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Cut off the King's Head? Constitutional Democracy and the State Against Arbitrariness

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ABSTRACT

Constitutional democracies are increasingly perceived as limited devices. Against invitations to reducing their influence and size, these pages highlight one aspect or function that the State and constitutionalism share and which turn them into valuable instruments: avoidance of arbitrariness. I here argue that a central feature of both institutions is a commitment to making sure that citizens must lead lives that can be planned with some degree of certainty and reasonableness.

Keywords: state, constitutionalism, democracy, arbitrariness

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1. Introduction

The institutions of constitutionalism and the State share a commitment to creating conditions under which citizens may lead their lives with some degree of certainty. A commitment, that is, to avoiding arbitrariness.

The claim matters in times when both constitutionalism and the State are said to be in crisis. The State, we read today, no longer wields sovereign power, if by sovereign we still mean the absolute and perpetual power of a republic (Bodin [1576] 2014, I.VIII). What is more, we are often told that we should welcome this state of affairs. The invite has been accepted by legal and political theorists of sundry stripes. The days of the sovereignty of the modern State, we are told, are and should be behind us (e.g., Herzog, 2020). And then, on the other hand, we have the crisis of constitutionalism. First, a crisis of what one could term "traditional" constitutionalism, a view we have inherited since the early modern period according to which a constitution is meant to curb political power. The power exerted by modern states is far too great ("There is no power on earth to be compared to him", in Hobbes's use of the book of Job) to be let loose, so that constraining it became the hallmark of liberal constitutionalism. This model has been questioned by those we could call "democratic" constitutionalists. The tag covers a number of positions and opinions described in several ways (republican, political, deliberative, dialogical, popular, global, etc.), but they all share a critical stance towards the notion that constitutionalism is and should be solely and foremostly about limiting political power. Constitutionalism, according to these views, must channel rather than curb power, and it must do so through democratic means.

Whatever their shape, constitutional democracies are increasingly perceived as limited devices, for while we should keep political power in check and while there is still faith in democracy, the challenges faced by contemporary societies can no longer be dealt with using the same old tools

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(Atria, 2016; Gargarella, 2022, 282). The initial concerns for which constitutionalism emerged, today take the back seat in the face of issues such as climate change, populism, global inequality, global capitalism, the risk of nuclear war, and so on; matters which seem to threat human existence in ways hitherto unparalleled.

Against such bleak prospects, these pages highlight one aspect or function that the State and constitutionalism share: avoidance of arbitrariness. A central feature of both institutions is a commitment to making sure that citizens must lead lives that can be planned with some degree of certainty and reasonableness. Individuals cared for this when constitutionalism and the State became fashionable, when constitutionalism entered the history of politics, since constitutional democracy has been chosen as a mode of governance, and we still do today.

The argument is in three parts. I begin with some ruminations on traditional constitutionalism and its emphasis on limiting political power. I then discuss contemporary versions of constitutionalism and their critical stance towards the traditionalist camp. Strictly speaking and as varied as those versions are, they all show a concern about controlling potentially arbitrary uses of political power. This leads us to the conclusion that however different traditionalists and democratic constitutionalists may be, non-arbitrariness is a concern for both (section 2). I continue discussing how the modern State exhibits exactly that same concern with arbitrariness, even in its most absolutist version. I offer an impressionistic view of Locke's, Rousseau's and Hobbes' conceptions of the State to show that a preoccupation with non-arbitrariness is a major reason why individuals would be inclined to sign a social contract to create the State. I take Hobbes' view as one that which, for all the powers and prerogatives it grants to the sovereign, it nevertheless creates the institutional conditions for that power to be exerted non-arbitrarily (section 3). After this, I suggest that the State and Constitutionalism are connected; that they do not vary independently (section 4). The argument leads up to the conclusion that contemporary attacks on the State undercut the

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capacity of constitutional government to cope with pressing contemporary challenges such as the ones mentioned above. Invitations to getting rid of the State are counterproductive if we care about non-arbitrariness (section 5).

Before I begin, I should warn readers that I do not focus here on the mismatch between claims that state sovereignty is or should be gone and actual instances showing that such claims neglect the role the state plays today in world politics. To be clear, I believe that the state is currently strong, alive and kicking. Yet, philosophy remains to a large degree inattentive to these developments, and the fact that the state is strong does not entail that it will behave in desirable fashions. The pages that follow should be read against the light of those considerations.

