What is the relation between collective and individual self-determination in the liberal script?

Christoph Möllers

One common definition of "liberalism" in theory and practice refers to a priority of individual freedom over other values or freedoms as its decisive feature. The systematic and historic relation between individualism and state power in liberal theories goes against this assumption, as does the function of individual rights in liberal constitutionalism. There is no need to deny the importance of individual self-determination for contemporary liberalism. Still, its relation to collective self-determination is better understood in equal or open terms as "co-original" (Habermas 1992) than as part of a normative hierarchy.

1 NORMATIVE INDIVIDUALISM

According to a common narrative, "liberalism" is a model for a political order that is founded on normative individualism, on the assumption that individual freedom or individual self-determination constitutes the core element of justification for every form of legitimate political order. This assumption comes in a complex variety of versions and with different and historically changing implications in the theory of political liberalism as well as in the practice of political liberals: from the need to individual consent in social contract theory to models of basic and human rights to political cries for "freedom" from people affected by state regulation. Though it is not necessary to dismantle the connection between "liberalism" and "individualism" altogether some critical remarks concerning their identification are necessary. These remarks will address two issues: The relationship between liberalism and the strength of state authority (2), and the case

of constitutionalism as an alleged example for the priority of individual self-determination (3). The contribution will end with a short, more constructive outlook on the relation between individual and collective self-determination in contemporary liberalism (4).

2 THE RELATIONSHIP BETWEEN LIBERALISM AND THE STRENGTH OF STATE AUTHORITY

Social contract theory, beginning with Hobbes, takes individual consent as the fundamental element of legitimate political organization. Yet, it is already clear in Hobbes' theory that his systematic starting point from an individual right to self-protection must not necessarily imply any limit to state power. To the contrary, Hobbes' model leads its readers to a strong voluntarist concept of sovereignty. And though one may take Hobbes to be an outlier in the history of social contract theory, this combination of individualism and absolutism (Schnur 1963) is not just a theoretical affair because it has remarkable correspondences with the institutional reality of political liberalism.

In early liberal politics, i.e. in the political movement that invented and popularized the term "liberalism" after the French Revolution (and long before "liberalism" was applied to political theory), the liberal bourgeoisie was not just critical of absolutist state power, but in many accounts the ally of monarchist centralism against intermediate feudal structures (Furet 1988). Individual action had not necessarily to be protected from a strong state, but surely so from irrational and arbitrary public authority and from unaccountable social intermediaries like guilds, trade unions, cartels, pressure groups, religious corporations and encroaching feudal privileges that ignored the liberal idea of equal citizenship before the law. The liberal distrust of institutions occupying the social space between the individual and the political is something that classical liberalism early on shared with the Jacobine left. Strong state power served as a necessary condition for the liberation of individual forces, be it on the marketplace, in fine arts or in sciences. Therefore, the destruction of social and religious intermediaries is an important element of liberal politics up to Margaret Thatcher's attack on feudal leftovers in Great Britain, and it determined a big deal of liberal political interventions in the 19th century. The invention of the free market and the development of strong centralized bureaucracies are in this view not contradictory. The original liberal political project at least before

World War I was not anti-sovereigntist or anti-monarchist, but anti-feudal. It is therefore no accident that classical tools of organized state action like a police force that disposes, in Max Weber's terms, of the monopoly of legitimate physical power and an organized structure of systematic taxation, are projects that are defined and endorsed by liberal politics of this era.

These historical reminiscences put the narrative of liberal individualism in a certain context and cannot but affect its meaning. When one of the perennial conundrums of liberal political theory is posed by the question which is the bigger threat to freedom, private power or state authority, this question is relatively easily answered by early political liberalism: the problems are intermediary structures in which privates hold old forms of public authority. This implies that the realization of individual freedom needs a strong political background order. In much of the liberal political imagination up to World War II and sometimes beyond it (Slobodian 2018) this order did not have to be democratic. The liberal fight against the introduction of universal suffrage was one of the reasons why liberal parties lost much of their relevance at the end of the 19th century. The liberal fight for national political causes and for colonialism completes the picture: The liberal take on individual freedom was dependent on the presence of a strong state and it was not open to all individuals but only to those who were qualified by property, gender and pedigree.

For today's liberal script that has (more or less) made its peace with democratic inclusion, there are still lessons to be learned. There is nothing self-evident in an interpretation that takes political liberalism to be critical of state power. The innovation of modern liberalism is to understand state power not as a given delivered by tradition, but as a constructed means to an end, though not, correspondingly, individual self-determination as an end in itself. The status of individual self-determination is a construction that is built on political institutions, especially on effective state power.

