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Freedom and equality as necessary constituents of a liberal democratic state

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Chapter 14. Comprehensive freedom

14.1 The goal of this chapter and the next is to evaluate the theories of two political philosophers who have tried to accommodate individuals' freedom in the liberal democratic state, namely, John Rawls and Jürgen Habermas, with the observations made in the previous chapters in mind, dealing with Rawls's position first.

14.2 With the observations of chapter 13 in mind, an analysis such as that of Rawls appears problematic. He seeks to find an answer to the question "How might political philosophy find a shared basis for settling such a fundamental question as that of the most appropriate family of institutions to secure democratic liberty and equality?"⁴⁵⁶ The result should, according to Rawls, be a conception of justice that "[...] should be, as far as possible, independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm. In formulating such a conception, political liberalism applies the principle of toleration to philosophy itself. The religious doctrines that in previous centuries were the professed basis of society have gradually given way to principles of constitutional government that all citizens, whatever their religious view, can endorse. Comprehensive philosophical and moral doctrines likewise cannot be endorsed by citizens generally, and they also no longer can, if they ever could, serve as the professional basis of society."⁴⁵⁷

Rawls's own theory, however, seems to manifest precisely the elements that would qualify it as a comprehensive doctrine,⁴⁵⁸ his own observations to the contrary notwithstanding.⁴⁵⁹ This is clear from his starting point: "Since we start within the tradition of democratic thought, we also think of citizens as free and equal persons. The basic idea is that in virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought, and inference connected with these powers), persons are free. Their having these powers to the requisite minimum degree to be fully cooperating members of society makes persons equal."⁴⁶⁰ Rawls speaks of 'moral powers' providing the basis of freedom⁴⁶¹ and equality. This means that,

⁴⁵⁶ J. Rawls, *Political Liberalism*, Lecture I, p. 8.

⁴⁵⁷ J. Rawls, *Political Liberalism*, Lecture I, pp. 9, 10.

⁴⁵⁸ In a way the problems seem even more dire than this since he starts with the ambition (*vide* note 456, *supra*) to realize democratic liberty and equality, so that the theory he will finally embrace must necessarily contain these values, so that he would appear to be arguing in a circle, finding such a (comprehensive) view by disqualifying others from the outset. However, this problem need not manifest itself. After all, a view that seeks to realize democratic liberty and equality from a non-'moral' stance – such as mine – is also possible.

⁴⁵⁹ J. Rawls, *Political Liberalism*, Lecture I, pp. 10, 13; Lecture IX, pp. 373, 374.

⁴⁶⁰ J. Rawls, *Political Liberalism*, Lecture I, pp. 18, 19; cf. *A Theory of Justice*, § 77 (pp. 441-449).

⁴⁶¹ In addition, he states: "[...] citizens are free in that they conceive of themselves and of one another as having the moral power to have a conception of the good." *Political Liberalism*, Lecture I, p. 30. Such a definition is incompatible with that of negative freedom, and may be said to attest to a comprehensive view,

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with respect to freedom, the notion of ‘negative freedom’ in the straightforward sense presented in chapter 7, is apparently not at stake; after all, *that* notion does not involve any content whatsoever and is, accordingly, compatible with *any* view. It is even reconcilable with a totalitarian view, acknowledging its physical manifestation in nature while denying that it should be allowed in the political domain (which means that it is *conceptually* acknowledged at the political level; that it should not be *allowed* to citizens (and thus not allowed in that sense) is of course another matter). As for equality, Rawls obviously has something else in mind than basic equality, basic equality being devoid of any ‘moral’ meaning. His views in this regard were discussed in chapter 2; I will focus here on the issue of freedom.

14.3 Rawls states: “It is left to citizens individually – as part of liberty of conscience – to settle how they think the values of the political domain are related to other values in their comprehensive doctrine. For we always assume that citizens have two views, a comprehensive and a political view; and that their overall view can be divided into two parts, suitably related.”⁴⁶² It is clear that Rawls disadvantages those comprehensive views (i.e., worldviews) which leave no room for a separate domain for a political view, namely, those whose ambit encompasses the political view. The results such worldviews seek to realize are obviously incompatible with liberal democracy, so that they could be deemed undesirable for that reason, but that is another matter. (That does not mean that it is not an important matter, though; chapter 16 is devoted to the topic of integrating such views into a liberal democratic state.)