2. Constitutionalism and Avoidance of Arbitrariness

The twofold description of constitutional theories – traditionalists and democrats - I have offered above is perhaps too stringent. While "democratic constitutionalists" do indeed tend to account for their preferred views of constitutional phenomena as distinct, as offering a more compelling description and evaluation of constitutionalism, the dividing line between them is not as sharp, at least regarding the aspects I here emphasise.

Constitutionalism has traditionally been associated with limitation to majoritarian decision-making. As Mill put it, "the people … may desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power" (Mill, 1989, 8). Constitutionalism is a way of instantiating such precaution. There is no need, I think, to give a fully-fledged explanation of what traditional constitutionalism is all about. It will suffice, I hope to cite Justice Jackson's remark in *West Virginia State Board of Education v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subject from the vicissitudes of political controversy, to place them beyond

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> the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections.[1]

The remark is an instance of a traditional view of what constitutionalism is about and for and what the function of a constitution is. It is equivalent to what Bellamy refers to as "legal constitutionalism". A view that "constitutions enshrine and secure the rights central to a democratic society", which defines a constitution as

> a written document, superior to ordinary legislation and entrenched against legislative change, justiciable and constitutive of the legal and political system. It contends that a constitution of this kind, not participation in a democratic politics *per se*, offers the basis for citizens to be treated in a democratic way as deserving of equal concern and respect (2007, 1).

I side with Habermas in that whereas according to this traditional vision, constitutionalism and democracy stand in a paradoxical union, in union they nonetheless stand. The connection is, according to Habermas, evident in the way in which we conceive of how fundamental rights and liberties are brought about. The story is well-known. Individual rights typically championed as liberal conquests against the public, against the State, emerge as the result of public interactions, public conquests. And vice versa. They are, in Habermas's parlance, co-original (1996). Voting, mobilising, deliberating – in short, democracy – are then the conditions for the very existence of those rights we hold dear. Again, and vice versa.

I agree. I underscore this not to do away with theses still emphasising that the essence of traditional versions of constitutionalism is the limitation of

[1] United States Supreme Court, *West Virginia State Board of Education v. Barnette*, 1943, 319.

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political power, democratic or otherwise, but to draw attention to the underpinning of the different accounts falling under the tag "democratic constitutionalism"; attention, that is, to the fact that *pace* Locke and natural rights lawyers more generally, constitutional rights, even conceived of in their most liberal versions, owe their existence and maintenance to the political process. Now, while these two perspectives diverge in their focus and stand to some degree in tension to each other, the divergence occurs at a certain level of abstraction that does not give full account of why both groups endorse one version or the other. Raise the divergence to a higher level and you find agreement on a rather important point: both traditionalists and democratic constitutionalists care about avoiding arbitrariness in the ways power is exerted over individuals.

You may think that this is not a major discovery. And you may be right. Political theories of different stripes converge on sundry aspects. One prominent aspect in the case traditional and democratic constitutionalism is often institutionalisation. Members of both groups endorse, for example, separation of powers, believe in enfranchising constitutional rights and liberties, in some versions of judicial review of legislation, and other matters. Fair enough. Non-arbitrariness may be just another example of contingent convergence.

I must be adamant that one should not be overly schematic or present the distinction as a sharp one, for the reflections above do not turn the liberal-democratic distinction into a spurious one. Both camps do exhibit major differences. These divergences are better seen from the "democratic" side of the divide. Different versions of "democratic constitutionalism" have correctly placed distinct accents on the different aspects of traditional constitutionalism that they see as troublesome. Republicans and political constitutionalists put their finger on the problems raised by the conception of freedom pervading traditionalism (e.g.,Tomkins, 2005; Bellamy, 2007).

Globalists question whether traditional constitutionalism is suited to dealing with matters of rights and freedoms outside the boundaries of

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domestic law (Lang Jr & Wiener, 2017). Popular constitutionalists question the traditionalist stress on courts as strongholds of constitutional rights and liberties (e.g., Kramer, 2004a). And so on. And these differences are not superficial.

