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BERT VAN DEN BRINK

THE RIGHT TO JUSTIFICATION

Recensie van: Rainer Forst (2007) *Das Recht auf Rechtfertigung. Elemente einer konstruktivistischer Theorie der Gerechtigkeit*. Frankfurt am Main: Suhrkamp, 413 pp.

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‘The demand for justice is an emancipatory one, which has been described with terms such as fairness, reciprocity, symmetry, equality or balance; reflexively, this demand is grounded in the claim to be respected [...] as a being who can give and demand justifications. Not the person who lacks certain goods but the person who does not ‘count’ in the production and distribution of goods is the primary victim of injustice.’ (10, my translation)

This quote from the introduction of Rainer Forst’s recent collection of essays from the period 1999-2007 can be read as a brief summary of what the collection is about. First, Forst argues that justice is an emancipatory and moral ideal that expresses the equal dignity of persons in a special way. Second – and this is the main message of the book – he argues that this dignity is to be understood in terms of persons’ capacity to give and demand justificatory reasons for convictions and actions that they and those acting on them have or undertake. Finally, in practical matters, this leads to the conclusion that injustices are never just about the presence or

absence of certain states of affairs, but rather about persons’ status as legislators of the rules and authorities they fall under.

That said, it has to be stressed that Forst’s thought goes much further than one may at first sight expect from an exercise in thinking through our status as moral legislators. Forst is not just a Kantian moral theorist; he is a Critical Theorist working in the tradition of Jürgen Habermas as well. His theory is in the end as much a critique of interpersonal power relations as it is a positive account of morality. This makes Forst’s work attractive, passionate, and in many ways convincing: his critique of power relations by which victims of injustice are robbed of the very possibility to demand for a justification gives his conception of morality both a concreteness and an acuteness that makes his central notion of the right to justification stick. After reading the collection, I am convinced that we have such a right, even though I don’t accept Forst’s exact argument for it. But perhaps that is not so important, what is important is that the notion itself convinces.

The book starts with a first part on fundamental questions in practical philosophy about practical reason, morality and justice. This is followed by a second part on political and social justice in nation states and a third and final part on human rights and transnational justice. The book gives us a good sense of Forst’s developing work over the last ten years. I cannot possibly give a comprehensive review of the book in just a couple of pages. I will discuss at some length the theoretical account of morality that he develops in the first part and look at its consequences for what he calls a critical theory of transnational justice as developed in the third part.

The right to justification

So what is this right to justification? In his introduction, Forst states that it:

‘articulates the demand, that there should be no political and social power constellations that cannot be adequately justified to those affected by them. Irrespective of the specific and ‘thick’ situated language [a] protest is phrased in, in essence it always goes back on the claiming of the right not to be subjected to laws, structures or institutions that are ‘groundless’, i.e. that can be understood as an expression of insufficiently justified power.’ (10, my translation)

The idea of a basic right to justification is as attractive as it is simple. Everyone with a sufficiently developed sense of morality, social relations and politics will readily agree that the practice of protest, of critique, of saying ‘no’ to the powers that be in some sense or other presupposes a freedom or capacity to ask for a justification. ‘Why do you do this to me?’ and ‘Why this law rather than that, why this formulation of it rather than the other?’ are questions we all have posed. They have at least two meanings: we demand a factual explanation – what has *caused* your doing this to me? What has *caused* your supporting this law rather than that? – and we demand a moral justification – why do you think that what you did or chose was *justified*? And: if you cannot justify this act or choice to me, then take it back, repair it, compensate me for the damage you have done. To the extent that we believe that we should always have the freedom to ask for a justification we can indeed speak of a *right* to justification, i.e. a justified social claim for a justification backed up by moral insight and possibly political power.

