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REPUBLICANISM BETWEEN JUSTICE AND DEMOCRACY



REPUBLICAN DEMOCRACY AND THE
PRIORITY OF LEGITIMACY OVER JUSTICE

BY

PAMELA PANSARDI

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Republican Democracy and the Priority of Legitimacy Over Justice

Pamela Pansardi

In *On the People's Terms: A Republican Theory and Model of Democracy*,¹ Pettit offers the most accomplished, if not the definitive account of his republican theory of freedom and government previously presented in the books *Republicanism*² and *A Theory of Freedom*³ and in a series of articles.⁴ The originality of this latest work lies in the attempt to provide a theoretical framework for the analysis of two different questions of political theory. The first question is, in Pettit's words: 'what decisions or

¹ Philip Pettit, *On the People's Terms. A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012). Unless specified otherwise, in-text references are to this book.

² Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

³ Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Cambridge: Polity Press, 2001).

⁴ See Philip Pettit, 'Freedom as Antipower', *Ethics*, 106 (3), 1996, pp. 576-604; Philip Pettit, 'Actions, Persons and Freedom as Nondomination', *Journal of Theoretical Politics*, 10 (3), 1997, pp. 275-283; Philip Pettit, 'Agency-freedom and Option-freedom', *Journal of Theoretical Politics*, 15 (4), 2003, pp. 387-403; Philip Pettit, 'Freedom in the market', *Politics, Philosophy and Economics*, 5, 2006, pp. 131-149; Philip Pettit, 'Free persons and free choices', *History of Political Thought*, 28 (4), 2007, pp. 709-718; Philip Pettit, 'Republican Freedom: Three Axioms, Four Theorems'. In Cecile Laborde and John Maynor (eds), *Republicanism and Political Theory*. (Oxford: Blackwell Publishing, 2008), pp. 101-130; Philip Pettit, 'Freedom and Probability: A Comment on Goodin and Jackson', *Philosophy and Public Affairs*, 36 (2008), pp. 206-20; Philip Pettit, 'The Determinacy of Republican Policy: A Reply to McMahon', *Philosophy and Public Affairs*, 34 (3), 2008, pp. 275-83.

policies should the state impose in order to establish social justice in the relationship between citizens?’ (p. 75). The second question is: ‘what processes of decision-making should [the state] follow, if it is to count as a politically legitimate decision-maker for its citizens on questions of justice?’ (p. 75). The first question is a question about *social justice*, and aims at investigating the way in which the relationships amongst fellow citizens in a society should be structured. The second question is a question of *political legitimacy*, and is directed at the identification of the way in which the relationships between citizens and the state should be organized.

Pettit’s republican theory, as expounded in this book, is then both a theory of justice and a theory of legitimacy, and aims at addressing both questions on the basis of the single ideal of freedom as non-domination. However, unlike other political philosophies, such as Rawls’s theory of justice,⁵ Pettit’s republican theory underlines the need to keep the two normative questions distinct. Justice and legitimacy, in Pettit’s view, represent two distinct goals of political philosophy, which could be promoted independently of each other. Both at the theoretical and at the empirical level, justice and legitimacy do not imply each other. On the one hand, ‘a state may be fully legitimate [...], and yet not succeed in furthering the cause of social justice very well’ (p. 130). On the other hand, just societies may not be fully legitimate. For instance: ‘we can imagine a benevolent despotism [...] under which people’s relations with one another are ordered in a socially just manner’ (p. 130). The distinction between social justice and political legitimacy, however, should be described as a ‘conceptual divergence’ (p. 131) more than a practical one, since: ‘It is unlikely that people who fared badly in justice terms could do much about

⁵ John Rawls, *A Theory of Justice*. Revised Edition (Cambridge: Harvard University Press, 1999), quoted in Pettit, *On the People’s Terms*, pp. 76-77.

constraining the state to satisfy legitimacy. And it is unlikely that the unconstrained state would do much to establish justice amongst its citizenry' (p. 131).

