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thus presupposes that inherent in all cultures is a critical potential which will eventually enable them to partially converge on a complex of legal and political values concretizing in a set of human rights.

This double-tiered scheme makes it possible to reconcile two contrary theses on human rights: the thesis that cultural sensitivity to local traditions should override the universality of human rights, over against thesis that it is instead the universality of human rights which should preempt local traditions. Pluralist integration attempts to reconcile these two theses on a higher level.

A strong case for such a synthesis can be made arguing from the correspondence between rights and interests. Which is to say that the basic rights map out the most important human interests and are accordingly supposed to protect them—and some of these interests are clearly global, as in the case of our interest in environmental protection and security, as well as our interest in curbing inequality and poverty. That these interests carry global import is definitely beyond question. We could think of them in analogy to public goods, on the basis of the traditional argument that presents such goods as a safety net against the risk of market failures. Where environmental risks, security problems, and poverty are concerned, we are confronted with problems that single nation-states cannot each resolve on their own. And since these challenges are intrinsically global, they call for global solutions. Whence the role of universal human rights, forced into the scene as tools with which to attempt such solutions. Yet these solutions have to be reasonable, in that human rights are susceptible of different interpretations within different cultures, and this makes it necessary to frame common standards and conditions subject to which human rights can be enforced. This situation intuitively explains not only the *need* for an overlapping consensus on some universal rights, but also the *possibility* of such a consensus.

5 Stability

In this section, I consider my proposed model, pluralist integration, from the standpoint of stability. I start here too from Rawls by noting the curious lot that befalls the notion in his intellectual career: stability is at first long neglected, only to become—after *A Theory of Justice* (1971)—an over-discussed issue. This twist of fate is somewhat baffling because *Theory* devotes much space to stability; in fact, the third and final part of the book can be said to culminate in an idea of stability understood as resulting from a convergence of the right (the reasonable) and the good (the rational) in a society regulated in keeping with the principles of a sound theory of justice.

We can make sense of this complex vicissitude by noting that there are in Rawls two different albeit parallel notions of stability. One is the notion of stability found in *Theory* and the other the one found in *Political Liberalism*, and although they do overlap in important ways, the differences ultimately outweigh the similarities. So, let us call them stability 1 and stability 2. The main difference, as I see it, is that stability 1 is based on the sheer force of justification, whereas stability 2 also relies

on the idea of legitimation. It might also be said, with a little strain, that stability 1 is unqualifiedly moral, whereas stability 2 is moral and political at once. It is my claim that stability 1 does not work but that stability 2 does. (I should note, incidentally, that this distinction of mine between stability 1 and stability 2 is not intended to be particularly original; in fact, what it illustrates is roughly the direction that Rawls himself seems to take in revising *A Theory of Justice*).

Stability 1 proceeds on the idea that Rawls's theory of justice as fairness can generate its own support. It is based on two main arguments: a psychological one and a philosophical one. We will not be concerned here with the psychological argument for stability, in large part because it is irrelevant to my thesis, and will only consider instead, however briefly, the philosophical argument, the one Rawls presents in the now-famous Chapter 9 of *A Theory of Justice*. This argument is based on the congruence of the good and the right, whereby rational persons using their full deliberative powers will decide that their rational interest lies in the principles of justice, which they will accordingly choose as the best scheme by which to regulate their mutual relations. In this way, the right and the good become congruent.

Rawls later concedes that this idea of stability (stability 1) is unrealistic: it will not work, since it cannot be assumed (or even imagined) that the members of a pluralistic society would all share the same comprehensive doctrine, as Rawls now qualifies his own theory of justice as fairness. This failure is generally regarded as the main motivation behind Rawls's passage from *A Theory of Justice* to *Political Liberalism*.

The main argument against stability 1 is that stability cannot be grounded in a philosophical justification alone, since, as discussed, philosophical justifications are plural and seldom reach across cultures, for which reason they are actually *part* of the problem: they may introduce the problem of stability, but cannot solve it. And it is precisely for this reason—because we need to solve this problem in a workable way—that it proves necessary to resort to legitimation (alongside justification). What necessitates legitimation, then, is the need to find a shared basis beneath the pluralism of deep philosophical theories. In a sense, the need for legitimation, in the quest for stability can be said to arise out of modesty: political philosophers have to be modest; their ambitions cannot be Platonic, as they do not have any special access to the truth; and they cannot turn to invention, either. Whence the need for them to proceed on a shared basis in working out solutions. And where matters of law are concerned, this shared basis is given, at its most general, by the fact of legitimation.

