DEMOCRATIC LEGITIMACY -
Working agreement or rational consensus?

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Contents

The quest for deliberative democracy is connected to the difficulties with what we for the sake of simplicity refer to as *a voting model of democracy*.[1] This model holds elections and votes as the central features of democracy because they establish egalitarian structures of decision-making. Equal respect for citizens is secured by the aggregation of citizens' preferences through neutral and fair institutions. It is through voting that the citizens' will is expressed and it is through the organizational principle of parliamentary democracy - party competition and majority vote - that decisions can be made in a democratic way.

The majority principle (as well as group bargaining) is an important part of democracy as it guarantees equal treatment of all the members' preferences. Majority rule reflects the principle of equal citizenship and treats everyone numerically equal. It is, however, insensitive to reasons. It can not let any interests or demands be favoured – not even for good reasons. The choice between different alternatives is made on the same footing as the flipping of a coin. As demonstrated in Arrows' Impossibility Theorem, it is not possible to infer from individual preferences to collective choices. A majority decision represents arithmetic artifacts and not a common will.However, under certain circumstances, as when all parties are equal, or when there are only two alternatives and no authoritative "truths", votes can be used without raising serious moral concerns. It is when this is not the case, as when the winner takes it all and the goods are unequally distributed because of it, the relevance of *correctness theories of democracy* becomes clear. If we want a fair distribution, we do not decide a case as if it was a lottery. Implicitly this shows that there are independent measures as to what constitute a correct result. Voting as the primary political action, based on pre-established preferences, can never represent real political equality for suppressed or excluded groups. Majority vote does not guarantee full political equality. Not only does it make minorities permanent, it also *creates* a "majority" that does not represent the opinions of the majority. This is due to cyclical majorities, strategic voting, and manipulations of the voting order. The outcome of legislative processes is likely to be determined by who controls the agenda and where in the voting cycle a decision appears.

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[1] I am grateful for comments made by Anders Molander

The proponents of deliberative democracy hold deliberation to be a procedure for establishing what is correct or just as it compels actors to argue in terms of the common good. Deliberative democracy signifies the testing and in some cases the transformation of the citizens' standpoints by means of public discourse. The concept of deliberative democracy has gradually become more complex, and the discussion about what it really means is quite extensive. At the core is the notion that the reasons and justification for any political decision must be properly explained to those affected by it. It is based on the ideal of public reasoning and on the principle that legitimate decisions are those that can be accepted - or at least are not discarded - in a free discourse.

However, in representative democracies deliberations usually end with a vote and the question is how the discourse theory of democracy can allow the individual to submit to laws that they have not consented to. How can discourse theory, which holds that only those laws are legitimate that are agreed to by the affected parties in a free and rational public debate, allow for collective decision-making on the basis of voting and bargaining in which some become winners and some losers. Further, can consensus be the standard when even rational actors may reach different conclusions in a rational debate? Can deliberation establish the required conditions for political equality? The question is therefore whether there is a need for a less idealised standard for democratic legitimacy than a rational consensus.

I proceed by first spelling out the deliberative procedure and the reasons for deliberative democracy. Further, I approach the problem of democratic legitimacy and delineate two alternative readings of deliberative democracy – the 'rationalistic' and the 'participatory' one. Then I address Habermas' epistemic account of the moral value of democratic procedures and the problem this poses for a viable conception of democratic legitimacy. I make the case for a weaker form of consensus as the criterion of democratic legitimacy - a *working agreement* resting upon different, but reasonable reasons.

The deliberative procedure

In the 'liberal' voting-theoretical tradition of the political studies, it is the right to vote that shows how collective decisions are connected to the single individual's choice. Equal respect for persons is ensured in free and secret elections. The majority principle guarantees further that decisions are being made even when there are conflicts and disagreement. Proponents of this conception of democracy do not consider it possible that normative questions can be decided rationally. It is the fact that the citizens' votes have equal weight and that the majority principle is cherished which ensure respect for the decisions, not that the decisions are substantially good or just. Democracy is merely a decision-making method.[2]

Against this, adherents of the deliberative conception of democracy first of all claim that normative questions can in principle be decided rationally, or in a weaker form, that the disagreement is reasonable. Secondly, they claim that majority vote cannot stand alone. On the one hand, it rests on an established agreement that is binding also for those who lose the vote. There must be an agreement as to who represent the demos, what the unit is, on which cases can be decided by majority vote, and which cannot. One has to agree on what is disputed, what alternative choices there are and which voting procedure to apply. The limited use of majority vote in the European Union and human rights constraints in national constitutions indicates the foundation and limits of majority rule.

