

## **Freedom and Equality in a Liberal Democratic State**



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## INTRODUCTION

Freedom and equality are generally considered to be important elements in the political realm. Yet there is, at the same time, a tension between equality and freedom. The purpose of this inquiry is to examine to what extent equality and freedom are necessary constituents of a liberal democratic state.

The question seems circular from the outset. After all, I will not research every form of government, but merely liberal democracy, which is characterized by precisely these matters, equality and freedom, at least in principle. The fact that I will limit my research in this way stems from the given that some forms of government can easily exist without the premises that confine the present inquiry. Whether it is agreeable to live in a state with such a form of government is, of course, an altogether different matter. In any event, if I were to apply my research question to such governments as well, the research with regard to them would not only be peculiar, but easily concluded as well: equality and freedom are not necessary conditions for all forms of government<sup>1</sup>. This still does not liberate me from the other part of the question, and the circularity does not seem to have been resolved: if I am to limit myself to the liberal democratic state, why should the question be posed at all? The first reason for this inquiry is that the concept of 'equality' is ambiguous. It simply will not suffice to say that equality in any unqualified sense is necessary. 'Freedom' may also be used in many ways, although the difficulty here lies primarily in finding the proper criteria to restrict liberties; such liberties must exist, of course (lest there not *be* a liberal democratic state in the first place), but that does not mean that they cannot be mitigated in some cases.

It is, then, necessary to determine what 'equality' and 'freedom' mean. 'Freedom' is a notoriously elusive concept, in some discussions even extending to the discussion of the existence of a 'free will' (which has no bearing on the current research), so some preliminary remarks are in order. First of all, 'liberty' and 'freedom' may be distinguished. Dworkin does so in the following way: "I distinguish your freedom, which is simply your ability to do anything you might want to do without government constraint, from your liberty, which

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<sup>1</sup> In the case of equality, this is somewhat nuanced; I will argue below that some sort of equality is indeed necessary in any form of government.

is that part of your freedom that government would do wrong to constrain"<sup>2</sup>. He clearly has a 'neutral' situation in mind when defining 'freedom' (a tiger hunting a deer is free, in contrast with one being held in a cage; or, to use human examples, under 'normal' circumstances, a person is free to travel, in contrast with a prisoner), which is contrasted with the comprehensive, or even value-laden, notion of 'liberty'. Such a distinction may be warranted, but since the terms can be defined the other way around with just as much justification<sup>3</sup>, I will forgo it and use 'liberty' and 'freedom' interchangeably, rather adding adjectives to specify the notions if necessary.

Incidentally, Dworkin uses the same method to distinguish between various perspectives when he says: "We use the words 'liberty' and 'equality' in two senses. We use each as a flat description that carries, in itself, no suggestion of endorsement or complaint, and we also use each normatively to identify a political virtue or ideal that we endorse. We use 'liberty' in its flat sense simply to indicate the absence of constraint", [...] "We use 'liberty' in its normative sense, on the other hand, to describe the ways in which we believe people ought to be free"<sup>4</sup>.

In any event, it appears that Dworkin considers 'freedom' here to be negative freedom (as Berlin defines it<sup>5</sup>). This is also how it will be used by me, unless specified otherwise. Freedom in this sense, when applied to the present inquiry, is manifested, *e.g.*, in freedom of expression, which does not point to any criterion with regard to the content: no evaluation takes place here for the freedom to exist. An evaluation may be the case when it comes to the decision which manifestations are to be limited, *e.g.* in order to prevent hostile situations, but that is another matter since no judgment pertaining to the 'truth' of the *content* is involved here; rather, the negative outcomes of allowing the freedom to be manifested in this way are concerned. Indeed, if the content *were* judged in such a way, it would not be

<sup>2</sup> R. DWORKIN, *Justice for Hedgehogs*, p. 4 (*cf.* p. 366). Similarly, in *Is Democracy Possible Here?*, p. 67, he says: "[...] I shall use the word 'liberty' to describe the set of rights that government should establish and enforce to protect people's personal ethical responsibility properly understood. I shall use the word 'freedom' in a more neutral way, so that any time the government prevents someone from acting as he might wish, it limits his freedom."

<sup>3</sup> For example, Narveson, though using 'liberty' and 'freedom' interchangeably, seems to consider 'liberty' the more 'neutral' notion and 'freedom' the more value-laden one ("The Right to Liberty is incompatible with the Right to Equality", pp. 124-129).

<sup>4</sup> R. DWORKIN, *Sovereign Virtue*, p. 125.

<sup>5</sup> "I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others", I. BERLIN, "Two Concepts of Liberty", § 1 (p. 169).



amiss to say that a liberal democratic state is not realized in the first place. This means that a ‘substantive’ concept of freedom, as set forth by, amongst others, Rousseau, who contrasts ‘natural liberty’ (*liberté naturelle*) with ‘civil liberty’ (*liberté civile*) and ‘moral liberty’ (*liberté morale*)<sup>6</sup>, Hegel<sup>7</sup> and Green<sup>8</sup> will not be espoused here. Such a concept may be useful, or perhaps even necessary, if one should wish to found a philosophy of law with a metaphysical and/or ‘moral’ superstructure, but I need not presently be concerned with the issue of whether such an ambition may be realized at all, as my aspirations are relatively modest here.

‘Equality’, just as ‘freedom’, may be specified in many ways<sup>9</sup>, so it is incumbent on me to make it clear from the outset which sort or sorts of equality I will explore, and why. The concept of equality that will feature prominently in my inquiry in the first part of this study is that of formal equality, which I take to include: (1) political equality, consisting of granting political liberties, such as the right to vote<sup>10</sup> and freedom of expression, and (2) legal equality (or equality before the law), which entails the right to equal treatment<sup>11</sup>. As for both elements, I will research on what basis the existence of these rights can convincingly be argued (*i.e.*, on what basis they exist in the first place), and why they are necessary.

In the case of political equality, the point of departure will be that political liberties are not to be restricted in any way. These liberties are not problematized until the second part of this study, at which

<sup>6</sup> J.-J. ROUSSEAU, *Du Contrat Social*, Book 1, Ch. 8 (p. 24).

<sup>7</sup> G. W. F. HEGEL, *Grundlinien der Philosophie des Rechts*, e.g., § 4 (p. 50), § 10 (pp. 62, 63), § 11 (p. 63), § 15 (pp. 66-68), § 29 (p. 79).

<sup>8</sup> T. H. GREEN, “Lecture on ‘Liberal Legislation and Freedom of Contract’”, pp. 199, 200.

<sup>9</sup> Cf. D. RAE, *Equalities*, p. 132: “In any real historical context *no* single notion of equality can sweep the field. Because the structure of human societies is complicated, equality must be complicated if it is to approach practice.” Dworkin similarly observes: “People can become equal (or at least more equal) in one way with the consequence that they become unequal (or more unequal) in others”, *Sovereign Virtue*, p. 11.

<sup>10</sup> The presence of this right is explained by the fact that the conditions for democracy to exist are explored, among which (in states characterized by representative democracy) (*ex natura rei*) the right to vote features prominently.

<sup>11</sup> Together these rights constitute an important segment of the whole of civil and political rights. (I do not deal with *all* of these rights, as some of them, such as the right to fair trial, are associated with the rule of law rather than with liberal democracy.) Incidentally, it may be argued that the rule of law is an essential part of liberal democracy (e.g., M. PLATTNER, “From Liberalism to Liberal Democracy”, p. 121; F. ZAKARIA, “The Rise of Illiberal Democracy”, p. 22). Such a definition of ‘liberal democracy’ is not incompatible with what I will argue here, so that the need to take a principled stance with regard to this matter does not present itself. It may still be argued that, given the fact that I will establish whether freedom is a necessary constituent of a liberal democratic state, the rights considered to be part of the rule of law, such as the right to fair trial just mentioned, the rights considered to be part of the rule of law, such as the right to fair trial just mentioned, must also receive extensive attention. Still, I am confident that what will be said in part 2 of the inquiry, especially chapters 8, 10, 11 and 13, is sufficient to address the relevant issues that may ensue from taking these rights into consideration.

point it will be inquired whether and, if so, to what degree restrictions could be justified.

As for legal equality: the equal treatment that is the focus here is the treatment that leads to equality of opportunity. By ‘equality of opportunity’ I mean here simply that certain characteristics deemed irrelevant are not to be decisive for the outcome of a process between individuals who are in other respects equal (or basically equal, as I will call it). The relevance will be decided according to the demands called for, so that it is, incidentally, immediately clear that material equality, also known as equality of outcome, is not the issue at hand<sup>12</sup>.

In one respect, though, formal equality and material equality overlap, if ‘material equality’ is understood broadly: formal equality entails – to anticipate matters somewhat – among other things that employers may not discriminate on the basis of, *e.g.*, race or gender, thus allowing all those that are qualified, irrespective of the specifics just mentioned, to be taken seriously as prospective employees. (Employers may still use specific qualifications as criteria to select, so long as these are relevant for the job (and even the characteristics just mentioned may be used to select: actors, *e.g.*, may be chosen on the basis of gender or race), which is what prompted my remark that ‘material equality’ is to be understood broadly.)

It may be argued here that the notion of (negative) liberty does not apply unequivocally, in the sense that an employer who wishes to decide which candidate to hire on the basis of the prospective employees’ racial backgrounds is impeded to do so by legislation against such discrimination. It is unmistakably an infraction on the liberty of such an employer to decide for himself how to proceed, but such an infraction may be justified on the basis of considerations that outweigh this liberty.

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<sup>12</sup> Cavanagh’s question “Would you really want just anyone – never mind their unsteady hands, or psychotic tendencies – to have an equal chance of becoming your dentist?” (*Against Equality of Opportunity*, p. 8) is of course rhetorical; in the situation that I will investigate, the same sort of question, namely, “Would you really want just anyone to be treated formally equally?”, would also be a rhetorical one, at least nearly, for there are some cases in which one must be nuanced, such as the rights of children in this respect, but the reason why it is rhetorical differs significantly from the one in the situation to which Cavanagh refers. In his case, it is obvious why not everyone should have an equal chance to become a dentist, while in mine, it will (hopefully) be obvious, to anticipate what I will argue, why (nearly) everyone should be treated formally equally.

The sorts of equality that will not be inquired, then, are those concerned with economic equality<sup>13</sup>, such as material equality<sup>14</sup>. That does not mean that they are not important, but for this inquiry's specific goal their meaning serves no purpose, as this sort of equality is only an issue once formal equality has already been accepted as a guiding principle. Economic equality can further specify the conditions, but formal equality must have been acknowledged in the first place. (There are, of course, examples of states in which formal equality is not even an issue, but these exhibit a form of government irrelevant to this inquiry, which focuses on liberal democracy.)

The point that, with formal equality in place, different outcomes are possible when it comes to economic equality can be illustrated by pointing to two states that exhibit, I think few would contest, a liberal democratic structure, namely, Norway and the U.S.A. Both states are characterized by the presence of representative democracy and important political liberties<sup>15</sup>. Yet when economic equality is considered, there appear to be great differences, Norway being a welfare state<sup>16</sup>, in contrast to the U.S.A.<sup>17</sup>. This means that various ways of dealing with the economic positions of citizens are compatible with the model that I will research. The specific measures taken at that level may in fact be seen as a specific concretization compared to the *a priori* structure of the liberal democratic state, which is the foundation<sup>18</sup>.

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<sup>13</sup> This is an imprecise term (if only because economic inequality is in most cases the norm, the only issue being the *degree* to which such inequality should be allowed to exist), but since this is a minor issue here, I will not dwell on this. In any event, 'economic equality' is to be read here as 'economic (in)equality' unless specified otherwise.

<sup>14</sup> Alternative approaches to those that defend material equality are, *inter alia*, a libertarian one (the government should restrict itself to protecting existing property rather than redistribute it) and a welfare-based one (the government should optimize citizens' welfare (rather than goods, which is the crucial element in material equality). (R. DWORKIN, *Law's Empire*, p. 297, and in detail *Sovereign Virtue*, especially pp. 1-183, defending equality of resources, which he considers a species of material equality (*Sovereign Virtue*, p. 3)). Incidentally, 'economic equality' may be taken to mean the same as 'material equality', but I have distinguished between them for the reason given above, namely, that 'formal equality' and 'material equality' (*i.e.*, 'equality of outcome') overlap in a *non-economic* sense.

<sup>15</sup> It is not important here to what extent these liberties are nonetheless limited in each case, since these countries are mentioned as examples to make another point.

<sup>16</sup> Simply put, first, goods deemed important by many, such as health care, are provided publicly, while, second, benefits exist for those unable to collect an income. The term 'welfare state' is not easily demarcated, by the way, and the U.S.A. may also be argued to be one, but even in that case, the existence of significant differences between individual countries, at least at present, is undeniable.

<sup>17</sup> There are some public provisions in this country as well, but not to such an extent that it would (at present) be warranted to speak of a welfare state in this case.

<sup>18</sup> This is not to say that historical developments must correspond with this analysis. A state may have started with another form of government and have changed to exhibit liberal democracy while not significantly evolving from an economic point of view.

One crucial question has hitherto remained unanswered, namely, that of the equality of *whom*: who is to be considered equal to whom, and why should such equality be the case? This question has so far received relatively little attention<sup>19</sup>, debates usually being focused on the economic equality issues. It is the question I intend to answer in the first part of this study, and which in fact precedes the question of *which* equality should be realized. To that effect, one or more additional concepts of equality are required, of course. After all, if I am to focus on formal equality, it must be clear what the criteria are to be treated (formally) equally. To that effect, I shall use the concepts of factual equality, basic equality and prescriptive equality.

Factual equality is the equality that can in fact be observed to exist between two or more beings, either precisely (in which case there is identity) or approximately. The latter (approximate equality) is in practice the most important variation of the two. Basic equality is a specification of factual equality: factual equality is observed in many ways, and basic equality is the sort of factual equality between two or more beings that is considered relevant to them. Crucially, the beings that consider whether the feature is relevant are both those that observe the factual equality and those that distill the relevant aspects for basic equality from it. Prescriptive equality is the sort of equality that should be realized, but not on the basis of a 'moral' insight<sup>20</sup> but rather on the basis of what those already deemed basically equal consider the most desirable outcome. It is the demand that those who are basically equal should be treated equally and thus the general, abstract form of formal equality, which specifies what this equal treatment should mean (namely, that those who are basically equal should enjoy the same rights).

This sounds somewhat abstract, perhaps, and I will not (inappositely) use the excuse that this is only the introduction, which serves merely as an outline, but illustrate the matter to some extent, so as to indicate the importance of these distinctions. The relevant basic equality between human beings consists in their (approximately)

<sup>19</sup> Cf. J. WALDRON, "Basic Equality", p. 2. Waldron rightly uses the word 'anterior' for this domain of research ("Basic Equality", p. 5).

<sup>20</sup> That is what distinguishes it from normative equality, which may be considered to involve a 'moral' appeal. I do not think, by the way, that 'normative' implies a reference to a 'moral' norm, but in order to avoid confusion I use 'prescriptive' rather than 'normative'. The distinction may be said to be arbitrary (so that it may, on the contrary, be defended that 'prescriptivity' is the more value-laden term and 'normativity' the more 'neutral' one – in fact, I just mentioned that I do not associate 'normativity' with 'morality'), but on the basis of the definition of 'prescriptive equality' I presented above, it should be clear what this means. (The occurrence of the word 'should' should (no pun intended) prove not to be problematic in light of the analysis presented in chapter 6.)

equal rationality (or reasoning power<sup>21</sup>)<sup>22</sup>. This is, for reasons to be explored in detail in chapter 6, the crucial element for a liberal democratic state to remain in existence<sup>23</sup>. Prescriptive equality consists in the corollary of basic equality, namely in the fact that those who are basically equal should be treated equally<sup>24</sup>. ‘The most desirable outcome’ just mentioned would in the present context consist in the necessary conditions for a liberal democratic state to remain in existence. A final concept of equality is needed in order to concretize prescriptive equality, which is formal equality. This is the prescriptive equality needed for a liberal democratic state to remain in existence. It consists in granting equal rights to those deemed basically equal<sup>25</sup>.

This account should secure a solid ground to justify the presence of formal equality and thus provide the answer to the first part of the main question addressed above, *viz.*, to what extent equality is necessary in a liberal democratic state. With that in mind, I will turn to the second question and inquire to what extent liberty must be granted to citizens in a liberal democratic state. Formal equality is a demand that is realized through legislation which, when enforced, places restrictions on individuals’ freedom, but that does not necessarily entail that each individual will accept it as a decisive (or ‘right’)

<sup>21</sup> ‘Rationality’ and ‘reason’ (or ‘reasoning powers’) are equated here. I will elaborate on this in chapters 2, 5 and 6.

<sup>22</sup> It is important to distinguish between ‘basic equality’ and the definite description ‘the basic equality’. The latter is used to point to a specification of the general concept ‘basic equality’. The specification that will be defended by me is ‘basic rationality’; as I will argue in chapters 1 and 6, many specifications of basic equality are possible, both on the basis of liberal democracy and on the basis of other forms of government, basic rationality being the most viable specification in a liberal democratic state. (Likewise, diverse sorts of basic equality may be discerned in the animal realm, although these may in most cases not be recognized, communities arising less artificially, to phrase it thus, than in the case of mankind.)

<sup>23</sup> I say ‘*remain in existence*’ rather than ‘*come into existence*’, for on the basis of a competing conception of basic equality that would formerly successfully be applied, a liberal democratic state was possible at that time. I will deal with this issue in chapters 1 and 6.

<sup>24</sup> Basic equality and prescriptive equality thus overlap. This is one of the elements that distinguish this outlook from an ethical viewpoint in which the descriptive and normative realms are separated (with a radical approach such as Kant’s (*e.g.*, *Grundlegung zur Metaphysik der Sitten*, p. 444) providing the greatest contrast to mine). (I have omitted a comma before the word ‘in’ here (thus rendering a restrictive clause) as there are alternative ethical viewpoints that differ from mine as well but that do not strictly separate these domains, such as Mill’s (*e.g.*, *Utilitarianism*, Ch. 2 (pp. 214, 218-220); *cf.* Ch. 3 (p. 231), Ch. 5 (pp. 246, 247)).) The issue of the overlap between the descriptive and prescriptive realm will receive attention in chapter 6.

<sup>25</sup> The research is by no means a merely academic exercise, but even irrespective of that, I can only agree with Waldron when he says: “I have heard people say: ‘Why do we need to explain or defend basic equality? Nobody denies it’. But even if that’s true, it is still important for philosophers to explore the character and the grounds of propositions we take for granted”, *God, Locke, and Equality*, p. 4 (note). Waldron’s notion of ‘basic equality’ is roughly the same as mine; he defines it as “[...] equality as a background commitment that underlies many different policy positions”, *God, Locke, and Equality*, p. 2.

directive; he may simply obey the law since failing to do so may result in punishment, in which case he may be said to be externally rather than internally motivated to comply. An appeal to formal equality is in each case an appeal to a judge who will realize the consequences of the relevant legislation, or – if one directly addresses an individual that (presumably) does not adhere to the appeals made by the norms of formal equality – the threat with such an appeal directed at such an individual. This means that the answer to the question to what extent equality is necessary in a liberal democratic state merely provides some limits on individuals' freedom (to the effect that they do not discriminate): it does not address the matter what room is left, once these limits are acknowledged, for individuals' freedom, so that this subject matter warrants a separate treatment.

From the foregoing it appears that the questions of freedom and equality cannot be 'surgically' separated<sup>26</sup>. I already pointed to an employer who is faced with the fact that he may not use any criterion he deems fit to choose between prospective employees. Apparently, then, certain liberties are *a priori* restricted, in the sense that some characteristics, such as race and gender, may, as a rule, not be used as selection criteria. This is a given (legislation exists that is enforced if necessary), but that does not answer the question why such restrictions should (have to) be the case.

To provide such an answer, one may appeal, as some authors do, to notions such as 'human dignity' axiomatically, as if these were starting points that could (or may) not be questioned. Even if this is deemed a desirable strategy from a political point of view, the question arises whether it can ultimately lead to a convincing theory. No notion should be exempt from scrutiny, and if any is considered to be basic on whatever ground, this is no reason to desist from subjecting it, or its proponents' considerations to advocate it, to a critical analysis, but in fact provides all the more justification to do so. I will accordingly take a cautious stance, which may not lead to a lofty theory but will hopefully at least present a compelling account, without resorting to elements that have to be taken at face value for the simple reason that they *cannot* be analyzed any more profoundly.

Rawls and Dworkin will feature prominently in this study. With respect to the first part I can say the following. Rawls's approach

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<sup>26</sup> This issue must be separated from the issue of whether 'equality' and 'freedom' may be separated conceptually. The latter issue will be inquired in chapter 9.

bears a similarity to mine, although the differences will soon come to the fore. More importantly, both thinkers deal with matters that touch upon the domain in question, although they do not, or hardly, explicate it<sup>27</sup>. The importance of Rawls's work is clear from his centralizing the questions *whose* interests (primary goods<sup>28</sup>) are to be considered<sup>29</sup>. Dworkin presents the 'abstract egalitarian thesis': "From the standpoint of politics, the interests of the members of the community matter, and matter equally. I suggest that this proposition captures the concept of equality, taken to be at least an element in a theory of social justice, in such a way as to embrace various competing conceptions of equality"<sup>30</sup>. Dworkin appears, then, to present a sort of 'encompassing equality' (to dub it thus), preceding the more 'applied equalities' (so to speak), thus seemingly providing precisely the sort of Archimedean point I seek. Whether his qualification of this point is *correct* is another matter, of course. This will be explored in the course of the first part. In addition, the relevant aspects of the theories of Kant and Kateb will receive attention. Kant is mainly important here because of his views on practical reason, while the way Kateb approaches 'human dignity' provides a useful contrast to my account.

Once it will have been established on what basis equality is a requisite for a liberal democratic state, it will also have become apparent which rights must in any event be guaranteed, *viz.*, those forthcoming on the basis of formal equality, outlined above. These are rights which take the form of liberties. At that level, then, one may say that equality and freedom cannot merely be reconciled but are intertwined. However, this is still only the minimum that must be realized. There are many liberties that will not have been discussed once this analysis will be completed. After all, by protecting the liberties of some, certain liberties of others, such as that of the employer mentioned above, are limited, and, moreover, there are many liberties the scope of which should be clear at the end of this study, but cannot yet be decided merely on the basis of the foregoing. For instance, to what extent should private parties incorporate the relevant basic equality in their worldview? Should they actually be

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<sup>27</sup> Rawls does present an important section in his main work that is aptly titled "The Basis of Equality" (*A Theory of Justice*, § 77 (pp. 441-449)), but whether this sufficiently treats the issue I wish to address remains to be seen.

<sup>28</sup> J. RAWLS, *A Theory of Justice*, § 11 (pp. 54, 55).

<sup>29</sup> Utilizing the famous thought experiment of the veil of ignorance (J. RAWLS, *A Theory of Justice*, § 24 (pp. 118-123)).

<sup>30</sup> R. DWORKIN, "In Defense of Equality", p. 24.

convinced of the correctness of a certain specification of basic equality, or is it sufficient that they obey the law when it prescribes that they treat people equally, so that they may act on the basis of a conviction that would conflict with the conviction that people are equal in spheres that allow them some freedom in that such freedom has not been depleted through legislation<sup>31</sup>? These are matters that must remain unanswered until the second part, in which the domain of individual freedom will be inquired.

There are at least three reasons for discussing religious freedom at length. First, it seems a pertinent field of inquiry in the context of the first part of the inquiry. After all, if equal treatment is the norm, does this imply that those acting on a religious conviction should be treated equally with those that do not adhere to one? Second, not unrelated to the first reason, this is especially relevant in light of the fact that some of those who represent a religion do not limit themselves to making statements that are offensive to some (they share this with many people who do not operate on the basis of a religious tenet) but actually perform actions that are arguably not inconsequential, such as circumcision, if this takes place without the possibility of knowing whether the person undergoing the procedure consents. Third, the theme generates a great deal of attention in the current public debate. I mention this reason last as I deem it the least important one. This may seem surprising, but it is my ambition to present an outlook whose relevance is not limited to current debates. It is difficult or even impossible to foresee whether the tensions between adherents of the various religions (and between such adherents and atheists) will abate, continue or even intensify. If the second or third situation sketches future events, the justification for all three reasons to focus on this specific issue is presented; I daresay that the advent of the first would merely reduce the third reason to an academic discussion whose ambit does not exceed the confines of its own time and would not derogate from the importance of the first and second reasons, which will remain even if this state of affairs should indeed be realized.

Rawls, Dworkin and Habermas have addressed the issue of the extent of individuals' liberty to refrain from accepting equality as a ('moral') starting point. My theory will be presented most clearly by

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<sup>31</sup> That such spheres should exist in the first place is a given in a liberal democratic state (lest it not be a *liberal* democratic state in the first place; this issue will receive extensive attention in chapter 13). In such a form of government, the question is not whether various sorts of freedoms should exist, but rather whether those that do may be limited at all and, if so, on what grounds.



comparing it with theirs. In the first part of this study, the theories of all thinkers that are extensively discussed (namely, Rawls, Dworkin, Kateb and Kant) are presented before my own alternative. In the second part, such a sequence is only preserved with respect to Dworkin's theory, which appears before my most important observations; those of Rawls and Habermas, conversely, appear after it. The reason behind this succession in part 2 is that what Dworkin says provides a useful frame of reference to formulate my own thoughts; the contrasts will readily become apparent. Rawls's and Habermas's ideas, on the other hand, are most profitably treated in light of those of my own. These concern the limitations of freedom of expression. More specifically, I will first examine why freedom of expression may be limited in the first place, and how the various interests that are involved should be balanced.

To this effect, I will introduce the ignore principle. This principle takes all the interests that are concerned seriously by clinging to a broad notion of 'harm'; only thus, it will be argued, may they appropriately be balanced. This principle will also be decisive in determining the limitations of government interference in individuals' private domains, at which point the question mentioned above, whether individuals should be convinced of the truth of the relevant basic equality, can be answered adequately. In this context, the issue of whether states can take a neutral stance in determining the limitations of freedom of expression. A final issue to be addressed is whether individuals in a liberal democratic state should have the freedom to propagate its dissolution. If this question is answered in the affirmative, a paradoxical result seems to ensue, as freedom would be used for the purpose to take away that same freedom, while if it is answered in the negative, it would be necessary to clarify on what basis this freedom might democratically be curtailed. It will be inquired which of these alternatives is most compelling, and whether such a paradox arises at all.

I have made no concessions to precision or nuance where such a stance would have simplified (and thus misrepresented) my meaning, seeing no need to do so considering the intended readership and the relative straightforwardness compared with alternative theories that are rife with notions difficult to grasp and in need of a support of their own, leaving the matter for now whether such a support is usually successful, or even provided, a matter that will arise on several occasions during the research. As for quotes, the original spelling has been preserved; in the case of non-English

quotes, the original text is presented along with a translation of my own.

The notions I introduce in this study are necessary to accommodate the thoughts presented here. Although I have made an effort to distinguish between them in a clear fashion, I think presenting them together at the end may have some added value. The reader will find a glossary of modest proportions. In addition, while I have throughout the inquiry tried to be as critical as possible of my own thoughts, an examination of what I have argued appears by means of some possible objections, presented together at the end. They are most profitably addressed there, since they can only accurately be dealt with once the inquiry will have been completed.

**Part 1**  
**EQUALITY**



## Chapter 1

### THE RISE OF FORMAL EQUALITY

1.1. In order to make it clear what the relevance is of the analysis that is to follow, I will start with a sketch of the development of formal equality, which I take to consist in granting equal rights, on the basis of formal equality, to those deemed basically equal; they are, simply said, to be treated equally. Formal equality is the result that should ensue from what will be argued in this first part of the study. The actual realization of this sort of equality in liberal democratic states is the result of a long and steady process. This is not a descriptive historical work and I will refer to relevant facts only when necessary to illustrate a point; the assessment of slavery is such a case, with which I will commence this inquiry. It will be elaborated upon in chapter 6.

1.2. At a time when slavery was considered (as far as can be determined) something mundane by many<sup>1</sup>, it was not out of the ordinary to have an outlook on basic equality as Aristotle's, who distinguishes between those who are naturally masters and those who are naturally slaves; being able to use one's reasoning powers is the decisive quality for the former, while being able to use one's body is the decisive characteristic of slaves<sup>2</sup>. Apparently, Aristotle's conception of basic equality includes fewer beings than does mine (unless this statement is taken to testify to a different idea of 'rationality' than mine, but that has no bearing on the outcome in practical terms). This may be contrasted with Cicero's position, who seems to interpret basic equality to refer more broadly than does Aristotle:

“Of all the matters that are discussed by learned men, nothing is verily more important than that it is clearly understood we are born for justice, and that law is not constituted by opinion but by

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<sup>1</sup> Cf. *Corpus Iuris Civilis*: Institutiones, Book 2, Title 3 (p. 2).

<sup>2</sup> ARISTOTLE, *Politica*, 1252a. Aristotle does grant that, as a consequence of irrelevant events, those not naturally suited to be slaves end up in that capacity (*Politica*, 1255a). Incidentally, while the basic definitions pertaining to slavery are stipulated in the Institutiones, it is indicated to be contrary to nature there: “Slavery [...] is an institution of the law of nations, by which someone is subjected, contrary to nature, to the dominion of another”. (“Servitus [...] est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur”), *Corpus Iuris Civilis*: Institutiones, Book 2, Title 3 (p. 2).

nature. This will be clear if you examine the association and society between men. For nothing is as alike to another, or as similar, as we all are to each other. If the corruption of customs, if the emptiness of opinions did not wind an imbecility of minds and turn them in whichever way, no one would be as like himself as all men are like all others. Accordingly, whatever the definition of 'man' is, it applies to everyone. This is sufficient to prove that there is no dissimilitude within the species. If this were the case, no single definition could include everyone. Indeed, reason, by which alone we surpass the beasts, by which we can infer, argue, refute, discourse and accomplish things and reach conclusions, is assuredly shared by all; even though they may adhere to different teachings, their faculty to learn is equal"<sup>3</sup>.

The acknowledgment of the ability to reason in slaves is not inconsistent with slavery, unless basic equality is argued to be relevant in this respect. This is precisely what Seneca does in pointing specifically to the treatment of slaves: "Would you contemplate that the one you call your slave is born from the same seeds, enjoys the same sky, breaths, lives and dies in the same way! Now despise a man with this fortune, which, while you despise him, may befall you. This is the highest of my precepts: live with a man of lower standing in such a way as you would want a man of higher standing to live with you. Live indulgently with a slave, and courteously, and allow him to join you in discourse, counsel and meals"<sup>4</sup>.

What Seneca points out is that one has no way to protect oneself against the vicissitudes of fate. This is not the place to discuss the

<sup>3</sup> "[...] omnium, quae in doctorum hominum disputatione versantur, nihil est profecto praestabilius, quam plane intelligi, nos ad iustitiam esse natos, neque opinione, sed natura constitutum esse ius. Id iam patebit, si hominum inter ipsos societatem coniunctionemque perspexeris. Nihil est enim unum uni tam simile, tam par, quam omnes inter nosmetipsos sumus. Quod si depravatio consuetudinum, si opinionum vanitas non inbecillitatem animorum torqueret et flecteret, quocumque coepisset: sui nemo ipse tam similis esset, quam omnes sunt omnium. Itaque quaecumque est hominis definitio, una in omnis valet. Quod argumenti satis est, nullam dissimilitudinem esse in genere. Quae si esset, non una omnis definitio contineret. Etenim ratio, qua una praestamus belluis, per quam coniectura valemus, argumentamur, refellimus, disserimus, conficimus aliquid, concludimus, certe est communis, doctrinam differens, discendi quidem facultate par", M. T. CICERO, *De Legibus*, Book 1, Ch. 10, Sections 28-30 (pp. 295, 296).

<sup>4</sup> "[V]is tu cogitare istum, quem servum tuum vocas, ex isdem seminibus ortum eodem frui caelo, aequae spirare, aequae vivere, aequae mori! [C]ontemne nunc eius fortunae hominem, in quam transire, dum contemnis, potes. [...] [H]aec [...] praecepti mei summa est: sic cum inferiore vivas, quemadmodum tecum superiorem velis vivere. [...] [V]ive cum servo clementer, comiter quoque, et in sermonem illum admitte et in consilium et in convictum", L. A. SENECA, Letter 47, pp. 139, 140.

Stoic perspective on how to deal with life's vexations; I have merely pointed to this passage to indicate that a certain equality is stressed by him that is shared by the slave and his master, which outstrips the qualities the master has and the slave lacks (and supersedes them when it comes to judging the actions the first performs). It is crucial that it be clear what the consequences of this sort of equality are for the scope of citizens, *i.e.*, those who are to be treated as a citizen, and hence enjoy the same rights on the basis of formal equality, and on what basis it should be acknowledged.

**1.3.** This may be illustrated by an account of slavery, and how it came to be abandoned in the U.S.A. I will mention some relevant details here and come back to the issue in chapter 6, when it can be used as an illustration of my viewpoint.

Is basic equality in the sense of basic rationality necessary in a liberal democratic state? Perhaps not: did the U.S.A. not exhibit such a form of government *before* 1865<sup>5</sup>, when slavery was abolished (with the adoption of the Thirteenth Amendment to the Constitution) (or *before* 1920, when women's suffrage was achieved there for all states<sup>6</sup>)? It may be objected that prior to the acknowledgement of the relevant rights of black people and women, this country was *not* a liberal democratic state for precisely that reason, but that response would be based on a biased specification of 'basic equality'<sup>7</sup>, looking at history with a model of liberal democracy with the standards by which one would at present evaluate a form of government. Formally, however, such a form of government was in place; the fact that those whose position would *presently* be taken into consideration were not in every sense treated equally with those who, or whose representatives, were in charge does not detract from this given. It simply means that a liberal democratic state existed with fewer people being considered bearers of rights and simultaneously constituents (or, to be precise, citizens) than would now be the case<sup>8</sup>. (I agree, consequently, with Schmitt when he does not consider

<sup>5</sup> Or 1863, if one takes the Emancipation Proclamation as the standard.

<sup>6</sup> Some individual states granted this right prior to 1920.

<sup>7</sup> One may argue that basic equality had the same meaning as the one I put forward, namely, basic rationality, in which case the powers that be (and/or those already belonging to the constituency) simply maintained that black people and/or women were not rational (or at least not as rational as white men), either for political reasons or on the basis of a real conviction. I mention this for completeness; in practical terms, it does not matter which explanation is correct.

human equality joined with democracy<sup>9</sup>. Democracy is merely a form of government and must not be confused with an ideal political situation<sup>10</sup>. One must not be misled into committing the category mistake of confusing the latter with the claim that a democratic form of government is *desirable*.)

For completeness I would add that another conception of democracy is possible, according to which certain rights are guaranteed, and the room to reach certain radical changes that would conflict with the respect for such rights is thus restricted<sup>11</sup>. This concept may alternatively be used (although I will critically discuss it in chapter 16), but in the interest of clarity, I will use the restricted conception – sometimes called ‘formal democracy’ – and speak of ‘liberal democracy’ when, in addition, certain rights are guaranteed<sup>12</sup>. That is not to say, of course, that each manifestation of this form of government is equally *desirable*, but that matter must be treated as a separate issue lest the methodology become sloppy. In any event, it is important not to make the (category) mistake to confuse liberal democracy with a presumably desirable form of democracy, in which all, or most<sup>13</sup>, human beings that reside in a country should be considered citizens, since it is precisely this matter

<sup>8</sup> One may (at present) lament the ruling of the Dred Scott case (*Dred Scott v. Sandford* (60 U.S. 393, 1857)), in which it was decided that “A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a ‘citizen’ within the meaning of the Constitution of the United States. When the Constitution was adopted, they were not regarded in any of the States as members of the community which constituted the State, and were not numbered among its ‘people or citizens’. Consequently, the special rights and immunities guaranteed to citizens do not apply to them. And not being ‘citizens’ within the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States, and the Circuit Court has not jurisdiction in such a suit”. It seems safe to say that such a ruling would nowadays not be acceptable to most people, but that does not necessarily mean that it was ‘wrong’ (or that a contrary decision would have been ‘right’). The reason why such a line of thought would not be acceptable at present must, I think, be found elsewhere than in ‘moral’ considerations. I will deal with the issue of slavery in chapter 6 in some detail, where it will become apparent what this alternative is.

<sup>9</sup> C. SCHMITT, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, p. 18.

<sup>10</sup> Cf. C. SCHMITT, *Verfassungslehre*, p. 225. Schmitt’s conception of ‘democracy’ is somewhat complex; it will receive attention in chapter 16.

<sup>11</sup> E.g., R. DWORKIN, *A Matter of Principle*, p. 196: “Democracy is justified because it enforces the right of each person to respect and concern as an individual; but in practice the decision of a democratic majority may often violate that right, according to the liberal theory of what the right requires” (cf. pp. 65, 66).

<sup>12</sup> A complicating factor is that citizens’ right to (indirectly) have a decisive influence on the legislative process is an integral part of democracy; if this right is characterized as ‘politische Freiheit’ (‘political freedom’) (H. KELSEN, *Vom Wesen und Wert der Demokratie*, § 9 (p. 93)), this freedom is of course part of all states with formal democracy (lest they not be democratic states in the first place), whether they are liberal or not.

<sup>13</sup> Excluding, e.g., those that reside in a country illegally from exercising (at least some) rights.



which is in question: which beings are to be considered citizens<sup>14</sup>, and thus be treated formally equally with one another?

This is an important matter since the relations between persons in a state<sup>15</sup> are mediated by the legislation and the powers enforcing it (an exception can arguably be said to exist in the case of friendship or perhaps family relations). For example, an employer and an employee do not interact directly, but *as citizens*, so that the relation employer-employee is laden with the legislation that specifies it; in their interactions they are both shielded by the applicable legislation that protects them against each other, as (some of) their interests necessarily conflict (*e.g.*, the employee tries to obtain the highest possible wages, while the employer, simply put, wants the costs to be minimal)<sup>16</sup>. Absent such legislation, a ‘laissez faire’ situation (in economic terms) would be the case, and, more radically, absent fundamental norms, expressed primarily in penal terms, a society would not be possible at all<sup>17</sup>, or lack stability.

**1.4.** One may claim that people are (‘morally’) ‘right’ at this moment in resisting segregation, which would mean that many people were (in hindsight) ‘wrong’ in, *e.g.*, the U.S.A. prior to 1865, when slavery was abolished, or even later, when black people did not have the

<sup>14</sup> “In a word, who is or who is not a citizen depends on the law, and on the law alone. The difference between citizens and noncitizens is not natural but conventional. Therefore, all citizens are, in fact, ‘made’ and not ‘born’”, L. STRAUSS, *Natural Right and History*, p. 104.

<sup>15</sup> Perhaps this must be considered a pleonasm, in the sense that a person can only come to exist as a person once a state is in place, and this may be taken to mean that one is only able to manifest oneself thus (stably) in this situation (*cf.* Th. HOBBS, *Leviathan*, Ch. 13 (p. 89) and Ch. 46 (p. 459)), or, more radically, that it is impossible for a person, a human being, to *be* (*i.e.*, to *exist*) at all if a state, or, more broadly, a society, is not in place to let such a being come to fruition, which Rawls formulates as follows: “We have no prior identity before being in society: it is not as if we came from somewhere but rather we find ourselves growing up in this society in this social position, with its attendant advantages and disadvantages, as our good or ill fortune would have it”, *Political Liberalism*, Lecture I, p. 41. It may be argued, in a similar vein, that a cultural or societal background is a prerequisite in this sense (Ch. TAYLOR, *Philosophy and the Human Sciences*, pp. 205, 206; *Sources of the Self*, pp. 27, 28; A. MACINTYRE, *After Virtue*, pp. 220, 221). It would be difficult for those who adhere to the latter persuasion to prove their hypothesis; apart from the objections against testing it (presuming that the conditions are available to do so), the evaluation of the outcome of such an experiment would of course depend on one’s notion of ‘person’ or ‘human being’. (The position that one cannot conceive of a human life form that would not already be constituted by a relevant framework (*Sources of the Self*, pp. 30, 31) testifies to an obvious *argumentum ad ignorantiam*.)

<sup>16</sup> The need for such legislation is less pressing (in the sense that states can exist in the absence of such legislation) than basic legislation – expressing fundamental norms – that protects all citizens against each other, notably penal legislation, which must be in place in any event, and may therefore be said to occupy a ‘higher’ place than labor law, if they are hierarchically organized in this regard.

<sup>17</sup> Th. HOBBS, *Leviathan*, Ch. 13 (p. 89), Ch. 15 (pp. 100, 101).

same rights as white people in many respects, prompting, for example, the Voting Rights Act of 1965<sup>18</sup>.

There are basically two possible positions. The first consists in locating some feature that beings supposedly have in common – the most commonly proffered candidates seem to be reason<sup>19</sup> and ‘human dignity’ –, which would have to be acknowledged; not doing so would (presumably) be (‘morally’) ‘wrong’. The second option is to concentrate on the actual acknowledgement of equality and to look for the most likely and convincing explanation to qualify such behavior. Some shared feature may also serve as a justification for such a *modus operandi*, but this need not be problematic so long as one starts out with an observable characteristic, which, in addition, can account for the fact that the beings in question are treated equally.

The first option – which could be characterized as a top-down approach – brings with it the promise of an ‘elevated’ theory, while the ambitions of the second – a bottom-up approach – appear to be limited from the start. The downsides of each option are at the same time the benefits of its counterpart, however: in the case of the second option, there is a minimal need to incorporate notions the status of which is questionable, or which cannot, at any rate, compel assent by pointing to an incontestable given, which is what the first option may be faced with by introducing such notions. I will first present some important prevailing perspectives (those of Rawls and Dworkin), and then qualify these in terms of what I just outlined, paying special attention to Kant’s work. This will provide the proper context to present my own perspective.

### 1.5. Summary and Relation to Chapter 2

Basic equality in the guise of basic rationality is no condition for a liberal democratic state to come into existence: formal equality need not apply to all rational beings, as the example of the U.S.A. demonstrates. The task that lies ahead is to identify the features that have led to basic equality and to inquire the consequences of this conception.

<sup>18</sup> Incidentally, Lincoln stresses the *inequality* between white and black people and takes it to be a corollary that they should live separated (thus exhibiting a more radical stance than the (later) ‘separate but equal’ doctrine), suggesting Central America as a location for a suitable colony for black people (*Address on Colonization to a Deputation of Negroes* (August 14, 1862), pp. 371-375). He points to the inequality as a given, without rendering a judgment concerning its desirability; moreover, it is difficult to assess whether what he says has been dictated by political considerations. I merely point to this text as an example of a situation in which not all those able to reason are (or were) considered equal.

<sup>19</sup> ‘Reason’ is an intricate concept. As I mentioned in the introduction, I will deal with the relevant meanings it may have below, in chapters 2, 5 and 6.

Rawls's viewpoint is the first to consider; he emphasizes the relevance of rationality, promoting this characteristic as the crucial one of (in my terms) basic equality; whether he also clearly *identifies* it remains to be seen.



## Chapter 2

### A THEORY OF RATIONALITY

2.1. The first theory to be discussed on the basis of the previous chapter is that of John Rawls, who qualifies rationality as the crucial feature to serve as the criterion to be granted important rights. What he says qualifies as an example of the first of the two positions identified in section 1.4. As was indicated in the introduction, Rawls's work merits attention here on account of the fact that the question whose interests are to be considered is an important issue for him. For present purposes, it is not necessary to present an overview of Rawls's views on justice. Only the foundation of his theory will be relevant here. Rawls appears to adhere to a basic equality, stating: "[...] since political power is the coercive power of free and equal citizens as a corporate body, this power should be exercised, when constitutional essentials and basic questions of justice are at stake, only in ways that all citizens can reasonably be expected to endorse in light of their common human reason"<sup>1</sup>.

The notion of 'free and equal citizens' plays a pivotal role throughout Rawls's work. He makes it clear what this means in the following: "I have assumed throughout, and shall continue to assume, that while citizens do not have equal capacities, they do have, at least to the essential minimum degree, the moral, intellectual, and physical capacities that enable them to be fully cooperating members of society over a complete life"<sup>2</sup>; "To approach [the question of the basic liberties and their priority], let's sum up by saying: fair terms of social cooperation are terms upon which as equal persons we are willing to cooperate in good faith with all members of society over a complete life. To this let us add: to cooperate on a basis of mutual respect"<sup>3</sup>.

In his major work, *A Theory of Justice*, Rawls ascertains that the principles of justice are accepted by "[...] free and rational persons concerned to further their own interests [...]"<sup>4</sup>. Yet this motivation is not decisive, according to Rawls. Altruism is only motivating to a

<sup>1</sup> J. RAWLS, *Political Liberalism*, Lecture IV, pp. 139, 140.

<sup>2</sup> J. RAWLS, *Political Liberalism*, Lecture V, p. 183.

<sup>3</sup> J. RAWLS, *Political Liberalism*, Lecture VIII, pp. 302, 303.

<sup>4</sup> J. RAWLS, *A Theory of Justice*, § 3 (p. 10); in chapter 3, Rawls phrases this as follows: "[the first principles of justice] are those which rational persons concerned to advance their interests would accept [...]", *A Theory of Justice*, § 20 (p. 102).

limited degree<sup>5</sup>, but since one does not know one's own position, individual interests are not decisive: "The veil of ignorance prevents us from shaping our moral view to accord with our own particular attachments and interests"<sup>6</sup>. An egoist is, by contrast, unable to view things from a different perspective than that of his own interests<sup>7</sup>.

2.2. The problem seems to be that Rawls clings to too narrow a notion of 'egoism' here. Under the veil of ignorance these special interests are, indeed, not decisive, but it must be asked *why* one would be motivated to accept the principles of justice in the first place. Someone who opts for the principles of justice from behind the veil of ignorance merely does this because he is ignorant of his position, at least with respect to the second principle (which concerns social and economic equalities)<sup>8</sup>. One may phrase it somewhat irreverently by saying that one acts by purchasing a sort of insurance: should one not find oneself in the most desirable place, the consequences won't be grave.

The comparison with an insurance is not inappropriate, since the veil is itself part of the model. If one should, in contrast to the model's premise, have access to relevant information pertaining to one's position, and this would prove to be a relatively favorable one, the need to agree with the principles of justice would be removed, and it would even be contrary to one's interests to agree with them, since one would thereby be forced to relinquish some of one's rights without receiving something in return with enough value to compensate for the loss. This is precisely the situation someone faces when he has paid the premium for his insurance and the event against which he has insured himself has not taken place. He would, with the benefit of hindsight, never have insured himself. He (at the moment he insures himself) and the person behind the veil of ignorance share the same ignorance of their situation. Should one agree with the principles of justice from some sort of insight into what is 'just', the veil of ignorance would be a redundant attribute; the fact that it is not proves that such a consideration is not the basis for agreeing with the principles of justice.

Rawls does argue that egoism is not decisive on account of the fact that there is a difference between the situation behind the veil of

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<sup>5</sup> J. RAWLS, *A Theory of Justice*, § 43 (p. 248).

<sup>6</sup> J. RAWLS, *A Theory of Justice*, § 78 (p. 453).

<sup>7</sup> J. RAWLS, *A Theory of Justice*, § 86 (p. 497).

<sup>8</sup> J. RAWLS, *A Theory of Justice*, § 46 (p. 266).

ignorance, where the parties are characterized as mutually disinterested, and ordinary life: “In practical affairs an individual does have a knowledge of his situation and he can, if he wishes, exploit contingencies to his advantage. Should his sense of justice move him to act on the principles of right that would be adopted in the original position, his desires and aims are surely not egoistic. He voluntarily takes on the limitations expressed by this interpretation of the moral point of view”<sup>9</sup>. In this case, however, it would be unclear *why* the individual would opt for the ‘right’ principles (just as someone who is sure that some event will not take place, or won’t affect him, won’t pay an insurance premium to be insured against such an event).

2.3. One may try to evade the problems by stressing that the principles only apply to ‘moral’ persons, a strategy that Rawls adopts. He states that “[...] it is precisely the moral persons who are entitled to equal justice. Moral persons are distinguished by two features: first they are capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a minimum degree”<sup>10</sup>.

It is not surprising, in this line of thought, that the behavior towards animals<sup>11</sup> is no object of the principles of justice<sup>12</sup>. Such a perspective might be defended by pointing out that animals are *de facto* unable to be parties to any agreement<sup>13</sup> (forgoing here rudimentary ways of living together in which an implicit ‘agreement’ may be said to exist, *e.g.*, between a dog and its owner). This may be a legitimate reason not to exclude rationality from the items about which one lacks knowledge behind the veil of ignorance. After all, if rationality itself were one of those items, the entire thought experiment would not even get off the ground, so to speak, since rational agents are required for such an experiment in the first place.

<sup>9</sup> J. RAWLS, *A Theory of Justice*, § 25 (p. 128).

<sup>10</sup> J. RAWLS, *A Theory of Justice*, § 77 (p. 442).

<sup>11</sup> I will use ‘animal’ in the sense of non-human animal, unless specified otherwise.

<sup>12</sup> J. RAWLS, *A Theory of Justice*, § 3 (p. 15), § 77 (p. 441). Cf., though in a different context, J. FICHTE, *Das System der Sittenlehre nach den Prinzipien der Wissenschaftslehre*, § 22 (p. 246): “Wie es in Beziehung auf die vernunftlose Natur keine Rechte giebt, eben so wenig giebt es in Beziehung auf sie Pflichten” (“Just as there are no rights regarding nature, being devoid of reason, there are no duties with regard to it.”).

<sup>13</sup> Cf. TH. HOBBS, *Leviathan*, Ch. 14 (p. 97): “To make Covenants with brut Beasts, is impossible; because not understanding our speech, they understand not, nor accept of any translation of Right; nor can translate any Right to another: and without mutuall acceptance, there is no Covenant.”

One must, however, be careful not to confuse this given with the claim that rationality would itself provide a ground to grant certain rights. Such a stance may be taken, but must then be argued independently. Furthermore, the thought experiment easily leads to the unwarranted privation of rights from animals compared to people who are unable, just as animals are, to agree with the principles of justice, namely cognitively impaired people<sup>14</sup>. The question is justified whether there is room in Rawls's model to defend that in the case of 'perfect procedural justice', there would be "[...] an independent criterion for what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed"<sup>15</sup>.

There is a clear limitation to the veil of ignorance: "The parties arrive at their choice together as free and equal rational persons knowing only that those circumstances obtain which give rise to the need for principles of justice"<sup>16</sup>. So there really is no complete ignorance: one already knows that one will share a society with others that are free and equal to oneself. If that same limitation is subsequently used once the veil is lifted, and differences between human beings and animals are allowed, the circularity is obvious: one has introduced a standard to distinguish between these beings behind the veil and applies the same standard after it has been lifted<sup>17</sup>. The issue is perhaps most patently clear in the following: "That moral personality suffices to make one a subject of claims is the essential thing"<sup>18</sup>. When Rawls says: "The minimum capacity for the sense of justice insures that everyone has equal rights"<sup>19</sup>, the reference to 'everyone' is restricted in such a way that the 'equality' means that those who are able to agree with the principles of justice are at the same time those who are entitled to the rights based on them.

<sup>14</sup> Cf. P. SINGER, *Practical Ethics*, pp. 18, 19. Rawls does not discuss the position of such people in detail (and does not include them in his assumption (cf. note 2, *supra*)), and even deals with *physical* impairments only in passing (J. RAWLS, *Political Liberalism*, Lecture V, p. 184).

<sup>15</sup> J. RAWLS, *A Theory of Justice*, § 14 (p. 74).

<sup>16</sup> J. RAWLS, *A Theory of Justice*, § 39 (p. 222).

<sup>17</sup> Lloyd Thomas reaches a similar conclusion when he remarks that: "[...] there is a problem about how it is possible to avoid drawing back the veil, as one hardly can remain ignorant of one's capacities for rational deliberation in the original position", "Equality Within the Limits of Reason Alone", pp. 549, 550.

<sup>18</sup> J. RAWLS, *A Theory of Justice*, § 77 (p. 443). In order to paint a representative picture of RAWLS's position, it must be added that he leaves it open whether moral personality is, besides a sufficient condition for being entitled to equal justice, a necessary condition (*A Theory of Justice*, § 77 (pp. 441, 442)).

<sup>19</sup> J. RAWLS, *A Theory of Justice*, § 77 (p. 446).



Rawls initially clings to a ‘neutral’ definition of ‘rationality’, according to which a rational person ranks his options depending on how well they further his purposes and seeks an optimal satisfaction<sup>20</sup>. Such an outlook would be compatible with purposes and the concomitant plans to achieve them that would, presumably, not be considered ‘moral’<sup>21</sup>, such as someone’s plan to murder his spouse to collect life insurance. Further on, however, Rawls seems to smuggle in a ‘moral’ notion in stating the following: “[...] to establish [the principles of right] it is necessary to rely on some notion of goodness, for we need assumptions about the parties’ motives in the original position”<sup>22</sup>. Elsewhere, Rawls makes it clear that he considers the parties’ conduct as constrained by the requirements of pure practical reason, seeking a correspondence with Kant’s theory<sup>23</sup>, revising his earlier position that the theory of justice should be considered a part of the theory of rational choice, this theory rather being “[...] itself part of a political conception of justice, one that tries to give an account of reasonable principles of justice”<sup>24</sup>. (The relevance of the ‘moral’ aspect of reason will be fleshed out in chapter 5, when Kant’s views will be considered.)

Rawls’s remark that assumptions about the parties’ motives in the original position are needed seems to me to be correct, but to conclude from that to the necessity of a notion of ‘goodness’, however ‘thin’ Rawls, admittedly, acknowledges this to be<sup>25</sup>, is a *non sequitur*, unless one would grant ‘goodness’ to be deprived of its meaning<sup>26</sup>, or at least identify it with a non-‘moral’ quality (such as desirableness), thus rendering the issue moot. Rawls does speak here of ‘the principles of right’, but this does not get him off the hook, since ‘the right’ is itself taken to be of a ‘moral’ nature (although Rawls does not, as he himself states, simply adopt the traditional concept of ‘right’<sup>27</sup>): “The intuitive idea is this: the concept of something’s being

<sup>20</sup> J. RAWLS, *A Theory of Justice*, § 25 (p. 124).

<sup>21</sup> I say ‘presumably’, since I suspend judgment about such matters altogether here.

<sup>22</sup> J. RAWLS, *A Theory of Justice*, § 60 (p. 348). It is also clear from the following: “[...] moral personality is characterized by two capacities: one for a conception of the good, the other for a sense of justice. When realized, the first is expressed by a rational plan of life, the second by a regulative desire to act upon certain principles of right” (*A Theory of Justice*, § 85 (p. 491)).

<sup>23</sup> J. RAWLS, *Justice as Fairness. A Restatement*, § 23 (p. 81). The parallel with Kant’s work is, incidentally, already clear in *A Theory of Justice* (e.g., § 40 (p. 221-227)).

<sup>24</sup> J. RAWLS, *Justice as Fairness. A Restatement*, § 23 (p. 82). In addition, the account of ‘rationality’ in *Political Liberalism* is relatively complex; means-ends reasoning and self-interest do not exclusively constitute it (Lecture II, pp. 50, 51).

<sup>25</sup> J. RAWLS, *A Theory of Justice*, § 60 (p. 348).

<sup>26</sup> Whether it has a meaning at all is not an issue here, as this would result in a meta-ethical analysis that would mean too great a detour to justify, given the confines of this inquiry.

<sup>27</sup> J. RAWLS, *A Theory of Justice*, § 18 (p. 95).

right is the same as, or better, may be replaced by, the concept of its being in accordance with the principles that in the original position would be acknowledged to apply to things of its kind"<sup>28</sup>. That means that a *petitio principii* is committed, since it is concluded that there must be a notion of 'goodness' on the basis of the 'moral' 'principles of right'.

2.4. The choice Rawls does not but should make is between (1) acknowledging that rationality does not imply a 'moral' viewpoint and (2) arguing why it does (if the latter option is available at all, of course). He provides the example of an experienced climber who gives advice to another with regard to the equipment he should use and the route he should follow; "He wants to know what we think is rational for him to do"<sup>29</sup>. This has nothing to do with morality from the point of view of the prospective climber: he simply wants to act in the safest way possible. From the perspective of the experienced climber, one may say that 'morality' is involved: "Climbers [...] have a duty of mutual aid to help one another, and hence they have a duty to offer their considered opinion in urgent circumstances"<sup>30</sup>. However, it is not clear what the basis of such an (alleged) duty would be (it would not be a *legal* duty, in any event, as such an explanation would unnerve the premise of the account, since the climber merely acts as he should, in such a case, because he wishes to avoid punishment).

