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Defining and Founding Civil Liberty

Svend-Erik Skaaning

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Center on Democracy, Development,
and The Rule of Law
Freeman Spogli Institute for International Studies
Stanford University
Encina Hall
Stanford, CA 94305
Phone: 650-724-7197
Fax: 650-724-2996
<http://cddrl.stanford.edu/>

About the Center on Democracy, Development and the Rule of Law (CDDRL)

CDDRL was founded by a generous grant from the Bill and Flora Hewlett Foundation in October in 2002 as part of the Stanford Institute for International Studies at Stanford University. The Center supports analytic studies, policy relevant research, training and outreach activities to assist developing countries in the design and implementation of policies to foster growth, democracy, and the rule of law.

About the Author

Svend-Erik Skaaning is a visiting Pre-Doctoral Fellow (University of Aarhus, Denmark) at CDDRL. His research interests include Comparative Methodology (including QCA-methods), Civil Liberty, Political Development in Latin American and Post-Communist Countries, Democratization and Liberal Political Theory. The working title of his PHD project is “Democracy besides Elections: An Exploration into the Development and Causes of Respect for Civil Liberties in Latin American and Post-Communist Countries.” The dissertation addresses the extent of civil liberty (freedom of: opinion and expression, assembly and association, religion, movement and residence as well as independent courts) in 20 Latin American and 28 post-communist countries. Apart from tracking the development of respect for civil liberties from the late 1970's till 2003, it also attempts to explain the present level of respect by examining different structural explanations, such as historical experience with liberty, ethno-religious composition, modernization and natural resources (primarily oil).

Skaaning has constructed his own dataset and index on civil liberties based on coding of the State Department's Country Reports on Human Rights Practices from 1977 to 2003, which he uses in his descriptive analysis of the development and as the dependent variable in the subsequent causal assessment. In this stage of the research, he both undertakes intraregional analyses, utilizing the fuzzy-set method and OLS-regression, and interregional comparisons.

Skaaning received his B.A. (2000) and M.A. (2003) in Political Science from the University of Aarhus, Denmark, where he is also a PHD scholar in the final year. Parts of his MA degree were completed at Ruprecht-Karls-Universität (Heidelberg) and Freie Universität (Berlin).

Defining and Founding Civil Liberty

There is not a word [liberty], which expresses so much of what is important and excellent
- Richard Price, 1972[1778]: 5

Freedom, like love and beauty, is one of those values better experienced than defined
- Orlando Patterson, 1991: 1

Abstract

In order to facilitate a subsequent operationalization of civil liberty, the paper attempts to define and ground civil liberty on the basis of liberal political philosophy/theory as this tradition provides fruitful conceptual distinctions and specifications and offers some interesting motivations for taking civil liberties into deeper consideration. Different clusters of perspectives are found in the literature and one these is identified as key to understand the character of civil liberty and the relationship between civil liberty and democracy. Thereafter, to specify what is plausibly meant by civil liberties, I introduce three historically significant forms of rights codifications, that is, agreements about rights put down in peace treaties on the background of religious wars between Catholics and Protestants; national declarations and constitutional provisions connected to the revolutions in the seventeenth century England and the late eighteenth century USA and France; and international conventions on human rights. As one cannot settle the question of the plausibility of civil liberties just by reference to their legal recognition, I turn to some of the justifications offered by liberal philosophers that are briefly confronted with some general critiques.

The paper concludes that there are good reasons to respect civil liberties and to narrow the focus to (modern, negative) liberal freedom understood as absence of state interference in certain personal exertion rights. On this background, five rights are selected to constitute the core of a civil liberty measure: freedom of opinion and expression; freedom of assembly and association; freedom of thought, conscience and religion; freedom of movement and residence; freedom of recourse to independent courts.

It has been claimed that personal liberty is comparatively modern since there seems to be hardly any discussion of individual liberty as a conscious political ideal in the ancient world (Berlin, 1997[1958]: 200-201). This assertion, however, is much disputed because appeals to reason and freedom long preceded the Enlightenment. It has even been argued that the modern conceptions of, and intense commitment to, freedom in the West were established in the ancient world, and that no

lacuna in the idealization of freedom has existed meaning that there has been a pattern linking this key value of Western culture throughout history (Patterson, 1991). Then again, the liberal thinkers of the Enlightenment introduced an original framework of ideas that, although highly incongruent, emphasizes rationality, impartiality and equality of some sort and ties these values to fundamental individual rights. I thus choose to base my definition and grounding of civil liberty in the liberal political philosophy/theory of two main reasons. This tradition seems to provide highly relevant conceptual distinctions and specifications. Moreover, it offers some of the most promising justifications for caring about civil liberties.

