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## Legal Values: Freedom

Katarzyna Eliaż and Wojciech Załuski  
Jagiellonian University, Krakow, Poland

### Introduction

The concept of freedom is strongly ambiguous: it has many different meanings which come into complex relationships. It seems that a good point of departure for disentangling these meanings is making a distinction between *freedom as a fact* and *freedom as a value*. The former type of freedom has a purely descriptive sense: it describes, so to speak, a “metaphysical condition” of man. The basic controversy in this context is whether human beings have free will (which is the capacity to make choices undetermined by past events) or whether the only type of freedom inscribed in their “metaphysical condition” is freedom from compulsion (which consists in acting in accordance with one’s desires and beliefs and is compromised either when an agent is coerced into doing an act by some other agent or if she suffers from some mental disease, deficiency, or disturbance that makes her incapable of recognizing the significance of her act and/or controlling her conduct). This controversy, essential for the philosophy of criminal law (and more specifically, for the question about the conditions of moral and legal responsibility), will not be a focus of this article. Its focus will be freedom as a value, i.e.,

the type of freedom which is or can be an object of human aspirations and, consequently, is or can be pursued by means of law (by contrast, freedom as a fact cannot be aspired to; either human beings are endowed with free will or can be free only in the sense of freedom from compulsion). One can distinguish four types of freedom as value, viz., negative freedom (i.e., freedom as non-interference), freedom as non-domination, political freedom, and positive freedom. The article will aim at presenting them and analyzing their mutual relationships.

### Freedom as Noninterference (Negative Freedom) and Freedom as Non-domination

The basis for the distinction between freedom as noninterference (negative freedom) and freedom as non-domination – two types of freedom which are usually opposed to each other – is the question about the conditions under which one can plausibly say that freedom is violated. The adherents of freedom as noninterference claim that freedom is undermined in the case of the *actual* interference into a subject’s sphere of choices, whereas the adherents of freedom as non-domination claim that the very possibility of interference, i.e., *potential* interference with an agent’s sphere of choices, constitutes a diminution of her freedom (Pettit 1996, 1997).

The famous formulation of freedom as non-interference (negative freedom) comes from Isaiah Berlin who claimed that being free is equivalent to enjoying a state of lack of coercion, i.e., “the deliberate interference of other human beings within the area in which I could otherwise act” (Berlin 2000: 194). Interference, if thus understood, is a deliberate encroachment aimed at worsening a subject’s situation of choice. This manner of thinking about freedom can be, in general, attributed to the representatives of the liberal tradition (e.g., Hobbes, Locke, Mill, or von Hayek). For instance, in Thomas Hobbes’s formulation, a free man is the one who can act in accordance with his wit or strength without impediments (Hobbes 1996: 146). In a likewise manner, Friedrich August von Hayek defines freedom as the absence of coercion, where coercion is understood as a state “when one man’s actions are made to serve another man’s will, not for his own but for other’s purpose” (Hayek 2011: 199). Needless to say, the acceptance of the conception of freedom as noninterference does not entail the support for the unlimited sphere of this freedom. *Maximal* negative freedom, i.e., unrestrained by any external (e.g., legal) regulations, would turn into its opposite – a state of *minimal* negative freedom in which all could interfere with one another’s choices without impediment. Thus, although the supporters of negative freedom consider legal and political institutions as a limitation of liberty, they acknowledge its necessity.

The supporters of freedom as non-domination draw attention to the insufficiency of freedom as noninterference. Although the idea of non-domination has been thoroughly examined and developed in Philip Pettit’s works, it is not a contemporary conception (Pettit 1997). According to Pettit, equating freedom with non-domination is a trademark of republican political thinkers, such as Machiavelli, Harrington, or Montesquieu. The republicans oppose freedom to domination, i.e., a state of *arbitrary* interference of one party into the affairs of another undertaken *at will* and *with impunity*, where arbitrariness is understood as the lack of “reference to the interests, or the opinions, of those affected” (Pettit 1997: 55). Pettit illustrates the

