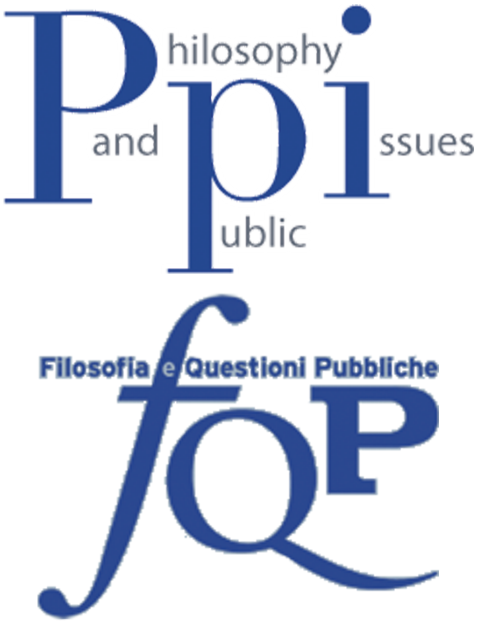
SYMPOSIUM

REPUBLICANISM BETWEEN JUSTICE AND DEMOCRACY




# KANTIAN REPUBLICANISM AND THE INTERNAL RELATION BETWEEN JUSTICE AND LEGITIMACY

BY

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# Kantian Republicanism and the Internal Relation
## Between Justice and Legitimacy

James Gledhill

It is a commonplace to observe that, under the influence of Rawls, Kantian ideas displaced utilitarianism from its dominant position within analytic political philosophy. And yet considerable obstacles remain to the assimilation of the Kantian framework, and the wider tradition of the philosophy of right. Much contemporary political philosophy remains Platonic in its focus on justice and the role of law in promoting justice; Lockean in its voluntaristic, natural rights view of the demands of legitimacy; and consequentialist in its concern for promoting just and/or legitimate states of affairs. As a result, all too often it fails to engage with central categories of modern political thinking centred on the idea and reality of the law-governed sovereign state. In this paper, I argue that a realistic approach to political theory requires a broader shift from a moral to a juridical frame of reference, in which legitimacy is understood in the context of the idea of sovereignty and the closely related concept of public law, or political right. In defending a form of Kantian Republicanism that draws upon the work of Habermas, I contrast this with the republican theory of legitimacy recently developed by Phillip Pettit.

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It is a commonplace to observe that, under the influence of Rawls, Kantian ideas displaced utilitarianism from its dominant position within Anglo-American political philosophy. And yet considerable obstacles remain to the assimilation of the Kantian framework, and the wider tradition of the philosophy of right. Much contemporary political philosophy remains Platonic in its focus on fact-independent principles of justice, and the instrumental role of law in promoting justice; Lockean in its voluntaristic, natural rights view of the demands of legitimacy; and consequentialist in its concern for promoting just and/or legitimate states of affairs. Sustained by a widely assumed, if often implicit, view of the genealogy of political thought, these assumptions mean that contemporary political philosophy all too often fails to engage with central categories of modern political thinking centred around the idea and reality of the law-governed sovereign state.[1]

My aim in this paper is to explicate and defend a form of Kantian Republicanism and to argue that it offers a distinctive and attractive way of understanding the relationship between justice and legitimacy. I will defend such an approach both in general terms, as a tradition of thought extending through Rousseau, Kant and Hegel to Rawls and Habermas, and specifically in the Habermasian form that I take to be the most adequate. In doing so, I will contrast this position with that of

[1] Admittedly this is a sweeping claim, but the general assumptions upon which it depends are neatly encapsulated in what G. A. Cohen took to be the three central questions of political philosophy: (i) What is justice? (ii) What should the state do? (iii) Which social states of affairs ought to be brought about? G. A. Cohen, "How to do Political Philosophy", in *On the Currency of Egalitarian Justice and Other Essays in Political Philosophy*, ed. Michael Otsuka (Princeton: Princeton University Press, 2010). See also the critical discussion in Jeremy Waldron, "*Political* Political Theory: An Inaugural Lecture", *Journal of Political Philosophy* 21 (2013): 1-23.

Phillip Pettit. In important recent work, Pettit has extended his republican theory of justice, according to which the state is tasked with promoting freedom understood as non-domination, to encompass a republican theory of legitimacy, which requires a system of democratic popular control over government.[2] While in many ways this brings Pettit's approach closer to a Habermasian conception of radical democracy, fundamental differences remain. In particular, Pettit has been concerned to defend the 'Italian-Atlantic' tradition of republicanism, and its idea of the mixed constitution, against the 'Franco-German' republican tradition, originating with Rousseau and Kant, and its unitary idea of sovereignty. My defence of Kantian Republicanism will therefore take the form of a broader defence of the Franco-German tradition of the philosophy of right. Even if ultimately problematic, Rawls's approach, which is one of Pettit's main targets for criticism, shares the idea of an internal relation between justice and legitimacy that is central to this tradition.

When it comes to Pettit's own position, I will argue that with respect to justice, there is a tension between Pettit's republicanism and his fundamental commitment to consequentialism, and that as a result his approach effaces considerations about the fundamental constitution of the authority of government. With respect to legitimacy, on the other hand, in making no recourse to the idea of popular sovereignty, and in seeing legitimacy as a binary property that states either possess of lack, I will argue that Pettit's theory offers inadequate guidance for making judgements of legitimacy.

Recent interest in the concept of legitimacy has been fuelled by the work of political realists, for whom legitimacy provides a

[2] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012).

necessary corrective to a liberal preoccupation with justice.[3] While Pettit does not describe his position as realist, he shares a realist opposition to ideal theory and, to some extent at least, a prioritisation of legitimacy over justice. However, realists often fail to move beyond the idea that political philosophy is applied moral philosophy, embracing a "prescriptive realism" in which justice as a strong standard of normative evaluation is replaced by legitimacy understood as a weaker one.[4] This leads to a fundamental ambivalence about the legitimacy of the state that Pettit's approach shares. In prioritising legitimacy over justice, such an approach provides a more realistic standard for the state to meet, while at the same time raising the stakes should the state continue, as is likely to be the case, to fail to meet this standard.

By contrast, I will argue that what is required is a broader shift from a moralistic to a juridical frame of reference in which legitimacy is understood in the context of the idea of sovereignty and the closely related concept of public law, or political right.[5] The relationship between justice and legitimacy that I will argue for is equivalent to the relationship between objective freedom and subjective freedom within a conception of political right. I will argue for two moves, then, in an understanding of justice and legitimacy and the relationship between them: first a procedural view of justice in which principles of justice constitute a practice of democratic constitutionalism and, second, a processual view of

[3] For a survey, see Enzo Rossi and Matt Sleat, "Realism in Normative Political Theory", *Philosophy Compass* 9 (2014): 689-701.