3 THE CASE OF CONSTITUTIONALISM

One of the prime proofs for the alleged priority of individual over collective self-determination seems to be modern liberal constitutionalism. Revolutionary constitutions often start with the invocation of basic and human rights that are designed to protect individual self-determination. Critical theory since Marx has even claimed that it is the legal form of the

(bourgeois) individual right which is mainly responsible for the apolitical individualist atomization of modern capitalist societies. Yet, it is not only the Marxist critique, but also the liberal endorsement of modern constitutionalism itself that often backs a reading in which individual self-determination is claimed to be the basis on which political institutions are built.

There are at least two problems with this set of assumptions with regard to modern constitutionalism. The first lies in the fact that the act of constitution-making in which the natural freedom of the individuals is transformed into subjective rights is itself a collective political project. So, the priority of individualism is the result of a collective decision. Individual rights are constituted by a political community. This is relevant because we can observe that scope and depth of these rights differ to a considerable degree between different constitutional orders even in the "West". To give just one example: In the German post-war tradition, human dignity has become the master guarantee, the basis of all other rights. Maybe there are good reasons for this, but it is clear that human dignity cannot claim the same importance in many other constitutional jurisdictions (McCrudden 2008). The explicit constitutional protection of dignity seems to be a path-dependent enterprise that has relatively little support in the Anglo-American constitutional traditions (Whitman 2005). These historical differences are conceptually relevant because they underline the dependency of individual rights protection from the preferences or values of the liberal political community that endorses them. To mention a spectacular case: One constitutional order began through its highest court in the 1970ies to declare the *prohibition* of abortion to be unconstitutional (United States of America (USA)). Another constitutional order began through its highest court in the 1970ies to declare the *legalization* of abortion to be unconstitutional. The common denominator of a shared concept of individual freedom between these two cases is virtually impossible to find.

The second problem plays out on the institutional level of constitutional law. Even if there was a priority of individual over collective freedom, how could it play out in concrete institutional terms? One answer to this question refers to a hierarchy of norms in which collective political decisions (mostly taken in the form of a parliamentary statue) enjoy a lower rank than constitutionally entrenched basic rights. Such a hierarchy of norms could be enforced by an independent judicial review. This is, as a matter of fact, an institutional solution that we find in many liberal constitutional

orders. An individual person whose rights are abridged can claim the priority of her rights over collective action in a court procedure. The court is empowered to strike the statute down or, at least, to declare it inapplicable for the given case.

Plausible as it sounds there are again different problems with this institutional answer. As a matter of fact, many modern liberal constitutional orders do not know this kind of judicial review though there is a global tendency within the family of liberal constitutional orders towards it. Still, prominent western systems like the British, the Scandinavian, for a long time the French, or the Australian did not introduce this kind of constitutional review because they explicitly did not want to give such a vast power of control over the political process to politically not responsible courts. As often in constitutionalism, a theoretical question becomes one of institutional politics. Rights are not just rights – they are norms that empower and disempower certain institutions within a constitutional framework. For most constitutional orders before World War II the protection of individual rights was a task of the legislator, not of courts. The case of the US Supreme Court that started to apply rights against the legislator was exceptional and contested. The declarations and catalogues of rights in post-revolutionary constitutions addressed the political process, parliaments, not its judicial review.

This tradition is, as we have seen, still relevant for many liberal-democratic constitutional orders. But even if one counter-factually accepted constitutional judicial review of rights as a general institutional feature of liberal constitutionalism, there would be a further conceptual problem: There are not only, as already mentioned, big differences in the interpretation of rights between different orders that belong to the liberal script. There is also a deep ambivalence within jurisdictions in the way basic rights are understood and interpreted by courts as well as by the political community as a whole. On the one hand, individual preferences are considered worthy of protection as such, indifferent from their rational justification. On the other hand, rights are often interpreted in the light of a social function they are expected to fulfil. Freedom of expression is supposed to serve democracy, private property should create welfare, religious freedom is expected to support some kind of value-orientation of members of society. These functional justifications are also relevant for the question of which actions are protected by basic rights. Do rights protect all forms of idiosyncratic

behaviour or only such forms which promise to make a meaningful contribution to the community? My assumption would be that there is no clear answer in contemporary constitutional practice to that question. German constitutional law has, on the one hand, strong functionalist tendencies in the interpretation of rights. It applies, on the other hand, a general right to free action, that covers basically everything, even the most mundane and trivial practices – something we do not know in many other liberal jurisdictions. The picture in US constitutional law is different: only specifically enumerated practices are protected by basic rights, but there is a tendency in the jurisprudence of the US Supreme Court to interpret these rights in a voluntaristic manner. The exercise of freedom of speech does not have to bother about a functional democratic process. The exercise of religious freedom may ignore public health.