As the quote above (note 28, *supra*) shows, Rawls explicitly refers to an 'intuitive idea', but this is not sufficient. Such an appeal to intuition is not compelling, and is perhaps a sign that the argument cannot be pursued to a satisfactory degree<sup>31</sup>. Perhaps such an appeal will – in the end – be inevitable; even a solid field of research such as mathematics must resort to this (most expressly when it comes to the acceptance of its axioms) lest it be confronted with an infinite regress. That does not mean, though, that it should be left in place if alternatives are available that provide a more compelling account.

<sup>28</sup> J. RAWLS, *A Theory of Justice*, § 18 (p. 95).

<sup>29</sup> J. RAWLS, *A Theory of Justice*, § 62 (p. 356).

<sup>30</sup> J. RAWLS, *A Theory of Justice*, § 62 (p. 357).

<sup>31</sup> MacIntyre puts it, somewhat more poignantly, as follows: "[...] the introduction of the word 'intuition' by a moral philosopher is always a signal that something has gone badly wrong with an argument", *After Virtue*, p. 69. A radical stance in this regard is taken by Cappelen, who argues that philosophers don't even genuinely rely on intuitions (*Philosophy without Intuitions*, e.g., pp. 3, 18, 115).

2.5. An alternative would be to take 'rationality' to have a limited scope (and the one with which Rawls initially seems to concur), as a faculty which is focused on the non-'moral'<sup>32</sup> goal of obtaining the most desirable outcome in the long term<sup>33</sup>. (The phrase 'in the long term' must be added here to accommodate the aspect of rationality; without it, the behavior of an animal such as a cat, which presumably acts on instinct<sup>34</sup>, would be included.) Hobbes's account may, perhaps, be said to be somewhat crude in some respects, but as a starting point it has its merits, being limited to premises that can be verified and not resorting to vague notions that cannot find approval from those who are willing and able to analyze matters critically and consistently.

Hobbes's definition is the following: "[...] REASON, [when wee reckon it amongst the Faculties of the mind], is nothing but *Reckoning* (that is, Adding and Substracting) of the Consequences of generall names agreed upon, for the *marking* and *signifying* of our thoughts [...]"<sup>35</sup>; "[...] deliberation is nothing else but a weighing, as it were in scales, the conveniences, and inconveniences of the fact that we are attempting; where, that which is more weighty, doth necessarily according to its inclination prevaile with us"<sup>36</sup>. Incidentally, Hobbes does not seem to distinguish between 'reasonable' and 'rational' (as Rawls does<sup>37</sup>), as is clear from the following quote, in which he uses them interchangeably: "The Definition of the *Will*, given commonly by the Schooles, that it is a *Rationall Appetite*, is not good. For if it were, then could there be no Voluntary Act against Reason"<sup>38</sup>. An analysis of the consequences of such an outlook, which leads, I think, to the conclusion that no 'moral' standards can be found, must be forgone here<sup>39</sup>. In any event, I will not distinguish between 'rational'

<sup>32</sup> Which is something else than 'immoral'. It simply means that 'morality' is not an issue here.

<sup>33</sup> This is merely a working definition; as Posner rightly observes, the word 'rational' lacks a clear definition ("The Law and Economics Movement", p. 1).

<sup>34</sup> If one considers the behavior of the relatively developed animals, the notion of 'rationality' becomes even harder to define than is the case when one limits oneself to human beings. There may, in addition, be a fine line between instinct and rationality. Needless to say, these are issues that cannot be worked out here.

<sup>35</sup> Th. HOBBS, *Leviathan*, Ch. 5 (p. 32). He also puts it, even more poignantly, as follows: "In summe, in what matter soever there is place for *addition* and *subtraction*, there also is place for *Reason*; and where these have no place, there *Reason* has nothing at all to do", *Leviathan*, Ch. 5 (p. 32).

<sup>36</sup> Th. HOBBS, *De Cive* (the English version), Ch. 13, § 16 (p. 166).

<sup>37</sup> J. RAWLS, *Political Liberalism*, Lecture II, pp. 50, 51; Lecture VIII, p. 305; *Justice as Fairness. A Restatement*, § 2 (p. 6), § 23 (p. 81).

<sup>38</sup> Th. HOBBS, *Leviathan*, Ch. 6 (p. 44).

<sup>39</sup> Hobbes's own position is inquired in J. DOOMEN, "A Systematic Interpretation of Hobbes's Practical Philosophy", pp. 470-476.

and 'reasonable' in this inquiry, if only because such a distinction is not necessary here.

By defining 'rationality' (and thereby 'reasonableness') as I have done, I have not, of course, precluded the possibility of clinging to a (different) conception of 'reason', which would enable one to distinguish between reason in the sense in which I have used it (*i.e.*, as a mere instrument to reach a desired end) and reason as a 'moral' faculty. (If such a strategy *were* permitted, nearly every philosophical issue would immediately be solved, but not, presumably, in a satisfactory way.) All that matters here is that if reason is indeed to be considered a (mere) instrument, there would seem to be no ground to treat those that are endowed with it in any special way *vis-à-vis* those (including animals) that are deprived of it. Whether the other sort of reason (*i.e.*, the 'moral' faculty) may provide such a basis will be inquired in chapter 5.

**2.6.** I mainly criticized Rawls in the foregoing. That is not to say that I consider his account to be without merit. This lies primarily, however, in a domain I have not explored since it is not part of the research question, namely, the distribution of economic inequality, which is not a matter of formal equality, which is my focus here. Related to this, the fact that Rawls presents a lexical order for the principles of justice, according to which (political) liberties are not to be restricted for anything else than (other) (political) liberties<sup>40</sup> (so not for equalizing welfare, for example), does not conflict with my account, since my account is concerned with formal equality, the object of which is (*inter alia*) political liberty. As I have inquired into the basic equality that lies at the root of distribution issues, no conflict arises here, since, absent the inquiry, no such conflict *can* arise. It does mean that there is an overlap between formal and material equality insofar as political liberties are considered to be the result of a policy to realize the equal opportunity to be politically active (resulting in political liberty), but that is still far from what is usually taken to be the core of economic equality.

### **2.7. Summary and Relation to Chapter 3**

In Rawls's theory, there is a focus on rationality as the pivotal feature to consider beings equals and to treat them equally. The main problem is that the import of this feature is not fleshed out; in

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<sup>40</sup> J. RAWLS, *A Theory of Justice*, § 8 (pp. 37, 38), § 46 (p. 266).

particular, it remains unclear whether rationality is a 'moral' characteristic. A similar approach is found in Kant's account of – practical – reason; Kant *does* make the explicit choice that is lacking with Rawls. Before turning to this alternative, however, Dworkin's and Kateb's positions will receive attention, in order to deal with the two elemental alternatives – *viz.*, the lack of any particular feature as a (purportedly) decisive one and rationality as the essential feature – in the proper order.



## Chapter 3

### TAKING EQUALITY SERIOUSLY

**3.1.** In the previous chapter, Rawls's position with regard to the matter which beings should be granted certain rights was addressed; Rawls considers reason (as he uses the concept) to be a decisive criterion. I will now turn to an alternative approach, that of Ronald Dworkin, which concentrates on other aspects than does that of Rawls. This means that the problems involved with Rawls's position do not appear here, but Dworkin's alternative raises some other important issues of its own. His position merits attention in a study such as the present one. He has written extensively on the sorts of equality mentioned in the introduction that are not relevant here, but also addresses the level that *precedes* this analysis, thus dealing with precisely the issues that are of interest here.

Dworkin interprets Rawls's position<sup>1</sup> as follows: "[...] justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice"<sup>2</sup>. Indeed, Rawls characterizes the principles of justice he discerns as "[...] the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association"<sup>3</sup>.

Dworkin's evaluation of the aspect of Rawls's theory that is of interest for me here is the same as my own: "[The right to equal respect] is possessed by all men who can give justice, and only such men can contract. This is one right, therefore, that does not emerge from the contract, but is assumed, as the fundamental right must be, in its design"<sup>4</sup>. I have indicated what the problems are with Rawls's answer to the question of who is to be treated equally with whom in the previous chapter. Dworkin's own stance on equality will now be inquired.

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<sup>1</sup> Justice as fairness "[...] conveys the idea that the principles of justice are agreed to in an initial situation that is fair", J. RAWLS, *A Theory of Justice*, § 3 (p. 11).

<sup>2</sup> R. DWORKIN, *Taking Rights Seriously*, p. 182.

<sup>3</sup> J. RAWLS, *A Theory of Justice*, § 3 (p. 10); cf. chapter 2, note 4.

<sup>4</sup> R. DWORKIN, *Taking Rights Seriously*, p. 181.

3.2. When Rawls's reasons to take into consideration the concerns of humans (and *only* their concerns) were evaluated, he turned out to recognize a special equality that purportedly singles out human beings, namely reason (as he understands it). Dworkin, I will argue, is less clear in this respect, but he, too, maintains that such a quality is to be acknowledged. As he puts it: "Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust. The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom. I do not want to defend or elaborate these ideas here, but only to insist that anyone who claims that citizens have rights must accept ideas very close to these"<sup>5</sup>.

It is important to notice (although Dworkin fails to do so) that these ideas are in fact two facets of the same basic point. After all, the (supposed) 'human dignity' (the first idea) is what shields human beings from the unjust treatment, while it would be difficult to grasp on what basis the weaker members of a political community should be entitled to the same concern and respect as the more powerful members (the second idea) if not on account of that same element (*viz.*, the (supposed) 'human dignity')<sup>6</sup>.

In a similar vein, 'flat' and 'normative' equality, as Dworkin uses these terms, seem interrelated. Dworkin says: "We use 'equality' in its flat sense simply to indicate sameness or identity along some specified or understood dimension without suggesting that the

<sup>5</sup> R. DWORKIN, *Taking Rights Seriously*, pp. 198, 199.

<sup>6</sup> Indeed, this is the way Nussbaum approaches the matter: "We should probably avoid thinking that dignity has an obvious specific content all on its own: it seems to be a notion that gets fleshed out through its relationship with other notions, such as that of *respect* (dignity is that attribute of a person that makes the person an appropriate object of respect), and a variety of more specific political principles", *The New Religious Intolerance*, p. 62. This still carries with it the need to explain what is meant by 'respect', of course. Nussbaum considers conscience to be the source of respect ("Liberty of Conscience: The Attack on Equal Respect", p. 342), but this does not yield much, for the reasons put forward in chapters 4 and 5.



speaker believes sameness along that dimension is desirable. [...] We use 'equality' in its normative sense, on the contrary, precisely to indicate the respect or respects in which the speaker thinks people should be the same, or treated the same way, as a matter of justice. [...] Political philosophers who worry about conflicts between liberty and equality have the normative not the flat sense of these ideas in mind"<sup>7</sup>.

He thus distinguishes between two sorts of equality. The first is needed, however, in order to defend the second, for otherwise it would not be clear *who* should be treated equally with whom (certainly not every being, since humans are treated differently than animals). There even seems to be a circle here: in order to find out who should be treated equally with whom (the normative sense), one must appeal to equality (the flat sense) lest there be no basis to differentiate in the treatment of various beings (notably, in distinguishing between humans and animals). The circle can be resolved (Dworkin himself does not provide such a solution, not even considering this a problem in the first place) if one denies that two separate levels are at stake here, so that the obligation to treat beings equally follows from an element they share in common. This is what I will in fact argue in chapter 6, demonstrating how prescriptive equality (as I call it) is based on basic equality.

The distinction between 'flat' and 'normative' equality is similar to that between 'equal treatment' (which corresponds with formal equality as I have defined it, so long as economic equality is not considered) and 'treatment as an equal': "What rights to equality do citizens have as individuals which might defeat programs aimed at important economic and social policies, including the social policy of improving equality overall? There are two different sorts of rights they may be said to have. The first is the right to *equal treatment*, which is the right to an equal distribution of some opportunity or resource or burden. Every citizen, for example, has a right to an equal vote in a democratic state; that is the nerve of the Supreme Court's decision that one person must have one vote even if a different and more complex arrangement would better secure the collective welfare. The second is the right to *treatment as an equal*, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else. [...] [T]he right to treatment as an equal is fundamental, and the right

<sup>7</sup> R. DWORKIN, *Sovereign Virtue*, p. 126.

to equal treatment, derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances"<sup>8</sup>.

3.3. Dworkin is right, I think, when he says that the government must treat people with equal concern and respect, but fails to make it clear why this would be, as he claims, a postulate of political morality<sup>9</sup>. (In *Justice for Hedgehogs*, Dworkin makes an effort to present a meta-ethical theory<sup>10</sup>, although he would himself not use this vocabulary, presenting in this regard, too, an alternative of his own<sup>11</sup>. The theory leaves a number of things to be desired, but this is not the place to go into these matters.) 'Respect' is most convincingly associated with power (this issue is explored in section 6.9). In any event, Dworkin states: "Equal concern is the sovereign virtue of political community – without it government is only tyranny [...]"<sup>12</sup>, but this is a false dilemma, fueled by a rhetorical use of the word 'tyranny'. After all, what does 'tyranny' mean?

For Aristotle it is a kind of monarchy in which only the interest of the monarch is served<sup>13</sup>. The problem with this notion is that in another kind of monarchy than a tyranny, the monarch would also have the interests of others in mind, which is not necessarily the case; he could, *e.g.*, simply enforce laws that the public finds agreeable in order to appease them. Hobbes's view is the following: "[A King and a Tyrant] differ [...] in the sole exercise of their command, insomuch as he is said to be a King, who governs well, and he a *Tyrant* that doth otherwise. The case therefore is brought to this passe, That a King legitimately constituted in his *Government*, if he seeme to his Subjects to Rule well, and to their liking, they afford him the appellation of a King, if not, they count him a *Tyrant* [...]"<sup>14</sup>.

To 'govern well' is a criterion relating to content. It would perhaps be preferable to opt for a criterion that stresses the procedure, and focus on the rule of law; in a democratic state where the rule of law applies, this means, *inter alia*, that elections are held (to ensure that the government acts as the people (*i.e.*, the electorate) wants it to). To

<sup>8</sup> R. DWORBIN, *Taking Rights Seriously*, pp. 226, 227; cf. *A Matter of Principle*, p. 190, and *Sovereign Virtue*, p. 11.

<sup>9</sup> R. DWORBIN, *Taking Rights Seriously*, pp. 272, 273.

<sup>10</sup> R. DWORBIN, *Justice for Hedgehogs*, Chs. 2-6 (pp. 23-122).

<sup>11</sup> R. DWORBIN, *Justice for Hedgehogs*, pp. 25, 31. 'Dignity' is an important notion in this work (*e.g.*, p. 204), but for the present discussion it does not yield any relevant results.

<sup>12</sup> R. DWORBIN, *Sovereign Virtue*, p. 1.

<sup>13</sup> ARISTOTLE, *Politica*, 1279b.

<sup>14</sup> Th. HOBBS, *De Cive* (the English version), Ch. 7, § 3 (p. 108).

be clear: democracy is just an example. The rule of law can apply without there being a democratic form of government<sup>15</sup>. In this respect, I agree with Raz when he says that “[...] the rule of law is [...] not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies”<sup>16</sup>. So long as the procedure is legitimate, the regime cannot be characterized as tyrannical. That is not to say that such a regime would necessarily be *desirable* (since it is compatible with a form of government in which minorities are discriminated against), but that is another matter. (It is certainly a matter relevant to the present study, so I must address it, but that does not necessarily mean that it must be analyzed in detail here.)

One may agree with Dworkin’s remark about the government’s task without at the same time adopting his evaluation of it, by proposing the following, I think, more compelling, alternative. Anyone would want the government to treat people with equal concern and respect for the simple reason that if unequal treatment were accepted, and one cannot know if one will one day belong to a relevant minority (be it in a respect that has immediate consequences, such as being handicapped or unemployed, or one whose consequences may be difficult to assess, such as one’s race or adherence to a religion), it is simply rational (prudent, in the non-‘moral’ sense discerned above) to agree with a basic scheme for all parties

<sup>15</sup> Conversely, a government can be democratically legitimate without adhering to the rule of law (as I said in the introduction (*vide* note 11), in the case of *liberal* democracy this is somewhat more complicated); cf. C. SCHMITT, *Verfassungslehre*, p. 258: “Der demokratische Gesetzbegriff ist ein politischer, kein rechtstaatlicher Gesetzbegriff; er geht aus von der potestas des Volkes und besagt, daß Gesetz alles ist, was das Volk will; lex est quod populus jussit [...]” (“The democratic concept of law is a political concept, not one of a state of law (‘Rechtsstaat’); it is based on the power of the people and expresses that law is anything the people wants; the law is what the people has commanded.”) Besides, ‘state of law’, or ‘Rechtsstaat’, is no clearly delineated term (cf. C. SCHMITT, *Legalität und Legitimität*, p. 19). Alternatively, one may argue that governing legitimately includes equal concern for those that are governed and respecting their freedom (R. DWORKIN, *Justice for Hedgehogs*, p. 2), but that is just a matter of vocabulary (whether something meets one’s criterion depends on the definition with which one starts).

<sup>16</sup> J. RAZ, “The Rule of Law and Its Virtue”, p. 14. Schmitt, when dealing with ‘freedom’ in this context, puts it as follows: “Domestic political freedom is the principle of the civil state of law (‘Rechtsstaat’), which modifies the principles of political form when it is joined with them, whether they be monarchical, aristocratic or democratic.” (“Die innerpolitische Freiheit ist das Prinzip des bürgerlichen Rechtsstaates, das zu den politischen Formprinzipien – mögen sie nun monarchisch, aristokratisch oder demokratisch sein – modifizierend hinzutritt.”), *Verfassungslehre*, p. 224.

involved. (This is basically what Rawls also suggests, though, crucially, on another basis than I do.) The fact that a line is still drawn *somewhere* (animals are excluded from such a scheme; some rights are protected in some societies, but usually to a very limited degree<sup>17</sup>) seems to be a sign that basic equality is the criterion to grant rights in the most important cases.

3.4. This is not Dworkin's approach, however, which differs from both Rawls's account and my own, to be expounded in chapter 6. He states: "[...] I believe that we are now united in accepting the abstract egalitarian principle: government must act to make the lives of those it governs better lives, and it must show equal concern for the life of each"<sup>18</sup>. This gives rise to the question what 'each' means. Apparently, this refers to each *human* being, which needs a defense, and this is precisely what is lacking in Dworkin's approach, which introduces an assumption at this level. Pojman stresses the weakness, or at least abstract nature, of Dworkin's position in this regard when he interprets Dworkin's justification to respect individual rights as follows: "It is a given, something intuitively self-evident. The notion of equal natural rights based on equal human worth simply becomes the assumption that replaces earlier religious or Kantian metaphysical assumptions"<sup>19</sup>. Dworkin appeals to "the principle of intrinsic value", supposedly shared by "almost all of us", which "[...] holds that each human life has a special kind of objective value"<sup>20</sup>. The notion of 'intrinsic value' is vague, however, and, besides, for something valuable to exist an assessor of its value seems indispensable, which makes the word 'intrinsic' problematic<sup>21</sup>. If someone should want to avoid this problem by awarding mankind this role, it is not surprising that he would consider mankind (his own species) the only (or at least most) valuable being<sup>22</sup>.

<sup>17</sup> For example, in article 20a of the German Constitution the position of (*inter alia*) animals is considered, but the article starts as follows: "Der Staat schützt auch in Verantwortung für die künftigen Generationen die natürlichen Lebensgrundlagen und die Tiere..." ("The state protects, mindful also of its responsibility towards future generations, the natural foundations of life and animals..."), so that animals are (at least partly) considered, just as natural resources, as means (for future human beings).

<sup>18</sup> R. DWORKIN, *Sovereign Virtue*, p. 128.

<sup>19</sup> L. POJMAN, "Are Human Rights Based on Equal Human Worth?", p. 609.

<sup>20</sup> R. DWORKIN, *Is Democracy Possible Here?*, p. 9.

<sup>21</sup> Cf. Schopenhauer's criticism of Kant's notions of an 'end in itself' ("Zweck an sich", or "Zweck an sich selbst") and 'absolute value' ("absoluter Werth") in *Die beiden Grundprobleme der Ethik*, p. 161. (This important part of Kant's philosophy will be discussed in sections 5.3 and 5.4.) Schopenhauer goes so far as to say that these definitions affront logic (*Die beiden Grundprobleme der Ethik*, p. 161) as relative terms are formulated as if they were absolute.

<sup>22</sup> Cf. A. SCHOPENHAUER, *Die beiden Grundprobleme der Ethik*, p. 162.

Yet I would not plead the expansion of the domain of those supposedly having such a value, but rather presume that none does, for the simple reason that such a basis seems too unstable or vague to reach a convincing position. If Dworkin argues, on the basis just outlined, that “Someone’s most basic human right [...] is his right to be treated by those in power in a way that is not inconsistent with their accepting that his life is of intrinsic importance and that he has a personal responsibility for realizing value in his own life”<sup>23</sup>, someone else might argue that animals are entitled to the same treatment (though presumably merely on the basis of the first of these principles), and another, who considers the entire notion of ‘intrinsic value’ meaningless, that such a basis is absent for each case (both human and non-human). The last situation would, if one should want to found one’s scheme on such a notion, seem to result in a lack of a solid basis to grant rights at all. Since this situation reflects my position, it is incumbent on me to provide an alternative approach. I will postpone doing this until the present matter will have been sufficiently explored. To that end, I will start with an inquiry of the notion of ‘human dignity’ in order to determine whether this may be a viable candidate to buttress a theory such as that of Dworkin.

### 3.5. Summary and Relation to Chapter 4

The major problem with Rawls’s account lies in his unwillingness to clarify the significance of rationality; Dworkin’s position is more abstract, not specifying *any* feature but opting for an ‘intrinsic value’ as the decisive element to deem beings equal to one another. The problem of vagueness that this alternative brings is supplemented by the fact that no reason why some beings should be considered ‘intrinsically valuable’ (and others not) is provided. Considering its relatively abstract nature, in order for this account to be justified, it would have to be supported by an even more solid foundation than one such as Rawls’s, although one wonders whether such a foundation can be produced at all. This will be the decisive question in chapter 4. Kateb, whose work will receive some attention, is indeed very clear on the justification of his starting points, but that does not entail that this justification is correct.

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<sup>23</sup> R. DWORKIN, *Is Democracy Possible Here?*, p. 35.



## Chapter 4

### THE IMPORT OF 'HUMAN DIGNITY'

4.1. Having examined Rawls's and Dworkin's views, I will explicate the decisive presumptions that are prevalent in these views, so that the discussion can be broadened. This also affords the opportunity to evaluate such presumptions. Dworkin's position could be supplemented by a notion such as 'human dignity', while Rawls's perspective, which focuses on reason, may benefit from an examination from a Kantian stance. Such an extension of the discussion would be desirable in any event, since I would not limit the research to an exegesis of the works of these authors, which serve merely as starting points here, albeit important ones. The first explication is presented in the present chapter and consists in an examination of 'human dignity', while the next chapter provides the Kantian stance just adumbrated.

'Human dignity' has many defenders. Rather than to provide an overview here, I will concentrate on one author and expand the discussion from there. The author in question is George Kateb, since in his work *Human Dignity*, 'human dignity' is not just, as is the case with many of its protagonists<sup>1</sup>, an assumption or presumption necessary to argue some philosophical outlook, but features itself as the object of inquiry. I will first scrutinize the arguments Kateb amasses<sup>2</sup>. The result of this process bears on the position of other thinkers as well, so that the relevance of what is brought to the fore in this chapter is not limited to his presentation. In order to make the practical relevance of the discussion clear, I will subsequently refer to some representative legislation in which the phrase 'human dignity' appears.

4.2. One way to consolidate the rights of their bearers is to seek a justification in their being human as a special element. Incidentally, in this case – as in any similar argument – the justification will *succeed* rather than *precede* the actual *status quo*, since the discussion arises only *within* a society the presence of which is a condition for it to arise

<sup>1</sup> E.g., M. NUSSBAUM, *Frontiers of Justice*, p. 79: "The basic intuitive idea of my version of the capabilities approach is that we begin with a conception of the dignity of the human being, and of a life that is worthy of that dignity [...]."

<sup>2</sup> The first part of the following text corresponds with what is said in my review of George Kateb's *Human Dignity*, which appeared in *Dialogue*, vol. 51, no. 2 (2012), pp. 329-333.

at all<sup>3</sup>. (Whether it be governed democratically or not is not irrelevant for this issue, but not crucial.) I will initially focus here on Kateb's *Human Dignity*, which aspires to an encompassing theory on mankind's place in the world, and to designate the consequences this has for the evaluation of mankind.

4.3. Kateb's work is brought to the fore here as an example of a theory that tries to accommodate for certain human qualities while at the same time providing a scheme that protects the interests of those that lack them. It is, as I will indicate, in my view, a typical example of a theory that wants too much, so to speak: it is unwilling to sacrifice what is special in humanity but fails to accept the consequences of this premise when it is pressed to do so, thus leaving an account that may be considered inconsistent or even void.

The outline of *Human Dignity* is presented thus: "I wish to go to the extent of saying that the human species is indeed something special, that it possesses valuable, commendable uniqueness or distinctiveness that is unlike the uniqueness of any other species. It has higher dignity than all other species, or a qualitatively different dignity from all of them. The higher dignity is theoretically founded on humanity's partial discontinuity with nature. Humanity is not only natural, whereas all other species are only natural. The reasons for this assertion, however, have nothing to do with theology or religion.

I therefore work with the assumption that we can distinguish between the dignity of every human individual and the dignity of the human species as a whole. With that assumption in place, I make another assumption, that the dignity of every individual is equal to that of every other; which is to say that every human being has a *status* equal to that of all others. [...] All individuals are equal; no other species is equal to humanity. These are the two basic propositions that make up the concept of human dignity. The idea that humanity is special comes into play when species are compared to one another from an external and deindividualized (though of course only human) point of view. When we refer to the dignity of the human species, we could speak of the *stature* of the human race as distinguished from the *status* of individuals"<sup>4</sup>.

<sup>3</sup> This brings to mind Hobbes's remark that philosophy can only take place in a commonwealth (*Leviathan*, Ch. 46 (p. 459); cf. Ch. 13 (p. 89)).

<sup>4</sup> G. KATEB, *Human Dignity*, pp. 5, 6.



4.4. Kateb's notion of 'human dignity' is an intricate one, incorporating status and stature<sup>5</sup> (as mentioned above). One wonders, though, what could prompt such an amalgam. If there were merely a need to underline the special contributions individuals (are able to) accomplish, the stature aspect would obviously be a superfluous addition. The benefit – if that is what this is – of such a conception is, in any event, that it includes those who cannot claim any merit; for them the stature aspect is the crucial element. A clear downside of this element is its vagueness, which may be precisely what accounts for its success to accommodate those that lack a status in the *actual* sense (to contrast it with the author's conception of this word). (I must be a bit harsh here, since even this word's meaning is hollowed out by the author, who clearly does not want to acknowledge the relevance of any qualities that are not evenly divided among human beings.)

The difficulties are brought to the fore by Kateb's insistence to consider uniqueness to be "[...] the element common to status and stature [...]"<sup>6</sup>. This becomes apparent when it is somewhat concretized: "[...] the dignity of the human species lies in its uniqueness in a world of species. I am what no one else is, while not existentially superior to anyone else; we human beings belong to a species that is what no other species is; it is the highest species on earth – so far"<sup>7</sup>. Still, if Kateb is, as would appear to be the case, not willing to make choices, and, in other words, to single out one or more actual criteria on the basis of which the human species's 'dignity' would subsequently be defended, it is simply the bare fact of belonging to this species that is decisive, namely (presumably) having certain *physical* characteristics, making the decisive element an arbitrary one. Once Kateb reaches the point where he starts to list the characteristics that are unique to human beings, it is clear that he dismisses such a way out (and rightly so, for the reason just mentioned), but he does not provide another solution: "All the traits and attributes are based in the body, but none is reducible to a merely biological phenomenon with an exclusively biological explanation. They all establish that humanity is partly nonnatural"<sup>8</sup>.

It is not reason (in whatever sense) that is crucial, as this would exclude those that are seriously cognitively impaired, and would

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<sup>5</sup> G. KATEB, *Human Dignity*, p. 9; cf. p. 18.

<sup>6</sup> G. KATEB, *Human Dignity*, p. 8.

<sup>7</sup> G. KATEB, *Human Dignity*, p. 17.

<sup>8</sup> G. KATEB, *Human Dignity*, p. 133.

easily force a modification of this outlook, either conferring 'dignity' on those animals that exhibit more intelligence than these individuals, or denying these individuals 'dignity'. Neither of these options is open to Kateb, which makes the vagueness of his definitions all the more problematic<sup>9</sup>. It also makes it suspicious, to phrase it thus: it is almost as if the theory were constructed with the agenda in mind to create a 'safe haven' for every human being, while being able to justify a different treatment for animals (whose suffering, not belonging to a species that is unique, is less important than that of mankind<sup>10</sup>). This becomes apparent, *e.g.*, when Kateb says, committing an obvious *argumentum ad consequentiam*: "[...] we should not speak as if at any time degraded human beings are no longer human; to do so would justify the treatment inflicted on them"<sup>11</sup>.

Taylor's analysis is similarly problematic: "[...] men and women are the beings who exhibit certain capacities which are worthy of respect. The fact that we ascribe rights to idiots, people in a coma, bad men who have irretrievably turned their back on the proper development of these capacities, and so on, does not show that the capacities are irrelevant. It shows only that we have a powerful sense that the status of being a creature defined by its potential for these capacities cannot be lost"<sup>12</sup>. In such cases as those that are mentioned, however, the most credible position is that the potential is indeed lost, and that the very nature of the creature has changed in a decisive way, for otherwise one should be forced to acknowledge that some

<sup>9</sup> Incidentally, it would be a *non sequitur* to conclude from the mere fact that the human species is unique that it should *eo ipso* be 'elevated' in some way compared to the other species. One need only point to some conspicuous actions in history that humans uniquely perform to know that caution in making such an inference is warranted. As far as I know, the systematic destruction of one's own species and others, apart from that of the planet as a whole, is not behavior consistently manifested by any animal. Of course, the very reason why humans are, in contradistinction to animals, capable of performing such acts in the first place may be said to testify to the presence of a special quality, but if the mere *capacity* to act in some way or other (*i.e.*, in a positive or negative, or, less vaguely, desirable or non-desirable way) is sufficient to have 'human dignity', this may perhaps be said to detract from the notion's value (irrespective of the more fundamental issue of its possible semantic voidness).

<sup>10</sup> G. KATEB, *Human Dignity*, pp. 22, 23. Kateb does not ignore animals' suffering, though, and speaks of animal rights as "[...] made up of two components: the quasi-moral and the quasi-existential, in analogy with human rights", *Human Dignity*, p. 117.

<sup>11</sup> G. KATEB, *Human Dignity*, p. 21.

<sup>12</sup> Ch. TAYLOR, *Philosophy and the Human Sciences*, p. 196. Incidentally, in *Sources of the Self*, Taylor upholds a contingent sense of 'dignity', so to speak, and points out its problems involved with it: "[...] my sense of myself as a householder, father of a family, holding down a job, providing for my dependants; all this can be the basis of my sense of dignity. Just as its absence can be catastrophic, can shatter it by totally undermining my feeling of self-worth. Here the sense of dignity is woven into this modern notion of the importance of ordinary life, which reappears again on this axis", *Sources of the Self*, pp. 15, 16.

faith, *i.e.*, an *unfounded* view (which may in this case be expressed by the phrase wishful thinking), is decisive. If one notices the irrevocable loss of the capacities that are deemed necessary to conclude that the being in question merits respect, the only defensible conclusion is that such respect, and *a fortiori* its particular status, along with the special rights that accompany it, can no longer credibly be acknowledged, at least not in the way indicated above.

4.5. On the basis of the foregoing, it appears difficult, if not downright impossible, to delineate, within this frame of thought, a domain to which human beings exclusively belong on account of a non-trivial trait. This may be called a lower limit when it comes to seeking a contrast with those species that (supposedly) lack (this sort of) 'dignity'. The upper limit, by contrast, lies in the acknowledgement of the non-existence of a special standing for those human beings that are endowed with extraordinary qualities (at least at the level of analysis with which I am concerned. Kateb does not overlook the differences between individual human beings). Still, he seems to need precisely the achievements of such individuals to buttress the special position of mankind: "[...] equal individual status is shored up by the great achievements that testify to human stature because [...] they rebut the contention that human beings are merely another species in nature, and thus prepare the way for us to regard every person in his or her potentiality"<sup>13</sup>.

'Great achievements' would in fact plead *inequality* among human beings (since the greatness of such achievements is acknowledged by contrasting them with achievements of others that are *not* great). The uniqueness of the species can, accordingly, only be said to follow from the achievements of great individuals (or at least not from the acts of each individual), forgoing here the matter what factors constitute the acts of such individuals; in the most extreme cases (people that are significantly cognitively impaired), individuals are not even *capable of* performing unique accomplishments. It must be granted that Kateb connects the great achievements to human *stature*<sup>14</sup> rather than to the status of individuals, so that individuals may be said to 'share' in the achievements: they are of the same species as the 'great' individuals and might be considered, from this perspective, to achieve great things if the circumstances had been

<sup>13</sup> G. KATEB, *Human Dignity*, p. 8; cf. p. 115.

<sup>14</sup> *E.g.*, G. KATEB, *Human Dignity*, p. 179.

different, whereas an animal would (presumably) never be able to, e.g., compose music or cure a disease.

If this reasoning is carried through consistently, those individuals who are unable to contribute in such a way should not be considered human beings. The alternative consists in including such beings, at the expense of the disappearance of the demarcation line (the lower limit just mentioned) between human beings and animals. This is not what Kateb would argue, focusing on the fact of being human: “There are people who are so disabled that they cannot function. Does the idea of dignity apply to them? Yes, they remain human beings in the most important respect. If they cannot actively exercise many or any of their rights they nevertheless retain a right to life, whatever their incapacities (short of the most extreme failures of functioning)”<sup>15</sup>.

It is not surprising that Kateb finds himself in a split, which can only be considered to be a dilemma, although he does not himself describe it as such<sup>16</sup>: “I am not saying that when we regard any particular individual we should see in him or her an embodiment or personification of the whole human record, and by that conceit inflate the person into the species, or even allow the full range of demonstrated human capacity to bestow its aura on any given human being or on all human beings equally. No, we deal here with the stature of the species, carrying with it a past that grew out of other species and will be extended indefinitely into the future. But the fact remains that every individual has all the uniquely human traits and attributes that the human record shows. The human record shows and will show, however, a cumulative display of these traits and attributes that surpasses any individual and any particular group or society”<sup>17</sup>.

On the one hand, individuals are not the personification of the human record (so that the individuals whose mental capacities are exceeded by those of some animals are included – at the same time, a supposedly common ground (the very human record) between ‘great’ individuals and these individuals is lost), but on the other hand, every individual has all the decisive traits and attributes to include him (which is easily refuted on the basis of experience).

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<sup>15</sup> G. KATEB, *Human Dignity*, p. 19.

<sup>16</sup> The fact that he does not characterize the matter in such a way does not, of course, relieve him of the task to take the problem seriously.

<sup>17</sup> G. KATEB, *Human Dignity*, pp. 125, 126; cf. p. 179.

4.6. What does all this mean for the issue of granting rights? Kateb says: "Two kinds of equality are involved when the state recognizes and respects human rights. First, there is moral equality, and second, there is the equal status of every individual"<sup>18</sup>. The first sort of equality is difficult to maintain in light of the preceding analysis. The second sort of equality, the equal status of every individual, by contrast, can be defended, but in order to eliminate the difficulties pointed out above, another foundation (or, rather, *a* foundation) must be provided. This is what I will attempt to do in my own alternative. For now, I will broaden the inquiry with regard to the topic at hand, examining whether 'human dignity' may serve as a basis to grant rights.

The problem with 'human dignity', it seems, is that it is an honorific rather than a description, so that the reason *why* 'dignity' should be bestowed on human beings remains to be clarified<sup>19</sup>. One may contrast this with an honorific bestowed on, *e.g.*, athletes who have shown extraordinary accomplishments. They are praised for this, and in this consists the honorific: the honorific is based on some quality or performance considered exceptional by some<sup>20</sup>. Crucially, such an honorific can only have a meaning if the reason for it to be bestowed can be *contrasted* with situations in which it would be out of place. The honorific is bestowed on athletes who show, as I said, extraordinary accomplishments. They are 'extra'-ordinary (beyond the ordinary) in the sense that ordinary people (or the athletes with whom they compete) cannot (or, in any event, do not) perform such feats. If a medal were to be awarded to anyone who is able to walk, *e.g.*, the number of people lauded would be so great that it would lose its meaning. The contrast with others not able to act thus is lacking in this latter case<sup>21</sup>.

In the case of 'human dignity', the problem seems to be that everyone who is a human being (a person) is *eo ipso* qualified a proper candidate to have 'dignity' bestowed on him. There is no contrast

<sup>18</sup> G. KATEB, *Human Dignity*, p. 30.

<sup>19</sup> One may define 'dignity' as "[...] a matter of status – one's status as a member of society in good standing" (J. WALDRON, "Dignity and Defamation: The Visibility of Hate", pp. 1611, 1612 (*cf.* p. 1610)), but while this provides a notion that has practical merit, it would be difficult to underpin it in terms of the present discussion, especially if it is added that "Philosophically speaking, we may say that dignity is inherent in the human person – and so it is.", "Dignity and Defamation: The Visibility of Hate", p. 1612.

<sup>20</sup> It is not necessary to dwell on the issue of whether praise is in each case warranted. The example is merely used to make a point.

<sup>21</sup> The contrast with those who are quite unable to walk (some handicapped people) is of course irrelevant here.

(not even with those who lack reason, who are still treated with ‘dignity’ (if they cannot fend for themselves, they are not simply abandoned, which would probably mean their death, but are taken care of in special institutions)). (There is, to be sure, a more fundamental contrast, namely with non-humans (animals).) If there is no criterion to bestow an honorific (such as ‘dignity’), the honorific itself loses all meaning<sup>22</sup>. As Hegel says, to say that persons are equals is an empty, tautological statement (“ein leerer tautologischer Satz”) as long as ‘person’ has not been specified and thus remains an abstraction<sup>23</sup>.

An alternative would be not to focus on the ‘human’ part of ‘human dignity’ but rather to deem a characteristic decisive that some may be said to exhibit and which others lack, such as rationality. If rationality in the sense of a (mere) theoretical faculty is the focal point, some may be inclined to speak of ‘worth’, but in this case, the *differences* between individuals would have to be stressed. This is what Pojman does when he says: “Contrary to the egalitarians, and in spite of the widespread acceptance of the ‘egalitarian plateau,’ there is good reason to believe that humans are not of equal worth. Given the empirical observation, it is hard to see that humans are equal in any way at all”<sup>24</sup>.

Likewise, Hobbes qualifies man’s (value or) worth as his price<sup>25</sup>, while defining ‘dignity’ as “The publique worth of a man, which is the Value set on him by the Common-wealth [...]”<sup>26</sup>. In such a case, ‘human dignity’ in the sense discussed here is in fact hollowed out. Another conception of rationality (or reason) may be put forward to evade this outcome. This is Kant’s alternative. Crucially, his stance differs from Pojman’s in that ‘given the empirical observation’ is not relevant for him, which may be a way to salvage, so to speak, ‘dignity’, but given the ‘costs’ in philosophical terms, it must be

<sup>22</sup> Cf. C. SCHMITT, *Verfassungslehre*, p. 227 and *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, p. 14. On p. 17 of the latter work, he says: “Eine absolute Menschengleichheit wäre [...] eine Gleichheit, die sich ohne Risiko von selbst versteht, eine Gleichheit ohne das notwendige Korrelat der Ungleichheit und infolgedessen eine begrifflich und praktisch nichtssagende, gleichgültige Gleichheit.” (“An absolute equality of human beings would be an equality that is understood by itself without any risk, an equality without the necessary correlate of inequality and consequently an equality that is both conceptually and practically void and indifferent.”)

<sup>23</sup> G. W. F. HEGEL, *Grundlinien der Philosophie des Rechts*, § 49 (pp. 102, 103).

<sup>24</sup> L. POJMAN, “Are Human Rights Based on Equal Human Worth?”, p. 621.

<sup>25</sup> Th. HOBBS, *Leviathan*, Ch. 10 (p. 63): “The Value, or WORTH of a man, is as of all other things, his Price; that is to say, so much as would be given for the use of his Power: and therefore is not absolute; but a thing dependant on the need and judgement of another.”

<sup>26</sup> Th. HOBBS, *Leviathan*, Ch. 10 (p. 63).

demanded whether this constitutes a viable option. Kant's proposal will be expounded in chapter 5.

If one should, however, want to stress the 'human' part, it may be argued that, rather than to find a quality that may serve as the basis to bestow such an honorific, 'human dignity' has been 'invented'<sup>27</sup> to serve as a political means (if all human beings (rather than just a selected group, on the basis of some specific quality that these individuals share and those not included in this group lack) are to be considered bestowed with 'dignity', they are all shielded against acts that would conflict with respecting such a quality). It is not the case that one encounters 'human dignity' through experience and consequently uses this quality as the basis for one's political outlook; the outlook itself demands that such a fiction be created. The alternative, that 'human dignity' can be derived from nature somehow, would have to account for the fact that *human* 'dignity' and not *non-human* (*animal*) 'dignity' is said to exist, which is impossible for the same reason outlined above, namely, that no criterion is provided on the basis of which 'dignity' can be bestowed<sup>28</sup>.

Only if such a criterion were provided could the contrast between humans and non-humans be explained on other grounds than political ones, but this would render humanity (being human) as the basic feature problematic. This is precisely the dilemma Benn faces<sup>29</sup> and which he is clearly unable to resolve: "[...] we respect the interests of men and give them priority over dogs not insofar as they are rational, but because rationality is the human norm. We say it is unfair to exploit the deficiencies of the imbecile, who falls short of the norm, just as it would be unfair, and not just ordinarily dishonest, to steal from a blind man. [...] [A] man does not become a member of a different species, with its own standards of normality, by reason of not possessing [the characteristics that distinguish the normal man from the normal dog]"<sup>30</sup>.

The problem here is not the claim that rationality is the human norm but rather that it is hard to defend on 'moral' grounds why this norm should exclusively be applied in dealing with members of one's

<sup>27</sup> I place the word between inverted commas as it may not have been contrived but rather (gradually) have become a workable notion. If this is indeed the case, the inquiry must be just as critical as when the outcome is a deliberate result.

<sup>28</sup> Incidentally, any argumentation in which a criterion is used by humans to bestow 'dignity' on humans is suspicious for that reason alone, especially if other species (animals) are claimed to be deprived of it.

<sup>29</sup> This brings to mind the dilemma with which Kateb finds (or should find) himself confronted (*cf.* section 4.5).

<sup>30</sup> S. BENN, "Egalitarianism and the Equal Consideration of Interests", p. 71.

own species. (Whether such a position may be defended on *other* than ‘moral’ grounds remains to be seen.) Such a stance easily leads to the (rightful) accusation of speciesism<sup>31</sup>, so that someone who “[...] would make ‘human worth’ dependent upon nothing more than being a member of a certain natural species is in similar trouble [as a racist, J.D.]”<sup>32</sup>. (Incidentally, Kateb denies that the accusation of speciesism (referring to it as ‘species snobbery’) applies to his position<sup>33</sup>, but I have found no basis in his work that would support this.) It may be argued that unqualified speciesism, which means that species per se is ‘morally’ relevant, is question begging<sup>34</sup>, or even *a priori* unacceptable. It is understandable that mankind should want to award itself a special position, but that does not point to a ‘moral’ foundation<sup>35</sup> and may perhaps more convincingly be construed as an attempt (and a successful one at that) to find the most agreeable outcome, having to take into consideration the interests of the beings that, like mankind, can claim certain rights while being able to exclude those that are unable to do so.

4.7. It is worthwhile to examine some representative legislation in which the notion of ‘human dignity’ features, so that the discussion is shown not to be a merely academic one. The present legislation at the international level (forgoing here the issue of whether ‘international law’ is actually law) appears to consider ‘human dignity’ a (‘moral’) axiom<sup>36</sup>. To present some examples:

### *Consolidated Version of the Treaty on European Union*

#### *Article 2*

*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human*

<sup>31</sup> This may be defined as follows: “To base judgements and/or treatment of an individual on their species where species is not relevant.” (J. TANNER, “The Argument from Marginal Cases: Is Species a Relevant Difference”, p. 228), or as “[...] a prejudice or attitude of bias in favor of the interests of members of one’s own species and against those of members of other species”, P. SINGER, *Animal Liberation*, p. 6.

<sup>32</sup> D. A. LLOYD THOMAS, “Equality Within the Limits of Reason Alone”, p. 541.

<sup>33</sup> G. KATEB, *Human Dignity*, p. 179.

<sup>34</sup> J. TANNER, “The Argument from Marginal Cases: Is Species a Relevant Difference”, p. 228.

<sup>35</sup> Cf. C. SCHMITT, *Verfassungslehre*, p. 226: “Daraus, daß alle Menschen Menschen sind, läßt sich weder religiös, noch moralisch, noch politisch, noch wirtschaftlich etwas Spezifisches entnehmen.” (“Nothing distinctive can be derived from the given that all human beings are human beings, be it in religious, moral, political or economic terms.”)

<sup>36</sup> It features at the national level as well. Article 1 of the German constitution, *e.g.*, starts as follows: “Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.” (“The dignity of man is inviolable. It is the duty of all state authority to respect and to protect it.”) Incidentally, ‘dignity’ seems not to have come to the fore in legislation until the 20<sup>th</sup> century (D. SCHROEDER, “Human Rights and Human Dignity”, p. 324).



*rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

The International Covenant on Civil and Political Rights (ICCPR) is rife with references to 'human dignity':

### ***International Covenant on Civil and Political Rights***

#### ***Preamble***

*Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,  
Recognizing that these rights derive from the inherent dignity of the human person,*

#### ***Article 6***

*1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

#### ***Article 10***

*1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*

#### ***Article 47***

*Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.*

The word 'inherent' is similar to 'intrinsic'. It may have been used here to point to the fact that something important is at stake, but including it does not in fact reach that goal. It only adds an element (one might even say: a *metaphysical* element) to (presumably) solidify the meaning; it would be the same as saying that the human person has an essential 'dignity' (it belongs to the essence of a human being). If this means anything at all, it is not clear what, and if it does not mean anything in the first place, it is of no use to protect it from being violated, just as it would be in vain to erect a concrete wall around a box presumably containing the essence of an (invisible) round

square. One could have started article 6 with “Every human being has the right to life”. This would acknowledge the fact that such a right exists, without resorting to a supposedly existing right prior to granting this. In other words, one would not speculate whether such a right in fact exists irrespective of its being granted by the legislator.

The objection that the importance of the right is not sufficiently acknowledged thus is easily refuted by putting forward the questions: (1) does such a supposedly natural basis actually add anything in explanatory power, and can its existence be proved?, and (2), more importantly, does its presence add anything in practical consequences? As for the second point: should someone be deprived of a right, it should be enough to appeal to the relevant article. He may in addition claim that this is based on a natural right, but his assailant will presumably not be impressed by this, nor should it make a difference to the judge who must reach a decision.

‘Human dignity’ is not the starting point in legislation as an axiom in each case. For example, in the American Declaration of Independence, it is stated:

*When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.*

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.*

In this case, there is mention of laws of nature; the basis is apparently sought in a divine act, which becomes especially clear from the fact that the ‘unalienable rights’ have their source in God. This is problematic since it appeals to the existence of a God, and His (presumed) actions, but at least it is indicated what the basis of these (purportedly unalienable) rights is. (A remaining problem is the apparent self-evidence of these supposed truths.) A claim that ‘inherent rights’ should exist *without* a concomitant appeal to a divine foundation is in need of just as much support as one that does include such a basis. So if one leaves out the appeal to God, this does not mean that an actual explanation is provided; it just means, on the contrary, that one’s account is all the more abstract, and I know of no poorer methodolog-

ical approach than that which consists in confusing abstracting with explaining. By removing God from the equation, so to speak<sup>37</sup>, one has merely indicated which alternative one does not accept; if one leaves it at that, no explanation whatsoever is given. One still has to explain, accordingly, on what basis such rights should be 'inherent', presuming that such a basis can be provided at all, of course.

I have argued that this is not the case. That is not to say that the rights presented above for that reason become void, but rather that 'human dignity' fails to provide the legitimacy for their existence, so that it may be said to be superfluous<sup>38</sup>.

#### 4.8. Summary and Relation to Chapter 5

Kateb argues that 'human dignity' is what makes human beings special; it may be used as a standard to grant rights to – human – beings. A main problem is that it remains unclear what the 'stature' aspect adds to the analysis, unless it would be the inclusion of those whose value is not covered by the 'status' aspect, in which case 'human dignity' is veritably hollowed out. In addition, there must be an actual basis to grant 'human dignity'; if no such basis, being found in a characteristic (such as rationality, perhaps), is forthcoming (presuming that such a characteristic *would* suffice), the accusation of speciesism or the absence of an explanation looms. This is no mere academic observation, as the examples of international legislation show. Perhaps a return to the characteristic mentioned before, rationality, must, then, be considered, albeit, given the problems pointed out in chapter 2, from another perspective than the one that was presented there. This will be undertaken in chapter 5, where Kant's conception of 'reason' is the focus of attention.

<sup>37</sup> Such a locution will, I presume, not be taken to attest to an irreverent disposition.

<sup>38</sup> Cf. M. HOSSENFELDER, "Menschenwürde und Menschenrecht", p. 32: "Der Begriff der Würde findet in der Ableitung nirgendwo Verwendung. Er ist für die Begründung der Menschenrechte überflüssig und meine Empfehlung wäre, ihn in Zukunft tunlichst zu meiden. Zum einen wegen seiner Inhaltslehre." ("The concept of dignity is not applied anywhere in the derivation. It is superfluous for the founding of human rights and I would recommend that it be avoided in the future, if possible. In the first place because of its lack of content.") This means that this account must be traded in for an alternative 'moral' standard of the same standing, presuming one is (readily) available lest the right's legitimacy be a postulate rather than a demonstrable given. Failing such an alternative – or at least the proof that one exists –, a relatively modest account, cleansed of all 'moral' elements, is the only viable option.



## Chapter 5

### A CRITIQUE OF REASON

5.1. The previous chapter was concentrated on ‘human dignity’. For the reasons put forward there, this notion fails to function as a foundation to grant rights to human beings. An alternative would be to force the propagators of rights to show their colors, and use an actual criterion. In this chapter I will present an obvious candidate to fulfill such a role: reason. It is such a candidate since reason is often considered a special quality, perhaps even belonging to a different category than physical qualities. Whether reason is in fact the decisive element in such a way remains to be seen, of course. In chapter 2, Rawls was shown to exhibit such a stance. I will examine the arguments of the philosopher who may be considered his precursor in this regard, Immanuel Kant, to consider reason – as he understands it – to be crucial in treating those who (are presumed to) act on the basis of reason in a special way.

5.2. The relevance of Kant’s work for the present study lies primarily in his emphasis on reason as the focal element for a ‘moral’ theory. It is precisely this aspect of his philosophy that may make it a suitable alternative to the alternative of starting with the – vague – notion of ‘human dignity’. (To anticipate matters somewhat, ‘dignity’ will turn out to be an important issue for Kant as well, but not, significantly, as a starting point (in the way it features in Kateb’s work, for instance).) By stressing the importance of reason, Kant seems at least to have found an actual criterion to distinguish between various beings. Whether his conception of this faculty will in the end provide a workable theory is what I will explore here.

5.3. First of all, it must be clear what Kant means by ‘reason’ in his ethical works. This is not to be taken in the sense of reasoning power, or in the sense which comes closest to this in his own main theoretical work, *Kritik der reinen Vernunft*, as the faculty of principles (“das Vermögen der Principien”)<sup>1</sup>, or the faculty to establish the unity of the rules of the understanding guided by principles (“das Vermögen der Einheit der Verstandesregeln unter Principien”)<sup>2</sup>.

<sup>1</sup> I. KANT, *Kritik der reinen Vernunft*, A 299/B 356.

<sup>2</sup> I. KANT, *Kritik der reinen Vernunft*, A 302/B 359.

It is not understanding<sup>3</sup> itself which constitutes the crucial difference between man and animal (since this merely leads to a relative difference<sup>4</sup>), but rather man's practical reason. That this is the decisive element is perhaps most clearly expressed by Kant when he states that it is on the basis of being autonomous that one is to be considered an end in itself<sup>5</sup>, which is (supposedly) possible in the domain that cannot be reached by the use of – theoretical – reason<sup>6</sup>. The (theoretical) reasoning powers do not, then, constitute the decisive ground for man to be considered an end in itself; something has 'dignity' on the basis of its capacity to act 'morally'<sup>7</sup>. Autonomy is the basis of the 'dignity' of man's nature, and of every reasonable creature (or 'nature', as Kant puts it)<sup>8</sup>.

5.4. Kant's notion of 'dignity' differs in a significant way from Kateb's. As was just demonstrated, Kant links this to autonomy; Kateb, by contrast, speaks of 'human dignity' as an existential rather than a 'moral' value (demonstrating his awareness of the difference from Kant's view)<sup>9</sup>. Crucially, 'dignity' is not a starting point for Kant, as it is for Kateb, who insists that "Human dignity is an existential value; value or worthiness is imputed to the identity of the person or the species"<sup>10</sup>.

For Kant, 'dignity' is rather a corollary of being endowed with, and acting in accordance with, (practical) reason. Indeed, from his vantage point, it should be considered a category mistake to *start* with 'dignity'. This does not necessarily mean that Kant's approach is correct, but merely that it is more intricate and consequently merits a serious inquiry. A false dilemma must be avoided: that Kant's theory provides a criterion that is not *a priori* to be *rejected* does not mean that it should therefore be *accepted*, for there may be (*a poste-*

<sup>3</sup> I do not explicate here the crucial distinction in Kant's theoretical philosophy between understanding ('Verstand') and reason ('Vernunft'), as this would digress needlessly from the topic at hand.

<sup>4</sup> I. KANT, *Die Metaphysik der Sitten*, pp. 435, 436; cf. notes 15 and 19, *infra*.

<sup>5</sup> I. KANT, *Kritik der praktischen Vernunft*, p. 87. Autonomy (of the will) is defined by Kant (*Grundlegung zur Metaphysik der Sitten*, p. 440) as "the state of the will by which it is a law to itself (independently of any state of the objects of volition)." ("[...] die Beschaffenheit des Willens, dadurch derselbe ihm selbst (unabhängig von aller Beschaffenheit der Gegenstände des Wollens) ein Gesetz ist.")

<sup>6</sup> E.g., I. KANT, *Kritik der reinen Vernunft*, A 532 ff./B 560 ff., A 702/B 730, A 800 ff./B 828 ff.

<sup>7</sup> I. KANT, *Grundlegung zur Metaphysik der Sitten*, p. 435.

<sup>8</sup> "Autonomy is the basis of the dignity of human and every reasonable nature." ("Autonomie ist [...] der Grund der Würde der menschlichen und jeder vernünftigen Natur."), I. KANT, *Grundlegung zur Metaphysik der Sitten*, p. 436.

<sup>9</sup> G. KATEB, *Human Dignity*, pp. 10-17.

<sup>10</sup> G. KATEB, *Human Dignity*, p. 10. On p. 24, Kateb says of human stature: "Human stature is essentially an existential, not a moral, value."

*riori*<sup>11</sup>) considerations on the basis of which it is, in the end, to be abandoned. A<sup>12</sup> clear difficulty with Kant's position is that freedom (in the sense of a 'free will'), which is the basis of autonomy, cannot be demonstrated<sup>13</sup> and must accordingly be presupposed or postulated<sup>14</sup>. This means that it is, strictly speaking, not up to a human being to judge whether someone (else) is 'dignified' or not (with the corollary, if one is consistent, that no ('moral') difference between man and animals can be made, at least not by human beings themselves). After all, human beings are not able to (empirically) observe the freedom of the beings they encounter, which would serve as the determining divide between beings that have a price and those that have a 'dignity'<sup>15</sup>.

On the other hand, Kant does at least provide a criterion to differentiate between beings that do not act autonomously and those that do, whereas Kateb, whose approach is not burdened by an elusive notion such as 'autonomy'<sup>16</sup>, fails to provide *any* criterion. If a human being is not able to act 'morally', he is not to be considered an end in itself. After all, Kant states: "Morality is the condition under which alone a reasonable being can be an end in itself, since it is only through morality that it is possible for it to be a legislating member in the realm of ends. So only ethics and humanity, insofar as it is capable of it, is that which has dignity"<sup>17</sup>. The phrase 'insofar as it is capable

<sup>11</sup> Indeed, any objection must, I think, be such: the matter cannot be resolved *a priori*.