The idea of an overlapping consensus is an important part of Rawls’s intended solution to produce a stable democratic state while acknowledging the differences between comprehensive doctrines:⁴⁶³ “When political liberalism speaks of a reasonable overlapping consensus of comprehensive doctrines, it means that all of these doctrines, both religious and nonreligious, support a political conception of justice underwriting a constitutional democratic society whose principles, ideals, and standards satisfy the criterion of reciprocity. Thus, all reasonable doctrines affirm such a society with its corresponding political institutions: equal basic rights and liberties for all citizens, including liberty of conscience and the freedom of religion. On the other hand, comprehensive doctrines that cannot support such a democratic society are not reasonable.”⁴⁶⁴

The rights Rawls mentions are those that are relevant for the present discussion. They were addressed in part 1 of this inquiry, where the issue of who may be deemed basically equal and thus the bearer of the rights afforded on the basis of formal equality was addressed. It was argued in chapter 12 that a neutral way to approach issues such as *which*

although it must be granted that this comprehensive view is more general (or, put negatively, vaguer) than those comprehensive views which Rawls does not incorporate in his theory.

⁴⁶² J. Rawls, *Political Liberalism*, Lecture IV, p. 140.

⁴⁶³ J. Rawls, *Political Liberalism*, Lecture I, p. 39.

⁴⁶⁴ J. Rawls, *Political Liberalism*, “The Idea of Public Reason Revisited”, pp. 482, 483.

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beings should be considered equal or *which* worldviews should be tolerated is not forthcoming from a neutral stance. Rawls makes it appear as if he describes how such a stance would be possible in a pluralistic society,⁴⁶⁵ but this is difficult to uphold if my analysis is correct.

To return to the topic of the overlapping consensus, when Rawls says: “An overlapping consensus [...] is not merely a consensus on accepting certain authorities, or on complying with certain institutional arrangements, founded on a convergence of self- or group interests. All those who affirm the political conception start from within their own comprehensive view and draw on the religious, philosophical, and moral grounds it provides. The fact that people affirm the same political conception on those grounds does not make their affirming it any less religious, philosophical, or moral, as the case may be, since the grounds sincerely held determine the nature of their affirmation.”,⁴⁶⁶ it is clear that not every comprehensive view is compatible with the overlapping consensus.⁴⁶⁷ (Indeed, only *reasonable* comprehensive views are acceptable, an issue that will be revisited in section 14.4.) Those which do not acknowledge the political equality of men and women, for example, are excluded, for the position from which they start is such that they can never reach the political conception that Rawls considers crucial. His model of thought does not afford the room of disagreement mine does, which does not demand of any view that its contents should be compatible with the political reality but merely that the *outward acts* of citizens – whatever particular view they may hold – do not conflict with it.

Apart from that, even the very feasibility of such an enterprise may be questioned: “[...] the more things that people must believe in order to be included in [an overlapping] consensus, the more difficult it will be for a consensus actually to be achieved. In other words, if participation in the consensus requires affirmation not only of a particular set of principles of justice but also of certain metatheses about the status of those principles, then, other things equal, one would expect the consensus to include fewer people.”⁴⁶⁸

⁴⁶⁵ He explicitly characterizes neutral institutions and policies as neutral “[...] in the sense that they can be endorsed by citizens generally as within the scope of a public conception.” J. Rawls, *Political Liberalism*, Lecture V, p. 192.

⁴⁶⁶ J. Rawls, *Political Liberalism*, Lecture IV, pp. 147, 148.

