

Constitutionalism and Contestation: Legal Authority in the Political Theory of
Hannah Arendt

Name: Machiel van Bruggen

Student number: 4168216

Supervisor: prof. dr. Thomas Mertens

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Radboud University Nijmegen

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Abstract

Although Hannah Arendt considers authority to have vanished from the modern world, her analysis in *On Revolution* shows she did not accept this disappearance. In her extensive analysis of authority in the American Revolution, Arendt reconceptualizes the concept of authority, fit for a modern, secular age. This article develops Arendt's conception of legal authority, which mediates between the constitution as founding of a polity and the constitution as written document. I argue that, for Arendt, legal authority is not harmed when it is contested. On the contrary, a constitution's authority is reaffirmed by contestation. Law and politics are therefore interdependent: politics cannot exist without the bounds of the law, while law cannot be authoritative without politics.

1. Introduction

The concept of authority is not commonly associated with the political thought of Hannah Arendt. Arendt has the reputation of a thinker of action and novelty in politics, of radical openness. She famously rejected many of our familiar political concepts, among which sovereignty, rule, and the conception of law as command, all of which she thought belong to a deeply flawed tradition of political thought. Moreover, she seemingly thought that authority was lost in modernity. However, her extensive analysis of authority in *On Revolution* shows that Arendt considered authority important. I contend that this analysis underlies an intriguing notion of legal authority.

Contrary to her reputation, Arendt does not celebrate political action at the expense of stability.¹ Her extensive reading of the Greek polis does not amount to unequivocal admiration. According to Jacques Taminiaux, Arendt's appreciation of the Romans was due to the fact that they knew of the remedies for the deficiencies of Greek politics, for the unpredictability and irreversibility of action.² These remedies are the faculties of promising and forgiving.³ Arendt

¹ See also Jeremy Waldron, "Arendt's political constitutionalism," in *The Cambridge Companion to Hannah Arendt*, ed. Dana Villa (Cambridge: Cambridge University Press, 2006), 201-219.

² Jacques Taminiaux, "Athens and Rome," in *The Cambridge Companion to Hannah Arendt*, ed. Dana Villa (Cambridge: Cambridge University Press, 2006), 165-177.

³ Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998), 236-47 (hereafter cited in text as *HC*).

explicitly harkens back to the Roman understanding of law, or *lex*, which originally meant “‘intimate connection’ or relationship, namely something which connects two things or two partners whom external circumstances have brought together.”⁴ This understanding of law as a promise is Arendt's alternative to the law as command. It is the only form of law that can stabilize the political realm without sacrificing politics itself, by throwing “certain islands of predictability” (*HC*, 244) into the realm of human affairs.⁵

Although legal systems vary greatly, Arendt holds “that they were designed to insure stability,” stability that politics cannot do without.⁶ Her insistence on the importance of law supports the interpretation of Arendt as a ‘thinker of order.’⁷ A crucial element of the stability promoting characteristic of law is its authority. If law has no element of command, as Arendt contends, how can law then account for political *order*? Hence the question I intend to answer: What is the authority of law in Arendt's political theory? Without legal authority, the law cannot provide a stable order – not without turning violent. In this paper, I will analyze Arendt's rather unorthodox understanding of legal authority. I will argue that, for Arendt, authority of the law is unharmed, and even supported, when the law is contested. Authority does not involve a demand for obedience; Arendt considers obedience to be an apolitical concept, appropriate only to the misguided understanding of law as command. Disobedience – as long as it is civil disobedience – *reaffirms* the authority of the law.

I will start by discussing Arendt's critique of authority. The authority that she claims was lost in modernity is not authority as such, but rather a specific, religious form of authority. Then, in section 3, I will describe Arendt's analysis of authority in *On Revolution*, a work that has drawn criticism for its one-sided celebration of the American Revolution over the French. Although legitimate criticism can be leveled against Arendt's romanticized reconstruction of history, I will generally refrain from doing so. Instead, my focus will be on what Arendt's narrative reveals of her political theory. This narrative reveals that Arendt thinks that authority in America resembles that of Rome, which she claims is the origin of the very concept. *On Revolution* is therefore Arendt's attempt to reconceptualize this Roman – and secular – form of authority for modernity.

In the fourth section, I will address the consequences of this analysis for legal authority. Arendt's paradigm example of a constitution with authority is the American Constitution. The objectivity, in Arendt's sense of the word, of the American Constitution is important in this respect, because this objectivity requires the exchange of different interpretations of this constitution. In section 5, I argue that what makes a constitution authoritative is *critique* of that constitution. For Arendt, a constitution that enables politics requires political action for it to

⁴ Hannah Arendt, *On Revolution* (London: Penguin, 1965), 187 (hereafter cited in text as *OR*).

⁵ See also Jan Klabbers, “Possible Islands of Predictability: The Legal Thought of Hannah Arendt,” *Leiden Journal of International Law* 20, no. 1 (2007): 1-23.

⁶ Hannah Arendt, “Civil Disobedience,” in *Crises of the Republic* (New York: Harcourt Brace & Company, 1972), 79 (hereafter cited in text as *CD*).

⁷ The phrase is Christian Volk's, quoted from his *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* (Oxford: Hart Publishing, 2015), 10.

remain authoritative. The relation between politics and the constitution is therefore reciprocal. This makes for a fragile conception of authority, but for Arendt it is the only one that does not stymie politics.

2. The Decline of Religious Authority

Arendt sometimes seems quite unequivocal about the decline of authority in the modern age, especially in "What Is Authority?" In this essay, she thought it may have been more appropriate to ask the question "What was – and not what is – authority? For it is my contention that we are tempted and entitled to raise this question because authority has vanished from the modern world."⁸ Her understanding of authority justifies this assertion: "Its hallmark is unquestioning recognition by those who are asked to obey; neither coercion nor persuasion is needed."⁹ Indeed, this attitude seems quite foreign to modern citizens.

However, Arendt's claim that authority has vanished from the modern world is misleading, because on the very next page she moderates her position: "The authority we have lost in the modern world is no such 'authority in general,' but rather a very specific form which had been valid throughout the Western World over a long period of time" (*WIA*, 92). Thus, the *concept* of authority has not disappeared; rather, the Western *conception* of authority is no longer valid.

According to Arendt, the origins of this Western conception of authority are Roman. For the Romans, authority was intimately tied to the foundation of the eternal city of Rome and the tradition in which later Romans stood. Arendt contends that the foundation of Rome lay at the heart of Roman politics; politics meant, above all, to preserve this founding. The founding of Rome even formed the political content of Roman religion, a religion in which 'piety' designated the Romans' relation to the past. Religion in this context does not involve the worship of revealed deities. Rather, religion in Rome "literally meant *religare*: to be tied back, obligated, to the enormous, almost superhuman and hence always legendary effort to lay the foundations" (*WIA*, 121). According to Arendt, politics and religion were near synonymous in ancient Rome: both derived their meaning from the preservation of the event of foundation.

Arendt claims that this is the context in which the word 'authority' first appeared and in which it acquired its meaning: "The word *auctoritas* derives from the verb *augere*, 'augment,' and what authority or those in authority constantly augment is the foundation" (*WIA*, 121). The foundation of Rome, a unique event, required the continued activity of later Romans to preserve it. Those who were in authority – i.e., the elders or, more specifically, the senators – had obtained it from those who founded Rome. Their authority was derivative: it depended on its

⁸ Hannah Arendt, "What Is Authority?" in *Between Past and Future: Eight Exercises in Political Thought* (New York: Penguin, 2006), 91 (hereafter cited in text as *WIA*).

⁹ Hannah Arendt, *On Violence*, in *Crises of the Republic* (New York: Harcourt Brace & Company, 1972), 144 (hereafter cited in text as *OV*).

transmission through tradition. Only by being tied back via a continuous tradition could living Senators be said to have authority.

What this authority precisely constituted is, according to Arendt, something elusive to us. It is emphatically not power, because the Romans distinguished between power, which resides in the people, and authority, which resides in the Senate.¹⁰ Authority, which is derived from the example of Rome's founders, consists in something similar to advice: it does not have the form of a command nor does it require coercion. Needing neither force nor persuasion, it entailed "the moral political standard as such" (*WIA*, 123). Thus, the precedent set by the ancestors, and from which the Senate derived its authority, constituted a model for action for Roman politics.

All of this makes clear that the three concepts of authority, religion, and tradition are intimately connected. Without the religious tie to the past, and without the tradition that transmits the example set by the founders of Rome, there can be no authority. Arendt dubbed this relation the "Roman trinity of religion, authority, and tradition" (*WIA*, 124), as each single one depends on the other two. Wherever one of the three was doubted, "the remaining two were no longer secure" (*WIA*, 128). But this did not happen for a long time, as the trinity proved to be remarkably durable.

According to Arendt, the trinity even survived the downfall of the Roman Empire. After the decline of the Roman Empire, the Church was compelled to assume political responsibilities. In doing so, the Catholic Church became Roman, as it "made the death and resurrection of Christ the cornerstone of a new foundation" (*WIA*, 125), which meant that "the great Roman political trinity of religion, tradition, and authority could be carried into the Christian era."¹¹ Here, too, the trinity led to a miraculously durable institution.

Even the Reformation did not end this constellation of religion, tradition and authority, because it merely challenged the authority of the Roman Catholic Church, not the trinity itself. The Reformation only resulted in several churches; it never "intended to abolish a religion that rests on the authority of those who witnessed its foundation as a unique historical event and whose testimony is kept alive by tradition."¹² According to Arendt, modernity's loss of authority was not caused by Luther's dissolution of the bond between authority and tradition. Rather, the primary cause was the separation of authority and religion, i.e., secularization, of which the first stage was "the rise of absolutism, and not the Reformation" (*OR*, 26). What ultimately broke the bonds between religion and authority was the separation of church and state.

¹⁰ "Cum potestas in populo, auctoritas in senatu sit" (Cicero, *De legibus* 3.28), quoted by Arendt at *WIA*, 122.

¹¹ Hannah Arendt, "The Tradition of Political Thought," in *The Promise of Politics*, ed. Jerome Kohn (New York: Schocken Books, 2005), 50.

¹² *Ibid.*, 51.

The origin of this development lies in the fact that the Catholic Church, in its assumption of worldly responsibility and its appropriation of Roman categories, changed the source of authority. The Church substituted the founding of Rome with the death and resurrection of Christ as foundational event. According to Arendt, this foundation ultimately refers to a trans-mundane source: the source of authority is God, and not a human act. Religion thus no longer refers to our ties to an exemplary past, as it did in ancient Rome, but to a transcendent, non-human reality. The source of authority lies wholly outside the reach of human power: it has become an absolute that human beings can only choose to obey.