Many if not most political philosophers throughout the history of man have praised liberty and/or freedom and as a consequence the meaning of the terms has become so porous that there is little interpretation that they seem able to resist (cf. Berlin, 1997[1958]: 193). Yet it is not my primary intension to discuss the hundreds if not thousands senses offered by different thinkers nor to track the history of these essentially contested concepts in detail. Instead I propose to identify some clusters of perspectives and select one of them as key to understand the character of civil liberty. Furthermore, I will discuss, in short, its relation to another crucial concept, that is, democracy. Then I move on and present three different forms of rights codifications that have played a significant historical role and have emphasized a more or less comprehensive set of civil liberties. The first form is agreements about rights put down in peace treaties on the background of religious wars between Catholics and Protestants, whereas the second is some of the national declarations and constitutional provisions connected to the revolutions in the seventeenth century England and the late eighteenth century USA and France. The last form is international conventions on human rights, which have come to play a prominent role in the rights discourse over the last decades.

As one cannot settle the question of the plausibility of civil liberties by reference to whether they have received comprehensive legal recognition or not, the affiliated rights have to be justified by solid arguments in contrast to mere postulations. In order to achieve this, I turn to some of the reasons offered by liberal philosophers – both classical as well as some newer propositions established by Mill, Rawls and Dworkin – which I then briefly confront with some predominant approaches questioning of the validity of general rights. Finally, I conclude the paper by specifying the civil liberties that I attempt to construct a measure of; as described in another paper (Skaaning, 2006).

I. Initial Conceptual Clarification

As to the conceptual origins of freedom and liberty, it has been claimed that non-Western peoples have thought so little about freedom that most human languages did not even possess a word for it before they got in contact with the West. Even where an indigenous term roughly equivalent to some aspect of Western freedom existed, it was typically used in the pejorative sense of license or, occasionally, in the slightly less negative sense of existing by oneself (Patterson, 1991: x). Quite tellingly, what some scholars regard to be the first written reference to the concept of liberty or freedom, namely the Sumerian word *amargi* used in the description of a reform process under Urukagina (2350 BC), literally means return to mother. In contrast, English speaking people actually have the unique opportunity to choose between liberty and freedom, which is not offered by any other ancient or modern Western language (Pitkin, 1988: 523). Whereas most scholars use the concepts interchangeably (cf. e.g., Miller, 1991: 2; Berlin, 1997[1958]: 194; Muller, 1963: xiii), others have identified significant differences in meaning (Pitkin, 1988; Fischer, 2005). Whereas both words in their early uses implied not to be slave, ability to exercise personal will and a power to choose, they are different in others of their original meanings as it is made clear in the summarizing table below (Fischer, 2005: 10).

Table 1: Original Meanings of Liberty and Freedom

| Geographical origin | Mediterranean | Northern Europe |
|----------------------------|--|--|
| General concepts and ideas | Liberty, libertas, eleutheria (separation, release, autonomy) | Freedom, Freiheit, folcfre (kinship to free people) |
| Legal possessions | Privilege (that which may be given) | Right (that which must be given) |
| Social obligations | Use independence responsibly, and not as a libertine | Serve and support a free folk, and to respect rights of others who are free |

This subtle dissimilarity in meaning found in the historical roots of the concepts seems rather plausible. However, I will predominantly use both words to mean the same for two main reasons. Firstly, most of the references are in English and written from the nineteenth century till present, when writers have mostly employed them interchangeably. A change in terminology would thus rather lead to confusion than support clarification. Secondly, many modern conceptualizations of freedom and liberty, including the present authors, combine elements from both meanings – such as the absence of constraints and rights that must be given – which makes the distinction less useful.

I.i Various Kinds of Liberty

In a speech at the Athénée in Paris with the title *The Liberty of the Ancients Compared with that of the Moderns*, Constant made a distinction between ancient and modern liberty. Accordingly, liberty in ancient Greece consisted in directly participation in a wide range of collective activities such as pronouncing judgements, voting on laws and examination of the magistrates meaning that the individual was completely subjected to the authority of the community. In contrast, in the early nineteenth century among modern European nations liberty had come to mean civil liberty, i.e., the right to be subjected only to laws and not to be arrested, detained, put to death or maltreated in any way and the right of everyone to: express their opinion, chose their profession, dispose of property, come and go without permission, to associate with other individuals and to process the religion which they prefer. Finally, it also included the exercise of some influence on the administration of government (Constant, 1988[1816]: 311).

Another classic distinction is the one provided by Berlin in the essay *Two Concepts of Liberty*. He distinguished between a negative concept of liberty used to settle the area within which a person or a group is or should be left do to what he or she is able to do or be, without the interference of other persons, and a positive concept of liberty used to determine the source of control or interference that can determine someone to do, or be, one thing rather than another (1997[1958]: 194). In addition, he asserted that lack of political liberty is only to be connected to the prevention by other person in contrast to mere incapacity to attain a goal and whatever the standard in terms of which the sphere of non-interference is to be drawn – natural rights, utility, a categorical imperative, a hypothetical social contract or anything else – liberty in this sense means liberty from something (1997[1958]: 198-199).

Constant's and Berlin's classical suggestions for conceptual distinction are appealing, but Miller has provided a more compelling alternative. He makes an initial tripartition of the main traditions of thought about liberty, i.e., families of ideas hold together by a family resemblance among their members. The first is republican freedom. It understands a free person to be a citizen that plays an active role in government, so the enacted laws reflect the wishes of the people. The second, liberal freedom, views freedom as a property of individuals and consists in the absence of constraint or interference by public authorities and/or other persons in general. Finally, idealist freedom is the third tradition, which deems a person free if this person is led by own authentic desires or rational beliefs about how he or she should live (1991: 2-4).

