SAFEGUARDING THE PUBLIC SPHERE: A PHILOSOPHICAL PERSPECTIVE

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1 Introduction

In 1972, the Indian government issued a law which specified the minimum wage farmers should pay to their servants. In his fascinating book `The Poverty Regime in Village India', the Dutch sociologist Jan Breman described its effects.[1] Nothing seemed to change for the landless workers, who remained underpaid and never received more than half of the prescribed amount of rupees. It did, however, positively affect the income of the inspectors. From that time on `they travelled around the countryside, not to ensure that landowners were complying with the law, but to threaten them with prosecution unless they paid them a bribe'.[2] The poverty-stricken caste of the Halpati was not helped at all by governmental regulation.

Had the Halpati been able to read this volume, they would probably not have understood its efforts in pointing at the state as the ultimate safeguard for social security. Virtually all policies and programs issued by the democratically elected government seemed to founder on the incapacity of the system to provide a minimum of security and justice. Apparently, state regulation is not sufficient to safeguard their socio-economic rights, not even in those cases in which the state is democratically accountable.

The sad story seems to capture precisely the problems that are central to this volume. It makes clear that by declaring social security a `public interest' nothing is yet said about the question who is the best candidate for safeguarding such a public interest or, more interestingly, *how* such a public interest should be dealt with. Pointing to the state as the ultimate protector of socio-economic rights does not solve the interesting question *under which conditions* the state can execute its public tasks in a satisfactory way and *how* it should execute these tasks.

In order to answer these questions we should avoid the temptation to identify too easily the public sphere with the official sphere. These are separate domains.[3] Although public *law* indeed refers to the organisation of the state and its relation with the citizens, the same does not apply to other things called `public'. A public house does not belong to the state. All we intend to say by declaring houses, gardens, restaurants and even Hyves pages `public' is that

1 Breman, Jan, *The Poverty Regime in Village India: Half a Century of Work and Life at the Bottom of the Rural Economy in South Gujarat*, Oxford UP, 2007.

2 Breman, *op.cit.*, p. 90.

3 In the words of Eisenstadt: `The concept of a public sphere entails that there are at least two other spheres – the "official" sphere of rulership and the private sphere – from which the public sphere is more or less institutionally and culturally differentiated. It is, therefore, a sphere located between the official and the private spheres'. Eisenstadt, S.N., "Civil Society and Public Spheres in a Comparative Perspective" in *Polish Sociological Review* No.2 – 2006 (Quarterly of the Polish Sociological Association), Warsaw, p. 143-166.

they are open and accessible to all. [4] In this sense, the market is a public place, even though it is regulated by private law. What is more: its public nature (openness and accessibility) is safeguarded by private (anti-trust) law.

In this contribution I will argue that in order for states to safeguard different interests –including socio-economic ones- in a reliable and effective way, there needs to be a strong public sphere, to be differentiated from both the private and the official domain. The features of such a public sphere will be sketched, in fairly simple terms, as the result of a process of representation and abstraction. On the basis of this rough sketch, I will develop three normative requirements by means of which strong public spheres can be distinguished from weak ones. On the basis of these requirements the question can be addressed to what extent and under which conditions the nation-state is able to maintain a strong public sphere in which not only liberty-rights but also socio-economic rights are safeguarded. After having outlined the weaknesses of the welfare-state in preserving a public sphere, two alternative candidates are examined: lower level institutions and the judiciary. It is argued that all three have difficulties in optimising the three requirements. The article concludes by proposing some possible remedies.

2 Making oneself understood

The boundary that distinguishes the private sphere from the public domain is an essentially contested one. Frontiers shift incessantly. The mediaeval custom of the nobility to receive important guests in their bedroom may suggest to us that at that time a private life as such had yet to be invented. But the mediaeval noble might draw the same conclusion if he could have witnessed our ease in talking about emotions or sexual problems on the television. These examples may alert us to the fact that the dividing line between public and private is mainly determined by *how we act*. The nobles may have received people in their bedroom but they did not act in a very private way. They may have worn night-gowns but their conduct was a very formal one. On the other hand, what strikes us in witnessing people on tv, is that they speak to us as if we are close friends instead of an anonymous audience. What we call private and public is therefore closely connected with a *certain way of doing* things.

This difference in attitude can rather easily be explained. If we start with the simple notion of the public sphere as a sphere which is `open and accessible to all', it is clear that it is nothing more -nor less- than the world where we have to deal with people who might not be familiar to us and who may even be strangers. This implies that in the public domain a different form of behaviour is called for, which enables us to deal with such people. We can no longer rely on the many implicit rules, conventions and customs that regulate our lives with family-members and intimate friends. We have to find ways in which we can be understood by others, who may *not* share these tacit assumptions.

This can be done by conducting affairs in a particular way; namely by adopting roles and rules. Both rules and roles generate a stock supply of meanings that are shared and therefore

4 Habermas, Jürgen, *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, Hermann Luchterhand Verlag GmbH, Neuwied und Berlin, 1962, p.13.

accessible to all involved. The simplest example of someone who adopts a role is the ritual dancer who bears a mask.[5] In doing so, he does not act out his `true and authentic self' but represents himself on a different level, by playing a role that is recognizable to others. This role can be a very concrete one, e.g. where a particular ancestor is represented, or an abstract one (`evil forces'). What is important, however, is that the represented item can be identified, and recognized by others.[6] In adopting a role, I represent myself as someone who is accessible and understandable to others, even strangers. I make myself public, so to speak.

We engage in this form of communicative behaviour daily. In choosing a special type of clothes, or a special trendy type of iPod, I indicate that I want to be regarded as a certain person. In order to succeed in this, I have to make sure that that role is understood by the others. In some contexts, for instance in academic circles, the proudly displayed Vuitton bag would probably not even be noticed. The bag then fails to help me represent myself, just as the masks of the ritual dancers fail to represent the ancestors in the eyes of an audience that mainly consists of tourists. Roles rely on shared meanings relating to the representation.