[4] This is Michael Freeden's term. See, Michael Freeden, "Editorial: Interpretative Realism and Prescriptive Realism", *Journal of Political Ideologies* 17 (2012): 1-11.

[5] For a related argument, see Terry Nardin, "Realism and Right: Sketch for a Theory of Global Justice", in Cornelia Navari (ed.) *Ethical Reasoning in International Affairs: Arguments from the Middle Ground* (London: Palgrave Macmillan, 2013).

legitimacy, according to which a practice of democratic constitutionalism is legitimate to the extent that it enables an ongoing developmental process in which the justice of such principles is open to challenge.

Appreciating the nature and appeal of Kantian Republicanism requires situating it within the Franco-German tradition of republicanism. To this end, I begin in section 1 by setting out Pettit's distinction between two republican traditions. In section 2, in endorsing the Franco-German tradition, I sketch an alternative genealogy of the development of political philosophy from the perspective of the concepts of sovereignty and political right, and seek to restore these concepts to their appropriate place. In sections 3 and 4, I turn to the fundamental conceptual differences in the understanding of justice and legitimacy that these competing narratives serve to uncover. In closing, in section 5, I provide reasons for thinking that the Habermasian framework of Kantian Republicanism provides the most adequate development of this kind of approach.

## I

## The Italian-Atlantic and Franco-German Republican Traditions

In recent writings, Pettit has sought not only to defend republicanism against liberalism, but also to defend the "Italian-Atlantic" tradition of republicanism against the "Franco-German" tradition.[6] Pettit recognises that both Rousseau and Kant defend a conception of freedom as non-domination,

[6] Pettit, *On the People's Terms*, pp. 11-18; Philip Pettit, "Two Republican Traditions", in Andreas Niederberger and Philipp Schink (eds.) *Republican Democracy: Liberty, Law and Politics* (Edinburgh: Edinburgh University Press, 2013).

understanding freedom in terms of independence from the will of others. But he argues that they depart from the Italian-Atlantic tradition in two crucial respects. In the first place, both reject the idea of the mixed constitution associated with civic republicanism. While civic republicans argue that governmental powers should be separated and shared out among mutually checking centres of power, Rousseau and Kant argue that sovereignty must be absolute and undivided. Second, they are also united in rejecting the civic republican idea of contestatory citizenship that complements its commitment to the mixed constitution. This applies both to Kant's notorious opposition to the right to resist the sovereign and Rousseau's vision of popular sovereignty in which individual citizens must confirm to the general will of the collectivity. Taken together, in Pettit's view this means that despite their fundamental normative commitments, both end up departing entirely from the Italian-Atlantic tradition.

Pettit traces the roots of both of these departures to the idea of sovereignty that Rousseau and Kant inherit from Bodin and Hobbes, showing some sympathy for alternative views of sovereignty in which the constituent power of the people is not subsumed within the constituted power of the state.[7] However, I think there is a more complex—indeed, dialectical—story to be told about how the very idea of sovereignty opens up a field of debate about the role of the government and people in the

[7] Pettit, *On the People's Terms*, 288-92. Andreas Kalyvas distinguishes between an absolutist tradition of sovereignty which, in addition to Bodin and Hobbes, he takes to include Samuel Pufendorf, Benedict de Spinoza, John Austin and Max Weber, and a tradition focused on the constituent power of the people, comprising George Lawson, John Locke, Thomas Paine, Emmanuel Sieyès and Carl Schmitt. Rousseau, Kant and Hegel are conspicuous by their absence, for they do not sit neatly on either side of this distinction. Andreas Kalyvas, "Popular Sovereignty, the Constituent Power, and Democracy", *Constellations* 12 (2005): 223-44.

representation of the sovereignty of the state. Only in this way is it possible to make sense of how the idea of sovereignty develops within the tradition of the philosophy of right. The necessity of engaging with this development is a demand of realism in a twofold sense. First, the reality of the modern sovereign state and the threats it poses cannot be wished away. But, second, it should be recognised how progressive conceptions of popular sovereignty have been articulated in opposition to—indeed as the negation of—absolutist conceptions.

If, in line with Rawls, one traces the origins of liberalism to the Wars of Religion and the principle of religious toleration, then Bodin and Hobbes will have an important place in this story. The modern idea of sovereignty establishes the domain of the political as one independent of the person of the sovereign and of religious doctrines, thereby establishing the basis for a political liberal idea of equal citizenship. Since he recognises the motivations of Bodin and Hobbes in overcoming religious conflict and acknowledges that republicanism is a corrective to aspects of liberalism rather than a competitor, there is no reason to believe that Pettit would dispute this importance. Nevertheless, it is worth noting that what is in dispute between Pettit's republicanism and Kantian Republicanism is how freedom as non-domination can be realized within the institutions of the modern liberal state, not whether there exists a comprehensive alternative to this political order.[8]

Central to the genealogy of the development of the idea of sovereignty is the category of pubic law, or political right. The inherent complexity of this idea is compounded by the lack of a natural English translation, and within the Anglo-American tradition the concept of political right plays little role in the

[8] Thus Pettit acknowledges that his approach might be described as republican liberalism or liberal republicanism. Pettit, *On the People's Terms*, 11, n. 8.

dominant narratives of political thought. However, the inescapability of the concept, and the continuing need to come to terms with it, is evident from a cursory scan of the modern canon, from Rousseau's *Social Contract*, with its subtitle *Principles of Political Right* (*Principes du droit politique*) and Kant's *Metaphysics of Morals*, with its first part the *Doctrine of Right* (*Rechtslehre*), through Hegel's *Elements of the Philosophy of Right* (*Grundlinien der Philosophie des Rechts*) and the work of later Idealists, up to Habermas. The publication of Habermas's major work of political philosophy in English as *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* somewhat obscure its place within this tradition. A more literal rendering of its subtitle would make clear that it is a discourse theory of right and the democratic constitutional state (*Rechts und des demokratischen Rechtsstaats*). Lest it seem entirely foreign to the Anglo-American tradition, one need only note that Rawls is explicit that he aspires to establish a 'complete conception of right', a point to which I return below.[9]

Given the increasing interest in the specificity of Kant's legal and political philosophy, there is less need to argue for the distinctiveness and importance of the idea of political right than there once might have been.[10] However, it remains difficult to make sense of the idea within dominant conceptual frameworks, and such difficulties are manifested in Pettit's analysis. In Pettit's narrative, while the "liberal opposition" represents the final nail in the coffin of the republican tradition, Rousseau inaugurates an earlier "communitarian opposition."[11] Kant is also placed in this communitarian camp, although the inaptness of this designation

[9] John Rawls, *A Theory of Justice*, revised edn. (Cambridge, MA: Harvard University Press, 1999), 95.
[10] Particularly in the wake of Arthur Ripstein, Force *and* Freedom*: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009).
[11] Pettit, *On the People's Terms*, 11-18.

is apparent in Pettit's qualification that he is using the term communitarianism in a way that does not imply contextualism.[12] What needs to be recognized, I think, is that Pettit is setting himself against more than a communitarian version of republicanism, but against the very idea of sovereignty in its modern sense.