In a long and thorough first chapter on the foundation of morality, Forst introduces the reader to the details of his account of practical reason, motivating and justificatory reasons, and ultimately morality. He starts with a reflection on practical reason. This he sees, in a Kantian vein, as the capacity to answer practical questions with justifying reasons in ways that fit with the practical contexts in which they arise (31). Practical ‘contexts’ such as law, morality, politics and ethics (of the good life) all have their own criteria of justification. Yet in his first chapter, Forst concentrates on the moral context and its justificatory aspects. He does not so much

demonstrate but *starts from* the Kantian assumption that the dignity of the human subject lies in its capacity to give itself the law in practical matters and that the moral law is the only law that has a status that is binding unconditionally. This approach sits a little uneasily with the claim that the chapter offers a recursive reconstruction of what it means to act and judge in moral contexts. Forst does not so much analyse contexts of moral action; he rather discusses literature that has genuinely offered rational reconstructions of moral action: Kant, Habermas, Korsgaard and others. Against the background of a thorough discussion of this literature Forst discusses some of the main questions in meta-ethics and the theory of action that we know from the literature: What is practical reason? What is justification through practical reasoning? How do justifying reasons relate to motivating ones? What is the practical ground of morality as seen from a first-person perspective, i.e. *how can morality really become practical*?

The upshot of the first chapter is the following position on practical reason and justificatory reasons: The ‘context of morality’ demands of persons that they give reasons for their actions that every moral person will respect, ‘even in cases where those concerned do not share a further ethical or political context’ (32). Morality is, in other words, *autonomous*. Its norms and principles, its liberties, rights and duties can be understood by every moral person. Indeed, as we will see, following moral norms for reasons external to morality, i.e. instrumental or eudaemonistic reasons, disqualifies that act *as moral*. Morality is not just about the consequences, it is about the right motivation and judgment as well.

Forst claims that in moral contexts the validity claim of a norm about x is always that *every* person has the duty to x or to refrain from x (33). If the norm is valid, then no-one has reason not to obey it. The general principle of reasonable justification is a principle of reciprocal-universal justification (34). And this justification should be understood as a discursive practice rather than a test of the will *in foro interno* (35).

Forst defends an intersubjective and performative understanding of morality. Yet, it remains somewhat unclear to me what that means exactly. In order for the quality of an intersubjective practice of justification to be safeguarded, it is of tantamount importance that persons have learned to reflect on the needs, interests and viewpoints of the other. It is true that one learns this best in intersubjective practices. Yet it also is true that such practices run best when some individuals show true excellence in the form of deliberation; they know how to make a moral judgment and may be thought of as moral exemplars. Good parents are like that; good moral and political leaders are like that. And apart from this, in many situations that call for moral justification not all concerned have an effective voice. Moral paternalism is a case in point: legitimate forms of moral paternalism illustrate how we come to a judgement *for* the other when genuine justificatory intersubjectivity on a course of action is impossible. All in all this seems more than enough reason to doubt whether moral justification should always be seen as a fully intersubjective process. I would have liked to see some more thought devoted to the question of how the moral importance of intersubjective exchange relates to the empirical circumstance that in morally pressing cases, such relations tend to be at risk.

Be that as it may if we assume that Forst's overall argument up to this point is valid he has succeeded in a basic but impressive argument for the right to justification. 'According to the principle of reciprocal-universal justification moral persons have a fundamental right to justification – and an accompanying unconditional duty to justification of morally relevant actions. This right lends every moral person a veto-right against actions and norms that cannot be morally justified.' (36)

Practical reasons for morality

Forst stresses that an account of a fundamental moral right is not worth much if it cannot be made clear how justified reasons can be *practical* reasons, i.e. reasons that motivate persons to moral action. He claims that *moral action* is different from *action that merely conforms to moral norms* in that it is motivated by moral reasons; reasons that all could will, or rather would accept in intersubjective deliberation. *Insight* into justifying reasons is a *practical reason for action* as well. Here, in an exchange with and critique of Bernard Williams' well-known reflections on the subject of internal and external reasons, Forst argues that merely subjective desires cannot ground moral validity because, as merely subjective desires, they cannot be defended in light of the criteria of reciprocity and universality. Contra Williams he argues that there is no such thing as an agent-relative *moral* motivation because *moral* motivation is by definition shareable by all moral subjects. Real moral action is not just acting in conformity with moral rules and insights, it is action from insight into the moral correctness of the moral thing to do. Self-interested reasons or reasons born from a particular conception of the good life (i.e., a religious, humanistic, or cultural conception of the good life for the human animal) are external to morality and cannot count as moral motivations. Forst acknowledges that this strict view about moral motivation is a problem for Kantian morality. Yet, he claims to have an answer to it: the right and at the same time practically effective kind of moral motivation is found in the unconditional claim for moral respect and responsibility with regard to the both morally capable and morally vulnerable *other*. In those who already acknowledge the correctness of the moral law, a confrontation with the moral claims of the other will 'trigger' the required cognitive, volitive and affective aspects of the moral disposition. Respecting – or, as Forst says towards the end of the first chapter, recognizing – a person as an end in itself is to respect her right to justification in practical situations.

