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Equality versus Religious Freedom*

I. Introduction

The current rise of religious fundamentalism fosters a renewed attention to the relationship between Church and State, or, to formulate it more broadly, between religion and the state. One question arises as to how traditional democratic values may be upheld and defended when fundamentalist groups acquire a strong political position or even take over state power, like in Israel and Pakistan. Of more practical importance to European societies is the attitude of the state towards fundamentalistic minorities whose values are in direct contradiction with democratic values. A clear example is the Salman Rushdie affair. The theoretical question raised in this context is: in what respects are we obliged to tolerate the intolerant?

This question, however, is not only relevant with respect to fundamentalist religious views. One of the foundations of modern democracy is that every citizen should be regarded as an equal. As a consequence, the citizen has a right to be protected against discrimination, a right that may be found in many modern constitutions and international treaties. However, discrimination seems to be widespread among religious groups, which might invoke the freedom of religion to counteract state intervention in their discriminatory behaviour. Discrimination on grounds of race has been defended with biblical arguments in South Africa and in the southern parts of the United States. The exclusion of women from priesthood is central to the Roman Catholic Church and many other churches and religions. Even more widespread among churches and religious organisations is unequal treatment of homosexual men and lesbian women and of non-married couples.

Is this unequal treatment to be regarded as discrimination, and if so, should the state tolerate it because of religious freedoms? This has been the subject of a most lively debate in the Netherlands since 1981. In that year the Dutch government drafted a first proposal for a law against discrimination of persons upon the basis of sex, marital status, and homosexuality.[1] This proposal met fierce opposition by

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1 On the history of the debate: Marianne Hoogma (1988) The Netherlands: a fifteen year fight for equal rights, in: *The Second ILGA Pink Book; A Global View of Lesbian and Gay Liberation and Oppression*, (Utrecht: Utrecht Series on Gay and Lesbian Studies nr. 12.), pp. 129ff.

traditionalist Christian groups.[2] Since 1981 the debate has lingered on. Under the present Christian democratic and socialist coalitiongovernment there seems to be a real chance that such legislation might finally pass.

Two lines of argument can be seen in the traditionalist reactions. The first line is not so much a serious political argument, but simply deplores the fact that the Netherlands are no longer a Christian society with a Christian government.[3] However, from a democratic point of view this neutrality towards religious values is only to be welcomed. The second line of argument is that the law would be a major infringement upon the constitutional freedoms of religion, association and education.[4] According to this critique, the conflict between the right to non-discrimination, which is guaranteed in article 1 of the Dutch Constitution, and these other constitutional rights should be solved in a way that leaves more room for religious organisations to discriminate against homosexuals, lesbians and unmarried persons living together.

In this paper I will deal with the theoretical question how, from a democratic point of view, this conflict of constitutional rights should be solved. This analysis is not only of interest for the Netherlands, as many modern constitutions and various international treaties guarantee similar fundamental rights as does the Dutch Constitution.[5] I will focus on the topic of discrimination upon the basis of homosexuality, because this was the most controversial aspect of the law. However, the approach in this paper can also be applied succesfully to other forms of discrimination. Of course, when I talk about sexuality in this paper, I refer to consensual sexual activity.

Perhaps my conclusions may sound extremely radical. Nevertheless, it seems to me that these are the implications of systematically rethinking the concept of democracy in a pluralistic society. Many reforms are necessary if this analysis is to be accepted; but these reforms are a democratic obligation.

2 Some churches and many other religious organisations, however, supported the law. The Dutch churches are strongly divided on the theme of homosexuality. One of the oldest Protestant churches, the Remonstrantse Broederschap, recently reformed its constitution and has completely removed every distinction between the blessing of homosexual and heterosexual relationships. The orthodox Protestant churches on the other hand fiercely oppose homosexuality. The two major Protestant churches and some of the smaller ones are divided, but are in the process of more openly accepting homosexuality. Most of the Catholic bishops strongly oppose homosexuality, while it has been accepted already for decades by most of laity, priests and religious orders.

