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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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Cover Page



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Title: Freedom and equality as necessary constituents of a liberal democratic state

Issue Date: 2014-05-21

Chapter 3. Taking equality seriously

3.1 In the previous chapter, Rawls's position with regard to the matter which beings should be granted certain rights was addressed; Rawls considers reason (as he uses the concept) to be a decisive criterion. I will now turn to an alternative approach, that of Ronald Dworkin, which concentrates on other aspects than does that of Rawls. This means that the problems involved with Rawls's position do not appear here, but Dworkin's alternative raises some other important issues of its own. His position merits attention in a study such as the present one. He has written extensively on the sorts of equality mentioned in the introduction that are not relevant here, but also addresses the level that *precedes* this analysis, thus dealing with precisely the issues that are of interest here.

Dworkin interprets Rawls's position⁹¹ as follows: "[...] justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice."⁹² Indeed, Rawls characterizes the principles of justice he discerns as "[...] the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."⁹³

Dworkin's evaluation of the aspect of Rawls's theory that is of interest for me here is the same as my own: "[The right to equal respect] is possessed by all men who can give justice, and only such men can contract. This is one right, therefore, that does not emerge from the contract, but is assumed, as the fundamental right must be, in its design."⁹⁴ I have indicated what the problems are with Rawls's answer to the question of who is to be treated equally with whom in the previous chapter. Dworkin's own stance on equality will now be inquired.

3.2 When Rawls's reasons to take into consideration the concerns of humans (and *only* their concerns) were evaluated, he turned out to recognize a special equality that purportedly singles out human beings, namely reason (as he understands it). Dworkin, I will argue, is less clear in this respect, but he, too, maintains that such a quality is to be acknowledged. As he puts it: "Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different

⁹¹ Justice as fairness "[...] conveys the idea that the principles of justice are agreed to in an initial situation that is fair." J. Rawls, *A Theory of Justice*, § 3 (p. 11).

⁹² R. Dworkin, *Taking Rights Seriously*, p. 182.

⁹³ J. Rawls, *A Theory of Justice*, § 3 (p. 10); cf. note 54, *supra*.

⁹⁴ R. Dworkin, *Taking Rights Seriously*, p. 181.

CHAPTER THREE

schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust. The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom. I do not want to defend or elaborate these ideas here, but only to insist that anyone who claims that citizens have rights must accept ideas very close to these.”⁹⁵

It is important to notice (although Dworkin fails to do so) that these ideas are in fact two facets of the same basic point. After all, the (supposed) ‘human dignity’ (the first idea) is what shields human beings from the unjust treatment, while it would be difficult to grasp on what basis the weaker members of a political community should be entitled to the same concern and respect as the more powerful members (the second idea) if not on account of that same element (*viz.*, the (supposed) ‘human dignity’).⁹⁶

In a similar vein, ‘flat’ and ‘normative’ equality, as Dworkin uses these terms, seem interrelated. Dworkin says: “We use “equality” in its flat sense simply to indicate sameness or identity along some specified or understood dimension without suggesting that the speaker believes sameness along that dimension is desirable. [...] We use “equality” in its normative sense, on the contrary, precisely to indicate the respect or respects in which the speaker thinks people should be the same, or treated the same way, as a matter of justice. [...] Political philosophers who worry about conflicts between liberty and equality have the normative not the flat sense of these ideas in mind.”⁹⁷

He thus distinguishes between two sorts of equality. The first is needed, however, in order to defend the second, for otherwise it would not be clear *who* should be treated equally with whom (certainly not every being, since humans are treated differently than animals). There even seems to be a circle here: in order to find out who should be treated equally with whom (the normative sense), one must appeal to equality (the flat sense) lest there be no basis to differentiate in the treatment of various beings (notably, in distinguishing between humans and animals). The circle can be resolved (Dworkin himself does not provide such a solution, not even considering this a problem in the first place) if one denies that two

⁹⁵ R. Dworkin, *Taking Rights Seriously*, pp. 198, 199.