The promotion of social justice and that of political legitimacy are both tasks of republican theory, and they both concur to the promotion of freedom as non-domination. As we will see later in detail, in Pettit's account social justice refers to the elimination and prevention of *private* forms of domination among fellow citizens (p. 77), while legitimacy refers to the elimination and prevention of *public* forms of domination concerning the relationships between citizens and the State (p. 77). However, if we are presented with the choice between a society which scores better in terms of justice, and one which scores better in terms of legitimacy, according to Pettit, we have reasons to choose the latter: 'A failure in political legitimacy would compromise the robustness of freedom more deeply than a failure only in social justice. Where a lack of social justice would make us vulnerable only to our fellow citizens, a lack of political legitimacy would make us vulnerable on two fronts' (p. 24). The reason for this, in Pettit's view, is quite straightforward: in the absence of popular control on state decisions, social justice may be just a contingent feature of the society, subject to the arbitrary power of a good-willed ruler. Social justice, thus, understood in terms of non-domination in the relationships amongst fellow citizens, would not be enjoyed in this case in the 'robust' sense entailed by republican theory.

The interpretation of the relation between the two goals of republican theory just expounded may be described as entailing a *normative priority of legitimacy over justice*. However, in this note, I shall argue that, within the boundaries of the same republican account, justice is relevant to the achievement of legitimacy, and that, as well as explicitly assuming a normative priority of

legitimacy over justice, republican theory implicitly assumes a *logical priority of justice over legitimacy*. I shall argue, more specifically, that the same definition of republican legitimacy contains ‘social justice’ amongst its elements. Moreover, I shall offer normative reasons for arguing in favor of a priority of justice over legitimacy; in other words, I shall explain why social justice, within republican theory, *should* be considered as a necessary condition for legitimacy. I shall claim that the equal share of each citizen in the popular control of the government – which is at the core of the idea of the legitimate state – can only be achieved when citizens are resourced and protected from (actual and potential) domination on the part of their fellow citizens. This argument will be in line with the republican interpretation of justice and legitimacy in ‘procedural’, rather than ‘substantive’ terms, according to which both of these normative goals refer to the structure of the social and political relations under scrutiny (that is, non-dominating relations) and not to the obtainment of particular goods. Accordingly, the absence of domination amongst fellow citizens should be thought of as a necessary ‘procedural requirement’ for a legitimate democratic society.⁶

I

Distinguishing Social Justice and Political Legitimacy

In Pettit’s account, the promotion of freedom as non-domination entails the elimination and prevention of relations of domination of both a *vertical* and a *horizontal* kind: ‘Where the issue of social justice is a matter of the horizontal relations of

⁶ Pamela Pansardi, ‘Democracy, Domination, and the Distribution of Power: Substantive Political Equality as a Procedural Requirement’, *Revue Internationale de Philosophie*, 70 (275), 2016, (forthcoming).

citizens to one another, political legitimacy is a matter of their vertical relations to the state that rules over them’ (p. 136). Accordingly, political legitimacy entails the elimination of relations of domination of the state over the citizens by means of an equally shared ‘individualized, unconditioned, and efficacious control’ (p. 167) over the government, while social justice entails the elimination of domination in relations among fellow citizens, and consists in the ‘equality in the enjoyment of certain fundamental choices, the basic liberties, on the basis of a guarantee of public resources or protection’ (p. 77). In the rest of this section, I shall offer a more detailed account of Pettit’s interpretation of the two normative goals of republican theory.

