Freedom and equality as necessary constituents of a liberal democratic state

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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."[183]

[183] 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.

I will not resort to such drastic measures, for two reasons. First, although such starting points are at times unavoidable[184] (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."[185] 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.""[186] In a similar vein, Lucas argues that 'equality' does not add anything relevant when it comes to the decision which beings are to treated in any way.[187] 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

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[184] 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).

[185] P. Westen, "The Empty Idea of Equality", p. 547.

[186] 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.

[187] J. Lucas, "Against Equality", pp. 298, 299. Cf. H. Kelsen, *Was ist Gerechtigkeit?*, Ch. 5, § 23 (pp. 26, 27).

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,[188] 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.[189] 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 which is characteristic of a liberal democratic state.[190] 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

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[188] 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.

[189] Cf. J. Waldron, "The Substance of Equality", p. 1365: ""Equality" is used […] to identify properties on which commendations would supervene."

[190] 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).

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.

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.[191] 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[192]) 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[193] on the basis of the existence of actual equality: "Whether […] men be equall by nature, the equality is to be acknowledged, or whether unequall, because they

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[191] In line with what I remarked in the introduction (note 20, *supra*), 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).

[192] The *locus classicus* is D. Hume, *A Treatise of Human Nature*, Book 3, Part 1, Section 1 (p. 469).

[193] 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).

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."[194] (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.[195])

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."[196] 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 […]."[197]

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.[198]

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

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[194] Th. Hobbes, *De Cive* (the English version), Ch. 3, § 13 (p. 68); cf. *Leviathan*, Ch. 15 (p. 107).

[195] J. Doomen, "A Systematic Interpretation of Hobbes's Practical Philosophy", pp. 472-476.

[196] J. Locke, *Two Treatises of Government*, An Essay of Civil Government (the second Treatise), Ch. 2, § 4 (pp. 339, 340).

[197] 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).

[198] 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.

to, even if it succeeds in restraining him, or telling him that if he does what he wants, he will be disliked, ostracized, punished or killed?"[199] 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[200]),[201] 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.[202] 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 générale'), a – political – minority being (in hindsight) mistaken.[203]) Since normative equality is not based

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[199] M. Zimmerman, "The "Is-Ought": An Unnecessary Dualism", p. 56; cf. p. 61.

[200] 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.

[201] 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.")

[202] 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).

[203] 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.

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,[204] 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,[205] 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,[206] just as one can only know what an island is if its limits are encountered (in which case it is also literally defined,[207] 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[208] and joining a club for people who are gifted in some way (thus excluding those

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[204] 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.

[205] 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* note 61, *supra*)); 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).

[206] Cf. what I said in section 4.5 and above in the present section.

[207] The Latin 'definire' means 'to bound', or 'to confine', so the limits ('fines') of the island are encountered once the sea is reached.

[208] 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

who are not).[209] 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,[210] 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.[211] (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 (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[212] – 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

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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.)

[209] 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.

[210] One need only point to some regimes in the 20th 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).

[211] 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.

[212] Factions on the basis of virtually any criterion can be found, varying from religion and race to class differences.

the apparent difficulty that this is itself a prescriptive statement (and the reader who is suspicious that I do may rightly substitute 'should be'[213] 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,[214] at least in developed countries),[215] and, 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.[216] 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

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[213] I indicated above that 'should' does not necessarily have a 'moral' sense.

[214] 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.

[215] 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).

[216] Cf. D. A. Lloyd Thomas, "Equality Within the Limits of Reason Alone", p. 547.

situation. Second, there is no all-or-nothing situation here:[217] 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,[218] in which case they will themselves be faced with less than agreeable circumstances.[219] This is the fundamental difference with animals, which may be treated differently, in this line of thought, since people cannot change into animals.[220]

Reason is not some special feature whose mere presence brings *eo ipso* certain rights with it for those that are endowed with it.[221] This *could* be argued, in the line of an approach such as Kant's,[222] 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

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[217] 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).

[218] 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.

[219] 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.

[220] Disregarding here those who believe in reincarnation between species. Their preferred specification of 'basic equality' is, presumably, broader than 'basic rationality'.

[221] 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.

[222] 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."

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.[223] 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*."[224] The will defines man.[225] Crucially in this respect, reason is a mere instrument, the will being the decisive element in the coming about of actions.[226] 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."[227] may be seen as a precursory (albeit relatively rudimentary) analysis to those made by contemporary psychologists.[228]

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[229]) 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,

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[223] A. Schopenhauer, *Die Welt als Wille und Vorstellung*, part 1, Book 1, § 6, p. 24.