Yet, and as I mentioned above, there is one important point of convergence between these two strands: their stress on the avoidance of arbitrariness. While this desideratum is not the only one pursued by traditional constitutionalism, it enjoys pride of place. It is central in John Locke's *Second Treatise*, a tract meant to convince us that no legitimate government can arise without the consent of its eventual addressees and without respect for pre-political rights to liberty, property, and person. No government is entitled to breach or encroach upon these individual rights for they are not the result of their say-so in the first place, nor they are brought about by legal fiat. Respect for these natural rights expresses itself through law-making processes that respect the liberty of subjects. Power exerted otherwise is despotical: "absolute, arbitrary power one man has over another, to take away his life whenever he pleases. This is a power, which neither nature gives, for it has made no such distinction between one man and another, or compact can convey" (2012, § 172).

Locke has inspired contemporary liberals claiming that the main evil against which individuals should be protected from is arbitrary power. According to this view, the function of a constitution is to curb political power so that citizens may be able to plan their lives in advance with some degree of certainty towards the future.

Democratic constitutionalists express a similar concern, even if they question the traditionalists' emphasis on the need to limit *any* kind of political power, democratic or otherwise. As I have mentioned above, this questioning of traditionalism in constitutional theory has taken several forms. However, there are some commonalities. For example, many of the writers that could be included in this camp think that our constitutions should not only recognise and enshrine so-called first-generation rights and freedoms but also social or

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democratic rights (Waldron, 1999; Bellamy, 2007; Gargarella, 2010; Bellamy, 2012). One reason for this has already been mentioned above in Habermas' terms. However, the point can be expressed without using Habermasian language.

The exercise of liberal rights and freedoms typically enshrined in modern constitutions, such as the right to life, free speech and so on, requires material conditions, the absence of which renders these rights dead letter. Material conditions such as health, education and so on, are not mere expectations, but actual demands that individuals can make on others and, in particular, on the State. This latter feature partly explains why democratic constitutionalists reject solipsistic characterisations of rights and instead underscore their social nature; their being brought as the result of collective action. A second area of agreement emerges from this commitment to social rights. That is, that virtually every democratic constitutionalist rejects strong forms of judicial review of legislation. Given that the primacy of constitutional rights over every day democratic decision-making cannot be explained without considering the social nature of the former, democracy pervades both sides of the equation. It then becomes increasingly difficult to champion institutional models granting a great deal of decision-making power to courts on the basis that these institutions are above the frail of everyday politics. Not so. If rights are social and therefore political, the final word on the determination of their content and limits should be given to political institutions. (Bello Hutt, 2021)

As I mentioned, there are several strategies by which different strands of democratic constitutionalism justify their preferences for a certain conception of rights or a certain version of institutional design. The point I want to stress, just as I have with traditional constitutionalist, is that coincidences on the endorsement of social rights and weak forms of judicial review signal a broader agreement on an objective placed at a higher level of abstraction: avoidance of arbitrariness.

Two prominent examples of democratic constitutionalism where this concern with avoiding arbitrariness is pressing, are republican and political

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constitutionalism. Political constitutionalists endorse both features described above and are committed to a republican notion of freedom according to which a free person is she who does not live under the potential exercise of the arbitrary will of another (Tomkins, 2001; 2005; 2010; Bellamy, 2007; Lovett, 2016). A free person is then one who is not subject to domination or subordination. Moreover, this conception of freedom imposes certain duties on citizens, who are tasked with contributing to the creation of the conditions under which the polity is to be maintained and safeguarded. It involves, that is, an attitude in the public domain, typically described as civic virtue. Thus understood, this conception of freedom signals a connection between social rights and weak forms of judicial review on the one hand, and avoidance of arbitrariness on the other, for freedom from domination is tantamount to being bound by norms and practices whose creation and eventual application is in some sense reasonable or susceptible of being tracked back to the assent of their addressees because they themselves are creators and recipients of the rights they are entitled to. If such is the case, citizens can be said to be guided by reasonable and thus non-arbitrary norms.

This goes for political constitutionalists endorsing the republican narrative.[2] But it also goes for other strands of democratic constitutionalism. Consider, for example, popular constitutionalism and its critique of traditionalism and its insistence on giving the Supreme Court the final word in the interpretation of the constitution.[3] For popular constitutionalist, the final say in the determination of what counts as constitutional should be, to use Mark Tushnet's expression, taken away from the courts and placed in the hands of the people themselves. Reasons offered for this contention have been historical as well as philosophical. Larry Kramer (2004a), for example, has examined the United States constitutional history and revisited certain commonplaces regarding the power held by the Supreme Court, questioning

[2] *Pace* Michaelman 1988.
[3] See, for example, Friedman, 2003; Kramer, 2004a; 2004b; Braveman, 2005; Tushnet, 2006; Kramer, 2007; Pozen, 2010; Schwartzberg, 2011; Donnelly, 2012.