A comparison of Miller's proposal with the two others reveals that Constant's distinction corresponds fairly well to the contrast between republican and liberal ideas of freedom, while Berlin's concept of negative liberty obviously corresponds to the liberal view. His concept of positive liberty, however, is related to not less than three different doctrines, i.e., freedom as the power or capacity to act in certain ways; freedom as rational self-direction and freedom as

collective self-determination (Miller, 1991: 10). For the time being, however, there is no need to dwell on further distinctions because there appears to a general agreement that freedom from interference constitutes a separate conceptual perspective – whether it is called modern liberty, negative liberty or liberal freedom – and that the plea for civil liberties primarily springs from this conception of freedom.

I.ii Civil Liberties and Democracy

The relation between civil liberties and democracy can be systematically summarized in different ways (cf. Bobbio, 1990: 48-49). Some see civil liberties and democracy as distinct phenomena – if democracy is just associated with self-government¹ – that possibly can, but not necessarily do, coexist, in the sense that political self-governance and competition and civil liberties can be respected simultaneously. This was Berlin's point of view. He argued that liberty in the negative sense is compatible with some kinds of autocracy, or at any rate with the absence of self-government because civil liberty concerns the area of control, whereas self-government concerns its source. In short, there is a logical distinction between answering the questions about who governs and the question about how far the government interferes in the life of the citizens (cf. Böckenförde, 1991: 365). Consequently, a democracy may deprive the individual citizen of civil liberties which he or she might have under another form of government (Berlin, 1997[1958]: 201-203).

However, this schism between civil liberties and popular sovereignty, Habermas, among others, has criticized to be flawed in that certain rights are constitutive conditions for free political opinion formation and decision-making (Habermas, 1992: 610-616; 1996: 294-301; cf. Kägi, 1953: 134-136). Thus, the features can also be understood as necessary and jointly sufficient for democracy if some or all civil liberties are deemed prerequisites for the meaningful functioning of

¹ I here identify self-government with either direct democracy or an electoral democracy (cf. Diamond, 2002) where the principal positions of political power are filled through clean and regular elections characterized by free political participation and competition. A discussion of the possible relations between civil liberties, self-government and social/economic equality will, although interesting, not be addressed.

self-government. This perspective covers at least two versions of democracy that I dub limited and full liberal democracy, respectively. Limited liberal democracy is, apart from self-government, defined by some civil liberties believed to be immanent a democratic process. These are often pointed out to be freedom of speech and press as well as freedom of association and assembly; as emphasized, for instance, in Dahl's polyarchy criteria (1989: 221; cf. Rawls, 1971: 225[§ 36]). The full liberal democracy additionally includes most or all of the other civil liberties presented later in this paper as found, for instance, in Beetham's democratic assessment criteria (Beetham, 2005; cf. Lauth, 2004: 330-350). In concluding this section, I just want to add that despite which relation seems more reasonable – my opinion on this issue is reflected in the title of this dissertation: Democracy besides Elections – it remains plausible to treat the elements as analytically distinct in both theoretical and empirical studies.

II. Historical Codifications

The extent of comprehensive, secular and non-philosophical written statements on human rights issues before the Reformation is rather limited. Actually, in a collection of human rights speeches, essays and documents from the ancient times to the present, the first document included that fulfils these criteria is *Magna Carta*² (Ishay, 1997). Dating back to 1215, it was issued by King John under the compulsion from the English barons (Muller, 1963: 70). It prescribed, e.g., that no free men should be imprisoned, dispossessed, outlawed or in any way molested except by lawful judgement of peers or by the law and that no one should be refused or delayed right or justice. Yet after the Reformation, the composition of such texts increased dramatically.

² This and the other documents referred to in this chapter can be found at www.yale.edu/lawweb/avalon/avalon.htm

II.i Religious Wars and Liberal Revolutions

The liberal worldview emerged out of the struggle for freedom of religion and opinion that began with the Reformation, laying the groundwork for claims for other universal rights (Ishay, 2004: 65). During the Enlightenment a universal discourse of rights committed to reason and individual free choice and the rule of law took hold. As the components of the liberal tradition emerged, adherents began the political struggle to develop effective means to promote the rights they championed.

In the sixteenth century Europe, Luther's rebellion against the dominant Catholic Church led to a fierce struggle between Catholics and Protestants. The *Religious Peace of Augsburg* signed between the Holy Roman Emperor, Charles V, and the Schmalkaldic League of Protestant princes was supposed to relieve the tension by introducing the principle *cuius regio, eius religio*; the ruler was to decide the religion for his area (Ishay, 2004: 77-78). Not all religious communities, though, were protected under the peace, and the antagonisms were far from settled. New devastating conflicts broke out and different wars with religious overtones continued, until the *Treaty of Westphalia* ceased the Thirty Years' War. The affiliated treaty, among other things, declared the right to religious asylum and once again underlined the prerogative of each state to select its religion.

