Freedom and equality as necessary constituents of a liberal democratic state

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Chapter 8. Freedom's empire

8.1 Now that it is clear what 'freedom' means in the present inquiry, its import needs to be discussed. That some liberties must be restricted in any state is evident. I already pointed out, in the previous chapter, that the freedom to commit a murder, or to steal, cannot be allowed in any state. These examples were not randomly selected. In a liberal democratic state, just as in other forms of government, acts such as those mentioned must be forbidden. There are in general, however, compelling reasons to criminalize acts to a minimal degree and grant citizens as much freedom as possible, at least when freedom of expression is concerned. It is obvious that it is not only incumbent on me to provide these reasons but to make it clear as well what 'a minimal degree' and 'as much as possible' mean. The latter issue refers to the need for a criterion according to which it can be determined which acts should be allowed, and which not. I will, however, begin with the former issue – the reasons why freedom is important in the first place – since it must be clear what the significance of the 'liberal' part of 'liberal democracy' is.

One may, in answering this question, not, of course, simply refer to the fact that 'liberal' is part of 'liberal democracy' here, as this would render an obvious *petitio principii*. Another mistake would be to equate 'democracy' (in general) with 'liberal democracy' (cf. section 1.3). That a careless use of one's definitions (or a rhetorical trick) easily leads to such confusion may be demonstrated by means of the following quote: "Perhaps the time has come when it is no longer wise to close one's eyes to the fact that liberal democracy, suitable, in the last analysis, only for the political aristocrats among the nations, is beginning to lose the day to the awakened masses. Salvation of the absolute values of democracy is not to be expected from abdication in favor of emotionalism […]."[275] 'Liberal democracy' is apparently identified with 'democracy',[276] which creates the opportunity to speak of 'the absolute values of democracy' under the banner of 'liberal democracy'. Further on in the same text, Loewenstein says: "In this sense, democracy has to be redefined. It should be – at least for the transitional stage until a better social adjustment to the conditions of the technological age has been accomplished – the application of disciplined authority, by liberal-minded men, for the ultimate ends of liberal government: human dignity and freedom."[277] The problems involved with the notion of 'human dignity' were discussed at length in chapter 4. As for freedom: including it in one's conception of democracy would constitute an obvious category mistake, confusing democracy as a form of government with a *desirable* (democratic) state. In any event, the 'liberal' part of 'liberal democracy' needs a separate defense, and it is the goal of this part of the inquiry to provide just that.

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[275] K. Loewenstein, "Militant Democracy and Fundamental Rights, II", p. 657.

[276] Cf. K. Loewenstein, "Militant Democracy and Fundamental Rights, I", pp. 421, 422.

[277] K. Loewenstein, "Militant Democracy and Fundamental Rights, II", pp. 657, 658.

Some of the reasons why freedom is important can be inferred from part 1 of the inquiry, such as the vested interest one has to have the right to vote, but freedom of expression is still to be explored in detail. It is worthwhile to examine the position of Hobbes and Spinoza in this regard, since both clearly identify the crucial issues and propose interesting, though strongly differing, solutions.

8.2 A possible justification to limit freedom of expression follows from the fact that opinions may lead to factions, which may, as was remarked in section 7.3, in the worst scenario result in anarchy. As Hobbes puts it: "[…] it is annexed to the Soveraignty, to be Judge of what Opinions and Doctrines are averse, and what conducing to Peace; and consequently, on what occasions, how farre, and what, men are to be trusted withall, in speaking to Multitudes of people; and who shall examine the Doctrines of all bookes before they be published. For the Actions of men proceed from their Opinions; and in the wel governing of Opinions, consisteth the well governing of mens Actions, in order to their Peace, and Concord."[278]

In evaluating a stance such as Hobbes's, it is necessary to consider that he contrasts the commonwealth with the state of nature;[279] in terms of his dichotomy, there is little room for nuance.[280] Yet even if this is overlooked, and the argument is accepted, an alternative reasoning may still be preferred. Spinoza contrasts the state with the state of nature, as Hobbes does, but he compares them differently than his precursor does.[281] Spinoza observes that the more freedom of expression, or, more precisely, the freedom to judge ('libertas judicandi') is limited, the greater the contrast is with the state of nature, and consequently the

[278] Th. Hobbes, *Leviathan*, Ch. 18 (p. 124).

