LUISS Guido Carli

Religion and Liberal Legitimacy

Margherita Galassini

A thesis submitted to the Department of Political Science of LUISS Guido Carli for the degree of PhD in Politics: History, Theory, Science, Rome, November, 2019.

Abstract

Controversies over the appropriate relationship between religion and politics have spurred the re-emergence of theories of jurisdictional political pluralism that forcefully object to the liberal notion of state sovereignty. On their view, the state acts illegitimately every time it unilaterally enforces and limits individuals' and groups' rights; for state sovereignty is externally limited by the sovereignty of other sources of authority, such as religious ones. The aim of this thesis is to assess the role of state sovereignty and liberal legitimacy in settling questions concerning the scope of the rights to freedom of religion and of association. After the first introductory chapter, in which I set out the background and the framework of my research, this thesis is constituted of two main parts. In the first part (Chapter 2 and Chapter 3), I address theories of jurisdictional political pluralism head on, highlighting their points of disagreement with mainstream liberal understandings of state sovereignty and legitimacy. Hence, the main question that I address in Chapter 3 is the following: how should we conceive of state sovereignty vis-à-vis the authority of religious associations? It is my contention that, despite their superficial differences, both accounts rely on the principle of *Kompetenz-Kompetenz*, according to which the state is the only legitimate authority in drawing the boundary between the private and the public spheres, thus settling controversies about the scope of groups' rights – or about the scope of groups' authority, as pluralists would put it. In the second part of this thesis (Chapter 4 and Chapter 5), I apply Laborde's liberal egalitarian theory of religion and the state to controversies arising from the conflict between rights. My goal here is to defend a plausible liberal account of secularism which allows the state to adequately protect the rights of individuals and groups. Hence, in Chapter 4, I endorse an account which I term tolerant pluralism and which slightly diverges from Laborde's "minimal secularism" in that it accords wider protection to religious manifestations in the public sphere. In Chapter 5, I apply Laborde's framework to the question of whether faith-based businesses and associations may ever permissibly discriminate on morally arbitrary grounds against their employees, customers or patients in the provision of their services. Once again, I suggest a modest

modification of Laborde’s approach so as to eliminate the traces of secularist ideology that it is retains.

Table of Contents

Chapter 1 Introduction

Religion is not a thing of the past - and if you are sceptical, I invite you to reconsider. 84% of the world's population identifies with an organized religion (Sherwood, 2018) and – albeit the most religious countries are also the poorest world nations – Western societies can hardly be regarded as immune from the influence of religion. Until a few decades ago, sociologists were quick to agree that the process of Western modernization - characterized by the secularization paradigm – would eventually spread to all countries, accompanying their transition into more advanced industrial economies; yet, history has proven them wrong in at least two ways. First, the secularization theory finds no support in rapidly modernizing societies such as India or China. Second, Western democracies are witnessing an unexpected resurgence of religion in public life and discourse. In the Old Continent, the influx of asylum seekers from predominantly Muslim countries is rapidly changing the demography of European states. Projections of the growth of the Muslim population in Europe estimate a rise from 4.9% in 2016 to 14% by the year 2050 if the flows of refugees were to stabilize – in numbers and religious composition – to the levels recorded between 2014 and 2016 (Pew Research Centre, 2017). Meanwhile, in the U.S. religious faith remains robust, confirming its first place as the most devout country of all the developed Western democracies, with more than half of American adults praying daily (Fahmy, 2018).

In Western democracies, the resurgence of religion has taken different forms in public discourse. In a desperate fight against the 'Islamic invasion' of Europe, right-wing populist leaders portray themselves as protectors of Christianity and defenders of the European cultural heritage. In Italy, for instance, Matteo Salvini, leader of the League party, during his 2018 electoral campaign swore on the Gospel that "those who are last shall be first" and started what has become his habit of brandishing a rosary at political events and rallies. Similarly, Giorgia Meloni, leader of right wing Brothers of Italy party, has recently rekindled the controversy over the presence of the religious Christmas nativity crib in elementary schools, objecting that those who oppose it are motivated by an ideological fanatism that aims to censor Italy's cultural symbols and traditions (Redazione Scuola, 2019). It thus appears evident that

religion is increasingly instrumentalized on the part of politicians in order to gain more consensus; hence, a dangerous narrative is developed - one that is grounded on the existential distinction between “us” - the community of friends – and “them” - the inimical Muslims. Indeed, Muslim migrants are increasingly portrayed as cultural aliens who threaten national identities and endanger the reproduction of the social fabric[1].

