

# An Aristotelian Critique of the Idea of Mixed Constitutions in Modern Governance

## Una critica aristotelica all'idea di costituzione mista nella governance moderna

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**Abstract.** The main argument of the article regards Aristotle's anti-realistic account, which presents a different viewpoint from that which simply fulfils or negates the truth-values of our statements on Mixed Constitutions. In modern times, the idea of a Constitution of many minds or of many individuals is proposed by Sunstein and by Hart, who maintain that neither intentions in juridical procedure nor Constitutional provisions can produce an ideal Constitution. Thus any interpretative procedure assigning to legal reality any definite, once-and-for-all meaning is precarious, according to Aristotle who asks whether we can gain epistemic access to the real essences of Constitutions and their structure. These ideas respond to a challenge in the Works of Contiadés, who will help us to turn the ideal Constitution into a realisable model in the situation in which we live nowadays. This is the main challenge to be met by the institutions of Europe in order to safeguard the nature of historical and intellectual values.

**Keywords:** theory of knowledge, a reductionist theory of the state, Aristotle's anti-realism, modern politics, Cartesian dualism.

**Riassunto.** L'argomento principale che viene trattato nell'articolo riguarda la posizione antirealista di Aristotele, che presenta un punto di vista diverso da quello che semplicemente soddisfa o nega il valore di verità delle nostre affermazioni sulle Costituzioni miste. In epoca moderna l'idea di una Costituzione di molte menti o di molti individui è proposta da Sunstein e da Hart, i quali sostengono che né le

intenzioni insite nella procedura giuridica né le disposizioni costituzionali possono produrre una Costituzione ideale. Pertanto ogni procedimento interpretativo che assegni alla realtà giuridica un significato definito una volta per tutte è incerto, in accordo con Aristotele che si chiede se sia possibile ottenere un accesso epistemico alle essenze reali delle Costituzioni e alla loro struttura. Queste idee rispondono ad una sfida contenuta nelle *Opere* di Contiades, in grado di trasformare la Costituzione ideale in un modello realizzabile nella situazione odierna. Questa è la sfida principale che le istituzioni europee devono raccogliere per salvaguardare la natura dei valori storici e intellettuali.

**Parole chiave:** teoria della conoscenza, teoria riduzionista dello Stato, antirealismo aristotelico, politica moderna, dualismo cartesiano.

## I. Introduction

Aristotle's anti-realistic account of the world only means that while elaborating his angle on the idea of Mixed Constitutions, his advance as regards the realisation of values remains open to an obstinate "Why". The reply needs an explanation in terms of something which does not itself require to be explained. And it is to this end that the concept of the logical impossible is introduced.

Material reductionism in historical theory concludes that talking about the Constitution of a state is talking about individuals. Can the opposite, that is, that individuals are unimportant, be true? Is a rationalist viewpoint in historical theory possible? Non-material reductionism implies that our statements about mind cannot be reduced to statements about matter. There is no definite answer to the question of the reliability of mind beside the undeniably psycho-physiological content of experience.

A false idea of time renders us incapable of seeing and understanding our weak nature, our limits and our limited ability to assign causes to facts, as do our dealings with the world if connected with this false idea. Hence the idea of a mixed Constitution is shown to be a fabrication of the mind; it is meaningless outside a prescribed set of circumstances that is defined by what we ordinarily understand when using our knowledge of the balance of power. Laws in history are given *ab extra* in Aristotle. No man's mind can impose them on history. He, however, does not consider change an evil.<sup>1</sup> To honour those who discover anything which is useful to the state is a sound proposition but cannot safely be enacted by law, he states. This may encourage informers and perhaps may lead to politi-

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<sup>1</sup> Aristotle, *Politics*, 1268 b23-31.

cal turmoil. Thus, he adds, it has been doubted whether it is expedient to make any changes in the laws of a country even if another law is better. Under pretence of doing a public service a man may introduce measures which are in fact destructive to the laws or to the Constitution.

## II. Aristotle and the Mixed Constitutions

Clarifying Aristotle's interpretation of the Mixed Constitutions suggests that to dismiss the Why question referred to the Introduction to this article, one needs to introduce the concept of the logically impossible to the end of realising the ideal Constitution, as required by the explanation of that different order.

Aristotle had seen Constitutions in practice. The arbiter, he states,<sup>2</sup> is always the person most trusted. He who is in the middle is an arbiter. The more perfect the admixture of the political elements, the longer the Constitution will last. Many, even of those who desire to form aristocratic governments are mistaken, he adds, as they give too much power to the rich. There comes a time, he adds, when out of a false good there arises a true evil. This is a synopsis of his line of thought regarding not only his reservations on aristocracy but on the mixed character of the Constitution. The encroachments of the rich are more destructive to the Constitution than those of the people. Thus collective decisions, Barnes states,<sup>3</sup> will be best only in special circumstances.

Why should we not suppose that individual expertise will be submerged in general incompetence? Aristotle states<sup>4</sup> that the multitude ought to be in power rather than the few best. This is true but it is only with some difficulty that this can happen. For the many, of whom not everyone is a good man, when they meet together may be better than the few good. He explains this: they are regarded not individually but collectively. A feast to which many contribute is better than a dinner provided out of a single purse. Here we see Aristotle's scorn of material reductionism. Each individual among the many has a share of excellence and practical wisdom. When they meet together they become in manner one man. This "man" has many feet and hands and senses. This holds with regard to their character and thought. Hence the many are better judges of music and of poetry of than a single man. Some understand one part, he claims, and some another. And among them they understand the whole.

<sup>2</sup> Aristotle, *Politics*, 1297 a5-12.

<sup>3</sup> Barnes, "Aristotle," 21-4.

<sup>4</sup> Aristotle, *Politics*, 1281 a40-1281 b10; 15-25. Giouli, "Polybius." *Intuition*, 47-48.

