ and was concerned primarily with totalitarianism as a form of government.¹ Scholarly discourse, however, has highlighted her work on political action, portraying her as a theorist of action and, more recently, of freedom.² As a philosopher writing during the political upheavals of the mid-twentieth century, she saw the ‘success of totalitarianism’ to be coterminous with ‘the much more radical liquidation of freedom’ in modernity.³ This gradual loss of freedom as an experience occupies her as she reflects on revolutions and the nation-state, on political action and judgment, and most crucially, in my opinion, on citizenship and constitutions.

To Arendt, the experience of freedom is fundamentally political, and forms of government such as totalitarianism that are based on the people’s turn away from politics contribute to the destruction of freedom in modernity.⁴ While her examination of totalitarianism deals with political freedom only cursorily, her later works focus more prominently on what it means for an individual to experience freedom. We find that *The Human Condition* captures the theoretical underpinnings of her endeavour to position politics as a meaningful experience of freedom and *On Revolution*, often touted as her ‘most constitutionalist work,’ contains her reflections on a form of government that exemplifies the ‘*constitutio libertatis*’, the ‘constitution of freedom’.⁵

In this thesis, I draw on Hannah Arendt’s extensive body of work, encompassing her constitutional and non-constitutional writings, to present an Arendtian theory of democratic constitutionalism. Building on the link she establishes between freedom and politics, I present active citizenship as the normative and critical focal point of the

¹ Olivia Goldhill, ‘Hannah Arendt Was the Philosopher to Reference in 2017’ (*Quartz*, 23 December 2017) <<https://qz.com/quartz/1162378/hannah-arendt-the-thinker-on-totalitarianism-is-popular-in-the-trump-era/>>; Richard J Bernstein, ‘The Illuminations of Hannah Arendt’ (*The New York Times*, 20 June 2018) <<https://www.nytimes.com/2018/06/20/opinion/why-read-hannah-arendt-now.html>>; Sean Illing, ‘The Philosopher Who Warned Us about Loneliness and Totalitarianism’ (*Vox*, 8 May 2022) <<https://www.vox.com/vox-conversations-podcast/23048597/vox-conversations-hannah-arendt-totalitarianism-the-philosophers>>. See also, Richard J Bernstein, *Why Read Hannah Arendt Now* (Polity 2018).

² Margaret Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (Cambridge University Press 1995); Craig J Calhoun, John McGowan and Martin Jay (eds), *Hannah Arendt and the Meaning of Politics* (University of Minnesota Press 1997); Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Rowman & Littlefield 2003); Bhikhu C Parekh, *Hannah Arendt and the Search for a New Political Philosophy* (Palgrave Macmillan 2015); Kei Hiruta (ed), *Arendt on Freedom, Liberation, and Revolution* (Palgrave Macmillan 2019). Although the discourse is right in identifying both freedom and politics as central concepts in Arendt’s work, in my opinion, Arendt’s oeuvre resists such orthodox categorisations. It would be more correct to identify key themes animating her discourse but even then, depending on the issue propelling her thinking, the cadence changes.

³ Hannah Arendt, ‘A Reply to Eric Voegelin’ in Jerome Kohn (ed), *Essays in Understanding, 1930-1954: Formation, Exile, and Totalitarianism* (Schocken Books 2005) 408.

⁴ *ibid.*

⁵ Jeremy Waldron, ‘Arendt’s Constitutional Politics’ in Dana Villa (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press 2006) 203.

Arendtian conception of democratic constitutionalism. I show how, in the Arendtian understanding, active citizenship refers to an experience of freedom through politics. To use Arendt's metaphors, individuals enter the political realm and experience citizenship when they act with and alongside their peers. I take forward her emphasis on the centrality of politics by presenting the citizens' political acts and judgments as the proper source of power and authority in a democratic constitutional order. Such an approach clarifies what Arendt means by a 'constitution of freedom': democratic constitutionalism refers to a form of government that ensures the citizens' experience of political freedom and is, at the same time, dependent upon the citizens' active support and participation for its maintenance and preservation. In other words, democratic constitutionalism both constitutes active citizenship and is constituted by an active citizenry.

In writing *Origins of Totalitarianism*, Arendt claimed her aim was not really to list the 'origins' of totalitarianism 'as its title unfortunately claims.'⁶ It was to give 'a historical account of the elements which crystallised into totalitarianism' so that we may be better equipped to deal with the underlying problems that the rise of totalitarianism was symptomatic of.⁷ Serena Parekh points out that for Arendt, the key problematic condition engendered by modernity was the loss of a common world.⁸ The loss of traditional and transcendent ideas about faith, authority and morality as evidenced by the rise of totalitarian ideology meant that the people could no longer refer to and rely upon common experiences and realities; it meant that 'we can no longer fall back upon authentic and undisputable experiences common to all.'⁹ Arendt's constitutionalist writings reflect an attempt to find a source of law that is not transcendental, i.e., it does not lie beyond the political realm and is, thus, capable of being held in common by the active citizenry – it is law 'specifically designed to operate in the between.'¹⁰ This common-ness of law in Arendt's writings corresponds with democratic constitutionalism's promise about the experience of freedom: it not only represents the idea that citizens create law and its principles by acting together but also reflects the common responsibility they possess for its preservation and maintenance.

For Arendt, while modernity presents us with the opportunity to bring into existence such a conception of law for a freedom-establishing democratic constitutional order, an overreliance on electoral democracy chips away at the experience of freedom that is critical for active citizenship. Her critique of modernity comprises an attack on electoral democracy on two main grounds: the overwhelming primacy of elections combined with

⁶ Arendt, 'A Reply to Eric Voegelin' (n 3) 403.

⁷ *ibid.*

⁸ Parekh identifies three interconnected problematic conditions of modernity in Arendt's thought: alienation, superfluosity and loneliness. Serena Parekh, *Hannah Arendt and the Challenge of Modernity: A Phenomenology of Human Rights* (Routledge 2009) 1–4.

⁹ Hannah Arendt, 'What Is Authority?', *Between Past and Future* (Penguin books 2006) 91.

¹⁰ Hannah Arendt, 'Introduction into Politics' in Jerome Kohn (ed), *The Promise of Politics* (Schocken books 2005) 180.

the inadequate infrastructure for public meetings results in a lack of opportunities for the citizens, outside of the ballot box, to come together to deliberate, judge, and act; and second, in light of the lack of avenues for political participation in law-making, the interest-group style categorisation of the voter as the sole source of democratic legitimacy of the political parties abases the existing or potential plurality of the citizens.¹¹

Concomitant to her critique of inadequate participation is her criticism of understanding the constitution as a limit on power. Arendt claims that this limited view of constitutions arises out of a philosophy that views freedom as antithetical to power and, consequently, politics. Instead, she argues, the constitution represents the act of increasing the power of the political community.¹² She argues that since a democratic constitution represents the institutionalisation of freedom through politics, it also represents the institutionalisation of a schema to continuously generate power from the citizens' political acts and judgments. Although not as egregious as a totalitarian or dictatorial government, for Arendt, electoral democracy is a deficient form of government because it reduces the opportunities for the citizens to generate power by acting collectively on issues of common concern.

Arendt is aware of the demanding nature of the conception of political freedom that she wants to preserve. She imagines that the establishment of a constitution for politically free citizens would confront the founding generation with the 'riddle of foundation'.¹³ The riddle problematizes the possibility of establishing a political-legal order that preserves the freedom of self-legislation for future generations without being self-contradictory to its *raison d'être*.¹⁴ She asks, 'in the case of foundation – the supreme act in which the "We" is constituted as an identifiable entity – the inspiring principle of action is love of freedom,' and yet, this very act of foundation – the creation of the new order – 'in one way or another constrain(s) the free will of their citizens.'¹⁵ In simpler terms, she asks, what authorises – and continues to authorise – the democratic constitutional order?

The answer for Arendtian constitutional theory lies in conceptualising public law as a system of obligations arising out of the relations among citizens. In the case of the *constitutio libertatis*, this implies a political-legal order where authority, like the binding power of a promise made between two parties, is generated out of the voluntary obedience of the

¹¹ Hannah Arendt, *On Revolution* (Faber & Faber 2016) 234–251. On the implications of Arendt's work for participatory democracy, see Shmuel Lederman, *Hannah Arendt and Participatory Democracy* (Springer Berlin Heidelberg 2019). On Arendt's critique of modernity see, Maurizio Passerin d'Entrèves, 'Modernity and the Human Condition: Hannah Arendt's Conception of Modernity' (1991) 30 *Thesis Eleven* 75; Benhabib, *The Reluctant Modernism of Hannah Arendt* (n 2); Parekh (n 8); Mark Antaki, 'The Critical Modernism of Hannah Arendt' (2006) 8 *Theoretical Inquiries in Law*.

¹² Arendt, *On Revolution* (n 11) 152, 164–178.

¹³ Hannah Arendt, *The Life of the Mind* (Harcourt 1981) 214. See also, Arendt, *On Revolution* (n 11) 182–184.

¹⁴ Arendt's riddle of foundation is similar to what Loughlin and Walker have called is the 'paradox of constitutionalism'. Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism* (Oxford University Press 2008). See also, Adam Lindsay, 'Hannah Arendt, the Problem of the Absolute and the Paradox of Constitutionalism, or: "How to Restart Time within an Inexorable Time Continuum"' (2017) 43 *Philosophy & Social Criticism* 1022.

¹⁵ Arendt, *The Life of the Mind* (n 13) 203.

citizens. The resultant theory contains relevant insights not just for the role of citizens' participation in politics as a source of power and authority of the constitutional order but also points at a distinctly Arendtian justification of civil disobedience in a democratic constitutional order. It begins from the acknowledgement that individuals experience active citizenship at a multiplicity of sites. They may be institutional – through direct or indirect participation in the legislature or as participants in the judicial process – or extra-institutional – in social and political movements. Arendtian constitutional theory treats civil disobedience as an extension of active citizenship in the extra-institutional setting. For Arendt, democratic constitutionalism is characterised by citizen support and participation in both, institutional and extra-institutional settings. And civil disobedience reflects an attempt by an active citizenry to preserve the authority of the constitutional order by disturbing the stability of institutions whose actions are inimical to the principles of the constitutional order.

I will now summarise the three themes that underlie my account of an Arendtian constitutional theory before I discuss my methodology for reading and interpreting Arendt's writings and outline the progression of my argument through the five chapters of the thesis.

Themes

In building a framework of conceptions that capture the nature of active citizenship in democratic constitutional orders, three recurring themes animate the Arendtian discourse: the existence of *human plurality* as a reality that is worth preserving, the political capacity of humans to make and keep *promises*, and *amor mundi*, the citizens' love for their shared constitutional order.

Human Plurality

The recognition and emphasis on human plurality is one of the most prominent themes in Arendt's work.¹⁶ She understands plurality as the condition of human existence arising from the fundamental fact that humans are unique and distinct individuals.¹⁷ In Arendt's framing, plurality encompasses both a descriptive and normative dimension: it represents a fact that cannot be avoided and a value that enriches our political life.¹⁸

¹⁶ Canovan (n 2) 281.

¹⁷ Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 2018) 175.

¹⁸ On the value of plurality in Arendt's thought, see Margaret Canovan, 'Arendt, Rousseau, and Human Plurality in Politics' (1983) 45 *The Journal of Politics* 286; Alice MacLachlan, 'An Ethic of Plurality: Reconciling Politics and Morality in Hannah Arendt' in Ingvild Torsen and Alice MacLachlan (eds), *History and Judgment: IWM JVF Conference Vol. 21* (2006); Sophie Loidolt, *Phenomenology of Plurality: Hannah Arendt on Political Intersubjectivity* (1st edn, Routledge 2017); Adriana Cavarero, 'Human Condition of Plurality': (2018) 2 *Arendt Studies* 37.

The undeniability of the distinctness of individuals, however, does not imply that plurality is a quantitative notion of numbers; on the contrary, it is a qualitative concept that captures the individuals' diversity and unique political personalities. Arendt points out that human beings are not solitary entities but live in a world of others, forming a web of relationships and interactions.¹⁹ Taking her cues from Greek and Roman antiquity, Arendt describes the political realm as the arena where citizens disclose themselves (and their political wishes) through words and deeds and act towards the political goals and ends that gain majority support from the spectating citizens. The fact of plurality makes these relationships and interactions meaningful because in acting together, individuals disclose their unique selves to their peers and get acknowledged as beings equally worthy of respect. Human plurality makes action possible and meaningful because each new entrant to the political realm brings with them the potential of a new beginning.²⁰ To put it in simpler words, plurality consists of being equal and at the same time different from our peers, and valuing the fact of human plurality, to Arendt, implies valuing the mutual differences while at the same time recognising the equal worthiness of those who do not share our political identities and positions.

In *The Human Condition* and *The Origins of Totalitarianism*, Arendt examines the role of plurality in the political realm. She points to the dangers of totalitarian ideologies that seek to eradicate plurality by eliminating diversity and dissent, resulting in the loss of political freedom and the potential for tyranny.²¹ She contends that the avoidance or suppression of plurality would require significant coercion and violence. Any attempt to impose a homogenous and uniform society would undermine the very essence of human existence.

According to Arendt, plurality is essential for the functioning of politics, which seeks to protect and preserve the rights and freedoms of individuals within a community. Politics in a democratic constitutional order, based on the principles of equality and plurality, establishes a framework that allows different perspectives and interests to coexist and interact without domination.²² Plurality enriches our collective existence by being the condition for dialogue, debate, and the exchange of ideas – through the differences arise the commonalities on which political promises can be made. Further, it is only through encountering different perspectives and engaging in public discourse that individuals develop their political judgment and share the responsibilities for collective action.

¹⁹ Arendt, *The Human Condition* (n 17) 183–84.

²⁰ *ibid* 9. On the idea that natality and plurality are the two conditions of Arendtian action, see Cavarero (n 18).

²¹ Hannah Arendt, *The Origins of Totalitarianism* (Penguin Classics 2017) 604–629. See also, generally, Jerome Kohn, 'Arendt's Concept and Description of Totalitarianism' (2002) 69 *Social Research* 621.

²² Christian Volk, *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* (Hart Publishing 2017) 186–94.

The second theme I identify as relevant to Arendtian constitutional theory refers to the Arendtian emphasis on promising as a political activity. Arendt's discourse on promising begins from understanding freedom as the capacity to initiate political actions along with one's peers.²³ Coming to a consensus on a political aim involves action as well as judgment, the human faculties she identifies as faculties par excellence in the *vita activa* and *vita contemplativa*, respectively. However, action is inherently unpredictable, and the durability of our acts and judgments comes from the political faculty of making and keeping promises. Thus, while freedom and plurality represent one side of Arendt's theory of action, promising represents the other side of the conception.

Arendt views *constitutio libertatis* as a constitution that aims to make the experience of freedom stable and durable through the establishment of an order that creates substantive opportunities for the experience of politics. Her emphasis on the capacity of promise-making and promise-keeping as a crucial political activity corresponds with the need to establish lasting institutions. In other words, promising is the political capacity of plural individuals to create durable political structures.²⁴

One of the key reasons why Arendt highlights the significance of promises is that they reflect our capacity for political action and agency. By making promises, individuals voluntarily bind themselves to specific courses of action, creating obligations and commitments. Arendt argues that the ability to make and fulfil promises distinguishes humans from other creatures. Promises are a uniquely human phenomenon that enables individuals to engage in meaningful interactions, build relationships, and establish a sense of collective responsibility.²⁵ She recognises the importance of promises in human relationships and their role in fostering trust, cooperation, and the establishment of a shared world. Arendt's emphasis on promising stems from her understanding that promises serve as the foundation for political freedom and authority.

She identifies two crucial insights regarding promise-making and its political implications. The first descriptive insight is that human beings are always interdependent and reliant upon others for the realisation and protection of their experience of freedom as active citizens.²⁶ Her second prescriptive insight is that this interdependence and reliance on promises has the potential to allow individuals to escape the coercive power of higher authorities or entities that do not respond to their consent.²⁷ In traditional forms of political

²³ Arendt, *The Human Condition* (n 17) 243–45.

²⁴ *ibid* 243; Arendt, *On Revolution* (n 11) 172–76.

²⁵ Hannah Arendt, *The Promise of Politics* (Jerome Kohn ed, Schocken books 2005); Jay Bernstein, 'Promising and Civil Disobedience: Arendt's Political Modernism' in Roger Berkowitz, Jeffrey Katz and Thomas Keenan (eds), *Thinking in Dark Times: Hannah Arendt on Ethics and Politics* (Fordham University Press 2010).

²⁶ Hannah Arendt, *The Freedom To Be Free* (Penguin Books 2020) 34.

²⁷ Arguably, Arendt's presentation of the potential of promise-making for the establishment of constitutional orders is contingent on a specific historical and socio-political context such as the Mayflower compact.

authority, individuals are subjected to the will of a higher entity that exercises power over them without their active participation or consent. However, through promise-making, individuals establish a realm of political action where their consent and cooperation become essential.

Promises provide a means for individuals to create a space of freedom within the political realm. By making and keeping promises, individuals can negotiate and shape the terms of their relationships and interactions. The act of promising allows for the establishment of a political order based on voluntary associations and agreements, where individuals collectively determine the rules and norms that govern their shared world. In this sense, Arendt sees promise-making as a vital political activity that enables individuals to exercise their agency and escape the coercive forces of authority. Promises, rooted in mutual consent and voluntary agreements, provide a framework for the expression of freedom and the preservation of rights within a political community. Promises, as expressions of trust and commitment, create the foundation for a shared world where individuals can enjoy their rights and exercise their agency in cooperation with others.

For the love of the world

A third theme informs Arendt's thinking about political action and institutional structures: *amor mundi*, or the love for the world. It is not only theorised in Arendt's work but also under studied in Arendtian discourse.²⁸ And yet, it appears as the driving ethical motivation, especially in her work concerning political responsibility and judgment.²⁹

Amor mundi, a Latin phrase meaning 'love of the world,' holds significant importance in Arendt's work. Inspired partly by her disconcert with the inadequacy of Augustine's conceptions of love, this more *political* kind of love originates from her examination of the ancient Greek concept of 'public happiness' or 'common world.'³⁰ It refers to the idea that human beings find fulfilment and meaning in their engagement with the world and their interactions with others and represents a stance of active involvement

Arendt herself acknowledges as much when she notes that the American foundation was based on both, the 'original sin' of racism and the relative socio-economic parity amongst the settlers in the New World that enabled the individuals to come together to join in a compact. Hannah Arendt, 'Civil Disobedience', *Crises of the republic* (Harcourt Brace Jovanovich 1972); Arendt, *On Revolution* (n 11). In this thesis, I push Arendt's insight on the value of promising as the basis of conceptualising a democratic constitutional order and show how it can also be used to understand re-foundings of constitutional orders to include the previously excluded and marginalised members of the political community.

²⁸ Some notable exceptions are: Joanna Vecchiarelli Scott and Judith Chelius Stark, 'Rediscovering Hannah Arendt' in Hannah Arendt, *Love and Saint Augustine* (Univ of Chicago Pr 1996); Shin Chiba, 'Hannah Arendt on Love and the Political: Love, Friendship, and Citizenship' (1995) 57 *The Review of Politics* 505; SJ James W Bernauer (ed), *Amor Mundi* (Springer Netherlands 1987) <<http://link.springer.com/10.1007/978-94-009-3565-5>> accessed 14 November 2023; Lucien Ferguson, 'From Love to Care: Arendt's *Amor Mundi* in the Ethical Turn' (2022) 50 *Political Theory* 939.

²⁹ Vecchiarelli Scott and Chelius Stark (n 28) 118.

³⁰ *ibid* 154–160.

and care for the political world one shares as a citizen. Throughout her work, *amor mundi* appears as a recurring theme in Arendt's exploration of political action, public space, and the pursuit of freedom. She emphasises the importance of individuals engaging in the world, actively participating in public affairs and the maintenance of the constitutional order. She argues that genuine political action requires a deep sense of responsibility and an active commitment to the well-being and flourishing of the world and its inhabitants.³¹

In terms of Arendtian constitutional theory specifically, the concept carries significant implications. Arendt theorises that a vibrant and democratic political community relies on individuals willing to engage in the public sphere, participate in public decision-making, and uphold the principles of freedom and pluralism. Her conceptualisation of 'love for the world', a political commitment towards the shared constitutional order, calls for a political culture that nurtures active citizenship, where individuals embrace their roles as co-creators of the common world.³² The conception of *amor mundi* is intrinsically connected with the theme of human plurality in the sense that it highlights the significance of enabling everyone to contribute to the establishment of governing norms. However, it does not present a specific blueprint for achieving equality or participation and, instead, provides an ethical basis for actions and practices that can foster progress in both areas.

In a freedom-guaranteeing constitution, both power and authority are inextricably connected with the political acts and judgments of the citizens. This is because it is only through actively participating in their governance as sources of power and generators of authority, Arendt suggests, that citizens experience freedom as equal yet distinct political persons. At the same time, the stability and durability of such an arrangement is guaranteed by the strength of promises. Arendtian constitutional theory highlights the ability of citizens to preserve and maintain a shared constitutional order, an ability manifested in the relationship between the citizens' obedience and the authority of the constitutional order.

Methodology

The three themes and the Arendtian conceptions they correspond with, such as freedom as politics and law as promises, are partially descriptive and partially prescriptive. This is because for many of her works, Arendt's aim was not to elucidate what it means to do politics but to describe the conditions necessary for the experience of politics and to understand how modern developments led to the turn away from politics.³³

³¹ Ferguson (n 28). See also, Bernstein, 'Promising and Civil Disobedience: Arendt's Political Modernism' (n 25).

³² Vecchiarelli Scott and Chelius Stark (n 28) 151.

³³ For instance, because her work in *The Origins of Totalitarianism* led her to think about the origins of totalitarianism in Western political philosophy, she planned to write *Totalitarian Elements in Marxism* as the first part of a two-part project, with a second book, titled *Introduction into Politics*, in tow. The project, ultimately

Arendt never explicitly defines or justifies her methodology. However, a brief discussion on critical thinking in her *Lectures on Kant's Political Philosophy* gives us an insight into the way she approaches her work.³⁴ Discussing the nature of critical thinking and its role in transcending dogmatism and scepticism, she argues that critical thinking is not a middle ground between these two extremes but a path to move beyond them. She explains that people often begin as dogmatists, relying on philosophical doctrines or religious beliefs for answers to the big questions. When confronted with the diversity of dogmas, scepticism can emerge, leading one to doubt the existence of truth altogether. However, this scepticism is met with the dogmatist's counterargument that even claiming there is no truth implies a belief in a truth, thus, causes an impasse.

In contrast, she claims, critical thinking takes a different approach. It recognises the human limitations in comprehending any ultimate truth(s) due to the finite nature of our powers of perception and comprehension. Rather than embracing or rejecting dogma, it suggests a more modest stance: the acknowledgment of human faculties and a commitment to examining what can be known and understood through reason and inquiry: 'Let us analyse what we can know and what we cannot.'³⁵ In other words, a critical approach to thinking about the political and legal orders would involve the exploration and understanding of the human condition, with the acknowledgment of the inherent limitations in such a search for knowledge and wisdom. It translates to an emphasis on the centrality of human experiences in theorising especially about politics and law. It also translates to the acknowledgment that since we cannot know human nature and the diversity that is inherent in the way humans behave, we cannot build a legal or political theory with any claims about human nature as our foundation.

A comprehensive reading of Arendt's writings makes clear that in conceptualising her normative frameworks, Arendt makes special effort to find her bearings from the world around her. Responding to Eric Voegelin's objection to Arendt's claim that the appearance of forms of government such as totalitarianism fundamentally change the human condition, she insisted not only that humans do not have a core 'essence' but also that the 'nature' of humans responds to the conditions in which they live their lives and the way in which they appear to each other.³⁶ For Arendt, historical thinking implies an exercise in

never written, was initially envisaged as a study of the totalitarian elements in Western political thought, and influenced the direction she took in *The Human Condition*. Subsequently, in the second book, in preparation for which she prepared and delivered a series of lectures, essays and a tremendous amount of diary entries, Arendt planned to 'introduce' politics. This was, however, an *into* politics, and not an introduction *of* politics and has been collated and edited as *The Promise of Politics* by Jerome Kohn. Jerome Kohn, 'Introduction by Jerome Kohn' in Jerome Kohn (ed), *The Promise of Politics* (Schoken books 2005) vii.

³⁴ Hannah Arendt, *Lectures on Kant's Political Philosophy* (Ronald Beiner ed, University of Chicago Press 1992) 33.

³⁵ *ibid.*

³⁶ Arendt, 'A Reply to Eric Voegelin' (n 3).

retrieving and being confronted by political experiences; she wrote, ‘if we lose the ground of experience, then we get into all kinds of theories.’³⁷

Philosophy which stresses the centrality of experiences and consistently attempts to acknowledge the human condition is better known as phenomenology. Recently, Arendt has been increasingly associated with a particular style of phenomenological approach.³⁸ Sophie Loidolt, for instance, proposes to understand Arendt as a political phenomenologist where Arendt’s concern for plurality functions as a normative foundation for her account of political intersubjectivity. In her account, Arendt’s treatment of concepts such as plurality, appearance, experience, and world, elucidate her methodological approach to actualising a plural sense of the ‘we’.³⁹ She proposes that an Arendtian approach to conducting a phenomenological analysis of law would necessarily proceed by integrating law with its political origins. To achieve this, she delves into Arendt’s theory of action and its interconnectedness with law. She examines how, when viewed through the lens of phenomenology of action and plurality, law takes on a multifaceted and ambivalent nature: law stabilises, enables, and emerges from action.⁴⁰

While Loidolt’s centring of plurality as the normative foundation of Arendt’s thought captures the centrality of the concept for Arendt’s worldview, it does so at the cost of importing a stronger normative thesis in Arendt’s work than is warranted. Arendt’s method of thinking and writing about both law and politics is to treat them as phenomena. To Arendt, a phenomenon cannot be defined comprehensively; it can only be understood. Thus, comprehending the phenomenon of the rise of totalitarian ideology did not imply deducing the unprecedented nature of totalitarianism from precedents, or explaining away the shock of its experience and the impact of its reality in terms of already existing analogies and classifications.⁴¹ Instead, it required, as she set out to do in *The Origins of Totalitarianism*, an examination of the conditions which led the world to that state.

What does this imply for a thesis seeking to capture and build upon Arendt’s larger discourses on law and politics? It implies, I propose, to read Arendt’s discussion of law and politics as phenomena whose definition she deliberately did not attempt to give. In my reading, Arendt does not speak about the meaning of law or politics and focuses instead on the conditions that *lead into* law and politics. Consequently, in this thesis, I make the *experience* of active citizenship as the starting point of the thesis as it allows me to emphasise the conditions and most importantly, the infrastructures that are required for citizens to

³⁷ Melvyn A Hill (ed), *Hannah Arendt, the Recovery of the Public World* (St Martin’s Press 1979) 308.

³⁸ Jonas Holst, ‘Retrieving Experience: On the Phenomenology of Experience in Hegel and Kierkegaard, Arendt and Gadamer’ (2019) 2 *Open Philosophy* 480. On Arendt’s brand of phenomenology, see Lewis P Hinchman and Sandra K Hinchman, ‘In Heidegger’s Shadow: Hannah Arendt’s Phenomenological Humanism’ (1984) 46 *The Review of Politics* 183; Margot Wielgus and Polish Academy of Sciences, ‘Arendt’s Phenomenology: Social-Political Thought and Ethical Life?’ (2015) 25 *Dialogue and Universalism* 115.

³⁹ Loidolt (n 18).

⁴⁰ Sophie Loidolt, ‘Order, Experience, and Critique: The Phenomenological Method in Political and Legal Theory’ (2021) 54 *Continental Philosophy Review* 153.

⁴¹ Arendt, *The Origins of Totalitarianism* (n 21) xiv.

experience freedom in a constitutional democratic order.⁴² Not only does this approach allow readers of Arendt to place her insistence on plurality as a condition for action, it also provides a framework for configuring Arendt's writings on political action and judgment as equally important components of the experience of active citizenship. Further, as conceptual categories, law and politics coincide with the concept of the experience of active citizenship. To put it simply, the conditions necessary for the experience of citizenship cannot be neatly separated into the legal and the political. This blurriness allows the thesis to go a step beyond claiming that law is inherently political. One of the insights from Arendtian constitutional theory relates to the intricate fusion between the legal and the political. In such a formulation, not only is law political, but politics itself is constituted by law and, most notably, is inherently about law.

The focus on the experience of citizenship, however, does not imply that my understanding of Arendtian constitutional theory is completely devoid of any normative foundation. This thesis shares and often relies on the normative grounds emerging from Arendt's conception of political action, lending a normative colour to the discussions on concepts such as freedom, power, and authority. The aim of this thesis, however, is not to derive a comprehensive normative theory combining her prescriptive and descriptive analyses, but to develop key themes and concepts that contain relevant insights for constitutional theory about the experience of citizenship.

At one level, what I propose to do in this thesis is merely to shift the emphasis on citizenship, moving the experience of citizenship from the periphery to the centre in constitutional theory. I propose that Arendtian constitutional theory views law as constituting active citizenship and, in its democratic-normative form, is constituted by it; it emerges from the acts and judgments of citizens, all the while enabling the experience of active citizenship. In proposing such a formulation, I have a two-fold aim. The direct aim is to understand and present the implications of defining democratic constitutionalism in terms of the political acts and judgments of citizens. The grander ambition, however, lies in proposing that a certain, Arendtian conception of political freedom is the most appropriate guiding value of democratic constitutionalism.

My task is made complicated by Arendt's tendency to not speak to a definite audience: she is sometimes a journalist describing with great dexterity and nuance the happenings of her time, sometimes a philosopher examining and challenging the metaphysical frameworks underpinning modern political thought, and sometimes a political theorist interested in understanding and analysing the political and juridical structures of modern governments. The frequent change in cadence requires some degree of selective handling of her oeuvre, necessitating close reading of some essays and book-sections more than others. In this thesis, I have paid close attention to her arguments and

⁴² On the similarity (in terms of publics) between laws and infrastructures, see Benedict Kingsbury and Nahuel Maisley, 'Infrastructures and Laws: Publics and Publicness' (2021) 17 *Annual Review of Law and Social Science* 353.

concepts when they relate directly to law and legal institutions and have used her wider discourse on political theoretical and philosophical issues to explain and build upon her juridical thought.

There is another conundrum that a reader faces when trying to understand Arendt and it lies in her refusal to use a consistent methodology across her highly diverse writing outputs. She is sometimes descriptive, using thorough historical enquiries to make a point, and at other times, critiques the entirety of the history of political thought by using highly generalised and abstract conceptions. We also never get to know if Arendt's conceptions (of law, for instance) are intended to be read as historical descriptions (such as her highly optimistic readings of the American revolution, Greek antiquity, and the Hungarian revolution) that she laments modernity for losing or paying insufficient attention to or as suggestions for an alternative way of doing things (law as politics). In this thesis, I have taken a middle route. I reject the pessimistic reading of the tradition of western thought because I do not think the losses have been as dramatic. Moreover, I believe that following a political phenomenology of law approach allows us to capture the stabilising, constitutive and enabling function played by law with regards to politics. Thus, the conception of law at work around us, in my view, is a conception that can be seen to correspond both to the command theory that Arendt critiques and the relational theory that she values.⁴³ Consequently, I have used examples from constitutional law both to bolster her critique and highlight the alternative, relational understanding of law. Arriving at an Arendtian conception of democratic constitutionalism does not imply choosing between two mutually exclusive scenarios, where we either have to accept that the modern world is doomed and can only be saved through a clean re-founding or we have to try and find evidence of Arendtian conceptions in each and every working of law around us. The law, as it works, is full of tensions and one of the tensions that a study of Arendt's writings highlights is the tension between the various ways in which law constitutes the space for politics but also, by its very nature, slows down the occurrence of radical changes.

Literature Review

The thesis identifies, and aims to bridge, two significant gaps in the existing literature: (1) a systematic study of Arendtian constitutional thought that considers her conception of law and politics, and (2) a constitutional theory that treats civic participation and responsibility as important aspects of democratic constitutionalism where active citizenship is understood in terms of the citizens' capacity both for action and for judgment.

⁴³ Keith Breen, 'Law beyond Command?: An Evaluation of Arendt's Understanding of Law' in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the law* (Hart Publishing 2012); Massimo La Torre, 'Hannah Arendt and the Concept of Law. Against the Tradition' (2013) 99 *Archiv für Rechts- und Sozialphilosophie* 400.

Arendt has been studied primarily as a theorist of political action and more recently, as a theorist relevant to law.⁴⁴ Notably, feminist political theorists have read with and against Arendt to develop the concept of agonistic politics that views politics as an end in itself.⁴⁵ Politics *as* freedom is presented as an Arendtian challenge to freedom *from* politics and freedom *through* politics.⁴⁶ In other words, Arendtian thought is explored and connected with the modern condition of growing political apathy and receding civic engagement.⁴⁷ Arendt is also employed to challenge instrumental conceptions of politics under liberal democracy that view politics as a means to achieve a pre-conceived, desired end such that the outcome of the political process determines its validity.⁴⁸ In response, the aesthetic character of politics is unearthed, and democratic politics is proposed as an end in itself by way of a reinterpretation of Arendt's conception of politics.⁴⁹ While such an interpretation of political action is congruent with the aims of this thesis, I argue that a study of the role of institutions in Arendt's literature is equally relevant and hence I turn to constitutional theory.

Scholars have read Arendt's *political* thought for specific legal problems. Scholarly discourse has interpreted Arendt in relation to judicial review, humanitarian law, international criminal law, and international politics.⁵⁰ Despite the consistent interest shown by legal scholars in Arendt's work, some commentators have argued that her understanding of law is too scattered and facile to enable any proper study of institutions.⁵¹ More recently, attempts have been made to unearth Arendt's concept of law from her

⁴⁴ Hiruta explores the dimensions of freedom in Arendt's thought by reading her in light of contemporary populism. Hiruta (n 2).

⁴⁵ Most notable in this regard is Bonnie Honig's theory of agonistic politics that uses Arendt's rejection of expressive, identity-based politics to argue for a performative political contestation of sex and gender into binary and binding categories of identity. Bonnie Honig, 'Arendt, Identity, and Difference' (1988) 16 *Political Theory* 77; Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press 1993); Bonnie Honig, 'Toward an Agonistic Feminism: Hannah Arendt and the Politics of Identity' in Judith Butler and Joan W Scott (eds), *Feminists Theorize the Political* (Taylor and Francis 2013). In response, Benhabib has proposed an alternate reimagining of Arendtian politics as associational. Seyla Benhabib, 'Feminist Theory and Hannah Arendt's Concept of Public Space' (1993) 6 *History of the Human Sciences* 97; Seyla Benhabib, 'Models of Public Space: Hannah Arendt, the Liberal Tradition and Jürgen Habermas', *Situating the self: gender, community, and postmodernism in contemporary ethics* (Routledge 2020).

⁴⁶ Michael Wilkinson, 'Between Freedom and Law: Hannah Arendt on the Promise of Modern Revolution and the Burden of "the Tradition"' in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the law* (Hart Publishing 2012).

⁴⁷ Ronald Beiner, *Political Judgement* (Routledge 2009).

⁴⁸ Michael Wilkinson (n 46).

⁴⁹ Mary G Dietz, *Turning Operations: Feminism, Arendt, and Politics* (Routledge 2002).

⁵⁰ On citizenship, the nature of human rights, and imperialism, see Jeffrey C Isaac, 'A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights' (1996) 90 *American Political Science Review* 61; Peg Birmingham, *Hannah Arendt & Human Rights: The Predicament of Common Responsibility* (Indiana University Press 2006); Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012); Parekh (n 2). On international law and politics, David Luban, 'Hannah Arendt as a Theorist of International Criminal Law' (2011) 11 *International Criminal Law Review* 621; Deborah Whitehall, 'Hannah Arendt and International Law' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford handbook of the theory of international law* (First Edition, Oxford University Press 2016).

⁵¹ On Arendt's lack of legal understanding, Judith N Shklar, 'Hannah Arendt as Pariah' (1983) 50 *Partisan review* 64.

analysis of the Greek notion of *nomos* and the Roman idea of *lex*.⁵² An Arendtian conception of law is presented as ‘relational, dynamic and intertwined with the political at the root.’⁵³ She is placed in juxtaposition with liberal legal constitutionalism and typical Arendtian conceptual frameworks on political authority and power are utilised to critique absolutist notions of sovereignty as a source of juridification.⁵⁴ In this thesis, I propose that reading law as both *nomos* and *lex* generates a more helpful understanding of the way in which law and administration interact with the constitution and maintenance of the public sphere within which citizens can experience active citizenship. The dual role of law as constitutive and enabling of active citizenship further generates important insights on the space for representation and participation.

Despite the increasing interest of legal theorists in Arendt’s work, a systematic study of the content of the relationship between law and politics with respect to constitutional institutions remains to be done. Christian Volk is an important exception. Developed around what he calls the various paradoxes of a nation-state order, Volk presents a re-reading of the promise of political action. He interprets Arendt as a thinker not of politics or law, but of an ‘order of freedom’; the establishment of an ‘order of freedom’, he argues, is based on a ‘de-hierarchical’ relationship between law and politics.⁵⁵ By de-hierarchisation, Volk refers to an interdependency between law and politics for legitimisation in a way that the autonomy of both is preserved. His conception of Arendtian constitutionalism concerns itself with the establishment of institutional rules that reflect the de-hierarchised relationship between politics and law. In this respect, it is the closest to the aims of this thesis.

However, while Volk focuses primarily on *vita activa*, the political life of action,⁵⁶ in this thesis, I integrate Arendt’s writings on the importance of political judgments and responsibility, the *vita contemplativa*. Arendt’s later works were concerned as much with political action as with political judgment and are, in my opinion, much more critical for discerning her constitutional thought as a disposition arising from a very specific and distinctly Arendtian conception of an ‘acting’ and ‘thinking’ citizenship. More importantly, the inclusion of political judgment and responsibility corresponds with my method of choice: theorising about constitutional law by centring the experience of being an active citizen.

By presenting constitutions wholly within the domain of political action, we lose the opportunity to engage with an equally, if not more, insightful literature of Arendt:

⁵² Breen (n 43).

⁵³ Michael Wilkinson (n 46).

⁵⁴ *ibid.*

⁵⁵ By de-hierarchization, Volk refers to an interdependency between law and politics for legitimization in a way that the autonomy of both is preserved. Volk (n 22) 12.

⁵⁶ He marks his literature as spanning the English and German versions of Arendt’s literary work concerning political action namely, *The Human Condition* and *Vita Activa*, *On Revolution* and *Über die Revolution*, *Origins of Totalitarianism* and *Elemente und Ursprung totaler Herrschaft*, *Between Past and Future* and *Zwischen Vergangenheit und Zukunft* and finally, *Denktagebuch*, Arendt’s 1200-page intellectual diary.

political judgment as a political ‘way of being’. Similarly political responsibility is examined under theories of judgement but remains largely underexplored as an integral part of the order of constitutionalism.⁵⁷ In this regard, the central aim of this thesis is to shift the focus from a distinctive reading of politics to the exploration of political action *and* judgment as constitutive of Arendt’s constitutional thought.

In her focus on the civic participatory nature of citizenship in democratic orders and the ethical dimension of experiencing active citizenship, Arendt joins the league of civic republican theorists. Dana Villa convincingly argues that Arendt is not merely a Nietzschean, but rather, she is an inheritor and reformulator of the civic republican tradition.⁵⁸ Despite her intellectual debts to Aristotle, Kant, Heidegger, and her affinities with existentialism, Villa asserts that Arendt formulated her distinctive vision of freedom through the classical republican lens. While her broadly civic republican credentials are acknowledged, her unique conception of freedom, grounded in the experiential aspect of freedom as shared with others, sets her apart. Villa contends that Arendt breathed new life into what was considered a moribund theoretical tradition, particularly evident in her work *On Revolution*, which played a pivotal role in the revival of civic republicanism in Anglo-American thought.⁵⁹ Further, Pocock and Beiner credit Arendt with contributing to the resurgence of civic republicanism and acknowledge her influence on contemporary aspirations for a revival of modern Western republicanism.⁶⁰ Pocock, for instance, acknowledges that his book, *The Machiavellian Moment* ‘has told part of the story of the revival in the early modern West of the ancient ideal of *homo politicus*’ in ‘terms borrowed from or suggested by the language of Hannah Arendt.’⁶¹

⁵⁷ Kristen Rundle is a notable exception. She juxtaposes Arendt’s juridical personhood i.e. the construction of citizenship through law with Fuller’s legal normativity. However, she does not aim to write with regards to the constitutional state and presents it, instead, as a normative theory. Kristen Rundle, ‘Legal Subjects and Juridical Persons: Developing Public Legal Theory through Fuller and Arendt’ [2014] *Netherlands Journal of Legal Philosophy*. Thus, while citizenship as the ‘right to have rights’ has become embedded in formal and substantive implications of membership in political communities, the relational and isonomic nature of Arendt’s conception remains underexplored. Similarly on bureaucracy, she is used as a critique of political economy and administration by experts but the undertones of political (ir)responsibility are under-utilised. Ayelet Shachar, ‘Introduction: Citizenship and the “Right to Have Rights”’ (2014) 18 *Citizenship Studies* 114; David Owen, ‘On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights’ (2018) 65 *Netherlands International Law Review* 299. An important exception is Soon-My Han’s dissertation which explores the implications of an administrative state and what she categorises as the moral responsibility of the citizen. However, here again, its connotations for democratic constitutions are not explored. Jennie Soon-My Han, ‘Moral Responsibility in a Bureaucratic Age: Redefining Agency as a Function of Thinking’ (University of Chicago 2011).

⁵⁸ Dana Villa (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press 2006) 12.

⁵⁹ Some notable instances of scholars using Arendt as a civil republican, see Anne Phillips, ‘Feminism and Republicanism: Is This a Plausible Alliance?’ (2000) 8 *Journal of Political Philosophy* 279; Patricia Springborg, ‘Arendt, Republicanism and Patriarchalism’ (1989) 10 *History of Political Thought* 499; ‘Arendt on the Republic of Parties and Councils’, in Camila Vergara, *Systemic Corruption* (Princeton University Press 2020). See generally, Benhabib, *The Reluctant Modernism of Hannah Arendt* (n 2).

⁶⁰ John GA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press 2003); Ronald Beiner, ‘Citizenship as a Comprehensive Doctrine’ (2008) 10 *The Hedgehog Review* 23.

⁶¹ Pocock (n 60) 550. Emphasis mine.

In my opinion, Arendt can be read as offering a more radical version of Philip Pettit's civic republican defence of formally instituted and facilitated mechanisms for citizen contestation of governmental action.⁶² Pettit puts forth a constitutional framework of republican institutions and an active role for republican citizens in challenging the status quo. On one hand, it suggests that the optimal system will entail a diverse, decentralised approach to decision-making and interaction, rather than a single entity holding absolute power. On the other hand, it advocates for citizens to take on a contestatory role rather than being mere bystanders. He argues that since the people's voice should arise from a process of interaction between various bodies, individuals operating in both electoral and contestatory capacities should be essential components of the citizenry. Pettit suggests that the optimal constitutional framework would require the participation of individuals in two essential ways: first, by engaging in a multi-faceted system of governance at the initial stages, and secondly, by overseeing the different nodes within the network and participating actively in establishing mutually acceptable, network-wide standards for decision-making at the later stages. This collective effort creates a dynamic set of shared values and considerations that influence the procedures and consequences of policy-making in the long run.

Like Arendt, Pettit proposes the introduction of a system of individualised contestation that parallels the collective challenge that elections make possible, arguing that 'there ought to be openings for particular individuals and subgroups to test the laws or proposals for how far the process in which they are generated respects the value of equal access to influence and, more generally, the value of equal status.'⁶³ For Pettit, like Arendt, it is important that the citizens have both, 'an editorial, as well as authorial, role' so that they may test as well as generate policies.⁶⁴ However, *contra* Arendt, he stresses the individualised dimension of this process and moves away from the collective dimensions of dissent.⁶⁵ Further, he dismisses more radical understandings of citizens' relationship with and control of the state as merely an ideal of a rule of impersonal, will-independent norms. He conflates any further radicality in terms of the objectives of politics with a call for an anarchist abolition of the state.

The most important distinction between Arendt and Pettit, however, arises from the difference in their starting points. For Pettit, the coercive power of the state is not incidental but a requirement, 'the state must have the power of coercively imposing the

⁶² This has been highlighted by William Smith, who argues that '[w]hile their perspectives differ we should nonetheless recognise Arendt's emphasis on the importance of governmental appellate bodies like the US Supreme Court and Pettit's praise for radical social movements agitating for change via non-governmental organizations.' William Smith, 'A Constitutional Niche for Civil Disobedience? Reflections on Arendt' in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the law* (Hart Publishing 2012) 140–142. See also, Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 227.

⁶³ Pettit (n 62) 213.

⁶⁴ *ibid* 218.

⁶⁵ *ibid*.

order it establishes, threatening and implementing penalties for those who disobey, without competition from rival bodies.⁶⁶ The main job of republican theory, in the way he conceptualises it, is to justify how the state's protection of citizens' freedom as non-domination would make the state normatively legitimate. He does this by arguing that political coercion is non-dominating if the constitutional order is designed to ensure that the citizens' equally control the choice of direction of the hence, democratic constitutional order. In contrast, Arendt's makes *isonomia* – a political order that precludes ruling as such – her starting point. For Arendtian constitutional theory, a conception of constitutional democratic order necessarily begins from a non-hierarchical, relational conception of the state.⁶⁷

Consequently, while Pettit's emphasis on the contestatory role of citizens is dependent upon institutions such as the judiciary for implementation and impartial adjudication of results, Arendt rejects any notion that views institutions, and not citizens, as key players in constitutional politics. This is reflected not only in her claim that the law can only legalise change after it has occurred through extra-legal action, but also in the constant emphasis on the value of plurality in the political realm.⁶⁸ Institutions, by design, can only 'rule' through homogenisation, whereas extra-institutional politics always retains the capacity to recognise and act to preserve the plurality of citizens. According to Mark Wenman, for Arendt, it is this periodic (re)emergence of the constituent power, rather than constitutional lawyers' rulings, that generates democratic politics.⁶⁹

Beyond its theoretical relevance in terms of centring citizens and their political experiences in constitutional theory, the project gains further relevance from the work being done on new ways of structuring civic participation such as sortition, citizens' assemblies, and council systems.⁷⁰ In writing this thesis, I hope to contribute an Arendtian perspective to the theoretical and foundational questions that underlie these political innovations.

⁶⁶ *ibid* 133–34.

⁶⁷ Arendt, *On Revolution* (n 11) 168–73.

⁶⁸ For example, she claims that the US Supreme Court's enforcement of the Fourteenth Amendment in the Southern States was only possible due to the drastic change in attitudes brought about by civil rights campaigns, Hannah Arendt, *Crises of the Republic* (Harcourt Brace Jovanovich 1972) 80–81.

⁶⁹ Mark Wenman, 'Democracy: The Constituent Power as Augmentation and/or Revolution', *Agonistic Democracy: Constituent Power in the Era of Globalisation* (Cambridge University Press 2013) 79.

⁷⁰ John F Sitton, 'Hannah Arendt's Argument for Council Democracy' (1987) 20 *Polity* 80; James Muldoon, 'The Lost Treasure of Arendt's Council System' (2011) 12 *Critical Horizons* 396; The Hannah Arendt Center, 'Revitalizing Democracy: Sortition, Republicanism, and Citizen Power' (*Amor Mundi*, 14 August 2022) <<https://medium.com/amor-mundi/revitalizing-democracy-sortition-republicanism-and-citizen-power-cb682353d39a>> accessed 14 November 2023; Esmeralda Colombo, 'The Politics of Silence: Hannah Arendt and Future Generations' Fight for the Climate' (2023) 17 *ICL Journal* 43.

Chapter Outline

The thesis makes an argument in three parts. In Part 1, I begin my examination of active citizenship in democratic constitutional orders by explicating the role of law and politics in constituting citizenship and its connection with the experience of freedom. This comprises the first two chapters of the thesis. In Part 2, I highlight the way in which the citizens' acts and judgments become the source of power and authority in a democratic constitutional order. Chapters three and four thus correspond with the role played by active citizenship within the institutional structures of a democratic constitutional order. In Part 3, I evaluate the relationship between active citizenship, power, and authority in the extra-institutional context of civil disobedience. This is treated in chapter 5. A summary mapping of the arguments in each chapter is as follows:

In Chapter One, 'Constituting the Citizen', I examine the Arendtian understanding of citizenship and propose that citizenship is a relational and isonomic enterprise held together by law and politics to constitute active and responsible citizens in a democratic constitutional order. I suggest that by making promises the basis of her normative theory, Arendt builds an associational and isonomic conception of citizenship. Delving into the influence of Greek and Roman conception of law on Arendt's writing as well as the interactions between the categories of work and action that she proposes in *The Human Condition*, I argue that law functions as both 'action' and 'work' in a democratic constitutional order. Law, as action and work, upholds the infrastructures, both tangible and intangible, that are necessary to allow individuals to enter and maintain the 'web of relationships' that constitutes citizenship. Further, I develop Arendt's critique of the conception of 'the People' as an unfractured, monolithic, and historical entity with no ties to the plural make-up of the citizens of the polity post-establishment. I suggest that Arendtian constitutionalism treats the reality of pluralism in political societies as its starting point and recognises that one of the primary roles of public law in a democratic constitutional order is to establish political equality, enabling diverse individuals to partake in the experience of citizenship. I also extend Arendt's discourse on the meaning of love in politics to bring into the fold the important role played by judging for active citizenship. I explore how political action enables individuals to reveal their political identity to others and propose that a claim to equal citizenship implies assuming responsibility for their actions within the shared constitutional order.

Next, in Chapter Two, 'Freedom as Politics', I focus on what it means for a citizen to be active and experience freedom. While much has been written about the Arendtian conception of free action, I propose that Arendt's later writings that deal with the political faculties of the mind contain within them a strong claim that in matters relating to politics, the human mind requires publicness as a condition of being free. I take forward the insights

from the chapter one on viewing law as both *nomos* and *lex* to generate a similar insight on viewing freedom as both negative and positive. This implies, I argue, that Arendtian constitutionalism must view freedom as an experience that is dependent not only upon the institutional arrangements that allow citizens to experience ‘positive’ freedom through action but is also dependent upon the ‘negative’ freedom from non-interference. I use this relationship between positive and negative freedom in Arendtian constitutionalism to clarify the meaning of freedom as participation within constituted orders and the space for representation in an Arendtian freedom-establishing revolutionary constitution. While the positive dimension is connected to political participation, aligning with the phenomenological nature of Arendt’s exploration of the experience of active citizenship, the negative dimension of freedom relates to freedom of thought, a crucial element for individuals to engage in critical thinking, judgment, and taking responsibility for their actions. My goal in this chapter is to correct a common misreading of Arendt’s work, challenging the perception that she solely emphasises direct political participation. I contend that Arendt appreciates representation as a valuable form of political organisation that complements active citizenship, particularly in ensuring a plurality of opinions in the public sphere.

Once the meaning of active citizenship has been established, in Chapter Three, ‘Political Power’, I examine the relationship between power and politics and suggest that in the Arendtian framework, power denotes the collective ability of active citizens to guide and regulate governmental actions. I look at the three chief ways in which power has been understood and theorised by Arendtian scholars: as communication in deliberative democratic theory, as non-violent in civic republicanism, and as the ‘freedom to’ act in agonistic democratic theory. While the three formulations may seem disparate, they capture different but equally important aspects of power. To construct a comprehensive understanding of Arendtian power, it is essential to view these models not as conflicting but as interrelated dimensions. Despite inherent tensions, this three-dimensional approach provides insight into power as the collective capacity to steer government actions, incorporating both descriptive and normative aspects. Using these insights, I propose that power is a temporary but perceptible capacity that citizens possess collectively to make, unmake, or preserve a constitutional order. I use the concept of principles – generated out of citizen actions and judgments – to explain the political underpinnings of power and to distinguish between violence that destroys politics and violence that is critical to maintaining the political realm. Examining the symbiotic relationship between action and work, particularly the role of the fabricators’ violence, reveals its necessity for maintaining the public realm where action unfolds, and power is generated. This nuanced perspective, I suggest, aligns with Arendt’s normative-theoretical vision of democratic constitutionalism which treats freedom as the principle of democratic constitutionalism.

Building on my previous conclusion that an active citizenry is vital for empowering democratic constitutional institutions, in Chapter Four, 'Political Authority', the reciprocal relationship between the authority of the constitutional order and citizens' political acts and judgments, is examined. I explicate the Arendtian conception of authority two ways: the source of authority (foundation) and the binding power of authority (reverence). Using the distinctions Arendt creates amongst the various forms of government, I argue that for Arendtian constitutional thought, authority is intimately connected with politics. I highlight the distinctly political character of authority in democratic constitutional orders and propose that, for democratic constitutional orders, the constitution itself is the wellspring of authority. I claim that Arendt envisions authority as intricately linked to the act of founding, wherein citizens willingly participate out of respect for the upheld principles, fostering a sense of authority as a willingly embraced commitment to the constitutional order. I also address the institutional implications of this understanding of authority, particularly in relation to the judiciary. While Arendt primarily centers on the judiciary as the seat of authority, I propose expanding this to include citizens as integral to the judicial process. I suggest that the judicial process is best understood as a process of memorialisation and that the citizens involvement in the process generates an image of a discursively generated framework of constitutional principles. Such a reading allows us to simultaneously view the judiciary as the site where the authority of the constitution is augmented through the participation of citizens in a highly particularised procedure as well as explain the limits of the judiciary in its function as the seat of authority.

Finally, in Chapter Five, 'Civil Disobedience', I examine Arendt's strangely phrased call for 'finding a constitutional niche for civil disobedience'. To Arendt, the limits of the American judiciary become apparent in the 'political question doctrine' during the Vietnam War. She finds that not only can institutions gain authority over time, but they can also lose their authority. She views civil disobedience as the most explicit declaration of this loss of authority of constitutional institutions and suggests viewing civil disobedience as the phenomenon through which the citizens not only express their disagreements with governmental action, but also act to change the institutional settings motivated by their concern for the constitutional order itself. I propose that Arendt expands the understanding of constitutional democracy as a 'society of consent' to give a more active role to the dissenting citizen. In the context of authority, this implies specifically that not just the 'voluntary obedience' of the citizens, but also the 'civil disobedience' of the citizens is critical for maintaining the authority of the constitutional order. I suggest that in Arendtian constitutional theory, civil disobedience helps maintain the authority of the constitutional order because of its dual nature. At one level, civil disobedience consists of disobedience towards constitutional institutions and processes. At another level, civil disobedience comprises of allegiance to higher order constitutional principles. In such a formulation, constitutionalising a niche for civil disobedience implies not only instituting

structures and platforms for the citizens' right to dissent but also carries within it the duty to preserve and maintain the constitutional order. I propose that this apparently paradoxical implication is effected by Arendt through a theoretical separation of the stability of institutions from the authority of the constitutional order. Consequently, a stronger relationship between authority and politics is required than is allowed by Arendt in her earlier work. Taking the support of her writings on civil disobedience, I suggest that if we take seriously Arendt's proposal to create a 'constitutional niche' for civil disobedience, we must amend our understanding of authority to include within it the implications of treating civil disobedience as a phenomenon of augmenting the authority of the constitutional order. Linking it back to the discussion on participation and representation in Chapter Two, I propose that civil disobedience indicates the phenomenon when the citizen does not have the avenue to experience active citizenship through institutional means and thus, to try to bring the juridical structures closer to the political realm. In other words, civil disobedience represents the citizens' attempt at creating a temporary, extra-institutional political realm in order to preserve or modify the existing institutional structures of freedom.

Taken together, the five chapters propose a conception of democratic constitutionalism that is centered on the experience of active citizenship.

Chapter One

CONSTITUTING THE CITIZEN

Hannah Arendt experienced first-hand the conditions of existence that accompany statelessness.¹ It is, therefore, not surprising that an enquiry into citizenship frames her discourse on law and constitutions.² Starting with *The Origins of Totalitarianism* through *On Revolution* to *The Life of the Mind*, the experience of active citizenship – what it means, why it is important, and how to secure it in modern constitutional orders – remains a central concern for Arendt.³ Albeit scattered, Arendt’s remarks on citizenship foreground her take on constitutional themes because she sees the construction of citizenship as temporally and theoretically coincidental with the establishment of a democratic constitution. In Arendt’s framing, citizenship appears as a partly normative and partly descriptive idea, sometimes used as a load-bearing normative ideal from antiquity and other times as a juridical category to describe and critique contemporary forms of government.⁴ The varied use attests to the concept’s foundational place in Arendtian constitutional theory – the Arendtian understanding of democratic constitutional orders is centred on the experience of active citizenship.

According to Arendt, individuals experience citizenship and freedom when they enter the public realm to act with each other. However, the congruence of the experience of citizenship with the ability to engage in political action, although a crucial aspect of the Arendtian notion of citizenship, tells us little about the nature of citizenship. In this chapter, I propose that citizenship in democratic constitutional orders is relational, isonomic, and accompanied by a sense of responsibility. While this chapter concerns the nature of citizenship, I will examine the Arendtian conception of freedom in the next chapter, which corresponds with the notion of ‘active’ in active citizenship.

¹ Statelessness is the condition of being deprived of one’s citizenship and consequently of one’s political rights. Arendt lived as a stateless person for 18 years after fleeing from Nazi Germany, before she was naturalised as an American citizen. For an account of her experience and the ways in which the personal experience of statelessness influenced her thoughts and works, see Richard J Bernstein, ‘Hannah Arendt on the Stateless’ (2005) 11 *Parallax* 46.

² Arendt’s claim that citizenship is the ‘right to have rights’ is perhaps one of the most quoted phrases from her work. For an account of the path taken by Arendt’s phrase, see Stephanie DeGooyer and others, ‘Introduction’, *The right to have rights* (Verso 2018) 7–16. See also, Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004); Ayten Gündoğdu, “‘Perplexities of the Rights of Man’: Arendt on the Aporias of Human Rights’ (2012) 11 *European Journal of Political Theory* 4; Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012); David Owen, ‘On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights’ (2018) 65 *Netherlands International Law Review* 299.

³ Peg Birmingham, for instance, claims that ‘Arendt’s entire work can be read as an attempt to work out theoretically this fundamental right to have rights’ in Peg Birmingham, *Hannah Arendt & Human Rights: The Predicament of Common Responsibility* (Indiana University Press 2006) 4.

⁴ She uses citizenship descriptively in her initial works but develops a normative understanding by looking at the experience of citizenship in Ancient Greece and Ancient Rome in her later works.

To provide my discussion with a robust structural integrity for the purposes of arriving at an Arendtian constitutional theory, I draw on Arendt's relational conception of law and propose that the Arendtian notion of citizenship emphasises the relational dimension of being a citizen in a democratic constitutional order.⁵ Most notably, her discourse on the Greek (*nomos*) and the Roman (*lex*) understandings of law generates the insight that law maintains the 'web of relationships' within which an individual can experience citizenship.⁶ In other words, citizenship is a relational experience of action maintained in a multiplicity of ways through law. To clarify this insight, I employ Arendt's description of the categories of 'work' and 'action' to highlight the role law plays in maintaining citizenship: as 'work' that constructs, defines and regulates the public sphere – the intangible 'web of relationships' and the tangible public spaces – within which individuals experience citizenship, and as 'action' that characterises the experience of acting with each other.

The relational nature of citizenship also draws attention to the artificial, human-made nature of equality that arises out of the relationships established when individuals act together. In my reading, Arendt proposes to see the modern conception of democratic constitutionalism in terms of the principle of *isonomia*. A Greek term that translates to 'no-rule', *isonomy* refers to a form of political organisation devoid of any hierarchy between rulers and the ruled. The construction of active citizenship implies the construction of an artificially created equality of political participation: we make ourselves equal through human endeavour, 'as members of a group on the strength of our decision to guarantee ourselves mutually equal rights'.⁷ However, equality does not imply sameness, and Arendt's critique of the homogenising tendency of frameworks based on national sovereignty highlights the value of pluralism for democratic constitutionalism, generally, and the notion of citizenship, more specifically.⁸ It alerts us to the idea that the experience of citizenship consists of entering into relationships with plural individuals such that the parties to the promise maintain their distinctiveness in the relationship.

We find greater clarity on the meaning of active citizenship from Arendt's discourse on *amor mundi*, i.e. the political love for a shared constitutional order. Moving beyond Arendt's direct writings on citizenship and relying on her broader thought on political judgment and responsibility, I argue that a crucial component of the experience

⁵ Another account of the relationality underpinning the experience of democratic constitutionalism has been offered by Jennifer Nedelsky. Jennifer Nedelsky, 'Reconceiving Rights and Constitutionalism' (2008) 7 *Journal of Human Rights* 139; Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2013).

⁶ Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 2018) 184.

⁷ Hannah Arendt, *The Origins of Totalitarianism* (Penguin Classics 2017) 296. See also, Alison Kesby, 'Introduction', *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 1–12.

⁸ On plurality in the thought of Arendt, see Adriana Cavarero, 'Human Condition of Plurality': (2018) 2 *Arendt Studies* 37; Margaret Canovan, 'Arendt, Rousseau, and Human Plurality in Politics' (1983) 45 *The Journal of Politics* 286.

of active citizenship lies in the citizen's political act of disclosing the 'self'.⁹ Put simply, this implies that the act of politically acting with each other results in the construction and publication of the political identity of the individual. More specifically, in the context of citizenship, this means that citizenship is a site of constant contestation. Individuals engage in politics not only to promise the (artificial) equal status of citizenship to each other but also to claim the status (and the right to equal participation that it entails) for themselves.

At the same time, politics understood in terms of self-disclosure also involves showing concern and taking responsibility for the shared constitutional order.¹⁰ I claim that political promise-making and promise-keeping have a distinctly public character that conjoins political actions with the act of presenting oneself for the judgment of others; in acting as a citizen, we disclose our political identities in relation to our peers and present for their judgment, our actions taken for the maintenance of the shared constitutional order. Constituting the citizen, thus, is a relational, isonomic enterprise that materialises through the to-be-citizen's political actions and involves a sense of responsibility for the shared constitutional order.

The chapter proceeds as follows: I begin with a discussion of Arendt's relational conception of law. I draw out the implications of the juridical act of promise-making and promise-keeping for citizenship before engaging with Arendt's twin inspirations – *nomos* and *lex* – and the two categories of human activity – work and action – to highlight the role law plays in maintaining the tangible and intangible infrastructure for individuals to experience relational citizenship. In the second section of this chapter, I propose that citizenship is an isonomic enterprise and put forward a teleological understanding of Arendtian constitutionalism: one of the primary purposes of public law in a democratic constitutional order is to institute political equality to enable plural individuals to experience citizenship. In the last section of the chapter, I use Arendt's discourse on the meaning of politics to import further meaning into the concept of citizenship. Through political action, an individual discloses their political 'self' to others and, in doing so, not only stakes a claim to equal citizenship but also takes responsibility for their actions for the shared constitutional order. Finally, I conclude with a summary of the connecting themes that I will take forward in the next chapter, *Freedom as Politics*.

I. A relational conception of citizenship

Against the predominant image of Arendt as a scholar concerned only with politics, some scholars point out that throughout her work, she displays a consistent interest in law and

⁹ Patricia Moynagh follows a similar line of thought and presents citizenship as a 'politics of enlarged mentality', Patricia Moynagh, 'A Politics of Enlarged Mentality: Hannah Arendt, Citizenship Responsibility, and Feminism' (1997) 12 *Hypatia* 27.

¹⁰ On the connection between politics as self-disclosure and responsibility, see Garrath Williams, 'Disclosure and Responsibility in Arendt's *The Human Condition*' (2015) 14 *European Journal of Political Theory* 37.

legal institutions.¹¹ They suggest that although not systematic, her writings show an attempt to lay down a coherent and well-developed philosophy of law.¹² In these discussions, Arendt's discourse on the human capacity to make and keep promises features heavily as the starting point for identifying and understanding the relational concept of law that underpins her thought. However, aside from outlining the contours of relationality underpinning her conception of law, her writings on the act of promise-making and promise-keeping also contain important insights about the relational nature of citizenship in her constitutionalist thought.