This thesis addresses specific rights claims advanced by religious citizens and groups in order to assess their compatibility with the principles of liberal justice. The rights to freedom of religion and association are increasingly invoked to protect Muslim women’s interest in wearing the Islamic headscarf, Christian bakery owners’ request not to be legally forced to supply cakes with a pro-gay marriage message, or Catholic hospitals’ demand not to provide contraceptive services – whether to their employees or patients. These sorts of questions are deeply divisive and call for resolute state’s interventions. Indeed, political liberalism presupposes state sovereignty, which entitles state authorities to legitimately draw the boundary between the religious and public spheres in settling debates about the appropriate scope of freedom of religion and association. Yet, the re-emergence of theories of jurisdictional political pluralism has put this liberal framework under scrutiny, objecting that the state lacks the legitimacy to unilaterally enforce and limit individuals’ and groups’ rights. For at the heart of theories of political pluralism there is the claim that state sovereignty is externally limited by the sovereignty of other sources of authority, such as religious ones. Hence, the aim of this thesis is to assess the role of state sovereignty and liberal legitimacy in settling questions concerning the scope of the rights to freedom of religion and association. How should we conceive of state sovereignty vis-à-vis the authority of religious associations? Which notion of secularism is consistent with the requirements of liberal legitimacy? Can religious symbols be displayed in the public sphere? Can

[1] In the literature, scholars refer to the ‘securitization’ of migration and Islam: that is, the fabrication of migration and Islam as existential threats to our society (Huysmans, 1998; Laegard, 2019). The concept of securitization is commonly framed with reference to the writings of the Copenhagen School of Security Studies; originally formulated by Waever, the concept of securitization concerns the representation of an issue as ‘posing an existential threat to a designated referent object” (Buzan, Waever & Wilde, 1998: 21).

faith-based businesses and associations ever permissibly discriminate on morally arbitrary grounds against their employees, customers or patients in the provision of their services? In this thesis I intend to put forward reasoned solutions to these debates.

1.1 Political liberalism

In *Political Liberalism*, John Rawls addresses the fundamental challenge posed by deep-seated moral and religious pluralism: "How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime?" (Rawls, 1993: xviii). Rawls' solution lies in the establishment of a freestanding political order – that is, independent from any conception of the good. Indeed, against the backdrop of deep-seated, reasonable pluralism, citizens can nonetheless reach a consensus over a conception of political authority which ought to inform their constitutions and political institutions – i.e. the "basic structure" of a society (Bailey & Gentile, 2015: 2, 3).

Political authority ought not to be justified in terms of any particular doctrine as this would result in its imposition on at least some citizens without their consent. Following contractualism, Rawls places a strong emphasis on the moral obligation of the state to show equal respect to all citizens. He holds that the state's exercise of political is legitimate only if it can be justified to every citizen in terms which he cannot reasonably reject. This is how the state shows equal respect to all citizens. Consequently, Rawls supports a principle of liberal neutrality whereby the exercise of political authority is neutral in relation to the various available comprehensive views and conceptions of the good. Rawls defines a conception of the good as an understanding of what is valuable in life. Rawls stresses that one's understanding of what is required for human flourishing is ultimately linked to one's comprehensive view about the world and one's own position within it by ascribing value and significance to various ends (Patterson, 2004: 718). In sum, political liberalism requires the state to avoid intentionally favouring any particular comprehensive view above another.

But how are governments required to remain neutral among reasonable conceptions of the good? There are different formulations of the principle of liberal neutrality; yet, the one that seems to be best suited to achieve Rawls' aim is the principle of

neutrality of means and ends, which requires the state to remain neutral both with regards to the ends it pursues and to the means through which it intends to achieve those ends. Thus, if a state implements some law L, it ought to be able to justify its *aims* as well as the *measures* chosen to fulfil them in terms which each citizen cannot reject. For every objective and means must be such that no citizen can reasonably reject them as something that is intended to subordinate his conception of the good (Kramer, 2017: 19). Rawls stresses that liberal neutrality is what enables each reasonable comprehensive doctrine to support political liberalism, for it is a political conception that each reasonable citizen may defend without rejecting his own religious or philosophical commitments. Against this backdrop, Rawls articulates his conception of public reason.