Roles also rely on shared understandings of the proper context. The black dress at a funeral has a different meaning from the black dresses worn by gothic girls. These shared understandings can be expressed by rules. These rules can be said to constitute the role. They are of the form:

If conditions a, b, c obtain > X counts as Y in context C.

They stipulate in advance that under condition a, b, and c, and in a specified context C, a particular mask *counts as* `ancestor', a particular dress *counts as* the expression of `grief', and a particular utterance *counts as* `promise'.[7] Every role and representation presupposes such a rule.

In relatively small and simple communities these underlying rules are barely noticed, because their content is well-known and does not need to be made explicit. Implicit rules are hardly perceived as rules. We only become aware of their existence if they are violated or simply ignored. So if we have to deal with newcomers or relative strangers, it will be necessary to make these underlying rules explicit. In such a context, it is no longer possible to rely on tacit background knowledge and unquestioned moral distinctions. The rules that are supposed to guide the representations we make, but also the rules that guide our behaviour and the way we relate to others should be made `public', in the sense that they should be made explicit and clear; they should be `published' in the sense of accessible to all involved, and -preferably- it should be possible to question the rules in a 'public' debate, which is equally open and accessible to all.

Instead of the dichotomous division of a space into a private and a public sphere that are mutually exclusive, it seems therefore more appropriate to keep the picture in mind of the wider

5 Grimes, Ronald L. , 'Masking: Toward a Phenomenology of Exteriorization', *Journal of the American Academy of Religion* Vol. 43 No 3 (Sept. 1975) p. 508-516., O.U.P.

6 White, Randall, 'Toward an Understanding of the Origins of Material Representation in Europe', *Annual Rev. of Anthropology,* 1992, p. 537-564.

7 Humphrey, Caroline & James Laidlaw, *The Archetypal Actions of Ritual: A Theory of Ritual Illustrated By The Jain Rite of Worship*, Clarendon Press, Oxford, 2004 (1994). For a philosophical analysis of `count-as'- norms, see Searle, J. *The Construction of Social Reality*, The Free Press, 1995.

and narrower circles that surface by throwing a stone in the water. What counts as `public' depends on one's point of view. Viewed from the confines of my family home, the inhabitants of my village belong to the public realm. Viewed from the perspective of the village-dweller, the public realm begins outside the village. The wider the circle, the more strangers are included. The more strangers are included, the more need there is to make the rules that guide our relations, roles, and representations explicit.

If we adopt the metaphor of these widening circles, we may allow for the possibility of differentiating between what I would call `stronger' and `weaker' public spheres: a stronger public sphere encompasses *a greater diversity* of people, and abides by *more explicit* rules and roles than a weaker public sphere.

3 Degrees of abstraction

To the dimensions of inclusiveness and explicitness a third element should be added in determining the strength of a public sphere and that is the level of *abstraction*.

In order for ritual masks, bags and iPods to function as bearers of shared meanings, they have to be impersonal. The mask represents someone *else* (the ancestor), not the bearer himself. The representation is more `objective' than the actual living person who represents himself, which means that the representation *abstracts* from the particulars that distinguishes Peter from Jim. One may object that although this may apply to the masks of primitive man, it does not apply to modern man who, on the contrary, wants to distinguish himself by his trendy iPod. But this is a mistake. The proud owner of the iPod represents himself not as *a particular* person but as someone belonging to a *class* of people, a class of people which is fortunate, rich, modern etc. By showing off his iPod he distinguishes himself, it is true, but only by abstracting from particular and individual features and by representing himself as belonging to the desired category of people. In the public sphere, people represent themselves in categories that are more abstract than the particular individual they are in private life.

The level of abstractness of the categories can vary and is, I believe, directly linked to the inclusiveness of the public sphere in which one moves. If I am travelling in Africa there is no sense in representing myself as someone who is born in Rotterdam, not even as an inhabitant of the Netherlands. It is no exaggeration to say that only in Africa I represented myself as a European. The wider the public circle is drawn, the more diverse its members, the more the need to make one self understood in terms that are accessible to the other members, the higher the level of abstraction required. A very high level of abstraction is reached in the representation of individuals as citizens. This representation not only abstracts from the particularities of Jim, it also abstracts from more abstract roles as employee, consumer or city-dweller and turns him into a member of the abstract category of the citizenry.

It is important to note that where the roles and categories are abstract, the rules that govern these categories are equally abstract. In order to grasp the relation between categories and rules, we should distinguish between the rules that turn Jim into a citizen and the rules that are applicable to Jim once he is regarded as a citizen. The rules that turn Jim into a citizen may be general in the sense that they all equally apply to a member of a particular class, but these rules can be quite concrete. E.g. the rule that all immigrants from a specific province

in Iraq who succeeded in acquiring a work permit before June 10, 2005, and who have been employed for more than 6 months by a certified employer, are entitled to Dutch citizenship. This is no doubt a *general* rule in the sense that it applies to all those who belong to the designated category, but the category itself (immigrants from this particular province) is extremely *concrete*. However, once Jim is entitled to Dutch citizenship he enjoys a set of rights and duties that are not only generally applicable to all citizens, but which are also fairly *abstract* since they flow from the abstract category of citizenship. Abstractness of roles matches abstractness of rules.

What we see here is that the category of citizenship acts as an *intermediary* between on the one hand a set of conditions that should be met and on the other hand legal consequences.[8]

> *If conditions [Iraqi province, 2005, certified employer] obtain > Ahmed counts as citizen*
> *If condition [Ahmed = citizen] obtains > Ahmed is entitled to rights a – z*

If we keep this intermediary function of concepts such as `citizen' in mind, it is clear at once that the choice of representing oneself as either `consumer', `Halpati' or `citizen' is not entirely free. Such a choice is to a large extent informed and necessitated by the rights and duties that are attached to such a concept. In a society where rights and duties are usually accorded to castes, there is obviously hardly any need to invoke the general notion of citizen. It does not serve, in those contexts, as a viable intermediary notion connecting conditions to legal consequences.