The promise of promises

Arendt begins *The Human Condition* with the claim that 'labour', 'work', and 'action' constitute the three chief activities that characterise the human condition.¹³ She suggests that these three articulations of the human condition may be described in two distinct ways. When conceived as the means to live a contemplative life (the *vita contemplativa*), labour refers to the production of the means of subsistence, work denotes the creation of a tangible world, and action responds to the need for organising society for a singular end: peace, the condition for contemplation.¹⁴ Here, work occupies the highest position because of its ability to generate lasting results, a durability that is predicated on its ability to prevent change.¹⁵ On the other hand, to understand what it means to live an active life (the *vita activa*), Arendt argues, we need to look at labour, work, and action from a different viewpoint. This new viewpoint, advanced most prominently in *The Human Condition* but present in most of her work, places action at the top of the hierarchy.¹⁶ And, in contrast to

¹¹ The predominant view has been advanced by scholars who argue that Arendt displays limited or no interest in law and legal institutions and that her writings do not contribute anything original to international criminal justice law. See, Judith N Shklar, 'Hannah Arendt as Pariah' (1983) 50 *Partisan review* 64; David Luban, 'Hannah Arendt as a Theorist of International Criminal Law' (2011) 11 *International Criminal Law Review* 621. More recently, however, scholarly work has attempted to derive a distinct and Arendtian concept of law from Arendt's oeuvre. See, Jan Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt' (2007) 20 *Leiden Journal of International Law* 1; Marco Goldoni and Christopher McCorkindale, *Hannah Arendt and the Law* (Hart Publishing 2012); Peg Birmingham, 'Hannah Arendt's Philosophy of Law Approach to International Criminal Law' (2014) 14 *International Criminal Law Review* 695; Christian Volk, *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* (Hart Publishing 2015).

¹² Birmingham (n 11) 695.

¹³ Arendt, *The Human Condition* (n 6) 7.

¹⁴ Hannah Arendt, *The Freedom To Be Free* (Penguin Books 2020) 2.

¹⁵ *ibid* 5.

¹⁶ *ibid* 4. Arendt critiques the western philosophical tradition for privileging *vita contemplativa* over *vita activa*. For an analysis of Arendt's critique, see, Steve Buckler and Hannah Arendt, *Hannah Arendt and Political Theory: Challenging the Tradition* (Edinburgh Univ Press 2011); Massimo La Torre, 'Hannah Arendt and the Concept of Law: Against the Tradition' (2013) 99 *Archiv für Rechts- und Sozialphilosophie* 400.

the peace that comes from ‘no change’,¹⁷ action in the political sphere begets constant change.¹⁸

To Arendt, action’s potential for change and its ability to initiate new beginnings makes it a political phenomenon to be valued, and not feared.¹⁹ This view has been advanced most succinctly as the agonistic conception of democratic politics; agonistic democratic theorists source inspiration from Arendt to argue that politics is a valuable activity for its own sake, and critique notions of law and politics that treat politics as a means to a pre-determined end.²⁰ However, despite the towering influence Arendt has had on agonist democratic thought, it would be remiss to read her as concerned solely with advancing the value of treating politics as a meaningful experience to be enjoyed for its own sake.

Arendt’s conception of action encompasses its creative as well as constitutive potential; creative, because action contains within itself the forever lurking possibility of establishing something new and initiating something unprecedented, and constitutive, because through such an establishment and initiation, action lays down the foundation for successive political actions, thus constituting the trajectory of future politics. This dual potential of action comes out most explicitly in her discussion of the act of constituting a body politic through the establishment of a constitution. And although her discourse on politics focuses on clarifying the *meaning* and *nature* of political action, when writing about law – and, most notably, constitutions –, Arendt is equally concerned with the *conditions* necessary for undertaking political action.²¹

In Arendt’s framing, the founding of a democratic constitutional order represents the establishment of a freedom-guaranteeing body politic.²² Her writings point to a direct,

¹⁷ Arendt, *The Freedom To Be Free* (n 14) 5.

¹⁸ On change and action, Patchen Markell, ‘The Rule of the People: Arendt, Archê, and Democracy’ (2006) 100 *The American Political Science Review* 1; Patchen Markell, ‘The Experience of Action’ in Roger Berkowitz, Jeffrey Katz and Thomas Keenan (eds), *Thinking in Dark Times* (Fordham University Press 2009); Cindy Horst and Odin Lysaker, ‘Miracles in Dark Times: Hannah Arendt and Refugees as “Vanguard”’ (2021) 34 *Journal of Refugee Studies* 67.

¹⁹ For instance, for Arendt it is freedom as natality that allows man to perform miracles and consequently hope for redemption from totalitarian regimes. This point has been made variously by Arendt scholars. See, Patricia Bowen-Moore, *Hannah Arendt’s Philosophy of Natality* (Macmillan 1989); Birmingham (n 3); Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge University Press 2008); Serena Parekh, *Hannah Arendt and the Challenge of Modernity: A Phenomenology of Human Rights* (Routledge 2009); Bhikhu C Parekh, *Hannah Arendt and the Search for a New Political Philosophy* (Palgrave Macmillan 2015).

²⁰ Bonnie Honig, ‘Arendt, Identity, and Difference’ (1988) 16 *Political Theory* 77; Bonnie Honig, ‘The Politics of Agonism: A Critical Response to “Beyond Good and Evil: Arendt, Nietzsche, and the Aestheticization of Political Action” by Dana R. Villa’ (1993) 21 *Political Theory* 528; Bonnie Honig (ed), *Feminist Interpretations of Hannah Arendt* (Pennsylvania State University Press 1995); Mark Wenman, ‘Democracy: The Constituent Power as Augmentation and/or Revolution’, *Agonistic Democracy: Constituent Power in the Era of Globalisation* (Cambridge University Press 2013); Shmuel Lederman, ‘Agonism and Deliberation in Arendt’ (2014) 21 *Constellations* 327.

²¹ On Arendt’s conception of politics, meaning and nature, see Margaret Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (Cambridge University Press 1995); Craig J Calhoun, John McGowan and Martin Jay (eds), *Hannah Arendt and the Meaning of Politics* (University of Minnesota Press 1997).

²² Hannah Arendt, *On Revolution* (Faber & Faber 2016) 28.

normative relationship between the experience of active citizenship and freedom.²³ For Arendt, the founding of a democratic constitutional order represents the institution of conditions necessary to constitute ‘a public space where freedom could appear’ and for citizens to experience freedom through active citizenship.²⁴

Such a framework prioritises the life of action (*vita activa*) over a life of contemplation (*vita contemplativa*) and to Arendt’s mind, relies upon the political activity of promising to generate a relational conception of law that corresponds and coexists with the Arendtian understanding of democratic constitutionalism’s guarantee of active citizenship.²⁵ To a certain extent, Arendt’s discourse on promising functions as a placeholder for her democratic instinct that emphasises the value of consent as the basis of rule.²⁶ A deeper enquiry, however, suggests that Arendt introduces the human capacity to make and keep promises as the mechanism to produce lasting results in order to emphasise the possibility of a conception of law that responds to the need for stability and durability without compromising politics’ potential for change. Thus, Jeremy Waldron finds recurring throughout her work the argument ‘[t]hat politics needs *housing*, and that building such housing can be equated with the framing of a *constitution*’.²⁷ He notes that Arendt’s concern about lasting institutional structures leads her to the ‘idea of a promise’ as the ‘solution to the problem of political instability’.²⁸ This political capacity to promise first makes an appearance in Arendt’s writing in *The Human Condition*, but features as the central – and the most promising – political activity when she begins to talk about constitutional foundations in *On Revolution*.

In *The Human Condition*, Arendt points out that action, especially political action, is not a solitary activity; all human acts ‘fall into an already existing web where their immediate consequence can be felt.’²⁹ Whenever individuals act together, they establish a ‘web of relationships’ amongst themselves.³⁰ Even the most hostile encounters, for instance, between the perpetrator and the victim, result in creating relations between the parties, such that when the act ends, the deed and suffering become ‘two sides of the same event.’³¹ Because action has the unbounded potential to establish relationships, it comes with the

²³ A number of scholars have explicated the Arendtian conception of freedom as political participation in the public realm. See, Maurizio Passerin d’Entrèves, *The Political Philosophy of Hannah Arendt* (Routledge 1994) 161–64; Jeffrey C Isaac, ‘Oases in the Desert: Hannah Arendt on Democratic Politics’ (1994) 88 *American Political Science Review* 156; Parekh (n 19).

²⁴ Arendt, *On Revolution* (n 22) 255.

²⁵ On the Arendtian conception of law arising from her emphasis on promises, see Christian Volk, ‘From *Nomos* to *Lex*: Hannah Arendt on Law, Politics, and Order’ (2010) 23 *Leiden Journal of International Law* 759; La Torre (n 16).

²⁶ Isaac (n 23).

²⁷ Jeremy Waldron, ‘Arendt’s Constitutional Politics’ in Dana Villa (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press 2006) 203. Emphasis supplied.

²⁸ *ibid* 203, 212. However, Waldron’s overemphasis on the ‘importance of structure, formality, and procedure’ misses the centrality of politics in the creation and maintenance of these structures, forms, and processes.

²⁹ Arendt, *The Human Condition* (n 6) 184.

³⁰ *ibid*.

³¹ Hannah Arendt, *The Promise of Politics* (Jerome Kohn ed, Schocken books 2005) 177.

‘inherent tendency to force open all limitations and cut across all boundaries.’³² This characteristic, namely, action’s ‘inherent unpredictability’, contributes to its boundless nature.³³ The faculty to make and keep promises, Arendt argues, is the remedy for the unpredictability of action.³⁴ It gives stability to the political realm; in binding oneself through promises, individuals not only establish a relationship with each other, but also commit to the stability, durability and continuity of the ‘web of relationships’ that is hence established.

In the first instance, promising projects an image of commitment, a form of undertaking that signifies binding oneself to do or not do something in the future. Thus, promising in the context of politics would imply communicating to the other party one’s intention to act in a certain way. It assuages the anxieties that come with working with and alongside others by creating ‘islands of certainty’ in the ‘sea of uncertainty’ that is the future.³⁵ However, the act of promising promises to do more than just make the future reliable. There is another layer at which Arendt’s use of the concept of promising operates. This second layer corresponds to the by-products of promising: the relationship the act of promising creates between the parties to the promise, and the corresponding relational statuses that are generated and formalised when a promise is made and kept.

To put it differently, promising is a public act that creates a link between our future conduct and the political futures of those we have promised to affect or not affect. Our future conduct is no longer free of any considerations because by informing others of our promise, we commit to being publicly accountable for our future behaviours. This linking of futures simultaneously creates a relationship and generates a political persona; in promising, we convey to others what our political acts and speeches will be in relation to them. In keeping these promises, we formalise our identity by making a conscious effort to sustain them. As Jay Bernstein reasons, ‘[i]f promising bestows upon me a public identity in relation to others, then forfeiting a promise is forfeiting that identity (myself for others).’³⁶

A brief examination of the Arendtian conception of law further supports the insight that she perceives the constitution as the establishment and preservation of lasting relations amongst citizens, and by implication, of the identity of a person as a citizen. In such a framing, the construction and maintenance of the ‘in-between space’, because it is a *conditio sine qua non* for the experience of citizenship, plays the important role of structuring the political activities of the citizen. And, just like the identity of the parties to a contract as promisors and partners is never the object of the agreement but is nonetheless

³² Arendt, *The Human Condition* (n 6) 190.

³³ *ibid.*

³⁴ *ibid.* 237.

³⁵ *ibid.* 244.

³⁶ Jay Bernstein, ‘Promising and Civil Disobedience: Arendt’s Political Modernism’ in Roger Berkowitz, Jeffrey Katz and Thomas Keenan (eds), *Thinking in Dark Times: Hannah Arendt on Ethics and Politics* (Fordham University Press 2010) 120.

generated out of the interaction, the identity of the citizens as citizens is generated out of the constitution and maintenance of the 'in-between space'.

Law as nomos and lex

In *On Revolution*, Arendt brings together these three characteristics of promising – promising as consent-giving, promising to ensure stability, and promising as generating a political identity – in terms of a constitutional founding. She points at the American Revolution to highlight the role played by agreements and contracts in the establishment of a modern democratic constitutional government.³⁷ She describes the Mayflower Compact as a significant event for the establishment of the American Constitution to emphasise the kind of consent that is generated through mutual promises. This consent is freely given and linked with the person's identity as a promisor, denoting a further linkage between the identity of the citizen as a citizen and the commitment to preserving the constitutional order that citizenship entails.

The political interactions and mutual agreements generate what Arendt calls is the 'in-between space'.³⁸ It is characterised by what the citizenry holds in common ('inter-est'). This is why speech, a quintessential political activity, is when 'someone *talks to* somebody *about* something that is of interest to both because it *inter-est*, it is between them.'³⁹ While the 'objective in-between' consists of human artefacts such as architecture, tools, and artworks, and is congruent with the visible, tangible world we share with each other, the 'subjective in-between' is constituted by speech and deeds and is synonymous with the political realm, properly speaking. This in-between is a 'space of appearance' where citizens can appear to others and have others appear to them.⁴⁰

However, this space does not become a physical political space until it is formally constituted and organised. Pointing to the Greek maxim '[w]herever you go, you will be a polis,' Arendt notes that action and speech carry within them the potential of creating a political realm, 'but only potentially, not necessarily and not forever.'⁴¹ She argues that it is only with the formal constitution of a public realm and the establishment of a form of government through which the realm will organise itself that the space of appearance, the 'in-between space' in constant flux, transforms into a constitutional order. Consequently, in *On Revolution*, she develops her thinking on promising by conceptualising the establishment of a constitution as the establishment of a public realm on the strength of

³⁷ Arendt, *On Revolution* (n 22) 167. Scholars have pointed out the performative and constitutive aspect of these declaratory agreements that Arendt emphasises: Bonnie Honig, 'Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic' (1991) 85 *American Political Science Review* 97; Waldron (n 27).

³⁸ Arendt, *On Revolution* (n 22) 167.

³⁹ *ibid* 81.

⁴⁰ Arendt, *The Human Condition* (n 6) 198.

⁴¹ *ibid* 199.

promises; she claims, '[t]he grammar of action: that action is the only human faculty that demands a plurality of men; and the syntax of power: that power is the only human attribute which applies solely to the worldly in-between space by which men are mutually related, combine in the act of foundation by virtue of the making and the keeping of promises, which, in the realm of politics, may well be the highest human faculty.'⁴²

Much like in *The Human Condition*, where Arendt's theoretical description of action – as a meaningful experience valuable for its own sake and the potentiality (for conceptions of law) inherent in the political activity of promising – is greatly influenced by *both* the Greek and Roman antiquity, in *On Revolution*, when talking about the establishment of a constitution as a successful end of a revolution, Arendt develops her own conception of law by combining *nomos* and *lex*, the conceptions of law underpinning her two sources of inspiration. Arendt's discussion on the Greek concept of law (*nomos*) and the Roman concept of law (*lex*) is critical for understanding the role played by law in establishing the tangible and intangible infrastructures that formalise, preserve, and regulate the relationships established through political action as well as the 'in-between space' in which future political action would take place.

Scholars studying Arendt source her relational theory of law from her reflections on the Greek notion of *nomos* and its Roman counterpart *lex*.⁴³ While there is some debate about the relative priority that should be afforded to *nomos* and *lex*, what is settled is the idea that law performs two main functions in her theorisation: law creates a stable realm for politics and this stabilisation is performed on the strength of consensus derived from agreements. Arendt's referrals to *nomos* and *lex* reflect her attempt to conceptualise the role law plays in the construction, definition, regulation, and maintenance of citizenship as a phenomenological identity individuals possess within a democratic constitutional order.

There is little doubt about the influence of Greek antiquity on Arendt's thought.⁴⁴ Her conceptualisation of political action as an agonal practice is marked by Greek imageries and references.⁴⁵ Alongside the activities of the Athenian *polis*, Arendt also uses the Greek conception of law, *nomos*, to build her own conception of law. She notes that the agonistic politics of Ancient Greece laid great emphasis on self-disclosure and distinction, in the 'passionate drive to show one's self in measuring up against others.'⁴⁶ The point of all political action was to commit acts and give speeches that would be remembered as heroic

⁴² Arendt, *On Revolution* (n 22) 175.

⁴³ Some of the prominent works are: Jacques Taminioux, *The Thracian Maid and the Professional Thinker: Arendt and Heidegger* (Michael Gendre tr, State University of New York Press 1997); Roy T Tsao, 'Arendt against Athens: Rereading the Human Condition' (2002) 30 *Political Theory* 97; Keith Breen, 'Law beyond Command?: An Evaluation of Arendt's Understanding of Law' in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the law* (Hart Publishing 2012); Michael Wilkinson, 'Between Freedom and Law: Hannah Arendt on the Promise of Modern Revolution and the Burden of "the Tradition"' in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the law* (Hart Publishing 2012); Christian Volk, *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* (Hart Publishing 2017).

⁴⁴ Parekh (n 19); Miriam Leonard, 'Arendt's Revolutionary Antiquity' [2018] *Classical Philology* 53.

⁴⁵ Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press 1993).

⁴⁶ Arendt, *The Human Condition* (n 6) 194.

and live beyond the biological life of the actor. To that end, a stable and durable realm was needed, to be held in common not only with one's contemporaries but also with the succeeding generations so that accounts of the memorable deeds and the names of their heroic actors could be shared and passed on to posterity. Consequently, to the Greeks, Arendt claims, law-making was a pre-political activity. The main role of the law-maker was to build the walls of the *polis*, 'much like a sculptor or architect,'⁴⁷ and structure its laws for the specific purpose of creating a public space for the Greek citizens to perform heroic acts. By treating law as a pre-political activity, the Greeks, in Arendt's reading, were able to focus on the core quality of political action: politics as the experience of initiating something new, something heroic, something worth remembering.

In the first instance, *nomos* appears in the image of law as a boundary. *Nomos*, Arendt notes, acted as a 'stabilising force' to 'impart to human affairs a solidity that human action itself... can never possess.'⁴⁸ The Greek *polis* 'as a unity' could ensure its stability and durability '[b]ecause it surrounded itself with a permanent wall of law.'⁴⁹ But a further analysis of Arendt's use of *nomos* alongside her description of work as a human activity reveals another, related function of law. In the tripartite categorisation of human activities – labour, work, and action –, work corresponds to the human condition and need for worldliness. Arendt notes that our being in the world requires the construction and maintenance of durable worldly structures that can provide stability to our lives; she says, the products of work 'give the world the stability and solidity without which it could not be relied upon to house the unstable and mortal creature that is man.'⁵⁰ These productions of work possess a 'certain objectivity' that not only imparts them the durability to last longer than the lifetimes of the producers, but also allows humans with their 'ever-changing nature' to 'retrieve their identity by being related to the enduring sameness of objects.'⁵¹ Thus, a house can be seen as a product of work, a use-object whose function is to stabilise human life in multiple ways and also generate for the human associated with it the identity of a property holder.⁵²

Work and action, two of the three human activities Arendt describes in *The Human Condition* correspond to two different aspects of our being in the world. While the activity of work is driven by the need to fabricate a permanent world, action corresponds more properly to the experience of freedom. Another difference lies in the nature of the two

⁴⁷ Arendt, *The Promise of Politics* (n 31) 179.

⁴⁸ Arendt, *The Human Condition* (n 6) 334; Arendt, *On Revolution* (n 22) 716; Volk, *Arendtian Constitutionalism* (n 43) 218.

⁴⁹ Arendt, *On Revolution* (n 22) 716; Volk, *Arendtian Constitutionalism* (n 43) 218.

⁵⁰ Arendt, *The Freedom To Be Free* (n 14) 13–14.

⁵¹ *ibid* 14–15.

⁵² The house can also be a product of labour and a site for action depending on the activity that we choose to focus on. The congruence of the three activities does not imply a flaw in Arendt's theory because the categorisations do not refer to fixed categories, but instead, as Pitkin puts it, as attitudes to activities performed by humans everyday. Hanna Fenichel Pitkin, 'Justice: On Relating Private and Public' (1981) 9 *Political Theory* 327, 342.

activities. Work is a private activity guided by instrumental rationality. Even when performed in a group, the actual presence of others does not change the pre-determined end-goal, the achievement of which determines the work's success and completion. Unlike work that proceeds from a blueprint and measures its success based on the achievement of its purpose, 'action almost never achieves its purpose.'⁵³ Action is a public activity, wholly dependent upon the presence of plural peers. One cannot act alone since action requires an audience as well as co-actors, and its success can only be adjudged by the parameters the group decides to judge it by.

The final distinction concerns the two categories' relevance for democracy itself. A society whose acts and laws are guided by instrumental rationality, as in Plato's Republic where 'the philosopher-king applies the ideas as the craftsman applies his rules and standards'⁵⁴ relegates politics as a means to an end. This constitutes a displacement of action by work as the proper mode of political being together and is an 'argument against democracy' itself. Once the logic of instrumental rationality takes over governance, the political acts and judgments of the citizens do not have any part to play in deciding the future course of governmental action. As Michael Wilkinson notes, 'this is reflected in our valuing the work of politician as a technician or craftsman, rather than the opinions of those acting and speaking with each other in the public realm.'⁵⁵

Scholars have already noted the similarities between the ways in which Arendt describes the nature and function of work and the nature and function of *nomos*. Law as *nomos* possesses a certain tangibility in that it is 'wall-like' and its function is to act as a durable thing that can 'house' the free citizens' political activities.⁵⁶ Academic discourse presents *nomos* and *lex* as mutually exclusive, with scholars arguing either that Arendt's conception of law is influenced primarily by Ancient Greece or Ancient Rome. More recently, it has been argued that Arendt herself moves from *nomos* towards *lex*, and that her ultimate understanding of law is based on the distinction between the violent, work-like underpinnings of *nomos* and the promise-based, action-encompassing theorisation of *lex*.⁵⁷

The Roman conception of *lex*, it is argued in such accounts, is based on action's potential for promising and the promise of the human capacity to make and keep promises for the durability and stability of a body politic. Jacques Taminiaux, in one of the earliest rebuttals against the charge of Graecomania imposed on Arendt, claims that Arendt, in *The Human Condition*, recognises the shortcomings of the Greek conception of politics (and consequently, law) and introduces the Roman reliance on agreement and treaties as a way

⁵³ Arendt, *The Human Condition* (n 6) 184.

⁵⁴ *ibid* 227.

⁵⁵ Michael Wilkinson (n 43) 55.

⁵⁶ Waldron (n 27); Michael Wilkinson (n 43); Anna Jurkevics, 'Hannah Arendt Reads Carl Schmitt's *The Nomos of the Earth: A Dialogue on Law and Geopolitics from the Margins*' (2017) 16 *European Journal of Political Theory* 345.

⁵⁷ Volk, 'From *Nomos* to *Lex*' (n 25); Michael Wilkinson (n 43).

of redeeming action.⁵⁸ He argues that Arendt saw the Greek inability to view law-making as a political act and the consequent equation of legislation with architecture as a failure to recognise the role of action in law-making.⁵⁹ Roy Tsao explains it even further. Parsing through and rearranging the contents of *The Human Condition*, he makes a case for reading the book as a treatise that doesn't exalt the Greek conception of action. Instead, and especially when we consider her reading of Rome, it displays significant departures from Greece.⁶⁰ According to Tsao, Arendt saw as delusional the Greek attempt to treat law-making as fabrication in which 'men act like craftsmen' and where 'the result of their action is a tangible product,' – law – 'and its process has a clearly recognizable end.'⁶¹ Her turn to the Roman understanding of law as alliances was, he argues, a move to emphasise the idea that law also concerns the maintenance of 'formal relationships between people.'⁶² Finally, Wilkinson draws out the connection between *nomos* and work, and contrasting it with *lex* and action, argues that while the former treats constitution-making as a violent, individualistic exercise of designing a polity based on a blueprint or utopia, the latter 'presents instead an image of constitutionalism as political freedom, "as an activity that arises among men acting and speaking together".'⁶³

Law as work and action

While the scholarly discourse stands on a strong interpretative ground, I believe it misses an important function of *nomos* – the role played by law in the construction and maintenance of citizenship as an identity. The root of the problem lies in the highly essentialised image of politics generated by the distinction between law as work and law as action.⁶⁴ It suggests that *any* technocratic activity done in the offices of a politician is something to be critiqued, or, at the very least, viewed with suspicion, and relegates administration to a place that will always be less-than a highly idealised conception of political action. More crucially, once relegated to the non-political realm, the work of administration is free to follow the logic of instrumental rationality, unattended by the otherwise onerous demands placed upon political action by freedom and plurality.⁶⁵

⁵⁸ Jacques Taminiaux, 'Athens and Rome' in Dana Villa (ed), *The Cambridge Companion to Hannah Arendt* (1st edn, Cambridge University Press 2000) 171. See also, Taminiaux (n 43).

⁵⁹ Taminiaux (n 58) 172.

⁶⁰ Tsao (n 43) 99.

⁶¹ *ibid* 108.

⁶² *ibid*.

⁶³ Michael Wilkinson (n 43) 58.

⁶⁴ For a challenge to a rigid distinction between action and work, see Patchen Markell, 'Arendt's Work: On the Architecture of "The Human Condition"' (2011) 38 *College Literature* 15.

⁶⁵ The best and most thorough critique of Arendt's essentialism has come from feminist philosophy: Pitkin, 'Justice' (n 52); Seyla Benhabib, 'The Pariah and Her Shadow: Hannah Arendt's Biography of Rahel Varnhagen' in Bonnie Honig (ed), *Feminist interpretations of Hannah Arendt* (Pennsylvania State University Press 1995); Hanna Fenichel Pitkin, 'Conformism, Housekeeping, and the Attack of the Blob: The Origins of Hannah Arendt's Concept of the Social' in Bonnie Honig (ed), *Feminist interpretations of Hannah Arendt*

An example – one that speaks directly to the use of law in constructing, maintaining, and regulating citizenship – illustrates my point. In December 2019, the Parliament of India passed the Citizenship (Amendment) Act, 2019 (CA Act). The Act amends the existing Citizenship Act, 1955 to provide an accelerated pathway to migrants escaping religious persecution from Afghanistan, Bangladesh, and Pakistan. The Act specifies, however, the religions that qualify for this new provision: only persons belonging to Hindu, Jain, Buddhist, Sikh, Parsi, or Christian communities are eligible for citizenship under the new Act. The exclusion of Islam, whose members such as the Hazaras and Ahmadis also face religious prosecution, has been variously criticised and protested.⁶⁶ Connected to the entire saga, and at this point, directly relevant to the point I will make, is the National Register of Citizens (NRC), a nation-wide registry mandated under an earlier law that aims to construct and maintain a database of all legal citizens in order to identify the illegal migrants.⁶⁷ Following on the promises it had made in the election manifesto (to provide fast track citizenship to non-Muslims escaping religious persecution), the Modi Government made active efforts to update the NRC in the State of Assam, a state bordering Bangladesh and home to a significant number of Muslim migrants.⁶⁸

It is in the challenges to the implementation of the CA Act and the NRC before the Supreme Court that the pernicious cloaking effect of the administrative logic is most explicitly revealed. While it is true that the NRC in its census like nature is merely a technocratic exercise that has no direct connection with the CA Act of 2019, and the Indian Government has defended the NRC by posing it as a national security measure necessary to protect against the threats posed by illegal migration. What is not to be missed is that since the passage of the CA Act fundamentally changes the definitional composition of Indian citizenship (by making Indian citizenship religion-based), the administrative exercise of compiling the NRC is also affected by the change.

However, once framed as an administrative measure, the implementation of which the Supreme Court can and has overseen, legal challenges to exclusions in the NRC can be limited to testing the fairness of the hearing in the particular case and systemic

(Pennsylvania State University Press 1995); Seyla Benhabib, ‘Hannah Arendt’s Political Engagements’ in Roger Berkowitz, Jeffrey Katz and Thomas Keenan (eds), *Thinking in Dark Times* (Fordham University Press 2009). See also, Breen (n 43); Richard J Bernstein, *Why Read Hannah Arendt Now* (Polity 2018).

⁶⁶ ‘Citizenship Amendment Bill: India’s New “anti-Muslim” Law Explained’ *BBC News* (9 December 2019) <<https://www.bbc.com/news/world-asia-india-50670393>>; ‘Citizenship Amendment Act and Its Shadow on Northeast Politics’ *The Times of India* (13 February 2023) <<https://timesofindia.indiatimes.com/elections/assembly-elections/tripura/news/citizenship-amendment-act-and-its-shadow-on-northeast-politics/articleshow/97851232.cms?from=mdr>>; Christophe Jaffrelot, ‘Citizenship Law in India, a Populist Polarization?’ (*Institut Montaigne*) <<https://www.institutmontaigne.org/en/expressions/citizenship-law-india-populist-polarization>>.

⁶⁷ ‘In All-India Database Plan, A National Register Of Citizens (NRC) Prequel’ *NDTV.com* <<https://www.ndtv.com/india-news/in-all-india-database-plan-a-national-register-of-citizens-nrc-prequel-3429646>> accessed 18 November 2023.

⁶⁸ ‘India’s Anti-Immigrant Crackdown Has Torn Apart Families and Locked Up Hundreds’ *Time* (6 September 2021) <<https://time.com/6092299/india-anti-immigrant-crackdown-assam/>> accessed 18 November 2023.

inequalities are further entrenched.⁶⁹ For instance, in a highly controversial decision upholding the decision of the Foreigner Tribunal that had declared the petitioner as a foreigner, the Supreme Court performed an exceptionally legalistic reading of the statutes to hold that none of the eight documents the petitioner had provided as proof of her citizenship were admissible evidence before the Tribunal.⁷⁰ Despite starting the judgment with an acknowledgement about the effect of exclusion on the political status and dignity of the citizen, the focus of the court remained on assessing the rationality of the Tribunal's opinion on a narrowly defined set of parameters. In doing so, as one commentator astutely put it, the court missed a unique opportunity to remedy the historical injustices arising from the arbitrary stripping away of citizenship in which the Foreign Tribunals operating in Assam have been complicit.⁷¹

In addition to the array of cases where the apex court has been criticised for being more executive minded than the executive itself, the Supreme Court has also frequently postponed hearings, a phenomenon Gautam Bhatia describes as 'judicial evasion'.⁷² The Supreme Court's refusal to hear and adjudicate upon challenges to the legal framework surrounding Indian citizenship and an unusually thorough reliance on legal technicalities, thus, avoids addressing the systemic inequalities and exclusions generated by presenting citizenship as a purely descriptive identity generated out of an administrative exercise. In other words, it does not connect the work performed by the administrative exercise with the political conditions the administrative work is supposed to recognise and maintain. Consequently, it is only in the realm of political actions and speeches – the widespread protests – that we find a reflection of the contested nature of citizenship and a space for discourses on freedom and plurality in the determination of one's status as a citizen.⁷³

Challenging the essentialised understanding of law as work or action allows us to see the interaction between law as work and law as action. I propose to challenge an essentialised reading of law as either work or action by relying upon Bonnie Honig's

⁶⁹ Atreyo Banerjee, 'The NRC and Scope for Redemption – The Supreme Court's Opportunities in *Lal Bhanu vs Union of India and Ors.*' (*Indian Constitutional Law and Philosophy*) <<https://indconlawphil.wordpress.com/2022/09/25/guest-post-the-nrc-and-scope-for-redemption-the-supreme-courts-opportunities-in-lal-bhanu-vs-union-of-india-and-ors/>>.

⁷⁰ *Lal Bhanu @ Musstt Lal Banu v Union of India and Ors* [2022] Supreme Court of India (Supreme Court of India) <https://www.livelaw.in/pdf_upload/22975202222438360order23-sep-2022-436477.pdf>.

⁷¹ Banerjee (n 69). See also, 'Designed to Exclude: How India's Courts Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (Amnesty International India) <https://www.amnesty.be/IMG/pdf/rapport_inde.pdf>.

⁷² Gautam Bhatia, 'Judicial Evasion and the Status Quo: On SC Judgments' *The Hindu* (9 January 2019) <<https://www.thehindu.com/opinion/lead/judicial-evasion-and-the-status-quo/article25953052.ece>> accessed 18 November 2023.

⁷³ Farrah Ahmed, 'Constitutional Parasitism, Camouflage, and Pretense: Shaping Citizenship through Subterfuge' (2023) 21 *International Journal of Constitutional Law* 285; Jhanvi Sandhu and Vikram Aditya Narayan, 'Constitutional Patriotism in India: Appreciating the People as Constitutional Actors' in Swati Jhaveri, Tarunabh Khaitan and Dinesha Samararatne (eds), *Constitutional resilience in South Asia* (Hart 2023).

attempt to ‘read with and against Arendt’.⁷⁴ Honig de-essentialises Arendt’s definitions by taking forward Hanna Pitkin’s characterisation of these categories as particular ‘attitudes’ towards the activities one is performing.⁷⁵ She suggests that work and action represent ‘(rival) sensibilities’ where ‘[e]ach would be understood as itself a performative production’.⁷⁶ In such a reading, work or action do not claim to represent an ‘authentic essence of a class, or a gender, but always the (sedimented) product of the actions, behaviours, norms, and institutional structures of individuals, societies, and political cultures.’⁷⁷ Applying Honig’s characterisation to the dominant scholarly strain of thought that presents Arendt as a critic of law as fabrication generates a further layer of nuance to the discourse: we do not need to completely dismiss the function of law as work.

Instead, support may be gathered from Arendt’s writings to suggest a distinction between law understood *only as* work and the work-like function of law intended to sustain law as action (and consequently freedom). In other words, administration may now be categorised as work performed only for the sake of work, such as the compilation of a national register of citizens for the sake of having a database, or as work performed for the sake of action. When seen as administrative work performed for the sake of action, challenges to exclusions from the NRC, to continue the example from before, would not only be adjudicated on the specially curated parameters of administrative fairness and efficiency but also reflect the point of the exercise: for the maintenance of a plural public realm within which citizens may be free to participate in their governance as equal yet distinct political actors.

Honig’s insight can be applied to our present discussion by treating *nomos* and *lex* as heuristic devices to describe and explain the two mutually non-exclusive conceptions of law that can support freedom and thus, constitute a public realm for an active citizenry. In other words, I argue that not only is it better to see *nomos* as a conception of law that has an important role to play in the construction of citizenship, but also that *nomos* cohabits with *lex* in the establishment of a democratic constitutional order. To frame it in terms of the Indian example, the construction of Indian citizenship is effected by the commitments exemplified in the constitutional text (*lex*) but also the administrative acts that maintain and regulate the legal status of an individual as a citizen (*nomos*). However, when the experience of citizenship becomes dependent wholly upon administrative registers such as the NRC, it no longer corresponds to the commitments institutionalised in the constitution – in this case, the idea that Indian citizenship will not be religion-based – because the administrator views the success of their actions from a consequentialist viewpoint, treating

⁷⁴ Honig, *Feminist Interpretations of Hannah Arendt* (n 20); Bonnie Honig, ‘Toward an Agonistic Feminism: Hannah Arendt and the Politics of Identity’ in Judith Butler and Joan W Scott (eds), *Feminists Theorize the Political* (Taylor and Francis 2013).

⁷⁵ Honig, *Feminist Interpretations of Hannah Arendt* (n 20) 143.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

the exclusions as a necessary evil for the sake of the ultimate goal: the register of legal citizens.

To frame it in terms of relationality, treating law as both *nomos* and *lex* allows us to see not only that the experience of citizenship materialises through the relationships citizens enter into when they act with each other and make promises about their future conduct (*lex*), but also that the experience of citizenship is dependent upon administration (*nomos*) that maintains the conditions – and the existence of a public realm – for these promissory relationships.

Such an understanding of the role of law in maintaining boundaries is further clarified in Arendt's discourse on the spatial relevance of law, but this time it speaks more directly to the existence of borders. Arendt takes further the Greek imagery of 'wall-like law'⁷⁸ to a generalised characterisation of law's role in constituting a political community. She attributes a spatial character to law, and claims that '[a]ll laws first create a space in which they are valid, and this space is the world in which we can move about in freedom.'⁷⁹ She argues, 'the territorial boundaries which protect and make possible the physical identity of a people, and the laws which protect and make possible its political existence, are of such great importance to the stability of human affairs precisely because no such limiting and protecting principles arise out of the activities going on in the realm of human affairs itself.'⁸⁰ This claim is repeated in her discussion of Montesquieu, when she argues that the experience of freedom is dependent upon the ability of the infrastructure of laws to provide a durable political realm.

Further nuance comes from Arendt's reading of Carl Schmitt. Schmitt looms as an important background figure in Arendt's discussions on the *nomos*.⁸¹ Although references to his works are conspicuously absent from her published works, Arendt's diaries, and marginalia in her copies of Schmitt's books evidence her deep engagement with his conception of *nomos*.⁸² Amongst the many nodes of similarities and differences, there is one in particular – the spatial undertones of law – that clarifies Arendt's own conception of law. Developed as a critique of Schmitt's conceptualisation of law's relationship with soil in *Nomos of the Earth*, Arendt envisions an alternative conception of law that retains its function as a boundary but is not dependent upon soil for its legitimacy.

Arendt shares with Schmitt the sentiment that territorial boundaries lend a certain concreteness to law that is not present in notions of law that project an image of universalism.⁸³ Her critique of the universalism of human rights and the concomitant

⁷⁸ Arendt, *The Human Condition* (n 6) 63–4.

⁷⁹ Arendt, *The Promise of Politics* (n 31) 190.

⁸⁰ Arendt, *The Human Condition* (n 6) 191.

⁸¹ Kalyvas (n 19); Hans Sluga, 'The Pluralism of the Political: From Carl Schmitt to Hannah Arendt' [2008] *Telos* 91; Jurkevics (n 56); Andreas Kalyvas, 'From the Act to the Decision: Hannah Arendt and the Question of Decisionism' (2004) 32 *Political Theory* 320.

⁸² Jurkevics (n 56).

⁸³ *ibid* 348.

assertion on citizenship as the ‘right to have rights’ is, at its core, an attempt to tie the experience of citizenship, and the rights such an experience entails, with the territorial boundaries that *nomos* produces.⁸⁴ However, as Anna Jurkevics notes, Arendt finds in Schmitt’s work a ‘fixation on the political conquest of the soil’.⁸⁵ Schmitt’s notion of *nomos* is predicated on the act of land-appropriation as the constitutive event; he calls land-appropriation ‘the primeval act in founding law’.⁸⁶ What this means for Schmitt is that temporally speaking, the capture of soil comes before the founding of a polity: ‘[n]ot only logically, but also historically, land-appropriation precedes the order that follows from it.’⁸⁷ This fixation on soil as the source of law, in Arendt’s view, ultimately leads him to an essentially imperialist understanding of geopolitics, based on a mistaken equation of injustice with law-making.⁸⁸ In Arendt’s view, Schmitt’s account of law suffers from a kind of ‘contentlessness’. The excessive focus on soil as the source of law leaves no space for the actual makers of law, and the inter-subjective inclinations that underpin the making of laws. Jurkevics summarises Arendt’s objection to Schmitt’s conception of *nomos* pithily: ‘by grounding all law in the soil, he disregards the content of laws and their orientation (*Richtung*) towards the people.’⁸⁹

In contrast, Arendt believes that the public realm is the most appropriate source of law in a democratic constitutional order. This public realm, however, despite her usage of spatial metaphors, is not ‘soil’-based, as in Schmitt’s arguments. The public realm, or the ‘in-between space’, refers to the legal-political space generated through the intersubjective activity of promising.⁹⁰ To put it in terms of the two components of *nomos* both Arendt and Schmitt identify – acquisition and division –, whereas for Schmitt acquisition precedes division, Arendt, writing in her copy of *The Nomos of the Earth*, argues that ‘before the acquisition comes the division and not consequent.’⁹¹ She sees Schmitt’s temporal placement of acquisition of land before a ‘constitutional moment’⁹² of promising to imply that all political foundings are only acts of conquest, and do not involve any political deliberation and negotiation. Subsequently, in *The Human Condition*, Arendt revises his definition of *nomos* by not only reversing acquisition and division, but also trimming off the parts of his conception that present conquest as the beginning of the constitution of a

⁸⁴ *ibid.*

⁸⁵ *ibid* 346.

⁸⁶ Carl Schmitt and GL Ulmen, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press 2003) 45.

⁸⁷ *ibid* 48.

⁸⁸ Jurkevics (n 56) 351. Jurkevics brings in ‘justice’ as a motivating concept in Arendt, possibly a placeholder for plurality and freedom. Arendt’s use of ‘principles’, in my view, is less decisionist as Wolin makes them out to be. Sheldon S Wolin, ‘Hannah Arendt: Democracy and The Political’ [1983] *Salmagundi* 3. See also, Sinja Graf, ‘Carl Schmitt Reads Hannah Arendt’s *Eichmann in Jerusalem*: Archival Perspectives on Convergences and Divergences’ (2022) 66 *American Journal of Political Science* 918.

⁸⁹ Jurkevics translates the marginalia in Jurkevics (n 56) 350.

⁹⁰ *ibid* 347.

⁹¹ *ibid* 352. Jurkevics 13/05/2024 19:06:00 translates Arendt’s marginalia on 108.

⁹² Jurkevics uses this term to refer to Arendt’s notion of ‘questions of right’ *ibid.*

political order: '[t]he Greek word for law, *nomos*, derives from *nemein* which means to distribute, to possess (what has been distributed), and to dwell.'⁹³

Replacing land-acquisition with possession and dwelling is a conscious step Arendt takes to highlight the compatibility of *nomos* with *lex*, especially with respect to democratic constitutional foundations. In Arendt's normative framing, to possess and to dwell reflect conditions of living *after* the appearance of the public realm. At various instances, Arendt notes that a *polis* comes into existence once plural individuals get together to act.⁹⁴ Here, *polis* is but another characterisation of the 'web of relationships' generated through collective political action.⁹⁵ However, the *polis* is only a temporary structure, an ephemeral, inter-subjective realm that exists only so long as the individuals continue to act with each other. The establishment of a constitution represents the opportunity to reify the *polis* by constituting a lasting public realm 'where freedom may dwell.'⁹⁶ The acts of possessing and dwelling are acts that represent stability and durability, and Arendt's critique of Schmitt for content-lessness refers to the lack of orientation of laws if stability and durability precede the human condition of acting and promising; stability and durability as concepts inherently refer to a preceding act or condition which is supposed to last.

If the origin of constitutional order lies in conquest of soil, in the sense that laws derive their legitimacy from this act of conquest, the actual political experience of acting and promising would bear no significance on the direction the constitutional government takes. However, when, as Arendt posits, the intersubjective public realm is understood as the origin of the constitutional order and by extension, law, the citizens – through acting and promising – play a role in constitutional governance. To simplify it even further and frame it in terms of the relationship between the role of law as a boundary and the construction of relational citizenship: law delineates the spatial boundaries within which citizens can engage in free political action, but the marking of these boundaries comes about through an act of promising (foundation) and not conquest (*imperium*). Here, promising and its promise of an intersubjective political realm is both the condition necessary for political action – and in that sense, precedes the foundation – as well as the condition that makes political action meaningful – promising also stabilises the products of political action once the public realm has been established.⁹⁷

⁹³ Arendt, *The Human Condition* (n 6) 63.

⁹⁴ *ibid* 198–99.

⁹⁵ It is a public space created out of a collaborative, emancipatory power generated when people act together, as opposed to an order created on the basis of domination. Seyla Benhabib, 'Feminist Theory and Hannah Arendt's Concept of Public Space' (1993) 6 *History of the Human Sciences* 97.

⁹⁶ Arendt, *On Revolution* (n 22) 28.

⁹⁷ In political theory, the conception of state formation often involves envisioning it as the outcome of a pact symbolizing the shift from a state of nature to a civil society. This approach is rooted in the idea that a multitude can only perceive itself as 'a people' through such imaginative exercises. Paul Ricoeur notes that while one may critique the abstraction, idealism, and hypocrisy associated with this pact, the state, in reality, emerges from a virtual act—a consent that transcends a specific historical event and becomes apparent only through reflection. In essence, treating the founding act as a pact allows the state to be conceptualized within the autonomous realm of the political, leading to its constitution. See, Paul Ricoeur, 'The Political Paradox' in his *History and Truth* CA Kelbley trans (Northwestern University Press, 1965), 247-70 at 252, 251.

The role of *nomos* in founding the Greek city-state, and of *lex* in extending the *societas Romana* consisted of the use of law in recognising the territory within which a private individual would experience citizenship. Whereas for the Greek *polis*, providing for a physical space where the experience of citizenship could materialise was the explicitly spatially motivated purpose of law; for the Roman Republic, law implied becoming partners with former enemy territories and adding them to the Roman system of alliances. It is important to pay attention to the spatial character of law not only because it alerts us to the tangible limits of the experience of citizenship, but also for the public things the citizens hold in common by virtue of being citizens.⁹⁸

Honig establishes the critical connection between the experience of democracy and public spaces – infrastructure, utilities, buildings, ‘things we bring, build, use, and maintain collectively’ that ‘affect and constitute us.’⁹⁹ At the very least, the things we hold in common contour the relations we have with each other, as ‘sites of attachment and meaning that occasion the inaugurations, conflicts, and contestations that underwrite everyday citizenships.’¹⁰⁰ In their ideal theorisation, public things ‘constitute citizens equally as citizens’ not only because their condition affects us but also because joining together in building, maintaining, and using public spaces is a task of democratic citizenship and an important object of democratic life.¹⁰¹ This adduces a material meaning to Arendt’s categorisation of citizenship as the ‘right to have rights’: because citizenship can only materialise in the public realm, it would be remiss to not pay attention to the citizens’ right to public spaces and the consequent weight it holds for structuring constitutional institutions.¹⁰²

In other words, the experience of citizenship is generated when individuals act together and towards a future they have mutually committed to. At the same time, because the future citizens share with each other corresponds to the tangible and intangible public and political things they hold in common, citizenship is also linked with the boundaries that delineate access to common public spaces. Both, the commonness of things (tangible) and commonness of the public realm (intangible) is important for the actualisation of citizenship.¹⁰³

⁹⁸ Passerin d’Entrèves (n 23) 147.

⁹⁹ Bonnie Honig, *Public Things: Democracy in Disrepair* (First edition, Fordham University Press 2017) 5. See also, Bonnie Honig, ‘Care and Concern: Arendt with Winnicott’, *Public Things* (Fordham University Press 2017); Markell, ‘Arendt’s Work’ (n 64).

¹⁰⁰ Honig, *Public Things* (n 99) 6.

¹⁰¹ *ibid* 11.

¹⁰² The UNESCO ‘Right to the city’ is an example of a way to pay attention to the Arendtian emphasis on infrastructure: See, Alison Brown and Annali Kristiansan, ‘Urban Policies and the Right to the City: Rights, Responsibilities and Citizenship’ (UNESCO 2009) SHS/SRP/URB/2008/PI/H/3 REV.

¹⁰³ Citizenship is essentially an experience of belonging and while positive law explicitly constitutes, describes, and regulates the relations between individuals, it can also indirectly reveal, affect, and entrench historical processes and practices of exclusion. Because law structures relations with people and things, and in doing so defines and regulates the identity of an individual as a citizen, paying attention to law’s interactions with space and time allow us to acknowledge the enduring nature of structural inequalities that get built in through

II. Citizenship as an isonomic enterprise

An important consequence of understanding the construction of citizenship through the lens of relation-establishing promise-making and promise-keeping lies in the implications such an approach contains for political equality amongst the members of the body politic. The characteristically Arendtian phenomenological focus on the experience of citizenship results in a conception of equality that is an artificial construction that imposes substantial normative demands on the constitutional order.

Enacted political equality

In my reading, despite the heavy normative implications concerning equality in her thought, Arendt does not venture a conception of equality. Rather, her writings reveal a scepticism towards using a broad understanding of equality in theorising a constitutional order. She speaks to a limited – *political* – conception of equality in her discourse. Although Arendt does not explicitly state this, one can see that one of her primary disagreements with Marx lies in his distinction between political and human emancipation.¹⁰⁴ To Marx, when the state ostensibly ensures political equality, it does so by abolishing distinctions based on birth, rank and education and occupation. But in doing so, ‘it proclaims that every member of the people is an equal participant in popular sovereignty regardless of these distinctions’ and relies upon a legal construction which is predicated on taking away the

‘landscapes of exclusion’. Sibley, in his monumental work *Geographies of Exclusion* elucidates the ways in which public spaces unwelcome the certain marginalised groups. David Sibley, *Geographies of Exclusion* (Routledge, 1995).

¹⁰⁴ Hannah Arendt, ‘Karl Marx and the Tradition of Western Political Thought’ in Jerome Kohn (ed), *Thinking without a banister: essays in understanding, 1953-1975* (Schocken 2018); Hannah Arendt, ‘From Hegel to Marx’ in Jerome Kohn (ed), *The Promise of Politics* (Schocken books 2005); Hannah Arendt, ‘The End of Tradition’ in Jerome Kohn (ed), *The Promise of Politics* (Schocken books 2005). Arendt’s critical reading of Marx comes from a place that begins with significant agreement and an attempt to, as she says to Karl Jaspers, ‘rescue Marx’s honor’ (in a letter to Jaspers, 1950). Her critique of *Marxism* should be separated from her critique of Marx (‘If we want to find out who Marx was, what he thought, and how he stands in the tradition of political thought, Marxism all too easily appears mainly as a nuisance...’ in Arendt, ‘Karl Marx and the Tradition of Western Political Thought’ 4.) She critiques Marx for ignoring the value of political action as a human activity. Her critique is based on the claim that Marx does not distinguish between action, work and labour (by reducing action to ‘making of history’, Hannah Arendt, ‘The Concept of History’, *Between Past and Future* (Penguin books 2006) 77.). To Arendt, history cannot be explained on the basis of trends or forces (of nature or necessity). Her theory of natality argues that action gets its political nature from the fact that each new birth brings with it the potential of a new (political) beginning – a beginning that is entirely unpredictable. She claims that action derives its value from its unpredictable nature because it signifies political freedom and the idea that freedom implies being able to initiate something new. However, as Pitkin notes, Arendt’s works do not adequately acknowledge the similarities between her and Marx. Hanna Fenichel Pitkin, *The Attack of the Blob: Hannah Arendt’s Concept of the Social* (Univ of Chicago Press 1998) 115–144. Pitkin points out how Arendt’s critique of Marx is based on a misreading of Marx’s discourse on work and freedom. Arguably – and especially with regards to their critiques of the nation state – Arendt and Marx share common ground. On the point of enacted equality, however, the limited Arendtian claim is that action *can* result in the construction of a temporary, teleologically motivated artificial equality that can allow individuals to experience political freedom outside of the private realm. See generally, Jennifer Ring, ‘On Needing Both Marx and Arendt: Alienation and the Flight from Inwardness’ (1989) 17 *Political Theory* 432.

political character of birth, rank and education and occupation.¹⁰⁵ Such a presupposition, however, does nothing for the actual inequalities of birth, rank and education and occupation. Rather, by taking them away as political categories, the state further entrenches the inequalities by relegating them to a realm that politics cannot reach. For Arendt, however, equality can be artificially generated through collective political action; however, it will not be a comprehensive kind of equality; inequalities of birth, rank and education persist and will continue to persist even after the foundation of a democratic constitutional order. What the democratic constitutional order can achieve, however, is an *enacted* equality, where citizens *experience* equality as political actors when they enter the public sphere to *act* as citizens.

Throughout her work, Arendt acknowledges that humans are born unequal and that at any given point of time, a body politic will always be constituted by a community comprised of inherently unequal individuals.¹⁰⁶ Her own conception of equality, then, is better understood as *political* equality because it is highly specific and contextual to the individuals' *political* experiences as citizens of a democratic constitutional order.

Two distinctions in particular can be used to clarify the Arendtian understanding of enacted political equality. In *The Human Condition*, Arendt insists on the separation of the public realm from the private realm.¹⁰⁷ She equates the private realm with the realm concerning the household; the domestic sphere that responds to our biological needs and is characterised by hierarchies amongst its dwellers. The public realm, on the other hand, is political because it is the realm an individual enters to leave behind the inequalities of the private realm and participate and contribute to common concerns as an equal.¹⁰⁸ The second distinction between the political and the 'social' follows from the ontology of the first distinction between the private and the public. Arendt argues that modernity is characterised by a 'rise of the social' to the detriment of the political realm.¹⁰⁹ In this account, her claim is that politics is being displaced by an all-consuming tendency to homogenise and manage the national economic matters in the form of an amorphous and anonymous household. In other words, the domestic structures of the family that exist in the private realm are now being used outside of their domestic context to the effect that the entire society is being treated as one big family. This leads to a form of bureaucratic

¹⁰⁵ Karl Marx, "On the Jewish Question" in Joseph J O'Malley and Richard A Davis (eds), *Marx: Early Political Writings* (1st edn, Cambridge University Press 1994).

¹⁰⁶ Arendt, *The Human Condition* (n 6) 175–247; Arendt, *On Revolution* (n 22) 53–110.

¹⁰⁷ Arendt, *The Human Condition* (n 6) 73–78.

¹⁰⁸ There has been significant objection, most notably from feminist thought to this distinction. The argument is that by bracketing certain inequalities as belonging to the private realm, Arendt, in effect, not only categorises them as natural but also removes them from the scope of what politics and law can remedy. See, Pitkin, 'Justice' (n 52). In response, a number of scholars have attempted to 'rescue' Arendtian thought by highlighting the importance of a separation between the private and the public realm that Arendt suggests without relegating gendered inequalities to the *oikos* that can never appear and be remedied in the political realm. See, Benhabib, 'Feminist Theory and Hannah Arendt's Concept of Public Space' (n 95).

¹⁰⁹ Arendt, *The Human Condition* (n 6) 38–49.

‘rule by nobody’ that displaces the opportunities for individual distinctiveness provided by the political realm in favour of conformism and ‘mass society’.¹¹⁰

Using the analogy of the public realm as a table, Arendt argues that ‘[w]hat makes mass society so difficult to bear is not the number of people involved, or at least primarily, but the fact that the world between them has lost its power to gather them together, to relate and to separate them.’¹¹¹ In the first instance, political equality emerges as a heuristic device to critique the rise of ‘mass society’ and the consequent homogenisation of distinct individuals for the ostensible purposes of managing poverty.¹¹² With respect to citizenship, however, the two distinctions highlight Arendt’s attempt to recover the potential of politics to be an activity through which individuals who may, otherwise, be unequal can get the opportunity to *act as equals* without letting go of their individual distinctiveness. I will come back to her emphasis on human plurality in the next sub-section but will now focus on the potential she sees in political actions’ capacity to generate equality. According to Arendt, the artificiality of the experience of politics allows the individuals to momentarily overcome the hierarchies affecting them in the private realm because to be a citizen in a democratic constitutional order, in Arendt’s constitutionalist thought, implies acting in the public realm as equal individuals. Thus, political equality refers to an artificially created equality, valid only within a certain, public ‘space’ and for certain political purposes: participation in one’s governance.

Moreover, I propose, political equality is intrinsically connected to her conception of law as a relationship-establishing activity in modern democratic constitutional orders. In Arendt’s framing, equality is best understood as an enacted reality achieved through the construction and maintenance of citizenship as a legal personality. This legal personality functions as an artificial mask that enables the bearer to act and speak as an equal yet distinct political actor. In the previous section, I explained how Arendt’s relational conception of law enables us to clearly see the identity-creating dimension of law. We can take forward the identity creating dimension of law by focussing on the conception of equality underlying her reading of the Roman *lex* as relations between partners joining together in an alliance. She points to the original meaning of *lex* – ‘intimate connection’ – to highlight the relativity underscoring the Roman *lex*: laws were ‘something which connects two things or two partners whom external circumstances have brought together.’¹¹³ And contrary to the friend-enemy distinction implied in Schmitt’s theory, to Arendt *lex* represents a conception of law wherein ‘the existence of a people in the sense

¹¹⁰ *ibid.* For a comprehensive account of Arendt’s description of ‘rule by nobody’ as a consequence of ‘the rise of the social’ and its implications on moral responsibility, see Jennie Soon-My Han, ‘Moral Responsibility in a Bureaucratic Age: Redefining Agency as a Function of Thinking’ (University of Chicago 2011); Pitkin, ‘Conformism, Housekeeping, and the Attack of the Blob: The Origins of Hannah Arendt’s Concept of the Social’ (n 65) 133.

¹¹¹ Arendt, *The Human Condition* (n 6) 55.

¹¹² Pitkin, ‘Conformism, Housekeeping, and the Attack of the Blob: The Origins of Hannah Arendt’s Concept of the Social’ (n 65) 133.

¹¹³ Arendt, *On Revolution* (n 22) 187.

of an ethnic, tribal, organic unity is quite independent of all laws.¹¹⁴ For the Romans, Arendt notes, laws were a means to establish alliances with the political entities they defeated not as an imperialist goal but to join in partnership with their former enemies in ‘the ever extending group of Roman *socii* who formed the *societas Romana*.’¹¹⁵ In other words, citizenship, as an identity, represents being at an equal level as one’s peers in the sense of being equal participants in a web of collective, mutual agreements.

To further support the thesis that citizenship *makes* unequals artificially, Arendt looks at the theatre-inspired history of the Latin word *persona*. She notes that the word *persona* in its original meaning signified the masks the actors wore when enacting a play. This mask had two functions: first, to hide the actor’s face and second, to make it possible for the actor’s voice to sound through. She argues that it is this artificial construction of a *persona*-lity that inspired its legal counterpart. Thus, ‘the distinction between a private individual in Rome and a Roman citizen was that the latter had a *persona*, a legal personality, as we would say; it was as though the law had affixed to him the part he was expected to play on the public scene, with the provision, however, that his own voice would be able to sound through.’¹¹⁶

In doing so, the point was that not a ‘natural man’ but a right-and-duty-bearing person *created by the law* entered a space defined by law. She argues, when rights are declared to be ‘natural’ and emanating from ‘human nature’ independent of and outside of the political realm, they only equate the rights of man *qua* man with the rights of the citizens and consequently, lack the validity and tangibility that comes with an association with the political realm.¹¹⁷ Her argument is that in contrast with an understanding of equality that automatically arises from the fact that all citizens are humans and thus, refers to one’s position in the world as a ‘natural man’, the equalising factor of citizenship as a *persona*-lity affects the individual in their position only as a citizen (‘in certain respects’) and is aimed at the role of the citizen in governance (‘for specific purposes’).

She relies upon the Greek notion of *isonomia* to highlight a particular characteristic of equality – specifically, equality in terms of enjoying freedom in a constitutional order – that is established in the establishment of a constitution by ‘the People’.¹¹⁸ *Isonomia*, as opposed to monarchy or oligarchy was characterised by the complete absence of any

¹¹⁴ *ibid.*

¹¹⁵ *ibid* 189.

¹¹⁶ *ibid* 102.

¹¹⁷ *ibid* 147.

¹¹⁸ What captures Arendt’s attention in such a conceptualisation is the idea that freedom and equality are interconnected in ways that are complementary and not antagonistic to each other. Thus, the Greek idea that freedom could ‘appear and be real only when others saw them, judged them, remembered them’ represents for Arendt the understanding that the presence and company of peers is an essential condition for the enjoyment of one’s freedom. I merely allude to the idea of freedom here for the purposes of explaining its connection with equality. The notion and its implications for political participation are dealt with in depth in the next chapter, Chapter Two, *Freedom as Politics*.

notion of ruling.¹¹⁹ ‘It meant to live among and to have to deal only with one’s peers’ such that one was neither under the command of another nor was expected to be in command of others.¹²⁰ This understanding of equality reflected the Greek belief that one can be free only among their peers; thus, neither the tyrant who commands nor the slave who bears the commands could be considered free since neither had access to the opportunity to ‘act in concert’ with their equals.¹²¹ She takes this to imply that isonomy was not the equality of condition inherent in a naturalised conception of man but an attribute of the political realm. It was conventional and artificial because it was a product of human effort and a quality of the man-made world, an experience persons received by virtue of their membership of the *polis*, and not by virtue of their birth.¹²²

Arendt connects this understanding of *isonomia* with the idea that citizenship implies ‘equality within the range of the law’.¹²³ She claims that the equality of citizens in a political realm is ‘necessarily an equality of unequals’ because it concerns individuals who ‘stand in need of being “equalised” *in certain respects and for specific purposes*.’¹²⁴ It is because men are born unequal and remain unequal in society that they need an artificial institution such as the *polis* that could create the conditions for them to be temporarily equal in their interactions with each other. For the modern context, the key takeaway is the insight that law functions as an equaliser for the experience of citizenship i.e. law makes unequals equal so that they may equally enjoy the experience of citizenship within the political realm. She notes that ‘one of the important characteristics of modernity was ‘the Revolutions brought to the fore the experience of being free’, with the result that the public realm was now, theoretically, open to the previously excluded sections of society.’¹²⁵ Although modernity did not resolve the inequalities of the household, to Arendt, democratic constitutionalism

¹¹⁹ Kojin Karatani has made a case for understanding *isonomia* as a conceptual challenge to *demokratia*, a challenge, he argues, that is more egalitarian and faithful to freedom. The problem with his characterisation, however, comes in the distinction he makes between isonomic and democratic forms of political organisations and the insufficient detail to the isonomic ideas *within* democratic theory. Further, Karatani misreads Arendt when he proposes *isonomia* as a critique of democracy as such (and not modern, liberal election-based democracy). For Arendt, democracy, in essence, is a technical device of decision making in so far as it proposes majority decision as the way of resolving conflicts and coming to an agreement (‘the principle of majority is inherent in the very process of decision-making and thus is present in all forms of government, including despotism’). The problem with majority, for Arendt, lies in the conversion of majority decision to majority rule, i.e. when ‘after the decision has been taken, [the majority] proceeds to liquidate politically and in extreme cases physically, the opposing minority. Kōjin Karatani, *Isonomia and the Origins of Philosophy* (Duke University Press 2017).

¹²⁰ Arendt, *The Human Condition* (n 6) 32.

¹²¹ This equality not only presupposed the existence of ‘un-equals’ but was dependent upon the unequal relationships existing outside of the polis between the master of the household and his slaves and women. However, one could experience citizenship only within the artificially constructed public realm: one could experience citizenship ‘only in this specifically political realm, where men met one another as citizens and not as private persons.’ Arendt, *On Revolution* (n 22) 23.

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ Arendt, *The Human Condition* (n 6) 215. Emphasis mine.

¹²⁵ Arendt, *On Revolution* (n 22) 34.

presents an opportunity to *create* artificially equal citizens with equal rights to participate in their governance.

Such a construction of citizenship in a democratic constitutional order presents citizenship as an intentional political project and democratic constitutionalism as an isonomic enterprise. According to Phillips, Arendt highlights the idea that equality is a ‘political commitment and claim.’¹²⁶ This implies, to frame it in terms of Arendt’s distance from Marx, that the artificial equality generated out of politics and law forms a part of the web of promises that sustain a democratic constitutional order. It does not presuppose natural equality, nor does it define inequalities of birth, race, education, and occupation out of existence. The categorisation of artificial equality as a commitment and claim reinforces the relational conception of law that undergirds the experience of citizenship. The equality that is enacted in the performance of mutual promises is a ‘commitment that societies make at the point of adopting democratic systems; a commitment people as individuals make when they talk of human, not just citizen, rights; and a claim people make against their societies whenever they mobilise to challenge subordination or exclusion.’¹²⁷

However, the artificiality of the phenomenon points to the man-made nature of this equality, and in turn, affects the kind of equality that citizens have access to – equality here refers to the equality of opportunity to access the public realm and participate in governance as equals, and not equality in the natural sense. This simultaneously makes artificial equality a limited but also thick construction. It is limited because it acknowledges, from the get-go, the limits of its declarative potential. It aims to equalise members existing within the shared constitutional order for the specific and limited purposes of giving them an equal voice in shared concerns.

However, despite its avowed distance from notions of social or economic equality, the *raison d’être* of artificial equality inevitably grants it a wider domain: because it is directed towards the experience of active citizenship, the conditions that exclude individuals from experiencing active citizenship become a subject matter of political equality, even if they relate more substantially to what has often been associated with human emancipation.¹²⁸ Thus, Arendt notes, government intervention is critical to abolish discrimination that prevents individuals from pursuing their business and leading their life as an equal citizen of the body politic.¹²⁹ She understands that the question of equality of conditions is ultimately a question about the circumstances in the private lives of the individuals that

¹²⁶ Anne Phillips, *Unconditional Equals* (Princeton University Press 2021) 16.

¹²⁷ *ibid.*

¹²⁸ For a critique of Arendt on this point, see Pitkin, ‘Conformism, Housekeeping, and the Attack of the Blob: The Origins of Hannah Arendt’s Concept of the Social’ (n 65); Emiliios Christodoulidis and Andrew Schaap, ‘Arendt’s Constitutional Question’ in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the law* (Hart 2013).

¹²⁹ Hannah Arendt, *Responsibility and Judgement* (Jerome Kohn ed, Schocken 2003) 207. Arendt distinguishes between two kinds of discriminations to argue that while there may be some discriminations within the social sphere where the government may not intervene, when the social discriminations threaten the individuals’ right to equal participation, it is incumbent upon the government to ensure political equality.

prevent them from actualising their position as citizens. To Arendt, the experience of freedom cannot precede the experience of liberation from the biological needs and wants of life.¹³⁰ Consequently, an important aspect of the Arendtian conception of political equality lies in the positive obligations it imposes on the body politic to remove the inhibitors that prevent individuals from enjoying an active public life.¹³¹

Relevant to this discussion is the temporal character of the artificial equality that is generated in Arendt's framework. In so far as law aims at stability and durability, it is a temporal project in two ways. *Nomos* seeks to establish a *polis* as an institution to create a durable realm where the heroic acts and speeches would find life beyond the mortal life of their doer: 'the *polis* had to be founded to secure for the grandeur of human deeds and speech an abode more secure than the commemoration that the poet had recorded and perpetuated in his poem.'¹³² *Lex* relies on a system of mutual promises to guarantee the course of future actions. Consequently, the artificial equality that is enacted is also a project of equalising generations: in such a setting, the succeeding generations stand at the same pedestal as the founding generation with respect to the project of maintaining and changing the constitution – an idea that assumes prominence in Arendt's framing of the citizens' political acts and judgments as the source of power and authority of the constitutional order.

