Critical Exchange

Reply to Elena Icardi and Pietro Maffettone

The Privatized State: A Reply to My Critics

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I am very grateful to Elena Icardi and Pietro Maffettone for their generous and thoughtful comments on *The Privatized State*. It is a privilege to be given the opportunity to respond to their critical observations. Given the wide range of issues both contributors raise, I will not be able to provide a comprehensive response to all of them. I will rather concentrate my reply on five central topics, which can be broadly summarized as follows: 1) the relation between Kantian republicanism and neo-republicanism; 2) the over-demandingness of an internalist conception of legitimacy; 3) the relation between ideal and non-ideal theory; 4) the place of efficiency in evaluating the state involvement in the economy; and 5) the relation between bureaucracy and democracy. These are all important themes in the book, and I am glad to have the chance to further clarify, and expand on them.

Beginning with the first theme, Icardi wonders why I do not ground my critique of privatization on a neo-republican approach, and what the real difference between neo-republicanism and the Kantian account of freedom and democratic legitimacy I endorse is, given their many apparent similarities. I believe there are three main differences that motivate my choice of theoretical framework.

The first difference, which Icardi herself notes, has to do with their respective conceptions of the state, and of its relation to justice. For neo-republicans like Philip Pettit the state is "an unintended precipitate of human history", and living under a state is "a historical necessity on

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a par with living under the laws of physics".[1] This is what ultimately explains why the mere fact of having to live under a state is not itself a form of domination. From a Kantian perspective, things are very different. The state is a normative demand, not a historical fact. The existence of the state is necessitated not by history, but rather by freedom. More precisely, given the fact of physical proximity and thus of potential interference with each other purposiveness, freedom requires rights – secure spaces for self-determined action. Such rights, in turn, can only become conclusive within a state – a system of rules expressive of an omnilateral, that is to say, reciprocal, public and appropriately representative will.[2] True, for Pettit, the state is not *just* an historical necessity. Political institutions are also valuable means of nondomination – they serve the normative goal of minimizing domination between private parties (justice) and, when appropriately constituted, they also minimize the domination of private parties by the state itself (legitimacy). Yet, their value ultimately remains instrumental. The distinctiveness of Kantian republicanism, by contrast, consists in viewing political institutions and, I would add, democratic ones, as having a justice-constituting role. Without such institutions, justice would be conceptually impossible, as rights would remain merely provisional. For reasons I extensively examine in Chapter 2 of *The Privatized State*, I believe this account of the normative foundations of the state is both philosophically appealing and necessary to reject what I call the "interchangeability assumption" – the idea that, at a fundamental level, public and private forms of action are just interchangeable means for the achievement of independently defined ends. My normative critique of privatization as a return to the state of nature develops from such rejection.

A further difference with neo-republicanism relates to the very definition of freedom. For Pettit, non-domination is the absence of arbitrary power of interference, where "interference" is defined in terms of reduction of options for choice.[3] My own interpretation of Kantian freedom as independence makes no reference to the reduction of options

[1] Pettit 2012, 161.

[2] See also Ripstein 2009.

[3] Pettit 2012, 152.

for choice. Rather, the focus is on not having one's ability to form and pursue ends subject to, and dependent on, the merely unilateral will of another, whether one's options for choice are reduced or not. This distinction is important. To see why, consider the case of private philanthropy (a central theme of Chapter 7). Dependence on philanthropy is often thought to be incompatible with neo-republican freedom. But in what sense, exactly, does the philanthropist have the power to interfere? After all, the philanthropist, by making donations, only has the power to add options for choice to the beneficiary's pre-existing set. The reason why a person's dependence on philanthropy is incompatible with her freedom is not that the philanthropist has the power to reduce the beneficiary's options for choice but rather that the beneficiary's ability to form and pursue ends depends on the exercise of someone else's merely unilateral, because private, discretional, and non-accountable will. The Kantian account of freedom better captures this point.

The third difference is that neo-republicanism cannot, I think, suffice to ground a case for the authority of democracy, understood as collective rule. This is because a system of impersonal ruling, e.g. a system where a robot or computer makes the rules, would seem to be compatible with non-domination (assuming the robot is not an agent). If so, "rule of all", that is to say democracy, is not required by non-domination. It is also because, even if non-domination were to succeed in grounding a case for democracy at the level of sovereignty – the authorization of fundamental laws or constitutional essentials – it is unclear whether it would suffice to ground a secure case for democracy at the lower level of government. Suppose, for example, that a people democratically vote on a constitution that allows for certain forms of dictatorships, at least for certain periods of time, and that people retain the power to periodically revise the constitution. Why would subjection to the dictator's rule be incompatible with neo-republican freedom? The Kantian account of freedom as independence may have more resources to obviate this problem, insofar as freedom as independence includes, as a corollary, what Kant calls a requirement of "rightful honor". A political system can then be regarded as meeting such requirement only if it empowers citizens to resist becoming mere means for the pursuits of others' ends, and to *assert* their own worth in their relation to others, including those in power. These desiderata would be jeopardized by forms of government that reduce

