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# Privileging argument and the problem of ideology: Some ‘activist challenges’

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## Abstract

Justifying judicial review as a democratic institution is a core concern of Cristina Lafont’s splendid new book. Even though her interpretation is appealing, this also poses some problems. This is due to the *non-thematization of ideology* that results from Lafont’s ideal-theoretical and argument-privileging approach. I will first address this *ideology-problem* and then reflect on the implications that this has for the question of what is considered legitimate political action.

## Keywords

Cristina Lafont, ideology, Iris Marion Young, judicial review, prefigurative politics

Justifying judicial review as a *democratic* institution is a core concern of Cristina Lafont’s splendid new book. Even though her interpretation is appealing, I feel a certain discomfort. This is mainly because the great trust in judicial review that this interpretation evokes may tempt one to dismiss certain forms of dominating power. This is due to the *non-thematization of ideology* that results from Lafont’s ideal-theoretical and *argument-privileging* approach. I will first address this *ideology-problem* and then reflect on the implications that this has for the question of what is considered *legitimate political action*. As my title already indicates, I took some inspiration from Iris Young’s famous essay *Activist Challenges to Deliberative Democracy*, in which she presents a staged exchange between a deliberative democrat and a political activist, who raises four challenges that he thinks the deliberativist cannot adequately address.

(I) Deliberative democracy in Lafont’s understanding is characterized by the ‘*the rule of considered public opinion*’ (102). The underlying ideal of democratic

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self-determination demands mutual justification among equal citizens and is incompatible with any kind of blind deference. Lafont emphasizes that ‘such an approach requires institutions to be in place such that citizens can contest any laws and policies that they cannot reasonably accept by asking that either proper reasons be offered for them or that they be changed’ (12). Against this background, she unfolds her discussion of judicial review, which aims to demonstrate – by exposing its *democratizing* (i.e. [re]politicizing) potential – that even a participatory conception of democracy can defend such a non-majoritarian institution. Contrary to common interpretations, Lafont highlights judicial review’s role as a ‘conversation initiator’ of a democratic debate: ‘the main contribution of the institution is that it empowers citizens to call upon the rest of the citizenry to publicly debate’ (238) fundamental political issues. It empowers them ‘*to call the rest of the citizenry to put on their robes*’ (240). Judicial review here is seen as a reactive ‘mechanism[] of correction’ (162), stimulating deliberation and promoting vibrant democracy. It ‘guarantees that all citizens can [...] open or reopen a deliberative process’ (212f.). This (re)opening works by providing *reasoned* objections. ‘In order to trigger judicial review [citizens] must argue their case in court *on the basis of reasons*, considerations, and arguments’ (210f.). This has to be kept in mind for my subsequent discussion, as the reference to ‘providing appropriate reasons and evidence’ (193) raises the question of what constitutes appropriate or good reason.

What, then, remains of this modelling when one confronts it with Young’s accusations from 2001, directed at most of the existing approaches to deliberative democracy at that time? As Young herself points out, the first two accusations – concerned with the lack of inclusion and insufficient publicity of certain institutions and procedures – do not pose a great challenge to *participatory* deliberativists. They, too, would criticize and try to combat these circumstances – even if by other means. The same obviously applies to Lafont. The other two accusations are more serious in Young’s eyes. Since, in my opinion, Lafont can also, at least basically, deal with the third accusation – which concerns the ignoring of structural inequality in the form of power relations sedimented in institutions – by rightly referring to the reflexive ‘supervision-function’ of judicial review, I would like to come straight to the fourth and most profound accusation. The activist worries that deliberation may be ‘influenced by a common discourse that itself is a complex product of structural inequality’ (Young 2001, 685). Such a discourse conveys ‘the widely accepted generalizations about how society operates [...], as well as the social norms and cultural values to which most of the people appeal when discussing their social and political problems’ (Young 2001, 685). Inasmuch as such ‘social imaginaries’ naturalize unjust power relations or falsely universalize a particular perspective, Young speaks of ideology. The phenomenon of ideology ‘refers to how the conceptual and normative framework of the members of society is deeply influenced by premises and terms of discourse that make it difficult to think critically about aspects of their social relations or alternative possibilities of institutionalization and action’ (Young 2001, 685f.). Young’s objection to (almost all) representatives of deliberative democracy is that they do not take this into account sufficiently (if at all) and thereby negate or at least conceal ideological forces. The general problem is quite obvious and relates to the previously mentioned question of the ‘appropriateness’ of reasons and evidence: Advocates of deliberative democracy commit citizens to argumentative

language-based action, requiring them to navigate in an always already existing space of reasons, which determines what good and bad reasons are and what counts as a reason at all. Accordingly, certain speech acts have to be suspended as inappropriate, irrational or simply as ‘noise’. As noted by such different authors like Robert Talisse, Sally Haslanger or Toby Rollo, this is problematic because the very vocabularies in which public discussion is – or: *has to be* – conducted may contribute to the continuation and reinforcing perpetuation of injustice and there may be no vocabulary-immanent way to reflect on that. Lafont’s approach is not immune to these objections either, which becomes particularly apparent in connection with the institution of judicial review. In one way or another, there will be a kind of ‘gatekeeper moment’ in which the admissibility of a petition is examined and a decision is made if a review is granted or denied. Ideological distortions can lead to certain claims being classified as ‘noise’ and dismissed as such during the process of case selection. In these cases, the judges do not *feel* or *think* or even *have* to have a ‘legal obligation to examine the complaints of litigants, to listen to their arguments, and to provide a reasoned answer’ (233). If one assumes that judicial review is always linked to a prior ‘admissibility examination’ of a complaint, it should be pointed out that such procedures virtually force one to play the existing ‘language game’. Positions that do not fit into the existing language game – or *cannot be fitted in* – are then effectively silenced. Not every case brought to the ‘gatekeeper’ of the court will succeed in becoming the subject of a judicial review, thereby producing the democratic effects Lafont is hoping for. If such an ideologically conditioned act of selection happens, it happens *even before* the actual process of judicial review can function as a ‘conversation initiator’. Although Lafont addresses certain issues related to the independence of the judiciary, more subtle forms of dependence – like *ideological dependence* – do not come into view. What Lafont’s approach seems to be missing from my point of view is an enrichment by an ideology-sensitive social theory – in order to be also a *critical* theory of democracy.

