

Politics and Power. Notes on Lafont's Hermeneutics of Democracy

Liesbeth Schoonheim

Krisis 40 (1): 126-135.

Abstract

This essay is part of a dossier on Cristina Lafont's book *Democracy without Shortcuts*.

Keywords

Democratic theory, Agonism, Political realism, Judicial review, Hermeneutics

DOI

[10.21827/krisis.40.1.37058](https://doi.org/10.21827/krisis.40.1.37058)

Licence

This work is licensed under a [Creative Commons Attribution-NonCommercial 3.0 License](https://creativecommons.org/licenses/by-nc/3.0/) (CC BY-NC 3.0).

Politics and Power. Notes on Lafont's Hermeneutics of Democracy

Liesbeth Schoonheim

Cristina Lafont's *Democracy without Shortcuts* is a refreshingly down-to-earth plea for upholding our current democratic system, cautioning against ambitious proposals to overhaul and replace time-honoured institutions with poorly thought-through institutional blueprints. Lafont's defence of our current democratic institutions and strongly qualified support for implementing new ones (such as minipublics) is motivated by her concern for citizens' democratic control. Her guiding intuition that only participatory democracy mitigates the alienation that citizens experience with regard to their laws and policies is very persuasive. She writes:

Only if citizens are in fact committed to convincing one another can they continue to *identify with* the institutions, laws, and policies to which they are subject and *endorse them as their own* instead of feeling alienated from them. (Lafont 2020, 4).

To put the issue in political-existentialist terms, the question is how can we feel at home in a common world (cf. Lafont 2020, 20) in which the support for laws, procedures and policies implies our voluntary compliance with them? The way to achieve that sought-after identification and endorsement consists in "the long, participatory road that is taken when citizens forge a collective political will by changing one another's hearts and minds." (Lafont 2020, 4). Many normative accounts, whether they are deliberative democratic or not, ignore the democratic requirement of citizens' identification with, and endorsement of, the procedures, laws and policies that are imposed on them, and replace the long and winding road of participatory democracy with 'shortcuts'. The term is used by Lafont to criticize various institutional reforms that, in their attempt to improve collective decision-making, "[bypass] the actual beliefs and attitudes of its own citizens." (Lafont 2020, 4). The problem with these shortcuts is partly practical because they are self-defeating – after all, without the wide support of the citizenry, laws, policies and procedures have to be applied with force, which is more costly and less effective than voluntary compliance. The problem is also that these shortcuts exacerbate the alienation that citizens experience with regard to politics, which Lafont remarks in passing is all too likely to result in growing support for populist parties (cf. Lafont 2020, 4).

In this response, I cannot do justice to all the interesting issues raised by Lafont. Instead, I

would like to explore two strands of argumentation, in order to invite further reflection on topics that are, strictly speaking, outside the scope of the current project but which nevertheless touch on some of its fundamental assumptions. The first regards what Lafont calls the settled view on rights, and what seems to be her disregard for the unsettling of that consensus, for instance (but not exclusively) by populist movements. In this discussion I will also object to her reconstruction of agonism, and show how agonism accommodates, *pace* Lafont's argument to the contrary, democratic citizens' hope for political change. The second starts from Lafont's helpfully comprehensive account of constitutionalization, and probes into the conditions for this process of opinion-formation given the prevalent power dynamics in late-modern society. These conditions should be articulated on the level of civil society, e.g., which organizations submit cases for judicial review, but also on the level of subjectivity, or the 'legal consciousness' of citizens.