The political authority of the Church therefore depended on a sanction from God. With the separation of church and state, with the 'emancipation' of politics from the church, states had to find another absolute to ground authority. According to Arendt, the solution was thought to be found in "absolute monarchy, which had placed an absolute, the person of the prince, into the body politic" (*OR*, 158). The first consequence of secularization was, Arendt argues, European absolutism.

The reason for this development was that people were convinced that only an absolute ruler could guarantee the legitimacy of the law, as only the absolute rule of a king mirrors the omnipotence of God: the king "incarnated on earth a divine origin in which law and power coincided. His will, because it supposedly represented God's will on earth, was the source of both law and power, and it was this identical origin that made law powerful and power legitimate" (*OR*, 156). Authority, as it was understood at the time, could only be guaranteed by the absolute of a transcendent God. Therefore, when kings claimed authority without the aid of pope and bishop, they attempted to clothe their rule with the same religious sanction. They claimed the divine right of kings.

Arendt thus discerns a strong continuity in the tradition of political thought, from the adoption of Roman categories by early Christianity all the way to the modern revolutions. It all started

when, after the 'Word became flesh', the incarnation of a divine absolute on earth was first represented by the vicars of Christ himself, by bishop and pope, who were succeeded by kings who claimed rulership by virtue of divine rights until, eventually, absolute monarchy was followed by the no less absolute sovereignty of the nation. (*OR*, 194)

This continuity does not mean, however, that Arendt believes that the validity of authority remained unchanged. On the contrary, after the initial substitution of an earthly event by a transcendent source, it was changed once more after the separation of church and state. When the prince 'stepped into the pontifical shoes of Pope and Bishop,'¹³ he did not assume the same function and sanctity that pope and bishop possessed: "in the language of political

¹³ The phrase, which Arendt uses in *On Revolution*, is quoted from Ernst Kantorowicz, "Mysteries of State: An Absolutist Concept and Its Late Mediaeval Origins," *The Harvard Theological Review* 48, no. 1 (1955): 67.

theory, he was not a successor but a usurper" (OR, 160). The prince's claim on worldly authority without the sanction of the clergy resulted in a separation of religion and authority. This led to the breakdown of the Roman trinity of religion, authority and tradition.

The solution of absolutism was no solution at all: it "served only to hide, for some centuries, the most elementary predicament of all modern political bodies, their profound instability, the result of some elementary lack of authority" (OR, 159). Absolute sovereignty, which lacked the specific sanction of religion because it lacked the transcendent source, "could only degenerate into tyranny and despotism" (OR, 160). After all, a sovereign unbound by laws rules on the basis of his own will.

According to Arendt, the sovereignty of the nation, proclaimed in the French Revolution, stands in the same theoretical tradition. It, too, postulates an absolute as the source of the authority of the law: the nation. Sieyès drew the distinction between the *pouvoir constitué* and the *pouvoir constituant*. The former, constituted government, could only be legitimated by the latter, the nation, which Sieyès placed in a perpetual state of nature. Both "power and law were anchored in the nation" (OR, 163). Hence, the nation was unbound like the king had been, a *potestas legibus soluta*: a power guaranteeing the law yet itself absolved from all laws. The French Revolution had merely substituted the king with the nation, elevating the nation to the status of an absolute.

Although secularization is generally thought of in terms of the emancipation of the state from religion, Arendt believes that the reverse can be said with equal, perhaps more, justification. The many theoretical difficulties that surfaced during the modern revolutions "could well be taken to demonstrate that politics and the state needed the sanction of religion even more urgently than religion and the churches had ever needed the support of princes" (OR, 161). It seems that the Church's lost political element amounted to no more than the belief in Hell, which was believed to be vital in ensuring adherence to law – even the 'enlightened' revolutionaries thought the belief in an afterlife was crucial for a republic (OR, 190-91; WIA, 134) – whereas the state's lost religious element undermined its very authority.¹⁴

Without the sanction of religion and the resultant lack of authority, monarchs turned to absolutism. Absolutism thus seems a logical consequence of the problem of authority in secular times. This is not a necessary consequence, however, even though Arendt claimed as much in one of her earlier works, *The Origins of Totalitarianism*: "A conception of law which identifies what is right with the notion of what is good for – for the individual, or the family, or the people, or the largest number – becomes *inevitable* once the absolute and transcendent

¹⁴ Hannah Arendt, "Religion and Politics," in *Essays in Understanding, 1930-1954*, ed. Jerome Kohn (New York: Harcourt Brace & Company, 1994), 383-84.

measurements of religion or the law of nature have lost their authority.”¹⁵ Here, Arendt was still pessimistic about finding a suitable answer to the problem of the absolute.

In her later works, however, she is clearly no longer satisfied with such inevitability. She therefore turned to the possibility of law without an absolute, with a different form of authority, in her study of the modern revolutions. Her analysis in *On Revolution* is meant to expand upon, and where necessary correct, Arendt's earlier views of authority – a new analysis she already alluded to in “What Is Authority?”¹⁶

3. The American Revolution and Roman Authority

According to Arendt, the problem of the absolute appeared when the modern revolutions overturned established power structures. This laid bare a fundamental problem for the revolutionaries: a lack of authority. Absolutist kings merely clothed themselves in religious garb, ruling ‘by the grace of God,’ in an attempt to hide their lack of authority. At the heart of this problems lies secularization, but this need not spell the end of the political concept of authority. Although for a long time monarchs needed the sanction of the clergy, Arendt asserts that

the long alliance between religion and authority does not necessarily prove that the concept of authority is itself of a religious nature. On the contrary, I think it much more likely that authority, insofar as it is based on tradition, is of Roman political origin and was monopolized by the Church only when it became the political as well as spiritual heir of the Roman Empire.¹⁷

The form of authority that Arendt pronounced dead in “What Is Authority?” is the specific religious form of authority that has disappeared with secularization. Arendt's analysis of the American Revolution, during which the political significance of promise and foundation was supposedly rediscovered, must therefore be read as an attempt to rethink the concept of authority. Creating a secular form of authority is, according to Arendt, one of the crucial tasks of the modern revolutions, if not the most important: “Indeed, it may ultimately turn out that what we call revolution is precisely that transitory phase which brings about the birth of a new, secular realm” (*OR*, 26).¹⁸

¹⁵ Hannah Arendt, *The Origins of Totalitarianism* (New York: Houghton Mifflin Harcourt, 1973), 299, emphasis mine (hereafter cited in text as *OT*).

¹⁶ See *WIA*, 140, and especially the accompanying endnote at *WIA*, 287n62.

¹⁷ Arendt, “Religion and Politics,” 372.

¹⁸ I therefore disagree with Samuel Moyn, who argues that Arendt's analysis of the modern revolutions involves the ultimately impossible attempt at definitive secularization of the political realm. Instead of reading Arendt's analysis as an attempt to recover Roman categories, Moyn argues that Arendt believes this cannot be done: “The religious past affects the revolutionary project and makes an exact return to the classics impossible; the intractable problem of the absolute, she thinks, forbids it.” Samuel Moyn, “Hannah Arendt on the Secular,” *New German Critique*, no. 105 (2008): 91.

For Arendt, the possibility of secularization and of devising a form of authority fit for modernity means reclaiming a worldly form of authority. The Catholic form of authority is inadequate, as the substitution of Rome's founding with the death and resurrection of Christ made it transmundane; the foundation was no longer political but religious. Arendt argues that, though the foundation remained highly influential in religious affairs, "its political significance would have been lost if it were not for the eighteenth-century revolutions in France and America," which "actually revived the fundamental contribution of Rome to Western history."¹⁹ The revolutions in France and America turned to Roman precedents.

The primary task with which the revolutionaries in both America and France were confronted, when their original intention of merely (re)claiming limited government had transformed into the need to found government anew, was to ensure the legality of the new political order. The revolutionaries needed to solve the problem "of the source of law which would bestow legality upon positive, posited laws, and of the origin of power which would bestow legitimacy upon the powers that be" (*OR*, 160). Because the revolutions ended up breaking the threads with the political authorities that preceded them, both the Americans and the French needed to found a new government, one that could not derive its legitimacy from the same source. In any case, the lack of authority of the governments that preceded them forbade it.

The task of founding authority anew turned out to be a nigh insurmountable task. On the one hand, an absolute cannot function as a source for human law, because "laws residing on human power can never be absolute" (*OR*, 39), nor can human power ever amount to omnipotence. On the other hand, the tradition of political thought bore heavily on the revolutionaries. For centuries, the tradition of political thought conceived of law in terms of command, and power in terms of a ruler with the capability to command. Moreover, invoking an absolute felt natural to them, because the absolute that is the source of the Church's authority is the event in which the 'Word had become flesh.' In other words, the religious absolute appeared in *our* world and in *our* history: "It was because of the mundane nature of this absolute that authority as such had become unthinkable without some sort of religious sanction" (*OR*, 160). Political theory was fundamentally influenced by the religious concept of authority.

Both the American and the French revolutions were thus confronted by the problem of founding authority anew. But where the French went wrong – in merely substituting one absolute, absolute kingship, with another, the nation – Arendt claims that the Americans succeeded. They managed to find an earthly source of authority, but only because their political experience remained largely immune to the influence of the tradition of political thought. The reason for the durability of the American republic was the Americans' experience of contracting, starting with the Mayflower Compact, and not their theory.

According to Arendt, the then-current social contract theory distinguished between two kinds of social contract: one concluded between individuals establishing society, the other concluded between society and its ruler that was supposed to result in legitimate government.

¹⁹ Arendt, "The Tradition of Political Thought," 53.

These two were considered to be part of a single two-fold contract. The contract that is supposed to create society is associated with John Locke; the contract that is supposed to create legitimate government is associated with Thomas Hobbes. Arendt later called the former the 'horizontal version' and the latter the 'vertical version' of the contract (*CD*, 85).²⁰ Both were considered to be a historical fiction, only meant to explain existing relations – although Arendt seems to suggest that the horizontal contract need not be fictitious, because only the vertical contract is described as 'fictitious' (*OR*, 170).

