Workshop Working Group 1 “Constitution-making and deliberative democracy: Theories and practices”

Bologna 20-21 May 2019

Universita’ di Bologna,
Dipartimento di Sociologia e Diritto dell’Economia — SDE
Strada Maggiore, 45
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Provisional Programme

Monday 20 May, 2019

Keynotes

15.00-17.00

Alan Renwick, Constitution Unit, University College London - Rerunning the UK’s Brexit Decision: How Could the Process Have Been Better?

The UK’s reputation for political stability and moderation has been torn apart by the process of Brexit. The referendum in 2016 asked a vague question and was preceded by a miserably poor campaign. For almost three years, parliament and government have wrestled with how to interpret and act upon the instruction that voters gave them. No final resolution is in sight.

In this lecture, Dr Alan Renwick from the Constitution Unit at University College London will consider how the process could have been better. Drawing on experience from the UK and around the world, he will argue that a more deliberative and multi-stage approach to engaging citizens in discussion and decision-making would have yielded an outcome with far greater legitimacy and coherence. He will propose a new model for making decisions on similar issues in the future.
Tuesday 21 May, 2019

9.30 – 17.30

Deliberative meeting WG1

9.30 – 10.30  Theme 1 – Social Movements
10.30 – 11.00 Coffee Break
11.00 – 12.00 Theme 2 – Deliberation, rhetoric, legitimacy
12.00 – 13.00 Theme 3 – Populism
13.00 – 14.00 Lunch
14.00 – 15.00 Theme 4 – Deliberation and Representation
15.00 – 16.00 Theme 5 – Constitutional law and deliberation
16.00 – 16.30 Coffee Break
16.30 – 17.30 Conclusions

Theme 1 – Social movements

Andrea Felicetti, Belgian representative, KU Leuven
During the event I would like to engage with scholars looking at constitutionalism from a social movement and democratic innovations standpoint. My writing on social movements and democratic innovations is not addressed to constitutionalism directly at the moment. However, I am eager to explore possible collaborations that would enable me to do so over the next few months. I am interested in collaborating on theoretical work as well as on empirical analyses of European case studies (English, French, Italian). Actually, I believe that at the moment Belgium features an interesting convergence between movements and innovations also on constitutional issues.

[Social movement and democratic innovations]

Biljana Đorđević - The social movements as constituent power: deliberative and participatory potentials and problems

The constituent power of the people has been revived in the constitutional scholarship with the return of the political and the return of the people in scholarship on constitutional democracy. This return of the people comes after a long period of taming constituent power in both theory and practice and was a reaction to the crisis of democratic legitimacy which escalated when it became blatantly clear how the idea of the people as the democratic sovereign has been reduced solely to the constitutional fiction of the people as the ultimate source of all legitimate law. Furthermore, the procedures of democratic legitimization of the
governments and policies have been further disembedded from the activities of the people subjected to these structures of governance. The general crisis of democratic legitimacy has particularly been deepened by the recent financial and political crises which caused various anti-crisis mobilizations in countries hit by austerity measures as well as social movements mobilizing around defence of existing constitutional rights, struggle for introduction of new constitutional rights or struggle for reclaiming the common goods. Although many of these movements do not start with the idea of amending constitutions, they are particular forms of constituent power of the people as they articulate various unfulfilled social demands that were not adequately recognized in the unresponsive constitutional system.

One of the key theoretical questions concerns the nature of relationship between constitutional power and constitutional form, that is, what is recognized as the constituent power, by whom and how does the interaction among the actors function both within and against the constitutional forms. These interactions have been summarized by Laughlin and Walker (2008) as four theses: juridical containment thesis of liberal theories of constitutional democracies - constituent powers are routinely in accord with constitutional formations; co-originality thesis or mutual articulation thesis of theories of deliberative democratic constitutionalism; radical sovereignty or self-creation thesis of radical democratic theories; and the irresolution thesis of the agonistic democratic theories - the governed by exercising constituent powers can modify but are unable to transform the unequal relations in which they act.

Regardless of the general aim and success of a particular social movement (and whether or not it can be recognized as a constituent power) often its articulation of a social demand may be channelled into a more formal process of constitutionalization of new political order or constitutional revision/amendment by either that very social movement or may be taken up by other actors building on the initial articulations and struggles. This is the stage where different participatory and deliberative democratic experiments are possible – both in terms of decision-making within the movements (e.g. democratic innovations coming out of grassroots initiatives) and crossing bridges between the so-called informal and formal public, or counterpublics and public (democratic iterations; agonistic mini-publics; institutionalizations of new rights and politics empowered by the countervailing power of social movements etc.).

