

Freedom as Non-Arbitrariness or as Democratic Self-Rule?

A Critique of Contemporary Republicanism*

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Most republicans share the general view that there is a link between the freedom of citizens and their participation in the self-government of the community of which they are members. How this link is to be conceived, however, remains subject to dispute, and it is this question which I will discuss in what follows. The argument proceeds in four steps. I will start with a quick reminder of the neo-republican argument for the introduction of a third concept of freedom, viz. freedom as non-domination (I). I will then sketch a defence of this argument against a recent criticism raised by the proponents of the so-called theory of pure negative freedom who claim that what counts is actual (and potential) interference, not the mere fact of domination (II). In the third part I will raise a different objection against the neo-republican position as it is elaborated by one of its most prominent representatives, Philip Pettit (III), and I will end by suggesting the superiority of another, more democratic variety of republicanism (IV). In a nutshell, my claim will be that while neo-republicanism brings into view a form of unfreedom ignored by liberal thinkers, especially in the variant put forth by Pettit, it fails to sufficiently take into account a specifically political form of unfreedom due to its problematic, and surprisingly liberal-constitutionalist, understanding of the link between freedom and democracy. On the one hand, neo-republicans supply us with a radical revision of the concept of freedom, but on

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the other hand they tend not to be radical enough when it comes to the link between freedom and participation.

A THIRD CONCEPT OF FREEDOM

Under what conditions can we regard ourselves as politically free? What (if any) link is there between freedom and democratic participation? There seem to be three possible answers to this question which allow us to (admittedly, in a very crude way) structure the theoretical landscape: i) There is no link: Being free is neither necessarily nor contingently related to (the possibility of) democratic participation. ii) There is a contingent and external link: (The possibility of) Democratic participation can, under certain circumstances, be a facilitative condition of being free. iii) There is a necessary and internal link: (The possibility of) Democratic participation is a necessary and/or constitutive condition of being free.

Proponents of classical liberalism usually hold thesis i) or ii). Here are just two famous quotes from the many possible examples from authors who favour the negative understanding of freedom as the absence of interference (while many egalitarian liberals, following Rawls, obviously subscribe to a much richer notion of freedom). The first is from Hobbes (1997, ch. XXI, p. 149): “There is written on the Turrets of the city of *Luca* in great characters at this day, the word *LIBERTAS*; yet no man can thence inferre, that a particular man has more Libertie, or Immunitie from the service of the Commonwealth there, than in *Constantinople*. Whether a Common-wealth be Monarchicall, or Popular, the Freedome is still the same.” The second is from Isaiah Berlin (1969, pp. 129-130): “It is perfectly conceivable that a liberal-minded despot would allow his subjects a large measure of personal freedom. [...] Freedom in this sense is not, at any rate logically, connected with democracy or self-government.”¹ With this understanding, we can regard ourselves as free to the extent that the state respects our rights and does not interfere with our private sphere – and whether this is the case remains independent from the democratic credentials of the state in question. Berlin’s statement, however, already opens the door to an instrumentalist understanding of the link between freedom and democratic participation, but this

1 Skinner (2008a) argues that Hobbes’ position should be understood as an ideological intervention aimed at discrediting the “democratic gentlemen”, i.e. the parliamentary critics of monarchy; Tully (2013) argues that we should understand Berlin’s influential article in a similar way, namely as an attempt to discredit the “democratic gentlemen” of his day.

contingent link may be rather weak and of no great theoretical or political significance.

Proponents of republicanism usually hold thesis ii) or iii) and I will argue that what kind of republican one is depends on which of these options one subscribes to – what we can call constitutionalist republicans tend to hold ii), while democratic republicans hold iii).²

If freedom is understood as the absence of domination, as in Pettit's influential development of this 'third concept' of freedom, the nature of the link between freedom and participation obviously depends on the concrete understanding of non-domination.³ For the sake of brevity, Pettit's view can be characterized by two core theses (for the latest statement of these see Pettit, 2012, ch. 1.3.-4.). According to the first, unfreedom as dependence and domination can exist in the absence of interference. This can be illustrated by the example of the 'lucky' (n.b.: not 'happy') slave and the non-interfering master: Even if the master is very lazy, or inattentive, or benign and does not interfere much with how his slaves lead their lives, they are still depending on his arbitrary will and can therefore not be regarded as free in any meaningful sense. According to the second thesis, interference does not necessarily amount to domination, and can thus be compatible with freedom. This can be illustrated by the example of the rule of law: Proper laws interfere with the individual's actions but do not dominate it and are thus compatible with its freedom.

