

This paper is an inquiry into the legitimation problem of new beginnings of political communities, or put in another way, the problem of the origins of the authority of constitutional orders. The problem is that when a political community is constituted, the act of constituting is per definition unconstitutional or extra-legal; no law exists to provide it with legitimacy. For this reason, the question of the origins of legal orders falls, strictly speaking, outside the scope of legal theory.^[1] The question is thus how we can understand new beginnings of political communities? Can there be any extra-legal criterion for distinguishing between legitimate and illegitimate political beginnings? And since ordinary law rests upon this beginning—the constitution—can we ultimately distinguish between legitimate and illegitimate laws? Or, will the constitution of law always be a manifestation of historical relations of domination as famously has been argued by Walter Benjamin; “*Rechtsetzung ist Machtsetzung und insofern ein Akt von unmittelbarer Manifestation der Gewalt*”^[2]? In that case we might just as well restate La Fontaine’s famous dictum: “*La raison du plus fort est toujours la meilleure*” and conclude that legitimacy is nothing but a mask of sovereign power to command.

In this paper I will look into the tradition of constituent power in two of its modern exponents: Emmanuel Sieyès and Hannah Arendt. This tradition argues against the tradition of sovereign power of domination as the origins of new beginnings. This tradition makes it possible to think new beginnings of politics on basis, not on *power over*, but on *power to* and *power with*, that is, democratic beginnings of popular sovereignty. In the tradition of constituent power, the origins of political power always reside with the many (the people, multitude, the demos, the ruled) and never with the few (the pope, the emperor, the king, the ruler): the political power of the ruler has its origins in the ruled themselves; power emanated from below, not from above. The ideal typical core of the tradition of constituent power is that sovereign power has to be understood as (at least) dualistic. The power to command (*power over*)—eloquently described by Jean Bodin: “There are none on earth, after God, greater than sovereign princes, whom God establishes as His lieutenants to command the rest of mankind”^[3] which in political theory is understood as the core of sovereign power—has to be distinguished from the common power to create political communities and laws and in some

cases depose these communities, laws or their instituted rulers (*power to* and *power with*).[4]

The problem of democratic legitimacy of new beginnings is however not easily solved within the tradition of constituent power because of an inherent tendency within the tradition of reproducing the sovereign power to command in the form of political theology, populism and sovereign dictatorship; as will be argued in this paper, the reference to “absolute foundations” (most often God, natural law or a deification of the people) opens up the possibility that popular sovereignty becomes dictatorial. Historically, and also recently, revolutionary new beginnings have been legitimized with reference to religion: the most recent example hereupon might be the Iranian Revolution of 1979.^[5] The danger of political theology in the form of populism and sacralization of the people (and not the recourse to explicit religious foundations) is however the most potent danger in this tradition. Countless examples can be given hereupon but maybe Napoleon’s dictum: “*Je suis le pouvoir constituant*” is the most clear cut example. The power of the people can very easily tip over into a sovereign dictatorship, whereby the sovereign power to command is reproduced by the common will of the people.

The problem for this paper is thus how to think radical democratic new beginnings; anti-metaphysical or groundless new beginnings; new beginnings that do not become political theological or collapse into sovereign dictatorships. Can we have any criteria for legitimacy if we accept that new beginnings are arbitrary and groundless? What would they be? What does it mean to begin in a radical democratic way? I will discuss these problems on basis of readings of Emmanuel Sieyès’ *What is the Third Estate?* and Hannah Arendt’s *On Revolution*.

The inherent danger of popular sovereignty becoming dictatorial whereby the sovereign power to command is reproduced in a deification of the people is maybe most emblematically manifested in Sieyès political pamphlet, *What Is The Third Estate?*, written in 1789 shortly before the outbreak of the French Revolution. In this pamphlet—‘the bible’ of the French Revolution—Sieyès seeks to solve the legitimation problem of revolutionary new beginnings of popular sovereignty. More specifically, the question Sieyès tried to answer is why it is legitimate that the Third Estate (composed mainly of the bourgeoisie) was entitled to act on behalf of the French Nation as the constituent power and draft and ratify a (new) constitution for France. Or in the words of this paper, Sieyès tried to make a case for why the political new beginning of the French Revolution is not merely an arbitrary act of violence. The pamphlet is of course dated in its discussion of the Third Estate (the discussion of which I will hence leave out), but through its logic we might be able to understand some of the problems extra-legal theories of new beginnings by popular sovereignty (or revolutionary new beginnings) face also today.