We see here Aristotle's scepticism: it is doubtful whether the principles of collectivity and lack of ability can apply to every democracy, and to all bodies of men. In some cases, the principle cannot be held applicable, he states. The argument would equally hold about animals and it could be asked whether men differ from animals. There may be bodies of men, he admits, about whom our statement is true. If so, one difficulty has already been raised. There is also another difficulty: what power should be assigned to the mass of freemen and citizens who are not rich and have no personal merit? This can easily be solved, he adds. It implies that we are incapable of realising this mixed character in all circumstances and what is left to us is just generalising.

But is this anti-realism always the case?<sup>5</sup> Aristotle's empiricism is evident. This has nothing to do with the "beginninglessness" (non-determined beginning) of Constitutional ideas and facts and values; nor with their realisation despite the fact that the idea of the Constitution may be imperceptible *in abstracto* to us. We must insist on the succession of events and their causes. Aristotle is very unwilling to trace causality before the beginning of time and the Constitution. Thus, causal principles, we understand from Charles<sup>6</sup> do not govern or influence our future progress. Cause is qualified by the succession of time in Aristotle. We must not confuse the infinite succession of time with the cause-chain in Aristotle.<sup>7</sup> The infinite chain of fathers and sons proves only the infinity of time. It does not prove the infinity of causes. The chain of causes is finite, he adds, because each cause is the same in kind in this chain. Thus, we may steer clear of the optimistic goal of any model-making based on time's eternal nature. Constitutions, too, are not susceptible to models, as they live and die with time. That is why Aristotle is extremely pessimistic about whether mixed Constitution model-making ideas can free us from inequality and worthless conduct in a State. These procedures only testify to human vulnerability. There comes a time, Aristotle states, when out of a false good there arises a true evil.

### III. Modern Ideas

As Sunstein<sup>8</sup> and Hart<sup>9</sup> maintain, neither intentions in juridical procedure nor constitutional provisions help us to avoid such perils. There

<sup>5</sup> Charles, "Method and Argument," 231-57 and Giouli, *How is Social Science Possible?* 135-260.

<sup>6</sup> Charles, *Meaning and Essence*, 1-3.

<sup>7</sup> Alexander of Aphrodisias, *Aristotle Metaphysics 2&3*, 5, 29-30 and nn. 64-66.

<sup>8</sup> Sunstein, *A Constitution of Many Minds*, x, 28-29.

<sup>9</sup> Hart, *The Concept of Law*, 71-73.

is no reductionism in our critique of these mixed Constitutions: talking about States is not talking about the individuals that constitute them. The opposite is not true in Aristotle's theories of a State as a logical construction made up of individuals. Yet, our critique does not hint at Cartesian dualism on State theories and lived experiences: Descartes rejected the view of the psycho-physical status of experience. Aristotle's view of Constitutions offers the best possible account of them which links directly with Sunstein's pragmatic idea of a Constitution's being meaningful if, and only if, it is made rather than found: the ideal interpretation of a Constitution is not contained in the document.<sup>10</sup> The process of interpretation remains always imperfect and open. We can never realise social and political values or pursue them; we can only qualify causality in terms of an uninterrupted temporal chain. We are unable to fully respond to and understand the challenge which the pursuit of values requires. We may need to pursue values, but we cannot reach them. The idea of a Constitution of many minds or of many individuals – as thought out in our modern tradition by Sunstein or by Hart – develops beyond the dead end that Aristotle sketches in his ideas on mixed Constitution.

#### A. Sunstein

The Constitution, Sunstein states,<sup>11</sup> does not set out the instructions for its own interpretation. It sets out no such rules; it does not say that judges or others, attempting to interpret the document, should be Thayerians, originalists, minimalists, perfectionists, or anything else. But can we realise it *in abstracto*? A Popperian bound-to-fail agenda of the misinterpretations of the Constitution is aptly described by Sunstein. The mixed Constitution solution is, clearly, just another of these misinterpretations. Thus, Sunstein continues, any approach to the document must be defended by reference to some account that is supplied by the interpreter. This document needs to establish itself, identify itself and produce evidence about itself. The Constitution, he states, is rightly taken to be binding on judges and others. If we are engaged in interpretation, we cannot simply cast aside a normativistic attempt to refer to the document. However, it is possible to go further, Sunstein adds. In the end, any approach to the original document must ultimately be perfectionist in the sense that it attempts to make that document as good as it can possibly be. This possibility simply recalls Aristotle here. There is in us a common sensibili-

<sup>10</sup> Giouli, "The Dogma of Reductionism," 144-166.

<sup>11</sup> Sunstein, *A Constitution of Many Minds*, 23.

ty, Aristotle states,<sup>12</sup> that allows no further inferential steps.<sup>13</sup> Hence, no further inferential steps are needed regarding how we come to know that common qualities are not incidental in the Constitution. Hence, we need not answer any question on what triggers our mental images of the ideal Constitution.

Perhaps, Sunstein adds, the alternatives to perfectionism are all, in some sense, perfectionist too. Sunstein's pragmatism does not outweigh Aristotle's no-way-out, as mentioned above. Since Sunstein is aware of our inability ever to attain the ideal Constitution together with its interpretation, his statement on perfectionism is not an arrogant statement. His viewpoint contains no Cartesian Dualism due to his awareness of human incapacity and frailty. Sunstein states that the idea of interpretation thus understood imposes constraints. As jurists we must use the permitted equipment which does not extend into the unknown, into the ideal interpretation. These are the constraints Sunstein hints at. There is nothing that interpretation clearly is, he adds, but there are some things that interpretation clearly is not. Pragmatically speaking it would be good to substitute the best imaginable Constitution for our own Constitution. This substitution cannot count as interpretation. As we have mentioned above, the substitution does not fall within our conceptual range; hence it is incomplete. The idea of interpretation, he adds, does not compel any form of originalism. It is perfectly normal to find domains in which interpretation occurs without the slightest reference to either original meaning or original intentions. Indeed, here we can do nothing other than generalise regarding the intentional, this bizarre aspect of the human mind.