[social movements as constituent power]

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**Theme 2 – Deliberation, rhetoric, legitimacy**

**Agnieszka Kampa** - Rhetoric, Rhetorical Citizenship and Deliberative Democracy

Rhetoric can be considered both as the first public practice of deliberation and the first theory of public debate. In various concepts of deliberative democracy and the public sphere, there are threads that have their sources in the thoughts of Aristotle or sophists. There are also works that directly refer to the rhetorical tradition and show its timeliness and usefulness in the reflection on contemporary processes of reaching agreement in democratic states. In my speech, I would like to present this rhetorical perspective, developed by contemporary researchers, including Gerard A. Hauser (Vernaular Voices, The Rhetoric of Public and Public Spheres), Bryan Garsten (Saving Persuasion, A Defense from Rhetoric and Judgment), Christian Kock (Deliberative Rhetoric: Arguing about Doing), I will also refer to the concept of rhetorical citizenship (Lisa Villadsen, Christian Kock). I would like
to consider how rhetorical the perspective may be useful in constitution-making and deliberative democracy.

[deliberation and rhetoric]

**Deven Burks** – The intersection of deliberative legitimacy, constituent power and constituted form

Enhanced legitimacy is a driving force behind deliberative innovations (Fung 2015, Curato and Böker 2016). This is no less the case for constitutional deliberative innovations. Assessing deliberative constitutionalism’s success in generating legitimacy necessitates a better grasp of the distinct legitimacy standards which constitutional deliberative innovations may meet. Bound up with those standards is deliberative constitutionalism’s attempt to navigate the tension between politics and law, constituent power (CP) and constituted form (CF). How do factors of deliberative legitimacy interact with standard ways of modelling that tension? To answer this question, I proceed in three parts, the first of which maps ten factors of deliberative legitimacy at four levels: personal, interpersonal, institutional, and systemic. The second lays out four ways of modelling the tension between CP and CF from Loughlin and Walker (2007): the containment, mutual articulation, radical potential, and irritant models. The last part sets out to determine whether the four models directly or indirectly support or neglect the realization of the forms of deliberative legitimacy and casts in a different light from Parkinson (2016) the landscape of deliberative democracy and constitutions. I conclude that certain forms of deliberative legitimacy may be more sensitive to and better served by some models of CP and CF than by others.

[constituent power and deliberation]

**Camil-Alexandru Pârvu** - Constitutional Change and The Rhetorical Limits of Public Deliberation after the “Systemic Turn”

In the more conventional accounts of deliberative democracy, rhetoric and public reason have been understood as two distinct and rather incompatible forms that deliberative models can articulate. Whereas the original public reason-based versions envisage a strict notion of what counts as public reasons admissible into the deliberative fora that mimics the argumentative requirements of constitutional courts, alternative accounts have increasingly proposed an enlarged idea of democratic deliberations that can include the rhetorical dimension of public discourse aimed at persuasion and facilitating collective decision-making.

More recently, several authors have attempted to overcome the various empirical and normative limits of the original accounts of deliberative democracy by proposing to think of it at a more systemic level. Deliberative systems, rather than narrow domains of application, should make democratic deliberation both viable and normatively desirable.

This contribution to the WG1 meeting in Bologna aims to examine the role that rhetoric plays in the accounts of deliberative democracy in the aftermath of its ‘systemic turn’, particularly in a context of constitutional change. For this, it will first elaborate a review of the existing literature on rhetoric and its critical relation with the various accounts of
deliberative democracy, and then look into the notions of ‘systemic turn’ and deliberative systems in order to reassess the place of rhetoric within deliberative accounts - especially in contexts of constitutional change.

[rhetoric, deliberation and constitutional change]

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**Theme 3 – Populism**

**Dušan Spasojević**, Faculty of political sciences, University of Belgrade - Populism and deliberative democracy

The recent wave of populism and populist actors spread across the continent. Populist ideas are driven by the notion of division between the people and the elite (Mudde 2004) and supported by the general and widespread disaffection with contemporary democracy and democratic performances. Although the most successful populist actors belong to the right-wing part of the political space (and some of them being at the radical, anti-systemic and non-democratic end), populist ideas should not be immediately framed (solely) as a threat to liberal democracies, xenophobic and/or intolerant.

Namely, regardless of their actual political effect or proposed solutions, populists are presenting themselves as “the defenders of democracy” and significant part of voters are supporting this understanding. It means that at least populists’ understanding of problems could be investigated as the source of narrative on “what is wrong with contemporary democracy”. Also, populist ideology is begins to “rub-off” and to be used by many mainstream parties (Deegan Krause 2007) which will increase the probability of constitutional change based on those notions. Also, non-populist parties are forced to react on populist narrative and to propose alternative and innovative participatory mechanisms, both for internal party debates and for general policy process. Finally, there are many leftist populist parties that are trying to introduce participatory and deliberative methods as their way of bridging/reducing the gap between the people and the decision makers.