It was the concurrent Puritan Revolution (1642-1648) in England, though – with its ferment of religious and political ideas and movements – that opened up for the advancement of ideas of civil liberty, which became a lasting heritage of liberal thought (Bobbio, 1990: 46). Universal claims of rights were first advanced against Charles I's efforts to restore his centralized powers at the expense of parliament. The royal authority was challenged, culminating in the execution of the king and the establishment of a republic led by Cromwell (Treadgold, 1990: 154-156). With the monarchical restoration, the hope for freedom was thwarted. Yet it was to re-emerge in a brief explosion during the Glorious Revolution in 1688. A direct result hereof was the English *Bill of*

Rights (1689). Out of the collection of rights and obligations accentuated herein; for example, freedom from royal interference with the law (i.e., the king was forbidden to establish his own courts or to act as a judge himself), freedom from cruel and unusual punishments, and excessive bail in addition to freedom from fines and forfeitures without trial, most of the items had already formed part of the unwritten constitution (Treadgold, 1990: 187-192). Nevertheless, the outcome of the English revolutions had lasting consequences as a political order serving as a model for other peoples. It sat England squarely in opposition to the tendencies prevailing in all the monarchies on the continent and has even been asserted to be the pre-eminent English contribution to the history of Western freedom (Muller, 1963: 290). Simultaneously with these developments, the efforts to suppress unpopular opinions also came under attack. National censorship was the rule, and another important obstacles to the spread of ideas was the *Index Librorum Prohibitorum*; a list of publications which the Catholic Church censored for being a danger to itself and the faith of its members. In England criticism eventually led to the abolishment of prepublication censorship in 1695 (Ishay, 2004: 78-79).

The struggle for change in England provided a worthwhile example of resistance for the American colonies to emulate. Fighting for independence, they included the struggle for individual rights (Ishay, 2004: 73). In the *Declaration of Independence* from 1776, Thomas Jefferson wrote the notorious passage that men are equal and endowed with unalienable rights and among these are life, liberty and the pursuit of happiness. In line with this spirit, the first amendment of the American *Bill of Rights* from 1791 forbade laws respecting an establishment of religion or prohibiting the free exercise thereof. Nor was it allowed to abridge freedom of speech and press, freedom to assemble peacefully or to petition the government for redress of grievances. In the fifth and sixth amendments, it was made clear that no person was to be deprived of life, liberty or property without due process of law and that the accused should enjoy a speedy and public trial by

an impartial jury states, whereas a banning of excessive bail and fines as well as the imposition of cruel and unusual punishment was underlined in the eight amendment.³

The accomplishments of the Americans then became an inspiration for many Frenchmen, who revolted against the *ancien régime* in 1789 under the slogan: *liberty, equality, fraternity, or death!* A fundamental document of the French Revolution, the *Declaration of the Rights of Man and of the Citizen*, was outlined by some of its leaders. It emphasized a wide set of rights. Among these were that all men are equal before the law; no person should be accused, arrested, imprisoned or otherwise punished except in the cases and according to the forms prescribed by law, and severity not essential to securing the prisoner's person was forbidden. Additionally, no one was to be disquieted on account of his religious or other opinions and everybody was allowed to speak, write and print with freedom. Four years later, these rights were incorporated in the *Montagnard Constitution* (Treadgold, 1990: 201-204). Apart from placing more emphasis on welfare and public assistance, the constitution also mentioned the right to peaceful assembly and the right to choose occupation, which were not included in the preceding declaration. It was never put into effect, though, due to the suspension of all ordinary legality introducing the Reign of Terror. Actually, all the gains in freedom put forward were met by conservative responses, but nevertheless these historical events represented the first crucial affirmation of the liberal ideas, which would later captivate the West and, eventually, play a significant role in the rest of the world.

II.ii International Human Rights Conventions

Many of the rights emphasized in the liberal revolutions were incorporated in national constitutions during the nineteenth and twentieth century, but on the international scene not much happened until after WWII. The United Nations was founded in 1945, replacing the League of Nations, in order to

³ Furthermore, the first section of the third article in the *Constitution of the United States* provided for the independent authority of the judicial power.

facilitate international cooperation and security. The atrocities committed in this war, first and foremost the Holocaust, led to the widespread feeling that the *United Nations Charter* did not sufficiently clarify the rights, it was meant to protect. The requirement of a universal declaration, fully articulating each right, was therefore proposed and complied with. The next step was the elaboration of a more specific and legally binding covenant of human rights, which was eventually split into two parts due to controversies about the relationship between different types of rights (Ishay, 2004: 223).

The articles about rights in the three main UN human rights documents, namely the *Universal Declaration of Human Rights* (UDHR); the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), are often divided into three main groups primarily identified with the key concepts of liberty, equality and fraternity. They are often referred to as human rights generations based on the historical sequence of their respective recognition (Umozurike, 1998: 539). The first group addresses the first generation of rights, that is, rights ensuring personal security and liberty, and thereby overlaps with the principal centre of attention; the second group specifies the second generation of rights by emphasizing political, social and economic equity, whereas the last group invokes the importance of culture and national self-determination connected to the third generation of rights. Table 2 represents a systematization of the relevant rights articles and an expansion of the international human rights documents to include the regional *American Convention of Human Rights* (ACHR) as well as the *European Convention of Human Rights* (ECHR).