⁴⁶⁷ Rosenfeld is right, then, when he observes: “By restricting participation in the elaboration in the elaboration of political justice to those who agree to ‘reasonable’ worldviews, Rawls insures the emergence of a sufficiently broad domain of overlapping consensus to allow for a workable array of political rights. He does this, however, at a very high cost. Indeed, on the one hand, what is ‘reasonable’ may be contested, but even if it is not, proponents of non-reasonable worldviews are excluded. From their standpoint, therefore, the political rights that emerge from an overlapping consensus are the equivalent to rights tied to a competing conception of the good that one thoroughly rejects. On the other hand, the linking of the ‘reasonable’ conceptions to the ‘overlapping consensus’, makes the process circular if not entirely superfluous.” “A Pluralist Theory of Political Rights in Times of Stress”, p. 16.

⁴⁶⁸ S. Scheffler, “The Appeal of Political Liberalism”, p. 13.

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14.4 An additional problem is that Rawls maintains that “[...] the political conception of justice [...] is itself a moral conception.”⁴⁶⁹ The same problem that arose, *mutatis mutandis*, in chapter 2 is apparent here: Rawls does not make it clear what makes his perspective a ‘moral’ one, and in this case, the added problem is that such an inclusion seems to point to a comprehensive view, so that Rawls seems, as I said (*vide* note 458, *supra*), either to argue in a circle, or to defeat the very premise of his own account.

Rawls may be⁴⁷⁰ right when he observes that “[...] a continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power. If we think of political society as a community united in affirming one and the same comprehensive doctrine, then the oppressive use of state power is necessary for political community. In the society of the Middle Ages, more or less united in affirming the Catholic faith, the Inquisition was not an accident; its suppression of heresy was needed to preserve that shared religious belief. The same holds, I believe, for any reasonable comprehensive philosophical and moral doctrine, whether religious or nonreligious.”⁴⁷¹ Still, his position testifies to a comprehensive view, as comprehensive elements are smuggled in because of the way he approaches equality.⁴⁷²

⁴⁶⁹ J. Rawls, *Political Liberalism*, Lecture IV, p. 147. Cf. *Political Liberalism*, Lecture I, p. 11: “While [a political conception] is, of course, a moral conception, it is a moral conception worked out for a specific kind of subject, namely, for political, social, and economic institutions.” In an accompanying footnote, Rawls says: “In saying that a conception is moral, I mean, among other things, that its content is given by certain ideals, principles and standards; and that these norms articulate certain values, in this case political values.” Depending on what Rawls means by ‘values’ here, he either adheres to a comprehensive view or eradicates those elements usually called ‘moral’. In the first case, the problems noticed above apply, while in the second case, the theory must be replaced by a less ambitious one.

⁴⁷⁰ I say ‘may be’ rather than ‘is’; ‘is’ would in fact imply a nihilistic outcome, *viz.*, that it should be impossible for one view to be correct (whatever one takes this to mean) while being acknowledged by all (i.e., accepting it without being forced to do so). I am a skeptic in this regard, as the situation warrants lest an *argumentum ad ignorantiam* be committed: such an outcome cannot *a priori* be excluded, but that does not mean that it must be the case. The European Court of Human Rights appears to make a similar category mistake as Rawls when it observes: “As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. [...] The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.” *Kokkinakis v. Greece* (ECtHR, Application no. 14307/88, 1993). A liberal democratic society need not, however, exhibit pluralism, and certainly not a democratic society in general (unless one makes the mistake, addressed, *inter alia*, in section 1.3, of identifying ‘democracy’, which is, as I noted there, merely a form of government, with an ideal political situation (the Court does not, by the way, specify its conception of ‘democracy’ in this case). In any event, no pluralism exists if every citizen is convinced of the correctness of a single (world)view and adheres to it *for that reason*. So I would amend the Court’s statement to the one that the *possibility* of pluralism is indissociable from a *liberal* democratic society.

⁴⁷¹ J. Rawls, *Political Liberalism*, Lecture I, p. 37.