Freedom is thus still construed negatively, as an absence – not as the absence of interference, however, but as the absence of domination. Correspondingly, unfreedom does not coincide with interference since there can be both domination (and thus unfreedom) without interference as well as interference without domination (and thus without unfreedom). In opposition to the understanding put forth by Hobbes and Berlin, freedom thus understood is dependent on the type of political system one is living in – it matters greatly whether one lives in Lucca or

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- 2 This distinction overlaps but is not identical with the one made by Pettit (2012, pp. 11-18) between the Italian-Atlantic and the Rousseauvian tradition that he characterizes as communitarian and that focuses on freedom as participation rather than non-domination.
 - 3 In what follows, I mainly discuss and criticize Pettit's proposal, which in great detail spells out the consequences of the neo-republican position for democratic theory. Occasionally I also refer to Skinner's work, which is of course equally influential in the neo-republican debate, and seems to avoid some of the problems I will raise with regard to Pettit's position. For some of the differences, which I will not be able to go into in any detail on, see Pettit 2002.

in Constantinople. In this the neo-republicans follow the lead of James Harrington (1992, p. 20) who has replied to Hobbes's quip with the observation that in Constantinople "even the greatest bashaw is merely a tenant of his head, liable to lose it as soon as he speaks or acts in such a way as to cause the sultan offence."

Let us now examine the two core theses in turn. There are two kinds of argument republicans put forth to support the first core thesis. The first kind is psychological: Those who live in conditions of domination (or dependence) tend to pre-emptively adapt to the anticipated reactions of those they depend on and engage in acts of practical self-censorship with the aim of avoiding future interference. As Skinner (2002, pp. 256-257; see also Skinner, 1997, pp. 92-95) notes: "[A] mere awareness of living in dependence on the goodwill of an arbitrary ruler *does* serve in itself to restrict our options and thereby limit our liberty. The effect is to dispose us to make and avoid certain choices, and is thus to place clear constraints on our freedom of action, even though our ruler may never interfere with our activities or even show the least sign of threatening to interfere with them." To pick just one from numerous contemporary examples, in 2010 the German constitutional court (1 BvR 256/08) ruled that a law was unconstitutional that required the monitoring and documentation of communication via phone and email. The defenders of the law argued that law-abiding citizens, in contrast to terrorists and other criminals, have nothing to worry about and would of course not be restricted in their freedom. As empirical surveys have shown, however, a majority of people said that they would refrain from using phone or email to contact psychotherapists or drug help agencies if the new law became effective. Using proto-republican terminology, the court ruled that already "the diffusely threatening feeling of being under surveillance" was incompatible with the basic liberties protected by the constitution, even in the absence of concrete interference (see the court's press release 11/2010).

It is, however, questionable whether this kind of psychological mediation – the psychological fact of being aware of one's dependence on the arbitrary will of others – is really essential for existing forms of domination to count as forms of unfreedom. According to the republican position, it seems that even slaves who are not only lucky but also naïve and unaware of their slavery are nevertheless slaves and thus unfree. It is the mere fact of domination that counts, not the awareness of this fact and the behaviour that results from it. Why this is so can be seen from the following conceptual explication of the first thesis which goes beyond the psychological argument supporting it: Freedom is not just predicated on individual actions, it is – essentially – a status that can be ascribed to a person depending on her standing in relation to other persons, and that can come

in degrees depending on both the intensity and extension of non-domination.⁴ This status is incompatible with the mere fact of domination, independently of any psychological considerations. As Pettit (2007, p. 715) explains, for actions to count as free they must meet two conditions:

“First, they must be unobstructed; second, they must be unobstructed in virtue of the status enjoyed by the person. Choices that are unobstructed for purely contingent reasons, not because of the status of the agent, will count as unfree. The choice of a free person that is frustrated by a contingent crime will not be free; nor will the choice of the unfree person – in the limit case, the slave – even when that person manages to do as he or she wishes.”