3 The campaign against this law has the typical characteristics of a "symbolic crusade". There are many interesting parallels to Gusfield's analysis of the Temperance Movement around the turn of the century in America. Joseph R. Gusfield (1976[4]), *Symbolic Crusade: Status Politics and the American Temperance Movement* (Urbana, University of Illinois Press).

4 The Dutch Constitution acknowledges these three rights as separate rights. Other rights which will be referred to are also included in the Constitution: the right to equal treatment and to non-discrimination, the right to privacy and the right to bodily integrity.

5 Cf. Article 8 (right to privacy) and Article 14 (non-discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Most European countries are party to this treaty.

II. The State and Homosexuality

As a normative starting-point I will, with Ronald Dworkin, simply assume that at the basis of our political convictions is the fundamental principle that the state must treat its citizens with equal concern and respect.[6] A second assumption is that, for this principle to function as the foundation of democracy, it must be given a liberal interpretation. In a liberal interpretation equal respect implies that citizens have to be treated as they themselves wish to be treated and not as the good or truly wise person would wish to be treated. In other words, the government must be neutral as to a citizen's conception of the good life.[7] If we want to justify the full freedom of religion and other rights that belong to the modern conception of democracy, we need this liberal interpretation.

This narrow neutrality thesis should not be seen as the fundamental principle of political morality, but only as an interstitial principle that may conflict with other principles.[8] The implication of these other principles will often be that the state does not equally benefit persons with different conceptions of the good life. The duty to prevent harm to its citizens will be prejudicial to the interests of thieves. The provision of public goods often will benefit some citizens more than others. The neutrality thesis does not imply the absurd position that the state should never produce public goods. It merely implies that the state should not produce or foster those public goods which can only be justified with an appeal to controversial (elements of) conceptions of the good life.[9]

We must be careful, therefore, to distinguish in what respects the government must be neutral and in what respects it must not. Firstly, the neutrality does not extend to all moral or religious positions. A democratic government cannot be neutral towards human sacrifices, nor need it be neutral towards sexist or racist moral positions. At the basis of democracy is a moral position, namely, the principle of treatment with equal concern and respect. That democratic moral position implies that government cannot be neutral towards positions that treat other citizens as less than equal.

Secondly, government need not be neutral towards facts and scientific controversies, even if these have implications for moral or religious positions. Nor need

6 Ronald Dworkin (1978), *Taking Rights Seriously* (Cambridge, Mass: Harvard UP), p. 272

7 Ronald Dworkin (1985), *A Matter of Principle* (Cambridge, Mass: Harvard UP), pp. 191 ff.

8 This interpretation makes the neutrality thesis largely immune from the critique in Joseph Raz (1986), *The Morality of Freedom* (Oxford: Clarendon). Selznick notices rightly that pluralism cannot be a doctrine of everything goes. (Philip Selznick (1989), Dworkin's unfinished task, *California Law Review* vol 77, no. 3, p.511). However, one need not infer, as Selznick does, the need for restriction of the alternative conceptions of the good life to those that are roughly equal in moral worth or at least morally permissible. If we construe neutrality as no more than an interstitial principle that may conflict with other principles we need not abandon liberal tolerance.

9 Thus the liberal legislator should not bracket substantive questions, like Michael Sandel suggests in his caricature of liberalism. (Michael J. Sandel (1989), Moral Argument and Liberal Toleration: Abortion and Homosexuality, *California Law Review*, vol 77, no. 3, pp. 521ff.) The ideal of liberal democracy presumes a substantive position. The liberal state only brackets conceptions of the good life for an individual person from the justification of its policies and laws.

it be completely neutral towards all non-moral evaluative controversies. Government should not be irrational. I may be strongly convinced that my young, four-year old niece is as good an artist as the modern Dutch painter Karel Appel. But it would be irrational for the government to take a neutral position towards this conviction and buy the paintings of my niece. It would be equally irrational if the government did not base its policy on those scientific theories that have the strongest support among the community of scientists. The state need not finance the search for a *perpetuum mobile*, or a research project that tries to show that the world was created in six days some thousands of years ago.