To clarify further his thoughts Sunstein offers an example. Suppose that the Supreme Court is interpreting a precedent—say, its own decision to invalidate separate-but-equal. What, he wonders, are the implications for racial segregation at a federal prison? There racial tensions are running very high and prison officials reasonably fear that integration would produce violence. The Court, he states, is most unlikely to ask about the subjective intentions of Chief Justice Earl Warren, the author of the Court's opinion in this case and is equally unlikely to inquire into the subjective intentions of those who agree with this opinion. Perhaps, he continues, there is no such intention with respect to the question. Perhaps it is not accessible even if it exists. In any case the Court will show little interest in it. This is less because it is inaccessible than because it is not controlling and perhaps irrelevant even if it is accessible. Nor will the Court pay attention to the original public meaning of its own decision in the case

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<sup>12</sup> Aristotle, *On the Soul*, 428 a28-30.

<sup>13</sup> Charles, *Meaning and Essence*, 125.

(whatever that might mean). Judicial interpretation of precedents has little to do with original intentions or original meaning. Thus, he concludes, in dealing with the meaning of the case, the Court makes an independent judgment about how best to fit and to justify its own prior ruling. Thus, he states, originalism is merely one type of interpretation. The question is whether it is the right one. That is the question which requires attention; not the concept of interpretation. It focuses on the consequences of the recommended angle. He wonders whether this would make our Constitutional order better or worse.

Sunstein shows the greatest wisdom when he dismisses all our ideas on interpretation, arguing that he does understand what it consists of in. His rationality admits that the search for Constitutional truth ends somewhere – and begins from some point. However not all theories about the Constitution can be conclusive. What seems to give these theories an abiding interest is, firstly, their tragic attempt – fatally unsuccessful – to supply us with irrefutable propositions regarding Constitutional and historical truth.

These theories remain permanently at risk<sup>14</sup> due to the (logical) insufficiency of scientific evidence. Such propositions imply the use of a conceptual armament extending into the unknown. The scientist's task is to make sense of the Constitution within a certain conceptual range. This range does not and cannot include such extensions. Can one allow that science can undertake the impossible?

Sunstein fitly points out how adamant Aristotle is that the ideas of many minds can sort out problems and confusions. This holds good in the Constitution-making process. Sunstein refers in detail to Aristotle's texts: thus, the quality of the ideas of the best thinkers can be improved on by the diverse ideas of diverse groups of thinkers when they all meet. This is a collective process, not an individual one. Each can contribute her/his share of goodness and moral prudence, thus contributing to the process of deliberation. When many are involved, Sunstein continues, following Aristotle, some appreciate one part, some another, and all together appreciate all. This quality of the ideas of the best thinkers is clearly improved, Sunstein states, by many minds deliberating together. This is exactly what is meant by Aristotle's preference for the ideas of society over those of the individual in the Constitutional process.<sup>15</sup> Sunstein, however, summarises the fallibility of this solution as regards possibilities of confusion and misunderstanding in the making of the Constitution.<sup>16</sup> In one word, Sunstein

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<sup>14</sup> Giouli, *The Taming*, 15.

<sup>15</sup> Sunstein, *Infotopia*, 49 and n.7.

<sup>16</sup> Sunstein, *Infotopia*, 57-58.

warns us against cliquishness in group deliberating procedures. Firstly, Sunstein mentions the way people have preconceptions about truth before they arrive at the truth. Thus, he adds, the truth is likely to win given that the correct view has a lot of support within the deliberating group *before* people start to talk. Hence, statements concerning what can be regarded as indubitably evil and what good suggest criteria that can guide our research in order for us to realise this ideal – an impossible task. To the disappointment of the sceptic, however, we cannot treat every statement as open to criticism and demand evidence for its truth and falsity. This is clearly inferred by Sunstein herein, as he states that questions to which the correct answer is clear can guide the deliberating groups to the truth, the correct view of which has the above-mentioned advance support. However, he stresses that when groups move in dangerous directions e.g. when discussing or/and carrying out killings and destruction, this is usually because the flow of information supports that movement.<sup>17</sup> This means, Sunstein states, that deliberating groups generally arrive at a truth which cannot be demonstrated. But to what extent can such advance support lead to safe reasoning: i.e. reasoning not based on prejudice or seclusion? Sunstein and Hastie,<sup>18</sup> following Irving Janis, refer emphatically to an idea of *groupthink* according to which groups blunder, not in spite of group deliberation but because of it. After deliberation, for example, governments, companies, labour unions and religious organisations often make disastrous decisions.

Secondly, Sunstein touches on the poor communication of information among the members of deliberating groups. Poor communication means degradation of the knowledge of political Good. However, deliberating group members can communicate the relevant knowledge obtained in advance to a greater degree than the knowledge acquired by one or a few group members. This means, Sunstein maintains, that knowledge acquired by many minds getting together is not fully aggregated, and thus, not correctly arrived at. And if the group is secluded this is a poor way of arriving at knowledge. I.e. it is unsuitable as a way to realise the values of *paedeia*. Unfortunately, Sunstein and Hastie maintain,<sup>19</sup> groups fail to live up to their potential. An example of this would be that group investment in the future goals of knowledge of the political Good go awry, harming millions of people over the years.

Thirdly, Sunstein refers to the fallibility of statistics concerning the above-mentioned procedures of deliberating. Individuals, he states, clear-

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<sup>17</sup> Sunstein, *Going to Extremes*, 23.

<sup>18</sup> Sunstein and Hastie, *Wiser*, 6.