Sieyès tried to solve the problem of extra-legal legitimacy of constituent politics with his famous distinction between *pouvoir constituant* (the nation) and *pouvoir constitué* (the government), where the *pouvoir constituant* is the source of both legality and legitimacy: “The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself. Prior to the nation and above the nation there is only natural law.”[6] Due to the magnitude and dispersity of the members of the nation, the common will of the nation always have to be represented by a “government by proxy” to exercise its rights.[7] The notion of representation is maybe the most problematic of Sièyes’ concepts since the government by proxy (the office and the individual representatives) can belong both to the constituted power (*ordinary representatives*) and the constituent power (*extraordinary representatives*).^[8] The ordinary representatives, the government, are bound by the constitution and they are a product of positive law; the government is legal if it acts in accordance with the constitution it has been bound to by the nation. The nation, on the other hand, and those to represent it, is not bound by any constitution; the constitution is solely meant to bind the ordinary representatives.^[9] It would be absurd, Sieyès argues, if the nation could bind itself with a constitution. “What is a contract with one self?” he asks

mockingly.^[10] The nation always exists in a state of nature and it therefore has a perpetual right to overthrow any government or any constitution.

If a situation arises where the constitution itself is disputed among the ordinary representatives, the nation (the constituent power) has to be consulted and decide upon the disputed constitution: “Even if the nation had held regular sessions of the Estates-Generals” Sieyès argues, “it would not be up to this constituted body to pronounce upon a dispute affecting its own constitution.”^[11] The question is thus how the nation is to be consulted and who are entitled to do that? Regarding the latter, Sieyès argues that it is the duty of everyone, not least the executive power. The problem is of course how the nation is to pronounce its verdict since it, following Sieyès’ argument, only can act through representation. Here the *extraordinary representatives* of the nation come into the picture. As the ordinary representatives they are a “government by proxy,” but in contrast to the ordinary representative they are not bound by anything; they act from a state of nature and their will is law: “*Extraordinary* representatives have whatever new powers it pleases the Nation to give them.”^[12] The extraordinary representatives therefore erase the distinction between constituent and constituted power: it is a government that is not bound by a constitution. They can do anything, anything at all, because they, allegedly, act on behalf of the nation.

Sieyès’ fundamental distinction between *pouvoir constitué* and *pouvoir constituant* that makes up the heart of his argument thus collapses due to his understanding that the nation though unconstituted and in the state of nature, still bears the mark of the constituted form of representation. Representation requires some criteria of recognition and legitimation (e.g. rules of election) to provide the extraordinary representatives with the authority of the common will of the nation. A claim of informal representation can of course be made, but those claims are very doubtful since no criterion of legitimation exists for whether the extraordinary representatives speak on behalf of the nation or not. Further, it is hard to see why informal representatives, without any further criteria of legitimation, enjoy a greater

authority than the ordinary representatives, who, at least potentially, have the legitimacy of the popular vote. In the case of the French Revolution, the Third Estate had not received the authority to act on behalf of the constituent power from anyone: they merely claimed the authority of the constituent power: *Nous sommes le pouvoir constituant!*

The same claim of authority was made by Napoleon Bonaparte some 15 years later and the unpleasant truth is that the problem of the legitimacy of the Third Estate and Napoleon as extraordinary representatives of the people are identical. For this reason it is not hard to see how Sieyès' theory of the nation as the origins of law and the legitimacy of new beginnings easily can flip over into a sovereign dictatorship: in the name of the nation, one or a few men can implement any law they want without consulting anyone because they enjoy the legitimacy of the constituent power. This problem is however not only due to Sieyès' problematic understanding of representation but also his understanding of the nation as the subject of the constituent power. The nation is, for Sieyès, a secularized version of the divine right of kings, and in that way, pure political theology. The notion of the nation as the constituent power is problematic not only because it is metaphysical but also because it is prepolitical, naturalized, and therefore not politically contestable. Furthermore, the idea of a common will of the nation has some strong totalitarian traits because the political community is reduced to one individual will which therefore easily can be represented by one man, one leader. If the will of the people really could be reduced to the will of one individual person—a perfect consensus—democracy indeed seems compatible with dictatorship. In Sieyès' theory of constituent power, the legitimate origins of law founded on the power of the people, can ultimately not be distinguished from sovereign dictatorship, that is, the establishment of new constitutions by the dictator representing the sovereignty of the people. In the following I will engage with Hannah Arendt's comparison of the American and French Revolution and discuss whether a more promising understanding of democratic new beginnings can be found within her political theory.

