

Applications of Republican Liberty

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A strength of Phillip Pettit's paper is that it offers a comprehensive explanation for the entire suite of institutional and other choices that may be made in relation to any one constitutional system. In doing so, it gives a persuasive account of how limits on majoritarian decision-making can be rationalised as consistent with democracy rather than cast as a qualification of it. The paper also shows how republican liberty may itself provide a justification for judicial review of the constitutional validity of legislation in place of or in addition to the pragmatic requirements of federalism or of a constitutional separation of powers.

A charge commonly levelled against systems that impose substantial limitations on government is that they prevent government taking necessary action in the interests of the community as a whole. Pettit's argument engages with that view, to the extent that the pursuit of the common good is an integral element of republican liberty. The role of democratic election and contestatory opportunities is to ensure that the common good is identified and that policies contrary to it are not pursued. The question remains, however, whether constitutional systems should enable the state actively to pursue the common good and, if so, whether republican liberty is adequate to the purpose. On one level this is an ideological point that would divide Pettit from, say, social democrats of various kinds. On another level, however, the question is prompted by Pettit's own thesis. He accepts a role for the state. What is not clear is where he would strike a balance between limiting the state in the interests of liberty and leaving room for the state to act, in manner that secures the common good. The ambiguity may be inevitable. Its existence nevertheless detracts from practical utility of republican liberty as a guide to constitutional design and change.

I have three specific comments to make. The first concerns the application of Pettit's republican analysis to Australia's current constitutional arrangements. The second focuses on the relevance of the paper to the Australian debate on a republic that culminated, at least for the time being, in the referendum of November 1999. The third raises the question whether direct democracy offers another manner in which powers can be divided and in a controlled form thus can contribute to republican liberty or whether it is inherently antithetical to it.

For all three purposes I accept Pettit's broad conception of a Constitution as extending beyond the written document to the essential organisation of the polity. It is not a remarkable position. Even the most elaborate written instrument will not

reflect the entire body of constitutional norms. Some norms cannot adequately be protected or reflected in legal constitutional form. On the other hand, the legal properties of an entrenched Constitution equip it to provide special protection for selected institutions and norms. To that extent, the Constitution itself is likely to be central to any constitutional inquiry. I do not understand Pettit to disagree. Some of the constitutional constructs that he endorses as conducive to republican liberty require an entrenched Constitution. Most obviously, this is the case with federalism. The need for a written Constitution follows also, however, from Pettit's assumption that legislators should be subject to constraints, based on principle, which can be enforced through courts. On the threshold of the 21st century, there are few countries in the world whose governing arrangements are so simple that they do not need a written Constitution, but can rely instead on long-established tradition to hold constitutional norms in place.

The Australian Constitutional System

At first blush, Australia fits Pettit's republican regime reasonably well. The rule of law prescription is reasonably apt. Australia has a constitutional separation of powers, albeit one that is startling in its asymmetry.¹ Manifestly, federalism is a feature of the Australian system of government. Most Australian Parliaments are bicameral.² Australian democracy is characterised by regular elections and the peaceful transfer of power following a change in electoral fortunes. Super-added features include many identified by Pettit: such independent scrutiny mechanisms as the Ombudsman and Auditors-General and some statutory support for the public's right to know. From this perspective, there is no doubt that Australia meets the description of a 'republican' polity better than do many other countries. Indeed, it is tempting to conclude that reflection on Australia has prompted some of Pettit's ideas about mechanisms that might be used to protect against abuse of discretion and to contest the decisions of representatives.

But the fit is relative. From another perspective the Australian system, or at least the principal influences on it, remain inherently Diceyan and, to that extent, inconsistent with Pettit's republicanism. Elite support for the fusion of legislature and executive, extolled by Bagehot,³ may be even more pronounced in Australia than in Britain. In practice the effects of fusion are qualified by the presence of powerful Upper Houses in several Australian jurisdictions and in particular, in the Commonwealth Parliament, by the Senate. Non-government majorities in Upper Houses are considered an aberration in many circles, however. Criticism is familiar, on precisely that basis.

Nor is the relationship between legislature and executive the only respect in which Australia may fall short of Pettit's republican ideal. Australian federalism has a decidedly centralist cast. International law is not automatically part of Australian domestic law and at best provides only a limited check on arbitrary

¹ *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

² The Parliament of Queensland is the sole exception.

³ Walter Bagehot, *The English Constitution* (Collins/Fontana, 1963) 69.

power. The channels of access to the democratic process are severely constrained by political parties. Freedom of information, Auditors-General, procedures for judicial and administrative review and other mechanisms for contestatory democracy had a hay-day in the 1980s but increasingly were threatened in the decade that followed. The rule of law, as explained by Pettit, has no constitutional legal protection. Experience suggests that constitutional morality on which Australia traditionally has relied, in fact offers insufficient protection for the rule of law, at least where minorities are concerned. These difficulties may be compounded by privatisation, detracting from the rule of law to the extent that particularist contract rather than principled legislation increasingly is the preferred choice of government.

The Australian Republican Debate

The tug of war between different perspectives on the republican credentials of the constitutional system is familiar in Australia and, for that matter, elsewhere. It was given sharp focus by the debate on the establishment of a republic that culminated, for the moment, in rejection of the referendum proposal on 6 November 1999.⁴ In the context of that debate the term "republic" was used by most to refer to a system of government in which the highest public office is not hereditary. There is a question what, if anything, Pettit's sophisticated analysis of republican forms has to do with the minimalist proposal with which Australians were confronted in the referendum.