<sup>19</sup> Sunstein and Hastie, *Wiser*, 5.

ly tend towards error; the same –even greater– is the tendency towards error of deliberating groups. Members of these groups place more faith in shared knowledge than in unshared. This suggests, Sunstein states, that they disregard surveys and polls. He gives an example of this: in the case of an unclear answer, i.e., not easily demonstrated to be false or correct, groups express the tendency towards error in a clearer way than individuals do. When, for example people begin with a high level of outrage and favor some kind of aggressive responses, groups are more aggressive than individuals.<sup>20</sup> Nevertheless, in the case of the individual's attitude to the use of force, we can see that the likelihood that they are better informed than groups is statistically expressed, incorporated, and designed.

This means that deliberating groups are more accurate in this case, though perhaps statistical groups are superior in other ways. But statistically evaluating individuals means incorporating all the likelihood that they are well-informed. Thus, the tendency of individuals towards error can be measured in terms of their rights; i.e., this is a question of rights and the relinquishment of rights. What is the value that qualifies the existence of these rights?<sup>21</sup> It is the individual's being well-informed and engaged in the realisation of the ideal of political Good, rather than their participating in a "cliquish" group that can make a difference and lead to an answer to questions. The tendency of individuals towards error can be measured more safely in the former case than that in deliberating groups. Hence, secluded group deliberating procedures, according to Sunstein, prevent deliberators from (i) reaching the correct result (ii) evaluating the information dispersed within the group and (iii) being in tune with results reached jointly by statistical groups and deliberating groups.

Here, Sunstein designs his plea for the ideal deliberative democracy and warns us against the formation of secluded enclaves. Hence,<sup>22</sup> the idea of a "public forum" may sound good. However, the lesser amount of common experiences as well as a prejudiced system of individualised filtering might weaken an ideal Constitution derived from such a democracy. It is the increase of communication between diverse people and diverse opinions in the deliberation process that will keep both ideal and fora safe from prejudice and relativism; that is, this increase will keep their institutional, public and common character<sup>23</sup> immune from cliquishness. And among the diversity of views about what this ideal sanctions, a Constitution is a constraint.

<sup>20</sup> Sunstein, *Going to Extremes*, 16.

<sup>21</sup> Sunstein and Hastie, *Wiser*, 33. Giouli, "Freedom," 334 and n. 43; 336 and n. 58.

<sup>22</sup> Sunstein, *#Republic*, 34.

<sup>23</sup> Giouli, *Destitution and Paedeia*, 130-131 and n. 1.

Once a Constitution is in place, Sunstein maintains,<sup>24</sup> people do not have to decide how many presidents to have, or whether there will be some kind of supreme court, or whether elections will be held. This Popperian angle on what we can do and what we cannot do, in the Aristotelian absence of the omnipotence of political and legal reasoning,<sup>25</sup> is further stressed by Sunstein. A Constitution can itself be seen as a precommitment by which we relinquish our flexibility in order to be governed by firm rules, he states.<sup>26</sup> Sunstein refers<sup>27</sup> to the example of Ulysses and the Sirens to show that the demand for totally unrestrained freedom is self-defeating.<sup>28</sup> Sunstein not only points out the problems associated with indeterminacy, but hails the fact that, in many domains, choices are made for us;<sup>29</sup> though certainly it is right to celebrate freedom of choice. If each of us, he states, had to participate in each of the decisions that affect us, we would immediately be overwhelmed by complexity. Hence, a settled background, of a grammar-like nature, would promote our freedom, not undermine it, he adds. A number of choices – amendable in theory but fixed in reality – is made by the US Constitution, he further maintains. Here we see, as in the case of deterrence mentioned above, that the ideal we are seeking can be neither a single nor a long-term one; at times, whatever we do in search of this ideal is done in response to a sudden crisis. This, however, is plainly subject to trial-and-error procedures.<sup>30</sup>

Sunstein expresses serious concerns regarding deliberation as a process for improving judgements: is this a process of transgressing rights? Sunstein's stern warning is against the formation of secluded enclaves, as mentioned above. Deliberation on the Internet, he states, for example through blogs, may be meaningless, as the cluster of like-minded mindsets in secluded groups maximises error and falsehood, especially within groups deliberating in a small enclave.<sup>31</sup> This, he states, is a potential danger to social stability and, simultaneously, an apparent source of social fragmentation. We are warned by him against social injustice and meaninglessness. Group polarisation and social homogeneity damage the process of deliberation, as embedded in the Constitutional law of many nations, he adds. Can the risks inherent in the limited deliberation of like-minded people be minimised? Aristotle would seriously doubt it.

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<sup>24</sup> Sunstein, *Choosing Not to Choose*, 206-207.

<sup>25</sup> Giouli, *How is Social Science Possible?* 73 and n. 7.

<sup>26</sup> Sunstein, *Worst-Case Scenarios*, 192.

<sup>27</sup> Thaler and Sunstein, *Nudge*, 191.

<sup>28</sup> Giouli, "Freedom;" "Huntington;" "Cybertrends." Burke, *Popper*, 181.

<sup>29</sup> Sunstein, *Simpler*, 210.

<sup>30</sup> Burke, *Popper*, 186.

<sup>31</sup> Sunstein, *Change*, 20.

Indeed, prejudices and relativism can prove fatal, here. For Sunstein, all depends upon the distinction between deliberation and deliberators.

What is the meaning of Aristotle's warning that material reductionism can affect the function of the State negatively? Aristotle lays great stress on this focal point in his political philosophy and epistemology, concluding that human life and its products ineluctably deprave.<sup>32</sup> Giouli, like Plato before her,<sup>33</sup> brings up the question of the inexplicable. Such an understanding can help us to come to terms with our passions and fears regarding the unattainable. This is also stated by Aristotle.