Social justice

Social justice, according to Pettit, refers to the equal attribution of the status of free person (p. 88) to each citizen in a society, where citizens are understood as ‘the adult, able-minded, more or less permanent residents of the society’ (p. 87). In order to promote social justice, ‘the state ought to promote the enjoyment of free or undominated choice amongst its citizens, under the expressively egalitarian constraint of treating those citizens as equals’ (p. 82). In order to specify what the republican theory of justice entails, according to Pettit, three kinds of reflections are needed. Firstly, it is necessary to define *which choices* or which domain of choice should be protected by the State. Secondly, it is necessary to identify *the way* in which the State should protect these choices from domination. Lastly, it is necessary to define *the level at which* those specific choices need protection. In addressing these questions, Pettit writes: ‘The choices to be entrenched are the basic liberties; the kind of entrenchment to be provided is the public sort that enlists laws and norms; and the level to be secured is whatever is necessary

for passing the eyeball test in the local society' (p. 88). Let us consider each of these points in turn.

The identification of the choices that need protection to guarantee to each individual the status of a free citizen – those that he calls the 'basic liberties' – is based on two tests. The choices that are to be protected need to be both co-exercisable and co-satisfactory. What does it mean that they should be co-exercisable? It means that the choices included in the list of basic liberties should be exercisable conjunctively both at the individual and at the collective level. Co-satisfaction, on the other hand, means that those choices should adequately satisfy each single individual as well as the collectivity: 'The criterion of individual satisfaction argues that the choices we entrench as basic liberties should be ones that by received social criteria promote the enjoyment and welfare, over the long term, of those who make them' (p. 98).

The identification of the strategies for the protection of the basic liberties points to the establishment of the relevant legal norms, but also on the consequent diffusion of cultural and moral norms. He writes: 'Corresponding to the coercive effect of laws against fraud or violence or murder, we might expect to find norms that occasion a complementary approbative effect, deterring potential offenders by holding out the prospect of communal disapproval' (p. 83-84).

Lastly, the degree to which the basic liberties should be protected is defined on the basis of a particular test: 'people should securely enjoy resources and protections to the point where they satisfy what we might call the eyeball test: they can look others in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status, objective and subjective, of being equal in this regard with the best' (p. 84). The eyeball test allows the

expectations of the republican theory of social justice to be more feasible and realizable, being independent from individual differences, for example, in timidity or cowardice. This kind of individual differences should not be taken into account in determining the level of resourcing and protection available for a society. Moreover, material inequalities are accepted, as long as the ‘threshold of resourcing and protection that should be secured for all in the domain of basic liberties’ (p. 85) allows each citizens to pass the eyeball test. However, the asymmetries in power generated by material inequalities should be regulated by the state, in order to prevent such inequalities from resulting in forms of domination: ‘Certain differences of wealth and power may jeopardize the freedom as non-domination of the less well off, as we shall see, and be objectionable on that count. But, assuming that they are not allowed to have this effect, they are consistent with the status of a free citizen being available to all, richer and poorer alike’ (p. 85).

Political legitimacy

The republican theory of legitimacy assumes that each citizen should be treated equally in the way in which a political order is imposed by the state. Given the plurality of views on social justice held by citizens in a society, a legitimate state is one in which citizens share the ability to control the government’s decisions and in which, by reason of that, they ‘accept the decisions of the state as binding on them all and [...] submit to the coercive application of those decisions by the state’ (p. 131). The definition of republican legitimacy relies thus on the definition of those criteria that allow us to identify the case in which ‘a state can impose coercively on citizens without dominating them’ (p. 147). The problem of the coercive nature of the state is addressed by relying on the republican distinction between mere

interference and domination. State interference does not necessarily impinge on people's freedom; it does so only when it constitutes an instance of domination. Accordingly, the controlled interference of a non-dominating state is consistent with freedom as non-domination: 'if people governed by a state control the interference practiced by the government – if they control the laws imposed, the policies pursued, the taxes levied – then they may not suffer domination at the hands of their rulers and may continue to enjoy their freedom in relation to the state' (p. 153). In this situation, the state 'would practice interference, for sure [...] but it would only interfere with them on their terms, not at its own will or pleasure' (p. 153).