1. Unsettling Views

Lafont opens and concludes her book with a nod to the rise of populist parties that undermine the democratic institutions which she argues for so convincingly in her book. It is fair to say that, as Lafont does not aim to contribute to the growing scholarship on populism, (a notoriously vague term, both in her text as well as in the wider literature), her response to it remains somewhat under-theorized. Notwithstanding her explicit claim that she is not concerned with populism, Lafont refers to populist parties at key sections of her argument, which suggests that these form an important backdrop to her argument. For instance, in the introduction she rightly suggests that the rise in populism betrays the neglect within democracies of the key role played by citizens' identification with, and endorsement of, institutions, laws and policies (Lafont 2020, 4). She returns to the populist threat when, in the concluding paragraph, she admits that judicial review's democratic potential has been actively undermined by recent populist attacks on the judiciary. Her suggestion is all the more urgent now, as governments facing the COVID-19 pandemic rush through emergency legislation that significantly expand executive powers, both in countries known for their authoritarian leadership as well as those with a longstanding democratic tradition (cf. Walker 2020; Gebrekidan 2020). Other countries seem to use the health crisis to put controversial legislation on the agenda which had previously been removed due to popular protest, such as abortion legislation in Poland. While the current crisis might

be exceptional, the seizure of executive powers and the introduction of conservative policies are not, and as such these moves vividly remind us that core democratic values are not quite as settled as we would like them to be. These and similar issues keep citizens who are concerned with democracy awake at night —the very citizens that Lafont explicitly takes to be her audience (cf. Lafont 2020, 5). But drawing on Bernard Williams' (2009) helpful distinction between an *audience* (the purported readers of a text) and the *listener* (those whose concerns are addressed by a text), we can ask if Lafont's book is merely meant to be read by democratic citizens, but if it falls short in addressing their concerns. Allow me to elaborate by focusing on two related issues.

Firstly, the under-theorization of populism hampers Lafont's reading of agonism, which despite problems of its own does provide consistent and convincing accounts of the rise of right-wing populist parties. Take, for instance, Lafont's dismissive portrayal of agonism as holding on to the idea that "democracy depends on some basic form of shared agreement or overlapping consensus." (Lafont 2020, 63). Building on her prior statement that any meaningful disagreement over rights presupposes a prior agreement, Lafont rejects the agonistic mainstay that aiming for consensus neutralizes political contestation. Yet it is unclear what Lafont bases her (fairly simplistic) reading of agonism on. Mouffe, to limit ourselves to the author aimed at by Lafont, would agree that political adversity requires a prior, shared commitment to democratic values. Mouffe explicitly argues that "democracy requires a 'conflictual consensus': consensus on the ethico-political values of liberty and equality for all, dissent about their interpretation." (Mouffe 2005, 121). Secondly, the agonistic conflict emerges out of the construction of a collective identity. Where Lafont would depart with Mouffe is that the latter would hold that this collective identity cannot be reduced to a clear-cut set of ideas, interests or values, but is the product of a 'chain of equivalences' in which various democratic struggles are linked together (cf. Laclau and Mouffe 2014, xviii), and that the resulting collective identity depends on the 'constitutive outside' of their political opponent (cf. Mouffe 2005, 15). A second example of an unfair reading is Lafont's claim that "the agonistic model wholly misses the power of public opinion within a democracy." (Lafont 2020, 67). Insofar as public opinion is attentive (in the case of deliberative democracy) to the rights of all its citizens, it can be mobilized by social movements fighting for justice; hence, so her argument runs, agonism's neglect of public opinion implies a denial of one of the few, if not only, opportunities to contest rights violations.

This reading neglects the point that, for Mouffe, political adversaries compete over the hegemonic ‘common sense’ that determines how social injustices are articulated. In the agonistic approach, as with that of participatory democracy, the silent, critical mass has to be mobilized in the struggle against injustices if a social movement is to effectively challenge existing legislation and policy. The two approaches differ in that Mouffe explicitly acknowledges power relations, whereas Lafont relies on the forceless force of the better argument. The power relationships acknowledged by agonistic theorists are not total (as Lafont at times seems to suggest), but they do inform the tactics that can be pursued in winning over common sense. Given that Lafont allows for a plethora of activities through which public opinion can be altered, the difference between agonism and participatory democracy does not so much lie on the level of concrete activities pursued by engaged citizens, but on what could be called the finality of political action. In the case of participatory democracy, the aim is to reach a settled view (with the minor qualification that this consensus potentially opens up other areas of contestation), while in agonism it consists in winning over common sense (in full awareness that this victory can never be completely guaranteed). In Mouffe’s account, populism is not a regression with regard to the settled views on rights, but the expected outcome of the repression of the agonistic nature of politics: if opposition cannot take place within the political institutions of liberal democracy, it will turn against these institutions.