Table 2: Rights Articles of International Conventions by Human Rights Generation

| | UDHR | ICCPR | ICESCR | ACHR | ECHR |
|-------------------|-------|-------|--------|--------|------|
| First Generation | 3-21 | 6-26 | - | 3-25 | 2-13 |
| Second Generation | 21-26 | 25 | 6-13 | 23, 26 | - |
| Third Generation | 27 | 1, 27 | 1, 15 | - | - |

All the conventions cover first generational rights and do this more comprehensively in comparison to the second and third generation of human rights. One of them, the European convention, merely includes such rights. The only exception is, quite naturally, the covenant on economic, social and cultural rights. With regard to political participation (vote and eligibility), it has often been treated as a first generation of liberal right. Based on historical reasons, though, it is also possible to link electoral rights to the second generation of rights (Ishay, 2004: ch. 3). The articles concerning political participation appear thus as belonging to more than one group of rights. Yet another possibility is found in Marshall's essay *Citizenship and Social Class*, in which he proposed political rights to be connected to their own period in-between the introduction of civil and social rights, respectively (1964[1950]: 71-83).

A further specification of the large number of proclaimed rights is needed in order to limit the focal point of the present study and to support the subsequent operationalization. All, or almost all, of the international conventions considered consent in rejecting: arbitrary arrest or detention, discrimination, ex post facto laws, forced labour, slavery and torture. To a large extent they also agree on the rights to: associate and assemble, asylum, due process, equality before law and courts, life, marry, movement and residence, nationality, opinion and expression, privacy, recognition before the law, redress, and thought, conscience and religion (cf. Green, 2001: 1069). Most of these rights had already been highlighted in important documents emanating from liberal revolutions (see above), and it is among these rights the constituting attributes of civil liberty are to be found.

Before commencing on the outright theoretical reflections on the normative foundation and final definition of civil liberty, an overview of convention ratifications by the examined countries is provided below. The government commitment to civil liberties as reflected in the ratification of international agreements is scrutinized (see table 3) since approval illustrates whether a government is formally and principally obliged to observe a legally binding framework of civil liberties.

Table 3: Ratification of International Human Rights Conventions by Country

| Latin American | International Covenant on Civil and Political Rights | American Convention on Human Rights | European Post-Communist | International Covenant on Civil and Political Rights | European Convention on Human Rights |
|----------------------|--|-------------------------------------|-------------------------|--|-------------------------------------|
| Argentina | 1986 | 1984 | Albania | 1991 | 1996 |
| Bolivia | 1982 | 1979 | Armenia | 1993 | 2002 |
| Brazil | 1992 | 1992 | Azerbaijan | 1992 | 2002 |
| Chile | 1972 | 1990 | Belarus | 1973 | - |
| Colombia | 1969 | 1973 | Bosnia-Herzegovina | 1993 | 2002 |
| Costa Rica | 1968 | 1970 | Bulgaria | 1970 | 1992 |
| Cuba | - | - | Croatia | 1992 | 1997 |
| Dominican Republic | 1978 | 1978 | Czechoslovakia | 1975 | 1992 |
| Ecuador | 1969 | 1977 | Czech Republic | 1993 | 1992 |
| El Salvador | 1979 | 1978 | Estonia | 1991 | 1996 |
| Guatemala | 1992 | 1978 | Georgia | 1994 | 1999 |
| Haiti | 1991 | 1977 | Hungary | 1974 | 1992 |
| Honduras | 1997 | 1977 | Latvia | 1992 | 1997 |
| Mexico | 1981 | 1981 | Lithuania | 1991 | 1995 |
| Nicaragua | 1980 | 1979 | Macedonia | 1994 | 1997 |
| Panama | 1977 | 1978 | Moldova | 1993 | 1997 |
| Paraguay | 1992 | 1989 | Poland | 1977 | 1993 |
| Peru | 1978 | 1978 | Romania | 1974 | 1994 |
| Uruguay | 1970 | 1985 | Russia | 1973 | 1998 |
| Venezuela | 1978 | 1977 | Serbia-Montenegro | 2001 | 2004 |
| Asian Post-Communist | | | Slovakia | 1993 | 1992 |
| Kazakhstan | 2006 | | Slovenia | 1992 | 1994 |
| Kyrgyzstan | 1994 | | Ukraine | 1973 | 1997 |
| Mongolia | 1974 | | USSR | 1973 | - |
| Tajikistan | 1999 | | Yugoslavia | 1971 | - |
| Turkmenistan | 1997 | | | | |
| Uzbekistan | 1995 | | | | |

All countries, except Cuba, have signed and ratified the Internal Covenant on Civil and Political Rights; Kazakhstan did not ratify before 2006, though. Likewise, the great majority of countries have ratified the major regional conventions. Once again, Cuba constitutes an exception in the Latin American area, whereas Belarus is the only post-communist country that lives up to the geographical qualifications for ratifying the European Convention of Human Rights and yet has not done so. However, most of the rights emphasized above are incorporated in the national constitutions of Cuba and Belarus – just as it is the case with regard to the other countries. Taken together, virtually all countries have signalled political commitment to civil liberties by their ratification of conventions and/or constitutions addressing particular rights.