In arguing for framing the debate in terms of the competing tradition of the philosophy of right, as opposed to that of a communitarian republicanism, I will adopt a different approach to the history of political thought. Pettit is clear that he is engaged in building philosophically on the republican tradition rather than relying on the idea that there is a continuous thread of republican ideas running up to the present.[13] However, this involves making a historical jump from the 17th century to the present that passes over the history of the development of the modern state.[14] It has been argued that Pettit's interest in putting the civic republican tradition to modern use results from sympathy with its elitism, but this criticism is uncharitable and overblown.[15] Rather, Pettit's revival of civic republicanism comports easily with his

[12] Kant is only mentioned in passing in *On the People's Terms* (12 n. 9), but the argument is elaborated in more detail in Pettit, "Two Republican Traditions." The unhelpfulness of the communitarian label is further apparent in the suggestion that Hannah Arendt and Michael Sandel are inspired by the Rousseauian version of republicanism. Sandel is more concerned with an Aristotelian idea of personal virtues, while Arendt is a noted critic of Rousseau's idea of the general will and of the idea of sovereignty more broadly.

[13] Pettit, *On the People's Terms*, 18-21.

[14] My criticism here parallels that of Martin Loughlin—whose work I draw upon in the next section—in his critique of Adam Tomkin's republican constitutional theory. Martin Loughlin, "Towards a Republican Revival?" *Oxford Journal of Legal Studies* 26/2 (2006).

[15] John P. McCormick, "Republicanism and Democracy", in Andreas Niederberger and Philipp Schink (eds.) *Republican Democracy: Liberty, Law and Politics* (Edinburgh: Edinburgh University Press, 2013).

fundamental commitment to consequentialism. For Pettit, as with the classical utilitarianism, the fundamental form and constitution of the state, and its authority, is taken as given and the question for political philosophy is what normative goals ought to be pursued by the government. In contrast, I will suggest that there is a continuing conversation about the constitution and locus of authority of the state, and that the Kantian Republicanism that I wish to defend is continuous with this tradition.

## II

## Franco-German Republicanism and the Philosophy of Right

The historical development of public law, or political right, may be divided into three phases: the establishment of the concept of the state, or sovereignty; the birth of modern constitutionalism in the English, American and French revolutions; and the subsequent development of modern regimes of government. Imposing a simplifying framework upon a complex historical story, a recognisable pattern is discernible in the first two phases, in which the articulation of the sovereignty of the state forms the basis for the assertion of the sovereignty of the people, upon which the power of the state depends.[16]

Public law is a product of modernity, representing the secularization, rationalization and positivization of the idea of fundamental law, itself based on natural law. The birth of public law, associated with Bodin, involves the birth of an autonomous

[16] In sketching this genealogy of sovereignty I draw upon Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010). This reflects my overall view that a juridical perspective is essential to an adequate understanding of the canon and a necessary corrective to the political moralism that informs the interpretation of the history of political thought in much contemporary political philosophy.

secular political order that is detached from both a transcendent religious source of authority and the person of the ruler. Bodin's establishment of the idea of absolute sovereignty is concerned with both constitutive rules for the establishment of a state—the formal logic of sovereignty—and the regulative rules and practices through which power is exercised within this framework. The constitutive rules of sovereignty place restrictions on power, establishing the right to rule, distinguishing public from private, and promoting religious toleration, but this enables practices that enhance the sovereign's capacity to rule. Modern natural law, epitomised by the work of Hobbes, can be seen as the rationalization of Bodin's thought. Hobbes explains the formation of the state through a contract, but as a consequence of individuals alienating their natural rights, the state is established as autonomous. Law and right are separated through the identification of law with the commands of the sovereign. However, as with Bodin, the criteria constitutive of sovereignty, the capacity to maintain peace, leaves citizens free to pursue their ends where the law is silent and establishes conditions of religious toleration. In this way, from the start, the capacity of the state to maintain its power is shot through with normative principles.

Crucial to my defence of the Franco-German tradition is the idea that popular sovereignty, of the people as the repository of sovereignty, 'takes shape in the mirror of monarchical power'.[17] The absolute sovereignty of the people as asserted against the absolute sovereignty of the ruler. Thus, for example, Johannes Althusius, argues against Bodin that the right of sovereignty is equivalent to the right of the realm, that is, the sovereignty of the

[17] Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion*, trans. O. Burge (Princeton: Princeton University Press, 1997), 58, quoted in Loughlin, *Foundations of Public Law*, 63.

associated body of the people, rather than the sovereignty of the ruler. In turn, Rousseau's *Social Contract* can be seen as turning a Hobbesian conception of sovereignty on its head. In Rousseau, political right take the place of natural law. Whereas Hobbes's equation of liberty with the silence of the laws takes the issue of state formation off the agenda, Rousseau reopens the issue through the idea of the right ordering of the state. The relational logic of liberty and law is re-established through the idea of autonomy or self-government. Contrary to Hobbes, the sovereign is not a single man or a representative office but the public person formed by the assembled people. Sovereignty, or the exercise of legislative power, is distinguished from government, or the execution of the laws.

In reinterpreting Rousseau's idea of the social contract as an idea of reason, Kant's *Rechtslehre* threatens to sever the relationship between individual autonomy and political right. For Kant, it is only through law and the establishment of governmental order that freedom can be realized. One can accept the importance of Kant's view in establishing the idea of the modern law-governed state while recognising that it is Hegel who raises the question of how Rousseau's vision can be reconciled with modern social forms.[18] Hegel can therefore be seen as occupying a fundamentally important place in the Franco-German republican tradition. Despite his professed opposition to Rousseau, he is best understood as concerned with how a Rousseauian idea of the general will can be realized in the institutions of the modern state.[19]

[18] Frederick Neuhouser, *Foundations of Hegel's Social Theory* (Cambridge, MA: Harvard University Press, 2000).