<sup>12</sup> This is *a*, not *the* (only), difficulty, for several other issues remain which make Kant's position difficult to uphold; in some respects, the criticism of KATEB's position can be directed at Kant's as well.

<sup>13</sup> I. KANT, *Grundlegung zur Metaphysik der Sitten*, pp. 448, 461; on pp. 458, 459, Kant puts it as follows: "[...] alsdann würde die Vernunft alle ihre Grenze überschreiten, wenn es sich zu *erklären* unterfinge, wie reine Vernunft praktisch sein könne, welches völlig einerlei mit der Aufgabe sein würde, zu erklären, *wie Freiheit möglich sei*." ("Reason would exceed all its limits if it were to undertake to *explain* how pure reason could be practical, which would be completely identical to the task to explain *how freedom would be possible*.")

<sup>14</sup> I. KANT, *Grundlegung zur Metaphysik der Sitten*, pp. 449, 459. In *Kritik der reinen Vernunft* and *Kritik der praktischen Vernunft*, this topic is dealt with in greater detail. This is not the place to elaborate on this theme.

<sup>15</sup> I. KANT, *Grundlegung zur Metaphysik der Sitten*, pp. 434, 435.

<sup>16</sup> "[...] human dignity cannot depend on autonomy as its ultimate justification because most people, no matter how favorable the circumstances to individuality, will never break out of conformity to the extent that autonomy demands", G. KATEB, *Human Dignity*, p. 108. Strictly speaking, by the way, this observation does not strike Kant's viewpoint, as the place where he locates autonomy, if it exists at all, is not to be found through experience (pursuant to the characteristic distinction between the phenomenal and the noumenal realms (e.g., *Kritik der reinen Vernunft*, A 42, 43/B 59, 60, A 238, 239/B 298)), but that very fact may be said to be part of the problem in that it contributes to the elusiveness of the notion.

<sup>17</sup> "[...] Moralität [ist] die Bedingung, unter der allein ein vernünftiges Wesen Zweck an sich selbst sein kann, weil nur durch sie es möglich ist, ein gesetzgebend Glied im Reiche der Zwecke zu sein. Also ist Sittlichkeit und die Menschheit, so fern sie derselben fähig ist, dasjenige, was allein Würde hat", I. KANT, *Grundlegung zur Metaphysik der Sitten*, p. 435.

of it' makes it clear that it is not the mere fact of being a human being that is decisive but rather the ability to act 'morally'. This means that other reasonable beings than man, if they exist, may be 'moral' agents<sup>18</sup>. The accusation of speciesism cannot, then, be leveled against Kant.

This can also be inferred from what Kant says in *Die Metaphysik der Sitten*, in which simultaneously becomes apparent what was argued before, that reason as a theoretical faculty is not the decisive ability to grant human beings a special status, as there is only 'an *extrinsic* value' ('einen *äußeren* Werth') for man's usefulness, which only leads to a relative difference, based on a price ('Preis'), between human beings and animals, and that a human being has a dignity as a '*noumenal man*' ('*homo noumenon*'), in which case – *theoretical* reason not being decisive – he is regarded elevated above any price<sup>19</sup>.

On the basis of such considerations, man is said to have 'an inalienable dignity' ('eine unverlierbare Würde' ('*dignitas interna*'))<sup>20</sup>, a phrase that brings to mind the similar dictum in the legislation mentioned in the previous chapter with regard to 'inherent dignity' and 'inherent right'<sup>21</sup>.

5.5. What remains problematic in Kant's theory, *inter alia*, is that the crucial elements are unprovable and must be postulated (which appears most clearly in *Kritik der praktischen Vernunft*<sup>22</sup>). This has important consequences for a concept such as 'autonomy', which is difficult to grasp<sup>23</sup>. The concept may be said

<sup>18</sup> Cf. I. KANT, *Grundlegung zur Metaphysik der Sitten*, pp. 408, 426, 428, 430, 436, 447.

<sup>19</sup> I. KANT, *Die Metaphysik der Sitten*, pp. 435, 436.

<sup>20</sup> I. KANT, *Die Metaphysik der Sitten*, p. 436. A similar stance is exhibited by Fichte (*Über die Würde des Menschen*, pp. 87-89).

<sup>21</sup> Schopenhauer observes, based on a similar line of thought as the one mentioned above (*vide* chapter 3, note 21), that value, and, *a fortiori*, 'human dignity', is to be understood as a relative rather than an absolute notion (*Die beiden Grundprobleme der Ethik*, p. 166).

<sup>22</sup> I. KANT, *Kritik der praktischen Vernunft*, pp. 122-134.

<sup>23</sup> I leave it to the reader whether he is indeed, perhaps with some effort, able to do this. I myself am not: for me, the word has no meaning, and no concept corresponds with it. One may use 'autonomy' in a 'diluted' way, referring to the liberty citizens have (expressed, *e.g.*, through the political and legal rights that are the topic of this inquiry), but that is not a concept that would correspond with the encompassing (and literal) one of 'autonomy' addressed here. This means that Rawls's notion of 'full autonomy', which is presented as a political rather than an ethical value (*Political Liberalism*, Lecture II, pp. 77, 78), may be upheld while the problems with a notion such as 'rational autonomy', which is said to be "[...] shown in [persons'] exercising their capacity to form, to revise, and to pursue a conception of the good, and to deliberate in accordance with it" (Lecture II, p. 72), are apparent in light of the considerations presented above (although it must be granted that Rawls's version of even this variety of autonomy seems less ambitious than Kant's).



to result from an effort to artificially salvage a special status for man: "Autonomous man serves to explain only the things we are not yet able to explain in other ways. His existence depends upon our ignorance, and he naturally loses status as we come to know more about behavior"<sup>24</sup>.

5.6. Apart from this issue, the general difficulty is that 'dignity' cannot conclusively be said to follow from any characteristic. A distinction between desirable and non-desirable characteristics is easily made, by means of the basest observation. To conclude, however, that 'dignity' should in some cases be acknowledged attests to an unwarranted jump to an unobservable given. At first sight, the problem is not as grave as in the case of Kateb's line of reasoning, since Kant constructs a link between (practical) reason and 'dignity' rather than between (Kateb's vague conceptions of) 'humanity' and 'dignity'. However, the difference is actually largely cosmetic, for in the end, anyone employing a notion such as 'dignity' will have to be clear what it means (if this is possible at all).

The problem I mentioned in section 4.6, that 'dignity' is hollowed out if it is equated with worth (in the sense of price), is a pressing one for Kant as well. If the aspect of worth in this sense is decisive, it is not difficult to treat different cases in different ways: those who work hard and/or display talents that are valued will be treated differently (receive higher rewards) than those who do not, an issue that is uncontested in any non-egalitarian distribution system<sup>25</sup>. In such an approach, rewards or even rights are not bestowed on the basis of some 'moral' insight. Various explanations may be provided why this happens, but a common explanation<sup>26</sup> is that granting someone rewards promotes his industry. Such an explanation is not hard to follow, and may easily be accepted (precisely because it does not introduce any elements that cannot be clarified).

<sup>24</sup> B. SKINNER, *Beyond Freedom and Dignity*, p. 14. Perhaps Skinner is also correct in saying: "Autonomous man is a device used to explain what we cannot explain in any other way. He has been constructed from our ignorance, and as our understanding increases, the very stuff of which he is composed vanishes", *Beyond Freedom and Dignity*, p. 200.

<sup>25</sup> Taking the term 'egalitarian' in the radical interpretation, manifested in communism.

<sup>26</sup> This has already been propagated by Mandeville (*The Fable of the Bees*, Part 2: Sixth Dialogue, pp. 414, 415, 429, 430). (Mandeville does not address fundamental rights here, but rather specific rewards (profits), but the analysis is essentially the same.)

By contrast, the link between ‘dignity’ (assuming here, *arguendo*, that it has a meaning, and that this may be demonstrated (otherwise the following argument is moot)) and some sort of entitlement is difficult to grasp, making the possibility of using it as a starting point problematic. That is not to say *a priori* that it cannot exist, but if that is the case, it must be demonstrated, leaving those who seek to found (certain) rights on ‘(human) dignity’ with the onus to demonstrate, first, that such a notion is not devoid of meaning, and, second, how such an entitlement may be said to follow from it. Given the limitations that I have set upon this inquiry, and the absence of the need to include such an analysis into it, such a burden does not lie on me, so I can end this discussion here, remarking merely that, although the presence of these limitations was not incited by a desire to evade this burden, I do not regret, noticing the predicament with which those who defend an alternative are faced, that this is the consequence of my starting point.

5.7. To what do the foregoing observations amount? The problems in Kant’s system of thought may be considered to be somewhat mitigated by the distinction he makes between ‘moral’ and juridical laws of freedom<sup>27</sup>, leading to different demands (respectively the internal and external conformity with the norm)<sup>28</sup>. Still, even if one limits the analysis to the domain of law (in which the motive is, on the whole, not relevant and compliance (whether this result from an external motivation or from a conviction or not) is the main issue)<sup>29</sup>, the question of the demarcation of the domain of bearers of rights<sup>30</sup> remains a pressing matter, precisely because practical reason as the criterion is not available here.

In any case, ‘humanity’ as such and ‘reason’ – in whatever sense – are insufficient to conclude to ‘(human) dignity’. As I said above (section 3.4), the notion of ‘intrinsic value’ is vague, and, apart from

<sup>27</sup> I. KANT, *Die Metaphysik der Sitten*, p. 214.

<sup>28</sup> I. KANT, *Die Metaphysik der Sitten*, pp. 214, 219.

<sup>29</sup> A situation such as the penalization of attempt (*i.e.*, the failed attempt to commit a crime), in which case, strictly speaking, a motive is the critical aspect, must not be confused with this observation, since it is still irrelevant, except when the punishment is concerned, *which* motive may have been decisive (in the case of a justification, the outcome is significantly different, no punishment being administered, but the motive is in that case, too, not important to make an appeal to it).

<sup>30</sup> Why human beings are those whose freedom (not in the ‘moral’ sense) must be taken into consideration, and why they must therefore be the bearers of rights, is not explicated by Kant when he presents this as the fundamental tenet of a system of law (*Die Metaphysik der Sitten*, pp. 230, 231; *cf.* p. 246), but since this is the domain of *external* – rather than *internal* – conformity, no respect for the ‘dignity’ in man (which could, after all, only follow from his (alleged) ability to act ‘morally’) can be determinative here.

that, an assessor of the (supposed) value is required. Kant does not escape this, speaking of 'Würde' ('dignity') as something that has 'einen innern Werth' ('an inner worth')<sup>31</sup>. Another criterion than reason or humanity may be put up as a candidate, but it would, as far as I am able to assess the situation, be random and, apart from that, one would still be confronted with the burden of making it clear what 'dignity' means. Perhaps the most credible – and effective – position consists in giving up such a search altogether and trading in the ambition to constitute a philosophy that is enriched by a 'moral' superstructure (and recognize that it may in fact be said to be an impoverishment as soon as the addition should prove to be superfluous or even void of content) for a more cautious approach, or at least not accept such a superstructure until its existence or meaning will have been proved, if possible.

There is nothing *a priori* amiss with the wish for an 'elevated' theory, but one must always keep in mind that the extent to which a theory must be justified corresponds with that of its claims rather than with its appeal or the aspirations of its originator. Perhaps the strategy to start cautiously and add elements to one's theory only if it is clear that these do not suffer from problems such as those encountered with some of the claims of the authors discussed above is the most promising one. This outcome might seem to be detrimental to the search for a foundation of the rights that must be granted on the basis of formal equality. If that were the case, denying such a result should only be allowed for political ends (for philosophically, one would be committing a clear *argumentum ad consequentiam*), if such a *modus operandi* were deemed acceptable and could work at all. Such a conclusion is, however, to be forestalled until my own view will have been presented, which will, I think, prove to be a viable alternative to resorting to such unconvincing actions, for its (intended) solution is indeed a philosophical one, albeit minimalistic compared to some of those discussed in the foregoing.

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<sup>31</sup> I. KANT, *Grundlegung zur Metaphysik der Sitten*, p. 435. A contemporary variant is found in the work of Christiano, who seems, when speaking of 'the value of humanity', bent on introducing as much metaphysics in his theory as possible: "The fact of humanity confers a special status on most human beings, a dignity which ought to be honored. The humanity of a person is that person's capacity to recognize, appreciate, engage with, harmonize with, and produce intrinsic goods", *The Constitution of Equality*, p. 14; "Human persons have equal moral status. Since the status of humanity derives from the fact that humanity is a kind of authority in the realm of values, equal status is based on the fact that human beings all have essentially the same basic capacities to be authorities in the realm of value", *The Constitution of Equality*, p. 17.

### **5.8. Summary and Relation to Chapter 6**

Kant's account of reason is such that practical reason is the decisive criterion for a being to have a 'dignity'. The criticism of speciesism does not apply here, but other issues are problematic. Apart from the fact that the ability to act practically reasonably is an elusive matter in Kant's philosophy, to see how 'dignity' should follow from acting thus is no less difficult than it is to grasp how it should follow in the alternatives presented before, from the foundations (or alleged foundations) that were defended there. A sufficient number of representative views that defend equality with an appeal to a 'moral' outlook have been discussed to conclude that such an approach proves problematic and calls for an alternative. If that alternative proves more compelling, it should be adopted to replace such views. Chapter 6 is essentially a defense of such an alternative, arguing what I conceive to be the most viable position to defend basic equality.

## Chapter 6

### BASIC EQUALITY AND ITS CONSEQUENCES

**6.1.** Nothing is easier than to locate faults in the writings of others (although this facility is in some cases mitigated by what can virtually be considered a sport of the author in question to hide the arguments through a line of reasoning that makes them hardly accessible). I must, now that it is time to contemplate and assess my own thoughts, be just as critical as I was before, in evaluating theirs, and will try to maintain the same rigor here; the reader is of course the proper judge to determine whether I will in the end have acquitted myself of this task.

**6.2.** A number of possible views to defend granting the rights necessary in a liberal democratic state were presented and analyzed above. First, the views of Rawls and Dworkin were presented. They appear to adhere to certain conceptions with regard to human beings and to argue that certain rights should be granted on the basis of these respective conceptions. They do not explicate the presuppositions inherent to their respective models of thought but do seem to cling, in differing ways, to the view that the nature of a human being is to be considered something special. I have unearthed the presuppositions in these views and subsequently examined whether they can lead to a tenable outlook; having brought to light the starting points with these two thinkers, the examination was expanded to include every possible account that uses such a basis. The first possibility is to presuppose that 'human dignity' is, in and of itself, a sufficient basis to grant rights. The second possibility focuses rather on a specific feature, although it is one only found in humans (as far as one can tell), namely rationality or reason in a 'moral' sense. Neither position can be maintained, for the reasons provided in the previous chapters.

An alternative would be to leave the goal to find a cogent explanation and simply start with one or more assumptions or postulates. This is what Dahl, among others, suggests when he presents as an assumption: "[...] the moral judgment that all human beings are of equal intrinsic worth, that no person is intrinsically superior to another, and that the good or interests of each person must be given

equal consideration. Let me call this the assumption of intrinsic equality"<sup>1</sup>.

I will not resort to such drastic measures, for two reasons. First, although such starting points are at times unavoidable<sup>2</sup> (which was the reason for me to acknowledge in section 2.4 the appeal to intuitions in some cases), the fewer one introduces the better, in order to meet one's justificatory obligations as far as possible. Second, to start thus would immediately raise the question of the scope of the relevant beings when it comes to distributing relevant rights, a criterion for which is now lacking for precisely the reason that a starting point is used: this is characterized by the fact that it cannot be justified in such a way (for otherwise that which would provide the justification, or possibly an even more fundamental point, would be the *real* starting point). The authors just mentioned, for example, would include all human beings, while those stressing animal rights would desire a domain that is more expansive than this, while still others might, by contrast, limit the scope to include only a number of people, excluding others, on the basis of whatever criterion (*e.g.*, race). This is a problem that must be taken seriously and eliminated if possible.

In my alternative, reason will feature prominently, but it will (in contradistinction to what is decisive in Kant's view) be reason in the sense in which I distinguished it above, *viz.*, as a faculty which is focused on the non-'moral' goal of obtaining the most desirable outcome in the long term.

6.3. Westen claims that "Equality is an empty vessel with no substantive moral content of its own"<sup>3</sup>. This is a conclusion from the – circular – consideration that "[...] equality [...] tells us to treat like people alike; but when we ask who 'like people' are, we are told they are 'people who should be treated alike'"<sup>4</sup>. In a similar vein, Lucas argues that 'equality' does not add anything relevant when it comes to the decision which beings are to be treated in any

<sup>1</sup> R. DAHL, *On Political Equality*, p. 4. Likewise, Sadurski states: "[...] I will not try to justify *why* the principle of equality has, and should have, a legitimating force", *Equality and Legitimacy*, p. 44. In response to such positions (although criticizing not these authors but two others, namely, Feinberg and Nielson), Friday goes so far as to say that "[...] helping [yourself] to a premise while admitting that it has no rational foundation at all is the abandonment of philosophy and a dismal foundation for moral and political theory", "Moral Equality and the Foundation of Liberal Moral Theory", p. 69.

<sup>2</sup> Lest a circle or infinite regress (have to) be accepted (H. ALBERT, *Traktat über kritische Vernunft*, p. 15; cf. *Plädoyer für kritischen Rationalismus*, p. 20).

<sup>3</sup> P. WESTEN, "The Empty Idea of Equality", p. 547.

way<sup>5</sup>. These considerations cannot be ignored, and may seem to be detrimental to the concept of basic equality as I have introduced it when it comes to human beings (*viz.*, as the (approximately) equal reasoning power, or rationality), or at least to reduce it to a redundant definition, to be dispensed with in a similar way as some of the notions scrutinized in the previous chapters. After all, the crucial element, rationality, or, more precisely, some degree of rationality, is observed in each person<sup>6</sup>, and the fact that it can be observed in each of them (approximately) equally adds nothing to that given.

Strictly speaking, this is correct, and 'basic equality' may in that respect be replaced by its specification 'basic rationality', so that the relevant respect in which the beings are necessarily equal is immediately clear. Alternative specifications of 'basic equality' likewise provide the desired contents. Still, with these remarks in mind, I see no problem in continuing using 'basic equality', so long as one realizes that it is merely a 'function', to use a mathematical simile, or indeed an empty vessel, to speak with Westen, waiting for its contents<sup>7</sup>. Factual equality is, then, the result of the observation of any feature in two or more beings, rationality, I will argue, being the optimal candidate in the case of basic equality, when factual equality is specified thus. As I outlined in the introduction, prescriptive equality is the judgment that those who are rational should all be treated in some way, to be explicated by formal equality as that

<sup>4</sup> P. WESTEN, "The Empty Idea of Equality", p. 547. Cf. H. L. A. HART, *The Concept of Law*, p. 159: "[...] any set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblance and differences are relevant, 'Treat like cases alike' must remain an empty form." As Kelsen remarks: "He who is a believer will interpret the principle of equality rightly in such a way that only equals should be treated equally. Yet that means that the decisive question 'what is equal?' is not answered by the professed principle of equality. [...] This principle is too vacuous to be able to determine a legal order's design with regard to the content." ("[Wer gläubig ist] wird das Prinzip der Gleichheit ganz mit Recht dahin interpretieren, daß nur Gleiche gleich behandelt werden sollen. Das heißt aber, dass die entscheidende Frage: was ist gleich, durch das sogenannte Prinzip der Gleichheit nicht beantwortet wird. [...] Dieses Prinzip ist zu leer, um die inhaltliche Gestaltung einer Rechtsordnung bestimmen zu können."), *Was ist Gerechtigkeit?*, Ch. 5, § 22 (p. 26). This matter is more thoroughly analyzed in *Reine Rechtslehre*, pp. 390-393.

<sup>5</sup> J. LUCAS, "Against Equality", pp. 298, 299. Cf. H. KELSEN, *Was ist Gerechtigkeit?*, Ch. 5, § 23 (pp. 26, 27).

<sup>6</sup> One may argue that the concepts 'person' and 'member of the species *homo sapiens*' must be distinguished (P. SINGER, *Practical Ethics*, pp. 73, 74), in which case the nuance that rationality is not present in children and cognitively impaired persons need not be addressed separately. However valuable this distinction may be in the context of Singer's line of reasoning, I do not use it, since it is not necessary for my purposes here, and 'person' has no special meaning for me, so that it may be identified with 'human being'. This does not mean that I need not deal with the absence of rationality in the beings just mentioned; this issue will receive attention below.

<sup>7</sup> Cf. J. WALDRON, "The Substance of Equality", p. 1365: "'Equality' is used [...] to identify properties on which commendations would supervene."

which is characteristic of a liberal democratic state<sup>8</sup>. As was described in the introduction and section 3.2, Dworkin distinguishes between 'flat' and 'normative' equality. In a similar (but in important respects differing) vein, my distinction will be between factual, basic and prescriptive equality.

Prescriptive equality and formal equality are identified at this point, but I remark here that strictly speaking they must be distinguished, or, more accurately, two sorts of prescriptive equality are involved. Prescriptive equality is what those who are basically equal prescribe to each other, while formal equality is the corollary of this, namely, the actual manifestation of this given, realized by the legislator. The acknowledgement of basic equality is thus the first step, followed by prescriptive equality in the first sense, *i.e.*, the demand *by those who are basically equal* that they be treated equally, which is in turn followed by prescriptive equality in the second sense (which is properly identified with formal equality), *i.e.*, the demand *by the legislator* that they be treated equally. I add this caveat primarily for methodological reasons, since *practically* these two sorts of prescriptive equality can be identified. After all, in a liberal democratic state the legislator represents those who demand the first sort of prescriptive equality.

**6.4.** The distinction between factual equality and basic equality may seem to be trivial. That I have differentiated between them is prompted by the following. Factual equality may be observed: approximate equality is at least apparent in many respects. Still, the jump from this given to prescriptive equality would be too great, since there is, at the level of factual equality, no clue as to the basis to treat beings equally. For example, a deaf person cannot hear, while a 'normal' person can, just as a 'normal' dog (the latter, moreover, usually having a hearing that is vastly superior). The ability to hear is considered irrelevant when it comes to the issue that is at stake here, namely, treating them equally (the prescriptive equality aspect) in granting rights. Basic equality is needed to make it clear which aspect is decisive, thus specifying factual equality.

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<sup>8</sup> This formulation entails, strictly speaking, a *petitio principii*, if liberal democracy is to be understood as the form of government that guarantees equal political and legal rights. Formal equality may, if one wants to avoid this circle, alternatively be specified by presenting an enumeration of the actual political and legal rights. A core, or 'essence', if one prefers, may be discerned here, but the precise enumeration will depend on the extent of the domain to which the principles of the specific liberal democratic state in question apply (*e.g.*, whether mayors are elected or not).



A circle seems to emerge, for the prescriptive equality question (namely, “who is to be *treated* equally with whom?”) and the basic equality question (namely, “who is to be considered to *be* equal to whom?”) are answered from one and the same perspective. The circle is, I maintain, not a weakness of the model, but rather a strength. (No *logical* circle (*petitio principii*) is involved here, by the way.) It does mean that a normative stance is ruled out if the normativeness should be exhibited by a distinction between a descriptive domain and a normative one<sup>9</sup>. If a normative stance *is* argued, the circle needs to be resolved, the descriptive domain not being reducible to the normative, or vice versa. Such a position would be hard to take in any event, I think, for the reason put forward already, namely, that a ‘moral’ domain is difficult, and perhaps impossible, to discern. Besides, I have started from the premise that such a domain should only be included in the analysis if this should prove necessary, and I have seen no reason to leave this cautious stance. The meta-ethical issue of how to bridge the chasm between the descriptive and the normative realm (the ‘is-ought’ question<sup>10</sup>) does not, then, present itself as a problem for me, but some additional attention to this matter so as to alleviate any remaining concerns may be in order.

I note, first, that my outlook is not without precedent. Hobbes argues that equal treatment is prescribed<sup>11</sup> on the basis of the existence of actual equality: “Whether [...] men be equall by nature, the equality is to be acknowledged, or whether unequal, because they are like to contest for dominion, its necessary *for the obtaining of Peace, that they be esteemed as equall*; and therefore it is [...] a precept of the Law of nature, That *every man be accounted by nature equall to another*, the contrary to which Law is PRIDE”<sup>12</sup>. (For completeness, I must account for the fact that Hobbes here appeals to the law of nature as he understands it. I will not deal with this matter here in detail, but refer to my treatment of it elsewhere, where I argued that no ‘moral’ dimension corresponds with this motivation<sup>13</sup>.)

<sup>9</sup> In line with what I remarked in the introduction (note 20), I do not object to the concept of normativity so long as this is identified with prescriptivity. I will, however, take ‘normative’ to refer to the domain of ‘morality’ (the avoidance of the ambiguity of this concept was the reason to introduce the concept of ‘prescriptive equality’ in the first place).

<sup>10</sup> The *locus classicus* is D. HUME, *A Treatise of Human Nature*, Book 3, Part 1, Section 1 (p. 469).

<sup>11</sup> In Hobbes’s model of thought, the only source of prescription is self-interest (J. DOOMEN, “A Systematic Interpretation of Hobbes’s Practical Philosophy”, pp. 469, 470) (this does not detract from the fact that prescriptivity in the definition used here is the case; it just means that the sort of prescriptivity is clarified).

<sup>12</sup> TH. HOBBS, *De Cive* (the English version), Ch. 3, § 13 (p. 68); cf. *Leviathan*, Ch. 15 (p. 107).

<sup>13</sup> J. DOOMEN, “A Systematic Interpretation of Hobbes’s Practical Philosophy”, pp. 472-476.

A similar connection between prescriptive and basic equality (to phrase the matter in my own terms), at least in this respect, is demonstrated in one of Locke's major political works: "[...] we must consider what state all men are naturally in, and that is, a state of perfect freedom [...]. A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection: unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty"<sup>14</sup>. He also puts it as follows: "The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions [...]"<sup>15</sup>.

Pointing to such similarities cannot suffice, however, for it is not ruled out that these philosophers were simply mistaken, and if I were to consider this state of affairs a reason to cease the inquiry here, I would, if this should indeed be the case, add a faulty analysis to the stockpile of philosophical arguments amassed over time, and, apart from that, commit an obvious *argumentum ad verecundiam*, ironically acting against the precept of the person just mentioned, as he is the originator of this designation<sup>16</sup>.

What my analysis amounts to is that the normative domain (the domain where 'ought' statements are made) is dissipated, or at least considered irrelevant (until a 'moral' argument could be compellingly made, if ever). A similar conclusion is reached by Zimmerman, who essentially says that 'ought'-statements have no added value: "If a man wants to break promises, tell lies, rape or kill, which is better, merely telling him he ought not to, even if it succeeds in restraining him, or telling him that if he does what he wants, he will be disliked,

<sup>14</sup> J. LOCKE, *Two Treatises of Government*, An Essay of Civil Government (the second Treatise), Ch. 2, § 4 (pp. 339, 340).

<sup>15</sup> J. LOCKE, *Two Treatises of Government*, An Essay of Civil Government (the second Treatise), Ch. 2, § 6 (p. 341). Waldron also argues that the step from the descriptive to the prescriptive domain is not taken by Locke, albeit from another consideration than mine (*God, Locke, and Equality*, pp. 69, 70).

<sup>16</sup> J. LOCKE, *An Essay concerning Human Understanding*, Book 4, Ch. 17, § 19 (p. 260). This is not to say, incidentally, that such a fallacy should be avoided *for this reason*, since arguing thus would constitute another fallacy of the same kind. I therefore add that, since Locke's observation seems to me a correct one, it will *for that reason* be taken to heart.

ostracized, punished or killed?"<sup>17</sup>. A word such as 'ought' may, by the way, continue to be used in the same sense as 'should' in a non-'moral' way (in saying, *e.g.*, that one should follow a certain procedure in a deductive reasoning, or that human beings should be treated equally with one another<sup>18</sup>)<sup>19</sup>, just as 'good' may be used in a non-'moral' sense (one may, *e.g.*, say that a piece of music is good in the sense that it is pleasing or composed in conformity with a certain standard or practice).

**6.5.** In light of the preceding considerations, 'prescriptive equality' is an unproblematic notion (as well as an indispensable precept in a liberal democratic state), while the same cannot be said of normative equality, which is the position that there is a 'moral' duty to treat some beings equally with one another. Normative equality may be defended instead of, or in addition to, prescriptive equality, but normative equality cannot serve as a basis for a political philosophy or a philosophy of law, since the 'moral' notions involved in it do not necessarily have a meaning. (Should this be considered too stark a position, I would, *arguendo*, resort to the more cautious alternative of suspension of judgment with regard to such matters, maintaining that prescriptive equality is sufficient to account for the granting of rights.)

This does not mean that normative equality might not be desirable, but if *that* – its desirability – is its base, no compelling result is reached, of course<sup>20</sup>. Whether people (and animals) are actually treated thus is to be decided by those in charge; what they find desirable will be decisive. In a (liberal) democratic state, that will be the will of (the majority of) the people. (This does not amount to an elaborate theory such as Rousseau's, according to which the people is always right, expressed through the general will ('la volonté

<sup>17</sup> M. ZIMMERMAN, "The 'Is-Ought': An Unnecessary Dualism", p. 56; *cf.* p. 61.

<sup>18</sup> I include this second example just to make it clear (again) that I do not consider this precept (which constitutes formal equality) to be part of a 'moral' theory.

<sup>19</sup> *Cf.* H. L. A. HART, "Positivism and the Separation of Law and Morals", pp. 612, 613: "We must, I think, beware of thinking in a too simple-minded fashion about the word 'ought'. [...] The word 'ought' merely reflects the presence of some standard of criticism; one of these standards is a moral standard but not all standards are moral. We say to our neighbour, 'You ought not to lie,' and that may certainly be a moral judgment, but we should remember that the baffled poisoner may say, 'I ought to have given her a second dose.'" (*Cf.*, with regard to 'should', P. SINGER, *Practical Ethics*, p. 278: "'Should' need not mean 'should, morally'. It could simply be a way of asking for reasons for action, without any specification about the kind of reasons wanted.")

<sup>20</sup> This is to be distinguished from the thesis (defended by, *inter alios*, myself, in this inquiry and elsewhere) that the most desirable result is to be realized, for in this latter case, the desirability is the reason to propose a theory in the first place (rather than a reason to support a theory that should be argued independently as its claims exceed this meager contention).

générale'), a – political – minority being (in hindsight) mistaken<sup>21</sup>.) Since normative equality is not based on an empirical observation or a compelling analysis, I cannot refute it. It cannot, however, serve as a starting point, either, for precisely the same reason.

Even if this issue is ignored, those propagating normative equality would have to choose on what basis some beings should – 'morally' – receive a certain treatment, while, if they do not include every being in their analysis, they would have to address the question why some beings are relatively poorly treated. I pointed out the problems with one such undertaking in chapter 4. Alternatively, one could start with a very concrete (approximate) equality between beings, but this would come at the expense of excluding others. In primitive societies (*i.e.*, hunter-gatherer societies), *e.g.*, one may point to men's (approximately) equal physical strength, thus excluding weak men and women. (An actual unequal treatment in such societies need not be the case, by the way<sup>22</sup>, but if this occurs, it has an external cause, such as the need or desire (of which the members may not be aware) to maintain bonds within a community.)

In present-day liberal democratic states, such qualities are no longer acknowledged to be guiding, which one may deem to be a sign of progress (although the exclusion has not disappeared at present, but merely shifted: a greater number of beings than before is deemed equal to one another, but there remains a disparity between, *e.g.*, animals and human beings), but this comes at the (converse) cost of depriving 'equality' of any meaning. The notion will become ever fainter<sup>23</sup>, until it will have dissipated. Perhaps equality between beings *can* only exist if there are others they can exclude, so that their shared identity is (at least partly) the result of a negation<sup>24</sup>, just as one can only know what an island is if its limits are encountered (in

<sup>21</sup> J.-J. ROUSSEAU, *Du Contrat Social*, Book 4, Ch. 2 (p. 152). I must add, however, that a consistent view of democracy comes close to such a position. Chapter 16 will deal with this issue.

<sup>22</sup> It has recently been argued that there is a great degree of inequality in such societies, although this seems to be constituted primarily by wealth: "[...] we may need to rethink the conventional portrayal of foragers as highly egalitarian and unconcerned with wealth", E. SMITH, K. HILL, F. MARLOWE, D. NOLIN, P. WIESSNER, M. GURVEN, S. BOWLES, M. BORGERHOFF MULDER, T. HERTZ and A. BELL, "Wealth Transmission and Inequality among Hunter-Gatherers", p. 31.

<sup>23</sup> Supposing that animals were considered humans' equals, one would no longer maintain 'humanity', which is vague enough, but have to trade it in for 'animality' (using the broader definition of 'animal' in contrast with the narrow one I have used throughout the text (*vide* chapter 2, note 11)); if all living beings were included (so plants as well), this would be even further-reaching (and not only conceptually, given mankind's dietary staple).

<sup>24</sup> Cf. what I said in section 4.5 and above in the present section.

which case it is also literally defined<sup>25</sup>, of course), or what it is to be free from tyranny if one knows what ‘tyranny’ means.

Some (mundane) examples at the individual level are fashion (this has value to individuals who wish to express, consolidate, or even principally (partly) define their identity by contrasting it with others, who manifest themselves differently), the ‘inflation’ of forms of address<sup>26</sup> and joining a club for people who are gifted in some way (thus excluding those who are not)<sup>27</sup>. At that point, equality is shown to be the ‘empty vessel’ mentioned above, and a criterion to acknowledge or grant rights is lacking, at which time any politically motivated criterion may become decisive. Since this may have undesirable outcomes<sup>28</sup>, the need for basic equality (in the sense argued here) and prescriptive equality as its corollary does not merely reach beyond an academic discussion; it may be said to be preferable to a situation in which, equality having indeed lost all meaning, views that harbor violent tendencies will (again) emerge<sup>29</sup>. (Since *what* is preferable is, in a liberal democracy, decided by the majority, it cannot principally be ruled out that such views will be decisive in the end. I will deal with this issue in chapter 16.)

**6.6.** There seem to be two alternatives: one may (1) cling to normative equality, but in order for this to have a meaning, one needs to demarcate it (in other words: delineate its scope, and thereby indicate who is *excluded*), in which case the same beings are referred to as in the case of basic equality, but more elusively (and thus less compellingly), the practical outcome when it comes to the granting of rights being the same, or (2) simply consider the notion of ‘normative equality’ to be devoid of any meaning altogether

<sup>25</sup> The Latin ‘definire’ means ‘to bound’, or ‘to confine’, so the limits (‘fines’) of the island are encountered once the sea is reached.

<sup>26</sup> For example, one addresses anyone with ‘sir’ or ‘madam’, which is a sign of these forms of address having lost their honorific connotation altogether. They only have a meaning if the status of ‘sirs’ or ‘madams’ can be *contrasted* with those of other people, who are considered to be of a lower standing than they. (Incidentally, the word preceding these forms of address, ‘dear’, has similarly lost all meaning, being used in virtually any situation, so irrespective of one’s disposition towards the addressee.)

<sup>27</sup> The existential question what (if anything) remains of one’s identity once one has stripped oneself (or has been stripped) of all these qualities and whether they are to be considered identity-guiding or rather identity-constituting qualities is an important one, but beyond the scope of the present inquiry.

<sup>28</sup> One need only point to some regimes in the 20<sup>th</sup> century to back this up with historical examples (keeping in mind, by the way, that one may base an equally devastating tyranny on equality of a particular type as well, as the regimes in communist countries have demonstrated).

<sup>29</sup> Strictly speaking there are other means to prevent violence, *viz.*, in other sorts of government than a liberal democratic one, but such forms of government are (presumably) not preferable; in any event, my research is limited to the liberal democratic state.

(provided this outcome has not in fact *already* been reached *a priori*), by including ever more categories of beings, thus inflating the notion to the point at which it, as the counter of the first case, fails to exclude any being. In the first case, a reason for the demarcation that is used is lacking (or arbitrary), while the demarcation itself is absent in the second case. The problems that may emerge in the first case – and that have emerged throughout history<sup>30</sup> – are potentially even greater in the second case, since here, a single criterion (or even a cluster of criteria) to serve as the basis for conflict is absent; *anything* may in this case be used thus, precisely because of the lack of defining criteria.

Rationality is to be considered the decisive criterion when prescriptive equality is fleshed out; it is, in other words, to be decisive in granting the rights that are themselves decisive in a liberal democratic state. By phrasing the matter thus, I do not intend to avoid the apparent difficulty that this is itself a prescriptive statement (and the reader who is suspicious that I do may rightly substitute ‘should be’<sup>31</sup> for ‘is to be’) by simply saying something like “Rationality is the decisive criterion...”, as this cannot be experienced. Even at this level, then, prescriptivity is apparently not absent. This must, however, not be analyzed in terms of a ‘moral’ sense, just like prescriptive equality, which also lacks one. It is simply a precept for a rational being that it let rationality itself be decisive; this is in its interest.

Rationality is basically equally present in those who are able to claim these rights, but it is not yet present in children, while some cognitively impaired people will never become rational. Those that *are* rational have the power to decide collectively whether these people shall have any rights at all. This will be the case if they have an interest to do so.

That such an interest exists is evident in the case of (most) children: they (presumably) usually have parents who wish to protect their interests (otherwise it would be hard to understand why people would have children at all<sup>32</sup>, at least in developed countries)<sup>33</sup>, and,

<sup>30</sup> Factions on the basis of virtually any criterion can be found, varying from religion and race to class differences.

<sup>31</sup> I indicated above that ‘should’ does not necessarily have a ‘moral’ sense.

<sup>32</sup> If people have children from some desire to be ‘immortal’ somehow, they will still at least have to provide for them and safeguard them from harm while preparing them for a life, at some point in the future, where their children will be independent from them.

<sup>33</sup> Similarly, in discussing the just savings principle, Rawls assumes that the parties in the original position (*A Theory of Justice*, § 4 (p. 16)) “[...] care at least about their more immediate descendants [...]”, *A Theory of Justice*, § 44 (p. 255); cf. *Political Liberalism*, Lecture VII, p. 274 (note 12).

apart from that, it is necessary that there will not be a reason for children to, in time, rebel against the state. Children are not to be treated completely (formally) equally as (rational) adults in every way; it is justifiable to exempt them from political rights, if for no other reason than because they (generally) don't even understand to what these rights amount<sup>34</sup>. They are thus to be treated as potentially rational beings.

In the case of cognitively impaired people, who are unable to act rationally, the case is somewhat more intricate. Political rights may be withheld from them for the same reason as in the case of children (though with the important distinction that, presuming that their handicap does not abate, this situation will be a permanent one), but children, at least those that do not fall in the first category, will in time enjoy the full extent of such rights. They are from the start granted the most important rights, such as that to life, which is easily justified on account of their potential to become rational adults. In the case of mentally handicapped people, by contrast, people in whose interest it is that they should be cared for may be absent, and the risk of – organized – sedition is negligible, but there may still be a reason not to treat them poorly, or even let them die. They are thus to be treated as fictitiously rational beings.

There are two considerations here. First, rational beings may lose their reasoning abilities and may want to prevent being treated poorly (or killed) themselves in such a situation. Second, there is no all-or-nothing situation here<sup>35</sup>: if mentally handicapped people are to be treated differently than 'normal' people, the question is what 'normal' means. Perhaps there will be a day when those with an average intelligence will be considered mentally handicapped compared with those that far exceed them in this respect<sup>36</sup>, in which case they will themselves be faced with less than agreeable circumstances<sup>37</sup>. This is the fundamental difference with animals, which

<sup>34</sup> Cf. D. A. LLOYD THOMAS, "Equality Within the Limits of Reason Alone", p. 547.

<sup>35</sup> That such a situation *is* the case may be argued for instances such as anencephalic children, but these form the exceptions (and, as I mentioned, the matter is in some cases an academic one).

<sup>36</sup> This implies that I do not grant those whose mental abilities far exceed those of an average person *eo ipso* a special position. I will return to this matter briefly below.

<sup>37</sup> This is just a thought experiment. Since an average intelligence is the norm in this example, this problem will probably not realize itself, as most people by definition have an average intelligence, and they would not accept an extreme worsening of their situation (with their mental abilities they should still be able to understand the change, and know that it is beneficial to oppose such measures), even irrespective of the fact that democracy means that they will let their voice be heard and (indirectly) resist any legislation not to their liking.

may be treated differently, in this line of thought, since people cannot change into animals<sup>38</sup>.

Reason is not some special feature whose mere presence brings *eo ipso* certain rights with it for those that are endowed with it<sup>39</sup>. This *could* be argued, in the line of an approach such as Kant's<sup>40</sup>, but, as I demonstrated in chapter 5, it would, in that case, have to be considered as something more than an instrument (but rather as a 'moral' quality). The option to introduce a faculty such as 'practical reason', a sort of amalgam of will and reason, seems to confuse matters rather than elucidate them: once one arrives at the point where the way in which this faculty is presumed to function needs to be explained, reason and will (constituting such a faculty together) must be separated again, so that joining them in the first place appears an exercise in futility. The problems with such an approach have been pointed out and, besides, reason is not considered here in that regard but rather as, indeed, a (mere) instrument to produce welcome results. The difference between rational and non-rational beings would then consist, simply, in the fact that the latter are not able to produce such results in as efficient or organized a manner as the former.

In that respect, I subscribe to Schopenhauer's contention when he undermines the special position ascribed to man on account of his reason, on the basis of what he considers essential in human beings and animals. For Schopenhauer, both human beings and animals have the ability to understand ('Verstand'), since they are all aware of objects<sup>41</sup>. There are obvious differences in their behavior, but they share a core: "The animal senses and observes; man in addition *thinks* and *knows*; both *will*"<sup>42</sup>. The will defines man<sup>43</sup>. Crucially in this respect, reason is a mere instrument, the will being the decisive

<sup>38</sup> Disregarding here those who believe in reincarnation between species. Their preferred specification of 'basic equality' is, presumably, broader than 'basic rationality'.

<sup>39</sup> My theory may seem to say this, but I would only agree with such a position insofar as the outcome is concerned: those that are rational are able to claim certain rights and are *for that reason* granted them.

<sup>40</sup> Or in a somewhat mitigated variant such as Rothbard's (*The Ethics of Liberty*, p. 155): "[...] Individuals possess rights *not* because we 'feel' that they should, but because of a rational inquiry into the nature of man and the universe. In short, man has rights because they are *natural* rights. They are grounded in the nature of man: the individual man's capacity for conscious choice, the necessity for him to use his mind and energy to adopt goals and values, to find out about the world, to pursue his ends in order to survive and prosper, his capacity and need to communicate and interact with other human beings and to participate in the division of labor."

<sup>41</sup> A. SCHOPENHAUER, *Die Welt als Wille und Vorstellung*, part 1, Book 1, § 6, p. 24.

<sup>42</sup> "Das Thier empfindet und schaut an; der Mensch *denkt* überdies und *weiß*: Beide *wollen*", A. SCHOPENHAUER, *Die Welt als Wille und Vorstellung*, part 1, Book 1, § 8, p. 44.

<sup>43</sup> A. SCHOPENHAUER, *Die Welt als Wille und Vorstellung*, part 1, Book 4, § 55, p. 345.



element in the coming about of actions<sup>44</sup>. Indeed, his observation that “the intellect remains excluded from the real decisions and secluded purposes of the own will to such a degree that it can experience these at times, just as those of a strange one, only by spying and surprising, and must catch the will in the act expressing itself in order to discover its true intentions”<sup>45</sup> may be seen as a precursory (albeit relatively rudimentary) analysis to those made by contemporary psychologists<sup>46</sup>.

6.7. One might object that rationality as the decisive element to constitute prescriptive equality and thence formal equality is introduced here as a mere pragmatic criterion. In that case, moreover, the *status quo* (the actual manifestations of the idea of a liberal democratic state) would merely be confirmed while the situation might have been a significantly different one. Although nothing would be further from my purport than to aver that history has developed necessarily as it in fact has, rationality must, at some time, necessarily be acknowledged as decisive, and not only because *rational* creatures are those who decide that rationality is to be the criterion. Suppose that one would consider another criterion (that can actually be experienced<sup>47</sup>) decisive. It is possible to acknowledge only the rights of a majority, such a majority being endowed with that ‘contingent’ criterion; this majority is capable of withholding many or all rights to one or more minorities. One cannot, however, know whether one will oneself become a member of such a minority. After all, the conditions as one knows them can change.

For example, some racial minority may initially be excluded from exercising certain rights, but this situation can – through a political change – shift to the exclusion of another race, or to other exclusions,

<sup>44</sup> A. SCHOPENHAUER, *Die Welt als Wille und Vorstellung*, part 2, Book 2, Ch. 19, pp. 228, 229, 242, 250, 259. Basically the same observation is found in Hume’s work: “We speak not strictly and philosophically when we talk of the combat of passion and of reason. Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them”, *A Treatise of Human Nature*, Book 2, Part 3, Section 3 (p. 415). For Hobbes, the very reason why a commonwealth is necessary follows from the fact that “[...] the Passions of men, are commonly more potent than their Reason”, *Leviathan*, Ch. 19 (p. 131) (cf. J. DOOMEN, “A Systematic Interpretation of Hobbes’s Practical Philosophy”, pp. 475, 476).

<sup>45</sup> “[...] der Intellekt bleibt von den eigentlichen Entscheidungen und geheimen Beschlüssen des eigenen Willens so sehr ausgeschlossen, daß er sie bisweilen, wie die eines fremden, nur durch Belauschen und Ueberraschen erfahren kann, und ihn auf der That seiner Aeufferungen ertappen muß, um nur hinter seine wahren Absichten zu kommen”, A. SCHOPENHAUER, *Die Welt als Wille und Vorstellung*, part 2, Book 2, Ch. 19, p. 234.

<sup>46</sup> Notably, D. KAHNEMAN, P. SLOVIC and A. TVERSKY (eds.), *Judgment under Uncertainty: Heuristics and Biases*, *passim*.

<sup>47</sup> I include this restrictive clause to indicate that criteria that are *not* observable need not be considered here; they have been dealt with (hopefully not *ad nauseam*) in the foregoing chapters.

such as handicapped persons being treated differently than others<sup>48</sup>. This is the basic equality that is needed for a liberal democratic state: in its absence, it will – in the most extreme cases – be less beneficial for the minority or minorities to keep to the law than to – violently – oppose it<sup>49</sup>. Perhaps just as important, there is the added insecurity for those that do *not* belong to a minority, or at least not a relevant one<sup>50</sup>. Their position is safe for now, but since no basic equality is guaranteed (or, more accurately, since the specification of basic equality that exists may be exchanged for another), they might, if the political situation changes, be confronted with the same predicaments the minorities that are presently suppressed face<sup>51</sup>. An additional effect that may be mentioned is a decline of a sense of community, but that is, indeed, merely an *additional* element, since it cannot serve as a basic consideration (*inter alia* on account of the fact that its meaning is difficult to pin down).

Basic rationality – as a specification of basic equality – must be presupposed in order to counter this problem – and thus produce a *stable* liberal democratic state – for this reason<sup>52</sup>, while people's approximate strength in this respect is a precondition as well. I say 'in this respect', for *physical* strength has become an ever less important factor with mankind's evolution. Merely physically handicapped people, *e.g.*, may not be disregarded. They can exert relevant influence (through alliances or individually) in the same way as those that are not handicapped in this respect, and, apart from that, denying them the equal rights would conflict with the very premise of rationality as the basic element. (The rights to benefits for those who are unable to generate an income because of their handicap are

<sup>48</sup> I do not refer here, of course, to the fact that persons with a (severe) handicap are in fact treated differently than those who are not inflicted with such a handicap in the sense that they are given the means to live as 'normally' as possible, since this rather testifies to an appreciation of their predicament and is a sign of positive discrimination (affirmative action) rather than (negative) discrimination; material rather than formal equality is decisive here.

<sup>49</sup> Cf., in a broader context, Th. HOBBS, *Leviathan*, Ch. 14 (p. 98).

<sup>50</sup> In practice, anyone can be considered to belong to a minority in some respect.

<sup>51</sup> Dworkin's observation, "The institution of rights is [...] crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected" (*Taking Rights Seriously*, p. 205), forgoing here the phrase 'their dignity', is not incorrect, but only if the reason for the majority's promise to have arisen is taken into account.

<sup>52</sup> A precursory analysis, at least when the outcome is concerned, is found in Hobbes's work: "[...] if a man be trusted to judge between man and man, it is a precept of the Law of Nature, that he deale Equally between them. For without that, the Controversies of men cannot be determined but by Warre", *Leviathan*, Ch. 15 (p. 108); "The safety of the People, requireth [...] from him, or them that have the Sovereign Power, that Justice be equally administred to all degrees of People; that is, that as well the rich, and mighty, as poor and obscure persons, may be righted of the injuries done them [...]. For in this consisteth Equity; to which, as being a Precept of the Law of Nature, a Sovereign is as much subject, as any of the meanest of his People", *Leviathan*, Ch. 30 (p. 237).

part of the domain of economic equality, which is not an issue here.) The ‘approximately’ aspect entails that no special rights may be claimed by those that are intellectually superior: they may on this basis be able to acquire a relatively high income, but that should depend on the variables of the liberal democratic state in question, specified when the issue of economic equality is arranged (*cf.* the comparison between Norway and the U.S.A. mentioned in the introduction).

My outlook differs in this regard from Lloyd Thomas’s, who defends an unequal treatment even at the basic level, and lets a special position ensue from the very nature of superior rationality: “Those who possessed rational nature to a superior degree would, in a well-ordered society, come to acquire positions to which special rights attached”<sup>53</sup>. I would prefer any such differences, if they are considered acceptable at the level of economic equality at all in the liberal democratic state in question<sup>54</sup>, to be arranged there. An individual with special qualities would still have to prove himself, which would on the whole presumably be easier for him than for those merely averagely gifted.

The point of ‘approximate equality’ is also found in the work of two philosophers who consider it an essential element for a social organization to exist at all, namely, Hart<sup>55</sup> and Hobbes<sup>56</sup>. Their considerations pertain to each sort of state, so that the scope of their analyses is not limited to the model of the liberal democratic state, but all that matters here is that these bear on such a form of government in any event. Hart recognizes a ‘moral’ feature here<sup>57</sup>, speaking elsewhere of “[...] a moral and, in a sense, an artificial equality [...]”<sup>58</sup>. Such elements seem redundant; one may limit oneself to observing that it is a simple matter of fact that acknowledging such equality is indispensable; Hobbes does indeed limit himself to this (minimalistic) position. In the hypothetical case that

<sup>53</sup> D. A. LLOYD THOMAS, “Equality Within the Limits of Reason Alone”, p. 553. (I take it that my observation that such a position entails the (voluntary) enslavement of mankind if intellectually superior aliens were to invade earth is not considered a *reductio ad absurdum*.)

<sup>54</sup> Which would be the case in any liberal democratic state that is not communistic (forgoing here the issue of whether these two outlooks are reconcilable in the first place). This still leaves much room for a precise economic arrangement (this was illustrated in the introduction by the comparison between Norway and the U.S.A.).

<sup>55</sup> H. L. A. HART, *The Concept of Law*, pp. 188-191.

<sup>56</sup> TH. HOBBS, *Leviathan*, Ch. 13 (pp. 86, 87); *De Cive* (the English version), Ch. 1, § 3 (p. 45).

<sup>57</sup> H. L. A. HART, *The Concept of Law*, p. 189.

<sup>58</sup> H. L. A. HART, *The Concept of Law*, p. 165. For completeness, I must add that Hart discusses another sort of equality here, presenting a means to mitigate the *inequalities* that present themselves (irrespective of the approximate equality) (*The Concept of Law*, pp. 160, 161).

the latter situation would not apply, and that one being would be sufficiently strong not only to oppose some others but everyone else, he would have no incentive to abide by the law<sup>59</sup>, apart from 'moral' considerations, but it is unclear how these could force him<sup>60</sup>.

6.8. For completeness, it must be added that the fact that basic equality as I have specified it (*i.e.*, basic rationality) is necessarily the case at present does not detract from the existence of another sort of basic equality in previous liberal democratic states<sup>61</sup>. In section 1.3 I observed that the U.S.A. was a liberal democratic state prior to the abolition of slavery, excluding some people from being treated formally equally, thus not enjoying the full extent of the rights formal equality entails. This is explained by the fact that another criterion, or rather other criteria in various spheres, for basic equality applied, and that basic equality, or, again, rather basic equalities, proved to be decisive. For example, in some cases, one's race was a crucial element, while in others, though sometimes with the same extension – *i.e.*, referring to the same people –, one's gender. Such a scenario has now become impossible, if one wants to present a stable form of government while respecting the demands made by a liberal democratic outlook at present<sup>62</sup>, the only viable criterion being rationality. One may still use another criterion, but would then immediately be confronted with the given that one's criterion is random, or, more precisely, exterior to the demands that a liberal democratic state makes.

Another relativization of what has been presented as virtually an *a priori* model that must be mentioned is minor from a theoretical standpoint (and is in that respect merely a refinement), but important from practical considerations, namely, that the notion of 'citizen' has

<sup>59</sup> As Hobbes remarks: "[...] if any man had so farre exceeded the rest in power, that all of them with joynd forces could not have resisted him, there had been no cause why he should part with that Right which nature had given him [...]", *De Cive* (the English version), Ch. 15, § 5 (p. 186); cf. H. L. A. HART, *The Concept of Law*, p. 198.

<sup>60</sup> Or even motivate him at all. I cannot deal with this in detail here, since this would mean an unwarranted (and undesirable) departure of the necessary confines set by the present inquiry.

<sup>61</sup> This is to be distinguished from an *evaluation* of these variants, of course.

<sup>62</sup> I add the phrase 'at present' because I wish to be nuanced, and because it would be presumptuous to state that this must be the final say on things. One cannot know, without resorting to speculation, whether those buttressing their liberal democratic outlook with a competing content of 'basic equality' were convinced of their position or carried out such a view with political considerations in mind; presuming the former alternative, they can in hindsight be said to have defended an incorrect, or at least incomplete, model of thought, but there is no guarantee that such a stance will, in time, be taken when my own model is assessed. (Incidentally, rationality may be said to have been used in previous conceptions as the criterion for basic equality, if those arguing it claimed that not all human beings were rational (or rational enough for their position to matter) (cf. chapter 1, note 7).)

various dimensions, rationality being a necessary condition but not a sufficient one to be a member of society. This is what Armstrong points to when he says: “As I employ it, the concept of citizenship has two uses. [...] Citizenship refers to the way in which a variety of institutions – most typically the state, historically at least – apprehend and incorporate individuals as equal members of a polity, rather than outsiders. In its second sense, citizenship refers to a ‘status’ – or more precisely to a complex and shifting set of statuses [...] that determines a set of rights and responsibilities, and the relation of individuals to the state, and to each other”<sup>63</sup>. In a similar vein, Schmitt links democratic equality to similarity of the people in question, contrasting a people and humanity as such<sup>64</sup>.

The fact that formal equality applies only within the confines of the state<sup>65</sup> may be defended by an appeal to historical contingencies which have led to the extant states<sup>66</sup>. This introduces a contingency (or an *a posteriori* element) into the theory, which may weaken it somewhat, but I would rather acknowledge the consequences of the facts than being accused of defending an air castle of my own making, which can only be upheld by ignoring them. A contingent characteristic, namely, nationality, is, then, more decisive than it would be if one could start from an *a priori* foundation.

**6.9.** Perhaps my position has been sufficiently illustrated by means of examples, but I think it not amiss, in order to come full circle to the topic used in the beginning, slavery, to interpret the developments in the U.S.A. from the time of the abolition of slavery in terms of my theory.

Slavery may be said to be (‘morally’) ‘wrong’. From my perspective, this has become a redundant observation (at least when it comes to the treatment of human beings in this way). Slavery is undesirable for those who are able to exert power. That is the crucial element. It was undesirable for the slaves prior to its abolition, of

<sup>63</sup> C. ARMSTRONG, *Rethinking Equality*, p. 7.

<sup>64</sup> C. SCHMITT, *Verfassungslehre*, p. 234.

<sup>65</sup> Forgoing here the fact that some of these rights are the result of *international* legislation (with the important addendum that this is in many cases drafted with the purpose to *limit* the power of national governments; the fact that one may appeal to an organ of the state once one deems one’s rights disregarded by the state itself – which should be possible on the basis of measures to implement principles like the idea of separation of powers – takes away nothing from (or even confirms) the fact that it is still at the state level that one primarily, if not exclusively, seeks protection of one’s rights), and exceptional situations in which national borders are crossed.