III. Foundation in Political Theory/Philosophy

The leading ideas in liberal revolutions and the content of the international human rights conventions have obvious similarities with the thoughts of the liberal philosophers of the Enlightenment belonging to the natural rights or natural law tradition. However, a caveat needs to be addressed. Even though, the respect for civil liberty is tied to, and to some extent dependent upon, legal codification, we should remain concerned by the question of the philosophical foundations of such rights. The reason is that a mere understanding of civil liberties as positive legal rights is not sufficient to justify their observance in that arguments about moral obligation cannot be finally settled by a simple reference to presence or absence of such provisions. Thus, core arguments for civil liberties are called for.

III.i Early Liberalism

On the background of the many religious wars (see above), Locke argued that the choice of religion should lie with the individual and not any king or government. According to his *A Letter Concerning Toleration*, governments should not be concerned over the religion of the citizens for three main reasons. First, individuals cannot alienate control over their souls. Second, force cannot create the change necessary for salvation and, finally, even if coercion could, there is no certainty that the religion doing the oppressing is the true religion (1993[1689]: 394-396[par. 9-14]).⁴ In the *Persian Letters* Montesquieu also pled for religious toleration, since adherents of a tolerated minority religion are often very useful for a country. Furthermore, he thought that every religion has precepts useful to society and that shortcomings of religions can be remedied by religious multiplicity (1973[1721]: 165[85]).

⁴ Locke, however, had reservations with regard to Catholics and atheists due to supposedly negative consequences for the public order. A similar reasoning is found in *The Social Contract* by Rousseau in which he first rejected a national religion and proclaimed that tolerance should be shown to all that tolerate others, and then argued for expelling people, who say that outside their religion, there is no salvation (1987[1762]: 227[bk. IV, ch. VIII]).

Very much related to the question of religious toleration, freedom of speech and press was put on the agenda. In a tract on the issue, *Areopagitica*, Milton pled for the liberty to know, to utter, and to argue freely since the access to a multitude of ideas and thoughts is crucial for people to exercise their talent at reasoning between right and wrong (1927[1644]: 26[par. 15]). Furthermore, he considered the truth to have a unique power of survival, if it was allowed to assert itself freely and openly without government interference. Indeed, he equalized the destruction of books with the killing of reason itself (1927[1644]: 4[par. 3]). Also Diderot defended the freedom of expression by arguing that if the government does not allow people to express themselves freely on economic and political subjects, the nation is kept in ignorance of those things that matter most to its true interest and that the drawbacks of free press are very small in comparison to the possible advantages (1992[1781]: 182-183[bk. X, ch. XIII]).

A third dominant issue in the political ideas of the time was judicial independence as connected to reflections on the separation of powers. In *The Spirit of Laws* Montesquieu argued that there is no liberty if the judiciary power is not separated from the legislative and executive powers. He reasoned that if it was joined with the executive, the magistrate might behave violent and oppressive, whereas placed by the legislative would subject the life and liberty of the citizens to arbitrary control (1949[1748]: 152[bk. XI, ch. 6]). *The Federalist Papers* were very much inspired by this argument and herein Hamilton isolated two operational goals of judicial independence. First, he pointed to the ability of an independent judiciary to resist encroachments by the legislative and executive. Second, he also referred to judicial independence as a constraint against external influence in individual decisions (1995[1788]: 216-226[78]). Used in this way, judicial independence also covers a general preservation of the judiciary's integrity and impartiality.

III.ii Civil Liberty as Utility, as Consent, and as Trump

The struggle between liberty and authority has been a main topic in the history of political ideas. Mill even thought it to be the most prominent feature in history and prescribed that limits on government are needed, regardless of the government's form. In contrast to thinkers emphasizing a social contract and natural rights, Mill explicitly forwent the possibility of deriving his arguments from the idea of abstract right. In *On Liberty* he instead found the principle of utility to support freedom if utility is understood in its largest sense, i.e., grounded on the permanent interests of man as a progressive being (1996[1859]: 79 [ch. I, par. 11]). By this idea Mill meant the interests persons would have and the activities they would rather pursue under conditions encouraging freedom of choice. On this background, he derived a principle, which asserts that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others" (1996[1859]: 78[ch. I, par. 9]).

Two critical reasons to consider free institutions as intrinsically valuable were emphasized by Mill. First of all, civil liberties are required to educate and develop the faculties of persons in order to arouse strong and vigorous natures because their exercise necessitates choice making. If people are not allowed to cultivate their inner capacity due to restraints, instead of actively and energetically to undertake valuable activities, their character will become static and languorous (1996[1859]: 126, 130-131[ch. III, par. 3, 9]). Moreover, an individual's choice among different opportunities should preferably be taken on an informed and rational basis. Thus a number of liberties are prerequisites for the observation and activity needed for making a considerate choice about the personal plans for life (1996[1859]: 126, 135-136[ch. III, par. 4, 13]).