[279] Th. Hobbes, *Leviathan*, Ch. 17 (pp. 117, 118).

[280] I pointed out in section 7.2 that negative freedom is always to be understood within the context of a state. This is not to be taken to mean that freedom is to be practically hollowed out, which is the outcome, or at least danger, in Hobbes's line of reasoning: "[…] when private men or subjects demand *liberty*, under the name of liberty, they ask not for *liberty*, but *dominion*, which yet for want of understanding, they little consider; for if every man would grant the same liberty to another, which he desires for himselfe, as is commanded by the law of nature, that same naturall state would return again, in which all men may by Right doe all things, which if they knew, they would abhor, as being worse then all kind of civill subjection whatsoever. But if any man desire to have his single freedome, the rest being bound, what does he else demand but to have the *Dominion*? for who so is freed from all bonds, is *Lord* over all those that still continue bound." Th. Hobbes, *De Cive* (the English version), Ch. 10, § 8 (p. 135).

[281] This does not mean, however, that their *concepts* of freedom would differ, as Israel argues (*Radical Enlightenment*, pp. 258, 259). Spinoza does use various concepts of freedom (J. Doomen, "Spinozan Freedom", pp. 53-58), but the one that is relevant here is negative freedom as Hobbes understands it (J. Doomen, "Spinozan Freedom", pp. 60, 61); the difference between their outlooks (at least in *this* respect) is one of *appreciation* rather than of *conception*.

more violent the government.[282] Hobbes would simply dismiss this in light of the fact that the state of nature is worse than *any* form of government.[283]

By contrast, Spinoza only deals with the democratic form of government here,[284] while Hobbes considers the commonwealth as such, deeming the *form* of government a minor issue,[285] but that is not a problem for the present analysis since the only thing that matters here is whether these authors can be compared in the relevant aspects. It does mean that Spinoza has room to distinguish between the goal of the community ('societas') in the broad sense, so the reason for there to be a state at all, which is to live safely and comfortably,[286] and the goal of a commonwealth ('respublica'), which is freedom.[287] Such room is not available in Hobbes's model, but since he would not use it to provide for freedom apart from anything the sovereign might allow, that does not matter for him.

Spinoza, while granting that the state of nature needs to be abandoned in favor of a form of government,[288] does not infer from this given that one's freedom in each respect should be transferred to the government in question, the more so since he has a more balanced view with regard to the state of nature than Hobbes, the positive aspects of which are preserved in democracy.[289] Although an unbound reign is stated not to be incompatible with a democratic form of government, Spinoza points out that a violent government is in practice doomed to perish before long.[290]

When this claim is corroborated, it appears that the contrast with Hobbes's stance is not limited to the content; in contradistinction to Hobbes, Spinoza does not – as is the case in *Ethica* – base his conclusions on an *a priori* line of reasoning:[291] it appears that no one can fully transfer his power and rights.[292] This comes to the fore most clearly when it is concretized by pointing to the fact that it proves impossible for people not to express themselves and to restrain themselves in this respect;[293] furthermore, even if this liberty *could* be suppressed, such a course of action would have adverse effects.[294]

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[282] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 20 (p. 245).

[283] Th. Hobbes, *Leviathan*, Ch. 20 (pp. 144, 145).

[284] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 16 (p. 195).

[285] Th. Hobbes, *Leviathan*, Ch. 30 (pp. 233, 234).

[286] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 3 (p. 48).

[287] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 20 (p. 241).

[288] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 5 (pp. 73, 74), Ch. 16 (pp. 191-193).

[289] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 16 (p. 195).

[290] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 5 (p. 74), Ch. 16 (p. 194).

[291] Incidentally, Hobbes's philosophy is not fully *a priori* in nature (and those who designate him as an empiricist are not necessarily *entirely* mistaken), but rather partly based on *a priori* analyses and partly on empirical observations (J. Doomen, "A Systematic Interpretation of Hobbes's Practical Philosophy", pp. 467-469), but in the *present* respect the latter are absent.