The popular control of the government is thus necessary for legitimacy. It consists in both a direct influence in the process of decision-making and in the capacity to provide a direction, i.e., in the ability to provide an input that may result in a specific output. Moreover, a legitimate system of popular control should be individualized, unconditional and efficacious. It should be individualized in the sense that gives every citizen an equal share of control – understood in terms of the ability to control, although it may be different in terms of its effect. It should be unconditional in the sense of being independent of any changes in the will of the government, and efficacious in the sense of actually participating in, and limiting, the government decision-making power (p. 167). Pettit writes: 'If it allows the wills of some to rule on certain matters, as in giving the majority party control of various issues, it does so only because such restricted empowerment is consistent with all that popular direction and control requires; like the power that I enjoy when you give me the key to the alcohol cupboard, the power given to the majority party can only be exercised within accepted bounds and need not count as dominating' (p. 176).

However, cases in which the decisions imposed by the state are not in line with certain citizens' interests may occur, but they do not necessarily constitute cases of domination. In particular, where a system of popular control is established and effective in providing guidance for the government decisions, Pettit claims that 'unwelcome results of public decision-making are just tough luck' (p. 177). These 'unwelcome results' may be thought of as contingent and accidental outcomes of the decision-making process that however do not constitute infringements on freedom as non-domination. The 'tough-luck test' is, then, according to Pettit, the counterpart of the 'eyeball test' in assessing the degree of popular control needed to constitute non-domination: 'Where the eyeball test is a good index of whether the guards against private domination are adequate, a parallel tough-luck test is a good index of whether the guards against public domination are efficacious' (p. 176).

II

Is There a Priority of Legitimacy Over Justice?

In the previous section, I have presented Pettit's republican interpretation of both social justice and political legitimacy. In this section I shall firstly take into account Pettit's assumption of a normative priority of legitimacy over justice. Secondly, I shall offer reasons for suggesting that republican theory implicitly assumes a logical priority of justice over legitimacy. Lastly, I shall provide a few arguments for explaining why, within republican theory, we *should* consider social justice as a necessary condition for legitimacy.

As mentioned earlier, according to Pettit every relations between justice and legitimacy is only contingent, since no direct (logical or empirical) implication between the two exists: 'Social

justice does not entail political legitimacy [...] nor does political legitimacy entail social justice' (p. 130). However, Pettit values legitimacy more than justice since justice, in the absence of an established and effective system of popular control, may be subject to changes in the will of the dominating government. In the absence of legitimacy, then, justice may be a contingent feature of a society, dependent upon the discretionary will of the ruler: 'While the law may put social controls in place, guarding us against private domination, those safeguards will only be as reliable as the will of the government that establishes and maintains them' (p. 24). Legitimacy is thus to be preferred to justice not because legitimacy implies justice, but because the absence of legitimacy entails a lack of 'robustness' in any attribution of justice.⁷ The point here, however, is not that legitimacy offers a more 'robust' defense of social justice in a society, but that the lack of legitimacy put citizens in the condition of being exposed to two different evils: *actual* vertical domination and *potential* horizontal domination. In Pettit's words: 'Where a lack of social justice alone would make us vulnerable only to our fellow citizens, a lack of political legitimacy would make us vulnerable on two fronts' (p. 24). Accordingly, political legitimacy should be more valued than social justice as a goal that republican theory should promote, leading to the assumption that republican theory entails a *normative priority of legitimacy over justice*.

However, if we look more closely at Pettit's definition of the two normative goals of republican theory, a different interpretation of the relations between justice and legitimacy can

⁷ It is not clear, however, how can we claim that the absence of legitimacy entails a lack of robustness in social justice without claiming, at the same time, that the presence of legitimacy entails more robustness in social justice – which is expressly excluded by assuming the absence of any logical or empirical implication between the two goals.

be seen to emerge. Let's take Pettit's indicative list of basic liberties, which represents the set of choices that should be protected in line with the republican theory of justice:

The freedom think what you like.

