

Juridicocratic Shortcuts to the Long Participatory Road of Democracy?

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Abstract

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

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Dorothea Gädeke

In times when requiems for democracy gain bestselling status (Brennan 2016; Levitsky/Ziblatt 2018), Cristina Lafont's *Democracy Without Shortcuts* sets a welcome counterpoint. Her defence of a participatory, deliberative model of democracy resists alarmism as well as the frantic search for quick fixes to counter the "danger of democratic deconsolidation" (Lafont 2020, 2). It is uncompromising in its insistence on the requirement that those subject to laws and policies need to be able to reasonably endorse them and identify with them as their own if coercive power is to be justified democratically – and its refusal to settle for anything less. And yet, it is by no means idealistic or utopian. It is rooted in a sober realism that seeks to show why any attempt to bypass this core requirement, in the name of strengthening democratic institutions and practices, in fact further undermines them.

With the idea of *blind deference*, Lafont offers a straightforward criterion for assessing the democratic credentials of political institutions. While citizens need not take all decisions by themselves – and thus routinely defer to others – they may not be forced to *blindly* abide by laws and policies that they cannot endorse reflectively and identify with, based on insights into their reasonableness. Mere political equality regarding decision-making (such as an equal vote), however, is not sufficient to avoid such blind deference. Citizens' substantive concerns regarding the reasonableness of laws and policies entail a stronger form of democratic control that enables them to participate in shaping the content of laws and policies to which they are subject so as to make sure that they conform with their judgments about justice (Lafont 2020, 22). In turn, any institutional setting that results in a "potential *disconnect* or permanent misalignment between the interests, values, and considered opinions of the citizenry and the political decisions to which they are subject" (Lafont 2020, 23 [original emphasis]) forces citizens to blindly defer to decisions made by others and thus undermines the democratic ideal of self-government.

And this, Lafont argues, is precisely the problem – not just in currently existing democracies but also in recent proposals for institutional reform advocated by democratic theorists. Deep pluralists argue that only strict majoritarian rule can overcome the problem of profound and pervasive disagreement since substantive considerations are bound to produce further

disagreement. Yet this *procedural shortcut* requires citizens to simply put up with the majority view as there is no legitimate ground for challenging it substantively (Lafont 2020, 50f). Epistocratic conceptions of deliberative democracy seek to overcome the (alleged) problem of deep-seated voter ignorance by assigning decision-making power to experts. However, such a “rule of the knowers” (Lafont 2020, 77) reduces the epistemic function of deliberation to tracking the truth while disregarding the other, crucial, epistemic dimension of deliberation: justifying policies to those who must comply with them. Thus, the *expertocratic shortcut* results in a misalignment between experts and decision-takers. Lottocratic conceptions of deliberative democracy aim to strengthen both the quality and representativeness of political decision-making by empowering mini-publics to take political decisions. Such a “rule of the randomly selected” (Lafont 2020, 162), however, bypasses the actual broader public. And thus, the *micro-deliberative shortcut* misses the broader transformative function of political deliberation. In short, while all three proposals seek to address democratic deficits, they end up further weakening democracy by requiring blind deference, whether to majorities, experts, or the randomly selected. In a dialectical manner, Lafont concludes, “[t]he road to an undemocratic hell might be paved by good democratic intentions.” (Lafont 2020, 3).

Lafont’s critical analysis of democratic innovations focuses on underlying key assumptions, not on institutional details. It is meant to support the core claim of the book: there simply are no shortcuts for bypassing the lengthy and sometimes tedious democratic process of opinion- and will-formation and decision-making:

The only road to better political outcomes is the long, participatory road that is taken when citizens forge a collective political will by changing one another’s hearts and minds. Commitment to democracy simply *is* the realization that there are no shortcuts. However arduous, fragile, and risky the process of mutual justification of political decisions through public deliberation may be, simply skipping it cannot get us any closer to the democratic ideal. In fact, it will move us further away. (Lafont 2020, 4).