[292] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 17 (p. 201).

[293] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 20 (p. 240).

[294] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 20 (pp. 243, 244).

It is not my purpose here to provide a thorough political analysis with regard to the issue of whether or not granting citizens the freedom to express themselves will have negative effects in the sense just outlined. It seems clear that this might be the case in a totalitarian form of government (presuming, lest the word 'negative' be devoid of meaning, that the continuation of such a form of government should be preferable to its dissolution), but that is no concern here, since it is solely the liberal democratic state that is the focus of attention. With that in mind, it would seem, given the 'liberal' part of this denomination, that one might operate from the premise that freedom should be granted and that the onus to prove that it should be constricted is on its opponents.

Difficulties emerge precisely at the point where controversial statements are made. Spinoza himself pleads the following restriction of freedom of expression: "No one may without transgressing the law act against a decree of the sovereigns, but everyone does have the right to unreservedly think and judge and consequently also speak out, provided that he speaks and expresses himself in a straightforward way and conformably to reason alone, not acting by means of deceit, anger or hatred, and absent the intention to introduce any change in the commonwealth on the basis of the authority of his own decree."[295] Some of these categories to limit one's freedom may prove problematic upon further analysis. In any case, the first reason to grant freedom of expression in a liberal democratic state (the extent of which is to be specified at a later stage) has been provided.

8.3 A 'negative' reason, so to speak, to allow (at least some) freedom of expression in a liberal democratic state was provided above: its suppression is either pointless or counterproductive. I call this a negative reason since this merely points to the fact that it must be granted, without having considered any beneficial results that might ensue from its presence. That such results exist has been pointed out perhaps most famously by Mill: "If there are any persons who contest a received opinion, or who will do so if law or opinion will let them, let us thank them for it, open our minds to listen to them, and rejoice that there is some one to do for us what we otherwise ought, if we have any regard for either the certainty or the vitality of our convictions, to do with much greater labour for ourselves."[296]

Spinoza similarly argues that a commonwealth profits if citizens are allowed to demonstrate that some law should reasonably be revoked.[297] Apart from that, freedom is

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[295] "[…] salvo summarum potestatum jure nemo quidem contra earum decretum agere potest, at omnino sentire, & judicare, & consequenter etiam dicere, modo simpliciter tantum dicat vel doceat, & sola ratione, non autem dolo, irâ, odio, nec animo aliquid in rempublicam ex authoritate sui decreti introducendi, defendat." B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 20 (p. 241).

[296] J. S. Mill, *On Liberty*, Ch. 2 (p. 252); cf. Ch. 2 (pp. 229, 243, 254), Ch. 3 (p. 267).

[297] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 20 (p. 241). One may add to this that in order for a democratic state to function at all, free expression is necessary: "[…] freedom of expression is required in order for citizens to *participate* effectively in political life. […] Free expression means not just that you have a right to be heard. It

necessary for the development of the sciences and the arts.[298] These appear to be valid observations. A present-day equivalent of Galileo should not experience a threshold in presenting his findings in the form of a threat of being persecuted (whether by religious or secular authorities) for doing so, and a liberal democratic state that takes itself seriously should be willing to debate any law currently in force, if only because such a discussion might provide viewpoints hitherto unconsidered.[299] The converse standpoint implies that governments or lawmakers cannot err on account of their possessing divine inspirations.[300]

Here, then, a 'positive' reason to incorporate freedom in a liberal democratic state is provided.[301] Still, this is still an 'external' reason in the sense that it deals with the way a liberal democratic state may optimally produce desirable results, be it within the sphere of what it itself governs (the legislation) or outside it (the sciences and the arts). There is one final consideration, which I would dub an 'internal' reason, which will now be addressed.

