



ON THE ORIGINS OF RULE OF LAW AND THE META-PHYSICS OF INSTITUTIONS

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Abstract

The question concerning the origins or the beginning of the concepts is a philosophical problem that is located at the core of some of the most important reflections in our current time. In specific, the question about the origins of the state — the Rule of Law — is taken as the object of this reflection. It's known that there is a wide range of answers given to it, mainly by the classical perspective of distinct authors that addressed the issue, in an effort to create theories that could shape an outlook to the social community and explain some important themes which structure the identity of a society, as such, the origins of sovereignty, the legitimacy of the representatives, the declarations of rights and the functioning of the institutions. The aim of the present paper is to show the mechanisms that work in the "underground" of these concepts or, how does the institutions use a meta-physical production of self-legitimizing acts. Problems that can be seen in the "we" of term "We the people", in the following terms: who is the "we" that precedes the "We the people", or constitutes the "people"? The state is thought as being "always there", even before the "we"? One can say that our forebears created the state but, when? And, where did come the power that legitimated our forebears? On the other hand, from where is originated the legitimacy of the Law? How to enforce the law, remembering that the Law is an authorized and justified force, a force that justifies itself. And, furthermore, the operation that creates the Law tend to be a *coup de force*, that no prior foundation could, by definition, guarantee, ensure or contradict. In sum, the search for the origins of the Rule of Law implies in putting in evidence the aporias that constitutes both the Law and Politics and, as a consequence, the uses that Law makes of politics to legitimate itself, and vice versa. Considering that both institutions bear a meta-physical structure of legitimation.

Keywords

Rule of Law. Institutions. Politics.

SOBRE AS ORIGENS DO ESTADO DE DIREITO E META-FÍSICA DAS INSTITUIÇÕES

Resumo

A pergunta sobre as origens ou o início dos conceitos é um problema filo-filosófica que está localizado no centro de algumas das reflexões mais importantes do nosso tempo atual. Em específico, a pergunta sobre as origens do Estado – o Estado de Direito – é tomado como objeto

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desta reflexão. É conhecido que há uma ampla gama de respostas que lhe são dadas, principalmente pela perspectiva clássica de autores distintos que abordaram o tema, em um esforço para criar teorias que poderiam moldar uma perspectiva para a comunidade social e explicar alguns temas importantes que estruturam a identidade de uma sociedade, como tal, as origens da soberania, a legitimidade dos representantes, as declarações de direitos e o funcionamento das instituições. O objetivo do presente artigo é mostrar os mecanismos que trabalham no "subterrâneo" desses conceitos ou, como é que as instituições usam um meta-produção física de atos autolegitimação. Problemas que podem ser vistos no "nós" do termo "Nós, o povo", nos seguintes termos: quem é o "nós" que precede o "Nós o povo", ou que constitui o "povo"? O estado é considerado como sendo "sempre lá", mesmo antes do "nós"? Pode-se dizer que os nossos antepassados criaram o Estado, mas, quando? E, de onde veio o poder que legitima os nossos antepassados? Por outro lado, de onde se origina a legitimidade do Direito? Como fazer cumprir a lei, lembrando que a lei é uma força autorizada e justificado, uma força que se justifica. E, além disso, a operação que cria a Lei tendem a ser um golpe de força, que nenhuma fundação prévia poderia, por definição, garantir, assegurar ou contradizem. Em suma, a busca pelas origens do Estado de Direito implica em colocar em evidência as aporias que constitui tanto a Lei e Política e, como consequência, os usos que a Lei faz da política a si mesmo legítimo, e vice-versa. Considerando que as duas instituições têm uma meta-estrutura física de legitimação.

Palavras-chave

Estado de Direito. Instituições. Política.

1. FOUNDATION

According to Hannah Arendt, the concept of authority has vanished from the modern world — not the concept in its large sense, but a specific form of it that has been valid in the Western world for a long time.¹ Arendt is talking about the Roman concept of political authority, in which the source of authority rested in the past, in the moment of the foundation of Rome, and in the importance of its forebears.

In Rome, says Arendt, since the beginning of the Republic, the sacred character of the foundation was sustained because once something has been founded, it remains connected to future generations. This was the form of political participation in Rome: the preservation of the foundation of the city, connecting it with the past, and the effort to build foundations that would last for eternity.