On the surface the answer is not much. Pettit's republican liberty is concerned with broader, more functionally important aspects of the constitutional system. Even so, there are several points at which these two different approaches to republicanism meet and several ways in which Pettit's more comprehensive thesis can inform consideration of the position of Head of State.

First, and most obviously, a broader conception of republicanism was raised directly by arguments that Australia already is a republic. The argument was at least partly tactical, underpinning a claim that description of the proposal as designed to establish a republic was misleading. Not surprisingly, in these circumstances, it was used principally by supporters of the monarchy, to defend the status quo. In a sense, however, this understanding of republicanism also divided advocates of change. Some of those who opposed the republican model on offer did so on the ground that it did not adequately tackle other problems in the system of government, including the concentration of legislative and executive power that is a hallmark of parliamentary government.

It would have been possible to test Australia's more comprehensive republican credentials against Pettit's criteria for republican liberty. Despite sniping around the edges the issue was never joined, however, in a way that had any impact on public debate. Broader notions of republicanism did not appear to assist with the principal purpose of the proposed change: namely, to break what formerly had been

⁴ Constitution Alteration (Establishment of a Republic) 1999.

colonial links with Britain through the Crown and to create a position of Head of State, chosen periodically in Australia. Pettit's thesis has some relevance, however, even to the concept of a republic in this narrow, if popular, sense.

One minor point draws on that part of Pettit's paper dealing with the manner in which positions of authority in a society are filled. From the perspective of republican liberty there is an element of arbitrariness in the manner of the choice of the Monarch, as might be expected. A similar difficulty might be argued also to attend the choice of Governor-General or State Governors, given the absence of clear or accepted constraint on Prime Ministerial decision.

More importantly, Pettit's argument also encourages evaluation of claims made in support of the status quo that the Queen and the Governor-General, individually or collectively, provide a significant check and balance in the Australian constitutional system. The degree to which this is so is indeterminate, depending both on personalities and on the understanding of unwritten and often contested constitutional convention. On any view, however, the capacity of either the Queen or her representatives to intervene in governmental affairs is limited, probably to circumstances in which the government lacks adequate control over the Parliament. The tenor of the republican debate in Australia suggested that there is an inflated view in some quarters of the role of the Crown as a check and balance. This view diverts attention from more effective forms of distribution of power, conducive to republican liberty. To the extent that the Crown has an unexpressed and largely unacknowledged power to intervene in times of crisis, however, another problem is raised for republican liberty, with its focus on the capacity for arbitrary intervention rather than on its exercise. This ground of criticism would not entirely have been averted by the republican model proposed for Australia in 1999, which would have retained for the President some reserve powers, subject to the same constitutional conventions.

The Challenge of Direct Democracy

Pettit identifies a range of ways in which powers may be divided in defence against arbitrary government. Those he mentions are the traditional separation between the institutions and functions of legislature, executive and judiciary; the shared power of the Houses of a bicameral legislature; the division of power between the spheres of government in the federation; and the increasingly important influence of international institutions and law on national and sub-national policy.

Another line of division is likely to be more hotly contested in this context. Recognition of a direct role for people, in addition to or instead of decision-making by elected representatives, is an increasingly familiar phenomenon in late-20th century constitutions. From one perspective, direct democracy is the antithesis of republican liberty. Taken to its logical extreme, it offers the prospect of domination by the majority, with no necessary commitment to the common good, through a process of decision-making that may well be ill-informed and arbitrary.

On the other hand, direct democracy may have a contribution to make to

republican liberty as well. The role of the people offers an antidote to an excess of power in the hands of representatives, which may be particularly important in constitutional systems influenced by the tradition of parliamentary sovereignty. Even symbolic recognition of popular sovereignty may be significant, to the extent that it provides a rationale for characterisation of the power of representatives as a form of trust,⁵ or for the acceptance of Constitutions as higher law.⁶ In addition, in practice, elements of direct democracy can temper decision-making by representatives on matters of major importance for the polity. Common examples include constitutional design and change, surrender of national sovereignty or alteration to the limits of territory. Use in this way, direct democracy is merely another mechanism for the division of power, albeit one that may present a "danger of the false negative", in Pettit's phrase, more often than other democratic forms.

Whatever its merits or demerits, direct democracy is a phenomenon with which theories of republican liberty may need to come to terms. On current indications, its use is likely to increase. Uncontrolled, it will almost certainly detract from the freedom for which Pettit argues. Controlled, it may make a contribution to it. Experimentation with forms of control presently is taking place in several countries. An example of long standing is the negative or passive referendum, which depends of the initiative of representatives, and which has been in operation in Australia since federation.⁷ Others include limitation of the matters that can be determined by referendum,⁸ use of the popular initiative to force consideration by representatives,⁹ and introduction of the indicative referendum or plebiscite.¹⁰ To the extent that these and other forms contribute to popular understanding of public issues, they may assist also to build a civic virtue on which the effectiveness of republican liberty depends.

⁵ Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed), *Essays on Law and Government: Principles and Values* (Law Book Co Ltd, 1995) 1.

⁶ *Marbury v Madison* 1 Cranch 137 (1803).

⁷ Australian Constitution section 128.

⁸ Constitution of the Portuguese Republic 1992, Article 118.

⁹ Constitution of the Kingdom of Thailand 1997, Article 170.

¹⁰ Eg, the referendums on the electoral system in New Zealand in 1992, 1993.