Equal, yet distinct citizens

There is another aspect of the Arendtian notion of equality that gives it its limited nature: the acknowledgement of the fact of human plurality. Arendt views plurality as not just an ideal to be preserved but as a factual reality of living in a political community. She attempts to separate 'equality of conditions' from the acknowledgment of 'differences' and claims that '[t]he more equal conditions are, the less explanation there is for the differences that actually exist between people; and thus all the more unequal do individuals and groups become.'¹³³ Seyla Benhabib calls this the 'dialectic of equality and difference' and notes that it showcases the complexity and multi-layered nature of human interactions and relationships.¹³⁴

To Arendt, when equality is treated as an innate quality possessed by every individual, it turns the political concept of equality into a social concept that brings with it the danger of homogenising the plurality of the members of the body politic at the risk of dismissing as too different whoever does not conform to the uniform category of a normal citizen. She critiques notions of 'the People' for homogenising the citizens and treating

¹³⁰ Arendt, *The Freedom To Be Free* (n 14) 86.

¹³¹ Hannah Arendt and Jerome Kohn, *Thinking without a Banister: Essays in Understanding, 1953-1975* (1st edn, Schocken Books 2018) 510.

¹³² Arendt quotes Thucydides, Arendt, *The Promise of Politics* (n 31) 124.

¹³³ Arendt, *The Origins of Totalitarianism* (n 7) 54.

¹³⁴ Honig, *Feminist Interpretations of Hannah Arendt* (n 20) 96.

them as a monolithic whole capable of acting as a single individual in possession of a single will. In her understanding, equality does not imply sameness. Her critique of Robespierre's 'rule by terror', for instance, is an attempt to point at the absence of any recognition of human plurality in discourses that treat politics as a means to an end (such as the betterment of 'the people') instead of acknowledging that the act of engaging in politics constitutes an end in itself. It allows the citizens to act out their plurality by making promises as plural individuals holding distinct viewpoints even as they act *with* each other as equals.

She critiques Robespierre for homogenising the citizens by using a monolithic '*le peuple*' as the object of politics. She juxtaposes the Roman understanding of *persona* to distinguish between citizens treated as interchangeable human beings and as citizens treated as distinct, yet equal political actors, and claims, '[w]ithout his *persona*, there would be an individual without rights and duties, perhaps a "natural man" – that is, a human being or *homo* in the original meaning of the word, indicating someone outside the range of law and the body politic of the citizens, as for instance a slave – but certainly a politically irrelevant being.'¹³⁵

Arendt carries forward this critique to highlight the tendency of modern electoral democracies to generalise 'the People' and flatten the realities of political contestation. She cautions against viewing 'the People' as a monolithic, pre-political absolute with no ties to the contemporary political realm. Phillips makes special note of Arendt's resistance towards essentialised qualifying properties that make humans human and thus, qualify them for equality. To Arendt, she notes, political equality works on a 'non-natural basis' in the sense that it is 'not something derived from our human characteristics.'¹³⁶ After all, Phillips insists, references to shared biological properties serve to inevitably exclude sections of society, and appealing to 'shared properties' can result in 'the exclusion of the vast majority of humans, either explicitly, as when women or the poor or members of racialized groups are said to have very different—and inferior—properties, or tacitly, in simply rendering the excluded rest of humanity invisible.'¹³⁷ Consequently, in Phillips' reading of Arendt, Arendt's conception of equality generates the important insight that equality should not to be grounded in our qualities or faculties, or in some pre-determined facts about 'our shared rationality or intelligence or dignity or shared willingness to obey the law'.¹³⁸ This is because political equality, she says, does not, and *should not*, disappear if one loses possession of these characteristics.

¹³⁵ Arendt, *On Revolution* (n 22) 103.

¹³⁶ Phillips (n 126) 51.

¹³⁷ *ibid.*

¹³⁸ Phillips notes that even in Arendt's own terms, the notion of political equality she proposes is too limiting because it does not pay sufficient attention to the inequalities produced through, for example, segregated schooling, that contribute to 'unequal access to educational and then to political resources, to important inequalities in the political realm.' Phillips (n 126).

The constitutional implications of pluralising ‘the people’ come out most clearly in Arendt’s discourse on sovereignty. One of the earliest instances where Arendt discusses sovereignty is in her critique of the establishment of Israel as a nation-state.¹³⁹ She found the influence of European nationalism problematic since it inspired a reliance on biological characters, instead of history and culture, as the only criteria of nationhood.¹⁴⁰ The coincidence of sovereignty and nation resulted in the problematic recognition of the nation as the sole determinant of who is in and who is out of the state’s protection.¹⁴¹ Arendt’s criticism of Israel’s state building exercise as a Jewish state in *Eichmann in Jerusalem* and in her letters to Karl Jaspers clarify her attempts to distinguish nationality from citizenship.¹⁴² Arendt’s historical analysis of Jewishness as a naturalized identity further show that she saw it as a process of depoliticization of what was a socially constructed identity.

Subsequently, in the *Origins of Totalitarianism*, Arendt develops her critique of the nation-state through her experience of statelessness and the concomitant loss of citizenship as ‘the right to have rights’. Amongst others, she identifies the decline of the nation-state as one of the catalysts of totalitarianism.¹⁴³ She contends that with the downfall of absolute monarchy the common interest of the people came in danger of being overtaken by permanent conflict among class interests and a struggle for control of the state machinery. The French Revolutionaries, then, ended up relying on the only remaining bond between citizens to symbolise their political unity: common origin. By itself, national sovereignty with its ‘original connotation of freedom of the people’ displayed in self-consciousness of the people as a shared cultural and historical entity bounded by physical territories, was a good thing.¹⁴⁴ The tragedy of the ‘conquest of the state by the nation’ happened when European nationalism perverted the state into an instrument of the nation as a pseudo mystical entity that could arbitrarily determine citizenship. This was problematic because in equating nationals with citizens and the interest of the nation as the only legitimate interest, it inevitably resulted in the exclusion of the minorities as persons of interest and consequently, made it easy for them to be removed from the state’s protection in the name of the ‘national will’.¹⁴⁵ In other words, the pluralism that guarantees political action gave its way to assimilation as the end-goal. Arendt finds that

¹³⁹ It is important to mention here that Arendt’s views changed significantly on the topic. What remains consistent, however, is her critique of the ‘national will’ as a source of juridification in nation-states.

¹⁴⁰ Hannah Arendt, ‘Zionism Reconsidered’ in Jerome Kohn and Ron H Feldman (eds), *The Jewish writings* (Schocken books 2007) 343–74.

¹⁴¹ *ibid* 186–198.

¹⁴² Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 2006); Hannah Arendt, *Hannah Arendt Karl Jaspers Correspondence 1926-1969* (Hans Saner and others eds, Harcourt Brace 1993). See also, Idith Zertal, ‘A State on Trial: Hannah Arendt vs. the State of Israel’ (2007) 74 *Social Research* 1127.

¹⁴³ Arendt, *The Origins of Totalitarianism* (n 7) 300–302.

¹⁴⁴ *ibid* 301.

¹⁴⁵ *ibid* 300. The concept of nation or nation-state appears in various forms in Arendt’s writing. In this particular instance, however, Arendt’s use of the term is ‘historical-political’ because she sees that ‘two factors that had been separate during the eighteenth century, national belongingness and the state apparatus, merged with the advent of the French Revolution.’ See, Volk, *Arendtian Constitutionalism* (n 43) 45–83.

the ‘national will’ as a successor to monarchical sovereignty turned out to be even more absolute and unlimited as the source of power and authority.

Arendt’s consternation with concepts such as ‘national sovereignty’ comes from the notion of undivided centralised power that comes with it. She argues that ‘power under the condition of human plurality can never amount to omnipotence, and laws residing on human power can never be absolute.’¹⁴⁶ She finds it problematic when the ‘factual plurality of a nation or a people or a society’ is ignored in favour of an ‘image of one supernatural body driven by one superhuman, irresistible “general will”.’¹⁴⁷ Arendt says that because the ‘persona’ is a mask that the law of the land can affix to any individual or group or corporation, it could even affix this personality to a ‘common and continuing purpose’ such as the ‘person’ who owns the properties of Oxford or Cambridge colleges without being either the founder or the founder’s decedents.¹⁴⁸ This example gains importance once we see it as a critique of ethnic nationalism and Arendt’s proposition of constitutional citizenship as a condition based on objective bonds for a common cause rather than circumstances of birth.¹⁴⁹

For Arendt, any connotation of ‘the people’ as a whole with a similarly generalised will, discernible by a set of representatives without any consultation, deliberation or exchange of opinions is closer to tyranny than it is to freedom. According to Arendt, the French Revolutionaries fell in the trap of absolutism since the only way the so-called representatives of the *le peuple, les malheureux* (the people, the unfortunate) could possess legitimate power was if they could display the capacity of compassion for a generalised misfortunate whole. She argues that for Robespierre’s government to retain legitimacy, it became obvious that the French people would need to be united into one nation. The ‘one force which could and must unite the different classes of society into one nation was the compassion of those who did not suffer with those who were *malheureux*, of the higher class with the low people.’¹⁵⁰

Arendt argues that humans are incapable of boundless compassion, especially when it comes to political matters: ‘laws and all ‘lasting institutions’ break down not only under the onslaught of elemental evil but under the impact of absolute innocence as well.’¹⁵¹ This, she contends, is because compassion is not fit to be a political virtue since it relies upon absolute goodness of intention and relies upon the absence of reason. Thus, when Robespierre insisted that laws were to be ‘promulgated in the name of the French people’ – as opposed to ones made with the consent of the French Republic – compassion for a mass of deindividualized people, seen only as the ‘low classes’, became the standard of legitimacy for power. When Robespierre made (the virtue of) compassion for the

¹⁴⁶ Arendt, *On Revolution* (n 22) 32.

¹⁴⁷ Arendt, *On Revolution* (n 22) 54.

¹⁴⁸ *ibid* 103.

¹⁴⁹ Passerin d’Entrèves (n 23) 139–165.

¹⁵⁰ Arendt, *On Revolution* (n 22) 74.

¹⁵¹ Arendt, *On Revolution* (n 22) 79.

unfortunate the condition for having legitimate political power, he based the government on the 'natural goodness of a class' namely, the representatives, 'rather than on institutions and constitutions.'¹⁵²

Arendt argues that citizens are 'bound to, and at the same time separated and protected from, each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws.'¹⁵³ A nationalist conception of citizenship that associates citizenship with birth, ethnicity or religion is necessarily bound to the interest of these pre-determined categories.

One of the pillars of Arendt's thought is the notion that in politics, not life, but the world is at stake.¹⁵⁴ By life, Arendt means the immediate bodily needs and wants, the biological necessities that force us to labour. Instead, she argues, politics should be concerned with the world which is what we share with each other and hold in common.¹⁵⁵ A formulation of national sovereignty that presents the nation as a response to the common interest could only relate to the most basic biological needs and would, in Arendt's view, be subsumed by it. Life also implies biological markers for citizenship. Here, what starts as a unifying factor, turns into a propeller for political action in a way that no political action is any longer necessary.

Transposing this insight to our constitutional context, Arendt's writings urge us to take stock of the plurality of the founding generations as evidence of the fact that the foundational text is a negotiated promise amongst equal but distinct individuals. Arendt reasons that 'plurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives or will live.'¹⁵⁶ In other words, the condition of plurality implies not only that all persons are equally worthy of participating in politics, but also that all political actors are unique beings capable of possessing distinct view-points and should be treated as such by a democratic constitutional order. She claims that while our equality allows us to understand each other and the previous generations so that we can plan the future and foresee the needs of the succeeding generations, our capacity to use political speech and actions gives us the tools to communicate our distinct worldviews and appear to each other in the present as unique individuals, '*qua men*'.¹⁵⁷

¹⁵² *ibid* 70.

¹⁵³ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 2006) 262–63.

¹⁵⁴ Arendt, *The Freedom To Be Free* (n 14) 49.

¹⁵⁵ Patricia Owens, 'Not Life but the World Is at Stake: Hannah Arendt on Citizenship in the Age of the Social' (2012) 16 *Citizenship Studies* 297.

¹⁵⁶ Arendt, *The Human Condition* (n 6) 8.

¹⁵⁷ *ibid* 175–6. Self-disclosure or appearing to each other as distinct political actors is an important element of Arendt's rendition of agonistic politics. In *The Human Condition*, while enumerating Labor, Work, Action as the three chief human activities, she gives Action the highest position. This is because it is only through speech and action that human beings can reveal their unique distinctness i.e. communicate viewpoints beyond immediate wants and needs and unprompted by biological necessity or work. See, on the concept of politics as self-disclosure, Honig, 'Arendt, Identity, and Difference' (n 20); Williams (n 10).

In making life, which is the lowest common denominator, the highest goal of politics, human distinctiveness and plurality is made redundant, which, in turn, results in the taking away of avenues for the individuals to experience equality. In other words, the protection and preservation of human plurality is a vital component of public law in democratic constitutional orders because it is inextricably connected with the citizens' experience of equality.

III. Citizenship as self-disclosure and responsibility

Some scholars have raised concerns about Arendt's focus on the political life. Schaap, for instance, argues that 'although she eschews any notion of human nature, Arendt nonetheless presumes a particular conception of human flourishing that is associated with the existential achievements of public appearance'.¹⁵⁸ In this section, I will argue that such a critique is right in identifying the *vita activa* as the locus of Arendt's political thought, but does not adequately capture the depth of the experience of active citizenship.

In the Arendtian perspective, politics is borne out of the aspiration of individuals to make themselves visible in the public arena and establish their presence in the shared realm.¹⁵⁹ The public sphere plays a vital role for those engaged in political actions and discourse not because it allows them to attain personal interests, virtue, or a collective benefit; instead, they experience 'a new existential meaning' that cannot be obtained through other means.¹⁶⁰ This 'new existential meaning' refers to politics as self-disclosure: politics allows citizens to disclose their identities, and in doing so, I argue, it allows them to take responsibility for the maintenance of the shared constitutional order. Thus, Arendtian constitutional theory's emphasis on active citizenship concurrently operates to provide the citizens with the opportunities to reveal their authentic, plural political selves to their peers *and* to share the responsibilities of caring for the things they hold in common.

Citizenship as a site of constant contestation

In section I, I argued that making a promise is a public action that establishes a connection between our future actions and the political destinies of those to whom we have made commitments or refrained from affecting. Our future behaviour is no longer unrestricted, as when we inform others of our promise, we pledge to be publicly answerable for our forthcoming conduct. This interweaving of future outcomes simultaneously forges a connection and shapes a political persona. Through promising, we

¹⁵⁸ Andrew Schaap, 'Enacting the Right to Have Rights: Jacques Rancière's Critique of Hannah Arendt' (2011) 10 *European Journal of Political Theory* 22, 24.

¹⁵⁹ Arendt, *The Human Condition* (n 6) 199–206.

¹⁶⁰ Lederman (n 20) 334.

communicate to others how our political actions and expressions will relate to them. By honouring these commitments, we formalise our identity by consciously upholding them.

The idea that personas can be created only through political action finds evidence in Arendt's description of the realm of political action as the 'space of appearance'.¹⁶¹ The space of appearance comes into existence whenever individuals get together to act. She equates it to a stage where 'living beings *make an appearance* like actors.'¹⁶² 'To be alive,' Arendt argues, 'means to be possessed by an urge towards self-display which answers the fact of one's own appearing-ness.'¹⁶³ Thus, to lead a human life implies living among men (*'inter homines esse'*)¹⁶⁴ and death means 'to cease to be among men (*inter homines esse desinere*).'¹⁶⁵

Arendt equates acting politically as the attempt to 'insert ourselves in the world', like a 'second birth'.¹⁶⁶ Through political action and speech, we present an image of ourselves to our peers. This presentation, however, goes beyond merely conveying basic human needs and emotions, such as thirst, hunger, affection, hostility, or fear, and extends to openly and intentionally expressing our individuality, setting us apart from being mere objects. According to Arendt, political identities refer to more than just our 'qualities, gifts, talents, and shortcomings' or even our positions and roles in the society: they may tell the observer *what* we are, but the *who* can only be revealed through political actions.¹⁶⁷ Adriana Cavarero goes as far as to argue that 'the intrinsic political character of speech does not consist, for Arendt, in its function of expressing that which is good, right, useful, and harmful for the community but instead consists in the ability to express and communicate to others the uniqueness of the speaker.'¹⁶⁸ Writing about the Italian Sardine's movement from November 2019 and the people who gathered in the Italian piazzas to protest against racism and the right-wing parties actions, Cavarero claims that the protestors were exemplifying a genuinely Arendtian message: 'We are plural, each an embodied uniqueness, distinct and equal, rejecting exclusion and enacting inclusion. We embrace and empower differences.'¹⁶⁹

However, as Arendt notes, at any given point in time, it is impossible to determine with great specificity the political identity of a political actor. The 'who' of the individual, although plainly visible to their peers, retains a mysterious elusiveness that frustrates any attempts at clear verbal articulation. Thus, '[t]he moment we want to say who somebody is, our very vocabulary leads us astray into saying what he is' and we cannot but describe a

¹⁶¹ Arendt, *The Human Condition* (n 6) 199.

¹⁶² Hannah Arendt, *The Life of the Mind* (Harcourt 1981) 21.

¹⁶³ *ibid.*

¹⁶⁴ Arendt, *The Human Condition* (n 6) 51.

¹⁶⁵ *ibid* 8f.

¹⁶⁶ *ibid* 176–177.

¹⁶⁷ *ibid* 179.

¹⁶⁸ Adriana Cavarero, 'Politicizing Theory' (2002) 30 *Political Theory* 506, 512.

¹⁶⁹ Adriana Cavarero, *Surging Democracy: Notes on Hannah Arendt's Political Thought* (Stanford University Press 2021) xi.

person by the ‘qualities he necessarily shares with others like him’ with the consequence ‘that his specific uniqueness escapes us.’¹⁷⁰ In other words, while politics allows the individuals to act out and perform their political identities, the identities themselves are never fixed.

Consequently, an important insight is added to the understanding that active citizenship is a relational, equalising experience: citizenship is a site of constant contestation. Here, the contestation arises from, and responds to, the forever developing political judgments of the individual and their peers. In other words, the experience of citizenship emerges out of one’s interactions with one’s peers and, in that sense, is equally dependent upon law and politics for its realisation. In such a framing, citizenship appears as a normative-descriptive idea that avoids the shortcomings of idealisation by leaving open the possibilities of creation and change of identities through the intersubjective activities of the political actors. Further, it alerts us to the insight that despite the focal status of active citizenship for the experience of democratic constitutionalism, it must necessarily remain a site for constant contestation to keep open the channels for challenging the petrification of certain identities.

A substantive and realist view to citizenship would see citizenship in democratic constitutional orders as a negotiated identity dependent upon the acknowledgment of one’s peers and reflects the relationship one has with other citizens. In making negotiations, and not one’s claim to humanity or some biological identity, the Arendtian conception of citizenship avoids essentialising identities. As Morris Kaplan notes, ‘by marking as inherent qualities the effects of shared historical circumstances, racialized identities served to naturalize and internalize the subordination of marginal groups, subjecting them to continuing social control as distinct, transparent and permanent minorities.’¹⁷¹

Here, Honig, who reads ‘with and against Arendt’ to clarify what citizenship as a negotiated identity could look like for modern democracies, provides an elegant way forward.¹⁷² According to Honig, political identity of a citizen is a site of contesting values; and, importing an identity from the social sphere serves only to disturb the agonism inherent in Arendtian politics.¹⁷³ She endorses Arendt’s concerns about the homogenising effects of an identity-based politics but pierces through the rigidity of Arendt’s private-political distinction by arguing that if the aim is to disrupt the *status quo*, a more effective method is to radicalise Arendt’s agonism: ‘performative politics can be harnessed by a feminism that presupposes not an already known and unifying identity of ‘women’ but agonistic, differentiated, multiple nonidentified beings that are always becoming, always

¹⁷⁰ Arendt, *The Human Condition* (n 6) 181.

¹⁷¹ *ibid* 6.

¹⁷² Honig, ‘Toward an Agonistic Feminism: Hannah Arendt and the Politics of Identity’ (n 74); Morris Kaplan, ‘Refiguring the Jewish Question: Arendt, Proust, and the Politics of Sexuality’ in Bonnie Honig (ed), *Feminist interpretations of Hannah Arendt* (Pennsylvania State University Press 1995).

¹⁷³ Honig, *Feminist Interpretations of Hannah Arendt* (n 20).

calling out for augmentation and amendment.¹⁷⁴ Although she speaks with respect to sex-gender identities, Honig's reading of Arendt can be replicated for all political identities and gain relevance for understanding citizenship in democratic constitutional orders.

Citizenship as an identity in democratic constitutional orders is not about conformity or the suppression of individual characteristics and is better understood as a concept that embraces differences and allows for a pluralistic understanding of human existence. Here, the equality inherent in citizenship is not conditional on shared properties but acknowledged as an unconditional commitment and claim for equal treatment. In such a reading, citizenship is constitutive but not determinative of the identities that a citizen may choose to claim and disclose by acting in the political realm. The individual self is, then, constituted in an ongoing, dynamic way by the relationships through which each person interacts with others and performs their identity. Consequently, citizenship is better understood, formulated, and preserved as a negotiated identity that finds expression in law but is dependent upon politics for its materialisation. Law plays a crucial role in shaping the citizen by defining their relationship with the in-between space, the intangible public realm, and the tangible public domain.

Active, responsible citizen

There is another, equally important insight that can be sourced from the Arendtian understanding of politics as self-disclosure, namely, the connection between active citizenship and political responsibility. Some scholars have read Arendt's discourse on politics to be devoid of any substantive, normative content.¹⁷⁵ The argument is that by making political expressions the peak of human activity, Arendt shows a reluctance to give any moral criteria for politics. In the words of Mary Dietz, 'without a substantive purpose, Arendt's courageous political performer is constantly in danger of becoming only an actor, "concerned merely with the 'impression' he makes".'¹⁷⁶ Such critiques, in my opinion, miss an important aspect of Arendt's thought: *amor mundi*, the capacity to love the world as it is. For the most part, the way Arendt talks about citizenship reflects her emphasis on the ability of politics to create new beginnings. However, the political actors' capacity for novelty is simultaneously accompanied by a commitment towards the durability of the hence instituted beginnings. To Arendt, constitutional foundings in particular show the dual nature of political action – as change and stability – when individuals constitute a public realm with the aim of creating 'lasting institutions'.¹⁷⁷ Freedom in a democratic

¹⁷⁴ *ibid* 7.

¹⁷⁵ George Kateb, *Hannah Arendt: Politics, Conscience, Evil* (Robertson 1984); Pitkin, 'Justice' (n 52); Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Rowman & Littlefield 2003).

¹⁷⁶ Mary G Dietz, "'The Slow Boring of Hard Boards': Methodical Thinking and the Work of Politics' (1994) 88 *American Political Science Review* 873.

¹⁷⁷ Arendt, *On Revolution* (n 22) 92, 228.

constitutional order, she proposes, refers to the citizens' capacity to participate in their governance and is intrinsically related to the citizens' ability to take responsibility for the shared constitutional order. As Bernstein notes, her argument is that 'we take responsibility for our presence in the world by acting; we take responsibility for the world itself, for all that is sedimented in the institutions and practices we inhabit, when we act to found a state.'¹⁷⁸

I have discussed how the establishment of a constitution is coterminous with the construction and formalisation of citizenship in the body politic. Citizenship is constituted by the formalisation of the relationships that come into existence when people join together to establish a lasting political community. In declaring 'we, the People', we not only declare each other as being equal citizens with respect to the state, but also acknowledge the commitment we have made to each other with the establishment of the constitution. In so far as our own political identities are a result of promise-making and promise-keeping, our political personas are intrinsically connected with our sense of responsibility. This sense of responsibility however does not concern moral considerations of human conduct regarding the self; instead, it concerns political considerations concerning the world.¹⁷⁹

To put it differently, the stability of our political identities is linked with the stability of the public realm within which we have promised to appear in a certain way. Creating a promising and sustainable society requires the establishment of stable institutions, which, in turn, depend on citizens following through on their commitments. This commitment is bound with the citizens' love for the shared constitutional world, a concept that can be derived from Arendt's writings on *amor mundi*, which she translates to the 'love of the world'. Connected also is the idea that when citizens participate in their governance, they actively take a part in building the legal and political world which they share with their peers and will leave for the next generation. Translating this into the context of the Arendtian categories of 'work' and 'action', Markell emphasizes that both work and action are vital in the process of constituting a responsible citizen.¹⁸⁰ Thus, as Arendt points out, '[j]ust as promises and agreements deal with the future and provide stability in the ocean of future uncertainty where the unpredictable may break in from all sides, so the constituting, founding and *world-building capacities* of man concern always not so much ourselves and our own time on each as our "successor," and "posterities".'¹⁸¹ In this sense, the 'world-building' capacity of citizens is connected with the sense of responsibility that underpins their political action.¹⁸²

¹⁷⁸ Bernstein, 'Promising and Civil Disobedience: Arendt's Political Modernism' (n 36) 116.

¹⁷⁹ Passerin d'Entrèves (n 23) 94.

¹⁸⁰ Markell, 'The Rule of the People' (n 18).

¹⁸¹ Arendt, *On Revolution* (n 22) 174. Emphasis mine.

¹⁸² Passerin d'Entrèves (n 23) 94.

According to Arendt, ‘our sense of unequivocal reality is so bound up with the presence of others that we can never be sure of anything that only we ourselves know and no one else.’¹⁸³ In other words, we need the presence of our peers to give objectivity to our experiences, acts and judgments. She notes how this influenced the way men of the Revolution experienced *public* freedom: ‘freedom for them could exist only in public; it was a *tangible worldly reality*, something created by men to be enjoyed by men rather than a gift or a capacity, it was the man-made public space or market-place which antiquity had known as the area where freedom appears and becomes visible to all.’¹⁸⁴ This is why, she argues, the act of foundation and the framing of a constitution by constitutional assemblies is a momentous event for modern times. And, for democratic constitutional orders, this sense of responsibility encompasses a commitment to pluralism and materialises in the responsibility of the citizens to remain attentive to human plurality.

The conception of *amor mundi* can be traced to Arendt’s dissertation on Augustine where she finds two distinct forms of love: love as craving (*cupiditas*) and love as remembering (*caritas*).¹⁸⁵ The concept of love as craving originates from a sense of deficiency and fixates on a specific object that triggers the desire. This desire serves as the motivating force driving the individual to pursue and ultimately enjoy the object, perceiving it as something inherently good. However, this craving inevitably transforms into the apprehension of losing the cherished object once acquired, as life itself remains fleeting, even if the desired object endures. Arendt’s exploration of the second form of love, drawing from Augustine’s examination of memory in *The Trinity*, centres on what allows a lover to recognize something as good and lovable. While experiences of ‘justice’ and ‘happiness’ do not directly manifest in our worldly encounters, we possess a profound sense of what these concepts entail. In Arendt’s reading, Augustine contends that they must be innate experiences within pure consciousness, and the faculty of memory serves as the conduit enabling the lover to access these intuitions during acts of love. Building on Augustine’s ideas, Arendt asserts that in contrast to the initial mode of love-as-craving, this second mode of love-as-remembering leads the self on a quest to discover its origins and ultimately connect with the Creator God. Whereas the first form of love is characterized by a fear of mortality, this second form is marked by an appreciation for birth and existence, which, according to Arendt, represents the capacity for new beginnings or what she terms ‘natality.’¹⁸⁶

However, in her later years, Arendt finds these two conceptions of love to be inadequate, in so far as love plays a role in the political realm. Thus, Arendt travels beyond Augustine’s ‘neighbourly love’ by trying to make it work in her distinctly political conceptual frameworks. Joanna Scott and Judith Stark argue that between writing her

¹⁸³ Arendt, *On Revolution* (n 22) 92.

¹⁸⁴ *ibid* 120. Emphasis mine.

¹⁸⁵ Hannah Arendt, *Love and Saint Augustine* (University of Chicago Press 1996) 18.

¹⁸⁶ *ibid* 146–48.

dissertation in 1929 and making revisions to it in the 1960s, Arendt builds natality as the moral equivalent normative ideal for her theory. They argue ‘the problem of abstract categories of judgement imposed on the human community from the outside is Augustine’s but also Arendt’s [problem].’¹⁸⁷ They point out that the avoidance of thinking and responsibility for behaviour – a theme that Arendt highlights in her dissertation on Augustine – can be seen as a precursor to her conceptualisation of the ‘banality of evil’ and *Eichmann in Jerusalem*.¹⁸⁸

For Arendt, Augustine’s conceptions of love fall apart when one tries to use them to explain how and why one must respond to evil when the normal standards of behaviour have lost their authority. While Augustine’s conception of ‘neighbourly love’ tells us why we must love beyond ourselves, it fails to answer a key question: ‘who is my neighbour without offering the equivocal response “every man because they have rational souls which I love even in thieves”.’¹⁸⁹ For Arendt, ‘every man’ is not an answer that can work in the political realm because it directs love ‘not at men in their concrete uniqueness but towards the most abstract quality of being human.’¹⁹⁰ Her critique of the use of compassion in the public realm, discussed in the previous section, also corresponds to her consternation with Augustinian love. It thus becomes clear to Arendt that love, if it is to hold any significance in the political realm, must be derived from a different source – one that exemplifies care for the other without reducing the other to their most basic ‘human’ characteristics.

Consequently, she starts to think about another, political kind of love, the *amor mundi* that allows us to care for the world and our peers in all their alterity. By conceiving of love in this political sense, Arendt places the fact of human plurality as an object of care, transforming the objective behind Augustine’s ‘love of the neighbour’ into the ‘equality of interdependence’. It implies, especially in a constitutional democracy, that the “coexistence” of human beings is no longer “everyday” but is “freely chosen” and entails obligations to the neighbour.¹⁹¹

A brief reference to Arendt’s Kantian influence further clarifies how the freely chosen interdependence of our plural existence corresponds with the responsibility we share as citizens of a constitutional democratic order. The Kantian idea of ‘enlarged mentality’ finds significant congruence with Arendt’s conception of imagination. Imagination, in Arendt’s writings appears as an important part of the activity of judging, and consists of the ability of making the others, in their alterity, present in an internal imaginative space that nonetheless mimics the external public realm. The notion that we can expand our thinking to consider the thoughts of others involves assessing our

¹⁸⁷ *ibid* 164.

¹⁸⁸ *ibid* 144.

¹⁸⁹ *ibid* 164.

¹⁹⁰ *ibid* 167.

¹⁹¹ *ibid* 102.

judgments to account for the potential judgments, the possible rather than the actual judgments of others and requires us to place ourselves in the place of the other.¹⁹²

One way to understand the importance of imagination in Arendt's writings is to find its relevance in her discourse on the 'banality of evil.' Her observations on Eichmann lead her to the claim that one of the main ways in which the Nazi regime was able to function efficiently was due to the inability of bureaucrats such as Eichmann to think, and consequently, take accountability of their actions.¹⁹³ She notes, how 'the inability to think has fatal implications for the faculty of judging'¹⁹⁴ and that the lessons from our experiences of the Nazi regimes is that 'the responsibility for making judgments' cannot be overlooked 'even when commitments and allegiances of a familial or national kind would seem to intrude'.¹⁹⁵

Another way to think about the importance of imagination for the citizens' sense of responsibility lies in conceptualising citizenship itself as being concerned with the shared legal-political order. Imagination allows citizens to not only develop a sense of political judgment that takes into account the plural existence of individuals around them, but also consists of acting – and through acting, performing the standards of action – that further respond to human plurality.

According to Arendt, paying attention to *logon didonai*, the Greek phrase for 'to give an account' allows us to see how political action is accompanied by standards of accountability that are generated autonomously out of the political act itself. In this context, accountability doesn't require proof, but rather consists of the act of providing explanations for one's opinions and the reasons behind them.¹⁹⁶ She notes that the Greek actor's interest in *doxa* implies a concern for fame 'that is the opinion of others'.¹⁹⁷ Here, because fame can be achieved only through the opinion of others, the actor's action necessarily must take into account the potential judgments of the spectators. Although Arendt's thought has been influenced to a great deal by Kant, she moves beyond Kant when she distinguishes between the three ways in which we can consider the affairs of men: as the human species generally and its progress; as singular individuals as moral beings and an end in themselves; and 'as men in plural, who actually are in the centre of our consideration and whose true end is... sociability.'¹⁹⁸ Further, while the concept of 'enlarged mentality' for Kant extends to a humanistic universalism, for Arendt, the actualities of public governance and administration implies that the political realm will necessarily be spatially limited.¹⁹⁹

¹⁹² Hannah Arendt, *Lectures on Kant's Political Philosophy* (Ronald Beiner ed, University of Chicago Press 1992) 43.

¹⁹³ Arendt, *Responsibility and Judgement* (n 129) 37.

¹⁹⁴ Arendt, *Lectures on Kant's Political Philosophy* (n 192) 101.

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid* 41.

¹⁹⁷ *ibid* 55.

¹⁹⁸ *ibid* 26.

¹⁹⁹ *ibid* 75; *ibid* 44.

Consequently, the actor's reliance on the spectator's opinion means that the actor's actions are not autonomous in the sense that the actor does not act based on an inherent and independently individualistic voice of reason but rather in accordance with what the audience anticipates from them. The spectator's judgment 'is autonomous' that is, it is not imposed from the outside and instead, comes out of the actor's acknowledgement of human plurality and is, thus, bound to the plurality of the individuals within the democratic constitutional order.²⁰⁰ And by taking into account the actual and potential judgments of the plural spectators, the citizen enlists their own activity into the set of actions that correspond with a concern for what the citizen and her spectating peers care for and hold in common: the shared constitutional order.

Conclusion

In this chapter, I have described the nature of active citizenship in democratic constitutional orders. For Arendt, the establishment of a democratic constitutional order is coterminous with the constitution of active citizenship because establishment represents the joining together of plural individuals 'on the strength of mutual promises' to constitute a political realm within which they can all experience citizenship.²⁰¹ The *polis* that otherwise disappears the moment the actors disperse can be kept into existence by the force of mutual promises or contract.

I argued that such a notion of citizenship is relational in the sense that it is based on reciprocity and comes out of 'confidence in one another, and in the common people.'²⁰² In such a framework, the unpredictable nature of politics is tamed, and freedom of the citizen is preserved through a system of promises.²⁰³ The relational conception of law that Arendt associates with democratic constitutionalism constitutes active citizenship in two ways. Through action, law 'establishes new relationships between men... in the sense of an agreement between contractual partners' and reflects the promise to construct and maintain a public realm where the experience of citizenship can be preserved and upon entering which citizens enjoy freedom *qua* citizens.²⁰⁴ Simultaneously, law, in its function as 'work' acts as the stabilising institution that maintains the tangible and intangible infrastructures for citizens to experience relational citizenship.

²⁰⁰ Arendt, *Lectures on Kant's Political Philosophy* (n 192) 55.

²⁰¹ Arendt, *On Revolution* (n 22) 167.

²⁰² *ibid* 182.

²⁰³ Arendt adopts an antiquity-inspired definition of freedom as non-domination: 'full independence of the necessities of life and the relationships they originated' i.e., freedom from "compulsion by others.' *ibid* 13. Arendt reads in Nietzsche the unequaled clarity connecting human sovereignty and the promise making capacity. *ibid* 245. This sovereignty 'resides in the resulting, limited independence from the incalculability of the future, and its limits are the same as those inherent in the faculty itself of making and keeping promises.' *ibid*.

²⁰⁴ Arendt, *The Promise of Politics* (n 31) 180.

Consequently, to be a citizen of a constitutional order represents being in a web of human relationships built on mutual promises. In such a coming together, where a ‘body of people bound and kept together...by an agreed purpose for which alone the promises are valid and binding’, the homogeneity of past and origin, the decisive principle of the nation-state, starts to lose relevance in the formation of a political community.²⁰⁵ I identified isonomy as a central aim of the Arendtian conception of a democratic constitutional order. *Isonomia*, the system of government that precludes ruling as well as being ruled by another, is juridified as an artificially enacted equal citizenship under the constitution, and the citizen is made an equal participator in government without homogenising her distinctiveness.

Finally, I highlighted the Arendtian critique of the conceptualisation of citizenship in pure, formal terms, and argued that notwithstanding its dependence on legal recognition, citizenship should be looked at as a negotiated identity, dependent also upon being acknowledged as such by one’s fellow citizens. I examined the Arendtian conception of politics as self-disclosure: politics emerges from individuals’ desire to become visible in the public sphere and establish their presence in the collective domain. The public arena plays a crucial role for those involved in political activities and discourse, not because it enables them to achieve personal interests, virtues, or collective benefits. Instead, they encounter a new existential meaning that cannot be obtained through other avenues. This new existential meaning signifies politics as an act of self-revelation: politics allows citizens to unveil their identities, and in doing so, it enables them to assume responsibility for upholding the shared constitutional order.

In this chapter, I focused on the nature of citizenship and the way in which it is constituted through law and action. A description of the Arendtian conceptualisation of active citizenship, however, would be incomplete without devoting a separate discussion to what it means to act as a citizen. In the next chapter, I elaborate how active citizenship in a democratic constitutional order, for Arendt, is bound with the experience of freedom.

²⁰⁵ Arendt, *On Revolution* (n 22) 173.

Chapter Two

FREEDOM AS POLITICS

In the last chapter I alluded to the strong relationship between the experience of active citizenship and the experience of freedom. The term ‘active’ in active citizenship refers to the ability of citizens to actively participate in their governance. Arendt characterises the citizens’ capacity for political participation as *political* freedom and places it at an exalted position with respect to the experience of citizenship. In this chapter I examine the Arendtian notion of freedom as politics and take forward the implications of this connection for the role of participation and the space for representation in Arendt’s framing of a democratic constitutional order.

Arendt’s conceptualisation of freedom is one of the most comprehensive themes in her constitutionalist writings.¹ It appears in many forms. In a more direct sense, she claims that a revolution may be considered a success only if it establishes freedom.² She implies that a democratic constitutional order is a ‘constitution of freedom’ if it institutes a public realm where its citizens can participate equally in their governance.³ She even goes on to critique the American Constitution for failing to establish durable institutions that would enable public participation.⁴ In a more philosophical sense, Arendt presents the experience of freedom as the *raison d’être* of all political action.⁵ Here, a thicker understanding of freedom, and one that corresponds with the Arendtian notion of politics as self-disclosure that I discussed in the last chapter, points at its role in leading a meaningful life.⁶ It reflects what for Arendt is one of the highest activities a human being is capable of: disclosing one’s political person to and acting with one’s peers. Further still, freedom also appears in her writings as an elusive experience. She often associates the experience of freedom with either politics in antiquity or modern revolutions, presenting it as an ephemeral experience that is always in danger of being lost.⁷

Because of the breadth and richness of the concept, it would not be possible to comprehensively cover Arendt’s thoughts on freedom in this chapter. Instead, I focus

¹ Freedom makes an appearance in a number of Arendt’s writings: Hannah Arendt, ‘What Is Freedom?’, *Between Past and Future* (Penguin books 2006) 154; Hannah Arendt, *On Revolution* (Faber & Faber 2016) 30–1; Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 2018) 30–1; Hannah Arendt, *The Promise of Politics* (Jerome Kohn ed, Schocken books 2005) 116–24.

² Arendt, *On Revolution* (n 1) 21–58, 141.

³ *ibid* 141.

⁴ *ibid* 235–37.

⁵ Hannah Arendt, ‘Freedom and Politics, A Lecture’, *The Freedom To Be Free* (Penguin Books 2020) 33.

⁶ On the Arendtian notion of politics as self-disclosure, see Jacques Taminiaux, *The Thracian Maid and the Professional Thinker: Arendt and Heidegger* (Michael Gendre tr, State University of New York Press 1997) 79–87; Margaret Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (Cambridge University Press 1995); Seyla Benhabib, ‘Hannah Arendt’s Political Engagements’ in Roger Berkowitz, Jeffrey Katz and Thomas Keenan (eds), *Thinking in Dark Times* (Fordham University Press 2009) 55–61.

⁷ Arendt, ‘What Is Freedom?’ (n 1).

more specifically on the ways in which Arendt's discussion on freedom is relevant for completing the definition of active citizenship I had started to lay out in the last chapter. I engage in a close reading of Arendt's writing to describe the foundations of Arendt's conception of freedom as politics and suggest that the insights from the last chapter on viewing law as both *nomos* and *lex* can be taken forward to theorise a space for representation: analogous to law as work, representation enables the citizens to experience participatory action.

The Arendtian conception of freedom is often presented in terms of its affinity with political action.⁸ To Arendt, a democratic constitutional order successfully establishes freedom if it creates the public spaces and avenues for the citizens to experience freedom through participation. Political freedom as political participation generates an image of a positive conception of freedom that responds to the phenomenological nature of Arendt's enquiry into the experience of active citizenship. However, as I propose in this chapter, a negative conception of freedom exists within her discourse on freedom. This negative freedom refers to freedom of thought that is critical for citizens to be able to think, judge and take responsibility for their actions.

Understanding Arendt's conceptualisation of freedom as politics in this dual sense is important for avoiding the common misreading of her writings as being only concerned with direct participation. Arendt is sometimes presented as a theorist of direct political action who not only romanticises political participation by eschewing the value of representation but is also criticised for a kind of democratic elitism that privileges a political life at the risk of denigrating a life that is primarily occupied with earning the means of basic subsistence.⁹ It is my contention that Arendt displays an appreciation for representation as a valuable form of political organisation and as a way of experiencing active citizenship. The value of representation, in Arendt's framework, comes out of the vital role representation plays in ensuring a plurality of opinions in the public sphere. Further, much like the 'work' performed by administration for the maintenance of the relational aspects of law, representation supplements the experience of active citizenship. The object of Arendt's critique, thus, is not representation as such, but an ordering of institutions where representation takes over or makes redundant political participation i.e., when instead of supporting the experience of active citizenship, it supplants citizens' participation in their governance.

The chapter proceeds as follows. I begin the chapter with a discussion of the three claims that inform Arendt's conception of freedom as politics: that political action is necessarily unpredictable, that free political action requires the presence of others, and that

⁸ Bhikhu C Parekh, *Hannah Arendt and the Search for a New Political Philosophy* (Palgrave Macmillan 2015); Canovan (n 6).

⁹ George Kateb, 'Arendt and Representative Democracy' [1983] *Salmagundi* 20; Margaret Canovan, 'The Contradictions of Hannah Arendt's Political Thought' (1978) 6 *Political Theory* 5; Emiliios Christodoulidis and Andrew Schaap, 'Arendt's Constitutional Question' in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the law* (Hart 2013).

the experience of freedom is reliant on both, freedom of thought and freedom of action. Combined, the three claims produce a distinct understanding of political freedom as participation. Next, I analyse this understanding of freedom as politics by drawing out the normative burdens she places on the citizens' ability to participate in their governance. I trace her comments on freedom and revolutionary constitution-making, before explicating freedom as the right to participate in governance once the constitution has established a political order. Finally, I present a reading of Arendt's writings to argue that her conception of freedom is not limited to forms of political organisation that are based on direct participation but can be extended to justify the value of representation for the experience of freedom and active citizenship.

I. Three claims about freedom

Three claims underlie Arendt's conception of freedom as politics. The first claim is that freedom is a 'worldly tangible reality' that can be experienced not as the freedom of will but as the freedom to speak and act in unpredictable and miraculous ways.¹⁰ The second claim is that 'people can only be free in relation to one another' and so, freedom can only be experienced in the public realm, i.e. in the presence of one's equals.¹¹ A third, related claim is that freedom requires both, freedom of thought and freedom of action. She acknowledges that given the experiences of total domination where 'freedom disappeared where politics became endless and limitless', it is understandable why we might doubt that there exists a positive coincidence of politics and freedom.¹² But a rigid understanding of politics as antithetical to freedom and the notion that 'freedom begins where politics ends' reduces freedom to a marginal phenomenon, overtaken by security and private welfare as the ends of governance.¹³

In this section, I theorise Arendtian political freedom in terms of the unpredictability of action and the requirement of publicness. And I use her diagnosis of the distortion of the idea of freedom in modernity to contextualise and propose that a guarantee of freedom *as* politics is nevertheless dependent upon the institutional guarantees of freedom of speech and thought.

¹⁰ The idea of freedom as 'tangible worldly reality' appears throughout her work: Arendt, *On Revolution* (n 1) 275; Arendt, 'Freedom and Politics, A Lecture' (n 5) 35; Hannah Arendt, *The Freedom To Be Free* (Penguin Books 2020) 5. See also, Lucia Rubinelli, 'Arendt and the French Revolution', *Constituent Power: A History* (Cambridge University Press 2020) 176–205.

¹¹ Arendt, *The Freedom To Be Free* (n 10) 34.

¹² *ibid* 35.

¹³ Arendt, 'What Is Freedom?' (n 1) 148.

Unpredictability of action

What does it mean to act freely? For Arendt, it is the ability ‘to *call* something into being which did not exist before, which was not given, not even as an object of cognition or imagination, and which therefore, strictly speaking, could not be known.’¹⁴ In other words, freedom lies in being able to act in unpredictable ways and, she borrows from Kant, to ‘begin a series of occurrences entirely from itself.’¹⁵ This is a positive dimension of freedom that is missed, she argues, when freedom is reduced to a matter of will, ‘a freedom of choice that arbitrates, and decides between two given things.’¹⁶

Freedom, when defined in terms of will, refers to the mental capacity of the individual to choose between two options. The location of freedom, in this case, is inside the human mind, and protection of freedom requires preventing anything from interfering with the human will. In such a conceptualisation, freedom is understood as the absence of undue influences on the causes of human conduct. Arendt says we come face to face with the inner contradictions of such a conception of freedom when on the one hand, free will is taken to be a self-evident truth in practical and political matters, and on the other hand, scientific and theoretical endeavours proceed with the assumption that everything we do is subject to cause and effect. She argues that in grappling with these metaphysical considerations, the Western philosophical tradition ‘has distorted, instead of clarifying, the very idea of freedom such as it is given in human experience by transposing it from its original field, the realm of politics and human affairs in general, to an inward domain, the will.’¹⁷

She critiques the Western tradition of philosophy for privileging a life of contemplation, the *vita contemplativa*, over a life of action, the *vita activa*.¹⁸ Briefly put, the argument is that the Western philosophical tradition, beginning with Plato’s case for a philosopher-king and ending when Marx ‘turned away from philosophy so as to ‘realize’ it in politics’¹⁹, misconstrues the potential of politics and political freedom. Plato’s philosopher-king is capable of *seeing*, through contemplative thought, the true form the perfect *polis* must take and is thus the best placed to rule the populace so that he may direct

¹⁴ *ibid* 150.

¹⁵ Arendt, *The Freedom To Be Free* (n 10) 67.

¹⁶ Arendt, ‘What Is Freedom?’ (n 1) 150.

¹⁷ *ibid* 144.

¹⁸ The critique emerges primarily in *The Human Condition* but resurfaces in shorter essays in her later years, Arendt, *The Human Condition* (n 1) 248–326; Hannah Arendt, ‘Montesquieu’s Revision of the Tradition’ in Jerome Kohn (ed), *The Promise of Politics* (2007). For an analysis of the tradition with respect to the meaning of freedom and politics, see Steve Buckler and Hannah Arendt, *Hannah Arendt and Political Theory: Challenging the Tradition* (Edinburgh Univ Press 2011); Michael Wilkinson, ‘Between Freedom and Law : Hannah Arendt on the Promise of Modern Revolution and the Burden of “the Tradition”’ in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the law* (Hart Publishing 2012).

¹⁹ Hannah Arendt, *Between Past and Future* (Penguin books 2006) 17.

the citizens to *make* the city in the image of this model, removing any need for the citizens to engage in any political action. With Marx, the tradition is turned on its head, when, inspired by a vision to realise universal freedom and equality, he seeks to transform politics *as a means* to achieving an end that ‘History’ has all along been aiming at.²⁰ In contrast, the actual experience of revolutions brought to the scene of politics the experience of freedom *as* politics, dispelling any notion of freedom as the end of politics (Marx) or freedom as the absence of politics (Plato).²¹

Arendt contends that two notable philosophers, Kant and Montesquieu, demonstrate an acute awareness of the limitations within the Western philosophical tradition.²² She discerns in Kant’s writings a fundamental divergence between the concepts of will and action, which she interprets as evidence of an inherent contradiction in the idea of freedom as free will. She reads Kant’s work as encompassing two distinct political philosophies: one stemming from the *Critique of Practical Reason* that regards freedom as an attribute of the will, and the other from the *Critique of Judgment* that considers freedom a quality of the imagination rather than the will.²³ In Arendt’s reading, Kant’s differentiation between ‘pure’ and ‘practical’ reason and his attribution of freedom as the capacity for reasoning and self-legislation stem from his recognition that political freedom, signifying what one can *do* within the political realm, differs from philosophical freedom, representing what one can *will* within the realm of thought.²⁴

Similarly, she takes note of Montesquieu’s distinction between ‘philosophic liberty’ and ‘political liberty’.²⁵ While ‘philosophical freedom’ lies in the exercise of will undisturbed by circumstances and in the pursuit of the goals set by such an exercise of will, ‘political freedom ... consists in being able to do what one ought to will.’²⁶ Like Kant, she claims, Montesquieu is also aware of the fact that an individual could not be called free acting if they lacked the capacity to act.²⁷ The difference between the two philosophers is that for Montesquieu, it is irrelevant whether this impediment is caused by factors interior or

²⁰ Arendt’s discourse on Marx is a little more complicated. As Kohn points out, she studied Marx thoroughly and, despite how she portrays him in her later works, had significant agreements with him, so much so that, at places, she defends him against conservative critics and differentiates Marxism from Marx’s own role in the politics of his day. Arendt, *The Promise of Politics* (n 1) xiv.

²¹ Arendt, *On Revolution* (n 1) 126–130.

²² On Arendt’s use of Kant and Montesquieu, Arendt’s reading of the two philosophers can be taken to be idiosyncratic at best, and wrong, at the worst. See, Patrick Riley, ‘Hannah Arendt on Kant, Truth and Politics’ (1987) 35 *Political Studies* 379; Onora O’Neill, ‘I. The Public Use of Reason’ (1986) 14 *Political Theory* 523; Hannah Arendt, *Lectures on Kant’s Political Philosophy* (Ronald Beiner ed, University of Chicago Press 1992); Matias Sirczuk, ‘Look at Politics With Eyes Unclouded By Philosophy: The Arendtian Reading of Montesquieu’ (2018) 2 *Arendt Studies* 171; Lucy Cane, ‘Arendt, Montesquieu, and the Spirits of Politics’ in Peter Gratton (ed), *The Bloomsbury Companion to Arendt* (Bloomsbury Academic 2021).

²³ Arendt, *The Freedom To Be Free* (n 10) 60.

²⁴ This is a contentious claim in so far as she attempts to portray Kant as unconcerned with political freedom. O’Neill (n 22). See also, Roy T Tsao, ‘Arendt against Athens: Rereading the Human Condition’ (2002) 30 *Political Theory* 97.

²⁵ On the interchangeable use of liberty and freedom at some places, and the distinction in other places in Arendt’s work, see Hanna Fenichel Pitkin, ‘Are Freedom and Liberty Twins?’ (1988) 16 *Political Theory* 523.

²⁶ Arendt, ‘What Is Freedom?’ (n 1) 159.

²⁷ *ibid.*

exterior to the mental sphere. Thus, unlike Kant, Montesquieu is able to see that political freedom can only appear in the public realm established for this purpose, 'in political communities governed by laws'.²⁸ Montesquieu, Arendt claims, correctly understood that 'power and freedom belonged together, that, conceptually speaking, political freedom did not reside in the I-will but in the I-can, and that therefore the political realm must be construed and constituted in a way in which power and freedom would be combined.'²⁹

However, her point of disagreement begins with Montesquieu's central placement of the freedom of the will, the *liberum arbitrium*, in his thesis: 'for Montesquieu's definitions sound as if political freedom is nothing but an extension of philosophical freedom, namely the freedom that is indispensable for the realisation of the freedom of an I-will.'³⁰ She sees in his conceptualisation of freedom in terms of security the strain of Western philosophical tradition that misjudges the potential of politics. By placing philosophical freedom on a higher plane and by making political freedom a means to enjoy philosophical freedom, Montesquieu also ignores the promise of politics as an experience of freedom as an end in itself.

Despite her disagreements, Montesquieu's influence on her constitutional thought is evident throughout *On Revolution*. With respect to freedom, this is reflected in her characterisation of political freedom as 'public freedom' and the idea that freedom is a 'tangible, worldly reality'.³¹ She posits that freedom is experienced in political action, that it appears only in a 'man-made public space', and that it acquires its tangibility 'in words which can be heard, in deeds which can be seen, and in events which are talked about, remembered, and turned into stories'.³² In other words, freedom is a 'demonstrable fact' in the sense that it is experienced when we act politically.³³

Arendt builds on Montesquieu's conception of political liberty to arrive at her own version of political freedom. She shifts the emphasis from what one wants or should want to do (philosophic freedom) to the ability of being able to do (political freedom) something unpredictable. By making the acts and the deeds more significant, Arendt's logic is that freedom can be seen as more than just a quasi-automatic fulfilment of the will. This distinction between freedom as a mental capacity and freedom as action is crucial because it changes the location of freedom from will to political action. To Arendt, freedom is 'something created by men to be enjoyed by men rather than a gift or a capacity'.³⁴ Freedom, no longer a predicate of will, can now be understood as unpredictable action.

Arendt looks at Greek and Roman antiquity to develop her understanding of freedom as political action. Where the Greek words for 'to act' mean 'to begin, to lead, and

²⁸ Arendt, *The Freedom To Be Free* (n 10) 58.

²⁹ Arendt, *On Revolution* (n 1) 148.

³⁰ Arendt, *The Freedom To Be Free* (n 10) 58.

³¹ Arendt, *On Revolution* (n 1) 120.

³² Arendt, 'What Is Freedom?' (n 1) 153.

³³ Rubinelli (n 10).

³⁴ Arendt, *On Revolution* (n 1) 120.

to rule', and 'to carry something through', the corresponding Latin words refer 'to set something in motion' and 'the enduring and supporting continuation of past acts'.³⁵ The Greek conception of action especially influences her account of freedom. Arendt sees in the understanding of political action as beginning something new the spontaneity that characterises free action. A range of meanings, derived from the Greek experience of political action in the *polis* populate Arendt's understanding of freedom. She says that to institute a new beginning is 'conjoined with leading and finally ruling' which are, to her mind, the 'outstanding qualities of a free man'.³⁶ For the Greeks, to be free meant being free from the necessities of bodily wants and needs. This meant that to be a citizen of the *polis*, one had to also be a master of a household of slaves who would liberate the master from the necessities of life.

It would, however, be a mistake to read Arendt's reliance on the Greek understanding of freedom as the ability to rule over the disenfranchised. By leading and ruling, Arendt refers not to the ability to command others' labour, but to *isonomia*. As I discussed in the last chapter, the Greek notion of isonomy refers to the condition of 'no-rule'. To lead and to rule in the isonomic sense implies to 'not...be subject to the necessity of life or to the command of another and not...be in command oneself'.³⁷ From the Greek experience, Arendt derives not the idea that freedom comes with the capability to dominate others but that in acting politically, citizens can experience an escape from the burdens of household's necessities and enjoy the happiness that can only be derived from acting alongside one's peers to institute something new and carrying it through.³⁸

In the last chapter, I also presented the Arendtian conceptualisation of politics as self-disclosure: politics as the activity through which citizens disclose and negotiate their identity. In framing freedom as a political experience, Arendt imports within the conception of freedom the normative characterisation of politics as an activity that derives its meaningfulness from its ability to provide individuals the avenues to disclose their identities. In experiencing freedom through politics, citizens get the opportunity to disclose themselves, reveal 'who' they are to their peers, and are recognised for it. In doing so, citizens are able to lay claim to their chosen identities through politics.³⁹ The unpredictability of political action adds to the normative value of freedom experienced through political action because it acknowledges the capacity of citizens to disclose and challenge their political identities as an important aspect of the experience of freedom.

Such a conception of political freedom finds further resonance in Arendt's understanding of freedom in the Roman republics. For the Romans, Arendt notes, the foundation of the city was also the simultaneous foundation of freedom because in

³⁵ Arendt, *The Freedom To Be Free* (n 10) 62.

³⁶ *ibid.*

³⁷ Arendt, *The Human Condition* (n 1) 32. Emphasis mine.

³⁸ She takes forward this idea as 'public happiness' in *On Revolution*. Arendt, *On Revolution* (n 1) 115–140.

³⁹ Shmuel Lederman, 'Agonism and Deliberation in Arendt' (2014) 21 *Constellations* 327; Shmuel Lederman, *Hannah Arendt and Participatory Democracy* (Springer Berlin Heidelberg 2019).

founding the city, the founders of Rome instituted a lasting space within which citizens could initiate new beginnings.⁴⁰ Here, new beginnings are made possible because the ‘help of others, which is indispensable for carrying something through... is always on hand in a regulated community of citizens.’⁴¹ Like Montesquieu, she defines her concept of political freedom as something that can exist only within a political community established and regulated by law.⁴² Consequently, freedom as initiating unpredictable action does not imply having the individual capacity to do whatever one wishes. Arendt’s conception is a conservative kind of freedom in the sense that it can be experienced only within the bounds of a constitutional order, a man-made ‘space of appearance’ within which citizens can come together to collectively experience freedom.⁴³

This making of the ‘space of appearance’ is what Arendt associates with the revolutionary founding of freedom. In so far as revolutions aim to initiate a new beginning, they embody the experience of freedom in the Greek sense of the term. However, in so far as revolutions aim to institutionalise and make durable the new order of things, they embody the Roman attempt to establish freedom through the foundation of a body politic which would guarantee the space of appearance for freedom.⁴⁴

Arendt critiques liberalism for ‘banishing liberty from the political realm’ because freedom as non-interference does not capture the difference between viewing politics as a means to achieving freedom as an end and viewing political freedom as an end in itself. For Arendt, spontaneity is the ‘most general and most elementary manifestation of human freedom’ because in possessing the avenues to act spontaneously, we possess, as citizens, the power to collectively institute changes to the constitutional order.⁴⁵

Further, she critiques the liberal inclination to conflate totalitarianism with authoritarianism because in conflating the two, she argues, we ignore the very important distinction between possessing no political freedom in totalitarian regimes and possessing some political freedom in authoritarian regimes.⁴⁶ In so far as the scope of political freedom is the parameter for judging governments, this difference is of acute importance.⁴⁷ In totalitarian regimes, spontaneity is not merely discouraged but entirely extinguished through methods of ‘conditioning’.⁴⁸ In contrast, in authoritarian regimes, freedom is curtailed rather than completely eradicated. This is because the authoritarian government, by presenting itself as bound by laws, remains tied to a limited conception of freedom that citizens continue to possess as long as their freedoms do not clash with the source of

⁴⁰ Arendt, ‘What Is Freedom?’ (n 1) 163–65.

⁴¹ Arendt, *The Freedom To Be Free* (n 10) 64.

⁴² This is a Montesquieu-inspired reading of Roman freedom in that Arendt also looks at the Roman experience in search of concepts, rather than historical facts.

⁴³ Arendt, *On Revolution* (n 1) 302 n 19.

⁴⁴ *ibid* 121.

⁴⁵ Hannah Arendt, ‘What Is Authority?’, *Between Past and Future* (Penguin books 2006) 96.

⁴⁶ Arendt, ‘What Is Authority?’ (n 45).

⁴⁷ Arendt, *On Revolution* (n 1) 22.

⁴⁸ Arendt, ‘What Is Authority?’ (n 45) 96.

authority in the legal and political order, which always exists outside the realm of human affairs.⁴⁹ On the other hand, in totalitarian regimes, there is no space for the freedom of the citizen because the citizen no longer exists as a distinct and equal individual. Totalitarianism, because it relies on various methods of mass conditioning, de-individualises the citizens by converting them into members of a monolithic movement with shared consciousness.⁵⁰ Consequently, freedom, as an experience that can be realised by equally distinct individuals among their equally distinct peers, ceases to exist in totalitarian systems.

What is relevant for the discussion in this chapter is the light that the distinction sheds on Arendt's conceptualisation of freedom. The idea that freedom can continue to exist in authoritarian governments and can be said to be completely extinguished only in totalitarian governments conveys the link between freedom and politics in Arendt's discourse. Authoritarian regimes are motivated not by principles that have been generated by the citizens, but by narratives that lie beyond the realm of political affairs.⁵¹ However, politics can continue to find relevance within authoritarian settings if it relates to the pursuit of the goals identified by the authoritarian government. In such cases, politics may be distorted and constrained in its scope, but citizens may retain some capacity to collectively act in pursuit of interests declared by the government, even if these interests are authoritative in nature. As opposed to authoritarian regimes that only seek to consolidate power, totalitarian regimes seek to dominate every aspect of life itself. Totalitarian governments generate an impression of politics, wherein members of the national movement appear as though they have determined the principles and goals of the government. In reality, however, all political actions and thoughts have been subsumed by an ideology originating from the central leadership.

There is one last reason why spontaneity of action is crucial for Arendt's conception of political freedom and it appears as an off-handed remark at the beginning of her essay '*What is Freedom?*'. She notes that the concept of freedom in modernity suffers from a contradiction 'between our consciousness and conscience, telling us that *we are free and hence responsible*, and our everyday experience in the outer world, in which we orient ourselves according to the principle of causality.'⁵² We can take forward the connection between freedom and responsibility by including at this juncture Arendt's discourse on collective responsibility: she says, 'laws are laid down in human communities, that decisions are taken, that judgments are passed'⁵³ so that we can share the responsibility of the

⁴⁹ In lying outside the realm of human affairs, the source of authority of an authoritarian regime is unconnected with the political acts and judgments of the citizens. I explore this idea in greater detail in Chapter Four, *Political Authority*.

⁵⁰ Arendt, 'What Is Authority?' (n 45).

⁵¹ *ibid.* On principles, see, Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge University Press 2008); James Muldoon, 'Arendtian Principles' (2016) 64 *Political Studies* 121.

⁵² Arendt, 'What Is Freedom?' (n 1) 142. Emphasis mine.

⁵³ *ibid.*

consequences of our collective actions.⁵⁴ In other words, the reason why the project of freedom is so essential to Arendtian constitutionalism is not only for the meaning it provides to live life as a citizen but also because in being free agents within a political community, we also assume responsibility for the acts of the political community. It connects fundamentally with the notion of active and responsible citizenship I had outlined in the previous chapter. The experience of citizenship is inherently related to political action and judgment; active citizenship materialises not only in being able to initiate something new initiating but also in acting and judging with a sense of responsibility and care for the constitutional order one shares with other citizens.

Freedom as political action consists of making a new beginning and continuing it through the support of one's peers. This support may come in the form of consent or in the shape of dissent. Citizens are considered to be politically free if they possess the avenues to either initiate action or to join with the initiator to help accomplish the common enterprise. Arendt suggests that even within a highly structured bureaucratic organization, characterised by a rigid hierarchical structure, it would be more insightful to view the roles of its members 'in terms of overall support for a common enterprise than in our usual terms of obedience of superiors.'⁵⁵ The idea that when individuals follow the laws of a country, they effectively endorse its constitution – '[i]f I obey the laws of the land, I actually support its constitution' becomes particularly evident in the actions of revolutionaries and rebels who choose to disobey 'because they have withdrawn this tacit consent.'⁵⁶ Whereas support engenders responsibility for the outcomes, a withdrawal of support reflects the refusal to claim responsibility for the acts of the government.

However, this withdrawal of support is possible only when citizens *can* act as politically free agents and give rise to unpredictable new beginnings. The theoretical incidence of politics with freedom in Arendtian constitutional thought points to the insight that the experience of political freedom simultaneously empowers citizens to shoulder responsibility for their government's actions while also affording them the means to retract the very support upon which the government relies.

Requirement of Publicness

The second claim that underlies Arendt's conception of political freedom relates to the requirement of publicness for the experience of freedom. She begins her lecture on freedom and politics with the claim that 'people can only be free in relation to one another'.⁵⁷ The idea of freedom as a relational experience finds further elaboration in its connection with her discourse on promises. When describing the relational and isonomic

⁵⁴ Hannah Arendt, *Responsibility and Judgement* (Jerome Kohn ed, Schocken 2003) 17–48.