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the notion that *Marbury v Madison,* or the Federalist 78, or Sir Edward Coke's decision of the so-called *Bonham's* case should be taken, as they typically are, as explanations for the power that the Court today claims to have. Others, most prominently Tushnet, argued that judicial supremacy in the interpretation of the Constitution generates pernicious incentives for both the people and their representatives, who forgo their roles as constitutional interpreters on the assumption that providing meaning to the charter is a matter for the courts. Tushnet's vindication of the people's involvement in the interpretation of what he calls the "thin" constitution, the fundamental guarantees of equality, freedom of expression, and liberty contained in a constitutional charter, are of a kind that the people, ordinary citizens, can commit to, speak of, discuss, and interpret in ways that non-political institutions like the court cannot (1999, 12). It is a way of understanding what fundamental rules and practices guide citizens' common political action while still giving political institutions a role in determining the content of the "thick" parts of the document. The relationship between these thick and thin domains of constitutional content is meant to protect the freedom of citizens, for giving courts the power to establish what counts as constitutional weakens the commitment and responsibilities that political institutions and citizens may feel toward constitutional values and institutions. Courts do have their role in determining what the thick constitution allows or bars individuals and institutions from doing, but extending that competence to the domain of the thin constitution entails entrusting courts with the task of determining the content, meaning and scope of hard-core moral and political values under the guise of legality, on pain of losing some things in the way of democracy and freedom. And this entails arbitrariness.

Other democratic constitutionalists such as Jeremy Waldron have claimed that while there is warranted room for weak forms of judicial review of legislation (200, 1354), how it is set up should be expressive of respect for the equality and freedom of individuals. That equality and freedom are manifested in political systems that choose to give citizens the possibility to

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decide about the scope and content of their basic rights and obligations under circumstances of political disagreement. Strong judicial review shifts the vocabulary by which citizens may tackle the differences they may legitimately have from the language of politics and morality to discussions framed in terms of legalese, precedent, text and judicial interpretation (2009; 2011). Moreover, it "disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights" (2006, 1353). The upshot of combining these two issues is well-portrayed as arbitrariness. Giving a small number of judges the possibility, not only to decide upon the meaning and scope of fundamental rights, but to place their judgement as the final say in that process, and to do so in a way that hinders their possibility to grapple with the actual reasons accounting for why their rights are to be understood in one way rather than another, entails that they will be governed by norms, rules and practices that can be hardly said to track their own conceptions about what constitutional rights and obligations mean.

And so, for all their differences, traditional and democratic constitutionalism meet halfway in their concern for doing away with arbitrariness in the exercise of constitutional power. This rather modest claim must be complemented with an examination of what role does the State play in putting that idea into action and, consequently, what does the reduction or retreat of the State entail for constitutionalism.

3. The State and Avoidance of Arbitrariness

I now want to explore an institutional angle of constitutionalism: the modern State. I do this because the State is an intrinsic institutional part of constitutionalism. And this entails that changes in the anatomy and functioning of the former will have bearing on the latter. Now that we hear and read that the sovereign power of the State is fading into the shadows, it is worth asking what effects this has on constitutionalism.

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I contend that there is a connection and that if we care about constitutionalism and the limitation of arbitrary exercises of political power, we should care about the State.

And so, in this section, I will reflect on that connection around the problem of arbitrariness. I claim that all conceptions of the modern State – or at least some of its most influential ones – are in some important ways tied to the constitutionalist project of avoiding arbitrariness in the exercise of power. That both constitutionalism and the State put the avoidance of arbitrariness at the centre of their most basic functions suffices to take both concepts as part of a common project whose realisation calls for their joint presence and action. The conclusion, explored in section IV, is that reducing the State entails the reduction of constitutionalism, irrespective of the form it assumes.

That the modern State is concerned with the avoidance of arbitrariness in the exercise of power is clear in some of the most classic figures in the history of constitutional thought, foremostly Locke and Rousseau. But things are not as obvious when it comes to studying the history of this institution. Famously, Thomas Hobbes conceived of a form of State equipped with so many and so great prerogatives that he makes it difficult for us to argue in its favour on the grounds of reasonableness, commitment to the rule of law, certainty, predictability, and other values that are part of the very stuff of what non-arbitrary government entails. Put in Runciman's terms, the Hobbesian state is then one where "there is always the risk of arbitrariness" (Runciman, 2021, 27).