[19] On Hegel as a civic republican, see Paul Franco, *Hegel's Philosophy of Freedom* (New Haven: Yale University Press, 1999); James Bohman, "Is Hegel a Republican? Pippin, Recognition, and Domination in the Philosophy of

The fundamental insight to be gained from considering the tradition of political right is the distinction between public law and positive law, sovereignty and government. The tendency of Anglophone discourse to conflate the two is bound up with the fact that English lacks the vocabulary for distinguishing between 'law as an instrument of government (*lex*, *la loi*, *das Gesetz*)' and 'law as an expression of the constitutive principles of right ordering (*ius*, *le droit*, *das Recht*)'.[20] Following this tradition, it is necessary to replace a twofold schema of ruler and ruled, government and citizens, with a threefold scheme of state, government and people. Such an approach unsettles the accepted frameworks of Anglo-American political philosophy.[21] The tradition of the philosophy of right rejects the idea of pre-political natural rights that necessitate a justification of the state, taking freedom to be constituted by law and therefore the state to be essential to rather than inimical to freedom. But while taking the state to be necessary, the state is not equated simply with the government, which would allow one to immediately proceed to the question of what the government should do. Rather, the concept of political right concerns the rational authority of the state. What this serves to emphasise is that the tradition of Kantian Republicanism is not opposed to the separation of the powers of *government*, but rather to the possibility, as a conceptual

Right", *Inquiry* 53/5 (2011); Andrew Buchwalter, *Dialectics, Politics, and the Contemporary Value of Hegel's Practical Philosophy* (New York: Routledge, 2012).

[20] Loughlin, *Foundations of Public Law*, 8-9.

[21] For many, a focus on what ought to be done by government is definitive of the task of political theory. For a particularly clear statement of this view, see John Plamenatz, "The Use of Political Theory", *Political Studies* 8 (1960), who argues that that the use of political theory is to provide a normative theory of the purposes of government in contrast to a descriptive theory of how governments function.

and not simply a practical matter, of separating or dividing *sovereignty*.[22]

While the concept of political right might be translated as either justice or legitimacy, neither wholly suffices. To the extent that it is concerned with the ordering of the state, it reflects concerns similar to those usually discussed with reference to social justice. However, this is not an idea of justice defined independently of law, but rather based on a normative idea of freedom intrinsic to law, understood in terms of political right.[23] In requiring that principles of right should be capable to being endorsed by free and equal citizens, it reflects concerns that would usually be associated with the idea of legitimacy, but it makes no appeal to the idea of consent, whether explicit, tacit or hypothetical. Rather, with Rousseau there originate the idea that it is the free will that is the principle of the modern state.[24] Indeed,

[22] As Ingeborg Maus puts it, "The demand that all sovereignty be concentrated 'undivided' in the people is identical to the demand for a separation of powers between the legislature and the executive; it is intended to prevent regressions to absolutistic systems in which sovereignty and the monopoly on force coincide." My argument does not depend, however, on the truth of Maus's claim that an adequate conception of popular sovereignty is already to be found in the work of Rousseau and Kant themselves. Ingeborg Maus, "Liberties and Popular Sovereignty: On Jürgen Habermas's Reconstruction of the System of Rights", in *René von Schomberg and Kenneth Baynes (eds.)* Discourse and Democracy: Essays on Habermas's *Between Facts and Norms (Albany: State University of New York Press),* 117.

[23] As H. L. A. Hart observes, while the idea of political right seems to Anglophone theorists "to hover uncertainly between law and morals", it marks out a sphere of morality, the morality of law, with special characteristics, "occupied by the concepts of justice, fairness, rights, and obligations." H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review* 64 (1955), 177-78. This idea can be seen as exercising a decisive influence over Rawls's approach.

[24] As Hegel puts it, "it was the achievement of Rousseau to put forward the *will* as the principle of the state, a principle which has thought not only as its form (as with social instinct, for example, or divine authority) but also as its content,

for the whole tradition of political right, extending from Rousseau, Kant and Hegel through Rawls and Habermas, it is the free will rather than any notion of consent that is central to the question of legitimacy. Hegel's account of social freedom involves two dimensions. It has an *objective* aspect, requiring that rational laws and institutions must constitute the status of being a free citizen and secure the social conditions necessary to realise this freedom. It also has a *subjective* aspect according got which rational laws and institutions must make it possible for citizens to affirm them as good, and good for the right reason; that is, because they realize freedom in such a way that citizens can regard the principles that constitute their fundamental political institutions and their political relations as coming from, or congruent with, their own wills.[25]

In the next two sections, I will focus on Pettit's conceptions of justice and legitimacy and, through appealing to the framework of the philosophy of right and the requirements of objective and subjective freedom, I will argue that Pettit ought to move in the direction of the Franco-German tradition of republicanism is his understanding of both justice and legitimacy. Pettit principally contrasts his approach with Rawls's, arguing for more clearly separating the issues of social justice and legitimacy. While I will defend Rawls's conceptual framework, I will argue that Pettit is successful in drawing attention to deficiencies that result from its reliance on a Rousseauian idea of the general will. However, a Habermasian Kantian Republicanism represents an attractive way of continuing the Franco-German republican tradition that can

and which is fact thinking itself." G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. A. Wood. (Cambridge: Cambridge University Press, 1991), §258R.

[25] Neuhouser, *Foundations of Hegel's Social Theory*. See also, Kenneth R. Westphal, "Hegel's Standards of Political Legitimacy", *Jahrbuch für Recht und Ethik* 10 (2002).

respond to these criticisms. Central to my argument is the idea that justice and legitimacy have to be understood as interrelated. The role that legitimacy plays within a theory is conditioned by its understanding of justice. Before turning to the issue of legitimacy, then, it is first necessary to look at justice.

## II

## Republican Justice, or Objective Freedom

In line with his fundamental consequentialist orientation, for Pettit, freedom as non-domination is "an ideal for the state to promote."[26] Justice concerns the horizontal relations between private citizens that are ordered by the state, whereas legitimacy concerns the vertical relation between the government and its citizens. From the perspective of Kantian Republicanism, though, republicanism and consequentialism appear as fundamentally incompatible.[27] Indeed, radicalising a republican demand of freedom, Kantian Republicanism requires that the idea of freedom as non-domination be applied reflexively to the very justification of a conception justice. The demands of freedom as non-domination apply at a more fundamental level to the very constitution of the authority of government. This involves

[26] Pettit, *On the People's Terms*, 3. For Pettit, consequentialism is the idea that "the right alternative in any choice is a promotional function of the agent-neutral good." Philip Pettit, "The Inescapability of Consequentialism", in Ulrike Heuer and Gerald Lang (eds.) *Luck, Value and Commitment: Themes from the Ethics of Bernard Williams* (Oxford: Oxford University Press, 2012). This good can be defined in terms of freedom just as much as it can be defined, in utilitarian terms, as welfare.