I noted above that strong public spheres can be distinguished from weak ones by the extent to which they include diversity and the degree in which they make rules and roles explicit. To this, the third criterion of abstractness can be added. I assume that in a strong public sphere, categories and rules are of a fairly abstract nature. Abstractness is directly linked to the criterion of inclusiveness. The more a certain category abstracts from the particular properties of individuals and their specific interests, the more we arrive at the ideal of formulating rules that are generally applicable to members of the abstract category, without exceptions, privileges or favors due to some particular properties. [9]

Thinking back to the Indian inspector I introduced above, one of the things that went wrong in his enforcement of the minimum wage legislation is probably the lack of abstraction of roles and corresponding rights and duties. The inspector *does not take on the role* of the government official at all. He therefore presumably does not feel bound by the abstract rights and duties that are attached to that role. He rather sees his job as his personal belonging; a source of personal, private income.[10] Decisions on prosecution are therefore felt to be subject

8 These so-called placeholder concepts are analysed in Ross, A., `Tû-tû', *Harvard Law Rev.* 1957, p. 812-815. For a good Dutch overview, see, Hage, J., De betekenis van juridische statuswoorden, in: *Rechtsfilosofie & Rechtstheorie*, 2008/1, p. 13-28.

9 That is why lawyers tend to refer to abstract rules as `general' rules. Logically speaking, this is a mistake. *Any rule is ipso* general in the sense that it refers to general categories (`all immigrants who..') What lawyers mean when they talk about the virtues of `general rules' is that the categories of such rules are abstract enough to cover a wide range of individuals.

10 The conditions required in order to take the role of the official bound by abstract rules, are analysed, as is well-known, by Max Weber, Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie, fünfte Auflage, besorgt von Joh. Winckelmann, J.C.B. Mohr, Tübingen, 1980, p. 551-579. See also Eisenstadt, S.N., Bureaucracy, bureaucratization, and debureaucratization, in: *Administrative Science Quarterly*, 4 (1959). P. 302-320).

to personal discretion rather than to general and explicit rules pertaining to the abstract categories designated by the law.

4 Public interests

I have described several ways of making oneself understood in a sphere that is marked by diversity. In such a sphere there will not only be a diversity of opinions, values, and rules, but also of *interests*. I don't think, therefore, that `public interests' should be seen as interests that belong to the `public' in just the same way as we talk about `consumer interests' as the interests of `consumers'. Such a manner of speech presupposes a unity (the `public') which does not exist. Rather, we call something public the more a certain space includes *different* people and interests. To talk about `the' public interest is therefore often no more than a rhetorical device in order to conceal these differences and to elevate one particular interest above the others under the guise of its so-called public nature. [11]

Such an a priori definition of `public interest' overlooks the fact that a definition of the public interest is precisely what is at stake in those debates which revolve around the question *what* exactly we should make `public' (open and freely accessible). These debates are all about the demarcations of the public sphere: e.g. what should we prefer: an open and accessible (public) *market* in which there is free competition between different transport businesses? Or do we prefer to turn *transport itself* into a public commodity, i.e. freely accessible to all?

An advantage of my analysis of `public' as denoting a particular *way of dealing* with relative strangers, is that it does justice to that debate. The public interest is then not an interest of the public but consists in a way of handling conflicting interests. In line with the dimensions discerned above (inclusiveness, explicitness and abstraction) we may say that it is in the public interest to include as many interests as possible, to weigh and to balance them, to abide by explicit rules in regulating and resolving conflicting interests, and, if possible, to abstract from particulars by assigning rights and duties to more abstract and impersonal categories. In such a way, interests are *made* public instead of being presupposed to `exist' prior to how we deal with them. In a strong public sphere, there is an open (inclusive, explicit) discussion about which commodities should be publicly available.

I would like to defend the view that these tasks should for a large part be entrusted to the official domain. By `the official domain' I do not refer to a specific form of government, but simply to the idea of a third party, which has enough power to enforce its decisions, and which is hierarchically superior to the parties that entertain more or less horizontal relations with each other.[12]Such a third party is needed, since only such a party can develop the bird's eye view necessary to include, weigh, balance, explicate and abstract the various competing interests. The reasons for this all have to do with the importance of impartiality. [13]

11 Rousseau's concept of the volonté générale is an example of such a strategy.

12 See G. Simmel for a fascinating analysis of the differences between dyadic and triadic relationships, in: *The Sociology of Georg Simmel*, ed. and transl. by Kurt H. Wolff, Glencoe, Illinois: The Free Press, 1964, p.122-125.

13 Habermas, J. , *Recht en moraal: twee voordrachten*, vert. door W. Van der Burg en W. Van Reijen, Kampen: Kok Agora 1988, p. 79. (orig. *Recht und Moral: Zwei Vorlesungen*, University of Utah Press, U.S.A. 1988).

To a large extent it is possible for the parties themselves to draft rules (contracts) which are explicit enough to coordinate their mutual actions but these rules cannot be used as standards for arbitration if we do not allow a third party to intervene and to arbitrate in case of conflict. The same applies to the requirement of inclusiveness of interests. In order to safeguard such inclusiveness, it should be entrusted to an institution which -although it may have its own interests- does not have any directly competing interests which interfere with the other interests. And finally, rights and duties which are sufficiently impersonal and attached to abstract categories rather than to particular persons with their particular interests can only be allocated by the proverbial impartial judge who is blind to individual particularities.

In other words: in order to turn the public sphere into a strong public sphere, which is sufficiently inclusive and impersonal as well as guided by explicit and abstract rules, an official sphere is needed, which is superimposed upon the horizontal relations that are entertained by the parties themselves. By drawing attention to the importance of these functions, I am, however, not necessarily committed to a view about *who* is best equipped to exercise these functions. Several options are conceivable. Not only the nation-state but also professional organisations, all kinds of supervisory boards as well as the judiciary may all come forward and present themselves as suitable candidates. I only claim here that these candidates should be assessed and evaluated according to the three above-mentioned criteria of impartiality (reached by inclusiveness, explicitness and abstraction) in order to ensure that a diversity of interests is taken into account and coordinated. If a certain institution lacks the required impartiality, that institution is unfit as defender of the public realm.