This ambiguity, to understand individual freedom either as an aim in itself or as something functional useful for the community, and therefore inherently collectivized, is nothing particular to constitutional law. It seems to be part of a core problem of liberal political theory. John Stuart Mill's reflections on freedom (Mill 1989 [1859]) is a point in case. Mill had a keen sense for the individual development of every person as someone unique. The motto of his book by Wilhelm von Humboldt documents sources of his thinking in German idealism and romanticism. Yet the ultimate value of individuality lies for him in its function for the whole community. Individuality is an instrument through which societies are enabled to develop and improve themselves. Many liberal theories understand political communities as aggregates of natural, pre-politically given individual rights. But the status that individual persons enjoy, as legal subjects or as citizens, are themselves a product of the political community. Modern constitutionalism is the form through which political collective action transforms persons into subjects with rights. To quote the sharpest liberal thinker of the 20th century: "Liberalism cannot base itself upon the notion of rights as fundamental and given, but it does see them as just those licences and empowerments that citizens must have in order to preserve their freedom and to protect themselves against abuse." (Shklar 1998: 19)

4 OUTLOOK

Maybe any answer to the question of which comes first, individual or collective self-determination, is futile because the question itself is wrongly

posed (Möllers 2020). At least, it is fair to say that the institutional set-up of modern liberal-democratic constitutions is way too complex to be reduced to any such a rule of supremacy. A closer reading of the liberal political tradition would show us that individual and collective self-determination entertain a self-enforcing relation in which they are mutually dependent on the other while the concrete relation between their contradicting claims is constantly negotiated in and between different institutions (Möllers 2013). Jürgen Habermas has used Schelling's term of Gleichursprünglichkeit (co-originality) to reconstruct the relation between private and public autonomy (Habermas 1992). An important implication of this approach is the insight that there is no contradiction between rule of law and democracy. The underlying assumption that there is no contradiction between liberal and democratic ideas (Holmes 1995) is relatively new and became only generally accepted after World War II. Even in the 1920ies, liberalism and democracy were often juxtaposed. Therefore, all attempts to base liberalism on a priority of individual freedom seem like a step back in its own theoretical and political evolution.

REFERENCES

Furet, François 1988: La Révolution 1770–1880, Paris: Hachette.

Habermas, Jürgen 1992: Faktizität und Geltung, Frankfurt am Main: Suhrkamp.

Holmes, Stephen 1995: The liberal idea, in: Holmes, Stephen (ed.): Passions and Constraints, Chicago: University of Chicago Press, 13-41.

McCrudden, Christopher 2008: Human Dignity and Judicial Interpretation of Human Rights, *European Journal of International Law* 19(4): 655–724.

Mill, John Stuart 1989 [1859]: On Liberty, Oxford: Oxford University Press.

Möllers, Christoph 2013: The Three Branches. A Liberal Theory of Separated Powers, Oxford: Oxford University Press.

Möllers, Christoph 2020: Freiheitsgrade, Berlin: Suhrkamp.

Shklar, Judith N. 1998: The Liberalism of Fear, in: Hoffmann, Stanley (ed.): Political Thought and Political Thinkers, Chicago: University of Chicago Press, 3-20.

Slobodian, Quinn 2018: Globalists. The End of Empire and the Birth of Neoliberalism, Cambridge: Harvard University Press.

Schnur, Roman 1963: Individualismus und Absolutismus. Zur politischen Theorie vor Thomas Hobbes 1600-1640, Berlin: Duncker & Humblot.

Whitman, James Q. 2005: 'Human dignity' in Europe and the United States. The social foundations, in: Nolte, G. (ed.): European and US Constitutionalism, Cambridge: Cambridge University Press, 108-124.

“SCRIPTS Arguments” is a series serving to collect different perspectives of SCRIPTS members on central research questions of the Cluster of Excellence “Contestations of the Liberal Script (SCRIPTS)”. All SCRIPTS Arguments are available on the SCRIPTS website at www.scripts-berlin.eu/publications/arguments

SCRIPTS
CLUSTER OF EXCELLENCE
Contestations of the Liberal Script