[27] See also Rainer Forst, "A Kantian Republican Conception of Freedom as Nondomination", in Andreas Niederberger and Philipp Schink (eds.) *Republican Democracy: Liberty, Law and Politics* (Edinburgh: Edinburgh University Press, 2013).

nothing less than an inversion of the relationship between justice and legitimacy as this is commonly understood. Pettit's approach grants the state the right to impose a theory of justice upon citizens, and then seeks to ensure that this is subject to the democratic control of citizens. Kantian Republicanism, on the other hand, demands that government act within a framework of principles that can be justified to persons as free and equal citizens. Rather than social justice being an independently justified end that the government seeks to promote, raising the danger that the state becomes a dominating power in doing so, social justice becomes a condition of the legitimacy of the state, or in other words, a condition of political right.

This reflects Rousseau's fundamental legacy, namely the idea that political right is an intersubjective relation.[28] As Habermas argues, Rousseau is the first to introduce a procedural idea of political right (or a normative idea of legitimacy), in which, rather that depending upon serving external substantive values, the rational authority of the state depends upon principles of political right that realise the objective and subjective freedom of citizens.[29] Rawls's commitment to such an intersubjective conception of political authority is evident in the idea that the

[28] "[R]ational authority for Rousseau, is possible only intersubjectively—that is, as a network of relations of recognition among individual subjects, in which the sovereignty of each and the subjection of each to the whole are simultaneously acknowledged. Or, to put the point in Hegelian terminology: rational authority is an inherently 'spiritual' phenomenon, one that comes to be only through a supraindividual subject whose structure is that of an 'I' that is a 'we' and a 'we' that is an 'I'." Neuhouser, *Foundations of Hegel's Social Theory,* 216-17.

[29] Jürgen Habermas, "Legitimation Problems in the Modern State", in *Communication and the Evolution of Society*, trans. Thomas McCarthy (Cambridge: Polity, 1991).

power of the state is the power of the people collectively. As he puts it:

> political power is always coercive power backed by the government's use of sanctions, for government alone has the authority to use force in upholding its laws. In a constitutional regime the special feature of the political relation is that political power is ultimately the power of the public, that is, the power of free and equal citizens as a collective body.[30]

Justice, on such as view, becomes a horizontal relation between citizens, but in their public capacity as authors and not simply addressees of the principles of justice that constitute their political association, not as private persons whose relations are to be ordered by government.

Pettit contrasts his clear conceptual distinction between social justice and political legitimacy with Rawls's approach, in which the distinction between these two concepts is seemingly blurred in a conception of comprehensive or "social-cum-procedural justice."[31] Pettit first establishes the basic liberties required by social justice, which the state must properly resource, and then turns to considering political liberties in a second stage when considering the demands of legitimacy. Rawls, on the other hand, includes political liberties within his two principles of justice, which results, on Pettit's view, in a devaluation of the question of legitimacy. Rawls's position appears differently, however, when viewed from the perspective of the tradition of the philosophy of right. Rawls is explicit that his concern it to develop a "complete theory of right", comprising principles for institutions, individuals

[30] John Rawls, *Political Liberalism*, pbk edn. (New York: Columbia University Press, 1996), 136
[31] Pettit, *On the People's Terms*, 143-44.

and the law of nations.[32] The principles agreed upon in the original position must meet the Rousseauian-Kantian "formal constraints of the concept of right": they must be general, universal, public and complete.[33] Only in this way will they respect the demand that they be justifiable to persons as free and equal citizens. For Rawls, as for Rousseau, limitations on material inequality are a requirement of the legitimacy of the social order. Pettit objects that Rawls does not guarantee the resourcing required to ensure that liberties will be effective and not merely formal. This neglects the requirement that the fair value of the political liberties be guaranteed. More importantly, however, it neglects the fact that, in accordance with the four-stage sequence of application of the principles of justice, the first principle is a constitutional principle. The requirements of social justice are addressed at the legislative stage within this constitutional framework.

While the approach that I will defend is Habermasian rather than Rawlsian, getting clearer about how Rawls understands the relationship between justice and legitimacy is helpful for preparing the way. For situating Rawls's approach within a tradition of the philosophy of right shows that his position is not a confused blurring of two distinct concepts, but the continuation of a venerable tradition. As part of a full conception of political

[32] Rawls, *A Theory of Justice*, 93-98. This aspect of Rawls's view has been little discussed. One exception to this inattention is Jon Mandle, *Rawls's* A Theory of Justice*: An Introduction* (Cambridge: Cambridge University Press, 2009). Thomas Pogge jests that with G. A. Cohen's rescue of justice from Rawls successfully accomplished, via the distinction between fundamental principles of justice and mere rules of regulation, "the next edition of John Rawls's bestseller will bear the endearing title *A Theory of Regulation*." Thomas Pogge, "Cohen to the Rescue!" *Ratio* 21/4: 455-56. However, I think it would do no violence to Rawls's text if it were retitled *A Theory of Right*.

[33] Rawls, *A Theory of Justice*, 112-18.

right, Rawls's procedural principles of justice are designed to constitute persons as free and equal citizens in a manner that ensures objective freedom. Social justice enters as a constitutive part of this ideal of the rightful ordering of the state. Rawls's concern for stability—the congruence between the right and the good—reflects a concern with subjective freedom, that is, whether persons can feely will principles of justice as free and equal citizens. I will discuss this further in the next section.

It might be argued that I have exaggerated the extent to which Pettit's justificatory approach differs from Rawls's, and indeed the rest of the tradition of the philosophy of right. After all, Pettit follows Rawls in appealing to the capacity of a conception of freedom as non-domination to bring our considered judgements of justice into reflective equilibrium. But the analogy cannot be sustained, given that Pettit presents a philosophical theory that excavates an idea of freedom that he takes to have been almost completely buried by the triumph of liberal negative liberty. Like utilitarian theories, it remains a theory in the sense of a theory of government to guide the actions of policy-makers, albeit ones who are dependent upon the support of citizens. It therefore departs from Rawls's approach, in which a theory is offered to citizens generally as an explication of the relationship between objective freedom and subjective freedom upon which the legitimacy of the state depends.

## IV

## Republican Legitimacy, or Subjective Freedom

I have argued that Pettit ought to follow Rawls in applying the demands of republican freedom to the justification of a conception of justice, and therefore adopting a procedural view of justice. In place of Pettit's distinction between vertical and

horizontal axes, this results in an intersubjective conception of the rational authority of the state. Having done so, the question of legitimacy will appear differently. For Pettit, the state, which in this case can be read as synonymous with government, is tasked with guarding its citizens against private domination by their fellow citizens, but must in doing so avoid becoming a dominating power, exercising a form of public domination over citizens. The state needs to be forced to operate "on the people's terms." As Pettit puts it, then:

> The social justice question bears … on the character of the rules that determine the claims that citizens have, relative to one another, within the state. The legitimacy question bears on the way in which that set of rules—and any other associated rules—is imposed on citizens.[34]

That is, the question of legitimacy concerns whether "it [the state] can treat citizens well and equally in ordering their relations with the coercive state itself; whether it can provide for their equal undominated status in those relations."[35] This would be achieved if citizens shared equally in a system of democratic control over the state.