The freedom to express what you think.

The freedom to practice the religion of you choice.

The freedom to associate with those willing to associate with you.

The freedom to own certain goods and to trade in their exchange.

The freedom to change occupation and employment.

The freedom to travel within the society and to settle where you will (p. 103).

These liberties more or less mirror the classical liberal civil and political liberties and are at the basis of the constitutions of liberal-democratic governments; they are also consistent with the basic liberties identified by Rawls's first principle of justice.⁸ In order to support Pettit's claim of a 'conceptual divergence' (p. 131) between legitimacy and justice, the definition of the two concepts should diverge in terms of the elements included in them. The question here is whether it is possible to conceptualize legitimacy without including in its definition the attribution of those basic liberties to the citizens in a society. Is Pettit's definition of legitimacy independent of the basic liberties? Are the basic liberties excluded from the 'procedural' liberties (p. 185) that Pettit's theory of political legitimacy entails? Or, to put it differently, is it possible to imagine a definition of 'popular control' that does not include a reference to the enjoyment of these basic liberties – for example, freedom of speech or freedom of association? The answer is very likely to be a negative one.

⁸ Rawls, *A Theory of Justice*, p. 53.

In line with this reasoning, I suggest we should consider social justice, as Pettit defines it, as a necessary – although not sufficient – condition for legitimacy. In the absence of the basic liberties, the ‘procedural liberties’ mentioned by Pettit in the discussion of political legitimacy become void. Legitimacy, in this sense, comprises justice. Accordingly, I suggest a partial reconciliation between the concept of political legitimacy and social justice: justice does not entail legitimacy, although it is a precondition for it. And legitimacy implies justice, in the sense that in the absence of justice, legitimacy is not in place. As a consequence, we can assume a *logical priority of justice over legitimacy*. Recognizing the logical priority of justice over legitimacy does not entail, however, that we need to completely abandon a reference to the *normative priority of legitimacy*. If both justice and legitimacy are understood in terms of degrees, as Pettit does, that rise above a ‘sufficient’ threshold (p. 88), we can still claim that between two societies that both satisfy the minimal requirements for justice and legitimacy, the one we should prefer is the one which scores better in terms of legitimacy.

It is worth noting, however, that Pettit’s definition of social justice implies something more than merely a formal legal right to the basic liberties. He distinguishes his reference to the protection of the basic liberties from the one emerging from Rawls’s first principle: ‘In Rawls’s usage people are free to do or not do something just insofar as it is legally permissible for them to do it or not to do it: they have a legally protected right in respect of the choice’ (p. 108). Pettit writes: ‘liberty to choose in this [Rawlsian] sense between two options is quite consistent with an inability to make the choice: having the ability is not required for the liberty as such, only for its worth or value’ (p. 108). By contrast, republican theory implies that the basic liberties are both *resourced* and *effectively protected from domination*. Accordingly, for Pettit, basic

liberties should constitute not naked, but vested liberties⁹ insofar as they are not based on mere legal permissions, but on permissions that are ‘protected by a structure of claim-rights on the part of [an individual] that others act or refrain from acting in various ways’.¹⁰ In the republican view, basic liberties should be ‘vested’ in the double sense of being actively protected by the state and being resourced for: they correspond to an idea of ‘substantive’ freedom in terms of freedom as-ability.¹¹ Pettit writes: ‘Republican theory casts the procedural rights that people are to enjoy [...] as *powers* that they must each fully enjoy and equally exercise if they are not to suffer subjection and domination by an uncontrolled state’ (p. 185). Basic and procedural liberties are then not to be understood as mere liberty-rights, but rather as social powers, in the sense that they are both effectively protected and resourced.¹²

I suggested earlier that the entitlement to the basic liberties is a necessary condition for legitimacy, since basic liberties represent part of the requirements for popular control to be in place. However, is the effective protection and resourcing of the basic liberties in the ‘substantive’ sense just expounded also a necessary condition for legitimacy? The argument here moves back from the conceptual and logical to the normative level, and the

⁹ See Ian Carter, ‘The Myth of Merely Formal Freedom’, *Journal of Political Philosophy*, 19(4), 2011, pp. 486-495.