Forst stresses that this is in a way an ‘either you see it or you don’t’ account of morality. Towards the end of the first chapter he illustrates this with references to philosophers of practice such as Stanley Cavell and Ludwig Wittgenstein, who both in their own way are known for stressing that pragmatic attitudes precede theoretical reflection on possible grounds for such attitudes. You either know how to play the game, how to acknowledge the other in his or her humanity, or you don’t. If you have to ask, then you don’t know. But these references leave a huge question open. For these philosophers typically are not constructing general theories of morality but carefully describe multiple practices and attitudes, among which moral ones figure and will vary depending on the practice described. A Cavellian or Wittgensteinian analysis of morality would describe various aspects of moral practices, such as forms of care, of justification, and of disagreement, and let them exist along side each other. As a question, as it were. The analysis would most certainly not result in the theoretical articulation of a fundamental right underlying all these various aspects of moral practice. Indeed, these authors are known for their resistance to the idea that the multiplicity of social practices can be accounted for theoretically in terms of an ultimate ground.

One of the main points of Cavellian or Wittgensteinian understandings of moral acknowledgement is that if you are well-embedded in a practice you know what to do or how to judge without much thought. Moral insight does not precede moral action, so to speak. The kind of insight required is itself a practical rather than a theoretical kind of knowledge. It is hyperdependent on context and not to be thought of as grasping a general rule that can be applied to a specific case. Forst does not really escape that picture of morality, however. To him, having a practical reason for action *is* recognizing the other as someone whose right to justification should be answered in light of one’s moral duty to – *respect that right*.

Axel Honneth, Forst’s Frankfurt colleague, has recently held the following against Forst’s account of the sources of morality and moral

emancipation: ‘I find it highly implausible to conceive of this idea of [equal autonomy for all persons] as a serendipitous endowment that all past social actors possessed from the moment of birth. People aren’t born into the world as little Kantians, but as competent infants who possess all the capabilities they need to grow into – and perhaps even out of – the moral world constituted by their surroundings. Their parents, for their part, behave like Aristotelians, and assume their children to have all the potentials that they will need, along with the proper care and upbringing, to mature into morally competent adults.’¹ In other words: in giving an account of the practical ground of morality it is not enough to stress the importance of the capacity for moral insight. The capacity to act from this practical ground of morality has to be brought out in practice, through upbringing, education and self-development so that one gradually comes to recognize the instances in which it is called for. Yet, being able to act from this capacity is contingent on, first, the cultural horizon and understanding of morality of the life-worlds and language games in which one grows up and, secondly, on the care of parents and other significant others in introducing the child to this capacity. In his chapter on the foundations of morality, Forst remains largely quiet on this well known line of thought, which he knows only too well.

A critical theory of transnational justice

In the remainder of the first part of his book Forst dives deeper into the autonomy of his moral theory, fine-tunes the meaning of the difference between ethics and morality against the background of the right to justification; and relates his framework to that of his two great masters in Kantian moral theory: Habermas and Rawls. In the second part, he turns to the political and demonstrates how not just in moral theory, but in political theory as well the conception of a right to justification can ground our practical reasoning. In the third part of his book, he turns to human rights and transnational justice. Let me conclude my review with

a discussion of the final chapter of the book, in which Forst sketches the contours of what he calls a Critical Theory of transnational justice.