If we accept these premises, we will have stability 2, which is based on the idea of an overlapping consensus presented earlier. Stability can be achieved only on the condition that we accept from the outset the need to defend the liberal democratic state: if we accept this, then we can convincingly, albeit in different ways, justify such a state; if we do *not* accept this *ab initio*, then we will have no stability at all. That is why the notion of legitimation is key to understanding not only stability 2 but all of Rawls's work. And, as discussed earlier, the same model can be extended internationally to cover human rights.

6 Some Limitations

In this last section, I consider some limitations to my legitimation model. This model requires widespread acceptance of a political conception, a conception based on the idea of liberal democracy where domestic politics is concerned and on that of human rights where international relations are concerned. These ideas form our shared basis. And the main thrust of legitimation is that, once we are satisfied that something in this shared basis—say, a (moral) legal provision—is legitimated, we thereby have a duty to comply. This rule, however, is subject to exceptions, and I point out two of them below.

First, we cannot always assume we have the widespread background acceptance on which legitimation itself is based. It may happen that the presence of different justificatory backgrounds for the same institutional framework is in itself enough to set off a major controversy jeopardizing the prospect of our converging on a human-rights scheme. Thus, for example, the debate on so-called Asian values and the Islamic exceptions suggests—with all of the arguments put forward in support of these values and exceptions—that plural justifications essentially do amount to a lack of legitimation. The same may happen with bioethical issues such as abortion or artificial insemination. I actually think this is a different situation: this is not a matter we can enter into right now, but this much can be said, namely, that whatever else is true of the dynamics involved in a debate, divisive issues, like the ones just mentioned cannot be resolved without a strong and independent legitimation—this is a necessary background condition and there seems to be no way around it.

Second, our duty to comply given the fact of legitimation will lose much of its force in the face of significant injustice. Or rather, we will have in this case not one but two moral duties: on the one hand a duty to comply with legitimated law, and; on the other a duty to fight the injustice. Moral conflicts of this kind are typically the stuff of conscientious objection and civil disobedience, and it would be interesting to see whether deep social inequality is grounds for such action, or at least whether it properly sets up a conflict of duties. It is likewise interesting to imagine how such conflicts might apply beyond the case of the nation-state so as to become relevant in the sphere of international relations.

Third, we could ask how to go about meeting the challenge posed by non-standard objections, where exception is taken to the very idea of an overlapping consensus, viewed as inherently flawed from the start, *before* we even get to consider its scepticism or its comprehensiveness. This line of criticism might be taken, for example, by someone who was not in sympathy with me in supporting liberal democracy or human rights, perhaps on account of a deeper commitment to a radical political ideology, such as Marxism or fascism. My impression is that there is no argument against criticism of this sort, at least not if we stay within the scope of legitimation as presented in this paper. So, if any arguments can be made in reply to a nonstandard objection, they must come from somewhere other than from an idea of a global overlapping consensus however interpreted.

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Philip Pettit's *Law, Liberty and Reason*: Republican Freedom and Criminal Justice

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1 Republican Criminal Justice

The topics treated by Professor Pettit in his paper are connected with his republican theory of government, grounded in the "political ideal" of "liberty as non-domination." We know that Pettit draws this concept from the scholarship devoted to the early modern republican tradition, and in particular from Quentin Skinner's studies. In the writings of Machiavelli and the "neo-Roman" authors of the 17th and 18th centuries Skinner finds a conception of liberty clearly distinct from both the positive freedom of the ancients and the negative freedom of Hobbes and then the liberals. In my view, Pettit's political and legal philosophy convincingly shows that a study of early modern political thought can bring to light views, concepts, and approaches that can point out critical and evaluative tools for dealing with our problems. The historiographical work done on republicanism enables us to see that modernity has been thought of in different ways: this can provide us with the conceptual tools for an alternative approach to contemporary issues. Pettit did this in connection with the legal system and in particular with the criminal justice system.

A few years ago, Pettit and John Braithwaite worked out a "republican theory of criminal justice". Against the 1970s resurgence of retributive positions encapsulated under the banner "Criminals should get what they deserve—no more, no less" (Braithwaite and Pettit 1990, 4), we cannot, according to Pettit, simply returne to the traditional approaches of preventionism and utilitarianism. We must take a different perspective, which Pettit draws precisely from the early modern conception of republican freedom. On this basis we can outline a comprehensive theory of criminal justice with which to handle the key issues of the penal system and answer such questions as "what kind of behaviours should be criminalized by the system?" or "how should resources be allocated to the system?" or "what kind and intensity of surveillance should be tolerated?" or "what sentences should courts impose on those found guilty?" In other words, the theory so outlined will be meant to

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deal with the various interrelated sub-systems for investigating crimes, prosecuting them, determining guilt, and punishing convicted felons. All the keywords of the republican theory of criminal punishment begin with an R: *rectification*, *recognition*, *recompense*, and *reassurance*.