Sieyès theory of popular sovereignty is according to Arendt the theoretical manifestation of the failure of the French Revolution. The problem is, Arendt argues, that legality and legitimacy are anchored in the same entity: the nation. By making the will of the nation (sacralized and in the state of nature) the answer both to the question of the legitimacy of the new power (the extraordinary representatives of the people: the Third Estate) and to the question of the legality of the new laws (the constitution imposed by the Third Estate), Sieyès and the men of the French Revolution created a foundation “built on quicksand” since the will of the nation, if anything but a legal fiction, will be ever changing.[13] “What saved the nation-state from immediate collapse and ruin,” Arendt writes sarcastically “was the extraordinary ease with which the national will could be manipulated and imposed upon whenever someone was willing to take the burden or glory of dictatorship upon himself.”[14] The destiny of the Sieyès’ conception of the nation was in this way from the very beginning Napoleon Bonaparte’s declaration, *je suis le pouvoir constituant*, which, as it happens, was the same as saying: *L’État, ce moi!*.

In contrast to Sieyès, Arendt insists on breaking the triad: legality/law, legitimacy/authority, people/nation. The source of legality, Arendt argues, is the constitution which in contrast to the ever changing will of the nation, is a tangible object and for that reason it provides some kind of endurance and stability. The nation is however also disregarded as the source of legitimacy of the constituent subject because of its political theological or metaphysical implications of the deification of the people. The deification of the nation is, according to Arendt, the most recent and most dangerous manifestation of the tradition of “absolutes” or political theology.[15] This tradition of political theology and “absolute” legitimation is however tied to a very specific notion of law, namely, the theory of law as command that according to Arendt is Hebrew in origin and is represented by the “Thou shalt not” of the Decalogue.[16] It is thus the inheritance of this tradition, the inheritance from absolutism and of law as command that makes Napoleon the inevitable destiny of the French Revolution and the political theory of Sieyès.

In contrast hereto, Arendt argues, the American Revolution had a totally different understanding of law which had its legacy in Roman republicanism and the political theory of Montesquieu.[17] In this tradition, law is not understood as a command with a divine author but as a mutual agreement between human beings: law is human, and not divine, in origin.[18] The law is, in this tradition “no more than ‘rules’ or *règles* which determine the government of the world and without which a world would not exist at all.”[19] In contrast to the men of the French Revolution, Arendt argues, the men of the American Revolution understood that only power founded upon promises, covenants and mutual pledges, and not the power of the nation which amounted to nothing more than a disguise of the divine commandment of the king, could be a legitimate foundation for law.[20] In this tradition, the constitution would be a mutual agreement which constitutes the realm of the political.

The question of legitimacy of this initial agreement which establishes the constitution, or, in Arendt’s words, the authority of the legal system, has still not been answered. It is difficult to answer this question since metaphysics and political theology have to be left out in principle and constituent power, therefore, has to be thought from the fundamental condition of modernity, namely groundlessness, without falling into the normative void of nihilism, where all constitutional acts would amount to nothing more than arbitrary acts of violence. Arendt tries to overcome this problem by arguing that the act of constitution-making carries within itself an immanent principle of legitimation or authority. In contrast to the men of the French Revolution, the men of the American Revolution did not respond to the collapse of the legitimacy of “absolutes” in modernity with a deification of the people; instead they found an immanent authority in the *performance* of the constituent power; they derived an authority from the *act* of a political new beginning itself.[21]

This understanding of an authority immanent to the action of foundation did not rely on any absolute; if it was religious in any sense, Arendt argues, it was only in the Roman sense of *religare*; in binding oneself to the beginning of the political community, which in the American case manifested itself in a “worship” of the constitution.[22] What provides authority is however not the constitution in the sense of the written document, but the constituent act,

the new beginning; the foundation of authority is in this way a performative immanence and not an external absolute principle.[23] This immanent principle of new beginnings saves the act of foundation from the inherent arbitrariness of new beginnings: it saves the American Revolution from becoming an arbitrary act of violence as the French terror.[24] The principle inherent to the new beginnings was exactly a contractual understanding of law as the constitution of the political realm on the basis of common deliberations and the strength of mutual pledges built on the combined power of the many.[25] In this way, Arendt argues, it is possible to think political new beginnings that are neither arbitrary acts of violence nor consolidations of relations of domination.