⁵⁵ *ibid* 47.

⁵⁶ *ibid* 47.

⁵⁷ Arendt, *The Freedom To Be Free* (n 10) 34.

dimension of citizenship in the last chapter, I noted how for Arendt ‘our sense of unequivocal reality’ is dependent upon the existence of equal but distinct peers.⁵⁸ In making promises, we enter into relationships with those who inhabit the common public realm. The content of our promises, although they concern our future actions, make the limits we have imposed upon ourselves real by connecting them to the presence of the promisees. Our freedom, in so far as it consists of what we can do, is thus no longer a predicate of our will alone, but inextricably bound with the actual activities of those we have promised to act with.

While the negative conception of freedom, seen most prominently as the power of the self-assertion of the human will to compel action from oneself, presupposes a ‘retreat from the world’, the ‘positive’, political freedom consists in being able to act and exist alongside one’s equals.⁵⁹ In other words, a ‘positive’ experience of freedom, that Arendt characterises as political freedom, is dependent upon the presence of others. It is in this context that Arendt insists that freedom cannot be experienced in isolation, as a matter of will, or in a ‘dialogue between me and myself’.⁶⁰

The connection she draws between freedom in action and the performing arts is especially helpful here. She draws from Machiavelli’s concept of *virtù* which refers to the ‘excellence with which man answers the opportunities’ given to him by the world. In such ‘virtuosity’, ‘the accomplishment lies in the performance itself and not in an end product which outlasts the activity that brought it into existence and became independent of it.’⁶¹ She also adopts the Greek theatrical metaphors for her description of political actions (‘to act’, ‘to perform’, ‘to disclose’, and most pointedly, to be a part of the ‘enacted stories’). This is a deliberate move because it showcases the performance-like quality of political action and reinforces her claim that to exist in the political realm is to exist and act amongst one’s equals. In performing politics, much like in performing art, we need an audience to bear witness to the virtuosity of our deeds: ‘Performing artists – dancers, play-actors, musicians, and the like – need an audience to show their virtuosity, just as acting men need the presence of others before whom they can appear; both need a publicly organised space for their “work,” and both depend upon others for the performance itself.’⁶²

Arendt claims that the ‘experience upon which the body politic of a republic rests is the being-together of those who are equal in strength, and its virtue, which rules its public life, is the joy not to be alone in the world’.⁶³ In terms of constitutional theory, it points to a critical insight about the necessity of a public realm where citizens can experience collective action for a constitutional democracy. An important theme in Arendt’s writings concerns the loss of the experience – and joy – of acting with one’s

⁵⁸ Arendt, *On Revolution* (n 1) 92.

⁵⁹ Kei Hiruta (ed), *Arendt on Freedom, Liberation, and Revolution* (Palgrave Macmillan 2019).

⁶⁰ Arendt, ‘What Is Freedom?’ (n 1) 144.

⁶¹ *ibid* 151.

⁶² *ibid* 152.

⁶³ Arendt, *The Promise of Politics* (n 1) 67.

peers.⁶⁴ She notes that loneliness is a common ground for terror and ideology and is closely connected with ‘the breakdown of political institutions and social traditions.’⁶⁵ To be alone means ‘to have no place in the world, recognized and guaranteed by others.’⁶⁶ In the absence of a public realm, not only are citizens devoid of the actual capacity of initiating a new beginning but are also unable to experience the happiness experienced when one acts alongside one’s equals.

Further, she points out that because the realm of political action is closely tied to the act of speaking, our freedom to engage in discourse with one another becomes a vital prerequisite of our experience of freedom. According to Arendt, the freedom of speech holds a fundamental role in the manifestation of political freedom. She contends, ‘[o]nly in the freedom of our speaking with one another does the world, as that about which we speak, emerge in its objectivity and visibility from all sides.’⁶⁷ When individuals engage in dialogue and action alongside their peers, they have the opportunity to transcend the limitations of their individual perspectives. Arendt asserts that if someone seeks to perceive and understand the world as it truly exists, they can only do so by recognizing it as a shared reality among many individuals, ‘by understanding it as something that is shared by many people, lies between them, separates and links them, showing itself differently to each and comprehensible only to the extent that many people can talk *about* it and exchange their opinions and perspectives with one another, over against one another.’⁶⁸ It exists between them, serving as both a point of separation and connection. This shared reality is revealed in different ways to each individual and can be comprehended fully only when many people engage in discussions and exchange their viewpoints and opinions with one another, presenting their distinct perspectives in opposition and cooperation.

Thus, the public realm, which is the realm we share with others, provides the solution to our individual subjectivity in two related ways. To be able to act freely implies that one is being heard and seen. Free action occurs in the public when the audience for the action deems the actor as a worthy equal. Relatedly, free action gains validity when upon communication of the actor’s political position, the audience indicates support (or conversely, loses validity upon facing dissent) for the initiated action. To put it simply, freedom as political action requires the presence of others for the acknowledgement and recognition of the actor as an equal participant in governance, and to generate support for the initiated action. The freedom of speech and expression gains importance not only because it is the primary medium through which we disclose our political positions, but also because it is only through an exchange of opinions that citizens are able to recognise and acknowledge each other as equal participants and are able to consent or dissent with

⁶⁴ Arendt, *On Revolution* (n 1) 122–31.

⁶⁵ Hannah Arendt, ‘Ideology and Terror: A Novel Form of Government’ (1953) 15 *The Review of Politics* 303.

⁶⁶ Hannah Arendt, *The Origins of Totalitarianism* (Penguin Classics 2017) 475.

⁶⁷ Arendt, *The Promise of Politics* (n 1) 128.

⁶⁸ *ibid.*

the political action that has been initiated by one of their peers. Moreover, as I suggested in the last chapter, in the Arendtian framework, citizenship itself is a site of constant contestation. Individuals experience freedom when politics affords them the opportunities to claim, reframe or challenge their identities in a public realm.

Once again, we find a Montesquieu-inspired understanding of political freedom when Arendt characterises freedom as ‘dependent on a free people to grant it the space in which actions can appear, be seen, and be effective.’⁶⁹ The acknowledgement that freedom requires ‘security that guarantees the ability to perform’⁷⁰ which can only be provided by others assumes greater relevance when understood as a critique of the perspective of constitution-making that treats freedom as a self-evident truth either arising out of natural or positive law. To Arendt, there is nothing self-evident in political freedom. Freedom is not the end of politics and not something that can be achieved by political means. Freedom is, Arendt argues, ‘the substance and meaning of all things political.’⁷¹ It is an experience that lasts only so long as the action continues and thus, cannot be experienced in isolation or as a matter of individual capacity merely by virtue of being declared a right in law.

However, this does not mean that the constitution has no role to play in the institution of freedom. For freedom to be a lasting ‘tangible worldly reality’, it requires a ‘publicly organised world’, a community bounded and held together by laws that establish the terms on which the citizens may be equals and the institutions within which they may get the opportunities to participate in their governance as equals.⁷² For Arendt, it is only the durability of a public space where freedom ‘may dwell’ that marks the success of a revolution.⁷³ She saw the revolutions of the eighteenth century as game changing because they symbolised the ascension of the majority to a position that gave them equal opportunity to be seen and heard; ‘those who not only at present but throughout history, not only as individuals but as members of the vast majority of mankind, the low and the poor, all those who had always lived in darkness and subjection to whatever powers there were, should rise and become the supreme sovereigns of the land.’⁷⁴ It is because of the potential for establishing a realm where ‘freedom may dwell’ and where the previous excluded sections of the society may experience citizenship that constitution-making represents for Arendt the highest potential of political action. In other words, the establishment of a constitution enables plural individuals to come together not just for a temporary experience of freedom but also to institute a public realm where freedom may continue to be experienced for perpetuity by its citizens.

⁶⁹ Arendt, ‘What Is Freedom?’ (n 1) 144.

⁷⁰ Arendt, ‘Freedom and Politics, A Lecture’ (n 5).

⁷¹ Arendt, *The Promise of Politics* (n 1) 129.

⁷² Arendt, ‘What Is Freedom?’ (n 1) 147.

⁷³ Arendt, *On Revolution* (n 1).

⁷⁴ *ibid.*

Freedom through acting and judging

I suggested in the last chapter that law contributes to the construction and maintenance of citizenship by setting up the institutional spaces and structures within which freedom may be securely experienced. This freedom includes both, the freedom to act and the freedom to make judgments. Consequently, I propose in this sub-section, that a juridical guarantee of freedom should respond to both, the citizen's capacity to act and make judgments.

In my reading, despite her consternation with the central placement of the *vita contemplativa* as a method to arrive at laws governing human conduct, Arendt believes that the experience of political freedom is incomplete without an institutional guarantee of freedom of speech and thought. To Arendt, it is evident that freedom requires thought much in the same way as thought requires freedom. While some scholarly discourse has focussed primarily on the aspect of the Arendtian notion of freedom that corresponds with action, a parallel strain of thought may be populated from her writings on thinking and judging.⁷⁵ Support can be gathered from her emphasis on the value of thinking and judging as important aspects of taking responsibility to suggest that in the Arendtian framework, thinking too can be a political activity. This provides us with a richer understanding of freedom *as* politics in Arendtian constitutionalism.

Among other institutional guarantees, one speaks most succinctly to the complications within Arendt's conception of political freedom: the freedom of thought.⁷⁶ Note that Arendt's conception of political freedom is formed in response to the deficiencies in the 'negative' freedom that is predicated on will. Freedom cannot be experienced in isolation, as a condition of contemplation. And yet, she displays an appreciation for freedom of thought. She appreciatively quotes Montesquieu's belief that 'the sign of a free nation is people making any use at all of their reason (*raisonner*), and that, no matter whether they do this well or badly, the fact that they are thinking is enough to bring about freedom.'⁷⁷ Elsewhere, she says, 'it is the sheer activity of reasoning itself from which freedom arises' and that 'reasoning creates a space between men in which freedom is real.'⁷⁸

I mentioned in the previous sub-section that Arendt saw in Kant's work the presence of two political philosophies. She claimed that the less-studied political philosophy in the *Critique of Judgment* concerned political judgments. In such judgments, even though freedom remains a function of the mental sphere, it appears not as a predicate

⁷⁵ Taminaux (n 6); Coren Caplan and Clive S Kessler, *Hannah Arendt: Thinking, Judging, Freedom* (Gisela T Kaplan ed, Allen & Unwin 1989).

⁷⁶ Marie Morgan, 'Hannah Arendt and the "Freedom" to Think' (2016) 48 *Journal of Educational Administration and History* 173.

⁷⁷ Arendt, *The Freedom To Be Free* (n 10) 39. Curiously, a little later in her lecture (pg. 45), she critiques associating freedom with freedom of thought or of the will.

⁷⁸ Arendt, *The Freedom To Be Free* (n 10).

of will, but as an exercise of imagination.⁷⁹ Whereas willing, in the image of reason unperturbed by external or internal circumstances or factors, is a mental activity that can only be done in isolation, imagination brings in the perspectives of others in arriving at a judgment. In Kant's understanding of 'enlarged mentality' as the act of thinking in the position of everyone else, she finds a political activity that is performed in the mental sphere but continues to correspond to the presence of the others existing in the political realm. Moreover, unlike willing, the product of judgment seeks the presence of others and the opportunity to 'advance our thoughts in public to see whether they agree with the understanding of others.'⁸⁰

The 'reason' arrived at through spontaneous free thought, however, is not to be confused with the Kantian 'Reason (*raisonnement*)' which makes freedom 'an individual's subjective capacity'. In the latter 'Reason', freedom is no longer a 'worldly reality' because its location is not in a space between people (engendered by reasoning) but in the mental sphere, where it arrives at a law-giving Reason through isolated contemplation.⁸¹ On the contrary, 'reason' corresponds more properly with opinion formation. In more practical terms, the distinction between 'opinion' and 'Reason' refers to Arendt's consternation with the tendency to see the government 'in the image of individual reason and construing the rule of government over the governed according to the age-old model of the rule of reason over the passions.'⁸² This was, she argues, based on the 'facile and superficial equation of thought with reason and of reason with rationality.'⁸³

Arendt's argument emphasises that what is of paramount significance is not the pursuit of 'rational truths' but rather the profound understanding that, for individuals coexisting in society, the inexhaustible richness of human discourse surpasses the importance of any singular, ultimate truth.⁸⁴ This 'inexhaustible richness of human discourse' materialises in the form of diverse opinions when citizens engage in interactions with one another. In the context of Arendtian constitutionalism, the focal point of freedom shifts away from the mere pursuit of individual interests or rational truths. Instead, it centres on the experience of opinion formation and the sharing of those opinions. This transformation underscores a shift from focusing on the individual as a singular entity to considering individuals as part of a plural collective. This shift involves moving from a domain, as described by Madison, where nothing matters except the 'solid reasoning' of a single mind to a realm in which the strength of one's opinions is determined by their reliance on 'the number of individuals who are presumed to hold similar opinions,' a number that is not necessarily limited to one's contemporaries.⁸⁵

⁷⁹ *ibid* 60.

⁸⁰ *ibid*.

⁸¹ *ibid* 40.

⁸² Arendt, *On Revolution* (n 1) 91.

⁸³ *ibid*.

⁸⁴ Arendt, *Between Past and Future* (n 19) 229.

⁸⁵ *ibid* 231.

Opinions, when considered in isolation, may not possess the same weight as ‘rational truths, but they ‘acquire[s] firmness and confidence’ when they are capable of appealing to a broad spectrum of diverse citizens.⁸⁶ As Arendt explains, ‘the only guarantee for ‘the correctness’ of our thinking lies in that ‘we think, as it were, in community with others to whom we communicate our thoughts as they communicate theirs to us.’⁸⁷ This underscores the crucial importance of freedom of thought and expression. Human reason relies on interaction with others and the public sharing of thoughts. Arendt quotes Kant in support: ‘the external power that deprives man of the freedom to communicate his thoughts publicly, *deprives him at the same time of his freedom to think.*’⁸⁸

For Arendt, the concept of human togetherness is intricately connected with common sense. The presence of others plays a crucial role in regulating and overseeing all our other senses. Without this communal element, each of us would be isolated within our own subjective realm of sensory data, which in themselves can be unreliable and misleading. Arendt’s unfinished work on judgments was intended to be rooted in Kant’s aesthetic judgments, which involve the capacity of the individual to consider the viewpoints of others while formulating their own perspective in a manner that makes it widely accessible. This notion aligns with her discussions on the significance of common sense. Furthermore, the ability to express one’s opinions publicly necessitates a nuanced understanding of the relationship between *vita activa* (the life of action) and *vita contemplativa* (the life of contemplation). This, in my view, offers a more comprehensive understanding of freedom within the context of politics.

Political preferences develop, change, and are communicated much like matters of taste, and like all judgments of taste, politics seeks to impress the audience not through coercion or persuasion, but by communicating the beauty of the object (or in this case, the political position). This move is critical because once conceptualised not as the quality or capacity of the mind, but as the *political* freedom to communicate one’s political judgments, freedom of thought becomes a bridge between the *vita activa* as the manifestation of positive freedom to act and the *vita contemplativa* as the locus of negative freedom to be free from interference. Without falling into the liberal trap of privileging thought over action, thought nevertheless continues to have a space of importance as the source of political judgments and action continues to be the manifestation of freedom of thought and the experience of being able to communicate consent or dissent.

By combining the two assertions regarding freedom – that it pertains to the ability to initiate novelty and that this capability can solely manifest through speech and actions executed in the company of others – a distinct image of the political freedom that Arendt underscores in her works emerges: freedom implies political participation in one’s governance and requires durable institutions that create avenues for the citizen to act and

⁸⁶ *ibid* 230.

⁸⁷ *ibid.*

⁸⁸ *ibid.*

make judgments with regards to political matters. Further, her argument that the success of a constitution hinges on its capacity to create a public space where subsequent generations can continuously encounter freedom, when viewed within the framework of the dual dimension of freedom I propose (involving both thought and action), presents a normative objective for democratic constitutional orders. This objective revolves around the establishment of institutional frameworks that enable citizens to experience freedom through action and judgment in the course of ordinary politics. In the following section, I look at the institutional and normative demands made by an understanding of freedom as political participation.

II. Freedom as Participation

Put simply, the idea that freedom is an experience that can be realised only through participation refers to the citizens' ability to collectively initiate a chain of events that could not have been predicted. This explains why Arendt's 'most constitutionalist work', *On Revolution*, begins with a discussion on the experience of political action during revolutions and ends with a proposal for instituting constitutional structures that would keep alive the 'revolutionary spirit'.⁸⁹ According to Arendt, freedom was experienced in a distinct way during the American and the French Revolutions, but this experience of positive freedom remains in danger of being forgotten.⁹⁰ In this section, I describe what Arendt conceptualises as a 'revolutionary constitution' and analyse whether her highly demanding conception of freedom as participation (in constitution-making and post-establishment of the constitution) is too fantastical to be practicable. I will argue that despite the highly normative nature of Arendt's conceptualisation of freedom as participation, Arendtian constitutionalism must take its bearings from the relationship between negative and positive freedom that underpins Arendt's constitutional thought because it corresponds to the citizens' ability to participate in meaningful acts and judgments.

Revolutionary constitutions

To Arendt, revolutions exemplify the highest potential of action for two reasons: first, because in revolutionary action, especially that of the America and French revolutions, the actors experienced what it means to come together, to act collectively and spontaneously to institute a new political beginning; and, secondly, because revolutions

⁸⁹ Waldron calls *On Revolution* Arendt's most constitutionalist work in Jeremy Waldron, 'Arendt's Constitutional Politics' in Dana Villa (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press 2006). While the use of revolutions as a device to think about freedom in constitutional democracies is most evident in *On Revolution*, Arendt is consistently interested in revolutions throughout her life. See, Arendt, *On Revolution* (n 1); Hannah Arendt, 'The Hungarian Revolution and Totalitarian Imperialism' in Jerome Kohn (ed), *Thinking without a banister: essays in understanding, 1953-1975* (Schocken 2018).

⁹⁰ Arendt, *On Revolution* (n 1); Arendt, 'What Is Freedom?' (n 1).

open the door to the experience of making freedom durable through the establishment of a constitution.

For a revolution to be successful, however, it is not enough that the revolutionaries experience freedom in the course of the revolutionary activities. Arendt argues that revolutions are successful only when they actually establish a political realm within which the experience of freedom can be made durable and hence, available for the future generations.⁹¹ The idea that freedom is the ultimate aim of the revolution is so important to Arendt that she goes on to characterise rebellion and liberation futile ‘unless they are followed by the constitution of the newly won freedom.’⁹² This is a curious claim. Throughout her work, Arendt’s standard claim is that political freedom can only be experienced through political action and cannot be achieved as an end of political action. The only instance where she digresses from this line of thinking is when it comes to revolutions. She claims that revolutions are more than ‘mere changes’ to the constitutional order.⁹³ While the first instance of the experience of freedom lies in the act of revolution, the second instance where the end of revolution lies in the foundation of freedom signifies the only time where freedom becomes the end of political action, ‘freedom as the ultimate aim of revolution’.⁹⁴ It is understandable why Arendt perceives revolutions as the *experience* of freedom. However, the emphasis she places on freedom being the ultimate *aim* of revolutions requires some elaboration.

I propose that this is because Arendt, taking inspiration from Montesquieu, seeks to advance the claim that while political freedom may exist under limited governments, it is only under democratic constitutional orders that political freedom can be experienced to the fullest. Consequently, revolutions are only partly successful if they do not preserve the ‘revolutionary spirit’ and convert the revolutionary experience of freedom into a lasting institution through the establishment of a constitution.

Here, the difference Arendt sees between revolutionary and limited constitutional governments is crucial for understanding the foundations of her conception of freedom as participation. Arendt defines revolutionary constitutions in contrast with two other types of constitutions: limited constitutional governments and constitutions that institute a permanent revolution. According to Arendt, a constitutional, limited government is just a ‘government limited by law’ that is instituted for the ‘safeguard[ing] of civil liberties through constitutional guarantees.’⁹⁵ It is not revolutionary ‘in content or origin’.⁹⁶ On the other hand, *constitutio libertatis*, a term she borrows from Montesquieu that translates to ‘the constitution of freedom’, is a result of a revolution and manages to keep alive the

⁹¹ Arendt, *On Revolution* (n 1).

⁹² *ibid* 141.

⁹³ *ibid* 13.

⁹⁴ Arendt, *On Revolution* (n 1).

⁹⁵ *ibid* 141.

⁹⁶ *ibid*.

‘revolutionary spirit’ by ensuring that the citizens have the right to participate in government.⁹⁷

The *constitutio libertatis*, thus, is founded through the coming together of revolutionaries to establish a public realm where they may continue to experience as citizens the freedom they had enjoyed as revolutionaries. The constitution of freedom, as the tangible artifact signalling this ‘combination’, signals also the continued and equal right of the citizens to participate in government. As opposed to when the government is seen as a necessary evil that must be limited through the constitution, the constitution of freedom denotes the generation of power through collective action. Whereas in the revolutionary constitution, the individual, impotent outside the political realm, acquires power as a citizen of the constitutional order, in limited government, the ‘governed are politically impotent so long as they do not decide to recover their original power in order to change the government and entrust another ruler with their power.’⁹⁸ In the second case, ‘freedom and power have parted company’ with the result that power is now equated with violence, and government is seen as a necessary evil.⁹⁹ In a limited constitution, although power is still in the hands of the public, the individual has become powerless and must be protected against it. In other words, limited governments are based on the notion that citizens must be protected from the exercise of power through the guarantee of civil liberties, and revolutionary constitutions seek to make the citizen powerful through the experience of freedom *as* politics.

Another important thing to note is that while civil rights correspond to the liberties guaranteed by limited government and are the ‘preliminaries of civilised government’, freedom refers to the more substantive rights of the citizen to ‘be a participator in government’.¹⁰⁰ In Arendt’s view, civil liberties are concerned only with ‘the individual welfare of the greatest number,’¹⁰¹ as opposed to the meaningful experience of freedom in political action. Civil liberties include such rights as freedom of movement, the right to assembly, and are essentially negative as far as they signal an absence of restraint on the citizen. Thus, the right of the people to assemble peacefully to petition the government for a redress of grievances, which on the face of it appears as the most important positive freedom, assumes the form of a negative freedom if seen only as the right of the citizen to be free from any impediments imposed by the government. Only when the right to assembly to petition is seen as the right to participation in public affairs and of admission to the public realm, can it be seen properly as a positive freedom.¹⁰²

Further, it is not a given that all revolutionary experiences of freedom will actually result in the establishment of freedom through the constitution. Arendt notes that

⁹⁷ *ibid* 121. Arendt, ‘What Is Freedom?’ (n 1) 147.

⁹⁸ Arendt, *On Revolution* (n 1) 170.

⁹⁹ *ibid* 134.

¹⁰⁰ *ibid* 221.

¹⁰¹ *ibid* 223.

¹⁰² *ibid* 25.

revolutions might also lead to governments that seek to keep the revolution on going, such as the permanent revolutions in Russia and China ‘where those in power not only admit the fact but boast of having maintained indefinitely a revolutionary government’.¹⁰³ On the other hand, revolutions may also produce constitutionally limited governments, such as those produced in Europe in the nineteenth and twentieth centuries, ‘where in the aftermath of revolutionary upheaval some new “constitutional” government eventually comes into existence that guarantees a fair amount of civil liberties and deserves...no more than the name of limited government’.¹⁰⁴ Arendt claims that the second type of constitution-making was done by experts, as if the constitution ‘was a pudding to be made by a recipe,’ quoting Arthur Young.¹⁰⁵ In both these cases, however, revolution does not get to its intended end. In the first constitution of permanent revolution, freedom remains an unstable occurrence because the actual institutions within which it may materialise are sacrificed in favour of the higher goal of permanence of the revolutionary struggle. In the second, revolutionary limited government, the institution of stability as a guarantee of political freedom is once again displaced in favour of the institution of stability as the guarantee of non-interference.

In Arendt’s view, in a constitutional, limited government, security is the end of government so that the attention of the citizens ‘may be exclusively given to their personal interests’ and to the individual accumulation of wealth.¹⁰⁶ It is motivated by the ‘ruthless and fundamentally antipolitical desire to be rid of all public cares and duties’ through the establishment of a system of governance through which men could exert a modicum of control over their rulers without having to give the ‘time [not] required for the supervision or choice of the public agents, or the enactment of laws’.¹⁰⁷ Consequently, the difference between a limited government and a revolutionary constitution lies in the choice of the end for which the constitution is established: while, she claims, a limited government is devised to ‘serve and ensure their pursuit of private happiness more effectively than had the old regime,’ a revolutionary constitution institutes a realm for the enjoyment of ‘public happiness’ of its citizens.¹⁰⁸

The concept of public happiness occurs alongside the concept of public freedom in *On Revolution*.¹⁰⁹ It corresponds to the idea that freedom can only be enjoyed in the presence of one’s equals. Arendt identifies in the American revolutionary experience a conception of ‘public happiness’ that coincides with the experience of political freedom as a public experience. Her claim that the ‘Americans knew that public freedom consisted in

¹⁰³ *ibid* 144.

¹⁰⁴ *ibid* 142. See for instance, on the fragility of welfare state the constitutional systems that claim to appease the antagonistic social groups, Neumann, ‘The Decay of German Democracy’, Kirchheimer, ‘Legality and Legitimacy’, and ‘The Rule of Law under Siege’ (ed) William E Scheuerman, more generally.

¹⁰⁵ *ibid* 143.

¹⁰⁶ *ibid* 132–33. *ibid* 130.

¹⁰⁷ Arendt, *On Revolution* (n 1) 132–33.

¹⁰⁸ *ibid* 133.

¹⁰⁹ *ibid* 120.

having a share in public business, and that the activities connected with this business by no means constituted a burden but gave those who discharged them in public a feeling of happiness they could acquire nowhere else' is especially instructive.¹¹⁰ To Arendt, the experience of political freedom was a matter of enjoyment. She describes how when the citizens attend town assemblies, their motivation is not solely driven by a sense of obligation, and even less so by self-serving interests. The revolutionaries, she claims, engaged in these activities because they found enjoyment in the discussions, deliberations, and the process of decision-making.¹¹¹

The normative demands of freedom as participation

In so far as the experience of political freedom is contingent on the establishment of freedom through a revolutionary constitution, it almost seems like an impossible task purely because it makes the experience of freedom contingent upon the serendipitous occurrence of a number of events: that there must be a revolution, that the revolution must result in the constitution of a new form of government (as opposed to merely seeking amendments to the existing form of government), and in place of civil liberties limiting the scope of government, an elusive idea of political freedom prevails, which must be the end for which the constitutional government is instituted. Add to that the fact that political freedom corresponds not to private interest but to the joy of human-togetherness and a love for the shared constitutional order, and we find that Arendt's conception of freedom as participation assumes a highly fantastical and romantic form. Let me elaborate how.

In the life of a constitutional order, freedom as participation becomes important first and foremost in the making of the freedom-establishing constitution. Arendt emphasises the need for 'constituent assemblies and special conventions whose sole task it was to draft a constitution'¹¹² because it manifests the principle "that the people should endow the government with a constitution and not vice versa".¹¹³ Constitutions are termed 'non-revolutionary' by Arendt when they are not adopted through an organic, bottom-up drafting of the constitution but imposed on the populace after being drawn up by the government; in such a scenario, the flaw in the drafting process is that 'people and their revolution had been unable to constitute their own government.'¹¹⁴ Not only is Arendt's fascination with constituent assemblies and conventions based on a romantic, and historically inaccurate view of the writing of the American Constitution – Jason Frank

¹¹⁰ *ibid* 119.

¹¹¹ *ibid* 115. Connected is the concept of public interest as something shared by all, *amor mundi*, the love of the world we share in common. Freedom here was 'a tangible, worldly reality, something created by men to be enjoyed by men rather than a gift or a capacity, it was the man-made public space or market-place.' *ibid* 120.

¹¹² Arendt, *On Revolution* (n 1) 143.

¹¹³ *ibid* 144.

¹¹⁴ *ibid* 143.

analyses and points out the historical deficiencies in Arendt's narrative of the American founding moments¹¹⁵ – but by conceptualising the establishment of freedom as something that is contingent upon an idealistic coming together of the entire populace, Arendt makes political freedom a practical impossibility.

Arendt's perspective on political freedom and her emphasis on the role of constituent assemblies and conventions faces a unique challenge when applied to certain historical contexts, such as the case of the Constituent Assembly of India. According to Arendt's criteria, which advocate for the ideal of a constitution being created through a broad-based, participatory process that involves the entire populace, the Constituent Assembly of India would be deemed partially representative, as it did not encompass the entirety of the Indian population.¹¹⁶ Comprised mainly of the bourgeoisie elites and elected as representatives on a limited franchise, the Constituent Assembly did not represent the diversity of the populace.¹¹⁷ However, despite not meeting the rigorous participatory standard that Arendt seems to be setting for the establishment of constitution of freedom, the Indian constitution-making project was successful as a collective effort for political self-definition.¹¹⁸

Further, in conceptualising a revolutionary constitution in opposition to limited government, Arendt ignores the implications of her own understanding of liberation as a condition of freedom, and the complementary relationship between negative and positive freedoms. She says, 'the distance between tyranny and constitutional, limited government is as great as, perhaps greater than, the distance between limited government and freedom.'¹¹⁹ As a result, the paragon of her conception of political freedom, the American revolutionary constitution-writing process, also falls short of the normative demands of her theory. She claims that 'even in America where the foundation of a new body politic succeeded and where therefore, in a sense, the Revolution achieved its actual end, this second task of revolution, to assure the survival of the spirit out of which the act of foundation sprang, to realize the principle which inspired it ... was frustrated almost from the beginning.'¹²⁰ This is because the founding fathers substituted the pursuit of personal happiness for public happiness, of 'confusing public happiness and private welfare,'¹²¹

¹¹⁵ Jason A Frank, 'Revolution and Reiteration: Hannah Arendt's Critique of Constituent Power', *Constituent moments: enacting the people in postrevolutionary America* (Duke University Press 2010).

¹¹⁶ The Constituent Assembly comprised of representatives elected in British India on a limited franchise. On the unrepresentative character of the Constituent Assembly of India, generally, see Rajeev Dhavan, 'Sarvani Sen: Popular Sovereignty and Democratic Transformations: The Constitution of India' (2008) 2 *Indian Journal of Constitutional Law* 204.

¹¹⁷ *ibid.*

¹¹⁸ Sarvani Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations* (Oxfors India paperback, Oxford Univ Press 2010); Gary J Jacobsohn and Yaniv Rozna'i, *Constitutional Revolution* (Yale University Press 2020) 143–182.

¹¹⁹ Arendt, *On Revolution* (n 1) 220.

¹²⁰ *ibid* 223.

¹²¹ *ibid* 124.

thereby leading to a focus on property when it should have been freedom, looking at freedom as freedom from politics, rather than freedom *as* politics.

While civil liberties are a feature of all constitutional governments in the sense that the government is instituted to rule within the limits of the law and to protect the basic rights of the citizens, i.e. as limited, mild government, a revolutionary constitutional government aims higher at the institution of freedom without instituting a permanent revolution.¹²² The institution of freedom comes from the motivation to establish a physical space where the citizens can ‘be seen in action’ and have ‘the political right to participate in public affairs.’¹²³ Arendt distinguishes between liberties, which result from liberation, and what she considers the genuine essence of freedom. While liberties may emerge as a consequence of liberation, she argues, they are ‘by no means the actual content of freedom, whose essence is admission to the public realm and participation in public affairs.’¹²⁴ According to Arendt, freedom can only be achieved when individuals gain admission to the public realm and actively participate in public affairs.

Arendt acknowledges that while liberties are a result of liberation, she nonetheless, delimits what counts as freedom by distinguishing between political freedoms and economic well-being. She claims, that while ‘wealth and economic well-being’ may be ‘fruits of freedom’ or the result of ‘natural abundance under “mild government”,’ they are a ‘minor blessing’ compared with ‘the truly political freedoms, such as freedom of speech and thought, of assembly and associations.’ According to Arendt, even if a society experiences economic growth, it cannot automatically translate into the existence of freedom. ‘Economic growth’, she claims, even under the best of conditions, cannot ‘lead into freedom or constitute a proof for its existence.’¹²⁵

However, while liberation is a precondition for freedom, freedom does not inevitably follow liberation. Most importantly, in Arendt’s eyes, the biggest difficulty arises from the insight that ‘it is difficult to see and say where the desire for liberation, to be free from oppression, ends, and the desire for freedom, to live a political life, begins.’¹²⁶ This distinction is pivotal because it demonstrates that Arendt does not dismiss political efforts aimed at liberation. Instead, she provides a nuanced and normatively demanding conception of freedom. In her view, this broader understanding of freedom adds the right to be an equal participant in government to every struggle for liberation. It emphasizes that true freedom involves more than just breaking free from oppressive conditions; it necessitates active engagement in the political sphere and participation in governing oneself.

¹²² *ibid* 130.

¹²³ Arendt, *The Freedom To Be Free* (n 10) 85.

¹²⁴ *ibid.* Arendt, *On Revolution* (n 1) 22.

¹²⁵ Arendt, *On Revolution* (n 1) 219.

¹²⁶ Arendt, *The Freedom To Be Free* (n 10) 86.

Arendt also claims that a durable freedom is only possible in a form of government that creates the avenues for the exercise of this political right: it demands the ‘constitution of a republic’ and requires the establishment of the institutional structures to provide the citizens the opportunities to experience freedom.¹²⁷ While it is true that freedom as a positive experience cannot be guaranteed by merely guaranteeing civil liberties and private welfare through limited government, the experience of freedom is nonetheless dependent upon not only the acknowledgement of one’s peers but also the institutional structures that enable the citizen the opportunities to act and be heard. Consequently, protection of fundamental rights through devices such as the bills of rights ‘which were incorporated into the new constitutions and which are frequently regarded as their most important part’ do not, on their own, establish the ‘revolutionary powers of the people’.¹²⁸ Instead, they provide the framework of security for the exercise of the political experience of freedom.

The idea that in politics, there is always a scope for new and unimagined actions and events and that citizens can be free only if they can collectively institute a new order of things develops in Arendt’s writings as a response to the logic of automaticity she sees in the discourses around freedom. It is aimed primarily at liberalism and the ‘liberal credo, ‘[t]he less politics the more freedom’,¹²⁹ where politics is seen as a necessary evil that must be limited to allow for the private welfare and development of the individual. She objects to what she sees is the liberal conviction ‘that all power corrupts and that the constancy of progress requires constant loss of power, no matter what its origin may be.’¹³⁰ Her argument is that this supposed incompatibility of freedom and politics arises from a prejudice that views politics in the narrowest sense possible, as an ‘ineluctable necessity’.¹³¹ In contrast, she wishes to argue that politics is and can be a more meaningful experience once we see freedom as a political experience.

But Arendt rarely, if ever, engages with liberal writers, opting instead to speak of liberal truisms and convictions as a uniform category of thought that conforms to the Western philosophical tradition’s anti-political bias. It has been argued that Arendt reads liberalism in a highly economic sense.¹³² She conflates ‘liberal’ with ‘bourgeois’ when she posits liberalism as an ideological justification for the bourgeois class interests. In Arendt’s reading, liberalism is concerned solely with the ‘maintenance of life’ through the private welfare of the individual through wealth accumulation as the end of government. Nevertheless, she exposes an important weakness of liberal thinkers: it comprises of the assumption that one must enjoy the negative freedom of non-interference *before* pursuing the more positive aspect of freedom as self-disclosure or freedom as self-determination.

¹²⁷ *ibid.* Also, Arendt, *On Revolution* (n 1) 25.

¹²⁸ Arendt, *On Revolution* (n 1) 141.

¹²⁹ Arendt, ‘What Is Freedom?’ (n 1) 148.

¹³⁰ Arendt, ‘What Is Authority?’ (n 45) 96.

¹³¹ Arendt, *The Promise of Politics* (n 1) 119.

¹³² Hiruta (n 59) 17.

Arendt alerts us to the claim that positive, political freedom is an end in itself that is mutually related to the negative freedoms protected by civil liberties.

The insight relevant for Arendtian constitutionalism comes in Arendt's identification of the dangers to positive freedom. The positive freedom to act and think spontaneously is not endangered by negative freedom, but from the automaton of the political process. She emphasises that it only action that can generate the public realm within which citizens can experience freedom. While the institutional-organisational frameworks of law that perform the work of maintaining and stabilising the realm may remain intact and functional, the public realm 'vanishes immediately if action ceases, and security measures and maintaining the status quo take its place, or if there is a slackening of the initiative to project new beginnings into the processes that action first set in motion.'¹³³ Once the processes initiated by free political action become automatic, it loses its connection with the political acts and judgments of the citizens and 'an automatic process produced by men is no less ruinous for the world than automatic natural processes are for the life of the individual.'¹³⁴

In terms of constitution-making, the problem begins when the process of constitution-making loses its significance due to a lack of reality and realism and an 'overemphasis on legalism and formalities' and becomes a process of declaring rights as if the mere declaration would automatically materialise in the capacity of the citizens.¹³⁵ She rightly critiques the instinct behind Jefferson's declaration of certain 'truths to be self-evident' which was to 'put the basic consent among men of the Revolution beyond dispute and argument' as if equality can be a mathematical axiom that would compel itself into existence. She argues that equality is not self-evident and stands in need of agreement and consent, 'that equality, if it is to be politically relevant, is a matter of opinion and not "the truth"'.¹³⁶

We must read Arendt's claim that 'revolution of the one hand, and constitution and foundation on the other, are like correlative conjunctions'¹³⁷ in the light of the reality that the act of writing a constitution could be gradual and evolutionary, but at the same time, take seriously her insistence on the need for communicative consent and dissent in governance.

The normative demands implied within Arendt's theorisation of freedom as political participation can be brought out explicitly by considering the way in which demands for reconciliation have been made in Canada, in the treatment of indigenous communities. While there are multiple understandings of reconciliation, in one of the dominant strands of thought reconciliation is viewed as a peace-building exercise that

¹³³ Arendt, *The Freedom To Be Free* (n 10) 74–75.

¹³⁴ *ibid.*

¹³⁵ Arendt, *On Revolution* (n 1) 122.

¹³⁶ Arendt, *Between Past and Future* (n 19) 242.

¹³⁷ Arendt, *On Revolution* (n 1) 122.

prepares the society for its transition into democracy.¹³⁸ In such accounts, reconciliation is projected as a necessarily deliberative activity aimed at acknowledging the differences that serves to subsume the varying viewpoints into something that would make the body politic ready for a democratic future.¹³⁹ In response, a more agonistic viewpoint critiques the idea that reconciliation is a historical, reparatory exercise, and emphasises instead its more political undertakings.¹⁴⁰ Andrew Schaap, for instance, writes that political reconciliation makes ‘available a space for politics within which citizens divided by the memories of past wrongs could debate and contest the terms of their political association’.¹⁴¹

The Canadian experience¹⁴² has been used in a retrospective as well as forward looking way in discourses on reconciliation and provides an illuminating example of the importance of Arendt’s insight. In Canada, governmental bodies and judicial entities often grapple with persuasive assertions from indigenous communities regarding past injustices, encompassing land dispossession, unacknowledged entitlements, and imposed assimilation.¹⁴³ Despite the absence of a comprehensive reconciliation endeavour between the Canadian government and the indigenous population, the discourse on aboriginal matters now prominently incorporates reconciliation considerations.

The discourse surrounding the Nisga’a Treaty is especially instructive. The Nisga’a treaty stands as a comprehensive accord addressing land claims and self-governance, delineating the territorial boundaries and jurisdiction of the Nisga’a Nation within the Nass River Valley. For a span of two decades, negotiations unfolded between the Nisga’a, the provincial government of British Columbia, and the federal government of Canada, culminating in the agreement of its terms and conditions in 1998. Preceding the treaty, the Nisga’a were classified as distinct Indian bands, holding minimal reserves under federal trust and operating under the regulatory framework of the federal Indian Act. Post-treaty, the Nisga’a Nation possesses 2,000 square kilometres of land, accompanied by heightened decision-making authority and governance jurisdiction, as the treaty liberates them from the legal constraints of the Indian Act. While the initial framing of the treaty by those involved did not explicitly emphasize reconciliation, by the late 1990s, politicians and negotiators increasingly characterized the treaty and its outcomes through the lens of reconciliation.

¹³⁸ Darrel Moellendorf, ‘Reconciliation as a Political Value’ (2007) 38 *Journal of Social Philosophy* 205. See generally, Roland Paris, *At War’s End: Building Peace after Civil Conflict* (1st edn, Cambridge University Press 2004); Mary F Scudder, ‘Deliberative Democracy, More than Deliberation’ (2023) 71 *Political Studies* 238.

¹³⁹ Burcu Özçelik, ‘What Can a Political Form of Reconciliation Look Like in Divided Societies?: The Deliberative “Right to Justification” and Agonistic Democracy’ (2022) 9 *Democratic Theory* 52.

¹⁴⁰ Andrew Schaap, ‘Reconciliation as Ideology and Politics’ (2008) 15 *Constellations* 249; Patchen Markell, *Bound by Recognition* (Princeton University Press 2003).

¹⁴¹ Andrew Schaap, *Political Reconciliation* (0 edn, Routledge 2004) 235.

¹⁴² Mark D Walters, ‘The Jurisprudence of Reconciliation: Aboriginal Rights in Canada’ in Will Kymlicka and Bashir Bashir (eds), *The politics of reconciliation in multicultural societies* (Oxford University Press 2010).

¹⁴³ The Supreme Court of Canada has claimed that reconciliation, rarely, if ever, happens in the courtroom and suggested negotiation as the way forward, see Felix Hoehn, ‘The Duty to Negotiate and the Ethos of Reconciliation’ (2020) 83 *Saskatchewan Law Review* 1.

Carole Blackburn explores two distinct meanings of reconciliation associated with the Nisga'a treaty.¹⁴⁴ She claims that in the first context, the term 'reconciliation' is employed to encompass the process of rectifying historical wrongs and establishing a renewed relationship between indigenous and non-indigenous Canadians. In the second context, 'reconciliation' is used to denote the harmonisation of constitutionally safeguarded indigenous rights of the Nisga'a people with Canadian sovereignty and the coexistence of non-indigenous Canadians. A third perspective, and one that speaks directly to Arendtian emphasis on the value of freedom as political participation, has been put forward by Sara Nixon.¹⁴⁵ She suggests that instead of viewing reconciliation as a harmonising activity that renders inert the Indigenous polities' interests in the garb of reconciling them with the sovereignty of the Crown, reconciliation is better understood and approached as a form of treaty-making.

An echo of the language of the relational conception of law I had put forward in the last chapter is found in Nixon's claim that 'reconciliation as treaty... entails building and renewing treaty relationships through Crown engagement with Indigenous peoples.'¹⁴⁶ It aligns with the normative demands imposed by Arendt's conception of participation: reconciliation is not just an activity valuable for the possibilities of consensus it might produce, but also because participation generates its own value. It moves beyond treating participation as a means to an end (peace) and provides a framework to view indigenous participation as the peoples' experience of freedom and an acknowledgment of the ever-present plurality of conditions that will inevitably generate contestations.

Arendt's conception of freedom as politics, thus, refers to a positive experience that can materialise only through the act of getting together with people and engaging in political speeches and actions. While civil liberties provide the necessary foundation for this experience, they are not, by themselves, a sufficient guarantee of this positive experience. In Arendt's framework, freedom is a meaningful experience because it refers to the happiness that comes from acting with one's peers: it is only when we deliberate upon and disclose our viewpoints in the public that we experience what it means to act as a citizen.

III. Space for Representation

In my discussion so far, I have presented freedom as a normatively demanding aspect of Arendtian constitutionalism because of the peculiar way in which Arendt defines freedom, and the institutional structures that are required to create the conditions for the experience

¹⁴⁴ Carole Blackburn, 'Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada' (2007) 13 *The Journal of the Royal Anthropological Institute* 621.

¹⁴⁵ Sarah Nixon, 'Two Visions of Reconciliation in Canada' (2022) 27 *Appeal: Review of Current Law and Law Reform* 42.

¹⁴⁶ *ibid.*

of Arendtian freedom. The association of ‘participation in public affairs’ with the ‘actual content of freedom’ combined with her critique of the ‘modern party system’ generates the image of a theory of constitutionalism that is arguably exceptionally tilted towards direct participation, but one, I will now argue, that is not antagonistic to a system of representation.¹⁴⁷

Compatibility of freedom with representation

Arendt’s work on the concept of council democracy remained an ignored and often dismissed part of her thought for a long time. In recent decades, scholars have made substantial connections between her proposals for instituting a council system in America and her larger work on freedom and politics.¹⁴⁸ It has now been persuasively argued that Arendt’s interest in the council system was not merely an extravagant or utopian idiosyncrasy, but an integral aspect of her political theory.¹⁴⁹ For instance, Bernstein views Arendt’s emphasis on direct democracy as a means to protect individual dignity and the capacity for self-directed political action when faced with threats from totalitarianism and mass society.¹⁵⁰ He presents councils as a practical method for citizens to cultivate the political virtue of *phronesis* and develop the habit of judgment, which is vital for coexisting with fellow citizens in a politically diverse community characterized by plurality.¹⁵¹ Muldoon brings the discourse closer to constitutional theory by arguing that the council system responds to Arendt’s attempt to create a lasting revolutionary spirit within the constitutional democratic order because it provides a way to transcend the modern distinction between constituent and constituted power.¹⁵²

In such interpretations, the discourse brings out Arendt’s emphasis on freedom as participation and the normatively weighty demands made by the conception of freedom are highlighted in its theoretical incompatibility with representative democracy. In one of the earliest critiques, George Kateb points to Arendt’s ‘seriously incomplete’ treatment of representative democracy.¹⁵³ According to Claude Lefort, Arendt’s reluctance to take

¹⁴⁷ Arendt, *On Revolution* (n 1) 25, 217–285.

¹⁴⁸ John F Sitton, ‘Hannah Arendt’s Argument for Council Democracy’ (1987) 20 *Polity* 80; James Muldoon, ‘The Lost Treasure of Arendt’s Council System’ (2011) 12 *Critical Horizons* 396; Lederman, ‘Agonism and Deliberation in Arendt’ (n 39); Lederman, *Hannah Arendt and Participatory Democracy* (n 39); Shmuel Lederman, ‘The Centrality of the Council System in Arendt’s Political Theory’ in Kei Hiruta (ed), *Arendt on Freedom, Liberation, and Revolution* (Palgrave Macmillan 2019); ‘Arendt on the Republic of Parties and Councils’, in Camila Vergara, *Systemic Corruption* (Princeton University Press 2020); Benjamin Ask Popp-Madsen, ‘Between Constituent Power and Political Form: Toward a Theory of Council Democracy’ (2021) 49 *Political Theory* 54.

¹⁴⁹ Lederman, *Hannah Arendt and Participatory Democracy* (n 39).

¹⁵⁰ Richard J Bernstein, *Why Read Hannah Arendt Now* (Polity 2018).

¹⁵¹ Lederman, *Hannah Arendt and Participatory Democracy* (n 39).

¹⁵² James Muldoon, ‘Arendt’s Revolutionary Constitutionalism: Between Constituent Power and Constitutional Form: Arendt’s Revolutionary Constitutionalism: James Muldoon’ (2016) 23 *Constellations* 596. See also, Popp-Madsen (n 148).

¹⁵³ Kateb (n 9).

representative democracy seriously stems from viewing representation as a ‘foreign’ and ‘somewhat distasteful’ concept.¹⁵⁴ Arendt scholars have also noted that despite the pervasiveness of the theoretical foundations of council democracy throughout her work, Arendt herself was doubtful about the practicality of institutionalising a council system.¹⁵⁵ Instead, it is argued, her stance is better interpreted as a call for revitalising democracy and advocating the institution of more pluralist public spaces and actors through councils, grassroots initiatives, and voluntary associations, seeking to transform actual institutions without necessarily undermining their authority. According to this perspective, Arendt’s ‘participatory forms of democratic citizenship are not alternatives to mass democratic citizenship but rather complements to it.’¹⁵⁶

However, as Matteo Bortolini notes, contemporary commentators have largely rejected these reconciliation attempts.¹⁵⁷ Arendt’s focus on the distinctions between her vision of the council system and the representative institutions of a sovereign state point at the fundamental incompatibility between her conception of freedom and representative democracy. Wolfhart Totschnig, for instance, staunchly defends this perspective by asserting that the council and the party system are fundamentally incompatible, and only one can ultimately prevail.¹⁵⁸ His argument is primarily grounded in structural and institutional differences between the two systems: one being organized from the bottom up, and the other from the top down, each operating in opposing manners. Shmuel Lederman echoes a similar set of contrasts to emphasize the irreconcilability of these two systems.¹⁵⁹ In his view, council democracy represents the sole means to establish and sustain a space for freedom, not just as a moral imperative or individual right, but as the arena where an essential human experience—freedom—can be collectively practiced. Arendt’s work, it is variously argued, aims to theorise a form of government where constituent power can be preserved within everyday deliberative and decision-making institutions, effectively transforming the charisma of the founding moment into a long-lasting feature beyond conventional representative bodies.¹⁶⁰

In my reading, such interpretations are largely correct in highlighting the incompatibility of the experience of freedom Arendt’s values with modern electoral democracies. However, much like discourses surrounding the dual conception of law (as *nomos* and as *lex*) discussed in the previous chapter, a sharp juxtaposition between

¹⁵⁴ Claude Lefort, ‘Thinking with and against Hannah Arendt’ (2002) 69 *Social Research: An International Quarterly* 447.

¹⁵⁵ Matteo Bortolini, ‘Hannah Arendt, Council Democracy, and (Far) Beyond A Radical View’, *Conceptualisations of council democracy* (2022) (on file with the author).

¹⁵⁶ Jeffrey C Isaac, ‘Oases in the Desert: Hannah Arendt on Democratic Politics’ (1994) 88 *American Political Science Review* 156, 160.

¹⁵⁷ Bortolini (n 155).

¹⁵⁸ Wolfhart Totschnig, ‘Arendt’s Argument for the Council System: A Defense’ (2014) 1 *European Journal of Cultural and Political Sociology* 266.

¹⁵⁹ Lederman, *Hannah Arendt and Participatory Democracy* (n 39).

¹⁶⁰ Muldoon, ‘Arendt’s Revolutionary Constitutionalism’ (n 152).

participation and representation runs the risk of essentialising action and work. Consequently, while participation corresponds with action, representation corresponds with work that is necessary for the enjoyment of freedom through participation. I will now trace Arendt's writings on representation to draw out with more specificity her critique of electoral systems and then, in the next sub-section, discuss my proposal for viewing representation as work done for enabling participation.

Arendt's discourse on representation begins with the critique of the American constitution for failing to provide a space reserved for freedom, for the 'potentialities of action and the proud privilege of being beginners of something altogether new.'¹⁶¹ She cites Jefferson's 'sometimes violent, antagonism against the constitution and particularly against those who "look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched,"' as being motivated by a 'feeling of outrage about the injustice that only his generation should have it in their power to "begin the world over again"'.¹⁶²

In Arendt's reading, when freedom as participation is replaced by representation, the avenues of the experience of political freedom end up decreasing even if the set up exists within a constitutional democracy. However, she does not agree with Jefferson's proposal for regular constitutional conventions, calling them too 'fantastic to be taken seriously' and a 'somewhat awkward attempt at securing for each generation the "right to depute representatives to a convention"' to find ways and means for opinions of the whole people to be "fairly fully, and peaceably expressed, discussed, and decided by the common reason by the society."¹⁶³ Such an institution of procedure would throw 'the whole body politics out of gear periodically or, more likely, have debased the act of foundation to a mere routine performance, in which case even the memory of what he most ardently wished to save – "to the end of time, if anything human can so long endure" – would have been lost.'¹⁶⁴

Arendt focuses instead on the source of worry, which was the realisation that the constitution, 'while it had given freedom to the people, had failed to provide a space where this freedom could be exercised.'¹⁶⁵ Only the representatives representing the people, and not the people directly, were given the chance to participate in 'expressing', 'discussing', and 'deciding', which, properly speaking, constitute the experience of freedom. She argues that the reason why Jefferson proposes constitutional conventions is because he presumes that free action can only mean 'tearing down and building up'.¹⁶⁶ However, in so far as freedom *within* constitutional orders consists of acting within a space regulated by laws, it corresponds also to the right to be a participator in government. Thus, in proposing her

¹⁶¹ Arendt, *On Revolution* (n 1) 235.

¹⁶² *ibid.*

¹⁶³ *ibid* 237.

¹⁶⁴ *ibid* 238.

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid* 236.

system of governance based on federated councils, she argues that the townships and meeting halls act as training grounds for the people in political matters and give the opportunity for the exercise of public freedom and the enjoyment of public happiness in the republic.

At the same time, Arendt is aware that direct participation is not a practical suggestion for modern constitutional systems and that some level of representation must coexist with political freedom as participation, if only because ‘the room will not hold all’.¹⁶⁷ In theory, she points out, representation is taken to be a substitute for direct political action and the representatives are ‘supposed to act according to instructions received by their electors, and not to transact business in accordance with their own opinions as they might be formed in the process.’¹⁶⁸ But this is obviously not true in practice.¹⁶⁹ She lists two understandings of representation – representation as a technical procedural substitute for direct action of the people and representation as a process through which the electors empower the representatives to rule over them – and points to the flaws in both the approaches: ‘If the elected representatives are so bound by instructions that they gather together only to discharge the will of their masters, they may still have a choice of regarding themselves as either glorified messenger boys or hired experts who, like lawyers, are specialists in representing the interests of their clients.’¹⁷⁰ In this case the assumption is that the electorate’s business is more important than their own opinions and that they are merely paid agents of the people who do not wish to attend public business.¹⁷¹ She finds that the other option which sees representatives as ‘limited time [the] appointed rulers’ is closer to reality, but in this case there is no actual representation; the process simply means that the ‘voters surrender their own power, albeit voluntarily and that the old adage, “All power resides in the people,” is true only for the day of election.’¹⁷²

Thus, while in the first case, the government has degenerated into administration and no longer is reliant on deliberation, in the second instance, it proceeds on a distinction between the ruler and the ruled, and in doing so, negates the citizens’ freedom of acting as an equal participator, as the distinction between the ruler and the ruled introduced an hierarchical order in the political privileges available to each group. The result is that ‘the people must either sink into “lethargy, the forerunner of death to the public liberty” or “preserve the spirit of resistance” to whatever government they have elected, since the

¹⁶⁷ *ibid.*

¹⁶⁸ Here again, motivated by her experiences with totalitarianism and the concomitant concern for the importance of the availability of the opportunity to engage in free action, Arendt conflates liberal understandings of representation with the bourgeois (and in some cases, the Schmittian perspective on parliamentary systems) pursuit of private interest through lobby groups.

¹⁶⁹ Arendt, *On Revolution* (n 1) 239.

¹⁷⁰ *ibid* 237.

¹⁷¹ A better presentation of this perspective can be found in Waldron’s democratic theory that sees representatives as agents of the represented. Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard university press 2016).

¹⁷² Arendt, *On Revolution* (n 1) 240.

only power they retain is “the reserve power of revolution”.¹⁷³ Arendt cautions that the absence of a public space for the experience and enjoyment of freedom could lead to both, ‘elective despotism’ through parties that convert themselves into one-party dictatorships and ‘turn against the parliamentary system’¹⁷⁴, as well as the political apathy of the citizens which could result in the corruption of the populace itself.¹⁷⁵

According to Arendt, the corruption of the populace happens when the private domain overtakes the public business and the constitution grants power to the people and teaches them how to manipulate it.¹⁷⁶ This happens when power is given to the people in their private capacity, but no space is established for them to act – think and judge – as citizens.¹⁷⁷ Party systems, Arendt relies on Rosa Luxemburg to argue, which are dependent upon a cleavage between the party experts who possess the knowledge and the masses of the people who were supposed to apply this knowledge, ignore the possibility of the average citizens’ capacity to act and form his own opinion.¹⁷⁸ A better understanding can be gained through the quote Arendt cites from Rosa Luxemburg’s letter, and which is worth reproducing in full:

With the repression of political life in the land as a whole... Life dies out in every public institution, becoming a mere semblance of life, in which only the bureaucracy remains as the active element. Public life gradually falls asleep. The few dozen party leaders of inexhaustible energy and boundless experience direct and rule. Among them only a dozen outstanding heads do the ruling, and an elite of the working class is invited from time to time to meetings where its members are to applaud the speeches of the leaders, and to approve proposed resolutions unanimously... A dictatorship, to be sure; not the dictatorship of the proletariat, however, but of a handful of politicians.¹⁷⁹

Arendt’s criticism of Lenin mimics her consternation with representative governments in that it is aimed at the rise of party bureaucracy. She contends that Lenin surrendered the prospects of a logical, non-ideological economic advancement of the country, along with the potential creation of new institutional structures for freedom. This occurred when he determined that only the Bolshevik Party could propel both electrification and soviets, setting a precedent that led to the subsequent scenario in which the party and its apparatus became all-powerful.¹⁸⁰

¹⁷³ *ibid.*

¹⁷⁴ *ibid* 251.

¹⁷⁵ Arendt, *On Revolution* (n 1) 241.

¹⁷⁶ *ibid* 255.

¹⁷⁷ *ibid* 256.

¹⁷⁸ *ibid* 268.

¹⁷⁹ Arendt, *The Freedom To Be Free* (n 10) 102.

¹⁸⁰ Arendt, *On Revolution* (n 1) 60. She considers the possibility that Lenin did that for the sake of party’s power and not economic development, but the point is that in her opinion, whatever his reasons, he chose to ‘sacrifice the new institutions of freedom, the *soviets*, to the party which he thought would liberate the poor.’

On the other hand, she notes that the two-party system in America proves to be more viable because of the absence of ‘autocratic and oligarchic structure(s)’ and the presence of ‘internal democracy and freedom’.¹⁸¹ She claims that while the American two-party system manages to achieve ‘a certain control of the rulers by those who are ruled,’ it does not provide the avenues to the citizens to become a participator in public affairs. She points to the monopoly of nominations as one of the main reasons why parties cannot be regarded as popular organs and are instead ‘the very efficient instruments through which the power of the people is curtailed and controlled.’¹⁸² She sees the current system of electoral politics as capable of representing the citizens’ interests and welfare, but not their actions or opinions.¹⁸³ To Arendt, because opinions can only be formed when there is open discussion and debate, the party system needs to include opportunities for the formation of opinions. Thus, although through ‘pressure groups, lobbies, and other devices,’ the voters can influence the actions of their representatives to execute their wishes at the expense of the interests and wishes of others groups of voters, in doing so the voter ‘acts out of concern with his private life and well-being, and the residue of power he still holds in his hands resembles rather the reckless coercion with which a blackmailer forces his victim into obedience than the power that arises out of joint action and joint deliberation.’¹⁸⁴

Arendt’s normative claim is that in a freedom establishing democratic order, representation should extend beyond mere self-preservation or safeguarding self-interest against governmental encroachment because, as she argues, these essentially negative measures do not truly ‘open the political realm to the many’.¹⁸⁵ The representation of interests might address the citizens’ material needs but will invariably fail to grant them access to the ‘light of the public realm’ where they may say or do things that may be of consequence to the developing story of the political community.¹⁸⁶ Arendt emphasises that ‘darkness, rather than want is the curse of poverty’¹⁸⁷, that poverty’s curse lies not just in material want but in the absence of the opportunity to actively participate in the public space where consequential actions and expressions shape the unfolding narrative of the political community. Consequently, her critique is directed against forms of governments that, by positioning themselves as representative of the electorates’ interests and welfare, detach from the people, and in doing so, take away the experience of freedom through political participation from the citizens.¹⁸⁸

¹⁸¹ *ibid* 268.

¹⁸² *ibid* 273.

¹⁸³ *ibid* 272.

¹⁸⁴ *ibid* 273.

¹⁸⁵ *ibid* 63.

¹⁸⁶ *ibid*.

¹⁸⁷ *ibid* 64.

¹⁸⁸ *ibid* 69.

Where, then, lies the space for representation in the Arendtian understanding of democratic constitutionalism? In her copy of Montesquieu's *The Spirit of the Laws*, Arendt annotates two sentences that reflect the importance she assigns to representation. The first annotation speaks directly to the advantages of representation in a democracy: "The great advantage of representatives is their capacity of discussing public affairs. For this the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy."¹⁸⁹ The second annotation points at the work-use of representation: "One great fault there was in most of the ancient republics, that the people had the right to active resolutions, such as require some execution, a thing of which they are absolutely incapable. They ought to have no share in the government but for the choosing of representatives, which is within their reach."¹⁹⁰

It is important to note that Arendt tries to preclude these kind of consequences in her proposal for a federated council system by, at a first level, having everyone participate in the 'elementary republics' of a council system¹⁹¹ from which, at subsequent levels, deputies for the next higher council would be self-selected according to the intensity of their political vocation.¹⁹² Her ideal remains action and participation by all, and her council system is supposed to grow out of it, more or less 'spontaneously'¹⁹³ giving birth to ever higher 'organs'¹⁹⁴ so that no one would be left 'without their share in public happiness' and everyone would have 'a share in public power'.¹⁹⁵

While the commentators are correct to assert the fundamental incompatibility between modern electoral representative institutions and Arendt's understanding of politics and freedom, Arendtian constitutional theory contains an important work for representation. Mapping on the idea I developed in the last chapter regarding the role performed by administration as work in maintaining the political realm, I now propose that representation is better understood as work that needs to be performed to support the experience of freedom in a constitutional democratic order: representative institutions act as the institutional-organisational spaces within which a wide array of opinions may be aired, challenged, judged and formulated in terms suitable for governmental action.

Previously in this chapter, I argued that Arendt finds valuable the existence of a public realm because she sees the experience of freedom as consisting of both acting and thinking. Freedom of thought and opinion, I suggested, requires publicness because one

¹⁸⁹ Hannah Arendt, *Baron De Montesquieu's The Spirit of the Laws*, p 55 <<https://www.bard.edu/library/arendt/pdfs/Montesquieu-Spirit.pdf>> (marginalia).

¹⁹⁰ *ibid* 56.

¹⁹¹ Arendt, *On Revolution* (n 1) 278.

¹⁹² *ibid*.

¹⁹³ *ibid* 159, 262, 267.

¹⁹⁴ *ibid* 249.

¹⁹⁵ *ibid* 255. See also, 'Arendt on the Republic of Parties and Councils' (n 148).

can form opinion only through public dialogue and deliberation. Further, the distinctiveness of one's opinion as an opinion arises from there being other competing opinions on the same topic. However, two conditions prevent the realisation of this idea of the public realm. First, the reality that labour and 'continual toil' in pursuance of necessities of life prevent the individual from actively participating in government, although not from being represented and from choosing one's representatives.¹⁹⁶ And second, Arendt sees modern democracies as 'turbulent' and 'unstable', a feature which is marked by the 'the fickleness of its citizens, their lack of public spirit, their inclination to be swayed by public opinion and mass sentiments.'¹⁹⁷ Thus, representation in modern times fills the gap left by the self-exclusion of the citizens from the political realm. She argues that a permanent body is necessary to provide stability to the politics and consequently, the experience of freedom, of the active citizenry.¹⁹⁸

The distinction between opinions and interest that populates Arendt's concern is particularly relevant here. She characterises interests and opinions as entirely different phenomenon, arguing that in a political context, interests are deemed relevant only when viewed as group interests. Opinions, on the other hand, are exclusive to individuals and do not inherently belong to groups. Individuals, who 'exert their reason coolly and freely,' possess opinions. Multitudes, whether representing a part or the entirety of society, are incapable of forming an opinion collectively; multitudes possess 'passions', a form of mass sentiment that homogenises the individuals it is composed of. Opinions preserve the space for pluralistic views arrived at after deliberations with peers from opposing viewpoints whereas interests may be discerned and acted upon without any need for communication.

In Arendt's framework, both 'multiplicity of interests and diversity of opinions' are to count as the chief characteristics of free government, distinguished from direct democracies where a small number of citizens administer the government in person. She argues that 'public opinion is the death of opinion' in much the same way as 'the plebiscite puts an end to the citizens' right to vote, to choose and to control their government.'¹⁹⁹ A government based solely on 'unbridled rule of public opinion' does not contain the space for the acknowledgment and preservation of human plurality. The problematic nature of the rule of public opinion arises out of two primary reasons. First, the overwhelming power of the majority can erode the credibility of the institution as a truly participatory body. Second, public opinion, through its unanimity, elicits unanimous opposition and thereby suppresses genuine opinions. Arendt claims that it was due to this reason that the American Founding Fathers viewed rule by public opinion as akin to tyranny. In their eyes, 'democracy in this sense was ... but a new-fangled form of despotism.'²⁰⁰ Their aversion

¹⁹⁶ Arendt, *On Revolution* (n 1) 63.

¹⁹⁷ *ibid* 225.

¹⁹⁸ *ibid* 227.

¹⁹⁹ *ibid* 231.

