

LITERATURE

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Citizenship and privacy: a domain of tension

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*Introduction*

In a dynamic, individualized society personal information is continually subject to change. Bureaucratic organizations, therefore, are increasingly in need of information about citizens, among other reasons to fight fraud. This development forces citizens to be vigilant and places the protection of privacy high on the political agenda. Vigilance is a pre-eminent civic virtue. At the same time, however, safeguarding privacy raises questions. As Minister of Justice Korthals Altes said at the opening ceremonies of the Registration Chamber (1989) society today is characterized by an oversensitivity to everything that even remotely resembles interference or meddling with the individual life-sphere. The Minister was mainly referring to the fight against fraud and crime: criminals should not profit from the protection of privacy. But this does not alter the truth of his statement: interference in other people's affairs is increasingly being rejected.

We could even ask ourselves whether the importance of privacy has been exaggerated to the extent that citizens will use it to avoid their civic responsibility. The call for privacy often camouflages antisocial sentiment or encourages the social isolation emanating from it. The historian Barrington Moore points out that something close to a pathology of privacy has been created. 'It is a nice question whether our society suffers more from the pathology of privacy or from threats to privacy.'<sup>1</sup> He remarks that citizens are becoming increasingly impassive in their reactions to crime when directly confronted with it. Many witnesses even refuse to file charges for fear of getting involved. This reluctance is even greater on the part of neighbours in cases of domestic crimes, such as the physical abuse of children or wife battering. People do not feel authorized to intervene. This tendency to stay aloof is clearly stronger in the USA than in Europe. There are numerous examples of 'bad Samaritans', witnesses refusing to help out. A number of American judges have said these witnesses were right because they were not in any way related to the victims. They were strangers, and strangers do not have any legal obligations towards one another. Many lawyers support this no-duty-to-rescue regulation. The

idea that people do not have any obligations towards each other, except to avoid inflicting harm, is deeply anchored in the minds of Americans.<sup>2</sup>

The right to privacy can also be given an ideological turn. This is the case when privacy is interpreted as the right to be let alone. As early as 1890 the lawyers Samuel Warren and Louis Brandeis defined privacy as such. In 'The Right to Privacy', in which they particularly wanted to protect citizens against the advancing press, they stated:

*'That the individual shall have full protection in person and in property is a principle as old as the common law, but it has been found necessary from time to time to define anew the exact nature and extent of such protection... Gradually the scope of these legal rights (to life, liberty and property) broadened; and now the right to life has come to mean the right to enjoy life, the right to be let alone.'*<sup>3</sup>

Although many people agreed with this outlook, Brandeis himself had reservations. Not long after his research was published he admitted he ought to add a companion piece about 'The Duty of Publicity'. He was an ardent supporter of the necessity of a free press to keep the public well informed. As he lyrically phrased it: 'If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects.'<sup>4</sup>

Unfortunately Brandeis, like many liberal thinkers after him, did not get around to writing an essay on this 'duty of publicity'. This is not surprising, as the right to privacy has become far more important to the personal lifestyle that liberals cherish so much. Some picture privacy as being an impenetrable fortress meant to keep meddlesome people out. That is also not surprising, as the modern liberal political culture is focused strongly on non-interference.<sup>5</sup> Meddling in other people's affairs is conceived as coercion or an impermissible form of paternalism. I agree with Brandeis that the right to privacy requires the counterbalance of the duty of publicity. Citizens have a duty to point out undesirable or harmful developments and make them public. That is a key part of responsible citizenship. The emphasis on citizenship can also entail certain risks. It can infringe on personal freedom. Moreover citizens cannot be expected to be vigilant or responsible all the time.

How much can be expected from citizens? How should citizens put a stop to undesirable or harmful developments? To what extent should employees bring secret information out into the open when their organization has broken legal rules? And to what extent should they violate the privacy of fellow citizens if this serves the constitutional state? All these questions relate to the nature of public responsibility. But before we go into that, we consider another issue: what is good citizenship?

#### *Minimal and maximal citizenship*

In political-philosophical thinking two possible interpretations of citizenship prevail, both of which can be placed at the end of a continuum: the classical republican viewpoint and the liberal viewpoint. The first option, characteristic of Rousseau, emphasizes participation in serving the community. Citizens derive their identity from their activities for society. In this philosophy citizens who take no interest in politics do not deserve a place in society. The second option assigns a minimal role to citizenship. This concept focuses on increasing personal freedom rather than public participation. From a liberal point of view it would be bad to have every citizen actively meddling. This would be too great a threat to privacy and freedom.<sup>6</sup> So the notions of public and private are given completely opposite values. While the liberals more or less consider the public or political to be a necessary evil, subordinate to private life, republicans hold the opposite view. The household is seen as one of life's necessities (deprivation), whereas the public sphere is identified with freedom.

