

Comment on Niclas Berggren's paper „The Calculus of Consent at 50: Insights for Liberalism“

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Niclas Berggren's paper is an attempt to vitalize liberalism by rethinking selected themes from Buchanan and Tullock's Calculus of Consent. In my commentary I will adopt Niclas' strategy and provide a "[l]ist of diverse thoughts" (Berggren 2012, 2) not a systematic assessment of the work. Specifically, I will focus on two points that I find important and controversial. First, it is the idea that consensus is the only source of legitimization – in other words that only the procedure of unanimous consent can confer legitimacy on institutions; and second, that one may construe liberalism on strictly subjectivist grounds. I agree with neither proposition. I believe liberalism cannot be developed only with categories of economics independently of a sound theory of ethics.

Niclas argues that there is no other criterion for assessing institutional arrangements than people's unanimous consent: "It is what people agree to that is desirable, and there is no external criterion available that can be used to discriminate between various institutional settings." (2012, 21) Values are diverse and subjective and assertions incorporating values therefore do not have truth value; they are "reflections of subjective, personal opinions or sentiments". (2012, 20) The only situation where the observing scientist can make a judgment about desirability is when all people unanimously approve of a particular arrangement.

It seems to follow naturally from a general assumption taken from the Calculus of Consent that people are free in and through constitutional contract. (Berggren 2012, 4) Whatever people agree on is legitimate. Not even a highly redistributionist state can be criticized from a liberal perspective if free men consented to it.

I agree with the implication from consent to legitimacy but I doubt that consent can be considered the only or primary source of legitimization. If we start from a situation where consent is a meaningful concept we already acknowledge certain normative structures. Consent cannot be defined independently of any rules because no agreement can exist outside of a certain grammar. And even if the grammar is not absolute - it is just a provisional ladder that we modify later in the argument, we can never climb to a consensus without any ladder at all. At any particular moment there must be default rules that hold a factual status – Searle (2006) would call them institutional facts. Any agreement must therefore be preceded by an intersubjectively shared normative

interpretation of the situation which can serve as a criterion for our assessment of any actual institutional arrangement.

This seems especially relevant in assessing institutional change. Niclas argues that only changes approved by everyone can be considered improvements (2012, 22). I think this approach imposes unnecessary constraint on what we can say about desirability and sometimes can even lead us astray. The criterion of unanimous consent seems applicable only in cases where the starting position is an outcome of preceding consensus or in other words where all players remain within the grammar. That contracts should not be modified unilaterally looks like a sound and uncontroversial principle.

In other situations, however, the criterion loses much of its appeal. It is one thing to claim as Buchanan (Quoted in Vanberg 2004) does that “[a]ny discussion of institutional change must embody the recognition that we start from here...” and quite another to argue that the status quo is always normatively relevant. Why should a snapshot of a situation matter normatively more than the history that gave rise to the situation? Why should be any reform in contexts where the original contract has been broken or never existed conditioned by the agreement of all parties? Why should we not look at the prevailing grammar?

The argument is based on an assumption that agreement is the sole possible solution of a conflict. Yet it is not the case. If we assume that people are free at the ultimate level (which is Niclas’ starting point) it seems always legitimate to return to the original position preceding consensus. Hence, unless we are bound by a valid contract (e.g. the original contract has been broken) we can make an agreement with only a subset of the people involved in the original arrangement and thus change status quo (collective secession) or unilaterally leave prevailing status quo and remain in the state of freedom, or anarchy (individual secession). Insisting on consensus as the only possible way out of “social” status quo is like saying that a person confronted by a gunman asking for her money cannot escape but has duty to agree with the gunman on a consensual solution. It is quite likely that an agreement could be achieved where life would be exchanged for money to the benefit of both parties. But I think that the solution in which the victim managed to escape would be no less legitimate.

Contrary to Niclas I think consensus is not normatively basic. It is possible at least to some extent to discriminate among various institutional arrangements and their modifications outside of the consensus framework.

