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AUTHOR MEETS CRITICS

Must Justification Always Be Open and Inclusive?

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Abstract

Forst's right to justification is a powerhouse of inclusion and openness. It demands that the doors of power be opened to all affected on equal and reciprocal terms. No person is to be denied a voice on matters that bear on them. And yet much of the power exercised in contemporary liberal democracies *is* closed to direct popular control (e.g., constitutional conventions, courts, executive committees, commissions, legislative bodies, juries, etc.). Can such exclusions be justified using the Forstian framework? If they cannot, should we conclude that they are illegitimate or that the Forstian framework needs reform? The argument proceeds via a contrast between the right to justification and Pettit's account of non-domination and focuses on Forst's spectacular recent book, *The Noumenal Republic*.

Keywords: Domination; deliberation; republicanism; Forst; democracy

1. Introduction

Forst's right to justification is a powerhouse of inclusion and openness. It rails against closed and insular powers, demanding justifications and reasons wherever it goes. Reason-giving and reason-accepting, furthermore, cannot just go in one direction, namely from the top down. Reason-giving and reason-demanding must also go from the bottom up; there must be, in other words, a capacity for individuals to participate in authoring the laws that govern them.

But are there limits to inclusion and openness? And, if so, how can Forst's theory generate and justify them? My plan is the following: first, I contrast Forst's account of the right to justification with Pettit-style non-domination. This helps us to see the special force and dignity of the reason-demanding individual (as the idea is understood in Forst's magisterial new book *The Noumenal Republic*[1]). I then wonder whether the account leaves any room for reasonable exclusion, and I conclude with some possible avenues for dealing with these objections and assess their costs.

2. Non-domination: two readings

For Pettit (on the most recent proposals), one is dominated when a will, α, has the power to interfere in β's choices in ways that are 'alien' and 'arbitrary' (Pettit 2012).

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α's will is alien just in case it can (not *will*) interfere without being checked or controlled by *β*. A standard example is the lucky slave, whose master is reliably and robustly benevolent – it is common knowledge among all parties that he will not interfere with the slave. Though he will not interfere, he can, and this is enough to give the master arbitrary power over the slave and so to make the slave unfree. Here is a harder example. Suppose that *α* is a police officer and can throw *β* in jail. *β*, according to Pettit, is not dominated just in case he can control or check the police officer's actions through the exercise of his right to vote or his ability to otherwise influence the laws that give *α* his authority. (Let us leave aside the notable complication that for *β* to *actually* control or check what *α* does with his power, he needs to rely on the will of a sufficiently large number of other voters and on general respect for the rule of law (cf. Simpson 2017).)

In *Noumenal Republic*, Forst encourages us to wonder: why are checking and controlling so important? According to Forst, we ought to distinguish two readings:[2]

1. **Instrumental:** They are important because they serve to make non-interference (modally) robust and reliable.[3] Checking and controlling are, that is, instrumentally valuable. *Robust and reliable non-interference* is in the driver's seat.
2. **Constitutive:** They are constitutively valuable as expressions of our dignity as justifying beings. On this view, the fact that successful instances of checking and controlling ultimately make non-interference impossible is not ultimately what explains their value – unlike the liberal, the emphasis is not on the good of non-interference *as such*; rather, what explains their value is the fact that, when and insofar as they make interference impossible, they express our basic worth as justifying beings.[4]

Forst is right to say that Pettit seems to favour **Instrumental**. This is most evident when the emphasis is put on the notion of the 'free person', and the free person is defined in terms of freedom of choice. According to Pettit,

> The focus . . . is on the freedom of choice, by which I mean the freedom to select one option from among a number of mutually exclusive and jointly exhaustive options. . . . The free person, on the republican understanding, is someone who is systematically protected and empowered against alien control in those choice-types that are deemed significant in social life.[5]

Republicanism, on this view, seems to give ultimate value to individual freedom of choice (understood in the correct republican way) rather than to our dignity as justifying beings – beings, that is, concerned with giving and receiving reasons on equal terms with others.

Forst argues that republicans, if they follow Pettit, are wrong to do so. To motivate the argument, Forst provides the following example.

> **Machine:** The machine generates an entire system of laws that makes it impossible for any *α* to interfere in a dominating way with any *β* (and vice-versa). The machine is controlled or checked only in the sense that it can be turned off by the People acting collectively. (Forst 2024: 204).

