

Written evidence from Dr David Green (FOE0128)

Freedom of expression protects minorities and discourages majoritarianism.

In a democracy it is inevitable that the majority view will prevail. Freedom of expression protects minorities by ensuring their voice can always be heard and by promoting public spirit, namely seeking the common good and not imposing majority views or making sectarian demands. The most vehement opposition to freedom of speech today comes from identitarians. Historically we have been wary of activists with rigid self-righteous minds. Since the seventeenth century and the brief reign of the major-generals, such people remind us of the Puritan mentality.

Freedom of expression is necessary if the legitimacy of law is to be based on consent. The idea of law making by consent was based on a view of human nature that assumed all are capable of exercising conscience and must be free to do so (liberty), that all are equally capable of judging right from wrong (equality), and that all are capable of seeing that one law for all was best for everyone (fraternity). Knowledge of truth and right emerge in a public process open to all.

Often called civic republicanism, central to European civilisation has been the idea that to be free is to live under laws intended to allow the full beneficial unfolding of each personality. The fundamental idea is that individuals alone have intrinsic and ultimate worth because each has the capacity to change and improve. We find liberty where the conditions for personal development are met.

Natural law is a disputed concept, but a list of nineteen laws of nature that would have been widely accepted as moral precepts was produced by Hobbes in *Leviathan*. The list included ‘whatsoever you require that others should do to you, that do ye to them.’ and ‘be contented with so much liberty against other men, as he would allow other men against himself.’¹ Another was not to hate or hold in contempt, followed by not allowing pride to cancel out equal respect for others. When judging, impartiality was essential; people should be willing to submit to arbitrators.² No one should be a judge in their own cause and no arbitrator should gain profit or honour from taking one side in a dispute. These ‘natural’ precepts make little sense without the ability to express views freely.

Freedom of expression is an important antidote to judicial supremacism

Judicial supremacists claim that rights are necessary out of respect for the basic dignity of humans, but when freedom of speech is suppressed they deny many people the most basic of rights, namely to take part in government. Jeremy Waldron has reminded us of William Cobbet’s view that participation was the ‘right of rights’.³ We all know that any one voice may be small but judicial override guarantees that non-judicial voices will make no contribution at all. Judicial control resembles ‘government by proclamation’ rather than ‘government by consent’ following open discussion. As Waldron shows:

When one confronts a right-bearer, one is not just dealing with a person entitled to liberty, sustenance, or protection. One is confronting above all a particular *intelligence* – a mind and consciousness which is not one’s own, which is not under one’s intellectual control, which has its own view of the world and its own account of the proper basis of relations with those whom it too sees as others.⁴

A majority decision respects individuals in two ways: the *opinions* of participants are heard; and the *individuals* themselves are valued. No one’s view is suppressed.⁵ Democracy, according to this understanding, is far more than counting heads: it encourages wisdom, constraint and mutual respect.

Democracy raises the quality of public reason

Democratic government at its best is a continuous search for agreement and mutual accommodation. Again, it can be compared with judicial supremacism. Discussion is cut short and decisions given greater permanence by the creation of binding precedents. Parliament, on the other hand, makes laws but cannot bind successors, which makes it easier to learn from and rectify earlier mistakes.

The underlying assumption behind a parliamentary system is that all humans are fallible, even people who seem very clever. Judges are no exception. Recently the UK Supreme Court judges have been making regular speeches revealing their opinions, exposing not only considerable differences between them but also some all-too-human frailties. Moreover, lawyers belong to a fraternity that is fond of describing some of its members as having brilliant legal minds, which is often lawyers' code for exceptionally devious minds, skilled in using vaguely related precedents to justify meeting contemporary political objectives.

Judges who wish to take over the responsibilities of Parliament do not want to test their wisdom in the fire of debate. They avoid fighting their corner in open discussion and dismiss democracy as too slow or indecisive, even spineless. Parliament is accountable; courts are deliberately not. But if we want our laws to be just, they should never be made by individuals alone or by small groups who are insulated from the opinions of the people who will have to be governed by them.

Parliament works better than any alternative that curtails discussion. Lord Neuberger, when president of the UK Supreme Court, spoke of 'stepping in' if politicians were too slow.⁶ But democratic civilisation rules out impatient would-be rulers who find that defending and explaining their opinions is tedious. Judicial law-making is a form of rule by the few without full and open discussion and consent. In an open system no view is neglected when debate is open to all comers. Moreover, it is harder for factual errors and mistaken reasoning to continue among rulers, and their true motives are more likely to come out.

Democracy seeks agreement by confining methods of acting to persuasion; and it avoids actions that would be resented in others. Even with an electoral mandate, it is accepted that the prevailing majority should not avoid discussion.

The way in which toleration and wisdom can be gradually acquired through the free discussion of public affairs was well put by Mill:

In the case of any person whose judgment is really deserving of confidence, how has it become so? Because he has kept his mind open to criticism of his opinions and conduct. Because it has been his practice to listen to all that could be said against him; to profit by as much of it as was just, and expound to himself, and upon occasion to others, the fallacy of what was fallacious. Because he has felt, that the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this.⁷

Mill concludes that 'He who knows only his own side of the case, knows little of that.' Consequently, we should always try to ensure a full understanding of opponents' views.

In *Essay Concerning Human Understanding* John Locke described the philosophy of knowledge that, for him, justified an open system. A close associate of the leading scientists of his day, Locke's approach recommended the experimental method in science. Knowledge was gradually revealed in

a slow, piecemeal process through the co-operation of scientists questioning, correcting themselves and others in the light of observations, revising theories and conducting experiments to test them. He was sceptical of all-embracing theories that bestowed power on one group or a ruler. There was no certainty about general truths concerning the world. Natural science would only yield probable or provisional truths.

Locke was trying to describe an alternative basis for truth that did not rest on established authority or give an excuse for the possession of absolute power. He argued against those who held that truth was possessed by religions. Truth could not be justified by referring to a sacred book or the authority of priests. To be free was to be self-governing and to be self-governing was to be guided by reason.

There is an unavoidable fallibility about the human condition – hence the need for mutual criticism. Locke emphasised self-criticism, not just scepticism towards authority. Criticism was not about moral indignation, scepticism or protest, but a commitment to reason – objective testing and openness to contradiction.

David Green, CEO, Civitas

28/01/2021

Notes

-
- 1 *Leviathan*, p. 75.
 - 2 *Leviathan*, pp. 88-89.
 - 3 In Waldron, *Law and Disagreement*, London: Oxford University Press, 1999, p. 232.
 - 4 Waldron, 1999, p. 312.
 - 5 Waldron, 1999, pp. 109, 111.
 - 6 Lord Neuberger, *Magna Carta: The Bible of the English Constitution or a disgrace to the English nation?* Guildford Cathedral, 18 June 2015.
 - 7 Mill, J.S., *On Liberty, Collected Works*, Indianapolis: Liberty Fund, pp. 242-43