This non-neutrality towards science has important consequences for the field of sexuality. In modern psychology, sexual orientation is usually considered to be quite decisively settled at a very young age.[10] This is simply a fact that the state must accept as the basis of its policies. So it is irrational to try to change homosexual orientation by psychotherapy.[11] Therefore the state should not give financial support for attempts to do so, let alone propagate this type of psychotherapy. Moreover, as homosexual orientation is settled at young age, there is no need to safeguard teenagers from 'sexual corruption' through homosexual contacts. Hence there is no valid ground for the existence in many legal systems of higher age limits for legal homosexual contacts.

However, an appeal to rationality can only rule out some policies in respect to homosexuality. The homosexual orientation of some five to ten percent of its citizens must be taken for granted by the government. But from that fact alone we cannot simply deduce that government should accept homosexual behaviour as such. A further argument is needed for that position.

This argument is found in the constitutional right to privacy. A sexual encounter must be seen as one of the most central elements of this right. Moreover, sexuality is one of the most central aspects of human life and human personhood. Therefore it must be included in the right to privacy.[12]

One can find an analogy here with the constitutional protection of religion. The right to freely exercise one's religion can be seen as closely related to and originating in liberty of conscience. Liberty of conscience has as its physical

10 Cf. the extensive discussion of this topic in Speijer Committee1968, *Advice Concerning Relations with Minors, Particularly in Relation to Article 248 bis of the Criminal Code* (The Hague: Council of Health). For a discussion of different opinions on the "nature" of homosexuality, see Richard D. Mohr (1988), *Gays/Justice: A Study of Ethics, Society, and Law* (New York: Columbia UP), 39 ff. As a result of the growing consensus on this point the World Health Organization decided in 1988 to remove homosexuality from its list of diseases.

11 "If a homosexual is brought to heterosexual contacts or even marriage by persuasion and training, this is practically always an imaginary success with a regrettable result, as the homosexual propensity does not vanish and new, serious problems may arise for the homosexual and his partner. " (Speijer Committee, *o.c.*, p. 16)

12 Extensive arguments for this thesis can be found in Richard D. Mohr, *o.c.*. In the Dudgeon-case (22 October 1981) the European Court of Human Rights confirmed this thesis and held that the Northern-Irish law against homosexual contacts between men violated the privacy clause (article 8) of the European Convention. On the contrary, in *Bowers v. Hardwick* (478 U.S. 186 (1986)), the U.S. Supreme Court held that the Georgia anti-sodomy law did not violate the right to privacy. One reason for the difference may be that the European Convention explicitly mentions the private life, while the American Constitution does not.

counterpart the constitutionally protected bodily integrity. The right to freely exercise one's sexuality, which is included in the right to privacy, can be seen as closely related to and originating in bodily integrity. A constitutional theory should not be based on controversial rankings of body and mind - they must be considered to be on an equal footing. From a democratic point of view, therefore, freedom of religion is on a par with freedom of sexuality.

The argument so far has been completely neutral as to what kind of sexuality is involved. Hence the constitutional protection of sexual actions also extends to homosexual actions and, we might add, to other forms of consensual sexual behaviour.

So the state may not interfere directly with someone's homosexual behaviour.[13] But a different question is whether government may indirectly interfere, through unequal treatment towards homosexuals and lesbians or by withholding to couples of the same sex legal faculties which are given to heterosexual couples.

However, this option is also barred. If government were to treat homosexuals and heterosexuals differently, this would infringe upon the norm of equal respect and concern. For it would imply that the life of a homosexual or lesbian is less worthy of respect than the life of a heterosexual. And it would give homosexuals and lesbians lesser opportunities to realize their conception of the good life. Therefore all kinds of discrimination on grounds of homosexuality should be banned from law and governmental policy.

The implications of this are far-reaching. Not only should government decriminalize homosexual behaviour where it is still a crime; it should also change all those laws and policies that make a difference between homosexual and heterosexual couples. We have two alternatives: the legal institution of marriage, with all its advantages, should not be reserved to heterosexual couples or marriage should be denied legal status at all. If government wants to take its gay and lesbian citizens seriously, major reforms in most legal systems will be necessary.