Based on the previously presented framework, following research focuses are possible:

1. Analysis of populist narrative as the source of public perception of weaknesses of democracy; are some of the weaknesses compatible with “solutions” proposed by deliberative democracy? Is there a common ground between populism and deliberative democracy and what are the main differences?

2. What solutions/mechanisms/innovations are proposed and introduced by populist parties (both within the party and on state/local levels) and what is the supporting narrative? Are there differences between the old and new democracies?

3. What are the new deliberative/deliberative-like mechanisms proposed/introduced by mainstream/non-populist parties after the populist challenges in their countries? Are some of those related to constitutional dimension?

4. What are the new deliberative/deliberative like mechanisms proposed/introduced by mainstream/non-populist parties, regardless of populist success in their respective country (populist zeitgeist is influential, even without successful actors).

[deliberative democracy and populism]

**Paul Blokker** – Populism, direct democracy, and constitutional change

While often understood as such, the populist approach towards constitutionalism cannot be reduced to an entirely negative, abusive, or destructive force. Populist constitutionalism should in important dimensions be understood as an alternative constitutional project, rallying against existing injustice and inequality which are attributed to the institutions and
workings of liberal constitutional democracy. Depending on its specific manifestation, the populist counterconstitutional project reveals and addresses important short-comings in existing constitutional systems. At the same time, however, it tends to pose a great menace for pluralistic, inclusive projects of constitutional democracy. I will discuss, first, the theoretical and conceptual relation between constitutionalism and populism, to subsequently discuss the practices in a variety of populist projects of constitution-making and constitutional reform in Latin America and East-Central Europe. A prominent emphasis will be on the usage – or lack thereof – of deliberative instruments in constitutional reform and constitution-making processes.

[populism and constitutional change]

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**Theme 4 – Deliberation and representation**

**Elena García-Guitián** - Autonomous University of Madrid - Constructing the will of the people: problems of citizens representing “the citizen” in advanced democracies

The deliberative stand has influenced current normative literature on representation (Urbinati, 2006; Saward, 2010). It stresses that politics has a discursive and interpretative character, so it needs to have institutional and sociocultural spaces in which political action takes place to generate political judgement. But situating judgement at the core of the representative discussion gives place to an ongoing discussion about what’s the will of the people, and how does it come into being (participants/processes).

As Rosanvallon emphasized (following Lefort) (1998), modern democracy is linked to the principle of popular sovereignty and presupposes that there is a subject considered “the People” with a common will. Nevertheless, its embodiment (through representation) has always been controversial, as it’s a fictional construct but respond to real claims of identification. That’s the source of an unescapable malaise that goes back to its origins. To avoid it, each political system has developed different strategies to justify its model of representation, expressed in constitutional norms. Being always an answer to different political cleavages, there are periodic attempts to “close the gap” with nationalist, totalitarian or populist claims (Mudde,2004; Canovan, 1999). On the contrary, liberal democracy requires a “system of representation” (Masbridge, Urbinati, Saward, Rosanvallon) which includes various institutional as well as non-electoral forms of social representation. Adopting this perspective blurs the sharp distinction commonly established between representation and citizen participation. Criticized for been too elitist (Owen and Smith, 2015) -as it does not give a central role to “ordinary” citizens-, or too idealistic -as it distinguishes deliberation from political competition-, hiding the fact that preferences evolve in the context of elite interparty competition (Disch, 2011; Rosenblum, 2008), it may help to think on the problems of the representativeness of citizens participating through new participatory mechanisms (representing “citizens”). The paper will explore this literature, to critically assess current proposals to use deliberative mechanisms to involve “citizens” in constitutional reforms.

[deliberation and representation]

**Peter Stone**, Trinity College Dublin (**pstone@tcd.ie**) - A Paradox of Sortition?

Sortition—the selection of political officials by lot—is attracting increasing attention in politics. Both political theorists and political activists argue that randomly-selected citizen assemblies can play an important role in revitalizing democracy for the twenty-first century.
But what precisely is this role, and why should bodies selected via sortition be well-placed to make it? This paper draws attention to an apparent paradox generated by contemporary arguments for sortition. On the one hand, randomly-selected citizen assemblies are praised for their impartiality—for standing above fights within the body politic as a whole, and providing a cool deliberative “outsider” perspective on them. Such assemblies thus appear apolitical, in much the same manner as the Anglo-American jury, and are thus well-suited for tasks calling for an apolitical perspective (such as drawing legislative district boundaries). On the other hand, citizen assemblies are often regarded as embodying an authentic “voice of the people”—one superior in some ways even to the voice generated by consulting the people directly (as in a referendum) due to the deliberative quality they enable. This argument makes these citizen assemblies sound entirely political, and thus suited well-suited for tasks where the “people” need to speak. Somehow, then, randomly-selected citizen assemblies wind up being regarded as both highly apolitical and highly political. The stakes generated by this paradox are quite high, as the two sides of sortition seem to recommend it for completely opposite roles in the body politic. This paper investigates this paradox, arguing that it is generated by different features of the practice of sortition. The paper concludes that randomly-selected citizen assemblies will sound either political or apolitical depending upon the foundational story about democracy to which appeal is being made. A lack of clarity regarding that story renders the proper place of sortition in contemporary democracy unclear.