Those who held authority were the elders, the Senate or the *patres*, who inherited this authority from the founders of all future things.² For the Romans, the authority of the living was dependent on the founder's authority. *Auctoritas* connected to the past, to the tradition, and was set against power, *potestas*, the force of the living. *Auctoritas* was rooted in the past but was present and important to political life as much as the power or the force of the

¹ ARENDT, H. "What is Authority?". In: *Between the Past and the Future*. New York: Penguin Books, 1993. p. 91.

² ARENDT, H. ***Between the Past and the Future***.

living. Although the power was derived from the people, the authority rested in the Senate.

According to Hannah Arendt, the Romans required “founding fathers” and examples of authority in terms of ideas. This led them to take the Greek ancestors as authorities who provided philosophy and poetry.³ The past was sanctified through the tradition that preserved it, leaving the testimony of the forebears as a hope for the future generations.

Arendt noted that this model was incorporated by the Christian church, which transformed the Nativity into a “new foundation”. The same phenomenon was used in the Enlightenment revolutions, in which the French and Americans preached belief in a future State and in a “vengeful God” as part of the new political body.

Thomas Jefferson affirmed the need for a divine principle, a transcendent sanction in the public realm. Curiously, this sanction was called for during the revolutionary period, demonstrating the founders’ need for some type of metaphysical support.⁴

Although the authority, in its Roman sense demonstrated by Arendt, came close to complete oblivion, it has subsisted in Western political history in two ways: through modern revolutions, which rescued the importance of the idea of foundation, and in Machiavellian thought, in which the concept of foundation is fundamental.⁵

Conscious of the need for a new political organism, Machiavelli utilized the term *stato*, which identified him as the “father” of the modern concept of the State. Arendt adds that it is possible to consider Machiavelli the precursor of modern revolutions because he understood that in the foundation existed the central political action, the only great activity that could establish the public and political domain and that could turn the political into reality.

The modern revolutions — generally considered radical ruptures with tradition — emerged as events of political actions that were inspired by the origin of this tradition and extracted their primary force from it. According to Fioravanti, whereas the French revolution attempted to combine the individualist model with the State, the American Revolution attempted to combine

³ ARENDT, H. **Between the Past and the Future**. About philosophy and poetry, see: BLOOM, H. **Where shall wisdom be found?** New York: Riverhead, 2004.

⁴ ARENDT, H. **On Revolution**. New York: Penguin Books, 2006. See also: BROOKE, J. L. “Consent, Civil Society, and the Public Sphere in the Age of Revolution and the Early American Republic”. In: PASLEY, J. L.; ROBERTSON, A. W.; WALDSTREICHER, D. **Beyond the Founders: New Approaches to the Political History of the Early American Republic**. Chapel Hill; London: The University of North Carolina Press, 2004.

⁵ ARENDT, H. **Between the Past and the Future**.

individualism with historicism, excluding from its own horizon the European State philosophy of political sovereignty.⁶ In both revolutions, the figure of constituent power carried enormous relevance. Nevertheless, it is important to distinguish differences between the revolutions beyond some coincidences related to the attribution of sovereignty to the people.

In this way, one can attempt to understand why, of the modern revolutions that concentrated and justified their searches for foundations, the American Revolution was successful in renewing the “broken thread with tradition”.⁷

2. THE INSTITUTION'S MECHANISMS

The next step is based on thinking how this worked in the configuration of modern institutions. From another perspective, it's important to remember that, according to Mary Douglas, the entrenching of an idea is a social process.⁸ This process of entrenching implies also in determining intellectual, economic and political processes. Usually, to acquire legitimacy it will look after examples in nature and in reason, and it will be bounded to the very structure of the social order.

That's why it's common to think that institutions have a self-policing start, but, it's paradoxical to think that a community will grow up into little institutions. So, for a social convention turn itself into a legitimate social institution it must be accompanied by a cognitive convention that will structure it. This can be seen in the naturalization process that we are used to make in the dichotomist treatment we give to subjects like gender, ideology and politics.

The social principle is reinforced with a naturalized analogy: female and male, left and right, the people and the king. Mary Douglas observes that these dichotomies present both a complementary aspect, but, either a political hierarchy.⁹ Ultimately, the grounding of institutions will refer to nature, and, in the XVIII century, nature was still deeply bounded to God. God wasn't dead — yet.

Other characteristics help to understand the processes of institutions is the relation with the forebears, usually it is settled a list of inheritance laws. Any person that wishes to validate its pretensions has to remark its ascendancy, and the same rule is applied to the ones wishing to contest their legacy. In addition, the social convention needs also a naturalizing principle, to give

⁶ FIORAVANTI, M. *Los derechos fundamentales. Apuntes de historia de las constituciones*. 3. ed. Madrid: Editorial Trotta, 2000. p. 77.

