

Special Workshop 79: Constitutionalism and Disagreement

Liberal constitutionalism arose out of religious wars, as a way of coping with the breakdown of the deep societal consensus that had underlain the medieval world order. After the failure of twentieth-century efforts to forge societies grounded in ideological unity, liberal constitutionalism seemed to have established itself as the definitive model of government for a globalised world. The 'end of history' lay not in the transcendence of disagreement and the creation of 'species-beings', but in a form of society premised on disagreement.

Of course, not everyone was satisfied with the way liberalism dealt with disagreement, and the 'end of history' thesis was rightly challenged by those who saw that constitutional democracies were, in practice, framing debates in such a way that certain types of concern were effectively excluded. In recent years, however, we have seen in the US, Europe, and beyond the intensification of disagreement to such a degree that questions are being asked about whether the institutions and practices of liberal constitutionalism have the capacity to continue to hold societies together.

This workshop will examine the way in which liberal constitutionalism deals with disagreement – how disagreement is framed, fostered, negotiated and suppressed by liberal democratic institutions and practices – as well as addressing normative questions about how contemporary challenges ought to be met. Do we need to modify the traditional virtues of toleration and civility? Are the accounts of public reason-giving found in theories of deliberative democracy adequate to cope with the demands of the current moment? If not, with what do they need to be supplemented? Might some of the current attacks on the liberal order possess the potential to open up possibilities that had been foreclosed by liberal conceptions of constitutionalism? These and related questions will be addressed from perspectives drawn from political, legal and moral theory.

The workshop will be held on the morning of Friday 12 July. Papers will be distributed in advance; if you would like to receive them please e-mail a.g.latham@swansea.ac.uk or f.oliveiradesousa@maastrichtuniversity.nl.

Session 1 (8.30-10.30)

Alexander Latham-Gambi (Swansea, UK), 'The Circumstances of Politics: Disagreement, Collective Action and the Sphere of the Political'

Eoin Daly (NUI Galway, Republic of Ireland), 'Contesting the idea of disagreement as the circumstance of politics'

Felipe Oliveira de Sousa (Maastricht, Netherlands), 'Bonding Virtues'

Session 2 (11.00 – 12.45)

Konstantine Eristavi (Iliia State, Georgia), 'Social Rights, Radical Democracy and the Politics of Food'

Dana Alexander (Tel Aviv, Israel), 'Disagreements that mark the limits of liberal constitutionalism'

The Circumstances of Politics: Disagreement, Collective Action and the Sphere of the Political

Alexander Latham-Gambi, Swansea University

Using an analogy with the well-known ‘circumstances of justice’, Jeremy Waldron has argued that persisting disagreement about justice is ‘one of the *elementary conditions of modern politics*’ (*The Dignity of Legislation*). He argues that, just as without moderate scarcity and limited altruism we would have no need for justice, so without disagreement about justice we would have no need for politics. He thus describes the felt need for a decision in the face of disagreement as ‘the circumstances of politics’ (CoP), a concept he employs in a series of arguments regarding such matters as the obligation to obey the law, the virtues of civility and loyal opposition and the democratic legitimacy of judicial review.

In this article I critically examine the CoP and the use Waldron makes of his idea. I start by presenting a dilemma that Waldron faces in respect to the question of whether the disagreement in the CoP is itself *political*. If his answer is ‘no’, then he commits himself to a controversial Lockean view of justice as a pre-political value. If, on the other hand, his answer is ‘yes’, if the disagreement in the CoP *is* political, then this must be by virtue of other some feature of politics that is more fundamental than particular political disagreements, meaning that his claimed analogy with the circumstances of justice fails. I then examine closely a number of arguments in which Waldron makes reference to the CoP, arguing that, in all but one example, Waldron does not treat disagreement as pre-political. In each of these cases we see the crucial argumentative work being done not by the fact of disagreement *per se*, but by the value of an expressive commitment to the idea of the polity as a form of collective action. It is only in the final argument I look at, Waldron’s ‘core case’ against judicial review, that we see a Lockean conception being employed and the fact of disagreement taking centre stage; the result is a disappointingly thin line of reasoning that fails to justice to some of Waldron’s own insights. My conclusion is that a truly *political* political theory cannot simply assume the existence of disagreement as if it were a pre-political fact, but rather must examine the conditions of modern political life that make political disagreement possible.

Contesting the idea of disagreement as the circumstance of politics

Eoin Daly, National University of Ireland, Galway

Many political and legal philosophers believe that disagreement forms part of the “circumstances of politics”, even to a point where we might say that disagreement is *the definitive circumstance* of politics. That is to say, disagreement is understood as a central problem of politics, with which the enterprise of constitutional design is centrally concerned. Disagreement is both insoluble and is constitutive and characteristic of politics as such. And, for the most part, liberal and republican theorists dispute only the subject or extent of disagreement, with Rawls emphasizing disagreement as to questions of the *good* amidst a presumed consensus on questions of right or of justice, but with Bellamy and Waldron arguing that disagreement extends to questions of right as well as good, and that constitutions should be designed accordingly. In turn, such framings of disagreement underlie questions of institutional design, most notably the problem of judicial review and its relation to democratic legitimacy.