On the other hand, a majority decision usually rests on *justifying reasons,* and a great deal of reciprocal communication is usually required before a vote can be held. One also has to *argue for* using the voting procedure (Elster et al. 1998). Thus it is not only from a normative perspective that majority vote is limited, but from a functional perspective as well. Extensive communication among the decision-makers is required for the voting institution to work well (Rawls 1971:356 ff., Pitkin 1972:224). Deliberation then digs deeper than does voting. There is no substitute for or functional equivalent to linguistic communication as only language possess the resources needed to sort out the nature of things and practices and to chose between different conflict resolution procedures. Rational deliberation is, however,

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[2] See for example Schumpeter 1942, Downs 1957, Riker 1982, Riker and Weingast 1988.

the *gold standard* of conflict resolution. "What makes rational argument special is that it provides a resource that cannot break down in the way all other practices can. The impartiality of a judge can be questioned, as can the reliability of an oracle." (Heath 2001:306)

The essence of the deliberative conception of democracy is that citizens listen to what other people have to say, and that they are able to change their standpoints when better arguments are put forward (Habermas 1996: 339, Rawls 1993: 253). What this idea implies, can briefly be amplified by the help of four ideal claims on the institutions and the processes: freedom, rationality, equality and publicity:

1) The reciprocal deliberations are *free* in the way that the participants are bound only by the results and premises of their own deliberation. The institutions are not tyrannical and do not impose norms and conditions on the citizens that they themselves do not approve of.

2) The deliberations are *rational* in the way that the parties justify their standpoints and their proposals. It is justificatory burden in relation to unequal treatment and it is the power of the arguments that govern collective decision-making.

3) The parties are *equal,* i.e. all speech-competent individuals can participate and further their views on equal terms. Differences in relation to power and resources should either be compensated for or eliminated. This can be done, for example, by means of appointing advocates for those who are in a less favourable position.

4) The deliberations take place in *public*, and the outcomes of the deliberations are legitimate only when they are approved of in a free discourse with identical or at least mutually acceptable reasons.

When the deliberations comply with this procedure, there are grounds for expecting the result to be fair, or an expression of the common will. A minimal definition of deliberative democracy is that it is about public reasoning, but there are different opinions as to what it is good for.

Rationality and justice

When it comes to justification it is a question of both the epistemic qualities of deliberative democracy and deliberation as a principle of political validation. The first is that discourse or argumentation in itself brings about better decisions. Decisions that result from argumentation will be more rational and fair than those that are made on the basis of strategic bargaining and voting. The thesis is that public discourse and criticism improve the knowledge basis, increase the level of reflection as well as the responsibility of the decision-makers, and are, together with party-competition and periodical elections the best way of realizing popular sovereignty (Gutmann and Thompson 1996: 144). A discussion can, if successful, reveal private information, reduce the effect of limited rationality, force the actors to justify their claims, make Pareto-improvements, increase distributive justice etc. (See for example Elster 1998b: 11). Here deliberative democracy emerges as a remedy for rational decision-making. The epistemic justification, however, is broader in that the citizens, through enlightening discussions, will be able to dissolve delusions, false consciousness, group thinking or collective self-deception, and thus arrive at more adequate self-conceptions as well as of collective-self interpretations. These are assumed benefits of deliberation.

In addition, deliberation carry a moral weight as a political system which guarantees conditions for autonomous public deliberation, gives us better reason to believe that its decisions are morally correct (Hurley 1989). A form of *political autonomy* is constituted when actors have to seek justification in relation to what others can approve of, viz. everyone who is subject to collective decision-making must be able to find an acceptable basis for such decisions. The obligation to justify the use of political power to those affected by it is an expression of equal membership for everyone in the sovereign body that is responsible for authorizing the use of power (Cohen 1997: 416). The other argument, then, is that deliberation includes justifying the decisions towards those who are affected by them. In this way the citizens' equality is respected: deliberative democracy expresses a moral principle because it is based on a deontological argument of the respect for every person's autonomy

and freedom. It is only by justifying the decisions towards those affected by them and involving them in a dialogue, that there is reason to believe that they are correct.

The point, consequently, is that deliberation not only is necessary because it provides more information and a better basis for decision-making, and thus leads to better results than if other procedures such as bargaining and voting were used. Deliberation is also important because the outcomes of such a process are justified towards those affected by them. When this kind of process succeeds, the likelihood that citizens will respect the law and that democratic decisions will be lived up to without use of sanctions is high. The claim is, therefore, that decisions are democratically legitimated only when they can be approved of on the basis of a free and reasonable discourse among equals. Political systems within which the law is not justified towards those affected by them cannot claim legitimacy (Michelmann 1997: 162).