Arendt argues that the two kinds of social contract are actually mutually exclusive, because the horizontal version presupposes equality and reciprocity, whereas the vertical version involves the yielding of power by the people in favor of a ruler. Thus, the horizontal contract actually has the structure of a promise. Crucially, Arendt asserts that the horizontal contract can go without religious sanction. Whereas the vertical contract requires the guarantee of God, the horizontal contract, "the act of mutual promise is by definition enacted 'in the presence of one another'; it is in principle independent of religious sanction" (*OR*, 171). It is therefore of great consequence that the political experience of the American colonists revolved around the promise. Arendt considers the Mayflower Compact, in which the passengers of the Mayflower agreed to form a 'civil Body Politick' even before arriving at the New World, to be the archetype of the American contract. It symbolizes the American tradition of contracting, visible from the establishment of the colonies to the Declaration of Independence and the drafting of the Constitution.

According to Arendt, this experience of promising influenced the conception of power among the American revolutionaries. Neither the American nor the French revolutionaries had any problems in identifying the *source* of legitimate power – convinced that power resides in the people – though both had very different *conceptions* of power. The French understood by power a pre-political and natural force of the nation. The Americans understood by power the very opposite: to them, power sprang up when people joined together in promises and contracts. But this power requires authority in order to ensure the stability of the political realm. By itself, the promise "was by no means enough to establish a 'perpetual union', that is, to found a new authority" (*OR*, 182). Without authority, therefore, the power that sprang up during the American Revolution could not be preserved for future generations.

The problem of authority entails finding a source to legitimize ordinary legislation. All positive laws need some source from which it derives its legitimacy. According to Arendt, the source of authority in the American republic is found in the Preamble to the Declaration of Independence, written by Thomas Jefferson. But this document is ambiguous. Although it has

²⁰ In her essay "Civil Disobedience," Arendt identifies a third kind of contract, absent in *On Revolution*. This contract is the Biblical covenant between a people and its God, with which the people consent "to obey whatever laws an all-powerful divinity might choose to reveal to it" (*CD*, 84-85). This is quickly rejected, as it can only result in theocracy. It is worth noting, however, that the difference between this and the Hobbesian contract is not that great, at least not for Arendt. In both contracts a people consents to be governed by an all-powerful ruler, effectively ending politics. The main difference lies in the fact that in the Hobbesian contract this ruler is *given* his power, whereas in the Biblical covenant God's power is merely recognized.

turned out to be the source of a secular authority, its phrasing makes clear to what extent Jefferson's understanding was influenced by a tradition of religious authority.

The Declaration of Independence contains an odd combination of an appeal to an absolute with the practice of the promise, apparent in Jefferson's famous phrase 'We hold these truths to be self-evident.'²¹ This statement combines an agreement – the 'We hold' – that is necessarily relative to those who enter it, with an absolute – the self-evident truth – that does not need an agreement. The fallacy, according to Arendt, is that self-evident truth, which compels human reason, cannot be of the same nature as human law, nor can such 'mathematical laws' inspire or legitimize human law. She claims that

Jefferson must have been dimly aware of this, for otherwise he would not have indulged in the somewhat incongruous phrase, '*We hold* these truths to be self-evident', but would have said: These truths are self-evident, namely, they possess a power to compel which is as irresistible as despotic power, they are not held by us but we are held by them; they stand in no need of agreement. (*OR*, 193)

By saying '*We hold* these truths to be self-evident,' Arendt believes that Jefferson conceded that the claim 'that all men are created equal' needs agreement. In other words, equality, "if it is to be politically relevant, is a matter of opinion, and not 'the truth.'"²² The fact that Jefferson thought he needed to invoke an absolute does not indicate a shortcoming of the promise. Rather, it makes clear that despite the longstanding practice of promising in the American colonies, "the novelty of the New World's political development was nowhere matched by an adequate development of new thought" (*OR*, 195). It was due to the burden of the tradition of political thought that Jefferson invoked an absolute. In practice, this was wholly unnecessary.²³

The fact that authority in America is not the religious authority of tradition is underscored by Arendt: "Had this bondage to tradition determined the actual destinies of the American republic to the same extent as it compelled the minds of the theorists, the authority of this new body politic in actual fact might have crumbled under the onslaught of modernity – where the loss of religious sanction for the political realm is an accomplished fact – as it crumbled in all other revolutions" (*OR*, 195-96). What saved the American republic from this fate was not the appeal to an absolute but the act of foundation, not the Americans' theoretical understanding but their political experience.

²¹ There is a second appeal to an absolute in the Declaration of Independence: the appeal to 'the Laws of Nature and of Nature's God,' which was meant to justify America's rebellion. Arendt argues that this appeal to God is necessary if one appeals to the law of nature, because, she claims, "natural law itself [needs] divine sanction" (*OR*, 190) if it is to become binding for us.

²² Hannah Arendt, "Truth and Politics," in *Between Past and Future* (New York: Penguin, 2006), 242.

²³ In this sense, Samuel Moyn is right to say that it may have been impossible to escape the problem of the absolute for the American revolutionaries. This does not mean, however, that it is impossible *in principle*. Rather, Arendt's analysis in *On Revolution* is meant to show that invoking an absolute is unnecessary.

This experience includes an emotional connection of Americans with their constitution. This connection has often been described as a blind worship of the Constitution. But, Arendt argues, if the Americans' attitude towards their constitution can be called religious, "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" (OR, 198). Similar to the ancient Romans, the example set by the American founders has become a precedent, a model for action.

Authority in the American republic therefore mirrors the old Roman form of authority. This is no coincidence, because the American founders, faced with the task of founding a new republic, turned to the examples of history. What they called 'political science' meant "collecting with a care amounting to pedantry" (OR, 149) the many examples of republican constitutions, real and fictitious. And the "occasional rhetoric about the glory of Athens and Greece notwithstanding," the great model of the revolutionaries was "the Roman republic and the grandeur of its history" (OR, 197).

This focus on the ancients may have been one of the good fortunes of the American republic, because the need for an absolute is wholly absent from the ancients' view of law. According to Arendt, "neither the Greek *νόμος* nor the Roman *lex* was of divine origin" (OR, 186). For the Greeks, law was pre-political: the legislator, often a foreigner, was outside the body politic, but he was not above it, nor was he divine. Roman law is very different, though it needs no transcendent source either. *Lex* is the connection between different entities; it brings together former enemies, and it establishes an alliance between them. The Roman example was strengthened because, Arendt claims, the most influential philosopher among the American founders was Montesquieu. And he was the only pre-revolutionary thinker who used 'law' in the sense of Roman *lex*.²⁴

The influence of ancient Rome on the Americans is most obvious in the fact that the new republic called its upper house the Senate. But in clear distinction from the Roman republic, the American Senate was not the seat of authority but the seat of power. According to Arendt, the Americans understood the Roman distinction between power and authority well, which meant that they did not want to endow a branch of the legislature with authority. Instead, they endowed the judiciary branch with authority, precisely for its lack of power: "Institutionally, 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" (OR, 200). The authority of the Supreme Court is exercised in the interpretation of the constitution.

²⁴ This becomes clear in the very first sentence of *The Spirit of the Laws*: "Laws, taken in the broadest meaning, are the necessary relations deriving from the nature of things" (Book I, Chapter 1). Montesquieu describes the three kinds of positive law in similar terms: the right of nations concerns "the relation that [...] peoples have with one another"; the political right concerns "the relation between those who govern and those who are governed"; the civil right concerns "the relation that all citizens have with one another" (Book I, Chapter 3).

This means that, despite the Roman traits of the American institutional design, the concept of authority in America differs from that of Rome. Arendt claims that in Rome authority was political and it consisted in giving advice, while in America authority is legal and consists in interpretation. Moreover, the Supreme Court derives its authority from the constitution as a written document, whereas the Roman senators held authority because they represented or reincarnated the ancestors who founded Rome.

For both, however, authority involves the augmentation of a beginning. In Rome this meant the augmentation of the foundation of the eternal city. In America it is the Constitution that is augmented: constitutional amendments “augment and increase the original foundations of the American republic; needless to say, the very authority of the American Constitution resides in its inherent capacity to be amended and augmented” (*OR*, 202). The American Constitution is not a sacrosanct document, the Americans’ ‘constitution worship’ notwithstanding. The fact that the Constitution can be amended shows that it does not purport to be perfect. Although it is a written document, an objective thing, it allows for critique and opposition.

4. Objectivity and Common Sense

Arendt clearly discerned a reemergence of the concept of authority, uncorrupted by transmundane, religious elements, during the American Revolution. According to Arendt, the Supreme Court is the institution endowed with authority; it must interpret the constitution when problems arise. The decisions of the Supreme Court are accepted by the government, without it being able to enforce its decisions, or disposed to persuade the government. But what makes that the Constitution itself has authority? Why would an institution, and the ordinary citizen, be bound by any particular document? Arendt's notion of objectivity plays an important role in the answer to this question.

I ended the last section by remarking that the Constitution, though it is an objective thing, can be critiqued. It is more accurate, however, to state that the Constitution can be critiqued, not despite its objective character, but because of it. For Arendt, ‘objectivity’ does not mean that differences between persons are precluded, nor are different interpretations of the same constitution to be rejected. Rather, objectivity for Arendt lies in the fact that the same object is seen from innumerable different perspectives. Only when objects are seen “by many in a variety of aspects [...] can worldly reality truly and reliably appear” (*HC*, 57).

Arendt clearly has this sense of objectivity in mind when she describes the American Constitution: she characterizes it as “a written document, an endurable objective thing, which [...] one could approach from many different angles and upon which one could impose many different interpretations” (*OR*, 157). Arendt's ‘objectivity’ is not independent from our judgments. Rather, it emerges from “the freedom of our speaking with one another” (*IP*, 128). It is in the conflicting interpretations of different citizens that a thing acquires its objectivity. And in the exchange of interpretations in political action, a constitution acquires objectivity.

For Arendt, objectivity is not guaranteed by a sameness but by a difference. It arises not from any common nature of the citizens of a community, such as a common reason, but from the fact that these citizens have *different* perspectives. Objectivity emerges when different persons relate to the same object. Whenever this common relation to the same object by different citizens ceases to be, when “the sameness of the object can no longer be discerned, no common nature of men [...] can prevent the destruction of the common world” (HC, 58). No ‘human nature’ can give rise to objectivity, so that when citizens become radically isolated, as under totalitarianism, the common world disappears – and with it the possibility for politics. Rather, it is common sense that lies at the heart of objectivity.

Common sense, which Arendt called “the sixth and the highest sense” (HC, 274), is thus of prime importance in the public realm, as it makes a common world possible. It is important to note that common sense is not just another formulation of human nature. For Arendt, common sense is not merely a sense that is common to us all. She criticizes Cartesian philosophy for its introspection which made the notion of common sense purely private: it was “called common merely because it happened to be common to all” (HC, 283). This philosophy results in a loss of common sense as Arendt understands it. In her view, common sense “is the one sense that fits into reality as a whole our five strictly individual senses and the strictly particular data they perceive” (HC, 208). Common sense synthesizes our private and ‘subjective’ sense perceptions into an ‘objective’ and common world, by checking our private sensory data with those of others.