The experience of founding new political beginnings is an experience of freedom: the experience of bringing something new into the world together with equals. In *The Human Condition*, this experience is also the experience of true political life, which is based upon freedom and equality; politics consists in the human capacity to speak and act together and bring something new into the world.[26] Whether this form of beginning is democratic, and what that might mean, has however not been established yet. A way of illuminating this question might be to ask two other questions: firstly *where*, or in what space, does politics (the mutual promises and the common deliberation etc.) take place? And, secondly, *who* is the subject of the constituent power, who participates in this founding of new political beginnings?

“Political freedom,” Arendt argues “means the right ‘to be a participator in government’, or it means nothing.”[27] In the time of the American Revolution this experience of freedom took place in the town hall meetings, councils or wards and for this reason political freedom evolved from the bottom and not from the top in the American Revolution. The council system arose spontaneously during the revolution and presented a space of public freedom:

a space where people could speak and act together and give birth to new political ideas and changes. The council system presented an entirely new form of government manifested in the experience of self-rule and the abolition of the distinction between ruler and ruled. After the revolution this experience was however lost because the constitution did not institutionalize the new public spaces that appeared with the councils. Hereby the “revolutionary spirit” was lost.

The council system—the revolutionary spaces of freedom which were manifested in the soviets in the Russian Revolution and in the period of the French Revolution in the Paris Commune—was however not meant to be merely a short lived phenomenon of the revolutionary years; it was meant to be an entirely new form of government that persisted after the revolution; it was meant to be the constitution of freedom.[28] The council system was “nothing more or less than this hope for a transformation of the state, for a new form of government that would permit every member of the modern egalitarian society to become a ‘participator’ in public affairs, that was buried in the disasters of twentieth-century revolutions.”[29] In this way, the problem of representation which was discussed in relation to Sieyès is avoided in the council system because the people actually meet and develop their opinions with one another in the councils. During revolutions—here Arendt mentions the February Revolution of 1917 and the Hungarian Revolution of 1956—councils of many different kinds (councils of workers, soldiers, peasants, neighborhood, students, youths, writes, artists and so on) developed spontaneously and independently of the so called “professional revolutionaries” (parties and charismatic leaders).[30] Here Arendt presents some quite extraordinary claims: out of the “elementary conditions of action itself” in these spontaneously developing councils, the principle of consociation and confederation (“the federal principle”) arose.[31] This development, was aimed towards the common object of establishing a confederation of “elementary republics” (the councils), uninfluenced and independent of theoretical speculation or a threat of a common enemy.[32] Further, the “discovery” of the divisibility and separation of powers lies immanent in the action belonging to confederation because the councils are “jealous of their capacity to act and form opinion.”[33]

This new and spontaneously developing form of government—the federation of councils—was however crushed by professional revolutionaries and their concern, not for politics in the Arendtian sense, but for welfare of the people, or “the social question,” which led to the establishment, not of a council system, but of a party system. Where the councils were spaces of freedom where opinion could be developed and expressed, the parties were at best capable of representing the socio-economic interest of their voters.[34] In this way, Arendt argues, “the relationship between representative and elector is transformed into that of seller and buyer.”[35] The party system and the welfare state, Arendt argues, spell the end of politics because the people no longer participate in common deliberation and opinion making and their happiness is a private one.[36] In this way, opinion is reduced to interest, the people are reduced to the mass or the mob, politics is reduced to administration and the politicians are reduced to experts. In this way, Arendt argues, the ‘obsession’ with the social question—the ‘obsession’ with the socio-economic welfare of the people—led the welfare state, as it earlier had led Sieyès and the French Revolutionaries, to replace “the formula ‘government of the people by the people’” by this formula: ‘government of the people *by an élite sprung from the people.*’”[37]

At this point, it is however important that we raise the question of *who* the subject of the constituent power is according to Arendt. Even though politics concerns not only the many but everyone, the life of politics will always be the life of the few.[38] In her eagerness to contrast the opinion making of the councils from the social question, Arendt argues that councils concerned with socio-economic matters, such as workers’ councils cannot be understood as true examples of the council system:

“The councils have always been primarily political, with social and economic claims playing a very minor role, and it was precisely this lack of interest in social and economic questions which, in the view of the

revolutionary party, was a sure sign of their 'lower-middle-class, abstract, liberalistic mentality. In fact, it was a sign of their political maturity, whereas the workers' wish to run their factories themselves was a sign of the understandable, but politically irrelevant desire of individuals to rise into positions which up to then had been open only to the middle class." [39]

The problem with the workers' councils is, according to Arendt, that they are not concerned with the sphere of human relations, whose principle is *freedom*, but the sphere of life, whose principle is *necessity*: "The councils in the factories brought an element of action into the management of things, and this indeed could not but create chaos." [40] Ultimately, Arendt argues, the workers' councils failed because they tried to implement politics in the anti-political socio-economic sphere of labor, and the party system succeeded because of its anti-political oligarchic or autocratic structure of management.