citizens to passive subjects of a dictator, and deprive them of the ability to play an active part in actively shaping or influencing the content of the laws. If rightful honor constrains what a people can validly authorize through constitutional reforms, then, a people could not be understood as collectively authorizing an autocratic master to rule them.[4] Kantian freedom thus extends, more securely than neo-republicanism, the presumption in favor of democracy from sovereignty to government.

Turning now to the second theme, Icardi worries that my conception of legitimacy is overdemanding and that the non-dominating character of law-making, and of administration, does not hinge upon office holders' internal dispositions, rather it is enough that the process through which such powers are exercised meet "creteria of generality and reciprocity." In response, I would say, first, that it is not obvious what it means for a *process* to meet criteria of generality and reciprocity, e.g. is this a function of participants in the process acting according to the letter, or to the spirit, of rules or mandates? Is it also a function of the quality of reasons provided in support of so acting? Etc. Second, generality and reciprocity are, in my view, not enough for democratic legitimacy, if legitimacy is understood to be grounded on a commitment to republican values. This is because the process of law-making, and its implementation, must also be *representative* of an omnilateral will, understood as the collective, public will of the citizenry. More precisely, law-making must "carry out" such will so that no citizen is subject to the imposition of a will that represents a merely private form of judgment. My contention is that citizens' (i) shared control over the terms of democratic authorization, (ii) office holders' compliance with the letter of mandates, and (iii) ex post contestation, albeit essential, are not sufficient to secure that the process of law-making and implementation qualifies as appropriately representative. To see why, consider the following case:

> C*orruption*. Lawmakers are under a mandate to "pass a law that will result in 1000 new job placements." Some wealthy donors promise the lawmakers future benefits in exchange for passing a law the content of which happens to be identical to the one demanded by the people's original mandate. In response to the donors' request, the

[4] See also Hanisch 2016, 67-88 and 84.

lawmakers pass the law, which they would not have otherwise passed. The law successfully results in 1000 new job placements. After the law is passed, the donors change their mind and the lawmakers receive no extra benefit for passing the law.[5]

In the example, the officials make laws that they are authorized to make by all citizens equally sharing in the authorization process and the content of their decisions reflects the will of the people, such that citizens may see themselves as having no reasons to contest the law ex post. Further, no formal corruption takes place in the end. Nevertheless, there is still an important sense in which the will the officials carry out through the process of law-making is the donors' will, not the citizens' will. This is a function of the internal reasoning of the law-makers – the fact that they do what they do on the basis of considerations (the donors' preferences) that have a non-public nature. Now, one could respond, following Icardi, that the problem in this case rests with a feature of the external process (the fact that by promising benefits the donors violate the rules of the game, so to say), not with the internal reasoning of the lawmakers. I would disagree, however, and so for two reasons. First, the reason why the law cannot be regarded as carrying out a public will is not the existence of the donors' promise *per se*, but how the lawmakers treat such promise as a reason for action. Second, and relatedly, even in the absence of an actual promise, and thus of a violation of the external process, the *act* of law-making would still express a private, rather than public, form of judgment, thereby failing to carry out an omnilateral will, if it was based on non-public considerations.

One could object that, as a matter of practicality, it can be problematic to make the legitimacy of a norm dependent on the internal reasoning through which it is arrived at. But this is, in my view, not a reason to opt for a purely externalist conception of legitimacy, but rather to adopt institutional proxies as measurable standards of internalist requirements. For instance, insofar as the legal structure of public offices, with their duty of loyalty and tenure protections, as well as limits on campaign finance and lobbying, are arguably necessary to support the ability of

[5] I use this example in Chapter 5 of *The Privatized State*, where I discuss the normative conditions of representation.

public office holders to silence nonpublic reasons in decisional processes that are meant to be representative of a public will, such institutions can be used as proxies for office holders' quality of reasoning.