⁷ ARENDT, H. *Between the Past and the Future*.

⁸ DOUGLAS, M. *How Institutions Think*. Syracuse: Syracuse University Press, 1986. p. 45.

⁹ DOUGLAS, M. *How Institutions Think*. p. 49.

legitimacy to will be done in the future. It's not completely casual that Rome bears as its myth of foundation, the she-wolf relation with the twins Romulus and Remus.

The institutions endure to long phases in which they were simple fragile conventions. The early Christianity is also an example to this point. Being "naturalized", it became part of the universal order and, from this stage, it started to be used to ground different sorts of argumentation.

Another common aspect is that the founding analogies need to be hidden and the way of thinking about the world or the "epistemology" must also be a kind of secret, not accessible to everyone. That's the form in which institutions also give uniformity to a random mixture of items that count as "members" or "elements" of certain category.

The mechanisms by which the institutions provide this uniformity is not always clear. In the case of the Rule of Law, this can be seen in the efforts to eliminate antinomies, vagueness, and other imprecisions, derived from the use of natural language to create rules. But the major conflict about this subject involves the possibility of the judicial review. A practice that is originally legitimated in the name of the coherence of the whole legal system, but it produces a problem that goes beyond this simple question of maintaining its alleged coherence, the problem of legitimacy.

The way that institutions are build is squeezing the ideas into a common shape that pursues to be recognized by all, and become the parameter of correction of other variants — but it not happens always in a pacific way. Yet, institutions fix dynamic processes and hide their influence, they endow themselves with rightness. Mary Douglas understands that: "In marking its own boundaries it affects all lower level thinking, so that persons realize their own identities and classify each other through community affiliation".¹⁰

And it is exactly this question "who are the ones that belong to the community?" that is in the "underground" of the foundation of the modern States. It is on the root not only of modern problems like xenophobia but, in a more profound sense, concerning the origins of the people that created — *ex nihilo* — this community.

3. DEUS EX MACHINA

Jacques Derrida in his "Declarations of Independence",¹¹ start his reflections with one question about the Declaration of Independence: "who signs,

¹⁰ DOUGLAS, M. **How Institutions Think**. p. 102.

¹¹ In: DERRIDA, Jacques. **Negotiations: interventions and interviews, 1971-2001**. Stanford: Stanford University Press, 2002. See also: HONIG, B. "Declarations of Independence: Arendt and

and with what so-called proper name, the declarative act which founds an institution?"¹² This act, of signature is not only the *gesture* of signing, but goes beyond it because it performs, accomplishes itself, "does what it say it does".

What Derrida says is that a declaration that founds something like an institution, a constitution or a State requires that the signer engage himself with it, because the signature maintains a link with the instituting act. An example of it is the need that one institution has of keeping itself independent of the empirical individuals who take part in its production.¹³

But who signs the letter, the declaration? Which is the person that legitimates, that founds this actions? In the case of the Declaration, Thomas Jefferson, the draftsman of the project. By right, he writes but does not sign. Jefferson, the one who represented the representatives, the ultimate signers?

But the representatives sign, by right, for themselves, but also "in the name of", for others. By right the signer is "the people", the "good" people. They (the people) are the ones who declare themselves free and independent. The problem is that this "good people", which authorizes their representatives to sign the draft, does not exist. The inexistence is in the sense of an entity, before the declaration — and this is where the *aporia* is situated — can't be anyone, but the people is also the one who legitimates the signature — the performative act that constitutes a political community, "We the people". As Derrida says: "There was no signer, by right, before the text of the Declaration which itself remains the producer and guarantor of its own signature".¹⁴

The *coup* of force that found the Law, brings the law to the light of day, gives birth and day to the Law. In this point can be observed the union between the constation and performance of language.¹⁵ The Declaration of Independence is a performative act, represents in the verbal form an empirical action, the creator of a new settlement of things and the maker of a baptism.

The signature sustains the *simulacrum of the instant*, as said by Derrida, they invent (for) themselves a signing identity. They sign in the name of the laws of nature, in the name of God. They place the foundation of their institutions in natural laws, in the name of God, that is, the creator of nature, the last resource for legitimation.