As an alternative to these failures, Arendt proposes that the sphere of politics has to be purified from the socio-economic concerns of the welfare state, which is the same as saying that the social question should play no role in revolutionary politics. The public spaces of the councils, though in general open to the public, ought to be inhabited by the political elite (different from the social, cultural and professional elite) who will choose themselves in these public spaces. The political elite will be the guardian of political freedom and give birth to the law of the land; they will preserve the constitution through augmentation. This "aristocratic" form of government will however spell the end of general suffrage: "for only those who as voluntary members of an 'elementary republic' have demonstrated that they care for more than their private happiness and are concerned about the state of the world would have the right to be heard in the conduct of the business of the republic." [41] In this way, Arendt argues, political exclusion of the federal council system would be "self-exclusion": the people who do not choose to rise from the ranks of the necessity of mere life and courageously participate in the world of politics and public happiness do not have the right to participate in government. Instead they can enjoy the freedom from politics, which adequately was captured in the words of Benjamin Constant: "Poor men look after their own affairs; rich men hire stewards."

Arendt's rigorous distinction between the political and the social is one of the most problematic in her work, and it is the reason why her theory, in the end, becomes anti-democratic. Regarding the councils as space of pure politics a couple of points will have to be made. Firstly, it seems that Arendt in her eagerness to save the councils from the fate of the nation-state—which she ultimately perceives to be one-party dictatorship [42] or the Holocaust[43]—and her following rejection of the social sphere, she deprives the councils of all the content they historically had and all the content they imaginable could have. If the members of the councils are not supposed to be concerned with the social question, then what will they talk about and act upon, a part from maybe war and amendment rules (which in addition seems to present an uncanny combination), when they have decided upon the form of government? Further, who, if not the councils will decide upon everything else? If the councils are “islands of freedom” in the “sea of necessity,” [44] then who will make the laws of the sea? Arendt remains silent upon this point, but since they are merely “technical” questions in her opinion, one might speculate that a technocracy or a bureaucracy seems not to be incompatible with her theory as long as they do not enjoy any “political powers.” If the councils are not concerned with the social it is however hard to imagine how they could give laws to such a technical administration of the social whereby they could have been able to restrict the totalitarian tendencies of the no-man's rule of bureaucracy which Arendt herself was so afraid of. In a system where politics and the social are totally separated, the domination of the bureaucracy seems only to grow and politics to amount to very little.

It is confusing that Arendt concludes her discussion of the council system in *On Revolution* with a glorification of the purity of politics since her case studies of the American, Russian, and Hungarian Revolution speak directly against such a conclusion. All or most of the council she enumerates in *On Revolution* are exactly concerned with pragmatic questions that fall outside the scope of pure politics: councils of workers, soldiers, peasants, neighborhoods,

students, youths, writers, artists. None of these councils, which Arendt rightly perceives evolve from civil society or from “below,” would be interested in “pure politics.” The councils would, in general, be concerned with “politics of small things”[45] which cuts across the distinction between the social and the political; concrete cases of broader questions such as how to organize society, questions of production, of education and healthcare, questions of how to take care of children and elderly people, questions of individual, political, and social rights.

It was exactly this organization of civil society which so impressed Alexis de Tocqueville and made him conclude that only “the habits of the heart”[46] developed in civil and political associations can save modernity from sinking into tyranny. The political associations, Tocqueville argues, are however the most important because they teach people how to act in concert about governing their own society whereby they will lose the illusion that they are independent of other people and that they could do without society: political associations are “the great free school to which all citizens come to be taught the general theory of associations.”[47] The problem inherent to modernity of the atomization of the body politics (the problem of “individualism” in the terminology of Tocqueville) will be defeated because people constantly are reminded that their well being as well as the well being of their fellow men is dependent on their ability to act in concert. Perhaps Arendt is in agreement with Tocqueville on this point and believes that once people have learned the lessons of political associations and have been given both the taste and the freedom of association they will start to associate both for important and trivial matters and a culture of civil associations will start to bloom. Thus the organization of social life (though still distinguished from politics in the Arendtian sense) would be organized spontaneous and from below.