5 The welfare-state and the public sphere

So far, I have assumed and argued that the three requirements listed above all point in the same direction. It seems a plausible argument: in order to include as many interests as possible, one has to be impartial and abide by explicit and abstract rules.

However, precisely this assumption has been questioned. The debate concerning the vices and virtues of the welfare-state revolves around the inclusion of socio-economic interests. It has been argued that the inclusion of such interests is not beneficial to a strong public sphere, but rather *risks jeopardizing* the neutrality and impartiality of the nation-state. This view has been put forward forcefully by Ernst Forsthoff, when in post-war Germany the very first contours of a *welfare-state* became visible. [14] According to Forsthoff, the nation-state can only retain its impartiality by confining itself to classical liberty rights. As soon as the state adopts the role of distributor of socio-economic burdens and benefits, it forfeits its role as neutral arbitrator.

This may sound quite paradoxical. Why would a state, (or for that matter, any third party) jeopardize its impartiality by including *more* rights and interests? The opposite seems much more plausible. Forsthoff's argument is mainly based on the difference between safeguar-

14 See Ernst Forsthoff, Verfassungsprobleme des Sozialstaats, in: *Rechtsstaatlichkeit und Sozialstaatlichkeit: Ausätze und Essays*, hrsg. Ernst Forsthoff, Wissenschaftliche Buchgesellschaft, Darmstadt, 1968, p. 145-164, and Ernst Forsthoff, Begriff und Wesen des Sozialen Rechtsstaates, in: *op.cit.* p.165-200. A more recent overview of the literature around the welfare-state dilemma is given by Scheuerman, Bill, The Rule of Law and the Welfare State: Toward a New Synthesis, in: *Politics and Society,* Vol. 22, No 2, June 1994, p. 195-213.

ding and creating rights. According to Forsthoff, a classical `Rechtsstaat' mainly safeguards existing (liberty) rights. A *Sozialstaat*, on the other hand, does more than that. It carries out a program in order to establish new rights, to create welfare, and to achieve a just distribution of burdens and benefits.[15] The welfare state is `ein Staat der Leistung und der Verteilung'.[16] Whereas the classical rights are negative limitations of the power of the state, rights, `vor denen die Staatsgewalt halt macht',[17] socio-economic rights act as positive demands on the state to *perform*. Thereby, the task of the state is fundamentally altered. It can no longer act as arbitrator but turns into a regulator with interests of its own that enter in direct competition with those of (groups of) citizens.

The difference between negative and positive rights has been the subject of an extended debate[18], which -although interesting- I will not repeat here. I only want to draw attention to the fact that the distinction between positive and negative rights to a large extent depends on the assumption that negative liberty-rights should be considered as `Vorstaatlich', existing before the state comes into being, whereas socio-economic rights are considered to be the product of state -intervention. In the contribution by Brinkman and Eleveld to this volume, the various attempts to argue in favour of such rights have been dealt with.

This distinction between pre-existing rights and rights that result from state-intervention can be attacked from both ends. On the one hand we may argue that both kinds of rights should enjoy a `pre-state' status. One may then argue that Locke's natural rights to life, liberty and property should be extended to encompass the rights to income, housing, education etc. Or we may argue the other way round by saying that since no relevant distinction can be made between the two bundles of rights, *none* of these rights should be seen as existing prior to the state. In that case we should consider property rights as well as the right to free speech etc. as just interests that ought to be balanced against other interests. Both strategies discard the somewhat disingenuous move to elevate some rights over others by just declaring them to be `natural rights', prior to the state.[19]

Forsthoff's fears can therefore be dispelled by adopting either of these strategies. Only then can we hope to break through the dichotomy between a state which has to safeguard negative rights and a state which adopts the more positive role of creation and distribution; a dichotomy which -empirically speaking- is already considerably undermined in view of the massive amount of planning and intervention both at the national and the European level that is required in order to establish and maintain a free market and a healthy financial climate.
However, even if we succeed in attenuating the distinction between *Sozialstaat* and *Rechtstaat* by claiming that a considerable amount of intervention is needed for the preservation of both sets of rights, three of the issues raised by Forsthoff remain worth noting and they all three have to do with exactly those dimensions I indicated to be vital for a public sphere.

15 Forsthoff, *op.cit.* p. 177.

16 Forsthoff, *op.cit.*, p.149.

17 Forsthoff, *op.cit.*, p. 177.

18 See e.g. Borowski, Martin, Grundrechte als Prinzipien, 2nd ed , Baden-Baden: Nomos 2007

19 See my *The Disintegration of Natural Law Theory: From Aquinas to Finnis*, Leiden: Brill 1998

In the *first* place, we should be aware of the risk that a state which is allocating and distributing socio-economic burdens and benefits can turn into a very manipulative one.[20] This risk is all the more real in those cases where the state attaches extra conditions to the benefits (pensions, subsidies, allowances) it distributes. The additional requirements that should be met by unemployed people in order to `enjoy' their social security allowance may be defended by saying that rights should match duties, but it is rather easy to arrive at the situation in which civil obedience turns into a service for payment. The welfare state, by handing out benefits and distributing assets, has infinitely more power to enforce its own aims and interests than the classical guardian-state. The recent tendency of states to turn into bank-owners does nothing to dispel these fears. On the contrary, by becoming a player in the field, and a very powerful player at that, its interests tend to *compete* with those of the other players involved. The state risks losing the bird's eye view that is needed in order to meet the requirement of inclusiveness, which I indicated to be necessary for a strong public sphere.