If the Declaration of Independence wants to produce any signification this must follow a model, one example — once again, the *aporia* and the search

Derrida on the Problem of Founding a Republic". *The American Political Science Review*, v. 85, n.1, (97-113), 1991.

¹² DERRIDA, Jacques. Declarations of Independence. p. 47.

¹³ DERRIDA, Jacques. Declarations of Independence. p. 48.

¹⁴ DERRIDA, Jacques. Declarations of Independence. p. 50.

¹⁵ A overcoming of the constative and performative aspects of language proposed by Austin.

for grounding to something that through a performative act gives birth to itself. Which is the last instance? What is the last model — in the meta-physical field? To the “Founding Fathers” of the United States the answer can, in a first look, be simple. But this thought conceals a trap, because the French, in the same period, had their revolution, and they needed to change their political configuration, mainly, to put themselves against the *Ancien Régime*, so they didn’t want to be inspired by their predecessors, but, this also was an important question to the ones who aimed to Declare Independence in the United States, even though they were inspired by England they wished to create their own institutional design.

Which alternatives were left? Can a people be born from their own *baptism*? The social contract is ratified by whom? Is there a group of persons that precedes the “We the people”? But, isn’t this people that legitimates the Declaration of Independence — in the name of themselves? In that period there were few alternatives left to justify authority. But, this question was suspended. Or, one can say, *resolved*. The last signature belonged to God, the best proper name. But there is no *proper name*.¹⁶

From this first point a second one is developed. If, in one hand there is a crisis in the legitimation of the independent nation, the new State, on the other hand is the problem of representation. How representatives of the people can sign, speak in the name of the people? Is there a limit to the things that the representatives can do a limit to this *procurator*? The thin link between the paradoxes is located at the meta-physical *people*. The institution that institutes.

A representative cannot faithfully represent all the represented ones, not even their voters. But there is an invisible and indispensable link between the voter and the elected, the sovereign and its subjects, the State and the people.

Bonnie Honig following this trace discuss the paradox of politics, democracy’s grounding problem in which power should belong to the people,

¹⁶ “It is because the proper names are already no longer proper names, because their production is their obliteration, because the erasure and the imposition of the letter are originary, because they do not supervene upon a proper inscription; it is because the proper name has never been, as the unique appellation reserved for the presence of a unique being, anything but the original myth of a transparent legibility present under the obliteration; it is because the proper name was never possible except through its functioning within a classification and therefore within a system of differences, within a writing retaining the traces of difference, that the interdict was possible, could come into play, and, when the time came, as we shall see, could be transgressed; transgressed, that is to say restored to the obliteration and the non-self-sameness [**non-proprété**] at the origin”. DERRIDA, Jacques. **Of Grammatology**. Baltimore: John Hopkins University Press, 1997. p. 110

but the people is not allowed to make the important decisions that politics demands.¹⁷ For this reason states Honig that:

The paradox of politics is not soluble by law or legal institutions, nor can it be tamed by universal or cosmopolitan norms. The paradox of politics highlights the chicken and the egg circle in which we are law's authors and law's subjects, always both creatures and authors of law. Thus, the paradox teaches us the limits of law and calls us to responsibility for it. And it teaches that the stories of politics have no ending, they are never-ending.¹⁸

In the beginning of democratic regimes, especially those derived from ruptures with authoritarian governments, can be settled an agreement about who are the opponents, who should be antagonized, but, in fewer cases is possible to make a consensual agreement about the main values that will rule the society, the institutional design of the new government, which are the principles and ideals that the new State should protect — all this stays suspended and usually is the subject of political disputes.

4. REVOLUTION AND INSTITUTIONALIZATION

After the birth of this new nation, various problems emerged regarding the political and institutional configuration of the United States. One important anchor of the national identity of the United States is stated in the Constitution. For Arendt, the relation between the American people before the Revolution and the Constitution was of a *religious order*, in the original sense of *religare*, the capacity to bind or to connect to one's origin.

This tribute to the origin has two axes, the first of which was mistaken because the men of the American Revolution thought that in rescuing the memory, they could adopt its rights and liberties. In this case, they were attempting to consolidate a liberal comprehension of the guarantee of these rights. The second axis treats a political agreement by deriving both the authority and the stability from a political body.

This is the aspect of the American Revolution that differentiated it from the others: the implicit authority in the act of foundation despite the belief in an immortal legislator or the promises established in the rewards and threats of a future life, the after-life. For this reason, the self-evident "truths" enumerated in the Preamble of the Declaration of Independence were those that succeeded in guaranteeing permanence to the New Republic.