I shall now move on to the third theme – ideal versus non-ideal theory. Icardi spots an apparent contradiction in the way ideal and non-ideal considerations interact in my account of the duties of private actors within an already privatized state. As she puts it "It is one thing to acknowledge that the privatized state is unlikely to cease to exist in the near future, and that we need to adapt accordingly. But it is quite another to propose enhancing the legitimacy of privatization, even if only provisionally, in the non-ideal scenario. How can private associations act "as if they were legitimate"…if they cannot be legitimate by definition? Saying that seems to contradict the main argument." The contradiction, however, vanishes once we unpack the concept of provisionality. In my account, the legitimacy of private actors is merely provisional, in a way similar to the way in which private parties, in the Kantian pre-civil state, have a provisional, permissive authorization to claim rights and to use coercive force. Acting on such authorization, in the state of nature, is only transitionally and conditionally permissible, insofar as it is done compatibly with the final, obligatory end of bringing about a rightful condition, after which that authorization will disappear (being substituted by an omnilateral form of authorization). Similarly, private actors in the privatized state have only a provisional and transitional kind of permission to act, which does not amount to full legitimacy, and which is itself conditional on them being committed to exit the privatized state.

I should turn next to the place of efficiency in evaluating the state involvement in the economy. As Maffettone points out, I hold the view that the efficient achievement of certain justice-based outcomes is itself a demand (the substantive component) of legitimacy. But, as Maffettone also rightly notices, with a hint of disapproval, "efficiency considerations do not exactly take pride of place" in my argument. Should efficiency play a more central role in a theory of privatization, then? He seems to think so. Maffettone also suggests that we should adopt a more "case by case" approach to privatization, especially in analyzing "what is gained and what is lost when a given market structure is introduced for the funding and/or production and/or allocation of a public service." Some cases of privatization may empower beneficiaries, while others may not. In his ex-

ample, "If we could imagine a scenario where assessing benefit eligibility was contracted out to, say, twenty firms that applicants can realistically choose from, it is not at all obvious that benefit seekers would not gain substantially more 'power' than in a putative alternative where their eligibility was assessed by the government." In order to fully respond to these important criticisms, I would need more space.[6] Here I will limit myself to a few general considerations.

First, and in relation to the above scenario, I should make clear that, from a republican perspective, the relevant 'power', or form of empowerment, is not just a function of the number of options for choice beneficiaries have, and not even of the number of opportunities for exit. To go back to the philanthropy example, whether I am dependent on one benefactor or ten may make a difference in terms of my 'power' (actual capacity) to escape certain abuses, but it does not make a categorical difference in terms of my 'power' to be free – not to be dependent on a merely private and unilateral will. If the argument I make in the book – that private service providers who determine eligibility criteria necessarily lack the capacity to make such determinations in a public way – is valid, then, the problem of subjection to a merely unilateral, private will cannot be simply solved by multiplying the number of private organizations.

Second, my aversion for efficiency-based approaches to privatization, which Maffettone astutely grasps, is mostly targeted to those accounts, of which Joseph Heath's is an exemplar, which take each case of privatization as assessable on its own merits (the case-by-case approach), and which understand such merits in line with mainstream economic theory: "the state involvement in the economy should be guided primarily by the norm of efficiency, which is to say, the objective of correcting market failure."[7] When the market fails on both the demand and the supply side – the argument goes – then the state must act as both a purchaser and as a provider. When, instead, market failure occurs on one side only, it is on that side only that state intervention is required. The problem with this analysis, as I see it, is that it neglects and obscures the aggregative, structural and dy-

[6] Beyond the book, I expand on these points in a more recent piece (Cordelli 2024, 66-84).

[7] Heath 2023.

namic effects of privatization, especially on (i) the overall balance of power between the public and the private, states and private corporations; and (ii) the relationship between citizens and their state. It also unjustifiably subordinates such concerns to efficiency considerations.

With regards to (i), it is obvious that the more a government privatizes, the more it becomes dependent on the private sector for the performance of essential tasks. In turn, the higher its dependence on the private sector, the more the state will be vulnerable to, and powerless in front of, pressures from such sector – a sector populated by actors with a vast amount of economic resources and, in a context of international competition, with the power to threaten to bring their resources elsewhere.[8] Such dependency is further worsened by the likelihood of a "brain drain" from government to the private sector, which can generally afford to pay higher salaries. Call this *the problem of dependency*.

Further, the state's effective capacity to keep private actors under appropriate control and accountability standards is itself compromised by its level of dependence on the private sector.[9] This is not only because such sector can use its resources to impede needed regulations, but also because the more government outsources, the less capacity it is likely to retain to gather basic information about performance, costs, and outcomes, and thus to choose competent contractors, as well as to enforce contractual terms. Call this *the problem of control*.

With regards to (ii), since citizens' attachment to, and care for, their institutions mostly develop through their daily interactions with such institutions, in contexts where "the face" of government is largely privatized, citizens' interest in politics, and their motivation to act vigilantly, tend to diminish (as the empirical literature on the submerged state confirms), and civic apathy to grow.[10] Privatization thus generates *a problem of civic vigilance*, beyond those of dependency and control.