⁹⁶ Indeed, this is the way Nussbaum approaches the matter: “We should probably avoid thinking that dignity has an obvious specific content all on its own: it seems to be a notion that gets fleshed out through its relationship with other notions, such as that of *respect* (dignity is that attribute of a person that makes the person an appropriate object of respect), and a variety of more specific political principles.” *The New Religious Intolerance*, p. 62. This still carries with it the need to explain what is meant by ‘respect’, of course. Nussbaum considers conscience to be the source of respect (“Liberty of Conscience: The Attack on Equal Respect”, p. 342), but this does not yield much, for the reasons put forward in chapters 4 and 5.

⁹⁷ R. Dworkin, *Sovereign Virtue*, p. 126.

CHAPTER THREE

separate levels are at stake here, so that the obligation to treat beings equally follows from an element they share in common. This is what I will in fact argue in chapter 6, demonstrating how prescriptive equality (as I call it) is based on basic equality.

The distinction between ‘flat’ and ‘normative’ equality is similar to that between ‘equal treatment’ (which corresponds with formal equality as I have defined it, so long as economic equality is not considered) and ‘treatment as an equal’: “What rights to equality do citizens have as individuals which might defeat programs aimed at important economic and social policies, including the social policy of improving equality overall? There are two different sorts of rights they may be said to have. The first is the right to *equal treatment*, which is the right to an equal distribution of some opportunity or resource or burden. Every citizen, for example, has a right to an equal vote in a democratic state; that is the nerve of the Supreme Court’s decision that one person must have one vote even if a different and more complex arrangement would better secure the collective welfare. The second is the right to *treatment as an equal*, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else. [...] [I]he right to treatment as an equal is fundamental, and the right to equal treatment, derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.”⁹⁸

3.3 Dworkin is right, I think, when he says that the government must treat people with equal concern and respect, but fails to make it clear why this would be, as he claims, a postulate of political morality.⁹⁹ (In *Justice for Hedgehogs*, Dworkin makes an effort to present a meta-ethical theory,¹⁰⁰ although he would himself not use this vocabulary, presenting in this regard, too, an alternative of his own.¹⁰¹ The theory leaves a number of things to be desired, but this is not the place to go into these matters.) ‘Respect’ is most convincingly associated with power (this issue is explored in section 6.9). In any event, Dworkin states: “Equal concern is the sovereign virtue of political community – without it government is only tyranny [...]”,¹⁰² but this is a false dilemma, fueled by a rhetorical use of the word ‘tyranny’. After all, what does ‘tyranny’ mean?

For Aristotle it is a kind of monarchy in which only the interest of the monarch is served.¹⁰³ The problem with this notion is that in another kind of monarchy than a tyranny, the monarch would also have the interests of others in mind, which is not necessarily the case; he could, e.g., simply enforce laws that the public finds agreeable in order to appease

⁹⁸ R. Dworkin, *Taking Rights Seriously*, pp. 226, 227; cf. *A Matter of Principle*, p. 190, and *Sovereign Virtue*, p. 11.

⁹⁹ R. Dworkin, *Taking Rights Seriously*, pp. 272, 273.

¹⁰⁰ R. Dworkin, *Justice for Hedgehogs*, Chs. 2-6 (pp. 23-122).

¹⁰¹ R. Dworkin, *Justice for Hedgehogs*, pp. 25, 31. ‘Dignity’ is an important notion in this work (e.g., p. 204), but for the present discussion it does not yield any relevant results.

¹⁰² R. Dworkin, *Sovereign Virtue*, p. 1.

¹⁰³ Aristotle, *Politica*, 1279b.