Forst holds against the ‘etatists’ and the ‘globalists’ in the debate on transnational justice that they are locked in a fruitless discussion as to whether the problematic forms of cooperation and interdependence as circumstances of international (in)justice are to be understood as a responsibility for nation states or rather for the world-wide, global community. Forst asks them to *change the subject* and acknowledge that the problem is not mainly about who has the political power to shape cooperation and interdependencies, but about much more complex power relations that cannot be described in these terms of political influence at all. Forst argues as a true critical theorist where he states that focusing on immediate solutions for extreme poverty alone, for instance, is understandable yet ultimately unproductive. We rather have to understand the underlying *structural injustices* given with the power relationships that prevent a good ordering of transnational cooperation and interdependence – whether coordinated from many national or more centralized global perspectives. The question of power, Forst argues, is the first question of justice. (368)

In the remainder of the chapter, Forst argues that just societal relations – both at the national and the global levels, as well as all other levels – can be reached only where a practice of justification, based in the moral right to justification, has come to life and taken form in legal, political and social institutions. Philosophers cannot determine how questions of distributive justice should be answered in detail. They can, however, give an argument for the right to justification, as Forst does. Where this right is respected, members of societies can decide for themselves what a just distribution of other goods would imply (375).

At first sight, this may sound like a good strategy. But I think that it ultimately suffers from the problem that I touched upon earlier. Given the strict understanding of morality and moral motivation that Forst

defends it remains unclear how the institutional and dispositional requirements of his proposal are supposed to come into being in practice. Saying that the right to justification is fundamental or minimal in just association and that a just system of distribution of goods is to be seen as a ‘maximal’ idea of justice that will flow from this sounds good in theory. In practice, however, a theory such as Forst’s is immediately confronted with the question of who is going to implement the just basic structure of justification world-wide and who will find reason to accept it.


If we assume that we need a just basic structure that safeguards the right to justification *before* practices can become more just, then we end up in dead-ends such as those we see in Iraq. Basic rights to justification – as a basis for human rights – cannot be successfully imported into a shipwrecked social fabric. The relation between fundamental and maximal justice is much more complicated than that. The power relations that stand in the way of both minimal and maximal justice are not just those of a sovereign who suppresses his – in principle – Kantian subjects. Rather, the subjects have often been ‘subjectified’ into actors who supported the power relations that suppressed them.

It is true that a good basic structure based on a right to justification may help such persons to develop a new and morally more promising sense of self. But many more ways towards that goal are thinkable, among which are more paternalistic strategies, like the re-education of citizens of Germany after the Second World War. People have to be educated in individualistic morality before we can expect them to make sense of a basic right to justification in Forst’s sense. Here, his idea about true moral motivation as based in moral recognition of the *other* seems overly demanding. It is much more likely that persons come to accept human rights and use them against their governments for self-interested reasons first. We don’t have to go far from home to see that point. The history of Western constitutional states suggests that the acceptance of the moral core of constitutions was not something that happened overnight, but rather something that came about gradually after more and more groups

of citizens discovered – some through a long struggle for rights, others through being granted such rights – that there was much to be won – instrumentally at first – by recognizing this moral core. People can fight for more just distributions even in societies where the right to justification of all citizens is not being respected at all. Our history illustrates this abundantly and claiming that the acceptance of a right to justification in and between individual states is the *only* way to fight subordination (377) simply seems incorrect.

Every generation needs a great Kantian and Forst is a good one for mine! His is a downright impressive attempt at laying a moral foundation for our political thought. Its special virtue over other Kantian approaches to morality is its Critical Theoretical focus on a critique of power relations rather than a pure interest in right action. Still, as much as Forst tries to convince us that his account of morality gives persons sufficient *practical ground* for moral action, his approach remains at odds with historical realities and the strange multiplicity of normative strategies that have helped the human animal cope with the fact that our social world is not and cannot be governed by reasonable insight alone.

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¹ Axel Honneth, 'Rejoinder'. In: *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory*, ed. Bert van den Brink and David Owen, New York: Cambridge University Press 2007, p. 364, reacting to Forst's contribution to the same volume, "'To Tolerate Means to Insult': Toleration, Recognition, and Emancipation', 215-237.