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Freedom and equality as necessary constituents of a liberal democratic state

Doomen, J.

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Author: Doomen, Jasper

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Chapter 9. The compatibility of freedom and equality

9.1 Since freedom appears, just like equality, to be an important constituent of a liberal democratic state, it must first be inquired whether they are compatible and perhaps even interrelated in the sense that the existence of one implies that of the other. In that case, no further analysis is required and the inquiry can swiftly be concluded. I will now revisit Dworkin's philosophy, since he defends such a position.

Dworkin himself maintains that he does not defend a metaphysical standpoint: "[...] the idea of individual rights that these essays defend does not presuppose any ghostly forms; that idea is, in fact, of no different metaphysical character from the main ideas of the ruling theory itself. [...] Individual rights are political trumps held by individuals. [...] That characterization of a right [...] does not suppose that rights have some special metaphysical character [...]." ³⁰⁴ Still, it is difficult not to reach this conclusion if rights are supposed to exist irrespective of explicitly assigning them, as Dworkin indicates: "[...] those Constitutional rights that we call fundamental like the right of free speech, are supposed to represent rights against the Government in the strong sense; that is the point of the boast that our legal system respects the fundamental rights of the citizen. If citizens have a moral right of free speech, then governments would do wrong to repeal the First Amendment that guarantees it, even if they were persuaded that the majority would be better off if speech were curtailed." ³⁰⁵

9.2 I already indicated the problems with Dworkin's position in section 3.4, where the notion of 'intrinsic value' was addressed; the present discussion merits a separate treatment. It is important not to misrepresent Dworkin lest he become a straw man that is *too* easily refuted. He does speak of the constitution as the guarantor of the basic rights, ³⁰⁶ and the famous (or infamous) 'rights thesis' (according to which judicial decisions enforce existing rights ³⁰⁷) is not based on a traditional view of natural law, ³⁰⁸ but is clearly rooted in the institutional history. ³⁰⁹ Still, in light of what was said in chapter 6 about the *origin* of the existing rights, such a position is perhaps not the most convincing one, especially when one considers the fact that Dworkin speaks of 'a moral right'. His view of the government's position is (contra liberalism as it is usually taken, or 'liberalism based on neutrality', as he

³⁰⁴ R. Dworkin, *Taking Rights Seriously*, p. xi.

³⁰⁵ R. Dworkin, *Taking Rights Seriously*, p. 191.

³⁰⁶ E.g., R. Dworkin, *Taking Rights Seriously*, p. 185.

³⁰⁷ R. Dworkin, *Taking Rights Seriously*, p. 87.

³⁰⁸ Like the one espoused by Th. Aquinas, *Summa Theologiae* 1a2ae, q. 90, art. 2 (p. 150); q. 93, art. 3 (p. 164); q. 94, art. 2 (pp. 169, 170); q. 94, art. 5 (pp. 172, 173).

³⁰⁹ R. Dworkin, *Taking Rights Seriously*, p. 87.

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calls it³¹⁰) that of ‘liberalism based on equality’, which “[...] takes as fundamental that government treat its citizens as equals, and insists on moral neutrality only to the degree that equality requires it.”³¹¹

Incidentally, much of what Dworkin says³¹² about the barriers against an economic liberal theory with no government intervention (the sort of ‘liberal’ theory he opposes) in order to mitigate the negative effects for those who suffer the negative consequences of economic inequality seems acceptable (although the degree to which one’s agreement with this depends on one’s political convictions is difficult to assess), but, first, someone who agrees with government intervention in such a way may be said to act out of non-‘moral’ grounds (e.g., someone who agrees with the existence of government schemes for the handicapped or the poor may simply do this because he may himself be confronted with such a situation – cf. the example of the insurance in section 2.2), and second, this is not the topic of this inquiry.³¹³