In sum, there are different types of arguments for and benefits of deliberative democracy. The reasons for deliberative democracy range from pragmatic ones (1-3, see below) via ethical-political reasons referring to what is culturally valued as a common good (4-7) to strongly moral ones having to do with equality and justice (8-10).[3] The latter designate that public justification of the decisions are required, and the actors are compelled to regard each other as equals, with the same deliberative competence. In essence the arguments are that deliberative democracy

1) communicates wants, beliefs and standpoints and disperse information
2) improves the basis of knowledge through reciprocal illumination of various fields
3) compensates for limited rationality
4) allows the individual to achieve a more adequate self-perception and to understand which needs and interests are worthy of recognition
5) creates autonomous individuals through free opinion-formation in communicative communities

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[3] On these distinctions between categories of normative arguments see (Habermas 1996: 162ff.).

6) improves collective learning through increased knowledge of values, interests and opinions

7) increases the respect for collective decisions and the stability of regimes

8) contributes to mutual respect and increases the ability to live with disagreement

9) tests the decisions' legitimacy and credibility

10) validates collective decisions

The main arguments for deliberative democracy is to be found in the presumption that a free and open discourse brings forth qualitatively better decisions, and that the decisions are justified towards the affected parties. Deliberation contributes to the rationality of decision making by the pooling of information and by argumentatively testing the reasons presented. However, should a deliberation process not end up with an agreement, but with a vote, the deliberationists are facing a paradox. Why has not an agreement been reached if the process has been a good one? On the other hand, one can ask why majority decisions are accepted. How can decisions be seen to be legitimate when some are opposed to them? In order for this to be the case the democratic process must be evaluated by means of standards that are independent of the deliberative process (Christiano 1997: 265).

Deliberation and democratic legitimacy

Habermas, on his part, sees democratic deliberation as an ideal procedure to reach morally correct outcomes. Democracy embodies the basic principles of self-government as rights are instruments for *ensuring equality and freedom in the realization of the idea of people sovereignty.* Only the political process, governed by certain procedures, can lend legitimacy to outcomes. In the proceduralized version of popular sovereignty legitimacy is seen to depend on the manner in which political decisions can be vindicated and justified in a public debate due to their *epistemic quality.* According to Habermas the legitimating force of the democratic procedure is not merely to be found in participation and preference aggregation but in the access to processes that are of such quality that rationally acceptable decisions presumably

can be reached.[4] Hence, the thrust of deliberative democracy is to be found in the fact that a free and open discourse brings forth qualitatively better decisions. The laws are legitimate when they can be seen as the outcomes of people's deliberation under free and equal conditions and can discursively meet with the assent of all (Habermas 1996).

But if it is the procedure itself that legitimates results, what, then, justifies the procedure? There is a problem with a pure procedural conception of deliberative democracy (Lafont 1998, 2003). Independent standards may be required in order to evaluate the process or the outcome. But how can they then be justified? I return to this. From the point of view of democracy the question is how deep the deliberative commitment should run, whether it can bear the whole burden of legitimation or whether non-procedural, substantial elements are needed. In fact democracy cannot decide its own borders and deliberation does not by itself determine the necessary scope of participation in the deliberative process. A certain hierarchical or non-procedural element is necessarily presupposed in the deliberative reconstruction of democracy. The effective promotion of dispute and contestability in the citizenry require a variety of institutions and procedures, among them are participatory ones which ensures hearing of all voices and which guard against unaccountable authority and illegitimate domination (Pettit 1997). We may thus question whether deliberation is a means to reach correct outcomes or only a means to ensure participation so that each citizen count the common will formation processes. In line with this, two different readings of deliberative democracy's basic tenet that the laws should be justified to the ones bound by them may be derived.

> Version A, the 'rationalistic' reading, builds on the *epistemic value* of deliberation. Deliberation is held to lead to improvements in information and judgment conducive to a rational consensus and where the quality of the reasons makes for acceptability. Norms are only legitimate when they can be approved by all potentially affected in a rational debate.

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[4] "…the democratic procedure no longer draws it legitimizing force only, indeed not even predominantly, from political participation and the expression of political will, but rather from the general accessibility of a deliberative process whose structure grounds an expectation of rationally acceptable results."(Habermas 2001:110).

Version B, the 'participatory' reading, conceives of the democratic procedure as a set of basic rights that sets the conditions for justifying the laws. It is based on the *moral value* of deliberation revolving on the equality of the participants. This constitutes the threshold for the legitimacy of a collective will formation process aimed at an outcome that all can agree to as a reasonable.