The Tocquevillian argument is crucial for Arendt's discussion of why the American Revolution was relatively more successful than the French Revolution. Where the French revolutionaries might have had a *taste* for public happiness or a theoretical idea of public happiness; the American society, in general, had had an *experience* of public happiness: "The point of the matter is that the Americans knew that public freedom consisted in having a share in public business, and that the activities connected with this business by no means constituted a burden but gave those who discharged them in public a feeling of happiness they could acquire nowhere else." [48] The argument latent in *On Revolution* is that the American Revolution succeeded where the French Revolution failed because, the new beginning of the body politic was not entirely new; the American people were already enjoying a strong civil society with a flourishing associational life and they were organized politically, though informally, in the town halls. A similar argument is made by Arendt in *What is Authority?*:

"More important, perhaps, was that the act of foundation, namely the colonization of the American continent, had preceded the Declaration of Independence, so that the framing of the constitution, falling back on existing charters and agreements, confirmed and legalized an already existing body politic rather than made it anew. Thus the actors in the American Revolution were spared the effort of 'initiating a new order of things' altogether; that is, they were spared the one action of which Machiavelli once said that 'there is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle.'" [49]

In this light, the French and not the American Revolution is an entirely new beginning; and the French Revolution failed exactly for this reason. It was a wild fantasy, a theoretical dream that envisioned, without any underlying experience, that anything, absolutely anything, was possible. The American Revolution appears on the other hand as little more than a consolidation of a preexisting though informal political society; the New England town halls.

Here we might ask: why then the fuss about the new beginning? What happened with the American Revolution, according to Arendt, was exactly that the town hall meetings were *not* institutionalized and that the true spirit of the revolution hereby was lost. Why then is Arendt

so obsessed with revolutionary new beginning since they are difficult, doubtful, and dangerous? The reason hereto, I think, goes to the center of Arendt's work, namely her deep conviction that the crisis of the present world is political and that the "decline of the West" primarily consists in the decline of what she calls "the Roman trinity" of religion, tradition and authority (which in context of this paper could be translated to legitimacy) which makes up the foundation of the body politic. In modernity, no such foundation exists for politics, and the revolutions do in this light appear as "gigantic attempts to repair these foundations, to renew the broken thread of tradition, and to restore, through founding new political bodies, what for so many centuries had endowed the affairs of men with some measure of dignity and greatness." [50] The new beginning, with its immanent source of authority or legitimacy is what can be thought of as a non political-theological or a non-metaphysical foundation under the groundless condition of modern politics. New beginnings are experiences of political freedom among equals and the mutual agreement and promises are an immanent source of authority: *we will abide the constitution because it is our law: we created it for ourselves so that we can live a free dignified life together.*

On Revolution is perhaps the greatest and most important theory of political legitimacy of new beginnings. Still, before we close, one more question has to be (re)addressed namely the question of the subject of constitutional politics. After distancing herself rigorously from Sieyès and the idea of 'government of the people *by an élite sprung from the people*' Arendt herself argues for an elitist understanding of politics. Arendt's elite might not be identical with the other elites of society; though it seems unlikely that the elites, *de facto*, will not coincide. Even if they do not coincide, we again have to raise the question of legitimacy. It seems that the idea of an elite who selects itself without popular vote is embarrassingly close to Sieyès' understanding of the extraordinary representatives of the nation. In both cases, a few 'heroes' select themselves without popular vote to devote their lives to politics and constitution-making. There are differences between the two models; the question is however whether Arendt's model of elitist government is more legitimate than Sieyès' model. Why are

the political new beginnings or the laws decided upon in the councils, described by Arendt, legitimate? Why does it not degrade into a sovereign dictatorship à la Sieyès?

The root of the problem is that Arendt does not discuss whether the immanent principle of new beginnings carries within itself a criterion for the subject of the constituent power. At least at first sight it does not tell us who or how many ought to participate for the constitution to be legitimate. Arendt, it seems, cannot make up her mind on this matter: on the one hand, she clearly acknowledges that power originates in the many, but at the same time politics is the life of the few. As long as the public spaces, in principle, are open for the many, and the political elite is chosen on basis of self-exclusion, the fact that only few people participate in the political councils does not seem to present a legitimation problem for Arendt. Here Arendt does not take the radicalism of her own theory seriously. If the contractual understanding of law is to work, it has to include more than a few deputies who select themselves to devote their lives to politics. It has to be not only the many but everyone; since politics, as acknowledged by Arendt, is the concern of everyone.[51] The argument of immanent authority in the act of constitution-making is therefore, contrary to Arendt's own argument, fundamentally democratic: it is not only for the elite but for everyone.