In what follows I will outline Locke's and Rousseau's reflections on the State and its commitment to non-arbitrariness, and then Hobbes's more complex answer to the question of what the role of the State is. For all of them, non-arbitrariness emerges from the very process of *constituting* the polity through the social contract. Hobbes included. While impressionistic, the depictions show that the modern State is marked by a functionalist commitment to non-arbitrariness, even when – as it is the case with Hobbes – the prerogatives granted to sovereigns are extreme and make the road

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towards that end more difficult. The modern State may be absolutist, but even then, it is oriented towards making life minimally predictable.

The easy case is Locke. As it is well known, in his *Second Treatise*, he sought to ground the notion of a legitimate government on the consent of the governed. Political power emerges from the consent of those affected by the exercise of sovereign power and it is warranted when it is exerted within the limits of the law of nature, which in turn is an expression of the rights individuals have before the existence of the polity to whose creation they consent. Legitimate government is then government subject to limitations imposed by natural law regarding the respect for person, liberty and property. Should the government breach those boundaries, for example, by taking away property rights without the consent of the governed, citizens can then wield their right to resist and to "resume their original Liberty" (§222).

The moral of the story in Locke's *Second Treatise* is that every exercise of political power by a sovereign is guided by a normative structure that the sovereign is in no position to alter, let alone reduce or eliminate. That normative structure comprising pre-political rights functions as a justificatory background against which the sovereign may act. Thus, the sovereign must have recourse to a story whereby its decisions can be accounted for as manifestations of the rights and liberties subjects consented to being protected by the polity instead of doing so on their own. That idea, the notion that the sovereign must always act in light of reasons compatible with the ones subjects had when abandoning the state of nature, can be seen as an expression of a conception of political freedom framed as avoidance of arbitrariness. Locke's own words in the *Second Treatise* show this when he describes the state of nature as "inconvenient" given that everyone in such state "has the *Executive Power* of the Law of Nature", which puts them in the "unreasonable" position of being "Judges in their own Cases", "partial to themselves, and their Friends". It makes them, that is, arbitrary. And so, Locke defined freedom as liberty "to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance

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of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own" (§ 57).

The same goes for Rousseau, whose version of the social contract aims at bringing about a polity that wards against the negative effects of social conventions detrimental to the freedom of individuals, the most important of which is the individuals' acceptance of regimes of property rights allowing for unlimited accumulation of private goods. Reading the *Second Discourse* and the *Social Contract* as two stages of a single narrative leads us to see the first as a nostalgic story about how human relations were before small communities decided to accept the very Lockean claim by someone that her work – droving a stake on the ground – entitled her to the private enjoyment a piece of land and fruit it bears. Whereas Locke interprets this as warranting the enjoyment of a pre-political, natural right to private ownership, Rousseau thinks that there is nothing natural in the process, but merely a bad choice. Things would have been different and better had those who observed this individual claiming something for herself stopped to think for a moment and questioned him or her:

> What crimes, wars, murders, what miseries and horrors, would the human race have been spared by someone who, pulling up the stakes or filling in the ditch, had cried out to his fellows humans: "Beware of listening to this imposter. You are lost if you forget that the fruits are everyone's and the earth is no one's (2014, 91).

Rousseau reminds us, in a rather sardonic fashion, that "the wise Locke" was right in claiming that "where there is no property, there can be no injury", and invites us to understanding why. The reason is not that property is itself pernicious to human flourishing, for we must also remember that Rousseau considers that there was a time that took place after property was introduced, where "though men had become less patient, and natural compassion had already suffered some alteration, this period of the development of the human faculties, holding a just mean between the indolence of the primitive state and

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the petulant activity of egoism, must have been the happiest and most durable epoch" (2014, 97). Property is the seed of inequality. But more is required, namely a normative structure that moves from facts to norms, from the mere fact of appropriation to a right of private ownership.

And so, one understands Rousseau's contention in his *Discourse on Political Economy* that "the right of property is the most sacred of all the rights of citizenship, and even more important in some respects than liberty itself" (1997, 23). For under circumstances where property has already been accepted by individuals is that the Genevan wants to stir the course in a direction that somewhat resembles that happy and durable epoch. We then understand that the *Social Contract* takes men as they are and laws as they can be because it seeks to convince us that that government is made legitimate when it is in a position to control the pernicious effects that unlimited accumulation produces among individuals. A community that has entered a social contract whose terms allow for unlimited accumulation by some individuals renders others prey to the whims and unaccountable preferences and actions of others. It leaves them in a state of arbitrariness.