As we saw, Pettit’s second core thesis holds that interference does not necessarily amount to domination and is, under certain conditions, compatible with freedom. This is so because being dominated means being subject to arbitrary power. And from this it follows that if the interference is non-arbitrary (or uncontrolled, as Pettit (2012, p. 58) now says), it does not dominate me and thus leaves my freedom intact. Now, for Pettit, interference has to meet two conditions in order to count as non-arbitrary. The first condition is procedural: The interference has to be the result of rule-governed procedures that minimize or exclude the influence of the arbitrary will of others. The second condition is substantial: The interference has to track the (qualified⁵) interests and opinions of those affected, and the claim that it does this has to be controllable and contestable by those affected (this gives the substantial condition a procedural twist). According to Pettit, these conditions are supposed to hold under the rule

4 See Pettit 2007 as well as Pettit 1997, p. 75: “People will enjoy more and more non-domination both as dominators come to dominate them less intensely and as they come to dominate them across a smaller extent.” On freedom as status, see also Skinner 2010, p. 98: “*It is possible to act freely*, they [the republicans] maintain, *if and only if you are a freeman*. If instead you live as a slave, you can never act as a free agent under any circumstances. This is not necessarily because your choices and actions will be impeded, but rather because they will never be the product of your own autonomous will. They will inevitably be a product both of what you will and desire and of what your *dominus* may be willing to permit.”

5 Pettit uses a variety of formulations here, ranging from “interests” via “avowed interests” to “common avowable interests” – i.e. from de facto to somehow normatively qualified interests. See Pettit 1999, p. 176: “They are the interests that those who are expected to give a system of government their allegiance may reasonably expect government to track.”

of law (so imprisonment will, under these conditions, not constitute domination and accordingly not make the imprisoned unfree, although it will make them “non-free”⁶).

Before turning to the discussion of this second thesis, and to my worry that it leads to a constitutionalist rather than to a democratic version of republicanism which misconstrues the link between freedom and democracy, I will address a critique of the first thesis that freedom consists in the absence of domination which has been put forth by the defenders of a more liberal, or libertarian, negative conception of freedom.

POSSIBILITY, NOT PROBABILITY

The radical and distinctive character of the neo-republican proposal becomes evident in an exchange in which Skinner and Pettit have been criticized from the perspective of the so-called theory of pure negative freedom presented by Carter (2008) and Kramer (2008). According to this theory, what counts when we are interested in freedom is actual and potential interference and not the mere fact of domination. It is the *probability* and not the mere *possibility* of interference that is of theoretical and normative significance. On this probabilistic view, “where *A*’s mere opportunity to exercise power has some degree of probability of being exercised, then *B*’s unfreedom [recte: freedom] is to that same degree limited” (Carter, 2008, p. 70). If, in contrast, after a reliable probabilistic assessment, a slave comes to the conclusion that he can act in a certain way without being interfered with, he is thus free to act accordingly. Put in other words, freedom is, as in Hobbes, a matter of the options I have; but whereas Hobbes thought that the robber, who, by pointing a gun at me, confronts me with the choice ‘your money or your life’, still leaves me both options (although the costs of accepting one of them are extremely high) and thus does not take away my freedom, according to Kramer and Carter the robber does take away an important option, namely the conjunctive option of keeping my life and my money, and thus it is already his threat (and not only its being carried out) that, if credible, limits my freedom. In assessing the extent of our freedom, probability thus plays a crucial role. This

6 See Pettit 2002. With regard to this, Kramer (2003, p. 102) remarks: “Consequently, if the placement of a highly dangerous man in chains or a straitjacket is legitimate because of his uncontrollably violent behaviour, neither of those means of immobilization will deprive him of any liberties. A theory that generates such a conclusion can hardly claim to be cogently illuminating.”