²⁰⁰ *ibid* 226.

to democracy did not solely stem from concerns about disorder or factional strife but, more fundamentally, from their apprehension about the inherent instability of a government lacking public spirit and influenced by unanimous ‘passions.’²⁰¹ She counts the establishment of the American Senate as the lasting institution for opinion as one of the biggest achievements coming out of the American Revolution.²⁰²

For Arendt, the public realm characteristic of a democratic constitutional order is ‘constituted by an exchange of opinion between equals’ but this realm simply disappears the very moment an exchange becomes superfluous because all equals happen to be of the same opinion.²⁰³ The Senate was designed to be the lasting institution of opinion so that it may ‘guard against rule by public opinion or democracy.’²⁰⁴ In other words, the institution of Senate, which is the institution based on representation and not direct participation, was a measure to ensure that the passions of the majority do not overtake governance and more importantly to preserve the development and functioning of public spirit in the governance of the political community. Such a reading of the need for representation mirrors the discussion on the role of *nomos* and *lex* from the previous chapter. *Nomos*, that corresponds to the function of law as work done for the sake of action, also corresponds to the role law plays in ensuring the negative freedoms of the citizen. Representation, most definitely, remains in tension with *lex* that projects the image of direct participation in politics but in its institutional form, it corresponds with the structural settings required for the citizens’ to effectively participate in their governance.

A brief analysis of Arendt’s discussion of the judgments one makes when one represents further clarifies the role representation plays in preserving and maintaining the experience of freedom in a democratic constitutional order. While it is possible for people to form opinions solely based on their interests or the interests of their groups, Arendt considers this a ‘blind obstinacy’ indicative of a lack of imagination and judgment. According to Arendt, the public realm is composed of actors and spectators. The spectators act as critics and in that sense are as involved in the words and deeds of the actors as the actors themselves. She says, ‘this critic and spectator sits in every actor and fabricator’²⁰⁵ and that ‘without this critical, judging faculty the doer or maker would be so isolated from the spectator that he would not even be perceived.’²⁰⁶ To Arendt, the exercise of making political judgments in itself is inherently representative: ‘I form an opinion by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent; that is, I represent them.’²⁰⁷ This imaginative capacity reflects our ability for representative thinking. In other words, ‘when we go visiting others

²⁰¹ *ibid* 228.

²⁰² *ibid*.

²⁰³ *ibid* 88.

²⁰⁴ *ibid* 228.

²⁰⁵ Arendt, *Lectures on Kant’s Political Philosophy* (n 22) 63.

²⁰⁶ *ibid*.

²⁰⁷ Arendt, *Between Past and Future* (n 19) 237.

in the mental practice of judging,' we aim to engage the public imagination concerned with the subject in question.

It is in this context that Arendt identifies the Senate within the American constitutional system as a lasting institution for shaping public perspectives.²⁰⁸ She argues that 'neither the wise man of the philosophers nor the divinely informed reason, common to all men, of the Enlightenment – can ever be equal to the task of sifting opinions,' a representative institution is required to 'separate the arbitrary and the merely idiosyncratic and thus purify them into public views.'²⁰⁹ The Senate can be seen as performing the work of being the 'medium' through which all public views must pass. To put it differently, representative governments serve as more than just a technical solution for governing large populations.²¹⁰ They serve to purify both interests and opinions, to guard 'against the confusion of a multitude.'²¹¹ The rationale for representation for Arendtian constitutionalism lies in the fact that opinions are developed and tested through the exchange of differing viewpoints. To mediate these differences, a body of individuals is chosen for this purpose. Although these individuals, taken individually, may not be considered wise, their collective purpose is to provide wisdom within the constraints of human fallibility and fragility.²¹²

The concept of representation, especially in the context of a constitutional democratic order, can be better understood as a vital process that must be actively carried out to sustain the experience of freedom within such a framework. This perspective shifts the focus from representation as a passive or mechanistic function to one that actively contributes to the functioning of a democratic society. In this view, representation is seen as a form of work, a process that is performed to facilitate and maintain the democratic order. It is the mechanism that ensures that the voices and viewpoints of a diverse citizenry are included and acknowledged within the public realm. Instead of being a mere delegation of authority to elected officials, representation is framed as an administrative task that is instrumental in preserving the richness of diverse opinions. The maintenance of a plurality of opinions is crucial in a democratic society because it embodies the core values of freedom and the open exchange of ideas.²¹³

The discourse on descriptive representation and gender quotas in elected assemblies attests to the role representation plays in maintaining the experience of freedom

²⁰⁸ Arendt, *On Revolution* (n 1) 230.

²⁰⁹ *ibid* 229–30.

²¹⁰ For a general discussion on the value of partisanship and its support of political commitment and contestation, see Russell Muirhead and Nancy L Rosenblum, 'The Political Theory of Parties and Partisanship: Catching Up' (2020) 23 *Annual Review of Political Science* 95.

²¹¹ Arendt, *On Revolution* (n 1) 229.

²¹² *ibid* 230.

²¹³ This idea is connected with the defense of partisanship and parties, in general, that has been advanced in the last decade. Nancy L Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton University Press 2008); Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Harvard University Press 2014); Jonathan White and Lea Ypi, *The Meaning of Partisanship* (First Edition, Oxford University Press 2016); Muirhead and Rosenblum (n 210).

in a democratic constitutional order.²¹⁴ Anne Phillips emphasises the democratically relevant nature of the interest or needs argument, asserting that altering the gender composition of elected assemblies can reshape the political agenda to better address the historically marginalised needs and interests of women, who have been excluded from significant political and economic spheres, and who share distinct experiences and concerns compared to men. Phillips' argument, in my view, provides a good ground to evaluate and clarify Arendtian understanding of the value of representation. Despite incremental progress, the slow increase in the number of women in elected assemblies and the gradual development of agendas and policies for gender equality have raised concerns among scholars. There is a growing call for a paradigm shift, urging a re-imagination and re-engineering of political institutions.²¹⁵ Simultaneously, the connection between women's presence in politics and substantive political change has become a subject of scrutiny and further exploration. Theorists propose moving from a focus on achieving a 'critical mass' of women in politics to recognizing 'critical actors,' whether men or women, who actively seek to substantively represent women.²¹⁶ Additionally, in line with the constructivist shift in political representation, arguments are made that representatives, when claiming to speak for women, construct claims about them, actively shaping feminine subject positions.²¹⁷

Hans Asembaum provides an important rejoinder. He asks how the democratic ideal of inclusion can be achieved in societies marked by power asymmetries along the lines of identity categories such as gender and race.²¹⁸ He revisits debates of difference democracy of the 1990s, which promoted inclusion through a politics of presence of marginalized social groups. This strategy inevitably entails essentialising tendencies, confining the democratic subject within its physically embodied identity. By way of a solution, he generates a typology differentiating between empowered spaces such as parliaments, 'invited spaces' such as citizens' assemblies, and the 'claimed spaces' of social movements.²¹⁹ He argues that the democratic functions these spaces fulfil are best understood as three different modes of identity performance: identity continuation, identity negation, and identity exploration. In other words, the invited and claimed spaces are equally important but play different functions with regards to generating the identities

²¹⁴ Zohreh Khoban, 'Politics of Emancipation: A Feminist Defense of Randomly Selected Political Representatives' (2023) 17(4) *Critical Policy Studies* 505–23.

²¹⁵ Joni Lovenduski, 'Feminist Reflections on Representative Democracy' (2019) 90 *The Political Quarterly* 18; Sharon Thompson and others, 'The Sexual Contract 30 Years on: A Conversation with Carole Pateman' (2018) 26 *Feminist Legal Studies* 93.

²¹⁶ Sarah Childs and Mona Lena Krook, 'Analysing Women's Substantive Representation: From Critical Mass to Critical Actors' (2009) 44 *Government and Opposition* 125.

²¹⁷ Judith Squires, 'The Constitutive Representation of Gender: Extra-Parliamentary Re-Presentations of Gender Relations' (2008) 44 *Representation* 187. See also, Zohreh Khoban, 'Politics of Emancipation: A Feminist Defense of Randomly Selected Political Representatives' [2022] *Critical Policy Studies* 1.

²¹⁸ Hans Asenbaum, 'Making a Difference: Toward a Feminist Democratic Theory in the Digital Age' (2020) 16 *Politics & Gender* 230.

²¹⁹ *ibid.*

of a citizen in a democratic constitutional order. Thus, according to Asenbaum, a pluralisation of participatory sites and modes of identity performance facilitates inclusion while tackling the essentialising tendencies in difference democracy.

Asenbaum's model provides an elegant way to understand the varying but important role played by representation *alongside* participation. In the institutional form such as the formal representative institutions where existing identities are continued, representation helps represent the various political opinions in the institutional public realm. On the other hand, in citizens' assemblies and social movements, which can be characterised as non-institutional public spaces, representation plays a less important role since here, citizens' identities are negated and explored and generated through participation. Consequently, the importance of representation mirrors the importance of administration in maintaining the existing public realm and sustaining the already present plurality of discourse. In contrast, it is only through participation that the citizens get the opportunities to contest their status and identity. If the constitution is seen as a deliberative exercise that exemplifies the negotiations at the heart of the coming together of a plural people, the symbiotic relationship between representation and participation, along with the tensions between participation and representation reveal the necessary tension that allows the citizens to be able to both, participate through representation and participate outside of representation. It is in this context that Arendt suggests instituting a council system within the American constitutional system, to provide for more spaces for participation, but not as a replacement of representative democracy. In Arendt's view, on their own, electoral systems are inadequate modes of institutionalising the political realm since they cannot, due to their inherent nature, provide the avenues for creating new pluralities. However, in a system that encourages civic participation through assemblies and treats movements as a part of ordinary politics, representation compliments the discourses generated through the extra-institutional means.²²⁰

Further, representation does not look like or work like a mathematical formula and Arendtian constitutionalism appears especially as a critique of number-based electoral democracy where citizens, with regards to their participation, can appear only as a voter and join with their peers only to add to the existing numbers. In the Arendtian view, representation mimics aesthetic judgment and cannot be quantified as such. As opposed to the agent relationship that Waldron uses to signify the relationship between the represented and the representative, the Arendtian understanding of representation does not treat the representative as a vessel for communication of our interests. Instead, Arendtian constitutionalism suggests, when someone represents us, it implies that we agree with their political taste, that we share with them the political positionalities on a range of

²²⁰ This particular understanding of the role of representation and its relationship with extra-institutional political realms will gain further relevance when I discuss civil disobedience in Chapter Five.

issues, and so, we can trust them to be able to think, judge and act in a manner closest to our own.

Conclusion

In this chapter, I have examined Arendt's argument against the notion that 'freedom begins where politics ends' and against the tendency to 'measure the extent of freedom in any given community by the free scope it grants to apparently non-political activities, free economic enterprise or freedom of teaching, of religion, of cultural and intellectual activities.'²²¹ For Arendt, the end of government is not just security (as in Hobbes), or the protection of the 'life process, the interests of society and its individuals' (which was a conception of security different from Hobbes in that now security was aimed not as freedom from fear but as a condition for 'undisturbed development of the life process of society as a whole') or the protection of property.²²² In these conceptions, she argues, freedom becomes a marginal phenomenon.

In contrast, Arendt proposes, freedom through politics is an end in itself and the provision of a secure space for the appearance of freedom is the end of a democratic constitutional order. Freedom through political action thus corresponds with her normative theoretical claim that places the experience of human togetherness and the opportunity to influence the decisions that would affect one's political community as the most meaningful expression of being human. While the act of constituting a political realm by establishing a constitution through 'mutual deliberation and choice' represents the epitome of what free political action can achieve, Arendt's normative position becomes clearest in her claim that this unbounded freedom to act, seen and experienced most evidently during revolutions, should continue to be present after the constitution.

I examined the idea that Arendt sees a 'direct link between the idea of participating in government and the idea of being free' that becomes evident during revolutions but gets forgotten post the establishment of a constitution: 'at least thus far, these revolutions – and the direct experiences they provided for the possibilities inherent in political action – have proved incapable of establishing a new form of state.'²²³ The implication of Arendt's insistence on the continuation of unbounded freedom is often, and rightly, seen as an argument for a 'new form of state' with direct participation. I suggested that a critique of 'modern party systems' points to this link between participation and the experience of freedom within constitutional orders. Elections, in so far as they comprise choosing amongst candidates nominated and fielded by the party do not require the citizens to engage in free political action outside of the election period. And even when they do, it

²²¹ Arendt, 'What Is Freedom?' (n 1) 148.

²²² *ibid.* Arendt, *The Freedom To Be Free* (n 10) 36.

²²³ Hannah Arendt, 'Introduction into Politics' in Jerome Kohn (ed), *The Promise of Politics* (Schoken books 2005) 143.

limits the object and subjects of political action – citizens don't get to deliberate and choose the rules and principles but only the specific political goals and ends. Arendt's critique of representative government, however, is not intended as a critique of representation as such.

I proposed that for Arendtian constitutionalism, representation is better seen not as antagonistic to but as a continuation of participation. The interplay of negative and positive freedom combined with a nuanced understanding of the complementary nature of work and action generates an understanding of representation as work. Despite the under theorisation by Arendt, representation can be seen as complementary to participation in so far as it keeps open the spaces and avenues for the citizens to collectively and publicly act for their common interest.

Chapter Three

POLITICAL POWER

Power is one of the concepts that Arendt works with throughout her life. In her constitutionalist thought, power plays the important role of connecting her phenomenological conception of active citizenship with the functioning of a democratic constitutional order. The experience of active citizenship, as I have shown in the last two chapters, consists of the political freedom to participate in one's governance. This chapter concerns the power that is generated out of such an experience of active citizenship. In this chapter, I discuss the various ways in which Arendtian constitutionalism positions ordinary politics as the source of power in a democratic constitutional order: through intersubjective communication; as a non-violence capacity; and as the freedom to initiate and establish something new. Synthesising the various perspectives on power and framing it in terms of the experience of active citizenship, I argue that power refers to the citizens' political capacity to collectively propel and regulate governmental action through the generation of principles. Power connects the experience of freedom with the actual functioning of the government and in that sense, clarifies the centrality of active citizenship for Arendtian constitutionalism.

Despite its pervasiveness, Arendt's use of the notion of power is rarely consistent: it is at times a description of the way she sees politics work, and other times, a normative ideal that needs to be preserved through constitutional structures in modernity. She claims that power is 'the essence of all government' and that 'no government' – not even totalitarian governments – 'exclusively based on the means of violence has ever existed.'¹ Even revolutions, Arendt argues, occur when the government has lost power.² A straightforward way to understand Arendt's use of 'power' is to view it as a marker of legitimacy for government action. A government action is legitimate if has been propelled by the consent of the citizens (power) and illegitimate if is based on coercion (violence).

In contrast with these descriptive narratives of power, her writings on the kind of power that is generated and established during constitution-making have a normative tenor. She claims, for instance, that the 'inspiring principle' behind the formation of a constitutional democratic government is not a distrust or fear of power, but a confidence in the ability of the people to generate a 'power principle strong enough to found a perpetual union.'³ In constituting 'the people', the constitution establishes and formalises what Arendt calls are the 'power centres' of the body politic.⁴ This power of 'the people',

¹ Hannah Arendt, *Crises of the Republic* (Harcourt Brace Jovanovich 1972) 149–50.

² *ibid* 140–41.

³ Hannah Arendt, *On Revolution* (Faber & Faber 2016) 154.

⁴ *ibid*.

once it comes into existence, is capable of not only dismantling regimes but can also be used to found a new body politic; and when the establishment of a constitution juridifies power through the formation of a government, it manifests the ‘power potential of the republic’ in the working of the government.⁵

It is no wonder, therefore, that the Arendtian notion has been discussed in so many ways that are distinct in their choice of starting point but that also overlap in terms of the larger theoretical framework they suppose. I look at the three chief ways in which the Arendtian notion of power has been understood, theorised, and developed: the deliberative model, the civic republican model, and the agonist model. The three models highlight the three dimensions of the Arendtian conception of power: communication as a source of power, the non-violent nature of power, and power as the ‘freedom to’ act in the political realm.

Often, the dimensions intersect, especially when the discussion concerns Arendt’s conception of political action. This is because the Arendtian notion of power is decidedly political: it corresponds to the emphasis she places on ordinary politics. Nonetheless, the three categories under discussion are distinct in what they emphasise: source, nature, and function of power. The deliberative model focuses on the source of power (communication); the civic republican model highlights the nature of power (non-violence); and the agonistic model points at the objective of power (freedom).

The construction of the Arendtian conception of power, I argue, requires us to understand the three perspectives as dimensions of the same concept. Some tensions remain within this three-dimensional conception of power. However, these tensions are productive because they allow us to see power as both a descriptive categorisation and a normative conception in Arendtian constitutionalism. The three formulations capture different, but equally important dimensions of power and a better understanding of the notion of power – one more useful to constitutional theory – can be achieved if we read the three formulations as contextualising each other. In doing so, we arrive at a notion of power that corresponds to the central role played by active citizenship in democratic constitutional orders.

Together, these dimensions contribute to an understanding of Arendtian power as the collective capability to regulate governmental action. The descriptive aspect of this formulation recognises that a democratic constitutional order is powered on the strength of collective action. Citizens experience active citizenship and become the source of power when they act together – through speech and deeds – and make and keep promises signifying their agreement on the directions and policy objectives the government must pursue. However, the alienation of citizens from institutions of governance, whether self-imposed or resulting from a system that does not create any space for their participation, results in the dissipation of the power they had generated through collective political

⁵ *ibid.*

actions. The normative dimension of my formulation, while distinct but related, focuses on the correlation between the citizens' capacity to generate power and their experience of freedom. I propose that power symbolises the state of being free and represents the tangible expression of the actual capacity for active citizenship. This implies that democratic constitutionalism as a form of government finds its normative grounding in the actual existence of the citizens' collective capacity to regulate governmental action.

In this chapter, I also respond to critiques of Arendt's notion of power for being too idealistic and sanitised; and for not being able to explain the necessity and existence of the administrative bodies in a democratic constitutional order. I propose a distinction between the violence that is antithetical to politics and destroys politics when it appears in the political realm and the violence that exists in the periphery of the political realm and is critical to the maintenance of the political realm. Once again, the symbiotic relationship between action and work that I had advanced in the previous chapters becomes relevant: violence of a particular kind — one involved in the work of a fabricator and the administrator— is useful and necessary for maintaining the public realm within which action occurs and power is generated. I use Arendt's conceptualisation of the different role played by principles, goals, and ends to further clarify this incidence of power with violence and argue that her insistence on freedom as the principle of democratic constitutionalism alerts us to her normative-theoretical understanding of democratic constitutionalism.

This chapter is divided into four parts. The first three parts each deal with one of the three dimensions of power whereas the last part of the chapter concerns my synthesis of the three dimensions into an Arendtian conception of power. In each part of the chapter, I rely upon the schools of thought that have taken inspiration from each of the dimensions. I also pay special attention to the critiques levied against the *Arendtian* conceptions of power that have come out of these scholarly discourses. I do this because juxtaposing Arendt's own views against the variety of Arendtian viewpoints generates key insights with respect to power. In the last part of the chapter, my argument centres on the synthesis of three dimensions of power: power as communication, power as non-violence, and power as the 'freedom to'; I propose that power is both a capacity and a quality possessed by individuals and institutions. As a capacity, it refers to the actual capability of the citizens to propel and regulate governmental action and the ability of the institutions to act in the direction provided by politics. As a quality, power reflects the direct relationship between the legitimacy of the institutions and the actual experience of freedom as a principle of democratic constitutionalism.

I. Power as communication

The first and perhaps most normative account of Arendtian power comes out of the emphasis on communicatory action in Arendt's writing. Such a conception of power that

is centred around communication is best exemplified in the strain of Arendtian scholarship that views her as a theorist for deliberative, dialogical democracy.⁶ The act of speaking with one another has been taken as the source of power by Jürgen Habermas, and following Habermas, by Seyla Benhabib.⁷

Habermas interprets Arendt's conception of power as a response to the Weberian understanding of power as the 'possibility of forcing one's own will on the behaviour of others.'⁸ For Arendt, power is a potential for action that is generated when people come together and decide a future course of action; power is generated out of the 'formation of a common will in a communication directed to reaching agreement.'⁹ In Habermas' reading of Arendt, speech and generation of power is intertwined: he notes, for instance, that power is 'communicatively produced' and requires 'reciprocal speech' as well as 'unconstrained communication'.¹⁰ In contrast, Max Weber's is a teleological model of action that looks at the self-interested actors, 'actors who are oriented to their own success and not to reaching agreement.'¹¹ Such a model presumes the need for constraint and has no space for reciprocal speech that characterises power as communication. Any agreement, in the Weberian setting, is always bound to be instrumental because it is pursued entirely out of its usefulness for the participants and is a means to attaining their pre-determined goals.

On the other hand, Arendt's concept of power stems from a communicative model of action and 'is not the instrumentalization of *another's* will, but the formation of a *common* will in a communication directed to reaching agreement.'¹² In Habermas' interpretation, a sincere pursuit of agreement holds intrinsic value and should not be perceived through an instrumental lens. The 'strength of consensus' is achieved through unrestricted communication and cannot be assessed on an external success but rather against the inherent claim to rational validity that is embedded in speech acts themselves. To put it simply, the genuine intention to reach agreement, according to the deliberative model, is an end in itself that grants a communicatively generated power its normative value.

⁶ Habermas's theory of communicative power feeds into his hugely influential work on communications theory. However, his interpretation of Arendt has been variously critiqued for being selective. See, Gerard P Heather and Matthew Stolz, 'Hannah Arendt and the Problem of Critical Theory' (1979) 41 *The Journal of Politics* 2; David Luban, 'On Habermas on Arendt on Power' (1979) 6 *Philosophy & Social Criticism* 80; Margaret Canovan, 'A Case of Distorted Communication: A Note on Habermas and Arendt' (1983) 11 *Political Theory* 105.

⁷ Jürgen Habermas, 'Hannah Arendt's Communications Concept of Power' (1977) 44 *Social Research* 3; Seyla Benhabib, 'The Embattled Public Sphere: Hannah Arendt, Juergen Habermas and Beyond' [1997] *Theoria: A Journal of Social and Political Theory* 1; Seyla Benhabib, 'Models of Public Space: Hannah Arendt, the Liberal Tradition and Jürgen Habermas', *Situating the self: gender, community, and postmodernism in contemporary ethics* (Routledge 2020).

⁸ Habermas (n 7).

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.* Emphasis mine.

This is not to say that power defined in terms of its communicative origins lacks purpose. Habermas notes that although Arendt views the ‘development of power as an end in itself’, communicatively generated power performs the important function of maintaining ‘the praxis from which it springs.’¹³ The formulation of power in terms of its source is critical for deliberative theorists because it offers a theoretical foundation for a deliberative democratic method of legitimation of political institutions. Deliberative democratic theory sources from ‘power as communication’ the normative insight that the legitimacy of political institutions is always embedded in citizens speech-acting in concert.

To frame it in terms of active citizenship, the Habermasian conception of ‘power as communications’ suggests that citizens, through deliberative and dialogic actions, generate power when they reach agreements amongst themselves. The power that is hence generated not only marks the normative legitimacy of the political institutions but performs the second role of preserving the political structures from distortions that would affect future communication. Consequently, Habermas’ main argument is about the role communication plays in constituting the ideal political institutions and maintaining their character as a ‘non-deformed public realm’.¹⁴ The unrestrained character of communication as a property leads to, Habermas reads Arendt as saying, theorising the ‘general structures of an unimpaired intersubjectivity.’ Before we proceed any further with regards to the deliberative model of power, it is important to adequately capture what Habermas, and the theorists he influences, mean by ‘unimpaired inter-subjectivity’.¹⁵

Communicating with one another involves two stages: first, where citizens disclose their subjective political personalities, and recognise each other as equally capable of intersubjective agreement, and second, the agreement that comes out of the conversation amongst the distinct yet equal citizens. This, however, is the ideal, unimpaired conception of communication where citizens disclose their subjective differences and arrive at an agreement that represents their inter-subjective consensus. Benhabib identifies the following characteristics of such a discourse: ‘1) participation in such deliberation is governed by the norms of equality and symmetry; all have the same chances to initiate speech acts, to question, to interrogate, and to open debate; 2) all have the right to question the assigned topics of the conversation; and 3) all have the right to initiate reflexive arguments about the very rule of the discourse procedure and the way in which they are applied and carried out.’¹⁶ In other words, to be a citizen engaged in an ideal discourse implies being acknowledged as an equal participator despite one’s inherent distinctiveness such that no subject of discussion is outside the remit of what the citizen may support or

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ Habermas’s normative interpretation of Arendt forms the foundation of his discourse ethics, Peter J Verovšek, ‘A Case of Communicative Learning?: Rereading Habermas’s Philosophical Project through an Arendtian Lens’ (2019) 51 *Polity* 597.

¹⁶ Benhabib, ‘The Embattled Public Sphere’ (n 7).

challenge.¹⁷ On the other hand, deformation of the political realm occurs when citizens are isolated from one another and there is an absence of public exchange of opinions. The public sphere is distorted, and communication impaired by the presence of relationships of domination, prevalence of ideology, and use of coercion to exact consent.

The power that is generated from an unimpaired intersubjective communication amongst citizens not only establishes the public realm but also preserves it against deformations. Power as communication suggests that ideal constitutional arrangements are the general structures that not only create the conditions for unimpaired intersubjectivity through communication but are also preserved by the power of ‘common convictions’ that come to the fore when citizens deliberate together and reach an agreement. The destruction of the communicative structures annihilates the source of power and results in the degeneration of the political order to a rule based on violence. Thus, power, on such a reading of Arendt, is a normative ideal condition with only positive connotations – ‘no political leadership can with impunity replace power through force; and it can gain power only from a non-deformed public realm’ – and violence represents the antagonist to this ideal-theoretical understanding of ideal constitutional structures.¹⁸

Benhabib builds on Habermas’ discourse ethics and her own reading of Arendt’s agonistic politics to explicate the principles for a theory of deliberative democracy.¹⁹ She critiques Arendt for not being attuned to the realities of the modern world and thus failing to establish a link between her conception of power and the democratic modes of legitimacy. She argues that the ideal of a deliberative public realm is ‘both a regulative ideal and constitutive fiction of the democratic form of government.’²⁰ By regulative ideal she refers to the Habermasian instinct for theorising what an ideal discourse within a democratic form of government should look like. However, the changing nature of modern politics – the increasingly multicultural and globalised character of politics and the subjects of politics – converts this ‘regulative ideal’ to a ‘constitutive fiction’ when power is talked about for the purposes of theorising the legitimacy of modern institutions.²¹ Consequently, her disagreement with Habermas begins at his lack of acknowledgement of the fact that once deliberative politics is seen as an end in itself under modern conditions,

¹⁷ For some constituent power theorists such as Yaniv Roznai, this implies that deliberation fuelled constitutional amendments are the most legitimate and the bigger the distance between public participation and the amendment process, the lesser is the legitimacy of the constitutional amendment. Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (First published in paperback, Oxford University Press 2019) 226–230. According to Mouffe, there are ‘no prima facie rules limiting the agenda of the conversation, or the identity of the participants, as long as any excluded person or group can justifiably show that they are relevantly affected by the proposed norm under question.’ Chantal Mouffe, ‘Deliberative Democracy or Agonistic Pluralism?’ (1999) 66 *Social Research* 745. This is congruent with the construction of citizenship as a site of constant contestation I outlined in Chapter One.

¹⁸ Habermas (n 7) 9.

¹⁹ Benhabib, ‘Models of Public Space: Hannah Arendt, the Liberal Tradition and Jürgen Habermas’ (n 7); Benhabib, ‘The Embattled Public Sphere’ (n 7).

²⁰ Benhabib, ‘The Embattled Public Sphere’ (n 7) 15.

²¹ Benhabib, ‘The Embattled Public Sphere’ (n 7).

there hardly remains an impetus for the actors to reach a consensus on the higher-order, practical norms that set the standards of legitimacy of the political ordering.²²

For Benhabib, the solution to the dilemma lies in acknowledging that the idealised generation of power through deliberation is both a guiding principle for regulation and a foundational construct inherent to the democratic form of government. This perspective recognises that while the aspiration for power generation through deliberative processes sets a standard for how governance should ideally operate, it also acknowledges that this idealisation involves a certain level of imaginative or conceptual construction fundamental to the democratic system. The location of power within ideal communicative action serves two important roles with regards to the legitimacy of institutions: first, as a regulative ideal, it refers to the idea that the legitimacy of democratic institutions is dependent upon their ability to represent an impartial standpoint, ‘that the institutions of this polity are so arranged that what is considered in the common interest of all results from processes of collective deliberation conducted rationally and fairly among free and equal individuals.’²³ However, this is a necessary but not a sufficient condition for attaining legitimacy within a democratic form of government.

The second function served by sourcing power from ideal communication comes in the form of its value as a constitutive fiction. The fiction of a general deliberative assembly, rather than constricting, constructs the space for alternative modes of association that nonetheless satisfy the procedural models exemplified in the constitutive fiction. Benhabib describes the idea of a general deliberative assembly, where a unified people shape and express their will, as a fiction that should give way to a polity characterized by loosely associated, multi-foci of opinion formation and dissemination. She argues that these can take various forms, including political parties, citizens’ initiatives, social movements, voluntary associations, consciousness-raising groups, and more. The core of her argument is that it is through the interlocking web of these diverse forms of associations, networks, and organisations that an anonymous ‘public conversation’ emerges. According to Benhabib, the model of deliberative democracy favours such a public sphere marked by mutually interlocking and overlapping networks and associations, fostering deliberation, contestation, and argumentation.²⁴

Although Benhabib’s articulation of the principles of deliberative democracy are definitively Arendtian in the view they share about the centrality of deliberations, contestations, and argumentations as a central feature of politics that needs to be preserved, Benhabib, much like Habermas, relies upon a theoretical construction of legitimacy. Walzer critiques Habermas by arguing that the elementary norms that provide the standards for judging the legitimacy of political institutions are not ‘invented’ as in the Habermasian ideal discourse but are a product of the experience that power vanishes if not

²² *ibid.*

²³ *ibid* 8.

²⁴ Emphasis supplied.

instituted through actual negotiations and compromises. He points at the ideal quality of Habermas' communications theory and faults it for the undertones of universalisation it implies: ideal discourse transcends the practical need for mutual understanding in actual speech. He claims that while universalisation serves a theoretical purpose, distinct from the objectives of many real conversations, 'it is intended to rule out bargaining and compromise (the negotiation of particular interests) and to press the speakers toward a preordained harmony.'²⁵ For Habermas like Rousseau, Walzer points out, justice is not a negotiated settlement but a common life moulded by the general will of citizens—a universal norm agreed upon by all.

It is important to pay attention to Walzer's emphasis on the value and possibility of agreement because it highlights one of the main reasons why the deliberative model on its own does not sufficiently capture the notion of Arendtian power. Walzer argues that in a democratic society, mere acquiescence or passive agreement is insufficient; what is required is rational and explicit agreement. While acknowledging the importance of common language and understanding in any human society, he contends that conversation is just one aspect of the broader social process that produces consensus and shared understandings. Citizens in a democratic society 'can have no politics unless they also have what political scientists call a "consensus" on institutional arrangements and lines of authority.'²⁶ These processes, he says, include political struggle, negotiation, compromise, law-making, law enforcement, socialisation, economic transformations, and cultural creativity.

In the first chapter, I discussed how Arendt's consternation with the idea that there can be a formation of a 'common will' comes out of her insistence that plurality is not just a normative ideal but a feature of the human condition we are born into. Conceptions of sovereignty that rely on the coming together of people to generate a common will are not only illusory (because there could be no such thing as a common will) but also dangerous (because notions of common will inevitably end up needing a 'representative' to act out the unity, making the unity itself an end upon which the legitimacy of the representative would be based). Although Benhabib carves out a much larger space for acknowledging the plurality of political actors, in her reading the legitimacy of democratic institutions remains indebted to notions of an ideal discourse.

A primary reason behind this gap in Arendtian deliberative democratic theory is the excessive focus on the source of power for a normative perspective on deliberative democracy to the detriment of the phenomenological nature and function of power. As Walzer points out, '[d]emocratic citizens speak, listen, and ask questions; they play different roles on different occasions – not all roles together on a single occasion.'²⁷ He continues, we could consider communication in a democracy akin to Aristotle's conception of

²⁵ Michael Walzer, 'A Critique of Philosophical Conversation' (1989) 21 *Philosophical Forum* 182, 186.

²⁶ *ibid* 191.

²⁷ *ibid* 190.

citizenship: ‘ruling and being ruled, speaking and listening, in turn.’²⁸ The proceduralist tenor of the deliberative claim, however, not only subsumes acting within speaking but also fails to adequately acknowledge the productivity of power in disturbing the status-quo by delegitimising the existing political institutions. Thus, power viewed only as communication remains open for critique because it fails to account for the potential of free political action to initiate something new.

Margaret Canovan rightly points out that Habermas’s account is ‘dominated by his overriding interest in communication and rational agreement, which elbows out Arendt’s own concern with political action and worldly institutions.’²⁹ In presenting rational consensus as the source of the ‘common convictions’ that structure political institutions, he substitutes speech for action, consensus for conflict and a theoretical unity for a realist plurality. When confronted with the agonistic politics of Arendt, Habermas dismisses her critique of theoretical knowledge as a legitimate source of power. ‘Hannah Arendt,’ Habermas claims, ‘places more trust in the venerable figure of the contract than in her own concept of a praxis, which is grounded in the rationality of practical judgment.’³⁰ This is a misreading of Arendt in so far as it does not give adequate consideration to the role promises play in preserving the distinctiveness of the promising parties. Arendt places her trust in the potential promise-making and promise-keeping holds as a way to stabilise the political realm without taking away from the citizens the freedom and capacity to disclose their novel viewpoints and act in unpredictable ways. What Habermas does highlight, however, is the source of power in Arendt’s writings: power is generated when citizens act together through words and deeds. Including negotiations and compromises in this conception of power as communication does not dull the normative significance of the Arendtian conception advanced by Habermas but enriches our understanding of the role played by active citizens in the functioning of a democratic constitutional order.

II. Power as non-violence

We know from the last section that for Arendt, power is generated when citizens act in concert. However, this power is ephemeral: ‘it belongs to a group and remains in existence only so long as the group keeps together.’³¹ The ephemerality of power poses a problem for deliberative scholars because they wish to source from the ideal nature of power generation an ideal, transcendental theory of legitimacy of political institutions and require something more durable than a temporary phenomenon as the basis of legitimation of democratic institutions. After all, if consensus reached after deliberation is the source of legitimacy, institutions would have to wait for a considerable amount of time for the

²⁸ *ibid.*

²⁹ Canovan (n 6).

³⁰ Habermas (n 7) 24.

³¹ Hannah Arendt, ‘On Violence’, *Crises of the republic* (Harcourt Brace Jovanovich 1972) 143.

consensus to be achieved in real time. The problem of ephemerality of power leads the deliberative democratic theorists to theorise *as if* the institutions are already grounded in a rational consensus – for instance, Benhabib’s theorisation of the constitutive fiction.

This, as Canovan points out, is problematic because Arendt objects to knowledge as the basis of rule.³² In this section, I look at the scholars writing about the civic-republican model of power, who view Arendt’s writings on promise-making and promise-keeping as her way of providing a solution to the temporality of political power and consequently hint at what an Arendtian promise-based legitimation of political institutions would look like. Such a formulation builds upon the non-instrumental nature of power of mutual promises and the ways in which this power is distinct from violence. Power is a temporary, but perceptible capacity that citizens possess as a collective and is generated when citizens act in concert to make, unmake, or preserve a constitutional order. Power is generated through acts performed in consonance with these promises. The promising citizen becomes the source of power and is, hence, an active participant in the founding and preserving of the *polis*. In other words, citizens acting in concert are responsible for propelling and directing governmental action.

According to Canovan, Arendt acknowledges the importance of constitutional structures of laws and institutions but does not make them the focus of her attention.³³ She claims that Arendt chooses to emphasise the nature of power that is generated during political action. The power that is generated when citizens exercise their political freedom is non-violent, because citizens come together as equals to pursue a common enterprise. In such a coming together, there is no space for an absolute sovereign. Instead, isonomic association generates the power that propels the political community forward. This peculiar focus is related to the motivation Canovan attributes to Arendt: to understand totalitarianism and propose a rebuilding of civilised politics in a way that ‘takes account of human plurality and recognizes politics as something that happens in the space *between* plural men.’³⁴ In doing so, Arendt uses power and violence as the two categories with which to distinguish between a political structure that acknowledges plurality and an order that does not.

While defining active citizenship in the last two chapters, I argued that Arendt sees not only the establishment of a realm for citizenship but also the experience of citizenship itself as dependent upon the ‘acting in concert’ of individuals. To recap, citizenship is associational because its institution as well as experience is dependent upon the presence and acknowledgment of others. One cannot declare oneself a citizen any more than one can be a citizen alone. Citizenship as an identity becomes meaningful only when one has

³² Arendt on Plato’s cave allegory, Hannah Arendt, *The Promise of Politics* (Jerome Kohn ed, Schocken books 2005) 5–13, 32–39.

³³ Margaret Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (Cambridge University Press 1995) 208.

³⁴ *ibid* 207.

peers to act with: to communicate one's political positions and be present as an audience to another's communication. The positive and negative freedoms of the citizens materialise when their participation is complimented and supported by representative institutions. Thus, the coming together of citizens in and as a political community generates the political institutional structures within which they may continue to engage in communication with each other as equals about their common interests. In Arendt's view, such an isonomic associational citizenship acknowledges and creates a space for human plurality and is built on a relational conception of law.

For Arendt, a polity founded on a relational conception of law is founded on the 'strength of mutual promise' and the conviction that the power that is generated from agreement is 'enough to "enact, constitute, and frame" all necessary laws and instruments of government.'³⁵ In Canovan's reading, Arendt sees government as a form of organised and institutionalised power and the constitution as the (act of) promise through which power is preserved by institutionalisation: 'this means that instead of seeing the Constitution as a device for putting limits on rulers who somehow possessed power of their own, the point of the Constitution was to organise, stabilise and preserve the power of the people by associating and balancing the various bodies in which it was gathered.'³⁶ To theorise the source of power in mutual promises is a conscious move Arendt makes in response to the Schmittian understanding of sovereign power in the nation-state.

Without making explicit reference to Schmitt, Arendt works through her conception of power as non-sovereignty in parallel to Schmitt's reasoning on sovereignty.³⁷ Where Schmitt finds in the French Revolutionary experience two laudable discoveries that would form the foundation of his theory – the conceptualisation of an unlimited and indivisible sovereign in possession of the *pouvoir constituant* and the placement of the supra-legal constituent power in a nationally united ethnically homogenous 'people' –, Arendt uses the American Revolutionary experience as the theoretical challenge to the Schmittian sovereign by making a federal, fragmented power system as the basis of her constitutional theory.³⁸ Not consent, but mutual promises form the basis of the coming together of people and the establishment of a constitution. Although her reading of the two revolutions may be historically inaccurate, the conception of power that comes through in her discourse on the American founding commands attention for the value it provides as a challenge to Schmitt's conception of sovereign.

Power generated through the act of promising stands at a higher normative ground than power generated through the act of consenting for two reasons.³⁹ First, Arendt argues,

³⁵ Arendt, *On Revolution* (n 3) 166.

³⁶ Canovan (n 33) 209.

³⁷ On Arendt's marginalia in her copy of *The Nomos of the Earth*, see Anna Jurkevics, 'Hannah Arendt Reads Carl Schmitt's *The Nomos of the Earth*: A Dialogue on Law and Geopolitics from the Margins' (2017) 16 *European Journal of Political Theory* 345.

³⁸ *ibid.*

³⁹ See generally, Arendt's writing on the social contract tradition: Arendt, *On Revolution* (n 3) 169–174.

the act of promising involves a much higher degree of interaction, deliberation, and communication with one's peers than merely consenting to give up power. She argues that while the act of consent is 'accomplished by each individual person in his isolation', 'the act of mutual promise is by definition enacted "in the presence of one another"...'⁴⁰ It is important to note here that by consent, Arendt refers not to the reciprocal agreements that are made amongst individuals, but to the arrangement between the citizens and the government whereby citizens give up certain rights and powers and grant the government a monopoly over power in exchange for protection of life, property or liberty. She sees consent as a concept that is related to obedience and thus, can only exist in a non-isonomic constitutional arrangement, i.e. when the political community is divided into rulers and the ruled.⁴¹ In contrast, promises refer to the act of combining with one's equals to produce a political realm upon entering which the individuals become citizens and experience power. The difference between the two social contracts is that while within a promise-based constitutional order, the previously impotent individual becomes a powerful citizen, within a consent-based formation of a constitutional order, the government acquires a monopoly of power and the governed remain 'politically impotent so long as they do not decide to recover their original power in order to change the government and entrust another ruler with their power.'⁴²

She further explains that the mutual contract, where power is established through promises, embodies both the republican principle— 'according to which power resides in the people, and where a "mutual subjection" makes of rulership an absurdity: 'if the people are governors, who shall be governed?''⁴³ It also encompasses the federal principle, 'the principle of "a Commonwealth for increase" (as Harrington called his utopian *Oceana*), according to which constituted political bodies can combine and enter into lasting alliances without losing their identity.'⁴⁴ On the other hand, the social contract, which requires the citizens to surrender their power to the government and consent to its rule, encapsulates both the principle of absolute rulership, marked by an absolute monopoly of power 'to overawe them all' (Hobbes), potentially resembling divine power, since only God is omnipotent. It also involves the national principle, according to which there must be one representative of the entire nation, and where the government is perceived to embody the will of all nationals.⁴⁵

Keith Breen argues that Arendt's 'chief objective is to counter the traditional assumption that politics equates with violence by effecting a radical reevaluation of political

⁴⁰ *ibid* 171.

⁴¹ *ibid*.

⁴² *ibid* 167.

⁴³ *ibid* 170.

⁴⁴ *ibid*.

⁴⁵ *ibid* 171.

life as a whole.⁴⁶ She relies on the axis of instrumentality to distinguish power from violence: where *praxis* refers to action (speaking and acting in concert) when citizens come together to disclose their identities, *poiesis* refers to ‘work’ and is akin to fabrication that is governed by an instrumental logic, a kind of rationality that involves the calculation of means and end. Arendt says, ‘only such power, which rested on reciprocity and mutuality, was real power and legitimate, whereas the so-called power of kings or princes or aristocrats, because it did not spring from mutuality but, at best, rested only on consent, was spurious and usurped.’⁴⁷

Consequently, for Arendt, whereas promises correspond with power, consent implies a relationship based on violence. It is at this point when Arendt equates sovereignty with violence and political freedom with power that she is recognised as a theorist belonging to the classical republican school of thought. Recently, a case has been made to acknowledge the beliefs and premises Arendt shares with modern republicanism that sees freedom as non-domination.⁴⁸ The point is that in the civic-republican aspect of Arendt writings, any pursuance of political action that is legitimated by a conception of popular sovereignty would be based on a relationship of violence because popular sovereignty itself is a notion that constructs an absolutist conception of the people as a means to an end. The instrumental rationality embedded in the Schmittean construction of the sovereign deindividuates and depoliticises people because it treats human plurality as something that needs to be conquered for the construction of a sovereign.

In contrast, power comes into existence only when plural individuals come together to pursue action and disappears when this conglomerate disperses. Canovan summarises Arendtian power: ‘power is not something an individual can possess on his own, nor even the sum total of the combined strength of individuals. Instead, it is something that ‘springs up in between men’ when they act together.’⁴⁹ Such power cannot be ‘stored up’ and ‘preserved to be used at a later date.’⁵⁰ The fact of plurality of the involved actors brings with it an element of unpredictability to all joint enterprises. However, instead of exacting consent from the participating parties to ensure certainty, promises ‘establish in the ocean of future uncertainty islands of security without which continuity, let alone durability, of any kind, would never be possible in the relationships between men.’⁵¹ Promises do so by generating power: by establishing ‘islands of security’

⁴⁶ Keith Breen, ‘Law beyond Command?: An Evaluation of Arendt’s Understanding of Law’ in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the law* (Hart Publishing 2012).

⁴⁷ Arendt, *On Revolution* (n 3) 182.

⁴⁸ Breen (n 46).

⁴⁹ Canovan (n 33) 208.

⁵⁰ Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 2018) 200. Owens notes some similarity between Arendt and Foucault in this respect, Patricia Owens, ‘Not Life but the World Is at Stake: Hannah Arendt on Citizenship in the Age of the Social’ (2012) 16 *Citizenship Studies* 297, n13.

⁵¹ Hannah Arendt, *The Freedom To Be Free* (Penguin Books 2020) 30.

that limit the boundlessness of action that otherwise plagues the ‘ocean of future uncertainty.’⁵²

In the civic republican model, Arendtian conception of power focuses on the potential of promising to generate lasting political institutions: power consists of the capability to establish durable institutions without the use of violence. Arendt says, ‘binding and promising, combining and covenanting are the means by which power is kept in existence; where and when men succeed in keeping intact the power which sprang up between them during the course of any particular act or deed, they are already in the process of foundation, of continuing a stable worldly structure to house, as it were, their combined power of action.’⁵³ Hauke Brunkhorst suggests that while Arendt’s early discussion of power in *The Origins of Totalitarianism* was primarily negative, portraying power as the perpetual potential for the destruction of rule, whether legitimate or not, her later work starting from *The Human Condition* presents power in a more constructive light. This subsequent understanding of power aligns with the intersubjective interactions among citizens that not only dismantles and nullifies all order, state, and law but also concurrently generates, establishes, and founds them.⁵⁴

Consequently, in the civic republican model, power is used in both descriptive and normative sense. Canovan acknowledges, for example, that Arendt does not argue that ‘authentic power’ – and here, authenticity in Canovan’s reading is very closely related to the non-violent, associational nature of power – can only be used for idealistic laudable purposes.⁵⁵ Canovan points to Arendt’s acknowledgement of the fact that power and violence are intertwined in governance and that often, ‘the active support of one group of people – perhaps only of the secret police – can enable a government to rule the others by violence.’⁵⁶ In fact, even in the Greek *polis*, the power generated by the association of citizens was used to keep in place the hierarchical arrangement between the masters and the slaves in the private realm. Be that as it may, for Canovan, Arendt highlights that the appearance of power and violence together does not take away from the normative argument that as ‘governmental violence increases, power decreases, and that the ultimate climax of totalitarianism, when the population is completely atomised... can lead only to paralysis and impotence.’⁵⁷

In such a formulation, the legitimacy of political institutions is coeval with the appearance of power in the political realm. The power generated by free associations of citizens is perceptible in their active support and participation in governance. Human plurality continues to have space in such a coming together of individuals because the presumption is not that the free individuals will spontaneously concur in their opinions to

⁵² Arendt, *The Human Condition* (n 50) 237.

⁵³ Arendt, *On Revolution* (n 3) 174.

⁵⁴ Hauke Brunkhorst, ‘Reluctant Democratic Egalitarianism’ [2008] *Ethical Perspectives* 149.

⁵⁵ Canovan (n 33) 210.

⁵⁶ *ibid* 58.

⁵⁷ *ibid* 210.

generate a ‘common will’, but that they will agree to act within a set of institutional arrangements. ‘They will be united,’ Canovan claims, ‘not because they all think alike in the inner realm of their minds, but because outside in the world, they inhabit the same public space, acknowledge its formal rules, and are therefore committed to achieving a working compromise when they differ.’⁵⁸ Consequently, power will continue to remain a potential, ‘as a capacity that is neither outside of *the* subjects nor at the disposal of *a* subject.’⁵⁹

There are some parallels and points of convergence between the deliberative model and civic-republican model. First, plurality is treated as a fact of political life and its preservation feeds into the legitimacy of the political institutions. Further, the generation of power is a collective venture in both the formulations. Individuals cannot be powerful on their own but require the presence of other acting peers to generate power. In that sense, arguably, civic republicanism is not opposed to the deliberative democratic placement of plurality as a parameter of ideal communication. While for the deliberative democratic model, plurality assumes importance because reciprocal speech – which is possible only amongst plural individuals – makes decisions more rational and representative, for civic republicanism, plurality is intrinsically connected with the idea of freedom. Freedom, in the classical republican sense, consists of airing one’s views in the public to disclose one’s identity because it is only through public speech and action that individuals can experience freedom as non-sovereignty.

The disagreement, however, begins once we look closely at the centrality of promising to the generation of power. Civic republicans acknowledge that power is a temporary phenomenon that cannot be bottled up and is akin to a ‘political practice’ that is an observable fact. However, power can still provide legitimacy to political institutions through the act of promising which involves free individuals combining in a free association to create, in a moment of highest exalted political action, a constitutional order.

Arendt’s distinction between power and authority further clarifies the difference between legitimacy and authority. While power corresponds to the legitimate capacity to act, authority is more properly the driver of stability and durability of a constitutional order. The difference is important because in making a theoretical separation between power and authority, Arendt also clarifies the role of power in a political system. Although I will be dealing with Arendt’s understanding of authority in the next chapter of the thesis, for now, it is important to mention that the Arendt does not see power and consequently, legitimacy of political institutions, as a stable event fossilised in time. Power, because it is intrinsically dependent upon the free association of citizens, is forever in need of generation, and thus, the legitimacy of the political institutions is also always dependent upon the support and participation of citizens. This is why, for Canovan, Arendt’s analysis of power implies that ‘in so far as rulers can exercise power they do so only by drawing on popular support, on

⁵⁸ Canovan (n 6).

⁵⁹ Hauke Brunkhorst, ‘The Productivity of Power: Hannah Arendt’s Renewal of the Classical Concept of Politics’ (2006) 26 *Revista de ciencia política* (Santiago).

the willingness of their subjects to go on acting together to maintain the body politic.⁶⁰ In other words, even though the conception of power is very normatively demanding and consequently, highly unlikely to have a pervasive presence in actual constitutional orders, it is always power that maintains a democratic body politic and not violence. In such a reading, Canovan consciously maintains the strict boundaries between power and violence in order to preserve the normative thrust of Arendt's civic republicanism.

However, the establishment of a constitution as the establishment of citizenship involves not only the juridification of practices of inclusion, but also embeds within the system practices of exclusion.⁶¹ This generates a problem for civic republicanism. Can the political institutions establishing the freedom of citizens be truly legitimate if they are based upon relationships of domination? Modern republicanism faces the problems of exclusion and legitimacy by directly addressing the practices of exclusion that are inevitable in founding moments. Michelman, for instance, formulates a conception of a 'jurisgenerative politics' that proposes a practice of public justification that is dependent upon the continued inclusion of previously excluded social groups, that is, of bringing 'the margin to the centre'.⁶² Michelman's central claim is that the idea of self-rule can be reconciled with constitutional foundings and that legitimacy can be constantly generated if constitutional interpretation by the courts includes within it a practice of constantly reinterpreting the foundational moments to include the previously excluded communities. In this setting he sees law as a set of narratives and 'public normative references' that organise the political world and inform the individual and collective identity of its participants and sustains their continued commitment to that community.⁶³ Because foundational politics inevitably included practice of exclusion, Michelman proposes that the law may be used in a certain way to attain some sense of self-rule, i.e., through the process of 'discursive validation the give and take of reasoned argumentation by situated agents each coming towards agreement on the validity of the law from their own perspectives as free and equal participants'.⁶⁴

However, in the civic-republican maintenance of the non-violent nature of politics, power is reduced to a romantic ideal. Since the incidence of violence now corrupts the normative legitimacy of use of power by the political institutions, legitimate political action seems to be an image of ideal communication envisaged by deliberative democratic theorists with no real, practical implications for the way politics works within a constitutional order. One is left wondering, if power can ever achieve a foundation if it

⁶⁰ Canovan (n 33) 209.

⁶¹ See, for instance, Marianne Takle, Janikke Solstad Vedeler and Mi Ah Schoyen (eds), *Citizenship and Social Exclusion at the Margins of the Welfare State* (Routledge 2023).

⁶² Frank Michelman, 'Law's Republic' (1988) 97 *The Yale Law Journal* 1493. See also, Angelika Bernal, 'A Revolution in Law's Republic: Arendt and Michelman in Dialogue' 5 2009 <<http://www.hannaharendt.net/index.php/han/article/view/145/255>>.

⁶³ Michelman (n 62).

⁶⁴ *ibid.*

must satisfy the heavily normative typology of civic republicanism. If power is an end in itself and cannot, by definition, be generated as a means to an end, foundational as well as ordinary political events appear as accidental occurrences that may or may not be repeated in the future. In other words, in an effort to stay close to Arendt's non-instrumental conception of power, the civic republican model ends up minimising the scope of Arendtian power. Power appears as an ephemeral phenomenon possible only under ideal conditions, making serendipitous appearances throughout history. Nevertheless, much like deliberative theorists' conception of power as communication highlights the centrality of reciprocal speech as the source of power, the civic-republican model captures the non-violent nature of power in Arendtian constitutionalism.

III. Power as 'freedom to'

The civic republican emphasis on the non-violent nature of power focuses on the productive dimension of power. Yet, formulating power as isonomic and associational tells us nothing about what power is generated for, and what it seeks to achieve. The rigidity of the distinction between power and violence renders the civic republican conception of power romantic and unrealistic when seen in the context of modern constitutional arrangements. For instance, understanding violence as everything that involves an instrumental reasoning alienates most of what we associate with politics and governance today. Further, because legitimacy is sourced from whatever citizens choose to support, an exclusive focus on the form of power results in the implication that a constitutional arrangement based on Arendtian civic republicanism is contentless with regards to its normative directions. Despite Michelman's efforts to include exclusion as a matter of concern for modern republicanism – which in itself is limited because it makes the judiciary the only site of contestation – the civic republican model ends up delineating the scope for the Arendtian conception of power as a normative concept.⁶⁵

In this respect, the agonistic model reads Arendt's writings as providing for the possibility of the 'remainders' of political foundations.⁶⁶ The previously excluded communities find admittance in an agonistic reading of Arendt because power is seen as the ability to both establish something new and alter existing arrangements. Consequently,

⁶⁵ Michelman's article begins from a consternation with claims that view republicanism as supporting discriminatory and exclusive laws because all that matters is the majority sentiment and morality. He seeks to how republicanism's constitutional commitments contain the possibility of viewing the renovation of political communities by including those who have been previously excluded. However, because his starting point is the US Supreme Court judgment in *Bowers v Hendrick* (in which the court upheld the constitutionality of Georgia's anti-sodomy law), Michelman's remedy for civic republicanism also stays within the judicial domain. He sets for himself the task of elucidating how looking at the American Constitution through a republican-inspired lens could rejuvenate a constitutional discourse, fortifying judges against forsaking like those of Hardwick's. In his theorisation, there remains no space for extra-judicial sites of contestations that may occur and find relevance alongside the judicial process.

⁶⁶ Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press 1993).

the starting point is the function power performs with respect to the constituted order. Once seen as the capacity to initiate action that disturbs the constituted order, the emphasis returns to what power does and not how it is generated or on its qualities. In this section, I describe the two ways in which power as ‘freedom to’ has been developed by theorists: Bonnie Honig who sees power as the capacity for interruption of the status quo and views the generation of power as the ‘extra-in-the-ordinary’, and Andreas Kalyvas, who although not strictly an agonistic democratic theorist himself, nevertheless, sees power as the boundless capacity of action and develops Arendtian constituent power as the capacity for extraordinary politics.⁶⁷

While both Honig and Kalyvas start from the same point by acknowledging the boundless and unpredictable nature of action, Honig uses the agonism of Arendtian politics to argue that power makes an appearance in ordinary politics to disturb and reinvigorate the constitutional ordering, Kalyvas treats Arendtian power as the capacity for extraordinary politics of constitution-making. I conclude this section by arguing that in a dramatisation of power as the freedom to initiate a new beginning, the agonistic model fails to provide an account of the ways in which the ordinary citizens’ non-conflictual deliberative participation in governance also generates the power that propels the wheels of the constitutional structures. In other words, I argue that agonism elbows out agreement in favour of conflict and fails to acknowledge the relatively peaceful and non-conflictual modes of political interactions within modern democratic institutions that are essential for the stability and durability of the constitutional order.

Honig’s agonistic conception of politics sources inspiration from Arendt’s discourse on Greek *polis* and Machiavellian *virtù* to argue for the value of seeing politics as an end in itself and is driven by the instinct to ‘rouse enmity towards order’.⁶⁸ She begins by characterising theoretical projects that aim to ‘confine politics (conceptually and territorially) to the... regulative tasks... of building consensus, maintaining agreements, or consolidating communities and identities’ as a form of ‘virtue politics’.⁶⁹ In doing so, they dilute the potential of constituent power by arguing for the ontological superiority of one kind of constituted order over the other on the basis of transcendental principles that are discernible from outside the political realm and hence, can be used as a basis of legitimacy of proposed constitutional ordering. In contrast, she argues that all foundations are bound to always be an ‘imperfect construction’ of some ‘would be unity’ and acknowledging the existence of genuine political plurality requires viewing the work of constituent power as never complete. Drawing on Arendt and Machiavelli, she proposes that a politics of *virtù*

⁶⁷ *ibid*; Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge University Press 2008).

⁶⁸ Bonnie Honig, ‘The Politics of Agonism: A Critical Response to “Beyond Good and Evil: Arendt, Nietzsche, and the Aestheticization of Political Action” by Dana R. Villa’ (1993) 21 *Political Theory* 528. On Nietzsche’s influence on Arendt, see, Dana R Villa, ‘Beyond Good and Evil: Arendt, Nietzsche, and the Aestheticization of Political Action’ (1992) 20 *Political Theory* 274.

⁶⁹ Honig (n 66) 2.

treats disruptions to the constituted orders as the sites of democratic politics. In contrast with the civic republican faith in worldly institutions to stabilise the political realm, Honig's agonism appeals to reject the 'fantasy that the right laws or constitution might someday free us from the responsibility for (and, indeed, the burden of) politics.'⁷⁰

This inclination towards a 'perpetuality of contest' is fuelled by the Arendtian discourse on freedom as the boundless, spontaneous capacity to initiate a new beginning. For Arendt, freedom is the *sine qua non* of political action. *On Revolution* is framed from the very beginning as a treatise that presents freedom as politics and conversely politics as freedom. As I explained in the previous chapter, Arendt distinguishes between philosophical freedom and political freedom by relying upon Montesquieu's writings on the difference between *I-will* and *I-can*. She notes how Montesquieu 'had maintained that power and freedom belonged together, that conceptually speaking, political freedom did not reside in the I-will but in the I-can, and that therefore the political realm must be construed and constituted in a way in which power and freedom would be combined.'⁷¹ Arendt claims that the freedom of human will is better understood as an attribute of individual non-political mental activity because in choosing between two given options, the individual has no need for the presence of their peers. However, political freedom refers to the more public capacity of the individual to act which is always dependent upon other individuals with whom one seeks to act. Political freedom as the capacity to initiate new beginnings finds its most majestic materialisation in the establishment of a constitutional order. Consequently, constituent power is associated with the human capacity for initiate and reflects the collective capacity of individuals to interrupt the status quo. The agonistic understanding of democratic politics is best captured by Wolin's insistence on understanding democracy as a 'moment' that reveals the actualities and potentialities of actual political action, rather than as a 'form' of government.⁷²

However, while Wolin gives an absolute priority to power, Honig presents a more constitutionalist understanding of agonistic democracy where constituent power has *relative* priority over constituted authority. Honig's formulation is closer to civic republicanism in that she views freedom as being constantly regenerated when new forms of action establish new constitutional orders or augment the foundations of the existing order. In other words, Honig wishes to preserve the radical possibility of new beginnings inherent in power as 'freedom to' but also create space for the use of power in ordinary politics. Honig admits that politics always 'consists of practices of settlement and unsettlement, of disruption and administration, of extraordinary events . . . and [of] mundane maintenances' and presents freedom as the experience of ordinary political life.⁷³ In Honig's formulation, politics assumes a primacy over law and thus, ends up doing the bulk of the work in the

⁷⁰ *ibid* 211.

⁷¹ Arendt, *On Revolution* (n 3) 149.

⁷² Sheldon S Wolin, *Fugitive Democracy and Other Essays* (Nicholas Xenos ed, Princeton University Press 2018).

⁷³ Honig (n 66) 203.

maintenance of the legitimacy of the constitutional order. The legitimacy of the constitutional order is always a work in progress and dependent upon the ordinary political practices of the citizens.⁷⁴ In other words, legitimacy of political institutions is dependent upon the extraordinary moments within ordinary circumstances of everyday politics. Constituent power continues to exist within the constituted order in the form of the capacity of citizens to make, unmake or support constitutional norms.

In contrast, Kalyvas' project is aimed at articulating constituent power in terms of extraordinary politics.⁷⁵ Kalyvas makes as his starting point Arendt's description of action as a miracle. Action resembles a miracle because of its potential to disrupt what is known and accepted and institute a completely unique, unpredictable and out of the ordinary beginning and freedom 'brings into being new institutions, public spheres, higher constitutional-legal structures, and regime forms' and in so far as it is exercised through the 'extraordinary, spontaneous processes of founding a new government and drafting a new constitution', is synonymous with constituent power.⁷⁶

Unlike Honig, Kalyvas acknowledges the role of a promise-based conception of law as the source of stability and permanence of the constitutional order. However, law as the juridification of the free associations of people only provides durability to action by preventing the outcome of extraordinary politics from degenerating and protecting the constituted political realm from uncertainty. The legitimacy of the founding act is connected with the principles that are manifested in the performance of the act. According to Kalyvas, principles 'protect extraordinary politics from losing sight of what it has to accomplish and thus preventing it from turning into a self-defeating whimsicality or into a self-defeating permanent revolution.'⁷⁷

The discussion on principles is important because as opposed to other formulations, principles generated out of action in turn act as a limit on successive use of power. In Kalyvas' focus on foundational moments and extraordinary politics, the main difference between constituent power corresponding to extraordinary politics, and constituted power related to ordinary politics comes out in his argument that is only extraordinary politics that produces the principles of action that affect the future exercise of constituted power in ordinary politics.

Principles, in Kalyvas' reading of Arendt, are immanent, i.e, they appear from within the instituting act at the moment of the performance of the act. In other words, principles are not transcendental norms nor rationally derived universal precepts that can be deduced as a matter of theory. Principles guide, inspire, and often originate action and in that sense, have a qualificative effect on action. To scaffold the normative core of her

⁷⁴ Christian Volk, 'Towards a Critical Theory of the Political: Hannah Arendt on Power and Critique' (2016) 42 *Philosophy & Social Criticism* 549.

⁷⁵ Kalyvas, arguably, has a Schmittian reading of Arendt and in doing so, misrepresents the role of foundational politics in Arendt's constitutional theory.

⁷⁶ Kalyvas (n 67) 202–3.

⁷⁷ *ibid* 243.

constitutionalism, Arendt relies on Montesquieu's topology of identifying principles that guide various forms of government. For Montesquieu, each form of government has a principle that constitutes 'the spirit of the laws.' In Arendt's words, these principles provide 'guiding criteria by which all actions in the public realm are judged beyond the merely negative yardstick of lawfulness, and which inspire the actions of both rulers and ruled.'⁷⁸ While it is fear in totalitarian, virtue in republican, the principle of freedom guides revolutionary constitutional governments.⁷⁹ Consequently, Kalyvas argues, constitutional principles are generated in the 'actual performance' of constitution-making that involves 'a plurality of parties engaged in the constituting process of mutually granting to each other those powers and freedoms that they already acknowledge during the founding enterprise by simply practicing them.'⁸⁰

To put it in terms of active citizenship, for Kalyvas, constituent power is the capacity of the citizens to institute a constitution and generate constitutional principles in the performance of such an action. In his formulation deliberation assumes importance not on its own terms, as for example in Habermas' communications theory, but because 'widespread, informal, and extraconstitutional processes of persuasion and contestation are necessary to apprise the participants of these immanent principle, whose existence is not intuitively apparent to the actors.'⁸¹ We find that while Honig's formulation prioritises politics to such an extent that juridical order plays a negligible role in the legitimacy of institutions, Kalyvas' understanding of constituent power creates an artificial distinction between foundational and ordinary politics, and gives a subservient position to ordinary politics, much like laws and institutions in Honig's conception of constituent power.

Consequently, like the deliberative and the civic republican model, the agonistic model brings an important insight on the table: power is congruent with the citizens' experience of freedom. This corresponds with the commonalities I highlighted between the deliberative and the civic republican model with regards to the political nature of the Arendtian conception of power. Power is intrinsically connected with the political activities of the citizens. The agonistic model, however, radicalises Arendtian power by associating with power the capacity to make or unmake constitutional structures. In other words, citizens are powerful only when they have the avenues and the opportunities to institute, maintain and amend the constitutional principles that underlie governmental action. The radicalisation of power, however, creates an artificial, and in my opinion, unnecessary distinction between ordinary and extraordinary politics. By creating this distinction, agonistic theory runs the risk of dismissing the 'extra in the ordinary', as Honig points out. Contra Honig, however, a sincere emphasis on the value of the extra-in-the-ordinary

⁷⁸ Arendt, *The Promise of Politics* (n 32) 65.