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Forst argues that an instrumental reading of Pettit, focused on freedom of choice, can generate no objection to the **Machine**; by design, the **Machine** secures maximal zones of robust and resilient choice. But is this the right conclusion to draw? For Forst, it is not. Forst argues that in the **Machine** scenario, we have, in an important sense, lost track of our dignity as justifying beings. We have, in effect, delegated our authority to make decisions in light of reasoned deliberation *inter pares* to a machine that does everything for us. To be sure, we can turn the machine off if we don't like its results, but, for all intents and purposes, we have given up the hard task of justification and reason-giving that is meant to drive politics.

We can augment the argument in a Forstian spirit by recalling Kant's discussion of the ethical duties that follow from respect for the humanity in our own person (and, in the *Doctrine of Right*, the juridical duty of rightful honour). Kant writes:

> But a human being's duty to himself as a moral being *only* . . . consists . . . in a prohibition against depriving himself of the *prerogative* of a moral being, that of acting in accordance with principles, that is, inner freedom, and so making himself a plaything of the mere inclinations and hence a thing. (Kant 1999, Ak6:420).

Kant is here referring to ethical duties against lying, avarice, and servility (and, in the *Doctrine of Right*, to juridical duties against selling oneself into slavery, selling sex, or getting drunk). But we can extend the point to **Machine**. In **Machine**, we give up our moral powers of judgement and discernment to a machine and so make ourselves, in effect, into things – one might also add that such a delegation of authority would also, over time, deaden our abilities to reflect and evaluate political decisions critically. In Kantian terms, such delegation would therefore violate both juridical and ethical duties to self.

Forst therefore urges republicans to adopt the view that *both* choice and dignity matter. If this were the case, then the Republican could say that, in **Machine**, there is choice but no dignity, and so the **Machine** should be rejected. And, indeed, there are some places where Pettit also seems to endorse something like the appeal to dignity. For example, Pettit writes:

> The terrible evil brought about by domination, over and beyond the evil of restricting choice, and inducing a distinctive uncertainty is that it deprives a person of the ability to command attention and respect and so of his or her standing as a person. (Pettit 2002: 342)

For the sake of the argument here, I want to grant that Forst is right both to criticise Pettit and to suggest the proposed (Kantian) amendment to the view (as outlined in **Constitutive**). Does that make for a better republicanism?

3. The right to give and demand reasons

At the heart of Forst's right to justification is the idea of reciprocity and generality. *Generality* is the key one for our purposes. According to Forst,

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> Generality means that no one who is subjected to a normative order may be excluded from the discourse of justification. (Forst 2024: 181)

Forst really does mean *no one* is excluded in real-world discourses of justification. Generality, in other words, does not capture a notion of merely 'hypothetical' justification in which it is enough if, in taking decisions that affect your lives in fundamental ways, I merely *imagine* what you would say in a discourse. And, as we saw in the example of the **Machine**, it is also not enough for people to have mere checking and controlling powers. This is what distinguishes him from Pettit. According to Forst,

> This is the real meaning of legal independence or political–legal non-domination: you are only independent or not dominated if you are at the same time *subject* and *author* of the law, for otherwise your right to freedom or to justification is only half realized. You might receive freedom or some justification, but if you cannot be the *co-author* of the laws of freedom, it is not real freedom that you are being offered. (Forst 2024: 204)

So 'mere' checking powers and long chains of delegation aren't good enough. But then what is it? *How much* control do we need to redeem our right to justification?

4. Openness and exclusion

Consider that all constitutional democracies limit the scope and opportunity for popular deliberation, sometimes quite radically. (See, e.g., Möllers 2024; Elster 2013; Parkinson 2006; Fung, Graham & Weil 2007)

Here are some notable examples:

- Juries and jury deliberations (the sentenced, for example, aren't able to ask justifications from the jury or be witness to their deliberations).
- Constitutional courts, who report their decisions and sometimes an 'opinion of the court', but rarely (with the notable exception of the US Supreme Court) issue individual opinions or a record of the votes one way or the other. Deliberations after oral arguments are also closed everywhere.
- Constitutional conventions, including the US (1787), Germany (1949), South Africa (1994–1996), etc.
- Post-conflict negotiations (such as in Iraq 2003–2005).
- Cabinet deliberations in, for example, the UK government.
- Diplomatic and international negotiations (e.g., trade deals).
- Secret ballot (we cannot demand justification of our fellow citizens for the way they vote).
- Central bank meetings (in which interest rates are determined).
- Political party strategy meetings; caucuses.
- Agenda-setting in legislatures; conference committees; budget deliberations.