Now, the hard case in this story is Hobbes. Chapter 18 of *Leviathan* lists the prerogatives of sovereigns by institution. One only needs to skim the chapter to realise that whoever exerts those powers is under no relevant legal control. State power wielded by the sovereign is unbound, and does not need to give an account of its actions to one. Therefore, it is arbitrary.

The point is that even in its most absolutist version, the State is meant constrained – admittedly in Hobbes's case most likely only in principle – by its function to curb unchecked powers of the kind that make life unpredictable and hence arbitrary.

This is a standard reading of *Leviathan.* I thus need to briefly elaborate on the suggestion that the rights and prerogatives Hobbes is willing to give to the sovereign representative need to be interpreted against the light of the reasons why individuals living in a condition of natural liberty would be willing to sign a social contract comprising such extensive powers. This question leads

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us to conclude that, as much as Hobbes did grant the sovereign almost unlimited authority because the issue to which he was trying to contribute, namely the ending of civil war, was serious enough to require strong measures, he was in fact concerned with making the case for changing one state of complete arbitrariness – the state of nature – for another were individuals would lead lives with some degree of predictability – the civil state.

The point is that the standard interpretation of Hobbes which says that sovereigns are arbitrary, is inconsistent with the broader narrative explaining why and how the Commonwealth is brought about in the first place. The first thing to pay attention to, before the emergence of the State, is that subjects live in conditions of natural liberty, a state without a common power "to keep them all in awe", and that such condition, which is war, is a tract of time "wherein the Will to contend by Battell is sufficiently known". Such knowledge puts individuals in continuous disposition to fight, even if actual quarrels never materialise. Why is this tract of time and disposition equivalent to war? Because in such a state individuals live under conditions of anxiety and uncertainty that trigger a certain psychological disposition to look at others as enemies. In such a State there is no possibility of life planning, industry, culture, navigation, etc. What characterises war is not knowing what the actions of others mean and entail, and what one's own actions will entail for others and for oneself (Hobbes [1651], 1991, 89-90).

And so, reading Hobbes's project as one pushing for a move from an arbitrary state of nature to an arbitrary civil State puts us in a strange position whereby subjects seem to be willing to change one condition of fear and uncertainty for another one. This is an odd thing to argue for. For while Hobbes tends to insist on the frightening character of a *Leviathan* authorised to kill you if needs be, we should keep in mind the function such fear or impression is supposed to fulfil. And the function is to avoid that life becomes solitary, poor, nasty, brutish and short. Life in the civil state cannot be equivalent to that, as terrible as the sovereign could be. Mind you, that may,

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in fact, be the case. But – and this is a central concern for Hobbes – even when the Sovereign is authorised to kill you, at least you know that. At least you can plan your life, as miserable as it could be under the sword of the State, for at least you know that certain consequences will follow from your actions. If the sovereign systematically acts in a way that he cannot even guarantee that, there are no incentives for subjects to enter a pact that pretty much amounts to keeping life unbearable because uncertain. It may be a miserable condition, living in a civil State. But it is never as miserable as the state of nature (Hobbes [1651], 1991, 128). Some comfort!", you may think, and you would once more probably be right. But Hobbes does warn you that life in the civil state may be miserable; he never promises otherwise. The only thing for sure is that living under conditions of natural liberty is worse because it is arbitrary.

In conclusion, contractarians, even Hobbes, share the view that a basic function of the polity is set up the conditions under which individuals may plan their lives towards the future with some degree of certainty — to live under non-arbitrary rules.

Next, I will reflect on whether the commitment to non-arbitrariness expressed by the different strands of constitutional theory I have discussed in the previous section and the function that contractarians expect the State should fulfil of allowing individuals to plan their lives in advance with some degree of certainty are related. Moreover, I will comment on the consequence that may unfold for constitutionalism from reducing the size of the State or from declaring its passing.