And thus, it is not surprising that for Lafont, the solution to the crisis of democracy does not lie in institutional innovations but rather in reinterpreting somewhat classic features of constitutional democracies from a decidedly participatory deliberative point of view. Her focus lies on judicial review, which provides citizens with a right the political process itself cannot

secure: the right to reopen public debate on contested laws and policies and to structure it as a debate about their constitutionality rather than their ethical or prudential merits. This communicative power to constitutionalize political debates (instead of depoliticizing the constitution) empowers citizens to engage in political struggles over the meaning of the conditions of the very possibility of democracy itself: the ideal of citizens as free and equal participants in a fair scheme of cooperation (see Lafont 2020, 204). This, Lafont maintains simply, “is what a democracy without shortcuts looks like. We may never get there. But at least we should not be fooled into believing that taking shortcuts could get us there on the cheap.” (Lafont 2020, 240).

Lafont’s somewhat sobering account of democracy is by no means pessimistic. In fact, her holistic, first-person perspective lends itself directly to a call for active citizenship. Lafont resists reducing democratic politics to the moment of passing legislation or casting a vote. Her Habermasian perspective on the democratic process emphasizes the crucial importance of responsive links between formal decision-making bodies and the broader public. It allows her to draw attention to the crucial role of quiet masses. Any political decision requires the cooperation of decision takers in order to achieve the desired outcome. The quiet mass may be silenced regarding actual decision-making, but it still shapes the views and values and attitudes of the political community at large (see Lafont 2020, 85f). This emphasis on the structural role of seemingly passive masses is crucial because, in turn, it implies that political struggles will fail if they only focus on formal political decision-making: social transformations require citizens to change each other’s hearts and minds (Lafont 2020, 29).

The sobering but also encouraging thrust of Lafont’s account lies in this emphasis on the transformative dimension of democracy – and the democratic struggle it requires. It is written from the perspective of a democratic citizen and addresses the readers as fellow democratic citizens. While institutional mechanisms such as judicial review may empower citizens to contest the status quo, they cannot replace these struggles. The somewhat inconvenient claim that there simply are no shortcuts to democracy reminds fellow democratic citizens that democracy is a project that requires continuous engagement – and that there are no institutions, no innovations, no shortcuts that could relieve them of this task. I could not agree more. And yet, I wonder, whether Lafont has indeed enough to offer to fellow democratic citizens who are concerned about the current state of democracies. The three points I am going to raise are not

so much a critique of her constitutional model of participatory deliberative democracy; rather, they are meant to invite her to clarify to what extent her own account really avoids democratic shortcuts.

1. The inextricable link between substantive and interpersonal concerns

Lafont seeks to provide an ecumenical account of the ideal of self-government. The core commitment that forms the threshold of what may reasonably count as a plausible interpretation of this ideal is her claim that it is not reducible to (formal) equality in decision-making procedures. For Lafont, the concern with *blind deference* – that is, with the subjection to laws and policies that one cannot endorse reflectively and identify with, based on one’s own reasons – is motivated by the deeper concern to avoid *political alienation*. The idea is that the permanent disconnect between actual laws and policies and the ideas of citizens makes citizens unable to identify with these laws and policies, and thus to see themselves as participants in a democratic project of self-government. This holds especially when, in their own eyes, these laws and policies force them to wrong themselves or others (see Lafont 2020, 18-22). Avoiding such political alienation is essential for citizens to be able to maintain their sense of justice.

This concern with political alienation, Lafont maintains, is distinct from concerns with *political inequality* or *domination*, as it calls for opportunities to participate in shaping laws and policies substantively. As she puts it, “[a] substantive concern with the proper content of the laws and policies that I am bound to obey is different from an interpersonal concern with the proper relationship to others who also participate in the decision-making process.” (Lafont 2020, 19). However, while Lafont rightly emphasizes that mere *formal* political equality in decision-making cannot account for an assessment of the content of such decisions, she wrongly suggests that the concern with domination is merely one of formal equality, while the concern with alienation is a substantive rather than an interpersonal one.