The diversity of reasons for such exclusions is vast. In some cases (e.g., juries and secret ballots), restricting access is necessary to prevent undue pressure. In others, opening up venues for transparency and popular deliberative participation would

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undermine one of the central functions of the institution (central banks, e.g., the need to maintain their credibility and to tightly control their communication, but also international negotiations). In others still, closure is necessary to enhance the *quality* of deliberation (again, juries, legislative committees, courts, and even constitutional conventions) – were such bodies more open, the prospect of public attention would radically alter the kinds of things people would be prepared to say and decide, often in ways that run counter to the goal of securing good outcomes. Madison, for example, is reputed to have said of the Federal Convention that '*no Constitution would have been adopted* by the convention if the debates had been public'.[6] Publicity would have made delegates 'less open to the force of argument' because of their desire to remain consistent and steadfast in the face of a suspicious public.

4.1. First challenge: how much, and what kind of, control?

Why aren't each of these bodies (in the best of cases) just like the Machine? To construe: In what sense are we, each and every one of us, 'co-authors' of the decisions that issue from such bodies any more than we are 'co-authors' of the **Machine**'s decisions?

A possible response might be to point to the fact that we ultimately *control* who *occupies* those offices (Kolodny 2023: 330ff). Might this be enough to redeem the right to justification? Note that this isn't true of many of them: while we control who occupies seats in the legislature, we do not, for example, control who serves on juries or courts (except where judges are elected). And we do not, except in a very indirect sense, control who has a right to vote (consider that in many jurisdictions, electoral laws are established by difficult-to-reform constitutions). And even if we did control such occupants, how would this kind of control distinguish Forst from Pettit? After all, we control who 'occupies' the **Machine**, too. (Recall that we retain the power to turn it off should it not operate as planned).

Another problem with this defence is that it looks too weak. If occupancy control were enough, then a popular vote to empower an enlightened despot for life would also count as meeting the right to justification (with or without a right of 'recall', as in the **Machine** case).

Another response might point to the fact that we not only control who *occupies* the offices but also *direct* what they do once they are in office (since they operate under threat of being thrown out if they don't do what we want). The people who rule us rule in fear and deference to our will because of the consequences for them if they don't do what we want. The problem is that this is only true for legislative representatives (and only sometimes – consider second-term Presidents, for example), and, since the examples often involve secret deliberations, we often lack the ability to make informed decisions. Notice also that we don't have such directive control over constitutional delegates,[7] judges, and so on, let alone our fellow citizens (as in the ballot example).

4.2. Second challenge: higher-order justifications?

In this section, I want to consider a possible way forward, namely to propose the possibility of *higher-order* justifications – open, deliberative fora designed to generate

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justifications for exclusion at the first-order level. For example, the exclusions and restrictions typical of courts and juries might be justified, on this model, by the openness of the constitutional politics which fixed the separation of powers and constitution of the judiciary in the first place. An appeal here would be made, that is, to the classic division between the *constituted* and *constituent* powers.

One problem with this amendment is that the domain of constitutional politics, as we have seen, is often just as closed as other politico-jurisgenerative venues. The possibility of such higher-order solutions would, in addition, make the objection to the **Machine** harder to grasp: what if the machine was set up through an openly deliberative constituent assembly? And what about practices like the secret ballot? Why aren't we owed justifications from our fellow citizens for how they voted? (If we are in some looser sense, then how is the secret ballot justified?)

Another option would be to appeal to higher-order justifications that are in some sense idealised or hypothetical. Are there reasons that *everyone can accept* for the closures? But here, it should be clear, we have moved very far away from the Forstian starting point. If hypothetical justifications are just as good as the real thing, then surely they can be rolled out for the **Machine** as well. The **Machine**, after all, secures the highest possible form of non-domination for all concerned. Why shouldn't people accept it? If our dignity as justifying beings requires much more open participation and deliberation, such that deliberating publics would do themselves wrong in the highest degree to support closures at the first-order level, then we are back where we started: Why couldn't the same arguments be used to open up all the venues listed in Section 4? The appeal to higher-order justifications was meant to provide room for limitations in how open politico-jurisgenerative processes must be, but if the appeal to dignity just returns at the higher-order level, then the appeal to the higher-order hasn't done much to justify the closures in the first place.

More generally, the appeal to second-order reasons and justifications undermines the central idea that participation in reason-giving is an *essential* feature of our dignity as justifying beings. If our (first-order) right to justification can be traded off when the outcomes are better (as in all the cases from Section 4), then it doesn't look so essential after all.

5. A way out?

In this section, I want to briefly consider an appealing way out of the impasse. Could Forst appeal to the *co-constitutive* character of our dignity as justifying beings, on one hand, and a politico-jurisgenerative system that adequately balances principles of openness and closure, on the other? On this view, there is *neither* an independent notion of our dignity as justifying beings that defines an end point around which all institutions should be designed (akin to the Pettitean notion of non-domination) *nor* a set of uniquely and maximally open procedures that express our nature as dignified justifiers. Rather, the very *idea* of our dignity as justifying beings requires some determinate institutional fora for deliberation and jurisgeneration. There is, after all, no such thing as providing and giving reasons to each other in the *absence* of some appropriately designed forum. The ideal lacks content *without* such a forum. But, at the same time, the forum cannot be designed without some regulative notion of dignified justification in play to guide its design.