According to Mill, civil liberties are not only valuable in themselves since they also have many beneficial effects. Anticipating counterarguments from people not valuing self-development and the exercise of choice, he came up with four supporting, utilitarian arguments. First, the opponents could possibly learn something from the different activities put into practice. Second, to be successful, political leadership needs individuals, who are able to think independently. Third, the conformists benefit from living in a society characterized a diversity of views and practices. Fourth, plurality supports the progressive development of societies (1996[1859]: 135-139[ch. III, par. 13-17]). Somewhat more concrete applications of utilitarian argumentation were presented by Mill in his defence of freedom of expression. He argued that any opinion compelled to silence can be true, but then a denial would be to assume infallibility. The silenced opinion can also be erroneous, but contain some truth. In this case, since the prevailing or general truth is not like to be the whole truth, the collision of adverse opinions can support the supplement of the missing part. Even if the received opinion is the whole truth, it will probably be held as a prejudice without comprehension of its rational basis, and the meaning will be in danger of being lost or being ineffective for good if it is not contested (1996[1859]: 120-121[ch. II, par. 41-44]).

Based on the principle quoted above, Mill found the appropriate region of human liberty to comprise at least three spheres. The first is liberty of conscience demanding liberty of thought and feeling and absolute freedom of opinion and sentiment on all subjects, whether they are practical, speculative, scientific, moral or theological. The second is liberty of tastes and pursuits and the third he declared to be freedom to unite for any purpose not involving harm to others (1996[1859]:80-81[ch. I, par. 12]). In the same section, freedom of expression and publishing is mentioned as a fundamental liberty even though it is justified by another principle. This specification of fundamental liberties Mill concluded by emphasizing that no society in which these liberties are not respected and exist absolutely and unqualified is, in spite of its form of government, free.

Writing up against utilitarian understandings of justice, the primary objective of Rawls's *A Theory of Justice* was to characterize the fundamental guidelines for a just society that its potential citizens would be obliged to obey. He did this through the device of a hypothetical agreement, made under conditions of equality so that there would be no disparities in bargaining power. This hypothetical agreement should reflect a state form, which all would, under conditions of freedom, consent to. Rawls's work belongs to the social contract tradition of (e.g.) Hobbes, Locke, Kant and Rousseau, but he developed an innovative version. He posited that a just organization of the basic institutions is that which rational persons would agree upon if they did not know their positions and conditions in the new society in advance. From behind such a veil of ignorance characterizing the original position, the basic principles of a just society can, allegedly, be discovered due to the condition of pure equality.

Rawls argued that the persons in the original position would adopt two major principles, which would then govern the assignment of rights and duties across society. The second principle concerns the distribution of social and economic advantages, but it is lexically subordinate to the first principle, which says that "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all" (1971: 302[§ 46]). These basic liberties identified are moral liberty and freedom of thought, belief and religious practice, the right to take part in political affairs (vote and run for office) in regularly held free and fair elections, freedom of speech and assembly, and liberty to form associations (1971: 211-212[§ 34], 222-224[§ 36]). Finally, the rule of law understood as regular and impartial administration of law, in contrast to cross violations such as bribery or corruption, or the abuse of the legal system to punish political enemies or more subtle distortions of prejudice and bias, is needed in order to establish a basis for legitimate expectations. Without this criterion fulfilled, the boundary of liberty is uncertain and to the extent it is so, liberty is restricted by a reasonable fear of its exercise (1971: 235-243[§ 38]). The

outlined basic liberties are to be regarded as absolute in that each person possesses an inviolability founded on justice. Since, in a just society, the liberties of equal citizenship are settled, the rights secured by justice are not subject to political bargaining or to the calculus of social interest (1971: 3-4[§ 1]).

An attempt of reconciliation of utilitarian theories and theories of rights such as Rawls's, has been offered by Dworkin in *Taking Rights Seriously*. In this book he argued that our intuitions about justice presuppose that people have rights and among these is the most fundamental the right to equal concern and respect (1977: xii, 180); a claim based on the premises that governments have to treat the citizens as human beings who are capable of suffering and frustration and able to form and act on intelligent conceptions of how to live their lives (1977: 272). Individual rights to distinct liberties must therefore be recognized only when the fundamental right to equal treatment is shown to require these rights.

According to Dworkin, political decisions can reflect not just some accommodation of the personal preferences, but also the domination of a set of external preferences, i.e., preferences people have about what other should do or have. If so, decisions invade rather than enforce the right of citizens to be treated as equals and therefore, the liberal needs a scheme of civil liberties to remove certain issues from political decision-making altogether. Individual rights in this way function as political trump cards, which enable individuals to resist particular illegitimate decisions that would be otherwise reached; a trump based on the reason that a collective goal is not a sufficient justification for denying people what they wish to have or to do nor to impose some loss or injury upon them (1977: xi). As regards a specification of the fundamental rights, Dworkin did not mention particular rights, but elsewhere he has been more explicit by referring to some of the rights encoded in the *American Bill of Rights* such as freedom of speech and freedom of religion (1996: 196-197; cf. 2000: 127).