Obviously, a common world is required for politics, which is why Arendt considers common sense one of the highest *political* faculties. Thus, Arendt writes, “common sense obviously operates chiefly in the public realm of politics and morals, and it is that realm which must suffer when common sense and its matter-of-course judgments no longer function, no longer make sense.”²⁵ Without the common sense that offers individual citizens the certainty that they inhabit the same (political) world, politics founders.

One of the objects through which citizens establish a common political world is the law. The law is common to all citizens of a society, so that they relate to the same world. For Arendt, it is this relation to a common law that is the meaning of the law. Hence, Arendt's endorsement of the Roman conception of law, or *lex*.²⁶ Law is not analogous to a command but must be understood as that which relates different people: “a law is merely what relates two things” (OR, 188). By relating different people, the law creates a commonality between them. This common law helps to create and stabilize the common world of a society. Without laws, no society can exist.

This need for law, which enables a stable political realm, constitutes a positivist strand in Arendt's thought. To a large extent, we have no choice in the laws that we live under, because

²⁵ Arendt, “The Tradition of Political Thought,” 42.

²⁶ See also Christian Volk, “From *Nomos* to *Lex*: Hannah Arendt on Law, Politics, and Order,” *Leiden Journal of International Law* 23, no. 4 (2010): 759-779.

we cannot but accept these laws. For the vast majority of people – who are not alive during revolutionary times and who therefore cannot choose their laws – this is a consequence of the human condition. At birth, we are confronted with a set of rules. We have no choice but to accept these rules, because, Arendt claims, a human life is not possible without this acceptance. Using the metaphor of the rules of a game, Arendt argues that “I cannot enter the game unless I conform; my motive for acceptance is my wish to play, and since men exist only in the plural, my wish to play is identical with my wish to live” (*OV*, 193). The private life of the home is, in Arendt's view, not fully human. Only by interacting with others in a public realm can one realize the human life of speaking and acting.

A public world is not secured by merely drafting constitutions and enacting laws, however. The law needs to be *authoritative*. Arendt was well aware of the fact that a mere constitution was not enough to secure a political realm; this is one of her main criticisms of the French Revolution and of the European constitutions after the First World War. The background of these criticisms is directly related to the issue of the authority of a constitution – and of legal authority in general – and it is therefore useful to explicate the problem common to these constitutions.

One of the main problems of the drafting of a constitution during the French Revolution was, Arendt argues, the fact that it was written by a select group of people, who considered themselves to be permanent representatives of the French nation. They therefore did not think it necessary to debate its merits with those for whom the constitution was written – in stark contrast to the founding of the United States, during which, Arendt claims, the Articles of Confederacy and the American Constitution were extensively debated. As a result of this complete lack of interaction with what was supposed to become a new politically active citizenry,

the Constitution of 1791 remained a piece of paper, of more interest to the learned and the experts than to the people. Its authority was shattered even more before it went into effect, and it was followed in quick succession by one constitution after another until, in an avalanche of constitutions lasting deep into our own century, the very notion of constitution disintegrated beyond recognition. (*OR*, 125)

Because the first constitution was neither commissioned nor approved by anyone – neither by monarch nor by nation – the constitution existed in a vacuum. And each new constitution, necessary because the previous one turned out to be without authority, was just as impotent to garner any support among the citizens. The constitutions of revolutionary France, and the many that followed, were all without authority.

A similar fate was to befall the ‘constitutions of experts’ of the European nation-states after the First World War. According to Arendt, these were largely based on the example of the American Constitution and should therefore be fine constitutions. However, because of a mistrust among the people who were to live under them, half of these nation-states had become dictatorships in less than two decades, while most of the rest possessed a “sad lack of power,

authority, and stability" (*OR*, 146). None of the new constitutions of interwar Europe were able to stabilize the political realm.

We find one more example in Arendt's work of a constitution that was ignored by citizens and politician alike: the totalitarian regimes of the twentieth century. Here, the lack of authority of the constitutions of (continental) Europe had disastrous consequences. In the case of Germany, the Nazi regime constituted a clear break with its predecessor, the Weimar Republic. However, the Nazi party never attempted to overhaul the constitutional arrangements of Germany:

In the early years of their power the Nazis let loose an avalanche of laws and decrees, but they never bothered to abolish officially the Weimar constitution; they even left the civil services more or less intact – a fact which induced many native and foreign observers to hope for restraint of the party and for rapid normalization of the new regime. (*OT*, 393-4)

This hope for restraint clearly turned out to be in vain. The Weimar constitution had already lost its authority. It was therefore left in place, not because it would restrain the new regime, but because it could be ignored anyhow.

The same goes for the Soviet constitution, written in 1936. This constitution played "exactly the same role" as the Weimar constitution in Nazi Germany: "it was completely disregarded but never abolished" (*OT*, 395). Stalin allowed for one more absurdity, according to Arendt, when he executed the drafters of the Soviet constitution as traitors. The constitution was implicitly judged as treason, yet it was never repudiated because it did not have to be repudiated.

All of these constitutions suffered from the same problem: a lack of relevance of the most elementary sort. Although they might have been, in essence, fine constitutions, they were ignored by the citizens. And although they were objective in the sense of being a written object, they did not acquire objectivity in Arendt's sense. Without an active relation of the citizens to their constitution, these constitutions could not preserve their authority. Many of the respective political realms therefore collapsed, leading to dictatorship in one form or another. Occasionally, this may have secured some measure of stability, but it came at the expense of politics.

The presence of a constitution is therefore not enough. Rather, citizens must be able and willing to engage with it. The objectivity, and consequently the authority, of a constitution depends on political action: only when citizens actively recognize their constitution as the starting point for political discourse can we speak of an authoritative constitution. And without an authoritative constitution, the survival of politics itself is under threat – as is clear from the collapse of democracy in interwar Europe. This results in a reciprocal or circular relation: a constitution needs political action in order for the constitution to make politics possible.

5. Legal Authority and Contestation

The American Constitution stands in sharp contrast to these inconsequential constitutions. It is held in such high regard that it has been described as the object of 'worship.' But Arendt still has reasons for being critical: her quite one-sided and therefore often criticized celebration of the American Revolution does not extend to the American Constitution. Despite their success in founding a new authority for the new republic, the American revolutionaries failed to appreciate the crucial function of politics in *upholding* the new constitution's authority. Because of the lack of a truly public realm, readily accessible to all citizens, the relation between the founding of the American republic and the American Constitution has become tenuous. In Arendt's view, the Constitution is flawed. In this section, I will analyze the significance of contestation, in particular of extralegal contestation, for Arendt's concept of authority.

The 'religious' nature of the constitution worship in the United States consists in it being tied back to the foundation of the American republic. Because of the ambiguity of the word 'constitution,' however, constitution worship has a double meaning: it can mean both the worship of the written constitution and the worship of the constitution as event. For Arendt, it is the latter that is of most importance. It is crucial for the authority of the American republic that its foundational event continues to function as a model. Arendt therefore asserts that "one may be tempted even to predict that the authority of the republic will be safe and intact as long as the act itself, the beginning as such, is remembered whenever constitutional questions in the narrower sense of the word come into play" (*OR*, 204). Arendt's endorsement of the Roman concept of authority is clear: it is more important that the foundation is remembered as a model than that the written document is taken as dogma. The document may be critiqued fairly unproblematically, as long as the founding event that produced this document continues to function as a precedent.

To uphold any particular historical event as precedent may seem arbitrary. Arendt was aware of the seeming arbitrariness of any new enterprise that cannot continue a tradition or follow a precedent, like the creation of the American republic, which was not "a matter of founding 'Rome anew' but of founding a 'new Rome'" (*OR*, 212). Such arbitrariness seems irrational if it is to ground a polity's authority. But what saves the beginning from arbitrariness, according to Arendt, is the fact that the beginning gives birth to its own principle: principle and beginning are coeval.

Arendt claims that "[t]he principle which came to light during those fateful years when the foundations were laid – not by the strength of one architect but by the combined power of the many – was the interconnected principle of mutual promise and common deliberation" (*OR*, 213-4). It is this principle that makes the American Revolution worth remembering, and what the Supreme Court ought to remember when interpreting the constitution. The principle was supposed to find its expression in the new constitution, but Arendt believes that the American Constitution does not succeed in structuring the principle that emerged during the revolution.

The failing of the Constitution lies in the fact that it does not offer a public space for the continued practice of the principle that arose during the American Revolution. Thomas Jefferson, Founding Father turned critic of the Constitution, lamented the fact that it did not create a public space accessible to ordinary citizens. Periodic elections are not enough. Instead, he proposed a 'ward system' which was to officially incorporate the town hall into the federal republic, supposedly enabling Americans to exercise the same political freedom as during the American Revolution. Jefferson's criticism is largely espoused by Arendt in *On Revolution*.

According to Arendt, Jefferson considered "the mortal danger to the republic" to be that "all power had been given to the people in their private capacity and that there was no space established for them in their capacity of being citizens" (OR, 253). The problem is not just that the principle fails to be fully realized, but that the authority and durability of the republic depend on people willing to uphold the principle as a model, thereby establishing a new tradition and continuing it through generations. For Arendt, secular authority – which has no absolute and therefore does not demand obedience – requires the active support of citizens. Hence, only a public space accessible to all citizens could solve "one of the most serious problems of all modern politics" (OR, 278), namely how to reconcile political equality and authority. Without a public space, political engagement with the political event of the American Revolution, necessary to uphold it as a precedent, is frustrated. Or, rather, *legal* political action is frustrated.

The importance of a public space is the reason that Arendt wrote approvingly of the practice of civil disobedience. It is in accordance with the *spirit* of American law, she argues, as it constitutes political action. Arendt considers civil disobedience merely a special case of the longstanding American tradition of the voluntary association. In her essay "Civil Disobedience," the tension between both meanings of 'constitution' is central. On the one hand, she asserted that the phenomenon of civil disobedience was likely a result of the decline of law's authority, "though it can hardly be seen as its cause" (CD, 74). On the other hand, it is clear that civil disobedience does not by any means *contribute* to the decline of law's authority. Arendt even hoped that it would remedy the failings of the Supreme Court. She therefore defended civil disobedience, based on the precedent that was set by America's founding.

