

Democracy out of Reason? Comment on Rainer Forst's "The Rule of Reasons"

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Abstract. In my paper, I comment on Rainer Forst's paper in this issue. I raise doubts as to whether the justification of democracy emerges from a fundamental moral right to reciprocal and general justification, as Forst claims. His basic argument appears questionable because democracy is different from a "hypothetical-consent-conception" of moral legitimacy, which *limits* as well as *enables* democratic legitimacy. The former cannot, however, *justify* the latter through an argument centered on self-government: Such an argument relies heavily on the possibility of consensus, thus neglecting the crucial phenomenon of disagreement or dissent. As a result of not adequately dealing with this phenomenon, the argument is unable to account for the basic democratic principle of majority rule as the remedy at hand.

I.

Rainer Forst (2001, esp. part III) offers us an elegant philosophical theory of deliberative democracy. As such, it promises to satisfactorily answer the central questions of any normative theory of democracy:

1. Why democracy at all? Why is democracy the best form of government?
2. What kind of democracy? Why is deliberative democracy the best form of democracy? Just how does deliberation improve decision-making?
3. What is the proper scope or realm of democracy? Which issues should be decided democratically in a society and which, if any, should be decided by higher law and judicial review?

Forst offers his replies to these questions first by contrasting a Rawlsian-liberal conception of democracy with a communitarian one, and, secondly and more importantly, by providing his own constructivist theory of moral and political justification. His own proposal is presented as an alternative to Liberalism and Communitarianism; I would contend, however, that his own

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theory is basically a liberal view which only differs from the Rawlsian one in that it is more procedural. Let us take a closer look at the sort of answers his theory provides to the three questions mentioned above.

At the heart of Forst's theory lies a fundamental moral right to justification. This normative core—Forst claims—is revealed by a recursive reconstruction of the rules of our common practice of normative justification. The practice of giving and accepting reasons in the moral domain has built into it a criterion for moral legitimacy, namely the idea that norms must be supported by reasons that are reciprocally and generally justifiable.

In explaining the individual normative "ground," Forst first posits a fundamental moral "insight" into the duty to give justifications which, he says, itself needs no further justification.¹ Conversely, the most basic (and undeniable) claim that any human being can make is the right to justification, i.e., the right never to be treated in a manner for which he or she cannot (on demand) be given adequate reasons.

As I understand it, Forst's strongest claim in this paper is that the principal advantage of his normative theory over the liberal view lies in the fact that it relies mainly on procedural criteria of legitimacy (Forst 2001, 373). From this primary right to justification—he claims—one can construct human rights, a theory of justice, and most importantly in this context, a theory of democracy "co-originally," without any argumentative distance between democracy and justice or human rights. In Forst's view, the justification of democracy must follow more immediately, directly, and non-instrumentally than it does in liberal theories, as it flows naturally from the right to justification. This is so since "[t]he basic right to justification—when applied to a political context—calls for an institutionalization of forms of reciprocal and general justification" (Forst 2001, 374).

This basic right to justification also gives an appealingly easy answer to the second of our questions: What kind of democracy? Why is deliberative democracy the best form of democracy? If it is reciprocal justification that serves as the "ultimate [normative] ground" (Forst 2001, 374), then an ideal of democracy that gives a central role to mutual and public reasoning and to the giving of reasons would seem to evolve quite naturally. Thus Forst's proposal is, on the face of it, quite attractive; since it is unitary and inclusive, it succeeds in deriving all major elements of a theory of democracy from one single principle.

II.

Although I have considerable sympathy for this view, I must also express some reservations and raise some questions here. Can democracy really be constructed or deduced directly from a basic principle of reciprocal and

¹ This not very lucid notion of "insight" plays a major role in his conception of practical reason, cf. Forst 1999.

general justification? The reason why that may seem dubious lies in the fact that democracy is indeed something more than and different from public justification. In my view, the Forst-constructed ideal of democracy seems too idealistic. Democracy—as we know it—is first of all a form of government of real people by real people for real people (to rephrase Jefferson's definition). Forst's basic principle of justification (re)constructs our universalistic morality of equal respect, as well as a conception of justice based on it, as conditions on which everybody theoretically might have agreed. Thus he holds what one could call a "hypothetical-consent-conception" of moral legitimacy.

But Forst himself objects to this. In his view, the moral right to justification is an entitlement to actual reason-giving. However, it is not the *actual* asking for and giving of reasons that matters here. The criteria with the help of which we should be able to decide whether a given justification is "strict," in the sense of reciprocally and generally unable to be rejected, must be hypothetical. How else could we judge whether a given reason is truly general, i.e., truly inclusive of everyone affected, as well as truly reciprocal, i.e., no one party demands more from the others than she herself is prepared to agree to?

