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Freedom and equality as necessary constituents of a liberal democratic state

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Citation

Doomen, J. (2014, May 21). *Freedom and equality as necessary constituents of a liberal democratic state*. Retrieved from <https://hdl.handle.net/1887/25825>

Version: Corrected Publisher's Version

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Issue Date: 2014-05-21

PART ONE: EQUALITY

Part 1: Equality

Chapter 1. The rise of formal equality

1.1 In order to make it clear what the relevance is of the analysis that is to follow, I will start with a sketch of the development of formal equality, which I take to consist in granting equal rights, on the basis of formal equality, to those deemed basically equal; they are, simply said, to be treated equally. Formal equality is the result that should ensue from what will be argued in this first part of the study. The actual realization of this sort of equality in liberal democratic states is the result of a long and steady process. This is not a descriptive historical work and I will refer to relevant facts only when necessary to illustrate a point; the assessment of slavery is such a case, with which I will commence this inquiry. It will be elaborated upon in chapter 6.

1.2 At a time when slavery was considered (as far as can be determined) something mundane by many,³² it was not out of the ordinary to have an outlook on basic equality as Aristotle's, who distinguishes between those who are naturally masters and those who are naturally slaves; being able to use one's reasoning powers is the decisive quality for the former, while being able to use one's body is the decisive characteristic of slaves.³³ Apparently, Aristotle's conception of basic equality includes fewer beings than does mine (unless this statement is taken to testify to a different idea of 'rationality' than mine, but that has no bearing on the outcome in practical terms). This may be contrasted with Cicero's position, who seems to interpret basic equality to refer more broadly than does Aristotle:

“Of all the matters that are discussed by learned men, nothing is verily more important than that it is clearly understood that we are born for justice, and that law is not constituted by opinion but by nature. This will be clear if you examine the association and society between men. For nothing is as alike to another, or as similar, as we all are to each other. If the corruption of customs, if the emptiness of opinions did not wind an imbecility of minds and turn them in whichever way, no one would be as like himself as all men are like all others. Accordingly, whatever the definition of ‘man’ is, it applies to everyone. This is sufficient to prove that there is no dissimilitude within the species. If this were the case, no single definition could include everyone. Indeed, reason, by which alone we surpass the beasts, by which we can infer, argue, refute, discourse and accomplish things and reach

³² Cf. *Corpus Iuris Civilis*: Institutiones, Book 2, Title 3 (p. 2).

³³ Aristotle, *Politica*, 1252a. Aristotle does grant that, as a consequence of irrelevant events, those not naturally suited to be slaves end up in that capacity (*Politica*, 1255a). Incidentally, while the basic definitions pertaining to slavery are stipulated in the Institutiones, it is indicated to be contrary to nature there: “Slavery [...] is an institution of the law of nations, by which someone is subjected, contrary to nature, to the dominion of another.” (“Servitus [...] est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.”) *Corpus Iuris Civilis*: Institutiones, Book 2, Title 3 (p. 2).

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conclusions, is assuredly shared by all; even though they may adhere to different teachings, their faculty to learn is equal.”³⁴

The acknowledgment of the ability to reason in slaves is not inconsistent with slavery, unless basic equality is argued to be relevant in this respect. This is precisely what Seneca does in pointing specifically to the treatment of slaves: “Would you contemplate that the one you call your slave is born from the same seeds, enjoys the same sky, breaths, lives and dies in the same way! Now despise a man with this fortune, which, while you despise him, may befall you. This is the highest of my precepts: live with a man of lower standing in such a way as you would want a man of higher standing to live with you. Live indulgently with a slave, and courteously, and allow him to join you in discourse, counsel and meals.”³⁵

What Seneca points out is that one has no way to protect oneself against the vicissitudes of fate. This is not the place to discuss the Stoic perspective on how to deal with life’s vexations; I have merely pointed to this passage to indicate that a certain equality is stressed by him that is shared by the slave and his master, which outstrips the qualities the master has and the slave lacks (and supersedes them when it comes to judging the actions the first performs). It is crucial that it be clear what the consequences of this sort of equality are for the scope of citizens, i.e., those who are to be treated as a citizen, and hence enjoy the same rights on the basis of formal equality, and on what basis it should be acknowledged.