Adamantios Koraeas, born in Smyrna in 1748, died in 1833 in Paris, a brilliant Greek philologist and one of the intellectual instigators of the 1821 Greek Revolution, has stressed the notion of choice (προαίρεσις) in Aristotle. Koraeas' comments<sup>34</sup> refer to the political Good as chanced upon rather than chosen (προαίρεσις) in Aristotle. Indeed, in *Nicomachean Ethics*,<sup>35</sup> Aristotle states that we do not deliberate about the totality of human affairs, e.g. a Spartan would not meditate on the best Constitution for a Scythian; nor do we deliberate on eternal things. None of these things can be affected by our own efforts. Choices are made principally in an instable way by the ruling section of the self, i.e. when we have decided as a result of deliberation, we desire in accordance with our deliberation, Aristotle concludes in *Nicomachean Ethics*,<sup>36</sup> in what is plain also from very ancient Constitutions. We see here how little can be done by an experimentalist according to his "craftsmanship" model. How far can the ruling part of oneself be objective? Aristotle's idea of explaining and thus crafting the future and institutions, even from the perspective of an experimentalist, guarantees objectivity in his way of viewing nature and the world.<sup>37</sup> Charles finds this way challenging as regards his views on Aristotle.<sup>38</sup> The distinction, however, between deliberators and deliberation made by Sunstein is not possible for Aristotle. Aristotle speaks, though with reluctance, of society – not solely of individuals.

Thus, any dealings we may have with the world will be too little and too late to make any difference. Aristotle's objective admission that authority lies in the world out there – not in our dealings with the world<sup>39</sup>

<sup>32</sup> Aristotle, *Politics*, 1267 b1; Toynbee, *A Study*, XII, 584-587, esp. 585; Giouli, *The Taming*, 34 ff; 55 ff; 81 ff; 110 ff. Moutsopoulos, "Review of Giouli's *The Taming*," 181-2.

<sup>33</sup> Giouli, *The Taming*, 161 ff.

<sup>34</sup> Koraeas, MS 402 (3).

<sup>35</sup> Aristotle, *Nicomachean Ethics*, 1112 a28-30.

<sup>36</sup> *Ibid.*, 1113 a5-13.

<sup>37</sup> Giouli, *How is Social Science Possible?* 135-260.

<sup>38</sup> Charles, *Meaning and Essence*, 260-2 and 213-7.

<sup>39</sup> *Ibid.*, 260.

leads us to consider as incomplete all sorts of deliberating procedures – even those involving interpretation. But the distinction between deliberation and deliberators is all that is left for man, and even for Aristotle.

Does this abolish any attempt to attain interpretational knowledge, for Aristotle – which is what is left for the individual? Not entirely as, instead, he proposes his craftsmanship model, which suggests, no matter what, that no attempt to craft the future and Constitutional values need be completed, simply because these cannot really exist. But is there here a parallel with Sunstein's interpretation of the Ideal Constitution?

However, Aristotle's zeal for objectivity remains intact and guides us to focus on his idea that no process of interpretation need be complete: there is no requirement, Charles maintains, that the enquirer at the outset should know into which category the account in question fits. This means that our account of the world depends on whether or not there is a natural unity present which is significant, Charles states,<sup>40</sup> in so far as its linguistic expression signifies certain features.

The opposite happens in the interpretation process of the Constitution formed by deliberation and the Law in general, as proposed by Sunstein and by Dworkin. Dworkin claims, Sunstein maintains,<sup>41</sup> that a chain novel metaphor, that is, a novel published as a sequence of books, fits the nature of interpretation, and especially legal interpretation.<sup>42</sup> To answer questions on what the Constitution sanctions or forbids, Sunstein continues,<sup>43</sup> judges need to investigate their previous decisions and deliberate what answer puts these decisions in the best light or makes Constitutional law the best it can be. So they must write the next episode.<sup>44</sup> To a significant extent, that is what Constitutional law is, Sunstein concludes. Indeed, the use of the above-mentioned idea presupposes, as Burke puts it,<sup>45</sup> that we have already adopted a range of concepts that will allow us both to identify and formulate facts and values and to produce evidence about them. That is, this range of concepts renders possible the pursuit of legal values; furthermore, it makes us think more about the possible, than about what ordinarily happens. As Burke fitly adds, it determines what questions we ask, what answers we are prepared to take seriously and what possibilities we are willing to consider. Hence, it would be useless, Burke states, to adopt a neutral (non-interpretative) standpoint; independent of all such ranges of concepts. This is, indeed, what is left for mankind,

<sup>40</sup> Charles, "Meno", 138; 135; 137.

<sup>41</sup> Sunstein, *Star Wars*, 152-153.

<sup>42</sup> Dworkin, *Law's Empire*, 228-238.

<sup>43</sup> Sunstein, *Star Wars*, 153.

<sup>44</sup> *Ibid.*, 145 ff.

<sup>45</sup> Burke, *Popper*, 24.

clearly without their becoming entangled in relativism. One needs to refer solely to reason's weakness, and especially to the frailty of legal reasoning. Aristotle's objection to this, however, links with his conviction that time qualifies cause. Hence assigning causes to facts is precarious: the idea of time will remain elusive. Thus any interpretative procedure assigning to reality, and to legal reality especially, any definite, once-and-for-all meaning is precarious.

Sunstein tackles the complex topic of the diversity of causes in the chain of fathers and sons rather than the infinity of causes and time. In his *Star Wars*, a philosophy of history written from a legal angle, he proposes the redemption of a father if his son likes him.<sup>46</sup> Sunstein successfully cites the prophet Isaiah to unify his interpretational account of legal life and reality in general. However, Aristotle's reservations could be applied to this work. Sunstein<sup>47</sup> quotes from the prophet Isaiah,<sup>48</sup> the oracles regarding Judah, Jerusalem and the nations, who are promised restoration and warned of judgement by Isaiah. The prophet meticulously fixes such themes for the righteous whom the Lord summons: scarlet sins can yet be white as snow and white wool may be dyed crimson. This means, Sunstein maintains,<sup>49</sup> that freedom of choice is possible amidst a clouded future; hence choice resonates with time. Thus, one always draws time's "thread" through one's lives; one is unable, however, to "knot" it – to use Kierkegaard's metaphorical language.

