

Essay no. 73

Introduction

In the globalized world of today, with several of our modern day nations striving towards some sort of democratic rule (consider this in broadest possible sense of the term¹), the study of the nature of political institutions, how the political institution relates to agents within a political system and the extent to which these institutions must affect the agents or whether the institution must be an effect of agents' needs are all highly relevant questions requiring deliberate consideration. Thus despite the common use of "democracy" and other buzzwords in global politics and international relations, the task is left to political philosophy to develop a rigorous analysis of the design of political institutions (the State).

It is in such a context that I want to consider Hannah Arendt's quote:

"A legally unrestricted majority rule, that is, a democracy without a constitution, can be very formidable in the suppression of the rights of minorities and very effective in the suffocation of dissent without any use of violence."

Hannah Arendt, *On Violence* (1970)

Before I consider her premises and implications, it is important to also note the relevance of her quote, and political philosophy in general, in light of the political change that has occurred due to the Arab Spring. In the onset of the Arab Spring,² age old political orders have collapsed and new constitutions have been written, to define a new state and rule of law that stands in clear contrast to the earlier ones much despised by a majority of the people. Thus the design of constitutions, and political institutions, in light of revolutions heralded by a "majority," become important to ensure that the new order that arises encompasses principles of justice and fairness.

Unrestricted Majority Rule

According to Arendt, a democratic political system without an effective constitution can give way to suppression of minority rights or the suffocation of dissent (both characteristics we shall define as undesirable later in the essay). Thus through a discussion of

1 By mentioning democratic rule here I mean the general tendency in the modern world (including developing countries) to utilize the term democracy to refer to any system of government which purportedly holds elections on a period basis.

2 The Arab Spring refers to the recent downfall of the state, and the arising of new constitutions and formation of governments which have occurred from 2011 and are still currently undergoing.

her quote we can arrive at the function of a constitution (the purpose it serves). A majority rule will formulate legislation that serve particularly to benefit the majority viewpoint (P1). Consider the example of distribution of property rights in a village inhabited by 100 people, of which 4 belong to a Tribe 2 and 96 belong to a Tribe 1. Arendt contends that in a democratic system which clearly sets no restriction on the type of legislation that can be formulated, a policy which decides to allocate the land of Tribe 2 to produce bananas for the entire village's consumption will be allowed to pass. Such a utilitarian course of events is allowed to occur, as Tribe 1 has no particular cost to Tribe 2 losing their land, while Tribe 1 only gains to benefit from the bananas they can now consume. In a purely numeric majority rule situation, there is nothing to guarantee particular rights such as property rights, of the minority.

Now this situation of majority rule may be severely worsened if Tribe 2 tends to hold beliefs about the world that are not compatible with Tribe 1's beliefs. In the case that Tribe 1 cannot accept, only an ideological basis, the existence of Tribe 2's beliefs, it is clear that unrestricted majority rule can be a considerably dangerous proposition. An unrestricted majority rule in such a situation needs to also pay no heed to the dissent of a minority, especially if tribe 2's dissent has no consequence on Tribe 1's continuation.

The above understanding of Arendt's unrestricted majority rule world is simplistic however showcases the consequences of a state operating on a numerical, utilitarian (in the sense of greatest good for maximum number of people) principle. It is important to note a few things about these premises of Arendt's quotes before we move on to the introduction of rule of law. Firstly, we have to note that a unrestricted majority rule could occur in both an anarchist society that operates on purely utilitarian principles (the extent of utilitarianism we are considering here can be equated to Bentham's mathematical formulation of utils³) or a democratic state that holds majority legislation as a right of the highest order. Secondly, we assume for argument purposes, that people in Tribe 1 will not face some sort of compulsion for those in tribe 2. We can clearly establish that in cases whereby some animosity or ideological clash exists between majorities and minorities this compulsion is not to be felt. However in cases otherwise, we assume that the standpoint the people of the village are going to take is based on utilitarian principle: thus benefit for themselves from legislation is what they shall consider when formulating policy.

Restricted Democratic Rule: The Desirable Modern Democracy?

Does it follow, then, from Arendt's quote that a democracy with a constitution can prevent the consequences of unrestricted democracy rule? We can arrive at the following initial definition of a constitution:

³ It is interesting to note that Bentham had even written his own version of a utilitarian constitution, and taken it around to various newly formed kingdoms or states at the time. However his version of utilitarian constitution that actually mathematically considered utility was rejected by every statesmen he proposed it to.

A constitution is a document of the highest order in a political system, that defines principles of operation for the political system in a country.

Ofcourse then the constitution can be considered the official basis for rule of law (this arises from its highest order status) and the operation of the state. We can say that principles are particular rights or fundamental axiomatic statements, which the constitution adopts. Thus within a system of majority rule, a constitution can ensure that particular principles are concretely ensured. Thus a constitution can prevent the violation of individual rights (such as the right for an individual to dissent or the right of a minority) by clearly defining that no legislation passed must violate the principles of a constitution. This is a very important precept as to how a constitution or clear rule of law, if adhered to, can protect individual's in a majority rule situation.

However does it necessarily follow that a constitution by nature can always legally guarantee particular rights? We can ask whether Arendt is equivocating democracy with a political system that guarantees rights of all citizens. Thus we can say that if democracy by nature is meant to live up to a majority rule situation then how does a constitution fit in with a democratic system.