This brings me to my second objection. It might be worth mentioning at this point that one of the strongest and most attractive aspects of Lafont’s account is what we could call her democratic hermeneutics: she starts from the beliefs adhered to by those concerned citizens participating in political practice. In what follows I do not want to contest the beliefs that Lafont ascribes to these political agents — which I would not be well-placed to do anyway, given that this is an empirical question — but rather show that the beliefs which she ascribes to democratic citizens can also be accounted for in an agonistic approach, *together* with the beliefs about their erosion. Lafont refers throughout to the hope “that one does not have to keep fighting for the same rights over and over again.” (Lafont 2020, 62). Given the important role played by judicial review, this hope is for a significant part to be channelled through what Lafont calls the ‘constitutionalization’ of public opinion. This recursive process, as Lafont convincingly shows, allows minorities to bring the violation of their rights to a public court; in the course of this process the constitution itself can also be amended. What Habermas (in a

different context) writes about constitution-making also applies to the long and winding road of constitutionalization: we should conceive of “the constitution as a project that makes the founding act into an ongoing process of constitution-making that continues across generations.” (Habermas 2001, 768). This process of constitution-making, we should add on the basis of Lafont’s account of judicial review, involves not only Supreme Court justices, but also opinion formation taking place in the society at large. What drives this process forward are the activities by engaged citizens who (in Honig’s paraphrase of Habermas) have a “duty to act hopefully in pursuit of the unfinished project of modern constitutionalism.” (Honig 2001, 796). To return to Lafont, her acknowledgement of hope as a motivational force propelling the constitutionalization of politics leads her to assert that although agonistic theory is more realistic regarding the constant pushback on the minority’s fights for rights, her account is normatively more desirable because it hints towards the possibility of settled views on rights. Yet, as Honig (2001, 795) remarks with regard to Habermas’ account, we can ask how the ‘gesture to futurity [is] meaningful if that future is always already known to be governed by progress?’ While I agree with Lafont that political action is often (but, I would add, not exclusively) inspired by hope for a better future, it is not clear how that affect squares with the process of constitutionalization as she describes it. For instance, the assumption that we will eventually arrive at a settled view on rights might neutralise the very incentive to fight for those rights. To stay with the metaphor of Lafont: if one knows that one will travel down that long road forward (given, of course, that one keeps walking following the signs already put up), we might loaf about and take a long break on the sidewalk.

Moreover, we can ask ourselves if the ‘realism’ of agonism is not preferable to the normative desirability of Lafont’s account. Think, firstly and most clearly, of the vigilance practiced by concerned citizens with regard to those who have not been persuaded by the consensus on, for instance, women’s voting rights, the abolition of slavery, and the rights for a living wage. Can we really understand organisations such as ACLU or the Belgian Liga voor de Mensenrechten/Ligue des Droits Humains without this constant awareness that rights are not just won over once, but have to be constantly fought for? To replace one metaphor with another, constitutionalization might not so much consist of an arduous walk down a long road, but of an ongoing struggle in which a victory can define the battlefield for a longer or shorter period, but where one has to keep an eye out for new threats. Secondly, the open-ended view of the

future implied in agonistic theories does not rule out hope, but takes it seriously and supplements it with a plethora of other emotions that can spur us into action. It is exactly because the future is not determined in advance that we can expect the unexpected to happen. In the words of Arendt (1966, 478–79), much cited by Honig, political action contains the promise of a new beginning, and this promise can inspire hope in interrupting the oppression and injustices pervading society today. At the same time, agonistic theorists display an ‘affective pluralism’ because they acknowledge the range of emotions that can mobilize citizens, such as anger (Critchley, Connolly, Mouffe). The possible counter-argument that this anger is in fact better understood as hope is not really convincing, because it presupposes an inability by citizens to properly identify their motivations—displaying the very error theory that Lafont rejects because it disparages citizens’ self-understanding.