4. Constitutionalism and the State

Commentators of different political and philosophical stripes meet halfway in asking for the disappearance of the State. Foucault once avowed that "[w]hat we need is a political philosophy that isn't erected around the problem of sovereignty, not therefore around the problems of law and prohibition. We

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need to cut off the King's head: in political theory that has still to be done" (2005, 121). Placed on the opposite ideological side, Hayek pursued similar ends: "Though [the ideal of the Rule of Law] can never be perfectibly achieved, since legislators as well as those to whom the administration of the law is entrusted are fallible men, the essential point, that the discretion left to the executive organs wielding coercive power should be reduced as much as possible, is clear enough" (2007, 112). Or as a commentator of Hayek's work once put it, "the point is that the individual must know, in advance, just how … rules are going to work. He cannot plan his own business, his own future, even his own family affairs, if the 'dynamism' of a central planning authority hangs over his head" (Chamberlain, 2007, 254)

The two previous sections suggest that we should pass on Foucault's invitation, even if only for the sake of avoiding arbitrariness. The suggestion has been hitherto twofold, and its components taken independently. Constitutionalism and the State are concerned with arbitrariness. But we need to know whether they vary independently.

Constitutionalism – democratic or otherwise – is connected to the State in non-negligible ways. And this means that doing away with the State entails in some degree doing away with constitutionalism. Understanding how these two categories relate to each other matters for how we address claims about the role that constitutionalism generally and constitutions more specifically may play, if at all, in addressing contemporary societal challenges.

While constitutions can function as signs or expressions of the occurrence of the emergence of the State it is not obvious that they always are. Social contracts – in the contractarian sense – are hypothetical or metaphorical devices meant to account for the existence of society, its institutions and its laws and obligations, on the grounds of voluntary manifestations of the will of its members to bring the polity about. And these pacts have not been signed anywhere by anyone. This is why Hobbes, Locke, Rousseau, and more contemporarily Rawls, insisted, with different emphasis, on hypothetical consent. Additionally, constitutions change all the time. They are reformed

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everywhere more or less every 19 years in average and, even if when they keep their text intact, their content changes through interpretation. The United States Constitution and the Israeli Basic Norms are cases in point (Jacobsohn & Roznai, 2020). If these constitutions were equivalent to what contractarians call a social contract, then the society to which these pacts gave rise would change as well in its identity. Two constitutions, two States, as it were. But the point of a social contract is that it creates, in Hobbes's parlance, a Commonwealth with "and artificial eternity of life". Constitutions have more modest expectations, as evidenced by the fact that they contemplate the seed of their own demise, as it were, incorporating in their text procedures for their amendment. Yet, they also exhibit traces or samples of the State's claim to having an eternity of life. Consider three. First, preambles. While constitutional preambles are not legally binding, these sections are meant to state in prose the fundamental principles of the polity. They include, for example, narratives about how a country's shared history and normative commitments are spelt out, and such commitments are made explicit in non-legal jargon. That is, although their content is usually snubbed by lawyers as irrelevant for addressing actual cases. They express, oft-times directly invoking *the people* as the authors of the text, commitments, goals, histories and other value-laden narratives that indicate that the authors of the text at hand form a polity that gives itself a set of rules by which to live.

The same goes for the introductory chapters of a constitution. Although different countries frame these sections differently, there are common elements to them. They tend to make clear what the source of political power is, where it emanates from, the form of the State, the form of government, where the limits of sovereign power lie, etc. These elements function as interpretive tools against which the thick constitution, to use Tushnet's terms once more, can be given meaning. Different charters give such sections different titles or labels. For example, fundamental constitutional principles (Italian Constitution, Colombian Constitution, section II of the German Constitution), the basis of institutionality (Chilean Constitution),

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preliminaries (Spanish Constitution), Basic principles of the form of government (constitution of Sweden).

This is key to grappling with the question of whether the commitment that both constitutionalism and the State have towards avoiding arbitrariness in the exercise of power is merely contingent. I surmise it is not. Whether constitutions create the State or whether the polity predates its formal recognition through constitutional law or, put differently, whether the exercise of constituent power is tantamount to an exercise of community creation, is a difference of degree. If the first choice obtains, then talk of constitutionalism and the State becomes redundant. Constitutions are, in this vein, partial reflections of the State, and therefore their concern with arbitrariness is not really *their* but *its*. If the latter, then constitutions map onto and are instrumental to the State's fulfilment of its functions only partially. It means that the State is a much wider phenomenon, encompassing domains of political reality for which a constitution is much more limited in accommodating for.