[224] "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.

[225] A. Schopenhauer, *Die Welt als Wille und Vorstellung*, part 1, Book 4, § 55, p. 345.

[226] 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).

[227] "[…] 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 Aeußerungen 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.

[228] Notably, D. Kahneman, P. Slovic and A. Tversky, (eds.), *Judgment under Uncertainty: Heuristics and Biases*, *passim*.

[229] 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.

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, such as handicapped persons being treated differently than others.[230] 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.[231] 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.[232] 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.[233] 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,[234] 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

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[230] 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.

[231] Cf., in a broader context, Th. Hobbes, *Leviathan*, Ch. 14 (p. 98).

[232] In practice, anyone can be considered to belong to a minority in some respect.

[233] 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.

[234] 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 Soveraign 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 Soveraign is as much subject, as any of the meanest of his People." *Leviathan*, Ch. 30 (p. 237).

benefits for those who are unable to generate an income because of their handicap are 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."[235] 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,[236] 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[237] and Hobbes.[238] 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,[239] speaking elsewhere of "[…] a moral and, in a sense, an artificial equality […]."[240] 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 the latter situation would not apply, and that one being would be sufficiently strong not only to oppose some others but

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[235] 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*.)

[236] 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.).

[237] H. L. A. Hart, *The Concept of Law*, pp. 188-191.

[238] Th. Hobbes, *Leviathan*, Ch. 13 (pp. 86, 87); *De Cive* (the English version), Ch. 1, § 3 (p. 45).

[239] H. L. A. Hart, *The Concept of Law*, p. 189.

[240] 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 *in*equalities that present themselves (irrespective of the approximate equality) (*The Concept of Law*, pp. 160, 161).

everyone else, he would have no incentive to abide by the law,[241] apart from 'moral' considerations, but it is unclear how these could force him.[242]

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.[243] 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,[244] 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 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

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[241] As Hobbes remarks: "[…] if any man had so farre exceeded the rest in power, that all of them with joyned 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.

[242] 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.

[243] This is to be distinguished from an *evaluation* of these variants, of course.

[244] 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. note 38, *supra*).)

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."[245] In a similar vein, Schmitt links democratic equality to similarity of the people in question, contrasting a people and humanity as such.[246]

The fact that formal equality applies only within the confines of the state[247] may be defended by an appeal to historical contingencies which have led to the extant states.[248] 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 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.[249] So the policy of segregation simply did not

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[245] C. Armstrong, *Rethinking Equality*, p. 7.

[246] C. Schmitt, *Verfassungslehre*, p. 234.

[247] 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.

[248] The difficulties involved in demarcating the group of people who are represented are acutely illustrated by Dahl (*After the Revolution?*, pp. 45-51).

[249] 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

work anymore: black people are apparently powerful and endowed with reason.[250] 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.)

The most plausible explanation,[251] 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.[252] 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[253]).

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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).

[250] 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).

[251] 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.

[252] 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.

[253] This is an academic issue since such children usually die shortly after having been born.

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).[254]

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 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.[255] After all, the legal perspective is concerned merely with prescriptive matters,[256] while observations with regard to matters of fact are provided from a scientific

[254] 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.

[255] 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.

[256] 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

perspective.[257] 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[258] (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[259] is the only alternative,[260] 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."[261] 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."[262] 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."[263]

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

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law, H. Vaihinger, *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. Vaihinger, *Die Philosophie des Als Ob*, part 1, Ch. 33 (p. 257), part 2, § 28 (p. 611)).

[257] I concur with Vaihinger 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).

[258] 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).

[259] King himself calls for nonviolent disobedience, but some of the actual protests were violent in nature.

[260] M. L. King, Jr., *Why We Can't Wait*, p. 79.

[261] M. L. King, Jr., *Why We Can't Wait*, p. 82.

[262] M. L. King, Jr., *Why We Can't Wait*, p. 85.

[263] M. L. King, Jr., *Why We Can't Wait*, p. 81.

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."[264], lose none of their purport (provided that 'unjust' be deprived of its metaphysical connotation[265]). 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 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[266] of mankind (or its conclusion, if such a process has already been initiated on the basis of similar historical developments).[267] '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).[268]

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[264] M. L. King, Jr., *Why We Can't Wait*, pp. 85, 86.

[265] E.g. with Th. Hobbes, *Leviathan*, Ch. 13 (p. 90), Ch. 15 (p. 103).

[266] 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.

[267] 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.

[268] 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)).

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 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.