In the *second* place, the required abstraction of categories and rules seems to be endangered as well. Forsthoff observes that in a welfare state, the citizen no longer identifies himself as a citizen, but mainly as an interest-holder.[21] This contrast may be drawn too strongly. After all, one's choice to become a socialist or a conservative cannot be seen as entirely separated from one's perceived interests. However, there is a grain of truth in Forsthoff's observation that the more a state regulates the particular interests of particular groups, the more the law has to bend itself to the particularities of particular groups and particular circumstances.

The development that is discernible in the principle of equality testifies to this tendency of particularization.[22] It used to be customary to stress the first part of that principle, which requires that like cases are to be treated alike. Nowadays, however, the second part of the principle, which requires *different* cases to be treated *differently*, is emphasized and leads to increasing refinement of distinctions, categories and corresponding rights and duties.[23] The principle of equality can only be maintained at the cost of an endless proliferation of rules, all covering the specific needs of specific groups of citizens.[24] The call for tailor-made legislation is another symptom of the same phenomenon and can very well be understood as a reflection of the fact that those who distribute burdens and benefits need to take into account a wealth of particular requirements and circumstances, which inevitably leads to concretisation rather than abstraction.

This concretisation may be needed in order to arrive at fair outcomes. No one would deny that the father who distributes his heritage justly between the handicapped talented son and a champagne-drinking debauchee has to take into account the differences in needs and circumstances.[25] But it should be realized that the fine distinctions required here are at odds with the

20 'Kein Staat ist mehr in Gefahr, im Dienste der jeweils Mächtigen instrumentalisiert zu werden wie der Sozialstaat'. Forsthoff, *op.cit.* p163.

21 'Er is nicht mehr primär Konservativer, Liberaler oder Sozialist, sondern Landwirt, Importeur, Sozialrentempfänger, Grossist, Arbeiter, Hausbesitzer, Ostvertriebener usw.' Forsthoff, *op.cit.*p. 153.

22 Gerards, J.H. (2005), Judicial Review in Equal Treatment Cases, Leiden/Boston: Martinus Nijhoff 2005.

23 Minow, M. (1990), *Making All the Difference. Inclusion, Exclusion and American Law,* Ithaca/London: Cornell University Press,1990

24 For an interesting analysis of how such differential treatment works in the Indian case, see Zwart, Frank de, Administrative Categories and Ethnic Diversity: The Dilemma of Recognition, in: *Theory and Society*, Vol. 34, 2005, and `Practical knowledge and institutional design in India's affirmative action policy', in: *Anthropology Today*, Vol. 16, No 2, April 2000, p. 4-7.

25 Dworkin, R., What is Equality? Part 1 Equality of Welfare, *Philosophy and Public Affairs,* Vol. 10 (1981) p.183-246

ideal of blind Justice.[26] This means that in a welfare-state it will be increasingly difficult to arrive at impersonal and abstract categories and corresponding rights and duties. [27]

The *third* dimension I discerned by means of which the strength of a public sphere can be gauged is the extent to which the standards for decision-making are open and accessible to all, which entails the need to make them explicit. Rules need to be explicit, clear and precise, in order to serve as a shared frame of reference, by means of which decisions can be justified as well as criticised. If this requirement is to be taken seriously in a welfare-state which has to have an open eye for the different needs and circumstances of its citizens, it is clear that it cannot fail to result in excessive overregulation, in the sense that for each and every circumstance, explicit and highly detailed rules should be drafted. And the more concretely such rules and categories are formulated, the more vulnerable they are to change. Since such concrete rules are quickly outdated and cannot catch up with social or technical developments, the inflexibility of explicit rules will increasingly be seen as a major obstacle. [28]

This problem is not only anticipated on logical grounds, but is indeed conceived as one of the major problems of contemporary legislation and has led to all kinds of programs in order to reduce the burdens of overregulation. What all these programs in order to arrive at `better regulation' have in common is the attempt to overcome these problems by reverting to open, flexible but vague standards.[29] These open standards may either invite the judge to bend the law to specific cases or they may be meant to be tailored to concrete contexts by groups of norm-addressees and stakeholders. In both cases the degree of explicitness arrived at the central level is considerably decreased.

The conclusion seems to be justified that although there is no reason to exclude socio-economic rights and interests from public consideration, we should be aware that the welfare state risks to lose the very properties needed for preserving a strong public sphere. Its distributive role may increase its power and may undermine its impartiality. The need to meet particular needs affects its power to transcend concreteness by formulating impersonal and abstract rules and finally, it will no longer be possible to meet the requirement of explicitness without suffering from overregulation and inflexibility, which will lead to the formulation of vague standards; thereby increasing the discretionary powers of decision-makers.

We should add here, that if this analysis holds, it equally applies to the level of the European Union. The vast terrains covered by European regulation, together with the ambition to steer, shape and harmonize the different member-states by means of enormous amounts of subsidies and other such regulatory mechanisms, force the EC into a position that is comparable to that of the national legislatures.[30] The tendencies and the shortcomings listed above all

26 According to Forsthoff: 'Im Unterschied zu den Freiheitsrechten haben Teilhaberrechte keinen im vorhinein normierbaren, konstanten Umfang. Sie bedürfen der Graduierung und Differenzierung, denn sie haben einen vernünftigen Sinn nur im Rahmen des in Einzelfall Angemessenen, Notwendigen und Möglichen', *op.cit.* p.179.

27 Cf. Habermas, J., *op.cit.* 1988, p. 52 ff.

28 An abundance of official reports comment on the inadequacy of rules in this respect.

29 E.g. *Ruimte voor Zorgplichten*, Min. of Justice July 2004.

30 This is reflected in *European governance: a white paper*, Brussels 2001, Commission of the EC, which diagnoses the problems with rules in much the same way as Dutch reports, and offers roughly the same therapy.

equally apply to the European level as well. [31] We should arrive at the somewhat uncomfortable conclusion that the more interests are included and taken care of by the official domain, the more it risks to lose the virtues required of a neutral third party, which will inevitably weaken the public sphere.