distinction with a master-slave scenario: the slave may have a benignant master who does not interfere with his activities. For the proponents of freedom as noninterference, this alone would be sufficient to claim that slave’s freedom is not compromised. However, the master could alter his conduct and interfere with slave’s affairs on an arbitrary basis and with impunity. This state of being at the mercy of the other person is tantamount to unfreedom according to the adherents of freedom as non-domination (Pettit 1997: 22–23). In this point, freedom as non-domination proves to be a wider or stronger ideal than freedom as noninterference, as it implies that liberty is compromised not only by actual but also by potential interference. However, saying that freedom as non-domination is an extension or strengthening of freedom as noninterference would not be fully apt, since, as is emphasized by Pettit, acts of interference are not regarded by the adherents of freedom of non-domination as infringements thereof *unless they have a dominating character*. It should be noted that if, as the republicans claim, unfreedom of an agent is correlated with the other agent’s (who may be an individual but also institutions) capacity to exercise arbitrary power over her sphere of choices, the question arises as to the means by which freedom as non-domination can be secured. The republicans assert that freedom as non-domination can be most effectively secured by properly designed legal and political institutions, i.e., based on such measures as the separation of powers, checks and balances, or the rule of law. These measures minimize political domination, i.e., domination in the sphere of relations between the citizens and the state. However, as is emphasized in the more contemporary works in the republican tradition, for freedom as non-domination to be fully realized, also social domination, i.e., domination in the social relations, must be diminished. Social domination results from the glaring inequalities in social and economic status. Thus, contemporary supporters of non-domination acknowledge that fulfilling this ideal requires certain means of promoting personal independence and economic prosperity (Pettit 1997: 158–165). For instance, according

to Frank Lovett, non-domination demands some form of distributive justice, e.g., guaranteeing for each citizen unconditional basic income (Lovett 2009).

It is worth noting at the end of this section that, at the general level, there exists no fundamental disparity between the approaches to law by the supporters of freedom as noninterference and the supporters of freedom of non-domination. Both would agree in the crucial point, namely, that law is effective in realizing the type of freedom they adhere to. However, some subtle differences exist between them. Firstly, while the former claim that law, although effective in securing a possibly large amount of negative freedom, constitutes nonetheless its infringement, the latter do not *definitionally* oppose law and freedom and thereby do not depict being under the protective legal and political institutions as a form of a limitation of freedom as non-domination. Secondly, while the former assume that law is an effective but not necessary way of generating a possibly large sphere of negative freedom, the latter (given their claim about the definitional connection between law and freedom) assert that law is a necessary means for realizing freedom as non-domination.

## Political Freedom

The notion of freedom as non-domination draws attention to the connection between freedom and politics (*viz.*, that liberty requires protective legal and political institutions), but it does not exhaust all of the possibilities of achieving liberty *through* politics. Political freedom in a stricter sense is associated with political action, *i.e.*, a possibility to participate in governance. The conception of political freedom thus understood can be broader or narrower depending on the scope of participation in the political life of community. The broad conception of political freedom is characteristic for the ancient Athenian model of politics. The ancient liberty “consisted in exercising collectively, but directly, several parts of the complete sovereignty; in deliberating, in the public square, over war and peace; in forming alliances with the

foreign governments; in voting laws; in pronouncing judgments; in examining the accounts, the acts, the stewardship of the magistrates; in calling them to appear in front of the assembled people, in accusing, condemning or absolving them” (Constant 1988: 311). Thus, ancient political freedom encompassed an extensive bundle of political rights. However, such conception could not be sustained in the modern and contemporary era due to the transformations in the sociopolitical conditions, e.g., to the emergence of mass societies. For this reason, the idea of direct participation of all citizens in governance has been replaced by the support for representation (among contemporary philosophers, it was Hannah Arendt (1958) who – despite certain reservations – supported the ideal of wide political participation in the public realm). Moreover, the support for the ideal of representation stemmed from disbelief that the majority could make reasonable decisions and from the fear of what Alexis de Tocqueville labeled as “the tyranny of the majority,” taking place when the majority of citizens forces its demands upon minority without taking into consideration (or even at the expense of) its needs and interests (Tocqueville 2000: 239–241). For this reason, in the contemporary times, political freedom is mainly associated with the participation in electing political representatives and participating in other direct forms of political decision-making (such as referendums). Participation in certain forms of expressing political convictions, such as manifestations, is also a form of political freedom (although it is at the same time an individual right). Political freedom thus understood is one of the chief democratic values, partly due to its close relationship with the abovementioned conceptions of freedom, *viz.*, noninterference and non-domination. Expressing political attitudes and participating in public governance can be one of the means of securing both kinds of freedom, as in public participation and deliberation citizens manifest their consent and dissent toward legal authorities and express their opinions as to legal regulations, thereby setting the boundaries for the legal intervention in social life. However, the supporters of the theory of non-domination attach greater value to the institutional safeguards to

freedom than the supporters of freedom as non-interference, although, as it should be emphasized, both the former and the latter are skeptical toward a broad (Athenian) model of political freedom (their skepticism stems mainly from their fear of the tyranny of the majority). It should not be thought, however, that there exists some fundamental disparity between political freedom, on one hand, and negative freedom and freedom as non-domination on the other. They cannot be reconciled only if political freedom is understood in a radical way – as enabling the citizens to make *any* political decisions, i.e., if political freedom is unrestrained by individual, inviolable rights.