In order to appreciate this point, it is important to understand Arendt's understanding of civil disobedience. For her, the importance of civil disobedience lies primarily in the fact that the civil disobedient citizen "never exists as a single individual; he can function and survive only as a member of a group" (CD, 55). This becomes clear, Arendt claims, when we realize that one of the chief characteristics of civil disobedience is indirect disobedience, where laws that are considered unproblematic are broken in order to protest against some other governmental policy or executive action. Such disobedience can only make sense when it is performed in a group; an individual breaking traffic laws is politically impotent. It is therefore crucial that we recognize civil disobedience as political action.

There are two other important features of civil disobedience that, according to Arendt, make clear that it constitutes political action. First, civil disobedience is essentially public. The law is broken in full view in order to protest perceived injustice. It is also public in another sense, as dissenting citizens do not seek an exception for themselves but act “in the name and for the sake of a group” (*CD*, 76). The pursued goals are public as well. Second, civil disobedience is nonviolent. We are only justified in calling civil disobedient citizens ‘rebels’ if they use the means of violence. Civil disobedient citizens are therefore not criminal or rebellious. On the contrary, they are politically engaged citizens.

This means that, for Arendt, breaking the law is not always irreconcilable with the authority of the law. Legal authority does not involve an uncompromising demand for obedience, because she believes the model of law as command to be false: “The common dilemma – either the law is absolutely valid and therefore needs for its legitimacy an immortal, divine legislator, or the law is simply a command with nothing behind it but the state's monopoly of violence – is a delusion. All laws are “directives” rather than “imperatives” ’” (*OV*, 193, Arendt quotes Alessandro Passerin d’Entrèves’s *The Notion of the State*). Thus, ‘obedience’ is an inappropriate term to describe a citizen’s relation to the law, as the term ‘directive’ indicates a possibility of critique.

Arendt does use the term ‘force of law’ (*CD*, 70), but not in the context of civil disobedient citizens. The phrase refers to *criminal* disobedients, to those who hide their breaking of the law and who seek some gain for themselves. Arendt argues that “[t]he sanctions of the laws, which, however, are not their essence, are directed against those citizens who – without withholding their support – wish to make an exception for themselves; the thief still expects the government to protect his newly acquired property” (*OV*, 193). The force of law ought to be applied only to those who seek an exception for themselves.²⁷

Only when acting with others in a group, therefore, and when acting publicly and nonviolently, can one speak of civil disobedience. In other words, only when the breaking of law is *political* in nature, when disobedient citizens implement the principle of mutual promise and common deliberation, is the force of law misguided. In these cases, the law is not confronted with the violence of a criminal but with power. And “in a conflict between law and power it is seldom the law which will emerge as victor” (*OR*, 151). But using law to counter politically active citizens is not only to misjudge what law can do, it is also in conflict with the spirit of the American republic, which according to Arendt was meant to enable citizen participation.

It is therefore no surprise that Arendt wrote approvingly of civil disobedience, since it is just another form of power. In fact, she wrote, “[i]t is my contention that civil disobedients are nothing but the latest form of voluntary association, and that they are thus quite in tune with

²⁷ Arendt's rejection of the command model of the law is therefore only partially successful. Although the law ought not be violent in the domain of politics, outside of this realm the law must be violent: to combat crime obedience must be enforced. See also Keith Breen, “Law Beyond Command? An Evaluation of Arendt's Understanding of Law,” in *Hannah Arendt and the Law*, ed. Marco Goldoni and Christopher McCorkindale (Oxford: Hart Publishing, 2012), 15-34.

the oldest traditions of the country" (CD, 96). Arendt defends civil disobedience, not so much for its possible salutary effects but for its political nature.

Arendt even tries to find a "recognized niche" for civil disobedience – making it a part of political mores – through which civil disobedience could be made a more or less permanent part of American politics. Although she admits that the nature of law precludes the 'legalization' of civil disobedience, she claims that the special case of the American legal system – in which law is based on the practice of mutual promise – allows us to adopt a *political* attitude towards civil disobedience by according it the same recognition as other special-interest groups that lobby Congress. Moreover, such an attitude would enable ordinary citizens to uphold the authority of the Constitution, which the judiciary failed to do. Arendt claims that part of the origin of civil disobedience lies in the "failure of judicial review" (CD, 101), which she detected in the refusal of the US Supreme Court to rule on the legality of the Vietnam War by invoking the 'political question doctrine.'²⁸ It was Arendt's hope that the incorporation of civil disobedience among the political institutions of America could remedy this failure.

According to Marco Goldoni and Chris McCorkindale, this failure of judicial review led to the Supreme Court's loss of authority. They argue that, according to Arendt, this was caused by two constitutional moments.²⁹ The first was *Brown v. Board of Education*, in which the Supreme Court did not limit itself to its task of interpreting the Constitution, declaring segregation by state law unconstitutional. According to Arendt, the Supreme Court *changed* the Constitution by enforcing desegregation.³⁰ The second was the previously mentioned refusal of the Supreme Court to judge the legality of the Vietnam War.

It is important to recognize, however, that the authority of the Constitution can remain intact despite the loss of authority of an institution, even if that institution is 'the seat of authority.' Authority is *exercised* by the Supreme Court, as shown by the fact that its decisions are accepted. But the *source* of that authority lies in the Constitution. The Supreme Court's decisions may purport to be the 'definitive' interpretations, but these interpretations do not amount to 'objectivity' – especially when these interpretations are controversial as in *Brown*. The authority of the Constitution does not, therefore, depend on the Supreme Court.

The Constitution's authority depends on political action. Its authority remains intact as long as the Constitution is recognized as the central pillar that stabilizes the American republic. This recognition depends not on the Supreme Court alone; it requires citizen activism. Politics is crucial, as it is instrumental in the exchange of interpretations and in establishing of objectivity. Civil disobedience, being a special case of politics, accomplishes this task as well.

²⁸ For Arendt, this doctrine is incompatible with politics, as it allows the sovereignty principle to reemerge (CD, 100). See also Andrew Arato and Jean L. Cohen, "Banishing the Sovereign? Internal and External Sovereignty in Arendt," in *Politics in Dark Times*, ed. Seyla Benhabib (New York: Cambridge University Press, 2010), 137-171.

²⁹ Marco Goldoni and Chris McCorkindale, "The role of the Supreme Court in Arendt's Political Constitution," in *Hannah Arendt and the Law*, ed. Marco Goldoni and Chris McCorkindale (Oxford: Hart Publishing, 2012), 117-131.

³⁰ See Hannah Arendt, "Reflections on Little Rock," in *The Portable Hannah Arendt*, ed. Peter Baehr (New York: Penguin Books, 2000), 231-246.

This is why Arendt hoped that civil disobedience could remedy the Supreme Court's failings. Without a political commitment to the Constitution, the judiciary's unwillingness to interpret the Constitution could lead to the loss of the Constitution's authority.

The fact that Arendt claims that civil disobedience is in tune with the "oldest traditions of the country" (*CD*, 96) is telling. Civil disobedience stands in a continuous tradition going back to the American Revolution. It is 'religiously' – in the Roman sense – tied to that beginning. The constitution as foundational event is authoritative. At the same time, by criticizing the American Constitution, civil disobedient citizens preserve and strengthen the objectivity of the constitution as document. When citizens are convinced that the Supreme Court neglects its task of interpretation, they offer their own interpretation of the Constitution. By remembering the act of foundation of the American republic when constitutional issues 'in the narrower sense of the word' arise, politically active citizens interpret the Constitution in a manner similar to what Arendt hoped would be the Supreme Court's mode of interpretation.

The civil disobedient's criticism therefore reinforces the Constitution's authority. The nonviolent character of civil disobedience shows, in the words of Carl Cohen and quoted approvingly by Arendt (*CD*, 77), that "[t]he civil disobedient accepts, while the revolutionary rejects, the frame of established authority and the general legitimacy of the laws."³¹ The law is authoritative, even for the civil disobedient citizen that criticizes it. The law is not modeled on the divine command; it is not something irresistible. Therefore, as Bonnie Honig argues, "on Arendt's account, the practice of authority consists largely in [a] commitment to resistibility," which means that "the practice of authority turns out to be, paradoxically enough, a practice of deauthorization."³² The authority of the Constitution requires political engagement with its contents. This creates an interdependence between law and politics: without the law that stabilizes a public realm, politics cannot exist; and without political engagement with the law, the law cannot, for lack of authority, stabilize the public realm.³³

Even in the United States, so admired by Arendt, the Constitution's capacity for relating citizens with one another is flawed. Arendt thought that the Constitution did not include all Americans. She hypothesized that a constitutional amendment addressed specifically to the inclusion of the African Americans into the constitutional framework was necessary (*CD*, 91-2). The Fourteenth and Fifteenth Amendments failed to correct for the crime of slavery because, according to Arendt, they did not overrule the *Dred Scott* decision, which explicitly

³¹ Carl Cohen, "Civil Disobedience and the Law," *Rutgers Law Review* 21, no. 1 (1966): 3.

³² Bonnie Honig, "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic," *American Political Science Review* 85, no.1 (1991): 111. This view of law's authority that benefits from contestation is also present in *Eichmann in Jerusalem*, according to Lida Maxwell. She argues that Arendt's understanding of law in *Eichmann in Jerusalem* "portrays contestation of legal rules and constraints as enabling of, not debilitating to, law's authority and responsiveness." Maxwell, "Toward an agonistic understanding of law: Law and politics in Hannah Arendt's *Eichmann in Jerusalem*," *Contemporary Political Theory* 11, no. 1 (2012): 104-105.

³³ See also Christian Volk's 'de-hierarchization thesis,' in "Hannah Arendt and the Constitutional Theorem of De-Hierarchization. Origins, Consequences, Meaning," *Constellations* 22, no. 2 (2015): 175-187.

excluded African Americans from the Constitution.³⁴ This exclusion undermined the Constitution's very ability to function as a common framework. According to Arendt, it made it impossible for African Americans to appeal to the Constitution, which she called "the tragedy of the abolitionist movement" (*CD*, 90).

At this point, the importance of constitutional amendment becomes apparent. Because the human world is inevitably and continuously changing, the law, including the fundamental law, must be able to change accordingly – though not on a mere whim, as that is inconsistent with the very concept of a constitution. Arendt emphasizes that "foundation, augmentation, and conservation are intimately interrelated" (*OR*, 201). This insistence on augmentation makes clear that Arendt believed the authority of the Constitution can remain intact only through amendment, which "augment and increase the original foundations of the American republic" (*OR*, 202). The fact that the authority of the Constitution depends on its capacity to be amended shows, again, that legal authority depends on politics.