#### *Maximal citizenship: permanent participation*

Let us take a further look at Rousseau's philosophy. In his *The Social Contract* (1762), the *locus classicus* of 'modern' thinking about citizenship, Rousseau develops a number of contested principles about citizenship. He supposes a hypothetical natural situation in which individuals are autonomous, free and equal and cannot be forced into obedience without their own consent. Their freedom consists of observing laws they each draw up for themselves. Rousseau then states that individuals can come together in a social contract to form a sovereign body which is governed by the 'common will'. Everyone transfers their rights to the community, yet remains autonomous. When Rousseau moves on from this hypothetical 'common will' to describing the circumstances under which it can exist, his view on

citizenship alters: he introduces the Spartan model. The free individual drawing up his own laws is replaced by a product of intensive socialization.

In these 'Spartan' sections citizenship begins to dominate life completely. Rousseau even comes up with a 'civic religion' to stimulate patriotism and to check selfishness and discord. He believes private life (love and family ties) is the opposite of justice. For justice requires private interests to be subordinate to the public, universal good. Moreover he considers forcing a person to take on various roles and conflicting loyalties highly undesirable. A citizen like that is no longer 'obsessed' by his country. For the same reason he unconditionally rejects the idea of political representation (and therefore periodical elections). That too would tend to lessen patriotic feeling and lead to faction loyalties, the eternal competition between vested interests. Rousseau accentuates that freedom and continuing participation are two sides of the same coin. This explains his well-known remark that the British are only free once every four years: when they elect their Parliament. Rousseau's arguments end up in a totalitarian vision: a closed and unanimous society in which citizens are completely swallowed up by public life. People are citizens every minute of the day, disciplined, incorruptible and always mobilized for political and military duties. The totalitarian aspects of Rousseau's philosophy have had a great impact. During the French Revolution they were fully adopted. Robespierre and his allies established the 'terror of virtue'. Individual autonomy was sacrificed to the 'indivisible will', the absolute unity of the people. All important matters had to be unanimously organized by the community's common will.

Rousseau's ideas have also had great influence on the socialist movement, especially when a 'direct democracy' was promoted. The general idea was that the greater the participation of the common man in the exercise of power, the sooner the old order and all its injustices could be replaced by a correct order. The impact of this 'wonder religion' has been extremely persistent. It was taken up again with great enthusiasm by the protest movements in the sixties. Many of the reformers of those days believed that citizens should continually participate in the exercise of power. Like Rousseau their expectations of political participation were set very high. They saw political activity as man's real goal in life. Public life, to them,

represented a more complete and valuable life and was more able to meet the need for self-realization than private life. It is easy to criticize this argument. Participation is not the highly regarded experience activists make it out to be. Public action can quickly lose its reputation as moral and altruistic. Public initiatives often hide private interests. Thus, self-denial and dedication to a 'higher good' can form a smoke screen for self-promotion, prestige or aspirations for power.<sup>7</sup> The greatest flaw in Rousseau's philosophy is that it denies the value of privacy. For the sake of the common will (the 'volonté générale'), citizens would not have to hold back personal information or keep secrets from each other. The whole of society should be transparent. This view is not only dangerous but catastrophic to people's sense of justice: mutual trust crumbles, expectations become unstable. Privacy, knowing you are protected and don't have to live in fear, stimulates free expression of opinions and (economic) enterprise. The protection of the private domain is therefore one of the most elementary conditions for public activity.

#### *Minimal citizenship: nightwatchmen*

The arguments many liberals use are exactly the opposite to those used by republicans. Amongst 'laissez faire' economists the opinion prevails that, apart from their duty to obey the law, citizens owe little or nothing to the state. The idea of citizens sacrificing themselves for a public cause, let alone risk their lives for it, seems strange to them. The government is only obeyed because it offers protection and it is hard too see why any gratitude, and therefore duty, should be required in return. This opinion can lead – though not in the case of the moralist Smith, but with economists such as Friedman – to the state (politics) being seen as a parasite. From this viewpoint citizens are not free in the state, but free from the state. They are protected from political power, seen as a monopoly of power threatening to the individual. This suggests that freedom is not a result of the political order, but of economic independence, of production for the market.

However, politics retains the task of protecting the individual. The market therefore remains dependent on the state. It even needs the state essentially, not only to prevent corruption and crime and to maintain contracts, but also to regulate the economy and guarantee a minimal level of

welfare for its citizens. But these citizens are not active in the state. So the notion of citizenship in terms of public judgment and public participation is neglected. Yet public orientation is not entirely lacking; citizens are assigned limited public activities. They are forced into action by their special, mainly economic interests, but they cannot reap any 'benefits' if they do not have some understanding of politics. Thus they have to vote to prevent the (limited) government tasks from being carried out unfairly or ineffectively. But basically citizens remain nightwatchmen, so they can utilize their energy for private goals unhindered. So citizenship is not an intrinsically attractive activity. It is simply a 'necessary evil', one of those activities that can, unfortunately, not be avoided.

