

REVIEW

Richard Bellamy 2007. *Political Constitutionalism: A Republican Defence Of The Constitutionality Of Democracy.*

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Chris McCorkindale

Over the course of the past decade, something of a republican revival, harnessed by the concurrent work of Quentin Skinner and Philip Pettit, has reinvigorated the minds of those who find cause to cherish and celebrate, rather than fear and shut off, that which we (somewhat vaguely) know as 'the political'. Across the broad spectrum of disciplines from international relations (James Bohman) to political theory (David Miller); from philosophy (Richard Dagger) to law (Hans Lindahl), republicanism is slowly emerging in the mainstream of modern political and constitutional thought. As Bohman himself has said, "[b]y introducing the important ideal of freedom as nondomination, the republican tradition has significantly altered the landscape of political philosophy."¹

In *Political Constitutionalism*, Richard Bellamy turns to republicanism, and the language of nondomination, not only to celebrate 'the political', but to *defend* it from a very particular threat. "This book," he concludes, "has defended democracy against judicial review" (conclusion, p.260), and this it has done with a welcome, not to mention valuable, intervention in one of (if not,) the most pressing constitutional questions of the day. Rejecting the "increasingly dominant view...that constitutions enshrine and secure the rights central to a democratic

society" (introduction, p.1) the book simultaneously deconstructs the core claims made by those who promise (through law) the 'end' of politics and puts in their place the 'norms' and 'forms' which he believes should guide our conceptual reconstruction of constitutionalism. In each of these movements, *towards* the political constitution, away from the legal constitution, Bellamy's *republican* defence, his explicit belief that the constitution is a political and a public thing, speaks (in its most ideal formulation) to what van Roermund calls 'political reflexivity': "the whole people rules over itself as a whole."² As Bellamy himself says, "we must see the law as in some sense ours - a feeling that flows in large part from the law being a public good, depending upon and making possible mutually beneficial cooperation." (ch.2, pp.65-66) As such, *Political Constitutionalism* is not an especially innovative book. Kramer, Waldron and Tushnet have all sought to 'take the constitution away from the courts', whilst Pettit's theories of freedom and government are well cited by those, such as Lindahl, who seek out the space of reflexivity and those, such as Tomkins, who defend the political constitution from the Trojan horse of rights-based judicial review. More than that, much of the empirical work is done elsewhere, in the examples of Dahl on democracy, (ch.3, p.95) or Tomkins on politically motivated judicial activism. (ch.6, p.251) None of this however is to say that *Political Constitutionalism* amounts to little more than timely synthesis. The critique of legal constitutionalism contained in part I of the book sees Bellamy engage in theoretical groundwork to an extent unmatched by his peers, and provides the dominant liberal schools with a genuine case to answer; whilst the elaboration of political constitutionalism in part II pushes the intra-republican debate beyond the norms of political constitutionalism and toward the forms by which nondomination *must* be secured. "Nondomination," he writes, "not only provides republicanism's basic case for establishing a system of self-rule, but also dictates how this system should operate and be organised." (ch.5, p.176)

The organising principle in Bellamy's analysis is the republican (or, for Skinner, the neo-Roman) view that *unfreedom* means more than suffering "such forms of direct or indirect interference as exploitation and violence or marginalisation", but rather is manifest wherever "an individual or body possess[es] the power wilfully to exercise such interference over others, or in other ways to ignore or override their opinions and interests." (ch.4, p.151) This is to say, that by deny-