These fairly plausible criteria for moral legitimacy presuppose an *ideal discourse*. Only if, under ideal conditions, all parties affected cannot reasonably reject a claim, can this claim be deemed in fact morally justified. Hence our *actual* procedures of moral justification will always be at best a hypothetical anticipation of the conditions of an ideal discourse situation.

While such a criterion of hypothetical consent makes apparent sense in the moral realm, it fails to adequately justify the necessary and morally required institutionalization of moral rights. Moral rights are—as Habermas calls it—"unsatisfied" until they are codified and interpreted. Thus human rights require a political community which will codify, interpret and protect them as basic and inviolable. A legal community may, and should, for shared reasons, restrict, specify and institutionalize moral principles (Forst 1994, 79).

Given our shared convictions, this should intuitively be the place where democracy enters the picture and fulfills its role as the correct *procedure* for enabling decisions about binding laws and interpretations of basic moral rights. So far, however, a regime of moral rights might well be compatible with a non-democratic government that purports to rule in the best interests of all, with these interests understood as "hypothetical agreement."

As Frank Michelman (1999, 52–65; 1997) has pointed out, we must attribute to the category of universal moral rights an abstract and general normative content that is logically prior to and independent of the actual operation of any democratic procedure for deciding such content. The very concept of human rights implies *a priori* an abstract and general content that is, as Michelman puts it, democracy-independent. Thus human rights—as moral

rights that we are morally required to institutionalize—cannot be required to undergo a process of democratic “justification.” In order to be valid or legitimate, they must “only” be justifiable by means of reciprocal and general reasons.

There is, after all, a clear distinction between the standards of the moral rightness of norms and the (subsequent) democratic legitimization of laws or constitutional rights. The standard of moral legitimacy is the universalizability of the norm in question, i.e., the requirement that all parties affected could, in principle, agree. But what follows from this standard of moral legitimacy for the conditions of political legitimacy? So far, nothing! We cannot necessarily derive an argument for actual consent in the form of democratic procedures from consent in principle as a requirement for moral legitimacy. That is the real problem, and I have difficulty seeing how Forst’s theory solves or avoids it.

Hence the question truly is: How does Forst legitimately derive the principle of democracy from his Principle of Justification? He must be able to tell us whether and why we have moral reasons for thinking that we need not only democratic procedures such as public debate and reasoning, but also decision-making in elections qua majority principle.

Forst’s answer seems to lie in his distinction and (by the same token) connection between a strictly moral-political justification of basic legal, political and social structures and a general political justification “of other matters which do not directly concern morally central issues of justice” (Forst 2001, 363). The latter is, of course, the political realm of majority vote and compromise. For Forst, it seems to be decisive here that citizens reach a general justification through proper use of their “insight” (Forst 2001, 364f.). But what is insight? Which insight is to be deemed correct?²

Forst says that citizens should:

In the case of general, though not strict justification, [...] accept a decision as justifiable without thinking that the best decision has been reached—provided that moral reasons have not been overlooked or trumped by other considerations and that procedures have been fair. One simply sees that other positions were not morally rejectable and have gained more support given the values and interests of a majority of citizens. One understands the prevailing interests and values, even though one does not share them; thus one accepts the legitimacy of the decision and its reasons without adopting them. (Forst 2001, 365)

But why, and to what degree, one may ask, is this decisive cognitive capacity of insight that Forst requires from citizens actually able to provide the complete foundation of democracy?

Although, according to Forst’s theory, both basic moral or human rights and deliberative democracy are supposed to follow co-originally from the idea of a fair procedure of reason giving, the different procedures in fact

² Cf. footnote 1.

have—as one can see—a rather different status or standing even under his theory. One seems to be hypothetical, while the other is factual agreement, both based on the giving of reasons.

There are, of course, at least three important connections between political-moral and democratic justification. Moral legitimacy (i) *limits* as well as it (ii) *enables* democratic legitimacy. But can the former also (iii) *justify* the latter?

(i) Moral-political justification constitutes the core of general political justification. Moral principles have a priority over political decisions. Reasons and decisions in the democratic realm (public reasons in the weaker sense) must not violate basic principles that are reciprocally and generally justifiable (public reasons in the stricter sense). The procedural criteria of moral legitimacy thus entail important and strong substantive components (namely the moral core), which put certain limits on the democratic process and on the kind of normativity of its reasons.³ Hence moral principles constrain the content and the scope of democratic deliberation and decision making.