Thus, the participatory version grounds the principle of democracy morally. The democratic rights not only enable but also constrain the will formation process and hence establish criteria for its legitimacy. As indicated, Habermas subscribes to version A based on the epistemic account of the moral value of democratic procedures as he sees 'rightness' as an epistemic notion based on redeeming knowledge claims: Moral judgments and legal decisions have an epistemic status as they can be right or wrong. He offers a procedural account of justice and defines moral rightness as what rational agents could agree to under ideal conditions: "An agreement about norms or actions that has been attained discursively under ideal conditions carries more than merely authorizing force: it warrants the rightness of moral judgements".[5] The problem is how to link this in with democracy as a decision-making system. In particular how do we justify the state form and the principle of majority vote, which are the practical modus operandi of modern democracy and which entail subjecting to laws that have not been consented to by all in a free debate.

The epistemic account of deliberative democracy

Discourse theory holds that a practical discourse is a way to improve judgment and reach correct - or just - decisions. Deliberation makes impartiality of judgment possible when the actors adhere to the principles of rational argumentation. In order to find out what is equally good for all it is requested that everyone has a say. Deliberation has cognitive value as it examines whether claims and norms can pass the impartiality test, hence it makes for a rational appraisal of reasons. This proposal is an invaluable contribution to moral and political philosophy but it seems difficult to derive at practical political arrangements on this

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[5] And further, "Since the 'validity' of a norm consists in that it would be accepted, that is, recognized as valid, under ideal conditions of justification, 'rightness' is an epistemic concept." (Habermas 2003: 258, 2005).

basis. There is a big jump from such basic principles to the operational principles of modern democracy. Admittedly there is a link between deliberation and the state form as there is no need for actors to comply with obligations unless others comply and there is no way to know what is right unless there is a legal specification of obligations. This can only be accomplished by a system of authoritative norm interpretation and one which also has the capability to sanction norm violations (Apel 1998: 754ff.). The state is the key organizer of politics as it controls most means of coercion and is the main agent capable of making and enforcing laws equally binding on all.

But these are merely functional arguments as are the ones given for justifying the legal form underpinning statehood.[6] What is lacking is a normative link - or autonomous reasons - because the state has the authority to use its power to enforce legal norms without the consent of the free citizens and the majority principle asks some citizens to obey laws they disagree with. Contrary to this, the discourse principle guarantees the citizens autonomy in a very powerful manner. Those laws that the citizens cannot accept in a rational debate, are not legitimate! Unfortunately, this weakens the realism of the theory, as most laws do not satisfy such a criterion. I return to this problem. For the moment, the question is whether practical discourses at all can generate correct answers in the sense that argumentation makes clear what is just or 'equally good for all' (version A), or whether argumentation rather must be seen as a requirement that makes participation possible (version B)?[7] In the latter case, deliberation is needed for respecting and integrating the wants and beliefs of the citizens in collective decision-making. Deliberation is a way to ensure that the reasons of each of the participants count in the forging a common will.

Epistemic and Moral Justification

An epistemic interpretation of deliberative democracy asserts that deliberation is a cognitive process where arguments are assessed in order to find just solutions and form opinions about the common good. According to Habermas the standard for evaluating the quality of

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[6] "The legal form is in no way a principle one could 'justify,' either epistemically or normatively". (Habermas 1996: 112).
[7] See Habermas 1990 [1983]: 68, 71, 241, and Tugendhat 1993: 170.

the outcomes is given independently of an actually performed deliberation process. It is constituted by an ideal procedure, which specifies the contra-factual conditions for a public discourse in which all limitations on time and resources have been suspended, and where the authority of the better argument prevails.[8] To Habermas the rational consensus is the standard by which the correct outcome can be defined. By observing the ideal conditions for argumentation - the demanding requirements of a rational discourse - one should be able to arrive at the just or correct decision - one that everyone can approve of. The ideal deliberative procedure is constitutive for correctness as long as certain conditions are met. But if correctness is seen as what the actors will support under ideal conditions, it will be difficult to prove the epistemic qualities, i.e., that actual deliberation leads to better and fairer decisions. Under non-ideal conditions the problem with justifying the epistemic value of deliberation arises. Actual deliberations will not generally meet ideal requirements: they will be marked by, for example, ignorance, asymmetric information, power and strategic action. One may therefore question whether the reasons that can be stated publicly also are good (convincing or correct) reasons (Estlund 1993, Gaus 1997).