The significance of criticism of the law weakens the positivism in Arendt's claim that we must accept the existing laws in order to live a human life. In fact, Arendt asserts that the possibility of dissent enables a meaningful form of consent – or 'existential consent,' as she describes it (*CD*, 87-89) – while amendment weakens the arbitrariness of accepting existing laws. At the same time, however, the very notion of a constitution precludes new generations from merely adopting a new constitution if they believe they can do better than their forebears – this was Arendt's criticism of the 'avalanche of constitutions' in France. A constitution can only be preserved by allowing new citizens to relate to it in their own ways. If it cannot respond to political changes, it becomes a constitution that loses its authority; it becomes as ineffectual as the constitutions of interwar Europe.

6. Conclusion

Contrary to what may seem apparent at first sight, Arendt did not proclaim the loss of authority in the modern age. Rather, she discerned the appearance of a secular form of authority during the American Revolution, which she tried to explicate. According to Arendt, the American Constitution derives its authority from the Declaration of Independence, the expression of the principle of mutual promise and common deliberation that arose during the American Revolution. As a result, the Constitution's authority is not harmed by critique if this critique is political; rather, the use of common deliberation and mutual promise in political action – including civil disobedience – reaffirms the Constitution's source of authority. While

³⁴ It can be argued that the *Dred Scott* case is a prime example of a failure to – as Arendt hoped – remember the American founding when "constitutional questions in the narrower sense of the word come into play" (*OR*, 204). The judgment of *Dred Scott* was based on an exploration of the legal question whether African Americans were ever considered to be citizens in America, from the time of the Thirteen Colonies to that of the United States, both on the federal and the state level. By focusing on these legal technicalities (the constitutional question in the narrower sense of the word), the principle of mutual promise and common deliberation, which, arguably, would have led to a decision for *Dred Scott*, was lost out of sight.

the articles and words of the Constitution can be scrutinized, amending the Constitution through critique and political action preserves its authority. Although Arendt claims that the exercise of authority in America is legal, *upholding* the Constitution's authority that underlies it is political.

It is only when a constitution ceases to be the central point of reference in politics, when it no longer guides political action, that it loses authority. And without a constitution, without a model for action, the future again becomes radically open. This is a dangerous predicament – even if it may not go so far as the maxim “everything is possible” of totalitarianism.³⁵ A community that finds itself in such a situation has no stable public realm in which politics can thrive. Its task is to create that public realm, to set a model for action and to draft a constitution. The upshot of Arendt's political theory is, therefore, the necessity of law for politics.

The notion of legal authority in Arendt is quite fragile for its dependence on political action. If there is no political engagement with the law, if authority is lost, then the very real alternative would be violence and the return to the conception of law as command. The claim that Arendt announced the death of authority in the modern age therefore cannot be true. A loss of authority inevitably results in the reintroduction of the understanding of law as command, and consequently of violence, in the public realm. The background of her pessimism about modernity's ability to ground authority seems to have been her experience of (continental) Europe during the 'dark times' of world wars and totalitarianism. But America seems to have been a unique place in Arendt's mind; it was one of the few countries that remained immune to the failings that ruined Europe. Hence, Arendt tried to formulate a conception of authority fit for modernity in her narrative of the American Revolution.

³⁵ See *OT*, 440-441, for the incompatibility of this maxim and common sense.

Bibliography

- Arato, Andrew, and Jean L. Cohen. "Banishing the Sovereign? Internal and External Sovereignty in Arendt." In *Politics in Dark Times*, edited by Seyla Benhabib, 137-171. New York: Cambridge University Press, 2010.
- Arendt, Hannah. *Between Past and Future: Eight Exercises in Political Thought*. New York: Penguin, 2006.
- . *Crises of the Republic*. New York: Harcourt Brace & Company, 1972.
- . *The Human Condition*. Chicago: University of Chicago Press, 1998.
- . *On Revolution*. London: Penguin, 1965.
- . *The Origins of Totalitarianism*. New York: Houghton Mifflin Harcourt, 1973.
- . *The Promise of Politics*. Edited by Jerome Kohn. New York: Schocken Books, 2005.
- . "Reflections on Little Rock." In *The Portable Hannah Arendt*. Edited by Peter Baehr, 231-246. New York: Penguin, 2000.
- . "Religion and Politics." In *Essays in Understanding*. Edited by Jerome Kohn, 368-390. New York: Schocken Books, 1994.
- Breen, Keith. "Law Beyond Command? An Evaluation of Arendt's Understanding of Law." In *Hannah Arendt and the Law*, edited by Marco Goldoni and Chris McCorkindale, 15-34. Oxford: Hart Publishing, 2012.
- Cohen, Carl. "Civil Disobedience and the Law." *Rutgers Law Review* 21, no. 1 (1966): 1-17.
- Goldoni, Marco, and Chris McCorkindale. "The Role of the Supreme Court in Arendt's Political Constitution." In *Hannah Arendt and the Law*, edited by Marco Goldoni and Chris McCorkindale, 117-131. Oxford: Hart Publishing, 2012.
- Honig, Bonnie. "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic." *American Political Science Review* 85, no. 1 (1991): 97-113.
- Kantorowicz, Ernst. "Mysteries of State: An Absolutist Concept and Its Late Mediaeval Origins." *The Harvard Theological Review* 48, no. 1 (1955): 65-91.
- Klabbers, Jan. "Possible Islands of Predictability: The Legal Thought of Hannah Arendt." *Leiden Journal of International Law* 20, no. 1 (2007): 1-23.
- Maxwell, Lida. "Toward an agonistic understanding of law: Law and politics in Hannah Arendt's *Eichmann in Jerusalem*." *Contemporary Political Theory* 11, no. 1 (2012): 88-108.
- Montesquieu. *The Spirit of the Laws*. Translated by Anne M. Cohler, Basia C. Miller and Harold Stone. Cambridge: Cambridge University Press, 1989.
- Moyn, Samuel. "Hannah Arendt on the Secular." *New German Critique* 35, no. 3 (2008): 71-96.
- Taminiaux, Jacques. "Athens and Rome." In *The Cambridge Companion to Hannah Arendt*, edited by Dana Villa. Cambridge: Cambridge University Press, 2006. 201-219.
- Volk, Christian. *Arendtian Constitutionalism: Law, Politics and the Order of Freedom*. Oxford: Hart Publishing, 2015.
- . "From *Nomos* to *Lex*: Hannah Arendt on Law, Politics, and Order." *Leiden Journal of International Law* 23, no. 4 (2010): 759-779.

- . “Hannah Arendt and the Constitutional Theorem of De-Hierarchization. Origins, Consequences, Meaning.” *Constellations* 22, no. 2 (2015): 175-187.
- Waldron, Jeremy. “Arendt's constitutional politics.” In *The Cambridge Companion to Hannah Arendt*, edited by Dana Villa, 201-219. Cambridge: Cambridge University Press, 2006.

Research proposal

Title

The Legitimacy of International Criminal Law: Hannah Arendt on the Prosecution of Crimes Against Humanity in a Post-Westphalian World

Summary

International criminal law has been criticized since its inception. This criticism gained new significance after the creation of the International Criminal Court (ICC). The most persistent criticism is that an international court has no connection with a political community. Critics argue that an international court is like a 'foreign' court without democratic accountability. On October 27, 2017, Burundi became the first state to withdraw from the ICC, while several other states threaten to do the same. Moreover, numerous states have not joined the ICC, citing concerns of sovereignty, most notably the United States, Russia, and China. A satisfying answer to these criticisms is yet to be found.

This project will analyze the problem from the perspective of Hannah Arendt (1906-1975), one of the most influential political thinkers of the twentieth century. In *Eichmann in Jerusalem* (1963), Arendt pleaded for the creation of an international criminal court. She provided little argumentation – Arendt considered the book nothing more than a 'trial report' – while commentators have failed to take her legal theory into account. This project will study Arendt's plea within the framework of her legal theory. The resulting theory of international criminal law offers a new perspective on contemporary issues of legitimacy.

Word count: 200

Description of the Proposed Research

The Problem

Since its inception, international criminal law has been criticized, notwithstanding the creation of the International Criminal Court (ICC) in The Hague, on July 1, 2002. Critics often allege that an international court is like a 'foreign' court, unconnected to the defendants and their communities. Several African states threaten to withdraw from the ICC because of its alleged bias against Africa; on October 27, 2017, Burundi became the first state to do so. These threatened withdrawals exacerbate another problem: numerous states have not even joined the ICC, most notably the United States, Russia, and China.

The ICC is the first attempt at truly institutionalizing the prosecution of the most serious crimes. More philosophical research into the legitimacy of international criminal law is paramount. This project will approach this important issue through the work of Hannah Arendt (1906-1975), one of the most influential political thinkers of the twentieth century. Throughout her career, she studied many pertinent subjects, most notably the problem of state

sovereignty, the basis of law, and personal responsibility in state-sanctioned crimes. My research question will therefore be:

What can the work of Hannah Arendt tell us about the legitimacy of contemporary international criminal law?

In her most well-known book, *Eichmann in Jerusalem* (1963), Arendt pleaded for the creation of an international criminal court. Claiming it was nothing more than a 'trial report' – unfairly, as she dealt with various philosophical issues – Arendt did not provide much argumentation. This project will therefore also answer the question: What is the philosophical basis underlying Arendt's plea for an international criminal court? Contemporary scholarship has overlooked the legal theory that underlies Arendt's plea. This is unfortunate and misguided, since Arendt's other works offer a framework for understanding her views on international criminal law. This project will study the Arendtian model for an international criminal court. Because of Arendt's originality in theorizing (international) law and crimes against humanity, this model will yield new insight into the problems of contemporary international criminal law.

Criticism of International Criminal Law

The first ventures into international criminal law were the international military tribunals of Nuremberg (1945) and Tokyo (1946), which prosecuted German and Japanese war criminals respectively. After a long absence, international criminal law experienced a revival after the Cold War with the creation of new *ad hoc* tribunals, most prominently the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994). A common criticism, however, is that such *ad hoc* tribunals violate the principle of *nullum crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law). First, these tribunals prosecute actions committed before these courts are created. Secondly, the Nuremberg tribunal prosecuted defendants for crimes against humanity, a category that did not exist before. Furthermore, *ad hoc* tribunals are claimed to be victor's justice: the Nuremberg tribunal only prosecuted the crimes of Nazi Germany, while there was ample reason to prosecute the victors for similar crimes.