[sortition and citizens’ assemblies]

Theme 5 – Constitutional law and deliberation

Anna Michalak - Constitutional capabilities of introducing the deliberative democracy instruments into the Polish legal order.

Nowadays, the right of a citizen to active participation in governing the state, also in the period between parliamentary elections, is one of the basic constitutional right. However, the constitution of the Republic of Poland of 1997 did not directly regulate the public's right to participate in public policy-making and, in particular, to consult them. The basic law provides only that the supreme power belongs to the people who exercise it through their representatives or directly. However, such a right can be derived from the constitutional principles of: a democratic state of law, the supremacy of the nation, decentralization and subsidiarity.

Taking into account the content of the constitution, the doctrine of constitutional law provides that there are two forms of direct democracy in Poland: a referendum and a civic legislative initiative, none of which may involve a change in the constitution. Some authors define these procedures also as participatory democracy. At the same time, the right to petition guaranteed in art. 63 of the Constitution is omitted in these considerations.

The legislator also established other forms of public participation in the exercise of power, i.e. social consultations (e.g. at the stage of government legislative proceedings) and a public hearing during consideration of a bill in the first chamber of the parliament. However, none of these forms of expressing the will of the public in the period between parliamentary elections is mandatory (the constitution does not provide for a situation where conducting a referendum or a public consultation would be mandatory) and binding (the obligation for
parliament to pass a bill submitted by citizens) for public administration bodies (both legislative or executive).

You can even put forward a thesis (taking into account the practice of the functioning of these institutions) that they have a facade character (social consultations) / they are not used (public hearing) / they are ineffective (a civic legislative initiative).

As it seems for these reasons, the doctrine of constitutional law is silent about the possibility / need / necessity of introducing into the Polish system of constitutional law the institution of deliberative democracy that is developing in other countries.

However, if we put aside this negative assessment of the actual participation of society in governing the state, it is worth considering the concept of creating a definition of instruments appropriate for deliberative democracy (against the background of procedures and institutions of direct and participatory democracy) so that the discussion on the possibility of their introduction into the Polish constitutional order can begin.

The aim of this paper is to define what deliberative democracy is in the context of participatory and direct democracy (which are often interchangeable in Polish constitutional law) and to create a classification of instruments and institutions characteristic for particular forms of democracy.

[Deliberative democracy and constitutional law]

Clodagh Harris – Democratic innovation and constitutional change
I’m interested in participatory and deliberative democracy, particularly in democratic innovations in the field. Currently there are two strands to my research in this area:

1) Deliberative Democracy and Constitutional change. My research in this area focuses on deliberative mini-publics such as citizens’ assemblies and the Irish cases specifically. It considers the relationship between mini-public design and input, throughput and output legitimacy (Reuchamps and Suiter, 2016) and more recently the role for such sites of deliberation within the wider deliberative democratic system as well as the part ‘deliberative moments’ (Dryzek et al. 2019) can/may play in facilitating change.

2) Deliberative Democratic innovations as an action research tool: I’ve worked in recent years on transdisciplinary projects (ENTRUST & Imagining2050) that use citizens’ juries to collaborate with communities in the co-creation of shared visions on sustainable transitions and climate action more generally. These projects have involved engineers, social scientists and computer scientists combining forecasting models and innovative forms of community engagement.

Maria Marczewska-Rytko - Czesław Znamierowski’s Democracy as the System of Opportunities.
In Czesław Znamierowski’s view the role of elites in an effective democracy is rather difficult to overestimate, which is why he devotes considerable room to them. He proposes a thesis that there is a direct relationship between the functioning of a democracy and the quality of its elites. In other words, we can say that the higher the quality of elites created in the democratic system is, the better the functioning of democracy we are dealing with. Czesław Znamierowski himself says that the character of a political system is in fact determined by how its elite is created and transformed. He thus points to the role played by the mechanisms of forming elites and the relationships between elites and the rest of society. Observe that the theory of elites referred to by Znamierowski is not identical with the
conceptions of Vilfredo Pareto, Gaetano Mosci or Charles Wright Mills, in which the party is identified with the political elite.

[elites and democracy]

Volkan Gul

Camil Ungureanu