In order to defend the epistemic qualities of deliberation, process-independent standards are needed. An epistemic justification of outcomes will in that case become independent of ideal deliberative conditions but dependent on what the deliberation leads to with regard to rational decisions - independently defined. We are therefore faced with the following paradox: if deliberative democracy defends its claims on moral qualities via an ideal process, it cannot justify its claims on epistemic value. On the other hand, if deliberative democracy claims to have epistemic qualities, it can only be defended by standards that not only are process-independent, but also independent of deliberation (Bohman 1998, Bohman and Rehg 1997). How can public deliberation be both moral and epistemic, in the sense that features of the process can justify the outcome at the same time as it has good effects?

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[8] "All contents, no matter how fundamental the action norm involved may be, must be made to depend on real discourses (or advocacy discourses conducted as substitutes for them)", Habermas 1990: 94, cp Habermas 2003:362.

This poses a problem for discourse theory, which, as a consequence, cannot totally do away with substantial elements. Procedural-independent standards are needed for securing a fair process.[9] Substantive morality is reflected in the fact that we do not expect a minority that have lost their case in a fair process to use only procedural arguments when they complain about the outcome. Procedure-external standards are used when procedures are criticized, justified or reformed. Deliberation does not work without substantive reasons. Democratic procedures have to be justified with substantive arguments - from liberty, equality, openness etc - and this constitute parts of what confers legitimacy to outcomes (Peters 2005:102).

Substantive morality must be brought in to explain that political decisions have a binding power also on those who disagree as well as to explain the deontic commitment that constitutes respect for the law. This commitment hinges on a foundational morality basic to the principle of *equal worth of persons* in modern states, and which forms the background constraints for what can be accepted as a reason within a process of deliberation.[10] According to Charles Larmore *respect for persons* is basic to liberalism as it is that "what impels us to look for a common ground at all". It is a higher ranking principle as the norm of respect does not have the same sort of validity as the constitutional principles we live by (Larmore 1999). This I take to be the normative basis for variant B of deliberative democracy as it is on the basis of such a foundational substantive principle that one can account for private autonomy as well as for the argument that the reason or will of each participant shall count equally in the political process. The equal worth of persons constitutes the ultimate basis for the justification of force as well as the state form because the coerciveness of the law is intrinsically linked to equal liberties for all - it is to ensure compliance with such that a polity can legitimately use force.

The constituent norm of respect prior to agreement is proceduralized by Rainer Forst who suggests that *the right to justification* is the most basic right of all (Forst 1999a, 1999b). In his

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[9] The discourse principle is itself normatively charged – it contains a certain normative content as it 'explicates the meaning of impartiality in practical judgments"(Habermas 1996: 107). It builds on moral premises – on premises of a moral person who possesses certain rights and competences.
[10] "…as one cannot accept a reason within that process that some are worth less than others."(Cohen 1997: 415).

view this is not a substantive value - a natural right that needs no further justification - but an indication of what justification entails. It reflects the ideals of democracy and the language games that go with it, hence normative standards transcending actual legal procedures. The standard for democratic justification that is at work here is not objective or independent but rather one that constitutes the legitimation principle of democracy. It refers to an idea of a justly organized process that is used in assessing every actual institutionalization of political deliberation and decision-making (Forst 2001). This is an interesting approach to the foundational difficulty, but one stuck with the problem of overcoming the feasibility requirement - that is that solutions should also be applicable to the real world. How can we come from the right to justification which implies the basic requirement of *reciprocal and equal justification*, to democratic institutions able to convert goals into practical results? Forst's as well as Habermas' democratic principle implies, as Gosepath remarks, that actors have a veto: when they do not agree, nothing will be done (Christiano 1996, Gosepath 2001). Hence, there is a missing link between deliberation and decision-making.

Deliberation and electoral democracy

In discourse theory we are faced with the problem of knowing the quality of reasons in non-ideal situations. If we cannot know whether norms really are in the equal interest of all because the demanding requirements of a rational discourse cannot be approximated - even under ideal conditions it is impossible to include all affected (or their advocates) - there is a case for the participatory reading of the deliberative ideal - version B. This version allows for equal procedures of decision-making that revolve on the actual preferences of the citizens discounting their normative quality. In this perspective, majority vote can be seen a mechanism that make collective action possible when consensus has not been obtained,[11] and constitutional rights, legal protections etc, as control forms to hinder technocracy and paternalism - to block that rationality shall put aside all other concerns. Constitutional barriers prevent majoritarian tyranny and relapse into ethnocentrism and that political power can be camouflaged as rationality. Only the possibility to block and to revise on the

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[11] Majority vote is a way to prevent that the unanimity requirement of a rational consensus giving the right of veto to 'quarrellers' as well, shall prevent the reaching of collective decisions.

basis of a popularly enacted government can redeem the claim of moral value of democratic procedures. Thus, there can be no democracy without government organized by egalitarian procedures (Brunkhorst 2004: 97). The participatory reading of the deliberative principle renders many institutional and even aggregative arrangements of representative democracy justifiable (Nino 1996).