CHAPTER THREE

them. Hobbes's view is the following: "[A King and a Tyrant] differ [...] in the sole exercise of their command, insomuch as he is said to be a King, who governs well, and he a Tyrant that doth otherwise. The case therefore is brought to this passe, That a King legitimately constituted in his *Government*, if he seeme to his Subjects to Rule well, and to their liking, they afford him the appellation of a King, if not, they count him a Tyrant [...]"¹⁰⁴

To 'govern well' is a criterion relating to content. It would perhaps be preferable to opt for a criterion that stresses the procedure, and focus on the rule of law; in a democratic state where the rule of law applies, this means, *inter alia*, that elections are held (to ensure that the government acts as the people (i.e., the electorate) wants it to). To be clear: democracy is just an example. The rule of law can apply without there being a democratic form of government.¹⁰⁵ In this respect, I agree with Raz when he says that "[...] the rule of law is [...] not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies."¹⁰⁶ So long as the procedure is legitimate, the regime cannot be characterized as tyrannical. That is not to say that such a regime would necessarily be *desirable* (since it is compatible with a form of government in which minorities are discriminated against), but that is another matter. (It is certainly a matter relevant to the present study, so I must address it, but that does not necessarily mean that it must be analyzed in detail here.)

One may agree with Dworkin's remark about the government's task without at the same time adopting his evaluation of it, by proposing the following, I think, more compelling, alternative. Anyone would want the government to treat people with equal

¹⁰⁴ Th. Hobbes, *De Cive* (the English version), Ch. 7, § 3 (p. 108).

¹⁰⁵ Conversely, a government can be democratically legitimate without adhering to the rule of law (as I said in the introduction (*vide* note 11, *supra*), in the case of *liberal* democracy this is somewhat more complicated); cf. C. Schmitt, *Verfassungslehre*, p. 258: "Der demokratische Gesetzbegriff ist ein politischer, kein rechtstaatlicher Gesetzbegriff; er geht aus von der potestas des Volkes und besagt, daß Gesetz alles ist, was das Volk will; lex est quod populus jussit [...]" ("The democratic concept of law is a political concept, not one of a state of law ('Rechtsstaat'); it is based on the power of the people and expresses that law is anything the people wants; the law is what the people has commanded.") Besides, 'state of law', or 'Rechtsstaat', is no clearly delineated term (cf. C. Schmitt, *Legalität und Legitimität*, p. 19). Alternatively, one may argue that governing legitimately includes equal concern for those that are governed and respecting their freedom (R. Dworkin, *Justice for Hedgehogs*, p. 2), but that is just a matter of vocabulary (whether something meets one's criterion depends on the definition with which one starts).

¹⁰⁶ J. Raz, "The Rule of Law and Its Virtue", p. 14. Schmitt, when dealing with 'freedom' in this context, puts it as follows: "Domestic political freedom is the principle of the civil state of law ('Rechtsstaat'), which modifies the principles of political form when it is joined with them, whether they be monarchical, aristocratic or democratic." ("Die innerpolitische Freiheit ist das Prinzip des bürgerlichen Rechtsstaates, das zu den politischen Formprinzipien – mögen sie nun monarchisch, aristokratisch oder demokratisch sein – modifizierend hinzutritt.") *Verfassungslehre*, p. 224.

CHAPTER THREE

concern and respect for the simple reason that if unequal treatment were accepted, and one cannot know if one will one day belong to a relevant minority (be it in a respect that has immediate consequences, such as being handicapped or unemployed, or one whose consequences may be difficult to assess, such as one's race or adherence to a religion), it is simply rational (prudent, in the non-'moral' sense discerned above) to agree with a basic scheme for all parties involved. (This is basically what Rawls also suggests, though, crucially, on another basis than I do.) The fact that a line is still drawn *somewhere* (animals are excluded from such a scheme; some rights are protected in some societies, but usually to a very limited degree¹⁰⁷) seems to be a sign that basic equality is the criterion to grant rights in the most important cases.