III.iii Critique and Counter-Critique of Liberal Right Claims

Liberal and other proclamations of rights have persistently met scepticism about the status of such rights. Burke, Bentham and Marx are the three thinkers most often referred to in relation to critique of natural rights in general and the human rights declaration connected to the French Revolution in particular (cf. Waldron, 1987). They addressed and criticized the rights laid down in this document from three different perspectives.

The conservative Burke argued that in proportion as rights appear to be metaphysically true, they are politically and morally false. Instead, rights should evolve within and be limited and modified by national conventions, from which they derive their any appropriateness (Burke, 1986[1790]: 149-153). The utilitarian Bentham also criticized abstract rights by insisting that only legal rights can count as rights and that these derive any justification from the principle of utility and not from some vague and illusory natural rights, which he considered as simple, rhetorical nonsense upon stilts (Bentham, 1973[1816]: 268-270). Last, but not least, the socialist Marx disapproved claims of rights because they are based on a separation of man from man because freedom rights allow each man to find the limit of his freedom in others rather than actualization. In short, none of the individual rights go beyond the egoistic man withdrawn into his private interest and will, separated from the his fellow man and the community (Marx, 1994[1844]: 45-49).

Against Burke, an obvious respond would be that the existing traditions might be undesirable and therefore need separate justification. Also Bentham's utilitarian principle is questionable because it fails to take seriously the distinction between persons (cf. Rawls, 1971: 187[§ 30]) and even though particular rights might not be naturally given there can still be good reasons to implement and observe them. Finally, rights do not necessarily isolate people and make them egoistic as Marx proposed. In contrast, they often provide protection, so people are given a chance to act in concert in the pursuit of common goals.

Among the most prominent contemporary sceptics are the communitarist MacIntyre and the pragmatist Rorty (cf. Mendus, 1995). MacIntyre has paralleled the belief in rights with belief in unicorns and witches because all attempts to give reasons for believing in such rights have failed (MacIntyre, 1981: 67). Furthermore, he has claimed that there is no ahistorical conception of practical rationality independent of time, place, culture and enquirer. In contrast, what is considered to be valid, including rights, is dependent upon presuppositions found in traditions forming the context of the enquiry. Rorty, on the other hand, has alleged that foundations of all sorts are unavailable to philosophy. Consequently, moral practices merely have to be based upon a sentimental vision of humanity, that is, sympathetic identification with others, because it is not possible defend them rationally by appeal to moral theory (1993: 119).

As to Rorty's critique, his disapproval of metaphysical theories actually leads to a rejection of rational argumentation altogether, leaving justifications to be a sole matter of emotions; a rather implausible conclusion. Even if the search for objective truth was void, it would still be possible to search for intersubjective agreement based on a rational justification procedure evaluating pros and cons. Likewise, MacIntyre's objections are disputable. First, his alternative faces the same problems as Burke's and, second, it is far from certain that rationality is so culture dependent as he has proposed (cf. Elio, 2002).

To paraphrase Sartori's proclamation on democracy compared to its concrete alternatives (1987: 275), a tentative conclusion might thus be that we cannot, strictly speaking, prove civil liberties, but we can convincingly argue that they are preferable. This is both the case when liberal regimes are compared with their concrete alternatives – either previous or present – and, according to the above argumentation, if their legitimacy is evaluated more abstract standards.

IV. Conclusion

The exploration into general conceptualizations, codifications and political theory narrowed the focus to (modern, negative) liberal freedom understood as absence of interference in certain aspects of the citizens' life. In specific, the principal emphasis will be on infringement performed by states and state-related actors rather than societal actors at large. In this way, measurement is less complicated; the classical liberal state complex is maintained, and the study is carried out inside the boundaries of political science.

By now, civil liberty has been defined by reference to the agents who are free and the restrictions or limitations which they are free from. A completing distinction is needed, however, in order to support the internal coherence and operationalization of an empirical measure. Accordingly, it seems reasonable to distinguish between personal integrity/security rights and personal extortion rights. While the first group of rights exclusively concerns actions the state is not allowed to commit, the latter also refers to rights that allow – negatively understood – persons to undertake certain actions. Among these options, I choose to place the second in the centre of attention in the progressing specification procedure as several measures and studies of personal integrity rights already exist and because personal exertion rights appear to be more exclusively connected with liberal theory.

Hence, on the background the fundamental civil freedoms identified by prominent human rights documents and liberal political theory, combined with practical considerations for interesting variation and further specification, measurement and aggregation, five rights are selected to constitute the core of my measure: freedom of opinion and expression; freedom of assembly and association; freedom of thought, conscience and religion; freedom of movement and residence; freedom of recourse to independent courts. Whereas the first four liberties obviously have much in common, the last one might appear somewhat odd in this company. On the other hand, the

discussion made clear that a rights-based state is, among liberals, generally understood as a state in which public power is regulated by general norms, while citizens have the right to seek redress in an independent judiciary in order to prevent any power abuse (cf. Bobbio, 1990: 12). The resulting measure's empirical dimensionality will give further indication of the appropriateness of this choice; a procedure I have described and carried out in detail elsewhere (cf. Skaaning, 2006) in connection to my attempt of operationalizing civil liberty.

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