On this theme, Sunstein points out that a parent risks her/his life – as any child would wish – to save the life of her/his child. This is just even if the parent has to combat authority and arbitrariness from their perspective children, Sunstein adds, being good, believing and hoping in their capacity to forgive, redeem their parents in order to bring out their parents' better selves. This optimism, however, expressed by Sunstein in his account of the world in *Star Wars*, presupposes innocence in the possibility of choice as resonating with time. The opposite, however, is possible: to the extent that planners force people to choose whether or not people would like to choose; there is a paternalistic dimension to their actions, Sunstein states.<sup>50</sup> This means the annulment of both freedom and choice, as Aristotle stressed in his dictum on depravity. Hence, again, what triggers the intentional is a major problem – even if it is the normative.<sup>51</sup> According to Sunstein, although his opinion is controversial, choosing

<sup>46</sup> Sunstein, *Star Wars*, 91ff.

<sup>47</sup> *Ibid.*

<sup>48</sup> Isaiah, *Book, 1*, 18-19.

<sup>49</sup> Sunstein, "Star Wars".

<sup>50</sup> Sunstein, *Laws of Fear*, 200.

<sup>51</sup> Giouli, *How is Social Science Possible?* 82 ff.

is good for both freedom and welfare. This is, nevertheless, Aristotle's anti-realist understanding, which does not begin with the perception of order in this view of an ideal Constitution, but rather attempts to uncover it. It can be connected to major issues of the necessity of rights and the need to relinquish some rights at times.

Let us here cite an example to clarify the case of the interpretation of the Constitution, as regards individuals. Most possible security systems, including that of the US, Thaler and Sunstein maintain,<sup>52</sup> are also benefit plans. A person knows exactly what s/he will be paid unless Congress changes its mind, as it is allowed to do according to the Constitution. The Constitution does not protect the individual's right to Social Security benefits. Similarly, according to Thaler and Sunstein, the "right to a good education" is not part of the Constitution but has become a cultural commitment,<sup>53</sup> and a few steps could enable many more children to enjoy that right. From these two examples, we can understand how to pursue our commitment to realising values and establishing facts via the Constitution, rather than attempting to grasp what the Constitution really means at the present day. To repeat, we are unable to fully respond to and understand the challenge which the pursuit of values requires. However, whether the conditions for determining truth values are fulfilled or not, there remains the question of the realism/non-realism argument as to how we understand the term "Constitution".

Clarifying Sunstein's contribution, one must add the following: Whatever advance he makes in the field of Constitutions and politics remains always open to an obstinate Why. Sunstein, echoing Aristotle, is well aware that even when one succeeds in identifying still more general laws in legal science that govern order or primitive stages of its development, one will be in need of an explanation in terms of something which does not itself require to be explained.

### B. Hart

At this stage of the discussion, it is necessary to introduce Hart's contribution on the subject. H.L.A. Hart<sup>54</sup> has serious reservations about ever reaching an agreement about what the function of a Constitution is. How can it absolutely tame power? Are Constitutional procedures solipsistic? Hart states that every legal system must make, in one form or another

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<sup>52</sup> Thaler and Sunstein, *Nudge*, 107.

<sup>53</sup> Thaler and Sunstein, *Nudge*, 208.

<sup>54</sup> Hart, *The Concept of Law*, 71-3.

er, certain provisions; and this not necessarily by a written Constitution. These provisions regard the qualifications of the legislators and the manner and form of legislation. They clarify and identify the legislative body and what it must do. They act less as legal limitations, Hart adds, to the legislative body's power. The standards, however, for the accomplishment of such procedures are inexact. There are, he thinks, no accurate criteria for taming power in such procedures. It is very difficult to give general criteria which satisfactorily distinguish mere provisions as to manner and form of legislation. The same is true for the definitions of the legislative body. Substantial limitations prevent defining. Hart offers examples to stress such difficulties. Plain examples of substantive limitations, he adds, are to be found in federal Constitutions such as those of the United States of America. Commonplace processes of legislation cannot change the division of power between the central government and the member states, nor also certain individual rights. In these cases, he continues, legislation may be carried out either by the state or by federal legislature. It may alter, or be inconsistent with, the federal division of powers or with the protection of individual rights. In these cases, the enactment is liable to be treated, he states, as *ultra vires*, and to be declared legally invalid by the courts. This happens to the extent that the enactment is in conflict with the Constitutional provisions. A critique of such an account stresses the commonplace which dominates here. The most famous of such legal limitations on legislative power, Hart states, is the Fifth Amendment to the Constitution of the U.S. This states chiefly that no person shall be deprived of life, liberty or property without the process of law. Statutes of Congress thus have been declared invalid by the Courts when found to conflict with these restrictions. Hence there can be no other standards here than those implied by the commonplace. Such constant and common elements, however, do not abolish the possibility of error, of arbitrariness due to the omnipotence of power. The taming of power implies respect for the diversity of views. Certain provisions of the United States Constitution, Hart adds, raise political questions. Where a case falls within this category, the Courts will not consider whether a statute violates the Constitution. The impending danger of error here is indeed extreme. The above-mentioned constant elements, i.e. values, disappear and this shows a variable morality. Legal limitations, he states, on the normal operation of the supreme legislature can be imposed by a Constitution. But these themselves, he states, may or may not be immune from certain forms of legal change. This depends on the nature of the provision that is made by the Constitution for its amendment. Most Constitutions, he states, contain a wide power of amendment to be exercised by a body distinct from the ordinary legislature. Members of the ordinary legislature, using a spe-

cial procedure, can also exercise it. But not all Constitutions are qualified by such a power of amendment. Certain provisions of the Constitution impose limits on the legislature. But these are kept outside its scope even where there is such a power of amendment. But is not this power limited and exploited? We add the term *exploited* here to show our incapacity too ever reach freedom from exploitation and ignorance. This may be observed, Hart adds, even in the Constitution of the U.S. – though some limitations are no longer of practical importance.