3.4 This is not Dworkin's approach, however, which differs from both Rawls's account and my own, to be expounded in chapter 6. He states: "[...] I believe that we are now united in accepting the abstract egalitarian principle: government must act to make the lives of those it governs better lives, and it must show equal concern for the life of each."¹⁰⁸ This gives rise to the question what 'each' means. Apparently, this refers to each *human* being, which needs a defense, and this is precisely what is lacking in Dworkin's approach, which introduces an assumption at this level. Pojman stresses the weakness, or at least abstract nature, of Dworkin's position in this regard when he interprets Dworkin's justification to respect individual rights as follows: "It is a given, something intuitively self-evident. The notion of equal natural rights based on equal human worth simply becomes the assumption that replaces earlier religious or Kantian metaphysical assumptions."¹⁰⁹ Dworkin appeals to "the principle of intrinsic value", supposedly shared by "almost all of us", which "[...] holds that each human life has a special kind of objective value."¹¹⁰ The notion of 'intrinsic value' is vague, however, and, besides, for something valuable to exist an assessor of its value seems indispensable, which makes the word 'intrinsic' problematic.¹¹¹ If someone should want to

¹⁰⁷ For example, in article 20a of the German Constitution the position of (*inter alia*) animals is considered, but the article starts as follows: "Der Staat schützt auch in Verantwortung für die künftigen Generationen die natürlichen Lebensgrundlagen und die Tiere..." ("The state protects, mindful also of its responsibility towards future generations, the natural foundations of life and animals..."), so that animals are (at least partly) considered, just as natural resources, as means (for future human beings).

¹⁰⁸ R. Dworkin, *Sovereign Virtue*, p. 128.

¹⁰⁹ L. Pojman, "Are Human Rights Based on Equal Human Worth?", p. 609.

¹¹⁰ R. Dworkin, *Is Democracy Possible Here?*, p. 9.

¹¹¹ Cf. Schopenhauer's criticism of Kant's notions of an 'end in itself' ("Zweck an sich", or "Zweck an sich selbst") and 'absolute value' ("absoluter Werth") in *Die beiden Grundprobleme der Ethik*, p. 161. (This important part of Kant's philosophy will be discussed in sections 5.3 and 5.4.) Schopenhauer goes so far as to say that these definitions affront logic (*Die beiden Grundprobleme der Ethik*, p. 161) as relative terms are formulated as if they were absolute.

CHAPTER THREE

avoid this problem by awarding mankind this role, it is not surprising that he would consider mankind (his own species) the only (or at least most) valuable being.¹¹²

Yet I would not plead the expansion of the domain of those supposedly having such a value, but rather presume that none does, for the simple reason that such a basis seems too unstable or vague to reach a convincing position. If Dworkin argues, on the basis just outlined, that “Someone’s most basic human right [...] is his right to be treated by those in power in a way that is not inconsistent with their accepting that his life is of intrinsic importance and that he has a personal responsibility for realizing value in his own life.”,¹¹³ someone else might argue that animals are entitled to the same treatment (though presumably merely on the basis of the first of these principles), and another, who considers the entire notion of ‘intrinsic value’ meaningless, that such a basis is absent for each case (both human and non-human). The last situation would, if one should want to found one’s scheme on such a notion, seem to result in a lack of a solid basis to grant rights at all. Since this situation reflects my position, it is incumbent on me to provide an alternative approach. I will postpone doing this until the present matter will have been sufficiently explored. To that end, I will start with an inquiry of the notion of ‘human dignity’ in order to determine whether this may be a viable candidate to buttress a theory such as that of Dworkin.

3.5 Summary and relation to chapter 4

The major problem with Rawls’s account lies in his unwillingness to clarify the significance of rationality; Dworkin’s position is more abstract, not specifying *any* feature but opting for an ‘intrinsic value’ as the decisive element to deem beings equal to one another. The problem of vagueness that this alternative brings is supplemented by the fact that no reason why some beings should be considered ‘intrinsically valuable’ (and others not) is provided. Considering its relatively abstract nature, in order for this account to be justified, it would have to be supported by an even more solid foundation than one such as Rawls’s, although one wonders whether such a foundation can be produced at all. This will be the decisive question in chapter 4. Kateb, whose work will receive some attention, is indeed very clear on the justification of his starting points, but that does not entail that this justification is correct.

¹¹² Cf. A. Schopenhauer, *Die beiden Grundprobleme der Ethik*, p. 162.

¹¹³ R. Dworkin, *Is Democracy Possible Here?*, p. 35.