## Positive Freedom

Positive freedom is one of two concepts of freedom (the other being negative freedom, i.e., freedom as noninterference) analyzed by Isaiah Berlin in his famous essay *Two Concepts of Liberty*. The intuition that stands behind the distinction between negative and positive freedom (the distinction deeply embedded in the history of Western philosophy and thereby not invented by Berlin) is that we can use the term “freedom” to describe two markedly different phenomena: either a situation which is *external* to an agent or an *internal* state of an agent. In the former case, by saying that an agent is free, we mean that she would not encounter external (i.e., imposed by other persons) constraints if she wanted to act on various desires (those desires which she actually has and which she could have as a human being). In the latter case, by saying that an agent is free, we mean that she “governs herself” or is a “true master of herself.” There are two interesting differences between these two concepts. The first one concerns the degree of their clarity: the concept of negative freedom is clear and thereby needs no explication, whereas the concept of positive freedom is notoriously unclear and thereby needs an explication (and, consequently, one can formulate various *conceptions* of positive freedom). The second one concerns their cogency as a legal-political value: whereas negative freedom is commonly accepted as an uncontroversial legal-

political value, many thinkers question the importance of positive freedom in legal-political sphere. These two differences deserve a closer analysis.

The concept of positive freedom is notoriously unclear: its definition – “being a true master of oneself” or “governing oneself” – says very little besides indicating that it refers to an internal state of an agent. Accordingly, it needs to be developed by stating what “governing itself” exactly consists in. It is worth presenting (in very broad outline) the main accounts (conceptions) of positive freedom proposed in the philosophical literature. The first account, which can be dubbed “Socratic,” says that an agent is positively free only if her beliefs – regarding herself as well as the external world – are *true* beliefs. It follows from this account (among other things) that a positively free agent will not be prone to self-deception. The second account, which comes from Plato, says that an agent is positively free only if her reason controls her passions. This account does not require that our passions – the spirited (*thumoeides*) and the appetitive (*épthumêtikon*) part of our soul – should be extinguished but only that they should be controlled by reason – the rational (*logistikón*) part of our soul. The third account, formulated by Stoics, says that an agent is positively free only if she has reached the state of *apátheia*, i.e., if she has extinguished her passions and, thereby, as was emphasized especially by Epictetus, is not attached to things which are not dependent “on us.” A Stoic sage who has reached this state manifests *amor fati*: she does not want to change the course of events that happen to her but accepts it as good. The fourth account – Epicurean – implies that an agent is positively free only if her desires are limited to those which are natural and necessary; according to this account, the widening of the scope of one’s desires must lead to an inner enslavement. The fifth account – developed by St. Augustine and other thinkers from the Christian tradition – assumes an agent is free only if she makes morally proper choices (an evil man is therefore by definition positively unfree). The sixth account – Nietzschean – says that an agent is positively free only if she is not a “reactive person,” i.e., if she is free from *ressentiment*. The seventh account

(which can be called “procedural”) asserts that an agent is positively free only if her goals – values to be realized by her – have been formed in the process not based on manipulation, pressure, ignorance, deceit, etc. The eighth account, which can be called “axiological,” says that an agent is positively free only if her goals – values to be realized by her – are of special kind: they are *high* values. Three additional remarks seem to be in order here. Firstly, none of these accounts, when considered in isolation, seems to reflect the whole richness of the phenomenon of positive freedom; in order to build a concept of positive freedom which would fully reflect this phenomenon, one must arguably combine at least some of the above – partial – accounts (which, with perhaps some exceptions, are not mutually exclusive). Secondly, as was mentioned in section “[Political Freedom](#),” Benjamin Constant called political freedom “the freedom of the ancients.” It seems, however, that this view should be qualified: given that the most influential and, perhaps, also most mature conceptions of positive freedom were formulated by the ancient philosophers and that this concept of freedom was the main object of their theoretical reflection, one could just as well argue that it is positive freedom that can be most aptly called “the freedom of the ancients” (or that there are two “freedoms of the ancients” that can be justifiably opposed to the “freedom of the modern”). Thirdly, the concept of negative freedom is clear, though, as was mentioned in section “[Freedom as Noninterference \(Negative Freedom\) and Freedom as Non-domination](#),” it is not quite certain what exactly is its relations with the concept of freedom as non-domination. One can supplement the analysis of these relations conducted in section “[Freedom as Noninterference \(Negative Freedom\) and Freedom as Non-domination](#)” by noting that while negative freedom *unambiguously* refers to an external situation of agent (describes, to put it metaphorically, her “breathing space”) and positive freedom *unambiguously* refers to an internal state of an agent, freedom as non-domination transcends or rather cuts across the distinction “external situation-internal state”: since it is *a legally guaranteed status* of an individual which

*safeguards her negative freedom*, it refers at the same time to an external situation of an agent and, in a sense, to his internal state (i.e., to the feeling of security – which arises from awarding her a legally guaranteed status – that the sphere of her negative freedom will not be arbitrarily curtailed).