Does beginninglessness qualify Constitutional procedures and their ideals? Sceptical answers and reservations plainly deny this. We are dealing with a trial and error procedure, where reason's diminishing capacity to move the tide of Constitutional reality and history or interpret it is obvious. Morality in juxtaposition to rationality is also variable. Is there an impending danger regarding individuals who are engaged in Constitutional procedures without taking into consideration theories, viewpoints, significances or values? Can anything prevent the development of a Constitution towards its perfection? Is the ideal Constitution possible? The answer is definitely no; unless we are willing to accept the dead end an omnipotent rationalism entails. We must accept the frailty of reason each time we attempt the impossible and are bound to fail – while imperfectly forming the idea of mixed Constitutions. The content of experiences relevant to this formation is undeniably psycho-somatic. The agenda of the executive deals precisely with this content.

The commonplace qualifies the aforementioned Constitutional procedures. Hart's approach adds to such ideas on the forming of a Constitution. For him, this is bound to be an imperfect formation and it can top us from acting, unless we see and understand our weak nature, our limits and our limited ability to assign causes to facts. The same holds good for all our dealings with the world. Then we opt neither for a less empiricist viewpoint nor for a more rationalist one.

Hart's focal point as regards the mechanisms that lie beneath the function of the ideas of Mixed Constitutions has been undermined in the history of legal philosophy. His readers have failed to stress the importance of his belief that these mechanisms which produce the unique phenomenon of the function of the Constitution remain in the realm of the unknown.

### *C. Contiades*

At this stage, it is useful to introduce Contiades' contribution to the discussion. Contiades' idea that the perfect Constitution is not based

(but should be) on reason suggests a parallel with the ideas of Aristotle and Sunstein<sup>55</sup> on the Constitution. Commenting on the non-rational character of the Constitution, Contiades' account does not do away with the realist/non-realist argument, as he defends the view that a Constitution can be interpreted in various ways. This refers to the normativistic attempt to interpret documents and constitutional rights. Dismissing ideological premises<sup>56</sup> in an attempt to make any such document as good as it can possibly be does not, however, do away with the above-mentioned realist/non-realist argument. To opt for the logical impossible as regards a perfectionist approach to the Constitution is quite another matter. The criteria used to stress the common, public and institutional character<sup>57</sup> of social rights are inexact. Contiades puts us on our guard against<sup>58</sup> this inexactitude.<sup>59</sup> An anthropological view of social rights means that the institutional character of the social rights will be suspended. The norm for protecting the common good will be suspended and relativistic options as regards the common good and political choices will be entangled.<sup>60</sup> This tension between rights and the common good can easily be seen within the context of the market and e-communications. Only within a context of solidarity would it be possible to guard against hacking and exploitation. Unqualified freedom as regards the use of the Internet, say, certainly does not link to public rights. It is equality which is needed to make freedom and rights realisable.<sup>61</sup>

The only rationale which the Constitution should serve is a rationale that serves what the laws sanction or forbid; any unqualified rationale is non-sensical.<sup>62</sup> The "mechanics" of a Constitution should ideally function in order to annul the contingent and stress the essential character of the Constitution. Social coherence and a culture of political co-operation qualify<sup>63</sup> the essential elements of the Constitution and the cases in which it expands itself. Economic institutions guarantee its stability and function as regards electronic crime in the era of global crises.<sup>64</sup>

But does this recall Aristotle's "craftmanship" model of the world as we strive to turn the ideal into reality (without undercutting, however, the standard realist/non-realist argument)? In search of a shift from reason's

<sup>55</sup> Sunstein, *A Constitution of Many Minds*, 23.

<sup>56</sup> Contiades, "Social Rights", 267 ff.

<sup>57</sup> *Ibid.*, 284.

<sup>58</sup> *Ibid.*, 285-6.

<sup>59</sup> *Ibid.*, 269 and n. 6.

<sup>60</sup> Contiades, "Social Rights", 270-271.

<sup>61</sup> Giouli, "Cybertrends."

<sup>62</sup> Contiades, "Incorrect" *Constitution*, 120 and n. 204.

<sup>63</sup> *Ibid.*, 219 and n. 383; "Constitution".

<sup>64</sup> *Ibid.*, 218, n. 380.

limitless explanatory power to more pragmatic attempts, Contiades comments on the parallel between the Constitutional inability to provide the best possible solutions for the resolution of modern economic crises and the failure of political institutions. That Constitution can itself be seen as a precommitment by which we relinquish our flexibility in order to be governed by firm rules, is certainly a possibility.<sup>65</sup> The bottom line, following Aristotle,<sup>66</sup> is that the Constitutional status-quo loses in extension (of all actual contingencies), to gain intensionally (the essential).

This is a challenge faced in the Constitutional realm, as regards Contiades' idea of expanding Constitutional functions in such a way as to cover instances of the contingent. Extension here has an impact on the essence of the solutions this Constitution can provide us with. Precarious explanatory Constitutional models that appear in the poorest countries<sup>67</sup> guarantee failure of the Constitutional function, as well as being the proof of failure of the minds that form such Constitutions. The triumph of calculation here as regards the explanatory power of Constitutional models, does not guarantee the partiality and objectivity of reason's results. We hence understand Aristotle's asseveration that the rational is not the real. It is only the realisation of ideals that can bring us closer to our social and political pursuits.

In his "Incorrect" Constitution, Contiades' understanding of the "mechanics" of the Constitution is paralleled with Aristotle's idea of the dismissal of the actual contingencies to gain the essential in its function. This is Aristotle's intensional approach versus the extensional approach,<sup>68</sup> as regards the idea of the Constitution. We can thus make the ideal Constitution realisable solely in the passage from the contingent to the essential, thus expanding our conceptual armament from what merely happens to what might happen.