The political theoretician Tocqueville sharply criticized the consequences of this vision. Public tranquillity is a good thing, he said in his famous book about American democracy, but we should not be content with that. 'A nation which asks nothing more from the government beyond the maintaining of order, is already a slave in the bottom of its heart. It is a slave to its prosperity and the road is free for the man to tie the fetters.'<sup>8</sup> These eloquent words indicate that the legal order is an extremely vulnerable construction if it is not actively supported by its citizens. Its survival depends not only on legal institutions that function well, but even more on public involvement. It needs citizens who are sensitive to infringements to freedom and who are prepared to defend the law and the institutions that go with it.<sup>9</sup>

Siding with Tocqueville we can state that the social-moral aspects of public life cannot be replaced completely by procedures and laws. The constitutional state functions because of vital moral codes which it can fall back on (and which form the basis of citizenship). They are the life blood of the constitutional state. We have given an outline of two political visions with radically opposite claims. Both options have deficiencies. The liberal option neglects the importance of the public (legal) order and the importance of democratic moral codes for the protection of freedom. The weak point of the republican option lies in the fact that it demands too much public involvement and too much of a sacrifice from individual citizens. Moreover, individual freedom can be put at risk. The one idea is too passive, the other suggests over-activity. The question is now how to give

other

shape to responsibility, the most important civic virtue. First of all we should avoid the deficiencies of both visions. Secondly we ought to investigate to what extent active responsibility is preferable to passive responsibility.

#### *Active responsibility*

Responsibility can be described in terms of loyalty, saying yes, and agreeing to legal or moral rulings. If citizens comment on each other's behaviour, they make it clear to each other what standards they adhere to; they represent standards, rules and role patterns. But responsibility can also conflict with loyalty and even be the opposite of correct behaviour. For instance, duties and assignments related to a certain job can clash with more vital interests, such as preventing an impending disaster. In his study *Responsibility and organization* management expert Mark Bovens repeatedly points out the fact that responsible action can lead to certain standards deliberately being broken. In order to save a person's life one may consider it necessary to abandon normal duties, such as carrying out an assignment at work. If certain company activities entail unacceptable risks to the environment, employees may feel compelled to bring this to public notice (whistleblowing).<sup>10</sup> In such situations citizens show *Zivildcourage* (civil courage), a resister's attitude: they defend a certain cause, criticize, offer help or in another way make it clear that improvement is desired. Such action is a matter of daring, not being afraid to make mistakes, putting yourself at risk. 'Resistance' forces people to take risks: the risk of losing a safe position, losing membership of an organisation, becoming isolated or turning public opinion against themselves. The fear of failure, of taking the wrong action, of being considered meddling or simply of standing out in the crowd, should be overcome. Resistance may require citizens to act counter to old habits or traditions. Their colleagues and relatives may not always appreciate this. In other words, the resistant citizen is the opposite of the 'adjusted' citizen who will not readily decide to take an action that stands out or deviates from common norms and who would rather take a non-committal stance in order not to lose his reputation or 'good name'. Resisters act from a democratic conviction and in the hope that justice will be done and that their different opinion will be accepted by others. It is extremely important that the consequences of their intervention (or refraining from action) be carefully evaluated in advance. This

seems more evident than it actually is. Not everybody is prepared to include the consequences of their actions in their decisions. Religious people with strong principles or pacifists who reject violence under all circumstances, will disregard the consequences of their 'refraining from action'. From their point of view what really matters is a clear conscience and good intentions.

But good intentions or high moral values do not necessarily demonstrate a sense of responsibility. The important thing to do is to carefully balance the predictable consequences of one's own actions against the damage that would be caused by not acting or acting differently. In order to be responsible, citizens have to be accountable. They need sufficient intellectual ability to make choices. If this is the case, their actions can be called to account by a forum, be it the 'internal forum' of the conscience, informal forums of friends or family, or public forums ranging from the courts to television, the 'forum of the nation'.<sup>11</sup>

The significance of justifying one's actions before a forum is evident in liability: bearing moral, legal or political responsibility for the harmful (or shameful) consequences of certain actions. Liability is a form of passive responsibility: people are required to justify their actions after the event. Active responsibility, on the other hand, refers to taking responsibility: people take on duties and obligations. The emphasis is on acting in the present; or to be more precise, on preventing or correcting undesirable situations and events.