Regarding the second difference between negative freedom and positive freedom, negative freedom, as was already mentioned, is commonly accepted as an uncontroversial legal-political value, though it is widely discussed how broad the sphere of negative freedom ought to be. The views proposed in this controversy (which is in fact a controversy about the limits of legal intervention in social life) range from the strongly liberal (which assume John Stuart Mill’s “harm principle”) to the strongly moralistic and paternalistic (which assume that the law, apart from preventing harm to others, may enforce also those moral norms which do not concern interpersonal relations and interfere with the freedom of an autonomous agent without her consent if the agent’s welfare is thereby increased or protected from decreasing). It is worth mentioning in this context that the strongly liberal views, i.e., those which imply that limitations of negative freedom can be justified only if they in fact lead to the increase of the amount of negative freedom in society, can be of two different types. Within one type, negative freedom is considered to be an instrumental value, subservient to some intrinsic value; within the other, negative freedom is assumed to be an intrinsic value, that is, worthy of pursuing for itself. The most famous representative of the former view was John Stuart Mill who assumed that negative freedom derives its value from the fact that it contributes to the maximization of utility, which he believed to be an intrinsic value. The latter view was most fully developed by Immanuel Kant who rejected any other ground for the state coercion than the protection of negative freedom, which he called “the only inner right” and defined as “independence from being constrained by another’s choice, insofar as it can coexist with the freedom of every other in accordance with a universal law” (Kant 1996: 30). He emphatically opposed those who believed that the state is justified in imposing any particular

conception of happiness on citizens; he stressed that any attempt at such an imposition would amount to treating them as children, infringe upon their negative freedom, and constitute an offense to their “transcendental freedom,” i.e., free will (in which the value of negative freedom is ultimately embedded). Positive freedom, in contradistinction to negative freedom, is controversial as a legal-political value. According to Isaiah Berlin’s famous claim, it can be used by the authorities to justify the imposition of considerable limitations on citizens’ negative freedom. The justification might proceed in the following way: since the citizens cannot achieve by their own efforts the level of their “true or *noumenal* selves” and thereby cannot be “true masters of themselves,” they must be deprived of those options which are likely to be selected by their “empirical selves.” However, Berlin’s argument that the concept positive freedom could be easily used to justify encroachments into the sphere of citizens’ negative freedom seems to be valid only with reference to *some* accounts of positive freedom, namely, those that imply some form of the distinction between the “true or *noumenal* self” and “the empirical self,” not with reference to all accounts of positive freedom. For instance, the account of positive freedom which requires that agents select their goals – values to be realized by them – as a result of their autonomous deliberations, i.e., deliberations pursued in the absence of any external coercion, can hardly be invoked by the authorities to justify the curtailment of the sphere of negative freedom. But it must be admitted that even if positive freedom was to be regarded as a non-dangerous political ideal, it is hard to imagine how it could be effectively realized or promoted by the state. Moreover, and more importantly, one may argue that it is not possible to reconcile liberalism (which assumes that the state should not support any conception of good life but, rather, should create conditions for developing various conceptions of good life) with the suggestion that the state should pursue the ideal of positive freedom – one of many (even if, for some people, especially attractive) conceptions of good life.

## Conclusions

At the end, it is worth pointing at the conceptual relations between law and various kinds of freedom distinguished in this article. Negative freedom and positive freedom, unlike freedom as non-domination and political freedom, are *conceptually independent* on law, i.e., in their definitions, no reference is made to law. This implies, of course, that they need not be *necessarily* realized by means of law. It remains the fact, though, that law is arguably the most effective means of realizing negative freedom even if at the same time it constitutes, according to the adherents of negative freedom, infringement thereof (they admit, however, that, on balance, however, law may cause and usually causes a “net gain” of negative freedom). Thus, realized (i.e., legally guaranteed) negative freedom is equivalent to freedom as non-domination, though, as was mentioned in section “[Freedom as Noninterference \(Negative Freedom\) and Freedom as Non-domination](#),” the phrase “legally guaranteed negative freedom” is not a fully adequate definition of freedom as non-domination. The problem of the *factual relations* between positive freedom and law is much more complex: it is neither clear whether positive freedom can at all be realized or favored by law nor whether, if it could, such a realization would be desirable (given Berlin’s misgivings about the threat that positive freedom, when appealed to by politicians, may constitute a threat to negative liberty).

## Cross-References

- ▶ [Human Right to Democracy](#)
- ▶ [Isaiah Berlin](#)
- ▶ [Nietzsche and the Law](#)
- ▶ [Philip Pettit](#)
- ▶ [Rule of Law: Historical \(Theoretical\) Perspectives](#)
- ▶ [Rule of Law: Philosophical Perspectives](#)
- ▶ [Separation of Powers](#)

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