¹⁷ HONIG, Bonnie. **Emergency politics**: paradox, law, democracy. Princeton: Princeton University Press, 2009.

¹⁸ HONIG, Bonnie. *Emergency*. p. 3.

Governments were instituted with the aim of promoting the guarantee of rights, and these governments were derived from the consent of the governed. This gave the people the right to contest or even destroy it if the government violated these originary principles (the right of the people to alter or to abolish it and to institute a new government). The new political body should be faithful to these principles to achieve happiness and safety in the best possible way.

In this originary political derivation can be observed the inspiration of the Roman institutions before the challenges presented by the formation of a new sovereign entity as an organization of the internal structures of the social set and the stabilization of popular expectations. If the Roman example pointed to the power given to the people (*potestas in populo*), the authority remained with the Senate (*auctoritas in senatu*). In the case of the American revolutionaries, this formula was not fully used because the *auctoritas* was yielded to the judiciary.

From this perspective, Hannah Arendt notes that the lack of power presented in the *Federalist* indicates that the primary headquarters of the American Republic was the Supreme Court, which exercised its power through the constant constitutional activity of a permanent “Constitutional Assembly”.¹⁹

This epoch was addressing the problem of how to make a perpetual agreement — surrounded by tensions of different orders, such as England’s pressure and the necessary conciliation between the colonies — in such a way that the original act of foundation would become permanent. For this reason, a bet was made on trust in the stable and permanent figure of authority.

This “bet on authority” was also reflected in the double role played by the term “Constitution”. According to Arendt, this term expressed the notion of a “constituent act” that preceded all of the governments, the framing of a society, and its political and institutional configuration as well as the manifestation of the legacy of this foundational moment, the Letter, the Constitution in its document form.²⁰

This emulation of the “moment of origin” is the production of a foundational abstraction, a time in which the political actors were placed outside of the chronological continuum to become the “Founders”. As noted by Arendt, the important point here is not the utilization of the Romans to anchor the foundation, which, in itself, represented a re-constitution, but that the political actors were ready for the paradoxical work of producing a “new origin”. They were “Founders” with the authentic capacity to originate new things

¹⁹ ARENDT, H. *On Revolution*.

²⁰ ARENDT, H. *On Revolution*.

based in the nativity and in the comprehension of the fact that human beings existed in the world due the act of giving birth.²¹

The year 1789 marked two very important political occurrences: the French Revolution and the approval of the Constitution of the United States. Despite the political proximity between France and the United States, the institutional political models adopted by the two countries were significantly different.

However, in both cases, the revolution needed to be terminated. Therefore, the Constitution began to symbolize the institutionalization of the demands made by the revolutionaries. If, to a certain point, the Revolution had propelled the formation of new governance and a new institutional political architecture, it needed an end that allowed the transition of the revolutionary state to the Rule of Law.

The State was seen as the best form of government. Thus, the constitutional government attached democratic elements to non-democratic characteristics. This is an indication that there were tensions between the stabilization promoted by the Constitution and the Revolution linked to the constituent power and to the democratic expansion of the sovereignty.

In conclusion, it is important to note that the conventions were one of the political innovations arising from the American Revolution with the formation of a legislative body not directly connected with the legislature. The settlers had knowledge about these conventions, but, in 1770, the institutions of the government did not represent their interests. Thus, the conventions became the alternative defense of the people against the government.

As stated by Arendt, the American Revolution combined two important elements, mutual promises and deliberation. Therefore, it is remembered as the result of men who worked in common agreement backed by mutual promises because men should not be limited to the unpredictable inconstancies of fortune, waiting for their political constitutions to be graced by chance. As noted by Hamilton in the *Federalist* number 1, it was believed that societies of men were capable of establishing good governments as a result of reflection and choice.²²

In this sense, the expression “We the People” in the Preamble of the Constitution of United States had the objective of establishing the fiction that the community was not governed by a king or an external power but by insti-

²¹ ARENDT, H. *On Revolution*.

²² HAMILTON, A.; MADISON, J. JAY, J. *The Federalist Papers*. New York: Signet Classics, 2003. p. 27.

tutions that represented its own constitutional expression, with a political order that was not drawn from history but was created and implemented civilly by the people themselves.²³

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²³ KRAMER, L. D. **The People Themselves: popular constitutionalism and judicial review**. New York: Oxford University Press, 2004.