6 Alternatives: the norm-addressees

As I noted above, we should be careful not to indentify the public sphere with the official sphere too easily. The legislatures of nation-states and the European Union are not the only possible defenders of the public sphere. There any other candidates. In the first place the norm-addressees themselves, in the second place the judiciary. I will first examine the qualifications of the former; in the next section I will deal with the judiciary. They are both investigated by means of the above-mentioned criteria of inclusiveness, explicitness and abstraction.

The attempts to arrive at better regulation or deregulation led to a practice in which rulemaking was outsourced to the norm-addressees themselves, who are required to concretise the vague standards issued by the formal legislator. By delegating concrete rule-making to norm-addressees, mostly organised in branche-organisations and professional associations, or to supervisory boards and the inspectorate, it is generally hoped that at the central level the rules will remain abstract enough to avoid excessive detail and to withstand time and change. As I noted elsewhere[32] the rules that are issued at the central level and with which the lower echelons are confronted, may exhibit a certain amount of abstraction, but cannot be understood as ordinary rules. They do not prescribe the means in order to achieve a certain aim, but mainly prescribe the goals that should be reached. They leave it to the norm-addressees to devise the rules (i.e. rules prescribing means) by themselves. The only genuine rule here is the rule that admonishes the norm-addressee to *report* on the progress that was made.[33]

This strategy is often mirrored by lower echelons, which, in a similar vein, imposes a more concrete version of the desired aim, and likewise obliges an even lower echelon to fill in the necessary detail, i.e. to take measures or to draft rules in order to achieve the intended aim, and to report on the progress made. A chain of regulations can be discerned here. At each level, goals and aims are prescribed, whereas the actual task of rule-making is imposed on others. This chain hardly leads to any rule-making but mainly consists of an ongoing process of concretisation. At each successive step, the aims are translated into more concrete goals and targets.

This solution is beset by many problems, which I pointed out in detail in other places. The deregulation reached at the central level is outweighed by an enormous amount of excessively detailed regulation at lower echelons, the loss of legal certainty (due to the fact that the rules are tailor-made), and the growing importance of intermediate bodies of managers and self-professed rule-makers of different varieties are all just as inevitable as problematical. I will

31 See for a more elaborate analysis my `Governing by Goals: Governance as a Legal Style', *Legisprudence: International Journal for the Study of Legislation,* Hart Publishing 2007, p. 51-72.

32 See my 'The Emergence of New Types of Norms', in: Luc J. Wintgens (ed.), *Legislation in Context: Essays in Legisprudence*, Ashgate, Aldershot 2007, p. 117-133.

33 For the full argument the reader is referred to my publications, listed in the preceding footnotes.

not repeat these disadvantages but confine myself to the question which is at stake here: can we expect these lower bodies of rule-makers to meet the requirements necessary for a strong public space?

The answer is, I think, a mixed one. As for inclusiveness, it cannot be denied that the practice of outsourcing rulemaking to lower echelons, increases the likelihood that more interests are included. As long as these tasks are entrusted to groups marked by strong internal social cohesion, the chances that they can shape the rules to their specific needs are increased. It is different in those cases where regulating committees and bodies are established by the central legislator for the very purpose of such rulemaking. In those cases, inclusion may not always be warranted.[34] In cases where regulation is entrusted to supervisory boards, the picture is a mixed one, depending on the field at hand.

As for explicitness, the picture is less equivocal. Rules made by lower echelons are not only much more detailed but also much more explicit than those formulated at more central levels. The reason for this is simply that the lower bodies are usually confronted with the obligation to report on the rules they drafted and the measures they took. Since it is clearly not sufficient to state in vague terms that the goals are reached, standards need to be developed which enable the assessment and evaluation of such progress and documents need to be drawn up, stating in the most explicit terms the performance indicators, rules, codes and protocols that have been developed and instituted. The effects of such explicitness may be perverse, especially where the production of documents is seen as a substitute for a real performance or service.[35] In those cases where the rules are only drawn up in order to justify one's dealings and to account to the external world, the value of explicitness should not be exaggerated. But to the extent they are taken seriously internally as well, the process of making these rules and standards explicit may pave the way for criticism and change. [36]

The virtue that seems to suffer most from the delegation of rulemaking to lower echelons is abstraction. Rules are no longer made by (representatives of) *citizens*, but by people in their capacity of teachers (or more properly speaking: educational managers and experts) or in their capacity of health-specialists, or of consumers, or of employers, etc. etc. The picture sketched by Forsthoff of the welfare state mainly consisting of `Interessenten' is nowhere better embodied than in the regulatory landscape of today, where these *Interessenten* are precisely the ones who make the rules. In such a landscape more people may be included, but we should keep in mind that they are included not in their capacity of being an abstract member of society but as bearers of more concrete and particular roles.

One may be tempted to think that it is better to be included *qua* teacher or consumer than *qua* citizen, represented in a distant central body by equally abstract representatives. And indeed, as far as one's own interests are furthered by such direct forms of participation, there may be some truth in this. The disadvantage is, however, that there is no longer a *locus de-*

34 The Tabaksblat committee is an example: the trade unions were not included. See Stamhuis, Jellienke N., *Conflicting Interests in Corporate Regulation: An exploration of the limits of the interactionist approach to legislation in employee participation and corporate governance*, (dissertation), Groningen, Dec. 2006.

35 Hood, Christopher, Gaming in Targetworld: The Targets Approach to Managing British Public Services, in: *Public Administration Rev.* July/August 2006, p. 515-521.

36 A.R. Mackor, *Te meten, of niet te meten: dat is de vraag* (Inaugural lecture, University of Groningen), Amsterdam: SWP 2006.

liberandi where the various interests come together. Outsourcing areas of legislation means outsourcing to *specific agencies or institutions*, organised around the aim that is imposed by the central level. Rules concerning `health and safety at work' are drawn up by committees, boards and institutions that all somehow have to do with `health and safety at work'. They do not take into account other issues, such as environmental concerns, since they are simply not instituted to that end. Rulemaking is conducted in various functional regimes, which rarely interact with each other. This means that a bird's eye view encompassing different interests is lacking. Coordination between these functional regimes is highly problematical. If rulemaking is delegated and passed on to below, parliament is no longer the public space where the relationship and priority of the different aims and goals can be discussed and assessed.