<sup>66</sup> The difficulties involved in demarcating the group of people who are represented are acutely illustrated by Dahl (*After the Revolution?*, pp. 45-51).

course, but they did not have enough power for their point of view to matter at that point (just as, one might say, animals do not have enough power for such a position at present). Once the slaves were powerful enough to establish themselves (collectively) as a group to be reckoned with, they could themselves become part of that same establishment (*i.e.*, those who can exert power), albeit, in practice, slowly and gradually. If the abolitionists were pressed to clarify why they defended the end of slavery, and made a 'moral' appeal, they would be confronted with the problems described in the previous chapters<sup>67</sup>. So the policy of segregation simply did not work anymore: black people are apparently powerful and endowed with reason<sup>68</sup>. Prior to the time when black people were 'willing' to comply and/or unable to stand up for themselves, they had no rights. Not granting them once they *could* oppose the white people that had oppressed them would result in an unwelcome outcome for the latter group (*i.e.*, the continuous threat of seditious actions arising from the former group); to concede to them had now become the best strategy.

An alternative explanation is that denying the former slaves, black people, certain rights would mean that there should be no basis to acknowledge these rights of white people in the first place anymore. After all, if black people are able to reason and are nonetheless not granted the rights one considers essential for someone who has this faculty, why should one keep acknowledging the rights of white people (in opposition to animals, who can still be used in a slave-like way)? In order to maintain a special position for those endowed with reason, acknowledging that black people should have the same rights as white people (at least in theory) would be necessary lest the basis for granting those rights itself come under discussion. (One could still argue that the differences might justify dividing various groups of people in two or more categories, but this would – inappositely – suggest that easy demarcation lines would be available to create such categories at all.)

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<sup>67</sup> Abolition may have been prompted by religious considerations, as may have been the case with many members of the Pennsylvania Abolition Society (the majority of whose members were Quakers), but that does not provide an answer to the question why slavery should be abolished, especially when the motives for religious actions are questioned (*cf.* A. SCHOPENHAUER, *Die beiden Grundprobleme der Ethik*, p. 235, and J. DOOMEN, "Religion's Appeal", pp. 138-142).

<sup>68</sup> Crucially, these two faculties are interrelated. The decisive aspect of reason consists in the ability to stand up for oneself systematically (in contradistinction to, *e.g.*, a bear, which can only unsystematically, or at least less systematically than ('normal') human beings, exert force).

The most plausible explanation<sup>69</sup>, perhaps, combines both elements: reason is the crucial factor, but not as a quality that brings with it that those who have it must be respected, unless one takes respect to mean that those who are endowed with reason are to be taken seriously because they are able to exert power<sup>70</sup>. This power is to be understood broadly: those who are physically handicapped or weak are relevant beings, just as those who are potentially rational (children) or fictitiously so (the mentally handicapped, including extreme cases such as anencephalic children<sup>71</sup>).

Those who defend the thesis that political and legal rights are granted on the basis of some acknowledgement of qualities that were not ‘recognized’ before (whereas it did presumably already *exist*, waiting to be discovered) would probably have a hard time explaining the (seemingly incredible) coincidence that the moment such rights are granted is usually not long after the moment the persons demanding them have manifested themselves, as well as the parallel between the rights being demanded and the identity of those demanding them (one need only point to the statistical significance of black people pleading for the rights of black people or women for women’s rights, for example)<sup>72</sup>.

Each of these positions would render an illustration of basic equality in the guise of ‘approximately equal rationality’, if this is taken to mean the degree to which individuals can claim their rights. The addition of ‘approximately’ can be appreciated once it is acknowledged that *rationality* in this sense cannot be identified with *intelligence*, for a minimal intelligence level, consisting in the ability to

<sup>69</sup> It may be argued that such an explanation does not merely apply to formal equality but to material equality as well, if its presence can also be said to follow from basic equality.

<sup>70</sup> Not anyone’s claim based on the ability to exert power is to be granted. Supposing that a terrorist acts rationally, what he demands is not consistent with the demands of liberal democracy, and does not lead to a claim the sort of which could consistently be incorporated in a liberal democratic state. This is what makes this demand different from that of minorities (or women). The terrorist’s claim will of course *temporarily* be respected if he should yield so much power that it would be prudent to comply with his demand (*viz.*, if doing so will probably lead to a more desirable outcome than refusing to do so), but that is another issue than the one presently under discussion.

<sup>71</sup> This is an academic issue since such children usually die shortly after having been born.

<sup>72</sup> It is not surprising, for example, that ethnic minorities in the U.S.A. are in general more in favor of government intervention to realize racial equality than European Americans (J. HOCHSCHILD, “Ambivalence About Equality in the United States or, Did Tocqueville Get it Wrong and Why Does that Matter?”, p. 48). It seems ironical that this attitude is not reflected when it concerns immigrants (“Ambivalence About Equality in the United States or, Did Tocqueville Get it Wrong and Why Does that Matter?”, pp. 52, 53). A possible explanation is that immigrants can be identified as a different category of persons (in the sense that they may not enjoy the same rights as citizens), so that, from some point of view, it would not be inconsistent to deny equal rights to them; it would not matter, in this case, whether one is a European American or belongs to an ethnic minority, since both groups of people are equally American and can – consequently also equally – oppose granting immigrants equal rights.

understand and claim rights, is sufficient to be acknowledged as an individual who has certain rights. Basic rationality does not, then, imply a judgment with regard to specific abilities across categories (*e.g.*, whether women are generally more intelligent than men, or vice versa, or whether significant differences between races exist), since such matters cannot – unless one should adopt a dogmatic stance – be resolved within a legal framework; if answers to such matters are forthcoming, they must be scientific in nature<sup>73</sup>. After all, the legal perspective is concerned merely with prescriptive matters<sup>74</sup>, while observations with regard to matters of fact are provided from a scientific perspective<sup>75</sup>. Indeed, what I have said about *basic* rationality was not presented from a legal stance (but rather based on straightforward observations), in contradistinction to its corollary, *prescriptive* equality, which *does* qualify as a legal issue.

**6.10.** In any event, the rights that white people have must, at present, be granted to black people too lest a civil war arise<sup>76</sup> (at least once the point is reached when black people have more to gain than to lose from rebellion). This became manifest in the U.S.A. after slavery had been abolished. Against the background of the protests against the unequal treatment between black and white people in Birmingham, Alabama, Martin Luther King, Jr. argues that civil disobedience<sup>77</sup> is

<sup>73</sup> Importantly, if such differences in fact appear to exist, this state of affairs may lead to *material* inequality between some groups of people: if, generally speaking, some groups prove to be (significantly) more intelligent than others, it would be surprising, in a market economy, to find them evenly represented in the segments of labor markets. Formal equality is the only necessary specification of prescriptive equality and does not preclude the outcome just mentioned; additional measures are possible, in order to realize material equality, but such measures, displaying positive discrimination, would indeed be focused on diminishing said material inequality, or, in other words, realizing material equality, thus offsetting the ‘market outcome’ of formal equality which is the case if the state is otherwise passive. Whether positive discrimination in this sense is desirable need not be inquired: various positions can be taken here, all of which are compatible with what is said in this study.

<sup>74</sup> Notwithstanding the fact that the law frequently generates definitions; in this case, no description of reality is provided, but rather a useful qualification that serves as a directive. This occurs, for example, if one defines ‘servitude’ (or ‘servitudes’, as various sorts of this rights are distinguished in Roman law), or ‘usufruct’ (*Corpus Iuris Civilis*: Institutiones, Book 2, Titles 3 and 4 (p. 13) (*vide*, for a broader discussion of this matter in Roman law, H. VAHINGER, *Die Philosophie des Als Ob*, part 1, Ch. 30 (pp. 249-251)). Another example is that of the legal person, which is not found in reality but rather (in many specific forms) a useful creation, and which may thus be considered a fiction (*cf.* H. VAHINGER, *Die Philosophie des Als Ob*, part 1, Ch. 33 (p. 257), part 2, § 28 (p. 611)).

<sup>75</sup> I concur with Vaehinger when he remarks “that the legal science is not an actual science of that which exists”, (“[...] dass die Rechtswissenschaft nicht eine eigentliche Wissenschaft des Seienden ist [...]”), *Die Philosophie des Als Ob*, part 1, Ch. 33 (p. 257).

<sup>76</sup> Certainly if one defines this broadly, *e.g.* in Hobbes’s sense: “[...] WARRE, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known [...]”, *Leviathan*, Ch. 13 (p. 88).

<sup>77</sup> King himself calls for nonviolent disobedience, but some of the actual protests were violent in nature.



the only alternative<sup>78</sup>, claiming: “My friends, I must say to you that we have not made a single gain in civil rights without determined legal and nonviolent pressure. Lamentably, it is an historical fact that privileged groups seldom give up their privileges voluntarily. [...] We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed”<sup>79</sup>. King appeals, following Aquinas, to a variant of ‘human dignity’: “Any law that uplifts human personality is just. Any law that degrades human personality is unjust”<sup>80</sup>. It is clear that a ‘moral’ appeal is made, especially in light of King’s remark that he intends to “[...] help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood”<sup>81</sup>.

Still, such a ‘moral’ appeal is difficult to substantiate, and not only because of the observations made in the previous chapters. It is always suspicious when a minority appeals to a supposedly encompassing ‘moral’ outlook that will lead to an improvement for it or, by the same token, when a woman pleads for women’s rights, especially when the position they take is at the same the lower limit of the domain of bearers of rights (animals not being included in their outlook). A lot of effort and needless ‘moral’ ornaments may be dispensed with, and those claiming their rights may just get to the point that they should be treated equally with those who are presently favored compared to them, and make it clear that such a difference cannot be upheld in light of the fact that the only differences to which one might appeal (one’s race, gender, religion or social standing) are irrelevant when it comes to being treated formally equally, and enjoying the rights that follow from this.

The outcome is the same as in the case of a ‘moral’ appeal, but the road towards it is preferable since is not clouded by elusive lines of reasoning. Should one opt for such a position, King’s words, “A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law”<sup>82</sup>, lose none of their purport (provided that ‘unjust’ be deprived of its metaphysical connotation<sup>83</sup>). What is crucial here is that it would be difficult to see how the Civil Rights Act of 1964, or similar legislation, could have been passed if not because the legislator (or the

<sup>78</sup> M. L. KING, Jr., *Why We Can’t Wait*, p. 79.

<sup>79</sup> M. L. KING, Jr., *Why We Can’t Wait*, p. 82.

<sup>80</sup> M. L. KING, Jr., *Why We Can’t Wait*, p. 85.

<sup>81</sup> M. L. KING, Jr., *Why We Can’t Wait*, p. 81.

<sup>82</sup> M. L. KING, Jr., *Why We Can’t Wait*, pp. 85, 86.

<sup>83</sup> E.g. with Th. HOBBS, *Leviathan*, Ch. 13 (p. 90), Ch. 15 (p. 103).

constituency) is (or are) forced to respect the power the minority was obviously able to exert in a systematic manner.

It is not inapt, I take it, to speak, once the point is reached when a minority has more to gain than to lose from rebelling against the *status quo* (in a situation as the one just illustrated), of the prelude to the invention<sup>84</sup> of mankind (or its conclusion, if such a process has already been initiated on the basis of similar historical developments)<sup>85</sup>. 'Mankind', or 'man', is a very abstract term. At first, one needs to acknowledge the rights of those one considers to be part of one's group (for whatever reason). As the group expands (because it is more desirable (for whatever reason) to include additional individuals), individuals that do not share the same characteristics (*e.g.*, skin color) hitherto considered elementary (perhaps to such a degree that individuals with other characteristics were not even thought of, namely in situations prior to the first encounter with such individuals) are considered to be on a par (at least formally) with oneself. By the 'invention of mankind', then, I do not mean some invention that mankind has made (although human beings are of course beings that invent), but rather that mankind is itself the invention (so an objective rather than a subjective genitive)<sup>86</sup>.

**6.11.** I can hardly imagine a reader (at least a reader at the level presumed necessary to comprehend and to take an interest in the ideas expounded here) interpreting the above as racist (in the sense of derogatory towards a race) in any way, but – at the risk of annoying or insulting the intelligence of such a reader – in order to avoid any misunderstanding, I will add that the analysis would be the same if the situation were reversed. If, in some way, the slaves had seized power and imposed their will on their former owners, granting themselves the very rights they had been denied and denying them to white people (the situation being that black people

<sup>84</sup> Hegel points out that in Roman law, no definition of 'human being' would be possible, as the slave could not be subsumed under it (*Grundlinien der Philosophie des Rechts*, § 2 (p. 40); cf. § 57 (p. 111)). If this is correct, the invention, one might say, had not yet been made, so that it could not be incorporated in the legislation of the time.

<sup>85</sup> Foucault is more radical in this regard than I am (*Les Mots et les Choses*, Ch. 9 (p. 319), Ch. 10 (p. 398)). In this place I suspend judgment on the matter whether his analyses are correct.

<sup>86</sup> It is not the case that mankind would invent itself (from some sort of '*causa sui*'): the individuals that already exist (and are rational enough to act thus) invent mankind as a concept, or perhaps rather identity, to be 'acknowledged' in every being that meets the standard. This standard is – possibly deliberately – left vague, although it serves in practice, primarily to distinguish between people (mankind) and animals and to include people (mankind, so everyone) in the realm of those beings one does not treat as an enemy. It would, in this light, not be inapposite to deem such a characterization a fiction (cf. F. NIETZSCHE, *Morgenröthe*, § 105 (p. 91)).

were in charge, white people the slaves, *ceteris paribus* to the situation prior to the abolition), the same analysis as the one outlined above would apply. The example of slavery and the racial inequalities that remained after its abolition was merely used to illustrate the rise of basic equality and formal equality as its necessary consequence as a manifestation of prescriptive equality.

**6.12.** In the introduction the goal for the first part of this study was expressed to be to inquire to what extent equality, which I have identified by using basic equality as a generic term, is a necessary condition for a liberal democratic state to function, or even to exist at all. The result can now be summarized as follows. A liberal democratic state can exist as long as *some* specification of basic equality is acknowledged. This may be virtually any sort of basic equality. In the U.S.A., for example, race and gender (apart from religion and class differences, which I have not discussed because those that were mentioned sufficed to prove my point) were important elements.

Once, however, rationality is acknowledged to be the decisive criterion to be granted rights in a liberal democratic state, there is no way back, so to speak, at least not so far as I can imagine. Qualifying another criterion – or several other criteria – as decisive would mean that one contradicts oneself once one must concede that one's own rights have only been granted because one is rational oneself, or, if one should ignore this given – or refute it by pointing to a group of people that are of the same opinion, together with whom one can enforce one's will on others, who are not, accordingly, granted the same rights – one's position would be and remain unstable, since other, excluded, rational beings could – collectively – claim rights. (The latter situation was the case in, for example, the U.S.A., which is, of course, easy to note in retrospect.)

### **6.13. Summary**

Basic equality is what is decisive for prescriptive and – thus – formal equality; it thus serves as the preparatory descriptive stage for the prescriptive stage to have a solid ground, preventing an apparition *ex nihilo*. A 'moral' outlook is forgone, not because it would necessarily be absurd (although this conclusion cannot be excluded) but because of the (possibly too heavy) burden of proof it places on those who seek to defend it. Rationality is considered the decisive feature, meaning that basic rationality is the decisive specification of basic

equality. This specification is more straightforward than Rawls's, less ambitiously than Kant's and more realistic than either. If reason serves as the decisive criterion for those who have granted rights (exclusively) to reasonable beings (*i.e.*, themselves), these reasonable beings cannot desist from using the same criterion in future cases lest they contradict the premise of their account and/or risk upheaval. This course of action has no basis, it seems, in anything but self-interest.

#### **6.14. Transition to Part 2**

The foundation of formal equality, which follows from the acknowledgement of basic equality, leading to prescriptive equality, which is, as I have argued, a crucial postulate for a liberal democratic state to come into and remain in existence, was inquired in the first part, which is hereby finished. The necessary outcome that formal equality extends to those that are basically equal seems to leave little room to maneuver. Indeed, I consider what I have hitherto presented necessary conditions for a liberal democratic state to remain in existence.

Still, with that in mind, the question to what extent citizens are to incorporate the postulate of prescriptive equality in the guise of formal equality in their convictions, or, more generally, the question to what extent they should be free when this does not interfere with the demands of formal equality (which is, after all, merely a concretization of prescriptive equality) has been left unanswered. There was no need to provide such an answer at this stage, for the enforcement of formal equality can simply be left to the relevant organs of the state (the legislative and executive powers to create and enforce legislation, and the judicial power to judge cases). (These powers must of course indeed operate under the guidance of this postulate: prescriptive equality must be enforced lest it become of no use in practice.)

It remains to be seen, then, to what extent these principles leave room for the second concept considered of vital importance in a liberal democratic state: freedom. If citizens should be required to agree not merely with prescriptive equality being transformed into enforceable legislation but actually agree with its tenets, this would seem to intrude on their liberty to decide for themselves whether to consider people as equals. The second part of this study will focus on this issue.

**Part 2**  
**FREEDOM**



## Chapter 7

### PRELIMINARY REMARKS

7.1. In the first part of this study, I inquired into the meaning of 'equality' in a liberal democratic state. It was concluded that basic equality in the guise of basic rationality is indispensable once it is understood that other sorts of (basic) equality to constitute a viable basis are or have at least become insufficient. In this second part, I will, with the results that have been reached in mind, research to what degree there is room for freedom, more specifically, freedom of expression, in a liberal democratic state. Freedom of expression includes, but is not limited to, freedom of speech; it also refers to religious freedom. It seems that the limits of freedom of expression must (at least) be reached once a conflict arises with the postulates of prescriptive equality for precisely the reason that it, prescriptive equality, is itself a constitutive principle: if its directives should no longer be acknowledged as such, a liberal democratic state in which such a far-reaching freedom is allowed ceases to be a liberal democratic state.

This conclusion cannot be reached as simply as that, however. I will demonstrate that it is necessary to distinguish between acts performed by or on behalf of state institutions on the one hand and private acts on the other. It will be shown that it is justified to grant more freedom in the latter case than in the former. In addition, the contents – what is expressed – must be inquired: this is an important factor to decide what should be allowed.

7.2. Before dealing with the specific issues, however, it is necessary to be clear about the meaning of 'freedom'. As was mentioned in the introduction, freedom in the sense of 'negative freedom' is the notion I consider basic. This is not to be confounded with freedom of movement<sup>1</sup>, which has a greater scope than negative freedom. Freedom of movement means, in its core, unlimited freedom for a person or object, which consists in the mere absence of opposition, be it physical objects or immaterial elements, such as laws that constitute a prohibition<sup>2</sup>. The *extension* of freedom of movement may

<sup>1</sup> 'Movement' is to be taken broadly, encompassing any action one may perform.

<sup>2</sup> Cf. Th. HOBBS, *Leviathan*, Ch. 14 (p. 91), Ch. 21 (pp. 145, 146); *De Cive* (the English version), Ch. 9, § 9 (p. 125).

in this sense be the same (if one forgoes *physical* freedom of movement, which pertains to the first of the two categories just mentioned) as that of negative freedom: under any form of government, some laws to limit negative freedom (and thus freedom of movement) are necessary. A state in which murder and theft were not prohibited would presumably not have to concern itself with the question of whether other acts should be prohibited since it would not even remain in existence long enough to address such transgressions<sup>3</sup>.

Still, with regard to the *intension* (the meaning), it is useful to make the distinction. The presence of negative freedom is predicated on the existence of a government: the freedom that remains in such a state of affairs is the negative freedom in the specific state<sup>4</sup>. By contrast, freedom of movement does not merely describe this situation but also pertains to the freedom that exists in the state of nature (or *supposedly* exists, if one considers such a condition a merely hypothetical or fictitious one). The distinction may seem to attest to an overly academic disposition, but it is in fact based on a genuine political consideration. Freedom of expression, for example, may be said to be possible only within the context of a state<sup>5</sup>. In the state of nature, this freedom exists *stricto sensu*, of course (in the guise of freedom of – figurative – movement), but absent a government with the protection of a state apparatus to back such a freedom up, the question is pertinent whether it can safely be exercised, and this question would have to be answered in the negative<sup>6</sup>.

**7.3.** The downside of this negative freedom is precisely the fact that freedom of movement is limited by a government at all – this takes place in the same realm where negative freedom is granted in the first

<sup>3</sup> This statement can in practice be nuanced somewhat; there may, for example, be informal ways (within groups of people or communities) to steer individuals' behavior. Still, any act to discourage the actions mentioned above must be considered to constitute a prohibition.

<sup>4</sup> Cf. Th. HOBBS, *De Cive* (the English version), Ch. 13, § 15 (p. 165).

<sup>5</sup> This is not to be confused with the conception that the state is also necessary for a full-fledged freedom to come to fruition, as Hegel claims (*Grundlinien der Philosophie des Rechts*, § 260 (pp. 337–339); cf. § 153 (p. 235)). It is not surprising to find Hegel scorning the identification of freedom with the freedom to do whatever one wants (*Grundlinien der Philosophie des Rechts*, § 319 (p. 428)). Hegel defends a view of the state that is based on a separation I have not made, namely, between the state and civil society, considering the state from an ethical point of view while restricting the interest of individuals as the characteristic trait of civil society (*Grundlinien der Philosophie des Rechts*, § 258 (p. 329)). This is not the proper place to evaluate these views, and I already indicated in the introduction (note 7) that Hegel's concept of 'freedom' is not inquired here, so that I suspend judgment on the matter here, as is justified, given the fact that I started without the aspiration to take a comprehensive stance (cf. my remark to this effect in the introduction).

<sup>6</sup> Cf. J. LOCKE, *Two Treatises of Government*, An Essay of Civil Government (the second Treatise), Ch. 6, § 57 (p. 370).



place. The price for the possibility to use it unencumbered is this limitation. This would seem to be contradictory, 'unencumbered' pointing to the absence of a limitation, but it bears on the fact that – through the threat of punishment – *other* individuals (whose freedom is simultaneously protected) are restrained by the government from restraining one's freedom. That such a restraint cannot be complete, however, is evident from the fact that this would result in freedom being absent, rendering the issue moot. It is precisely the tension between unmitigated freedom on the one hand (which would, in the most extreme scenario, result in anarchy) and complete restraint on the other (which is characteristic of a totalitarian regime) that characterizes a liberal democratic state.

7.4. In this second part of the study I will seek to answer the question what the extent of the limitations to freedom should be in a liberal democratic state. To that end, I will first inquire the import of freedom in chapter 8, and try to make it clear why granting citizens as much freedom as possible is beneficial for both the (liberal democratic) state as a whole and citizens themselves. However, as the phrase 'as much as possible' indicates, it is significant to define the limits (if any) of freedom carefully. This prompts the question to what extent equality and freedom are compatible. Since part 1 of the inquiry emphasized the importance of basic equality, and specifically basic rationality, it would seem appealing to connect it with freedom, thus consolidating the model of the liberal democratic state. The merits and difficulties of such a position are inquired in chapter 9, where Dworkin's position is examined. An alternative for it is presented in chapters 10 and 11, where a demarcation line to limit freedom is defended. Mill's harm principle provides the frame of reference here; the ignore principle, as my own alternative is called, seeks to find the optimal outcome in balancing various interests.

The foregoing raises the question of whether the state can adopt a neutral stance, and how it should respond to those who deny certain principles of a liberal democratic state, notably those defended in part 1 of this study. In other words: what should the state's position be towards those who deny that people are equal, *e.g.* on the basis of racial differences? This is the central issue in chapters 12 to 15. I will argue that it is not the task of a liberal democratic state to decide what citizens should think, but that, in line with what is maintained in chapters 10 and 11, equal *treatment* should be guaranteed. In this light, Rawls's and Habermas's positions are examined critically.

Finally, in chapter 16, some attention is devoted to the subject matter of the guarantees to continue a liberal democratic state, and more generally, a democratic state. It would seem that such a state might be undermined by its own principles, a majority being able to radically change it to a form of government that is ultimately incompatible with those very principles. Such a possible outcome is radical enough to merit attention in a study such as this one.

### **7.5. Summary and Relation to Chapter 8**

The purpose of this chapter was primarily expository. I have indicated what freedom is to be taken to mean here, negative freedom being the decisive concept, and what the reader is to expect from the following chapters. Chapter 8 intends to indicate why freedom is important at all. It may in a sense be considered a continuation of chapter 7, and some of the reasons adduced there may appear obvious, but its presence is prompted by the need to present a complete and systematic account; while the next chapter's focus is not on presenting novel insights, the present study's strength would arguably be diminished in its absence.

## Chapter 8

### FREEDOM'S EMPIRE

8.1. Now that it is clear what 'freedom' means in the present inquiry, its import needs to be discussed. That some liberties must be restricted in any state is evident. I already pointed out, in the previous chapter, that the freedom to commit a murder, or to steal, cannot be allowed in any state. These examples were not randomly selected. In a liberal democratic state, just as in other forms of government, acts such as those mentioned must be forbidden. There are in general, however, compelling reasons to criminalize acts to a minimal degree and grant citizens as much freedom as possible, at least when freedom of expression is concerned. It is obvious that it is not only incumbent on me to provide these reasons but to make it clear as well what 'a minimal degree' and 'as much as possible' mean. The latter issue refers to the need for a criterion according to which it can be determined which acts should be allowed, and which not. I will, however, begin with the former issue – the reasons why freedom is important in the first place – since it must be clear what the significance of the 'liberal' part of 'liberal democracy' is.

One may, in answering this question, not, of course, simply refer to the fact that 'liberal' is part of 'liberal democracy' here, as this would render an obvious *petitio principii*. Another mistake would be to equate 'democracy' (in general) with 'liberal democracy' (cf. section 1.3). That a careless use of one's definitions (or a rhetorical trick) easily leads to such confusion may be demonstrated by means of the following quote: "Perhaps the time has come when it is no longer wise to close one's eyes to the fact that liberal democracy, suitable, in the last analysis, only for the political aristocrats among the nations, is beginning to lose the day to the awakened masses. Salvation of the absolute values of democracy is not to be expected from abdication in favor of emotionalism [...]"<sup>1</sup>. 'Liberal democracy' is apparently identified with 'democracy'<sup>2</sup>, which creates the opportunity to speak of 'the absolute values of democracy' under the banner of 'liberal democracy'. Further on in the same text, Loewenstein says: "In this sense, democracy has to be redefined. It should be – at least for the transitional stage until a better social adjustment to the conditions of the technological age has

<sup>1</sup> K. LOEWENSTEIN, "Militant Democracy and Fundamental Rights, II", p. 657.

<sup>2</sup> Cf. K. LOEWENSTEIN, "Militant Democracy and Fundamental Rights, I", pp. 421, 422.

been accomplished – the application of disciplined authority, by liberal-minded men, for the ultimate ends of liberal government: human dignity and freedom”<sup>3</sup>. The problems involved with the notion of ‘human dignity’ were discussed at length in chapter 4. As for freedom: including it in one’s conception of democracy would constitute an obvious category mistake, confusing democracy as a form of government with a *desirable* (democratic) state. In any event, the ‘liberal’ part of ‘liberal democracy’ needs a separate defense, and it is the goal of this part of the inquiry to provide just that.

Some of the reasons why freedom is important can be inferred from part 1 of the inquiry, such as the vested interest one has to have the right to vote, but freedom of expression is still to be explored in detail. It is worthwhile to examine the position of Hobbes and Spinoza in this regard, since both clearly identify the crucial issues and propose interesting, though strongly differing, solutions.

8.2. A possible justification to limit freedom of expression follows from the fact that opinions may lead to factions, which may, as was remarked in section 7.3, in the worst scenario result in anarchy. As Hobbes puts it: “[...] it is annexed to the Sovereignty, to be Judge of what Opinions and Doctrines are averse, and what conducing to Peace; and consequently, on what occasions, how farre, and what, men are to be trusted withall, in speaking to Multitudes of people; and who shall examine the Doctrines of all bookes before they be published. For the Actions of men proceed from their Opinions; and in the wel governing of Opinions, consisteth the well governing of mens Actions, in order to their Peace, and Concord”<sup>4</sup>.

In evaluating a stance such as Hobbes’s, it is necessary to consider that he contrasts the commonwealth with the state of nature<sup>5</sup>; in terms of his dichotomy, there is little room for nuance<sup>6</sup>. Yet even if

<sup>3</sup> K. LOEWENSTEIN, “Militant Democracy and Fundamental Rights, II”, pp. 657, 658.

<sup>4</sup> Th. HOBBS, *Leviathan*, Ch. 18 (p. 124).

<sup>5</sup> Th. HOBBS, *Leviathan*, Ch. 17 (pp. 117, 118).

<sup>6</sup> I pointed out in section 7.2 that negative freedom is always to be understood within the context of a state. This is not to be taken to mean that freedom is to be practically hollowed out, which is the outcome, or at least danger, in Hobbes’s line of reasoning: “[...] when private men or subjects demand *liberty*, under the name of liberty, they ask not for *liberty*, but *dominion*, which yet for want of understanding, they little consider; for if every man would grant the same liberty to another, which he desires for himselfe, as is commanded by the law of nature, that same naturall state would return again, in which all men may by Right doe all things, which if they knew, they would abhor, as being worse then all kind of civill subjection whatsoever. But if any man desire to have his single freedome, the rest being bound, what does he else demand but to have the *Dominion*? for who so is freed from all bonds, is *Lord* over all those that still continue bound”, Th. HOBBS, *De Cive* (the English version), Ch. 10, § 8 (p. 135).

this is overlooked, and the argument is accepted, an alternative reasoning may still be preferred. Spinoza contrasts the state with the state of nature, as Hobbes does, but he compares them differently than his precursor does<sup>7</sup>. Spinoza observes that the more freedom of expression, or, more precisely, the freedom to judge ('libertas judicandi') is limited, the greater the contrast is with the state of nature, and consequently the more violent the government<sup>8</sup>. Hobbes would simply dismiss this in light of the fact that the state of nature is worse than *any* form of government<sup>9</sup>.

By contrast, Spinoza only deals with the democratic form of government here<sup>10</sup>, while Hobbes considers the commonwealth as such, deeming the *form* of government a minor issue<sup>11</sup>, but that is not a problem for the present analysis since the only thing that matters here is whether these authors can be compared in the relevant aspects. It does mean that Spinoza has room to distinguish between the goal of the community ('societas') in the broad sense, so the reason for there to be a state at all, which is to live safely and comfortably<sup>12</sup>, and the goal of a commonwealth ('respublica'), which is freedom<sup>13</sup>. Such room is not available in Hobbes's model, but since he would not use it to provide for freedom apart from anything the sovereign might allow, that does not matter for him.

Spinoza, while granting that the state of nature needs to be abandoned in favor of a form of government<sup>14</sup>, does not infer from this given that one's freedom in each respect should be transferred to the government in question, the more so since he has a more balanced view with regard to the state of nature than Hobbes, the positive aspects of which are preserved in democracy<sup>15</sup>. Although an unbound reign is stated not to be incompatible with a democratic form of government, Spinoza points out that a violent government is in practice doomed to perish before long<sup>16</sup>.

<sup>7</sup> This does not mean, however, that their *concepts* of freedom would differ, as Israel argues (*Radical Enlightenment*, pp. 258, 259). Spinoza does use various concepts of freedom (J. DOOMEN, "Spinozan Freedom", pp. 53-58), but the one that is relevant here is negative freedom as Hobbes understands it (J. DOOMEN, "Spinozan Freedom", pp. 60, 61); the difference between their outlooks (at least in *this* respect) is one of *appreciation* rather than of *conception*.

<sup>8</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 20 (p. 245).

<sup>9</sup> Th. HOBBS, *Leviathan*, Ch. 20 (pp. 144, 145).

<sup>10</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 16 (p. 195).

<sup>11</sup> Th. HOBBS, *Leviathan*, Ch. 30 (pp. 233, 234).

<sup>12</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 3 (p. 48).

<sup>13</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 20 (p. 241).

<sup>14</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 5 (pp. 73, 74), Ch. 16 (pp. 191-193).

<sup>15</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 16 (p. 195).

<sup>16</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 5 (p. 74), Ch. 16 (p. 194).

When this claim is corroborated, it appears that the contrast with Hobbes's stance is not limited to the content; in contradistinction to Hobbes, Spinoza does not – as is the case in *Ethica* – base his conclusions on an *a priori* line of reasoning<sup>17</sup>: it appears that no one can fully transfer his power and rights<sup>18</sup>. This comes to the fore most clearly when it is concretized by pointing to the fact that it proves impossible for people not to express themselves and to restrain themselves in this respect<sup>19</sup>; furthermore, even if this liberty *could* be suppressed, such a course of action would have adverse effects<sup>20</sup>.

It is not my purpose here to provide a thorough political analysis with regard to the issue of whether or not granting citizens the freedom to express themselves will have negative effects in the sense just outlined. It seems clear that this might be the case in a totalitarian form of government (presuming, lest the word 'negative' be devoid of meaning, that the continuation of such a form of government should be preferable to its dissolution), but that is no concern here, since it is solely the liberal democratic state that is the focus of attention. With that in mind, it would seem, given the 'liberal' part of this denomination, that one might operate from the premise that freedom should be granted and that the onus to prove that it should be constricted is on its opponents.

Difficulties emerge precisely at the point where controversial statements are made. Spinoza himself pleads the following restriction of freedom of expression: "No one may without transgressing the law act against a decree of the sovereigns, but everyone does have the right to unreservedly think and judge and consequently also speak out, provided that he speaks and expresses himself in a straightforward way and conformably to reason alone, not acting by means of deceit, anger or hatred, and absent the intention to introduce any change in the commonwealth on the basis of the authority of his own decree"<sup>21</sup>. Some of these categories to limit one's freedom may prove problematic upon further analysis. In any case, the first reason to

<sup>17</sup> Incidentally, Hobbes's philosophy is not fully *a priori* in nature (and those who designate him as an empiricist are not necessarily *entirely* mistaken), but rather partly based on *a priori* analyses and partly on empirical observations (J. DOOMEN, "A Systematic Interpretation of Hobbes's Practical Philosophy", pp. 467-469), but in the *present* respect the latter are absent.

<sup>18</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 17 (p. 201).

<sup>19</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 20 (p. 240).

<sup>20</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 20 (pp. 243, 244).

<sup>21</sup> "[...] salvo summarum potestatum jure nemo quidem contra earum decretum agere potest, at omnino sentire, & judicare, & consequenter etiam dicere, modo simpliciter tantum dicat vel doceat, & sola ratione, non autem dolo, irâ, odio, nec animo aliquid in rempublicam ex autoritate sui decreti introducendi, defendat", B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 20 (p. 241).

grant freedom of expression in a liberal democratic state (the extent of which is to be specified at a later stage) has been provided.

8.3. A 'negative' reason, so to speak, to allow (at least some) freedom of expression in a liberal democratic state was provided above: its suppression is either pointless or counterproductive. I call this a negative reason since this merely points to the fact that it must be granted, without having considered any beneficial results that might ensue from its presence. That such results exist has been pointed out perhaps most famously by Mill: "If there are any persons who contest a received opinion, or who will do so if law or opinion will let them, let us thank them for it, open our minds to listen to them, and rejoice that there is some one to do for us what we otherwise ought, if we have any regard for either the certainty or the vitality of our convictions, to do with much greater labour for ourselves"<sup>22</sup>.

Spinoza similarly argues that a commonwealth profits if citizens are allowed to demonstrate that some law should reasonably be revoked<sup>23</sup>. Apart from that, freedom is necessary for the development of the sciences and the arts<sup>24</sup>. These appear to be valid observations. A present-day equivalent of Galileo should not experience a threshold in presenting his findings in the form of a threat of being persecuted (whether by religious or secular authorities) for doing so, and a liberal democratic state that takes itself seriously should be willing to debate any law currently in force, if only because such a discussion might provide viewpoints hitherto unconsidered<sup>25</sup>. The converse standpoint implies that governments or lawmakers cannot err on account of their possessing divine inspirations<sup>26</sup>.

<sup>22</sup> J. S. MILL, *On Liberty*, Ch. 2 (p. 252); cf. Ch. 2 (pp. 229, 243, 254), Ch. 3 (p. 267).

<sup>23</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 20 (p. 241). One may add to this that in order for a democratic state to function at all, free expression is necessary: "[...] freedom of expression is required in order for citizens to *participate* effectively in political life. [...] Free expression means not just that you have a right to be heard. It also means that you have a right to hear what others have to say", R. DAHL, "What Political Institutions Does Large-Scale Democracy Require?", pp. 195, 196.

<sup>24</sup> B. SPINOZA, *Tractatus Theologico-Politicus*, Ch. 20 (p. 243); cf. (with regard to the sciences) H. KELSEN, *Was ist Gerechtigkeit?*, Ch. 9, § 34 (pp. 42, 43).

<sup>25</sup> This issue bears both on matters that are of a political nature and on those that are not (or not directly), Galileo's statements alluded to above (*i.e.*, the heliocentric thesis, expounded, *inter alia*, in the *Letter to the Grand Duchess Christina of Lorraine*, pp. 8, 44) being of the latter kind. One may in general say that "[...] ideas, systems and conceptions of all sorts can only prove themselves insofar as they are exposed to the *risk of failing*." ("[...] bewähren können sich Ideen, Systeme und Konzeptionen aller Art nur insoweit, als sie dem *Risiko des Scheiterns* ausgesetzt werden.") H. ALBERT, *Plädoyer für kritischen Rationalismus*, p. 17 (the political consequences of this perspective are discussed on pp. 69-75).

<sup>26</sup> Cf. I. KANT, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nichts für die Praxis*, part 2, p. 304.

Here, then, a ‘positive’ reason to incorporate freedom in a liberal democratic state is provided<sup>27</sup>. Still, this is still an ‘external’ reason in the sense that it deals with the way a liberal democratic state may optimally produce desirable results, be it within the sphere of what it itself governs (the legislation) or outside it (the sciences and the arts). There is one final consideration, which I would dub an ‘internal’ reason, which will now be addressed.

**8.4.** The third reason why freedom should have a place in a liberal democratic state is connected with man’s very mode of existence (or at least *one* mode of existence, which is, moreover, perhaps not applicable to *all* people), made apparent – in part – by the need to express oneself. In an ‘elevated’ way, this may be seen, insofar as the outward manifestation is concerned, as a continuation of what was said in defense of the first reason why there should be room for freedom. For some people, being able to create something and share it may be so important that they are willing to risk their lives in order to do so. Somewhat less dramatically than this, Dworkin observes: “[...] liberty seems valuable to us only because of the consequences we think it does have for people: we think lives led under circumstances of liberty are better lives just for that reason”<sup>28</sup>.

In order to illustrate this point, one need only refer to recent history to find some relevant examples, such as the predicaments faced by composers (like Prokofiev and Shostakovich) and writers (like Solzhenitsyn and Pasternak) during the Soviet Regime. This is not the place to ponder the questions whether such contributions do indeed manifest something valuable – apart from the pleasure they bring – or to what extent such agents depend on their surroundings to realize their work. So long as individuals are able to express themselves and have a strong enough desire to do so, there is, on that basis alone<sup>29</sup>, sufficient justification to allow them to do so: they apparently consider it to be something valuable, whether this be for a reason one might arguably consider to be mundane, such as a desire for fame, or for a more ‘elevated’ reason (they may consider it to be something that constitutes the very reason they exist). Unless one takes a stance

<sup>27</sup> To be clear, the fact that this is a *positive* reason does not detract from the fact that *negative* freedom remains at stake.

<sup>28</sup> R. DWORKIN, *Sovereign Virtue*, p. 121. (In light of what I argued above, I cannot concur with the presence of the word ‘only’ here.)

<sup>29</sup> This is not to say that this is the *only* reason (and the word ‘alone’ merely means that a *sufficient* reason is provided here), as the first reason mentioned – it is simply impossible to effectively restrain people – is also relevant here.



that cannot, as far as I can assess, be supported without an appeal to some metaphysical theory, namely, that citizens somehow exist on behalf of the state (rather than vice versa), this third reason is compelling even in the absence of the danger of seditious acts by citizens.

8.5. The reasons for including freedom in a liberal democratic state have been presented, which were rubricated by classifying them as negative (the first one) and positive (the second two, one of which was marked external while the other was said to have an internal nature). The results that follow from these observations, namely, that it seems safe to say that freedom is an important given in a liberal democratic state and that liberal democracy can be defended on the basis of the foregoing, should not be surprising, but I nonetheless venture to say that the foregoing analysis was not an exercise in futility. That does not derogate from the fact that it was no more than a precursory inquiry, designed to set the stage for answering the most pressing questions.

#### 8.6. Summary and Relation to Chapter 9

Granting citizens freedom can be supported on (at least) three grounds. First, restricting it is bound to lead to sedition. Second, the room to express opinions that deviate from the *communis opinio* and/or the view of those that govern the state will lead to progress in legal, scientific and artistic respects. Third, many people consider the opportunity to express their ideas so important that they would be willing to rebel, which may have destabilizing effects, but even if such actions are unlikely to arise, there would be sufficient grounds to incorporate freedom in a liberal democratic state. Before I address the question to what extent freedom may be limited, I must first indicate how freedom is related to equality, since what was said about basic and prescriptive equality in part 1 raises this question. In order to locate my position in this discussion, I will compare it to Dworkin's.



## Chapter 9

### THE COMPATIBILITY OF FREEDOM AND EQUALITY

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

Dworkin himself maintains that he does not defend a metaphysical standpoint: "[...] the idea of individual rights that these essays defend does not presuppose any ghostly forms; that idea is, in fact, of no different metaphysical character from the main ideas of the ruling theory itself. [...] Individual rights are political trumps held by individuals. [...] That characterization of a right [...] does not suppose that rights have some special metaphysical character [...]"<sup>1</sup>. Still, it is difficult not to reach this conclusion if rights are supposed to exist irrespective of explicitly assigning them, as Dworkin indicates: "[...] those Constitutional rights that we call fundamental like the right of free speech, are supposed to represent rights against the Government in the strong sense; that is the point of the boast that our legal system respects the fundamental rights of the citizen. If citizens have a moral right of free speech, then governments would do wrong to repeal the First Amendment that guarantees it, even if they were persuaded that the majority would be better off if speech were curtailed"<sup>2</sup>.

**9.2.** I already indicated the problems with Dworkin's position in section 3.4, where the notion of 'intrinsic value' was addressed; the present discussion merits a separate treatment. It is important not to misrepresent Dworkin lest he become a straw man that is *too* easily refuted. He does speak of the constitution as the guarantor of the basic rights<sup>3</sup>, and the famous (or infamous) 'rights thesis' (according to which judicial decisions enforce existing rights<sup>4</sup>) is not based on a

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<sup>1</sup> R. DWORKIN, *Taking Rights Seriously*, p. xi.

<sup>2</sup> R. DWORKIN, *Taking Rights Seriously*, p. 191.

<sup>3</sup> E.g., R. DWORKIN, *Taking Rights Seriously*, p. 185.

<sup>4</sup> R. DWORKIN, *Taking Rights Seriously*, p. 87.

traditional view of natural law<sup>5</sup>, but is clearly rooted in the institutional history<sup>6</sup>. Still, in light of what was said in chapter 6 about the *origin* of the existing rights, such a position is perhaps not the most convincing one, especially when one considers the fact that Dworkin speaks of ‘a moral right’. His view of the government’s position is (contra liberalism as it is usually taken, or ‘liberalism based on neutrality’, as he calls it<sup>7</sup>) that of ‘liberalism based on equality’, which “[...] takes as fundamental that government treat its citizens as equals, and insists on moral neutrality only to the degree that equality requires it”<sup>8</sup>.

Incidentally, much of what Dworkin says<sup>9</sup> about the barriers against an economic liberal theory with no government intervention (the sort of ‘liberal’ theory he opposes) in order to mitigate the negative effects for those who suffer the negative consequences of economic inequality seems acceptable (although the degree to which one’s agreement with this depends on one’s political convictions is difficult to assess), but, first, someone who agrees with government intervention in such a way may be said to act out of non-‘moral’ grounds (*e.g.*, someone who agrees with the existence of government schemes for the handicapped or the poor may simply do this because he may himself be confronted with such a situation – *cf.* the example of the insurance in section 2.2), and second, this is not the topic of this inquiry<sup>10</sup>.

**9.3.** To return to the issue at hand, Dworkin opposes a “[...] general right to liberty at all, at least as liberty has traditionally been conceived by its champions. I have in mind the traditional definition of liberty as the absence of constraints placed by a government upon what a man might do if he wants to”<sup>11</sup>. Dworkin’s notion of ‘liberty’ becomes clear from the way he contrasts it with Berlin’s: “Liberty, [Berlin] says, is freedom from the interference of others in doing whatever it is that you might wish to do. [...] [O]ur commitment to

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

<sup>6</sup> R. DWORKIN, *Taking Rights Seriously*, p. 87.

<sup>7</sup> R. DWORKIN, *A Matter of Principle*, p. 205.

<sup>8</sup> R. DWORKIN, *A Matter of Principle*, p. 205.

<sup>9</sup> *E.g.*, in part 3 (Chs. 8-11) of *A Matter of Principle*.

<sup>10</sup> I do not, then, express myself here on the hierarchy between one’s economic and political interests, save for remarking that in the direst of circumstances, it would be virtually absurd to suppose that the former might not supersede the latter, and it is not inapposite to note, especially in view of urgent situations, that the interest in realizing the latter becomes moot if this realization is to take place at a time when one is no longer alive to enjoy them.

<sup>11</sup> R. DWORKIN, *Taking Rights Seriously*, p. 267.

liberty is not automatically a commitment to liberty as Berlin understood it. We might say: liberty isn't the freedom to do whatever you might want to do; it's freedom to do whatever you like so long as you respect the moral rights, properly understood, of others. [...] [I]t is far from obvious that liberty understood in this different way would produce an inevitable conflict with equality. On the contrary, it seems unlikely that it would [...]”<sup>12</sup>. Dworkin is justified to draw this conclusion (namely, that liberty *in this sense* does not (necessarily) conflict with equality). The crucial question is, however, whether the premise on which he bases this answer – namely, that liberty is to be understood as limited by respecting the ('moral') rights of others) – is *correct*<sup>13</sup>.

Elsewhere, Dworkin states: “Liberty is not the freedom to do whatever one wants no matter what, but to do whatever one wants that respects the true rights of others”<sup>14</sup>. Several problems are involved here. First of all, this is not a 'natural' definition of 'liberty', so to speak. I set out in the beginning of chapter 7 with such a definition, namely, negative freedom<sup>15</sup>. I do not wish to cling – dogmatically – to the position that only this sort of freedom exists, but anyone who would add other versions must demonstrate what might prompt their presence. It seems that Dworkin simply wants to make the point that some actions, and thereby (negative) freedom, should be limited. That may be a defensible stance, but to claim the existence of some sort of 'liberty' in order to operate under the banner of such a notion merely provides a *seemingly* solid basis from which to start (or, if it should indeed be necessary to operate thus, this merely demonstrates the unsoundness or weakness of what is claimed).

A second point is that Dworkin speaks of 'true rights', which seems to refer to rights subjects should have under any circumstance, so that the contingency of the development of actual rights is not sufficiently taken into consideration and simultaneously traded in for a metaphysical stance. This is a minor issue in light of the present discussion, however, so that I shall let it rest here. A third concern is that, depending on what one means by 'true rights', this stance seems to hollow out (negative) freedom, or at least limit it unjustifiably,

<sup>12</sup> R. DWORKIN, *Justice in Robes*, p. 112.

<sup>13</sup> It is obvious that this question must come to the fore. It is very easy to support a conclusion through premises of one's own fabrication, but that does not make it correct, of course (an extreme example of this approach is found in Spinoza's *Ethica*, notably the first part).

<sup>14</sup> R. DWORKIN, *Sovereign Virtue*, p. 237; cf. *Is Democracy Possible Here?*, pp. 69-73.

<sup>15</sup> Again, I myself do not distinguish between freedom and liberty and consider them synonyms.

namely, *before* (negative) freedom has been balanced against other matters that are considered important. With Dworkin's conception of liberty in place, someone who does not consider everyone equals, for example, has no freedom to express himself<sup>16</sup>. I would plead a sort of freedom that leaves room to balance such matters and does not reach a conclusion in advance, so that at this time, no conclusions may be drawn with respect to the question of whether the freedom of the person just mentioned should be limited or not.

The source of the disagreement between Berlin's view<sup>17</sup> and Dworkin's simply appears to be their diverging conceptions of 'liberty', a standard to decide which of them (Berlin arguing, on the basis of his conception, that liberty and equality necessarily conflict, Dworkin, on the basis of his, that they do not) would be right being unavailable (or at least undiscoverable)<sup>18</sup>. I will leave this matter here, save for the following. Dworkin seems to have found an alternative to Berlin's view by simply adhering to a competing definition. He is well aware of this, as he demonstrates<sup>19</sup>; his response to this (at least apparent) problem is that Berlin's view of the values of liberty and equality – *viz.*, that they conflict – would be just as question-begging as Dworkin's – *viz.*, that they do not conflict –, but that is insufficient for Dworkin to make his point. The onus is on Dworkin not merely to prove why Berlin's outlook would be incorrect, but also why his would be *correct*. After all, the possibility that both Berlin *and* he are mistaken is not excluded beforehand, and a false dilemma, according to which either one view or its opposite must be correct, must be avoided.

9.4. As long as Dworkin has indeed not shown the correctness of his position, it would be wise to take a cautious stance, by arguing that no values (which is itself a 'moral' notion<sup>20</sup>) are involved at all, by simply adhering to 'equality' and 'liberty' in the sense that was

<sup>16</sup> It would be a *petitio principii* to say that this conclusion is not warranted because Dworkin has not defined 'liberty' thus but rather by referring to equality in the first place. After all, what is under discussion is this definition itself, which is far from self-evident.

<sup>17</sup> The view that liberty should be understood as negative freedom in this case is not only propagated by Berlin, of course.

<sup>18</sup> An even greater skepticism may be defended, on the basis of which it may be argued that the question which party is right (or rather – in this case – 'right') is based on the unfounded premise (some would call 'essentialism') that such a question can be answered at all, as if the answer to it is hidden somewhere, waiting to be discovered.

<sup>19</sup> R. DWORKIN, *Justice in Robes*, pp. 112, 113; "Do Values Conflict? A Hedgehog's Approach", p. 256.

<sup>20</sup> This does not mean that equality or liberty cannot be *valuable*, but that is a different matter. One may consider music or a nice meal valuable, but it would be difficult, I think, to consider enjoying these things something 'moral'.

expounded in my alternative (so, 'liberty' meaning the absence of external impediments and 'equality' referring to basic equality). Dworkin does not, of course, reach this conclusion, but rather the following one: "Given that some people [...] want to kill on some occasions, is any wrong done to them by preventing them from doing so? Do we have any reason to apologize to the wolf who is denied his leg of lamb? Certain philosophers would answer that question: yes. Something important is lost, they say, whenever people of extraordinary spirit and ambition are thwarted by the laws of moral pygmies. I'm not asking whether anyone could think that. I'm asking what you think. And if you, like me, think that nothing wrong is done through such laws, then you will have that reason for rejecting Berlin's account of liberty"<sup>21</sup>.

He appears to appeal to an intuition here<sup>22</sup>, the problems with which were mentioned in section 2.4, to which may be added the fact that those whose judgment is taken into account are for the larger part not imbued with the qualities Dworkin mentions, so that if decisions are made on the basis of a democratic procedure, it will not be difficult to predict how Dworkin's question will be answered. In any event, in order to maintain that 'equality' in the sense in which Dworkin defends it is at stake, a more elaborate account of equality than the minimal one I presented in part 1 of this study will have to be compellingly presented, which, as I indicated, Dworkin has not done.

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

<sup>21</sup> R. DWORKIN, *Justice in Robes*, pp. 115, 116.

<sup>22</sup> Explicitly so elsewhere (R. DWORKIN, "Do Values Conflict? A Hedgehog's Approach", p. 254).

**9.6. Summary and Relation to Chapter 10**

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



## Chapter 10

### HARM AND IGNORE

**10.1.** The protection the state offers to citizens, or, more precisely put, those deemed basically equal, against each other (and foreign elements) is vital; it has to be there for the freedoms to be exercised at all, in a sense<sup>1</sup>. Without such protection, such freedoms may still be said to exist<sup>2</sup> (and even unboundedly<sup>3</sup>), but more important rights would not be protected. If one can be killed at random, one has other things to be concerned about than the right to free expression. That does not necessarily mean that a totalitarian state should be established, though, and reaching such a conclusion at this point of the inquiry would testify to a false dilemma. It is one option among many (but not the most desirable, as will be argued below). For now, the outcome is open-ended. It was argued in chapter 8 that freedom is important, but that merely means that freedom must be taken seriously, not that it cannot be limited if it is weighed against something more important.

**10.2.** What has become known as the ‘harm principle’ is a useful starting point. Mill’s formulation of it is the following: “[...] the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”<sup>4</sup>. It is difficult what ‘harm’ is supposed to mean. There are passages in Mill’s work where a broader notion than physical harm seems intended<sup>5</sup>, but clarity on the subject matter is wanting. Be that as it may, this is not an exercise in exegesis, and the issue at hand is whether this principle is tenable.

One could limit the domain of disallowed harm to physical harm, but this would constitute an arbitrary demarcation line between permissible and prohibited actions: while it is certainly defensible

<sup>1</sup> Cf. section 7.2 and Th. HOBBS, *Leviathan*, Ch. 21 (pp. 147, 148).

<sup>2</sup> Even this may be called into question, but in this case on the basis of a more fundamental analysis than I would here provide. I remark here only, in line with what was said above (chapter 1, note 15), that it is not *a priori* correct that people may be considered complete units prior to their functioning in a society; perhaps they can, conversely, only be considered to function as they do *within* a society, in which case such freedoms can *a fortiori* only exist there. This is an issue that is perhaps not answerable by science or philosophy.

<sup>3</sup> Indeed, if there were no difference between freedom of expression with and without the interference of the state, a large part of the present work would lose its import.

<sup>4</sup> J. S. MILL, *On Liberty*, Ch. 1 (p. 223).

<sup>5</sup> J. S. MILL, *On Liberty*, Ch. 1 (p. 224), Ch. 3 (p. 260).

that an action which would (or even might) result in the physical harm of another person than the agent<sup>6</sup> should be disallowed, it is not clear why it would at the same time be the *only* sort of action to be considered thus. The only reason I can think of to uphold such a demarcation line would be that physical harm is relatively easily observable<sup>7</sup>, which is a criterion that can be of no concern (except if the issue were whether someone is sincere in his claim that he is harmed). Libelous acts, for example, are not physical in nature but could easily be argued to be harmful<sup>8</sup>.

In any event, the importance to avoid other sorts of harm than physical harm cannot be dismissed by simply qualifying them as such (*i.e.*, as non-physical harm). Even if their avoidance is less pressing than that of physical harm, this still does not exclude the possibility that they, too, are to be prohibited. I am not saying that this is necessarily my position; at this stage, I merely seek to elucidate the issue, so that it becomes apparent what is at stake.

I must first support why physical harm itself is a sufficient reason to limit freedom. This is perhaps considered a trivial matter by some (or many)<sup>9</sup>, but in order to present a complete account – and take into account what I observed above regarding the importance of freedom – it is necessary to justify even this intrusion on one's freedom; that my justification of such an intrusion will be brief is not spurred by the former consideration – since *argumenta ad populum* are to be avoided at *each* stage – but rather by the fact that the argumentation is relatively straightforward. In the case of having to balance freedom against one of the reasons for a state to exist at all, *viz.*, to protect one's life (and possessions) and avoid being hurt at random, the hierarchy involved here dictates what the answer should be<sup>10</sup>.

<sup>6</sup> That the agent's *own* harm is not covered by this principle is an important caveat for Mill (*On Liberty*, Ch. 1 (pp. 223, 224)).

<sup>7</sup> If one considers all the acts that potentially cause harm to others, the extent of the actions that can be allowed is easily shown to be very small (D. DRIPPS, "The Liberal Critique of the Harm Principle", pp. 9, 10), which would show the need to demarcate a sub-domain of – merely – potentially harmful actions that *would* supposedly be allowed. This would complicate the matter, as the distinction between 'harmful' and 'potentially harmful' is in practice often difficult to make.

<sup>8</sup> I merely provide this example to illustrate my point. The next chapter will concretize what is said in the present chapter by means of some elaborate examples.

<sup>9</sup> But not by everyone. For example, according to Smith's interpretation of the harm principle ("Is the Harm Principle Illiberal?", p. 4), the incidence of (physical) harm is a necessary condition to limit freedom but not a sufficient one.