8.4 The third reason why freedom should have a place in a liberal democratic state is connected with man's very mode of existence (or at least *one* mode of existence, which is, moreover, perhaps not applicable to *all* people), made apparent – in part – by the need to express oneself. In an 'elevated' way, this may be seen, insofar as the outward manifestation is concerned, as a continuation of what was said in defense of the first reason why there should be room for freedom. For some people, being able to create something and share it may be so important that they are willing to risk their lives in order to do so. Somewhat less dramatically than this, Dworkin observes: "[…] liberty seems valuable to us only because of the consequences we think it does have for people: we think lives led under circumstances of liberty are better lives just for that reason."[302]

In order to illustrate this point, one need only refer to recent history to find some relevant examples, such as the predicaments faced by composers (like Prokofiev and

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also means that you have a right to hear what others have to say." R. Dahl, "What Political Institutions Does Large-Scale Democracy Require?", pp. 195, 196.

[298] B. Spinoza, *Tractatus Theologico-Politicus*, Ch. 20 (p. 243); cf. (with regard to the sciences) H. Kelsen, *Was ist Gerechtigkeit?*, Ch. 9, § 34 (pp. 42, 43).

[299] This issue bears both on matters that are of a political nature and on those that are not (or not directly), Galileo's statements alluded to above (i.e., the heliocentric thesis, expounded, *inter alia*, in the *Letter to the Grand Duchess Christina of Lorraine*, pp. 8, 44) being of the latter kind. One may in general say that "[…] ideas, systems and conceptions of all sorts can only prove themselves insofar as they are exposed to the *risk of failing*." ("[…] bewähren können sich Ideen, Systeme und Konzeptionen aller Art nur insoweit, als sie dem *Risiko des Scheiterns* ausgesetzt werden.") H. Albert, *Plädoyer für kritischen Rationalismus*, p. 17 (the political consequences of this perspective are discussed on pp. 69-75).

[300] Cf. I. Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nichts für die Praxis*, part 2, p. 304.

[301] To be clear, the fact that this is a *positive* reason does not detract from the fact that *negative* freedom remains at stake.

[302] R. Dworkin, *Sovereign Virtue*, p. 121. (In light of what I argued above, I cannot concur with the presence of the word 'only' here.)

Shostakovich) and writers (like Solzhenitsyn and Pasternak) during the Soviet Regime. This is not the place to ponder the questions whether such contributions do indeed manifest something valuable – apart from the pleasure they bring – or to what extent such agents depend on their surroundings to realize their work. So long as individuals are able to express themselves and have a strong enough desire to do so, there is, on that basis alone,[303] sufficient justification to allow them to do so: they apparently consider it to be something valuable, whether this be for a reason one might arguably consider to be mundane, such as a desire for fame, or for a more 'elevated' reason (they may consider it to be something that constitutes the very reason they exist). Unless one takes a stance that cannot, as far as I can assess, be supported without an appeal to some metaphysical theory, namely, that citizens somehow exist on behalf of the state (rather than vice versa), this third reason is compelling even in the absence of the danger of seditious acts by citizens.

8.5 The reasons for including freedom in a liberal democratic state have been presented, which were rubricated by classifying them as negative (the first one) and positive (the second two, one of which was marked external while the other was said to have an internal nature). The results that follow from these observations, namely, that it seems safe to say that freedom is an important given in a liberal democratic state and that liberal democracy can be defended on the basis of the foregoing, should not be surprising, but I nonetheless venture to say that the foregoing analysis was not an exercise in futility. That does not derogate from the fact that it was no more than a precursory inquiry, designed to set the stage for answering the most pressing questions.

8.6 Summary and relation to chapter 9

Granting citizens freedom can be supported on (at least) three grounds. First, restricting it is bound to lead to sedition. Second, the room to express opinions that deviate from the *communis opinio* and/or the view of those that govern the state will lead to progress in legal, scientific and artistic respects. Third, many people consider the opportunity to express their ideas so important that they would be willing to rebel, which may have destabilizing effects, but even if such actions are unlikely to arise, there would be sufficient grounds to incorporate freedom in a liberal democratic state. Before I address the question to what extent freedom may be limited, I must first indicate how freedom is related to equality, since what was said about basic and prescriptive equality in part 1 raises this question. In order to locate my position in this discussion, I will compare it to Dworkin's.

[303] This is not to say that this is the *only* reason (and the word 'alone' merely means that a *sufficient* reason is provided here), as the first reason mentioned – it is simply impossible to effectively restrain people – is also relevant here.