also holds for the law which closes off the option to both violate the law and continue to act in ways that will be made impossible by the law's sanctions (e.g. by imprisonment). In cases like these, interference consists in "the undoing of the conjunctive exercisability of many opportunities – opportunities that could have been exercised conjunctively in the absence of the dominant party's sway" (Kramer, 2008, p. 44; see also Kramer, 2003, p. 39). Thus, in order to speak of a restriction of one's "overall negative freedom" there does not have to be an actual interference, since a credible threat is sufficient. The focus will therefore turn on how credible the threat and how probable the threatened interference is. Pointing to the mere fact of domination is not informative. What matters is the likelihood with which this fact will lead to the closing down of certain options or combinations of options.

What can the republicans answer to this challenge? It seems that first of all, following Skinner and Pettit, they should insist that slaves are unfree regardless of the probability with which their masters will interfere. As Skinner (2008b, pp. 88-89) notes: "It is the mere fact that their [the slaves'] master or ruler has arbitrary powers to intervene that takes away their liberty, not any particular degree of probability that these powers will ever be exercised." Pettit (2008) makes a similar point when he speaks of "alien control" the mere fact of which, and not the probability with which it leads to interference, is incompatible with freedom as non-domination. According to the republicans, the pure negative conception of freedom simply misunderstands the existential situation of the slave and ignores that freedom is a question of the status of the agent, and not (or rather: only secondarily) of their sets of options.

Take an example that came up in this debate and imagine that there is a gentle giant who is reliably disposed against using his immense power and who lives peacefully among his fellow human villagers. According to Carter and Kramer the giant's neighbours can sleep without having to worry – so why should they be seen as dominated and thus as unfree? To this, Skinner (2008b, p. 97) replies: "If it is true, as he [Kramer] claims at one stage, that there is *no prospect* of the giant's interfering – if this has somehow been rendered impossible – then [...] the community is wholly free, for it is wholly free of the giant's arbitrary power. If on the other hand the freedom of the community remains dependent, as Kramer says at another stage, on the *disposition* and *inclinations* of the giant, then a republican will want to insist that the community is wholly enslaved. If the giant *could* interfere at will and with impunity, then the community remains in his power; and the essence of the republican argument is that living in such a state of subjection is equivalent to living in servitude."

In order to be free it is therefore not enough to make this sort of dominating interference unlikely, its possibility has to be ruled out: “The point is not just to make arbitrary interference improbable; the point is to make it inaccessible” (Pettit, 1997, p. 74). However, this obviously raises a new problem, namely the realistic worry about how this could ever be achieved: Isn’t the minimization of the probability of dominating interference the only thing we can reasonably expect to achieve (see Friedman, 2008; Kramer, 2003, pp. 138-139)? The neo-republican position seems to imply a fantastic notion of freedom that is difficult to reconcile with our ordinary understanding of social relationships. This challenge, however, need not worry neo-republicans too much: They can hold on to the (negative) claim that certain forms of dependence that are irreducible to actual or probable interference are cases of unfreedom – the dependence of employees on the arbitrary will of employers and of women on the arbitrary will of their husbands are paradigmatic examples – without subscribing to the unrealistic ideal of a state of perfect freedom. Such a state in which the possibility of dependencies of this sort would be ruled out once and for all is, indeed, hardly imaginable. Although it might be the case that all we can do is reduce the probability with which agents can get into a position that allows them to dominate others, the existence of certain positions of this type – the slave-holder, the colonial master, the tyrannical husband and employer – is incompatible with the freedom of those subject to such forms of dependence because it is incompatible with their status as free citizens.

NON-ARBITRARINESS AND DEMOCRATIC SELF-RULE

After having sketched a defence of the first core thesis associated with the neo-republican concept of freedom as non-domination as spelled out by Pettit, I now move on to the second thesis and a different kind of critique. As we saw, according to the second thesis, freedom requires the absence of the possibility of arbitrary interference. We also saw that there are two conditions for non-arbitrariness, one procedural and one substantial. Correspondingly, an interference is arbitrary, if it depends on the will of an individual or specific individuals and does not track the interests and opinions of those subject to the interference. This means that it is not dependence as such that is the problem but dependence on the *arbitrary* will of someone else (or *arbitrary* dependence on the will of someone else). Arbitrariness thus becomes the central concern, and this concern also guides the search for institutional remedies that aim at preventing such forms of dependence from arising.