(II) This leads me to my second point. Since every normative account of democratic legitimacy also involves prescriptions for how citizens *ought to be* politically engaged, the non-thematization of ideology also has to have implications for what is considered as legitimate political action. Only in such an ‘ideal-theoretical’, ideology-dismissing perspective, one can propagate reason-based argumentation as the only adequate (i.e. legitimate) form of political action. Dismissing ideology tempts one to define epistemic quality exclusively in argumentative terms. As Maeve Cooke has highlighted elsewhere, this ‘leaves no room for an understanding of epistemic quality that is non-argumentative’ (Cooke 2013, 264), which is then mirrored in the question of what is considered as legitimate political action and what is not (or as political action *at all*). An account of democracy that is defined exclusively in argumentative terms – Young speaks of ‘privileging argument’ – could then be said to *leave no room for an understanding of political agency that is non-argumentative*. ‘Privileging argument’ leads to a world where forms, means and meanings of political action otherwise than deliberativist political action get *normatively discredited* and *analytically invisibilized*.


Lafont’s approach is a prime example of an approach that *privileges argument*. As depicted under the label *deliberative activism*, the ‘good citizen’ of deliberative democracy exchanges good reasons with her fellow citizens to reach generally binding

decisions, or challenges binding rules on the basis of appropriate reasons. Therefore, ‘argument constitutes the primary [if not the only; PS] form of political communication’ (Young 2000, 37) and thus fosters ‘an identification of reasonable open public debate with polite, orderly, dispassionate, gentlemanly argument’ (Young 2000, 49). Admittedly, there is one single passage where Lafont points out that deliberative activism must not be limited to ‘providing abstract arguments’ and ‘must [not] take the form of an “idealized academic discourse”’ (30). But ultimately – by adding that non-discursive actions are legitimate only as long as ‘the *goal* of such forms of political action is to transform actual public opinion into considered public opinion’ (30) – such non-discursive, disorderly and disruptive forms of political engagement are again committed to argumentative communication and thereby forced under the prevailing order of justification. From the activist’s perspective, this has to be seen as problematic since for in view of the presumed ideological closure that restricts the deliberative process in its openness of outcome, he advocates ‘disruptive, annoying, or distracting’ (Young 2000, 49) communicative acts, which ‘confront rather than engage in discussion’ (Young 2001, 670). The activist doesn’t do that – at least not necessarily – out of pure pleasure in riot or non-conformity. There is indeed a communicative intention, albeit with different means and objectives, than a very narrow understanding of communication would suggest. His rationale is the following: unlike argumentative communication, which must necessarily remain within the framework of an already existing ‘language game’, such non-discursive actions aim ‘to rupture a stream of thought rather than to weave an argument’ (Young 2001, 687). They are meant to mess up what, until then, his fellow citizens ‘may have found normal and acceptable’ (Young 2001, 675). I would like to extend Young’s thoughts by adding that rather than being solely disruptive, such non-discursive actions may also involve a claim to practical *world-disclosure*. The point of this world-disclosing, *prefigurative political agency* (cf. Raekstad and Gradin 2020) is, after all, ‘that it *demonstrates* to the people, rather than *argues*, that an alternative is possible [and] reasonable’ (Rollo 2017, 595) – even if not under the existing standards of reasonableness. In the case of prefigurative politics, the meaning of non-discursive politics consists *not only* in bringing certain topics and demands to the table, *but also* in attempting ‘to establish new norms of conduct and governance’ (Rollo 2017, 595), new vocabularies or ‘new ways of seeing in the domain of practical reason’ (Cooke 2013, 257). Its emancipatory value and meaning lies precisely in the fact that the existing, possibly ideologically hardened frame of reference is broken up – *by enacting visible features of an alternatively institutionalized world*.<sup>1</sup>

But if the definition of (legitimate) political agency is narrowed down to only include acts that promote and contribute to an ongoing reason-based deliberation – and thus remain bound to a possibly ideologically sealed off order of justification –, then world-disclosing, non-argumentative practices ‘may not qualify as political action or as fulfilling democratic ideals’ (Rollo 2017, 594). Political action otherwise than deliberativist political action gets *normatively discredited*. What are the consequences? First, the potentially ideology-critical and emancipatory effects of non-argumentative action tend to be overlooked analytically. Furthermore, stipulating rational and argumentative dialogue as the sole medium of (democratic) political agency is not only not critical of ideology but might also have an ideology-*promoting* effect, because, as, for example,

Haslanger (2017, 7) recently pointed out, ‘ideology is part of what gives people their tools of reasoning in the first place’. Therefore, and to the extent that Lafont ultimately commits herself completely to a ‘privileging argument’-approach, I see a danger that her approach risks unintentionally contributing to the perpetuation of potentially ideological veiled, unjust conditions – by ruling out world-disclosing politics.

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## Note

1. In Haslanger (2017), a corresponding interpretation of such practices as decidedly ideology-critical can be found.

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