With regard to the majority principle Habermas understands it epistemically. It represents a *conditional agreement* internally related to truth: the relevant decisions claim to be correct in relation to actual circumstances and procedural norms. Minorities give licence to the majority on behalf of their own standpoints, because they have the opportunity to work to gain support for their standpoint and thus become a majority at the next crossroads. Votes therefore represent only *temporary stops* in the continuous discussion about what should be done (Habermas 1996: 179). Such a procedural interpretation of the majority principle makes it consistent with the concept of freedom when not applied to irreversible decisions. In this way discourse theory allows the individual to submit to laws that are not correct.

It can be objected, however, that in most cases it is unclear what is a correct or optimal decision, that the level of conflict is too high for there to be any prospects of consensus. The truth relation is therefore problematic (McCarthy 1994, 1996, Warnke 1996: 75ff.). On this background we may ask whether the majority principle is not in itself a respectable device compelling compliance. According to Rousseau, the majority principle is conditioned by a general right to vote, which is a reason for accepting it (Rousseau 1994 [1762]). Democracy has a numeric dimension because it consists of individuals that can be counted, which gives the majority's opinion a certain weight in itself. The interests of the majority must not simply be preferred to those of the minority, as Tocqueville contended (Tocqueville 1969 [1835-40]), because when more votes support a particular solution, "we can assume that interests of more people are satisfied".[12] Another point here is that the unanimity requirement in reality upset the principle of equality, because it pays undue attention to special interests and

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[12] Carlos S. Nino (1996: 127-128) draws on Condorcet's theorem saying that if each member of a decision making body is prone to adopt the right decision, the probability that the decision is right also increases as the number of members increases (See also Feld and Grofman 1988).

idiosyncratic arguments - it gives also quarrellers a right to veto. Majority decisions are regarded as more legitimate, because they treat everyone in the same way (Christiano 1996: 88, Ingram 1993: 302). The majority principle respects the formal equality of the citizens, even though it does not, as mentioned, ensure full political equality, and thus has value in itself reflecting the moral respect for persons.[13]

Furthermore, as laws are not decided on a whim, but are sought validated through prior public deliberation, the legitimacy of majority decisions rests on the substantial arguments put forward in their favour. As a rule collective decisions are made subsequent to extensive communication processes among affected parties. Deliberation contributes to clarify what the disagreement is about, so that a majority decision becomes understandable and tolerable to losers. Thus bargains struck between competing parties can achieve legitimacy in so far as the parties have had equal opportunities to fight for their cause and the reasons for the dispute have been brought to light. This is why the opposition does not take to the streets.[14] As Dewey reminded us, "majority rule … is never merely majority rule": it is preceded by argumentation and is justified with reasons that are found convincing for at least a section of the citizenry (Dewey 1927: 53, 207). A reason is only convincing as long as it is somebody's reason but it is the democratic process of law making that provide us with a basis for believing that there are reasons for them (Bohman 1996: 197, Nino 1996: 135). Hence there are agreements short of consensus that claim to be legitimate as they rest on reasons that have considerably weight.

Working agreement

Rational consensuses rest on mutual convictions, according to Habermas. Due to the impartiality constraint of practical discourses participants will converge in their recognition of the same validity claim and have *identical reasons* for observing an agreement. Conversely, *a*

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[13] But if the majority principle can be justified in itself, if it is found to have independent legitimizing power, the freedom of the individual is threatened. In that case, the right to have a say is no guarantee against unjust encroachments on the freedom sphere of the citizens (Engländer 1995: 494).

[14] And this is why the inertia which often results, and which public choice theory predicts, when unanimity is required can be avoided. Discourse theory envisages a shift in blocking standpoints due to the force of the better argument.

compromise is seen as an outcome of strategic bargaining processes and which is indirectly legitimated through the procedures that set the terms of a fair contest (Habermas 1996: 399). Bargaining may be depicted as the employment of credible threats and warnings in order to achieve given ends. In this case the parties will have *different reasons* for complying and will find the solution sub-optimal with regard to their initial preferences.

The consensus requirement of discourse theory is very demanding and one that does not necessarily follow from compliance with the proper rules of argumentation. Actors may remain at odds with each other even after a rational discourse. According to Rawls, there are un-avoidable limits to a qualified agreement because of "the burden of judgment", viz., obstacles to agreement that arise even when the actors reason as rationally as possible (Rawls 1993: 54). Such obstacles may be that relevant data are contradictory, that the actors weigh different views differently, that many concepts are approximate, that experience and personal biography affect the per-ception of what is seen as correct or good, and that there may be different but equally strong normative arguments in the same case; and even when people agree on the notion of justice they may "still be at odds, since they affirm different principles and standards for deciding those matters" (Rawls 1993: 14).