Constitutions, under this view, turn some domains of the State into positive law, but the State would be broader than the constitution. If so, then the declarations one traditionally finds in preambles as well as in the more programmatic aspect of the rights and liberties that constitutions typically enshrine, become not creations of the law but declarations, a recognition that those exerting constituent power make of some reality that is broader than what the text of the charter includes.

Notice that in both cases the Constitution maps onto the State it governs, either partially or fully. And this means that the state of constitutionalism, democratic or traditional, is tied to the state of the State. Once we appreciate this relation between the parts involved, we have the resources to understand why reducing the size of the State entails an affront to our search for avoiding arbitrariness in the exercise of power.

This is, admittedly, a relation that takes place in a limited or circumscribed domain. Avoiding arbitrariness is one among sundry other goals informing

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constitutionalism and the State. Many of these other goals, principles, values and so on could and most likely will outweigh it for several different reasons. Avoiding arbitrariness is a goal that is better understood as part of the domain of legitimacy, as one among a host of reasons the law can give its addressees to accept its content even, and perhaps, especially when they disagree with it, because they can always find comfort in the nature of the procedures leading up to its enactment. In turn, this means that there may be other considerations of a more substantive kind that can be separated from procedural considerations, at least analytically. For example, rights, justice, fairness, and others.

The circumscription of this domain suggests that the connections between constitutionalism and the State take place at a rather basic or minimal level and that they are fragile. After all, many States fall short of their duty to act non-arbitrarily. But there is one normatively relevant conclusion. That is, every constitutional polity is constituted as a State, and non-arbitrary law-making and government action is to be measured against the fundamental task every State – even the Hobbesian State – is mandated to pursue or at least not to deviate from, namely acting non-arbitrarily.

5. Conclusions

In speaking of non-arbitrariness, I have been writing about the character of constitutional actions adopted by the State. It is time to put a name to this. That the State and constitutionalism are committed to acting non-arbitrarily entails that they are committed to what is a basic tenet of the legal and political ideal we traditionally refer to as the rule of law.

This, I admit, says more about the structural conditions upon which the rule of law and not of men should obtain. It says that for it to get off the ground, a community committed to being governed by laws and not by the preferences, wills and particular interests of individuals is one that should be organised as a State and governed by a constitution. It says less about how to

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solve the disagreements between traditionalists and democrats in the constitutionalist camp and about which demands should society impose on the State beyond the rather basic and fundamental one that it should not be arbitrary. Whether morality, justice, rights, democracy and so on are part of the most basic elements of our political and constitutional imagination, or whether they are mere supplements to constitutionalism and the State, are questions that require a good deal of reflection. Much more than the one I can provide here, alas.

What are we to do, at this point, with Foucault's and Hayek's invitation to do away with the State? If my suggestion above is correct, it follows, perhaps not that the rule of law will be lost. There may be other ways of making sure that citizens live under non-arbitrary regimes or regimes guaranteeing freedom to their members. Both Hayek and Foucault thought so. The former even gave arguments and proposals for turning that ideal into something feasible, all in the direction of augmenting the size of the market in those areas left vacant by Government, trusting that the rule of law will be better secured through institutions emerging spontaneously. Foucault fell short in this respect, merely inviting us to imagine new forms of political organisation, generally hesitant to recommend solutions himself, wary of the danger that normative theorising is expressive of the values of a specific class (1977).

So, there may be alternatives to the State. The problem is that while we imagine these alternatives, buying into invitations to reducing its size or to getting rid of it almost all of it, entails, if my story here holds, jeopardising constitutionalism. I am not sure who would be willing to take such route. Hayek thought, as other libertarians do as well, that the rule of law is safeguarded with minimal intervention by government and by conceiving of society as an aggregation of individuals rather than as a community, practically eliminating the term "State" from his vocabulary (Kukathas, 2015). This is no mere linguistic choice, but a well-thought-out complex idea whose complete analysis requires more space than the one I can use here. For now, it suffices to say that the well-known application of such ideas to the

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political realm in the 1980s resulted in the dismantling of the State the widening of market forces, the weakening of welfare systems and the increase of private power. Libertarians may see this process as one where a certain kind of freedom and a certain conception of the rule of law have been secured. A discussion could be opened on this front. What is less certain is that the left would have welcomed such developments. Cutting off the King's head has led up to the processes mentioned above, against which the left, or rather a Foucaultian left, struggles today. If constitutionalism means limitation of arbitrariness, it needs the State.

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