1.3 This may be illustrated by an account of slavery, and how it came to be abandoned in the U.S.A. I will mention some relevant details here and come back to the issue in chapter 6, when it can be used as an illustration of my viewpoint.

Is basic equality in the sense of basic rationality necessary in a liberal democratic state? Perhaps not: did the U.S.A. not exhibit such a form of government *before* 1865,³⁶ when slavery was abolished (with the adoption of the Thirteenth Amendment to the Constitution)

³⁴ “[...] omnium, quae in doctorum hominum disputatione versantur, nihil est profecto praestabilius, quam plane intelligi, nos ad iustitiam esse natos, neque opinione, sed natura constitutum esse ius. Id iam patebit, si hominum inter ipsos societatem coniunctionemque perspexeris. Nihil est enim unum uni tam simile, tam par, quam omnes inter nosmetipsos sumus. Quod si depravatio consuetudinum, si opinionum vanitas non inbecillitatem animorum torqueret et flecteret, quocumque coepisset: sui nemo ipse tam similis esset, quam omnes sunt omnium. Itaque quaecumque est hominis definitio, una in omnis valet. Quod argumenti satis est, nullam dissimilitudinem esse in genere. Quae si esset, non una omnis definitio contineret. Etenim ratio, qua una praestamus belluis, per quam coniectura valemus, argumentamur, refellimus, disserimus, conficimus aliquid, concludimus, certe est communis, doctrinâ differens, discendi quidem facultate par.” M. T. Cicero, *De Legibus*, Book 1, Ch. 10, Sections 28-30 (pp. 295, 296).

³⁵ “[V]is tu cogitare istum, quem servum tuum vocas, ex isdem seminibus ortum eodem frui caelo, aequae spirare, aequae vivere, aequae mori! [C]ontemne nunc eius fortunae hominem, in quam transire, dum contemnis, potes. [...] [H]aec [...] praecepti mei summa est: sic cum inferiore vivas, quemadmodum tecum superiorem velis vivere. [...] [V]ive cum servo clementer, comiter quoque, et in sermonem illum admitte et in consilium et in convictum.” L. A. Seneca, Letter 47, pp. 139, 140.

³⁶ Or 1863, if one takes the Emancipation Proclamation as the standard.

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(or *before* 1920, when women's suffrage was achieved there for all states³⁷)? It may be objected that prior to the acknowledgement of the relevant rights of black people and women, this country was *not* a liberal democratic state for precisely that reason, but that response would be based on a biased specification of 'basic equality',³⁸ looking at history with a model of liberal democracy with the standards by which one would at present evaluate a form of government. Formally, however, such a form of government was in place; the fact that those whose position would *presently* be taken into consideration were not in every sense treated equally with those who, or whose representatives, were in charge does not detract from this given. It simply means that a liberal democratic state existed with fewer people being considered bearers of rights and simultaneously constituents (or, to be precise, citizens) than would now be the case.³⁹ (I agree, consequently, with Schmitt when he does not consider human equality joined with democracy.⁴⁰ Democracy is merely a form of government and must not be confused with an ideal political situation.⁴¹ One must not be misled into committing the category mistake of confusing the latter with the claim that a democratic form of government is *desirable*.)

For completeness I would add that another conception of democracy is possible, according to which certain rights are guaranteed, and the room to reach certain radical changes that would conflict with the respect for such rights is thus restricted.⁴² This concept may alternatively be used (although I will critically discuss it in chapter 16), but in the interest

³⁷ Some individual states granted this right prior to 1920.

³⁸ One may argue that basic equality had the same meaning as the one I put forward, namely, basic rationality, in which case the powers that be (and/or those already belonging to the constituency) simply maintained that black people and/or women were not rational (or at least not as rational as white men), either for political reasons or on the basis of a real conviction. I mention this for completeness; in practical terms, it does not matter which explanation is correct.