It seems to follow from this that I am not unfree if the norms I am subjected to are not the result of a political process in which I was able to participate as long as they are the result of a process that minimizes or excludes the influence of the arbitrary will of others and that tracks my (considered) interests and opinions in a way that is controllable and contestable. As Pettit (1997, p. 184, my emphasis) himself puts it:

“The promotion of freedom as non-domination requires, therefore, that something be done to ensure that public decision-making tracks the interests and the ideas of those citizens whom it affects; after all, non-arbitrariness is *guaranteed by nothing more or less* than the existence of such a tracking relationship. The decision-making must not represent an imposition of their will on us, as the citizens are likely to think about the matter. It must be a form of decision-making which we can own and identify with: a form of decision-making *in which we can see our interests furthered and our ideas respected.*”

Pettit thus seems to assume that there is no intrinsic relation between the genesis and the validity of a norm beyond the demand that the procedure reduce the influence of the arbitrary will of others on the norm that is its result. In this framework, the tracking of interests and the possibility of *ex-post* contestation take the place of *ex-ante* participation – i.e. participation in the process of norm-making itself.

On this basis it is not difficult to see why Pettit’s neo-republicanism is of an essentially liberal-constitutionalist type. Although he understands freedom in terms of a status that is fundamentally relational, he tends to construe this status and its institutional presuppositions and implications in a way that does not adequately account for the strong link between freedom and democratic participation. One might respond that Pettit’s idea of control can provide an answer to this worry since it requires that those subject to potential interference are “in control.” A closer look, however, reveals that “to be in control” of an interference means, for Pettit, that this interference is guided by one’s interests and not by the arbitrary will of others. Without losing its efficacy and its freedom-enhancing role, control can remain purely virtual as long as it can be activated if problems arise from the perspective of those who are virtually in control – or so Pettit claims. Control is virtual insofar as it is not activated: “It involves standing back while some other agency actively controls the process but assuming a disposition to amend what the active controller does, should the outcome not prove satisfactory” (Pettit, 2006, p. 302).

This distinction between active and virtual control is mirrored in his distinction between authorial and editorial control. While an author has active control

over the text she is writing, the control exercised by an editor is virtual: She can simply accept the text or reject it, but she also has the authority to make certain editorial changes. Even if she doesn't intervene at all, a good editor can influence how her authors write on account of her reputation as a very critical reader so that they try to anticipate her reactions in a way that renders her actual interference superfluous. This analogy is supposed to suggest that the form of control exercised by the editor is different, yet often equally and sometimes more significant, than the authors' control. Applied to the realm of politics it yields the following picture: While initially "the people [trust] the state to ensure a dispensation of non-arbitrary rule" (Pettit, 1997, p. 8), the citizens have to be watchful and check – presumably via some intermediary structure like a vibrant public sphere – whether the state lives up to the assigned task.⁷ If necessary, they can then contest the state's claim of having acted in their common interest. Such a contestation consequently has to trigger a review of the policy or law in question by an impartial, but not necessarily democratic body. The citizens thus exert "editorial control [...] to ensure, ideally, that only matters of common avowable interest have an influence on government" (Pettit 2001, p. 163; see also the discussion of active, virtual, and reserve influence in Pettit 2012, p. 156). Out of fear of public protest and sanctions in form of the loss of electoral support, representatives can be expected to aspire to govern in the way suggested by the criteria for non-arbitrariness: As Pettit (2006, p. 310) puts it, any reasonable government will make an effort "to adjust preemptively [to the interests of the people] in the attempt to keep the public happy."