According to Rawls, public reason "is part of the idea of democracy itself" (Rawls, 2001: 26). It is intended "to specify the idea of justification in a way appropriate to a political conception of justice for a society characterized, as a democracy is, by reasonable pluralism" (Rawls, 2001: 26). In such a society, citizens recognize that they cannot reach substantive agreement about many of the moral, religious and other matters that divide them (Horton, 2003: 9); consequently, they "need to consider what kinds of reason they may reasonably give one another when fundamental political questions are at stake" (Rawls 1997: 776). These reasons cannot depend on the truth of any comprehensive doctrine, for they ought to be accepted by each citizen, regardless of what particular comprehensive view he might hold. Among the reasons that are to be appealed to when deliberating according to the requirements of public reason there are, for instance, the widely shared political values of freedom and equality (Quong, 2013). What public reason requires then is that government officials and citizens who advocate policies concerning constitutional essentials and matters of basic justice are able to support them with considerations entailing a reasonable balance of public political values. Consequently, public reason represents a standard for evaluating laws, institutions, and the behaviour of government officials (Quong, 2013).

1.2 The shortcomings of liberal neutrality

In *Liberalism with Excellence (2017),* Kramer casts serious doubts on liberal neutralism's ability to deal with some of the most controversial debates that occur in

contemporary societies. In the third chapter of his book, Kramer illustrates his point by focusing on the debates over abortion, euthanasia, same-sex marriage and animal rights.

With regards to abortion, Kramer rightly points out that the crucial issue concerns the moral status of foetuses – that is whether foetuses should be considered as persons. Secular arguments that do not invoke any religious doctrine about the sanctity of human life can be, and have indeed been, put forward in order to defend the view that abortions are instances of culpable murder that should be prohibited by law. John Finnis and other likeminded philosophers refer to "the biological continuity of human organisms, which in its unique genetic composition begins at or very short after conception" (Finnis, 2011, in Kramer, 2017: 112, 113). Consequently, if liberal neutralists are to successfully sustain their "pro-choice" position, they ought to deny that foetuses are persons; for this is the only way to determine the reasonableness of their own position and the unreasonableness of the "pro-life" position. If they fail in this task, they cannot ultimately claim that the legal permissibility of abortion is neutral among all conceptions of the good that are reasonable in relation to the issue of abortion (Kramer, 2017: 145). Yet, if liberals are to object to the attribution of personhood to foetuses, they will need to engage with certain comprehensive doctrines and thus object to those secularized arguments in support of the "pro-choice" position. An appeal to the values of political liberalism will not suffice to counter the "pro-choice" position. Thus, as Kramer stresses, "liberal neutralists who want to remain at the level of detachedness envisaged by Rawls will have omitted to address the issues on which the neutrality and the very reasonableness of their "pro-choice" stances depend" (Kramer, 2017: 146). In sum, liberal neutralists are only able to affirm the neutrality and reasonableness of their view on abortion by rejecting the secularized arguments in favour of the attribution of personhood to foetuses, yet this move is itself a departure from the ideals of public reason that liberal neutralists envisage. Indeed, as Kramer concludes: "without addressing those questions, they would leave unjustified their own claims to neutrality and reasonableness; by addressing those questions, however, they will have abandoned the methodological or eristic detachedness which they have regarded as a hallmark of their neutralism" (Kramer, 2017: 146).

Kramer compellingly argues that the difficulties faced by liberal neutralists in the case of abortion generalize and extend to other fundamental controversies. It is my contention that the difficulties are pervasive. Indeed, they characterize many of the deep disagreements concerning the interpretation and implications of liberal principles. For the present purposes, I will only consider intractable "ontological disagreements about the boundaries of religion – and therefore, of freedom of religious association – itself" (Laborde, 2017 Pavia). Indeed, liberals' take on state-church disputes has predominantly focused on the distinction between the private and public spheres or, in John Locke's words, between 'irreducibly religious' and civil interests so as to 'distinguish exactly the business of civil government from that of religion' (Locke *A letter toleration Pavia*). In contemporary controversies, however, this matter is highly contested. When we are debating whether Catholic adoption agencies should provide their services to gay couples or whether Catholic hospitals should offer contraceptive services or whether Catholic schools should be allowed to discriminate on the basis of gender when hiring teachers, we are in fact debating whether activities such as helping people to build a family, providing health care services, or educating children are irreducibly religious or civil interests. These are deep ontological disagreements that divide religious critics and liberals.