As much as Pettit's philosophy of criminal law may be based on republican freedom, his republicanism is expressed in an original legal theory. In *Republicanism*, liberty as non-domination is presented by Pettit as a universal political ideal appealing to liberals and communitarians alike, as well as to environmentalists and feminists, to movements linked to the socialist tradition and those inspired by multiculturalism. And it is an "independent" ideal, one that need not be balanced with and weighed against other principles, such as equality, security or membership. As such, liberty as non-domination works for Pettit in the manner of a value guideline on which basis to work out a scheme for republican government; a scheme laying out the spheres where institutions may or should appropriately intervene, in such a way as to secure the rule of law and maintain different forms of "dispersion of power," including the separation of powers (legislative, executive, and judicial), as well as federalism and decentralisation. Particularly significant is his foundation of democracy "not on the alleged consent of the people, but rather on the possibilities for ordinary people to contest the doings of government" (Pettit 1997a, 277).

Pettit outlines a strategy of pre-emptive check on the actions of state officials which is very far away from Machiavelli's "assuming that all men are evil." For Pettit, we should rather assume that most individuals are law-abiding and value social esteem and their self-esteem, and should privilege screening devices over negative sanctions. Screening devices should operate, e.g., in political parties' selection of the political staff; and Pettit (2002) proposes here that we generally resort to committees of experts, including a "penal policy board." He imagines there to be an "intangible hand" whose operation should "boost a suitable economy of regard" (ibid., 236).

Institutions can achieve these goals "only if they win a place in people's hearts" (ibid., 240). From this point of view, the informal rules of civil society—Machiavelli's *buoni costumi*—play a crucial role together with state laws: "The laws must be embedded in a network of norms that reign effectively, independently of state coercion, in the realm of civil society" (ibid., 241). Republican laws need "habits of civic virtue and good citizenship" (ibid., 245), "a politics of the common good" (ibid., 249). According to Pettit, a democracy open to contestation by the citizens makes it possible "to establish the republican legitimacy of its laws in the public mind" (ibid., 280). In this way, a virtuous circle can emerge between republican vigilance—which requires an external attitude of personal distrust "keeping the authorities on their toes" (ibid., 281)—and a high degree of trust.

This is not to say that criminal law is irrelevant. Crime undercuts and conditions the victim's freedom; those who commit crime "present themselves as dominators of the victim" (Pettit 1997b, 68); crime "reduces the extent of the victim's undominated choices" and "damages the dispensation of non-domination in the society as a whole" (ibid., 156). But, on the other hand, the penal system itself can jeopardise freedom, so much so as to impose a "tyranny of avengers," as Montesquieu put it. Hence the need to exercise penal parsimony: "Since the laws should only

criminalize where criminalization promises to further overall non-domination [. . .] and since criminal laws are both delicate and dangerous weapons, there should be a presumption in favour of parsimony" (ibid., 154). The immense power of the modern police can hardly be subjected to effective checks and is liable to corruption. The system of penalties appears to be "the random product of press attention, moralistic fashion, and the fluctuating taste of vengeance" (ibid., 156), and must be "radically rethought." This criterion gives "more prominence to *moralizing* social control over *punitive* social control" (Braithwaite and Pettit 1990, v–vi; italics added). Indeed, for Pettit we cannot rely too much on citizens to make utilitarian calculations, on the assumption that they will weigh the pros and cons of breaking criminal laws: Rather, we should expect a better protection against crime if citizens view it "as shameful and unthinkable." The most relevant element here is reprobation: "We refrain from crime not so much because we fear or even know the punishment we are likely to get, but because it simply seems wrong to us, and one reason it seems wrong to us is that people are punished and shamed for it." This has direct implications for the theory and practice of punishment: "Moral education should be the primary purpose considered in sentencing decisions" (ibid., 126). In other words "the criminal law should give moral guidance to the community" (ibid., 127).