(ii) By the same token, moral principles enable a realm in which political self-government by public reason in the weaker sense becomes possible, since and as long as moral principles are not violated. Understood in this way, moral principles cannot be regarded as governing the whole space of practical reason. Indeed, there are possibilities for weaker forms of reasonable justification and acceptance on other than moral matters. Above the threshold of political-moral justification, there remains ample room for the political, a space that is not completely controlled or “moralized” by strict justifications which it would not be reasonable to reject. But how are we to draw the boundaries between strict and general justification? Here we must return to the third question I raised at the beginning of my remarks. What is the scope or realm of democracy? Which issues should be decided democratically in society and which, if any, are better decided by some higher law and judicial review?

As far as I can tell, in Forst’s view, however, all morally relevant questions or aspects of publicly debated issues must be strictly morally justified. Only additional matters which are not morally relevant can then be subject to the political debate and to deliberative democratic decision-making. Although I am in agreement with the general liberal notion that basic moral rights must enjoy priority over democratic decisions, it seems to me that Forst’s distinction between the political and the moral (if that is really what he intends) leaves too little space for the political. Where are the moral controversies of our time such as, for instance, abortion, questions as to the neutrality of the state or the level of necessary tolerance, to be discussed and resolved? These

³ This is why Forst’s view of deliberative democracy cannot be regarded as purely procedural, as he himself points out: cf. Forst 2001, 373. For the same reason it is also not really co-original, as he claims.

issues do not themselves reveal the extent to which they belong to the political vs. the moral sphere.

Forst says that it is only in the light of the criteria of strict justification that we can decide whether or not we are dealing with a fundamental moral claim that it would not be reasonable to reject. But since the question as to whether a claim is reciprocally and generally justifiable can only be raised and resolved under ideal circumstances, it would seem that these criteria can only function as some sort of ideal guideline for public debate.

Many have argued instead that, since we lack a moral agreement on these matters and do not know what the hypothetical impartial solution would look like, we should, as a second best option, decide these questions politically. That is to say, we will act only after extensive public debate allowing for the presentation of as many opinions and arguments as possible. But we must, in the end, decide politically, and that could well be by majority rule, in order to reach a binding decision at least for the moment. We must, of course, always be open to the possibility of altering or revoking that decision if and when better arguments are raised or the convictions of those involved change significantly.

(iii) In addition to these limiting and enabling functions, the political-moral principles (defining the basic standing of citizens) should, under Forst's theory, also govern the justification and interpretation of the principles of democracy. But how can the ideal of moral-political justification help to justify and interpret the ideal of democracy? The intrinsic argument for democracy Forst offers is "the basic moral right to justification which—when applied to a political context—calls for an institutionalization of forms of reciprocal and general justification" (Forst 2001, 374). But, as I claim above, this is a moral right that does not in itself necessitate actual public deliberation and democratic decision-making.

Forst argues that democratic deliberation must be seen as the best possible but still imperfect institutionalization of the right to justification, under the two conditions that there are fair procedures and good moral reasons notwithstanding. This argument relies, of course, on his understanding of moral justification as being actually reason-giving. But, as I claim above, the giving of reasons could well be actual, while the decision as to their reciprocal and general non-rejectability requires the presupposition of idealized conditions. Thus, it remains to be seen just why an actual exercisable right to actual democratic deliberation and collective decision-making follows from the basic moral right to justification.⁴ Let's look further for a possible argument.

⁴ Where he discusses the connection between the two, Forst makes the point that moral justification functions as an inherent critical standard for existing imperfect procedures of political decision-making. These procedures may be criticized and improved by pointing out more perfectly reciprocal and inclusive ones that would better serve to justify the norm at hand with respect to the interests of all individuals affected (Forst 2001, 373f.). I agree, but would point out that this argument already presupposes the necessity of democratic procedures.

III.

Historically, the most important argument for democracy is derived from the principle of self-government (Christiano 1996, Chap. 1).⁵ I suppose that Forst's argument is of the liberal democratic-republican variety, and I propose to look at that proposal more closely now. This type of approach starts from the observation that our moral principle of equal respect already entails two important elements from which one can build an argument for democracy: *autonomy* and *consensus*. According to our conception of morality, practical norms are morally justified only if they can be effectively argued for with respect to the interests of all individuals affected—i.e., if everyone has good reasons for accepting them and no one has a good reason for rejecting them.