From a perspective inspired by democratic republicanism, this view must seem surprising in several ways. One is more accustomed to hear the argument that the direct participation of citizens is of no great political significance and that what matters are "apt decisions" from critics of republicanism such as Brennan and Lomasky (2006, pp. 233-234): "[I]t is not at all plausible that more participation in setting policy is better than less. What is important is apt decisions, not the number of people who toss in their (more or less uninformed) opinions concerning how to prioritize these tasks. [...] The knowledge that currently complacent citizens will not inevitably remain so is itself a spur to political actors to moderate their activities in order not to rouse the sleeping giant. In this manner,

7 It is noteworthy that Pettit does not provide an extensive account of the role of civil society and the public sphere in his "contestatory democracy," leaving us without a clear idea about the process of democratic will-formation. This lacuna might be due to the utilitarian underpinnings of his theory that surface in his idea that the task of politics is to "track" the interests of those affected.

even the apathetic and disengaged are important political actors, albeit *in potentia*. This suggests that the availability of avenues of access to political participation is more important than participation per se.” It is of far greater importance, however, that Pettit subjects a fundamental principle of classical republicanism to a radical revision: In place of the principle that the addressees of a law also have to (be able to) conceive of themselves as its authors we now find the principle that they also have to (be able to) conceive of themselves as its editors. This reformulation points to what tends to get lost here: the very idea of democratic self-rule.⁸

As if this would not sufficiently curtail the power of the *demos*, Pettit (1999, p. 180) goes on to characterize popular editorship as the “limited and, of course, indirect power of editorship” which can be invoked ex post within the envisaged institutional fora of contestation (such as committees and ombudsmen). In a more active manner it is at best exercised in an advocacy way through courts such as the US Supreme Court and its powerful instrument of judicial review. Again, it is worth noting that Pettit’s position here is much closer to the liberal-constitutionalist case for judicial review than to a democratic-republican position which seems to provide a rather firm basis for a critique of judicial review (see Waldron 2004 and Waldron 2006). Like the liberal-constitutionalist position, Pettit’s position seems to be motivated by a fear of the tyranny of the majority which he at one point even calls “the ultimate form of arbitrariness” (Pettit 1997, p. 8). The institutional response to this risk, however, is in danger of creating and heightening the risk of the opposed danger of a tyranny of a minority – a danger also mentioned but not addressed adequately by Pettit. As Bellamy (2007, p. viii) notes: “Far from guarding against a largely mythical tyranny of the majority, the checks imposed by judicial review on majoritarian decision-making risk undermining political equality, distorting the agenda away from the public interest, and entrenching the privileges of dominant minorities and the domination of unprivileged ones.” All of these should obviously be great cause for concern from a republican perspective.

Instead of providing a convincing republican case for judicial review and the kind of limited democracy he envisages, Pettit thus tends to reproduce certain positions advocated by liberal constitutionalists such as Ronald Dworkin (1996) for whom it is primarily the constitution and the institutions that protect it that

8 This idea should not be understood to imply a collective self that then rules itself – rather, it implies that the citizens are, collectively, making their own decisions and do not have these decisions made by others.

are able to realize the basic principles of democracy. *Democracy in Robes*, however, is not an ideal to which republicans should light-heartedly subscribe.

Pettit's republicanism seems to suffer from two shortcomings: On the one hand, it truncates the ideal of democracy by reducing participation to the participation in the election of representatives (the only form of authorial control Pettit seems to allow for) and to *ex-post* forms of contestation; on the other hand, it limits these forms of contestation to institutionalized procedures in which individual citizens can voice their protest in very mediated ways. This trust in established institutions and the apparent renunciation of more active forms of participation and more activist forms of contestation (such as civil disobedience; see Celikates, 2014) seems to be due to the assumption that the institutions in question are indeed independent and impartial and thus willing and able to secure the interests of the citizens even in the face of representatives who might be prone to neglect or distort them.⁹ One does not have to believe in the "iron law of oligarchy" to remain sceptical in this regard. The whole framework also seems to involve a rather undemocratic shift in the burden of proof as citizens are asked to establish in procedures determined by the state that their interests and opinions have not been adequately represented or translated into political decisions. Given the well-known procedural democratic deficits of even well-functioning representative systems such as agenda setting and framing which are compatible with keeping up the liberal-democratic form, one can doubt whether such a form of contestation is very effective when it happens on the state's terms (see Young, 2001).