This entails the strengthening of procedural due process and the defendant's rights, as well as a less generalised resort to criminal trial. The state's investigative and repressive apparatus must be subjected to community accountability mechanisms. The shift of emphasis from deterrence and retribution to the "three R's" must also involve a redistribution of resources. Moreover, we should beware of buying into the illusion that a place of maximised domination such as is the prison can achieve results in terms of prevention, reeducation and resocialisation. It is through the massive recourse to measures alternative to incarceration that "Western criminal justice would become more like Eastern criminal justice with respect to moral education" (ibid., 134).

2 Law and Globalization

I am convinced that Pettit's "neo-republican" theory is important, and in particular that his account of liberty as non-domination and of contestatory democracy is very significant. I think that we should devote serious consideration to Pettit's idea that his theory of law—a very relevant one, ranging from constitutional law to criminal law—bears a connection to the foregoing principles, which he worked out in his treatment of early-modern political thought. And I think that his analysis of the legal system's role in contemporary societies is realistic in many respects, and that many elements of his proposed politics of law are convincing. Pettit rightly remarks that "checking the republic" and stabilizing the institutions all the while respecting citizens' freedom requires a complexly structurated range of strategies. In his articulating rules of civil society to the rules of law, his acknowledging that large tracts of the law cannot be reduced to a command-punishment scheme, and his laying emphasis on screening devices and positive sanctions, he shows how fruitful

an "impure" theory of law can be that comes to terms with the intricate evolutionary processes of contemporary legal systems.

From this point of view Pettit's account might be placed within the debate on the radical transformations of law—or crisis of law—in the age of globalization. In Italy, we associate this debate to the name of Maria Rosaria Ferrarese (2000; 2002). Globalization is said to lead to a legal system "of possibilities" based on "soft law" rather than to imperative rules of law. This means the end of the primacy of legislative or enacted law, all the while contract law is spilling over from private law to be used in constitutional, administrative, and criminal law, too. It is by now a blurred picture that Max Weber gave us of modern law as a coercive system supported by state monopoly of coercion in a given territory and legitimised by its being rationally "reckonable" and predictable. I think that Pettit's legal theory can account for some of these processes and, most importantly, might give an answer to some of these tendencies (an answer welcome by those who are not especially keen on an apology of the legal order of markets). However, I have to wonder whether his leaning towards a single universal ideal—liberty as non-domination—really suited to contemporary legal systems, with all their complexity and differentiation.

I must confess in this regard some perplexities about the very basic assumption of Pettit's theory. In other words, I wonder whether a systematic political philosophy can be built upon the complex and diverse history of early modern republicanism; or whether the different and often conflicting views of politics expressed in the language of republicanism can be reduced to one idea and make up a coherent theory. But most of all, I wonder whether liberty as non-domination can be taken to be the one unified self-sufficient political value, *the* ideal to pursue. Isaiah Berlin had many reasons for arguing that too inclusive a notion of freedom ends up with making us less aware of moral pluralism: The risk, in other words—when dilemmas of morality, politics, and law are at issue—is that the idea of a pivotal super-value may make less transparent our representation of value conflicts and more difficult our effort to balance these values against one another and settle on a decision (which entails taking political responsibility for an ultimate decision among irreconcilable and incompatible principles).

This seems to me especially relevant when we shift from the level of defining the republican ideal of freedom to that of designing republican political and legal institutions. Are we to think, as Pettit's stringent arguments suggest that something as complex as the contemporary society's legal system—or, even more implausibly, a global society's differently interplaying systems—can be governed and indeed *is* or *are* in fact governed, under a single political ideal, a single normative principle?

3 Legal System and Shared Ethos

Pettit more specifically deals with the crucial issue of the relationship between a legal system and a shared ethos. He revives Machiavelli's idea that while legal institutions—"*ordini*"—play a vital role in defending liberty against domination,

even the best institutional devices turn out to be ineffectual and powerless in the face of "universal corruption", or generalized social apathy.

Pettit sees here in particular the operation of the intangible hand and the beneficial effect of reprobation as powerful means to maximize freedom, that is to pursue the common good. Pettit confidently uses such phrases as "moralizing social control," emphasizing the possible effects of the devices of social approval and disapproval. He invites us in this regard not to overestimate the anonymity of contemporary societies. I wonder whether we could in return invite him not to underestimate the effects of social differentiation and of the way that social control and the media have evolved. I may be too biased by the experience of public communication in Italy. But I cannot help thinking of this experience when Pettit argues that the division and articulation of power favour the emergence of "an established ethos of people's speaking their mind" (Pettit 1997a, 236). I cannot but think of how communication between the legislative, the executive and the judiciary short-circuits on a daily basis, in large part as a result of pervasive media influence. And I wonder what the shared criteria of praise and reprobation can be in our societies exposed to an endless flow of multimedia communication. It seems that if we are fight back against Orwell's Big Brother, and are to do so on the basis of shared criteria, we cannot turn for help to *Big Brother*, a reality TV show whose characters—people "like" us, from the street—appear to either have no shared criteria or to share ones that won't do us much good.