The problem I mean to consider here is one of definition. The extent to which a constitution fits in with majority rule depends on the way the constitution is structured when it is originally formed. Consider a hypothetical constitutional democratic monarchy. If this hypothetical constitution monarchy defines particular rights for all citizens (let us define a basket of fundamental rights: F1), but also upholds that in arbitrary cases of consideration the monarchy upholds the power to override the provision of F1 to citizens. Then this constitution by definition becomes problematic as particular minorities, for example, could fall in the purview of the monarchy and thus not have F1. Another interesting example would be a theistic constitutional democracy (in a country where majority population belongs to the a religion X) whereby people are always given F1, however in the event of an individual violating the state's theistic fundamentals (in a case of blasphemy suppose), the individual's F1 are lost. The point I am trying to highlight here is that a majority rule democracy can form its constitution in such a manner that through defining the constitution in that particular manner individual rights may still not be protected. Thus we can see that a necessary rule of law may not be enough to protect the rights of people. Additionally it is important for me to introduce the possibility of using a Genealogical Method (*Genealogy of the State and Constitution* perhaps) to track how constitutions are formed in coherence with democracy and vice versa in order to see whether a constitution arises from majority principles or principles of general justice and which one must be held over the other.

This raises an interesting problem which we must address in light of political institutions and their relation to upholding principles that pertain to individuals. To what extent do we want a constitution to uphold the majority rule versus the principle of providing rights to all citizens under the constitution? We can introduce the argument of contemporary

political philosopher John Rawls to establish that we want a constitution that maintains principles of individual rights as opposed to a majority rule constitution. The argument known as the Veil Of Ignorance consider the case whereby we are in an original position, and we do not know what type of a political system we shall be born into or within that political system, who we shall be born as. Under this veil of ignorance, we shall choose that political system which protects my individual rights and principles as if I were to be born into Tribe 2, I would rather have an opportunity to fight against legislation violating my property rights as opposed to simply give into a majority rule situation. Thus if I didn't know the situation I would be in when born, I would choose a constitution that is defined by protection of individual principles rather than a constitution that implements majority rule principles (such as a theistic democracy whereby blasphemy removes fundamental right F1). Thus from the consideration of an original position argument, we have been able to establish that a constitution that upholds particular fundamental rights F1 is supreme. However now that we have a better idea of the preferable constitutional democracy, we are led to further questions about how such a constitution must be structured.

The nature of constitution and law: Organic Political System vs. Frozen Political System

We already arrived at the thought that a constitution has a pretty complex task of categorizing its principles which define its nature. The functional role that a constitution plays within a political system (a political system is defined by the various political institutions that comprise of a state) is to establish certain principles⁴. We can raise 2 problems which a constitution must appropriately tackle. Firstly a constitution must be protected from being hijacked by a majority rule whereby its principles are based on largely popular beliefs (like a theistic 'democracy') rather than principles of justice and secondly a constitution must have a structure that does not have contradictory claims. We can draw a parallel to epistemology to arrive at a correct formulation of a criterion for an effective constitution. Consider a constitution (or a rule of law for that matter) to comprise of various statements (that define the nature of the state it is setting up) which are in some manner structured (not necessarily out of importance, however in certain cases could be).

⁴ There arises the problem of the nature of the liberties the constitution is supposed to guarantee. We could shortly consider the separation of negative and positive liberties (following Isiah Berlin's characterization). Negative liberty is the removal of those things which restrain individual freedoms such as extreme poverty, something that restricts the individual. On the other hand positive freedoms include those liberties which enable the individual to address concerns greater than those that simply restrict him, such as an opportunity to fight legal battles against the state. The liberties a state must guarantee is important to consider in the sense of which type of liberty must a constitution encourage. However this discussion would be outside the scope of our current consideration as it would have to involve a careful consideration of freedoms and the logical consequence of each type of freedom.

It becomes very important for these statements to firstly be coherent in nature. Thus the addition of a new statement must not reduce the degree of logical consistency to be found in the document. Secondly each statement must correspond to particular foundational statements to be found in the constitution. It is another matter of argument of whether the justification for these foundational statements lies in epistemology, however it is important that a constitution has particular foundational statements that within the constitution itself do not require further justification.

Thus a constitution must do the following to ensure an effective democratic political system: -

- a. Outline the basic foundational principles available to all citizens
- b. Outline institutions that are meant to protect these basic principles
- c. Put in place a mechanism which sets in place how the constitution is protected when institutions outlined in b fails.

It is characteristic of modern democratic states to differentiate the power structure amongst a judiciary, a legislative body and an administrative body. Such separation of powers is an example of function b of an effective constitution which ensures that the political system does not allow excessive decision making capacity to a single institution. The above 3 functions are very important criterions that a constitution must fulfill to be formidable in protecting individual rights, and avoiding what we defined above as P1.

Further it is also important to consider the manner in which a constitution's nature is conceived off. Do we adopt an approach (Hegelian in a sense) whereby we try to freeze the constitution, so that atleast the fundamental foundational statements are never changeable or do we adopt a piecemeal method of social engineering (as proposed by Karl Popper) whereby constitutions and political institutions are always developed on the basis of changes in cultural, or technological factors. The strength of the latter approach is that the institutions we allow to be amended in regard of changes can better implement our foundational principles. Consider the examples of new minorities arising in face of cultural changes or as new forms of dissent arises within society in face of technological changes, the political institutions and the constitution must be able to encompass them as well.

Conclusion

Thus we have seen from Arendt's quote the importance of rule of law. We considered some of the problems associated with simply saying rule of law can help protect the rights she sees violated in a world without an explicit constitution. However we then established that a constitution can be protected in such a way as to it always being able to ensure a basket of fundamental rights F1.

Such questions of design of constitution, rule of law and institution are highly important (as I mentioned in my introduction) in the face of the continuous Heraclitian flux that is occurring the political world such as the changes in the Middle East. As these nations, follow into a post revolutionary phase, and design the political systems (highly influenced by cultural factors in the case of the Middle East) that they envision to stand for years to come.