From this starting point, the basic argument for democracy from self-government usually proceeds along the lines of three steps, roughly as follows (I may be oversimplifying, and I am certainly omitting various versions of this argument, but I think the summary is fair).

It seems clear that, in the end, only the directly affected parties can formulate and advocate their (true or reasonable) interests. Equal respect, which we owe one another reciprocally, thus requires regard for the autonomous decisions of each unique and non-interchangeable individual. This procedural approach to moral legitimization regards the *autonomy* of the individual as the standard of justification for universal norms. Since we are morally obliged to respect one another's autonomy, such a conception of morality necessarily entails a personal right to reflective self-determination or self-government for each autonomous individual. This is the principle of equal individual freedom.

Consensus is the criterion of legitimacy. If there is a consensus about an issue, e.g., on institutional constraints or regarding a framework of rules, then each party will affirm this agreement freely for him- or herself, thus following the rule of "one will." In this way, each party will govern him- or herself.

From these premises of autonomy and consensus, we can conclude that to be self-governing in the political realm entails participation in democratic discussions and enables decision-making under certain conditions. As Joshua Cohen (1989, 22) has put it: "Outcomes are democratically legitimate if they could be the outcome of a free and reasoned agreement among equals."

⁵ There are at least two different kinds of prominent moral arguments for democracy. Those are the arguments from self-government on the one hand and the arguments from equality on the other. Here I only discuss the former. For the exposition of these arguments I follow here Christiano 1996, chap. 1. For arguments from equality cf. Christiano 1996, chap. 2, and Gosepath, 1998, 201–41.

This principle states clearly the conditions under which democratic participation can be expected to yield legitimate outcomes. The basic idea is that individuals are self-governing if they base their terms of association on consensus. One might therefore term this a *constructive* version of the argument, since the results find their legitimization in the fact that they are the result of an established procedure of discussion, deliberation, and decision-making. Such a view also implies the importance of democracy and deliberation as necessary conditions of legitimate order. It is clear how, under this view, the emergence of free and reasoned consensus serves as a guarantee that each person will in fact adopt the discussed terms as in accordance with his or her own will.

The main difficulty with this schematic argument should, however, be clear: its strong dependence on the possibility of consensus. Constructed this way, the argument neglects the crucial phenomenon of disagreement or dissent. This is no accident. There is, in fact, considerable tension in this theory between the idea that an individual must be free to autonomously govern the world he shares in common with others and the claim that he must also afford to every other citizen this same freedom. Democracy thus would seem to be incompatible with individual self-government.

I do not see how an argument drawn from the principle of autonomy and self-government can therefore offer a thorough understanding of the foundations of democratic decision-making. In large part, this failure is due to the dependence of this kind of argument on the existence of consensus within society. Because the argument does not deal adequately with the phenomenon of disagreement, it is unable to account for the basic democratic principle of majority rule: When there are disagreements over what the terms of association are to be, the view that gains the support of a majority of the citizens ought to be chosen. Or, to put it differently: The argument fails to provide philosophical justification for democracy as it is practiced in real societies, which widely make use of majority rule. This central principle of democracy is not only entirely unaccounted for, but even stands in a certain tension to the notion of everyone governing him- or herself autonomously.

There might, of course, be a way to rescue the argument. One might claim, for instance, that the requirement that a norm must be the outcome of free and reasoned agreement is not to be understood literally, but rather expresses an *ideal*. We should then evaluate actual decisions in terms of whether they produced results that could also have been the outcome of such an ideal procedure.

But such an interpretation would be of little use, as it would bring us back to the problem of how to get from moral legitimacy, i.e., the consent in principle of everyone affected, to a workable conception of political legitimacy, i.e., democratic decision-making. One way to answer this challenge might then be to accept the distinction between the moral and the political,

i.e., between strict justification, the validity of which can be judged only under (presupposed) ideal circumstances, and weaker justifications. For the latter, one could, in the spirit of the argument from self-government under discussion, claim a right to be the author of the interpretation of human rights or moral principles.⁶ This would justify democratic procedures; democracy then becomes a question of interpretation.

Another possibility might be to interpret the ideal of free agreement among everyone involved in such a way that requires deviations from such a consensus to be justified. Thus, to the extent that it could be well established that consensus on a certain issue is not to be reached, we might be justified to resort to a second-best strategy (less than 100% agreement). But why should the dissenting minority in such a case feel obliged to follow a rule agreed upon by the majority, however great? Here, clearly, the minority (however small) would not be following "its own will as a rule."