Here another problem arises, which we have to leave open, namely: who is "everyone"? For Arendt, "everyone" is "the sum total of citizens." [52] A quick look at the number of non-citizens in European or Western countries (immigrants and refugees, "legal" and "illegal") or even better Arendt's own analysis of the problem of refugees and stateless people in *The Origins of Totalitarianism* [53] will very quickly make it clear that everyone cannot unproblematically be equalized with the sum of all citizens. Territory is however also a problematic demarcator for political inclusion/exclusion since many laws today are without territory, or exceeds the territory in which they have been agreed upon. In a globalized world, international law (especially international law concerning "social matters" such as control of international capital and environmental policies) are the concern of all human beings living on the planet. To what extent the pyramidal structure of councils envisioned by Arendt, where legitimacy or authority is produced neither at the bottom, not at the top, but at each layer of

the pyramid,[54] can be enlarged beyond the territories that today belong to nation-states, and to what extent this is desirable, is an open question. A theory of radical democratic beginnings, or democratic legitimacy, would have to take this question of the subject of the constituent power seriously, since its immanent authority, proposed by Arendt, only springs from an actual feeling (sociological or phenomenological) of mutual promises and agreements of all the subjects of the law. Elsewhere, the immanent source of legitimacy has failed and the law will again have to be enforced by a monopoly of violence. The immanent source of legitimacy of the constituent power is democratic at its core and democratic legitimacy is not and cannot be elitist. Its power comes from grassroots of civil society and if it loses contact with its roots it will no longer live up to its name. Whether or how such legitimacy can be achieved remains, however, an open question.

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Tocqueville, Alexis: *Democracy in America*. New York: Anchor Books. 1969.

^[1] Martin Loughlin. 2003. *The Idea of Public Law*. Oxford: Oxford University Press, p. 99-100

^[2] Walter Benjamin. 1965. *Zur Kritik der Gewalt*, in *Zur Kritik der Gewalt und andere Aufsätze*. Frankfurt: Suhrkamp.

^[3] Jean Bodin. 2009. *Six Books on the Commonwealth*. Translated by M.J. Tooley. Oxford: Seven Treasures Publications, p. 80

[4] Three of the classical exponents of the theory of constituent powers would be Marsilius of Padua, Johannes Althusius and the Monarcomarcs (Stephanus Junius Brutus among others). In the writings of Marsilius of Padua (1275-1342), though he does not use the concept “constituent power,” the *power to* and the *power with* are manifested in the power to legislate and constitute the form of government; a power that resides, neither with the emperor nor with the pope, but with the multitude. For Marsilius, the power of the multitude, or what later has been known as *popular sovereignty*, is double: the power to legislate and the power to institute rulers (See Marsilius of Padua. 2005. *Defender of Peace*. Cambridge: Cambridge University Press). In the writings of Johannes Althusius (1563-1638), the *power to* and the *power with* are to be understood as the power of associations (families, communities etc.) to come together and form a commonwealth. For Althusius, this power to constitute is superior to the *power over* (the power of the king) (Johannes Althusius. 1995. *Politica*. Indianapolis: Liberty Fund, Inc.). In the theories of the Monarcomarcs, the *power to* and the *power with* is manifested in the power of the people to kill the ruler if he has become a tyrant: the people’s right to tyrannicide (See Stephanus Junius Brutus, the Celt. 1994 *Vindiciae, Contra Tyrannos: or, concerning the legitimate power of a prince over the people, and of the people over a prince*. Cambridge: Cambridge University Press).

^[5] The Iranian Declaration of Independence Article 1.1 states the foundation of the Islamic Republic of Iran as being based on the belief in “the One God (as stated in the phrase ‘There is no god except Allah’), His exclusive sovereignty and the right to legislate, and the necessity of submission to His commands.”

(<http://www.iranonline.com/iran/iran-info/government/constitution-1.html>)

[6] Emmanuel Sieyès. 2003. *What is the Third Estate?* in *Political Writings*. Cambridge: Hackett Publishing Company (hereafter, Sieyès, *What is the Third Estate?*), p. 136.