³⁹ One may (at present) lament the ruling of the Dred Scott case (*Dred Scott v. Sandford* (60 U.S. 393, 1857)), in which it was decided that "A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a "citizen" within the meaning of the Constitution of the United States. When the Constitution was adopted, they were not regarded in any of the States as members of the community which constituted the State, and were not numbered among its "people or citizens." Consequently, the special rights and immunities guaranteed to citizens do not apply to them. And not being "citizens" within the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States, and the Circuit Court has not jurisdiction in such a suit." It seems safe to say that such a ruling would nowadays not be acceptable to most people, but that does not necessarily mean that it was 'wrong' (or that a contrary decision would have been 'right'). The reason why such a line of thought would not be acceptable at present must, I think, be found elsewhere than in 'moral' considerations. I will deal with the issue of slavery in chapter 6 in some detail, where it will become apparent what this alternative is.

⁴⁰ C. Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, p. 18.

⁴¹ Cf. C. Schmitt, *Verfassungslehre*, p. 225. Schmitt's conception of 'democracy' is somewhat complex; it will receive attention in chapter 16.

⁴² E.g., R. Dworkin, *A Matter of Principle*, p. 196: "Democracy is justified because it enforces the right of each person to respect and concern as an individual; but in practice the decision of a democratic majority may often violate that right, according to the liberal theory of what the right requires." (Cf. pp. 65, 66.)

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of clarity, I will use the restricted conception – sometimes called ‘formal democracy’ – and speak of ‘liberal democracy’ when, in addition, certain rights are guaranteed.⁴³ That is not to say, of course, that each manifestation of this form of government is equally *desirable*, but that matter must be treated as a separate issue lest the methodology become sloppy. In any event, it is important not to make the (category) mistake to confuse liberal democracy with a presumably desirable form of democracy, in which all, or most,⁴⁴ human beings that reside in a country should be considered citizens, since it is precisely this matter which is in question: which beings are to be considered citizens,⁴⁵ and thus be treated formally equally with one another?

This is an important matter since the relations between persons in a state⁴⁶ are mediated by the legislation and the powers enforcing it (an exception can arguably be said to exist in the case of friendship or perhaps family relations). For example, an employer and an employee do not interact directly, but *as citizens*, so that the relation employer-employee is laden with the legislation that specifies it; in their interactions they are both shielded by the applicable legislation that protects them against each other, as (some of) their interests necessarily conflict (e.g., the employee tries to obtain the highest possible wages, while the employer, simply put, wants the costs to be minimal).⁴⁷ Absent such legislation, a ‘laissez

⁴³ A complicating factor is that citizens’ right to (indirectly) have a decisive influence on the legislative process is an integral part of democracy; if this right is characterized as ‘politische Freiheit’ (‘political freedom’) (H. Kelsen, *Vom Wesen und Wert der Demokratie*, § 9 (p. 93)), this freedom is of course part of all states with formal democracy (lest they not be democratic states in the first place), whether they are liberal or not.

⁴⁴ Excluding, e.g., those that reside in a country illegally from exercising (at least some) rights.

⁴⁵ “In a word, who is or who is not a citizen depends on the law, and on the law alone. The difference between citizens and noncitizens is not natural but conventional. Therefore, all citizens are, in fact, “made” and not “born.”” L. Strauss, *Natural Right and History*, p. 104.

⁴⁶ Perhaps this must be considered a pleonasm, in the sense that a person can only come to exist as a person once a state is in place, and this may be taken to mean that one is only able to manifest oneself thus (stably) in this situation (cf. Th. Hobbes, *Leviathan*, Ch. 13 (p. 89) and Ch. 46 (p. 459)), or, more radically, that it is impossible for a person, a human being, to *be* (i.e., to *exist*) at all if a state, or, more broadly, a society, is not in place to let such a being come to fruition, which Rawls formulates as follows: “We have no prior identity before being in society: it is not as if we came from somewhere but rather we find ourselves growing up in this society in this social position, with its attendant advantages and disadvantages, as our good or ill fortune would have it.” *Political Liberalism*, Lecture I, p. 41. It may be argued, in a similar vein, that a cultural or societal background is a prerequisite in this sense (Ch. Taylor, *Philosophy and the Human Sciences*, pp. 205, 206; *Sources of the Self*, pp. 27, 28; A. MacIntyre, *After Virtue*, pp. 220, 221). It would be difficult for those who adhere to the latter persuasion to prove their hypothesis; apart from the objections against testing it (presuming that the conditions are available to do so), the evaluation of the outcome of such an experiment would of course depend on one’s notion of ‘person’ or ‘human being’. (The position that one cannot conceive of a human life form that would not already be constituted by a relevant framework (*Sources of the Self*, pp. 30, 31) testifies to an obvious *argumentum ad ignorantiam*.)