⁴⁷² A similar conclusion is reached by Dyzenhaus: “The talk of the citizen which is now prominent in [Rawls’s] theory of justice, and of such citizens deliberating as to the values that should inform our common lives, is an attempt to make liberal theory into a theory of liberal *democracy*. But Rawls attempts to finesse the democratic

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It may be objected that, while the fact that I have not distinguished between ‘rational’ and ‘reasonable’ (*vide* note 21, *supra*) may not have given rise to problems up to now (the analysis in section 2.5 would not have been different if I *had* differentiated between them), the awareness of the need for such a distinction is necessary here. After all, Rawls himself *does* distinguish between them,⁴⁷³ while only *reasonable* comprehensive doctrines, affirmed by reasonable persons, are considered acceptable,⁴⁷⁴ and, indeed, the idea of an overlapping consensus is only possible on the basis of such doctrines.⁴⁷⁵ I will not deal here with the convoluted nature of Rawls’s conception of ‘rationality’ (cf. sections 2.3 and 2.4) as it is rather ‘reasonableness’ that is inquired here. I do acknowledge, then, that a distinction such as Rawls’s can be made, but it does not follow from this that I have failed to include in my account an essential element; that remains to be seen.

Rawls says: “Reasonable persons, we say, are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others. By contrast, people are unreasonable in the same basic aspect when they plan to engage in cooperative schemes but are unwilling to honor, or even to propose, except as a necessary public pretense, any general principle or standards for specifying fair terms of cooperation. They are ready to violate such terms as suits their interests when circumstances allow.”⁴⁷⁶ Since only *reasonable* comprehensive doctrines are acceptable, it is clear that acknowledging the distinction between ‘rational’ and ‘reasonable’ does not affect my analysis of Rawls’s theory.

14.5 Rawls’s observations seem to result in an impasse. His position appears to invade people’s convictions, or at least not leave room for those which do not include the essential premises in his theory, demanding that they share a mind-set in order to realize a stable society, while the alternative, which is described by Rawls in the form of what he calls a *modus vivendi*, meaning that parties will adhere to agreements as long as this will be profitable, ceasing to do so once the circumstances should change,⁴⁷⁷ seems unacceptable.

A similar, and similarly problematic, stance is evidenced by Scanlon, who says: “Any society, no matter how homogeneous, will include people who disagree about how to live and about what they want their society to be like [...]. Given that there must be disagreements, and that those who disagree must somehow live together, is it not better, if possible, to have these disagreements contained within a framework of mutual respect? The

element by making of democracy a political system governed more or less covertly by the values of liberalism as a comprehensive doctrine.” D. Dyzenhaus, “Liberalism after the Fall”, p. 26.

⁴⁷³ J. Rawls, *Political Liberalism*, Lecture II, pp. 48-54.

⁴⁷⁴ E.g. J. Rawls, *Political Liberalism*, Introduction, pp. xvi, xxx; Lecture II, pp. 59-61.

⁴⁷⁵ J. Rawls, *Political Liberalism*, Lecture IV, pp. 134-140.

⁴⁷⁶ J. Rawls, *Political Liberalism*, Lecture II, p. 50.

⁴⁷⁷ J. Rawls, *Political Liberalism*, Lecture IV, p. 147.

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alternative, it seems, is to be always in conflict, even at the deepest level, with a large number of one's fellow citizens."⁴⁷⁸ First of all, the notion of 'respect' may be said to be difficult to uphold if not in the rudimentary sense that one acknowledges the power of the person or group of people with whom one is confronted (cf. note 241, *supra*), so that an appeal to mutual respect would add nothing relevant here (if one resents someone or a group of people but at the same time acknowledges (respects) his or their power, one will not harm him or them since one is unable to do so).⁴⁷⁹

Second, mutual respect is not something that can simply be stipulated, just as no one can be brought to believe something simply because one ought to do so. In a liberal democratic state, the *outward acts* can be regulated – to accord with the ignore principle – and apart from that, debates or other means to convince those who harbor a resentment (if these are deemed fruitful) can be used to change their viewpoint, but if a *government* should take indeed take a stance and restrain more actions than what could reasonably be ignored, it would not be difficult to accuse it of being verificationist,⁴⁸⁰ and thus of exceeding the limits of its authority. Third, conflicts are likely to remain in some domains, e.g. between employers and employees, at least with regard to the details that can be considered the outcomes of zero-sum games (notably, employees' salaries, which constitute costs for employers⁴⁸¹), which apply to all economic systems save for an extreme case such as communism. (Admittedly, though, cases such as those just mentioned may perhaps not be characterized as those to which Scanlon refers by 'the deepest level'.)