ing the very space of 'the political', that wherein the reflexive moment of the polity takes place, for example in constitution making, or in legislation, domination and servitude go hand in hand. As Skinner has said, "if you live under any form of government that allows for the exercise of prerogative or discretionary powers outside the law, you will already be living as a slave. Your rulers may choose not to exercise these powers, or may exercise them only with the tenderest regard for your individual liberties... The very fact, however, that your rulers possess such arbitrary powers means that the continued enjoyment of your civil liberty remains at all times dependent on their goodwill."³ Not, then, the denial of civil liberties as such, but the denial of political reflexivity draws the boundary between freedom and *unfreedom*. So, Bellamy says, "[a]n enlightened despot might strive to avoid oppressing his or her subjects but would still dominate them". In other words, where not the 'whole people' but the 'few...rule the whole people', there, says Bellamy, injustice reigns. "Distinguishing domination from oppression," he continues, "highlights that being dominated constitutes a form of injustice in its own right." (ch.4, p.152) Thus, Bellamy is able to attack legal constitutionalism not only as *unrepublican* and *unpolitical* (an accusation which legal constitutionalists would surely take as a compliment!) but with more bite, he is able to make and substantiate the claim that legal constitutionalism per se creates that of which it is most suspicious: *unfreedom*. By promising an 'end' to politics, manifest in the entrenchment of fundamental, constitutional rights, legal constitutionalists stand in danger *both* of dominating and of (even an inadvertent, silent) oppression. "The danger of oppression is increased not only because domination renders it easier to inflict and harder to rectify, but also, and most importantly, because in such circumstances oppression may go unacknowledged as such. If the dominant group define what counts as oppression, then they will be able to delegitimise all attempts to question prevailing definitions - especially [and here Bellamy cites the plight of women in the family and workers in private enterprises] if these have been taken outside the realm of politics." (ch.4, p.152) By employing republicanism as the core of his defence of the political, Professor Bellamy is able to construct a coherent and sustained attack on the 'age of rights' and thus on the supreme arbiters of the protections enshrined therein: the judiciary.

Motivated by the twin claims that human rights, as fundamental law, flow from “a rational consensus on the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve”, and, following this, “that the judicial process is more reliable than the democratic process at identifying these outcomes”, this book contends that the trend towards *legal* constitutionalism, in theory and in fact, *undermines* democracy by resting on the impossible promise of the end of politics. (Intro., p.3) Thus, the defence presented here by the author is not only the restatement of constitutional rights within what he calls the ‘circumstances of politics’ (Ch.1, p.20) but a celebration of the very *disensus* which *defines* our democratic relationships. “Though people may agree that the circumstances of justice render rights necessary, they disagree about which rights these are, their nature, bearings and relations. Does the right to life rule out abortion; how far does the right to property restrict transfer payments for welfare; when, if ever, should freedom of speech give way to privacy?” (Ch.1, p.20) By enshrining the right to life, by establishing as fundamental the right to property, by the reification of free speech, Bellamy convincingly argues in chapter 1 that far from achieving consensus, and with it the end of politics, politics and its defining disagreements are rather placed beyond the people themselves, beyond in some instances their elected representatives, and put hands of this tiny (judicial) minority.

Part I then sets out to debunk the (dominant) myths which lend their support to the modern trend towards legal constitutionalism. Chapter 3, ‘Constitutionalism and democracy’, engages with a broad range of political and constitutional thinkers (Dworkin, Ely, Habermas, Ackerman, Burt) in order to refute the many and various perspectives from which judicial review is defended as the guardian of rights prior to and constitutive of the democratic process: concluding that “the true protection of rights, the rule of law and even democracy comes from democracy – the power of individual citizens to claim and frame their rights and demand they be treated on equal terms with others.” (p.141)

It is chapter 2 however, ‘The rule of law and the rule of persons’, which pushes the boundaries of the wider debate. Taking the strikingly different positions of Hayek (law as a system of general rules guaranteeing the maximum possible freedom to the individual without impinging on the freedom of others) and Dworkin (constitutional

rights as law's underpinning principles, to be applied by judges in 'hard cases') Professor Bellamy demonstrates that each fails to shake off the self-constructed "bogey figure" of the Hobbesian sovereign. "By inviting judges to offer a view of 'good' law rather than law *per se*, Dworkin turns judges from third party arbiters into participants in many of the disagreements that it is politics' rather than the law's role to resolve...Far from promoting fidelity to law, the very ambition of Dworkin's approach risks undermining it by making law appear to be little more than the contentious opinion of a particular person." (p.79) Hayek's conception of the rule of law based upon clear and general rules too fails to meet what the author calls "the Hobbes challenge". (p.55) "Once we admit that there can be occasions when a rule like 'nobody can drive faster than thirty miles per hour in a built up area' might admit of exceptions - as when an ambulance, or possibly a private car, is rushing an emergency patient to hospital, then it becomes hard not to assess the rule in the light of its justification. If that occurs, the rule loses its rule-like character and becomes a piece of advice or a weighty consideration that has to be judged in terms of its relevance for the individuals in the case at hand and the likely effect of making a precedent of the exception or given reading of the rule." (p.71) Thus, the radicalism of Bellamy's argument lies not in empirical innovation, or in strikingly original thought, but rather in adding to the debate the theoretical groundwork by which political constitutionalists can coherently challenge the core claims made by their legalist counterparts. This, in and of itself, is a significant advance; one drawn on explicitly republican terms.