On almost all republican accounts of non-domination¹, the kind of political equality required is a status equality that refers not just to the formally equal distribution of power, as Lafont suggests, but to an “anti-power” (Pettit 1996), as Pettit famously put it, that is to control over power – and that includes a substantive concern with the content of laws and policies. Hence, blind deference is, in fact, a paradigmatic form of domination as it subjects citizens to the unchecked rule of others, whether majorities, experts, or the random few. However, this

substantive concern built into the ideal of non-domination is circumscribed by the commitment to non-domination. In other words: the interpersonal concern with proper (non-dominating) relationships to others already demands more than mere formal equality – while in turn, the legitimate substantive concern with laws and policies is motivated, and finds its limits, precisely in the preconditions of the possibility of proper (non-dominating) relationships to others.

In fact, Lafont's own account of participatory deliberative democracy has a similar structure. The deliberative dimension of mutual justification, which lies at its heart, requires justifying the coercion we impose on one another *to* each other. As such, it expresses an *interpersonal* concern with power asymmetries that goes beyond formal equality in decision-making, as well as beyond mere substantive concerns with the content of laws and policies. In fact, it calls for possibilities to shape their substantive content, especially regarding the scope and content of equal rights and freedoms that citizens owe *to* one another, precisely in order to allow for such an interpersonal justification. That means the substantive concern with considerations of justice is rooted in the interpersonal concern with just relations amongst citizens. However, Lafont's emphasis on the conceptual distinctiveness of the substantive concern, expressed in the notion of alienation, as opposed to the interpersonal concern with domination (which she reduces to a formal concern about equality), risks losing sight of the inextricable connection between these two aspects – and thus of inadvertently bypassing intersubjective procedures of mutual justification between equals in the name of securing political identification on the basis of citizens' actual, unconsidered opinions and preferences.

2. The unresolved tension between the two epistemic aims of democratic deliberation

To be sure, Lafont's account of deliberative democracy is deeply committed to processes of mutual justification which transform preferences of citizens into considered opinions. Lafont emphasizes that the epistemic dimension of political deliberation is not exhausted by its truth-tracking role. More important, from the point of view of deliberative democracy, is the epistemic dimension of justifying the coercive power that citizens exercise over one another *to* one another. This mutual justification is owed to everyone subjected to the laws and policies in question. The outcome of a political process has to be responsive to the considered public opinion of those subjected to the laws and policies in question – and needs to be assessed on

the basis of whether it is sensitive to the particular interests, values, and ideas of *this very* citizenry. The point of mutual justification is precisely to convince *those who are equally bound* by the laws and policies in question, that they, too, can reasonably endorse it.

This emphasis on the (partial) contextuality of mutual justifiability to fellow citizens, however, stands in tension with Lafont's proposal to create transnational courts that may subject national rulings to further scrutiny, and even prompt legislative changes. After all, it involves broadening public debates to include views and perspectives from outside the political community in question. In fact she claims that "[t]here are no justified exclusions from participation in this common task [of reaching a settled view on questions of rights, D.G.] if everyone's fundamental rights matter equally and their violations are a matter of everyone's concern" (Lafont 2020, 242). This inclusive view, however, cannot be justified based on the justificatory epistemic dimension of convincing others. Instead, it draws on the truth-tracking epistemic dimension of political deliberation and the enriching potential of diverse points of view; and thus it risks losing track of the democratic criterion of demarcation that includes all citizens and excludes all non-citizens. Why do transnational courts and the debates they trigger not face the problem of the micro-expertocratic shortcut: overemphasizing the truth-tracking dimension of deliberation to the detriment of tracking the justifiability of – and thus the sensitivity to – interests, values and ideas of those bound by the law?