⁷⁹ Hannah Arendt, 'Ideology and Terror: A Novel Form of Government' (1953) 15 *The Review of Politics* 303.

⁸⁰ Kalyvas (n 67) 251.

⁸¹ *ibid* 252.

politics does not need to imply a subservient role for juridical structures. As I have argued in the previous chapters, law and legal institutions perform an important role in maintaining the political realm within which active citizenship can be experienced.

In the next section, I show how an Arendtian conception of power can be crafted by explicating the three dimensions highlighted by the three models without jettisoning their unique contributions.

IV. Power as the collective capacity to propel and regulate governmental action

In my reading, and for the purposes of Arendtian constitutional theory, the three dimensions of power – power as communication, power as non-violence, and power as the ‘freedom to’ – can be combined to articulate Arendtian power as the collective capacity to regulate governmental action. The critical part of this formulation lies in the acknowledgement that because the generation of power is dependent upon the coming together of citizens, the alienation of citizens, whether self-imposed or due to a corruption of the system, results in the impotence of citizens and the concentration of power in the hands of those who remain capable of coming together to act. The related but distinguishable normative part of my formulation lies in the incidence of power and freedom: power represents the condition of being free and is the manifestation of the actual capacity for self-determination.

Bringing together the three models of power generates three insights that elaborate on the idea that power is the collective capacity to propel and regulate governmental action. Firstly, power is the collective capacity to act and is generated in the manner of the development of rules of grammar. Secondly, power is ephemeral, in need of constant generation, and is discernible through the active support and participation of citizens in governance. And finally, power is non-instrumental but not lacking in purpose and contains within it the principles that justify the use of strategic violence alongside power. I will now examine the three insights by turn.

Collective, organic generation of power

Arendt claims that power ‘is never the property of an individual’ and ‘belongs to a group.’⁸² Both deliberative democrats and civic republicans converge in acknowledging that power is a collective possession. Power is generated when individuals come together to pursue common interests. This collectivist dimension corresponds with the political nature of the conception. In the previous chapter, I explained the Arendtian claim that we need the presence of our peers to give objectivity to our experiences, acts, and judgments. The political nature of the conception implies that like political action, power too requires

⁸² Arendt, ‘On Violence’ (n 31) 143.

the presence of other people to come into existence. Most explicitly outlined in deliberative democratic theory's emphasis on the role reciprocal speech plays in the generation of power, power generated through communication creates a space for human plurality and aids in clarifying the common-ness of the concerns that the citizenry shares with each other. At the same time, the generation of power is non-violent in nature. Citizens generate the terms with which they will bind themselves through the political activity of promising. The civic republican model converges with the deliberative model in highlighting the potential of the political acts of the citizens as the source of power that does not rely on domination to be effective. Thus, the normative value of power that is generated through citizens acting together comes from the fact of their participation in the generation of the legitimacy.

Leo Penta points out that Arendt's discussion of power is informed, to a great extent, by metaphors of language.⁸³ This, in part, is the reason why the Arendtian conception of action is conflated with speech and communication. I argue that while Arendt's understanding of power is not completely reducible to power as communication, it mimics the qualities of the way rules of grammar are developed as a collective enterprise.

The first and most obvious point of similarity lies in the fact that power, like language, is not a property that can be owned by an individual. The shared quality of power implies that power is possessed by a group when it is actively engaged in action, i.e. mutual interactions. The second point of similarity lies in the maintenance of plurality of the actors as they engage in the production of power and language. Language is developed by equally distinct individuals such that in the development of rules of grammar, their plurality works as an asset, but at the same time, to use the rules of grammar, participants are not required to shed their unique identities. The third point of similarity comes from the agonistic nature of both the enterprises. Like the development of language, power is generated for its own sake and its generation serves to ensure its continuity. In simpler words, power and language both bring forth and sustain their space of appearance by creating the conditions in which their future development and use may occur. Most importantly, both power and language create relationships amongst the participants and are consequently the chief ways in which citizenship can be viewed as a relational conception.

Ephemerality of power

The second part of my formulation agrees with the civic republican assessment that power is ephemeral and in need of worldly institutions for its durability. The ephemeral nature of power comes from the ephemeral nature of the experience of freedom that generates power. She presents power as a discernible but temporary capacity that is generated when citizens act with each other and disappears the moment the action ends.

⁸³ Leo J Penta, 'Hannah Arendt: On Power' (1996) 10 *The Journal of Speculative Philosophy* 210, 212.

Against the supposed incompatibility between freedom and politics ('the less politics the more freedom'), Arendt proposes freedom *qua* politics ('the *raison d'être* of politics is freedom, and its field of experience is action').⁸⁴ In such a formulation, power represents the capacity of plural individuals to combine to not only liberate themselves but also to 'build a new house where freedom can dwell'.⁸⁵

In the last chapter, I showed how her conception of freedom – enacted through words and deeds in the company of distinct but equal peers – is mediated by the requirement of institutions that maintain the political space in which freedom may be experienced and enjoyed. Consequently, Arendt claims, the main question at the time of the foundation of a democratic political community through a constitution is not how to limit power but how to establish it.⁸⁶

To Arendt, it is problematic when power is equated with violence and politics is equated with administration because such formulations present government as a necessary evil to the detriment of the understanding of the public realm as the space for the experience of freedom as self-disclosure. She argues that it is possible that 'power is still public and in the hands of government, but the individual has become powerless.'⁸⁷ In such a situation, she claims, the citizens are no longer truly free; '[f]reedom... has shifted places.'⁸⁸ Once freedom is understood not as an experience to be had in the public realm but as a characteristic of a well-preserved private life, the constitution is presented as an instrument to limit the political power.⁸⁹

However, Arendt quotes Madison, a freedom establishing democratic constitutional order not only limits the power of the government – 'not only to guard the society against the oppression of its rulers' – but also establishes an entirely new system of power that would 'guard one part of the society against the injustice of the other part, to save the rights of individuals, or of the minority... from the interested combinations of the majority.'⁹⁰ Her concept of a democratic constitutionalism, I had pointed out in the first chapter, is based on a relational conception of law. In Arendt's framing, a democratic constitutional order is based on a relational conception of law whereby the political ordering that makes the experience of freedom durable is instituted on the strength of promises. She presents power as a product of man's capacity for promise-making and promise-keeping, arguing that power – a capacity that is compatible with freedom – is generated when free citizens join and act together on the strength of mutual promises.

While the institutions may be able to give durability to the institutional structures that support the experience of freedom, Arendt cautions, power itself is not capable of

⁸⁴ Hannah Arendt, *Between Past and Future* (Penguin books 2006) 145, 148.

⁸⁵ Arendt, *On Revolution* (n 3) 28.

⁸⁶ *ibid* 148.

⁸⁷ *ibid* 137.

⁸⁸ *ibid*.

⁸⁹ *ibid*.

⁹⁰ *ibid*.

durability. She argues against treating power as a property that can be possessed by representatives because it leads to the dangerous implications of taking the citizen away from politics and making them impotent. For Arendt, power consists of our ability to participate in the creation of constitutional meanings, at an equal footing as our representatives. Her treatment of power as an observable phenomenon that is manifested in the active support and participation of the citizens in their governance has important consequences for the space for representation in Arendtian constitutionalism. This implies that the legitimacy of representative institutions directly relates to their effectiveness in complimenting civic participation in politics. The power sustaining the constitutional order disappears when institutions do not maintain the political spaces within which citizens may act and generate power.

Power and principled violence

The third aspect of my formulation comes out in the form of a response to Habermas's critique of Arendt's conception of power as coming out of a philosophical construction rather than a well-balanced investigation. He objects to what he sees is the distinction Arendt creates between the public and the private. He says that the distinction is based on her superimposition of the Greek *polis* on the essence of politics as such. Consequently, he points out that her attempt at separating the state and economy, freedom from welfare and political-practical activity from production is inapplicable to modern conditions: 'a state which is relieved of the administrative processing of social problems; a politics which is cleansed of socio-economic issues; an institutionalisation of public liberty which is independent of the organisation of public wealth; a radical democracy which inhibits its liberating efficacy just at the boundaries where political oppression ceases and social repression begins — this path is unimaginable for any modern society.'⁹¹ He further critiques Arendt for screening 'all strategic elements' such as force 'out of politics', removing 'politics from its relations to the economic and social environment in which it is embedded through the administrative system' and generally being 'unable to grasp structural violence.'⁹²

Habermas argues that Arendt keeps strategic action, which is a form of action governed by instrumental reasoning, out of the domain of her conception of politics. He points out that the use of instrumental actions carried out by solitary subjects may be relevant for the power struggles within the political realm, such as 'the admission of an opposition, through the competition of parties and associations, through the legalisation of labor struggles, etc.'⁹³ However, in such a conception, strategic action is necessary only for acquiring and using power and not for generating or maintaining power. After all, he

⁹¹ Habermas (n 7) 16.

⁹² *ibid.*

⁹³ *ibid* 17.

agrees with Arendt, 'legitimate power arises only among those who form common convictions in unconstrained communication.'⁹⁴ A closer reading of Arendt on power and violence alerts us to an alternative model of companionship between power and violence.

Arendt acknowledges that the power generated by citizens 'acting in concert' and reliant upon the ability of making and keeping promises could never be truly free of violence.⁹⁵ Power, Arendt claims, 'corresponds to the human ability not just to act but to act in concert.'⁹⁶ The collectivity inherent in the generation of power means that it always 'belongs to a group and remains in existence only so long as the group keeps together.'⁹⁷ For modern constitutional theory, constituent power *is* what keeps the group together, which is why, some might argue, it cannot escape the violence Arendt associates with sovereignty. After all, the act of establishing a political community even in her paradigmatic example of the American Constitution closely follows the act of land-appropriation and is a far-cry from the Arendtian notion of a *polis* born out of the strength of mutual promises of free and plural political actors. Arendt acknowledges this 'original sin', and says, 'violence is no more adequate to describe the phenomenon of revolution than change; only where change occurs in the sense of a new beginning where violence is used to constitute an altogether different form of government, to bring about the formation of a new body politic, where the liberation from oppression aims at least at the constitution of freedom can we speak of revolution.'⁹⁸

Violence thus possesses an important (albeit often negative) connotation in Arendt's discourse. As John McGowan points out, there seems to be a 'Nietzschean affirmation' of the violence of the instrumentality of work: 'Arendt takes some pains to insist that the founding and the maintenance of the polis is work, not action, and as such is not itself political.'⁹⁹ In the first chapter, I had argued that Arendt's conception of *nomos* includes within it the appreciation of law as an instrument of setting boundaries.¹⁰⁰ Although Arendt categorises the rise of the social and the conditions it generates for rule by nobody as one of the greatest misfortunes of modern life in other places such as in her essay the Pentagon Papers she acknowledges that 'even the most bureaucratic of systems is not necessarily dishonest, a moral and self serving.'¹⁰¹ *Nomos*, in so far as it refers to making and world-building, is the human activity that binds and hedges politics and makes

⁹⁴ *ibid.*

⁹⁵ She points out, for instance, that the right to organise and strike was preceded by decades of frequent violent disobedience against laws. Hannah Arendt, 'Civil Disobedience', *Crises of the republic* (Harcourt Brace Jovanovich 1972) 80.

⁹⁶ Arendt, 'On Violence' (n 31) 44.

⁹⁷ *ibid.*

⁹⁸ Arendt, *On Revolution* (n 3) 28.

⁹⁹ John McGowan, 'Must Politics Be Violent? Arendt's Utopian Vision,' in *Hannah Arendt and the Meaning of Politics*, ed. Craig Calhoun and John McGowan (Minneapolis: University of Minnesota Press, 1997), 274.

¹⁰⁰ Jurkevics (n 37).

¹⁰¹ Coren Caplan and Clive S Kessler, *Hannah Arendt: Thinking, Judging, Freedom* (Gisela T Kaplan ed, Allen & Unwin 1989) 48.

enduring the products of politics.¹⁰² Arendt is critical of the theories that argue that ‘politics is and must be justified by end purposes that lie above and beyond politics, even though these end purposes have, of course become considerably more shabby over time.’¹⁰³ Jeffrey Isaac explains this by claiming that ‘for Arendt . . . it is not the use of violence so much as its codification that must be categorically opposed.’¹⁰⁴

I agree with McGowan that there is a ‘political violence in Arendt’s work—a violence that cannot be linked to necessity.’¹⁰⁵ He claims that in contrast to totalitarian violence, which does not represent political reality because it is fundamentally ideological, there is a form of violence that appears in Arendt’s work which is legitimately connected to politics: the violence that appears when groups are frustrated in their attempt to create a space for politics. This, he argues, is ‘political through and through.’¹⁰⁶ The particular problem of totalitarian violence, McGowan argues, is that it is ‘unceasing and unpredictable . . . its act of creation can never be completed because terror is, at base, a protest against the very terms of existence.’¹⁰⁷ But the representation of an alternate vision of violence in Arendt’s work, McGowan claims, means that we may differentiate more broadly between types of violence in Arendt; that we may do so in terms of politics; and that some of these forms of violence may be defined as political, in opposition to terror-violence. He concludes that ‘treating violence as a means sometimes necessitated by circumstances . . . has the crucial consequence of erasing the strict boundary between the non-political as violent and the political as non-violent in Arendt’s work.’¹⁰⁸

It is my contention that Arendt’s discourse on principles can be used to respond to Habermas’ challenge. Although power is non-instrumental – it is not generated as a means to an end – the principles that are manifested in the performance of action form the standards of legitimacy of the constitutional order within which the action takes place. These principles are declaratory and, in that sense, speak to the universal and ideal nature of power that deliberative and agonistic democrats highlight. At the same time, because the principles can only be generated through the actual experience of freedom through political participation, they respond to the civic republican model’s emphasis on the role of citizens’ political ability to make and keep promises.

The focus on non-instrumental reasoning in the generation of power through promises does not mean that politics does not concern itself with ends or is a performance with no normative standards binding its limits. Relevant here are the various stages that Arendt associates with the life of action and the distinction between principles, goals, and

¹⁰² Jurkevics (n 37).

¹⁰³ Arendt, *The Promise of Politics* (n 32) 135..

¹⁰⁴ Jeffrey C Isaac, ‘Oases in the Desert: Hannah Arendt on Democratic Politics’ (1994) 88 *American Political Science Review* 156.

¹⁰⁵ Craig J Calhoun, John McGowan and Martin Jay (eds), *Hannah Arendt and the Meaning of Politics* (University of Minnesota Press 1997).

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid* 266.

¹⁰⁸ *ibid* 270.

ends of political action.¹⁰⁹ For Arendt, action can be seen as both, the beginning, as well as the performance i.e., the initiation as well as the completion. While principles inspire political action and are manifested in the performance of political action, goals provide the standards by which citizens orient the political ends they propose and judge the political means they adopt to pursue the ends. On the other hand, ends function as tangible models towards which all political action aims to proceed.¹¹⁰

Arendt argues that ‘every deed has its goal and its principle’ that is manifested in the beginning and reiterated throughout its performance.¹¹¹ Action is not driven by a future aim conceived by imagination that can be achieved through willing alone. Instead, it is guided by principles. Principles inspires action but do not dictate a specific outcome as if following a program. Principles are not revealed in the results of action but are immanent, i.e., they manifest ‘only in the performance of the act itself.’ In this performance, she argues, willing and acting are simultaneous and indistinguishable; willing is not a precursor to action but is already the deed, ‘what is manifest is not a subjective will and its end-in-view, but a guiding principle that remains manifest as long as the action lasts.’¹¹²

Arendt proposes that the legitimacy of an act that institutes a new order is generated when the act ‘carries its own principle within itself.’¹¹³ In other words, actions gain legitimacy if they are principled in nature. The principle then guides, inspires, and regulates future action that follows the foundation: ‘[t]he way the beginner starts whatever he intends to do lays down the law of action for those who have joined him in order to partake in the enterprise and to bring about its accomplishment. As such, the principle inspires the deeds that are to follow and remains apparent as long as the action lasts.’¹¹⁴ Power, then, is the collective capacity of the citizenry to produce the principles, goals, and ends of political action. Consequently, political acts instituting a new order of things generate their legitimacy by manifesting principles through action and provide a standard for authorisation of the future political acts the foundation engenders.¹¹⁵ Such a conceptualisation of power creates a space for strategic violence that is required for the maintenance of the political realm, generally and for the pursuance of the goals and ends generated through politics, more specifically.

This presents a solution to the problem of legitimacy that is the main cause of friction between the three models of Arendtian power. To briefly recap, while deliberative democratic theorists source a universal, rational principle for legitimation from the Arendtian understanding of power as communication, civic republicans claim that

¹⁰⁹ Arendt, *The Freedom To Be Free* (n 51) 74.

¹¹⁰ *ibid.*

¹¹¹ Arendt, *On Revolution* (n 3) 93.

¹¹² Arendt, *The Freedom To Be Free* (n 51) 42.

¹¹³ *ibid.* 74.

¹¹⁴ Arendt, *On Revolution* (n 3) 214.

¹¹⁵ In this chapter, my focus remains on the act of generating these regulative standards, rather than the ways in which the authorisation occurs which will be covered in detail in the next chapter.

legitimacy of the political institutions is derived from the constant manifestation of the political freedom of the citizens through their active support and participation in governance. In contrast, agonistic democrats treat legitimation as an aspiration and ideal that inspires the conflictual interactions between the established and instituted centres of power and the remainders of foundational politics. Arendt's discourse on principles points us towards the normative core of her constitutionalism. She relies on Montesquieu's topology of identifying principles that guide various forms of government. For Montesquieu, each form of government has a principle that constitutes 'the spirit of the laws.' In Arendt's words, these principles provide the 'guiding criteria by which all actions in the public realm are judged beyond the merely negative yardstick of lawfulness, and which inspire the actions of both rulers and ruled.'¹¹⁶ While it is fear in totalitarian, virtue in republican, in *On Revolution* she presents the principle of self-determinacy as the guiding principle of revolutionary constitutional governments. For Arendt, the legitimacy of a normatively superior constitutional order is based on not just its method of establishment – power of the people to give themselves a constitution – but also, the continuation of the principle post-establishment.

The main question is whether the principle of foundation embodies power or violence. For Rome, it was power when they chose not Romulus who had slain Remus but Aeneas who was the fount of the Roman race.¹¹⁷ She says, 'the genius of Roman politics lay in the very principles which attended the legendary foundation of the city.'¹¹⁸ For the American constitution, she variously identifies 'public freedom, public happiness, public spirit' as the principles that inspired the foundation. She highlights that the principle that emerged during the establishment of the American Constitution 'was the interconnected principle of mutual promise and common deliberation.'¹¹⁹ The establishment, supported not by any architect's strength but through the collective power of the many, affirmed the idea that plural individuals are capable establishing a government and its principles of action through reflection and choice, on the strength of political power.¹²⁰ For the Arendtian understanding of democratic constitutionalism, consequently, this implies that a conscious, deliberate choice of one principle over the other is what lends some foundational moments more legitimacy than others.

Power and freedom as the principle of democratic constitutionalism

We can see now that Arendt's bone of contention is not aimed at the complete obliteration of the administration from governance or of the socio-economic from the

¹¹⁶ Arendt, *The Promise of Politics* (n 32) 65.

¹¹⁷ Arendt, *On Revolution* (n 3) 210.

¹¹⁸ *ibid* 211.

¹¹⁹ *ibid* 214.

¹²⁰ *ibid* 215.

political. Following the role played by administration as work I had proposed in the first chapter, we can read Arendt's critique to be pointed at the 'transformation of government into administration' the *replacement* of personal rule by bureaucratic measures, and the attending *transmutation* of laws into decrees.' This does not imply that Arendt sees no role of administration, bureaucracy, or decrees in governance. Instead, Arendt's writings point at and critique the growing tendency of one overtaking the other.¹²¹

The peculiar incidence of power and violence in Arendt's thought is further clarified through her critique of the 'rise of the social', a concept I discussed in Chapter One while clarifying the isonomic underpinnings of Arendtian citizenship. The delineation of the public and the private coupled with Arendt's insistence that matters concerned with only the biological belong properly to the private realm have not only puzzled Arendtian scholars but have also generated strong criticisms for its lack of realism. In the mix is also Arendt's identification of the rise of the social as one of the crucial problems facing modern democracies. However, as I argued, it is not that Arendt denies the role played by social inequalities in revolutions preceding constitutional change – she says, '[w]ho could deny the enormous role the social question has come to play in all revolutions, and who could fail to recall that Aristotle, when he began to interpret and explain Plato's μεταβολαι had already discovered the importance of what we call today economic motivation – the overthrow of government by the rich and the establishment of an oligarchy, or the overthrow of government by the poor and the establishment of a democracy?'¹²² – and she is certainly aware of the 'insight that forms of government are interconnected with the distribution of wealth'¹²³. She finds that in such a structuring, the 'overthrows and upheavals' are prompted by interest and are thus, violent. This is because they are dependent upon the assumption that the distinction between poor and rich is not only natural but unavoidable. While of course, the social question could and did play a revolutionary role, it is because men started doubting the unavoidability of poverty. The end was, in this case, literally an end, and not a principle. She says, 'it makes a huge difference whether freedom or life is posited as the highest of all goods – as the standard by which all political action is guided and judged.'¹²⁴

I had pointed out in the last chapter Arendt's acknowledgement that although liberation – by which she means the liberation from social inequalities – and freedom are not identical, liberation is certainly a condition of freedom and does not automatically lead to freedom.¹²⁵ This is an important distinction for Arendt's concern with ideologies that place liberation as the end-goal of politics. She is conscious of the fact that in conditions

¹²¹ Nicholas Tampio, 'Bonnie Honig, *Political Theory and the Displacement of Politics*' in Jacob T Levy (ed), *The Oxford Handbook of Classics in Contemporary Political Theory* (1st edn, Oxford University Press 2016).

¹²² Arendt, *On Revolution* (n 3) 14.

¹²³ *ibid.*

¹²⁴ Arendt, *The Promise of Politics* (n 32) 145.

¹²⁵ Arendt, *On Revolution* (n 3) 22.

of poverty, freedom as participation is not possible.¹²⁶ She says, ‘while it is true that freedom can come only to those whose needs have been fulfilled, it is equally true that it will escape those who are bent upon living for their desires.’¹²⁷

I argued that liberation, in Arendt’s writings, is essentially a negative notion of liberty: it refers to the absence of impediments on what the individual can achieve. On the other hand, freedom is a positive conception.¹²⁸ It refers to the specifically political condition where an individual is in the state to be with her peers. This political existence allows the individual to act, say, hear, judge and in other ways be consequential for the decisions made for the future of the constitutional order. She finds that civil rights such as the freedom of movement, the right of assembly, as well as the generalist right to be free from want and fear are all essentially negative and ‘are the results of liberation but they are by no means the actual content of freedom.’¹²⁹ Recall that the actual content of freedom, for Arendt, is ‘participation in public affairs, or admission to the public realm.’¹³⁰ In other words, freedom is citizenship which guarantees a seat at the table and is more than just the absence of restraint.

Arendt agrees with Marx when, she says, he speaks of the social question in political terms and interprets the ‘predicament of poverty in categories of oppression and exploitation’.¹³¹ Her disagreement begins when he starts to see ‘the iron laws of historical necessity lurking behind every violence, transgression, and violation.’¹³² When he starts arguing that life is the highest good and that the life process of society is the very centre of human endeavour, ‘not freedom but abundance became now the aim of revolution.’¹³³ The problem is that the reduction of violence to necessity has a theoretical advantage only because it simplifies the issue but in the process, blurs the distinction between violence and necessity.¹³⁴ Arendt’s argument is that while violence may be understood as a function or accompanying phenomenon of necessity, ‘necessity, which we invariably carry with us in the very existence of our bodies and their needs, can never be simply reduced to and completely absorbed by violence and violation.’¹³⁵

In Arendt’s framework, in contrast, providing for life’s necessities and defending itself are not to be construed as the reason for politics. These issues, she argues, are political ‘only in the real sense of the word, that is, to the extent that decisions concerning them were not decreed from on high but decided by people talking with and persuading one

¹²⁶ *ibid* 63.

¹²⁷ *ibid* 136.

¹²⁸ Arendt, ‘On Violence’ (n 31).

¹²⁹ Arendt, *On Revolution* (n 3) 25.

¹³⁰ *ibid* 32.

¹³¹ *ibid* 58.

¹³² *ibid*.

¹³³ *ibid*.

¹³⁴ *ibid* 59.

¹³⁵ *ibid*.

another.¹³⁶ The emphasis on relationality, in her conception of law and citizenship, once again becomes relevant. To Arendt, attempts to find absolute truths in politics are bound to fail because politics, by its very nature, is a domain ‘which is ruled by men’s relations and relationships with one another and hence is relative by definition.’¹³⁷ On the other hand, when a certain truth is discovered as a historical truth, it is supposed to be valid for all men. However, because truth demands universal validation, it removes the need for the citizens to act as citizens, ‘in whose midst there could exist only a multitude of opinions’ but not truths.¹³⁸

Throughout *On Revolution*, Arendt is emphatic when she says that the ultimate aim of revolution is the constitution of freedom, and the actual business of revolutionary government lies in the foundation of a republic.¹³⁹ The two revolutions of the Eighteenth century manifested in their progression the principle of freedom as the ability to establish a constitution by choice and deliberation. For Arendt, modern constitutionalism implies that ‘freedom’ and not ‘justice’ or ‘greatness’ ‘is the highest criterion for judging the constitutions of political bodies.’¹⁴⁰ She argues against understanding government ‘in the image of individual reason and construing the role of government over the governed according to the age-old model of the rule of reason over the passions.’¹⁴¹ On the contrary, a democratic constitutional order institutes a government that is ruled by a multitude of opinions, and not any pre-political universal ideas.

Arendt’s argument is that beside the important role played by economic inequalities in revolutions, it was freedom that inspired the formation of constitutional governments. Before constitution-making lost its significance and became associated with ‘a lack of reality and realism, with an overemphasis on legalism and formalities’, constitutions represented the moment when a nation constituted itself by laying down the ‘boundaries of the new political realm and to define the rules within it, that they had found and build a new political space within which the “passion for public freedom” or the “pursuit of public happiness” would receive free play for generations to come, so that their own “revolutionary” spirit could survive the actual end of the revolution.’¹⁴² In such a coming together of individuals, the ‘principle was neither expansion nor conquest but the further combination of powers.’¹⁴³

Consequently, a principle, that may also be characterised as a meta-principle because of its essential nature, emerges from this discussion: freedom, understood in a

¹³⁶ Arendt, *The Promise of Politics* (n 32) 134.

¹³⁷ Hannah Arendt, ‘The Great Tradition: I. Law and Power’ (2007) 74 *Social Research* 713, 725.

¹³⁸ Arendt, *On Revolution* (n 3) 46–47. This is when she critiques Hegelian notion of ‘world history’. She is sceptical of the Hegelian school of thought that sees the movement of world history as a function of dialectic and necessity, ‘in which both eventually coincide’.

¹³⁹ *ibid* 139.

¹⁴⁰ *ibid* 22.

¹⁴¹ *ibid* 91.

¹⁴² *ibid* 122.

¹⁴³ *ibid* 167.

certain way through its conjunction with power, is the principle of democratic constitutionalism. Despite its being at the core of the framework of principles that constitute a democratic constitutional order, freedom and power continue to maintain their links to the political realm because they are generated out of the political coming together of individuals and reflected in their acts and judgments in the course of democratic politics.

Conclusion

In this chapter, I proposed that the Arendtian conception of power is better understood as a three-dimensional understanding of power. The deliberative model centres the origin of power (communication); the civic republican model underscores the nature of power (non-violence); and the agonistic model indicates the purpose of power (freedom). Depending on where one begins, a particular aspect of power assumes priority over the remaining two. If we wish to look at constituent power as a description of how constitutional orders are made and remade, we find that the function of power as the freedom to initiate something is most helpful and the deliberative source and non-violent nature of power take a backseat. Similarly, if we attribute to the concept of constituent power a more normative project, deliberative consensus and non-violence become the parameters through which we can judge the legitimacy of the political institutions. A clearer picture would obviously only emerge once we acknowledge that in practice, constituent power functions somewhere between its descriptive and normative dimensions.¹⁴⁴

For Arendt, the objective behind the foundation of a democratic constitution is to 'keep the power potential of the republic intact.'¹⁴⁵ She views constitutional assemblies as representing the coming together of individuals in an association for a common purpose. The common purpose, in a democratic constitutional order, is reflected in the principle of freedom. The confrontations and deliberations amongst plural viewpoints not only produce a system of political arrangement that reflects compromise and the participation of distinct individuals in writing the constitution, the act of describing one's political positions and entering into negotiations aids in the revelation and clarification of the experience of freedom that propelled the constitutional assembly to action in the first place. In this sense, freedom assumes a priority over other principles because it finds its origin in the foundational experience.

In my formulation, power signifies the capacity of the citizens and the quality of their experience of freedom through which they can generate the principles for judging the

¹⁴⁴ Constituent power as a concept is used by political actors to give credibility to their established regimes, and also as a political narrative involving democratic ideas to legitimize constitution-making processes. For instance, contrast the use of the constituent power narrative by Hugo Chavez in Venezuela with the way in which the Supreme Court of Venezuela developed a conception of people to challenge Chavez's election rule. Sergio Verdugo, 'Is It Time to Abandon the Theory of Constituent Power?' (2023) 21 *International Journal of Constitutional Law* 14.

¹⁴⁵ Arendt, *On Revolution* (n 3) 154.

acts of the government. These principles propel governmental action but also act as parameters on the basis of which the governmental action can be regulated. While power refers to the capacity of citizens to generate principles, it is ephemeral. Power exists only as long as citizens act. It is a temporary phenomenon and is better understood as the ability of the citizens to control institutional activities. On the other hand, authority corresponds to the durability of the institutions. Authority is a quality that institutions possess that grants them the legitimacy to act as institutions. While authority is also generated in the political realm through the acts of the citizens, it does not end when citizens stop acting or judging. In the next chapter, I clarify the political antecedents of authority and show how principles which make up the constitutional order become durable through the voluntary obedience of the active citizenry.

Chapter Four

POLITICAL AUTHORITY

In the previous chapter, I presented power as the capacity to propel and direct governmental action. Citizens are powerful to the extent they can enter the political realm and act together to generate principles for the constitutional order. The generation of power, however, is intrinsically connected with political action. Power, as I had argued, is ephemeral, and disappears with the end of the political act. The unpredictability of politics inevitably brings it into conflict with the logic of durability that underpins constitutional systems leading her to the ‘riddle of foundation’.¹ It is for this reason that Arendt turns to another constitutional concept – authority – when she starts to think about the durability of the constitutional order. In this chapter, through a close examination of the source and binding power of authority, I argue that Arendt overcomes the tension between the novelty of political action and durability of a constitutional order by conceptualising authority as augmentation.

Once again, we find that the citizens’ ability to enter and keep promises is key for understanding the way in which Arendt views the enterprise of democratic constitutionalism. For Arendt, only the political realm can be a legitimate source of authority for political acts done within a democratic constitutional order. This does not imply, however, that the ‘people’ become the source of authority. Much like mutual agreements, where the authority of the contract is generated by the act itself, Arendt suggests that the authority of a democratic constitution is generated by the act of foundation. And again, just like the binding power of contracts comes from the commitment of the parties to stay within the terms of the contract, the compelling power of a democratic constitutional order comes from the citizens’ voluntary obedience and reflects their active commitment towards maintaining the constitution.

In Arendt’s framework, while power is generated in the same temporal plane as the citizenry and the government, authority stretches back and beyond the present public realm. Unlike power, authority is not a temporary phenomenon, and it does not disappear with the end of action. Authority, because of its connection with politics over time, connects present political action with past and future activities and it does so with the aid of principles. While power refers to the capacity to generate principles, authority refers to passing the test of legitimacy on the standards set by principles. To continue from the discussion in the last chapter, when principles are generated in the performance of a

¹ Hannah Arendt, *The Life of the Mind* (Harcourt 1981) 214. See also, Alan Keenan, ‘Promises, Promises: The Abyss of Freedom and the Loss of the Political in the Work of Hannah Arendt’ (1994) 22 *Political Theory* 297; Adam Lindsay, ‘Hannah Arendt, the Problem of the Absolute and the Paradox of Constitutionalism, or: “How to Restart Time within an Inexorable Time Continuum”’ (2017) 43 *Philosophy & Social Criticism* 1022.

political act, they may be used as a parameter for judging future political actions. Thus, the principles generated in the establishment of a constitutional order continue to guide the way political activities might be conducted within the democratic constitutional order. In that sense, constitutional principles function as standards of judgment produced through enactment and denote the relationship between authority and the political realm.

I begin the chapter by drawing out the political nature of authority. The distinct political character of authority in democratic constitutional orders becomes apparent when it is juxtaposed with non-political sources of authority in other forms of government. Drawing from the Roman example, Arendt argues that for democratic constitutional orders, the act of founding and establishing a constitution – along with the principle inherent in this act – emerges as a fitting candidate for a source of authority. In this Arendtian framework, the foundation of a body politic as a political act is not fixed and immutable but mirrors the realities of political negotiations, compromises, and arrangements within the political community. This results in the portrayal of the constitution as a canvas for mapping this ongoing conversation and, as a reflection of the principles generated in the act of foundation, becoming the source of authority for the acts of future governments.

The second part of the chapter then moves on to the binding power of such an authority. In my reading, Arendt sees authority as being connected to the foundation in such a way that the binding power of the constitution takes the shape of reverence for the act of founding. When citizens voluntarily obey through active support or participation, they do so not out of fear or necessity but out of respect for the upheld by the particular action or institution.

I deal with the institutional implications of such an understanding of authority in the final part of the chapter. I explore Arendt's categorisation of the judiciary as the 'seat of authority' and demonstrate how judicial interpretation, for Arendt, represents an act of 'preservation by virtue of augmentation.'² Building on her discourse on the role of memory in politics, I propose that the judiciary augments the authority of the constitutional order when it interprets contemporary political issues in constitutional terms, thereby reiterating the principles underlying the constitutional order.

I. Source of authority

Arendt distinguishes between authoritarian governments, tyrannical/dictatorial governments, and totalitarian governments, based on the difference between their sources of authority. She argues that the 'apparatus of rule, the technical forms of administration, and the organisation of the body politic' combine to result in specific 'technical-structural'

² Hannah Arendt, *On Revolution* (Faber & Faber 2016) 204.

differences between the three types of governments.³ Whereas in an authoritarian government, the source of authority lies outside the government, and in a tyrannical government, the tyrant is the source of authority, a totalitarian government sources its authority from a totalising movement, making a de-politicised mass the source of authority for the acts of the government.

In contrast, Arendt argues, democratic constitutional orders have before themselves the Roman inspired option to source their authority from the political realm. In this section, I use the distinctions Arendt makes amongst the various types of governments to contextualise the relationship between authority and the political realm that forms the basis of her conception of political authority. I will first analyse Arendt's proposed technical-structural differences amongst the forms of governments and argue that her conception of political authority is a response to the lack of a relationship between authority and politics in authoritarian, tyrannical and totalitarian forms of government. Next, I will employ Arendt's discourse on principled action to develop Arendt's proposal to treat the foundation as source of authority and propose that an Arendtian understanding of democratic constitutionalism requires treating the principles manifested in the establishment of the constitution as the source of authority of the constitutional order.

Relationship between authority and politics

Arendt argues that one of the main distinctions amongst the various forms of governments lies in the sources of power and authority of the government. She proposes three models that represent the 'technical-structural differences' among authoritarian, tyrannical and totalitarian governments.⁴ In this section, I will explain how in each of these models, the source of authority is either transcendental or within the grasp of the ruler, but never truly political in the sense of being embedded in the political realm available to the citizens of the body politic. Consequently, authority, in the three models Arendt outlines, has no relationship with the political acts and judgments of the ruled.

In contrast with these three models, she proposes a fourth model more suited for a democratic constitutional order. Arendt's proposal sources authority from the foundation of the body politic, which represents in Arendt's framework, the highest expression of freedom.⁵ This fourth model is inspired from the Roman conception of authority. Roman authority is intimately connected to a beginning in the past and corresponds to Arendt's project of conceptualising a more political understanding of authority. She theorises a political authority that rests 'on a foundation in the past as its unshaken cornerstone',⁶ because the foundation as a political act represents a source that

³ Hannah Arendt, 'What Is Authority?', *Between Past and Future* (Penguin books 2006) 98.

⁴ *ibid.*

⁵ Arendt, *On Revolution* (n 2).

⁶ Arendt, 'What Is Authority?' (n 3) 95.

is closer to the 'relationships and relativities of human affairs'.⁷ However, to understand how and why Arendt considers the foundation as the most appropriate source of authority, it is important to explain why she insists on a relationship between authority and politics.

Arendt outlines the ways in which three non-freedom establishing forms of government source their authority to ultimately draw a link between the absence of a relationship between authority and politics and the non-freedom of the citizens. For authoritarian governments, Arendt proposes the shape of a pyramid. The top of the pyramid represents the source and seat of power, and authority resides somewhere outside the structure but above the top of the pyramid. The government is structured in such a way that authority enters the system through the top, and along with power, trickles down to the base layer. In this system, each layer is subservient to and dependent upon the previous layer for power and authority. It is as if the distance between the ruler and the ruled is composed of a hierarchy and each level within the hierarchy is enmeshed in a framework. This framework is legitimised by a force that is external and superior to the powers of the ruler, 'like converging rays whose common focal point is the top of the pyramid as well as the transcending source of authority above it.'⁸ In other words, the framework sources its authority from beyond the system itself. Not only does the structure of authoritarian governments engender inequality but the hierarchical structure itself is dependent upon a point of reference beyond the acts of the government. This becomes clearer when contrasted with the imagery she uses for tyrannical governments.

Arendt considers tyrannical governments an egalitarian form of government where the tyrant is placed above all the citizens in such a way that all the citizens are 'equally powerless' against the government.⁹ Consequently, tyranny represents a pyramid without the intervening hierarchies between the ruler and the ruled such that 'the top remains suspended, supported only by the proverbial bayonets, over a mass of carefully isolated, disintegrated, and completely equal individuals.'¹⁰ In contrast to authoritarianism where the source of authority is transcendental and outside the reach of the government, tyranny implies that the will and interest of the tyrannical government is the source of both authority and power. Because the government rules by coercion, the citizens do not possess any power and are thus, never allowed to engage in politics. Consequently, if tyranny represents a form of government where authority lies within the political realm, it is only because the tyrant is the sole inhabitant of the political realm.

While the tyrant rules by suppressing the citizens and this suppression needs no justification other than the tyrant's word itself, authoritarian governments derive legitimacy for their acts from a code which is 'made either not by man at all, as in the case of the law of nature or God's Commandments or the Platonic ideas, *or at least not by those actually in*

⁷ *ibid* 115.

⁸ *ibid* 98.

⁹ *ibid* 99.

¹⁰ Hannah Arendt, *Between Past and Future* (Penguin books 2006) 99.

power.¹¹ Authoritarianism implies a hierarchically structured government that sources the legitimacy of its structure as well as the validity of the acts of the government from a force external and superior to those in the highest rungs of power. In other words, authoritarianism represents a form of government where authority lies outside the political realm. The standards of judging the acts of the government come from a reason derived not through political action and deliberation but one that is given from above; ‘these ideas... transcend the sphere of human affairs in the same way that a yardstick transcends, is outside and beyond, all things whose length it can measure.’¹² In the second part of the chapter, I will elaborate on Arendt’s argument that the power of ideas derived from a transcendental reason is reliant upon coercion, as opposed to ideas derived from the political realm whose binding power comes from the voluntary obedience of the citizens. But, for now, it is important to note that Arendt’s classification of authoritarianism as a form of government that sources authority from outside the political realm is meant to distinguish transcendental authority from political authority.

The source of authority is transcendental when it is derived from contemplation alone and does not correspond with the practical and real experiences within the political realm. For Arendt, Plato’s parable of the cave in *The Republic* represents one such ideal: the philosopher-king leaves the cave to contemplate about truth. Although this philosopher has access to the ‘sky of ideas’ that ‘stretches above the cave of human existence’, once he steps back into the cave, he experiences a loss of orientation. This loss of orientation, Arendt claims, is a form of lack of common sense, which affects the philosopher-king when he attempts to derive standards of human behaviour from thinking and with no regards to the realities that present themselves while acting with one’s peers. In Arendt’s view, authoritarianism makes the political realm irrelevant for the purposes of sourcing authority.

On the other hand, totalitarianism represents a novel and unsettling form of government because its existence is dependent upon the abolishment of the political realm itself. Arendt argues that a totalitarian government is structured like an onion, with a leader of a totalising movement at its centre. The component institutions and organisations such as ‘the front organizations, the various professional societies, the party membership, the party bureaucracy, the elite formations, and police groups’ make up the various layers enveloping the leader ‘in such a way that each forms the façade in one direction and the centre in the other, that is, plays the role of normal outside world for one layer and the role of radical extremism for another.’¹³ This dual perception is dangerous because when looked at structurally, from the outside, it gives the impression of the existence of a political realm, when in fact, the government machinery does not involve the active support and participation of its citizens.

¹¹ *ibid* 97. Emphasis mine.

¹² *ibid* 109.

¹³ *ibid* 99.

A totalitarian government rules by conditioning a mass society. It is a government of ideology and terror. The totalitarian leader justifies all his acts as a necessary measure towards achieving an ideologically inspired goal, often couched in terms of freedom, such as the dialectical materialism in Stalin's Marxism-Leninism or the natural process of race selection for the Nazi regime. In such a scenario, the end becomes an intangible need with an irresistible pull, a promise that can be fulfilled through purges and exterminations. The irresistibility of the process requires that the acts of the government 'be liberated from the meddlesome interfering activities of men', in other words, from the political involvement of the citizens.¹⁴

What matters most for our purposes is that in the image that Arendt constructs for totalitarianism, even though the source of authority is within, and not outside the system as in authoritarianism, it still is not *political* authority because the government's actions do not source their authority from the acts and judgments of the citizens. Unlike tyranny where the tyrant rules by suppressing the citizen, a totalitarian leader integrates the citizens in the system, but removes all avenues and reasons for the citizens to engage in *political* action. This generates the appearance of the political realm being the source of authority, when in fact, because of the totalising elements of the movement, the citizens are depoliticised to such an extent that the political realm itself is made redundant in pursuit of the irresistible end. Citizens exist within the system not as plural – equal, yet distinct – actors, but as de-individualised members of a movement. The acts of the government derive their legitimacy from the goals of a movement and the steady progression towards this goal involves the citizens but does not need their active participation.¹⁵

Although as heuristic categories for understanding types of government the categorisation into authoritarian, tyrannical and totalitarian archetypes is a useful exercise in itself, Arendt's discussion on the source of authority on which different kinds of governments could be based is also helpful in understanding the space for active citizenship in various forms of political organisations. To come back to the discussion, the three forms of government are different in the placement of the source of authority of the government but similar in the distance they maintain between the source of authority and the acts of the citizens.

In the previous chapters, I argued that freedom as participation through politics in one's governance is a cornerstone principle of Arendtian constitutional thought. The political realm represents the arena within which the citizens express and advocate their distinct political positions. Politics, for Arendt, implies a form of action that reflects the negotiations, compromises and settlements that accompany living with each other. However, in the three types of non-political governments (authoritarian, tyrannical and

¹⁴ Hannah Arendt and Jerome Kohn, *Thinking without a Banister: Essays in Understanding, 1953-1975* (1st edn, Schocken Books 2018) 75.

¹⁵ Hannah Arendt, *The Promise of Politics* (Jerome Kohn ed, Schocken books 2005) 132–33, 192–196. See also, James Muldoon, 'Arendtian Principles' (2016) 64 *Political Studies* 121.

totalitarian), the government derives its legitimacy and exacts compliance from the citizens on the basis of a code that does not emanate from the political realm; citizens not only have no part to play in the making of this code, but they also have no opportunity to make changes to it. To put it simply, Arendt's claim is the type of authority of these three forms of government is not political because the standard of judging the acts of government comes not from politics but from a point of reference that is immutable, fixed, and does not correspond with the political acts and judgments of the citizens within the political realm.

In attempting to find a conception of authority that preserves its links to the realm of human affairs, Arendt looks to Roman antiquity for inspiration. For the Romans, Arendt points out, 'the source of authority lay exclusively in the past, in the foundation of Rome'.¹⁶ But the past did not represent a transcendental reason unconnected with the political realities and experiences of the citizens. She notes that at the heart of Roman politics was the conviction in the 'sacredness of foundation'.¹⁷ This meant not only that the foundation of a new body politic was a central, decisive, and unique event in the history of Rome but also that politics itself was viewed as an act of preserving the founding of the city of Rome and consequently, the authority of the republic. In terms of the representative models she proposes for the three forms of governments, the Roman republic appears like a pyramid where 'the peak of the pyramid did not reach into the height of a sky above...the earth, but into the depth of an earthly past'.¹⁸ In other words, the pyramid no longer represents a vertical hierarchy between the political acts and judgments of the citizens and a transcendental, transmundane reason with no connection to the political acts of citizens. Instead, the government is structured like a horizontal pyramid that stretches from the past to the future through the continuous thread of tradition.

There is a two-fold relationship between authority and politics in Arendt's reading of Roman authority. The authority of the Roman republic was deeply connected with the original political acts of the founders as well as the political acts of their descendants. The 'past was...present in the actual life of the city'¹⁹ because of its continued existence within the political realm through tradition. She explains that in Roman antiquity, the founders (the *maiores*) possessed authority that was then passed down through generations to their descendants (the *patres*), who composed the Senate. All acts of the Senate were legitimised because they derived their authority from the foundation of Rome, granting the acts of the government a certain *gravitas*, grounding them with 'the whole weight of the past'.²⁰ At the same time, the foundational act of the founding fathers was continuously sanctified as a source of authority when each generation of Senators acted traditionally by acting in

¹⁶ Arendt, *Between Past and Future* (n 10) 98.

¹⁷ *ibid* 120.

¹⁸ *ibid* 123–4.

¹⁹ *ibid* 122.

²⁰ *ibid* 123.

accordance with the ‘accepted, time-honoured standards and models’ derived from the wisdom of the founding fathers.²¹

However, Arendt is all too aware of the fact that the Roman republic itself was based on a stratification of the Roman society. Her fascination with modern revolutions, specifically the eighteenth and twentieth century revolutions, stems from an understanding that revolutions represent a chance for a multitude of citizens to establish a government based on a political source of authority. Not only does the foundation of a constitutional order represent the highest expression of freedom as political participation, but the establishment of the constitution also presents itself as a suitable candidate as a source of authority. She quotes Hamilton to claim that the American Revolution, followed by the establishment of the American Constitution, ‘demonstrated that men are genuinely capable of establishing good government through reflection and choice, rejecting the notion that they are forever destined to rely on accident and force for their political constitutions.’²² For Arendt, the foundation of a ‘consciously formed’ political body presents itself as a source of authority because of the ‘great potential future stability inherent in new political bodies’ that could innovate upon the Roman model by opening the political realm to the masses.²³

Consequently, the establishment of a constitution is the only appropriate end for a revolution in modernity because the establishment of a constitution marks the foundational event as a source of authority. Arendt claims that in establishing a government through choice and deliberation, the American founders adopted a source of authority that was similar to the Roman conception of authority: authority of the constitutional order sourced from ‘the act of foundation itself.’²⁴ The foundation of a body politic represents a new beginning made through the political acts of the citizens and carries within itself its own authority.²⁵ This form of government, identified here as a democratic constitutional order, structures its source of authority from the foundation of constitutional order and engenders a decisively political kind of authority because it establishes a relationship between authority and the political realm, i.e. between the standards of judging the acts of the government and the political acts and judgments of its citizens.

²¹ *ibid* 124.

²² Arendt, *On Revolution* (n 2) 215.

²³ Hannah Arendt, *The Freedom To Be Free* (Penguin Books 2020) 79.

²⁴ Arendt, *On Revolution* (n 2) 196. Arendt’s narration of the role of choice and deliberation in the establishment of American constitution is highly romanticized (see, Frank) but, it still represents a type of establishment that attempts to include citizens in its formulation. This inclusion is worthy of remark and celebration for Arendt because it denotes the possibility of citizens getting together to establish a government for themselves. Jason A Frank, ‘Revolution and Reiteration: Hannah Arendt’s Critique of Constituent Power’, *Constituent moments: enacting the people in postrevolutionary America* (Duke University Press 2010). For a contrary view, see Patricia Owens, ‘Racism in the Theory Canon: Hannah Arendt and “the One Great Crime in Which America Was Never Involved”’ (2017) 45 *Millennium: Journal of International Studies* 403.

²⁵ Arendt, *On Revolution* (n 2) 199–200.

The strain of Roman authority that Arendt discovers in the American founding is based on the presence of ‘founding fathers and authoritative examples in matters of thought and ideas.’²⁶ However, she is insistent that it is not the founders that the tradition sanctifies, but the acts of the founders, and more specifically the principles generated in the performance of the act that become the source of authority for the constitutional order. In the following sub-section, I explain how the constitution as the act of foundation and as the product of foundation emerges as the source of authority when we read Arendt’s writings on the source of authority in Roman antiquity and revolutionary America alongside her discourse on principled action.

Constitution as the source of authority

I have already explained the connection Arendt draws between authority and foundation. For Arendt, authority is political when it is sourced from the political acts and judgments of the citizens. Her starting point for theorising political authority is Roman antiquity where the source of authority lay exclusively in the past. Drawing from the Roman example, she argues that for democratic constitutional orders, the act of founding and establishing a constitution presents itself as a suitable candidate as a source of authority. Questions relating to the specificity of the location of authority arise once we move ahead with Arendt’s claim that the foundation, an event signifying the beginning of the body politic, can be a source of authority for a democratic constitutional order. That authority is sourced from the foundation of a constitution tells us nothing about the ways in which the act generates the standards for judging the acts of the future governments. Moreover, in framing a past act as a source of authority, Arendt is confronted by what she calls is the ‘riddle of foundation’: the dilemma of founding a durable freedom-establishing constitutional order while at the same time, preserving the freedom to institute new beginnings for the future generations.²⁷ Once again, she turns to the Romans to resolve this tension between foundation and continuation, and more fundamentally, between the political realm and the revolutionary actions which give rise to it.

Arendt notes that when Pliny says that the authority of the living depended upon the authority of the founders (*auctores imperii Romani conditoresque*), he signifies with the word *auctor* ‘the author of the building, namely its founder’, who inspires the whole enterprise of the constitution.²⁸ This generates the image of a foundationalism that is centred on the greatness of the founder: the constitution becomes authoritative because it has been established by great founders. However, Arendt make explicit her disagreement with conceptions of authority that place the founders on a pedestal when she quotes Jefferson to argue that no single generation ‘should have it in their power “to begin the world over

²⁶ Arendt, *Between Past and Future* (n 10) 124.

²⁷ Arendt, *The Life of the Mind* (n 1) 214.

²⁸ Arendt, *Between Past and Future* (n 10) 122.

again”²⁹ while making the constitution unchangeable for successive generations; and, that each generation possesses the same ‘right to choose for itself the form of government it believes most promotive of its own happiness.’³⁰

I explain now how it is not the author but the product of his actions, not the founder but the building, that becomes the inspiration and the standard of behaviour in the newly constituted polity. To do this, I use Arendt’s discourse on action and principles and clarify how an act in the past generates principles as sources of authority that become authoritative standards within a constitutional order. I argue that in this Arendtian framing, the foundation of a body politic as a political act is not transcendental and reflects the realities of the political negotiations, compromises, and arrangements within the political community.

Arendt sees action as a two-stage process, noting that both the Greek and the Latin languages designate action by two verbs. The Greek *ἀρχεω* or *arche* and the Latin *agere* correspond to the first stage of action: initiation. The second stage, continuation, involves carrying this newly begun act through, and is denoted by the Greek verb *πράττειν* or *prattein* and the corresponding Latin verb *gerere*.³¹ The bridge between the two stages of action is formed by principles.

In the last chapter, I presented principles as standards of action that are immanent i.e. they are generated in the course of the performance of the act itself. A further exploration of the concept is warranted here in order to show how principles, in Arendt’s framing, are consequential when treating past actions as the source of authority. According to Arendt, ‘beginning and principle, *principium* and principle, are not only related to each other, but are coeval.’³² She defines principles as the ‘fundamental conviction that a group of people share’³³ and claims that the performance of action brings to the fore the principle behind it. Two important elements concerning the character of principles are relevant for understanding principles as the loci of authority in Arendtian constitutional theory. First, as I argued in the last chapter, in Arendt’s formulation, principles are immanent in the performance of the action and cannot be discerned prior to the initiation of action.³⁴ The principle makes an appearance in the world when an act is begun and continues to be manifest so long as the act continues. Second, the connection between initiation and action is important because it shows how principle, like other Arendtian conceptions such as

²⁹ Arendt, *On Revolution* (n 2) 235.

³⁰ *ibid* 237.

³¹ Arendt, *The Freedom To Be Free* (n 23) 74. See also, Patchen Markell, ‘The Rule of the People: Arendt, Archê, and Democracy’ (2006) 100 *The American Political Science Review* 1; Patchen Markell, ‘The Experience of Action’ in Roger Berkowitz, Jeffrey Katz and Thomas Keenan (eds), *Thinking in Dark Times* (Fordham University Press 2009).

³² Arendt, *On Revolution* (n 2) 214.

³³ Arendt, *The Promise of Politics* (n 15) 214–15.

³⁴ On immanence of principles see, Muldoon (n 15); Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge University Press 2008).

power and freedom, is a political creation because it is dependent upon the coming together of plural individuals to act within the political realm.

However, principles correspond not only with a beginning but are also relevant for the continuity of action. Once generated in the performance of an act, principles provide the framework for future acts to take place within a continuum; principles connect successive acts with each other, transposing, as it were, the meaningfulness of the beginning on to the deeds that follow in the footsteps of the first act. In doing so, principles save action from being an ephemeral enterprise by providing action with a politically generated normative grounding.³⁵ In simpler words, the principles that are generated in the performance of an act convey the shared political values of the participants, giving meaning to the act and generating a reason for its continuity. Thus, a principle performs two major functions: it communicates the inspiration behind the initiation of the act, and in communicating the inspiration, guides the continuation of the act by actors other than the beginner.³⁶ If seen in terms of politics, Arendt's claim is that political action involves an initiator who 'starts whatever he intends to do' and the way in which he performs it, lays down the principle in the form of a 'law of action for those who have' – or will – 'join him in order to partake in the enterprise and to bring about its accomplishment.'³⁷

The principle's function as a guide for future action allows it to become a standard for judging the acts of the future participants. An important clarification in the principle's role as a standard of judging comes in the form of a distinction Arendt makes between principle of an action, the end it pursues, and the goal of action.³⁸ While principles reflect the fundamental convictions of the participants and are intrinsic to the performance of the act, the goals and ends of action 'lie outside action and have an existence independent of whatever action is undertaken.'³⁹ The similarity amongst the three elements of action is that all three are used as a standard for judging action. The difference, on the other hand, is made up of what it is that is judged by using each of these elements as a criterion.

Principles such as honour (in monarchies), virtue (in republics) or fear (under tyranny) do not dictate specific aims to the participants and can consequently only be used to judge *how* an action is being performed i.e. what propels the citizens to act in the way they act.⁴⁰ On the other hand, ends and goals, because they lie outside action, are not

³⁵ The role of principles in providing a rationale for continuity of action in Arendt's constitutional thought also marks an important shift from her reliance on Greek political action to Roman political action. This shift is important because it conveys the recognition in Arendt's mind of the relevance of stability of constitutional orders and the consequent turn towards a more constitutional way of thinking about politics.

³⁶ James Muldoon characterises another function: organising power of principles to denote the ways in which principles organise the body politic and are reflected in the structure of the institutions. In my view, while elegant, the guiding and organising function of principles is similar enough to be congruent, especially when it comes to constitutional theory. Further, organising is an activity that can be performed as a way to continue the founding act, and does not belong to the same category of phenomenon as principles which are like standards for judging the future acts. Muldoon (n 15).

³⁷ Arendt, *On Revolution* (n 2) 214.

³⁸ Arendt, *The Promise of Politics* (n 15) 193–5.

³⁹ *ibid* 194.

⁴⁰ She takes this characterization from Montesquieu, *ibid*.

beholden to the spontaneity of action and can thus, offer a more concrete image of what success looks like at the completion of action. Here, the choice of principle, goal or end does not matter; Arendt remarks, ‘what was a principle of action in one period can in another become a goal by which the action orients itself, or even an end that it pursues.’⁴¹ What matters is the way the principle is used to dictate the progress of action. She gives the example of freedom: freedom as a principle in the Greek *polis* refers to the way citizens act, but under a monarchy freedom becomes a goal when it is used as a standard to measure whether the king has ‘exceeded the limits of his power’, and is treated as an end during revolutions when the revolutionaries pursue independence as the end of oppression.⁴² If seen in terms of a spectrum of tangibility, while principles and ends lie on opposite sides where the principles of action are the least tangible and the ends of action reflect the most tangible set of parameters, goals of action lie somewhere in between.⁴³

Principles as standards of judgment escape the trap of transcendentalism of goals and ends because principles are politically generated, and more crucially, are immanent to political action; principles remain in existence only so long as, plural individuals act together. Further, despite coinciding with the beginning of action, principles do not refer to the psychological intentions of the actors. Arendt distinguishes between principles and intentions of the actors by making it clear that the principle of action is never the direct cause of action.⁴⁴ Instead, principles achieve the level of abstraction necessary to become authoritative by being inter-subjective. Principles do not correspond to the will of an individual or group of individuals and are churned out in the process of negotiations and compromises that take place within the political realm. Consequently, the generality of principles comes not from an individual’s act of thinking about the universal in order to apply them to particulars but is a result of a multitude acting in response to particulars and generating a universal in the course of political action.

In my reading, Arendtian constitutional theory is characterised by relating the authority of a constitutional order to its principles. Arendt sees the act of founding a constitutional order as a beginning that generates the principles that guide the acts of future governments under the constitutional order. For Arendt, when we begin to act for the purposes of establishing a new constitutional order, we begin to communicate the political values that lie at the base of our endeavour. In founding a new constitutional order, we manifest the principles that inspire our action. I propose that the constitution is the canvas for mapping this ongoing conversation and, as a reflection of the principles generated in the act of foundation, the source of authority for the acts of future governments. In other words, when the constitution takes the shape of ‘the guiding criteria by which all actions

⁴¹ *ibid* 195.

⁴² *ibid*.

⁴³ *ibid* 194.

⁴⁴ *ibid*.

in the public realm are judged beyond the merely negative yardstick of lawfulness,⁴⁵ it reflects the fundamental and shared political convictions of the political community constituted through the establishment of a constitution.

The foundation of a body politic represents a new beginning, but one that has as its aim, the establishment of a lasting constitutional order.⁴⁶ Thus, the foundation refers to action as initiation but also action as continuation. For Arendtian constitutional theory, this results in the insight that the constitution as a political act does not end with the establishment of a written document but continues through the participation of successive generations in the preservation and maintenance of the constitutional order. These two dimensions are reflected in the twofold meaning Arendt finds in the word ‘constitution’: one refers to —what Thomas Paine called was the ‘antecedent to government’— the constituting act ‘by which a people constitutes itself into a body politic’ and which is, in the case of [revolutionary] constitutions, the experience of political freedom, whereas the second, more prominent meaning refers to the ‘result of this act, the Constitution as a written document.’⁴⁷

The foundation in this dual nature contains within itself the rationale for durability. It ensures the durability of the political realm by providing the citizens with the structural framework to ‘realise the principle which inspired it’.⁴⁸ To frame it in terms of the models discussed earlier, the foundation is not merely one event in the life of a constitutional order but continues to live as a principle through political traditions as if it is reaching ‘out towards the end’ and provides the continuous, uninterrupted scaffolding for future participants of the constitutional order.⁴⁹ Throughout *On Revolution*, Arendt insists that the establishment of a democratic constitutional order reflects the principle of freedom. The constitution, according to Arendt, not only establishes the boundaries of the political realm and lays down the rules within it, but also creates the political space within which freedom can be enjoyed by the generations to come.⁵⁰ Most crucially, as I argued in Chapter Two, the principles Arendt associates with democratic constitutionalism are iterations of the same principle: political freedom (which refers to the value of ‘consent and the right to dissent’⁵¹). The constitution as the source of authority corresponds with Arendt’s project of theorising a form of government based on a political source of authority that expresses the principle of freedom: this is the spirit of democratic constitutionalism.

⁴⁵ *ibid* 65.

⁴⁶ It is doubtful how new the beginning is, but for most of her discourse, this is the assumption Arendt goes with. In our context, even if we treat beginnings as relative novelties, Arendt’s proposal stands.

⁴⁷ Arendt, *The Promise of Politics* (n 15) 205.

⁴⁸ Arendt, *On Revolution* (n 2) 123.

⁴⁹ Arendt quotes Polybius, ‘The beginning is not merely half of the whole but reaches out towards the end.’ On authority being inviolate as long as tradition remains uninterrupted, see Arendt, ‘What Is Authority?’ (n 3) 19, 32.

⁵⁰ Arendt, *On Revolution* (n 2) 122.

⁵¹ Hannah Arendt, ‘Civil Disobedience’, *Crises of the republic* (Harcourt Brace Jovanovich 1972) 94.

The principle of freedom finds further expression in the way Arendt conceptualises the power of political authority to compel.

II. Binding power of authority

The second stage in the construction of an Arendtian conception of authority concerns its binding power. The binding power of authority corresponds to the way authority engenders obedience. In Arendt's formulation, different sources of authority rely upon different types of binding power to compel citizens to obey. In her essay 'What is authority?', Arendt defines authority in contradiction to force and persuasion, presenting both violence and argumentation as unsuitable for generating obedience within a democratic constitutional order. Building on her Roman antiquity inspired model, she claims that the binding power of Roman authority came from the citizens' reverence towards the foundation of the city. She talks in similar terms about the authority of the American constitution in *On Revolution*. She quotes Woodrow Wilson and claims that it was the "undiscriminating and almost blind worship" of the American constitution that was responsible for its durability.⁵²

Arendt's discourse on reverence towards the foundation is, I argue, an effort to conceptualise voluntary obedience as the binding power of political authority. In this part of the chapter, I propose that Arendt's critique of transcendental authority hits at its absolutism and its irresistibility. Arendt classifies transcendental authority as absolutist because a code or reason that transcends the political realm also transcends the political realities and plural makeup of the body politic. Further, the distance between the authoritative code and the acts and judgments of the citizens ensures that transcendental authority faces no resistance from the citizens. In contrast, an authority based on a political source corresponds to the plurality of citizens and, in being connected to the political realm, retains the scope for resistance.

I will first explicate from Arendt's critique of transcendental authority the Arendtian case against the absolutism and irresistibility of authority. Next, I will bring her writings on Roman antiquity and revolutionary America to bear, to construct an Arendtian account of voluntary obedience as the binding power of political authority. I will argue that when Arendtian constitutional theory proposes the constitution as the source of authority, it theorises the constitution as occupying a position of trust for the citizens so that they may continue to exercise their freedoms within the political realm. At the same time, voluntary obedience implies that the authority of the constitution is dependent upon the active support of the citizens and contains within it the opportunities for resistance.

Against the absolutism and irresistibility of transcendental authority

⁵² Arendt, *On Revolution* (n 2) 198.

Arendt's critique of transcendental authority begins with a critique of the absolutism inherent in a source of authority that is independent of the political acts and judgments of the citizens. In the previous chapters, I discussed Arendt's consternation with concepts that do not account for the plurality of human viewpoints. In Chapter One, for instance, I discussed Arendt's critique of understandings of sovereignty that are based on viewing 'the People' as a unified whole. In Chapter Two, I brought her discourse on the difference between interests and opinions to bear in order to highlight the value she ascribes to politics understood as an activity that occurs amongst plural individuals. In Chapter Three, I argued her presentation of freedom as the principle of democratic constitutionalism arises from the central place she affords to the citizens' capacity to act as plural individuals when they generate power. With respect to authority, once again, we find that Arendt critiques conceptions that treat authority as transcendental, i.e. where the source of authority transcends the political actions and judgments of the citizens. To Arendt, the independence of a transcendental source of authority from the political realm lends to it the character of an 'idea' that relies upon the strength of 'reason' to make citizens obey. She calls transcendental authority a 'tyranny of reason' and argues that the 'compelling power' of ideas rests on the ability of reason to coerce.⁵³ Further, she points out, ideas can be used as sources of authority '*because* they transcend the sphere of human affairs.'⁵⁴

Arendt uses Plato's discourse on 'ideas' to equate ideas with models that compel and rule from outside the realm of action.⁵⁵ She argues that in Plato's analogy, ideas attain their absolute character as 'standards for political and moral behaviour and judgment in the same sense that the "idea" of a bed in general is the standard for making and judging the fitness of all particular manufactured beds.'⁵⁶ In such a case, what counts as success has been imagined in the mind's eye and politics is reduced to replicating the pre-decided outcome in the real world. Not only is the absolute-ness of ideas relevant for an idea to become a source of authority, the absolute-ness is a feature of its distance from the real world. She claims that the essential characteristics of an authoritarian government lies in the fact that the source of the government's power needs to be beyond the sphere of power and 'like the law of nature or the commands of God, must not be man-made.'⁵⁷

However, politics concerns and relates to the multitude that comprises the political realm. A single yardstick cannot approximate the various things that are to be judged within a plural political community. In fact, she argues that the ideas cannot be used as measures of political action because the function of ideas is 'not to rule or otherwise determine the

⁵³ Arendt, 'What Is Authority?' (n 3) 108–9.