In emphasising the distinctness and importance of the question of legitimacy as opposed to that of justice, Pettit follows A. John Simmons and the Lockean tradition of natural rights.[36] From this perspective, Kant can be seen as suppressing the problem of legitimacy, moving from a demand of express consent to merely hypothetical consent. With the dominance of utilitarianism, under the influence of Bentham and Mill, the question of legitimacy is then fully suppressed. The turn to neo-

[34] Pettit, *On the People's Terms*, 141.
[35] Pettit, *On the People's Terms*, 147.
[36] A. John Simmons, "Justification and Legitimacy", *Ethics* 109/4 (1999).

Kantian approaches inaugurated by Rawls does little to change things on this view, for it adopts a Kantian idea of hypothetical consent. A concern with whether the state is properly supported on the basis of reasons that persons possess is replaced with the question of whether the state has an intrinsic character. [37]

In contrast to Simmons, however, having opened up space for consideration of the independent question of the legitimacy of the state, Pettit proceeds to narrow its demands.[38] First, on grounds similar to Kant, he argues that states are necessary in the modern world and that the challenge of anarchism is not one that his theory of legitimacy need directly confront. Second, he argues that what is required for the state to be legitimate is not consent, as in the Lockean tradition, but democratic control. Furthermore, he recognises that in practice, if not in theory, it is unlikely that social justice and political legitimacy will come apart.[39] I have argued that Pettit should recognise that any scheme of social justice that was imposed upon persons in a way that they could not will as free and equal citizens would *ipso facto* be unjustified. Having made this move, the role of legitimacy, or subjective freedom, and the way that Rawls treats this issue, appears in a different light.

As I have already suggested, the accepted narrative of the way that classical social contract theory takes the question of the legitimacy of the state off the agenda, with its focus on Locke and the idea of consent, misconstrues the significance of the tradition of the philosophy of right running through Rousseau, Kant and Hegel up to Rawls and Habermas. What is important in this

[37] Pettit, *On the People's Terms*, 144.

[38] For a critique, see Robin Douglass, "Control, Consent and Political Legitimacy", *Critical Review of International Social and Political Philosophy* (2014), doi: 10.1080/13698230.2014

[39] Pettit, *On the People's Terms*, 131.

tradition is not consent but will. Political right is neither an intrinsic property nor what persons pre-reflectively endorse. With respect to Kant, as Onora O'Neill has argued, his claim is modal rather than hypothetical, that is, it concerns what persons could will as free and equal rather than that to which they could consent.[40] With Hegel, this idea of objective freedom is complemented by an idea of subjective freedom, according to which citizens must be able to regard principles of justice as a product of their collective will. There is an internal relation between objective and subjective freedom, social freedom consisting in the unity of objective and subjective freedom.

Far from suppressing the question of legitimacy, as Pettit argues, Rawls is best seen as following in this tradition. From the point of view of objective freedom, Rawls argues that a procedural conception of justice for a democratic society is constructed in accordance with a constraint of legitimacy that establishes what it means to seek agreement between persons qua free and equal citizens. From the point of view of subjective freedom, according to Rawls's liberal principle of legitimacy, "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."[41] In other words, power must be exercised collectively by citizens in accordance with principles that would be chosen in the original position, or more simply still, principles

[40] Onora O'Neill, "Kant and the Social Contract Tradition", in Elisabeth Ellis (ed.) *Kant's Political Theory: Interpretations and Applications* (University Park: Pennsylvania State University Press, 2012).
[41] Rawls, *Political Liberalism*, 137.

that are just, in the procedural sense of being principles of political right.[42]

While I do not seek to explore or defend the details of Rawls's view, I do want to defend its overall structure. Rawls argues that political authority cannot be freely accepted in the same way as, when afforded liberty of conscience, one may freely chose to accept ecclesiastical authority. Unlike non-public associations, the fundamental political association of the state exerts an immediate and profound influence over our lives. In support of the view that Rawls relies on a conception of "current consent", however, Pettit cites Rawls's remark that

> we may over the course of life come freely to accept, as the outcome of reflective thought and reasoned judgement, the ideals, principles, and standards that specify our basic rights and liberties, and effectively guide and moderate the political power to which we are subject. This is the outer limit of our freedom.[43]

[42] I take this to be reflected in Sebastiano Maffettone's distinction between justice and legitimation in Rawls's work. See, Sebastiano Maffettone, *Rawls: An Introduction*. Cambridge: Polity, 2010). This interpretation contrasts with the idea that *Political Liberalism* is about legitimacy as opposed to justice. It also involves interpreting Rawls's liberal principle of legitimacy in a way that runs counter to Rawls's treatment of the contrast between justice and legitimacy in §5 of his 'Reply to Habermas'. Rawls, *Political Liberalism*, 429, n.76. Here, however, I follow the analysis of Simmons, who points out that Rawls's discussion in his 'Reply to Habermas' is concerned with the legitimacy of government and laws rather than state legitimacy, or the legitimacy of the constitution, and argues that Rawls's notions of justice and legitimacy are more closely related than commonly supposed. Simmons, "Justification and Legitimacy", 759-60, n. 48. However, I draw the opposite conclusion to Simmons: rather than seeking to separate justice and legitimacy, we should building on the way in which Rawls recognises that they are interrelated.

[43] Rawls, *Political Liberalism*, 222, quoted in Pettit, *On the People's Terms*, 158.

But Rawls's own gloss on this remark offers reasons to believe that what is doing the work is not consent, but rational endorsement of principles of political right. For he comments: "Here I accept the Kantian (not Kant's) view that what we affirm on the basis of free and informed reason and reflection is affirmed freely; and that insofar as our conduct expresses what we affirm freely our conduct is free."[44] It is what citizens can come to will freely, and not whether they consent to political authority, that is important.

Second, Rawls emphasises that within justice as fairness, justice and legitimacy, or in my terms, objective and subjective freedom, work in tandem:

> the guidelines of inquiry of public reason, as well as its [liberal] principle of legitimacy has the same basis as the substantive principles of justice. This means in justice as fairness that the parties in the original position, in adopting principles of justice for the basic structure, must also adopt guidelines and criteria of public reason for applying those norms. [45]

This offers clear evidence that as opposed to turning from justice to legitimacy, Rawls continued to regard his project as one or articulating a complete conception of right. Principles of justice, or principles of objective freedom, apply to the basic structure and constitute persons as free and equal citizens. The liberal principle of legitimacy, or the conditions of subjective freedom, concern the virtues of citizenship in the relationship between citizens within the basic structure, including political virtues of reasonableness and the duty of civility.