If the spirit of part 1 can best be captured with that old adage, 'the best form of defence is attack', then in part II of the book, when Bellamy turns his attention to constitutional prescription, we can perhaps reverse the position, and summarise that 'the best form of attack is defence', for what Bellamy presents is not a radical reconstruction of democracy, far less a call to arms for the revolutionary republic, but the rather more subtle defence of "the democratic arrangements [already] found in the world's established working democracies", albeit in need of "improvement". (conclusion, p.260) It is then precisely the 'improvement' of those arrangements which Bellamy seeks to draw from republicanism and its fundamental principle, nondomination. "Non-domination," he says, "not only provides republicanism's basic case for establishing a system of self-rule, but also dictates how

this system should operate and be organised." (ch.5, p.176) Thus in chapter 5 'The forms of constitutionalism', Bellamy offers two 'qualities' which republicans demand from the political process: the classic principle *audi alterem partem* (the duty to 'hear the other side'); and the balance of power.

For Bellamy, a republican account of *audi alterem partem* is one which rejects all substantive notions of the principle. "The principal rationale for a genuinely public form of reasoning – that is, one involving the public in such a way that 'all sides are heard' – stems from [the circumstances] of political disagreement." (ch.5, p.178) In established, working democracies, Bellamy identifies equal votes and, from those votes, majority rule as the best way to ensure the 'input' of public reasoning to the constitutional process. "Giving each and every citizen one (and only one) vote in a general election offers a rough and ready and easy to verify form of ensuring all citizens' views carry the same weight in collective decision-making" (ch.6, p.222) Such formal equality (one citizen, one vote) may be a prerequisite of equal voting, it is, however, in itself insufficient. Practices such as gerrymandering, or restrictive polling times/locations, can be used to turn formal equality into practical inequality. (ch.6, p.224) For Bellamy even the protection of these seemingly procedural requirements ought not to be placed in the hands of the judiciary. Relying heavily on the empirical work of Tushnet and Dahl, Bellamy suggests that "[c]ampaigns by disenfranchised and disadvantaged groups to acquire the vote and render its employment more effective have been far more effective in extending and reforming democracy than judicial action." (ch.6, p.225)

If not judicial overview, then for Bellamy the "crucial mechanism" for ensuring nondomination and *audi alterem partem* is the balance of power. (ch.6, p.230) The analysis begins (and rightly so) with the claim that the balance of power should not, as so often is the case, be thought of as a synonym of that most reified of constitutional principles: the separation of powers. Whilst both identify a common enemy, arbitrary rule, the republican balance of power is more demanding still. "[W]hile republicans acknowledge that constraining the power of any single actor plays a part in avoiding 'arbitrary rule', they also stress the positive role of dividing power in ensuring decision makers 'hear the other side' – most particularly of their principals, the citizens." (ch.5, pp.195-196) Drawing from Polybius (as well as Aristotle and Machiavelli) the republican theory that power should be divided

not functionally between the branches executive, legislative and judicial, but rather as a horizontal division amongst rival and competing powers (the social classes represented in monarchy, aristocracy and democracy) (ch.5, pp.196-197) Bellamy finds the complexity of modern power divided and balanced amongst political parties who compete both for the support of the electorate, and with that support, for the right to form the executive power of the state. "An appropriate, public reason inducing, balance of power," he says, "is achieved through parties competing across certain pivotal ideological cleavages that capture the main political divisions within contemporary societies." (ch.6, .233) By asking voters to refract their particular interests through the lens of the party, Bellamy suggests as its consequence, the formation of "a comprehensive set of policies for the people as a whole" (ch.6, p.232) – citizens forced to 'hear' and adjust to the competing claims of other citizens, government; government obliged to 'hear' and adjust to the will of the electorate.