2. Constitutionalization and Social Power

One of the great contributions of Lafont’s intervention is her argument that judicial review plays an “important role [...] in securing effective participation among all citizens on equal terms in shaping the content and scope of their rights.” (Lafont 2020, 219). Addressing political theorists opposing judicial review, she starts from actual politics, in which Supreme Court verdicts are key events that recast public opinion-formation in terms of fundamental rights. Her account has the great advantage of showing how affected citizens can appeal to the court, even if they are an electoral minority. In this section I would like to invite her to elaborate on constitutionalization for those who, like me, are persuaded by her account but are curious to hear more about its functioning in relation to the various social systems that comprise contemporary society. To put the issue somewhat differently, what is the impact of unequal social power on the process of constitutionalizing public opinion?

The first way to think about social power concerns the unequal access to economic resources that might be used to unduly influence public opinion. Lafont’s account of judicial review immediately brings to mind non-profit organizations such as ACLU or the *liga voor de mensenrechten*/*ligue des droits humains*, or groups representing minorities, such as those advocating for women’s rights or the rights of trans people. In these cases, it is very clear that judicial review “derives [its justification] from the right of affected citizens to effectively contest the political decisions to which they are subject.” (Lafont 2020, 226). But judicial review is not

exclusively used by non-profit civil rights organisations, but also by lobbying groups that represent vested economic interests. In recent years, cases in the US in particular have made this issue more urgent. In a very tangential way, Lafont responds to this problem in a throwaway comment she makes that judges shouldn't be political appointees (cf. Lafont 2020, 241). Yet this clear nod to the US Supreme Court does not address head-on the problem of big corporations allocating impressive resources for bringing cases to the Supreme Court. This phenomenon is particularly problematic because it undermines citizens' democratic control and exacerbates their political alienation — the very processes that, as Lafont shows so well, are anathema to democracy.

If judicial review owes its democratic legitimacy to affected citizens bringing their grievances over their violated rights to the court, then we might want to develop a criterion that distinguishes their initiatives from strategic, corporate-driven ones. We could find such a criterion, for instance, in Habermas' distinction (1998, 364) between “the actors who, so to speak, emerge from the public and take part in the reproduction of the public sphere itself from actors who occupy an already constituted public domain in order to use it.” Or we can draw on Iris Marion Young's (2011, 72) argument that we should be able to differentiate ‘between the assertion of selfish interests and normative claims to justice or right.’ This criterion delineates in a very intuitive way the non-democratic uses of judicial review (which can be aggravated by pathologies specific to particular judiciaries, such as political appointment in the case of the US Supreme Court). The question can then be asked what is the practical status of this criterion? For instance, can it be implemented as a procedural rule, and if so, how can this be done in such a way that it does not also exclude citizens from submitting cases—which would undermine the very democratic legitimacy of the institution? If, instead, this criterion is used to evaluate the process of public opinion-formation triggered by judicial review, it might lead to strong cynicism among citizens. After all, behind the exalted democratic language of the protection of rights, they will suspect the strategic pursuit of economic interests by big corporations. At the same time, if we assume that some citizens will share the ‘minority position’ articulated by these non-democratic agents, the criterion will render these citizens as dupes and as being mistaken about their views — and this implies an error theory that Lafont so convincingly rejects. To summarize: if we argue that judicial review plays an important democratic role by enabling affected citizens to contest political decisions and laws, on what

grounds can we exclude other, non-democratic uses of judicial review without falling into the trap of error theory?

Secondly, starting from Lafont's hermeneutic approach, we can also think of power as the relation between social position and subjective experiences. This requires elaboration.

Recall that, for Lafont:

the democratic significance of the institution [of judicial review] is that it *empowers* citizens to make effective use of their right to participate in ongoing political struggles for determining the proper scope, content, and limits of their fundamental rights and freedoms. (Lafont, 238) [emphases mine].