The purpose of this paper is to challenge this dominant understanding of disagreement *as such* as being a definitive circumstance of politics, and therefore, as a central problem of constitutional design. I make this argument with reference to two thinkers in particular, Jean-Jacques Rousseau and Pierre Bourdieu. Drawing on Bourdieu, I will argue that ostensible disagreement – as expressed in competing assertions or

claims as to the right or the good – need not necessarily be framed in *propositional* terms, but can rather be understood as socially *performative* and as exercises of symbolic and social power. Thus, disagreement as such is not antecedent to political and social order but is rather constituted and formatted by it. In turn, I will argue that Rousseau’s constitutional projects can be understood as reflecting a similar insight. In contrast to Rawlsian liberalism, the fundamental problem of political order, for Rousseau, is not a *propositional* one at all, concerning disagreement as to the right or the good. The starting point of political order is not the search for the good (or the right), but rather, the problem of, and the need for recognition, as the social context within which claims of right and good are asserted. A central challenge of politics, then, is how it is possible to constitute a shared symbolic universe in which political communication and political discourse can assume transparent and non-dominating forms. I will conclude by offering examples as to how constitutional design can account for this problem.

Bonding Virtues

Felipe Oliveira de Sousa, Maastricht University

In recent years, political life in Western societies have become extremely polarized. Antagonism, conflict, division, adversariality are all terms that can be used to characterize it. Very often, instead of engaging in an honest, cooperative discussion in the search for the truth or for mutual understanding, disagreeing parties adopt a defensive attitude towards each other that prevents any constructive interaction. Seeing each other as enemies, they very quickly end up just shouting at each other and get caught in an endless process of exchanging toxic, hostile criticisms and accusations that usually leads nowhere, except to even more disagreement and polarization. This sort of interaction can now be seen everywhere, in public places, TV shows, newspapers, circles of friends, on the internet, in public institutions. In my view, in order to overcome this situation, there is an urgent need for fostering a reflection on the virtues – i.e. on those traits of character and habits of mind that must be inculcated, promoted and practiced by citizens for them to be able to relate to each other well in the public sphere, especially with those with whom they disagree. In this paper, I discuss some of these virtues. I call them bonding virtues, in order to emphasize that their possession facilitate fostering and maintaining bonds with others in the public sphere. They are all virtues whose exercise helps citizens to overcome or at least reduce the levels of animosity, hostility, division that might exist between them and to interact in more cooperative ways with each other in circumstances of disagreement.

Social Rights, Radical Democracy and the Politics of Food

Konstantine Eristavi, Ilia State University

On the example of the food sovereignty movement’s innovative practice of rights claiming, and using the performative approach, this presentation will explore the conditions of possibility, the nature and the challenges of a *radical democratic* politics of *social* rights.

I will theorise and distinguish between two different forms of rights politics that the Movement is engaged in, and show how both are parts of the same radical democratic practice. While *iterative* politics augments and reconfigures existing structures and rights, a *ruptural* politics of rights operates through an immanent critique, faulting the extant order on the latter’s own terms. Iterative politics enables the rupture of the symbolic order to register as such, whereas ruptural moments provide guidance for political iterations. As I demonstrate, through this complex, cross-pollinating practice of rights claiming, the food sovereignty

movement constitutes itself as a radical political subject, defies the conventional procedures and structures, and discursively creates new addressees of rights claims.

Disagreements that mark the limits of liberal constitutionalism

Dana Alexander, Tel Aviv University

Liberal constitutionalism is meant to serve as a consensual normative framework for regulating the political sphere and settling disagreement. Usually this is the case, in Israel, even on unpopular human rights issues. However, certain legal human rights campaigns evoke such widespread public and political opposition, that their constitutional adjudication is rejected, and liberal constitutionalism, along with its agents, become themselves the subject of political controversy.

What is it about these cases, spanning different issues, that resists constitutional adjudication? In line with attempts being made, across the globe, to understand popular challenges to liberal constitutionalism, I turn to the actual social and political opposition to these legal campaigns as a source of insight regarding the nature of these challenges in the Israeli case. My findings point to deep normative differences over the polity's envisioned collective identity and boundaries, as underlying the opposition to these cases. As liberal constitutionalism itself rests on a liberal vision of collective identity, disagreements over this vision cannot be settled by liberal constitutionalism and mark its limits as a consensual normative framework. Moreover, use of constitutional litigation to impose a contested liberal vision of the polity's identity places constitutional agents on the political field and is liable to provoke backlash.