III. The State and Discrimination of Homosexuals in Society

Our conclusion so far has been that the state should not discriminate on the basis of homosexuality. The next question is: how should the state react to discrimination by citizens and by organisations? If these citizens or organisations claim their discriminatory behaviour is protected by constitutional liberties, there is a conflict of these liberties with the constitutional right to non-discrimination.

A very common approach to conflicts of rights is to balance the constitutional rights involved. If for instance a religious school wants to fire a lesbian teacher, we should weigh the freedoms of religion, association and education, on the one hand, against the non-discrimination principle and the rights to work and to privacy on the other. This model of balancing is quite familiar in constitutional law; in the Federal Republic of Germany it is known as the model of "Güterabwägung".

13 Additional arguments for this thesis, especially a detailed analysis of traditional arguments for prohibiting homosexuality, may be found in Burton M. Leiser (1973), *Liberty, Justice, and Morals: Contemporary Value Conflicts* (New York: MacMillan), Ch. 2.

However, this model does not always work when discrimination is involved. The non-discrimination right is different from 'classical' rights like the freedom of religion. Some scholars conclude that it is more important; others, that it carries less weight. My thesis, which I will now elaborate, is that it is not simply more important, but that it is entirely of a different order.

Discrimination is not simply the withholding of some good. To cite the Dutch lawyer Verrijn Stuart:

"Discrimination is not only not having access to work or money, it is especially the pain, the humiliation, the contempt, the negation, the denial, the prejudices and the continually returning images."[14]

Discrimination in this sense is an attack upon someone's human dignity. Here we should introduce a distinction. 'Discrimination in a neutral sense' is simply unequal treatment.[15] 'Weak discrimination' can be defined as unjustified unequal treatment.[16] 'Strong discrimination' is that type of unjustified unequal treatment which shows that certain aspects of the personality of the discriminated person are considered inferior.[17]

In a democratic constitution both the right to weak non-discrimination and the right to strong non-discrimination should be acknowledged.[18] The weak non-discrimination right is like other 'classical' rights a warrant, a trump against state action, in this case against arbitrary state action.[19] The strong non-discrimination right, on the other hand, is a different sort of right. It is a claim to protection against treatment as a less than equal human person. It is the protection of a citizen's basic human dignity.

Discrimination is usually not an incidental action. Discrimination on grounds of sex or race obviously has a structural aspect. Every individual act of discrimination only reinforces this structural aspect, this permanent statement by society or social groups that one is not a person with equal status. These structurally discriminatory classifications might be called 'suspect classifications'. The most important ones in our societies are race and cultural origin, sex, sexual orientation,[20] and religious and political convictions.

Traditional rights protect certain essential interests of citizens, like religion, political participation, etc. The strong non-discrimination right protects not merely

14 Heikelien Verrijn Stuart (1989), Wet gelijke behandeling: een leugen, in: Astrid Mattijssen en Martin Moerings (Eds),*Wet gelijke behandeling in perspektief*, (Utrecht: Publikatiereeks Homostudies dl 15.), p. 70 (my translation)

15 In this sense it is used in "positive discrimination' and also in Brian Barry (1965), *Political Argument* (London: Routledge and Kegan Paul), when he develops the ideal of non-discrimination. However, because the word "discrimination" also has a pejorative connotation, a strictly neutral sense is in fact impossible.

16 For reasons of simplicity I set aside the fact that one may also discriminate by treating the unequal equally.

17 This definition is inspired by the definition given by Minister of Justice De Gaay Fortman during the parliamentary discussions of the new Dutch constitution.

18 In the Dutch Constitution the first may be derived from the first sentence of Article 1; the latter from the second sentence of the same article.