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According to this kind of view, deliberative, jurisgenerative fora – including the whole range of governmental and constituted bodies – must possess an adequate balance between openness and closure. And what makes for an adequate balance is just the very idea of dignified justification itself. The fora, that is, must both protect and *constitute* us as dignified justifiers at the same time as the idea of dignified justification guides and *constrains* the set up of the fora. More concretely, any separation of powers, electoral system, etc., must be assessed in accordance with how it creates spaces for us to exchange reasons and justifications in accordance with norms of generality and reciprocity. This allows for closures just in case such closures *promote* such exchanges.[8] For example, the secret ballot would be justified on this model insofar as and because it allows for people's decision-making to reflect what they perceive to be the balance of reasons, rather than as a response to social or political pressure. Similar cases could, *mutatis mutandis*, be constructed for all the other examples from Section 4.

I think this is a promising avenue of response, but it may be seen just as pushing the question one step further back. Why *wouldn't*, say, a more directly democratic system that promotes much greater openness, participation, and transparency be preferred? How concrete, that is, can the ideal be once it is used to distinguish types of openness and closure in particular fora without appealing to independent criteria of justice and legitimacy (and, by implication, to independent criteria regarding the best outcomes)? What does the idea of dignified justification being co-constitutive with principles of openness and closure really give us? I have no doubt that there are responses to these questions, but it still strikes me as worth it to ask them.

6. Conclusion

In this paper, I have set up a dilemma for Forst. I have suggested that he can either (a) hold fast to the emphasis on the paramount importance of inclusion in jurisgenerative decision-making (which distinguishes his view from Pettit), but then be stuck with arguing against the legitimacy of the fora in Section 4, or (b) weaken the importance of inclusion (by adopting, for example, higher-order or co-constitutive strategies). While (b) would allow him to account for the legitimacy of the list in Section 4, it would also significantly weaken the contrast with Pettit. I believe (b) is the more appealing solution. But if Forst takes (b), he would need to explain how closures, limits, and exclusions can be consistent with the ideal of dignified justification. What, for example, would a view in line with (b) say about **Machine**? Does working out (b) require reintroducing the importance of freedom of choice and non-interference through the back door? Forst has constructed, as always, a powerful and attractive edifice, and I have no doubt that there are further floors to construct on its basis.

Notes

1 Polity Press, 2024.

2 I develop the points a bit further but in ways consonant with Forst's intentions (or at least I hope!). See, in particular, Chapter 10 of *Noumenal Republic.*

3 On the distinction between modal and probabilistic readings, see List and Valentini (2016). Controlling and checking are supposed to make dominating interference *impossible* rather than just *unlikely*. See Carter (2008) for the idea that liberals should be concerned with the *probability* of interference and that

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Pettit is wrong to focus on its *possibility*. Here's a current example to test the reader's intuitions. US research-intensive universities have been dependent on federal funding for decades. It seems clear that they are *now*, under the Trump administration's policies, subject to uncontrolled and unchecked powers of interference and so dominated, according to the Pettit view. But if this is the case *now*, has it *always* been the case? If the laws and the US system of checks and balances were insufficient to block Trump, then they must have been insufficient to block previous Presidents. Do we conclude that (a) US universities have always been dominated by the Federal government (the Pettit reading), since it is not now and was not in the past *impossible* for Presidents to interfere, or (b) that under previous administrations, insofar as the *probability* of interference was low, US universities were *not* dominated (the liberal reading)? What has changed, according to (b), is the probability (not the possibility) of interference. The probability has massively increased due to a change in the dispositions of the President and his administration to interfere.

4 As Forst makes clear at Forst (2024: 209–10), this view should not be confused with a defence of positive liberty, understood as the ability to be (internally) self-governing. What matters, in this view, is our relations with others and whether they express the respect we are due as worthy beings.

5 Pettit (2008: 103). See also Pettit (2012: 64ff).

6 Cited in Elster (2013: 230).

7 Indeed, this is something that distinguished such delegates from ordinary representatives, especially in cases where delegates are banned from serving in office once the constituent assembly has done its work.

8 I am here reconstructing a strategy that is similar to the strategy developed in Chapter 6 of Habermas (1996). It also resonates with the spirit of Forst (2011), especially in Ch. 7.

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