And yet Pettit is right to identify problems in Rawls's treatment of legitimacy that lead to shortcomings from the point

[44] *Ibid*., 222 n. 9.
[45] *Ibid*., 225.

of view of the idea of contestatory citizenship. Ironically, though, it the aspect of Rousseau's view from which Pettit ostensibly takes inspiration, namely Rousseau's idea of deliberation, that is most inimical to a radical democratic conception of republicanism.[46] This is well brought out by Bernard Manin. As he puts it, "Rousseau's individuals are already supposed to know what they want when they come to a public assembly to decide in common." They "do not deliberate, not even within themselves."[47] Or as Habermas puts the point, Rousseau's is an idea of "democracy without public debate", "more a consensus of hearts than of arguments."[48] Strikingly, as Manin points out, all the elements of Rousseau's conception—the requirement for unanimity, the absence of communication and the predetermined will of individuals—are present in Rawls's idea of the original position. Furthermore, this remains the case when one considers how the standpoint of the original position is to be mirrored in practice through Rawls's interconnected ideas of an overlapping consensus and public reason. [49] Rawls's idea of public reason is

[46] Pettit, *On the People's Terms*, 15-16.

[47] Bernard Manin, "On Legitimacy and Political Deliberation", *Political Theory* 15 (1987): 346, 347. See especially Jean-Jacques Rousseau, *The Social Contract*, in *The Social Contract and other later political writings*, ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), 73. Admittedly, this interpretation is controversial. Notably, Joshua Cohen rejects such a view. Joshua Cohen, *Rousseau: A Free Community of Equals* (Oxford: Oxford University Press, 2010), 76-77. While suggesting that Rousseau does not always employ the idea of deliberation in this way, Neuhouser broadly accepts Manin's interpretation. Frederick Neuhouser, *Rousseau's Theodicy of Self-Love* (Oxford: Oxford University Press, 2008), 202 n.27.

[48] Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge: Polity, 1989), 99, 98.

[49] See further, Michael Saward, "Less than Meets the Eye: Democratic Legitimacy and Deliberative Theory", in Michael Saward (ed.) *Democratic Innovation: Deliberation, Representation and Association*. London: Routledge, 2000); Michael Saward, "Rawls and Deliberative Democracy", in Maurizio Passerin

best seen as appealing to this Rousseauian idea of deliberation. It is not an idea of public reasoning, in the Habermasian sense of discourse or real processes of argument, even if it is often seen as such.

Notwithstanding these problems with Rawls's approach, its overall conceptual structure remains instructive. Consent operates as the gold standard for legitimacy within much contemporary political philosophy, but it plays only a minor role within the history of political thought, and plays no role within the tradition of the philosophy of right, within which it is the rational will and not consent that is crucial to the legitimacy of the state. Viewed from this perspective, far from devaluing the importance of legitimacy, Rawls can be seen as following a—if not the—leading modern tradition concerned with the rational authority of the state. I have argued, though, that Pettit is right to point to problems with Rawls's approach from the point of view of contestatory citizenship, and that these result from Rawls's inheritance of a Rousseauian idea of the general will. However, acknowledging these difficulties does not entail embracing Pettit's

d'Entreves (ed.) *Democracy as Public Deliberation* (Manchester: Manchester University Press, 2002). While Rawls is not a *discursive* democrat—in the sense of John S. Dryzek, "Discursive Democracy vs. Liberal Constitutionalism", in Michael Saward (ed.) *Democratic Innovation: Deliberation, Representation and Association* (London: Routledge, 2000—he can be seen as a deliberative democrat *avant la lettre*, in the sense in which the terms was coined by Jospeh Bessette to describe a tradition of American constitutionalism concerned to ensure that majority rule took a considered and deliberate form. Joseph M. Bessette, "Deliberative Democracy: The Majority Principle in Republican Government", in Robert Goldwin and William Shambra (eds.) *How Democratic is the Constitution?* (Washington, DC: American Enterprise Institute, 1981). In just this sense, Rawls takes majority rule to be subservient to a democratic constitution, whose role is to "compel a majority to delay putting its will into effect and force it to make a more considered and deliberate decision." Rawls, *A Theory of Justice*, 201.

conclusion that contestatory citizenship is best secured by a mixed constitution. Turning to Habermas, I will argue, finally, that what is required to overcome the deficiencies of Rawls's approach is a move to a processual understanding of legitimacy within which the idea of the general will serves as a regulative ideal.

## V

## The Internal Relation Between Justice and Legitimacy

Pettit notes the fact that Habermas also rejects Rousseau's communitarian republicanism, and indeed that Habermas's approach shares many of the features of his own republicanism. [50] But he gives no consideration to the way in which Habermas has sought to revise Rousseau's framework, in an approach that he refers to as Kantian Republicanism. On this view, political justice is a matter of constructing a system of rights that enables voluntarily associated free and equal citizens to legitimately regulate their collective lives through positive law, in accordance with a Rousseauian-Kantian idea of self-legislation.[51] Habermas presents this idea in terms of an internal relation between law and

[50] "For the record I think that Habermas's own views come close to republican views, as I conceptualize and defend them." Pettit *On the People's Terms*, 12, n. 11.

[51] For the idea of political justice, see especially Jürgen Habermas, "Reply to Symposium Participants", in Michel Rosenfeld and Andrew Arato (eds.) *Habermas on Law and Democracy: Critical Exchanges* (Berkeley: University of California Press, 1998), 406; Jürgen Habermas, "Reply to My Critics", in James Gordon Finlayson and Fabian Freyenhagen (eds.) *Habermas and Rawls: Disputing the Political* (New York: Routledge, 2011), 294-95.

democracy.[52] It might also be described an internal relation between the normative and sociological aspects of legitimacy. In the terms of my argument, it emerges as a clear example of an internal relation between (political) justice and legitimacy, when this is understood as an internal relation between the objective and subjective dimensions of political right. Habermas's Kantian Republicanism is republican in maintaining a Rousseauian idea of popular sovereignty, but in place of Rousseau's substantive idea of a self-governing people, it adopts a Kantian idea of legitimacy as involving the collective construction of positive law through the influence of procedures of the public use of reason upon the process of law-making. [53] This is a procedural view of popular sovereignty.[54] Furthermore, it is Kantian in disclaiming any suggestion that legitimacy is a property that any state could finally attain. Rather, it is processual, with a standard of what persons could agree to as free and equal citizens serving as a regulative ideal.[55]

On this view, then, a state is legitimate to the degree to which its principles of justice establish a process through which,

[52] Jürgen Habermas, "On the Internal Relation Between the Rule of Law and Democracy", in *The Inclusion of the Other*, eds. Ciaran Cronin and Pablo De Greiff (Cambridge: Polity, 1999).