<sup>10</sup> This reasoning warrants some caution. Apart from the fact that it does not apply to all cases, notably martyrs willing to suffer or die for their beliefs, a false dilemma (constituting at the same time a slippery slope) – which would ensue if one should argue, as Hobbes does (*vide* chapter 8, note 9), that a totalitarian state, while undesirable, is still preferable to a state of *total* freedom, in which one may randomly be killed or hurt – is to be avoided if a middle ground is possible and superior. Presenting such a middle ground is the purpose of this part of the present study.

**10.3.** On the basis of the foregoing I would argue that the forbearance of physical harm is the *minimum* that must be observed and because of which freedom may be limited, but that does not mean that the limit cannot be drawn at a less intrusive stage, using a broader definition of ‘harm’<sup>11</sup>. For example, someone may argue that he is harmed by the fact that cartoons are made that insult a person or deity<sup>12</sup> he considers to be of great value, or even sacred. His conception of ‘harm’ would obviously have a wider scope than physical harm, in a case such as this one consisting in being annoyed, or perhaps in being (non-physically) hurt because something or someone is not treated with the reverence he considers it, him or her to merit. From such a perspective, harm need not be physical in nature to warrant limiting freedom.

Feinberg distinguishes between harmful, hurtful and offensive experiences<sup>13</sup>, arguing that “Not everything valuable is such that its absence is harmful; nor is everything that is undesirable such that its presence is harmful. An undesirable thing is harmful only when its presence is sufficient to impede an interest”<sup>14</sup>. Indeed, an interest being thwarted, set back or defeated is the defining characteristic of being harmed, according to Feinberg<sup>15</sup>; he elaborates on this by saying that: “One’s interests [...] consist of all those things in which one has a stake [...]”<sup>16</sup>. I see no reason to disagree with such a way of qualifying the issue. This does mean, however, that it must be clear what an ‘interest’ is, or what having a stake in something is. For a believer, for example, not having one’s religion (or a deity) insulted may be considered such an interest.

Feinberg may distinguish, as he does, between offense and harm, stating that “[...] the offended mental state in itself is not a condition of harm”<sup>17</sup>, limiting what was just said about interests to the latter, but the question arises to what such a distinction amounts. After all, the crucial issue is not whether an act is harmful (in Feinberg’s sense) or offensive but whether the reasons to prohibit it outweigh those to allow it, and this applies to both offensive and harmful (again, in

<sup>11</sup> It is unwarranted to define a matter in some way and then draw one’s own conclusions from the result (cf. my remark in section 2.5 with regard to defining ‘rationality’ and chapter 9, note 13). ‘Harm’ is no clearly delineated concept and the difficulties that follow from this given must be taken into account.

<sup>12</sup> In the latter case, the insult would presumably be vicarious.

<sup>13</sup> J. FEINBERG, *Harm to Others*, pp. 46-49.

<sup>14</sup> J. FEINBERG, *Harm to Others*, p. 47.

<sup>15</sup> J. FEINBERG, *Harm to Others*, pp. 33, 34.

<sup>16</sup> J. FEINBERG, *Harm to Others*, p. 34.

<sup>17</sup> J. FEINBERG, *Offense to Others*, p. 3.

Feinberg's sense) acts. The believer just mentioned may agree with the statement that "It is unlikely [...] that being in an intensely offended state could *ipso facto* amount to being in a harmed state"<sup>18</sup>, but for him, the issue will be an academic one, his interest<sup>19</sup> not consisting in the way in which his negative experience is semantically qualified<sup>20</sup> but in the means to eliminate it.

Feinberg seems to have taken such an objection into account, saying that "It is the person of normal vulnerability whose interests are to be protected by coercive power [...]. He can demand protection only against conduct that would harm the normal person in his position. The further protection he needs he must provide himself by non-coercive methods"<sup>21</sup>. It must be admitted that the demarcation point between what should be allowed and what not is difficult to find and perhaps impossible to locate from a single perspective<sup>22</sup>. Yet 'normal' is, in my view, an insufficient term: it makes the outcome a virtually arbitrary one<sup>23</sup>.

In any event, a distinction such as the one made by Feinberg may have its value, but not for the purposes of the present discussion. One might still introduce specific terms to cover non-physical harm, such as 'secondary harm' for someone who would indeed be shocked because something very important to him is concerned, and 'tertiary harm' for someone who is merely annoyed, but a distinction between physical harm and other sorts of harm may not even be necessary: as long as harm is acknowledged to be the decisive element, a further division would only be relevant at a next stage, namely, to indicate the degree to which harm is inflicted. Since the first stage has not been completed, it would be premature to discuss this matter here; the following analysis will, moreover, show that such a division is

<sup>18</sup> J. FEINBERG, *Harm to Others*, p. 49.

<sup>19</sup> In order to evade a rhetorical way of responding to Feinberg's line of reasoning, I acknowledge that I use the word 'interest' here, which both he and I consider a vital element. However, as I mentioned above, for the person under discussion there may be an interest (something may be at stake) a nonbeliever is unable to grasp, in contradistinction to harm (in Feinberg's sense), the presence of which can (presumably) be grasped by both religious *and* nonreligious people when they see someone being physically harmed.

<sup>20</sup> This does not mean that one cannot debate the qualification. For example, Smith convincingly argues that emotional or psychic distress constitutes harm and opposes, along this line or reasoning, the attempt to differentiate between harm and offense (S. SMITH, "Is the Harm Principle Illiberal?", p. 16).

<sup>21</sup> J. FEINBERG, *Harm to Others*, p. 50.

<sup>22</sup> To anticipate matters somewhat, this issue will prove to be a difficulty in my own alternative as well.

<sup>23</sup> Feinberg uses 'harm' here in the way he has defined it, but, again, one's own definition may not be used as a directive. Applied to this case, if he wants to define 'harm' as he does, Feinberg must still make it clear why a 'normal' person should allow himself to be offended.

irrelevant. I will, then, continue to use the single, uncomplicated notion of harm with which I started; whether something is harmful can only be decided by those experiencing it as such.

**10.4.** Presuming that those claiming to be harmed in a non-physical sense are sincere, the problem that ensues is that someone may claim to be harmed (in this broad sense) on the basis of virtually any expression that is critical of his viewpoint. For instance, a Christian may claim to be harmed (and not just purport to be, but actually experience harm<sup>24</sup>) on the basis of a scientific exposition in the field of biology, or a joke in which his convictions are mocked. If such expressions should be considered undesirable and prohibited for that reason, little scientific progress would remain possible, few debates, scientific or otherwise, would continue to take place, and freedom of expression would easily be seen to be hollowed out<sup>25</sup>.

One might distinguish between those expressions which (presumably) provide a contribution to a public debate, and those which (presumably) do not, and in which one has no other objective but to offend (or harm) groups of people or individuals. Such a stance is taken by the European Court of Human Rights in the case of *Otto-Preminger-Institut v. Austria*: “[...] as is borne out by the wording itself of Article 10 para. 2 (art. 10-2) [of the ECHR], whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (art. 10-1) undertakes ‘duties and responsibilities’. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs”<sup>26</sup>.

What is problematic here is that it is difficult, if not impossible, to delineate the category of ‘gratuitously offensive’ expressions, and to steer clear from the lurking concomitant political abuse of this obscurity<sup>27</sup>. I concur, then, with Leigh’s evaluation of this judgment:

<sup>24</sup> Whether or not someone else would deem it harm, offense or nonsense, the Christian himself may experience it as something harmful, if ‘harm’ is understood to encompass more than physical harm.

<sup>25</sup> Cf. S. SMITH, “Is the Harm Principle Illiberal?”, pp. 20, 25, 38.

<sup>26</sup> *Otto-Preminger-Institut v. Austria* (ECtHR, Application no. 13470/87, 1994).

<sup>27</sup> In addition, it may be argued that acts considered by many to be gratuitous are actually a manifestation of an expression (cf. G. LETSAS, “Is there a Right not to be Offended in One’s Religious Beliefs?”, p. 256, who refers in this regard to insulting religious doctrines by burning crosses, writing heretical books and publishing cartoons).

“Gratuitously offensive speech is a vague category that is unpredictable in its application: it may extend not only to mere abuse but also to expression with a violent or hateful message”<sup>28</sup>. In the case of *Otto-Preminger-Institut v. Austria*, the Court referred to the case of *Handyside v. United Kingdom*<sup>29</sup>, acknowledging that its ruling constituted an exception to the general rule, expressed there, that “[...] freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’ [...]”<sup>30</sup>. To add that offensive expressions are allowed as long as they are not *gratuitously* offensive puts pressure on freedom of expression.

The line of reasoning presented above, according to which freedom of expression will cease to exist, may seem to constitute a slippery slope but it is, as long as a consistent line of reasoning is followed, simply the consequence of taking harm as seriously as I have. This consequence need not, admittedly, often occur *in practice*, for there are a number of ways to accommodate the various interests at stake, the usual – *i.e.*, politically most digestible – one in a liberal democratic state being that an imaginary line is drawn between those statements that are acceptable and those that are not. I say ‘imaginary’ since it is of course impossible to enumerate all statements beforehand and classify them one way or the other, so that, when an actual case presents itself, the discretion of the court ruling over the matter will – at least to some degree – be decisive, but, more importantly, no criteria to decide what should be tolerated are provided by the legislator (unless one should want to resort to the situation I qualified above, namely, the one in which expressions may be warded off on the basis of someone’s claim that he is harmed).

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<sup>28</sup> I. LEIGH, “Damned if they do, Damned if they don’t: the European Court of Human Rights and the Protection of Religion from Attack”, p. 71; cf. I. CRAM, “The Danish Cartoons, Offensive Expression and Democratic Legitimacy”, p. 327.

<sup>29</sup> *Handyside v. United Kingdom* (ECtHR, Application no. 5493/72, 1976).

<sup>30</sup> *Otto-Preminger-Institut v. Austria* (ECtHR, Application no. 13470/87, 1994).

So while such a pragmatic, political solution may suffice in many cases, that does not mean that it is also satisfactory (*too* pragmatic a stance must be avoided here). First, it suffers from inconsistency and randomness. For instance, making derogatory remarks about Jews is at present, against the background of the manifestations of anti-Semitism that culminated in the Holocaust, generally less acceptable in Western Europe than it was in the 19<sup>th</sup> and beginning of the 20<sup>th</sup> century, when discussing the 'Jewish question' was in vogue<sup>31</sup>, while, conversely, the possibilities to critically discuss religions have steadily increased over time<sup>32</sup>, which, to anticipate the discussion in the next chapter, makes it clear that the context needs to be considered in approaching such issues. Second, not unrelated to the first matter, it leads to uncertainty with regard to the extent to which one is at liberty to express oneself.

**10.5.** The problem seems to result from starting with the criterion: harm. I will propose an alternative, more productive criterion here. In a liberal democratic state, one may be expected to be able to deal with expressions from viewpoints that diverge from one's own. This may even be argued on the basis of a *quid pro quo* argument: in this sort of state, no view is so prevailing that its adherents can be assured that they can impose theirs upon others (provided they should want to), and, in line with what was said in part 1 of this study, even if it were, there is no guarantee that this state of affairs will continue indefinitely. The price they pay for having the opportunity to live according to their beliefs and express their views is that they should allow others to do the same.

There are, however, clear limits to this price. No one should have to be confronted with manifestations he cannot reasonably ignore. So there should, *e.g.*, be freedom to publish works in which views and persons are criticized and mocked, but no one should be forced to read them – one should have the opportunity to ignore such publications.

<sup>31</sup> Important exponents include W. MARR (*Der Sieg des Judenthums über das Germanenthum*) and E. DÜHRING (*Die Judenfrage als Frage des Rassencharakters und seiner Schädlichkeiten für Völkereistenz, Sitte und Cultur*).

<sup>32</sup> To avoid any confusion: no evaluative statements are made here about persecutions of groups of people. It may seem strange that I discuss Jews at all, as it follows from the first part of this study that they should, being *ceteris paribus* basically rational, be treated equally with other people (and thus not be singled out as a segment). However, if this is taken – in line with what was observed above, and not limiting oneself to religion – to be so broad that nothing may be said that may be taken to be harmful, no room seems left where freedom may be manifested. Neither of these two extremes – unequal treatment and the absence of freedom – seems desirable; I will present an alternative to accommodate both basic equality and freedom below.

The danger that a majority will use the contents of a view as a criterion to decide for minorities whether they should be allowed to express them is mitigated by the fact that no majority can be guaranteed its persistence in a liberal democratic state (*cf.* section 6.7). Since anyone may belong to a minority in the future, an outlook that optimally accommodates any view is preferable to anyone analyzing the matter rationally.

It is not clear whether ‘harm’ in ‘harm principle’ refers to the noun or the verb, which could be left open, whereas no such lemma form exists in this case, ‘ignore’ and ‘ignorance’ being the alternatives. I opt for the phrase ‘ignore principle’ rather than ‘ignorance principle’ for two reasons. First, ‘ignorance’ implies that one is ignorant and thus has no knowledge of the manifestation, which is not the case (for otherwise the issue would not arise in the first place), and, second, ‘ignorance’ implies passivity while ‘ignore’ indicates that the person in question needs to do something, namely, ignore that which might harm him.

**10.6.** An apparent problem in this theory is that one should be able to ‘reasonably’ ignore manifestations, while I have not specified what this means. Indeed, this vagueness is admittedly a weakness, but the limitations of what one can resolve at the *a priori* stage must be acknowledged rather than hidden through obscure phrases or lines of reasoning<sup>33</sup>. (In order not to let my own solution be rubricated as such, I will, in chapter 11, deal with this matter in detail.)

I would rather present a credible while limited theory than one whose comprehensiveness and elegance is made possible only by its procrustean (and thus flawed) nature. I have merely wanted to point out that it is impossible (at least for me) to foresee every (sort of) confrontation that might take place and to indicate in advance the limitations necessary to distinguish between what may and may not be demanded of citizens to ignore. Some room must be left in which the specifics of the cases can be dealt with in sufficient detail<sup>34</sup>; as I said, this will be brought to the fore in chapter 11.

<sup>33</sup> Feinberg suggests, following an approach similar to mine, “[...] the *standard of reasonable avoidability*. The easier it is to avoid a particular offense, or to terminate it once it occurs, without inconvenience to oneself, the less serious the offense is”, *Offense to Others*, p. 32. This seems to provide a viable starting point.

<sup>34</sup> The specifics attest to what is characteristic of a particular liberal democratic state, which may, so long as the general restrictions are taken to heart, differ from one case to the next (*cf.* the example (chapter 6, note 8) of the election of mayors in some but not all liberal democratic states).



10.7. I have not yet indicated whether religious outlooks should be treated in the same way as nonreligious ones. The issue of whether religious outlooks should receive a special treatment has stirred much debate and merits an investigation. An obvious reason to treat such outlooks in a special way in the present respect, offering religious people special protection against being harmed, would be that for religious people, much is at stake, namely, the very reason why they live. Criticizing their beliefs, let alone mocking them, one may contend, means disturbing something very important to them, in which respect their situation differs from that of nonreligious people, whose opinions can be said to be relatively trifling<sup>35</sup>.

This argument is not compelling. Apart from the ontological claims (the presence of one or more deities and – at least in the three monotheistic religions – an afterlife), there are no relevant differences. A communist, for example, may cling to his convictions with just as much vigor and consider his goals just as important as a believer does. The factors that drive persons to their opinions are more important in this regard than the *contents* of those opinions: various degrees of ardor are evidenced in both religious and nonreligious convictions.

The ontological claims might yet be put forward as a decisive reason to differentiate, but, absent the inclination to become dogmatic<sup>36</sup>, this would still necessitate making theologians of legislators. Even if one should opine – which I do not – that they must be concerned with ‘truth’, a realization along the lines just mentioned would be difficult to reconcile with the precepts determinative for liberal democracy. I must grant that this outcome is not *necessarily* irreconcilable with such precepts: one can imagine legislators acting upon religious convictions while taking into consideration the interests of nonbelievers. Still, the more they do so – and the more room they accordingly leave for the latter to express themselves, even when this should conflict with their own beliefs –, the less the issue is relevant. If such legislators should indeed operate *ceteris paribus* in the same way as legislators who don’t act upon religious convictions, the issue will be limited to the legislators’ *fora interna*<sup>37</sup> and thus be moot.

<sup>35</sup> Laycock avers, in a similar vein, that “People with a deeply held conscientious objection to a law are not similarly situated to people without such an objection”, D. LAYCOCK, “Formal, Substantive, and Disaggregated Neutrality toward Religion”, p. 1016.

<sup>36</sup> That this is to be avoided follows – if not already from a general disposition – from the considerations in section 8.3.

<sup>37</sup> Meaning here that if they are religious, that fact won’t affect the decisions they make as legislators regarding the freedom religious and nonreligious people should have.

10.8. Another reason why religious positions or their adherents should not merit special privileges in this respect follows in general from what was said about basic equality and prescriptive equality in chapter 6. Similarly, it can be argued that a special treatment for religious actors conflicts with the conditions of fairness and reciprocity<sup>38</sup>. Besides, should one want to depart from that stance only in this instance (and, in other words, privilege a religious position), there would be no *legal* considerations to do so, so that legislators would here, too, be forced into the role of theologians, since religious reasons would have to be decisive in order (to try) to support such an exception.

10.9. A final reason that may be adduced is that ‘religion’ is no principally delimited term, no criteria to determine when something is a religion being available; besides, the quest for such criteria could only be undertaken by theologians, this being the third instance that an appeal to them would be necessary. Should one nonetheless treat religious organizations differently from nonreligious ones (specifically, treat the first more favorably than the latter), it is not surprising that organizations should claim to be religious. To illustrate this point I refer to the presence of “Det Missionerande Kopimistsamfundet” (“The Missionary Church of Kopimism”), a Swedish association which considers, *inter alia*, the search for knowledge and the act of copying sacred and which has been acknowledged to be religious by the Swedish authorities (thus gaining strength in combating copyright restrictions, which is its goal<sup>39</sup>). This issue becomes all the more problematic in light of actions to disadvantage some groups of people under the guise of a religious practice<sup>40</sup>.

One may shift the focus from the content of ‘religion’ to the defense of “[...] conscientious belief and practice [...]”, which “[...] are beliefs and practices, which are not merely important to people, but important because, in light of their content, they are regarded as somehow demanded of them. This would extend to moral, political and, perhaps, some aesthetic beliefs as well as religious ones”<sup>41</sup>; and subsequently maintain that “[...] they are special preferences because of the sort of constraint they place on those who have them. It is not

<sup>38</sup> J. GARVEY, “An Anti-Liberal Argument for Religious Freedom”, pp. 290, 291.

<sup>39</sup> It is not relevant for the present discussion whether this is merely a means for the – in that case *actual* – goal to have unlimited access to knowledge.

<sup>40</sup> Cf. A. MCCOLGAN, “Religion and (in)equality in the European Framework”, p. 233.

<sup>41</sup> A. ELLIS, “What is Special about Religion?”, p. 239.

simply difficult for such people to abandon them, as it may be difficult for a pigeon-fancier to give up his hobby. The sacrifice involved is of a quite different sort, a sort that it is reasonable to wish to be immune from the normal process of weighing interests. That wish is realized in constitutional protection, which gives precisely that immunity<sup>42</sup>. This, however, immediately prompts the question of whether and, if so, how the sincerity of one's convictions should be measured. If no such inquiry is made, the issue is moot as people will continue to be able to claim that they have an interest in their beliefs being treated in a special way, but if, conversely, it is made, it would be hard to deny that an unwarranted state intervention will take place.

**10.10.** The line of reasoning presented above started from the premise that religious positions should not be *favoured* over nonreligious ones. Yet one may also argue that unequal treatment is justified in a way that *disadvantages* religious positions. Acts of aggression motivated by a religious outlook must of course be penalized or, preferably, prevented, but does that require taking a special stance with respect to religious positions? One must be nuanced here. So if it is stated that "[...] religion is indistinguishable from any other threat facing the state"<sup>43</sup>, it would not be warranted to consider (any) religion a threat if not in the very general sense that *any* view, religious or nonreligious, may constitute a threat (taken broadly).

The fact that the adherents of some views are more likely than those of others to indeed manifest undesirable actions does not necessarily mean that (all) religions should belong to the first category. Perhaps it is correct to say that "A religious authority figure is viewed as a representative of God on earth. A follower is far more likely to act on the words of a religious authority figure than other speakers"<sup>44</sup>, but whether a believer will indeed go so far as to *defy* secular authorities on this basis is not a given and cannot be determined *a priori*<sup>45</sup> (which Guiora seems to acknowledge by using the phrase 'far more likely'); such a statement needs empirical support.

<sup>42</sup> A. ELLIS, "What is Special about Religion?", p. 240.

<sup>43</sup> A. GUIORA, *Freedom from Religion*, p. 23.

<sup>44</sup> A. GUIORA, *Freedom from Religion*, p. 30.

<sup>45</sup> Religious sources, whether they be texts or persons, may of course instigate civil disobedience, but it is difficult to see how the various ways in which those that belong to the pertinent religious denomination can interpret them and act upon their directives may be captured in a single encompassing model.

Furthermore, to say that “Extreme religious speech *does* present a threat, or at least has the potential to present a threat in a manner that secular speech today does not”<sup>46</sup>, seems to be an overgeneralization: secular speech can be constituted by various views and can be manifested in many ways, some of which may *ceteris paribus*<sup>47</sup> constitute a greater threat than some religious sources. In any event, from the perspective of basic equality and prescriptive equality, no special treatment for religions would be justified. I would accordingly agree with the recommendation that “[...] religious speech be subject to the same careful scrutiny as secular speech”<sup>48</sup>. The same applies to actions that lead to physical harm<sup>49</sup>.

**10.11.** The differences between religious and nonreligious positions were relativized in the foregoing. This merely indicates that such positions should be treated equally; restricting their adherents’ freedom to the same degree would not conflict with this conclusion. If it is supplemented by the arguments for allowing freedom of expression from chapter 8, the standpoint that anyone in a liberal democratic state must stand what he can reasonably ignore seems to me to be justified. There is no reason, then, why those being able to reasonably ignore expressions irreconcilable with their religious outlooks should have a claim to suppress them. (The same applies to the reverse situation, of course, religious people having the freedom to express themselves with respect to nonreligious people and views.)

The possibly radical outcome of clinging to a special position for adherents of a religious denomination is neatly illustrated by Cram, referring to the case *Wingrove v. United Kingdom*, where it was ruled that “In the difficult balancing exercise that has to be carried out in these situations where religious and philosophical sensibilities are confronted by freedom of expression, it is important that the inspiration provided by the European Convention and its interpretation should be based both on pluralism and a sense of values”<sup>50</sup>. As he says, “‘Balancing’ sits oddly alongside established frames of Article 10 [of the ECHR] Jurisprudence that require any interference with expression to be both (i) ‘convincingly established’ and (ii) based on ‘relevant and sufficient’ grounds. This is commonly

<sup>46</sup> A. GUIORA, *Freedom from Religion*, p. 48.

<sup>47</sup> This caveat must be added since, again, it is not decisive what the views are but rather how those that adhere to them interpret them and act upon them.

<sup>48</sup> A. GUIORA, *Freedom from Religion*, p. 120.

<sup>49</sup> A. GUIORA, *Freedom from Religion*, p. 108.

<sup>50</sup> *Wingrove v. United Kingdom* (ECtHR, Application no. 17419/90, 1996).

thought to give a presumptive priority to the principle of freedom of expression and a correspondingly narrowed scope for national interference with expressive activity. ‘Balance’ seems to undercut much of this presumptive priority as virtually all criticism of a religion or the religious practices of its adherents is likely to cause offence and, as such, become eligible to be put onto the scales by national authorities who are best placed to judge the need for restriction”<sup>51</sup>. In the most extreme case this might lead to the disappearance of freedom of expression<sup>52</sup>. Indeed, “At bottom, the claim that an individual’s freedom of religion is somehow dependant upon (and may be improperly curtailed by) what others say about that individual’s religious beliefs effectively allows religious beliefs to dictate what may be said in the public sphere. This position is extremely difficult to reconcile with modern understandings of liberalism”<sup>53</sup>.

**10.12.** It may be objected to the foregoing that in the case of religion, something people may consider important is at stake, or even something so vital that they would be willing to (violently) oppose laws that would restrict their right to practice it. I have already pointed out why a distinction between religious and nonreligious standpoints is not warranted, but would add here that this problem cannot principally be resolved, neither through my account nor through any other<sup>54</sup>; this issue is not limited to situations in which people appeal to their religious convictions, but applies to any situation where the law conflicts with people’s convictions and where they are unwilling to obey the law.

<sup>51</sup> I. CRAM, “The Danish Cartoons, Offensive Expression and Democratic Legitimacy”, p. 316. The Court argues both in this case and elsewhere (e.g., *Handyside v. United Kingdom* (ECtHR, Application no. 5493/72, 1976); *Otto-Preminger-Institut v. Austria* (ECtHR, Application no. 13470/87, 1994)) that state authorities are in a better position than the Court to assess whether rights should be restricted in light of possible offense.

<sup>52</sup> In the case of *Wingrove v. United Kingdom*, Judge Pettiti argued, in a separate Concurring Opinion, that both adherents of religious beliefs and of philosophical convictions should be protected against offences, but, while all persuasions would thus be treated equally, this would constitute a graver problem: this approach “[...] goes in precisely the wrong direction by broadening and applying to secular ideas the notion of religious offence. Even if it is correct in fact that the misappropriation of secular cultural icons causes equivalent offence to their followers to that caused by blasphemy to religious adherents, the standard at which state intervention is proposed – ‘seriously offends the deeply held feelings of those who respect their works’ – is even vaguer than blasphemy”, I. LEIGH, “Damned if they do, Damned if they don’t: the European Court of Human Rights and the Protection of Religion from Attack”, p. 60.

<sup>53</sup> I. CRAM, “The Danish Cartoons, Offensive Expression and Democratic Legitimacy”, p. 320. I do not, incidentally, agree with the author’s way to resolve the difficulties by appealing to values such as tolerance, mutual respect and dignity (*ibid.*), for this is no convincing way to confront them, as will be shown in chapter 13.

<sup>54</sup> Excepting here something I have excluded from the outset, *viz.*, a totalitarian state. In such a state, not only violent opposition to laws but *any* opposition to those in power may be oppressed.

The question then presents itself to what extent states (and, specifically, governments) should be allowed to intervene in practices, whether they be religious or not. This may be answered in the abstract by pointing to the ignore principle, but when this principle is applied, the consequences may vary significantly. Someone who raises his children liberally may not even notice that this principle is used as the standard, while an individual who incorporates religious elements in his children's upbringing may – depending, of course, on the precise nature of this upbringing – be confronted with limitations he may challenge. For example, male circumcision is considered a solemn duty in the Jewish faith (Gen. 17:10-14), and a religious zealot may even go so far as to sacrifice his child, from the conviction that God has ordered him to do so (*cf.* Gen. 22:1-13). It is clear<sup>55</sup> that both of the practices just mentioned contravene the ignore principle<sup>56</sup>, but – on the basis of traditions that have gradually come to be accepted and the vested interests of advocacy groups – it may in practice prove difficult to alter all legislation in order to accommodate the ignore principle. This is yet another example of the confrontation of an *a priori* approach with an *a posteriori* state of affairs.

This *status quo* does not alter the fact that a consistent approach would, in light of the observations made above, entail that the child involved should be protected against harm it cannot reasonably ignore, whether the actions be motivated from religious considerations or not. An exception may be made in cases in which the actions can be justified on the basis of conflicting interests (of the child) that supersede the harm, *viz.*, if the child's health profits from implementing the procedure. In such cases, of course, freedom of religion is no consideration<sup>57</sup>.

<sup>55</sup> I must anticipate the treatment of the ignore principle in chapter 11 here, but these examples are, I think, extreme enough to be understood without yet having considered the detailed account.

<sup>56</sup> In the case of male circumcision described above, the choice is made by the parent(s). This is significantly different from a situation in which someone decides for himself to be circumcised. This is also the line of reasoning of the Landgericht (district court) of Cologne (Az. 151 Ns 169/11, 2012), condemning male circumcision in the first instance: "Die in der Beschneidung zur religiösen Erziehung liegende Verletzung der körperlichen Unversehrtheit ist, wenn sie denn erforderlich sein sollte, jedenfalls unangemessen. [...] Zudem wird der Körper des Kindes durch die Beschneidung dauerhaft und irreparabel verändert. Diese Veränderung läuft dem Interesse des Kindes später selbst über seine Religionszugehörigkeit entscheiden zu können zuwider." ("The violation of the corporal integrity that consists in the circumcision, being part of the religious upbringing, is, even if it should be required, in any event inapposite. [...] Moreover, the child's body is changed lastingly and irreparably by the circumcision. This change runs counter to the child's interest to be able to decide for itself, later on, regarding its affinity to a religion.")

<sup>57</sup> Incidentally, the practice of male circumcision itself may originally stem from precisely such considerations, but this is no argument for a believer to perform it, as he would appeal to a *nonreligious* reason and defeat the very basis of his (special) appeal.

**10.13.** Should one maintain that “[...] religion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. Government should not interfere with our beliefs about religion either by coercion or by persuasion”<sup>58</sup>, I can, in light of what has been said, only concur. The crux of the matter lies, however, in the phrase ‘as unaffected by government as possible’; as long as it is not clear what this means, no limits to government interference have been drawn. Laycock himself seems in any event not to want to limit religious freedom to the freedom to *believe* what one wants, as it should also cover religious *practice*: “Government must be neutral so that religious belief and practice can be free”<sup>59</sup>. This cannot justifiably be concluded from the former observation, precisely because ‘as unaffected by government as possible’ has not been qualified, and the step from ‘beliefs about religion’ to ‘religious belief and practice’ is obviously not a minor one.

Incidentally, the matter may be considered moot because of the way Laycock defines ‘religion’: “My conception of religious neutrality includes a neutral conception of religion. That is, any belief about God, the supernatural, or the transcendent, is a religious belief. For constitutional purposes, the belief that there is no God, or no afterlife, is as much a religious belief as the belief that there is a God or an afterlife”<sup>60</sup>. It would be hard to see, then, why from such a perspective the ignore principle should not be applicable: citizens are free to believe what they want, but should not induce harm that cannot reasonably be ignored.

It must be granted that here, too, an *a priori* stance to decide matters in every detail would be an illusion, or at least an oversimplification<sup>61</sup>. It is difficult to assess whether proposals such as mine do not suffer, at least in part, from their being embedded within a certain tradition, on the basis of which they may *seem* universally acceptable while their acceptability would in fact be confined to the very domain from which they have arisen. Robert makes an important observation in this regard: “[...] it must not be forgotten that Judeo-Christian thought has forged the Western mentality and that we are more familiar with certain denominations than with others that may shock us by their exterior aspect, their esotericism, or their ostensible

<sup>58</sup> D. LAYCOCK, “Formal, Substantive, and Disaggregated Neutrality toward Religion”, p. 1002.

<sup>59</sup> D. LAYCOCK, “Formal, Substantive, and Disaggregated Neutrality toward Religion”, p. 1002.

<sup>60</sup> D. LAYCOCK, “Formal, Substantive, and Disaggregated Neutrality toward Religion”, p. 1002.

<sup>61</sup> As Aristotle rightly observes, the same degree of precision is not to be expected in each subject matter (*Ethica Nicomachea*, 1094b).

attachment to beliefs and rituals that are foreign to our culture”<sup>62</sup>. Indeed, “[...] a danger exists that discrimination will arise between old and new religions since all do not exercise the same influence on the national culture and all do not have the same place in our common heritage”<sup>63</sup>.

At this point it must be reminded that the starting point, the ignore principle<sup>64</sup>, cannot be forgone, unless, contrary to what I argue here, one should maintain that no necessary (and thus universal) characteristics of liberal democracy are discernible at all. That given does not detract from the fact that the ignore principle is no completely *a priori* principle, meaning that only its basis is indeed universal, a matter that will be taken up in the next chapter.

**10.14.** A final consideration with regard to religious positions is pertinent. I have only dealt with the behavior of citizens amongst themselves, but the role of the state vis-à-vis individuals or groups of people cannot remain unaddressed in a discussion such as the present one. One may wonder, for example, how one should deal with matters such as the following: should a Muslim woman who is a public servant, or, specifically, a judge, be allowed to wear a headscarf while in function, should a Christian in that capacity be allowed to wear a Christian cross (visibly), and should a Sikh in that capacity be allowed to wear a kirpan<sup>65</sup> (a dagger (baptized) Sikhs are obligated to wear in accordance with their religious tenets)? The perspective from which this question is presented differs from the first, but the way it is answered is the same. Here, too, basic and prescriptive equality, in conjunction with the ignore principle, lead to equal treatment for religious and nonreligious denominations (if the value of this distinction has not already dissipated in light of what was observed above).

<sup>62</sup> J. ROBERT, “Religious Liberty and French Secularism”, p. 651. Cf. A. GALEOTTI, “Citizenship and Equality: The Place for Toleration”, p. 588: “The liberal democratic state, as a rule, interferes only when there is evidence of harm done to the person or to society in general. It is far from evident that chador-wearing would be harmful, whereas, say, Catholic symbols (e.g., necklace with the cross) are not so.”; p. 593: “[...] it is the fact that the French are accustomed to the cross but not to Islamic headscarves that makes the first quasi-invisible and the second highlighted to them.”

<sup>63</sup> J. ROBERT, “Religious Liberty and French Secularism”, pp. 651, 652; cf. S. BEDI, “What is so Special about Religion? The Dilemma of the Religious Exemption”, pp. 242, 243, and M. NUSSBAUM, *The New Religious Intolerance*, pp. 119 and 124-126, where she demonstrates a discrepancy between the treatment of Muslims on the one hand and ultra-orthodox Jews, Jehovah’s Witnesses and Christians on the other.

<sup>64</sup> Or, if the ignore principle should not be acceptable, a similar principle.

<sup>65</sup> In addition, Sikhs wear specific attire tailored to their religious duties.



It would be unfair to conclude the chapter thus, for one controversial matter remains: should a liberal democratic state not display an appearance of neutrality, which seems difficult to reconcile with someone's having the right to display a religious symbol? I would respond to this by saying that the ignore principle is no less a criterion here than it is in other matters. Should one really be convinced that a female Muslim judge will reach different decisions if she removes her headscarf in that capacity, that would be a reason to forbid judges to wear them, as the interests of one or more parties involved in lawsuits may then be concerned, but I find it hard to imagine that a causal link would exist between the manifestation and the process leading to the ruling. After all, even if she removes the headscarf, the judge is still a Muslim; should one be worried that her religious convictions are in any sense decisive, adjusting or removing her apparel will do nothing to alleviate this and should one have no such worries, the issue is moot to begin with.

The same line of reasoning can be used in the case of the display of the Christian cross. Only with an appeal to tradition may one fruitfully object to this, and maintain that judges should all have the same appearance, as far as possible, and the wearing of wigs may similarly be pleaded. (I do not mean to say by using 'fruitfully' that I would be convinced by this argument, but see no reason to try to dissuade those who persist in incorporating ceremonial elements into the process, as I consider this a relatively minor matter.) The case of the kirpan differs somewhat from the other two; in this case, the law may forbid carrying certain weapons and if the kirpan meets the requirements to be qualified as such, the Sikh should not be allowed to wear it, as he must be treated equally with those who adhere to another religion and nonbelievers.

The argument that civil servants represent the state as a whole and should *in this role* not express their own views<sup>66</sup> appears to me a valid one, but while it seems to me correct that civil servants are mere executors of state policy<sup>67</sup>, it may, at least in some cases, be questioned whether a display of one's religious view conflicts with the view of the state, for it may be questioned whether such a view exists at all<sup>68</sup>. (This issue will be revisited in section 12.2.) Focusing on

<sup>66</sup> P. CLITEUR, "State and Religion Against the Backdrop of Religious Radicalism", pp. 146-149.

<sup>67</sup> In the case of civil servants operating close to a minister, substantial contributions can be made, but their position is formally still a subordinate one.

<sup>68</sup> Governments have views, of course, but identifying such views with the view of the state would, in a liberal democratic state, mean that the state 'changes its mind' periodically, and that (some) religious manifestations may be allowed, but only at times.

such displays is possible, but only from an aesthetic standpoint, meaning that one would argue that it is necessary that the state be represented in a uniform manner. Since civil servants' opinions would, presumably, not be affected by such policies, still being able to cling to any (religious) view, not much seems to be gained.

I have of course not fully responded to the objection, for the issue of neutrality has not been addressed. However, since chapter 12 is entirely devoted to this topic, I will forestall discussing it until its detailed treatment will be undertaken there.

### **10.15. Summary and Relation to Chapter 11**

This chapter was focused on clarifying the meaning of 'harm' and to find the means to balance the interests of those who want to express themselves against the interests of those that may be harmed as a consequence. This has resulted in the ignore principle. Because of the specifics and intricacies of individual cases, it would be an illusion to maintain that a simple principle should suffice. The next chapter is devoted to this issue. Apart from the general theme of harm, I have paid special attention to religious outlooks, maintaining that they merit no special treatment, which I base on three considerations. First, to judge the contents of such tenets requires special expertise legislators may not be expected to have; second, equal treatment of all views means that religious views should be treated equally with all other views; third, 'religion' is not clearly defined, so that any position may be considered religious, rendering the issue of whether religious positions merit a special treatment moot. The position of religious denominations will receive further attention in the next chapters.

## Chapter 11

### THE IGNORE PRINCIPLE

**11.1.** In the previous chapter I adhered to the adverb ‘reasonably’ in saying that only manifestations that can reasonably be ignored should be allowed. I have thereby accepted an admittedly vague notion. One must be careful not to identify ‘reasonably’ in the present sense with ‘reasonably’ in the sense of ‘according to reason’, which would be a relatively unproblematic phrase, the considerations of chapters 2, 5 and 6 notwithstanding. ‘Reasonably’ as it is applied presently has a wide scope: it has a similar meaning as ‘equitably’, which may be associated with ‘equity’ as it is used in (civil) legal systems. This means that the notion has no ‘moral’ connotation. The vagueness that the concession of including ‘reasonably’ in this inquiry adds to it is the price to pay for providing not only a consistent but a credible theory, *i.e.*, a theory that accommodates the difficulties and specific circumstances an individual liberal democratic state must confront. I will try to remedy the problem of vagueness by illustrating my position by means of a number of examples.

**11.2.** A proper place to start is the workplace. Employees and prospective employees who are treated unequally with other (prospective) employees cannot ignore such treatment. They could ignore the discrimination and look for work elsewhere, but a matter such as employment is arguably an integral part of life (apart from the obvious issue of acquiring an income), so that any unwarranted interference with people pursuing it is unacceptable in any liberal democratic state. (I say ‘unwarranted’, not ruling out *any* interference, because in *special* instances, discrimination on the basis of, *e.g.*, race, must be allowed (*cf.* the example in the introduction of the criteria to select actors).) Discrimination qualifies, then, in such a case, as harm that cannot reasonably be ignored.

In the most extreme case, allowing employers to dismiss the principle of prescriptive equality might result in an unwelcome segregation, manifesting in some jobs a disproportionate representation of some categories (*e.g.*, relatively many black people and/or women). Such differences may, incidentally, continue to exist; whether they should be artificially combated – through a policy of

positive discrimination – cannot be conclusively answered from the present perspective, which demands only that basic equality be acknowledged, meaning that no discrimination be allowed, so the relevant qualities of employees being the criterion.

Such a segregation would in the long run not only affect individual employees, but the state as a whole, if the danger should arise that employees decide to rebel against their disadvantageous position. (Some categories of employees might display the same behavior if they collectively consider their wages to be lower than what they might expect, but that is an issue that lies beyond the scope of the present inquiry and demands its own response, whether it be in political, economic or penal terms.) In such cases, ‘reasonably’ can be linked to reason in the sense in which it was used in part 1 of this study, namely, as the decisive criterion for prescriptive equality, if basic equality is specified by basic rationality.

11.3. To illustrate the ignore principle by means of another example, libelous acts themselves can be ignored but their consequences may be so dire that they affect someone’s life in a serious way. In this case, ‘reasonably’ cannot be as easily determined as in the first case: it does not follow from prescriptive equality that libelous acts should be prohibited. ‘Reasonably’ must now be interpreted differently, namely, as the standard of appropriateness in the law, to be decided by the circumstances<sup>1</sup>. In this case, the link with ‘equity’ mentioned above is clear.

Yet another drawback of the limitations of the *a priori* perspective that has featured as the guiding approach throughout this inquiry becomes apparent here<sup>2</sup>: no clear criterion seems available to decide the issue. I – again – acknowledge the limitations here, and will not attempt, by means of a series of unconvincing contortions, to fabric a procrustean standard to merely *seemingly* accommodate the facts while in fact not doing justice to the complexity of the situation, but

<sup>1</sup> Cf. E. BURKE, *Reflections on the Revolution in France*, p. 240: “Circumstances [...] give in reality to every political principle its distinguishing color and discriminating effect.”

<sup>2</sup> Cf. E. BURKE, *Reflections on the Revolution in France*, p. 311: “The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *a priori*”, I would not assent to the following statement, though: “Nothing universal can be rationally affirmed on any moral or any political subject”, E. BURKE, *An Appeal from the New to the Old Whigs*, p. 80. Such a radical observation, at least with regard to politics, is incompatible with the *basis* of my inquiry, whose *a priori* nature is undeniable. For the same reason, MacIntyre’s point of view differs significantly from mine: “There is no standing ground, no place for enquiry, no way to engage in the practices of advancing, evaluating, accepting, and rejecting reasoned argument apart from that which is provided by some particular tradition or other”, *Whose Justice? Which Rationality?*, p. 350; cf. *After Virtue*, pp. 126, 127.

rather leave said perspective in this instance. This does mean that I must resort to an (*a posteriori*) alternative to complete the account, so that an *a posteriori* ‘superstructure’ must be added to the *a priori* basis.

**11.4.** A third example is hate speech. The phrase ‘hate speech’ is somewhat misleading: if it were interpreted literally, it would mean speech in which the hate towards (a group of) people is expressed or even instilled in those who listen to it and take it seriously. The usual sense, however, is speech that is used to incite people to violence to other (groups of) people. Speech of the latter kind cannot reasonably be ignored, in contrast to hate speech in the literal sense just mentioned, *i.e.*, the speech that expresses hate, which *can* reasonably be ignored so long as it does not also belong to the second category. In any event, by ‘hate speech’ I will refer to the usual rather than the literal meaning.

It is, just as in the second example, necessary to distinguish here between the *contents* (*i.e.*, what is said) and the *consequences*; the former can reasonably be ignored while the latter cannot. If someone considers the members of a particular race to be inferior to those of other races and consequently calls for the destruction of the former race, his opinion may reasonably be ignored, while those who are intended cannot avoid the consequences that follow from what he says, if his plea is taken to heart and carried out. It may be considered a hate speech act and be forbidden for the same reasons why other (potentially) harmful<sup>3</sup> acts are forbidden. (The word ‘potentially’ is problematic; I will deal with this in section 11.6, where the problems with the similar phrase ‘possible consequences’ are addressed.)

**11.5.** The application of the ignore principle may be further illustrated along the lines of actual legal cases. I point to the Skokie case<sup>4</sup>, in which it was decided that Nazi sympathizers should be allowed to march through Skokie, Illinois (where relatively many Holocaust survivors resided), wearing the uniform of the National Socialist Party of America and promoting anti-Semitism. Crucially, the First Amendment to the Constitution of the U.S.A. protects freedom of speech and the right to assemble peacefully. Whether the latter condition (a *peaceful* assembly) was met can of course be debated; in

<sup>3</sup> One may restrict this to *physically* harmful acts.

<sup>4</sup> *National Socialist Party of America v. Village of Skokie* (432 U.S. 43, 1977; 69 Ill. 2d 605, 373 N.E. 2d 21, 1978).

any event, the Appellate Court of Illinois ruled that ‘fighting words’<sup>5</sup> are not covered by the First Amendment but that this exception did not apply in the case at hand as far as the demonstration itself was concerned.

Significantly, the intentional display of the swastika *was* prohibited, as it might evoke violent reactions of some of Skokie’s residents<sup>6</sup>. So “[...] Intentionally displaying the swastika on or off their persons [...]” was not allowed, but the Illinois Appellate Court stated that it should in principle be considered part of freedom of speech and based its injunction – which was overturned by the Supreme Court – on the fact that “[...] the tens of thousands of Skokie’s Jewish residents must feel gross revulsion for the swastika and would immediately respond to the personally abusive epithets slung their way in the form of the defendants’ chosen symbol, the swastika. The epithets of racial and religious hatred are not protected speech [...]”; “In the instant case, the evidence shows precisely that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with the display of the swastika”<sup>7</sup>.

One may wonder whether the Skokie residents could not reasonably ignore the demonstration, including the swastikas that would be displayed. Indeed, this was the conclusion of the Supreme Court of Illinois, which ruled, stating that advance notice of the demonstration had been given so that no one would be forced to see any swastikas, that “The display of the swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of those who display it. It does not, in our opinion, fall within the definition of ‘fighting words,’ and that doctrine cannot be used here to overcome the heavy presumption against the constitutional validity of a prior restraint”<sup>8</sup>.

Whether a demonstration such as the one that prompted the *Skokie* case should indeed be allowed depends on the possibility for those that might be offended (and thus harmed, on the basis of my own broad notion) to reasonably ignore it. Feinberg’s assessment is roughly the same as mine in this respect, pointing out that the demonstration had been announced well in advance, so that it could

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<sup>5</sup> Cf. *Chaplinsky v. New Hampshire* (315 U.S. 568, 1942).

<sup>6</sup> 51 Ill. App. 3d 279, 366 N.E. 347, 1977.

<sup>7</sup> 51 Ill. App. 3d 279, 366 N.E. 347, 1977.

<sup>8</sup> 69 Ill. 2d 605, 373 N.E. 2d 21, 1978.

be avoided<sup>9</sup>, and that “[...] the seriousness of the offense in the actual *Skokie* case had to be discounted by its relatively easy avoidability”<sup>10</sup>.

The judgment whether such expressions should be allowed depends on the circumstances of the situation. As Rosenfeld writes, “As made manifest by the *Skokie* cases, the United States can afford to tolerate Neo-Nazi propaganda because of its minimal effect on its intended audience or on the affairs of the polity. In contrast, in Germany because of the Nazi past and of the fear that the Nazi monster may one day be reawakened, Neo-Nazi hate speech does loom as a potential threat to the unity and integrity of the polity”<sup>11</sup>. Whether this is a correct assessment I do not know, but supposing the same suppression of Jews that took place during World War II in Germany were to arise anywhere, it would be an understatement to say that they would be unable to reasonably ignore the hate speech directed at them, let alone the more dire acts accompanying it.

**11.6.** The *Skokie* case is also of interest for the reason that reflection on it provides legislators and policymakers with a criterion they must use when the issue arises whether some liberty may be limited. What citizens cannot reasonably ignore must be their standard; the possible consequences of hate speech, for example, cannot reasonably be ignored. There is a clear problem with the addendum ‘possible’. After all, in the most extreme case, all acts may be forbidden since they might result in harmful consequences citizens cannot reasonably ignore, even if the chance is remote (a cartoon produced with no other goal than to amuse children may inspire someone to commit a terrorist act, depending on his interpretation of it). The ‘clear and present danger’ test<sup>12</sup> offers no undisputable criterion, as the extent of ‘clear and present’ may still be debated (what is the nature of the ‘danger’ in a specific case, and what should

<sup>9</sup> J. FEINBERG, *Offense to Others*, p. 87.

<sup>10</sup> J. FEINBERG, *Offense to Others*, p. 88.

<sup>11</sup> M. ROSENFELD, “A Pluralist Theory of Political Rights in Times of Stress”, p. 45. Cf. U. BATTIS and K. GRIGOLEIT, “Rechtsextremistische Demonstrationen und öffentliche Ordnung – Roma locuta?”, p. 3462: “Die Nazis durften durch Skokie paradiere. Deutsche Gerichte hätten den Fall anders entschieden.” (“The Nazis were allowed to parade through Skokie. German courts would have judged the case otherwise.”)

<sup>12</sup> *Schenck v. United States* (249 U.S. 47, 1919): “The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” In *Brandenburg v. Ohio* (395 U.S. 444, 1969), the phrase ‘imminent lawless action’ was substituted for ‘clear and present danger’: “[...] the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

the timespan be within which it should (probably<sup>13</sup>) manifest itself?). No simple solution to this problem is forthcoming here. This is, after all, no matter of all-or-nothing, but a matter of assessing the likelihood that harm may result from an act, the extremes being the cartoon just mentioned on the one hand and an appeal to all Muslims by an imam to kill any Jew they encounter on the other.

Strictly speaking, there is no warrant to ensure that the legislator will diligently perform this task save for the threat that the electorate will express its discontent in the next elections. This may still mean that a majority may suppress a number of liberties<sup>14</sup>, but this need not be a problem as long as an independent judiciary is in place to ensure the exercise of liberties while being capable of balancing the import of such liberties and the consequences they might have<sup>15</sup>. This does not mean, though, that the issue is completely resolved, since the task of assessing the possible consequences has merely been transferred from the legislator to the judiciary, but at least the latter may appreciate the specific merits of each individual case, thus reaching a judgment tailored to the circumstances.

The judiciary's task is also of importance in countering the problem that the task of specifying what 'reasonably' means may not be in safe hands with the legislative power on account of its dependence on the electorate, which may tempt it to tailor the laws to the wants of the majority, thus sacrificing the rights of one or more minorities. (In states where judges are elected, this problem is not fully solved.) At the same time, no extraordinary abilities to reach a stance isolated from the factors that are decisive for the society in

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<sup>13</sup> The fact that there is a danger means that the actual harm has not manifested itself, meaning that some degree of uncertainty will remain until it does. There is more justification to intervene in the case of 'probably' than in the case of 'possible consequences' just mentioned, but even here, judges have a task to assess the circumstances of the case at hand.

<sup>14</sup> Cf. Th. SCANLON, "Freedom of Expression and Categories of Expression", p. 534: "[...] where political issues are involved governments are notoriously partisan and unreliable. Therefore, giving government the authority to make policy by balancing interests in such cases presents a serious threat to particularly important participant and audience interests."

<sup>15</sup> The judiciary must in that case be careful not to nullify its role, a danger that looms in judgments such as the following: "As in the case of 'morals' it is not possible to discern throughout Europe a uniform conception of the significance of religion in society [...]; even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference", *Otto-Preminger-Institut v. Austria* (ECtHR, Application no. 13470/87, 1994). On the basis of such statements, courts are liable to negate the very purpose of their existence. (For completeness, I add that the Court does complement this judgment by stating that the authorities' margin of appreciation is not unlimited, thus mitigating the problematic nature of its consideration.)



which one lives are forthcoming from judges (if such a stance is not downright impossible in the first place). After all, it seems likely that elements such as one's political climate and the ideas one encounters in one's education constitute one's outlook (although I would not try to determine to what degree). This is not to be taken to mean that one is necessarily delivered to a forlorn relativism but merely that a realistic assessment of the nature of (judicial) rulings is vital.

**11.7.** A controversial issue to mention here is the Holocaust denial. Should citizens be allowed to deny that Jews were systematically killed during World War II? To analyze the matter soberly means that one simply conducts historical research, looking for relevant data (documents, witnesses, etc.) to validate or refute the claim. Depending on the outcome of such a research, the Holocaust denier will be proved right or wrong. If he is proved wrong, and won't be convinced by compelling evidence, he does not have to be taken seriously. If the Holocaust indeed happened, those who survived it and their descendants, and even Jewish people in general, may be offended by such statements, but should be able to reasonably ignore them, just as the people in Skokie could reasonably ignore the manifestation in their hometown. If, on the other hand, he is proved right, there is no reason not to allow him to express his – correct – view, just as it would be strange to suppress a mathematician's right to claim that Cantor's theorem is correct.

The fact that a sensitive issue is at stake cannot be a valid consideration, since only the issue of whether something is correct is at stake, not whether it is *desirable* if it has indeed happened, and when the historical evidence is assessed, one must be just as critical as in other instances. As Altman puts it: "Even books by scholars of history contain demonstrably false statements. There is no reason to pick out the falsehoods of [Holocaust] deniers for special, disfavored treatment unless one takes into account the moral horror of what the falsehood covers up"<sup>16</sup>. The sensitivity of a view and its incorrectness should not be confused. (Incidentally, not even Cantor's theorem, just mentioned, has engendered unanimous support.)

The second aspect, of desirability, is important, and even decisive, in another case. This bears a similarity to the previous one but must not be confused with it. The case I mean is someone calling for a new Holocaust, which may be qualified as hate speech, and accordingly

<sup>16</sup> A. ALTMAN, "Freedom of Expression and Human Rights Law: The Case of Holocaust Denial", p. 42.

be suppressed (*cf.* section 11.4). In this case, in contrast to the first, the issue is not whether something happened, but whether it *should* happen. That a (new) Holocaust should happen, or more generally, that there should be room to seriously consider such an operation, will be denied by anyone accepting basic rationality and what prescriptive equality demands in that basis.

11.8. What was said above is merely an approximation of what 'reasonably' ignore might mean, for to the difficulties stressed here is added the fact that it is hard, especially in complex situations, to create a rule that is to be applied in any possible future case, covering all the details of the circumstances. Three stages are, then, to be distinguished. First of all, there is the *a priori* stage: one is either able to ignore something or not. The shortcomings of this perspective, which is satisfactory only in very simple cases (notably when physical harm is involved), have led to the need to introduce a notion that does justice to the various interests involved, so that, at the second stage, the criterion becomes what may reasonably be ignored. Still, only actual (judicial) decisions, at the third stage, can take into consideration all the intricacies of concrete cases. It is desirable to reduce the uncertainties for the parties involved (and for society as a whole) as far as possible (by preventing a situation in which one remains completely in the dark until the decision has been made). A step in this direction is made by somewhat concretizing what 'reasonably' means<sup>17</sup>, although supposing that this would mean that the decisions will be predictable to a great degree would evidence a perspective that is naïve, simplistic and reductionist.

This concretization means that a manifestation such as that of the *Skokie* case can reasonably be ignored in some situations and not in others, which in turn means that the outcome of the assessment varies from one society to the next, and from one time to the next. Jews cannot reasonably ignore such a manifestation, for example, in an atmosphere of violence towards them (*cf.* what I said at the end of section 11.5). The ruling in that case can be defended, then, if such an atmosphere is absent, or, put more generally, if consequences that cannot reasonably be ignored are unlikely to emerge. (I have already

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<sup>17</sup> If this is *not* concretized, although the adverb 'reasonably' is formally in place, this will add to the judge's task, since he will have to be the one to concretize it, lacking guidelines other than those he can find in precedent cases (the convincingness of which may in some instances be called into question in light of the present observations – there is, after all, no infinite regress into previous precedents).

indicated the difficulty with 'possible' consequences, which is revisited here; it is obvious that this adds to the burden of the notion of 'reasonably'.)

### 11.9. Summary and Relation to Chapter 12

It has become clear that the ignore principle faces some serious problems that I must, being unable to resolve them, mitigate as far as possible, an acceptable alternative to it being unavailable, as far as I am able to assess. Some room should be left to account for the circumstances in which an action takes place, which is expressed by the word 'reasonably': in each situation it will not be decisive whether someone is (potentially) harmed by an action, but rather whether he may reasonably ignore it. I have argued that the basis of the ignore principle is *a priori*, and as such valid in any liberal democratic state, but that this basis is meager and must for that reason be supplemented by an *a posteriori* superstructure, expressed by the term 'reasonably'. The next issue that must be addressed in the discussion of the reign of freedom is whether the state operates from a neutral framework. Prescriptive equality means that all positions and all citizens must be treated equally, but does that imply neutrality? This will be inquired in the next chapter.



## Chapter 12

### A NEUTRAL VIEW OF THE STATE?

**12.1.** Hitherto the rights of citizens amongst themselves have been dealt with; it appeared that there should be much room for them to express themselves, not being bound *in this respect* to prescriptive equality's stipulations. Chapter 13 intends to show that, while citizens are to adhere to prescriptive equality's demands *externally* (meaning that their outward acts may not conflict with these demands), this does not entail that they must also agree with the contents of this stipulation. The present chapter provides a precursory analysis to support that claim. In particular, it will be inquired whether a neutral view can be taken by the state when the issue of freedom of expression is concerned.

**12.2.** Citizens must act in accordance with the stipulations of the ignore principle, but this demand appears to leave them much room to express themselves, having to heed only what cannot reasonably be ignored by those (identified through basic equality) that might be affected by their actions. The question looms whether the same perspective can be taken when the state as a whole is considered. In other words: should the state operate from the presumption that no perspective is superior to any other? In that case, only *manifestations* are judged, citizens having the freedom to think whatever they want of each other so long as they refrain from acting in ways that cannot reasonably be ignored by others. The answer to the question of whether the state can take such a detached stance is to be found by simultaneously inquiring the meaning of the neutrality of the state. Can a state operate from a neutral position, and, if so, is such a position desirable?