The ICC, created in 2002, is the first permanent tribunal. The hope was that it would definitively end the impunity of international crimes, such as genocide and crimes against humanity. But this success is marred by persistent criticism and non-participation of several major powers. In May 2002, the United States announced that they would not join the ICC, though they signed the Rome Statute of the International Criminal Court. In November 2016, Russia also refused to join, although they, too, had signed the Rome Statute. Other large states like China and India have not joined the ICC either, while some member states may follow the example of Burundi. The probability of ending the impunity of international crimes is therefore very low.

The criticism of international criminal law is multifaceted. One of the most persistent criticisms is that an international court has no real connection to the crime or to the political community where the crime took place. This criticism is twofold. First, prosecution according to international law creates a disconnect between court and defendant. Traditionally, criminal law is connected with a community, so that a defendant (generally) recognizes its authority. International criminal law apparently represents a 'community of humanity.' However, numerous African states claim that international criminal law is Western, conjuring the specter of imperialism. Second, prosecution according to international law lacks a constitutional structure.³⁶ There are no clearly delineated procedures of legislation, adjudication, and execution of the law. It may even be unclear what the sources of law are: international criminal law is often vague, meaning that international courts must engage in judicial lawmaking to fill the gaps.³⁷ This renews fears of courts violating *nullum crimes sine lege* – even though the ICC cannot prosecute crimes committed before it was established. Thus, critics claim the ICC is a 'foreign' court that lacks democratic accountability.

A second common criticism concerns an alleged vulnerability to politicization. This fear is largely due to the vagueness of international criminal law. This means that, when a state and a court genuinely disagree about the interpretation of the law or of the crime, prosecution is perceived as undue political influence. The ICC was thought to be shielded from further politicization by the UN Security Council (although some fear the ICC will be politicized by NGOs instead³⁸), as permanent members cannot veto an investigation. Only an affirmative vote halts an investigation (for twelve months).³⁹ But this only changes the mechanism of politicization: a veto now *ensures* that an investigation continues. Hence, even the ICC can still be influenced by states.

Thirdly, critics decry the ICC's jurisdiction for a claimed risk of overreach, because the ICC has jurisdiction on the territory of its member states.⁴⁰ This means that the citizens of a non-member state can become subject of investigation and prosecution by the ICC if the crime is committed on the territory of a member state. This even led some of the supporters of international criminal law to criticize the ICC. Jack Goldsmith (2003) argues that the ICC's jurisdiction over signatories' territory leads to *increased* impunity of human rights violations. It prevents the United States from using force in states where human rights violations occur in order to stop these violations and arrest the perpetrators. Such 'humanitarian interventions' could lead to investigations into possible war crimes. This problem is exacerbated by the fact that even non-members can accept the jurisdiction of the ICC on a particular crime.⁴¹

³⁶ Bolton, 2001.

³⁷ Cf. Van Schaack, 2008.

³⁸ Bolton, 2001.

³⁹ Rome Statute, art. 16.

⁴⁰ Rome Statute, art. 12(2).

⁴¹ Rome Statute, art. 12(3).

Because no state official can ever be sure that humanitarian intervention will not be prosecuted, they may be disinclined to intervene, which may embolden (future) war criminals.

Tying these criticisms together is the prominent claim that international criminal law is incompatible with state sovereignty. Criminal prosecution of one's citizens is normally the prerogative of the state. Prosecution by an international tribunal is therefore seen as interference with a state's internal affairs. Moreover, even the citizens acting in an official capacity may be investigated and prosecuted by the ICC. This plays a substantial role in the attitude of the United States, as they have an active (military) presence in the world.⁴²

'State of the Art'

Although Hannah Arendt is primarily known for her political theory, recent scholarship has showed a growing interest in her legal theory.⁴³ One of the first to focus on Arendt's legal theory is international lawyer Jan Klabbers. In his seminal article, he explores Arendt's understanding of law, which holds that the law is the expression of a promise between equals.⁴⁴ Her understanding of law as promise is meant to counter the conception of law as command, which Arendt considers both inaccurate and harmful. This conception of law leads Klabbers to examine the various issues in contemporary international legal theory which Arendt's work can help elucidate.

Klabbers's article provoked further research into Arendt's legal theory, but hardly in the context of international law. Rather, philosophers primarily interpret Arendt's understanding of law through the lens of domestic politics. Perhaps the most comprehensive account is Christian Volk's *Arendtian Constitutionalism* (2012). His main thesis is that Arendt 'de-hierarchized' law and politics, meaning that law does not trump politics nor is politics unbound by law. For Arendt, law's authority depends on political activism, while politics cannot exist without legal bounds. Volk's interpretation is meant to elucidate Arendt's legal theory for the domestic sphere; he does not develop its implications for international law.

Volk's analysis is pertinent to the international sphere, however, because the basis for his 'de-hierarchization thesis' is Arendt's rejection of sovereignty. According to Volk, Arendt identified several paradoxes of sovereignty, which manifested in Europe during the interwar period.⁴⁵ Sovereignty turned out to be contradictory: it can only be preserved by international agreements that are, paradoxically, deemed incompatible with sovereignty. Arendt's rejection of sovereignty is therefore total. First, Arendt contends that sovereignty in the domestic sphere is incompatible with both law and politics.⁴⁶ Secondly, she argues that sovereignty in the international sphere is untenable. She believes that a new concept of state should be

⁴² Bolton, 2001.

⁴³ See Goldoni and McCorkindale, 2012.

⁴⁴ Klabbers, 2007.

⁴⁵ Volk, 2010.

⁴⁶ See also Arato and Cohen, 2010.

developed, one she sought in the federal structure.⁴⁷ For Arendt, the upshot of international law is world federalism.

Arendt's understanding of law as promise is remarkably pertinent to international law, which is largely based in treaties. It is therefore all the more remarkable that interpretations of Arendt's argument for an international criminal court make no use of her legal theory. Moreover, the scholarship on *Eichmann in Jerusalem* is rarely informed by a legal perspective. Lida Maxwell (2012), for example, interprets Arendt from a political perspective. She argues that Arendt's plea must be interpreted as a political intervention, a contestation of existing (legal) norms that was meant to enable the creation of a new institution. Seyla Benhabib (2000) interprets Arendt from a moral perspective. She asserts that Arendt's plea mediates between her moral universalism of the ideal of humanity and the particularism of the destruction of the Jews.

The few scholars that do interpret Arendt's views on international criminal law through a legal lens make no use of her legal theory. Thomas Mertens (2005) argues that Arendt's view on territorial jurisdiction based on culture conflicts with her idea that genocide, as a crime against humanity, should be prosecuted by an international court; Mertens maintains we should opt for the latter. Leora Bilsky (2010), on the other hand, interprets Arendt's view on territoriality as a useful alternative to universal jurisdiction, reducing the risk of politicization while simultaneously acknowledging the link to the community. Both commentators merely contrast Arendt's view on territoriality with contemporary international criminal law. Hence, neither accurately represents Arendt's views on international criminal law, as Arendt's concepts of legitimacy and authority are intimately connected with her legal theory.⁴⁸

Aim and Methodology

Although Arendt is recognized as a great source of inspiration for contemporary (international) legal questions, this research project will be the first to fully explore her legal theory in the framework of international criminal law. The project will address two issues. First, it will interpret Arendt's views on international criminal law based on a comprehensive interpretation of her legal thinking. Where current scholarship has overlooked Arendt's legal theory, this project will study this theory in order to create a deeper understanding of what kind of international criminal court she had in mind. Second, this Arendtian model of international criminal law offers a new, critical perspective that this project will fully exploit. It will form the basis of a contribution to the debate on the legitimacy of international criminal law.

The project will make use of textual analysis, legal analysis, and conceptual argumentation. In order to properly judge the Arendtian model of international criminal law, the project will

⁴⁷ See Klusmeyer, 2010.

⁴⁸ See Young, 2002.

first analyze the contemporary approach to international criminal law, both in theory and in practice. Hence, it will study arguments in jurisprudential and philosophical debates, but also in case law. This analysis provides a detailed depiction of the issues regarding the legitimacy of international criminal law.

An accurate understanding of Arendt's views on international criminal law requires the context of her other works, particularly with reference to her views on law and judgment. The project will therefore study Arendt's oeuvre through a textual and conceptual analysis. With this context, it will be clear that the Arendtian model provides a great new perspective, because Arendt's views are rather different from contemporary theory and practice. First of all, Arendt believes there is only one goal of criminal trials: justice. This is in sharp contrast to the prominent theory that the goal of international criminal law is norm projection, showing the world that some crimes are particularly heinous and truly unacceptable.⁴⁹

Perhaps the most consequential difference is Arendt's concept of genocide.⁵⁰ She deviates from the contemporary legal definition, which treats genocide and crimes against humanity as two different crimes.⁵¹ Instead, Arendt characterizes genocide *as* a crime against humanity. This is meant to convey the idea that the harmed community is humanity: the destruction of an entire people harms humanity, the plurality of peoples. Because of this, Arendt thought it more appropriate to try Eichmann in an international criminal court representing humanity.

For Arendt, humanity is not a biological but a political concept: in a world unified by our technical mastery, Arendt argues we have a duty to solidify this unity by mutual agreements. Fully understanding Arendt's concepts of 'genocide' and 'humanity' therefore requires studying her criticism of sovereignty and her alternative of world federalism.⁵² Arendt's understanding of law as promise means that a world without sovereignty is not a world without law. Thus, her legal theory offers a *prima facie* justification for criminal punishment without sovereignty. This is vital in any argument against the defenders of state sovereignty.

Arendt also dealt with the problem of *nullum crimen sine lege*. In the context of the Eichmann trial, she argues that the principle was not substantively violated because the crime of genocide was simply unknown to any legislature. This new crime therefore had to be judged according to new law. This is Arendt's idea of 'reflective judgment,' our ability to judge unguided by pre-established criteria. Such judicial lawmaking seems the only way to end impunity in absence of world federalism.⁵³ Arendt investigated this 'reflective judgment' because of the Eichmann trial; we must therefore study her later work on judgment to determine whether reflective judgment satisfies *nullum crimen sine lege*. The project will build on current scholarship on this concept.⁵⁴

⁴⁹ E.g., Sloane, 2007; Luban, 2010.

⁵⁰ See also Benhabib, 2009; Luban 2015.

⁵¹ Rome Statute, art. 5.

⁵² See also Klusmeyer, 2010; Volk, 2012.

⁵³ Compare Van Schaack, 2008.

⁵⁴ Deutscher, 2007; Schwartz, 2016.

The theory of international criminal law that this study of Arendt's work will produce offers a new perspective on contemporary international criminal law. Through the perspective of Arendt's original reasoning, this project will contribute to the debate on the legitimacy of international criminal law.