[53] Habermas describes his approach as a form of Kantian Republicanism in Jürgen Habermas, "'Reasonable' versus 'True', or the Morality of Worldviews", in *The Inclusion of the Other*, eds. Ciaran Cronin and Pablo De Greiff (Cambridge: Polity, 1999), 101.

[54] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: Polity, 1996), appendix.

[55] This is most evident in Jürgen Habermas, "Constitutional Democracy: A *Paradoxical* Union of Contradictory Principles?" in *Time of Transitions*, eds. Ciaran Cronin and Max Pensky (Cambridge: Polity, 2006). On legitimacy as a regulative ideal, see Christopher F. Zurn, "The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy", *Legal Theory* 16/3 (2010): 191-227.

reflexively, these principles of justice may be freely challenged and reformed, and, moreover, this process can be recognised as moving in a progressive direction, in accordance with the regulative ideal of popular sovereignty. To be sure, such a processual approach is adumbrated by Rawls's treatment of civil disobedience as a means of challenging the justice of an existing regime while maintaining fidelity to the ideal of law upon which the legitimacy of the democratic state depends. But on Rawls's model this can only prompt individual reflection on a community's evolving sense of justice, not change the general will. In contrast to Rawls's approach, following Kantian Republicanism the locus of deliberation moves from individual self-reflection within the background culture of civil society to the discursive public sphere. The locus of the determination of the requirements of social justice likewise moves from the legislative sphere to the relationship between formal and informal public spheres.

What is fundamentally problematic about Pettit's approach is the idea that legitimacy is an "on-off" property that the state either possesses or lacks.[56] It leaves us with an uninviting dichotomy. Either a state fails to meet the standard of legitimacy, with implications for citizens that are profound but unclear. Or the state meets the standard, with the implication that legitimacy is not something that has to be continually earned and whose demands can change over time, but rather something that can finally be achieved and then simply maintained. When understood in relational and processual terms, by contrast, legitimacy may be

[56] Pettit, *On the People's Terms*, 139. In this respect I agree with John Horton that, "although there is a tendency to theorize political legitimacy simply as [a] property that a state either possesses or lacks, it also needs to be seen in terms of an ongoing process through which legitimacy is affirmed or denied." John Horton, "Political Legitimacy, Justice and Consent", *Critical Review of International Social and Political Philosophy* 15/2 (2012): 144.

conceptualised in scalar rather than binary terms. The idea of what all persons could will qua free and equal citizens serves as a regulative ideal with respect to which citizens may judge the legitimacy of the state in practice and which the state may asymptotically approach.

Such a view retains a unitary idea of sovereignty, albeit in a form that is both procedural and processual, in contrast to Pettit's view of a mixed constitution. Pettit argues in opposition to the idea of unitary sovereignty that "There is absolutely no reason why the state should not be a distributed agency that is answerable to the demands of reason, like any agent, but answerable in virtue of the rules of coordination under which distinct component parts cooperate."[57] On this basis, he develops a dual-aspect theory of democracy under which collective control of government is a long-run emergent property of interactions that are often conflictual and not oriented towards seeking agreement under the ambit of a general will.

But Pettit fails to note that a Habermasian Kantian Republican conception of radical democracy has just this feature. Its central concern is to show how, out of the wild and anarchic arguments of the public sphere, something with the rational sanction of public opinion can arise that can hope to exert a steering influence upon government. The idea of popular sovereignty remains fundamental as an idea of reason according to which citizens collectively can seek to judge and challenge the legitimacy of laws. Now, it is not clear that Pettit would reject this. He takes his view to be consistent with the idea that "Popular sovereignty, understood as an *as if* regulating principle guiding citizens' political judgements and action, is a central motor for

[57] Pettit, *On the People's Terms*, 224.

democratizing representation."[58] And yet such an idea plays no part in his theory.

The idea that the state should be understood as a distributed agency, "answerable in virtue of the rules of coordination under which distinct component parts cooperate", is fine as far as it goes. But the fundamental question is how these rules of interaction arise. To use Pettit's example, while it may be the case that the University of Oxford is not a concrete place that can be visited like the Colleges out of which it is composed, neither is it the case that the university simply emerges out of the interaction of the colleges. Rather, it exists because of the interaction between the constitution, and constitutive rules, of the university and the way in which colleges and their members orient their actions in accordance with these rules.

Ultimately, Pettit's use of the idea of the mixed constitution obscures the fact that the coordination of the state depends upon rules and these rules must be understood as having some basis, whether they are determined by the constituent power, the constituted power or the ongoing interaction between the two. Despite Pettit's remarks about the priority of the constituting people, his own approach can be seen as making the achievement of legitimacy something that is to be promoted by government.[59] For Kantian Republicanism by contrast, the internal relation between justice and legitimacy, as an ongoing progressive process

[58] Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006), 223, quoted in Pettit, *On the People's Terms*, 290 n. 29.

[59] Pettit, *On the People's Terms*, 280-92. Pettit's remarks in this context are difficult to interpret, particularly because of his rendering of Sieyes ideas of constituent and constituted power in terms of the "constituting people" and the "constituted people." What does seem clear, however, is that Pettit thinks of the role of the constituting people as taking place within a constituted state, rather than as the power that constitutes the state.

of constitution-making oriented by the regulative ideal of agreement, means that the constitution of the state rests ultimately upon the popular sovereignty of the people taking shape through the medium of positive law and the public use of reason.

## VI

## Conclusion

In its inception, Pettit's republicanism can be seen as motivated by the idea of providing a new normative framework for a social democratic view of justice within a consequentialist, statist way of thinking about politics.[60] Through its idea of democratic popular control of government, Pettit's recent work has moved a considerable distance from this starting point, but its influence remains. In arguing for the superiority of a conception of Kantian Republicanism, I have argued for two moves, first a procedural understanding of justice in contrast to Pettit's consequentialist account, and second a processual understanding of legitimacy, in place of Pettit's idea of legitimacy as a binary property. As we have seen, while Pettit argues for the conceptual distinctiveness of the questions of justice and legitimacy, in practice his own approach closes the gap between the two. I have argued for going further in the above two senses. Only in this way is it possible to understand the tension between ideal and actuality that inhabits that idea of the law-governed sovereign state, the idea that is central to the tradition of the Franco-

[60] Pettit's initial defence of the republican ideal builds upon a social democratic theory of the state. Philip Pettit, "The Freedom of the City: A Republican Ideal", in Alan Hamlin and Philip Pettit (eds.) *The Good Polity* (Oxford: Blackwell, 1989); Philip Pettit, "Towards a Social Democratic Theory of the State", *Political Studies* 35 (1987).

German republican tradition of the philosophy of right and, in the form of Kantian Republicanism, remains indispensable.

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