14.6 A mere *modus vivendi* in the guise presented by Rawls may seem insufficient to realize a stable society. Still, the results presented in chapter 6 appear to provide a basis to counter such an objection. As I argued in section 6.7, absent basic equality (specified by basic rationality) there will be no guarantee for those presently in charge that they will fall victim to their own failure to secure rights for all those who are able to claim rights. This, basic equality, is precisely what serves as the element to realize the stable society to which one aspires, without having to demand of those who agree with its inclusion in a political solution that they should acknowledge anything more than precisely this basic equality. They do not have to acknowledge any more 'fundamental' sort of equality, and may continue to consider, for example, women inferior to men, or black people inferior to white people.

⁴⁷⁸ Th. Scanlon, *The Difficulty of Tolerance*, p. 193.

⁴⁷⁹ Apart from this consideration, the fact that one will (if caught) – presumably – be punished on the basis of penal legislation is of course an important given.

⁴⁸⁰ In chapter 10 I argued that legislators – in a liberal democratic state – are not appointed to be theologians, and I would add here, in a broader vein, that their task is not to inquire whether a doctrine is 'true'.

⁴⁸¹ Whether an actual zero-sum game applies in this case depends on the circumstances, specifically, whether employees' performances may be influenced (positively) by an increase in salary.

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Whether such inequalities can consistently be defended is a matter of scientific, religious or ‘moral’ inquiry.⁴⁸² Including elements from one or more of such domains in a political solution to matters of conflict amounts to nothing less than the advocacy of a comprehensive view, and if this is not acknowledged – by considering equalities other than basic equality as constitutive for a political view without at the same time granting that this makes it a comprehensive view – a misleading or indoctrinating view is proffered.⁴⁸³ According to Rawls, in such a situation, i.e., a situation characterized by a *modus vivendi*, “[...] we do not have stability for the right reasons, that is, as secured by a firm allegiance to a democratic society’s political (moral) ideals and values.”⁴⁸⁴ How one assesses such an observation depends on how ‘democracy’ is evaluated. The relevance of this last remark will become apparent in chapter 16.

14.7 Summary and relation to chapter 15

Rawls attempts to realize a political theory without using a comprehensive doctrine as its basis. Yet the conclusion that the crucial elements that constitute that theory themselves manifest a comprehensive doctrine appears inevitable. More specifically, Rawls’s outlook is a ‘moral’ one. What adds to this predicament is the fact that such an outlook can, indeed must, be forgone: citizens’ equality and freedom must be acknowledged, as Rawls argues, but on the basis of a different, less ambitious, theory than his, which leaves citizens relatively much freedom. That such an alternative to Rawls’s approach is necessary follows from what was argued in chapters 11, 12 and 13. A criticism similar to the one provided in the case of Rawls can be leveled against Habermas’s position, whose stance vis-à-vis religious outlooks differs from Rawls’s, but whose demands from citizens are similar.

⁴⁸² Rawls says: “The philosophical conception of the person is replaced in political liberalism by the political conception of citizens as free and equal.” *Political Liberalism*, Lecture IX, p. 380. This is precisely what I have aspired to, but it can, with what was said in chapters 6 and 12 in mind, only mean that freedom in the sense of negative freedom and equality in the sense of basic equality (which is presumably specified by basic rationality) are at stake. To base one’s account on other concepts than these *does* lead to the philosophical conception Rawls mentions.

⁴⁸³ Cf. S. Fish, *The Trouble with Principle*, p. 12: “As a genuine model for the behavior of either persons or nations, as something you could actually follow and apply, political liberalism is hopeless. Like all projects based, supposedly, on neutral principles, it is either empty [...] or filled with an agenda it cannot acknowledge lest it be revealed as the limiting and exclusionary mechanism it surely is.”

⁴⁸⁴ J. Rawls, *Political Liberalism*, “The Idea of Public Reason Revisited”, p. 459.