1.3 Method and outline

Litigations over the nature and scope of the rights of churches, non-profits, and for-profit corporations have recently started to spur an intense debate on both sides of the Atlantic about the ontology of groups and their status as rights-holders[2]. In the U.S., the Supreme Court consented to grant the "ministerial exception": the right of religious institutions to be exempt from employment discrimination laws in hiring ministerial employees. It was first recognized in *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission*, where the Supreme Court exempted the church-run school from the Americans with Disabilities

[2] Throughout this thesis, I will refer to groups and to associations interchangeably, by which I mean organized groups, with internal structures and decision procedures, as opposed to racial or ethnic groups or amorphous gatherings of people, such as mobs (Schragger and Schwartzman, 2016: 346).

Act after firing the teacher Cheryl Perich whom filed suit for retaliation[3]. The Court justified its ruling stressing that the freedom of "internal governance of the Church" was at stake. Although the Court did not refer to the principle of "church autonomy" directly, this case led many scholars to argue that it created "a new, extended right of corporate religious freedom" (Laborde, 2017: 177).

The first part of this thesis assesses different ways of conceptualising the existence and status of distinct associations and their relationship with the state. Or, to put it differently, it investigates the different views that liberal theories have about the relationship between individual freedom, social group life and state sovereignty. This analysis can be applied to a number of different kinds of associations – e.g. universities, trade unions, cities and so on – but its main focus here will be on religious associations. In particular, I will discuss theories of jurisdictional political pluralism, which have recently started to resurface in the literature, forcefully objecting to the role of state as the only authority which can legitimately limit the competence of the associations within its territory.

The rationale for my inquiry into this debate is twofold. First, in a time of increasing conflicts between liberal democracies and religious associations over the appropriate scope of their autonomy and rights, I believe that a deeper analysis of the authority of associations vis-à-vis that of the state can be particularly instructive. Second, contemporary theories of jurisdictional political pluralism aim to reconstruct old accounts of corporate freedom, which developed in early-twentieth-century England and became known as British pluralism. This strand of literature, however, has been mostly neglected and it has only recently began to attract a number of scholars, thus giving rise to a re-emergence of this approach in contemporary academic debates

[3] Ms. Perich performed several tasks at the school, including teaching secular subjects and a religious class, leading her students to prayer and devotional exercises, taking her students to chapel service, which she led herself about twice a year. After being diagnosed with narcolepsy, Ms. Perich began the academic year on disability leave. When she received medical clearance from her doctors, Ms. Perich notified the school principal whom responded that she had been replaced by another teacher. Subsequently, Ms. Perich was offered a portion of her health insurance premiums in exchange for her resignation and she threatened to file a suit. The congregation then decided to fire her due to "insubordination and disruptive behaviour". Ms. Perich thus pressed charges against Hosanna-Tabor, claiming that her dismissal violates the Americans with Disabilities Act. (*Hosanna-Tabor,* 2011: 1, 2).

about religious associations and their relationship with the state; yet, these arguments seem to be appearing in a vacuum and are still unfamiliar to many.

The question of what approach can best conceptualize and regulate the coexistence of distinct communities within society has been at the heart of many libertarian theories. Indeed, libertarians stress the importance of individuals' freedom and its role in legitimizing the practices of the voluntary groups they choose to enter. In *The Liberal Archipelago* (2003), Kukathas constructs an account focused on the issues of diversity and authority, thereby criticizing liberals' reliance on social unity as the most desired condition to be achieved by a theory of justice; instead of concentrating the power in the hands of the state, Kukathas advocates the establishment of a liberal society where citizens are free to enter into a variety of voluntary associations, running their affairs according to their creeds and being as illiberal as they want – as long as they grant their members the freedom to leave. Kukathas' commitment to protect individuals' freedom of conscience against all threats, especially those coming from state authority, is a reminder of the political pluralists' insistence on multiple spheres of sovereignty. Indeed, here it is worth quoting a passage of Kukathas in length:

> The metaphor offered here […] is one which pictures political society as an archipelago: an area of sea containing many small islands. The island in question, here, are different communities or, better still, jurisdictions, operating in a sea of mutual toleration. […] The liberal archipelago is a society of societies which is neither the creation nor the object of control of any single authority. It is a society in which authorities function under laws which are themselves beyond the reach of any singular power (Kukathas, 2003: 22).