My second point is closely related to the first one and concerns the foundations of liberalism. Niclas argues that it is possible to have liberalism without any foundations and believes the ensuing “nihilist liberalism” (2012, 20) is an appealing project. The lack of foundations means there are no facts to start from, everything is subjective including the procedural criterion of consensus. (Berggren 2012, 22)

In my view it seems possible to have some foundations without the necessity to commit to a suspicious and intolerant metaphysics. I agree that the search for ultimate source of justification can be unproductive because there may be no self-evident axiom from which the whole doctrine of liberalism could be derived. But it does not imply we can do totally without any foundations. I believe there can be a middle-ground position between the conviction that a discourse about values is impossible and the other extreme that values and facts are indistinguishable.

Adam Smith can be interpreted as attempting at such a middle-ground position. In the *Theory of Moral Sentiments* (1982) he starts from individual sentiments and shows how through a sequence of sympathetic moves of individuals seeking approbation it is possible to derive impartial standards of what is good and right. The standards will not be perfectly impartial or objective. Only the “[a]ll-seeing Judge of the world, whose eye can never be deceived, and whose judgments can never be perverted” (Smith 1982, III.2.33) could achieve such impartiality. Human beings are doomed to struggle in the “free communication of sentiments and opinions” (Smith 1982, VII.iv.28) and will never achieve absolute certainty about their normative judgments. They will always be partial but to a different degree.

Smith argues there are two types of rules: “The one, are precise, accurate, and indispensable. The other, are loose, vague, and indeterminate...” (Smith 1982, III.6.11) The former are similar to grammar while the latter resemble those “which critics lay down for the attainment of what is sublime and elegant in composition...” (Smith 1982, III.6.11) The distinction between “grammar” – which is commutative justice for Smith and is studied by jurisprudence - and “composition” (all other virtues studied by ethics) is helpful to shed light on the nature of liberalism.

Liberals have traditionally had significantly more confidence in statements about “grammar” or commutative justice than statements about “composition”. The larger the society the more unlikely is social consensus classical liberals believed. Yet again acknowledging diversity of opinion does not necessitate the conclusion that all normative judgments are subjective or subjective to the same degree. One can still argue that politics is not about “truth” in “composition” as Niclas seems to do by quoting Buchanan (on pages 20 and 21) and believe that some grammar - property rights, or commutative justice - are absolute like Rothbard (1998) or Hoppe (2006) claimed.

Niclas instead insists that even the grammar is purely subjective. As I suggested above I do not think such a position is internally consistent – there always is some given grammar. Niclas wants to distance himself from sometimes exaggerated claims of liberals about the apriori nature of the foundations and make argumentation with non-liberals easier. He assumes a role of a “bargainer” (Klein 2004) but I am afraid he tries to bargain on a wrong margin. My suggestion, if I can make one, would be to relax the pretense of apodictic certainty about the “grammar” but at the same time admit that talking about “composition” is not utterly impossible. Smithian multi-faceted approach to ethics and jurisprudence could be an example to follow. “Loose, vague, and indeterminate” claims are still improvement over no claims at all. “All or nothing” strategy is not the most productive. Liberalism operating on the level of jurisprudence and not ethics unnecessarily gives up ammunition needed for winning over people’s hearts.

My last comment is about toleration and should illustrate what I have just said. Niclas argues that the fundamental liberal value of toleration seems to naturally follow from regarding values as being subjective in character (Berggren 2012, 23) - if there is no truth in normative statements no one can be right to impose her preferred institutions on others. Yet, this would imply a strange type of toleration. If there is no reason for imposition there is equally no reason for defense of oneself. Such toleration would imply that one cannot find any reason to defend herself against aggression.

The traditional liberal concept of toleration (that Niclas writes about on page 14) has been derived from beliefs about certain objectivity of grammar combined with conviction about subjectivity of individual goals to be pursued within society. Such toleration implies that everyone is free to do whatever he likes within his private domain. Conflict is avoided by existing border lines. Yet there is another kind of toleration valued highly by people – toleration of plurality of values even within one’s private domain. This toleration is not implied by the grammar but would nonetheless be part of the richer Smithian liberal framework.

In conclusion I dare to say that Niclas and I agree to a great extent on the content of liberalism. Where we disagree is the meaning of a debate about values and the importance of ethics. I think a discourse on normative issues is worth pursuing and that not everyone’s opinion in that discourse is equally worthy – in other words there are some criteria for discriminating among normative assertions even though they lack precision and accuracy or scientific claims. Our moral intuitions have been, no doubt, imposed on us by genetic and cultural evolution (Haidt 2007) but there is, I believe, room for their cultivation in a meaningful debate.

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