19 In the terminology of Brian Barry, *o.c.*, it can be identified as the principle of equity.

20 For an impression of the international discrimination against gay men and lesbian women, see *The Second Ilga Pink Book, supra* note 1.

a more important interest, but a more fundamental one: the interest in being recognized as an equal; the interest in human dignity as such. Moreover, being socially recognized as an equal is in a sense, a precondition for being able to fully exercise one's social and civil rights.[21]

Therefore, when the strong non-discrimination right and other rights conflict, we cannot simply balance, especially not so when a suspect classification is involved. One can balance apples and pears, but one cannot balance apples and a pear tree. The equal status as a person is such a fundamental interest that strong discrimination must almost always be prohibited. Nevertheless, it is not absolute, and some exemptions must be granted, of which I can only give a rough outline.

A first category is not really an exemption, but simply stresses the fact that discrimination must usually be strong discrimination to be prohibited.[22] Sometimes unequal treatment will be objectively justified. In the field of sex-discrimination this argument holds in some situations, for example in choosing actors for a play, or in programs of affirmative action. With respect to discrimination against homosexuals and lesbians, however, I cannot think of any valid justifying argument. Sometimes unequal treatment may be merely indifferent from a constitutional point of view, like when an old lady only lets rooms in her home to female students. And lastly, in some situations unequal treatment may be unjustified, but constitutes merely weak discrimination, because it is not a direct insult to human dignity. Most cases of discrimination on non-suspect classifications are merely weak discrimination.

A second category of exemptions is the most controversial one. It deals with those cases in which the right to non-discrimination conflicts with other rights. We should distinguish between those cases in which merely important interests, protected by rights like the freedom of association, are violated by imposing the norm of non-discrimination, and those cases in which the imposition may be seen as a violation of human dignity itself. Only in the latter cases should an exemption on the norm of non-discrimination be allowed. Discrimination should only be permitted if this permission is strictly necessary to protect human dignity. The main fields in which this condition might hold are those covered by the right to privacy and freedom of religion.

To protect human dignity, two further conditions should be made. Firstly, the discriminatory activity may not result in unreasonable non-moral harm: clitoridectomy or female circumcision ought to be legally prohibited. Secondly, some form of free consent is essential. The more autonomous the choice for participation in the discriminatory activity or organisation is, the less narrowly the exemption may be construed.

Because an exemption to strong non-discrimination is an exemption to the protection of human dignity, these conditions should be strictly interpreted. Therefore, the exemption for religious activities should be limited to those activities which clearly belong to the internal organisation of the church and for which

21 Mohr, *o.c.*, 162 ff.

22 Weak discrimination may sometimes be prohibited as well, especially in the case of government agencies or other organisations in the public sphere. However, this is a different topic I will not deal with.

at least a minimally reasonable justification can be given. Segregation of monastic orders on the basis of race need not be accepted.

A third category of exemptions are those situations in which legal prohibition will not be effective or will have unacceptable side-effects. There is some overlap here with the previous category, as most of these situations will be found in the spheres of privacy and religion. Discrimination in the private sphere, therefore, in most cases should not be penalized. An effective alternative, however, might be the facilitation of civil law suits. Examples may be the acceptance of statistical evidence or the acceptance of "class actions".

IV. Conclusion

We now can come to a conclusion. The strong non-discrimination right is of a different, more fundamental kind than other constitutional rights. Therefore, a law prohibiting discrimination on the grounds of sexual orientation with only relatively few exemptions is not only justified but also obligatory from a democratic point of view.

There is a more general conclusion implicit. One recurrent topic of democratic theory is whether democracy must tolerate undemocratic groups and intolerant groups. Though in particular groups, like some fundamentalist groups, the intolerant and undemocratic aspect often coincide, they give rise to distinct questions. Whether democracy should tolerate antidemocratic groups is partly a question of balancing rights and partly a question of strategy. The constitutional rights of antidemocratic groups should only be set aside if their activities directly obstruct the democratic functioning of society or infringe upon rights of other citizens. Moreover it is often a wise strategy to tolerate their activities; their illegal activities might become really uncontrollable.

The problem of intolerant groups is not merely to be solved by balancing and strategy. Insofar as the intolerant groups act in a discriminatory way, government should take a clear and principled stance. Discrimination is not to be tolerated, because its victims are wounded in their most fundamental interest. Hence the measure of tolerance should be much higher in the case of antidemocratic activities than in the case of racist, sexist or other types of discriminatory activities.

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