Rights, Lafont seems to suggest, should be understood as relational: they do not designate properties of individuals, but institutionalized structures that enable actions between people. In Young's (2011, 25) formulation, rights "are relationships [...]; they are institutionally defined rules specifying what people can do in relation to one another." I believe Lafont would agree with Young's contention (2011, 25) that "[rights] refer to doing more than having, to social relationships that enable or constrain action." The right to submit a case for judicial review, for instance, is the capacity for kickstarting a process of opinion-formation on the constitutionality of political decisions and policies. I would add that rights should also be understood as enabling institutional rules by *political agents themselves*: citizens should think of themselves as having that right and as being capable of the concrete activities that it allows them to pursue. The difficulty lies in the fact that, whether or not one perceives rights as enabling structures, they are distributed unevenly among different groups of citizens, with those citizens most likely to benefit from the juridical contestation described by Lafont being among the least likely to frame their predicament in rights-language. For instance, in her study on the legal regulation of street harassment, Laura Beth Nielsen (2000) found that the groups most frequently confronted with street harassment (women, people of colour) were least inclined to draw on first amendment rights in their objection to the criminalization of street harassment, and they cited pragmatic reasons and aversion to police intervention instead. Those who faced the least street harassment (white men) were more inclined to cite freedom-of-speech rights in their objection to legal regulation. While this is not the place to provide a sociological explanation of this difference, and more empirical work has to be done to assess if similar results

hold for other issues, Nielsen's study illustrates that rights-based reasoning is unevenly exercised by citizens, and among those opposing legislation it is mostly deployed by "only [...] a particular subset of respondents - white males." (2000, 1075).

In the most optimistic reading, Lafont's account of constitutionalization denotes a process in which 'respondents' understanding of these common everyday events as a troubling, yet unavoidable and unremediable, part of social life' (Nielsen 1087) is altered such that they start to perceive these events in terms of rights-violations, and thus amendable by legislation. And there is no doubt that in some high-profile examples this has indeed been the case. But there might be many other cases in which such a change might not take place, and the process of constitutionalization is seriously hindered by social groups' different adaptation of rights-based reasoning. In that more negative scenario, civil-rights groups might still successfully submit cases for judicial review, but it might not trickle down: the hard-won rights might not be enabling structures used by those for whom they are intended. These issues require extensive empirical research, but if constitutionalization plays an important role in involving the democratic citizenry in political opinion-formation, we have to consider which groups might be disproportionately disinclined to participate in this process.

References

- Arendt, Hannah. 1966. *The Origins of Totalitarianism*. 3rd edition with added prefaces. New York: Harcourt, Brace and Jovanovich.
- Gebrekidan, Selam. 2020. "For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power." *The New York Times*, March 31, 2020.
- Habermas, Jürgen. 1998. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Translated by William Rehg. MIT Press.
- . 2001. "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" *Political Theory* 29 (6): 766–81. <https://doi.org/10.1177/0090591701029006002>.
- Honig, Bonnie. 2001. "Dead Rights, Live Futures. A Reply to Habermas's 'Constitutional Democracy.'" *Political Theory* 29 (6): 792–805.
- Laclau, Ernesto, and Chantal Mouffe. 2014. *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*. Second edition. London: Verso.
- Mouffe, Chantal. 2005. *On the Political. Thinking in Action*. New York: Routledge.
- Nielsen, Laura Beth. 2000. "Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment." *Law & Society Review* 34 (4): 1055–90.
- Walker, Shaun. 2020. "Authoritarian Leaders May Use Covid-19 Crisis to Tighten Their Grip." *The Guardian*, May 31, 2020. <https://www.theguardian.com/world/2020/mar/31/coronavirus-is-a-chance-for-authoritarian-leaders-to-tighten-their-grip>.

Williams, Bernard. 2009. "The Liberalism of Fear." In *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, 52–61. Princeton University Press.

Young, Iris Marion. 2011. *Justice and the Politics of Difference*. Princeton University Press.

Biography

Liesbeth Schoonheim is a junior postdoctoral research fellow at the Institute of Philosophy, Leuven. Her research specialization is located at the intersection of political theory, social theory and gender studies. In her current project (2019-2022), that is funded by the Research Foundation Flanders (FWO), she develops a relational notion of freedom that explores the potential to resist neoliberal normalization.