We should conclude then that a strong public space can only partially be safeguarded in a type of regulation in which rulemaking is outsourced to lower echelons. Only explicitness is served, whereas inclusion is doubtful and abstraction is downright problematic. It should be noted, however, that in such a regulatory landscape, the boundaries between public and private are also drawn in a different way. The process of what is commonly called `privatization' did not make things more `private'. On the contrary: figures and data concerning the performance of schools and hospitals are now publicly available on the Internet, and standards have become explicit which make them liable to change and criticism by outsiders. At the same time, however, affairs are conducted in a less public way at the more central level. Debates that used to be conducted in parliament are negotiated in the corridors, decisions as to the composition of important (rulemaking) bodies are taken in ways and quarters that are not accessible to the public at large (comitology).

7 The judiciary

The judge is probably the most plausible candidate to act as a third party, who by his impartiality can act as a defender of a public space. Judges include, weigh and balance the various interests involved, they do so by reference to a body of explicit rules that are used as justification for their decisions, and in judging they make use of impersonal, sometimes even highly abstract roles. The judge is about the only figure still surviving who is almost generally acknowledged to be the embodiment of the public sphere, infinitely less `personal' than the `ordinary' and all too human figure of the queen.

It is no wonder then that at the sight of the crumbling public authority of the nation-state, which in the form of a welfare-state,, as we have seen, increasingly takes on the role of a stakeholder with interests of its own, the judiciary has been invoked not only as a rival defender of the public sphere, but also as an infinitely better one. According to several writers[37] it is to the judge we should turn for the protection of our rights and interests. It is maintained that a more active role of the judge does not flout the principles of a state based on the rule of law, but instead can quite easily be fitted in the constitutional make-up. And indeed, since in a welfare state it is not the judge who distributes burdens and benefits he is better equipped to

37 In the Dutch literature examples are Brenninkmeijer, A.F.M., Het primaat van de politiek bestaat niet meer. Over politieke rechtspraak, rechterlijk activisme en de legitimatie van rechterlijke oordeelsvorming in: F.C.L.M. Jacobs en C.W.Maris (eds.), *Rechtsvinding en de Grondslagen van het Recht,* Van Gorcum, 1996, p. 123-145; Rijpkema, Peter, *Rechtersrecht*, Den Haag: Boom Juridische Uitgevers 2001, but also the official report to the government *De toekomst van de nationale rechtsstaat*, WRR, nov. 2002

see to it that no vital interests are excluded or harmed than the legislator with its programs, projects and aims.

However, there are problems here too which surface if we examine once more the three virtues required of any defender of the public space. The main problem is the law itself. As Habermas remarked, the law is the connection between two kinds of procedural legitimacy.[38] The legitimacy of the judicial procedure is to a large extent dependent on the question whether the law was administered properly. But the law can play this role on the basis of the assumption that it reflects the will of the majority of the (representatives of) the citizens. So the legitimacy of the judge depends for a large part on the legitimacy of the law and that legitimacy in turn depends on the legitimacy of parliamentary procedures of decision-making. The law is therefore the connective tissue, linking democratic and judicial procedures.

This connective issue, however, is losing firmness if the central legislator contends itself with vague standards prescribing just some values (fairness and equity) or abstract aims to be pursued. If the judge has to cope with such vague standards, the degree of inclusiveness will be diminished. Inclusiveness of interests is for a large part guaranteed by the assumption that the law embodies a balance between interests since it is the outcome reached in a democratic procedure that is designed to include as many interests as possible. If the law is too uninformative to act as such a living compromise or balance, this would entail that from now on the judge can only hope to include the interests of the *parties before him*; the concrete parties of the case at hand. But obviously, this limits the degree of inclusiveness considerably.

The same applies to the virtue of explicitness. Having no recourse to explicit standards, the judge has no other option than to formulate them himself or to rely on the rules and standards formulated by others (supervisors, organisations). It is clear that the judge is often reluctant to execute the job himself. He will remain on the safe side, referring to fairness and equity, and will not take the risk that his decision be repealed by courts of higher instance.[39] If, on the other hand, he takes the virtue of explicitness seriously, the judge has no other option than to rely on the rules and norms that have been developed by the lower echelons.

However, if he chooses the latter option, he is confronted with the problem that he cannot act as the judge who is blind to the peculiarities and contingencies of the concrete persons in front of him, which are relevant to the case at hand. He has to rely on norms for instance, which inform him that this particular branch of industry, of this particular size, can commonly be expected to achieve this particular level of performance in, say, health and safety precautions or environmental measures. He has to get into detail, and to take into consideration the particular make-up of the parties before him. In other words: he loses the virtue of abstraction. Although he himself may still represent the disembodied public realm, the parties before him will turn more and more into the concrete entities or living individuals they are, and whose circumstances should be taken into account. Of course, this problem is not new. It is inherent in any form of judicial decision-making. What is new, however, is the extent to which particular characteristics should be considered. If norms are made by lower echelons,

38 Habermas, J., *1988*, op.cit., p. 73.

39 This risk-avoidance was criticised by Barendrecht, Maurits, *Recht als model van rechtvaardigheid: Beschouwingen over vage en scherpe normen, over binding aan het recht en over rechtsvorming,* Kluwer, Deventer, 1992.

tailored to their specific needs and capabilities, these particular characteristics determine the norms that are applicable.

We may conclude that even if we are justified in our belief that the judge is genuinely disinterested and impartial, he cannot attain sufficient inclusiveness, explicitness and abstraction to uphold a strong public sphere on his own. He is bound by the law and the shortcomings of the law directly affect the judge as well. Vague laws will compel him to either use his own discretion, which limits the inclusiveness of interests, or to rely on standards of other bodies, which limits the degree of abstraction. Needless to say that this applies to both the national courts and to the ECJ.