9.3 To return to the issue at hand, Dworkin opposes a “[...] general right to liberty at all, at least as liberty has traditionally been conceived by its champions. I have in mind the traditional definition of liberty as the absence of constraints placed by a government upon what a man might do if he wants to.”³¹⁴ Dworkin’s notion of ‘liberty’ becomes clear from the way he contrasts it with Berlin’s: “Liberty, [Berlin] says, is freedom from the interference of others in doing whatever it is that you might wish to do. [...] [O]ur commitment to liberty is not automatically a commitment to liberty as Berlin understood it. We might say: liberty isn’t the freedom to do whatever you might want to do; it’s freedom to do whatever you like so long as you respect the moral rights, properly understood, of others. [...] [I]t is far from obvious that liberty understood in this different way would produce an inevitable conflict with equality. On the contrary, it seems unlikely that it would [...]”³¹⁵ Dworkin is justified to draw this conclusion (namely, that liberty *in this sense* does not (necessarily) conflict with equality). The crucial question is, however, whether the premise on which he bases this

³¹⁰ R. Dworkin, *A Matter of Principle*, p. 205.

³¹¹ R. Dworkin, *A Matter of Principle*, p. 205.

³¹² E.g., in part 3 (Chs. 8-11) of *A Matter of Principle*.

³¹³ I do not, then, express myself here on the hierarchy between one’s economic and political interests, save for remarking that in the direst of circumstances, it would be virtually absurd to suppose that the former might not supersede the latter, and it is not inapposite to note, especially in view of urgent situations, that the interest in realizing the latter becomes moot if this realization is to take place at a time when one is no longer alive to enjoy them.

³¹⁴ R. Dworkin, *Taking Rights Seriously*, p. 267.

³¹⁵ R. Dworkin, *Justice in Robes*, p. 112.

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answer – namely, that liberty is to be understood as limited by respecting the (‘moral’) rights of others) – is *correct*.³¹⁶

Elsewhere, Dworkin states: “Liberty is not the freedom to do whatever one wants no matter what, but to do whatever one wants that respects the true rights of others.”³¹⁷ Several problems are involved here. First of all, this is not a ‘natural’ definition of ‘liberty’, so to speak. I set out in the beginning of chapter 7 with such a definition, namely, negative freedom.³¹⁸ I do not wish to cling – dogmatically – to the position that only this sort of freedom exists, but anyone who would add other versions must demonstrate what might prompt their presence. It seems that Dworkin simply wants to make the point that some actions, and thereby (negative) freedom, should be limited. That may be a defensible stance, but to claim the existence of some sort of ‘liberty’ in order to operate under the banner of such a notion merely provides a *seemingly* solid basis from which to start (or, if it should indeed be necessary to operate thus, this merely demonstrates the unsoundness or weakness of what is claimed).

A second point is that Dworkin speaks of ‘true rights’, which seems to refer to rights subjects should have under any circumstance, so that the contingency of the development of actual rights is not sufficiently taken into consideration and simultaneously traded in for a metaphysical stance. This is a minor issue in light of the present discussion, however, so that I shall let it rest here. A third concern is that, depending on what one means by ‘true rights’, this stance seems to hollow out (negative) freedom, or at least limit it unjustifiably, namely, *before* (negative) freedom has been balanced against other matters that are considered important. With Dworkin’s conception of liberty in place, someone who does not consider everyone equals, for example, has no freedom to express himself.³¹⁹ I would plead a sort of freedom that leaves room to balance such matters and does not reach a conclusion in advance, so that at this time, no conclusions may be drawn with respect to the question of whether the freedom of the person just mentioned should be limited or not.

The source of the disagreement between Berlin’s view³²⁰ and Dworkin’s simply appears to be their diverging conceptions of ‘liberty’, a standard to decide which of them (Berlin arguing, on the basis of his conception, that liberty and equality necessarily conflict, Dworkin, on the basis of his, that they do not) would be right being unavailable (or at least

³¹⁶ It is obvious that this question must come to the fore. It is very easy to support a conclusion through premises of one’s own fabrication, but that does not make it correct, of course (an extreme example of this approach is found in Spinoza’s *Ethica*, notably the first part).

³¹⁷ R. Dworkin, *Sovereign Virtue*, p. 237; cf. *Is Democracy Possible Here?*, pp. 69-73.

³¹⁸ Again, I myself do not distinguish between freedom and liberty and consider them synonyms.

³¹⁹ It would be a *petitio principii* to say that this conclusion is not warranted because Dworkin has not defined ‘liberty’ thus but rather by referring to equality in the first place. After all, what is under discussion is this definition itself, which is far from self-evident.