First of all, it is misleading to speak of 'the state' as if it constituted a stable unity, which is a prerequisite for a state to have a view, at least if this is to be of any use: a view that may change from one moment to the next is without value, at least if this may happen capriciously<sup>1</sup>. This does not mean that great changes, such as revolutions,

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<sup>1</sup> I add the latter phrase in order to account for the fact that justified views, such as scientific ones, may also change thus. In that case, however, this happens because an unexpected discovery is made that is not reconcilable with the prevalent theory rather than on the basis of something as unstable as a majority preference.

occur frequently, but gradual changes are still changes. If they are *very* gradual, they may hardly be noticed, except by historians who survey long periods of time. This raises the question what the identity of a state might be, in the same way as uncertainty exists regarding the identity of Theseus's mythical ship, all its parts having gradually been replaced, no original part remaining.

In addition, it is important to determine what a state is. Conceptions of states that define them by means of some top-down structure, such as Hegel's, whose conception of the state has an 'ethical' character to boot<sup>2</sup>, are possible but difficult to uphold. In any event, I will interpret a 'state', presumably uncontroversially, as a defined territory with a (permanent) population and a government<sup>3</sup>. As such, if the state has a view, it can in the case of a liberal democratic state be no other than that of a majority of its citizens, the lack of stability being evidenced by the oftentimes fickle nature of majorities. In this case I say 'a majority' rather than 'the majority' since some items may be supported by different majorities (although mathematically at least *some* overlap is necessary in each case, of course)<sup>4</sup>. For example, the majority that agrees with the expansion of freedom of expression may be constituted differently than the majority that agrees with the increase of the minimum wage. In representative democracy, such issues need not arise in the periods between elections, but that points to a procedural aspect and does not remove the problem of 'the state' having a view. In states where referenda are used, the aspect of effectiveness may be said to be sacrificed to the democratic aspect, but there, too, majorities are decisive and not, in addition to or instead of them, the state as some separate entity.

Such concerns are sufficient to be skeptical when the issue of whether the state may be neutral or not is assessed. However, a systematical inquiry warrants a more thorough analysis than this, in which the state may be treated *as if* it indeed constituted a stable unity with a simple majority, the more so since the latter element – the majority – is no problematic element in this place: only one issue –

<sup>2</sup> G. W. F. HEGEL, *Grundlinien der Philosophie des Rechts*, § 257-261 (pp. 328-342); cf. chapter 7, note 5.

<sup>3</sup> These are, together with the capacity to enter into relations with the other states, the criteria set forth in the Montevideo Convention on the Rights and Duties of States.

<sup>4</sup> The existence of a population is not to be taken to mean, then, that a stable view would for that reason be in place. Some territory being more or less permanently inhabited by a population says nothing about the individuals' outlooks, and the most realistic assessment of the situation in a democratic state is that various interest groups are vying for influence, so that one may speak of a fiction when the people as a unity with shared interests is concerned (H. Kelsen, *Vom Wesen und Wert der Demokratie*, § 2 (p. 15)). Such a unity may on the other hand be manifested when the whole is concerned, notably, against an external enemy or a natural disaster, but that is another matter.

freedom of expression – is dealt with here. I will, then, proceed from such a fiction, but remark here that it follows from my minimalistic interpretation of the concept of ‘state’ that even in this conception the views the state holds cannot be considered separated from (the majority of) its citizens’ reasons to promote or at least agree with basic and prescriptive equality, in accordance with what was said in chapter 6.

**12.3.** The absence of a neutral stance does not mean that some worldview<sup>5</sup> is decisive, precisely because no stable majority is guaranteed and anyone may belong to a relevant minority, so that those whose view is treated favorably, in that they encounter relatively few hindrances in expressing it in the *present* circumstances, are motivated to grant propagators of other views the same room they are allowed (as they understand that the circumstances may change). That does not mean that *anything* may be expressed: the ignore principle’s demands rule out *some* expressions, namely, those which cannot reasonably be ignored by one or more citizens. The lack of neutrality is evinced, then, precisely where ‘reasonably’ is specified.

This makes a position such as Raz’s problematic, who states: “If the state is subjected to a requirement of comprehensive neutrality and if its duties to its citizens are very wide-ranging then the principle of comprehensive neutrality is a principle of neutrality indeed. On those assumptions the state can be neutral only if it creates conditions of equal opportunities for people to choose any conception of the good, with an equal prospect of realizing it”<sup>6</sup>. That the ‘neutral’ position of granting people ‘an equal prospect of realizing their conception of the good’ cannot be supported becomes clear when the differing consequences of the various conceptions are brought to the fore. Gender discrimination or performing a male circumcision on the basis of a religious conviction are outcomes of some worldviews while exponents of others refrain from such actions.

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<sup>5</sup> By a ‘worldview’ I mean an encompassing view with regard to religious, metaphysical and/or ‘moral’ matters. It may here be identified with what Rawls calls a ‘fully comprehensive’ conception or doctrine, the latter meaning a doctrine that “[...] covers all recognized values and virtues within one rather precisely articulated scheme of thought [...]”, J. RAWLS, *Political Liberalism*, Lecture V, p. 175. (In Lecture I, p. 13, virtually the same formulation (only substituting ‘system’ for ‘articulated scheme of thought’) is used for a ‘fully comprehensive conception’.)

<sup>6</sup> J. RAZ, *The Morality of Freedom*, p. 124.

On the basis of the ignore principle, or a similar principle, such actions cannot be allowed, which means that some worldviews will face more restrictions than others. (This issue will be treated in more detail in the next chapter.) More specifically, those worldviews that are relatively liberal will face relatively few restrictions. (This outcome may be related to the character of 'liberalism', an issue that will be dealt with in sections 12.7 and 12.8.)

**12.4.** The state is not neutral if it accepts prescriptive equality as a directive, since prescriptive equality is always based on some specification of basic equality, which is not neutral. In the case of basic rationality, this follows from the fact that *rational* beings stipulate that *rational* beings should be treated equally. A consequence of this observation is that what I have argued is not neutral. One may argue that since every citizen is treated equally on that basis, prescriptive equality testifies to a neutral stance, but such a conclusion would rest on a superficial analysis of the issue. I do not merely mean to address here the fact that the demand that citizens should be treated equally already means that a selection has been made, namely, that animals and people who are not citizens should not, or, more precisely, not necessarily, be treated equally, but also argue that prescriptive equality demands far greater sacrifices from some views than it does from others, as will be shown in chapter 13. That such sacrifices should have to be made in the first place can be defended, on the basis of my analysis in the previous chapters, or a similar one, but that takes away nothing from the fact that no neutral stance is taken here.

Should it surprise the reader that equal treatment is based on a non-neutral starting point, it should be reminded that prescriptive equality insofar as it can be identified with formal equality, presuming that basic equality is specified by basic rationality, is based on a number of starting points that are difficult to reconcile with some worldviews, such as the equality of men and women. This is a proper place to revisit the notion of 'material equality'. I said in the introduction that it has no bearing on the analysis undertaken in this inquiry, referring there to the economic meaning of that variety of equality. Similarly, material equality, *taken broadly* as defined there, is no directive in this instance. If it were, the consequences of legislation should have the same outcome for every worldview, and, apart from the question of whether a pluralistic society would be possible in such a case, it is obvious that prescriptive equality would, in such a confrontation with material equality, become devoid of



meaning<sup>7</sup>. One may accordingly say that neutrality presupposes a lack of content. As Fish puts it: “A real neutral principle, even if it were available, wouldn’t get you anywhere in particular because it would get you anywhere at all”<sup>8</sup>.

12.5. To illustrate my point I present two cases: (1) a worldview according to which only people of a certain race and religious denomination are considered basically equal, and accordingly treated differently than others, by denying those others (some of) the rights that are granted on the basis of formal equality, and (2) a worldview that not only observes the stipulations presented in chapter 6, according to which basic rationality is the specification of basic equality, but actually accepts them as part of its outlook. Neither position is neutral. A greater number of citizens have the right to express themselves in the second case than in the first, but that only says something about the *extent* of the subjects, not about the *contents* of the respective worldviews, which are both non-neutral. In the first case, part of the worldview is that some races and religious denominations are inferior to others, while in the second, part of the worldview is that they are equal<sup>9</sup>.

From the perspective of the public domain – while acknowledging that, strictly speaking, the state does not itself have a view (*cf.* section 12.2) – what should be decisive is that citizens *should be treated equally* rather than that they *are equal*<sup>10</sup>. Such a stance is also taken in the first

<sup>7</sup> Strictly speaking, the issue is slightly more complicated. Prescriptive equality is maintained, in a sense, but it bears on the equal treatment of *worldviews* rather than of *citizens*. Precisely for this reason it becomes meaningless when the *relevant* sense is concerned: the equal treatment of citizens is not prescribed by all worldviews, and if those worldviews that do not prescribe (or even condemn) such equal treatment cannot be treated differently from those that do (which is the situation in which material equality is accepted), prescriptive equality in the relevant sense cannot be maintained.

<sup>8</sup> S. FISH, *The Trouble with Principle*, p. 4.

<sup>9</sup> Even a worldview that – radically – includes all subjects, and thus maintains that all living beings should be treated – basically – equally is not based on a neutral starting point. Such a worldview would, using being alive, or being able to suffer, as the criterion to be treated equally, *e.g.* promote protecting all animals against being killed for their meat, even if this interferes with the interests of those who wish to do so. A state that would act in accordance with such a worldview (presuming this is possible) would have to take a stance against eating meat, and thus fail to take a neutral stance in treating beings equally. This is the clearest example of a situation in which the danger looms of confusing the extent of the subjects a (world)view includes with its – purportedly – neutral nature.

<sup>10</sup> This may seem to complicate matters, and even contradict my own account (equal treatment (prescriptive equality) being based, after all, on citizens being basically equal, so that such equality seems to be presupposed), but it must be reminded that in the present discussion, ‘being equal’ points to citizens’ equality on the basis of a worldview, and is motivated by significantly different considerations than mine. This is easily understood if one considers that in any liberal democratic state, and in any state for that matter, basic equality (whatever its specification may be) must be acknowledged, while a worldview need not similarly serve as a directive.

case, with the only difference that the criteria that are used are more restrictive, in the sense that fewer subjects are included. 'Neutrality' would in the first case mean that the way people are constituted (their race) and their outlook are relevant factors, while any other aspects, such as their social standing, are not taken into account. In the second case, the standard of 'neutrality' would be applied in a similar way, with the crucial difference that a greater number of aspects are disregarded, to such a degree that rationality remains as the only criterion, and the absence of reasonably ignorable harm remains as the only criterion with regard to the question of whether a view is acceptable<sup>11</sup>.

If this is how 'neutrality' is interpreted, it is clear that it resembles a black hole in the sense that its manifestation consumes what is salient in any outlook, leaving in the most extreme case nothing. (In other words: if it is consistently applied, there are *no* criteria to decide what would be acceptable.) Such a description applies to neither case. This does not have to be demonstrated in the first case, while in the second case, rationality at least is still a decisive criterion, the non-neutrality most obviously being demonstrated by pointing out that animals are still treated differently than people (*cf.* section 12.4). Actual neutrality would amount to the *absence* of criteria to distinguish between beings and between (the outcomes of) worldviews.

In section 12.3 I distinguished between merely taking a – non-neutral – stance and expressing a worldview. The state acts (justifiably) non-neutrally if it favors a worldview over another on the basis of the fact that one acknowledges some specification of basic equality while the other does not, the non-neutrality consisting in the fact that the criteria to establish that specification (and thus to indicate which beings are to be treated equally in accordance with prescriptive equality) do not result from a neutral process. This does not mean that such a stance necessarily constitutes a worldview. It *may* constitute a worldview, namely, if the criteria are based on an outlook that purports to establish the 'truth' regarding some matter. For example, if the (non-neutral) stance of treating men and women equally is based on their both being equally 'moral' beings, or equally having 'dignity', the state acts on the basis of a worldview. The state

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<sup>11</sup> As was remarked in various places, rationality is not *necessarily* the decisive criterion to specify basic equality, and I have merely argued its merit; as for the ignore principle, it may not be the decisive principle (namely, if I am simply mistaken), but it would then have to be replaced by a similar principle, which would either have to produce a non-neutral content, or, like the ignore principle, point to a domain where a non-neutral stance would, through a detour, be taken.

having a worldview is not a *necessary* given, however, not even if it acts non-neutrally. Indeed, what I proposed in chapter 6 does not itself constitute a worldview<sup>12</sup>, but merely a (and I would aver the most viable) way to ensure the continual enjoyment of the rights granted on the basis of formal equality, ‘basic rationality’ being a political rather than a ‘moral’ criterion. The ramifications of this stance will be presented in the next chapter.

It may be objected that freedom of expression points to a domain of neutrality. In light of the considerations presented hitherto, the meaning of ‘liberalism’ warrants an investigation.

**12.6.** There are two ways in which ‘liberalism’ can be approached<sup>13</sup>. First, it may be considered to constitute a worldview, and as such not to be a neutral position, if only because of the way in which citizens are considered. This is argued by, *inter alios*, Dworkin (*cf.* section 9.2) and, from another perspective, MacIntyre: “My thesis is not that the procedures of the public realm of liberal individualism were cause and the psychology of the liberal individual effect nor vice versa. What I am claiming is that each required the other and that in coming together they defined a new social and cultural artefact, ‘the individual’”<sup>14</sup>.

**12.7.** A second way to approach ‘liberalism’ is to focus on what its proponents argue. Liberalism defends a minimal interference in people’s actions, including their expressions, by the government or by other people. Freedom does not, as was shown in the introduction and section 7.2, testify to any contents but rather points to an *absence*.

Since the *absence* of something – namely, interference – is what characterizes liberalism, freedom may be considered a no man’s land whose necessity in a liberal democratic state is prompted by the fact that views diverge in some – sometimes very important – respects. This means that liberalism does not provide a substantive component; its presence is rather the result of a concession that follows from the acceptance of the plurality of views in a state.

In my characterization of ‘liberalism’ I spoke of ‘a *minimal* interference’, and the word ‘minimal’ is crucial. Should there be no inter-

<sup>12</sup> This does not preclude the possibility of a worldview incorporating basic rationality in its outlook, which is characteristic of the second worldview mentioned in the example above.

<sup>13</sup> It may be argued that ‘libertarianism’ is a more fitting term to use here, but this is usually associated with the economic position of minimal government interference, a topic I have excluded from this inquiry, and I have observed this interpretation.

<sup>14</sup> A. MACINTYRE, *Whose Justice? Which Rationality?*, p. 339. *Cf.* chapter 1, note 15.

ference whatsoever, there would be no government, or at least no active one. For example, the very existence of penal law and the institutions to effectuate it (being paid through taxation), which must be present in any state, represent such an interference. Liberalism can be *part* of a worldview, but it does not itself constitute one. This can easily be illustrated by contrasting two possible worldviews. The first, presumably liberal, propagates the equal treatment of men and women on the basis of the consideration that they are equal. The second worldview maintains that women are not to enjoy all the rights that are afforded on the basis of formal equality; they are to be considered unequal to men on the basis of a religious conviction. It is clear that according to the second worldview men and women should not be treated equally in some important respects.

On the basis of these descriptions, the first worldview is not more liberal than the second (which is why I said '*presumably* liberal' above). After all, what is characteristic of the first worldview is that men and women should be treated equally, which actually requires government *interference* in situations where discrimination takes place, while such interference should in the case of women's rights be absent. By contrast, the second worldview promotes more government interference than the first does when the right to act on one's religious conviction is compromised (in the first worldview, such a right is apparently deemed less important than women's rights), but *opposes* government interference when religious freedom is concerned, and is thus more liberal in this respect than the first worldview. Incidentally, my alternative of prescriptive equality as a result of specifying basic equality by basic rationality, with the addition of the ignore principle, would favor neither worldview *qua contents*, and is compatible with both, but should women's rights be at stake, it is clear that *qua outcome* only that which the first worldview propagates can be maintained.

The liberal aspect of a worldview is accordingly something other than what characterizes it, which is its substance. All worldviews are liberal to some degree, save for those that propagate a totalitarian regime.

**12.8.** It is possible that it is part of a worldview, even a worldview espoused by a political party, that people and other political parties should be free to express their disagreement with that worldview. Such a political party will probably uphold that government interference in people's lives should be minimal (disregarding here the

views it may have concerning material equality, which is no issue in the present inquiry). Still, this stance cannot constitute the entire worldview, since that would mean that it is only *negative* (*viz.*, that government interference should be restricted).

Schmitt considers liberalism ('Liberalismus') to be characterized by the absence, or at least reduction, of the influence of the state on individuals<sup>15</sup>, and to be without political content<sup>16</sup>. I would expand this to the observation that it is without content altogether. As was argued above, liberalism, if 'freedom' is understood in the negative sense<sup>17</sup>, is characterized not by something positive but rather by an *absence*, *i.e.*, the absence of (government) intrusion on one's convictions, and, to some degree, the manifestations that accompany them. In the case of libertarianism, this absence extends to the economic realm, introducing 'laissez faire' policies and only appealing to the state for those means that are necessary to ensure a stable society, such as a judicial system and infrastructure.

Liberalism's main significance, then, is its promotion of the absence of (state) interference<sup>18</sup>. If, as was just remarked, it does not itself uphold a worldview but rather maintains that there should be room for various worldviews to coexist, true liberals have no positive outlook, or such an outlook consists in the optimization of preferences<sup>19</sup>. One may, then, say: "The overriding good of liberalism is no more and no less than the continued sustenance of the liberal social and political order"<sup>20</sup>. This state of affairs might account for the simultaneous advent of liberalism and nihilism. Liberalism's lack of

<sup>15</sup> C. SCHMITT, *Der Begriff des Politischen*, § 9 (pp. 50-53).

<sup>16</sup> C. SCHMITT, *Der Begriff des Politischen*, § 9 (p. 50). Liberalism, Schmitt argues, does not produce a political outlook of its own; its presence rather indicates that a domain appears where no political decisions are made, and any decision that is made is of another nature, such as economic.

<sup>17</sup> In order not to be accused of committing a *petitio principii*, I will briefly indicate why the analysis does not include positive freedom (defined by Berlin as freedom to do or be something, in opposition to negative freedom, which stresses the freedom *from* something) (I. BERLIN, "Two Concepts of Liberty", § 1, 2 (pp. 177, 178)). Positive freedom is not what I would deem characteristic of liberalism. There are variants of liberalism that incorporate it, but it is not a necessary element, nor is it exclusively found there: socialists, for example, can also claim to want to realize it. Negative freedom, on the other hand, is characteristic of liberalism.

<sup>18</sup> That this absence is to be understood within the context of the state was pointed out above, in section 7.2. Incidentally, those who are liberals but not libertarians may defend (some) state intervention in the economic realm, which is a matter that may be treated independently from the one under discussion here.

<sup>19</sup> Cf. A. MACINTYRE, *Whose Justice? Which Rationality?*, p. 338. I add to this, though, that my interpretation of 'liberalism' differs from MacIntyre's (cf. sections 12.6 and 12.7).

<sup>20</sup> A. MACINTYRE, *Whose Justice? Which Rationality?*, p. 345. Alternatively (since it would be strange why people would merely want to maintain an order, which is no goal but rather a mere *means* to something they want to realize), it may be argued that, if liberalism is indeed without (political) content, its promotion may lead to a diminution of the goods one considers valuable, and perhaps even to a degeneration into commodity fetishism (K. MARX, *Das Kapital*, vol. 1, pp. 37-39), people finally *identifying* what is valuable with what is profitable being no mere remote possibility.

content is the downside of its presence. So liberalism is nothing more than the space that is granted by the state to various individuals and groups of people to express themselves. This space may either be void, unlimited, or something in between. In the first two cases there is no liberal democratic state to begin with (but rather a totalitarian state and a virtual state of anarchy<sup>21</sup>, respectively). The middle ground between these extremes is not determined in a neutral way, but rather on the basis of a consideration of the interests of the citizens, concretized by basic equality (by some specification) and formal equality and the ignore principle. Liberalism cannot fulfill such a role, lacking the content to do so.

12.9. In light of the foregoing, it is worthwhile to consider Brettschneider's proposal, who maintains that the state should protect hateful viewpoints but also criticize them<sup>22</sup>, maintaining that "[...] liberalism is faced with a 'paradox of rights': its commitment to free and equal citizenship in the public sphere is undermined by its protection of inegalitarian beliefs in the private sphere of civil society and the family"<sup>23</sup>. (Incidentally, 'liberalism' is interpreted as constituting a substantive view, which is difficult to uphold if my analysis is correct.) Brettschneider defends 'viewpoint neutrality', which "[...] is [...] the idea that the state cannot privilege one political viewpoint over others"<sup>24</sup>. This position seems inconsistent: "Viewpoint neutrality can be defended [...] in the liberal tradition by grounding it not in a viewpoint or value neutral justification, but in a commitment to treat all persons potentially subject to coercion as free and equal"<sup>25</sup>. After all, what this presupposes is that *all* citizens are to be considered free and equal<sup>26</sup>, which is not a neutral position<sup>27</sup> but rather one that either starts from considerations such as those

<sup>21</sup> The latter may seem an extreme outcome. I say 'virtual state of anarchy' as the very existence of a state excludes that of a state of anarchy, but even within a state, the absence of limitations to express oneself would mean that hate speech can be expressed without restraint.

<sup>22</sup> C. BRETTSCHEIDER, "When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion", p. 1006.

<sup>23</sup> C. BRETTSCHEIDER, "When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion", p. 1006.

<sup>24</sup> C. BRETTSCHEIDER, "When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion", p. 1007.

<sup>25</sup> C. BRETTSCHEIDER, "When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion", p. 1007.

<sup>26</sup> Brettschneider acknowledges that this is his stance ("When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion", p. 1006).

<sup>27</sup> Brettschneider himself – rightly – indicates that the values of freedom and equality are non-neutral ("When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion", p. 1006).

presented in chapter 6 or from a ‘moral’ viewpoint (and thus a worldview); that the latter is decisive is made clear<sup>28</sup>.

Actual viewpoint neutrality is not possible, not even if only *manifestations* are considered a proper reason to interfere in citizens’ private domains, as is the case with the ignore principle. So if ‘democratic persuasion’ is pleaded, the state expressing ‘its own values’<sup>29</sup>, it is clear that some worldviews are from the outset treated differently than others, such that viewpoint neutrality is an illusion. In fact, if viewpoint neutrality *were* the standard, no democratic persuasion would be possible, since there would be no position to use as the high ground – whether this be considered ‘moral’ or not – from which to start to persuade the advocates of alternatives of their ‘wrongness’. An appeal to “[...] the values of freedom and equality essential to the legitimacy of a democratic state [...]”<sup>30</sup> is without meaning until it is clarified *who* should be treated equally with whom and *which viewpoints* should be freely expressible<sup>31</sup>. The choice to treat every citizen equally and criticize those viewpoints that interfere with this directive can be maintained, but not on the basis of the misnomer ‘viewpoint neutrality’.

### 12.10. Summary and Relation to Chapter 13

The state cannot have a neutral viewpoint when the rights that are granted on the basis of formal equality are concerned. Apart from the fact that states do not have views at all, any viewpoint that pertains to these matters differentiates between worldviews, even if such a viewpoint is not itself based on a worldview. With respect to the issue which beings should be treated (basically) equally, no neutral position is forthcoming, either. There may be differences with respect to the number of subjects being treated (basically) equally, but even a view that includes all beings cannot be deemed neutral. As for liberalism, it does not itself constitute a worldview, but it may be part of one (and it is in fact part of various worldviews). This follows from

<sup>28</sup> C. BRETTSCHEIDER, “When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion”, p. 1007: “Respect for the two moral powers of citizens [...] requires viewpoint neutrality.” On p. 1011, he speaks of ‘an ideal of political morality’. This is admittedly contrasted with ‘morality per se’, but that takes away nothing from the fact that a ‘moral’ element is maintained.

<sup>29</sup> C. BRETTSCHEIDER, “When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion”, pp. 1009, 1011.

<sup>30</sup> C. BRETTSCHEIDER, “When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion”, p. 1006.

<sup>31</sup> The need to provide such a clarification is reflected in the present study by the introduction of, first, ‘basic equality’ and its specification (‘basic rationality’ being the most promising candidate), with prescriptive equality as a consequence, and, second, the ignore principle.

the fact that the freedom that is defended in liberalism is negative freedom. By contrast, positive freedom, which a worldview may defend together with negative freedom (as they do not exclude one another), does attest to contents. Positive freedom is not, however, inquired here. In the next chapter it will, with these results in mind, be inquired to what extent the state may intrude on citizens' private domains.



## Chapter 13

### THE PUBLIC AND PRIVATE DOMAINS

**13.1.** The foregoing analysis raises the question what the state may proscribe to citizens, or, in other words, to what degree the public domain should be allowed to intervene in private domains. Such an intervention is warranted in any situation in which three conditions are met: (1) there are various worldviews; (2) these worldviews' adherents express their convictions; (3) the acts of expression cannot reasonably be ignored by citizens who are harmed by them ('harm' being taken in the broad sense specified in chapter 10).

So long as no harm is caused, various groups of people may live side by side, sharing no 'common identity', interacting only to a necessary minimum (when the services of those that are not included in one's group are needed or can be obtained at a lower price from them than from those who do belong to one's group). Problems only potentially arise once this minimum is exceeded. I say 'potentially' since an interaction need not be antagonistic: a dialogue between adherents of different worldviews may take place in friendly terms. Still, problems may arise through a negative interaction between members of different groups or through an infraction from the public domain. To provide an example of the first situation, Muslims may be insulted by an atheist (or another non-Muslim) if cartoons are produced in which a person or deity revered by them is mocked. In the second situation, the various private interests are unified (abstractly). For example, if a person is murdered, it is in the general interest that the murderer be punished (on the basis of both specific and general deterrence). In this case, in contrast to the first one, the worldview of the person(s) harmed is no relevant issue.

**13.2.** If the issues of prescriptive equality and freedom are considered in light of this state of affairs, an obvious question emerges: how much room, if any, should be left to those who deny the prevalent specification of basic equality in a liberal democratic state, and who *a fortiori* fail to acknowledge prescriptive equality corresponding to that specification? (I will in this chapter presume, in accordance with what I have argued throughout this study, that basic rationality is the most viable specification of basic equality, but the argumentation does not depend on this specification; basic rationality may, accordingly, be exchanged for another specification here.)

There are four options: (1) basic rationality must be acknowledged by every citizen, irrespective of his worldview; (2) it does not have to be acknowledged, with maximal consequences (*e.g.*, an imam may call for the death of all infidels); (3) it does not have to be acknowledged, so long as the ignore principle is observed (*e.g.*, citizens may propagate discriminatory views on the basis of racial differences); (4) it does not have to be acknowledged, but this may not have any actual consequences (everyone may think what he wants, but has to accept every decision to limit his freedom to act, even if he doesn't agree with such a decision). The last option will in practice mean the same as the first one (since in the first situation, the freedom to think is not curtailed either). Basic rationality is not necessarily acknowledged in the fourth option, but since the demands of prescriptive equality are met, as far as outward acts are concerned, there is no difference.

If one opts for the first (and – thus – the fourth) option, there seems to be no room to practice one's worldview, and freedom of expression (and thus the freedom to act according to one's beliefs) will in the most extreme case disappear (*viz.*, if a majority should decide that one's worldview may have *no* consequences – one is not allowed to discriminate, or express one's view if this may cause offence). The second option can be ruled out on the basis of the ignore principle. The third option seems, in line with what was argued in the previous chapter, the one that is best compatible with liberal democracy.

One may wonder, though, whether this is sufficient. The position just outlined allows worldviews that promote discrimination between men and women, religious denominations and races; their adherents would only refrain from acting upon them because of the sanctions imposed on them if they were to do so. Would it not be more in line with the demands of liberal democracy to try to convince such adherents of the incorrectness of their worldviews, or at least allow them less freedom of expression than those who do not hold such views<sup>1</sup>?

**13.3.** It is clear that what prescriptive equality demands places a greater burden on some worldviews than it does on others. In fact, in some cases there is no intrusion whatsoever from the public domain,

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<sup>1</sup> Presuming in each case, of course, that nothing is done which cannot reasonably be ignored. After all, the ignore principle applies to *any* worldview.

which is the case if what a worldview promotes corresponds with what is prescribed and proscribed in the public domain (by the state). It may be the case that this happens from a different motivation, but that is no relevant factor since only the *outcome* (equal treatment) can be observed. So some worldviews are more facilely reconcilable with the demands of the public domain than others.

In general one may say that the more room is included in a worldview for citizens to disagree with it, the less conflict there will be with the public domain. This is easily understood with the observations of chapter 12 in mind. To illustrate this, I point to the fact that some worldviews leave people free to adhere to a religious outlook or not, so that *that* aspect is not part of those worldviews, while a religious worldview *does* stipulate people to do so, leaving people less freedom. A corollary of the fact that these worldviews leave relatively much room to form an outlook is that they face the threat of being devoid of content (*cf.* sections 12.7 and 12.8). Vice versa, the more substantive an outlook is, the greater the conflict with the public domain will be.

To illustrate: a Christian who is willing to abstain from any act that is forbidden by the public domain does not sacrifice anything (provided he actually agrees with this and does not merely comply from an external motivation, *e.g.*, the fear of being punished if he breaks the law). By contrast, a Christian who does not agree with, *e.g.*, an obligatory vaccination policy does face such a conflict. This is caused by the fact that his outlook may be said to be more substantive than that of the first Christian: the difference lies in an aspect – the view on vaccination – that is part of the worldview of the second Christian but not of the first, who considers this something to be decided by citizens individually, or the state in their place.

Incidentally, I do not express approval or disapproval by qualifying the matter thus. Specifically, I am not saying here that the second person is an example of someone who keeps true to his faith whereas the first does not, but rather note that they experience their faith in different ways. Should ‘more substantive’ (inappositely) be understood to have an evaluative meaning, I would instead simply say that for the second Christian, more is at stake than for the first. For the reason mentioned in section 10.9 that ‘religion’ is no principally delimited term, the present analysis applies to both religious and nonreligious outlooks.

In addition to possible conflicts between worldviews and the public domain, worldviews may conflict amongst themselves. If, for example, a female Muslim insists on wearing a headscarf in an area where she is not allowed to do so, and a non-Muslim (whatever his or her worldview is), or even a Muslim, interpreting his or her religion differently than the female Muslim just mentioned, opposes this, a conflict will ensue between, on the one hand, the Muslim's private domain and, on the other, both the public domain and the non-Muslim's private domain (and of course there may be a conflict between several private domains at the same time)<sup>2</sup>.

**13.4.** I have hitherto identified the various interests that are at stake. I will now present the position I consider to be the most viable to accommodate those interests. With respect to the worldviews vis-à-vis the public domain, there are three possibilities: (1) the private domains are completely separated from the public domain; (2) the private domains and the public domain completely overlap; (3) there is some, but no complete, overlap between the private domains and the public domain.

The first situation – a complete separation – only appears if all private domains are liberal: no one would seek to interfere with what others – from other private domains – think; everyone would accept the existence of the various domains and their differences, and would allow expressions with which they do not agree (so long as the demands of the ignore principle – or a similar principle – are met). Even in that case, however, it must be deemed an unreachable ideal (if one should consider it an ideal at all), for the risk of one or more parties representing themselves at first as liberal but operating under a hidden agenda, enforcing the (actual) view on the public domain once the circumstances are in its favor, must be taken into account. After all, only if the worldview is *fully* liberal, *i.e.*, not substantive *at all* and thus devoid of contents, will there be no conflict, but such a worldview provides too little substance (namely, none) to be of any political interest.

Apart from that, it would be an illusion to think that a party can be so liberal that it may really not come into conflict with other private

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<sup>2</sup> A complicating factor is that it is virtually impossible to speak of private domains to which all individuals would be confined (*e.g.*, someone may belong to one domain on the basis of his religious conviction but belong to another on the basis of his political view (presuming these don't fully overlap)); I have left this element out of the analysis since it would needlessly complicate matters.

domains and/or the public domain unless – again – the view of that party is without content. For example, a liberal party that considers women and men equal, so that they should both have the right to vote, must come into conflict with, on the one hand, a party that considers them unequal and on that basis maintains that only men or only women should have that right, and, on the other hand, a party that also considers itself liberal and, interpreting ‘liberal’ radically, grants the right to vote to whomever is able to claim it, by force or otherwise. Clearly, the first liberal party just mentioned is no *mere* liberal party but has incorporated a substantive element into its outlook, namely, that men and women are equal, or should at least be treated equally.

The second situation – a complete overlap – is not possible in a liberal democratic state: it is what constitutes a totalitarian state. It would even be misleading to speak of a complete overlap of the private domains and the public domain, for effectively only a single private domain would remain, or perhaps rather none. The third situation is the most balanced one, and, considering the problems involved in the first two, the only one that can be said to apply in a liberal democratic state.

**13.5.** As for the question to what extent the public domain should be allowed to intrude on the private domains, the ignore principle dictates that in some cases an intervention is warranted. An example is male circumcision in the case of children (*vide* section 10.12). The ignore principle must be used with caution, however, and only be appealed to if necessary, *i.e.*, if actual harm that cannot reasonably be ignored is likely to take place<sup>3</sup>. The interference should be minimal. Imposing a view from the public domain on citizens, so that they are to incorporate it into their private domains, means – paradoxically – that a totalitarian state will be realized.

**13.6.** In case the last remark should be perceived as a slippery slope, suppose, for example, that someone does not consider women and men as equals but rather considers women inferior, but that this does not affect his outward acts. In all aspects of life he behaves as if women were equal to men, acknowledging the legislation that guarantees such equality, knowing he is not powerful enough to

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<sup>3</sup> I dealt with the problems involved with a word like ‘likely’ in sections 11.4 and 11.6, where the problems with the word ‘potentially’ and the phrase ‘possible consequences’ were addressed.

enforce his will. His legal duty, however, *i.e.*, the concretization of prescriptive equality, leading to the demands of formal equality, is limited to his acting *as if* women were (basically) equal to men, which is precisely what he does. This is, then, a fiction which may be qualified a 'legal fiction' ('juristische Fiktion') in Vaihinger's sense<sup>4</sup>: "Since the laws cannot encompass all individual cases in their rules, individual, special cases of a deviant nature are considered *as if* they belonged to them. Alternatively, from a practical motive, an individual case is subsumed under a general concept to which it does not in fact belong"<sup>5</sup>.

Indeed, it is a fiction rather than a presumption. As Vaihinger puts it: "The *presumption* is a *surmise*; the *fiction* is an intentional, a conscious *fabrication*"<sup>6</sup>. After all, a fiction is distinguished from a hypothesis on account of the fact that the latter stands to be corroborated (or refuted)<sup>7</sup>. A fiction applies here: it is not the legislator's or judge's task to determine whether someone actually believes that equal treatment should be the case (and if this *were* their task, a hypothesis being the applicable means, it would be clear beforehand that it would be refuted; and if this were *not* the case (*viz.*, if everyone already considered equal treatment the norm), any legislation to enforce the norm would be redundant). If a political party exists that does promote such inequality, the individual mentioned above will vote for it, but so long as such a party is absent or has gained too little support to realize the changes it promotes, the law is the way it is, and he will comply (or be penalized), contrary to his own convictions<sup>8</sup>.

This train of thought is less outlandish than it may be taken, at a first approximation, to be. It applies to many, if not all, laws, as a mundane example will easily show. Someone who pays his taxes merely because such behavior is prescribed (and enforced) is

<sup>4</sup> H. VAHINGER, *Die Philosophie des Als Ob*, part 1, Ch. 5 (pp. 46-49).

<sup>5</sup> "[...] Weil die Gesetze nicht alle einzelnen Fälle in ihren Formeln umfassen können, so werden einzelne besondere Fälle abnormer Natur so betrachtet, *als ob* sie unter jene gehörten. Oder aus irgend einem praktischen Interesse wird ein einzelner Fall einem allgemeinen Begriff subsumiert, dem er eigentlich nicht angehört", H. VAHINGER, *Die Philosophie des Als Ob*, part 1, Ch. 5 (p. 46).

<sup>6</sup> "Die *praesumptio* ist eine *Vermutung*, die *fictio* ist eine absichtliche, eine bewusste *Erfindung*", H. VAHINGER, *Die Philosophie des Als Ob*, part 1, Ch. 5 (p. 48).

<sup>7</sup> H. VAHINGER, *Die Philosophie des Als Ob*, part 1, Ch. 21 (pp. 144-153).

<sup>8</sup> Of course, any individual – and, *a fortiori*, any political party – must, if the first part of this inquiry is correct, observe the demands of prescriptive equality, but those who operate on a conviction that does *not* accept basic rationality as the specification of basic equality may be hard to convince on the basis of rational analyses. (This is not to say, incidentally, that such a conviction is for that reason 'wrong' in any sense of the word; to support such a claim, or the contrary one, that it would be 'right' in any sense of the word, would necessitate an excursion to epistemology or meta-ethics and thus a transgression of the present inquiry's limitations.)

presumed to accept the laws prescribing paying taxes, even though he may not agree with all of them, especially not with every detail<sup>9</sup>. That does not matter, however, insofar as the practical effects are concerned. He will be able to cast his vote for a party intent on changing these laws in accordance with his wishes, but as long as they are in force, he must comply with them, as if he agrees with them<sup>10</sup>. Whether he also *agrees* with their contents is no issue for the legislator or the judge: so long as his outward acts correspond with the rules' demands, he is allowed to think what he wishes about them (and – on the basis of the ignore principle – to say why he considers them incorrect), so that the fiction that he does agree with them applies here (as it does in the case of every other citizen).

**13.7.** Is this not precisely the attitude one would want a citizen to have and to display<sup>11</sup>? The alternative would be that every citizen must acknowledge the equality between (groups of) people, the state suppressing, or at least discouraging, aberrant views on account of the fact that they do not express this equality. Such an attitude would,

<sup>9</sup> This does not derogate from the fact that taxes must be paid for a state to prosper (or even function at all (cf. G. W. F. HEGEL, *Grundlinien der Philosophie des Rechts*, § 184 (p. 264)). The extent and distribution of the taxes and the way in which they are imposed are, then, the issues that lend themselves to discussions.

<sup>10</sup> Cf. B. SPINOZA, *Tractatus Politicus*, Ch. 3, § 5 (p. 286): "[...] quia imperii corpus unâ veluti mente duci debet, & consequenter Civitatis voluntas pro omnium voluntate habenda est, id quod Civitas justum, & bonum esse decernit, tanquam ab unoquoque decretum esse, censendum est; atque adeo, quamvis subditus Civitatis decreta iniqua esse censeat, tenetur nihilominus eadem exequi." ("Because the body of the sovereignty is to be ruled as if by one mind and the will of the state is, consequently, to be taken to be the will of all, that which the state determines to be right and good is to be considered as if decreed by everyone, and therefore, however much the subject may judge the state decrees to be iniquitous, he is nonetheless bound to carry them out.") (I have translated both 'veluti' and 'tanquam', I think justifiably, as 'as if' here; although one must avoid projecting one's own thoughts on another's line of reasoning, it would be difficult to read anything but a fictitious account here.) Incidentally, Rousseau, to whose thoughts these remarks bear a similarity, is more radical in this respect than Spinoza (e.g., J.-J. ROUSSEAU, *Du Contrat Social*, Book 1, Ch. 7 (p. 22)), especially if his ideas concerning the content of what he perceives to be the general will are taken into consideration (*Du Contrat Social*, Book 2, Ch. 1 (p. 31), Ch. 3 (pp. 35-37)). *Such a view*, presuming that a minority is necessarily mistaken (cf. chapter 6, note 21), I do *not* endorse, unless the general will is interpreted as a fiction. What complicates this issue is that 'mistaken' may be taken in two ways, first in the sense of 'truth', and second in the sense of what is most desirable. The majority may be mistaken in the first sense but not in the second, as what is most desirable is *defined* in a (liberal) democratic state by what the majority considers to be such. Chapter 16 will elaborate on this issue.

<sup>11</sup> In a similar vein, Kant distinguishes between the 'juridische' (juridical) and 'ethische' (ethical) laws of freedom, the former regarding only external actions and their conformity to the law (*Die Metaphysik der Sitten*, pp. 214, 219 (cf. chapter 5, notes 27 and 28)). As he says further on (p. 225), "Die Übereinstimmung einer Handlung mit dem Pflichtgesetze ist die *Gesetzmäßigkeit* (legalitas) – die der Maxime der Handlung mit dem Gesetze die *Sittlichkeit* (moralitas) derselben". ("The conformity of an action with the law of duty is *legality*; that of the maxim of an action with the law is its *moralitas*.") What Kant argues with respect to 'moral' duties (on the basis of considerations such as those presented in chapter 5) constitutes a worldview.

in the most extreme case, lead to the complete overlap of the private and public domains (and thus, as was argued above, a totalitarian state<sup>12</sup>).

The example I presented did not coincidentally concern equality. If my analysis of 'equality' is correct, it would be doubly unwarranted for a state to intrude on a private domain by imposing its view<sup>13</sup> that equality in the sense of a reflection of 'human dignity' is 'morally right' on people that oppose such a view. The basic reason would be that the state should abstain from imposing anything that transgresses the minimum requirements for a liberal democratic state to exist. Apart from that, equal treatment by the state of its citizens means that the citizens should – equally – be allowed to hold whatever views they wish, irrespective of their contents. Forbidding some views on the basis of the fact that these are deemed reproachable would mean an unequal treatment, which is not justified, at least not *at this level*.

Once actual consequences that cannot reasonably be ignored follow from a (world)view, these consequences must of course be prevented and penalized – *at that level*, an unequal treatment is justified, namely, between those who act in a harmful way such that it cannot reasonably be ignored by those affected by such acts and those who do not. That has nothing to do, however, with a *condemnation* of the views themselves, which is, as far as the state is concerned, *not justified*<sup>14</sup>.

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<sup>12</sup> It is crucial that one acknowledge the totalitarian character of this state of affairs, and that one not be led astray by an outcome one deems *desirable*. In other words, the fact that the equality mentioned is deemed desirable does not mean that the process that is intent on forcing people to acknowledge it is not, for that reason, totalitarian. The universal acknowledgement of the equality of men and women that follows in the case of the example just given (forgoing here the fact that acknowledgement cannot be enforced, just as no one can be forced to believe something) may indeed be considered something desirable, but it comes at the expense of losing the freedom to express (or in *very* extreme – totalitarian – cases even *preserve*) one's own viewpoint, which may for some people amount to losing part of their identity. This may in itself be considered sufficient not to force an outlook on people, but I would in addition point out that some people may consider such an intrusion on the private domain sufficient justification to (violently) resist a government implementing such policies.

<sup>13</sup> It would be difficult to argue that the state, apart from those that govern the people, should have any view at all, as was indicated in chapter 12. Still, I am not using this space to cavil about semantic matters (besides, one might metaphorically speak thus) but would rather point out that a state need not acknowledge such equality. (Since some specification of basic equality must in any case be acknowledged by citizens in a liberal democratic state, at least insofar as the outward acts are concerned, the difference will in practice be nonexistent.)

<sup>14</sup> This dichotomy is described relatively neatly here compared with its practical manifestation. The following example should suffice to illustrate the difficulty. It would be difficult (and arguably undesirable) to forbid a member of parliament, or even a representative of the government, to express his opinion with regard to a view he considers abject.



### **13.8. Summary and Relation to Chapter 14**

The fact that a specification of basic equality – the most viable candidate being basic rationality – and, with it, prescriptive equality must be acknowledged by all citizens in a liberal democratic state means that they must act in accordance with the laws that concretize the allotment of the rights granted on the basis of formal equality, for otherwise the ignore principle would not be observed, but it does not follow from this that they should also be convinced of the correctness of this specification of basic equality, and they may use opportunities to – democratically – change the legislation. This issue will be revisited in chapter 16. The alternative would entail that the political domain would unjustifiably interfere with the private domains, to such an extent that in the most extreme case, the state would cease to be a liberal democratic state. After all, the freedom to think is seriously jeopardized if states demand of citizens that they not only act in accordance with prescriptive equality's demands – which may be justifiably imposed – but agree with the foundations from which such demands stem, which is all the more problematic if these foundations constitute a worldview. In light of what was argued in this chapter, some alternatives appear difficult to accept. Two such alternatives will be inquired in the following chapters, namely, those proposed by Rawls and Habermas, respectively.



## Chapter 14

### COMPREHENSIVE FREEDOM

**14.1.** The goal of this chapter and the next is to evaluate the theories of two political philosophers who have tried to accommodate individuals' freedom in the liberal democratic state, namely, John Rawls and Jürgen Habermas, with the observations made in the previous chapters in mind, dealing with Rawls's position first.

**14.2.** With the observations of chapter 13 in mind, an analysis such as that of Rawls appears problematic. He seeks to find an answer to the question "How might political philosophy find a shared basis for settling such a fundamental question as that of the most appropriate family of institutions to secure democratic liberty and equality?"<sup>1</sup> The result should, according to Rawls, be a conception of justice that "[...] should be, as far as possible, independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm. In formulating such a conception, political liberalism applies the principle of toleration to philosophy itself. The religious doctrines that in previous centuries were the professed basis of society have gradually given way to principles of constitutional government that all citizens, whatever their religious view, can endorse. Comprehensive philosophical and moral doctrines likewise cannot be endorsed by citizens generally, and they also no longer can, if they ever could, serve as the professional basis of society"<sup>2</sup>.

Rawls's own theory, however, seems to manifest precisely the elements that would qualify it as a comprehensive doctrine<sup>3</sup>, his own observations to the contrary notwithstanding<sup>4</sup>. This is clear from his starting point: "Since we start within the tradition of democratic thought, we also think of citizens as free and equal persons. The basic idea is that in virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good)

<sup>1</sup> J. RAWLS, *Political Liberalism*, Lecture I, p. 8.

<sup>2</sup> J. RAWLS, *Political Liberalism*, Lecture I, pp. 9, 10.

<sup>3</sup> In a way the problems seem even more dire than this since he starts with the ambition (*vide* note 1, *supra*) to realize democratic liberty and equality, so that the theory he will finally embrace must necessarily contain these values, so that he would appear to be arguing in a circle, finding such a (comprehensive) view by disqualifying others from the outset. However, this problem need not manifest itself. After all, a view that seeks to realize democratic liberty and equality from a non-'moral' stance – such as mine – is also possible.

<sup>4</sup> J. RAWLS, *Political Liberalism*, Lecture I, pp. 10, 13; Lecture IX, pp. 373, 374.

and the powers of reason (of judgment, thought, and inference connected with these powers), persons are free. Their having these powers to the requisite minimum degree to be fully cooperating members of society makes persons equal"<sup>5</sup>. Rawls speaks of 'moral powers' providing the basis of freedom<sup>6</sup> and equality. This means that, with respect to freedom, the notion of 'negative freedom' in the straightforward sense presented in chapter 7, is apparently not at stake; after all, *that* notion does not involve any content whatsoever and is, accordingly, compatible with *any* view. It is even reconcilable with a totalitarian view, acknowledging its physical manifestation in nature while denying that it should be allowed in the political domain (which means that it is *conceptually* acknowledged at the political level; that it should not be *allowed* to citizens (and thus not allowed in that sense) is of course another matter). As for equality, Rawls obviously has something else in mind than basic equality, basic equality being devoid of any 'moral' meaning. His views in this regard were discussed in chapter 2; I will focus here on the issue of freedom.

**14.3.** Rawls states: "It is left to citizens individually – as part of liberty of conscience – to settle how they think the values of the political domain are related to other values in their comprehensive doctrine. For we always assume that citizens have two views, a comprehensive and a political view; and that their overall view can be divided into two parts, suitably related"<sup>7</sup>. It is clear that Rawls disadvantages those comprehensive views (*i.e.*, worldviews) which leave no room for a separate domain for a political view, namely, those whose ambit encompasses the political view. The results such worldviews seek to realize are obviously incompatible with liberal democracy, so that they could be deemed undesirable for that reason, but that is another matter. (That does not mean that it is not an important matter, though; chapter 16 is devoted to the topic of integrating such views into a liberal democratic state.)

<sup>5</sup> J. RAWLS, *Political Liberalism*, Lecture I, pp. 18, 19; cf. *A Theory of Justice*, § 77 (pp. 441-449).

<sup>6</sup> In addition, he states: "[...] citizens are free in that they conceive of themselves and of one another as having the moral power to have a conception of the good", *Political Liberalism*, Lecture I, p. 30. Such a definition is incompatible with that of negative freedom, and may be said to attest to a comprehensive view, although it must be granted that this comprehensive view is more general (or, put negatively, vaguer) than those comprehensive views which Rawls does not incorporate in his theory.

<sup>7</sup> J. RAWLS, *Political Liberalism*, Lecture IV, p. 140.

The idea of an overlapping consensus is an important part of Rawls's intended solution to produce a stable democratic state while acknowledging the differences between comprehensive doctrines<sup>8</sup>: "When political liberalism speaks of a reasonable overlapping consensus of comprehensive doctrines, it means that all of these doctrines, both religious and nonreligious, support a political conception of justice underwriting a constitutional democratic society whose principles, ideals, and standards satisfy the criterion of reciprocity. Thus, all reasonable doctrines affirm such a society with its corresponding political institutions: equal basic rights and liberties for all citizens, including liberty of conscience and the freedom of religion. On the other hand, comprehensive doctrines that cannot support such a democratic society are not reasonable"<sup>9</sup>.

The rights Rawls mentions are those that are relevant for the present discussion. They were addressed in part 1 of this inquiry, where the issue of who may be deemed basically equal and thus the bearer of the rights afforded on the basis of formal equality was addressed. It was argued in chapter 12 that a neutral way to approach issues such as *which* beings should be considered equal or *which* worldviews should be tolerated is not forthcoming from a neutral stance. Rawls makes it appear as if he describes how such a stance would be possible in a pluralistic society<sup>10</sup>, but this is difficult to uphold if my analysis is correct.

To return to the topic of the overlapping consensus, when Rawls says: "An overlapping consensus [...] is not merely a consensus on accepting certain authorities, or on complying with certain institutional arrangements, founded on a convergence of self- or group interests. All those who affirm the political conception start from within their own comprehensive view and draw on the religious, philosophical, and moral grounds it provides. The fact that people affirm the same political conception on those grounds does not make their affirming it any less religious, philosophical, or moral, as the case may be, since the grounds sincerely held determine the nature of their affirmation"<sup>11</sup>, it is clear that not every comprehensive view is

<sup>8</sup> J. RAWLS, *Political Liberalism*, Lecture I, p. 39.

<sup>9</sup> J. RAWLS, *Political Liberalism*, "The Idea of Public Reason Revisited", pp. 482, 483.

<sup>10</sup> He explicitly characterizes neutral institutions and policies as neutral "[...] in the sense that they can be endorsed by citizens generally as within the scope of a public conception", J. RAWLS, *Political Liberalism*, Lecture V, p. 192.

<sup>11</sup> J. RAWLS, *Political Liberalism*, Lecture IV, pp. 147, 148.

compatible with the overlapping consensus<sup>12</sup>. (Indeed, only *reasonable* comprehensive views are acceptable, an issue that will be revisited in section 14.4.) Those which do not acknowledge the political equality of men and women, for example, are excluded, for the position from which they start is such that they can never reach the political conception that Rawls considers crucial. His model of thought does not afford the room of disagreement mine does, which does not demand of any view that its contents should be compatible with the political reality but merely that the *outward acts* of citizens – whatever particular view they may hold – do not conflict with it.

Apart from that, even the very feasibility of such an enterprise may be questioned: “[...] the more things that people must believe in order to be included in [an overlapping] consensus, the more difficult it will be for a consensus actually to be achieved. In other words, if participation in the consensus requires affirmation not only of a particular set of principles of justice but also of certain metatheses about the status of those principles, then, other things equal, one would expect the consensus to include fewer people”<sup>13</sup>.

**14.4.** An additional problem is that Rawls maintains that “[...] the political conception of justice [...] is itself a moral conception”<sup>14</sup>. The same problem that arose, *mutatis mutandis*, in chapter 2 is apparent here: Rawls does not make it clear what makes his perspective a ‘moral’ one, and in this case, the added problem is that such an inclusion seems to point to a comprehensive view, so that Rawls seems, as I said (*vide* note 3, *supra*), either to argue in a circle, or to defeat the very premise of his own account.

<sup>12</sup> Rosenfeld is right, then, when he observes: “By restricting participation in the elaboration in the elaboration of political justice to those who agree to ‘reasonable’ worldviews, Rawls insures the emergence of a sufficiently broad domain of overlapping consensus to allow for a workable array of political rights. He does this, however, at a very high cost. Indeed, on the one hand, what is ‘reasonable’ may be contested, but even if it is not, proponents of non-reasonable worldviews are excluded. From their standpoint, therefore, the political rights that emerge from an overlapping consensus are the equivalent to rights tied to a competing conception of the good that one thoroughly rejects. On the other hand, the linking of the ‘reasonable’ conceptions to the ‘overlapping consensus’, makes the process circular if not entirely superfluous”, “A Pluralist Theory of Political Rights in Times of Stress”, p. 16.

<sup>13</sup> S. SCHEFFLER, “The Appeal of Political Liberalism”, p. 13.

<sup>14</sup> J. RAWLS, *Political Liberalism*, Lecture IV, p. 147. Cf. *Political Liberalism*, Lecture I, p. 11: “While [a political conception] is, of course, a moral conception, it is a moral conception worked out for a specific kind of subject, namely, for political, social, and economic institutions.” In an accompanying footnote, Rawls says: “In saying that a conception is moral, I mean, among other things, that its content is given by certain ideals, principles and standards; and that these norms articulate certain values, in this case political values.” Depending on what Rawls means by ‘values’ here, he either adheres to a comprehensive view or eradicates those elements usually called ‘moral’. In the first case, the problems noticed above apply, while in the second case, the theory must be replaced by a less ambitious one.

Rawls may be<sup>15</sup> right when he observes that “[...] a continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power. If we think of political society as a community united in affirming one and the same comprehensive doctrine, then the oppressive use of state power is necessary for political community. In the society of the Middle Ages, more or less united in affirming the Catholic faith, the Inquisition was not an accident; its suppression of heresy was needed to preserve that shared religious belief. The same holds, I believe, for any reasonable comprehensive philosophical and moral doctrine, whether religious or nonreligious”<sup>16</sup>. Still, his position testifies to a comprehensive view, as comprehensive elements are smuggled in because of the way he approaches equality<sup>17</sup>.

It may be objected that, while the fact that I have not distinguished between ‘rational’ and ‘reasonable’ (*vide* the introduction, note 21) may not have given rise to problems up to now (the analysis in section 2.5 would not have been different if I *had* differentiated between them), the awareness of the need for such a distinction is necessary here. After all, Rawls himself *does* distinguish between them<sup>18</sup>, while only *reasonable* comprehensive doctrines, affirmed by reasonable persons, are considered acceptable<sup>19</sup>, and, indeed, the idea of an overlapping consensus is only possible on the basis of such

<sup>15</sup> I say ‘may be’ rather than ‘is’; ‘is’ would in fact imply a nihilistic outcome, *viz.*, that it should be impossible for one view to be correct (whatever one takes this to mean) while being acknowledged by all (*i.e.*, accepting it without being forced to do so). I am a skeptic in this regard, as the situation warrants lest an *argumentum ad ignorantiam* be committed: such an outcome cannot *a priori* be excluded, but that does not mean that it must be the case. The European Court of Human Rights appears to make a similar category mistake as Rawls when it observes: “As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. [...] The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”, *Kokkinakis v. Greece* (ECtHR, Application no. 14307/88, 1993). A liberal democratic society need not, however, exhibit pluralism, and certainly not a democratic society in general (unless one makes the mistake, addressed, *inter alia*, in section 1.3, of identifying ‘democracy’, which is, as I noted there, merely a form of government, with an ideal political situation (the Court does not, by the way, specify its conception of ‘democracy’ in this case). In any event, no pluralism exists if every citizen is convinced of the correctness of a single (world)view and adheres to it *for that reason*. So I would amend the Court’s statement to the one that the *possibility* of pluralism is indissociable from a *liberal* democratic society.

<sup>16</sup> J. RAWLS, *Political Liberalism*, Lecture I, p. 37.