In his treatment of the "economy of esteem" (Brennan and Pettit 2004) Pettit certainly takes social differentiation and groups pluralism into account. He does not seem as much aware, however, of a consequence of pluralism: pluralism exists even within the individual, now increasingly locus of multiple memberships; the streams of pluralism, in other words, do not just invest society as a whole but also cut across the individuals themselves, who accordingly have to deal with different regimes of approval and disapproval that can hardly be reduced to a single intangible hand (see, e.g., Facchi 2001). Here I might remark that Pettit does neglets to pay close enough attention to a significant aspect of the thought of some republican authors he otherwise often quotes: he fails to stress the importance recognized by a line of thinker—from Machiavelli to Adam Ferguson—for the theme of conflict between social groups and its possible impact on the development of freedom and the inclusion into citizenship. The issue of groups conflict brings into play that of value conflict, which is especially relevant within contemporary societies. Polytheism of values seems today more complex than in Weber's time: with the multicultural and transnational development of our social systems, the Pantheon becomes overcrowded and its gods appear more and more quarrelsome.

4 Rights and Criminal Law

These issues become especially delicate and tricky when dealing more specifically with criminal law. One can see in Pettit's work many concerns in common with the approach that in legal theory in Italy (and perhaps Spain, too) is referred to

as *garantismo*, by which is meant the primacy accorded to individual rights in criminal law and procedure. In many passages he proposes solutions suggesting something like what Luigi Ferrajoli (1989, 2007) calls "minimal criminal law," and in any event these proposals express the idea of a sparing recourse to penalties limiting personal freedom. Especially relevant in this regard are Pettit's compelling pages about prisons as places of maximized domination and about the dynamics set in motion by recurrent outbursts of public outrage, drawing media attention with demands for stiffer punishments and exemplary sentences: these pages shed light on those periods when the dark ideologies of law and order and zero tolerance seem to meet no opposition at all in political debate (see Re 2006). Pettit (2002) acknowledges all the limitations of criminal law, and in particular of a punishment-based criminal law, and even questions the politically feasibleness of criminal justice.

However, when outlining an alternative proposal from a republican perspective he insists upon a sort of moralization of criminal law itself. Not only do sanctions connected with approval and disapproval play a key role, but "the criminal law should give moral guidance to the community" and moral education is the principal aim of punishment. Even though entire libraries have been written, at least since Beccaria, about the separation between criminal law and morality, criminal liability and sin, it would be unfair to quote them against Pettit so much so that Pettit's argument is part of a multifaceted and highly developed theoretical debate on the function of criminal law, alternative forms of justice, penalties alternative to detention, and restorative justice. Still, the argument is open to some classical objections from the granitic principle of legality—*nullum crimen sine lege*—as well as from the principles of legal certainty and of mandatory criminal prosecution (the former principle involving a thorny issue, let alone the latter). For all the one-sidedness clearly involved Kelsen's crime-punishment scheme, under which a legal norm exists only insofar as the legal system connects a given act with a penalty, it cannot be denied that the scheme is still appealing from the standpoint of the protection of rights. For a whole tradition of thought stemming from the classical vision of the rule of law, the predictability of the state's judicial and repressive apparatus is undermined by conceptions of criminal law that seem to bring in elements of discretion, and so of uncertainty. And this is all the more true of any conception that appears morally supercharged. At the same time, however, can a penal system that cannot guarantee a minimum threshold of deterrence, prevention and re-socializations of convicts be regarded as providing any moral guidance for society?

Finally, a simple question I should like to set up as follows. The perspective of international criminal law has been into focus since the 1990s. The ad hoc tribunals set up for the former Yugoslavia and for Rwanda, as well as the International Criminal Court, seem to propose a liberal globalized model for the criminal trial, and to do so universalizing the traditional approach of punishment as deterrence or retribution, with all of its contradictions (see Henham 2003; Zolo 2006). However, alternative approaches have been attempted in dealing with the tragic experiences of communities coming out of situation of extreme crisis, from dictatorships to genocides and Apartheid: think of truth and reconciliation commissions or of traditional

nonjudicial forms of community justice (see Lollini 2003, 2005). Has the republican theory of criminal justice anything to say from this perspective, too?

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