Passive responsibility can be defined as a 'latent' virtue. Those who take a case to court, hope that 'justice' will be done and that the situation outside the court chambers is ended or properly compensated. Passive responsibility does not become a manifest virtue until it initiates a learning process: if during the confrontation people realise that they could have acted differently. Those who are confronted with the results of their actions, as well as outsiders in similar situations, can learn from their mistakes. They may be persuaded to change their minds, which may take away obstacles to cooperation.<sup>12</sup> Seen from the point of view of citizenship, liability remains a not very attractive option. It does not encourage prevention. Take for example anonymous situations and in complex orga-

nisations. Often no one can be held responsible. In anonymous situations people can turn to numerous excuses: they are outsiders ('It's none of my business' or 'Let them sort it out themselves'), they do not know anything about it or pretend not to know ('I do not know anything about it', 'I cannot remember'). In complex organisations where people have to conform to bureaucratic rules, they can turn to other excuses ('I am not authorized to do that').

Active responsibility does not involve these problems. For the emphasis is placed on taking the initiative to prevent harmful actions. If citizens act preventively, and thus take responsibility, they often do so because they realise they might one day have to justify their actions before a forum. This forum will often be built into their conscience. The moral restrictions our conscience enforces upon us have a preventive effect. Acting responsibly puts pressure on citizens. It is accompanied by stress, worries and demands a certain extent of self-sacrifice. Citizens find it hard to cope with the pressure of a great variety of duties that have to be carried out at the same time. Being burdened with too many responsibilities can result in a hesitant attitude, delegation of tasks and other methods of avoiding risks. The courage to take important or difficult decisions is lost and people try to protect themselves from mistakes. Therefore, we cannot expect citizens to take responsibility in every situation, to behave like moral heroes in every situation. There are limits to the sacrifices we can ask citizens to make.<sup>13</sup> What harmful or undesirable situations can and should citizens fight? The limits are blurred. When confronted with great injustices or offenses with great social consequences, such as the criminal practices of a contractor or the illegal dumping of toxic waste, one does not have to ask oneself whether action is called for. It is clear that the community will be harmed by this. It is with the 'smaller crimes' that problems arise. Should a student who works without reporting his income to the tax authorities be reported?

It is hard to define where the borderline is. But perhaps two criteria can tell us something about this border. The first is power. The more power a citizen's job entails and the greater the impact of their actions on society, the more their actions should be watched. In other words, possible abuse of power justifies a restriction of the right to privacy. We need to

know more about influential people. Top civil servants and politicians are used to this: they have to meet the higher moral standards of public service and often have to put up with inquiries into their private lives.<sup>14</sup> The same should hold true for people in top economic positions. Though not representatives of government authority, their power could well have greater impact than that of government policy-makers.

A second criterion is intimacy. Interference in an individual's emotional and spiritual life, such as love and religion, should be as limited as possible. For those involved it is less embarrassing having their salary or property publicized than having their intimate experiences brought out in the open. Not surprisingly there is great resistance to social security inspectors checking up on the sexual relations of people living on benefits. This demonstrates that one has to make careful considerations before publicizing rule-violations or abuse. At worst citizenship can be used as a weapon by moralists. What is then left of privacy? The last thing a healthy constitutional community needs is a culture in which it is normal for people to file charges and report on each other all the time. This destroys the very basis of civil life: *trust*.

The key issue is that citizens should judge problem situations themselves, using norms they associate with universal justice. It is important that conflicting standards and interests be properly balanced. In every problem situation the needs and interests of those who violate standards and of those suffering from the results of this have to be examined. In these instances matters of vital, public interest will be decisive factors.<sup>15</sup> It is only under these conditions that we can have any hope that citizens will reasonably intervene and make corrections.

### *Conclusion*

Citizens who signal offenses or dangerous situations can find themselves forced to interfere in private matters and to pass on secret information to the media. There are many signs today pointing to the fact that this aspect of public morality has been highly neglected, especially when compared with the degree of attention given to the right to privacy. The liberal's demand for non-interference has had a major role to play in this development. Nevertheless, a vital constitutional state that functions well depends

on citizens who take seriously their duty of publicity. Associating the right to privacy with the individual and the duty of publicity with the state would produce a distorted picture. Citizens who bring matters to public notice tend to identify themselves with the authority of public opinion rather than with the authority of the state. Publicity is open to the principles of fallibility and listening to both sides. On the contrary, citizens who blindly go to the police when they see rules being violated identify with the positive law, with the 'Obrigkeitsstaat', not with a 'Rechtsstaat'. The habit of filing complaints without independently verifying one's findings beforehand is the action of a subject not of a citizen.

This only emphasizes the fact that a responsible citizen is vigilant towards all institutions of power, including government institutions. Especially when those institutions are not particularly conscientious about adhering to the standards of the constitutional state in their fight against crime and fraud.