⁵⁴ Arendt, *Between Past and Future* (n 10) 109. Emphasis mine.

⁵⁵ *ibid* 110.

⁵⁶ *ibid*.

⁵⁷ *ibid*.

chaos of human affairs'.⁵⁸ Ideas can rule only through coercion because 'reason's impersonal claim to domination' arises from its absolutist character. Ideas rule by subsuming the particular and regulating deviances in such a way that they conform to the model in regards to which the idea has been imagined in the first place. In other words, ideas rule by collapsing all aberrations from one fixed standard into a universal archetype and in the process generalise the pluralities that exist as a matter of fact in the body politic.

Further, Arendt argues that a transcendental, absolutist authority is required only if we see law as 'a commandment to which men owe their obedience regardless of their consent and mutual agreements.'⁵⁹ However, neither the Greek *nomos* nor the Roman *lex* had a concept of legislation that required transcendent authority. As I discussed in the Chapter One, for the Greek understanding of *nomos*, although the legislator was supposed to come from outside the community, it did not imply that the lawgiver would be above the body politic and was certainly not supposed to be divine. Similarly, the Roman conception of *lex* was also intimately connected with the realm of human affairs and was not dependent upon divine authority of the lawgiver. Once again, Arendt's reliance on Montesquieu points to the relational conception of law she derives from his framing of law as rapport, i.e. the relation subsisting between different entities that preserve the different realms of being. Since law is relational in nature, it does not need an absolute source of authority.⁶⁰ She contrasts this understanding of law with an understanding that sees laws as commandments – in the form of 'Thou shalt not' – and argues that 'only to the extent that we understand by law a commandment to which men owe obedience regardless of their consent and mutual agreements, does the law require a transcendent source of authority for its validity, that is, an origin which must be beyond human power.'⁶¹

Herein lies the crux of her critique. The acts of government require a transcendent source of authority for their validity only when the rationale for obedience is coercive and precludes the consent and agreement of the citizens. In other words, a freedom-establishing constitutional order, principally, cannot rely upon coercion and consequently upon transcendental sources of authority. For Arendt, transcendental authority is problematic because its compelling power rests on its irresistibility. She argues that all truths carry within themselves 'an element of coercion' in the sense that truths demand acquiescence without 'agreement, dispute, opinion, or consent'.⁶² The absolute-ness of truths requires no agreement since, 'because of its self-evidence, it compels without argumentative demonstration or political persuasion.'⁶³ The transcendentalism of ideas is aimed to generate a peremptory claim to acknowledgment and preclude debate;

⁵⁸ *ibid* 112.

⁵⁹ Arendt, *On Revolution* (n 2) 190.

⁶⁰ *ibid* 189.

⁶¹ *ibid* 188.

⁶² Arendt, *Between Past and Future* (n 10) 235. See also, Bonnie Honig, 'Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic' (1991) 85 *American Political Science Review* 97.

⁶³ Arendt, *On Revolution* (n 2) 193.

consequently, a transcendental source of authority, for Arendt, is no less despotic than an absolutist religious doctrine or a mathematical axiom. Her point is that the laws that govern a community are not of the same nature as the laws of mathematics, and the latter cannot inspire the former. The power to compel does not come from the veracity of the sentence or the strength of the reason behind the idea, but from agreement. She argues that even reasoned statements stand ‘in need of agreement’ because the human capacity of reason is not ‘divinely informed to recognize certain truths as self-evident.’⁶⁴ The need for a transcendental authority becomes especially relevant in the establishment of a constitution. She characterises as mistaken Jefferson’s appeal to ‘self-evident’ truths in the American Declaration of Independence and argues that when he begins the sentence with the words ‘we hold’, he indicates the much more relevant involvement of the people in the making and preservation of the constitution.⁶⁵

At the same time, Arendt acknowledges the complexity underlying the foundation of a constitutional order that is not covered by the people’s involvement in the enterprise. Arendt notes that the ‘task of foundation’ involves a ‘*setting* of a new beginning’⁶⁶ and this setting requires a ‘new authority’ ‘designed in such a way that it would fit and step into the shoes of the old absolute that derived from a God-given authority.’⁶⁷ The problem, according to Arendt, of devising an absolutist conception of ‘the People’ as a source of authority is ‘insoluble because power under the condition of human plurality can never amount to omnipotence, and laws residing on human power can never be absolute.’⁶⁸ In other words, she claims that ‘the People’ as the source of power of the constitutional order cannot at the same time be the source of authority. She posits that the ‘specific sanction’ that came from the combination of tradition, religion and authority in Roman antiquity ‘could not simply be replaced by an absolute sovereignty, which, lacking a transcendent and transmundane source, could only degenerate into tyranny and despotism.’⁶⁹

Arendt sees in the American founding a structure that treats the people as the ‘seat of power’ but the Constitution as the ‘source of law’. The constitution is a ‘written document, an enduring objective thing, which, to be sure, one could approach from many different angles and upon which one could impose many different interpretations, which one could change and amend in accordance with circumstances, but which nevertheless *was never a subjective state of mind, like the will.*’⁷⁰ She argues that the ‘so-called will of a multitude (if this is to be more than a legal fiction) is ever-changing by definition, and that a structure built on it as its foundation is built on quicksand.’⁷¹ The point is that she equates an attempt

⁶⁴ *ibid* 194.

⁶⁵ *ibid*.

⁶⁶ *ibid* 31.

⁶⁷ *ibid*.

⁶⁸ *ibid*.

⁶⁹ *ibid* 158.

⁷⁰ *ibid* 156. *Emphasis mine*

⁷¹ *ibid* 162.

to ‘derive both law and power from the selfsame source’ with the ‘deification of the people.’⁷² Having recourse to the founding of a constitutional order as the end of the revolution allows us, she claims, to separate ‘the source of law’ which ‘bestow[s] legality upon positive, posited laws,’ and ‘the origin of power’ which ‘bestow[s] legitimacy upon the powers that be.’⁷³

Power that is generated when citizens join together through mutual promises is, for Arendt, ‘by no means enough to establish a “perpetual union,” that is, to found a new authority.’⁷⁴ This is because ‘neither compact nor promise upon which compacts rest are sufficient to assure perpetuity, that is, to bestow upon the affairs of men that measure of stability without which they would be unable to build a world for their posterity.’⁷⁵ She argues, however, that ‘it is futile to search for an absolute to break the vicious circle in which all beginning is inevitably caught, because this “absolute” lies in the very act of beginning itself.’⁷⁶ Thus, the ‘problem of authority’ is that ‘positive, posited laws’ need the sanction of a ‘higher law’ and while the ‘factual existence’ of the laws can be traced to the power of the people and their representatives in the legislatures, the representatives cannot, at the same time, constitute the source of authority from which the laws they legislated could be made ‘valid for all, the majorities and the minorities, the present and the future generations.’⁷⁷

Arendt’s conception of freedom, experienced in the constituting act, comes into conflict with the condition of durability she associates with the result of this act, the written constitution. How can we establish freedom and at the same time make space for the very capacity to radically break away from establishment? She calls the paradoxical relationship between the ever-present possibility of political innovation and the durability afforded and guaranteed by constitutional law the ‘problem of beginning’.⁷⁸ Once again, the ‘riddle of foundation’ that I had mentioned in the previous section becomes relevant. The riddle asks, how can the foundation be the source of authority of the constitutional order if ‘those who get together to constitute a new government are themselves unconstitutional.’⁷⁹ I have discussed in the previous chapters the claim that the establishment of a constitution represents the highest potential of free political action because in founding a new political order, the founders experience the freedom as the capacity to spontaneously institute a new order of things. On the other hand, authority can only be established through continuity. Authority results in the stability and durability of the constitutional order because it represents the citizens’ obedience to the existing constitutional order. The

⁷² *ibid* 183.

⁷³ *ibid* 159.

⁷⁴ *ibid* 182.

⁷⁵ *ibid*.

⁷⁶ *ibid* 205.

⁷⁷ *ibid* 182–83.

⁷⁸ *ibid* 203.

⁷⁹ *ibid* 184.

resulting tension between freedom and authority comes in the form of a choice between novelty and continuity.

Voluntary obedience of the constitution

Arendt does not, however, provide a solution to the riddle. Instead, she challenges the premise upon which it is based. Arendt argues that the riddle represents a puzzle to be resolved at the founding only if we see authority as an absolute, derived from a rigid and unchangeable truth that is independent of the political realm. She claims that continuing political freedom within a constitutional order does not have to result in the absence of spontaneity. Within free and stable constitutional orders, she argues, authority is formulated in terms of resistance and consequently, of change. In other words, in contrast to transcendental sources of authority that rely on an absolutism to exact obedience, political authority is dependent upon voluntary obedience and includes within it the potential for disobedience.

Voluntary obedience as the compelling power of political authority becomes evident once we read together Arendt's discourse on the 'sacredness of foundation' in Roman antiquity with her identification of a reverence towards the American constitution as the reason behind its durability. Underlying her discourse on voluntary obedience is a duality in Arendt's conception of action that arises from her attempt to combine the agonism of ancient Greek politics with the republicanism of ancient Rome.

On Revolution begins with Arendt drawing parallels between the acts of American revolutionaries and the political action of the citizens within the Greek *polis*. In both the scenes she sets, politics allows the citizens to experience equality – *isonomia* – because it provides them the opportunity to be seen, heard, and acknowledged as equals. In acting alongside each other, individuals discover a joy – a 'public happiness' – that can only be experienced in collective political action. However, this does not mean that the goals of the revolutionary politics take a backseat, but that beyond the goals, politics itself starts to appear as an end in itself. Further, revolutions represent new beginnings in the life of a constitutional order and in that sense, are congruent with the arbitrary and unpredictable nature of Greek agonistic politics: 'it is as though it came out of nowhere in either time or space'.⁸⁰ Arendt takes this lack of 'continuity' and boundedness with a 'temporal order'⁸¹ as features of politics that need to be preserved and not as problems of politics that need to be resolved through the establishment of a constitution. Consequently, for Arendt, it is imperative that the compelling power of political authority make space for spontaneous political action that could challenge, resist, and change the principles that make up the authority of the constitutional order.

⁸⁰ *ibid* 207.

⁸¹ *ibid*.

Arendt's argument that a revolution ends successfully only once it establishes a durable constitutional order is connected to this agonistic understanding of politics as an important dimension of democratic constitutionalism. As I explained in Chapters Two and Three, the normative argument is that constitutional democracies establish a political-legal framework that ensures freedom as participation in government not only as a means to achieve an end, but also because freedom as participation is an end in itself for citizens within a democratic constitutional order.

However, Greek antiquity proves to be inadequate in Arendt's search for a model for the durability of free action. To the Greeks, durability was congruent with remembrance: 'experiences and even the stories which grow out of what men do and endure, of happenings and events, sink back into the futility inherent in the living word and the living deed unless they are talked about over and over again.'⁸² To develop her constitutional thought, Arendt proposes the addition of 'conceptual notions' that act as guideposts for future remembrance and emulation. She argues that remembrance of the act is not enough, and the permanence of human acts can only be ensured by condensing and distilling the act 'into a framework of conceptual notions within which it can further exercise itself.'⁸³

These conceptual notions, I argue, are the principles of action that are made durable when they are juridified in a constitutional order whose authority relates to the political realm. I will be expanding on the institutional element of this argument (the role of the judiciary) in the next part of the chapter. For now, it is important to note that finds in the conception of *religare* the compelling power of political authority that corresponds with the voluntary obedience of the citizens. The continuity of the principles within the political realm arises out of the reverence they command from the citizens within the political realm. By coupling Greek agonism which values political action for its own sake with the Roman *religare* which makes the preservation of the foundation an intrinsic part of political action, Arendt attempts to produce a conception of political authority suitable for modern constitutional democracies. The project becomes clearer once we read her discourse on Roman antiquity alongside the parallels she draws, in the latter half of *On Revolution*, between the Roman republic and the establishment of the American Constitution.

Arendt notes that at the heart of Roman politics was the conviction towards the 'sacredness of foundation' of the city.⁸⁴ This meant not only that the foundation of Rome was a central, decisive, and unique event in the history of Rome but also that politics itself was viewed as an act of continuing and preserving this great founding. The contrast, she claims, is presented by the Greek notion of politics, where the foundation of a new body

⁸² *ibid* 222.

⁸³ *ibid*.

⁸⁴ Arendt, *Between Past and Future* (n 10) 120.

politics was an almost commonplace experience: ‘wherever you go, you will be a Polis’.⁸⁵ The Romans could not repeat the founding of their first polis in the settlement of their colonies, and could only add to the original foundation, ‘as though the whole world were nothing but Roman hinterland’.⁸⁶ When she remarks that the ‘Roman feeling of continuity was unknown in Greece, where the inherent changeability of all things mortal was experienced without any mitigation or consolation,’⁸⁷ she begins to formulate authority as a form of ‘continuity’, a ‘mitigation or consolation’, that results in the durability of the constitution, by introducing the element of a concern for the continuity of the political realm in her conception of political action.

The act of founding was perceived so ‘superhuman’, ‘legendary’ and ‘sacred’ that it was placed on an equal footing with divine power.⁸⁸ However, the sacredness of the foundation was not an attempt to derive compliance in the name of a divine figure. She notes that neither Roman *lex* nor the Greek *nomos* was of divine origin meaning thereby that the Roman and Greek law-making did not require religious sanction to be authoritative.⁸⁹ She continues, ‘the very notion of divine legislation implies that the legislator must be outside of and above his own laws, but in antiquity it was not the sign of a god but the characteristic of a tyrant to impose on the people laws by which he himself would not be bound.’⁹⁰

For Arendt it is important to recognise the artificial nature of laws, that they are a product of human action, and not divine intervention. This is because with respect to building a political conception of authority, her aim is to bring authority down to the political realm so that it may be subject to resistance and augmentation from the citizens. The contrast is provided by transcendental sources of law wherein, ‘like the absolute prince, the nation, in terms of public law, could do no wrong because it was the new vicar of God on earth’⁹¹ For Arendt, the resistibility and change-worthiness of the principles that determine the standards for judging the acts of government make authority political and thus, suitable for a freedom-establishing democratic constitutional order.

Arendt points to the fact that in Ancient Rome, religion itself was political and the sanctity of the foundation was seen to be a result of the greatness of the act of founding. Here, religion had a *political* meaning and served to tie back, obligate and thus, create a durable link to the founding moment. Arendt writes, ‘to be religious meant to be tied to

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ Arendt, *On Revolution* (n 2) 20.

⁸⁸ Arendt, *Between Past and Future* (n 10) 121.

⁸⁹ Arendt, *On Revolution* (n 2) 186.

⁹⁰ *ibid.* 187. She claims that while the Greek example the lawgiver came from outside, it meant only that the ‘laying down the law was pre-political, prior to the existence of the polis, the city-state, just as building the walls around the city was prior to the coming into existence of the city itself.’ In other words, ‘the Greek legislator was outside the body politic, but he was not above it and he was not divine.’

⁹¹ *ibid.* 191.

the past. Thus, religious and political activity could be considered as almost identical.⁹² But it wasn't just the founding that was the epitome of what politics could achieve. She quotes Cicero to indicate the importance of politically derived authority in the durability of the constitution: 'In no other realm does human excellence approach so closely the paths of the gods (numen) as it does in the founding of new and in the *preservation of already founded communities*.'⁹³

For the foundation as a political beginning in modernity to have *gravitas*, it requires being 'shrouded in the halo of time' which, at the time the American revolutionaries' establishment of the constitution, could not have been possible. Thus, the 'political genius of the American people' was, according to Arendt, the ability to put themselves in the shoes of the future generations as act as if the constitution had been a durable entity, 'in the extraordinary capacity to look upon yesterday with the eyes of centuries to come.'⁹⁴ Arendt claims that an "undiscriminating and almost blind worship" of the American constitution is responsible for its durability.⁹⁵ In this formulation, the object of worship is both, 'the constituting act' through which the body politic is established by the people, and the written document which is 'the result of this act'.⁹⁶ The 'remembrance of the event' results in the durability of the constitutional order because it provides an 'atmosphere of reverent awe' for 'the actual outcome of this act, the document itself'. Thus, the founding fathers are named so not because they possess some unparalleled virtue or wisdom but because they, quite literally, are the beginners of an act which the future generations 'improve and perpetuate'. What counts, for Arendtian constitutional theory, is neither the wisdom or virtue of the founders but the act itself.⁹⁷ And, the continuation of the act of establishment is supported by, Arendt claims, 'that veneration which time bestows on everything, and without which the wisest and freest government would not possess the requisite stability.'⁹⁸

The binding power of authority sourced from the founding act is like that of religion in Arendt's framing, so much so that one can say that 'the Constitution strengthens the American government "with the strength of religion".'⁹⁹ Here religion does not imply a people's Christian faith in God or a Hebrew obedience to the Creator-Legislator of the universe, but is a Roman, political conception of being bound to a beginning: 'If their attitude toward Revolution and Constitution can be called religious at all, then the word "religion" must be understood in its original Roman sense, and their piety would then consist in *religare*, in binding themselves back to a beginning, as Roman *pietas* consisted in

⁹² Arendt, *Between Past and Future* (n 10) 121.

⁹³ *ibid.* Emphasis mine.

⁹⁴ Arendt, *On Revolution* (n 2) 199.

⁹⁵ Arendt quotes Woodrow Wilson, *ibid* 198.

⁹⁶ *ibid* 205.

⁹⁷ *ibid* 204.

⁹⁸ *ibid* 203.

⁹⁹ *ibid* 199.

being bound back to the beginning of Roman history, the foundation of the eternal city.¹⁰⁰ Arendt claims that the binding force of authority within a freedom-establishing constitutional order is akin to *religare* and involves being tied back to the foundational beginning through the voluntarily given respect of the citizens to the establishment of the constitution. Consequently, even though the political founding is a rupture, in the sense that it begins something new, it ensures the stability of that which it establishes by generating a kind of authority that remains connected with the political acts of each successive generation. The foundation – and the principles it generated – could survive the spontaneity and unpredictability of politics because of the compelling power exerted by the great act of founding.

Related to Arendt's formulation of voluntary obedience as the compelling power of political authority is the dual meaning she gives to action once she starts talking about politics in a constitutional sense.¹⁰¹ The Greek *polis* where citizens act not in pursuance of a divinely ordained goal but in order to disclose themselves and be acknowledged by their peers, and the Roman republic where the greatness of political action is measured by the durability of its outcome such as, the establishment of lasting political institutions, combine to generate a distinctly Arendtian conception of action's relationship with authority. The role of authority is not to temper the spontaneity of action and the unpredictable political novelties that can arise out of politics, but to act as a conduit for the continuity of action.

In Arendtian constitutional thought, authority ensures the continuity of the political realm and the citizens' voluntary obedience arises out of each generation's judgments on the principles on which the constitutional order has been organised. We can further substantiate this reading of constitution as a source of authority that exacts compliance through voluntary obedience from Arendt's writings on Roman authority. I started this section with Arendt's quote from Pliny: *auctores imperii Romani conditoresque* which implies that the authority of the living depends upon the authority of the founders. Arendt notes that within the Roman republic, the authority of the Senate was derived from the authority of the founding authors. However, she also attempts to find another interpretation for Roman authority by focussing on the roots of the Latin word *auctores*. She claims that the word *auctores* when seen in contradiction to *artifices* alerts us to the fact that the founding author referred to in Pliny's statement 'is not the builder' but what inspires 'the whole enterprise and whose spirit, therefore, much more than the spirit of the actual builder, is represented in the building itself.'¹⁰² She insists that it is not the founders but the inspiring principle that constitutes the authority of Roman republic.

This becomes clearer once we look further into the Roman understanding of *auctor*. Originally, an *auctor* referred to a person who, because of their position in a relationship of

¹⁰⁰ *ibid.*

¹⁰¹ It is important to note that despite her characterisation as a theorist of extraordinary politics (especially by Kalyvas), Arendt does not distinguish between ordinary, constitutional, or extraordinary politics.

¹⁰² Arendt, *Between Past and Future* (n 10) 122.

exchange, is responsible for ensuring the validity of the legal transaction.¹⁰³ Combined with the insight that the constitution embodies the principles generated in the foundational act, *auctoritas* signifies the role of the constitution in ensuring the bonds of trust and mutual accountability for future negotiations. In other words, Arendt's reliance on authorship refers to the world-building through precedents, rules, and procedures that assures the exercise of political freedom.¹⁰⁴ The constitution, thus, functions as a promise, not only amongst the founding generation but also between the successive generations. To put it simply, the constitution occupies a position of trust with respect to the future generations and provides the continuity so people can continue to experience freedom.

III. Authority as augmentation

Arendt's understanding of the source and compelling power of political authority are geared towards conceptualising authority as augmentation. In the previous sections, I presented Arendt's formulation that political authority is sourced from the founding of a constitutional order and contains within itself the room for its resistibility. The compelling power of political authority is a function of the voluntary obedience of the citizens. The relationship that Arendt maintains between her conception of authority and the political realm is, consequently, aimed at reducing the rigidity associated with the conception of authority. In Arendtian constitutional thought, political authority performs the functions of stability and durability without taking the shape of absolute truths transcendent to the political realm. To put it differently, Arendt frames authority as augmentation because it allows her to bring together the act of establishing something new with the act of preserving what has already been established. In order to understand what it means for authority to be augmented, it is important to understand why Arendt calls the judiciary the 'seat' of authority.

Judiciary as the 'seat' of authority

In *On Revolution*, Arendt is emphatic that one of the greatest innovations made in the establishment of the American constitution lies in making the judiciary the 'seat of authority'.¹⁰⁵ There are however, different interpretations of what this entails. Jan Klabbers derives from Arendt a rather restricted function for judicial review, contending that she is supportive of judicial review as long as it remains confined to assessing whether legislation and administrative action had been undertaken properly, and as long as there was a distinct

¹⁰³ For a detailed examination of *auctores* in Arendt's framing, see also D Hammer, 'Authoring within History: The Legacy of Roman Politics in Hannah Arendt' (2015) 7 *Classical Receptions Journal* 129.

¹⁰⁴ She finds evidence of this world-building capacity in the bonds and covenants of colonial America that were used to establish political societies without relying on the English sovereign.

¹⁰⁵ Arendt, *On Revolution* (n 2) 204.

constitutional mandate.¹⁰⁶ Arato and Cohen, on the other hand, argue that Arendt supports a ‘constitution of judges,’ reading positively Wilson’s negative description of the Court as a ‘constituent assembly in permanent session.’¹⁰⁷ Arendt does not explicitly define what this implies but an explanation can be gathered by reading her discourse on authority in juxtaposition with her discourse on what she sees is the American innovation on the Roman, institutional model of authority.

Arendt finds two main similarities between the American and the Roman model of authority. Firstly, the Roman Senate was conceptualised as the seat of authority in response to the need for a ‘concrete institution’ for the purposes of authority.¹⁰⁸ For the American founders, the judiciary represented a ‘lasting institution for judgment’¹⁰⁹ not least because of the permanence of office of the judges but also because of the ways in which the judiciary worked through precedents and laws. I will come back to the method of the working of the judiciary in the next sub-section but for now it is relevant to note that the concreteness of the Senate in Ancient Rome and of the judiciary in America refers to the permanence of its composition in the polity. In doing so, Arendt is influenced by Cato who argues that because authority implies augmentation, the act of preserving the authority of a constitutional order can be ‘the work of no single man and of no single time.’¹¹⁰ Relatedly, the second similarity arises from the distinction between authority and power. Arendt argues that it was in the American founders’ ‘unwillingness to endow with authority a branch of the legislature that the founding fathers showed how well they understood the Roman distinction between power and authority.’¹¹¹ Unlike the legislature where the position of the representatives is dependent upon termly election-cycles, the judiciary, especially the American judicial institution that Arendt has in mind, is composed of individuals who retain their position beyond electoral cycles.

However, the most crucial insight with regards to the judiciary comes out of the difference Arendt identifies between the Roman and the American model regarding the institutional location of authority. Institutionally speaking, Arendt argues, ‘it is lack of power, combined with permanence of office, which signals that the true seat of authority in the American Republic is the Supreme Court.’¹¹² A basic premise of Arendt’s conception of the authority is that the judiciary is unfit for power in the same way and for the same reason that the legislature is unfit for authority: power and authority cannot be located from the same source because of the inherently different functions performed by power and authority. Whereas authority, because its function is to provide durability and stability

¹⁰⁶ J Klabbers, ‘Possible Islands of Predictability: The Legal Thought of Hannah Arendt’ (2007) 20 *Leiden Journal of International Law* 1, 21-22.

¹⁰⁷ J Cohen and A Arato, ‘Banishing the Sovereign? Internal and External Sovereignty in Arendt’ (2009) 16 *Constellations* 307, 317.

¹⁰⁸ Arendt, *On Revolution* (n 2) 200.

¹⁰⁹ *ibid* 231.

¹¹⁰ *ibid* 202.

¹¹¹ *ibid* 201.

¹¹² *ibid*.

to the constitutional order requires a 'lasting institution for judgment', power corresponds to the citizens' capability to spontaneously initiate something new and could only be properly institutionalised through a parliament which was to be a 'lasting institution for opinion'.¹¹³

In identifying the judiciary as a 'lasting institution for judgment', Arendt makes an important distinction between the nature of Roman authority and American authority. She notes that 'in Rome, the function of authority was political, and it consisted in giving advice, while in the American republic the function of authority is legal, and it consists in interpretation.'¹¹⁴ This constitutes a difference in the method through which authority is manifested. The Roman republic, because of its strong reliance on tradition and the stratification of the society on which traditions were based, manifested the authority of the Senate in political terms. Authority was acknowledged and re-sanctified when the members of the Roman Senate acted in accordance with time-honoured principles and standards of behaviour.

On the other hand, the authority of a constitutional order, such as America in Arendt's discourse, is manifested and preserved when 'the act itself, the beginning as such, is remembered whenever constitutional questions in the narrower sense of the word come into play.'¹¹⁵ The judiciary, by virtue of interpreting the contemporary problems in constitutional terms, represents the juridical version of the manifestation of political authority. In other words, authority becomes a juridical phenomenon once a body politic is founded through the establishment of a constitution.¹¹⁶ This is further evidenced by Arendt's distinction between the authority of the Roman Senate, which came from tradition and corresponded to the fact that it was composed of the descendants of the founders who were seen as the representatives or reincarnations of their ancestors; and, the authority of the Supreme Court, which, she notes, derives from 'the Constitution as a written document.'¹¹⁷ What, then, does it mean for the court to be a 'seat of authority' in terms of its functions?

Exploring Arendt's essays, 'Reflections on Little Rock' and 'Civil Disobedience,' Marco Goldoni and Christopher McCorkindale provide a nuanced perspective on the authority and power of the Supreme Court. They propose that Arendt's understanding of the judiciary as a seat of authority falls between Klabbers and Cohen and Arato's proposals, revealing her ambivalence towards conferring authority on the Supreme Court. Instead of dynamism, they find a conservative interpretation of the written Constitution in the

¹¹³ *ibid* 231.

¹¹⁴ *ibid* 201.

¹¹⁵ *ibid* 205.

¹¹⁶ Her comment on the constitution of the UK suggests that the written-ness of the constitution is not particularly important for Arendt and that when emphasising on written constitutions, Arendt's aim is to highlight the objective but tangible nature of public laws.

¹¹⁷ Arendt, *On Revolution* (n 2) 202.

Court.¹¹⁸ They claim that, according to Arendt, establishing a stable political community requires an institution capable of mediating between the power of the new beginning (the founding moment) and the stability of the constitution (that which was founded).¹¹⁹ Drawing on her discourse on Rome, they highlight the role of the Senate, composed of those who were recognised as having authority (*patres*), tasked with preserving the city's founding principles by ensuring that laws remained faithful to the principles. Here, as I argued in Section I, the past serves as a guide to future generations, connecting them across time and space. Thus, they argue, 'no generation was an island: each generation—past, present and future—was bound by a common world, both spatially and temporally.'¹²⁰

Arendt's conception of the temporal dimension of authority, counterintuitive yet crucial, challenges the conventional notion of growth and consequently, augmentation, as future oriented. Arendt saw that for the Romans, growth was directed towards the past: contrary to our concept of growth, where one grows into the future, the Romans felt that growth was directed toward the founding. The Senate in Rome derived authority from the fiction that it perpetually recreated the city's founding by tying present changes to the spirit of foundation. Goldoni and McCorkindale point out that in Arendt's reading, for Ancient Rome, it was not the founding moment, but its (mythical) reincarnation in a political institution which tied the changes of the present to the vitality of beginning, to the vibrancy of the constitutive act of foundation, which tied, in other words, future generations to their constitutional origins.¹²¹ In contrast, America placed authority not in a political institution but in a legal one. The Supreme Court's authority stemmed from interpreting the Constitution, not the political act of foundation as such. In other words, while the Roman Senate personified constituent power, embodying action, the Court personified the Constitution itself. They conclude that, in America, acting according to the Constitution equated to being in authority, with the Supreme Court's role limited to interpreting and reinterpreting legitimate vires within the Constitution: 'as such, the role of the Court was neither to deliberate nor to advise, but rather to interpret that document.'¹²²

In my reading, Goldoni and McCorkindale are correct to establish a connection between the role of the court in preserving the authority of the constitution and its categorisation as a 'seat of authority'. Arendt views the judiciary as an important institution that performs the important task of interpreting (and thus preserving) the constitution. The crucial insight that Arendt wishes to retain from the Roman conception of authority is that 'the act of foundation inevitably develops its own stability and permanence, and authority in this context is nothing more or less than a kind of necessary "augmentation"

¹¹⁸ Marco Goldoni and Christopher McCorkindale, 'The Role of the Supreme Court in Arendt's Political Constitution' in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the law* (Hart Pub 2012) 119.

¹¹⁹ *ibid* 120.

¹²⁰ Goldoni and McCorkindale (n 118).

¹²¹ *ibid* 120.

¹²² *ibid* 122.

by virtue of which innovations and changes remain tight back to the foundation which, at the same time, they augment an increase.¹²³

The Roman *auctoritas*, whose etymological root is *augere*, to augment and increase, depended upon the vitality of the spirit of foundation, by virtue of which it was possible to augment, to increase and enlarge, the foundations as they had been laid down by the ancestors. The ‘uninterrupted continuity of this augmentation’ and its ‘inherent authority’ could come about only through tradition, that is, through the handing down, ‘through an unbroken line of successors’, of the principle established in the beginning. To stay in this ‘unbroken line of successors’ meant in Rome to be in authority, and ‘to remain tied back to the beginning of the ancestors in pious remembrance and conservation meant to have Roman *pietas*, to be “religious” or “bound back” to one’s own beginnings.”¹²⁴ On the other hand, for modern, freedom-establishing constitutional orders, the juridification of authority results in a reliance on the continuous and lasting institution of the judiciary to perform the task of preservation. Judicial interpretation, as I will show in the following sub-section, represents for Arendt a suitable location for a coincidence of change and durability because she sees judicial interpretation of the constitution as an act of ‘preservation by virtue of augmentation.’¹²⁵

It is worth repeating at this juncture that in Arendt’s reading Roman authority was ultimately ‘not vested in laws’ but was ‘incorporated in a political institution, the Roman Senate – *potestas in populo*, but *auctoritas in Senatu*.’¹²⁶ Consequently, the establishment of the judiciary as the seat of authority represents a constitutional innovation on Roman authority because it juridifies the authority of the constitutional order. The judiciary in its functions is nevertheless limited because it sources its ability to interpret the constitution authoritatively not because it can lay a claim to power, but because its distance from power makes it the perfect institution to maintain the durability of the constitution. A separation between power and authority is relevant for Arendtian constitutionalism because it arises from the difference between the functions performed by judiciary as a seat of authority and the legislature as the seat of power but also because of the methods of their working.¹²⁷ The juridification of authority takes place through judicial interpretation of the constitution. I will now argue that in interpreting contemporary discourse in constitutional terms, the judiciary continues the remembrance of the constitution and in applying, changing, or reinventing constitutional principles, augments the authority of the constitutional order.¹²⁸

¹²³ Arendt, *On Revolution* (n 2) 204.

¹²⁴ *ibid* 202.

¹²⁵ *ibid* 204.

¹²⁶ *ibid* 200.

¹²⁷ Hannah Arendt, ‘The Great Tradition: I. Law and Power’ (2007) 74 *Social Research* 713. See also, Matías Sirczuk, ‘Look at Politics With Eyes Unclouded By Philosophy: The Arendtian Reading of Montesquieu’ (2018) 2 *Arendt Studies* 171.

¹²⁸ Honig (n 62).

I have so far discussed the role the court performs as the ‘seat of authority’ in a democratic constitutional order but have not said anything about the way in which judicial interpretation augments the authority of the constitutional order. In this sub-section, I will rely on Arendt’s writings on the role of memory in politics and develop the idea that the judicial process augments authority through a process of memorialisation.

Arendt emphasises two crucial aspects of memory. First, the ability to construct a personal narrative over time is vital for forming unique identities and building interpersonal relationships. Secondly, in order to coexist, citizens must establish connections that transcend social boundaries, extending to both ancestors and descendants. These relationships rely on the community to provide a shared framework for linking individual memories to past events, as Arendt points out that memory relies on an established reference framework, and the human mind struggles to retain unconnected information.¹²⁹

While memory has been recognized as a crucial part of Arendt’s thought, its role and implications have not been sufficiently explored.¹³⁰ In one of the few sustained analyses of Arendt’s writings on memory, Irene McMullin highlights the ‘evaluative quality’ of Arendtian remembrance, which allows it to serve ‘a foundational role in the establishment and maintenance of the public arena.’¹³¹ Whereas McMullin looks into the role of technology, Peter Verovšek focuses on the dangers that occur when these evaluative standards are called into question by traumatic experiences of historical rupture.¹³² He argues that ‘in the absence of shared public norms for evaluating what should count as excellent human lives, citizens turn to competing private visions that regularly conflict.’¹³³

Verovšek underscores the critical importance of memory in shaping individual identities and collective communities. Without memory, actions and words, despite their significance, dissolve into oblivion, leaving no lasting trace. The retention of these experiences in the mind is essential to maintain their relevance and impact, as they become irrevocably past and distant from our immediate sensory perception if not repeated and remembered. In the political context, Beiner aptly characterises memory as ‘the saving power of remembrance,’ emphasising its role in giving significance and continuity to our lives. Without memory, both individuals and communities would be deprived of the learnings of the past and a guide into the future, not least because political actions and

¹²⁹ Arendt, *Between Past and Future* (n 10) 5.

¹³⁰ Joanna Vecchiarelli Scott and Judith Chelius Stark, ‘Rediscovering Hannah Arendt’ in Hannah Arendt, *Love and Saint Augustine* (Univ of Chicago Pr 1996) 116; Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Rowman & Littlefield 2003) 86–91.

¹³¹ Irene McMullin, ‘The Amnesia of the Modern: Arendt on the Role of Memory in the Constitution of the Political’ (2011) 39 *Philosophical Topics* 91, 94.

¹³² Peter J Verovšek, ‘Unexpected Support for European Integration: Memory, Rupture, and Totalitarianism in Arendt’s Political Theory’ (2014) 76 *The Review of Politics* 389.

¹³³ McMullin (n 131) 97.

judgments run the danger of being completely lost to the next generations. More crucially, memory is how principles stay in the domain of political actions.

However, relying heavily on memory, an inherently fallible faculty, presents its own set of challenges and dissatisfactions. Similar to the arguments I have advanced in the previous chapters about the necessity of work for preserving action, once again, we see that all action is dependent upon reserving the past and the potential for action through tangible objects created by work. For words and deeds to gain substance and permanence, they must first be perceived, heard, and remembered. According to Verovšek, this process of 'reification of remembrance' operates through two interconnected aspects of collective life. The first is the role of the storyteller, who crafts narratives that can be passed down to others. The storyteller shapes memory by recounting stories and experiences, thus perpetuating the significance of actions and words. The second facet is the role of the political community, which safeguards these narratives over time and provides a space for their continued retelling. In this way, memory is preserved and transmitted within the broader context of a political community.

Arendt points out that speech and actions stand in need of being transformed into tangible manifestations, such as poetic sayings, written texts, printed books, paintings, sculptures, and various records, documents, and monuments. The entire sphere of human affairs relies on two fundamental pillars: the presence of others who have witnessed and remembered, and the transformation of the intangible into tangible forms. Arendt's assertion that a structured public space within the polis is necessary for human actions to take place underscores the importance of a secure and organized environment for meaningful human activity. The political community, through the establishment of laws governing social order, not only ensures safety and security but also fulfils a dual function: enabling remembrance in the present and reifying the memory of actions and words into enduring structures for future generations. This serves to 'hedge in each new beginning' while allowing the potential for innovation and unpredictability. In the previous chapters, I have argued that Arendt sees laws as promissory relationships that give durability to the political acts and judgments of citizens in a pluralist society. The discourse on memory merely brings out the way in which law as promising operates. The legal process can be used to guarantee the pre-existence of a shared world in which individuals can engage in meaningful action and communication. In addition to establishing the stability of the political space within which the individual may act, legal processes also actively 'construct a memory' that the individuals who are not present at the time of its happening can rely upon once the act is done.

Daphne Barak-Erez, a judge of the Israel Supreme Court, claims that an analysis of constitutional case law sheds light on the ways in which courts harness historical events in order to justify their normative choices. More specifically, she argues that while some judicial decisions cite history in order to justify continuity with the past, others regard

history as a cautionary tale that calls for a change of direction. In between, some decisions opt for a middle route, supporting continuity with historical decisions but offering new interpretations of their lessons.¹³⁴ In each of the ways, however, constitutional argument making necessarily involves the use of history and memory and in that process, also produces memory. This use, as Jack Balkin puts it, ‘shapes people’s views about what the law means and why people have authority.’ This dual process is the process of memorialisation that is unique to the functioning of judiciary as an institution in a democratic constitutional order.

The selective remembrance and exclusion of events possesses profound normative implications, shaping our understanding of identity, tradition, innovation, culpability, and collective responsibility. Memory serves as a fundamental basis for comprehending our legal and constitutional milieu by allowing us to import meanings to law and legal language by ensuring a link to lived political experiences. Balkin points out how, in constitutional interpretation, a nuanced interplay of memory and omission often occurs, with arguments rooted in precedent, tradition, and original meaning selectively emphasising particular facets of the past while obscuring others. Consequently, he argues, ‘at stake in constitutional memory is which historical figures and movements will count as makers of constitutional meaning for the present. In constitutional construction, we may look to the ideas of people whose views were unpopular or minority positions in their own time, but whose constructions of the Constitution turned out to be far wiser than the dominant opinions of their day.’¹³⁵

In other words, the judicial process is a process of memorialisation but one that forever stands in need of inclusion of plural voices so that important memories, ones that are relevant for the maintenance of a plural democratic order, are not lost to time. Such a reading allows us to simultaneously view the judiciary as the site where the authority of the constitution is augmented through the participation of citizens in a highly particularised procedure as well as explain the limits of the judiciary in its function as the seat of authority. Here judiciary acts as a constituent assembly in continuous session not to make and unmake the constitution but as a fictionalised enacting of the foundational principles for the purposes of resolving the dispute in front of it. To put it differently, it does not perform the legislative function of the constituent assembly, but by tracing the rationales and applying them to particulars, it reasserts the authority of the founding.

¹³⁴ Daphne Barak-Erez, ‘History and Memory in Constitutional Adjudication’ (2017) 45 *Federal Law Review* 1.

¹³⁵ Jack Balkin, ‘Constitutional Memories’ (2022) 31 *William & Mary Bill of Rights Journal* 307.

Conclusion

I began the chapter by explicating the Arendtian conception of authority as augmentation on two axes: the source of authority (foundation) and the binding power of authority (reverence). Using the distinctions Arendt creates amongst the various forms of government, I argued that for Arendtian constitutional thought, authority is intimately connected with politics. However, instead of representing a contradictory relationship, I argued that authority and politics are dependent upon each other. This is reflected in the juridification of authority when Arendt argues for the Supreme Court as the most appropriate seat of authority. Authority as augmentation is captured most succinctly in the ways in which judicial interpretation remembers the founding by re-iterating and reformulating the principles generated by the establishment of the constitution. The role played by citizens' political act and judgments in generating or destabilising the authority of a constitutional order lends further support to the starting premise that motivates Arendt's conceptualisation of political authority: that the only kind of authority suitable for freedom-establishing constitutional orders is political authority because it maintains the link between authority and politics.

In the next chapter, I take the support of Arendt's writings on civil disobedience to forward the argument that citizen interpretation can also be extra-institutional, especially when constitutional institutions have lost their authority. I will argue that extending the implications of the relationship between politics and authority is crucial to avoid the over-rigidity of the authoritative settlement of political issues by the judiciary and the loss of politics that entails.

Chapter Five

CIVIL DISOBEDIENCE

Some years after writing *On Revolution*, Arendt's views on the judiciary as the seat of authority undergo a significant change. In Arendt's view, the 'failure of judicial review' during the Vietnam War is accompanied by widespread protests and alerts her to the non-judicial ways in which citizens participate in authorising or de-authorising an institution or a constitutional order. To Arendt, the limits of judicial review become apparent in the 'political question doctrine' and the court's reluctance to hold certain acts of the government accountable on the standards set by the constitution.¹ This leads her to be less sure of the position of the judiciary as a seat of authority, and she attempts to formulate obedience as a function of the politics of citizens: Arendt argues, 'the establishment of civil disobedience among our political institutions might be the best possible remedy for [the] ultimate failure of judicial review.'²

However, civil disobedience as a constitutional phenomenon remains under-theorised in Arendt's work. She begins her eponymous essay by describing civil disobedience as a collective but spontaneous political act of citizens who have lost faith in the ability of the political institutions to represent and govern. The only elaboration she gives to her proposal to establish 'civil disobedience among our political institutions' is by way of suggesting that the 'civil-disobedient minorities' be given the same recognition as other special-interests groups. This implies, according to Arendt, that civil-disobedients, 'through their representatives' are 'permitted to influence and "assist" Congress by means of persuasion, qualified opinion, and the numbers of their constituents.'³ She suggests an equivalence between lobbyists and representatives of civil disobedience groups, and argues that this structural change would allow the 'minorities of opinion' to 'establish themselves as a power' not just on the streets but as ever-present and 'to be reckoned with in the daily business of government.'⁴

¹ To Arendt, what was most problematic about the use of the 'political question doctrine' to deny judicial review of acts of the executive was the idea that even questions of interpretation of constitutional *vires* – in this case, about the limits of the executive power to declare war without authorisation from the legislature – were beyond the judicial remit. In doing so, the courts not only left citizens without a legal remedy against executive abuse of power but, according to Michael Malakoff, they also made 'a binding decision on justiciability which in effect holds that federal courts will *never* question the President's authority to wage war'. Michael Malakoff, 'The Political Question and the Vietnam Conflict' (1969-70) 31 *University of Pittsburgh Law Review* 505 from Marco Goldoni and Christopher McCorkindale, 'The Role of the Supreme Court in Arendt's Political Constitution' in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the law* (Hart Pub 2012).

² Hannah Arendt, 'Civil Disobedience', *Crises of the republic* (Harcourt Brace Jovanovich 1972) 101.

³ *ibid.*

⁴ *ibid.*

This chapter argues that Arendt's discussion of civil disobedience marks a shift in her conception of 'active support and participation' of citizens. The shift comes in the form of a change in emphasis from 'voluntary obedience' to 'civil disobedience' as the source of augmentation in a democratic constitutional order. Now, the Arendtian conception of 'active support and participation' of the citizens not only refers to their voluntarily given obedience to the constitutional order but characterises a democratic constitutional order as a form of government that sources its normative legitimacy and political authority from the presence of dissenting citizens. For Arendtian constitutionalism, a discernible practice of dissent occupies the centre-stage. Dissent is not a by-product of free political action that must be accommodated in a constitutional order but is treated as a marker of free political action itself.

The emphasis on dissent, however, does not represent any radical change in the Arendtian conceptualisation of democratic constitutionalism as a form of government instituted for and through the experience of active citizenship. On the contrary, it merely adds another layer to our understanding of freedom's interaction with power and authority. In this thesis, I have argued that the citizens' experience of freedom is contingent upon the existence of a public realm where the individuals may enter to speak, be heard, and act alongside their peers. I argued that institutionally speaking this implies a coexistence of representation and direct participation in the governance of the polity. I have discussed how Arendt sees politics as an activity through which citizens disclose their unique political selves and in doing so, not only stake a claim for the equal worthiness of their political positions but also commit to acting a certain way in the future. For Arendt, one of the main commitments made by a citizen in a democratic constitutional order is the commitment to obey laws. Thus, citizens continue to possess the capacity to generate power and institute new beginnings but voluntarily choose to obey the existing constitutional order and in doing so, uphold the authority of the constitutional order. While legislatures and judiciaries represent the institutional sites of a citizen generated power and authority, civil disobedience maps the working of this practise in the extra-institutional setting. In the Arendtian framing, when institutions such as the parliament and the judiciary lose their power and authority, citizens constitute a temporary public realm outside of the institutional configurations and by acting within this temporary public space, attempt to generate new directions for governmental action. Consequently, civil disobedience signifies the experience of active citizenship in the extra-institutional sites of democratic constitutionalism.

Arendt ends *Civil Disobedience* with a call to find 'a constitutional niche for civil disobedience.' While her own proposals for constitutionalising civil disobedience appear under theorised, they nonetheless represent a reprioritisation of the political in her own thought. Because civil disobedience is inherently extra-institutional in its place of occurrence, the reprioritisation of the political also occurs through a sharper focus on the

citizens' political rights and duties outside of the formal political structures. Thus, for Arendtian constitutionalism, constitutionalising a niche for civil disobedience implies not only instituting structures and platforms for the citizens' right to dissent but also involves the citizens' self-implemented obligation to preserve the constitutional order, to 'take common responsibility' for the shared political world.

In the context of authority, this implies specifically that not just the 'voluntary obedience' of the citizens, but also, and perhaps, more importantly, the 'civil disobedience' of the citizens is critical for maintaining the authority of the constitutional order. In this chapter, I use the Arendtian framework I have built in the previous chapters to explain how civil disobedience helps maintain the authority of the constitutional order because of its dual nature. At one, and its most obvious, level, civil disobedience consists of a politically manifested disobedience towards constitutional institutions and processes. Disobedience disturbs and destabilises the juridical through political action. At another level, civil disobedience operates as a declaration of allegiance towards some higher order constitutional principles. The civil disobedient group disrupts the normal functioning of the constitutional order for the sake of preservation of the constitutional order. The presence of the second level distinguishes civil disobedience from revolution; revolutionaries seek to uproot the entire constitutional order with the aim of replacing it with another.

The line separating civil disobedience from revolution is very thin, and to Arendt, how quickly civil disobedience movements can turn into revolutions speaks to their complex nature. However, the most important distinction between the two kinds of political actions lies in the civil disobedients wish to preserve the constitutional order they share with each other. The dual nature of civil disobedience implies both disruption *and* preservation and represents the phenomenon through which citizens renew the foundational structures of their constitutional order to better align with the principles of the democratic constitutional order. This apparently paradoxical implication is raised by Arendt through a theoretical separation of the stability of institutions from the authority of the constitutional order. It is predicated upon an understanding that separates constitutional form from constitutional principles and defines civil disobedience as the destabilisation of constitutional form for the sake of reimagining the constitutional structures to align better with the constitutional principles.

There is another important implication of the interconnectedness of politics with authority that, in my view, Arendt does not fully draw out. As I have already discussed in Chapter Two, associating democratic constitutionalism with the experience of freedom as politics is predicated on valuing the unpredictability of political action and the consequent ability of citizens to institute radically new changes. In Chapter Three, I described but also circumscribed the idea that an active citizenry is powerful when it possesses the capability to collectively propel or redirect governmental action. In Chapter Four, I introduced the

work that principles perform in tempering the boundlessness of change that an active citizenry can legitimately introduce.

A corollary to this discussion is a discussion on the potential for change that political authority contains in democratic constitutional order. In such a formulation, authority does not imply a rigid preservation of the status quo but corresponds to the augmentation of the constitutional foundation; authority implies change with a view to maintaining durability. In other words, the political nature of authority means that alongside the inherent pull towards conservation of the status quo, the generation of authority in democratic constitutional order also includes within it a commitment towards maintenance *through* change. To put it simply, political authority maintains the durability and stability of the democratic constitutional order by functioning as an augments of authority. This augmentation is not mere repetition but occurs as a reperformance of principled actions, such that when citizens indicate their support through voluntary obedience and participation, they re-enact the foundational principles.⁵

I show that intertwined with her formulation of authority as augmentation is the relationship authority has with civil disobedience. For Arendt, conceptualising authority for a freedom-establishing constitution is a riddle that can be solved if we move away from an absolutist understanding of the concept that creates no space or opportunities for change and resistance; and if we acknowledge the dependence of authority on the realm of human affairs. I propose that Arendt's discourse on authority underscores the interconnectedness between disruptive politics and the durability of the constitutional order. I propose that if we take seriously Arendt's proposal to create a 'constitutional niche' for civil disobedience, we must amend our understanding of authority to include civil disobedience as a phenomenon through which the citizens participate in augmenting the authority of the constitutional order.

The chapter proceeds as follows. I begin the chapter by discussing the theoretical move ('dissent implies consent') Arendt makes to effect a shift from 'voluntary obedience' to 'civil disobedience' as the marker of political freedom in a democratic constitutional order. The second section examines the duality ('disruption and preservation') within civil disobedience to suggest that civil disobedience represents the phenomenon through which citizens renew the foundational structures of their constitutional order to better align with the principles they choose to entrench in the process. The penultimate section suggests another theoretical move ('separation between stability of the institutions and authority of

⁵ One can argue that in such a formulation, we cannot really distinguish between voluntary obedience and passivity of the citizens. It is worth noting that to Arendt, the experience of freedom, much like the generation of power, is an actual discernible practice that necessarily requires citizen participation in politics. Once again, the emphasis she places on the availability of avenues for the citizens to participate in their governance becomes important because seen from the viewpoint of active participation, voluntary obedience requires the citizens' active engagement with the constitutional institutions and processes, as opposed to the image of passivity generated by a citizenry that only interacts with the political institutions during the electoral cycle.

the constitutional order’) to align civil disobedience’s potential for the experience of active citizenship with Arendt’s call to find a constitutional niche for civil disobedience. The chapter concludes by arguing that constitutionalising a niche for civil disobedience means not only instituting structures and platforms for the citizens’ right to dissent but also involves the citizens’ own obligation to preserve the constitutional order, to ‘take common responsibility’ for the shared political world. Through civil disobedience, citizens get the opportunity to destabilise institutions and reimagine their structures while upholding their fealty towards the overarching constitutional order.

I. From ‘voluntary obedience’ to ‘civil disobedience’

Arendt’s writings on civil disobedience contain a subtle change in her conception of ‘active support and participation’. The change comes from a shift in emphasis from ‘voluntary obedience’ to ‘civil disobedience’. In her initial works, Arendt’s use of the term ‘active support and continuing participation’ implies that the citizens authorise the constitutional order by voluntarily *obeying* the rules of the system. In *Civil Disobedience*, however, it also includes the role and value of citizens’ *dissent* in maintaining the authority of a constitutional order, an aspect that was much less evident in her earlier work, if at all present. The shift is subtle because it does not stray too far from her conception of political action. But, it is important. In fact, it represents a reprioritisation of the political with a stronger emphasis on the collective, public and non-violent characteristic of political action.

I begin this section by discussing the theoretical move (‘dissent implies consent’) Arendt makes to affect this shift. The shift comes from considering the implications of valuing plurality in a polity. In the second half of the section, I focus on the political elements of civil disobedience that characterise her understanding of civil disobedience: collectivity, publicity, and non-violence. By emphasising the collectivity, publicness and non-violent nature of civil disobedient action, Arendt draws out the specifically political aspect of civil disobedience.

Dissent implies consent

In this thesis, I have presented freedom as the guiding principle behind the establishment of a democratic constitutional order. Political freedom implies a strong connection between governance and citizens’ political participation: active citizenship represents the constant activity with one’s peers, by speaking about, negotiating, and entering into agreements on issues of common interest. In other words, in a democratic constitutional order, citizens govern themselves by acting in concert regarding objects of common concern. For most of Arendt’s work, such a form of governance is based on the strength of mutual promises. To Arendt, promises aide a political mode of living together

whereby individuals with distinct viewpoints are seen, heard, and acknowledged. Promises represent a way for political action to generate consent without forcing homogeneity.⁶ To put it simply, in promising, citizens act in concert without dissolving the plural personalities of the contracting citizens. Thus, for Arendt, promises represent political agreement but not at the cost of erasing the distinct political positions of the citizens: '[t]he contract presupposes a plurality of at least two, and every association established and acting according to the principle of consent, based on mutual promise, presupposes a plurality that does not dissolve but is shaped into the form of a union – *e pluribus unum*.'⁷ Arendt's formulation of the juridical in terms of promises signifies the importance she adduces to the continuing protection of human plurality as a feature of political communities in a constitutional democracy.

An active citizenry generates power by acting together and is, thus, in a position to propel and direct governmental actions. The promise-based characterisation of democratic constitutional orders reflects her emphasis on the idea that consent is not 'mere acquiescence' predicated on the existence of a ruler and his willing subjects but consists of 'active support and continuing participation'. However, in *Civil Disobedience*, she draws out another implication of characterising constitutional democracy as a 'society of consent'.

Arendt's discussion in *Civil Disobedience* is prompted by an enquiry into the question: why should citizens obey the law? Throughout the essay, she characterises civil disobedience as dissent that grants normative legitimacy to the democratic constitutional order. She argues that if the entering into contracts was to result in a complete unification of the citizens, 'all talk about the citizen's *moral* relation to the law would be mere rhetoric.'⁸ In promising, not only are the outcomes generated through a consideration of plural viewpoints, but the act of promising also allows the promising parties – the plural citizens in this case – to resist their generalisation by retaining a 'restricted autonomy'.⁹ It is this retention of 'autonomy' that makes dissent significant and necessary.¹⁰

Consequently, Arendt says, the citizens' moral obligation to obey laws cannot be theorised with a historical, fictitious consent as its normative starting point. The ever-present heterogeneity of individuals in a political community implies that the citizens' obligation to obey cannot be based on a theoretical assumption that they have all self-legislated or that they have granted a pre-political blanket consent to the structures of the constitutional order. Arendt's argument for treating dissent as a discernible practice stems from her identification of all consent as a preliminary, and tacit support for the

⁶ Jay Bernstein, 'Promising and Civil Disobedience: Arendt's Political Modernism' in Roger Berkowitz, Jeffrey Katz and Thomas Keenan (eds), *Thinking in Dark Times: Hannah Arendt on Ethics and Politics* (Fordham University Press 2010).

⁷ Arendt, 'Civil Disobedience' (n 2) 94. Arendt's emphasis.

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.*

constitutional order that actualises only if citizens have the opportunities to exercise their right to dissent.

Arendt reasons that an individual's membership of constitutional democracies, like all societies, begins with 'tacit consent'. The implied nature of this consent means that it is not completely voluntary: 'We all live and survive by a kind of *tacit consent*, which, however, it would be difficult to call voluntary'.¹¹ Since each generation is born into a specific community with pre-existing juridical frameworks, an individual citizenship depends on being accepted and integrated as an equal member of the political community. In other words, an individual's acceptance as a citizen is premised on their conforming to the 'rules' to which they get a right to consent only once they are acknowledged as citizens of the polity. She calls this conformity to rules 'tacit consent' because it acts as a condition to one's acknowledgement as a citizen. Consequently, 'tacit consent' is not voluntary. After all, 'how can we will what is there anyhow?'¹²

This is where the shift from voluntary obedience to civil disobedience occurs: through the expansion of the conception of active support and participation.¹³ Arendt argues, 'dissent implies consent, and is the hallmark of free government: the one who knows that he may dissent knows also that he somehow consents when he does not dissent.'¹⁴ To frame it differently, consent becomes apparent only when citizens have the avenues to exercise their right to dissent. The possibility of resistibility inherent in the availability of the option to withdraw support and withhold participation converts 'tacit consent' into real consent. Thus, for a constitutional democracy to truly be a 'society of consent', dissent needs to be both, a 'legal and *de-facto* possibility'.¹⁵ Her emphasis on dissent as a practice makes clear the direct relationship Arendt sees between the maintenance of the legitimacy of the constitutional order and the citizens' ability – guaranteed through law and politics – to withdraw consent.

What counts as dissent?

Not all dissent can be characterised as the source of legitimacy of the constitutional order. Two main distinctions, between conscientious objection and civil disobedience and revolutionary action and civil disobedience clarify Arendt's conception of civil

¹¹ *ibid* 88.

¹² *ibid*.

¹³ There appears, as Cohen and Arato observe, to be a subtle shift in arrange treatment of the social contract in the decade or so between the publication of on revolution and civil disobedience. She had, in her earlier discussion, contrasted the idea of consent and mutual promise explicitly or implicitly suggesting that the former- in the sense of consent to the role- is only an outcome of the vertical and not the horizontal contract. See for instance, Hannah Arendt, *On Revolution* (Faber & Faber 2016) 271. 'By the time of *Civil Disobedience*, consent- in the somewhat different sense of active support and continuing participation- is treated as an outcome of the horizontal contract and thus reconciled with the practice of mutual promise.' Kei Hiruta (ed), *Arendt on Freedom, Liberation, and Revolution* (Palgrave Macmillan 2019) 180.

¹⁴ Hannah Arendt, *Crises of the Republic* (Harcourt Brace Jovanovich 1972) 88.

¹⁵ *ibid*.

disobedience. While the former alerts us to the requirements of collectivity and publicity, the latter displays her rejection of violence in civil disobedience.

As I noted above, Arendt begins *Civil Disobedience* by framing the essay as a discussion on civil disobedience as ‘the citizen’s moral relation to the law in a society of consent.’¹⁶ Drawing from Kant and Aristotle, she separates morality from good citizenship: ‘a bad man can be a good citizen in a good state.’¹⁷ Here, morality does not refer to individual conscience but is a collective and *political* mode of judging. In other words, the collectivity inherent in civil disobedience refers to its political character and ‘good citizenship’ is underscored by the presence of an infrastructure and ethos of collective public dissent. Let me explain how.

Arendt uses the criteria of collectivity to distinguish between ‘conscientious objectors’ and ‘civil disobedients’.¹⁸ She claims that civil disobedience can only be performed as a part of a group. She argues that civil disobedience of non-objectionable laws, for instance, the traffic regulations, in order to protest unjust state action(s), could only be acted out in groups (‘imagine a single individual disregarding traffic laws’).¹⁹ To put it differently, for Arendt, civil disobedience functions exclusively as a collective activity and civil disobedients are ‘organised minorities’ who have decided to collectively take a stand against what they perceive to be is unjust state activity. Arendt’s insistence on collectivity appears strange in the first instance. After all, it would not make sense to exclude from the ambit of civil disobedience acts that are performed by single individuals. Take for example, the case of the world longest hunger-striker, Iron Sharmila Chanu. Chanu began a lone fast in protest against the Indian state’s use of a draconian Armed Forces Special Powers Act (AFSPA). AFSPA grants military personnel extensive immunity in their exercise of powers to deal with insurgency in ‘disturbed’ areas. At the time she began her protest, hunger strikes were illegal in India; Chanu was arrested and force-fed multiple times by the police because her fast was adjudged to be attempted suicide. Chanu’s fast made international headlines and prompted a deeper enquiry into the extra-judicial killings and rapes committed by the troops who nonetheless escaped criminal liability because of the immunities granted by the Act.

Arendt herself characterises some individuals as exemplars of ‘good’ judgment arguing, for instance, in her lecture ‘Personal Responsibility Under Dictatorship’ that the most disturbing aspect of Nazi Germany was the refusal of individuals to take moral responsibility for the acts of their government and withdraw their support of the system.²⁰ Why, then, is Arendt’s emphasis on collectivity of civil disobedience significant? The answer, I propose, lies in the ability of collective action to generate inter-subjective and

¹⁶ *ibid* 51.

¹⁷ Hannah Arendt, *Lectures on Kant’s Political Philosophy* (Ronald Beiner ed, University of Chicago Press 1992).

¹⁸ Arendt, *Crises of the Republic* (n 14) 55–57.

¹⁹ *ibid* 56.

²⁰ Hannah Arendt, *Responsibility and Judgement* (Jerome Kohn ed, Schocken 2003) 17–48.

shareable standards for persuasive, and not coercive, collective action. The legitimacy of civil disobedience within a constitutional democracy comes from the group nature of this political action because ‘their concerted action springs from an agreement with each other, and it is this agreement that lends credence and conviction to their opinion’.²¹ It is connected to the generation of principles I had discussed in the previous chapters, where standards for future actions are manifested in the performance of action. Chanu’s dissent, performed individually, cascaded into collective action, prompting protest-marches in Delhi and elsewhere against the law. Her individual action prompted a discourse on judging state action based on collectively generated standards of justice.

This is why, in Arendt’s framing, the collective nature of dissident political action gives it an objectivity (and consequently, political legitimacy) not possessed by individual ‘conscientious objectors’ when they appeal to a ‘higher law’ as a standard for judging the acts of the government.²² The conscientious objector’s reliance on a higher order principle arrived at either through an internal reflection on what should be or derived from a transcendental religious code does not contain the same value in a secular political society.²³ The idea that principles for a constitutional democracy must be generated in the political realm is repeated throughout her work. In the previous chapters of this thesis, I have shown how the establishment and maintenance of a constitution represents the highest potential for political action for Arendt. The establishment of constitution is afforded such a high place because it represents a collective decision regarding the most fundamental principles upon which the political community would be based.

Arendt reiterates that humans are interdependent not merely in their needs and cares but also in their highest faculty: politics. This is especially true, because to Arendt, the most important characteristic of politics is that it involves acting and judging in the interest of the world we share.²⁴ Here, goodness is a political conception and has nothing to do with individual conscience. The reason why civil disobedience represents the spirit of constitutional democracy is because civil disobedient action is catalysed by common opinion and judgment generated by freely acting plurality of citizens and not a ‘common conscience’ that is theorised by generalising the individual conscience. The distinction between interests and opinions that I discussed in Chapter Two once again becomes important. It is only in the presence of plural peers in the public realm that we can properly exercise our freedom of thought and generate plural opinions that represent our diverse political positions.

Thus, the requirement of collectivity is conjoined with the publicity requirement for the Arendtian conception of civil disobedience.²⁵ Arendt claims that the ‘rules of

²¹ Arendt, ‘Civil Disobedience’ (n 2) 56.

²² *ibid* 56–57.

²³ *ibid* 55–68.

²⁴ Arendt, *Lectures on Kant’s Political Philosophy* (n 17) 10.

²⁵ Arendt, ‘Civil Disobedience’ (n 2) 58.

conscience' are 'negative' in the sense that they 'do not say what to do' and only 'say what not to do' and 'do not spell out certain principles for taking action'.²⁶ The problem with this framework is that they are entirely subjective and do not tell us how or why certain acts are more legitimate than others since it could come down to the validity of one man's conscience over others.²⁷ More importantly, she claims that it presupposes a level of homogeneity within the society that assumes that each citizen has the innate capability to distinguish right from wrong and in doing so uses the same higher order principles.

Kant exercises significant influence on her thinking in this regard. Arendt notes that publicity is one of the 'key concepts of political thinking' for Kant and argues that Kant was convinced that 'evil thoughts are secret by definition'.²⁸ She agrees with Kant's assertion that any action concerning the rights of others is unjust if its underlying principle cannot be made public. Kant argues that if the principle cannot be openly acknowledged without causing widespread opposition to the plan, then this opposition is a result of the unjust nature of the principle that threatens everyone.²⁹ For Arendt, this requirement of publicity denotes the difference between 'the criminal's avoiding the public eye' and the 'civil disobedient's taking the law into his own hands in open defiance'.³⁰

In other words, publicity implies addressing others.³¹ Although not explicitly framed in these terms, Arendt draws a connection between publicity and accountability. She says that a critical examination presupposes that everyone is willing and able to render an account of what they think and see. Politics, in other words, is concerned with, and takes into account, the rendering of accounts. This applies to both citizens and politicians.³² And so, in Arendt's understanding, civil disobedience involves holding oneself and everyone else responsible and answerable for one's actions and judgements.³³ Underlying the emphasis on a public generation of standards is the motivation to hold to account the very process through which standards are generated.³⁴ To continue the example from above, Chanu's hunger strike was a public act in two senses: first, it sought to attract attention to state injustices in order to demand accountability and justifications for state

²⁶ *ibid* 64.