Word count: 2492

Keywords

Hannah Arendt, International criminal law, State sovereignty, Personal responsibility, Crimes against humanity.

Timetable

Timeframe	Research Work	Output
Sept 2018 – Aug 2019	Study of contemporary theories of international law. Research on Arendt's understanding of (international) law.	First chapter of the dissertation.
Sept 2019 – Aug 2020	Analysis of the criticism of international criminal law, and of contemporary justifications of international criminal law. Study of Arendt's (descriptive and normative) concept of humanity; study of Arendt's theory of personal responsibility in state sanctioned crimes.	Article on Arendt's alternative to state sovereignty, world federalism. Second and third chapters of the dissertation.
Sept 2020 – Aug 2021	Historical research on the reception of <i>Eichmann in Jerusalem</i> and an analysis of the soundness of Arendt's legal arguments. Research on Arendt's (reflective) judgment, both during conflicts and post-conflict (criminal judgment); research on contemporary arguments for international criminal law upholding <i>nullum crimen sine lege</i> .	Article on the response to <i>Eichmann in Jerusalem</i> : the criticism in public debate and the estimation by legal scholarship. Fourth chapter of the dissertation.
Sept 2021 – Aug 2022	Construction of the Arendtian model of international criminal law; contrasting this model with contemporary theories.	Fifth chapter of the dissertation; completing the dissertation. Presentation of the results.

Summary for Nonspecialists

After World War II was won, the Allies decided that they would prosecute state officials of both Nazi Germany and Japan. This decision was unprecedented. The state had always been sovereign, which meant that all actions of a state were the sole responsibility of that state. State officials, acting on behalf of the state, therefore could not be prosecuted by other states. This was the birth of international criminal law, which ultimately led to the creation of the International Criminal Court (ICC) in The Hague in 2002. This permanent court would end the need for creating temporary courts for each occurrence of crimes against humanity. The hope was that the ICC would definitively end the impunity of war criminals. But despite this enormous progress, the legitimacy of international criminal law remains disputed.

Critics claim that international criminal courts have no right to judge crimes that were committed in a country far away. The legitimacy of a court, critics claim, requires a close connection with the community in which the crime is committed. International criminal courts lack this connection; the community they represent is the 'community' of humanity. The disputed legitimacy of international criminal law has a direct consequence: numerous states have not joined the ICC, most notably the United States, Russia, and China. These states argue that the ICC is incompatible with state sovereignty. Theorists of international criminal law have yet to provide a satisfying answer to these criticisms.

This research project will approach this important issue via the work of Hannah Arendt (1906-1975), one of the most influential political thinkers of the twentieth century. The research question it intends to answer is: What can the work of Hannah Arendt tell us about the legitimacy of (contemporary) international criminal law? Throughout her career, Arendt tried to understand the background and consequences of totalitarianism and its crimes, as she was forced to flee Nazi Germany. In her well-known book *Eichmann in Jerusalem* (1963), a report on the trial of the SS-officer Adolf Eichmann, she pleaded for the creation of an international criminal court. However, she did not provide much argumentation for her plea. For this, we must turn to her other work. Until now, however, the scholarship on Arendt has failed to take her other works into account.

This project will be the first to interpret Arendt's ideas on international criminal law within the framework of her entire philosophical work. The project will therefore also answer the following question: What is the philosophical basis underlying Arendt's plea for an international criminal court? Arendt's books deal with many relevant issues, among which judgment, the problem of state sovereignty, and the idea of international law as world federalism. These other works are fundamental in understanding Arendt's views on prosecuting crimes against humanity. These views provide a new perspective on the contemporary problems of the legitimacy of international criminal law. This project will use this new perspective, and it will try to find new answers to the criticisms of international criminal law.

Word count: 498

Bibliography

- Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil*. New York: Viking Press, 1963.
- Arato, Andrew, and Jean L. Cohen. "Banishing the Sovereign? Internal and External Sovereignty in Arendt." In *Politics in Dark Times*, edited by Seyla Benhabib, 137-171. New York: Cambridge University Press, 2010.
- Benhabib, Seyla. "Arendt's *Eichmann in Jerusalem*." In *The Cambridge Companion to Hannah Arendt*, edited by Dana Villa, 65-85. Cambridge: Cambridge University Press, 2000.
- . "International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin." *Constellations* 16, no. 2 (2009): 331-350.
- Bilsky, Leora. "The Eichmann Trial and the Legacy of Jurisdiction." In *Politics in Dark Times*, edited by Seyla Benhabib, 198-218. New York: Cambridge University Press, 2010.
- Birmingham, Peg. "Hannah Arendt's Philosophy of Law Approach to International Criminal Law." *International Criminal Law Review* 14, no. 4-5 (2014): 695-716.
- Bolton, John R. "The Risks and Weaknesses of the International Criminal Court from America's Perspective." *Law and Contemporary Problems* 64, no. 1 (2001): 167-180.
- Deutscher, Max. *Judgment After Arendt*. Aldershot: Ashgate, 2007.
- Goldoni, Marco, and Christopher McCorkindale, eds. *Hannah Arendt and the Law*. Oxford: Hart Publishing, 2012.
- Goldsmith, Jack. "The Self-Defeating International Criminal Court." *The University of Chicago Law Review* 70, no. 1 (2003): 89-104.
- Klabbers, Jan. "Possible Islands of Predictability: The Legal Thought of Hannah Arendt." *Leiden Journal of International Law* 20, no. 1 (2007): 1-23.
- Klusmeyer, Douglas. "Hannah Arendt's Case for Federalism." *Publius* 40, no. 1 (2010): 31-58.
- Lang, Jr. Anthony F., and John Williams, eds. *Hannah Arendt and International Relations: Reading Across the Lines*. New York: Palgrave Macmillan, 2005.
- Luban, David. "Arendt on the Crime of Crimes." *Ratio Juris* 28, no. 3 (2015): 307-325.
- . "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law." In *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, 569-588. Oxford: Oxford University Press, 2010.
- . "Hannah Arendt as a Theorist of International Criminal Law." *International Criminal Law Review* 11, no. 3 (2011): 621-641.
- Maxwell, Lida. "Toward an agonistic understanding of law: Law and politics in Hannah Arendt's *Eichmann in Jerusalem*." *Contemporary Political Theory* 11, no. 1 (2012): 88-108.
- Mertens, Thomas. "Memory, Politics and Law – The Eichmann Trial: Hannah Arendt's View on the Jerusalem Court's Competence." *German Law Journal* 6, no. 2 (2005): 407-424.
- Owens, Patricia. *Between War and Politics: International Relations and the Thought of Hannah Arendt*. Oxford: Oxford University Press, 2007.
- Schwartz, Jonathan Peter. *Arendt's Judgment: Freedom, Responsibility, Citizenship*. Philadelphia: University of Pennsylvania Press, 2016.
- Sloane, Robert D. "The Expressive Capacity of International Punishment." *Stanford Journal of International Law* 43, no. 1 (2007): 39-94.
- Van Schaack, Beth. "*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals." *Georgetown Law Journal* 97, no. 1 (2008): 119-192.
- Volk, Christian. *Arendtian Constitutionalism: Law, Politics and the Order of Freedom*. Oxford: Hart Publishing, 2012.
- . "The Decline of Order: Hannah Arendt and the Paradoxes of the Nation-State." In *Politics in Dark Times*, edited by Seyla Benhabib, 172-197. New York: Cambridge University Press, 2010.
- Young, Iris Marion. "Power, Violence, and Legitimacy: A Reading of Hannah Arendt in an Age of Police Brutality and Humanitarian Intervention." In *Breaking the Cycles of Hatred: Memory, Law, and Repair*, by Martha Minow, edited by Nancy L. Rosenblum, 260-287. Princeton: Princeton University Press, 2002.

Curriculum vitae

Personal details:

Name: Van Bruggen, M.W.
 First name: Machiel
 Address: Nimrodlaan 13
 6713 HP Ede
 Phone: 06-44613297
 E-mail: m.w.vanbruggen@outlook.com
 Date of birth: 29 November 1988
 Place of birth: Ede
 Nationality: Dutch
 LinkedIn: nl.linkedin.com/in/machielvanbruggen



I am an aspiring academic philosopher. Currently, I am in the process of graduating from the Philosophy Research Master at Radboud University Nijmegen, after having graduated from the regular master in philosophy with honors (*cum laude*). I have chosen to continue my studies in philosophy, as it is my strong ambition to pursue an academic career.

I specialize in Political Philosophy and Philosophy of Law. My main interest lies in the relation between the citizen, on the one hand, and political power and the law, on the other. But my interests are not limited to philosophy; I am interested in the societal practice of law and politics as well.

Because of my extensive engagement with philosophy, both at university and in my spare time, I have become a critical thinker with excellent analytical skills. Furthermore, I am an excellent writer, able to write on an academic level, both in English and in Dutch. During my studies I have also gained experience in writing for a broader audience, both in philosophical texts and in journalism.

Education:

- 2016- Philosophy Research Master
- Expected graduation date: before January 31, 2018
 - Specialization: Social and Political Philosophy
 - With courses at Utrecht University (Topics in the Philosophy of Human Rights) and at the Vrije Universiteit Amsterdam (Public International Law).
 - Master's thesis on the concept of legal authority implicit in the work of Hannah Arendt.
- Radboud University Nijmegen*
- 2014-2016 Philosophy Master (graduated *cum laude*)
- Specialization in Practical Philosophy, with emphasis on Political Philosophy, and with (additional) courses in the Philosophy of Law.

- Master's thesis on Hannah Arendt's conception of civil disobedience. (Grade: 8,0)
Radboud University Nijmegen

2011-2014 Philosophy Bachelor (graduated *cum laude*)

- Bachelor's thesis on legal obligation and personal autonomy in Immanuel Kant and Robert Paul Wolff. (Grade: 8,0)
- With a minor in History: Social History of the United States of America, and Cultural History of Europe.
Radboud University Nijmegen.

2007-2010 Business Administration Bachelor (no degree)
University Twente

2001-2007 VWO, Nature & Health
Het Streek, Ede

Work Experience:

2016- Distribution at Plantion Ede
Part-time.

2010-2012 Mail delivery at TNT Post / PostNL
Initially for five days per week. After enrollment in the Philosophy Bachelor part-time.

Skills:

Typing course
Driver's license B

Languages:

Dutch: mother tongue
English: excellent (Oxford Online Placement Test: score C2)
German: average

Hobbies:

Sport climbing
Reading
Philosophy
History
Progressive (rock) music