GENESIS AND VALIDITY

In accordance with his conception of control which already implies that the government, as the object of control, is an institution that is distinguished from the citizens who have to control it, Pettit understands democracy primarily as a combination of electoral and contestatory elements. On this view, participation and democratic self-rule are neither intrinsically valuable nor do they seem to be essential aspects of being a citizen. The inclusion of participatory and democratic elements – such as the election of representatives – in Pettit's republican framework may, of course, make it more likely that individual freedom is secured,

9 Pettit (2012, p.138) now acknowledges that "the act of breaking the law [...] may also count as a mode of contestation, a way of opposing laws within the system", emphasizing, however, that opposition has to be limited to "intra-systemic contestation".

and, to the extent that there is a correlation between how people get power and how they exercise it, the first aspect matters as well. But no intrinsic link between freedom as non-domination and democratic self-rule seems to exist. Democracy is called for as a means for securing non-domination, and it may well be that in certain policy areas it is not very good at that and, perhaps, there are other non-participatory functional equivalents that might do an even better job, as Pettit seems to suggest at times when he urges the depoliticization of certain fundamental questions (i.e. the delegation of decision-making power to expert bodies that are neither democratically elected nor democratically controlled, e.g. to central banks) as a means of increasing the quality of decision making and securing non-domination (see Pettit 2004).¹⁰ Waldron (2007, p. 49) therefore seems to be right when he points out that Pettit tends to regard “participation in lawmaking [a]s an anachronistic hangover from the liberty of the ancients, [...] that is not part and parcel of a useful modern conception of liberty as non-domination”.

In this sense Pettit opts for the second interpretation of the relation between freedom and democracy that I initially distinguished: Participation can, under certain circumstances, be a facilitative condition of being free but it is not a necessary or constitutive part of the citizens’ freedom. This seemingly leaves open the possibility of a paternalistic power that correctly tracks the enlightened interests of its subjects, envisages fora in which citizens can voice their dissent, and thereby governs non-arbitrarily. A similar point is made by Brennan and Lomasky (2006, p. 241) when they observe: “Republican liberty is compatible with extensive paternalistic control. Because the official requirement is to consider the *interests* of citizens, not their *preferences*, there is no limit to the state’s authority to override individuals’ preferences, just so long as it is deemed to be in their best interest to be deflected from the desired activity.” This might be true of Pettit’s constitutionalist brand of republicanism but it is certainly not true of its more democratic variants.

For these reasons the neo-republican view of freedom as non-domination has to be complemented by a more positive, democratic conception of freedom as involving, essentially, the possibility of effective *ex-ante* participation in order to

10 See Rostbøll 2008, p. 55: “For Pettit, then, whether or not a policy is arbitrary, and hence whether or not it compromises freedom, is a factual issue that can be determined impartially by a small body of people and, hence, without the participation of the people who are subject to the policy.” See also Urbinati 2010. Pettit (2012, p. 235) does acknowledge the potential dangers from unelected authorities but argues they can be checked by contestatory mechanisms.

account for a specific variety of unfreedom that tends to get ignored or at least marginalized in Pettit's framework. Whether a (basic) norm is compatible with the freedom of those subject to it, depends on whether the latter have had (the chance to have) a say in the framing of the norm (and continue to have a say in its continuing application), not on whether they would or could – hypothetically or ex post – give their consent to it. Another way to put this is to say that freedom and democracy have an expressive dimension: Those subject to a norm have to be able to understand the norm as the expression of their own activity *as* citizens, i.e. as a result of their political practice. If this turns out to be impossible, they will rightly regard the norm as alien and externally imposed, not as a realization of their freedom, even if it tracks their interests and even if they can formally contest it afterwards. This is the basis for the claim that there is an internal link between the genesis and the validity of political norms which Habermas (1996, p. 121) spells out as follows, in a way that to some might seem surprisingly radically democratic: “Even if each legal subject realizes, in the role of moral person, that she herself *could* have given herself certain basic rights, this moral approval in hindsight will not do; it by no means eliminates the paternalism of the ‘rule of law’ characteristic of political heteronomy. It is only *participation* in the practice of politically autonomous lawmaking that makes it possible for the addressees of law to have a correct understanding of the legal order as created by themselves.”

