Freedom and equality as necessary constituents of a liberal democratic state

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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?[442]

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, 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

[442] Presuming in each case, of course, that nothing is done which cannot reasonably be ignored. After all, the ignore principle applies to *any* worldview.

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).[443]

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,

[443] 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.

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 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.[444] 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 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

[444] 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.

is, then, a fiction which may be qualified a 'legal fiction' ('juristische Fiktion') in Vaihinger's sense:[445] "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."[446]

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*."[447] After all, a fiction is distinguished from a hypothesis on account of the fact that the latter stands to be corroborated (or refuted).[448] 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.[449]

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 presumed to accept the laws prescribing paying taxes, even though he may not agree with all of them, especially not with every detail.[450] 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

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445 H. Vaihinger, *Die Philosophie des Als Ob*, part 1, Ch. 5 (pp. 46-49).

446 "[…] 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. Vaihinger, *Die Philosophie des Als Ob*, part 1, Ch. 5 (p. 46).

447 "Die *praesumtio* ist eine *Vermutung*, die *fictio* ist eine absichtliche, eine bewusste *Erfindung*." H. Vaihinger, *Die Philosophie des Als Ob*, part 1, Ch. 5 (p. 48).

448 H. Vaihinger, *Die Philosophie des Als Ob*, part 1, Ch. 21 (pp. 144-153).

449 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.)

450 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.

them, as if he agrees with them.[451] 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?[452] 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, 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[453]).

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[451] 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 adeò, quamvis subditus Civitatis decreta iniqua esse censeat, tenetur nihilominùs 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. note 203, *supra*), 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.

[452] In a similar vein, Kant distinguishes between the 'juristische' (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. notes 178 and 179, *supra*). 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 *morality*.") What Kant argues with respect to 'moral' duties (on the basis of considerations such as those presented in chapter 5) constitutes a worldview.

[453] 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

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[454] 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.[455]

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

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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.

[454] 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.)

[455] 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.

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.