Consequently, in addition to the problems caused by weakness of will, the indeterminacy of norms, myopia and bias, different rules for deliberation, and complex moral standards, there are inherent cognitive limits to rational consensus. Even under ideal conditions a consensus may not occur. Because of this, one should not be epistemically optimistic when it comes to the prospects for political consensuses in modern complex and pluralist societies.[15] Nevertheless the basic procedure through which conflicts and ambiguities are handled and pluralism accommodated must in itself be seen to rest on some principles - be them the rules of communication, the liberal principle of toleration or the minimal deontological core of constitutions - that command moral respect and that all could, in principle, agree to with

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[15] "The precise characterization of the acceptable reasons, and their appropriate weight will vary across views. For that reason, even an ideal deliberative procedure will not, in general produce consensus." (Cohen 1997:414). Consequently, there are various degrees of agreement including discursive disagreement and reasonable disagreement as well as moral compromises and deliberative majorities (Bohman 1996, Grimen 1997, Gutmann and Thompson 1996, Valadez 2001).

identical reasons. Only conclusions that are based on the same premises can claim validity and establish the requisite stability of political orders.

Nevertheless, in a context practico-politico there are various degrees of agreement even when the appropriate rules of deliberation are respected. A rational debate may not lead to a shift in opinions and beliefs but may help to clarify arguments and challenge the reasons provided. Higher degrees of understanding may be reached when the deeper convictions and reasons are being spelled out. The parties may recognize that they have different evaluations and that there is no easy way out if they are to continue living peacefully together. In such cases the parties make concessions and opt for a solution that is, after all, sensible and reasonable - it reflects notions of justice in a pluralistic context.

My point is that an outcome might fall short of a rational consensus but still be the result of a deliberative process based on inter-subjectively justifiable reasons. In line with this, one may think of the possibility of reaching an in-between consensus, an agreement which testifies to some movements of positions and normative learning, which does not result in a rational consensus, but in a *working agreement*. Such a conclusion rests on different, but reasonable and mutually acceptable grounds. It is achievable among reasonable persons, who acts on the basis of in-sight in the burden of judgment and justice. Thus, "I(i)t makes sense to talk of a third concept of consensus characterized as the continuously improved consensus, in relation to the actual best possible consensus, viz., as the best possible improvement of the consensus obtained at any time. This is a notion of a realistic, realizable obligation to advance toward greater rationality." (Skirbekk 1993: 98-99).

Deliberation may, short of fulfilling the demanding requirements of a rational consensus, function, due to its epistemic merit, to increase the level of knowledge and judgment in such a way that different reasons become understandable and mutually acceptable; hence establishing a working agreement, which denotes an agreement that is based on *reasonable reasons*. Such agreements are, so to say, incompletely theorized (Sunstein 1995) as they depict agreements at a certain level leaving the deeper, principled questions un-clarified. They are not as stable as rational consensuses, as they reveal different legitimating reasons

emanating from different world views, descriptions of the situation and concepts of justice or correctness. With regard to justice-pluralism, we may think of the situations where actors have to deal with disagreement about rights and disagree about which distributive principle - such as merit, desert, equality, needs - should be applied. A working agreement, thus, differs from a pure convergence of interests and also from a modus vivendi resting on mutual respect for conflicting interests, as it is stabilized with normative arguments - with non-egoistic justifications. Besides it is more than an overlapping consensus based on the method of avoidance – the exclusion of unreasonable comprehensive world views - and the convergence of different though *non-public reasons*.[16] Working agreements builds on the public use of reason which, on the basis of existent plural value systems, manages to establish a cooperative scheme that compels compliance and support. Actors are swayed through the idealizing presuppositions of communication and the role of conversational constraints to agree without being entirely convinced that this is a rational or optimal result. The result may be seen as *a regime, a doctrine, a policy* based on common norms and entrenched rules, and as something that does not merely protect us but also represent a Pareto improvement. It reflects a binding structure of common commitments, and one that may be negotiated and overrun in the future, but for the moment it requests respect.