⁴⁷ The need for such legislation is less pressing (in the sense that states can exist in the absence of such legislation) than basic legislation – expressing fundamental norms – that protects all citizens against each other,

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faire' situation (in economic terms) would be the case, and, more radically, absent fundamental norms, expressed primarily in penal terms, a society would not be possible at all,⁴⁸ or lack stability.

1.4 One may claim that people are ('morally') 'right' at this moment in resisting segregation, which would mean that many people were (in hindsight) 'wrong' in, e.g., the U.S.A. prior to 1865, when slavery was abolished, or even later, when black people did not have the same rights as white people in many respects, prompting, for example, the Voting Rights Act of 1965.⁴⁹

There are basically two possible positions. The first consists in locating some feature that beings supposedly have in common – the most commonly proffered candidates seem to be reason⁵⁰ and 'human dignity' –, which would have to be acknowledged; not doing so would (presumably) be ('morally') 'wrong'. The second option is to concentrate on the actual acknowledgement of equality and to look for the most likely and convincing explanation to qualify such behavior. Some shared feature may also serve as a justification for such a *modus operandi*, but this need not be problematic so long as one starts out with an observable characteristic, which, in addition, can account for the fact that the beings in question are treated equally.

The first option – which could be characterized as a top-down approach – brings with it the promise of an 'elevated' theory, while the ambitions of the second – a bottom-up approach – appear to be limited from the start. The downsides of each option are at the same time the benefits of its counterpart, however: in the case of the second option, there is a minimal need to incorporate notions the status of which is questionable, or which cannot, at any rate, compel assent by pointing to an incontestable given, which is what the first option may be faced with by introducing such notions. I will first present some important prevailing perspectives (those of Rawls and Dworkin), and then qualify these in terms of what I just outlined, paying special attention to Kant's work. This will provide the proper context to present my own perspective.

notably penal legislation, which must be in place in any event, and may therefore be said to occupy a 'higher' place than labor law, if they are hierarchically organized in this regard.

⁴⁸ Th. Hobbes, *Leviathan*, Ch. 13 (p. 89), Ch. 15 (pp. 100, 101).

⁴⁹ Incidentally, Lincoln stresses the *inequality* between white and black people and takes it to be a corollary that they should live separated (thus exhibiting a more radical stance than the (later) 'separate but equal' doctrine), suggesting Central America as a location for a suitable colony for black people (*Address on Colonization to a Deputation of Negroes* (August 14, 1862), pp. 371-375). He points to the inequality as a given, without rendering a judgment concerning its desirability; moreover, it is difficult to assess whether what he says has been dictated by political considerations. I merely point to this text as an example of a situation in which not all those able to reason are (or were) considered equal.

⁵⁰ 'Reason' is an intricate concept. As I mentioned in the introduction, I will deal with the relevant meanings it may have below, in chapters 2, 5 and 6.

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1.5 Summary and relation to chapter 2

Basic equality in the guise of basic rationality is no condition for a liberal democratic state to come into existence: formal equality need not apply to all rational beings, as the example of the U.S.A. demonstrates. The task that lies ahead is to identify the features that have led to basic equality and to inquire the consequences of this conception. Rawls's viewpoint is the first to consider; he emphasizes the relevance of rationality, promoting this characteristic as the crucial one of (in my terms) basic equality; whether he also clearly *identifies* it remains to be seen.