8 Possible directions

Not one of the players in the field seems eminently suitable as a defender of the public sphere. This has nothing to do with the shortcomings of the players, but with the enormous complexity of the tasks that are undertaken. To create and sustain a society where socio-economic rights are safeguarded, where the financial climate is wholesome and a thriving market is ensured, where safety is guaranteed and the environment is protected, where sciences and arts are flourishing (but flora and fauna as well) and where a great diversity of interests, opinions and values are taken into account is something that cannot be brought about by the nation-state or by any supra-national entity. Such a task probably calls for an entirely different ordering of affairs.

It is probable that the current system of goal-regulation and outsourcing of regulation is a beginning of such a new ordering. If that is right, we should try to repair its shortcomings. The loss of abstraction is probably not to be remedied. The more regulation takes place at lower levels, the less room there is for abstract concepts such as ` the citizen'. Probably, the functional regimes will increase in importance. Already now this is how a major part of European legislation is drafted.[40] This might imply a supranational ordering along functionalist lines. Whether such an ordering might overcome fragmentation and concretisation is yet to be seen.

As for explicitness, we have seen that rules are made extremely explicit by the lower echelons which are required to report on the progress made. Elsewhere I describe the perverting effects of such an excessive degree of explicitness more fully.[41] But its effects can be beneficial as well (enabling change and criticism). Further analysis of the conditions under which detrimental and beneficial effects can be expected seems to be necessary.

Inclusiveness should be ensured by institutionalising the way committees and boards, professional bodies and associations should be constituted. It should no longer be possible that `self-regulating bodies' are created in a haphazard way, on the spur of the moment. Also the procedures of decision-making and rulemaking should be subjected to explicit rules, safeguarding at least *a moderate degree* of transparency in these corners. Not only the outcomes (rules and

40 Smismans, Stijn, *Law, Legitimacy, and European Governance: Functional Participation and Social Regulation*, Oxford: OUP. 2004.

41 `Who is regulating the self?', forthcoming.

codes) should be published, but also the procedures by which they were devised should be accessible to the public at large. Deficiencies in inclusiveness are then noticed more easily.

The lack of coordination that is felt so clearly in this style of legislation should be addressed by thinking of ways to manage potential conflicts between functional regimes. National authorities should probably spend less time on controlling post hoc what each sector has done and not done, and devote more time to the organisation of the traffic *between* the various sectors.

Finally, the nation-state should try to regain some of its impartiality by thinking of new ways to separate powers. Legislative powers should be strictly separated from the competences to allocate funding, subsidies and benefits. It should be constitutionally prohibited to use subsidies as an instrument to enforce policies. Safeguarding socio-economic rights should not be dependent on the performance of civil duties. Above all, it should no longer be possible to turn socio-economic rights into favors attached to civil obedience or performance.

9 Conclusion

On the basis of a broad notion of the public sphere as a space where one acts in a particular way in order to be understood by relative strangers, I have tried to formulate a few normative criteria that should be met in order to maintain that sphere. The public space should be inclusive, in the sense that different opinions, rules, values and interests are taken into account. It should coordinate these differences on the basis of rules that are explicit, clear and precise and which can therefore serve as criteria for justification as well as criticism. Finally, the categories used as well as the rights and duties attached to them should be fairly abstract. They should abstract from the particularities of the individual persons and circumstances in order to arrive at shared meanings.

Explicitness, abstraction and inclusiveness do not arise and grow spontaneously. These virtues ought to be preserved and maintained and that should be done by a neutral third party which is powerful but also impartial enough to include, weigh and balance interests by using explicit rules that cover abstract categories and attach equally abstract rights and duties to them. Several candidates present themselves as such defenders of the public sphere. The most plausible candidate is the nation-state. However, its impartiality can be said to be jeopardized by the essentially distributive tasks that are entrusted to a regulatory welfare-state. The distribution of socio-economic burdens and benefits turns the state into an interested stake-holder, and, consequently, the distinction between rights and favors tends to be blurred. The subjects of such a regulatory state risk losing their abstract title of citizenship to the extent they are addressed and regulated as people with particular needs and interests. Finally, the need to draw fine distinctions according to different needs and interests, leads to an ever-growing body of excessively detailed rules.

The current tendency to overcome this fragmentation by issuing goals to be concretized by the norm-addressees themselves, shifts the defense of the public sphere to a multitude of more or less `self-regulating' bodies, boards and committees. Although this leads to increasing explicitness of rules and standards, the requirement of inclusiveness can only partly be met.

Some of these bodies are more inclusive than others and matters may vary from case to case. Clear rules concerning the degree of inclusiveness are lacking. Finally, the virtue of abstraction cannot be attained at all in this fragmented landscape. Each of the institutions and bodies are organised around a single aim. These functional regimes hardly interact and there is little room for coordination.

The increasing partiality of the nation-state together with the fragmentation that ensues where legislation is outsourced to norm-addressees have led some people to emphasize the role of the judiciary as an important candidate for preserving the public space. However, since the legitimacy of the judge is ultimately based on the law as the product of democratic procedures, he cannot hope to escape from the increasing particularization of categories, the vagueness of the general clauses that are issued at the central level and the lack of inclusiveness resulting from deficient democratic procedures.

Wherever we turn, we are compelled to conclude that the three virtues of explicitness, inclusiveness and abstraction cannot all three be realized to the same extent. The complexity of the matters regulated by the welfare-state led to a situation in which explicitness can only be attained at the cost of abstraction, and inclusiveness can only be attained at the cost of explicitness, whereas all three are affected by the apparent inability of the official domain to retain its impartiality.

We are still a long way from the situation in Gujarat, with which this article began. But we should not take that distance for granted. Where discretion comes in place of explicit rules, and where impersonal roles are particularized, rights sooner or later turn into privileges that can be suspended at will.