³²⁰ The view that liberty should be understood as negative freedom in this case is not only propagated by Berlin, of course.

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undiscoverable).³²¹ I will leave this matter here, save for the following. Dworkin seems to have found an alternative to Berlin's view by simply adhering to a competing definition. He is well aware of this, as he demonstrates,³²² his response to this (at least apparent) problem is that Berlin's view of the values of liberty and equality – *viz.*, that they conflict – would be just as question-begging as Dworkin's – *viz.*, that they do not conflict –, but that is insufficient for Dworkin to make his point. The onus is on Dworkin not merely to prove why Berlin's outlook would be incorrect, but also why his would be *correct*. After all, the possibility that both Berlin *and* he are mistaken is not excluded beforehand, and a false dilemma, according to which either one view or its opposite must be correct, must be avoided.

9.4 As long as Dworkin has indeed not shown the correctness of his position, it would be wise to take a cautious stance, by arguing that no values (which is itself a 'moral' notion³²³) are involved at all, by simply adhering to 'equality' and 'liberty' in the sense that was expounded in my alternative (so, 'liberty' meaning the absence of external impediments and 'equality' referring to basic equality). Dworkin does not, of course, reach this conclusion, but rather the following one: "Given that some people [...] want to kill on some occasions, is any wrong done to them by preventing them from doing so? Do we have any reason to apologize to the wolf who is denied his leg of lamb? Certain philosophers would answer that question: yes. Something important is lost, they say, whenever people of extraordinary spirit and ambition are thwarted by the laws of moral pygmies. I'm not asking whether anyone could think that. I'm asking what you think. And if you, like me, think that nothing wrong is done through such laws, then you will have that reason for rejecting Berlin's account of liberty."³²⁴

He appears to appeal to an intuition here,³²⁵ the problems with which were mentioned in section 2.4, to which may be added the fact that those whose judgment is taken into account are for the larger part not imbued with the qualities Dworkin mentions, so that if decisions are made on the basis of a democratic procedure, it will not be difficult to predict how Dworkin's question will be answered. In any event, in order to maintain that 'equality' in the sense in which Dworkin defends it is at stake, a more elaborate account of

³²¹ An even greater skepticism may be defended, on the basis of which it may be argued that the question which party is right (or rather – in this case – 'right') is based on the unfounded premise (some would call 'essentialism') that such a question can be answered at all, as if the answer to it is hidden somewhere, waiting to be discovered.

³²² R. Dworkin, *Justice in Robes*, pp. 112, 113; "Do Values Conflict? A Hedgehog's Approach", p. 256.

³²³ This does not mean that equality or liberty cannot be *valuable*, but that is a different matter. One may consider music or a nice meal valuable, but it would be difficult, I think, to consider enjoying these things something 'moral'.

³²⁴ R. Dworkin, *Justice in Robes*, pp. 115, 116.

³²⁵ Explicitly so elsewhere (R. Dworkin, "Do Values Conflict? A Hedgehog's Approach", p. 254).

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equality than the minimal one I presented in part 1 of this study will have to be compellingly presented, which, as I indicated, Dworkin has not done.

9.5 I am unaware of any way to determine which view on freedom is the ‘right’ one, but whether such a view exists at all is not the purpose of this inquiry. I would, in line with what was said in section 9.3, rather start with negative freedom, as a notion that can at least be acknowledged as a conceptually unproblematic one, and examine how it relates to equality. Should it indeed prove necessary to limit it by some appeal to equality, the outcome may bear a similarity to Dworkin’s conception, but at least the accusation of clinging dogmatically to a particular notion will have been evaded. Negative freedom will, then, remain the guiding sort of freedom unless one or more reasons are found to depart from this stance.

9.6 Summary and relation to chapter 10

The concepts of ‘freedom’ and ‘equality’ are not intertwined but rather unrelated, in contradistinction to what Dworkin argues. Since both equality and freedom are constituents of a liberal democratic state, as was argued in, respectively, chapters 6 and 8, this means that the defense of equality in chapter 6 will not be helpful in order to determine the role of freedom. The latter requires, in other words, a separate analysis. This task will be taken up in chapter 10, where it will be inquired on what basis, and to what extent, one’s freedom may be limited.