Again, clarifying how Contiades contributes to the conclusion, one must stress the following: To dismiss the Why question, one needs to introduce the concept of the logically impossible to the said end, as required by the explanation of that different order. That point, stressed in this article, has evidently been neglected in the history of legal philosophy. We cannot comprehend the idea of Mixed Constitutions *in abstracto*. As traced in Contiades' ideas of the Constitution, echoing that of Aristotle, we cannot unveil order at the start, as we lack a recognisable notion of the ideal. It is not totally impossible, then, that we may discover order and

<sup>65</sup> Sunstein, *Worst-Case Scenarios*, 192.

<sup>66</sup> Giouli, "Aristotle's Philosophy of Time," 97-98 and n. 25; "Aristotle's Non-realistic Account of the World," 273, 267-268 and n. 3.

<sup>67</sup> Contiades, "Incorrect" Constitution, 222 and n. 388; 224.

<sup>68</sup> *Ibid.*, 222 and n. 389.

laws, uncovering the riddle of the unknown and turning it, if we wish, into a realisable model of a Mixed Constitution.

#### **IV. Constitution and Modern Europe: Some Problems with Dworkin's idea of Rights and the State**

These ideas on the nature of the Constitution only respond to an “appalling” challenge in Aristotle's Work: Why cannot we gain epistemic access to the real essences of Constitutional facts and structure? This is the challenge “par excellence” to be met by Europe's institutional and public institutions in order to safeguard its values and character. These qualities link with the questions on rights thus conditioning them. Dworkin stresses<sup>69</sup> that the isolation of the problem as regards cases in which basic liberties appear to clash with the good of the State, is what advances the Constitutional law. Belonging thus to the agenda of the Constitution, this problem is resolved through the tools of moral theory. That was exactly what happened with the theories examined above. This problem of rights sometimes, Dworkin adds, threatens Constitutional reason's dogmatic power. Once legal economics and legal sociology are established, this problem will be resolved with the linking of the Constitution with moral philosophy. Thus, it is reason's inability to give a definite, once-and-for-all answer to this problem, that will condition challenges and responses regarding the structure of the Constitution in Europe today. This has been adequately shown by the theories examined above.

To clarify further our rights issue as linking with Aristotle's pessimistic idea of mixed Constitutions, we need to refer to the European Convention on Human Rights.<sup>70</sup> This *Convention for the Protection of Human Rights and Fundamental Freedoms* in Europe, as it is formally called, is an international convention to protect rights and freedoms. It was defined by The Council of Europe in 1950 and enacted on the 3<sup>rd</sup> September 1953. The Convention fulfills Dworkin's request on the structure of a Constitution. The persons suffering violation of their rights under the Convention by a state party can take a case to the Court. Judgments finding violations are binding on the States concerned and they are obliged to execute them. What is even of more importance is the amendment of the framework of the Convention by the protocol 11. The Convention has several protocols which amend the convention framework.

If we take a closer look at protocol 11, we shall see an exact attempt to fulfill Dworkin's requests. It superseded protocols 2, 3, 5, 8, 9 and 10

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<sup>69</sup> Dworkin, *Rights*, 105-107; 131-149 and 185-186.

<sup>70</sup> 1 ECHR, European Court of Human Rights, 1-34.

and was enacted in 1998. Sanctioned on 21<sup>st</sup> April 2021, it was validated onwards 1<sup>st</sup> August 2021 (the fourth month deadline for appeal starts from 1<sup>st</sup> February 2022). This protocol takes Dworkin's problem of rights within the agenda of the Constitution. The protocol's differentia identifies the Convention with the tools of morals. Protocol 11 passes the authority of the Commission of Human Rights directly to the authority of the Court of Human Rights. Individuals can now apply for the first time directly to the Court. This shows how mixed Constitutions can be improved in structure if Reason's weakness is chosen instead of its omnipotence: it can ensure that the rights of marginal groups are covered by the average good that a Constitution protects.

## V. Concluding remarks

What is the essence of a written Constitution? How can we understand it? Any definite answer here is always blurred and dogmatic, Sunstein, Hart and Contiades warn. Is a possible answer the one that casts aside knowledge, coming from experience? And does this concern the pure succession of events? Sunstein insists on a pure rationalist answer with its no-way-out implications. The meaning of the Constitution, he states, must be made rather than found. This is not in the sense that it is entirely open to interpretation, but that it must be settled by an interpretative account that it does not itself contain. This holds good in Contiades' ideas also. Here it is evident that they speak of the unknown, the impossible which does not fit into our secular modes of research, or of discovery, nor into the document or its interpretation. We need to interpret the Constitution in order to find its ideal form. Can this angle bring an ideal Constitution to hand? Does the idea of mixed Constitutions suggest something like existing normativity? Definitely not. The opposite is true according to Contiades. The empiricist strain is very strong. Reason's diminished capacity to move the tide of history or interpret it is noticeable here. An example is offered by protocol 11 of ECHR, which offers the opportunity to a Constitution to make the rights of individuals against the state part of its own agenda. Morality in juxtaposition to rationality is also variable. In fairness to Aristotle, however, one must be cautious in referring to the weakness of the power of reason. What can outweigh this flawed capacity is a plea for a sense of dedication to the ideal of historical truth. Aristotle is very reluctant to make such a plea. Historically and constitutionally speaking, the cause-chain repeats itself uninterruptedly. One's perception of the pure succession of events remains unchallenged. The idea of the beginninglessness of time and

Constitutional ideas also remains unchallenged in both philosophers. Causes are definite – though indefinitely assigned to Constitutional facts in the course of time. This holds good in Hart's, Sunstein's and Contiades' ideas on governmental history.

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