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By

Isabell Villanueva Breulmann

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Berlin, February 2020 *Isabell Villanueva*

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I. Introduction

Disagreement is common. With respect to many topics, one finds intelligent and generally reasonable individuals who are familiar with the same or similar bodies of evidence, but who still disagree with one another, meaning they hold contrary or incompatible beliefs. In some cases, we experience the persistence of disagreement as quite problematic. These cases become even more problematic when they concern practical or theoretical matters that call for a decision.[1]

Law, and adjudication in particular, are the main mechanisms in a democratic society to deal with disagreement, or as Jeremy Waldron put it, the point of law is to enable us to act in the face of disagreement' (Waldron 1999: 9). Law is society's best solution to the problem of major disagreement, and most disagreements sharply dividing society finally end up before the courts. However, in court, once a resolution has been found for the difficult questions at hand, a justice[2] will probably only find out that his or her fellow justices have come up with (quite) different ideas, and others ways of answering these questions. And they most certainly think that one is as wrong as one thinks they are. We experience bitter dissent between judges and justices as to how to decide cases. Hence, adjudication is not only solving disagreement but gives rise to new or deepened disagreement.[3]

At the same time, one hopes, justices are to a greater degree willing and capable to integrate arguments from the opposite side into their deliberations and to account for them in their formation of opinion. Further problematizing this process, the reputation and standing of a court depends heavily upon the court's institutional ability to correctly discern the law. In the end, a judgment must earn respect because it is decided for good (not to say the best) reason, rather than merely command respect because it is a decision.[4] However, reading plain judicial opinions it is often hard to make sense of the disagreements involved in these ways. Any indications of remaining doubts, or why it was not possible to reach consensus on one of the two so obviously correct answers, are missing. Judges continue to

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[1] "[…] some disagreements in law divide us in fierce and intractable controversies. And like almost all political disagreements, they appear to implicate issues on which everyone acknowledges that we need as a society to take a common view." (Waldron 1999:12)

[2] I will use the term 'justice/s' to refer to judges at supreme courts in general, and not in a way restricted to the US context.

[3] Cf. the reactions to and consequences of e.g. the decision of the Supreme Court in *Citizen United v. FEC* 558 U.S. 310 (2010) on campaign finance in 2010 or the decision taken by the German *Bundesverfassungsgericht* on the ban on headscarves for teachers at state schools in 2015 (1 BvR 471/10, 1 BvR 1181/10).

[4] Post 2001: 1363.

convey remarkably high levels of certainty in their decisions. Opinions typically portray the chosen decision as singularly correct and as inevitably determined by the legal materials available.[5]

To develop a clearer understanding on what judges or justices in fact disagree about, and how these sources of disagreement interact is therefore particularly worthwhile. In law, the source of a mistake or a disagreement cannot be easily isolated because no overview of those sources even exists (not least how to deal with them). Thus, I will carefully analyze two salient cases in order to identify the sources[6] of disagreement at work, and provide an overview of these sources. I will analyze in which ways these sources overlap, and interact with each other and in which ways the "real" sources of disagreement might be concealed by more superficial disagreements. I will examine in detail the decision taken by the U.S. Supreme Court on the federal contraception mandate under the Affordable Care Act,[7] and the decision taken by the German Federal Constitutional Court, hereinafter *Bundesverfassungsgericht*, on the criminal liability of incest between siblings.[8] Both rulings dealt with highly controversial issues where agreement, even on the court's bench, could not be reached and where dissenting votes have been published by the minority-justices.

As a second step, building on this analysis, I will try to shed some more light on the theoretical challenge these disagreements create and reach a deeper understanding of disagreement between justices in the supreme courts of a country. Repeatedly, examples of dissent have been characterized as solely being based on political or ideological preferences[9], or as caricatures arising from what the judge ate for breakfast.[10] My claim is that these attempts at explanation run the risk of overlooking other sources of disagreement. They tend to overstate the decisive role of politics or ideological preferences, thereby eliminating other crucial elements, e.g. uncertainty or complex evidence. Taking legal arguments seriously entails the process of not reducing judicial decisions to the grounds of political preference or ideology.

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[5] Simon and Scurich 2013: 414.

[6] I will use the term 'source' to describe what the disagreement is about, identifying reasons that can explain the persistence of the dissent, and not in any strictly causal or other relational sense.

[7] *Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751 (2014), delivered on 30 June 2014.

[8] *BVerfG*, 2 BvR 392/07, delivered on February 26, 2008.

[9] Cf. Segal and Spaeth 1993; Epstein and Posner 2010; Sunstein et al. 2003.

[10] Cf. Danziger et al. 2011: 6889.

1. Peer Disagreement in Law

Another intriguing way of analyzing disagreements in the highest courts is by looking at them as a real-world phenomenon of peer disagreement, since the philosophical debate on peer disagreement deals specifically with people forming conflicting or contradicting beliefs about a question, despite sharing the relevant evidence and being equally capable of assessing it. Peer disagreement is typically defined as a disagreement between two *epistemic peers*[11].

– The problem can be framed as follows:

– S believes p.

– S finds out that T believes something incompatible with p.

– S takes T to be her epistemic peer.[12]

– Should S lower her confidence in p?

The general epistemic issues arising from peer disagreement started to form a vivid debate throughout the last decade.[13] There are striking questions about what the reasonable responses to peer disagreement can be. Can sticking to competing conclusions be reasonable? Can one rationally hold on to a belief while knowing that that belief is explicitly rejected by others who possess the same evidence, and whom one respects as having equally good powers of reason? The two central questions regarding the epistemology of disagreement are: Under what conditions is one epistemically blameworthy in retaining one's belief with the same level of confidence after discovering disagreement amongst one's peers? And how often, and for which beliefs, are those conditions actually satisfied in our lives?

Unfortunately, the literature has often concentrated on relatively simple examples to find a general answer to these questions. The debate still has to be applied

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[11] 'Epistemic peer' is an epistemological term of art. The term has been introduced to the debate on disagreement by Thomas Kelly in 2005. Cf. Kelly 2005: 168 fn. 3, where he writes that he owes the term 'epistemic peer' to Gutting 1982, who used it to refer to those who are alike with respect to 'intelligence, perspicacity, honesty, thoroughness, and other relevant epistemic virtues' (Gutting 1982: 83). Today, there are two main notions of epistemic peerhood. On the first, two people are epistemic peers with regard to a question when they have the same evidence and arguments relevant to the question, are equally competent in assessing the evidence, and have considered the evidence with the same care and attention (cf. Christensen 2007: 756 f.; Kelly 2005: 174 f.; Feldman 2007: 201; Lackey 2010: 302 f.). On the second notion, epistemic peers are defined as equally likely to be right on a particular question (cf. Elga 2010: 499 fn. 29; Konigsberg 2013: 97).

[12] See King 2012 for considerations of the possible alternatives 'T is in fact S's peer' and 'S is justified in believing that T is her peer'. In the ongoing debate these alternatives are not always clearly distinguished.

[13] Cf. Christensen 2009; Christensen and Lackey 2013; Elga 2010; Enoch 2010; Feldman 2007; Feldman and Warfield 2010; Frances 2014; Kelly 2005 and 2013; Lackey 2010; Sosa 2010; White 2009.