Figure 1: *Typology of agreements*

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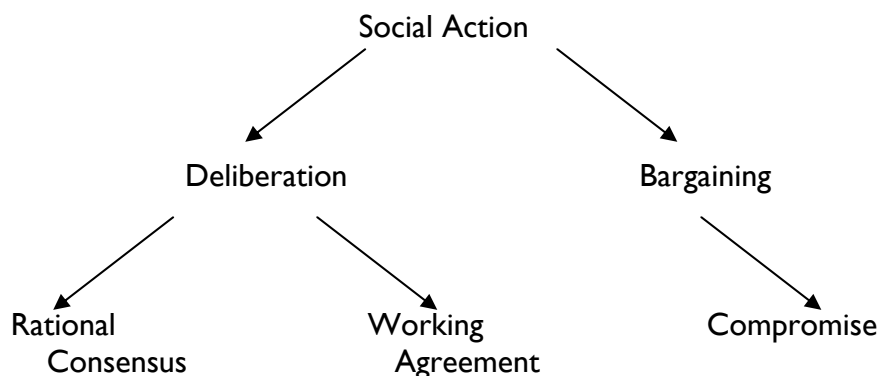
[16] Cp Habermas 1995, 2000: 85-86, Rawls 1993: 151, 1995. Rainer Forst argues that Rawls rather conceives of the private use of public reason in public affairs than of the public use of reason (Forst 1994: 156).

Such a category is needed not only for normative but also for explanatory purposes, viz. in order to fill in the lacuna left open by discourse theory between stricken compromises based on strategic bargaining and communicatively achieved rational consensuses (Eriksen and Weigård 2003: 42).

Democratic legitimacy

According to variant B of deliberative democracy there is no democracy without egalitarian procedures of law making, because only then can the citizens effectively influence the laws that affect them, determine whether the reasons provided are good enough, and possess the power to sanction the power holders. Even though deliberation increases the likelihood that losers comply with majoritarian decisions thanks to its epistemic merits, it cannot replace institutionalized forms of control, including majority vote and veto-positions, and participation, that are equally open to all. From the vantage point of this model, the most that can be expected with regard to collective will-formation are decisions based on reasonable - mutually justifiable - reasons. The principle of democracy in this reading, then, does not assert that the laws should meet with the rational assent of all, but rather that they are legitimate when they are the outcome of an open and fair (legally institutionalized) process and can be defended against criticism and accepted with reasonable reasons (Bohman 1996: 183, Habermas 1996: 110). However, as the ultimate test of the legitimacy of the law-making procedure, the rational consensus unavoidably provides the standard, because the reasons must be convincing in the same manner for the order to be stable, and this can only be accomplished by establishing what is in the equal interest of all. It is such that can test the substantive moral standards constitutive of B. It is a rather thin normative basis for this as it must be based only on what human beings have in common, viz., their right to freedom, equality, dignity, democracy and the like.[17].

Version A of the deliberative principle should therefore be reserved for the procedure of testing the core basic norms of the political order. That is, in a discourse on the

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[17] In this sense the discourse principle expresses the moral individualism of modernity that is constitutive of the participatory model – version B.

constitutional essentials under idealized conditions, actors would be able to reach a rational consensus on what is in the equal interest of all the affected parties. By abstracting from pressing constraints, by discussing typical situations and anticipate future states of norm application actors would be able to test the legitimacy of a norm in a coherent manner and come to a rational agreement. This does not imply infallibility, according to Habermas, as both moral justification discourses and pragmatist application discourses are subject to *a dual fallibilist proviso*: In retrospect we can see that we were mistaken about the 'presuppositions of argumentation' as well as have failed to anticipate relevant empirical circumstances (Habermas 2003: 258) As far as such makes up the modern form of self-reflexivity the citizens would be able to think in worst-case scenarios and institutionalize safety mechanisms, constitutional barriers, against the putative hubris of communicative rationality.

Conclusion

Underlying the distinctions between the two models of deliberative democracy is the question whether the ideal discourse can ever actually be carried out or should merely be thought of as a device for the representation of free and equal citizens - a fictional situation for the anticipation of all situations where the norms are to be applied - according to a criterion of validity external to discourse à la Rawls' or Scanlon's contractualism. From the epistemic point of view the discourse can be thought of as a *fictional discourse* for representing equal and free citizens. The requirement of an actually carried out discourse among affected parties, which Habermas opts for, is due to the fact that participation is necessary to establish what is just and right because the moral worthiness of an interest is not always clear and because a self-critical attitude is forced upon the actors - that induces them to critically examine their own preferences - under the exacting conditions of a rational discourse. It is also difficult to simulate a democratic discourse because of the unpredictability of spontaneous human interaction - the productive world-disclosing effect of human discourse - which makes for the unexpected, the unpredictable and 'undetermined new'. In institutional terms the requirement of an actually performed discourse links in with

the communicative net-works of the political public sphere with equality, freedom, inclusion, and open agenda as generic conditions, and hence with the radical democratic idea of citizens' self-government through politics and law. However, as established, problems linger as real communication processes can only approximate such ideals.

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