3. Judicial review and its macro-deliberative preconditions

Lafont's uncompromising defence of a somewhat classic constitutional model of deliberative democracy along the lines of Habermasian discourse theory, broadly speaking, might seem disappointing to democratic theorists and citizens engaged in developing institutional innovations. This holds especially for her discussion on mini-publics that have recently gained a lot of attention, not just amongst democratic theorists but also in political practice. While Lafont is open to introducing such micro-deliberative fora into the democratic process, she insists that their role should not be to cut the democratic process short but rather to contribute to transforming public opinion: "If we are stuck with improving deliberation in the public sphere with or without minipublics, then the micro-deliberative shortcut offers no solution at all." (Lafont 2020, 135). In that sense, she considers the micro-deliberative strategy to be parasitic on the macro-deliberative strategy.

While this seems a fair point, it may be slightly overstated in two respects. First, it reduces the argument in defence of mini-publics to the moment of formal decision-making – and disregards the fact that, as she later admits herself, they are also advocated precisely because of their role in stimulating broader public debate (Lafont 2020, chapter 5). Mini-publics without formal decision-making power, which are subject to ultimate decision-making by the citizenry at large, are not merely “superfluous as a shortcut to better outcomes” as the citizenry “may as well be directly asked for their endorsement without any need for the intermediate step” (Lafont 2020, 130). The idea is precisely to help transform the way in which the citizenry deliberates.

Second, and more importantly, Lafont’s own proposal of reinterpreting judicial review as a form of communicative empowerment suffers from a similar weakness. To what extent judicial review may indeed provide a remedy to the diagnosed lack of responsiveness of current democratic regimes, vis-à-vis the considered opinions of the larger public, hinges on how well it is embedded in broader deliberations in the informal public sphere. To be sure, Lafont’s contribution lies precisely in reinterpreting this legal mechanism as a deliberative tool, open to all citizens, for calling on fellow citizens to publicly debate the proper delineation of fundamental rights and freedoms. Yet it remains unclear under what conditions the micro-deliberative setting of a judicial procedure can actually feed into and strengthen such macro-deliberative constitutional debates. In times of filter bubbles, fake news, as well as rising mistrust and political attacks on (or even attempts to dismantle) an independent judiciary, it seems doubtful that a legal contestatory mechanism can provide the means to trigger a meaningful public debate that leads to broad social transformation. There is at least the risk that judicial review collapses into an individualized, juridicocratic shortcut that bypasses collective will-formation.

Indeed, one may wonder to what extent Lafont’s constitutional model of deliberative democracy addresses the fear, rehearsed by Lafont herself and “shared by citizens and academics alike”, that “the standard package of rights and opportunities for political decision-making that citizens enjoy in democratic societies are losing their political significance” (Lafont 2020, 2)? Is it sufficient to provide new interpretive horizons of how to understand such rights in order to reinfuse them with political significance? Or does the lack of responsiveness require a deeper institutional response? The only hint that Lafont offers to her readers is that of

transnational courts and deliberations. However, it is not only questionable to what extent this solution captures the concern with justifiability and political alienation which is at the core of Lafont's account. In the face of waning multilateralism, it also raises further questions as to its feasibility. Ultimately, it seems, whether Lafont's metaphor of 'citizens in robes' portrays a realistic avenue for democratic revitalization is an issue that Lafont leaves up to us democratic citizens. Her book can be read as an appeal to fellow democrats to put on their robes and to engage in the never-ending struggle to (re)appropriate democratic institutions and reinvigorate public debate. To what extent we are able live up to that remains to be seen.

Notes

1] Lovett (2010) is an exception; since he defends a formal account of arbitrariness, the substantive concern Lafont highlights gets effectively lost.

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Biography

Dorothea Gädeke is Assistant Professor in Philosophy at Utrecht University and Research Associate at the University of Johannesburg. Her research focuses on power and domination, democracy and structural injustice. In her book *Politik der Beherrschung. Eine kritische Theorie externer Demokratieförderung* (Suhrkamp, 2017) she develops elements of a critical republicanism to show how democracy promotion has turned into a politics of domination.