The so-called *epistemic* conception of democracy has put forward an argument for majority rule. It says that democracy and self-government will no longer seem incompatible, once we realize that the exercise of individual will is not simply to be understood along the lines of the model of reflective choice. Instead, we should view the will of each rational person as a substantive commitment to promoting the common good. Under this interpretation, the self-government of each then requires the advancement of the common good of all. Each citizen's participation in democratic deliberation and collective decision-making is essential to the process of discovery and promotion of this common good. And citizens ideally participate in democratic processes by advancing opposing conceptions of the common good and then trying to secure reasoned agreement on these conceptions. Discussion and deliberation thus greatly enhance each citizen's understanding of the common good. The votes of citizens (after such discussion and deliberation) is to be understood as a reasoned consideration as to what they judge to be the right conception of what is best for all. Their votes are judgments much in the same way as the votes of jurors in a trial. And the position that receives the most votes may legitimately be viewed as the one for which there is the most evidence that it is indeed for the common good. This is the crucial point in the argument for the majority principle. If the citizens are of roughly equally competence in determining the nature of this common good, and each has a better than 50% chance of being right about his judgment in each case, then the policy that receives the most votes will be the most likely to be for the common good (Condorcet's theorem) (cf. Cohen 1986). This is the argument for an epistemic conception of democracy in a nutshell.

Let me point out only two major weaknesses of this argument. First, very much will depend upon whether we can safely accept the first premise that

⁶ This was the idea of Frank Michelman which he raised in the discussion of Forst's paper and my comment on the conference "Law and Deliberative Politics" in Bielefeld 1999.

the self-government of each individual indeed requires the promotion of the common good of all. One might, for instance, attempt to show just how much each person's self-esteem depends upon the whole community of fellow citizens, and not only a few friends. I do not want to discuss such attempts in greater depth here, but must say that I am skeptical as to whether this approach can succeed in establishing a legitimate basis for the inclusion of *all* other citizens.

Let me, however, point to a second and more serious difficulty. Both premises of the argument for the majority rule are very likely to be false assumptions. Why should individuals be assumed to have roughly equal competence in judging each particular issue? Isn't it often so that, in particular cases, some people are clearly more competent than others? And why should individuals, on average, have a better than 50% chance of being right on a certain topic, especially if there are more than two alternatives to choose from? It seems to me that these questions already cast sufficient doubt on this part of the argument for us to conclude that we had better look for a more stable foundation for the principle of majority rule, as well as for the other elements of democracy as it is practiced today.⁷

IV.

Why must a citizen be enjoined to accept a majority vote which goes against her own judgment or preferences if she does not share the majority view and is convinced that the decision reached was not the best one possible? To my mind, this is the really troubling question for any normative theory of democracy, and it is a question that requires an answer. Without one, any theory of democracy is doomed to remain hopelessly idealistic.

It seems crucial that we keep in mind that the process of giving and taking reasons that no affected party could reasonably reject can only be understood in a hypothetical sense. On an institutional level, it is highly unlikely that we will ever be able to give a reason that can be generally accepted among all free and equal citizens. And Forst's basic right to justification, i.e., the right to be given reasons that one cannot reject with reciprocal and general arguments, functions as a veto right. Under his system, any one person could block any decision; political decision-making would come to a standstill.

Furthermore, even if we would reach such an agreement, actual reasons are fallible. We might all be wrong. For practical political decision-making, it therefore seems essential that we institute procedures which are different from and which transcend both hypothetical and actual consent.

The standard response to this challenge is a pragmatic one: In the end, any organizational principle put forward can probably only be pragmatically

⁷ An alternative view would be one based on the argument from equality, cf. footnote 5 above.

justified, given that moral justification enables and limits the political realm. I don't, at least, see how to give any intrinsic or moral argument for it. Locke's contention that without majority rule there will be paralysis must surely be an important part of any case for majority rule. Since full consensus is usually unlikely, no government will be possible without such a principle of organization. To allow for an effective government to secure our collective and individual interests, it is pragmatically necessary for us to establish majority rule, so long as basic individual rights, as well as political equality, are guaranteed for all, and especially for the minority.

In addition, it is important that some provisions be made to prevent the emergence of permanent minorities—pockets of people who always lose out. Minority members should be able to accept majority decisions because of the fact that they are benefiting from a just constitutional regime. Under this conception, however, democracy is framed and limited by *human rights* which spell out the principles of justice. For democracy to be acceptable for all, human or moral rights must have priority. So, according to the pragmatic view, moral rights and democracy are not co-originally constructable out of the basic principle of justification.

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