Political freedom is thus incompatible with uncoupling the validity of norms from their genesis. Pettit (1997, p. 186) therefore tends to miss the core of the idea of democratic self-rule by understanding it “in a modal rather than a historical way” and by claiming that “the self-ruling demos or people may often run on automatic pilot, allowing public decision-making to materialize under more or less unexamined routines.” Especially from a republican perspective, however, it must seem rather unlikely that citizens who “run on automatic pilot” will be able to muster the necessary political energy once they find themselves in a situation in which this would be called for. By being the passive observers of politics, a topos of classical republicanism that Skinner has brought back to our attention insists, they will gradually lose the cognitive and practical capacities as well as the motivational resources necessary for an active citizenry.

Even more worrying than this more pragmatic concern is the incompatibility of the outsourcing of self-determination – the reduction of democratic control to editorial control of norms authored by others – with the status of the citizen as free and equal. As Richardson (2002, p. 71) puts it: “when public decision-making emerges from ‘more or less unexamined routines,’ something importantly different is going on, namely: the people are being ruled by *someone else*.”

Whether one is making one's own decisions or is simply under the sway of another is always an issue pertinent to autonomy, individual or otherwise."

Note that the idea that freedom not only requires non-arbitrariness, but also a link between autonomy and democratic participation as well as self-rule does not imply the (confused) thesis that by participating in democratic decision making I am ipso facto free. If I do not belong to the majority but to a minority in a certain decision, it would be mistaken to say that this was, really, my decision. But it is not confused to say that being able to participate in these decision-making procedures is a necessary part of being respected as a free and equal citizen and of collective self-rule.

Pettit's republic comes too close to a system in which the *demos* only plays a passive and secondary role and in which political conflicts which have been regarded as a productive and freedom-enhancing force by republican political theory from Machiavelli via Arendt to Claude Lefort are domesticated and absorbed into state institutions (see Vatter, 2005, McCormick, 2011). This alternative, a more democratic and conflict-oriented variant of republicanism has always insisted on the fact that emancipatory progress is not the work of elected or unelected rulers but of the struggles of the ruled that often have to resort to non-institutionalized forms of political practice. It is in these more intense and active forms of involvement and participation, and not merely in accountability and responsiveness plus control and ex post contestation, that the agency of ordinary citizens expresses itself (see Markell, 2008).

Accordingly, this more democratic variant of republicanism also involves a different conception of citizenship as primarily a positive status that individuals have as members of a community of free and equal citizens who collectively govern themselves. On this understanding, "equal participation in the collective decision-making process [i]s constitutive of non-arbitrary rule" (Bellamy, 2007, p. 218). Non-domination properly understood must thus include the effective participation of equals not just ex post, but ex ante. Thus, "a government of laws, and not of men" could still be regarded as tyrannical if those subjected to it have no direct say in its establishment, however "apt" the laws may be when it comes to tracking their interests. While for Pettit being a citizen seems to consist primarily in enjoying a negative status – namely not being subjected to the arbitrary will of another – from a democratic perspective the link between citizenship and having an effective say is essential: Freedom requires not only non-arbitrariness, but also self-rule. Correspondingly, unfreedom not only consists in not being able to articulate one's interests and to give them weight in public decision-making, it can also consist in only being able to participate under conditions that have been established without one's participation and that one cannot effectively

control – if I can only participate on terms and in ways that others have set, this can make me unfree. As James Tully (2008, p. 93) puts it: “If the rules by which the *demos* are governed are imposed by someone else, and even if they have a range of freedoms within this other-imposed regime, they are not self-governing, self-determining or sovereign, and are thus unfree.” It is this form of unfreedom that Pettit’s neo-republicanism is not sufficiently attentive to, due to its fear of populism, its focus on non-arbitrariness, and its resulting problematic, liberal-constitutionalist construal of the link between freedom and democracy.

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