[7] Sieyès, *What Is the Third Estate?*, p. 136.

^[8] Sieyès, *What Is the Third Estate?*, p. 139.

^[9] Sieyès, *What Is the Third Estate?*, p. 137.

^[10] Sieyès, *What Is the Third Estate?*, p. 137.

^[11] Sieyès, *What Is the Third Estate?*, p. 138-139.

^[12] Sieyès, *What Is the Third Estate?*, p. 139.

[13] Hannah Arendt. 2006. *On Revolution*. London: Penguin Books (hereafter Arendt, *On Revolution*), p. 154.

[14] Arendt, *On Revolution*, p. 154.

[15] Arendt, *On Revolution*, p. 186-187.

[16] Arendt, *On Revolution*, p. 181

[17] Though Arendt does not mention it, this is of course the tradition of constituent power which goes back to Marsilius of Padua.

[18] Arendt, *On Revolution*, p. 179-180.

[19] Arendt, *On Revolution*, p. 180.

[20] Arendt, *On Revolution*, p. 173.

[21] Arendt, *On Revolution*, p. 190.

[22] Arendt, *On Revolution*, p. 190-191.

[23] “From this it follows that it is futile to search for an absolute to break the vicious circle in which all beginnings is inevitable caught, because this ‘absolute’ lies in the very act of beginning itself” (Arendt, *On Revolution*, p. 196).

[24] “What saves the act of beginning from its own arbitrariness,” Arendt writes “is that it carries within itself, or, to be more precise, that beginning and principle, *principium* and principle, are not only related to each other,

but are coeval. The absolute from which the beginning is to derive its own validity and which must save it, as it were, from its inherent arbitrariness is the principle which, together with it, makes its appearance in the world.” (Arendt, *On Revolution*, p. 205).

[25] Arendt, *On Revolution*, p. 206.

[26] Hannah Arendt. 1958. *The Human Condition*. Chicago: Chicago University Press. p. 8-9, 175-178

[27] Arendt, *On Revolution*, p. 210.

[28] Arendt, *On Revolution*, p. 256.

[29] Arendt, *On Revolution*, p. 257.

[30] Arendt, *On Revolution*, p. 259.

[31] Arendt, *On Revolution*, p. 259.

[32] Arendt, *On Revolution*, p. 259.

[33] Arendt, *On Revolution*, p. 259.

[34] In contrast to Sieyès, the participants of the political council—those few who cannot be happy unless they devote their love to public matters—are not representatives of the will or the interest of the people; they act in according with their own opinion. The distinction between interest and opinion is an important point for Arendt; where interest is of socio-economic character and belong to groups or classes or social strata, opinion solely belong to individuals who develop their opinion together with their equals within public spaces (Arendt, *On Revolution*, p. 219-221). Where interest is the apolitical concern of the professional revolutionaries or the bureaucrats of the welfare state, opinion is the true political concern of the participants in the councils. The failure of the French Revolution and the welfare state was exactly that they did not understand the importance of the “purity” of politics.

[35] Arendt, *On Revolution*, p. 268.

[36] Arendt, *On Revolution*, p. 261.

[37] Arendt, *On Revolution*, p. 269.

[38] Arendt, *On Revolution*, p. 267.

[39] Arendt, *On Revolution*, p. 266.

[40] Arendt, *On Revolution*, p. 266.

[41] Arendt, *On Revolution*, p. 271.

[42] Arendt, *On Revolution*, p. 258.

[43] Hannah Arendt. 2009. *The Origins of Totalitarianism*. Benediction Classics (hereafter: Arendt, *Origins*), p. 279-290

[44] Arendt, *On Revolution*, p. 268.

[45] Jeffrey C. Goldfarb. 2006. *The Politics of Small Things: The Power of the Powerless in Dark Times*. Chicago: The University of Chicago Press, p. 10ff.

[46] Alexis de Tocqueville. 1969. *Democracy in America*. New York: Anchor Books (hereafter: Tocqueville, *Democracy*), p. 277, 287.

[47] Tocqueville, *Democracy*, p. 522.

[48] Arendt, *On Revolution*, p. 110.

[49] Arendt, *What is Authority?*, p. 140-141.

[50] Arendt, *What is Authority?*, p. 140.

[51] Arendt, *On Revolution*, p. 267.

[52] Arendt, *On Revolution*, p. 267.

[53] Hannah Arendt, *Origins*, p. 269ff.

[54] Arendt, *On Revolution*, p. 270.