<sup>17</sup> A similar conclusion is reached by Dyzenhaus: “The talk of the citizen which is now prominent in [Rawls’s] theory of justice, and of such citizens deliberating as to the values that should inform our common lives, is an attempt to make liberal theory into a theory of liberal *democracy*. But Rawls attempts to finesse the democratic element by making of democracy a political system governed more or less covertly by the values of liberalism as a comprehensive doctrine”, D. DYZENHAUS, “Liberalism after the Fall”, p. 26.

<sup>18</sup> J. RAWLS, *Political Liberalism*, Lecture II, pp. 48-54.

<sup>19</sup> E.g. J. RAWLS, *Political Liberalism*, Introduction, pp. xvi, xxx; Lecture II, pp. 59-61.

doctrines<sup>20</sup>. I will not deal here with the convoluted nature of Rawls's conception of 'rationality' (*cf.* sections 2.3 and 2.4) as it is rather 'reasonableness' that is inquired here. I do acknowledge, then, that a distinction such as Rawls's can be made, but it does not follow from this that I have failed to include in my account an essential element; that remains to be seen.

Rawls says: "Reasonable persons, we say, are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others. By contrast, people are unreasonable in the same basic aspect when they plan to engage in cooperative schemes but are unwilling to honor, or even to propose, except as a necessary public pretense, any general principle or standards for specifying fair terms of cooperation. They are ready to violate such terms as suits their interests when circumstances allow"<sup>21</sup>. Since only *reasonable* comprehensive doctrines are acceptable, it is clear that acknowledging the distinction between 'rational' and 'reasonable' does not affect my analysis of Rawls's theory.

**14.5.** Rawls's observations seem to result in an impasse. His position appears to invade people's convictions, or at least not leave room for those which do not include the essential premises in his theory, demanding that they share a mind-set in order to realize a stable society, while the alternative, which is described by Rawls in the form of what he calls a *modus vivendi*, meaning that parties will adhere to agreements as long as this will be profitable, ceasing to do so once the circumstances should change<sup>22</sup>, seems unacceptable.

A similar, and similarly problematic, stance is evidenced by Scanlon, who says: "Any society, no matter how homogeneous, will include people who disagree about how to live and about what they want their society to be like [...]. Given that there must be disagreements, and that those who disagree must somehow live together, is it not better, if possible, to have these disagreements contained within a framework of mutual respect? The alternative, it seems, is to be always in conflict, even at the deepest level, with a large number of one's fellow citizens"<sup>23</sup>. First of all, the notion of 'respect' may be said

<sup>20</sup> J. RAWLS, *Political Liberalism*, Lecture IV, pp. 134-140.

<sup>21</sup> J. RAWLS, *Political Liberalism*, Lecture II, p. 50.

<sup>22</sup> J. RAWLS, *Political Liberalism*, Lecture IV, p. 147.

<sup>23</sup> Th. SCANLON, *The Difficulty of Tolerance*, p. 193.



to be difficult to uphold if not in the rudimentary sense that one acknowledges the power of the person or group of people with whom one is confronted (*cf.* chapter 6, note 59), so that an appeal to mutual respect would add nothing relevant here (if one resents someone or a group of people but at the same time acknowledges (respects) his or their power, one will not harm him or them since one is unable to do so)<sup>24</sup>.

Second, mutual respect is not something that can simply be stipulated, just as no one can be brought to believe something simply because one ought to do so. In a liberal democratic state, the *outward acts* can be regulated – to accord with the ignore principle – and apart from that, debates or other means to convince those who harbor a resentment (if these are deemed fruitful) can be used to change their viewpoint, but if a *government* should take indeed take a stance and restrain more actions than what could reasonably be ignored, it would not be difficult to accuse it of being verificationist<sup>25</sup>, and thus of exceeding the limits of its authority. Third, conflicts are likely to remain in some domains, *e.g.* between employers and employees, at least with regard to the details that can be considered the outcomes of zero-sum games (notably, employees' salaries, which constitute costs for employers<sup>26</sup>), which apply to all economic systems save for an extreme case such as communism. (Admittedly, though, cases such as those just mentioned may perhaps not be characterized as those to which Scanlon refers by 'the deepest level'.)

**14.6.** A mere *modus vivendi* in the guise presented by Rawls may seem insufficient to realize a stable society. Still, the results presented in chapter 6 appear to provide a basis to counter such an objection. As I argued in section 6.7, absent basic equality (specified by basic rationality) there will be no guarantee for those presently in charge that they will fall victim to their own failure to secure rights for all those who are able to claim rights. This, basic equality, is precisely what serves as the element to realize the stable society to which one aspires, without having to demand of those who agree with its

<sup>24</sup> Apart from this consideration, the fact that one will (if caught) – presumably – be punished on the basis of penal legislation is of course an important given.

<sup>25</sup> In chapter 10 I argued that legislators – in a liberal democratic state – are not appointed to be theologians, and I would add here, in a broader vein, that their task is not to inquire whether a doctrine is 'true'.

<sup>26</sup> Whether an actual zero-sum game applies in this case depends on the circumstances, specifically, whether employees' performances may be influenced (positively) by an increase in salary.

inclusion in a political solution that they should acknowledge anything more than precisely this basic equality. They do not have to acknowledge any more 'fundamental' sort of equality, and may continue to consider, for example, women inferior to men, or black people inferior to white people.

Whether such inequalities can consistently be defended is a matter of scientific, religious or 'moral' inquiry<sup>27</sup>. Including elements from one or more of such domains in a political solution to matters of conflict amounts to nothing less than the advocacy of a comprehensive view, and if this is not acknowledged – by considering equalities other than basic equality as constitutive for a political view without at the same time granting that this makes it a comprehensive view – a misleading or indoctrinating view is proffered<sup>28</sup>. According to Rawls, in such a situation, *i.e.*, a situation characterized by a *modus vivendi*, "[...] we do not have stability for the right reasons, that is, as secured by a firm allegiance to a democratic society's political (moral) ideals and values"<sup>29</sup>. How one assesses such an observation depends on how 'democracy' is evaluated. The relevance of this last remark will become apparent in chapter 16.

#### 14.7. Summary and Relation to Chapter 15

Rawls attempts to realize a political theory without using a comprehensive doctrine as its basis. Yet the conclusion that the crucial elements that constitute that theory themselves manifest a comprehensive doctrine appears inevitable. More specifically, Rawls's outlook is a 'moral' one. What adds to this predicament is the fact that such an outlook can, indeed must, be forgone: citizens' equality and freedom must be acknowledged, as Rawls argues, but on the basis of a different, less ambitious, theory than his, which leaves citizens relatively much freedom. That such an alternative to Rawls's approach is necessary follows from what was argued in chapters 11,

<sup>27</sup> Rawls says: "The philosophical conception of the person is replaced in political liberalism by the political conception of citizens as free and equal", *Political Liberalism*, Lecture IX, p. 380. This is precisely what I have aspired to, but it can, with what was said in chapters 6 and 12 in mind, only mean that freedom in the sense of negative freedom and equality in the sense of basic equality (which is presumably specified by basic rationality) are at stake. To base one's account on other concepts than these *does* lead to the philosophical conception Rawls mentions.

<sup>28</sup> Cf. S. FISH, *The Trouble with Principle*, p. 12: "As a genuine model for the behavior of either persons or nations, as something you could actually follow and apply, political liberalism is hopeless. Like all projects based, supposedly, on neutral principles, it is either empty [...] or filled with an agenda it cannot acknowledge lest it be revealed as the limiting and exclusionary mechanism it surely is."

<sup>29</sup> J. RAWLS, *Political Liberalism*, "The Idea of Public Reason Revisited", p. 459.

12 and 13. A criticism similar to the one provided in the case of Rawls can be leveled against Habermas's position, whose stance vis-à-vis religious outlooks differs from Rawls's, but whose demands from citizens are similar.



## Chapter 15

### BETWEEN THE PRIVATE AND THE PUBLIC DOMAIN

**15.1.** In his own way, Habermas seeks to find a way to accommodate the interests of both those that adhere to different worldviews (with and religious worldviews in particular) and the state as a whole. There is no need to provide an encompassing representation of his views and I will concentrate on what he says about religious views in his recent contributions.

**15.2.** Through a dialogue with Rawls<sup>1</sup>, Habermas presents a nuanced approach to the problems involved with religious convictions: “The liberal state may not transform the requisite *institutional* separation of religion and politics into an undue *mental and psychological* burden on its religious citizens. It must, to be sure, expect of them the recognition of the principle of the ideologically neutral exercise of power. Everyone must know and acknowledge that beyond the institutional threshold which separates the informal public sphere from parliaments, courts, ministries and administrations, only secular reasons count. To accomplish that, the epistemic ability also to consider one’s own religious convictions reflexively from the outside and to link it to secular views is sufficient”<sup>2</sup>.

Importantly, Habermas is critical of those who would demand of believers that they should compromise their beliefs<sup>3</sup>. He does not seek to intrude on particular views but focuses rather on the practical outcomes, acknowledging that restrictions may place a greater burden on believers than on nonbelievers<sup>4</sup>. I can only concur with this observation, with the results from the previous chapters in mind.

<sup>1</sup> J. HABERMAS, *Zwischen Naturalismus und Religion*, pp. 123-129.

<sup>2</sup> “Der liberale Staat darf die gebotene *institutionelle* Trennung von Religion und Politik nicht in eine unzumutbare *mentale und psychologische* Bürde für seine religiösen Bürger verwandeln. Allerdings muss er von ihnen die Anerkennung des Prinzips der weltanschaulich neutralen Herrschaftsausübung erwarten. Jeder muss wissen und akzeptieren, dass jenseits der institutionellen Schwelle, die die informelle Öffentlichkeit von Parlamenten, Gerichten, Ministerien und Verwaltungen trennt, nur säkulare Gründe zählen. Dafür genügt die epistemische Fähigkeit, eigene religiöse Überzeugungen auch reflexiv von außen zu betrachten und mit säkularen Auffassungen zu verknüpfen”, J. HABERMAS, *Zwischen Naturalismus und Religion*, pp. 135, 136.

<sup>3</sup> J. HABERMAS, *Zwischen Naturalismus und Religion*, pp. 118, 132-135.

<sup>4</sup> J. HABERMAS, *Zwischen Naturalismus und Religion*, pp. 320, 321.

15.3. Habermas – rightly – points out that there is a duty for religious citizens to develop an attitude in light of the confrontation with other views<sup>5</sup>. (The same standard, one might add, applies in the case of nonreligious citizens, although it may prove to be less challenging for (at least some of) them<sup>6</sup>.) He does, however, demand too much, and arguably more than Rawls does, from these citizens, by stating that they should “[...] develop an epistemic stance toward the independence of secular knowledge and toward the institutionalized knowledge monopoly of scientific experts. This only succeeds insofar as they, from their religious perspective, fundamentally conceive of the relationship between dogmatic belief contents and secular knowledge of the world in such a way that the autonomous progress in knowledge cannot come to contradict the statements pertaining to salvation”<sup>7</sup>. This would intrude on citizens’ freedom too much, for the following reasons.

First of all, it presupposes a perspective on science that is (ironically) virtually tantamount to a dogmatic stance. After all, the results that the ‘experts’ produce can only be monitored by specialists in the field (at least if they are to be monitored integrally); the general public will in most cases have to base its judgments on the results produced in the past. Crucially, scientific outlooks are open to revision, which is what characterizes their prospect for progress, a prospect that (many) religions apparently lack (*inter alia* as it would undermine the premises that serve as the foundation of their very existence). One must be careful, however, not to confuse this latter fact with the justification of intervening in people’s convictions. The justification of such interference could be provided, on the basis of the ignore principle, if their clinging to such convictions would have harmful effects on others they cannot reasonably ignore, but it would testify to a paternalistic attitude to force people into an epistemic dialogue the value of which they would not recognize (and apart from that, one may wonder whether such an approach would be viable in the first place).

<sup>5</sup> J. HABERMAS, *Zwischen Naturalismus und Religion*, p. 143.

<sup>6</sup> Habermas demonstrates to be aware of this (*Zwischen Naturalismus und Religion*, pp. 132, 133); cf. note 4, *supra*.

<sup>7</sup> “Religiöse Bürger müssen [...] eine epistemische Einstellung zum Eigensinn säkularen Wissens und zum gesellschaftlich institutionalisierten Wissensmonopol wissenschaftlicher Experten finden. Das gelingt nur insoweit, wie sie aus ihrer religiösen Sicht das Verhältnis von dogmatischen Glaubensinhalten und säkularem Weltwissen grundsätzlich in der Weise bestimmen, dass die autonomen Erkenntnisfortschritte mit den heilsrelevanten Aussagen nicht in Widerspruch geraten können”, J. HABERMAS, *Zwischen Naturalismus und Religion*, p. 143.

That is not to say that no middle ground between letting everyone believing what he wants in isolation and forcing him into a dialogue can be found. Such a middle ground could consist in *inviting* citizens to such a dialogue, and hoping that they will have an open mind towards viewpoints that are not their own, or that even contradict them in some respects<sup>8</sup>. (Again, this position takes away nothing from the fact that the *manifestations*, *i.e.*, the outward acts, are restricted by the pertinent legislation; the dialogue only regards citizens' convictions.)

**15.4.** This would also be my answer to Habermas's following demand: "Religious citizens must develop an epistemic stance toward the precedence that secular reasons enjoy in the political arena. This only succeeds insofar as they embed the egalitarian individualism of the law of reason and universal morality unilaterally in the context of their comprehensive doctrines"<sup>9</sup>. If people are actually required to incorporate the 'egalitarian individualism' and 'universal morality' of which Habermas speaks here<sup>10</sup>, they may in fact be asked to give up part of their worldview, and, one might say, part of their identity<sup>11</sup>. (I say 'may' instead of 'would': for some positions it is not problematic to accept these demands while others cannot consistently be maintained if this is required. In addition, the elements Habermas considers necessary in fact constitute a worldview, so that citizens must in some cases abandon their worldview and exchange it for another.) Demanding such a concession would, in this case at least, seem disproportionate in light of the – minimal – demands the ignore principle makes.

Elsewhere, Habermas suggests the solution described above in different terms: "The liberal state expects that the religious

<sup>8</sup> A similar solution is proposed by Brettschneider ("When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion", *e.g.*, p. 1006), but, as I remarked in chapter 12, his position faces some important difficulties.

<sup>9</sup> "Religiöse Bürger müssen [...] eine epistemische Einstellung zu dem Vorrang finden, den säkulare Gründe auch in der politischen Arena genießen. Das gelingt nur in dem Maße, wie sie den egalitären Individualismus von Vernunftrecht und universalistischer Moral auf einseitige Weise in den Kontext ihrer umfassenden Doktrinen einbetten", J. HABERMAS, *Zwischen Naturalismus und Religion*, p. 143.

<sup>10</sup> Elsewhere, he addresses, in a similar vein, the duty of "[...] developing, from within the ethos of the religious community, cognitive links to the moral substance of the democratic constitution", J. HABERMAS, "Intolerance and Discrimination", p. 7. That 'democracy' need not have a 'moral' connotation should be clear from what was argued in part 1, especially chapter 6, of this study; this theme will be addressed in detail in the following chapter.

<sup>11</sup> It must be mentioned that Habermas claims this is not the case, expressing the desirability of people remaining free to cling to their claims to truth and certainties (*Zwischen Naturalismus und Religion*, p. 320), but these two ambitions seem difficult to reconcile.

consciousness of the faithful will [become] modernized by way of a cognitive adaptation to the individualistic and egalitarian nature of the laws of the secular community"<sup>12</sup>. I would contend, in line with what was said in chapter 13, that this is *not* what the liberal state expects, and that if it did expect such an assimilation, the necessary minimum of the public domain, produced by the demands of the ignore principle, would be breached.

To reiterate, all that may be required of a religious (or nonreligious) citizen is that he abstain from acts that conflict with what prescriptive equality demands. If he truly believes, for instance, that men and women are unequal but does not let this interfere with his legal duties (and in practice treats every citizen equally<sup>13</sup>), he fulfills all his duties in the public sphere and does what may be demanded of him. To demand *more* of him than this basic duty (namely, that he reconsider his views with regard to the equality of men and women) would boil down to let the citizens' private realm be permeated by norms that exceed the necessary minimum of the public domain and would effectively mean that he would be forced to adopt the view of a majority, a situation that one might paradoxically deem tyrannical<sup>14</sup>.

The only bastion for opponents of this conclusion to fend it off is the claim that the notions of 'egalitarian individualism' and 'universal morality' reflect reality somehow, in the sense that they testify to the 'right' way in which to live together, respecting each other on the basis of the values they proclaim. Considering what was said above, such a stance would be no less dogmatic than most religious tenets, and possibly more pernicious, since its dogmatic character is less easily acknowledged than that of religious viewpoints, whose adherents may more easily grant this to be the case. (This may, by the way, occur tacitly, *viz.*, if they simply fail to provide a support, in the form of an argumentation or otherwise.)

**15.5.** One observation admittedly complicates the present issue. Habermas says: "Every religion is originally a '*worldview*' or, as John Rawls would say, a 'comprehensive doctrine' – also in the sense that

<sup>12</sup> J. HABERMAS, "Intolerance and Discrimination", p. 6; cf. "Religious Tolerance", p. 11: "[...] those beliefs in which each person's ethos is rooted must be brought into harmony with the liberal norms of state and society."

<sup>13</sup> The difference, maintained by Dworkin, between 'equal treatment' and 'treatment as an equal' (*vide* chapter 3, note 8) becomes pertinent here: the first, which pertains merely to outward acts, can be demanded from citizens, while the second, which pertains to a conviction, cannot.

<sup>14</sup> Tyranny stemming from a majority is still tyranny, of course.



it lays claim to the authority to structure a form of life in its entirety. A religion has to relinquish this claim to an encompassing definition of life as soon as the life of the religious community is differentiated from the life of the larger society. A hitherto prevailing religion forfeits its political impact on society at large if the political regime can no longer obey just one universal ethos<sup>15</sup>. What I have argued means that the burden on religious (and nonreligious) citizens is lower than what Habermas demands. I limit what may be demanded of citizens to their *outward acts*, but do I not thus grant them too much freedom? After all, there is, in contradistinction to what a proposal such as Habermas's entails, no guarantee, or even aspiration, that people will relinquish ideals that may conflict with the very nature of democracy, and such ideals may, if their mindset is not changed, linger on until they can be used to dismantle the liberal democratic state itself.

Indeed, I would not demand of citizens to relinquish their "claim to an encompassing definition of life". This raises an important issue: if, in the most extreme scenario, citizens should want to substitute, for example, a religious totalitarian state for the liberal democratic one *by means of a democratic procedure*, should they be allowed to promote such a view, and if a majority should hold such a view, should the consequence of the cessation of the liberal democratic state in question be accepted? This is a serious issue that merits a discussion of its own. It will be discussed in the next chapter.

### 15.6. Summary and Relation to Chapter 16

Habermas takes the interests of those who adhere to religious worldviews seriously. Still, while his alternative to Rawls's account seems at first to be more compelling and viable, when its consequences are exhibited, it appears that what Habermas demands of (some) citizens proves no less problematic. They are required to acknowledge egalitarian and even explicitly 'moral' elements, thus compromising, in some cases at least, their worldview. Such a sacrifice from citizens is difficult to defend: the ignore principle merely requires that citizens' outward acts meet certain criteria, not that they be convinced of the 'truth' of any ('moral') worldview. On the other hand, Rawls's and Habermas's accounts provide liberal democratic states with a certain stability that may be welcome: some worldviews are incompatible with the aspiration for a liberal democratic state to endure, as they

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<sup>15</sup> J. HABERMAS, "Religious Tolerance", p. 11; cf. *Zwischen Naturalismus und Religion*, p. 268.

would seek to end this form of government. If accounts such as those of Habermas and Rawls are abandoned, the realization of that aspiration is jeopardized. The compatibility of worldviews that do not meet Rawls's and Habermas's standards (and, more broadly, that do not agree with an established specification of basic equality) with the guaranteed continuance of a liberal democratic state is the focus of attention of the next chapter.

## Chapter 16

### THE ADDED VALUE OF 'MILITANT DEMOCRACY'

**16.1.** Since basic equality and freedom are necessary constituents of a liberal democratic state, as I have argued, the question arises to what extent changes that might undermine their foundational role in a liberal democratic state, and thus the liberal democratic state in question itself, should be prevented.

This question is most fruitfully brought to the fore through an examination of the concept that has come to be known as 'militant democracy', or – by its German denomination – as 'streitbare Demokratie'<sup>1</sup>. Militant democracy consists in fending off any changes to a (liberal) democratic state that are so radical that the form of government is no longer recognizable as (liberal) democracy; significantly, this includes changes proposed through the proper democratic procedure, so that (liberal) democratic states are protected against being dissolved via the means that are characteristic of them<sup>2</sup>.

**16.2.** The necessity of militant democracy seems evident. After all, the need for basic equality and (some) freedom in any liberal democratic state seems at odds with their possible negation, which may very well be the outcome of a democratic procedure. To such an observation I would, with regard to the first element, basic equality, respond that 'basic equality' may be specified in many ways, so that little is said if one seeks to defend basic equality. Still, this is a somewhat rhetorical response, and one may urge on the specification that has featured prominently in this study, namely, basic rationality, which cannot be denied once it has been acknowledged (*cf.* section 6.8). It must then be reminded that basic rationality is merely something rational beings should acknowledge, as prescriptive equality dictates, 'should' being no 'moral' imperative but rather an expression of an appeal to self-interest, in line with what was said in section 6.4, and there is no measure to force people to be rational, so that they need not acknowledge basic rationality, and thus not act upon that which prescriptive equality stipulates.

<sup>1</sup> The *locus classicus* is K. LOEWENSTEIN, "Militant Democracy and Fundamental Rights, I", especially pp. 423, 430-432.

<sup>2</sup> To point to an actual example where this line of thought is practiced, the German Constitution stipulates (art. 79), *inter alia*, that amendments to the Constitution that affect the principles laid down in art. 1 and 20 are inadmissible. (Art. 20 states, *inter alia*, that Germany is a democratic and social federation ('Bundesstaat'); article 1 is mentioned in chapter 4, note 36.)

With regard to the second element, freedom, I have already indicated what criterion should be used to decide whether it may be curtailed: the ignore principle. Paradoxically, only in a totalitarian state can opinions that plead the cessation of a democratic form of government be suppressed. What complicates matters is the fact that such opinions might lead to precisely such a state. In the most straightforward scenario, the populace may be convinced by a (charismatic) politician to vote for a party that will dismantle the democratic form of government.

I readily grant that there is nothing in my model to principally avert this state of affairs. Just as in the case of basic equality, people must on the basis of a rational assessment act in such a way that the most desirable result for them is most likely to follow, which may in certain circumstances lead to a radical change as the one just outlined (leaving the matter whether such a change can actually follow if the matter is indeed rationally assessed). It is obvious that it is quite unsatisfactory to reach this result, being able only to express the hope that one will have enough historical awareness to make balanced decisions in this respect, especially since militant democracy has not been inquired in detail, and a judgment regarding the desirability of militant democracy must be forestalled until this will have been done, although it has already become apparent that at least some elements seem difficult to reconcile with that position. Such an inquiry will now be undertaken.

**16.3.** I would first approximate the matter of the tenability of militant democracy from a practical stance. If militant democracy is in place, and a political party has already gained so much support from the populace that it would rise to power if a 'normal' democratic state (observing the demands of 'formal democracy' (*cf.* section 1.3))<sup>3</sup> were in place, the changes such a party seeks to realize apparently find much approval. In the most extreme scenario, a coup would ensue, so that the party could, via alternative means, reach the same result. The law is not better able to subdue a revolt than any other collection of words. In addition, banning such a party may actually have the adverse effect of making it more committed<sup>4</sup>.

Legislation may be passed to preclude outcomes a *present* majority considers undesirable, but – again, unless a totalitarian state is in

<sup>3</sup> What is said here applies to democracy in general and is not limited to *liberal* democracy.

<sup>4</sup> M. MINKENBERG, "Repression and Reaction: Militant Democracy and the Radical Right in Germany and France", pp. 40-44.

place to begin with, thus defeating the premise and purpose of the present account – it will not be ultimately effective. The effects that legislation can produce are not to be overestimated: legislation is a mere means to realize some goal decided upon external to the process of legislation itself. It is first decided by the majority, for example, that the minimum wage must be increased, which is subsequently formalized. (In representative democracy, the process is of course more circuitous.) The opposite result – a decrease of the minimum wage – can just as easily be realized.

The law itself does not exist as a (separate) authority to express its approval or disapproval but is a mere record of the legislator's decision. To expect the law, or, in its place, unwritten, 'natural law', to provide definite answers to hitherto unsettled issues is to take a downright metaphysical stance, and, besides, such a position would evidence a category mistake, identifying the means (the law) as the goal. It is clear, moreover, that the law itself cannot enforce behavior: its effectuation depends on the existence of government officials. A continual performance on their part is not in every case necessary, as the mere threat that they will act may be sufficient.

**16.4.** Even if the law can be enforced, it must (usually) be obeyed by a substantial number of people. If it should be generally disobeyed, it could (at least in practice) not be maintained<sup>5</sup>. (The number of people sufficient to make it a 'substantial' number cannot in general be delimited; this will depend on the circumstances.)

The foregoing observation is easily demonstrated by the ineffectiveness of the prohibition of alcohol in the U.S.A., which was imposed in 1920 and had to be terminated eventually (in 1933, when the Eighteenth Amendment to the Constitution was repealed by the Twenty-first). Hart points to the importance of a rule of recognition, which specifies "[...] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts"<sup>6</sup>. The rule of recognition provides criteria for identifying primary rules of obligation<sup>7</sup>. It is identified within a system of rules, no external criterion to assess its validity being available<sup>8</sup>.

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<sup>5</sup> Cf. H. L. A. HART, *The Concept of Law*, pp. 90, 112, 113, 116, 118.

<sup>6</sup> H. L. A. HART, *The Concept of Law*, p. 94.

<sup>7</sup> H. L. A. HART, *The Concept of Law*, p. 100.

<sup>8</sup> H. L. A. HART, *The Concept of Law*, p. 109.

The issue of 'is-ought' (*vide* section 6.4) is revisited here. Although Hart does not himself qualify the issue in these terms, he does say: "[...] the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact"<sup>9</sup>. This appears to provide a possibility to breach the chasm between the descriptive and prescriptive realms. It does mean that an independent norm, be it one stemming from 'morals' or not, is no factor of importance here.

Should one, alternatively, as Kelsen does, cling to a strict separation of 'is' and 'ought'<sup>10</sup>, the crucial task will be to indicate which element, or elements, would feature at the 'ought' level, and thus take the normative role. Kelsen notoriously resorts to a basic norm ('Grundnorm')<sup>11</sup>, the main problems of which consist in its being devoid of content<sup>12</sup> and the fact that it can only be upheld by resorting to a fiction<sup>13</sup>. The latter issue is not necessarily problematic (and I appealed to fictions myself, in chapters 6, 12 and 13), but if the basis of the legal system is concerned, one should operate with caution in this regard. Whether a stance such as Kelsen's is downright impossible I do not know, but absent any convincing candidate to provide the necessary contents, I venture to say that the most promising way to confront this issue is to locate the descriptive and prescriptive elements at the same level of analysis.

**16.5.** I hasten to add to these observations that legal reforms are in many cases no trifling measures. To claim the contrary would make much of what is argued here and in many other works moot. This observation is, however, not sufficient to satisfy the reader who suspects this *argumentum ad consequentiam* to be guiding in warding

<sup>9</sup> H. L. A. HART, *The Concept of Law*, p. 110.

<sup>10</sup> E.g., H. KELSEN, *Reine Rechtslehre*, pp. 4, 10.

<sup>11</sup> H. KELSEN, *Reine Rechtslehre*, p. 197.

<sup>12</sup> H. KELSEN, *Reine Rechtslehre*, pp. 199, 200: "Die Grundnorm liefert nur den Geltungsgrund, nicht aber auch den Inhalt der dieses System [des dynamischen Typus von Normensystemen] bildenden Normen." ("The basic norm only provides the basis of validity, and not also the content of the norms that shape this system [i.e., the dynamic type of systems of norms]."); cf. pp. 201-208.

<sup>13</sup> H. KELSEN, *Allgemeine Theorie der Normen*, p. 206: "Die Grundnorm einer positiven Moral- oder Rechtsordnung ist [...] keine positive, sondern eine bloß gedachte, und das heißt eine fingierte Norm, der Sinn nicht eines realen, sondern eines bloß fingierten Willensaktes. Als solche ist sie eine echte oder 'eigentliche' Fiktion im Sinne der *Vaihingerschen* Philosophie des Als-Ob, die dadurch gekennzeichnet ist, daß sie nicht nur der Wirklichkeit widerspricht, sondern auch in sich selbst widerspruchsvoll ist" ("The basic norm of a positive moral or legal order is no positive norm but a purely thought and thus a fictitious norm, and the meaning is not of a real act of will but of a purely fictitious one. As such it is a genuine or a 'real' fiction in the sense of *Vaihinger's* philosophy of as-if, which is characterized by the fact that it not only contradicts reality but is self-contradictory.")

off this result, so that I would add that there is a difference between driving on an uneven road and a paved one; while the outcome – measured by distance – may be the same, legislation makes a significant difference here, realizing the objective as carefully as possible, and thus taking care of any foreseeable obstacles while leaving those that present themselves along the way to the courts' judgment.

**16.6.** I have tried to show that it would be in vain to produce legislation in order to enforce behavior if a significant part of the populace would disobey such legislation. One would combat a political problem by legal means, which is no more effective than to stop the rain from falling by shouting at it. Applied to the topic at hand, this means that restricting the actions of those that seek to undermine the democratic procedure would be in vain. If they have acquired the support of a sufficient number of people (*i.e.*, a majority, and in some cases a qualified majority) to carry through the changes by means of the democratic procedure, it would be unrealistic to expect government officials to be able to suppress such a mob, especially if it is well-organized. As I said above, even a coup could be expected.

However, the foregoing merely indicates why clinging to a more substantive concept of democracy than that of 'formal democracy' will not yield much. It may be welcome not to limit the analysis to such a pragmatic stance and to approach the subject matter in a more principled way, stating what the problems with the concept of 'militant democracy' might be, thus judging the matter even regardless of the question of whether the implementation of militant democracy would result in a viable polity. This is my task for the remainder of the chapter.

**16.7.** A first reason to defend the existence of militant democracy is that a majority will make decisions that have far-reaching effects for a minority (*viz.*, the minority that wants to continue the democratic state). This is no compelling argument, as *every* democratic decision that is not supported by every citizen is of this nature, so that, if this line of reasoning were followed, practically no democratic decision could be made. To be sure, what is at stake here is important, but the weight of the matter must not be an essential factor, since, as I indicated, a principled rather than a pragmatic view is the objective here.

One may argue that those who seek to end democracy act paradoxically, using the very procedure they would ultimately

terminate<sup>14</sup>. Such an objection, however, confuses the means (*i.e.*, the democratic procedure) with the end (*i.e.*, the goal(s) a political party wants to realize) (*cf.* what was said in section 16.3). The antagonists of democracy want to replace it by another form of government because they apparently have some goal(s) they wish to achieve (absent such goals, they would have no stake in reforming the procedure; reforming it can only be of value in any sense if the new procedure may be *used* for something), and they apparently consider it impossible or at least difficult to achieve their goal(s) within the confines of democracy, for which they seek, for that reason, to substitute another form of government. Should one incorporate some end into what one considers to be characteristic of ‘democracy’, one would, *contra* such antagonists, implicitly claim that the democratic procedure is an amalgam of the procedure – the means – and some special (allegedly positive) content – the end – that other forms of government supposedly lack, thus acting under the guise of some apparent ‘moral high ground’. (I will return to this point below.)

**16.8.** This is the proper place to make the transition to a discussion of the *concept* of ‘democracy’. It does not follow from this concept that it should be safeguarded against its own annihilation. Rather, if the legislator impedes the destruction of democracy by means of a democratic procedure, this is prompted by *external* considerations, primarily the fear that some minorities will be confronted with negative effects, which may in time have negative effects on society as a whole<sup>15</sup>. Such concerns may be legitimate but have nothing to do with the concept of ‘democracy’. I agree, then, with Kelsen when he soberly observes: “Democracy judges the political will of each person to be *equal*, just as it regards equally every political opinion, whose expression is indeed merely the political will. That is why it affords each political conviction the same opportunity to express itself and to assert itself in the free *competition* for people’s dispositions”<sup>16</sup>. If this

<sup>14</sup> Cf. J. RAWLS, *A Theory of Justice*, § 35 (p. 190): “[...] it seems that an intolerant sect has no title to complain when it is denied an equal liberty”.

<sup>15</sup> In addition (if the phrase ‘society as a whole’ is too vague), I would remind the reader about what I said in sections 3.3 and 6.7: one may at some time in the future oneself become a member of a relevant minority. This is sufficient reason for those belonging to a majority to steer clear from parties that are intent on abolishing the democratic decision procedure.

<sup>16</sup> “Demokratie schätzt den politischen Willen jedermanns *gleich* ein, wie sie auch jeden politischen Glauben, jede politische Meinung, deren Ausdruck ja nur der politische Wille ist, gleichermaßen achtet. Darum gibt sie jeder politischen Ueberzeugung die gleiche Möglichkeit, sich zu äußern und im freien *Wettbewerb* um die Gemüter der Menschen sich geltend zu machen”, H. KELSEN, *Vom Wesen und Wert der Demokratie*, § 10 (p. 101).



is correct, 'democracy' is devoid of content<sup>17</sup>, just as liberalism (*cf.* sections 12.7 and 12.8).

The fact that (basic) equality is a necessary constituent of a democratic state takes away nothing from the observation just made. Still, it must be clear how this equality is to be understood. 'Basic equality' can receive virtually any content, my contention that basic rationality is the most desirable concretization notwithstanding. This position may be contrasted with, *e.g.*, Schmitt's, who speaks of 'the substance of equality' ('die Substanz der Gleichheit') to characterize democracy<sup>18</sup>. While Schmitt states that this substance may be qualified in diverse ways, he seems to resort to a static state model, being unwilling to agree with a procedure as the decisive criterion<sup>19</sup>, focusing instead on the will of the people<sup>20</sup>, which may be present in a minority rather than a majority<sup>21</sup>. In his own way, Schmitt defends militant democracy, pleading a dictatorship ('Diktatur') if the true will of the people is not acknowledged, dictatorship being identified with ('true') democracy<sup>22</sup>. This leads to the conclusion that "democracy can exist without that which is called modern parliamentarianism and parliamentarianism without democracy; and dictatorship is just as little the decisive opposite to democracy as democracy is the one to dictatorship"<sup>23</sup>. Such a conception of 'democracy', albeit perhaps idiosyncratic<sup>24</sup>, is possible, but that does not mean that each position is equally tenable. I will return to this issue in section 16.9.

One may still claim that it is characteristic of democracy that it cannot dissolve itself. This raises the question why such a consideration should apply especially to *democracy*, and not also, *e.g.*, to monarchy. Should a monarch decide to resign, leaving the political room to be filled by democracy, this is just as 'self-destructive' as the

<sup>17</sup> Kelsen explicitly characterizes it as a mere form or method (*Vom Wesen und Wert der Demokratie*, § 10 (p. 99)).

<sup>18</sup> C. SCHMITT, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, p. 14; *cf.* *Verfassungslehre*, pp. 227-234.

<sup>19</sup> C. SCHMITT, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, pp. 14-16.

<sup>20</sup> In *Verfassungslehre*, p. 234, 'democracy' is defined as the "identity of ruler and ruled, governing and governed, commander and obeyer" ("[...] Demokratie [...] ist Identität von Herrscher und Beherrschten, Regierenden und Regierten, Befehlenden und Gehorchenden.")

<sup>21</sup> C. SCHMITT, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, pp. 35, 36.

<sup>22</sup> C. SCHMITT, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, p. 37.

<sup>23</sup> "Es kann eine Demokratie geben ohne das, was man modernen Parlamentarismus nennt und einen Parlamentarismus ohne Demokratie; und Diktatur ist ebensowenig der entscheidende Gegensatz zu Demokratie wie Demokratie der zu Diktatur", C. SCHMITT, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, p. 41.

<sup>24</sup> I will forgo here the complication that the meaning of 'dictator' has shifted considerably throughout history, and depends on the context in which the term is used.

converse situation. If those defending militant democracy refer to the 'self-destructive' element, then, they must either also speak of 'militant monarchy' and 'militant aristocracy', or make it clear why democracy stands out as a special instance. The first option would mean that forms of government can never change into others, except through another sort of change than the one presently under discussion, such as revolutions, while the latter boils down to a defense of 'substantive democracy'. As Dworkin describes it, "[...] the partnership conception does not make democracy independent of the rest of political morality; on that conception we need a theory of equal partnership to decide what is or is not a democratic decision, and we need to consult ideas about justice, equality, and liberty in order to construct such a theory. So on the partnership conception, democracy is a substantive, not a merely procedural, ideal"<sup>25</sup>. Such a substantive conception is not tenable, though. Judging whether a decision is democratic by such a standard is like judging whether a substance is whisky not by using the production process as a standard but one's palate, confusing whisky with nice whisky, the latter being a special instance of the former.

**16.9.** If those upholding militant democracy take 'democracy' to mean more than a form of government in which the majority of the population is in power<sup>26</sup>, they may be accused of making the category mistake similar to those to which I referred in the introduction and in section 8.1, namely, to include in the concept of 'democracy' (apart from the given that it cannot dissolve itself) elements such as the requirement that the rights of minorities be respected and that citizens enjoy freedom. While the latter results may ensue from a democratic decision process, they do not necessarily follow from the mere existence of such a process. Included in a conception of 'substantive democracy' are elements that need a support of their own; including them in one's own conception of 'democracy' is as unproductive as it is unsatisfactory. That such elements may be deemed desirable I will not deny, but that anything meritorious is accomplished by smuggling them in under the guise of 'democracy' is hard to uphold.

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<sup>25</sup> R. DWORKIN, *Is Democracy Possible Here?*, p. 134; cf. chapter 1, note 11.

<sup>26</sup> Forgoing here the practical details (such as the difficulties involved in the formation of governments in a multi-party system (*i.e.*, a system in which more than two political parties can participate in elections), where it is in general necessary to form coalitions).

A position such as Schmitt's is faced with such difficulties. He finds fault in considering the outcome of a procedure, with a majority vote being the criterion, decisive. Instead, the people constitutes a democratic state. Schmitt avers "that every democracy rests on the presupposition of the indivisibly alike, entire, unified people"<sup>27</sup>, speaking of "a substantive likeness" ("eine substanzielle Gleichartigkeit")<sup>28</sup>. Such an likeness differs significantly from basic rationality as defended by me, which, first, is not necessarily acknowledged as the decisive criterion to specify basic equality (as I have argued, it would be rational to do so – using the very means to specify basic equality as the decisive criterion –, but that is another matter), and, second, may be universally applied, being a possible criterion for any state (and any people) on account of the fact that my approach has been an *a priori* one, as far as possible.

Decisive for Schmitt is the following: "according to the democratic presupposition, the people that is in itself homogenous has all the characteristics that contain a guarantee of the justice and reasonableness of the will uttered by it. No democracy exists without the presupposition that the people is good, and its will suffices accordingly"<sup>29</sup>. More concretely, "one presupposes that, by virtue of the equal membership to the same people, everyone essentially wants the same, in the same way"<sup>30</sup>. Such a position is, with respect to the relevant aspects, hard to uphold. I deliberately say 'the relevant aspects': it may be argued that some peoples exhibit, to some extent, a unity, but as far as the issues discussed in the present inquiry are concerned (*i.e.*, the rights granted on the basis of formal equality), a common view on what one wants would, even if this is taken broadly, be illusory, let alone when those not discussed here (*e.g.*, the extent of a system of social security) are concerned.

Apart from that, the criteria Schmitt proposes – that justice be served, that one be reasonable and good – are vague, and it may be questioned whether his view is tenable once it is confronted with the

<sup>27</sup> "[...] daß jede Demokratie auf der Voraussetzung des unteilbar gleichartigen, ganzen, einheitlichen Volkes beruht [...]", C. SCHMITT, *Legalität und Legitimität*, p. 31. Cf. p. 43: "Grundsätzlich beruht jede Demokratie, auch die parlamentarische, auf der vorausgesetzten durchgehenden, unteilbaren Homogenität". ("At the core, every democracy, including parliamentary democracy, rests on the presupposed continuous, indivisible homogeneity.")

<sup>28</sup> C. SCHMITT, *Legalität und Legitimität*, p. 31.

<sup>29</sup> "[...] nach demokratischer Voraussetzung hat das in sich homogene Volk alle Eigenschaften, die eine Garantie der Gerechtigkeit und Vernünftigkeit des von ihm geäußerten Willens enthalten. Keine Demokratie besteht ohne die Voraussetzung, daß das Volk gut ist, und sein Wille infolgedessen genügt", C. SCHMITT, *Legalität und Legitimität*, pp. 27, 28.

<sup>30</sup> "[...] man setzt voraus, daß kraft der gleichen Zugehörigkeit zum gleichen Volk alle in gleicher Weise im Wesentlichen das Gleiche wollen", C. SCHMITT, *Legalität und Legitimität*, p. 31.

issues addressed in the present inquiry. Suppose a people should be of one mind that citizens of some race or religious denomination should not have the same rights as others, or that such a difference should exist on the basis of one's gender, meaning that some persons should no longer be considered full-fledged citizens<sup>31</sup>. Would such a stance conform to Schmitt's standard? If so, the room for the people to manoeuvre is apparently significantly reduced; if not, the standard of 'justice, reasonableness and goodness' seems arbitrarily set<sup>32</sup>. Making the fact that it cannot be revised on the basis of a procedure all the more troubling.

For the reasons addressed in this section, 'substantive democracy' is hard to maintain. It is understandable that one might want to prevent some of the consequences that may result from a purely procedural model, but if this comes at a price that cannot philosophically be justified, while it is difficult, if not also impossible to do so politically, such a position must be relinquished.

**16.10.** A final issue to be considered is the international level. Article 17 of the European Convention on Human Rights reads: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention', Whether or not a party should aspire to change the form of government so radically that no democratic procedure remains, it would still be obligated to steer clear from the destruction of the rights and freedoms<sup>33</sup> just mentioned.

First of all, a general problem international legislation faces is that it cannot properly be enforced<sup>34</sup>, so that what was said in section 16.3 applies here on a larger scale: should a state relinquish some of the principles it has agreed to uphold, and fail to respect some of the rights it has agreed to protect, no international officials could force it

<sup>31</sup> Schmitt's position may seem to be paradoxical (those opposed to the change, among whom presumably at least those concerned, seemingly being no part of the people (which is in the case of gender hard to imagine without resorting to outlandish instances, such as the society of the Amazons) even *before* it is effectuated), but that is not the issue here. After all, as mentioned before (*vide* chapters 1 and 6), a liberal democratic state, and, therefore, a democratic state as such, may exist without acknowledging every reasonable person as a citizen.

<sup>32</sup> Leaving the matter here whether such words have a meaning at all.

<sup>33</sup> It is actually strange to speak of 'rights and freedoms' as if the latter were something else than rights. Only in the case of one sort of freedom, which is irrelevant here, would this be correct, namely, freedom of movement insofar as this concerns physical processes; *cf.* section 7.2.

<sup>34</sup> J. DOOMEN, "The Meaning of 'International Law'," pp. 884-889.

to do so. Apart from that issue, it is unclear when actions that would contravene these rights would take place: "Article 17 [of the ECHR] suggests that a state might be entitled to act in a militant manner toward associations or organizations that aim to destroy the rights and freedoms enshrined in the convention, but it fails to stipulate any criteria for determining whether an organization or association fits this description. The international legality of militant democracy – in all of its manifestations – will remain uncertain until the field is able to provide legal standards for defining those associations, organizations, or actions against which a state is entitled to act in a militant manner"<sup>35</sup>.

Shifting the focus to the judicial level does not appear beneficial: "[...] the framework the [ECtHR] offers for determining the legality of militant democracy requires greater specificity on issues relating to timing, standard of proof, and probability of harm. In the absence of relatively specific rules and presumptions addressing these issues, this framework invites an entirely ad hoc exercise of interest balancing"<sup>36</sup>.

In general, *any* proposition stemming from a government or parliament seeks to limit rights. This is clear, *e.g.*, in the case of realizing a system of social security, which needs to be paid through taxation, thus limiting taxpayers' rights to freely use their means. To point to another example, this time regarding the present issue, freedom of expression may be limited in order to protect individuals or groups of people, but, regardless of the question of whether this is justified or not (on the basis of the ignore principle, or a similar principle), the protection comes at the expense of curtailing this right.

There is of course an article in the ECHR that deals specifically with the issue of balancing the various interests at stake, namely, article 10, but, as was pointed out in section 10.4, it is difficult to reach a consistent and acceptable result in the absence of the ignore principle (or a similar principle). Indeed, section 2 of this article reads: "The exercise of [freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or

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<sup>35</sup> P. MACKLEM, "Militant Democracy, Legal Pluralism, and the Paradox of Self-determination", p. 495.

<sup>36</sup> P. MACKLEM, "Militant Democracy, Legal Pluralism, and the Paradox of Self-determination", pp. 513, 514.

crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

Most of these restrictions can easily be defended on the basis of the ignore principle. ‘The rights of others’ is admittedly a very general category<sup>37</sup>. Similarly, it would be difficult to see what ‘the protection of morals’ might encompass. ‘Morals’ may be of various sorts<sup>38</sup>, stemming from as varied (world)views as, *e.g.*, Christianity, Islam, Hinduism, Confucianism and Humanism, and to this difficulty is added that their adherents may differ in significant respects as to what these views require. Conceding to every position would effectively result in nothing other than a stalemate. A choice must be made by means of a criterion, and I have proposed the ignore principle to fulfill such a role.

It must be clear, however, how ‘harm’, which is what the ignore principle seeks to eliminate, must be understood here. Harm is in each instance ascertained *within* the confines of the liberal democratic state, so as long as it is extant. It would be misleading, then, to use the ‘clear and present danger’ test (*cf.* section 11.6) in the case of calls for the cessation of the liberal democratic state, as such a test is to be used to ward off harm from an *external* source, such as a terrorist attack<sup>39</sup>, while the harm is *internal* here in such a way that ‘harm’ may even be a misnomer, since in *this* case the only proper judge to decide whether harm occurs is the majority<sup>40</sup>.

<sup>37</sup> Incidentally, the ‘reputation of others’ is an arguably justifiable criterion. It is admittedly a rather vague term, but may be defended on the basis of the fact that libel can be identified as harm (*cf.* sections 10.2 and 11.3).

<sup>38</sup> Forgoing here the meta-ethical question of whether this has a meaning at all.

<sup>39</sup> Both states that adhere to militant democracy and those which observe the standards of non-militant (formal) democracy can undertake actions against such threats.

<sup>40</sup> This state of affairs may be compared with the difference between murder and suicide. In the case of murder, the harm stems from an external source, while an internal source is the cause of suicide. I readily grant the potentially controversial nature of this example: it may be argued, *inter alia*, that suicide must be caused by an external source, like a malady, or, more radically, that it is difficult or even impossible to distinguish between external and internal factors. The former argument requires more than those defending it in the present context – in order to buttress a theory of militant democracy – can proffer without an appeal to nonpolitical elements. The latter argument may be plausible, for reasons I shall not explore here, but those defending it – for the same reason – would undermine their own premise as an appeal to it would strip the notion of ‘liberal democracy’ of any substance, and reduce it to a procedural framework (as I have argued on an alternative basis). As for the additional argument that in the case of a state, it is not just a single individual who is involved, and each citizen is affected by a majority decision, this may be rebutted by pointing to the fact that any democratic decision is of this nature (*cf.* section 16.7).

**16.11.** The foregoing considerations do not derogate from the fact that installing certain thresholds to impede the change of some rights considered very important<sup>41</sup> is justifiable (although, admittedly, on a pragmatic basis) as a middle ground between the 'normal' procedure (where something is accepted if more than 50% of the representatives agree with it) and some unchangeable principles, the latter testifying to a presumptuous attitude of the – contingent – legislator (however understandable their introduction may be with some historical events in mind).

**16.12.** The concept of 'militant democracy' and its ramifications have been critically examined. It appears that it cannot consistently be maintained, and consequently that (liberal) democracy is not necessarily the final form of government that can be realized. This need not be a negative outcome. What is decisive for democracy is merely a certain procedure, and the possibility cannot be excluded that a superior form of government exists. It would be difficult to see who should judge the merits of such a form of government (the populace being ruled out as a candidate since it would be democracy itself for which its presumable successor would be substituted), but it does not follow from that given that (liberal) democracy must be the ultimate form of government. Any other outcome would constitute an *argumentum ad ignorantiam*, as one would conclude from one's inability to imagine a superior alternative to (liberal) democracy that it *must* be the ultimate form of government.

In the introduction I indicated that basic rationality is the crucial element for a liberal democratic state to remain in existence. The foregoing in no way impugns that observation. It merely means that the proposition must be read as a *modus ponens*: if one wants to continue a liberal democratic state once it is in place, basic rationality is an indispensable element. This is formulated purely hypothetically: whether 'one' (*i.e.*, the majority of the citizens of a particular (liberal) democratic state) indeed wants to do so remains to be seen in individual states. A liberal democratic state will remain in existence as long as a (qualified) majority wants it to.

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<sup>41</sup> For instance, the Dutch Constitution (art. 137) stipulates that any change to it must first be approved by both the House of Representatives and the Senate (the two Houses of Parliament) on the basis of a (simple) majority. After the House of Representatives has been dissolved and a new House of Representatives has been installed in pursuance of the new election result, the proposed change(s) must again be approved, this time by a qualified majority (specifically, a two-thirds majority) in both Houses.

**16.13.** It is not difficult to see that basic rationality and the continuance of a liberal democratic state spring from the same source. It is arguably in an individual's interest that he has certain rights and that such rights are optimally protected against intrusions from both other individuals and the state itself, the former being realized by penal legislation and the latter mainly by the separation of powers and the existence of general elections. Acting on his interest, and thus rationally, would mean that he should both uphold basic equality (in the guise of basic rationality) and withhold his support from parties that seek to undermine the liberal democratic state of which he is a citizen.

That does not necessarily mean, of course, that one will in fact act rationally. In that case, there are two possibilities. Anyone who considers himself better able to judge what is in individuals' interest than they themselves are will have to put forward a compelling reason for his claim. If he *observes* the standards of liberal democracy, no other means is at his disposal than rational persuasion, which entails that he may try to convince those opposed to liberal democracy of the presumable error of their position, but must refrain from using any alternative. If he, by contrast, *fails* to observe such standards, he will have used means that conflict with the very premise of his position, thus refuting himself by acting tyrannically.

Some individuals may consider a certain state and form of government more important than these rights. Should they constitute a (qualified) majority and withhold them from citizens (and thereby from themselves), they would act arguably irrationally<sup>42</sup>, but in a liberal democratic state the (qualified) majority is right, its sheer quantity being the decisive criterion. This does not mean that what it decides is therefore correct or 'true', for in order to reach such a result, it is in most cases less advisable to appeal to the majority than to experts. The majority's rightness has, then, merely a *political* meaning.

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<sup>42</sup> Whether they would indeed act irrationally is in fact difficult to say. Suppose, *e.g.*, that they act from religious convictions that cannot be rationally refuted. Saying that this is too meager a basis to cling to such convictions (as this constitutes an *argumentum ad ignorantiam*) fails to take into consideration that interests are at stake that may for some people be (far) more important than the rights under discussion, to which may be added that, depending on one's philosophical outlook, reason may be too limited a faculty to claim anything with regard to religious matters.



**16.14. Summary**

Apart from the problem of the practicability of militant democracy, the very concept of 'militant democracy' is difficult to uphold. This does not mean that every viewpoint is equally desirable, but whether it *is* indeed desirable cannot be decided in a liberal democratic state by any other instance than the majority of its citizens. There are no guarantees that a liberal democratic state will continue to exist once it has come into existence. It is, depending on one's criteria, arguably the least unappealing form of government at present, but a dogmatic stance is to be avoided in legal and political philosophy no less than elsewhere, which means, applied to the case at hand, that it cannot be ruled out that the liberal democratic form of government will be succeeded by a superior one.



## REMAINING ISSUES

The theory as I have presented it may appear to lead to some inconsistencies and problems. I will address the issues I think merit some additional attention below, by addressing some possible objections.

### 1. General Issues

*1a. How can I warrant that what I have argued is true? I have presented a number of arguments why (basic) equality should be acknowledged in a liberal democratic state, leading, through prescriptive equality, to formal equality, and why freedom, albeit limited, should be allowed, but have other authors not presented their own arguments to claim other, conflicting views? How can I know that my account is true (and theirs is not)?*

1b. I have introduced as few assumptions as possible, and no notions whose meaning is controversial or even impossible to grasp. This still does not mean, of course, that no alternative account could be superior to mine, which is why I defend it by pointing to the fact that my claims are relatively modest. I have simply set out to find a theory that would optimally accommodate the difficulties and different – even conflicting – needs that arise in a liberal democratic state, without claiming that this theory would be in any sense an ultimate one, and the fact that this resolves me from what a ‘true’ account might be, or even mean, is, admittedly, no unwelcome consequence of this given. (Whether other authors who *do* profess to provide a ‘true’ theory manage to support such a claim I shall not discuss here, and is a matter I leave to the reader’s judgment.)

Such a stance would be hard to take for me in any event, as I consider myself to be a factor-determined being. I will not fatigue the reader with an extensive account regarding this issue and only remark the following. Factors ‘create’ an action if nothing besides factors is involved. A factor-determined being would, in order to present a more ambitious theory than the one excogitated here, have to be able to balance the factors themselves, which is only possible from a factor-free position, which is lacking for precisely the reason that I am such a being. I cannot, for example, abstract from the factors that have shaped my outlook (possibly elements such as my education – including reading what various thinkers have produced –, which, moreover, was provided in a specific country whose

relatively liberal climate may have had a certain influence) and thus move in such a factor-free realm, but must rather acknowledge my limitations.

This is an important reason for me to resort, at times, to a pragmatic stance, to which I think may be added that this might differ considerably if I should contemplate the current issues from some point in a distant past or future; whether this is indeed the case I cannot, of course, say, for otherwise I would already be able to identify (some of) the factors that constitute my specific stance, thus isolating them and removing them from the analysis, which is precisely what I am, as a factor-determined being, unable to do. Others may leave this position and aspire to a more ambitious view than mine, presumably from the starting point that they would *not* be factor-determined beings, but they would then have to make it clear, provided they could, *how* they would be able to reach a (presumably) factor-free realm.

2a. *Regardless of the previous matter, I criticize those who use notions or definitions of their own making as starting points, but do I not do this myself? An example is 'basic equality'.*

2b. As for the notions I have introduced, namely 'basic equality', 'basic rationality' and prescriptive equality', these are no items that have been exhibited *ex nihilo*. 'Basic equality' is an abstraction from what may be (approximately) equally observed and is thus no contrivance on my part, as 'human dignity', *e.g.*, may be argued to be. The same applies, *mutatis mutandis*, to the other notions used by me in this study. 'Prescriptive equality', *e.g.*, and its concretization 'formal equality' simply stipulate that some beings (namely, those who are basically equal) should be treated equally – notably, that they should enjoy the same rights. If someone should claim that this usage differs in any way from what is practiced widely in politics and in both legal science and practice, I would be curious to know what would evidence this.

As for another notion that has been used frequently, '(negative) freedom', it was not introduced here but is generally accepted, and – in case this is considered an *argumentum ad populum* – its manifestation in nature is easily corroborated in the form of freedom of movement, the freedom being manifested in the absence of opposition. Its specifically political manifestation is realized by the absence of opposition from the state or individuals.

Such considerations have also been decisive in preferring the minimalistic conception of 'democracy' that has been preferred to any other. Such considerations do not reflect any insight into 'reality', and it has not been my ambition to provide such an insight, irrespective of the fundamental question of whether this is possible in the first place.

## 2. The Meaning of 'Equality'

3a. *'Basic equality' is not clearly demarcated. It may at present be specified by 'basic rationality', but as I have indicated, this was specified differently (or alternative specifications were implicitly used) in previous societies. Besides, I have argued that once basic rationality is acknowledged anywhere, this must become the criterion, which seems to imply a development, or even progress. Do these observations not necessitate a reevaluation of the a priori character of the basis of my position?*

3b. It must be granted that various specifications are compatible with the account of basic and prescriptive equality. I have not claimed that any specific content of basic equality should be decisive, apart from basic rationality, once it has emerged. The *a priori* nature of my account is, then, rather to be recognized in the *structure* of the liberal democratic state. Whether one should speak of 'progress' once basic rationality is acknowledged I leave to the reader to decide. Progress is in the eye of the beholder, and some may consider an ever greater number of beings being treated equally a negative development. Such an evaluative stance is not taken up here.