The important point for our purpose is that, insofar as all the above problems are a matter of scale, not of any single instance of privatization taken in isolation, a "case-by-case" analysis of privatization, especially if primarily

[8] Farrell 2019.

[9] Freeman, Minow 2009; Michaels 2017; Verkuil 2007; 2008.

[10] Mettler 2011.

focused on economic efficiency, will necessarily miss them. Yet, from a Kantian-republican perspective (a perspective that, of course, I cannot defend here but which I do my best to defend in Chapter 2), these problems are crucial, for they undermine the very point and purpose of the democratic state. On the one hand, the problem of dependency and civic vigilance lead to *the domination of the state by private actors*. Once the democratic process is dominated by private interests it can no longer carry out an omnilateral will. On the other hand, the problem of control leads to the *domination of citizens by a privatized state*. Contract incompleteness often leaves private contractors with wide degrees of discretion. The less the state retains the effective capacity to exercise appropriate forms of control over private contractors, the more citizens will unavoidably become subject to unaccountable, and thus unilateral, exercises of discretionary power. Both problems are entirely independent of whether private actors exercise their discretion in ways that benefit or rather undermine overall efficiency. And, both issues reproduce within the state the same problem of domination, the solution to which was meant to justify the existence of the state itself. Insofar as, in the account I defend, the state is first and foremost the constituent of a rightful condition, and not a solver of collective action problems, it cannot appeal to considerations of efficiency alone to justify the undoing of that very rightful condition.

I want to conclude with a brief discussion of my proposal to partially democratize public administration, in order to avoid the problem of bureaucratic domination. Maffettone is skeptical of this proposal mostly, it seems to me, on elitist grounds, and on the basis of considerations concerning the trade-off between legitimacy and other values. He argues

> citizens not being children [which, in turn, entitles them to not be put under fiduciary guardianship by experts] does not provide the sort of reassurance that would allow me to feel confident that *their* judgment and purposes are such that my life will not be made considerably worse because of *their* oversight of *our* bureaucracy.

He continues:

> More to the point, it is at best unclear to me that the comparative evaluation of the risks involved in a despotic and unresponsive professional bureaucracy, on the one hand, and of poor-quality inputs from democratic forms of oversight, on the other, ought to be settled by assigning greater urgency to the former.

In response, I would first resist the logic of simple trade-offs. The value of not being ruled by an alien will, whether a guardian or a dictator, is not something we can just balance against some improvement in terms of outcomes. I take it, for example, that even if an enlightened dictator could make better decisions than a democratic government, we would still opt for the latter. I hope that Maffettone would agree with me on this point. Now, if this is true of a democratic government when law-making is at stake, why shouldn't it be also true of a system of administration, when the implementation of those laws is at stake? In other words, if we give much importance to not being subject to an alien will in the making of laws, why should we be content with being subject to any such will when their application to particulars is concerned, given the fact that this application is what ultimately matters for our lives? The traditional answer, of course, is that the system of administration is already democratically legitimized because bureaucrats respond to the executive, which in turn implements the legislature's will, ect. However, the entire problem of bureaucratic domination arises precisely because certain exercises of administrative discretion simply cannot be legitimized by appealing to higher rules, mandates and chains of delegation (see Chapter 4). The only means to legitimize residual discretion is thus to democratize it.

But, hopefully, I can say something more to alleviate Maffettone's concerns. What I propose is a theory of administrative co-determination, not one of full democratization of the bureaucracy. Co-determination, unlike full democratization, does not give citizens full oversight over bureaucratic decisions. Meritocratically selected public administrators would still retain the responsibility to develop and propose rules, according to their technical expertise, and in light of information obtained during public hearings. Randomly selected citizen juries would only be given the power to veto rules that fail to take appropriate considerations into account – considerations that would have emerged during the relevant public hearings. Such role would not require in-depth technical expertise, which citizens may reasonably lack. It would certainly require certain competences and critical skills, but these would be the competences and skills that most citizens should be expected to have in a democracy, since it is hard to see how a democracy can be called such if citizens lack the capacity to understand and critically assess the laws and regulations that they are supposed to co-author, and to which they

are subject. I would add that there is no reason to suppose that citizens' bodies necessarily lack epistemic virtues, as the, by now extensive, work on mini publics and collective intelligence confirms.[11]

I hope I have gone at least some way in providing a preliminary answer to the many provocative and insightful questions posed by Icardi and Maffettone. I want to take the opportunity to thank them, once again, for engaging with my work in such a thorough way.

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[11] See, e.g., Landemore 2012.