There is no doubt that *Political Constitutionalism* is primarily a defensive piece, which is stronger in its attack on legal constitutionalism than it is in constitutional prescription. As Bellamy says in his conclusion "[s]aying precisely *how* to [reinvigorate the democratic constitution] lies outside this book". (p.263, my emphasis added) Nevertheless, in an age oft characterised by a cynicism of politics and a turn away from 'the political', Bellamy's celebration of politics and its constitutional potential is both a refreshing and important response to the liberal mainstream. That said, when Professor Bellamy turns his attention to democracy, that which is being defended, it seems that the case made is, at different stages, both *over* and under determined. So Professor Bellamy over plays the democratic hand when he says, citing leading Supreme Court decisions *Roe v Wade* and *Brown v Board of Education*, that progressive judicial activism broadly reflected already existing democratic shifts; (ch.1, p.41) that "[r]eal change only comes with legislation, and judicial review may hinder as much as it promotes that process." (ch.,1, p.44) There is no doubt that legislation is a real force for constitutional change (the creation of the Scottish Parliament, for example by the Scotland Act 1998) as well as for more subtle societal changes (attitudes to wearing seatbelts in cars, or smoking in public places as the result of prohibitive legislation are but two welcome examples). Yet, it is also true that the judicial review of executive power is capable of both leading the legislature where, exposed to the pressures of public opinion, it may fear to tread, and

of protecting the rights of individual citizens where the whims of the *demos* are only marginally engaged. Thus, no such prior democratic movement preceded the development by the courts of rules of natural justice in 19th century England, which protected individual citizens (*Cooper v Wandsworth Board of Works*⁴ and *Dimes v Grand Junction Canal Proprietors*⁵ the classic examples) from the arbitrary exercise of executive power; whilst the legislative changes brought about in the sentencing of young offenders convicted of murder in England and Wales, contained in section 60 of the Criminal Justice and Courts Services Act 2000, were no less significant, no less just, for the fact that they came about as a response to judicial review of executive action⁶ made *in the face of* overwhelming public pressure.

On the other hand, whilst it is reasonable to argue that in times *ordinary* the political constitution is best channelled through a system of equal votes for all citizens, majority rule, and robust competition amongst political parties, (Ch.6), by denying any conceptual distinction between ordinary/normal politics and extra-ordinary moments of *constitutional* politics, Professor Bellamy seems to *deny* the people themselves any moment of self-rule, bar that one day in every four or five years when they exercise their right to vote. "A people," he said, "continuously reconstitute themselves and democracy through *normal* politics." (Ch.3, p.136, my emphasis) Yet, as Larry Kramer and Andreas Kalyvas, to name but two, have recently shown, in infrequent and extra-ordinary moments, the people themselves are compelled to emerge from the shadows of representation and challenge the exercise of politics in the normal. This was as true in the case of those individual US citizens who 'disobeyed' the orders of the United States military to take up arms in Vietnam, on the basis of the President's *ultra vires* declaration of war, as it was of the one million peaceful protesters who emerged on the streets of London in 2003 when *both* the courts *and* parliament failed to give adequate scrutiny to the British government's case for military intervention in Iraq. Whilst acknowledging that the *institutionalisation* of such extra-ordinary moments of disavowal and challenge present seemingly insurmountable problems of definition and potential misuse, it is, I believe, precisely by re-thinking the *constitutionality* of such moments that we can best meet Professor Bellamy's worthy challenge of reinvigorating the political constitution, give meaning to self-government, and rein in the ever lurking spectre of arbitrary rule.

NOTES

1. James Bohman 'Nondomination and Transnational Democracy', in Cécile Laborde and John Maynor (eds.) *Republicanism and Political Theory* (Oxford, Blackwell Publishing Ltd., 2008), pp.190-216, p.190
2. Bert van Roermund 'First-Person Plural Legislature: Political Reflexivity and Representation', in (2003) 6 *Philosophical Explorations* 237
3. Quentin Skinner *Liberty before Liberalism* (Cambridge, Cambridge University Press, 1998) p.70
4. (1863) 14 CB NS 180
5. (1852) 3 HL Cas 759
6. *V and T v United Kingdom* (1999) 30 EHRR 121