²⁷ *ibid*.

²⁸ Arendt, *Lectures on Kant's Political Philosophy* (n 17) 18.

²⁹ *ibid* 48.

³⁰ Arendt, 'Civil Disobedience' (n 2) 75.

³¹ Like Rawls who also relies on Kant says, citizens in a 'nearly just society' are permitted to engage in civil disobedience 'to address the sense of justice of the majority and to serve fair notice that in one sincere and considered opinion the conditions of Fair cooperation are being violated.' John Rawls, *Theory of Justice*, 335. However, Rawls limits the radicality of civil disobedience by limiting civil disobedience to exceptional circumstances and by emphasising and portraying it as a remedy of last resort. In contrast, Arendt is highly critical of the liberal insistence upon a code of self-restraint and self-sacrifice civil disobedience.

³² Interesting to note that Arendt sees Kantian judgment as 'a peculiar talent which can be practiced only and cannot be taught.' Thereby, making politics a decidedly non-elitist activity. Arendt, *Lectures on Kant's Political Philosophy* (n 17) 4.

³³ *ibid* 41.

³⁴ *ibid* 69.

activity; and second, in performing her hunger-strike in a public space, Chanu offered her own political position up for public judgment.

Socrates, too, appears as an emblematic figure in Arendt's attempt to emphasise on the publicity requirement of civil dissent. Arendt quotes Socrates – 'an unexamined life is not worth living' – to propose that in speaking at his trial, he made his thinking process – the very source of his criminality – public and hence accountable: '[h]e performed in the marketplace the way the flute player performs at a banquet.'³⁵ In public speech and actions, even a reliance on conscience, Arendt argues, is ultimately put forward in the public arena for validity. People who engage in civil disobedience can rely on their conscience when proposing public action. However, once their views become part of public opinion, they no longer rely solely on their conscience: 'what had been decided in *in conscientiae* has now become part of public opinion, and although this particular group of civil disobedients may still claim the initial validation – their conscience – they actually rely no longer on themselves alone.'³⁶ Consequently, in the public arena, opinions become indistinguishable from one another, and the power of an opinion depends on how many people support it.³⁷

Running parallel to the distinction between civil disobedience and conscientious objection is the distinction Arendt makes between civil disobedience and revolution. For Arendt, civil disobedience is a decidedly non-violent form of political action. Her denunciation of violence is based on her belief that the use of violence not only restricts the scope of political actions that can respond to it but also changes the character of the political realm for the worse: '[t]he practice of violence like all action changes the world, but the most probable change is to a more violent world.'³⁸ In contrast, she claims, revolutionary action does not foreclose the possibilities and use of violence. In *On Revolution*, for instance, Arendt notes that 'violence is a marginal phenomenon in the political realm' but insofar as 'it plays a predominant role in wars and revolutions, both occur outside the political realm.'³⁹

However, Arendt's discussion of politics and violence in *Civil Disobedience*, is in many ways, not reflective of the nuances that arise from a combined reading of her views on the place for violence in the political realm.⁴⁰ The rigidity in her treatment of violence here is puzzling and unproductive. It is puzzling because Arendt herself acknowledges the thin line that separates civil disobedience from revolution and is unproductive because a distinction between the two based solely on the incidence of violence would result in blunting the force of her conception of civil disobedience. Following from the arguments I put forward in Chapter Three, Arendt's writings contain a distinction between violence done for the sake of politics, and violence used by way of domination. By its very nature,

³⁵ *ibid* 37.

³⁶ Arendt, 'Civil Disobedience' (n 2) 68.

³⁷ *ibid*.

³⁸ Hannah Arendt, 'On Violence', *Crises of the republic* (Harcourt Brace Jovanovich 1972) 177.

³⁹ Arendt, *On Revolution* (n 13) 9–10.

⁴⁰ Caroline Ashcroft, *Violence and Power in the Thought of Hannah Arendt* (University of Pennsylvania Press 2021).

disobedience aims to offend, shock and disturb the normal course of political business. On the one hand, it might involve the use of violence to self (like Chanu) or to public infrastructure (spray-painting facial recognition cameras during the Umbrella Revolution). At the same time, disobedience could also look like the US Capitol riots that committed violence against both, people and things. Consequently, I propose, that it is more fruitful to distinguish between criminal and civil disobedience rather than between revolutions and civil disobedience.

Mapping on to the distinction between political violence and non-political violence I advanced in Chapter Three, the difference between criminal and civil disobedience lies primarily in the principled nature of civil dissent. This allows us to amend Arendt's conception of civil disobedience to include a limited, but principled role for violence. To continue the discussion on principles and violence, according to Arendt's framework, principles appear in the world when an act is begun and continue to manifest so long as the act continues. Principles don't just apply to the start of an action, but also to the action's ongoing continuation. When principles are established during an act, they provide a framework for future actions, linking them together meaningfully. This helps to give ongoing actions a normative foundation, which makes them politically significant and not just short-lived events. Where revolutions establish *new* principles for the future, civil disobedience *continues* a previously established principle, as if the civil disobedient action is merely another political act within a chain of political actions beginning at the establishment of the constitution. Thus, the Arendtian idea of civil disobedience is not necessarily nonviolent; it is a form of revolutionary action limited by political considerations such as publicity, collectivity, and the principles that civil disobedients choose to follow.⁴¹ On the other hand, violence that is indiscriminate and prompted by efforts not to communicate and persuade but to coerce one's peers into submission characterises the kind of dissent that would not pass the muster of Arendt's criteria.

⁴¹ Celikates argues that the traditional liberal (Rawlsian) standards of publicity and non-violence for civil disobedience should be abandoned. However, he is frustrated with the narrow interpretation of the publicity standard that demands disobedients to give 'fair notice in advance' of their actions. He also has an issue with the non-violence test because it can blur the line between violence towards people and violence towards things. Despite this, like his liberal opponents, Celikates insists on non-violence towards people. More critically, he rejects the notion of civil disobedience working within the bounds of fidelity to law, seeing such requirements as a complacent commitment to a legal and constitutional status quo that urgently requires a fundamental overhaul. However, I agree with Brownlee who argues that non-violence is a term that can lead to misunderstandings. In common usage, the term violence can encompass a range of activities and incidents that carry a risk of harm but may not necessarily result in actual injury or damage. For instance, hurling stuffed animals at police officers may be considered a violent act by some. Additionally, according to the publicity test, civil disobedients, such as animal rights activists who break into labs to release captive animals, may have to carry out their actions covertly at first. However, Brownlee suggests that even initially covert acts of disobedience can become open and communicative if the individuals behind them ultimately acknowledge their actions and explain their reasons for undertaking them. Robin Celikates, 'Rethinking Civil Disobedience as a Practice of Contestation-Beyond the Liberal Paradigm: Rethinking Civil Disobedience as a Practice of Contestation: Robin Celikates' (2016) 23 *Constellations* 37; Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford University Press 2012).

II. The dual nature of civil disobedience

The shift from voluntary obedience to civil disobedience cogenerates a framework where the citizens' rights (to disobey) and obligations (to obey) are directly and equally connected to the authority of the constitutional order. Civil disobedience represents the regeneration of the authority of the constitutional order because it presents the opportunity to renew the foundational promises. Civil disobedient action represents the opportunity for a political re-founding of the constitutional foundations of the body politic, an 'inner immigration' through which a constitutional democratic order 'constantly renews itself.'⁴² In doing so, I propose, the Arendtian conception of civil disobedience presents itself as a mode of experiencing citizenship outside of the formally constituted institutional structures.

Citizens' right to dissent and the obligation to preserve

Inherent in the very act of promising are certain rights and obligations. One important way in which Arendtian constitutionalism conceptualises civil disobedience is as the right to dissent and the obligation to preserve. It corresponds to disobedience as the right to break the promise in case of change in circumstances⁴³ but for the sake of the duty that is inherent in the very activity of promising: the obligation to keep one's own promises.⁴⁴ However, although Arendt uses the motifs of social contract tradition, she does not conceptualise civil disobedience as a right to break away from an original contract. The reason why she uses social contract conceptions is to emphasise the relational nature of citizenship in a constitutional democracy. This is important to note because it allows Arendt to avoid the logical contradiction that either results in conceptualising civil disobedience as a right available only to the original members of the original contract or as conceptualising civil disobedience as a necessarily disruptive activity performed by people who wish to force their way into or out of the original contract.⁴⁵

The obligation to keep promises serves as an assurance about one's future conduct. In terms of Arendtian constitutional theory, this duty to 'make and keep promises' and a reciprocal assurance from one's peers is a defining characteristic of citizenship.⁴⁶ However, Arendt does not say anything about the content of this obligation or what it implies to

⁴² Arendt, 'Civil Disobedience' (n 2) 88.

⁴³ 'We are going to keep our promises provided that no unexpected circumstances arise, and provided that the mutuality inherent in all promises is not broken. There exist a great number of circumstances that may cause the promise to be broken, the most important one in our context being the general circumstances change. And violation of the inherent materiality of promises can also be caused by many factors, the only relevant one in our context being the failure of the established authorities to keep to the original conditions.' *ibid* 93.

⁴⁴ *ibid* 92.

⁴⁵ Hiruta falls in this fallacy. Hiruta (n 13) 125.

⁴⁶ Arendt, 'Civil Disobedience' (n 2) 92.

'keep promises' as a citizen. Some idea can be gained from her discussion on Socrates and Thoreau whom she uses as two emblematic figures to distinguish between a 'conscientious objector' and a 'civil disobedient'.

In her description of Socrates' trial, Arendt argues that Socrates 'never challenged the laws themselves – only this particular miscarriage of justice.'⁴⁷ She frames a commitment to obey law in terms of promises; and for Socrates, she notes, that it was important to acknowledge that 'his personal misfortune did not entitle him to "break his contracts and agreements" with the laws'.⁴⁸ In other words, a compliance with and obedience towards law comes about because Socrates, she argues, sees his duty as a citizen as a form of a promise towards the laws of the city. '[T]he notion of a contract pervades the latter half of the *Crito*,' Arendt continues, 'but... the contract which is binding is ... *the commitment involved in the trial*'.⁴⁹ For Socrates, this commitment involved in the trial implied that he could not run away or avoid in any other way, the legal proceedings because to do so would imply a breach of his obligation as a citizen.

On the other hand, Arendt is critical of Thoreau's civil disobedience and categorises his refusal to obey law as an individualist conscientious objection. This is because she sees his reliance on conscience as 'unpolitical'. Arendt reads Thoreau's conception of civil disobedience as an act that is not concerned with the world, which is the proper domain and subject of political action, but with his individual conscience: 'it is not primarily interested in the world where the wrong is committed or in the consequences that the wrong will have for the future course of the world'.⁵⁰ She claims that Thoreau's concern with 'individual self and its integrity' requires only that the individual not be an 'agent of injustice'.⁵¹ In contrast, one can assume, Arendt wishes to highlight the specifically *political* obligation of a citizen: a commitment to the preservation of the constitutional order.

Thus, the main distinction between a conscientious objector and a civil disobedient citizen turns on the subject of their concern. While the conscientious objector is not 'responsible for the successful working of the machinery of the society', the civil disobedient is concerned precisely with the legal framework that governs the political community.⁵² A civil disobedient 'though he is usually dissenting from a majority, acts in the name and for the sake of a group; he defies the law and the established authorities on the ground of basic dissent, and not because he as an individual wishes to make an exception for himself and to get away with it'.⁵³ In a similar vein, she distinguishes between

⁴⁷ *ibid* 58.

⁴⁸ *ibid* 58–9.

⁴⁹ *ibid* 59. Arendt's emphasis.

⁵⁰ *ibid* 60.

⁵¹ This position could also be likened to Rawls who says: 'to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions is itself a form of illegitimate force that men in due course have a right to resist.' *Theory of justice*, 342.

⁵² Hannah Arendt, 'The Concept of History', *Between Past and Future* (Penguin books 2006) 62.

⁵³ *ibid* 76.

criminal disobedience and civil disobedience. The main distinction between a criminal law-breaker and the civil disobedient lies in the civil disobedient's concern not for himself but for the political world he shares in common with his peers. In other words, Arendt associates civil disobedience with the citizens' right to dissent that is exercised within the umbrella of an overarching commitment towards the higher order constitutional principles. This commitment is motivated by the civil disobedients' concern for the constitutional order they hold in common. We get greater clarity on this line of reasoning when we look at a fundamental aspect of Arendt's oeuvre: *amor mundi*, for the love of the world.

In her diary, *Denktagebuch* (or 'Thinking Journal'), Arendt asks, '*Amor mundi—warum ist es so schwer, die Welt zu lieben?*' ('Love of the world—why is it so difficult to love the world?'). The question reflects a puzzle Arendt keeps coming back to in her work. In the first chapter of the thesis, I described how Arendt's fascination with the value or uselessness of love as a motivator in the public realm arises from her doctoral study on the three concepts of love in the work of St Augustine. Throughout her work, she develops her own understanding of what it means to love the world and to act motivated by such a love. Her explorations begin with a critique of notions of (political) love (and for that matter, any similar sentiment) in the political realm. In *The Human Condition*, for which her original title was *Amor Mundi*, she argues that love is 'the most powerful of all antipolitical forces' because it is 'unworldly' i.e., it is not concerned with the world and the existence of plurality in the world but only with the object of love and their well-being.⁵⁴ Note here, that her characterisation of Thoreau's civil disobedience as 'unpolitical' also arises from a similar critique on the grounds of being inward-looking and ultimately individualist in nature. Similarly, in *On Revolution*, she devotes an entire chapter to argue that a 'misplaced emphasis on the heart as the source of political virtue' could not result in principles for a lasting constitutional democracy because it does not make space for public discussions amongst plural citizens.⁵⁵

It is only in *Civil Disobedience* that she is able to draw out, albeit in a limited way, what it could mean to act out of a love for the world. The shift from voluntary obedience to civil disobedience corresponds also with a shift in her thinking on a political love for the world. She writes in *Civil Disobedience*, 'the care for the world takes precedence in politics over your care for yourself, whether the self is your body or your soul.'⁵⁶ She quotes Machiavelli ('I love my native city more than my own soul'⁵⁷) and Lincoln ('the paramount object even in the struggle for the emancipation of the slaves, remained... to save the Union, and... not either to save or destroy slavery'⁵⁸) to distinguish between 'the good

⁵⁴ Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 2018) 242.

⁵⁵ Arendt, *On Revolution* (n 13) 92. but more generally, *The Social Question*.

⁵⁶ Arendt, *Lectures on Kant's Political Philosophy* (n 17) 50.

⁵⁷ Arendt, 'The Concept of History' (n 52) 61.

⁵⁸ *ibid.*

man' and 'the good citizen'. Her understanding of *amor mundi* leads her to her ultimate claim that while the good man acts in pursuance of his 'personal wish' (to end slavery from the world or with a belief in a higher god), the good citizen acts to save his political world. To put it in constitutional terms, 'good' citizenship implies the right to dissent but also the simultaneous obligation to dissent in order to preserve the constitutional order.

Consequently, civil disobedience can be understood as the act of dissenting *and* consenting; civil disobedience disrupts the juridical processes but also exemplifies an obedience that, *at the same time*, reinforces constitutional principles. Arendt acknowledges this dual nature of civil disobedience, as disruption and preservation, when she claims that 'civil disobedience can be tuned to necessary and desirable change or to necessary and desirable preservation or restoration of the *status quo*.'⁵⁹ The use of civil disobedience to change, preserve or restore reflects a more substantive understanding of constitutional democracy as a 'society of consent' founded on a promise-based conception of law.⁶⁰ It also lends substance to the understanding of the ways in which citizens establish, alter, and maintain a constitutional order: by entering into agreements with each other.

There is one obvious and straightforward way in which Arendt's articulation of the importance of the right to dissent becomes relevant for constitutional theory. Ensuring the 'legal and *de-facto*' possibility for dissent is an important way of ensuring that the constitutional order provides the citizens with the platform to actively support and participate in their governance. Arendt conceptualises consent as a *discernible practice* of active support and participation. This not only implies that the normative legitimacy of the constitutional democratic order is based on the institutional and structural settings that allow the citizens to express and enact their dissent but also imposes an obligation on the citizens to keep alive the practice of politically participating in their governance.

Disobedience as renewal

Arendt's characterisation of good citizenship as the form of political living together where dissent is motivated by the obligation to preserve the constitutional order can, at one level, be seen as motivated by a romantic foundationalism and an idealisation of the founding moments. In this sub-section, I argue that there is a more disruptive side to Arendt's conception of civil disobedience, one that aims to disrupt the very structures of the constitutional order in order to renew and augment the foundational principles. The disruptive side of civil disobedience comes through in the reprioritisation of politics in her discussion. The constructive side corresponds with the sense of responsibility that accompanies the exercise of freedom by a citizen in a democratic constitutional order.

⁵⁹ *ibid* 75.

⁶⁰ *ibid* 86–7.

For Arendt, civil disobedience is not only compatible with constitutional democracy, it also exemplifies the spirit of constitutional democracy. She calls consent and the right to dissent the inspiring and organising principles of action of a constitutional democracy.⁶¹ In doing so, she emphasises the role of politics as the primary means of governance within a constitutional democracy. However, civil disobedience, more precisely, corresponds to extra-institutional politics and consequently, represents an opportunity for the citizens to renew the foundational principles.

Arendtian constitutionalism is premised on an understanding of constitutional democracy as a form of government where power ultimately derives from the people. This means that the people entrust certain individuals to represent them and act on their behalf. However, Arendt notes, institutional positions within constitutional democracies may face a 'loss of power'. This loss of power would signify 'that the people have withdrawn their consent from what their representatives, the empowered elected officials, do.'⁶² It could also imply that representatives claim to represent those who have not been empowered to begin with. Consequently, a continuation of such representation, to Arendt, amounts to resorting to force to maintain control.⁶³ In such a situation, civil disobedience can also be understood as a political response to state violence used by representatives to maintain control when the people do not form the actual basis/source of their power.⁶⁴

In so far as civil disobedient action is performed as a response to government actions and policies, it reflects a re-assertion of the citizens' rights to be seen, heard and afforded an equal treatment as a citizen. In my view, one way to understand civil disobedience is as the performance of citizenship. We can look at the connection between disruptive politics and the experience of citizenship by looking at civil disobedience as a kind of political action that disrupts the juridical process to call attention to a group's demand to be considered an equal participator in their governance. Arendt presents the increasing frequency of civil disobedience and protest movements across the world as a consequence of the declining trust in representative institutions. The institutional mechanisms' inability to grant citizens the avenues to participate in their governance is highlighted when citizens choose to exercise their 'power' 'on the streets'. Citizens experience free political action when they dissent for the sake of constitutional principles. Civil disobedient action challenges the rigidity of formal constitutional institutions by challenging and bringing to the surface the discrepancy between their stated aim of following the constitutional principles and the actual practices of inequalities perpetuated by the structural arrangements.

By using politics and not law to bring the inequalities to light and to assert their equal status, civil disobedient citizens embody the original spirit of constitutional

⁶¹ Hannah Arendt, 'What Is Authority?', *Between Past and Future* (Penguin books 2006) 94.

⁶² Arendt, *Crises of the Republic* (n 14) 223.

⁶³ *ibid.*

⁶⁴ *ibid.*

democracy. The normative crux of Arendtian constitutionalist thought is that the citizen's consent, manifested through support and active participation, generates the power that sustains the constitutional order as well as the constitutional principles upon which the acts of the government are to be judged. According to Arendt, politics brings changes that law stabilises. She presents law as a stabilising factor, 'foremost among the stabilising factors, more enduring than customs, manners, and traditions, are the legal systems that regulate our life in the world and our daily affairs with each other.'⁶⁵ The primary purpose of laws is to ensure stability, which is why they appear as a 'restraining force' on action.⁶⁶ She argues that law 'can indeed stabilise and legalise change once it has occurred, but the change itself is always the result of extra-legal action.'⁶⁷

At the same time, the reprioritisation of the political is also a reflection of the multi-layered concept of citizenship as the right to have rights. An understanding of citizenship as a more substantive and not just a juridical status moves beyond viewing the state as the main or the dominant actor in citizenship politics. Arendtian constitutional theory highlights the citizen's capabilities and recognises and encourages citizens initiatives to reclaim their right to have rights in solidarity with other previously excluded communities.

The reprioritisation of the political serves also to augment the composition of the original political community by including the previously excluded communities.⁶⁸ It shows Arendt's acknowledgement that every iteration of the 'the people' is bound to exclude and generate 'remainders of politics', for instance, the Native Americans and Blacks from the 'original *consensus universalis* of the American republic'.⁶⁹ When read in light of the emphasis on the collective nature of civil disobedience that shows Arendt's conception of citizenship as a relational status, we find that civil disobedience presents itself as a way of reformulating the original group composition by altering who gets to act like a citizen. The relativity upon which one's existence as a citizen is based materialises when one acts, in consent or dissent, alongside one's peers. In other words, the collectivity of civil disobedient action is in itself the performance of citizenship. This allows entry to what Honig calls are the 'remainders' of the original foundational moment.⁷⁰

Arendt's conception of 'the people' whose active support and participation is what makes a constitutional government legitimate and powerful is characterised by her insistence on the value of treating the idea of 'the people' as an 'endless variety of

⁶⁵ Arendt, 'Civil Disobedience' (n 2) 79.

⁶⁶ *ibid.*

⁶⁷ *ibid.* 80. Here she gives the example of resistance or change advocated outside of the institutions before it is brought before the institutions (Supreme court: right of serviceman's refusal of combat duty; and Senate: labor legislation providing for the right to collective bargaining, the right to organise and to strike).

⁶⁸ This is why Smith and Wang are wrong to argue that Arendt's conception of civil subsidence does not speak to the injustice of arbitrary exclusion in the foundation of a constitutional order. Civil disobedience does not only reassert citizenship but also renegotiates the terms of the original contract. For a view similar to mine, see also Frank Michelman, Frank Michelman, 'Law's Republic' (1988) 97 *The Yale Law Journal* 1493.

⁶⁹ Arendt, 'Civil Disobedience' (n 2) 90.

⁷⁰ Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press 1993) 212.

multitude'⁷¹. Arendt emphasises the importance of perspectives in the formation and existence of the world. According to her, the world is not a fixed entity but rather comes into being through the act of viewing it from different perspectives at different times. It is the perspectives that give the world its dynamic character, making it a constantly evolving and changing entity. Without perspectives, the world would become stagnant and lifeless. She asserts that politics revolves not so much around individual human beings but rather the world that emerges between them and persists beyond them. To phrase it differently, the greater the number of people in the world standing in specific relationships with one another, the more extensive the world formed between them becomes, and the larger and more enriched that world will be.⁷²

Furthermore, Arendt argues that each individual and group has a unique perspective on the world, which arises from their particular position and experiences. This unique perspective is an essential part of the world, as it contributes to the diversity and richness of our collective existence. If a group with a distinct perspective is annihilated, it is not only the loss of individuals but a portion of our common world that is destroyed. It is an aspect of the world that has revealed itself to us until now but can never be experienced again. She writes, 'If people or nation or even just some specific human group which offers a unique view of the world rising from its particular position in the world- a position that however it came about, cannot readily be duplicated, is annihilated, it is not merely that a people or a nation or a given number of individuals perishes, but rather that a portion of our common world is destroyed and aspect of the world that has revealed itself to us until now but can never reveal itself again.'⁷³ Arendt's notion of the destruction of the world through the loss of unique perspectives underscores the importance of preserving the diversity of perspectives in constitutional democracies.

This does not imply, however, that civil disobedience is concerned only with including the previously excluded sections of the population. Good citizenship, in Arendtian formulation, requires individuals to challenge public claims and scrutinise conflicting viewpoints in a civil and vigilant manner. This process involves multiple perspectives and public testing to judge the appropriateness of opinions.⁷⁴ By asserting their opinions in the public realm, the civil disobedient citizen calls to attention the existence of plural viewpoints that have not been represented or taken into account by the government. Civil disobedience represents the manifestation of the revolutionary spirit because it showcases a heightened care for the public realm on the part of the citizens who disrupt the institutional framework and enter into the political realm to protect the constitutional order. It represents the spontaneous generation of power outside of the institutional frameworks of the constitution in an attempt to hold the government

⁷¹ Arendt, *On Revolution* (n 13) 93–94.

⁷² Hannah Arendt, *The Promise of Politics* (Jerome Kohn ed, Schocken books 2005) 175–6.

⁷³ *ibid.*

⁷⁴ Hiruta (n 13) 71.

accountable and influence the direction the government's actions will take. The main point for Arendt is that civil disobedients, when they act in concert to convey their dissent of the government's actions, act according to the 'spirit' of constitutional democracy.⁷⁵ This results in a normatively thick conception of what it means to be a citizen within a constitutional democracy. On the one hand, it refers to the platforms and opportunities available to the citizens for taking part in their governance. On the other hand, the acknowledgement from one's peers of one's status as a citizen assumes greater relevance for one's actual experience of citizenship. Where the first requirement of citizenship – the availability of avenues to participate in government – corresponds with the more positive, constructive character of one's role as a citizen; Arendt's conception of civil disobedience disturbs and rearranges the relativity criteria to focus on the role of disruptive politics in the maintenance of a constitutional order.

For Arendt, the chief characteristic of politics lies in its ability to generate novel outcomes. The value of politics and the meaning of political experience, comes out of the citizens ability to spontaneously initiate something new. Although, politics within a constitutional democracy is principally limited, it does not spell an end to the citizens ability to initiate political actions unforeseen by the government or those in power. This is because the value of political participation does not come from its ability to generate the citizens' obedience but to provide a course correction to the constitutional order. According to Arendt, dissent not only represents the highest potential of political but 'is rather the substance and meaning of all things political.'⁷⁶

III. Civil disobedience as the politics of institutional reimagination

In this section, I argue that Arendt's conceptualisation of civil disobedience alerts us to a distinction between constitutional norm and structure. The dual nature of civil disobedience is predicated upon a separation of the authority of the constitutional order from the stability of constitutional institutions. This separation of stability from authority allows Arendtian constitutional theory to answer the question 'why should citizens obey the law?' by bifurcating what 'law' means. The practice of civil disobedience represents the dismantling of constitutional structures as a simultaneous building-up of the constitutional norms of the political community. In a way, for Arendtian constitutionalism, there is no normative justification for citizens to obey the law. All there is, is a discernible practice that tells us if citizens are preserving the constitutional norms and augmenting the authority of the constitution. Consequently, I propose, an Arendtian understanding of constitutionalising civil disobedience implies acknowledging the need for extra-

⁷⁵ Arendt, 'Civil Disobedience' (n 2) 76.

⁷⁶ Arendt, *The Promise of Politics* (n 72) 129.

institutional methods of changing institutional frameworks. This is because in the exercise of their right to dissent, citizens re-authorise the constitutional order by reiterating and reperforming the constitutional principles.

The separation of institutional stability from constitutional authority

There are two main ways in which we can read in a separation of institutional stability from constitutional authority in *Civil Disobedience*. First, Arendt presents civil disobedience as collective action arising from a mistrust of the institutions' capacity to represent and incorporate the dissidents' opinions. In protesting state action, the dissenters nevertheless continue to maintain their trust in and support for the overarching enterprise of the constitutional order. Second, her institutional suggestions such as proposing constitutional amendments and instituting a council system further clarify the relationship between amending constitutional structures and maintaining the authority of the constitution. She claims that the authority of the American constitution resides 'in its inherent capacity to be amended and augmented.'⁷⁷ I propose that for Arendt, maintaining the authority of the constitutional order involves reimagining alternative institutional structures to better materialise the principles of the constitutional order. I will now deal with each of these arguments one by one.

Arendt argues that 'civil disobedience arises when a significant number of citizens have become convinced either that the normal channels of change no longer function, and grievances will not be heard or acted upon, or that, on the contrary, the government is about to change and has embarked upon and persists in modes of action whose legality and constitutionality are open to grave doubt.'⁷⁸ According to Arendt, citizens engage in civil disobedience when they believe that the constitutional institutions are not sufficiently responsive to their opinions and perceive institutions as acting in legally contested ways. In other words, she interprets the rise of civil disobedience as a consequence of the growing mistrust in the representative character of constitutional institutions.

Arendt sees disobedience to the law as a 'defiance of established authority' but also as a sign of the 'inner instability and vulnerability of existing governments and legal systems'.⁷⁹ It represents a 'progressive erosion of governmental authority' 'caused by the government's inability to function properly, from which springs the citizens' doubts about its legitimacy.'⁸⁰ She argues that we must distinguish between consent to specific laws in specific policies and consent to the constitution itself. According to Arendt, the idea that consent to statutory laws can be implied from consent to the constitution is fictitious, especially in the context of representative government. She suggests that representative

⁷⁷ Arendt, *On Revolution* (n 13) 202.

⁷⁸ Arendt, 'Civil Disobedience' (n 2) 74.

⁷⁹ *ibid* 69.

⁸⁰ *ibid*.

government is in crisis because citizens no longer have opportunities for meaningful participation: ‘representative government today is a crisis today, partly because it has lost, in the course of time, all institutions that permitted the citizens actual participation, and partly because it is now gravely affected by the disease from which the party system suffers: bureaucratisation and the parties’ tendency to represent nobody except the party machines.’⁸¹ Moreover, she challenges the argument that our obligation to obey comes from the right to vote. She questions the sufficiency of universal suffrage and free elections for the claim of public freedom in a constitutional democracy by highlighting the value the actual experience of politics has for the experience of freedom.⁸²

In Chapter Two, I had relied on Asenbaum to distinguish between institutional spaces such as parliaments as ‘invited spaces’ and extra-institutional spaces such as citizens’ assemblies and social movements as ‘claimed spaces’. According to Asenbaum, both invited and claimed spaces serve different democratic functions through three modes of identity performance: identity continuation, identity negation, and identity exploration. This suggests that invited and claimed spaces, though equally significant, fulfil distinct roles in shaping the identities of citizens within a democratic constitutional order. I argued that Asenbaum’s model offers a nuanced perspective on the interplay between representation and participation. In formal representative institutions, where existing identities persist, representation helps reflect diverse political opinions in the institutional public realm. Conversely, in citizens’ assemblies and social movements, considered non-institutional public spaces, representation plays a diminished role as identities are negated, explored, and generated through participation. Consequently, the importance of representation aligns with the role of administration in upholding the existing public realm and sustaining discourse plurality. In contrast, participation allows citizens to challenge their status and identity. Arendt proposes the incorporation of a council system within the American constitutional framework, creating additional spaces for participation without replacing representative democracy. According to Arendt, electoral systems alone inadequately institutionalise the political realm, lacking the capacity to foster new pluralities. However, in a system that encourages civic participation through assemblies and incorporates movements into ordinary politics, representation complements discourses arising from extra-institutional means.

In Arendt’s framing, civil disobedience is extra-institutional dissent that arises from defects in the institutional framework, especially when they relate to the representation and participation of the citizens. To Arendt, civil disobedience is symptomatic of a fundamental defect in the system: where citizens do not have adequate avenues to experience freedom through politics and generate power, they join together and generate a temporary political realm within which they can generate the power to influence governmental actions.

⁸¹ *ibid* 89.

⁸² *ibid* 84–85.

However, there remains a minute, albeit important distance between extra-institutional dissent and revolutionary action. Arendt notes that ‘the civil disobedient accepts, while the revolutionary rejects, the frame of established authority and the general legitimacy of the system of laws.’⁸³ She acknowledges, however, that this distinction is hard to sustain because ‘the civil disobedient shares with the revolutionary the wish “to change the world,” and the changes he wishes to accomplish can be drastic indeed’.⁸⁴ Nevertheless, she sees student movements in America and Europe as a crucial example of the way in which citizens can work together voluntarily to address government actions that they see as unjust without going all the way to a revolution. For Arendt, this approach was significant because it acknowledges a *political* way of reforming and strengthening the constitution and preventing it from becoming outdated in the realm of politics.⁸⁵

The second way in which the separation between institutional stability and constitutional authority becomes more evident is through Arendt’s reform proposals themselves. At multiple times, Arendt suggests significant and far-reaching changes to the American constitution. In *On Revolution*, she proposes the council system. She argues that in order to preserve the ‘revolutionary spirit’, the American constitutional order should institute non-hierarchical, non-bureaucratic, and voluntary association-based councils to increase citizens access to the self-governance.⁸⁶ In *Civil Disobedience*, she proposes two amendments to the constitution: an explicit inclusion of the black population and the provision of the right of free association.⁸⁷ Both these amendments were to respond to structural problems within the American constitutional order and represented a way to resolve, through constitutional amendments, what would otherwise result in revolution. She also critiques the use of the political question doctrine by the judiciary and although does not explicitly argue for its reversal, argues that the judiciary’s use of the doctrine represents a failure of judicial review. Again, Arendt’s solution to the failure of judicial review comes in the form of instituting constitutional change: this time by creating a ‘constitutional niche for civil disobedience’ that would allow the citizens to hold their representatives accountable.⁸⁸

At this juncture, it is important to clarify that the way in which Arendt speaks of constitutional amendments is different from our contemporary understanding of constitutional change. Arendt does not consider the inherently legalistic nature of amending a constitution and instead, treats it as an extra-institutional process initiated through ordinary politics that is merely recognised by law. However, her lack of legal understanding does not take away from the separation she suggests between institutional stability and constitutional authority. If anything, it alerts us to the ways in which the formal

⁸³ Arendt, *Crises of the Republic* (n 14) 77.

⁸⁴ *ibid.*

⁸⁵ Hiruta (n 13) 71.

⁸⁶ Arendt, *On Revolution* (n 13) 265–285.

⁸⁷ Arendt, ‘Civil Disobedience’ (n 2) 91, 101.

⁸⁸ *ibid.* 101.

processes of constitutional amendment, because of their formalistic legalism, might not perform the (Arendtian) intended objective of augmenting the authority of a constitutional order.

Constitutionalising the space for institutional reimagination

Arendt's conception of authority undergoes a change when she is confronted with what she considered was 'the ultimate failure of judicial review' to appropriately respond to the challenges brought forward by the American citizens against the then ongoing Vietnam War.⁸⁹ The contrast is stark especially against her earlier insistence that it is the reverence towards the constitution as the 'source of law' and the judiciary as the 'seat of authority' derived from the constitution that makes a constitutional order stable and durable. In *On Revolution*, where she emphasises the 'unbroken continuity of the foundation' resulting from a 'reverent awe' towards the greatness of the event, we find that there is an automaticity in her logic. Citizens voluntarily obey the constitutional order because they remain in awe of the principles generated at the founding. The judiciary, by juridifying these principles, further augments the authority of the constitutional order. Change or resistance, in other words, remains in the narrow domain of a courtroom discourse and we don't really understand how or why the citizens remain reverent towards the constitution and by an automatic implication, the judiciary. In the previous chapter, I proposed that the judiciary augments the authority of a democratic constitutional order through a process of memorialisation when they interpret the constitution. My discussion in this chapter takes this one step forward by presenting civil disobedience as a form of citizen interpretation of the constitution conducted outside of the institutional spaces because the citizens no longer trust the institutional structures of the polity.

Much of Arendt's theorisation of political action and political freedom is inspired from the politics of Ancient Greece.⁹⁰ She views politics as the means through which citizens *become* citizens when, by acting and speaking, they appear before their peers and, are heard and acknowledged as equal members of the political community. She admires the Greek *polis* as the space that provides the citizens opportunities to 'win "immortal fame"'⁹¹ and as the arrangement that serves as 'a kind of organised remembrance'⁹² for the great acts and speeches. More pertinently, she sees revolutions as ruptures that represent a new beginning for the political community. She says, 'it is in the very nature of a beginning to carry with itself a measure of complete arbitrariness' and that the moment of establishing a constitution comes as a break in the temporal order and its given continuity.⁹³ However,

⁸⁹ *ibid.*

⁹⁰ Arendt's Greek inspiration has been discussed by Tsao, Roy T Tsao, 'Arendt against Athens: Rereading the Human Condition' (2002) 30 *Political Theory* 97.

⁹¹ Arendt, *The Human Condition* (n 54) 197–8.

⁹² *ibid.*

⁹³ Arendt, *On Revolution* (n 13) 207.

Roman antiquity exerts simultaneous influence on her development of political action. The Roman influence comes in her understanding of the foundation as an ongoing political act that is dependent upon the participation of successive generations for its continuation. In the Roman setting, politics itself is seen as the act of preserving the foundations of the city.

In her essay *Civil Disobedience*, Arendt formulates obedience in more radically political terms by diluting the initial distance she creates between power and authority. We can retain the insights from her earlier insistence on the separation of power and authority (that people as a general, absolute legal fiction cannot be the source of authority) while amending her conception of authority to bring it closer to the political acts and judgments of the citizens. Thus, a better insight on the value of civil disobedience is gained from the ways in which civil disobedience represents, for Arendt, a phenomenon lying at one end of a spectrum, where the other end is composed of voluntary obedience.⁹⁴ Thus, while both civil disobedience and voluntary obedience reflect a relationship between authority and the political acts and judgments of the citizens, voluntary obedience gives way to civil disobedience when consent towards the authority of the constitutional order is replaced by resistance and mistrust of the institutions comprising the constitutional order. To put it differently, while voluntary obedience reflects the positive and constructive limb of political authority, civil disobedience represents the negative and disruptive potential of politically sourced authority. Such a formulation stands closer to the conception of political authority that is *political* in Arendtian terms only because it simultaneously includes within itself a potential for its resistance.

Reading the dual conception of action together in terms of the role of citizens in manifesting and preserving the authority of a constitutional order allows us to see the relationship between authority and politics within a freedom-establishing order. If authority represents the ‘source of validity of laws’ and ‘the fountain of legitimacy for the new government,’⁹⁵ the placement of the citizen as an active participant in framing the standards according to which the government must act, speaks to the Arendtian conception of freedom as participation. A citizen can experience freedom only when they have opportunities to make judgments upon the validity of the acts of the government. At both the levels, at the level of voluntary obedience towards the laws enacted by the government and at the level of voluntary obedience towards the overarching constitutional order, ‘foundation, augmentation, and conservation are intimately interrelated.’⁹⁶ In other words, it is the coincidence of voluntary obedience and civil disobedience that is implied by the Arendtian conception of political authority as augmentation.

As an example, consider the protests, assemblies and discourse in Northern Ireland and the Republic of Ireland on reforming the law on abortion that can be seen as an

⁹⁴ Arendt, ‘Civil Disobedience’ (n 2) 102.

⁹⁵ Arendt, *On Revolution* (n 13) 200.

⁹⁶ *ibid* 203.

example of an extra-institutional method of claim-making.⁹⁷ The acts of citizen interpretations of the constitution on the streets alongside their institutional counterparts were a means of making a claim regarding the women as an identity in the making of law on abortion.⁹⁸ It challenged the stability of the institutions and the current constitutional framework but simultaneously augmented the authority of the higher constitutional principles that corresponded with the feminist demands.

The separation of constitutional authority from institutional stability allows Arendtian constitutional theory to put forward a clear and cogent understanding of the relationship between politics and authority, if radical because of its extra-institutional ambitions. At one level, citizens' voluntary obedience towards the constitutional order, made apparent in their active support of and participation in constitutional structures, maintains the authority of the constitutional order and makes the body politic durable. At a second level, citizens' civil disobedience of constitutional structures manifested through activities such as protests against state actions, refusal to obey laws and disruption of procedures destabilises the constitutional institutions without destroying the authority of the constitutional order. The two levels do not represent neat categories and the incidence of violence further blurs the distinction between civil disobedience that essentially aims to preserve the constitutional order and revolution intended to institute a completely new order. If anything, the non-committal nature of Arendt's own writings on revolution and violence suggests that there is very little distance between ordinary and extraordinary politics.

This theoretical framework, nevertheless, provides a foundation for conceptualising a 'constitutional niche' for civil disobedience. Creating a space for civil disobedience in constitutional democracy, to Arendt, involved untangling it from its revolutionary ends and bringing it within the juridical framework without completely jettisoning the revolutionary spirit that accompanies acts of dissent. She accomplishes this by retaining the constituent power of the citizens to change, preserve or amend the constitutional structures while also proposing that citizenship within a constitutional democracy implies an internal, voluntarily accepted limit on citizens' political action. The limit is self-generated in the sense that it comes from the binding force of principles generated within the political realm. Civil disobedience, in other words, represents the revolutionary spirit of constitutional democracy because it mimics, in substance, the revolutionary intention to institute a free political order but is, at the same time, a principled

⁹⁷ Pam Lowe, '(Re)Imagining the "Backstreet": Anti-Abortion Campaigning against Decriminalisation in the UK' (2019) 24 Sociological Research Online 203.

⁹⁸ 'Hundreds of Northern Irish Women Protest Abortion Ban after Woman Convicted for Termination' *The Independent* (12 April 2016) <<https://www.independent.co.uk/news/uk/home-news/hundreds-of-northern-irish-women-protest-abortion-ban-after-conviction-for-woman-who-had-termination-a6974926.html>>. For an instance of claim-making, see Fidelma Ashe, 'Gendering Constitutional Change in Northern Ireland: Participation, Processes and Power' [2022] Political Studies.

form of action. The voluntary respect for principles, in turn, further entrenches the principles, solidifying, in the process, the authority of the constitutional order.

When the authority of an institution wanes or is no longer perceived as legitimate, the traditional channels for generating power within that institution become ineffective. As a result, the method of representation, which is inherent to the functioning of institutional politics, becomes inadequate for addressing the grievances of the citizens. In response, citizens often resort to extra-institutional means, such as protests and social movements, to act together to generate power and generate principles in order to regulate or change governmental action. In these extra-institutional, claimed spaces, direct participation takes precedence, allowing the diverse and pluralistic voices of citizens to emerge more prominently than they would within the confines of formal institutions. The experience of citizenship materialises in these spaces when individuals come together to act for the sake of their shared political concerns and take responsibility for their political judgments.

Although these political spaces are often temporary by virtue of being extra-institutional, they possess the capacity to generate the power needed to institute constitutional changes. Citizens, when engaged in civil disobedience and extra-institutional activities, challenge the existing power structures and norms. However, because the authority of the constitutional order itself is not under question in civil disobedience, it implies that the civility of the disobedience comes through in the observance of constitutional principles in the acts of the disobedient citizens. In other words, for a civil disobedient citizen, the authority of the constitutional order remains intact, as the disobedient citizens do not question the constitution's authority but rather seeks to change the inadequate institutional settings to align them with the principles of the democratic constitutional order.

In Arendt's writings, the phenomenon of civil disobedience illustrates the complex interplay between authority, citizenship, and constitutional principles. When institutional channels fail to address citizens' concerns, they turn to extra-institutional means, with their actions underpinned by a commitment to the principles that guide the constitutional order. Understanding civil disobedience as a constructive and not destructive component of democratic politics not only highlights the adaptability of democratic systems but also underscores the crucial role of responsible citizenship in sustaining and evolving constitutional democracies.

Conclusion

In this chapter, I explained Arendt's positioning of dissent as an intrinsic component of constitutional democracy. I showed how her discussion of dissent marks a subtle but insightful shift in her thinking on the relationship between politics and authority. While

the citizens' active support and participation' remains at the fulcrum of Arendt's constitutional thought, her discourse on civil disobedience represents a change in focus about the role of active citizenship in democratic constitutional orders. In her initial works, such as *On Revolution* and *Between Past and Future*, Arendt presents the authority of a democratic constitutional order as a function of the voluntary *obedience* of citizens. In *Civil Disobedience*, however, she focuses more prominently on the availability of the avenues for individuals to be *disobedient* citizens. In a letter to Jaspers, Arendt mentions the peoples' 'common responsibility to public life' as an important element of being a citizen.⁹⁹ Civil disobedience represents the citizens' right to dissent with the institutional framework for the sake of their shared responsibility towards the preservation and maintenance of the overarching constitutional order.

On the surface, this is a minute change in focus, especially considering the importance Arendt assigns to the free citizens' political ability to initiate something new. The shift is nonetheless a fruitful point of exploration because it raises questions about the place for *extra*-institutional dissent within a constitutional democracy. Arendtian constitutional theory's attempts to answer these questions predictably come in the form of a reprioritisation of politics. It proposes a more substantive and dynamic role of disruptive, extra-institutional politics in the placement and displacement of authority. At the same time, because civil disobedience sits at the complicated intersection between law and politics, the Arendtian conception of politics itself, at least to the extent that it concerns constitutional democracies, is conditioned. The characteristic unboundedness of politics is curtailed by the citizens' concern for their shared constitutional world, which propels them to protect, preserve and improve upon the principles of the constitutional order.

The idea that democratic constitutionalism represents a form of government that ensures the citizens' political freedoms and is, in turn, maintained and preserved by the active support and participation of the citizens finds its normative peak in the Arendtian justification for civil disobedience. Throughout the thesis, I have presented the experience of active citizenship as focal point for Arendtian constitutionalist theory. I have argued that the very conception of law upon which democratic constitutional orders are based, has been designed to operate in between plural, active citizens. A constitution in such an order neither limits the power of the government, nor commands obedience from its citizens. On the contrary, the establishment of the constitution implies the institution of a durable public space where individuals may experience freedom by acting and judging as equal and responsible citizens.

Despite the problems afflicting electoral democracies, we still associate a representative government with the power of the electorate. For Arendt, the increasing distance between the experience of active citizenship through participation and the capacity of the citizens to generate the power that fuels and propels all governmental

⁹⁹ Hiruta (n 13) 82.

enterprises is problematic because she associates the citizens' turn away from institutional politics with the dissipation of both, power and freedom. Democratic constitutional orders, nonetheless, retain some power and freedom if the citizens participate in extra-institutional politics. In the Arendtian framework, civil disobedience movements allow alienated individuals to temporarily experience freedom and citizenship: individuals join together in collective active, disclose their political viewpoints, and disobey what they judge to be unconstitutional institutions for the sake of constitutional principles. In doing so, the citizens perform the very same task of augmenting the authority that the judiciary performs when it reiterates and re-enacts – by way of interpretation – the constitutional principles underlying the constitutional order.

It is important to note here that Arendt does not see civil disobedience as a primary means of participation in a democratic constitutional order. She views civil disobedience as a symptom of the loss of power and authority of the constitutional institutions. In this chapter, through a close reading of Arendt, I have proposed that she separates the authority of a constitutional order from the stability of its institutions. The separation provides us with the theoretical tools to advance, from her constitutionalist thought, a theoretical framework that views civil disobedience as an act of world-building: disruptive politics that challenges the legitimacy of institutions can (and should), at the same time, imagine and pursue alternate constitutional-structural arrangements to protect and preserve the foundational principles of the constitutional order. More importantly, studying the shift allows us to understand better not only Arendt's call for finding a constitutional niche for civil disobedience but also the normative ridges of Arendtian constitutionalism in the context of the experience of citizenship through politics, directly and through representation.

CONCLUSION

In this thesis I have advanced a constitutional theory from Arendt's political and constitutional writings with the aim of highlighting the role of active citizenship in sustaining modern democratic constitutional orders. In the introduction to the thesis, I stated that my Arendtian constitutional theory would be based on three themes that appear in Arendt's writings: human plurality, promises, and love for the world.

In Chapter One, 'Constituting the Citizen', I explored Arendt's conception of citizenship through the lens of those three themes. I argued that citizenship is a relational and isonomic experience, where citizens bind themselves together through law and politics and share responsibility for the maintenance of the democratic constitutional order. I explained how the human faculty of making and keeping promises, which forms the basis of the Arendtian conception of law, also allows individuals to construct the bonds of citizenship. Through an examination of the influence of Greek and Roman legal concepts on Arendt's work, unravelling the interplay between the categories of 'work' and 'action' she proposes in *The Human Condition*, I highlighted the relational dimension of citizenship. I argued that law, operating as both 'action' and 'work', upholds infrastructures, both tangible and intangible, that are essential for individuals to enter and maintain the 'web of relationships' within which individuals experience citizenship. Additionally, I developed Arendt's critique of 'the People' as an unfractured, monolithic entity to emphasise the recognition of human plurality. I proposed that for Arendtian constitutionalism, the role of public law consists of establishing political equality to enable diverse individuals to experience citizenship without letting go of their distinct political positions. Finally, I extended Arendt's discourse on the meaning of love in politics and highlighted the crucial role of judging for active citizenship. Drawing connections between a citizen's political 'love for the world' and active and responsible citizenship, I suggested that in the Arendtian framing, politics enables individuals to reveal their political identity to others for judgment and in doing so, allows them to lay claim to equal citizenship by assuming responsibility for the shared constitutional order.

In Chapter Two, 'Freedom as Politics', I continued my description of the Arendtian conception of active citizenship by shifting the focus to what it means for a citizen to be active and experience freedom. In Arendt's framing, freedom consists of being able to initiate a new, unpredictable course of action. The unpredictability of action pays heed to the forever existing fact of human plurality in society; because humans are unique beings, each new entrant to the political realm brings with them the potential for unpredictable change. While much has been written about the Arendtian conception of free action, I proposed that Arendt's later writings dealing with the political faculties of the mind contain a strong claim that, in matters relating to politics, the human mind requires

publicness as a condition of being free. I took forward the insights from Chapter One on viewing law as both *nomos* and *lex*, generating a similar insight on viewing freedom as both negative and positive: freedom as an experience is dependent on institutional arrangements that allow citizens to experience ‘positive’ freedom through action and on the ‘negative’ freedom from non-interference. This relationship between positive and negative freedom in Arendtian constitutionalism clarifies the meaning of freedom as participation within constituted orders and the space for representation in the Arendtian normative understanding of democratic constitutional order. I explained that while the positive dimension is connected to political participation, aligning with the phenomenological nature of Arendt’s exploration of the experience of active citizenship, the negative dimension of freedom relates to freedom of thought, a crucial element for individuals to engage in critical thinking, judgment, and taking responsibility for actions. I examined Arendt’s concerns regarding the party system and her suggestion to establish a council system in America. I argued that in Arendt’s writings, existing alongside an emphasis on the value of politics experienced through participation, lies an appreciation for representation as a valuable form of political organisation. Consequently, taking forward the relationship I developed between negative and positive freedom, I suggested that Arendtian constitutionalism views representation as a necessary institutional counterpart for the experience of active citizenship.

After discussing and elaborating on active citizenship, in Chapter Three, ‘Political Power,’ I explored the relationship between power and the political acts of the citizens. I looked at the three chief ways in which power has been understood and theorised by Arendtian scholars—communication in deliberative democratic theory, non-violence in civic republicanism, and the ‘freedom to’ act in agonistic democratic theory— and built my conception of Arendtian power by building on the three models. I proposed that power denotes the collective ability of active citizens to guide and regulate governmental actions. Once again, the three themes make an appearance. Human plurality as a fact of existence that is worth preserving and the human faculty of promising find an expression in the idea that power is generated when plural individuals come together to act in the political realm. I explained how, for Arendtian constitutionalism, power is a temporary but perceptible capacity to make, unmake, or preserve a constitutional order that citizens possess collectively. I built on the notion that active citizenship is concerned with judging by introducing the concept of principles as it appears in Arendt’s works. The notion of principles explains the political underpinnings of power by providing a strong theoretical foundation to distinguish between violence that destroys politics and violence that is critical to maintaining the political realm. Examining the symbiotic relationship between action and work, particularly the role of the fabricators’ violence, reveals its necessity for maintaining the public realm where action unfolds, and power is generated. This nuanced perspective, I proposed, aligns with Arendt’s normative-theoretical vision of democratic

constitutionalism, which treats freedom as the principle of democratic constitutionalism and is intrinsically bound with the experience of active citizenship.

Chapter Four, 'Political Authority' dealt directly with the role citizens play in maintaining the authority of the constitutional order. I explicated the Arendtian conception of authority by showing the political underpinnings of the source of authority (foundation) and the binding power of authority (voluntary obedience). I argued that for Arendtian constitutional theory, the constitution itself is to be seen as the wellspring of authority because Arendt envisions authority as intricately linked to the act of founding. The constitution is authorised every time citizens willingly participate in the institutional processes out of respect for the constitutional principles. The three themes run as subtext in the way in which the acts and judgments of the citizens ground the authority of the constitutional order: authority can only be generated by the voluntary obedience of plural individuals who enter the 'web of relationships' that constitute citizenship and willingly promise to maintain the structures of the political realm instituted by the constitutional order. I suggested that Arendt's characterisation of the judiciary as the 'seat of authority' can be explained by looking into the institutional implications of the peculiar interconnectedness of authority and politics in her framing. While Arendt did not write any further on the judiciary, I expanded on the formulation by proposing that the judicial process is best understood as a process of memorialisation where the judiciary augments the authority of the constitutional order through constitutional interpretation. In interpreting contemporary political issues in constitutional terms, the judiciary reiterates – and in doing so, augments the authority of – the principles underlying the constitution.

Finally, in Chapter Five, 'Civil Disobedience,' I took forward the idea an active citizenry – acting through voluntary obedience and civil disobedience – critical not only for generating the power but also for maintaining the authority of the constitutional order. I argued that in Arendtian constitutional theory, the value of civil disobedience comes from its dual nature: at one level, civil disobedience represents a disobedience towards constitutional institutions and processes; while, at another level, civil disobedience consists of obedience to higher-order constitutional principles. Further, I examined Arendt's conceptualisation of constitutional democracy as a 'society of consent' and argued that she effects this theoretical move to give a more active role to the dissenting citizen. Arendt sees civil disobedience as a phenomenon symptomatic of the loss of authority and power of institutions. Civil disobedience reflects not only the citizens' disagreements with governmental action but also reflects their attempt to change institutional settings motivated by a concern for the principles of the constitutional order. Consequently, she makes a theoretical separation between the stability of institutions and the authority of the constitutional order. With the support of her writings on civil disobedience, I suggested that if we take seriously the connection Arendt highlights between the experience of active citizenship and the power and authority of a constitutional order, we must consider the

implications of treating civil disobedience as the extra-institutional generation of power through which citizens augment the authority of the constitutional order. Linking it back to the discussion on participation and representation in Chapter Two, I developed civil disobedience as the phenomenon where citizens do not have the avenues to experience active citizenship through institutional means and thus try to bring juridical structures closer to the political realm. In other words, civil disobedience represents the citizens' attempt at creating a temporary, extra-institutional political realm to preserve or modify the existing institutional structures of freedom. I argued that an Arendtian emphasis on theorising civil disobedience as an intrinsic part of the ordinary politics of a democratic constitutional order implies, on the part of the institutions, a duty to establish structures and platforms for citizens' right to action *and* dissent, and on the part of the citizens, a duty to preserve and maintain the constitutional order.

In my view, the three themes, as they appear over the course of the thesis, challenge three dichotomies: between the individual and the community, between law and politics, and between acting and judging. In the rest of the thesis, I will restate this claim because it speaks directly to the importance of viewing democratic constitutionalism as a political and juridical enterprise that concerns a specific Arendtian understanding of the experience of freedom in a constitutional order.

Arendt has had a significant influence on the discourse concerning human rights.¹ Many activists have interpreted her expression 'the right to have rights' as a straightforward synonym for human rights. Arguably, one might think about it as the assertion that a fundamental right, inherent and pre-legal, underlies all civil rights. In this interpretation, the singular right in the phrase is seen as originating from the recognition that, in order to possess any other rights, one must first hold the right to be a member of a political community. However, given Arendt's scepticism towards human rights, the challenge arises as to how she could advocate for a right for millions of stateless individuals to belong to a political community without simultaneously asserting a transcendental source for rights – a type of right she critiques in her analysis of human rights. The puzzle, it has been argued, in essence, revolves around making sense of Arendt's phrase – the right to have rights – while rejecting the idea of grounding rights in human nature, considering it a naive or ideological evasion of the challenging task of establishing just rules for coexistence.

Seyla Benhabib proposes a solution by categorising the right to belong, to participate in civic life, as a moral right, asserting that its existence does not hinge on the recognition of others.² Lida Maxwell proposes another solution – one that takes away the moral tenor of rights in favour of viewing the right to belong as a phenomenological

¹ Peg Birmingham, *Hannah Arendt & Human Rights: The Predicament of Common Responsibility* (Indiana University Press 2006); Alastair Hunt, *The Right to Have Rights* (Verso 2018).

² Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004); Seyla Benhabib, 'Another Universalism: On the Unity and Diversity of Human Rights' (2007) 81 Proceedings and Addresses of the American Philosophical Association 7.

concept. She says, ‘to have’ rights entails participating in creating and sustaining a shared political world where everyone has the potential to legitimately claim and demand rights.³ While acknowledging that this understanding of ‘having’ a right is built on a more fragile foundation, it prioritises the reality of political negotiations over a potentially misleading myth of a pre-political universally available right. Maxwell argues that Arendt’s critique of rights, instead of providing comforting moral certainties, enables us to confront the current reality of rightlessness and emphasises the need to work towards a world where everyone can practically, rather than theoretically, assert their rights.⁴

While Maxwell’s solution stands closer to the understanding of citizenship I have advanced in this thesis, in both her and Benhabib’s solutions, the subject of right lies in an individual person. Looking at the relational – and more importantly, phenomenological – dimension of citizenship alerts us to another, and in my opinion, more nuanced way of reading Arendt: as challenging the locus of rights. Rights, in so far as they speak to the existence of certain conditions for the individual to experience or enjoy something, make little sense with singular individuals as the subject. The theme of plurality is based on the acknowledgment that humans exist in a ‘web of relationships’. Citizenship as the right to have rights refers to the right to exist within this web of relationships and thus, corresponds to a status that exists only in the presence of one’s peers. Such a conception of rights has been developed by Nedelsky, who takes issue with conceptualisations of rights as either ‘trumps’ or ‘boundaries’ and argues that ‘rights are collective decisions about the implementation of core values.’⁵

The normative value of such a conceptualisation comes from the claim that one’s uniqueness as an individual is dependent upon the existence of other unique individuals. In this thesis, I have discussed one of the most important rights democratic constitutionalism champions in almost all jurisdictions – the right to speech and expression and the freedom of opinion – in Chapter Two. I showed how the existence of plurality is essential for the citizens’ experience of freedom of opinion. When viewed through the lens of individual versus community rights, the right to speech and expression, along with the associated freedom of opinion, is often perceived as an individual right. An important consequence of framing these rights in individualistic terms is that the remedies for their violations tend to address the rights and freedoms of individuals only. In such an understanding, the important role played by the systemic and institutional conditions that enable and maintain these rights are not adequately captured. Thus, an individual might get a remedy for a violation of the right to free speech and expression and yet, the plurality that is essential for the actual enjoyment of free speech and opinion may continue to be

³ Hunt (n 1).

⁴ *ibid.*

⁵ Jennifer Nedelsky, ‘Reconceiving Rights and Constitutionalism’ (2008) 7 *Journal of Human Rights* 139; Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2013). See generally, Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol University Press 2021).

violated in a constitutional order. A community of plurals, in other words, is interlinked with the political experiences of an individual. Arendtian constitutionalism challenges the dichotomy between individual and community rights by highlighting the strong relationship between an individual's experience of freedom and active citizenship and the existence of such freedoms and experiences for distinct individuals in a community.

The second dichotomy – between law and politics – challenged by Arendtian constitutional theory corresponds to the Arendtian emphasis on the value of the human faculty of making and keeping promises. It would be trite to argue that constitutional theory does not acknowledge the strong inter-relationship between law and politics.⁶ However, scholars often frame their arguments as if law and politics are easily identifiable and separate activities. Arendtian constitutionalism, on the other hand, proceeds from the assumption that law and politics are intrinsically linked to such an extent that it is impossible to talk about law without referring to politics and vice versa, to discuss politics without simultaneously also making a conclusion about laws. Thus, Christian Volk, while developing his account of Arendtian constitutionalism in terms of her understanding of law and politics, argues that law and politics exist in a non-hierarchical relationship in a democratic constitutional order.⁷

Throughout the thesis, I argue that active citizenship, a decidedly political notion, is a central focal point for Arendtian constitutionalism. Arendt highlights the power of the political activity of promising to create durability of political action. Promise making and promise keeping, thus, appear as the foundational notions underlying the Arendtian understanding of law where law is itself a political activity but one whose explicit aim is to ensure the durability and stability of political action. In various chapters, I highlight the role law plays, as action and work, to enable, sustain and sometimes solidify the political realm within which active citizenship can be experienced. When we look at the role played by institutions, especially in light of the judicial process of memorialisation I described in Chapter Four, we find that our juridical institutions combine the function of law as action and work. Law appears as action in the role played by citizens in developing constitutional law and as work in the slow, methodological procedure through which the institutions create and modify legal principles. Consequently, Arendtian constitutionalism reminds us not only that law is always political but also that all politics is always about law.

Finally, the third dichotomy that is challenged in Arendtian constitutionalism is one that is often taken at face value in Arendtian studies: between acting and judging. Scholars look at Arendt as a theorist of action and freedom, using her discourse on judging and responsibility as placeholders for a teleological explanation of Arendtian politics.⁸ Arendt's description of judging as a mental faculty is partly responsible. In describing

⁶ See, for instance, Martin Loughlin, *Political Jurisprudence* (First edition, Oxford University Press 2017).

⁷ Christian Volk, *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* (Hart Publishing 2017).

⁸ Garrath Williams, 'Disclosure and Responsibility in Arendt's *The Human Condition*' (2015) 14 *European Journal of Political Theory* 37.

thinking, willing, and judging as mental faculties, she categorises them as aspects of the *vita contemplativa*, a category that she suggests does not capture the value that *vita activa* brings to human life.

In this thesis, through the theme of *amor mundi*, I have attempted to bridge the gap between acting and judging as a citizen in a democratic constitutional politics. In Chapters Two and Five, I examined the ways in which citizens' actions and judgments are bound with each other in such a way that it is impossible to separate them into stages. I suggest, for example, that each individual is both an actor and spectator when they act as a citizen because while speaking about issues of common concern, they are simultaneously also judging their own conduct from the eyes of the critic-spectators so that they may frame their political positions in a manner that receives maximum support from their peers. The discussion on principles and authority in Chapters Three and Four is specifically aimed at entangling the experience of freedom and active citizenship with the capacity of the citizens as a collective to generate the principles that form the core of the democratic constitutional order.

Within this framework, the intricate relationship between active citizenship and democratic constitutional orders gains further complexity. Arendtian constitutional theory suggests that we should be concerned not only with the content of rights that correspond with active citizenship but also with the institutional structures that are necessary to make the experience of active citizenship authentic. It suggests that beyond institutional instances of civic engagement, attention should be directed towards the extra-institutional dimensions of active citizenship. In my formulation, Arendtian constitutional theory acknowledges that citizens can shape the political landscape not only within formal institutions but also in the diverse arenas of civil society, acknowledging the value of movements, protests, and social initiatives as meaningful expressions of active citizenship. The emphasis here lies on the experience of citizenship, extending beyond civil and political rights to evaluate the constitutional order itself based on the parameter of freedom. This involves considering institutional structures that prioritise participation not merely as means to an end but as democratic ends in themselves. The role of the state in facilitating viable and accessible active citizenship, both within and outside institutions, becomes crucial.

The role played by active citizenship in generating power and as a source of authority also speaks to the centrality of active citizenship for democratic constitutional orders. In the thesis, I have argued that for Arendt, power can dissipate (when citizens do not have the avenues to act together), power can give way to violence (when governmental actions are not propelled and regulated by citizens but out of instrumental reasoning), and power can justifiably coexist with violence (in the performance of the work of administering the outcomes decided upon by politics). Similarly, I contended that authority is generated when citizens make judgments and obey the institutions and lost when

institutions lose the support of the citizens due to their actions. In situations where conventional procedures of representation fail to rectify such deficits, citizens act together to occupy extra-institutional public spaces, manifesting in social movements and protests. Arendtian constitutionalism reframes the perception of such extra-institutional spaces, asserting that they should not be perceived as inherently destructive. Instead, they offer avenues for citizens to challenge and reimagine institutional frameworks while upholding overarching constitutional principles. This simultaneous engagement in transformative acts and the preservation of constitutional authority exemplifies the dynamic and reciprocal relationship between citizens and the democratic constitutional order.

I had started the thesis by describing the ‘riddle of foundation’ that confronts Arendt’s constitutionalist thinking. The riddle confronts us with the problem of instituting the demanding conception of freedom as the principle of democratic constitutionalism without disturbing the structures of authority that provide it with the stability and durability necessary for survival. Arendtian constitutionalism navigates the challenge of preserving the experience of freedom while ensuring the durability of the constitutional order by centring the experience of active citizenship in its conceptions of power and authority. This results in a nuanced citizen-centric constitutional theory, which addresses both institutions and citizens. It emphasises the responsibility citizens bear for the civic order, thereby contributing to a more comprehensive understanding of the intricate dynamics between the maintenance of the constitutional order and value of citizens’ acts and judgments in democratic governance.

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