4a. *Does prescriptive equality not entail that worldviews that deny basic equality should be excluded beforehand from the range of acceptable worldviews?*

4b. Basic equality is a constituent of the liberal democratic state, as I have argued, but there are actually *no* worldviews that deny basic equality, precisely because it is not decisively defined. (The only exception would be a worldview that considers one being so special that none other is basically equal to it, but – if the analysis is limited to the political realm – I know of no such worldview.) For example, a worldview that considers women inferior to men would, if it should consider men, or a selection of men (regardless of the criteria that are used to make this selection), basically equal, still meet the requirement. Every worldview has a conception of basic equality; the rele-

vant differences between worldviews are decisive in determining the criteria to specify basic equality and thus the scope of beings considered basically equal.

*5a. Supposing that the foregoing response is correct, should, once basic equality is identified with basic rationality, and basic rationality is thus acknowledged as the criterion for prescriptive equality, worldviews that deny basic rationality not be excluded from then on? In addition, a paradox seems to manifest itself: propagators of such worldviews demand that they be given an equal forum while it is part of their worldview that not every being be treated equally.*

5b. A decisive reason not to exclude such worldviews is that doing so would be based – if not on their acceptance leading to actions some people may not reasonably ignore, which is a legitimate reason to restrict actions from proponents of *any* worldview – on the presumption that basic rationality would represent some final stage, while the possibility cannot be excluded that another criterion will at some time be deemed superior to basic rationality, from whatever source. It must be reminded that basic equality is not part of a worldview, and that I, consequently, have not aspired to a ‘true’ account but merely one that most convincingly accommodates the various relevant interests. Rationality (or reasonableness, which is the same in my account) may be part of a (‘moral’) worldview (so a different view than the one presented here), but those upholding such a worldview should be able to make it clear to those adhering to a competing worldview why theirs is ‘true’ if they do not wish to be accused of clinging to a dogmatic stance, to which I would add that a position’s nonreligious nature does not guarantee the absence of such a stance.

As for the second part of the objection, if the criterion is that *every* being must be treated equally, it is clear that, if one is consistent, many generally acceptable views should be excluded, notably, those worldviews that differentiate between animals and human beings in the most significant respects. Should ‘every being’ be taken to mean every reasonable being or every human being, the worldviews under discussion do not wish to be treated equally with other worldviews, but merely seek attention as a means to gain power, accepting the democratic process as long as necessary and in the most extreme cases as a ‘ladder’ to be discarded once the rise to power is realized. Should one persist on the paradox, the distinction presented in sections 16.3 and 16.7, between the means – the democratic

procedure, up to and including the realization of (new) legislation – and the end, whatever it may be, must be recalled. Terminating the democratic procedure is not itself a goal but rather something considered desirable or necessary by those antagonistic to it in achieving their (actual) goal.

*6a. I do not deal with (the desirability of) economic equality, but should this not be treated in the beginning, i.e., once basic equality is discussed? After all, for those unable to fend for themselves this issue may be just as important as formal equality.*

6b. For any person in a liberal democratic state who accepts its form of governance, basic equality is what is crucial. Some sort of factual equality is deemed decisive in order to be treated formally equally, and once rationality is selected as the specification of basic equality, basic equality being specified by basic rationality, all human beings are relevant bearers of rights (in some cases artificially, *i.e.*, by means of a fiction). For someone unable to fend for himself and who is dependent on (government provided) benefits, the import of economic equality overrides that of the political and legal equalities discussed in this study and formal equality is primarily of interest insofar as it serves to realize economic equality<sup>1</sup>.

Still, basic equality needs to be distinguished from the distribution issue in the economic domain since basic equality refers to the equality that is a necessary condition for a liberal democratic state to exist at all, which is what I set out to explain (and, more fundamentally, an equality must exist in *each* state (*vide* sections 6.4 and 6.7)), while economic equality, manifested in material equality (or an approximation thereof), is rather a specific outcome of such a state, which may be realized in various ways, dependent on political preferences. The more material equality is approached, the more the freedom of those able to generate an income and profit from their labors is limited, with, in the most extreme scenario, the realization of material equality at the cost of the dissipation of such freedom (at least the pecuniary freedom, to dub it thus) and, with it, equality of opportunity. Such a scenario is not a corollary of the model I have

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<sup>1</sup> In the gravest conditions, one's economic situation obviously outweighs one's political needs; a starving person is not even able to express himself, let alone concerned (at that moment) with the right to do so. Economic equality may therefore be said to be at least on a par with formal equality, which would lead to other rights (*cf.* H. SHUE, *Basic Rights*, pp. 7, 8, 24, 25, 29, 30, 70, 75, 78, 81, 82) (I do not agree, by the way, with Shue's characterization of 'moral' rights (*o.c.*, p. 13)).

described, although social benefits for, *e.g.*, handicapped people who are unable (or less able than 'normal' people) to generate an income could be defended as a consequence, in order to prevent a societal schism that would endanger the very foundation of the model itself, basic equality becoming hard to defend if such measures are not taken. In a liberal democratic state, the majority of the citizens must assess what should be the extent of such benefits to suffice in order, on the one hand, to prevent such an upheaval and, on the other, to find a willingness of those who have to pay for these benefits to actually make the material sacrifice.

*7a. Irrespective of the point just made, may the need of economic equality not be promoted for the same reason I proposed that formal equality should be acknowledged, i.e., because a failure to acknowledge it would result in an upheaval, those not being treated equally protesting against their predicament, a civil war being the most extreme outcome? Their interest to realize material equality may, after all, be so great that they have more to gain from an uprising than from silently accepting their lot. This was manifested, e.g., in the Russian revolutions of 1905 and 1917.*

7b. There are two ways to answer this objection. First, it may be pointed out that the prevention of sedition is not the only reason why citizens are equally granted political and legal rights; as I pointed out in chapter 6, not granting rational beings the rights that are considered to be crucial for such beings would result in an inconsistency, the very basis for the granting of rights becoming incredible: as soon as a being appears rational, it must be treated equally with another being endowed with the same quality.

The remaining dichotomy will be one between rational and non-rational beings. Whether such a dichotomy is desirable is another matter; the beings entitled to answer such a question are invariably those that are also able to do so (*i.e.*, the rational beings), so that – failing a conscious rebellious act by a faction of the animals – this situation will only change on the basis of a decision (by rational beings) that will limit some of the rights of rational beings in order to create room (to whatever extent) for the rights of non-rational beings.

Second, in the case of economic equality, 'equality' is not, or at least not necessarily<sup>2</sup>, to be taken literally. In this case, there are alternatives to an all-or-nothing solution that consists in realizing precisely

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<sup>2</sup> I add this caveat since this situation does apply (at least in theory) in a system such as communism.



the same results for each being. For example, a welfare system may consist of compensatory measures for those that have become unemployed in the sense that they are granted unemployment benefits, but such benefits do not have to be equally high as the salary they used to earn (or, in the case of those who have not worked a sufficient amount of time, the social assistance does not have to equal the minimum wage) (*inter alia* to stimulate their (renewed) participation in the labor market)<sup>3</sup>.

Formal equality, on the other hand, is characterized by precisely such an all-or-nothing dichotomy. One cannot treat beings more or less equally. If there is no equal treatment, there is unequal treatment, which may have far-reaching consequences. To remain in the same sphere: unequal treatment on the labor market (exhibited by discrimination on the basis of, *e.g.*, race) may result in people being confronted with a situation in which they consider resorting to illegal means preferable to accepting this inequality. In the case of economic inequality, on the other hand, it may (on the whole) be expected that even those who are dependent on benefits will agree with a material distribution of goods that does not lead to a complete material equality, not even if this is limited to the mere pecuniary aspects. So long as welfare measures are taken, policy makers may operate under the assumption that no grave problems are to be expected. Those crimes that will remain can be addressed individually, on the basis of the judicial system. To what extent the welfare system should be realized is a matter that cannot be decided *a priori* as this will depend on the preferences of those in charge (so in a liberal democratic state, the majority of the citizens will decide on these matters).

*8a. Since basic equality, and with it prescriptive equality, is a given in (virtually) any state, and not just a liberal democratic state (as set forth in section 6.7), have the specific conditions for a liberal democratic state to remain in existence been pointed out carefully enough?*

8b. First of all, strictly speaking, this question is inaptly put, since I have merely sought to indicate the conditions for a liberal democratic state to continue to exist; if such conditions should *also* prove decisive

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<sup>3</sup> Irrespective of that, it would be nigh impossible to realize material equality if other than pecuniary aspects were taken into consideration. Someone who is unemployed may not merely care about money but may want to work, and – more dramatically – a handicapped person may wish to function as ‘normal’ people do.

for other forms of government than liberal democracy, that result is insignificant for the questions that have directed my inquiry. Second, 'basic equality' is a concept that must be specified, which may be done in many ways. What I have argued is that basic rationality would be the most desirable and productive candidate for a liberal democratic state. Third, equality is only part of the analysis. Freedom is also a necessary element, and this provides a complement such that a state observing what has been argued may indeed be considered a *liberal* democratic one.

### 3. The Limits of Freedom

9a. *I pointed out in chapters 13 to 15 that the public domain should not permeate the private domains lest the room for citizens to maintain their own (world)views be compromised, resulting in the worst scenario in a totalitarian state. Yet the result of the inquiry made in chapter 16 is that such a state should be possible. Do these results not contradict each other?*

9b. The analyses presented in chapters 13 to 15 apply to the liberal democratic state. As long as a liberal democratic state is in place, it must operate within the specified limitations. There would indeed be a contradiction if a liberal democratic state were *at the same time* a totalitarian state, but my proposal wards off such a result. What it does not ward off, and now I turn to what was argued in chapter 16, is that a liberal democratic state can be *changed into* a totalitarian state, even by democratic means. Once a totalitarian state is indeed in place, the private domains may be permeated by the public domain, but such an outcome lies beyond the scope of the present inquiry, which only concerns what is necessary *within* a liberal democratic state. Accordingly, no contradiction arises at this level.

10a. *If a moral point of view that consists in considering people (or citizens) as equals provides more stability than the position that everyone is entitled to think what he wants so long as his behavior meets the required standards, is such a moral stance not to be preferred for that reason?*

10b. Stability may be specified in various ways (a totalitarian state may be very stable). Still, if stability is taken to mean a situation in which every citizen's rights are not only protected but also guaranteed (insofar as this is possible), a 'moral' perspective may seem to be preferable, since worldviews that are hostile towards granting rights to certain people, or towards democracy itself, may thus be offset.

Still, the alternative I have presented starts from self-interest as the decisive factor, which appears to provide a stable basis, while starting with a 'moral' stance, which may be continually questioned (and not only by those who operate from a competing worldview but even by the very people who adhere to it), does not. Even rationality does not provide such an undisputed basis from a 'moral' perspective, as was shown in chapters 4 and 5. It does, however, provide a relatively stable basis if rationality is associated with self-interest, the latter element being considered decisive in the political realm.

An additional reason not to accept a 'moral' view as the politically decisive one is the following. In chapter 10 I pointed to the problems of religious exegesis, and the fact that this would mean that legislators would have to act as theologians. In this case, conversely, they would have to act as moral philosophers, which is not their task, either. Their task is not a verificationist one, seeking after the 'truth' of matters (although they are of course free to operate from any worldview that motivates them), but rather one of protecting the rights just mentioned. Those that *do* consider their activities to include such a quest face a burden of proof they will find difficult to meet if the observations in chapters 2 to 5 are taken to heart. In fact, the 'moral' status of a citizen, or, more generally, a person, is arguably as difficult to uphold as any religious tenet. The lack of stability that accompanies this insight is compensated by basic equality, specifically basic rationality, which has no other basis than self-interest.

#### 4. The Boundaries of Democracy

*11a. Even if one grants that the concept of 'democracy' in general does not include the rule of law, so that a democratic state may exist without it (cf. section 3.3), does the concept of 'liberal' democracy not include it, making militant democracy on that basis alone a superior alternative to formal democracy?*

11b. The concept of 'liberal democracy' is difficult to demarcate. I have throughout this study operated from a broad conception, including a democratic procedure and certain liberties. The rights granted on the basis of formal equality were shown in part 1 to apply to all who are basically equal, while the scope of the liberties was examined in part 2. It may be argued, in accordance with what was said in the introduction, that the rule of law is part of liberal

democracy (though not of democracy without qualification), but that does nothing to ward off competitors to militant democracy. (Incidentally, if both 'liberal' and 'democratic' (or 'democracy') lack substance, as I have argued, it would be difficult to see why the rule of law must *necessarily* be observed in a liberal democratic state, as if it would somehow supervene on what is characteristic of a liberal democratic state.)

First, it is not a given that the rule of law is necessarily given up once a liberal democratic state is abolished. The rule of law does not uniquely find an application in a (liberal) democratic state, as was indicated in section 3.3. Second, the rule of law is no more eternal than the other elements of liberal democracy one may deem valuable. In a liberal democratic state, a (qualified) majority may abolish it on the basis of what was said in chapter 16. That the outcome of such a process is that the liberal democratic character of such a state is abandoned takes away nothing from the possibility that a liberal democratic state, including the rule of law, may be abolished. This outcome must not be confused, of course, with the *desirability* of such an abolition, which is, in a (liberal) democratic state, judged by none other than the (qualified) majority.

*12a. If militant democracy is not accepted, it cannot be excluded that, once a liberal democratic state has been dissolved, decisions are made that lead to outcomes that cannot reasonably be ignored, so that the ignore principle appears to be violated.*

12b. It is correct that such outcomes cannot be excluded, but the ignore principle has only been shown to apply *within* the liberal democratic state, and not to be based on a universal claim that should be granted. Should a liberal democratic state cease to be, the state being governed differently from then on, if an appeal is made to the ignore principle, this must rest on another basis. Liberal democracy, or democracy in general, has no monopoly on the ignore principle, but another form of government would not necessarily use citizens' interests as the criterion, so that the ignore principle, if upheld at all, should be based on another criterion, *e.g.*, that citizens might rebel if their harm is not sufficiently prevented.

## 5. Normative Issues

13a. *A descriptive and a normative analysis seem to be confused. The historical description in the first and last chapter is precisely that: a description. It does not follow that the historical course of action is also morally right. This appears most prominently in my analysis of 'formal equality' as a concretization of prescriptive equality, which follows from basic equality: I have indicated that equal treatment applies to those able to present themselves as proper candidates to be treated equally with those already in charge. That merely means that one may in retrospect (once the groups to which the beings that are now being treated equally belong have been included) conclude that the 'right' beings are treated equally, so that each situation is equally morally right (at least in retrospective), since a failure to include beings will merely result from their lacking the power to demand equal treatment, and that the status quo is always legitimated from this perspective.*

13b. First of all, I have not aspired to a 'moral' theory, and do not exclude the possibility that such an ambition may be mistaken for the simple reason that such a theory must appeal to notions that do not refer to anything. (I have not elaborated on this in the present study as it would lead to a greater excursion into meta-ethics than the subject matter justifies.) This does not mean that one may not use any criterion to distinguish various situations; I would myself consider desirability the 'proper' (so to speak) criterion, but that is an external criterion in the sense that (1) it may be used to judge whether other beings than those already included should be treated equally as well (notably, animals (but then the question again presents itself *which* animals)); (2) individual preferences will be decisive here to such an extent that no 'objective' standard can be found, or that it will in any event be difficult to do so within the confines of my modest account, which is evident from what I just indicated (should animals be treated equally, and, if so, which ones (or every animal (if possible)?), a question which must, of course, be answered by those already being treated equally).

In my theory, a factual situation is the starting point, after which a normative analysis follows, but normativity must be distinguished from (or is at least not identical to) 'morality' (in order to avoid such confusion, I have spoken of prescriptive rather than normative equality). For example, it is a norm that one should pay taxes and abstain from murder. In these cases, rules (legal norms) are involved

that may be deemed normative (in that they put forward a norm), but no 'moral' considerations need apply. One may simply abstain from forbidden but desired acts in order to avoid penalties whose undesirability exceeds the undesirability of not obtaining the results that would otherwise come forth. I do not see how this sort of behavior is guided by anything but self-interest.

Perhaps an analysis such as the present one is only possible in retrospect, *i.e.*, once it has become apparent on what basis the rights have been granted in the first place. I do not wish to imply by this – somewhat presumptuously – that this is the definitive analysis, since it is not necessarily correct. I merely want to express here the caution that must be used to prevent succumbing to the hindsight bias that one now 'knows' the 'right' theory, accompanied by the amazement at the presumable lack of insight with those in earlier times, who held slaves and/or suppressed women, since any theory may contain blind spots (if there are any here, I cannot of course identify them). The problem that the *status quo* is always legitimated is mitigated by the fact that I do not take 'legitimated' to have a 'moral' connotation, and that those who do understand it thus can still debate amongst themselves whether animals should enjoy certain rights. In that sense, the *status quo* may be questioned, so it is not considered here to be the necessary (or 'right') outcome.

It appears that prescriptions can only arise within the context of the developments that have been the subject matter of the descriptions I have presented, those who are concerned with prescriptive questions being those that are able to do so in the first place. This does not, however, address the more pressing issue of whether the exercise is not futile, confused, or circular: the descriptive domain itself seems to be used as the touchstone for the prescriptive domain. This is manifested by the fact that I point to the (gradual) inclusion of minorities and women in the realm of beings to whom are granted the rights discussed in this inquiry, which is itself subsequently prescribed on the basis of my conception of basic equality (and specifically basic rationality) and its corollaries.

To this objection I would reply that there is an overlap between the prescriptive and descriptive domains, but that it does not manifest confusion or a circle, and the domains remain – at least methodologically – separated. It just means that the description can only take place at a stage at which at least part of what one intends to realize has already been realized. The prescriptive issues are not, in other words, presented *ab ovo*; they are concerned with the *expansion* rather

than with the original *allotment* of rights (the original allotment possibly being the result of a spontaneous rather than a conscious process). The alternative would be to use a prescriptive criterion that is localized altogether outside the descriptive domain. I am not able to realize or even conceptualize a possible (let alone realistic) criterion of this sort, while the problems of the views of some important advocates of such criteria have been pointed out.

Moreover – in response to the objection that the argument is futile – my prescriptive model does not *inexorably* ensue from the description: one might alternatively acknowledge that the inclusion just mentioned has in fact taken place while arguing that it should not have, and must be reverted in some respects (depending on one's philosophical and/or political outlook), or alternatively, that the inclusion has not been carried through sufficiently (and that (some) animals must be granted certain rights), even arguing that a 'moral' base is needed (thus identifying 'prescriptive' and 'normative'). What I have done is to try to account for the granting of rights and the expansion of the domain of legal subjects, and subsequently how this may most stably and convincingly be upheld. This demonstrates the simultaneity of prescription and description; that these processes run parallel does not, however, manifest their (unwarranted) identification.

*14a. Irrespective of any reservations one may have with regard to 'moral' issues, might notions such as '(human) dignity' not have a meaning? It would be presumptuous to conclude from the fact that I am unable to find such meanings that their existence is not possible.*

14b. I cannot conclude to the nonexistence of something on the mere basis that I have not encountered it, or am unable to comprehend it. Still, is this a problem? The position of one who states that something must have a meaning because its reverse has not been proved is not acceptable, and the accusation of committing an *argumentum ad ignorantiam* could rightly be leveled against him, so I would argue that the burden of proof is on those who defend such notions to make it clear, if they can, what they mean, or, if they cannot, to give them up. So long as there is no need to include such notions in one's theory, as is the case, as I have argued, in my theory, I would keep them at bay (leaving the matter here whether a theory that would include them is not *a priori* unacceptable). Should my approach be considered reductionist for that reason, I can only agree with such a designation, being

unable to detect a derogatory qualification in a stance that abstains from using notions whose presence in one's theory is difficult or even impossible to uphold and which may even be devoid of meaning.

*15a. People who are cognitively impaired are considered fictitiously rational. Why should one not consider either 'human dignity' in the same way, or construct an encompassing notion that includes animals? As long as one is working with fictions, one may create fictions that apply to as many cases or beings as one wants.*

15b. The contrast between fictitious rationality and 'human dignity' is clear from the fact that in the latter case, an additional notion is introduced, whereas I, by using 'fictitiously rational', merely extend the application of an existing one to cases to which it does not *a priori* apply. In addition, the only reason why 'rationality' is extended thus is the same reason why fictitious rationality is introduced in the first place (namely, to protect the interests of those already rational), in which case the last justification to use 'human dignity', namely that it – supposedly – evinces a 'moral' quality, would disappear, leaving the notion not only without a reference but even *semantically* void (just as, *e.g.*, a 'round square'). My alternative is vulnerable, I admit, from the following consideration. It may be said to be in the interest of rational beings to promote the interests of their own children, or perhaps mentally handicapped persons to whom they are related, but they may also have an interest in the well-being of animals.

As for the inclusion of animals in the realm of right bearers: it is indeed possible to include them by extending the fiction's application. After all, they are no less rational than people who are seriously cognitively impaired. Still, opting for this alternative would prove the arbitrariness of the fiction construed on this basis. It would hollow out, so to speak, the notion (just as is the case with 'human dignity'). This does not mean that the fiction I have used is any more 'true' than the one under discussion here: 'truth' cannot be the criterion if one knows beforehand that one artificially applies a notion of one's own making instead of acknowledging one on the basis of independently acquired findings.

The absence of arbitrariness in my case follows rather from the fact that there is a clear motivation for those that use it, *i.e.*, those that *are* rational (lest they should not even be able to create, use or understand the fictitious conception in the first place, so that the opportunity for the present discussion to take place would not even exist),



namely to make sure that certain standards will be respected if they should lose their reasoning powers when it comes to their treatment (they may not, *e.g.*, be killed for the simple reason that they have lost their reasoning abilities). Of course, if a sufficient number of people (and *in this case* that would be the majority) should believe in reincarnation between species, this would presumably mean that the fiction's application should be extended. In that case, the application of the fiction would *in that context* be no more or less arbitrary than mine is in the current one.

Perhaps some would argue that they have a bond with (some) animals as close as the one that exists with their own children, and would for that reason grant (some) animals at least the rights that shield them from torture and death. Such a position is a valid or perhaps even commendable one, but not from the *a priori* standpoint I have taken. It is, in other words, not necessary in a liberal democratic state that such a position be taken, and a matter that must be decided *on* rather than *within* the basis of a liberal democratic state.

16a. *May one distinguish as easily as I have done between humans and animals? Is there not a moral obligation to treat them all in a certain way?*

16b. This has not been my inquiry. I have in fact left 'moral' issues aside altogether. If one should argue from a 'moral' basis, such a view might be defensible. However, another criterion than rationality must then, presumably, be used.

17a. *I have pointed out that a number of authors can be accused of speciesism. Does my analysis not attest to precisely such a position? Rationality is considered the decisive criterion to treat beings equally, but this is supported differently than, e.g., in Kant's philosophy (which does not, as I have argued, exhibit speciesism).*

17b. I am a speciesist in the sense that I favor my own species as one that exhibits basic rationality, although this stance has a *de facto* basis and is not one of principle, as I would acknowledge (as Kant would) the position of aliens who demonstrate behavior on the basis of which they can be considered basically rational. The issue of speciesism presents itself as soon as one is confronted with the consequences of the alternative of acknowledging the position of other species than mankind, which would result in – presumably – unfavorable outcomes if these consequences are followed through. One

may desist from eating meat, *e.g.*, but one of the most basic rights – the right to life – would also be called into question once one kills a mosquito in order to prevent being bitten by it (which would arguably have to be considered a disproportional measure if (all) animal rights are to be taken into consideration). This may seem a somewhat exorbitant example, but it is the outcome of any outlook that does not operate from a speciesist framework. I did not point to the authors that espouse it to indicate that their position is (‘morally’) ‘wrong’, for that has not been my purpose. I have merely pointed out the difficulties in accounts whose ambition it *is*, in contradistinction to mine, to present a ‘moral’ theory. It is everyone’s right to be inconsistent in matters such as this one, and to focus on finding a political solution rather than to aspire to expound a philosophical one, but ignoring the facts is in no instance an option (even irrespective of the issue of whether a political solution is thus forthcoming).

To be explicit, racism is, in my theory, no more ‘right’ or ‘wrong’ (in a liberal democratic state) than speciesism is. The difference is that those that belong to one’s own species share the crucial characteristic – reason – in common, and, not unrelated to this, that they are able to stand up for themselves. The treatment of racial minorities was a ‘moral’ issue as long as they were unable to stand up for themselves and claim rights, just as that of animals will remain one as long as they will be unable to do so. If the criterion to grant rights to beings is reason in a liberal democratic state, one’s race should no longer be a relevant factor, and if this is acknowledged, those belonging to a racial minority are themselves part of the group of beings that decide which (other) beings are granted the most important rights there are. In the case of animals, these rights are not political rights, of course – for the beings for whom they may be deemed relevant are themselves rational, so that the matter would be moot –, but rather the more basic rights to life and not to be tortured.

## 6. Difficulties in Applying the Theory

*18a. As was indicated in chapter 11, there is no guarantee that pointing to the possible consequences of some freedoms may not be used as a reason to reduce such freedoms to a point where they hardly exist. Is my solution to evade this outcome, namely, the existence of an independent judiciary in addition to the democratic procedure, not a mere pragmatic solution, so that the real issue, namely, to what extent it should be possible to limit liberties, is evaded?*

18a. I grant that the solution is a pragmatic one. The question, however, is whether a viable alternative exists. I have sought to steer clear from simple solutions in this case no less than in other instances where one was not forthcoming unless a straw man should be used to present a picture that would do no justice to the complexities of the matter. That matter is in this case, as I have said, that no all-or-nothing solution is possible in a world where one expression differs from the next, and it is difficult, if not impossible, to assess the reactions to each expression. What I have presented seems, in that light, the only acceptable perspective.

There is one alternative, but it depends on more presumptions than I have been willing to include in the analysis, notably the idea that a single answer exists, waiting to be unearthed, to be found if one looks hard enough. Absent the means to perform such a Herculean task (whose challenge would consist in indicating precisely which expressions should be allowed, thus being able to predict accurately the outcomes of each of them), the pragmatic solution, characterized by both its unpretentiousness and its reliability, must suffice, at least for now.

I remark here that a pragmatic approach is to be preferred to one that starts from the presumption that one solution to problems such as those discussed here exists, and I have not presumed that what I have proposed in this study is the final answer to those problems. Several issues remain that are not resolved and whose final resolution – meaning that an answer would be provided that would be acceptable from *any* point of view – is not forthcoming. I have merely indicated what I consider to be the best (in the sense of most desirable) perspective, without excluding the possibility that certain aspects need to be altered; as the answers have been proposed by a factor-determined being, no alternative disposition would be warranted.

*19a. The 'reasonably' part of what can reasonably be ignored remains a difficult issue. Is it realistic to expect it to cover all cases and thus serve as a guiding principle?*

19b. I have not aspired to a theory that would cover all situations that may arise, as I deem this unrealistic. I have not started from that premise or with the ambition of a theory that would constitute a reflection of reality (whatever one takes this to mean), for – apart from the fact that such an aspiration may be considered impossible

*a priori*, depending on one's epistemological outlook – the variety and complexity of issues would turn a claim of complete foreseeability on my part into a pretension. Rather than to defend a shadowy thesis, I acknowledge the limitations of my approach. This means that the ignore principle serves as a guideline for the judiciary, who can tailor it to the specific instances they encounter.

I indicated in various instances that a completely *a priori* solution is not forthcoming: the ignore principle is rather an amalgam of an *a priori* basis and an *a posteriori* superstructure. One may argue that this weakens the force of the principle, but it does on the other hand provide the necessary substance, while the danger of a forlorn relativism is adverted by the *a priori* core that constitutes its basis.

Just as in other cases, I did not start out with the ambition to produce the optimally 'aesthetic' or 'neat' theory as this would either result in a procrustean outcome, or an air castle of the author's own making, which are both as useless as (unfortunately) already readily available. I consider what has been said about the ignore principle to constitute the weakest part of this inquiry, but have found no way to remedy this other than by resorting to the drastic measures just mentioned, which would, as that part of the theory would cease to be realistic, reduce it to little more than an exercise in futility.

20a. *Returning to the previous objection: when the ignore principle must be applied, a demarcation line appears difficult to find when it must be decided which harmful acts can be tolerated. Male circumcision was argued to conflict with the ignore principle, which interferes with people's freedom to bring their children up as they want to. Should the same criterion be applied to the contents of a child's upbringing, which is arguably something a child cannot reasonably ignore (as it (presumably) shapes at least part of its outlook and identity)? After all, a child has (presumably) not yet evolved to an individual capable to critically assess what it learns. Should parents' freedom be restricted in this respect, so as not to harm the child?*

20b. The failure to definitely specify the ignore principle is admittedly a great weakness of my account, as was acknowledged in section 10.6. This is a clear illustration of the shortcomings of a model whose justification cannot be fully *a priori*. I have indicated the reason behind this, but that does not exempt me from my duty to respond to the present objection. Perhaps it is desirable, or even necessary, in a liberal democratic state that some education be provided on the basis of which citizens can, however paradoxical this may sound, be

'molded' into critical citizens, which presupposes that no worldview, not even one that best suits the prevalent specification of basic equality, should be promoted or rejected (an exception may be made with respect to worldviews that act contrary to the ignore principle, although this is controversial since the ignore principle protects those considered basically equal, so that some arbitrariness would remain at that point).

Incidentally, the education process points to an important given, namely, that no strict dichotomy is necessary in all instances, the dichotomy being that one either allows or restricts (speech) acts. As long as a means to sufficiently mitigate the effects of such acts is available, it would be excessive to restrain them. As Sumner puts it: "[censorship] should [...] be the last, not the first, resort of government for preventing the harm in question. Where less coercive measures (education, counterspeech, etc.) promise similar results they should be preferred. Where a narrower infringement of freedom of expression will be equally effective it too should be preferred"<sup>4</sup>.

This need not interfere with parents' freedom to convey their worldviews on their children, so long as what has been sketched is offered in schools, while all schools are committed to teaching programs dictated by the state. The criticism that the state would subsequently dictate what one should think is easily refuted: a critical attitude is realized, even towards those governing the state, which would be difficult to reconcile with a state unilaterally prescribing what one should think.

*21a. In chapter 16 it was pointed out, using the prohibition of alcohol in the U.S.A. as an example, that ineffective legislation will not last. Does the same consideration not apply to, e.g., male circumcision, which was argued, in chapter 10, to be something that should not be allowed?*

21b. It is not the case that the consideration of chapter 16 applies to *all* legislation. It applies merely to legislation that is usually, or generally, disobeyed by a substantial number of people. This does not yet answer the question, as a substantial number of people might disobey legislation that prohibits male circumcision. The government must create a policy on the basis of which the focus will be more on certain transgressions than on others. The most desirable result

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<sup>4</sup> L. W. SUMNER, "Incitement and the Regulation of Hate Speech in Canada: A Philosophical Analysis", p. 207.

would be that people who want to circumcise their sons would take the ignore principle seriously and balance it against the religious duty they think they must perform. A liberal democratic state may penalize actions, whether they result from religious considerations or not, but it may not intrude on people's (religious) convictions. If it considers an act grave, it must penalize it harshly, so as to deter offenders, who will hopefully, balancing the outcomes of an act against each other, restrain from carrying it out.

Irrespective of the foregoing, I would point out that a crucial difference between male circumcision of children and drinking alcohol is that the latter only affects those who themselves drink, so long as no exterior effects, such as violence, result from their behavior (which can be separately penalized).

*22a. The ignore principle provides a standard to find a balance between realizing a stable society and granting citizens the rights they consider important. However, those that do not want to reasonably ignore acts they perceive to be harmful will oppose such acts. My theory does not seem to accommodate this given.*

22b. Such people desire more restrictions – and these are, incidentally, restrictions that may ultimately, ironically, prove to yield undesirable results *for themselves*, for example when they themselves wish to express something considered controversial (and harmful) by others – than is warranted in a liberal democratic state seeking to optimize freedom while balancing it against equality; there is sufficient justification to penalize any action that results from their reluctance to accept the fact that such restrictions are absent.

*23a. In chapter 6 I argue how a stable liberal democratic state may be realized through basic rationality as the most viable specification of basic equality, which is presented as a superior alternative to 'moral' outlooks. However, to what extent can this stability be guaranteed? Is it not possible that a majority arises that operates on interests that run counter to the interests (hitherto) shared in common?*

23b. A first response is that in this scenario, there is a majority, operating, presumably, under the banner of *some* notion of basic equality, whatever its specification may be. After all, if *no* specification of basic equality were acknowledged, there would not be a sufficient basis for a majority in the first place. A majority can only exist if those

composing it share something in common. So the issue appears less problematic than it may seem at a first approximation: the only real change is that one common interest has been replaced by another. Still, the weakness of this response is manifested by the fact that it accepts *any* majority outcome, so that the desired stability is not forthcoming.

A more productive response is the following. Such an outcome cannot, admittedly, be excluded on the basis of the premises set out in this study. Although it must be acknowledged that one should, in defending one's viewpoint, only resort to pointing out the weaknesses of the alternatives to one's own perspective as an *ultimum remedium*, I venture to say that it is not amiss to recall the difficulties those who argue such outlooks must face.

One might still pragmatically cling to them, which would mean that a government, while not believing in 'moral' tenets, would instill beliefs into the populace so as to make them compliant. Apart from the fact that such a position would be difficult to reconcile with a liberal democratic outlook, nothing would be gained thus. Such a *modus operandi* would, unless such a government should take measures to enforce such tenets – thus giving up even the pretense of operating under the banner of a liberal democratic stance –, be no more effective against the rise of a hostile majority than the premise of basic equality, and perhaps even less so, since those who defend basic equality can at least support their claims by means of reason; whether the aspiration to disarm the majority is unrealistic will of course depend on the majority itself, especially the nature of the views its adherents hold and, not unrelated to this, their disposition (*i.e.*, whether they are hostile or not). By proposing basic equality as a starting point, a balance is aspired to between, on the one hand, an encompassing ('moral') outlook that would be hard to find and would not motivate those who do not share such an outlook, in which case stability would be found but at an unacceptable price, and, on the other hand, the absence of *any* starting point, whether it be a 'moral' one or not, in which case the stability would not be forthcoming, at least not at this level<sup>5</sup>.

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<sup>5</sup> I add the phrase 'at this level', since *external* factors, such as a natural disaster or a commonly shared enemy, may contribute to the rise of the desired stability, but, first, such factors, while providing a union, would presumably render a situation dire enough to render the present issue moot, and, second, there would be no reason to presume that once they would abide the union would continue to exist, so that the stability problem would once again arise.

It may yet be argued that universally shared 'moral' considerations might provide the desired stability, for example when the abolishment of slavery is concerned. Whether genuine 'moral' actions are possible at all is too far-reaching an issue to discuss here. Applied to the subject matter at hand, I can say that in light of the observations made in chapters 2 to 5, a 'moral' foundation, on which to base one's disapproval of (human) slavery, is not forthcoming. (It is possible, of course, that a satisfactory explanation I have simply overlooked exists, but I venture to say that I have sufficiently scrutinized the various alternatives to conclude that a 'moral' position would at least be problematic.) That leaves the option to – somewhat cynically, perhaps – propagate a 'moral' outlook in order to promote desirable actions, but, as I have said, to forgo such a strategy and resort to basic equality (in the guise of basic rationality) is preferable, both from a political and a philosophical perspective.

A possibility to remedy the issue of stability while maintaining a liberal democratic outlook is to incorporate elements of militant democracy. The viability of such a position, resulting in using such elements as a superstructure to the foundations discussed in the first part of this study, was inquired in chapter 16, concluding that it is untenable.

The desired guarantee is not, then, forthcoming. An appeal to rational beings that it is in their own interest not to dissolve the liberal democratic state and to use the characteristic they share in common, rationality, as the crucial characteristic to be (continually) treated formally equally is the most constructive alternative.



## CONCLUSION

I have inquired what role formal equality and freedom serve in a liberal democratic state. With respect to the first issue, the *foundation* of formal equality – which has been characterized in the abstract as ‘prescriptive equality’ – has been the focus of attention, to which end the notion of ‘basic equality’ was introduced. It has been my primary goal in the first part of this study to clarify on what basis one may claim a right to be treated formally equally with others, meaning that one should have the same rights that follow from political and legal equality as those others.

I have first, in chapters 2 to 5, examined various alternatives to base such a claim on a ‘moral’ appeal. Rawls attempts to realize such a theory by using rationality as the decisive criterion, but, first, does not take a sufficiently radical stance with regard to the veil of ignorance to warrant the status of rationality as a ‘moral’ criterion, and, second, fails to clarify why rationality is such a criterion at all. Dworkin’s approach faces some equally challenging problems. In his case, the difficulty consists in the fact that an appeal to an ‘intrinsic value’ is made without indicating how and why these notions would serve as foundational values. Kateb does provide such an account. The problem here is that ‘human dignity’, the crucial starting point in his theory, appears to apply to *all* human beings, regardless of any special qualities they might exhibit, leaving the notion void. In Kant’s philosophy, this problem is absent, as he does specify such a criterion, but, apart from the fact that this cannot, given his general philosophical outlook, strictly speaking be demonstrated, the general difficulty that plagues every such defense remains, namely, that the link between *any* quality and ‘dignity’, human or not, seems impossible to find. That some presume that it can be found may be explained from confusion between, on the one hand, something valuable – which may in some cases be expressed through a price – and, on the other, a value or ‘dignity’.

In contradistinction to what these thinkers argue, I have stressed, in chapter 6, the importance of rationality, but not as a ‘moral’ characteristic. It has, rather, the (usual) meaning of a faculty by means of which one seeks to obtain the most desirable outcome in the long term. I have not based my account on such a ‘moral’ faculty because of the difficulties that the alternative, starting with a ‘moral’ one, demonstrated in the first chapters, brings with it (although this is a

welcome aspect), but rather because I have seen no need to resort to the latter. It would have no added value, and would, accordingly, merely needlessly complicate matters.

The starting point is, in any liberal democratic state, basic equality, and its corollary, prescriptive equality, which is in turn concretized by formal equality, indicating which beings are to enjoy the rights stipulated by formal equality. 'Basic equality' may be specified in many ways, depending on the criteria to deem beings basically equal. What I have argued is that basic rationality is the specification that is to be preferred to any other specification in a liberal democratic state. It means that those who are basically rational are, on the basis of prescriptive equality, to be treated equally. Rationality must be acknowledged as the decisive criterion by and, simultaneously, for those who are rational (*i.e.*, for themselves) as this provides the optimal guarantee that they will continue to enjoy the rights they consider important. Another criterion, based on, *e.g.*, religious characteristics, does not provide the same guarantee. Apart from that, a failure to include (groups of) people who are rational is likely to lead to claims to the same rights from such people, perhaps by violent means, making them antagonists towards those already enjoying these rights. That this is no mere thought experiment is clear from the example provided in section 6.10.

The main question, whether equality and freedom are necessary constituents of a liberal democratic state, can be answered as follows. Material equality is no such necessary constituent, but formal equality is, meaning that citizens should be treated equally, based on basic equality and its corollary, prescriptive equality. In determining what this entails, I have opted for the middle ground between two extremes, avoiding on the one hand the possibility of one specific sort of (basic) equality and some exact extent of freedom, and on the other hand the possibility that 'freedom' and 'equality' may be defined in *any way*.

The former option would have resulted in a standard whose neatness would have come at the price that its uselessness would be evinced on account of its procrustean character, leaving no room for the specifics inherent in individual liberal democratic states, while the latter would in fact demonstrate the opposite of what I have argued: if these concepts can indeed be defined *in any way*, it has only been shown that *something*, whatever it may be, must be present in a liberal democratic state, which would be an obviously unsatisfactory outcome in this case as such a simple state of arbitrariness may be

reached through a far less extensive analysis than the one presented here, making it redundant and a waste of effort.

To conclude, basic equality has proved to be a somewhat flexible and abstract concept, while basic rationality is the specification that is the only viable candidate once it has been acknowledged; it may be replaced by another specification, although I find it hard to imagine what this might be. Another aspect of basic equality appears to be that those who are basically equal are, in a liberal democratic state, *themselves* the ones who decide who must be treated (formally) equally, through prescriptive equality.

As for freedom: I have tried to be as nuanced as possible in demarcating its realm, so as to do justice to the various complications involved in its implementation in a liberal democratic state. The result that was reached can be summarized as follows: freedom of expression should exist, limited only by what the ignore principle dictates: only actions that can be reasonably ignored by those who are basically equal should be allowed. The inclusion of the adverb 'reasonably' means that in this case, too, no absolute standard is proffered, the ignore principle being in need of the societal context in order to be concretized.

Some of the ideas presented here have the character of a 'framework' or a 'blueprint': no definite specification is provided. This appeared most prominently, perhaps, in the case of basic equality, but the ignore principle is another important instance. The fact that these aspects of a liberal democratic state were presented thus is advantageous in that it affords the necessary room, at least in the second instance just mentioned, to realize various concretizations, thus accounting for the specific characteristics of each state, but this does mean that some issues are not decisively answered. Whether others deem themselves capable to provide such answers in advance I do not know, but I would in any event not know how to do so without resorting to a model of the liberal democratic state a manifestation corresponding to which one would have a hard time locating other than in one's own imagination, such a manifestation being as simple as it is unrealizable.

An important issue that has arisen is the scope of the state's aspirations. There are two positions that one may take regarding this issue. One may, opting for the first position, consider it a task of the state to realize a 'correct' (or 'true') or even a 'moral' conception of politics, indicating, for example, in what fundamental respects people are

equal and limiting or discouraging, from such a consideration, conceptions with a conflicting outlook, which can be found in certain worldviews (or comprehensive doctrines, to use Rawls's phrase). I consider theories such as those of Rawls, Dworkin and Habermas examples of such a denomination. The differences between these theories are considerable, but what they share in common is that they incorporate 'moral' elements in their political theories. In Dworkin's case, this follows most clearly from the way he defines 'liberty', distinguishing it from – negative – freedom, demanding that citizens should in each case respect other citizens' rights. This means that some viewpoints are excluded from the outset.

Rawls's and Habermas's positions, discussed in chapters 14 and 15, respectively, likewise demarcate a domain beyond which no freedom of expression may be tolerated. Rawls seeks to establish a position beyond all comprehensive doctrines (worldviews), while being acceptable to all, but that position itself constitutes a comprehensive view. This outcome is not surprising, given the fact that, as was argued in chapter 12, a neutral stance with regard to freedom of expression cannot be taken lest it be devoid of content and thus be reconcilable with *any* and, paradoxically, simultaneously *no* view, let alone a worldview. This does not mean that the state itself must adhere to a worldview but rather that every way to determine the scope of freedom of expression, and thus to specify what may and may not be expressed, is based on non-neutral considerations. This outcome may seem close to what Rawls argues, but a crucial difference is that he bases his account on 'moral powers' citizens are supposed to have, leading him to maintain that not all comprehensive doctrines are acceptable but only reasonable ones. It is because of this element of 'moral powers' and its corollary that Rawls's own position qualifies as a comprehensive doctrine.

Habermas's theory is arguably more complex than Rawls's, and at first sight seemingly more nuanced, as he is willing to take the interests of religious worldviews seriously. Yet what he demands of citizens is, all things considered, more demanding. After all, what Rawls considers necessary for a worldview to be acceptable is that it is reasonable, which means that it must adhere to a 'moral' outlook. Habermas, on the other hand, departs from this, while mistaken, still carefully delineated minimal concession citizens are required to make, and stresses the need for an 'epistemic stance', meaning that religious citizens must reconsider their tenets in the light of scientific developments. This means that not only the 'moral' aspects of world-

views are involved, but – at least in some cases – the very bases on which they rest. Such a demand is both intrusive and more extensive than is warranted in a liberal democratic state (not being restricted to the minimum demanded in a liberal democratic state, expressed through the ignore principle).

Given the problems this first position presents, then, I prefer the second possibility, whose claims are modest in comparison. It does not seek after the ‘truth’ of any worldview but is content when it has been determined what the necessary conditions for the existence and continuance of a liberal democratic state are, accommodating the rights of those clinging to various – and mutually conflicting – worldviews, and, in accordance with what was said in chapter 13, keeping the intrusions from the public domain on the private ones to a minimum. In a liberal democratic state, a political outlook neither can nor should provide the answers citizens seek to find from their worldviews. Politics’ only ambition in a liberal democratic state should be to find the optimal way to let citizens live together peacefully, while respecting certain rights and procedures (as long as the liberal democratic state in question itself remains in existence). Whether metaphysical claims stemming from (religious) tenets are *correct* (or ‘correct’) cannot be decided by politics, just as it is not qualified to answer the question of whether any race is superior in any way to another, or any other such issue. If answers to such questions are forthcoming, they must be scientific, religious or philosophical in nature, and not political. To consider politics able or necessary to fulfill such a role is to take a stance that is both unrealistic and totalitarian. It must limit itself to mitigating harm and the harmful effects of acts of expression, in accordance with the ignore principle.

Stability and freedom seem to be negatively correlated, both within a liberal democratic state and with respect to the question of its continuance. Within a liberal democratic state, the freedom of its citizens cannot be boundless, since the harm that may result from it must be taken seriously lest those who are affected resist the harm in undesirable ways. That it is necessary to balance freedom and harm in a liberal democratic state is clear; such a task is most aptly carried out by using the ignore principle. At the same time, no ‘moral’ appeal is to be made to citizens to force them to acknowledge that people are equal in any sense except for what basic equality indicates in order to meet the standards of prescriptive equality; nothing more may be demanded of citizens than their willingness to treat people formally

equally. As for the continuance of a liberal democratic state, it cannot be guaranteed on the basis of my account, but, as was pointed out in chapter 16, the introduction of 'militant democracy' will do little if anything to remedy this (provided one would want to do so in the first place), and, apart from that, the concept suffers from a lack of consistency and persuasiveness.

These observations do not lead to the outcome that stability is any less attainable in my account than in competing ones, which *do* emphasize the need to acknowledge people's equality or to ban parties that would undermine the liberal democratic state. I know of no more stabilizing factor than self-interest, which is decisive here. With respect to the acknowledgment of basic rationality, the role of self-interest is clear from the following. If a majority of citizens should want to withhold rights from some of them, they would thereby acknowledge the admissibility to discriminate between citizens, and if such a situation is allowed, they cannot know whether they themselves should one day fall victim to a variation of the discrimination they have themselves installed, this being the case if they belong to a relevant minority, which may lead to being withheld political or legal rights. As for the possibility to dissolve a liberal democratic state, if those who would be willing to do so act rationally, they will have to take into account that the rights they presently enjoy would cease or may at least be jeopardized, and if they do *not* act rationally, the state already consists of a (qualified) majority of such citizens and must be considered, in terms of realizing a liberal democratic state, a total loss, at least for the foreseeable future.

It has been demonstrated that rationality is a crucial characteristic to realize a stable liberal democratic state, without the need, evidenced in some alternatives, to resort to theories that cannot be corroborated – either on the basis of experience or through simple semantic analyses –, 'rationality' in the sense used by me being a straightforward notion, meaning that it is both universally acceptable and easily applicable by anyone willing to critically and constructively respond to the problems with which liberal democratic states are continuously confronted.

## SUMMARY

This inquiry seeks to determine to what extent equality and freedom are constituents of a liberal democratic state; part 1 deals with equality, part 2 with freedom. Since the concept of the *liberal* democratic state is the subject matter at hand, it seems obvious that freedom is not absent, but that does not answer the question *to what extent* it should be allowed to citizens, which is what is inquired in detail. As for equality: equal rights, such as the right for every (adult) citizen to vote, are generally accepted to be an integral part of a liberal democratic state, but this raises the question on what *foundation* such rights are based. Equal rights have widely been defended on the basis of various ethical viewpoints. After dealing with some preliminary matters in chapter 1, the tenability of some important and representative theories are examined in chapters 2 to 5.

Rawls's theory focuses on rationality as the pivotal feature to consider beings as equals and to treat them equally, but fails to indicate the import of this feature in that it remains unclear whether rationality is a 'moral' characteristic. The problem with Dworkin's position, on the other hand, is its abstract nature: Dworkin does not base his account on rationality as a special characteristic, but instead speaks of some beings being 'intrinsically valuable'. In Kateb's account, 'human dignity' is the focal concept. When it comes to providing the basis for human dignity, this position appears to be difficult to uphold, primarily because it remains unclear precisely which characteristic of human beings is supposed to account for their alleged dignity. In Kant's alternative, this problem is absent, as reason – in a special sense – is the crucial feature for him. The main problem in this case is that it is difficult to see how dignity should follow from being reasonable or acting on the basis of reason.

Starting from an ethical outlook is problematic for these reasons and others, so in chapter 6, a position that does not use such a basis is defended. 'Basic equality' is the crucial notion here. Simply put, the actual (approximate) equality, which I call factual equality, is the starting point, to be specified by basic equality. Factual equality is observed in many ways, and basic equality is the sort of factual equality between two or more beings that is considered relevant to them (and simultaneously *by* them, as they are, in a liberal democratic state, also the ones who establish this). Basic equality must in turn be specified. Rationality, I argue, is the most viable

characteristic to realize this specification in a liberal democratic state; this has no 'moral' connotation.

The upshot of this stance is that a realistic alternative to the theories discussed above is offered, the benefits of which are twofold. On the one hand, vague and problematic terms are shunned, which adds to the position's consistency and tenability, while it provides, on the other hand, a solid basis for a liberal democratic state to recognize one of its essential features. This means that formal equality, manifested in political equality (exhibited by political liberties, such as the right to vote and the freedom of speech) and legal equality, resulting in equal treatment (*e.g.* of employees by their employers), can be upheld without the need to resort to 'moral' premises that not only fail to constitute a consistent account but are in addition not universally acknowledged.

Part 2 of the inquiry deals with freedom. After some general remarks are made in chapter 7, the import of freedom is indicated in chapter 8. This makes it clear why granting citizens as much freedom as possible is beneficial for both the liberal democratic state as a whole and for citizens themselves. However, as the phrase 'as much as possible' indicates, it is important to define the limits (if any) of freedom carefully. Since part 1 of the inquiry emphasizes the importance of (basic) equality, it would seem appealing to connect it with freedom. The merits and difficulties of such a position – Dworkin's ideas are examined here – are expounded in chapter 9. An alternative for it is offered in chapters 10 and 11, where a demarcation line to limit freedom is defended. Mill's harm principle provides a useful frame of reference here; the ignore principle, as it is called, seeks to find the optimal outcome in balancing the various interests that are involved.

The foregoing prompts the question of whether the liberal democratic state can adopt a neutral stance, and how it should respond to those who deny certain principles of a liberal democratic state, notably those defended in part 1 of this study. In other words: what should the state's position be towards those who deny that people are equal, *e.g.* on the basis of racial differences? This is the central issue that is examined in chapters 12 to 15. I argue that it is not the task of a liberal democratic state to decide what people should think, but that, in line with what is maintained in chapters 10 and 11, only equal *treatment* should be guaranteed, meaning that the outward acts of citizens may legitimately be regulated but nothing



else. In this light, Rawls's and Habermas's positions are examined critically.

Finally, some attention is devoted to the subject matter of militant democracy. The question is pertinent whether the liberal democratic state might be undermined by its own principles. After all, a majority is able to radically change this form of government to one that is ultimately incompatible with those very principles. I try to approach this issue as consistently as the others that present themselves throughout this inquiry.



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## GLOSSARY

The reader may find a useful aid in the guise of a list of definitions of the most important concepts that are used in this study below. These terms are not, as is customary, rubricated alphabetically, since a hierarchical presentation is warranted: some must first be defined in order to clarify others. This has been a necessary concession to the systematic treatment, which is thus facilitated; the difficulty of the non-alphabetic presentation is mitigated by the fact that few terms are rubricated here, which are of course, in addition, defined in the proper places in the main text.

*Equality* is a concept that must be specified by additional concepts, as its scope is extremely broad. Not all such concepts are addressed here ('material equality', *e.g.*, needs no attention, as its examination lies beyond the research project), but merely those that feature prominently in the inquiry.

*Factual equality* is the equality that can in fact be observed to exist, either precisely (in which case there is identity) or approximately. The latter (approximate equality) is in practice the most important variation of the two.

*Basic equality* is a specification of factual equality in the sense of approximate equality: factual equality is observed in many ways, and basic equality is the sort of factual equality between two or more beings that is considered relevant. Crucially, the beings that consider whether the feature is relevant are both those that observe the factual equality and those that distill the relevant aspects for basic equality from it. Basic rationality is a specification of basic equality.

'Basic equality' is in fact an abstract term. Compared to factual equality it is specified, but it needs to be further specified on the basis of certain characteristics. Those inclined to a nominalistic (or conceptualistic) stance rather than a realistic one may consider it a hollow rather than – or in addition to – an abstract term, and may exclude it from their ontological realm, accepting only the actual basic equalities, of which basic rationality is the only one that is relevant to the present study.

*Basic rationality* is the specification of basic equality that considers (a degree of) rationality decisive for such a basic equality to exist. As

this is a specification of basic equality, which is itself a specification of factual equality in the sense of approximate equality, the degree of rationality in the beings in question is not identical, nor is rationality to be confused with intelligence. For different beings to be basically rational, they need not be precisely equally rational (or intelligent).

*Prescriptive equality* is the sort of equality that should be realized, but not on the basis of a 'moral' insight (that is what distinguishes it from normative equality; I do not think 'normative' implies a reference to a 'moral' norm, but in order to avoid confusion I use 'prescriptive' rather than 'normative'), but rather on the basis of what those already deemed basically equal consider the most desirable outcome (in this case, the necessary conditions for a liberal democratic state to remain in existence).

One may distinguish between two concepts of prescriptive equality. The one just mentioned is the most fundamental one, so to speak, while the second version, which may be identified with formal equality, is the prescriptive equality that is dictated by the legislator. Since the legislator has, in a liberal democratic state, been appointed, through elections, by the people, prescriptive equality in this second sense is in fact a demand by those who are basically equal. Their freedom is limited in that they are forbidden to discriminate, which is apparently more desirable than the alternative, namely, that everyone should be allowed to do so, in which case no one could *a priori* have a guarantee that he should not be the victim of acts of discrimination. The limitation may thus be considered a sort of premium one pays in order to be safeguarded from disagreeable results.

*Formal equality* is the prescriptive equality needed for a liberal democratic state to remain in existence. It is, accordingly, a concretization of prescriptive equality and consists in granting the rights associated with political equality and legal equality to those who are considered basically equal.

The *ignore principle* stipulates that citizens should be secured against harm they cannot reasonably ignore. There is no reason to limit 'harm' to physical harm; there is, in other words, no reason to exclude non-physical harm from the analysis as insignificant. Whether harm must be endured or not depends on whether one must reasonably be able to do so. This standard of reasonably ignorable harm cannot be

decided on the basis of *a priori* considerations since 'reasonably' is no absolute term but rather one that must be concretized in accordance with the circumstances of individual cases.

*Freedom* is, just as equality, a very broad concept, and must likewise be specified. No elaborate notions of freedom, like the fulfillment of one's potential, are defended throughout the text, as no need to do so has arisen, let alone the notion of 'free will' (if this may be said to constitute a notion at all, which may be contested). 'Freedom' and 'liberty' are used interchangeably throughout the text.

*Negative freedom* is the sort of freedom that consists in the absence of opposition, specifically the absence of opposition brought forth by the state (or, concretely, by the government), but not exclusively so (for opposition may also come from citizens). This specification qualifies it vis-à-vis the more general notion of freedom of movement, which covers both negative freedom and the freedom that consists in the absence of physical opposition that has no political meaning, such as the opposition of a locked door, impeding one's exit or entrance.

*Liberal democracy* is a form of government that is a species of democracy. Democracy is not taken here to constitute substantive elements, such as those that would supposedly identify a people; 'democracy' refers rather to a political system in which, put in the simplest terms, (a majority of) the citizens have a significant influence on the contents of the legislation, which is realized through elections in a state characterized by representative democracy. This means that 'democracy' is identical to 'formal democracy'.

'Liberal democracy' is a species of 'democracy'. Here, too, no substantive elements are decisive. The scope of the citizens, *i.e.*, those individuals who have a right to decide what the contents of the legislation shall be, is decided, in a liberal democratic state, on the basis of the criterion of basic equality. What defines the 'liberal' part is the inclusion of a number of liberties, such as the freedom of expression. The extent of these liberties cannot be *a priori* demarcated, as it cannot be said in general to what degree they may be limited. Even if the ignore principle is accepted, much depends on the circumstances of individual cases. This means that 'liberal democracy' is a somewhat flexible concept, since the mere presence of certain liberties – so irrespective of their extent insofar as their practical realization is concerned – is sufficient to conclude to its existence.





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