¹⁰ Carter, ‘The Myth of Merely Formal Freedom’, p. 488.

¹¹ Carter, ‘The Myth of Merely Formal Freedom’, p. 492.

¹² Understood in this sense, basic liberties can be described as ‘powers’, in line with what contemporary power theory labels ‘power to’. On the relations between power and freedom in the ability-based sense see: Peter Morriss, ‘What Is Freedom if It Is Not Power?’, *Theoria: A Journal of Social and Political Theory*, 59 (132), 2012, pp. 1-25, and Pamela Pansardi, ‘Power and Freedom: Opposite or Equivalent Concepts?’, *Theoria: A Journal of Social and Political Theory*, 59 (132), 2012, pp. 26-44.

question it aims to answer is the following: Should basic liberties be protected and resourced – and not only formally attributed – in order to have political legitimacy? Undoubtedly, we can have elections and political competition also in the absence of the full realization of social justice, but would every citizen, in that case, share an equal control over the government? If we take the ideal of freedom as non-domination seriously, we should consider the effects of private (horizontal) domination in the citizens' capacity to actually exercise their procedural rights to control the government. If citizens do not enjoy the status of 'free person' at the societal level, they may share an equal *impact* in the political decision-making process,¹³ by reason of their right to vote, but they would not share an *equal opportunity of political influence*¹⁴ in terms of *powers* (p. 185). In order to actually share equal power on the government's decisions,¹⁵ citizens should see their procedural rights to take part to an individualized, unconditional and efficacious system of popular control 'resourced' and 'protected' not only against their infringement on the part of the government, but also against the potential infringement on the part of their fellow citizens. It follows that the full realization of social justice, embedded in the protection and resourcing of the

¹³ Ronald Dworkin, *Sovereign Virtue* (Cambridge: Harvard University Press, 2000), p. 191.

¹⁴ Pansardi, 'Democracy, Domination, and the Distribution of Power'; Harry Brighouse, 'Egalitarianism and Equal Availability of Political Influence', *Journal of Political Philosophy* 4 (2), 1996, pp. 118–141; Jack Knight, and James Johnson, 'What Sort of Political Equality Does Deliberative Democracy Require?'. In *Deliberative democracy: Essays on reason and politics*, ed. James Bohman, and William Rehg. (Cambridge: MIT Press, 1997), p. 293.

¹⁵ Pansardi, 'Democracy, Domination, and the Distribution of Power'. See also Pamela Pansardi, 'A Non-normative Theory of Power and Domination', *Critical Review of International Social and Political Philosophy*, 16 (5), 2013, pp. 614–633.

basic and the procedural liberties, should be thought of a necessary condition for political legitimacy.

III

Conclusion

The arguments set out in the final part of the previous section allow us to put forward the following claims. Although political legitimacy is considered, in republican terms, as more valuable than social justice, the former is, to an extent, dependent on the latter. Only the full entitlement, in terms of protection and resourcing, to the basic liberties – up to the ‘sufficient’ threshold identified by the eyeball test – can allow each citizen to fully enjoy *equal* ‘procedural rights’, understood as *powers*, in the control of the government. Accordingly, the promotion of private freedom as non-domination should be thought of as a necessary condition for the promotion of public freedom as non-domination. As a consequence, what Pettit labels social justice should not be thought of as the ‘substantive’ aim of the decisions or the policies that the government should implement, but rather as an *a priori* ‘procedural requirement’ for political legitimacy to be in place.¹⁶

University Of Pavia

¹⁶ Pansardi, ‘Democracy, Domination, and the Distribution of Power’.

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