Libertarian and pluralist theories share a deep commitment to individual freedom which, in turn, motivates their strong defence of the internal life of intermediate groups. Indeed, on both accounts, individuals' ability to form associations and live by their own rules is regarded as an essential component of individuals' freedom. Yet, pluralist theories exhibit distinctive features that distinguish them starkly from other theoretical defences of freedom of association. Political pluralists are primarily concerned with associations as sources of autonomous claims of legitimacy which generate rules and institutions similar to those of the state (Muniz-Fraticelli, 2014: 10). As Muniz-Fraticelli explains, the structure of pluralist position encapsulates three

core claims: the first is the claim of *plurality*, which stipulates that there is a plurality of sources of legitimate authority; the second is the claim of *incommensurability*, which indicates that these sources are somehow incommensurable. The third is the claim of *tragic conflict or tragic loss*, which posits that there is always the possibility – even if only in principle – of a conflict between two authorities, such that any solution will necessarily result in a tragic loss of authority on either or both sides (Muniz-Fraticelli, 2014: 11). Muniz-Fraticelli refers to this as the "parallel structure thesis" (PST). This common structure sets pluralist arguments apart from other accounts concerning values, diversity, authority, or conflict.

Chapter 2 traces the origins of jurisdictional political pluralist theories, exploring the connections between the Germanist conception of order championed by Otto von Gierke, pluralist liberals, such as Montesquieu, Tocqueville and Acton, and British pluralist thought as developed in the works of Maitland and Figgis. In this chapter, I rely on Levy's deconstruction of theoretical accounts concerning different liberal understandings of the presence and coexistence of distinct associations and communities within society (Koyama, 2015. 1). In *Rationalism, Pluralism, and Freedom* (2014), Levy's overarching aim is to point to a tension within the liberal tradition between two opposing approaches to the role of associations: on one side of the spectrum, there are the pluralist liberals who view state centralization with scepticism, favouring the development and protection of local, intermediate groups and communities. On the other Levy identifies the rationalist liberals who pursue "intellectual progress, universalism and equality before a unified law" (Levy, 2014: 1). The former consider intermediate groups as necessary to balance state power and to prevent it from becoming tyrannical. In other words, associations within society secure freedom; the latter, in Levy's words, see "them as sites of local tyranny that the liberal state must be strong enough to keep in check" (Levy, 2014: 2). Levy argues that, contrary to what is commonly thought, British pluralists are part of the liberal tradition. Levy's purpose in his book is thus to counter the tendency to equate the history of liberal thought with social contract theory and rationalism, neglecting other strands of literature – such as ancient constitutionalism. Further, in this chapter, I discuss an important element of the British pluralist tradition, namely the realist theory of group personality, which posits that an association must be able to function similarly to a natural person. This account acknowledges that associations

are constituted by individuals, but it denies that associative intention, agency, and identity are reducible to an aggregate of individual interactions or transactions" (Muniz-Fraticelli, 2014: 199)[4]. Pluralists thus investigate into the metaphysical nature of groups in order to develop a plausible account of their ontology which is able to justify the conception of groups as right-and-duty bearing units. Yet, I intend to argue that, in order to establish what moral and legal rights groups have, an inquiry into their ontological nature is neither necessary nor sufficient.

Chapter 3 discusses the most systematic recent formulation of political pluralism as developed in Muniz-Fraticelli's *The Structure of Pluralism* (2014). I apply Muniz-Fraticelli's political pluralist framework to the resolution of the titanic conflict between the Italian State and the Catholic Church over the legality of divorce. This exercise allows me to put the political pluralist understanding of sovereignty to the test. The fundamental question that I address in this chapter concerns how we should conceive of state sovereignty vis-à-vis the authority of religious associations. I show that Muniz-Fraticelli - just like other pluralists - does concede the state a privileged position when meta-jurisdictional conflicts arise. Hence, doubts may be raised on whether the picture of state sovereignty portrayed by jurisdictional political pluralists is fundamentally opposed to the modern and dominant one in political liberalism, according to which the state is the only sovereign. Laborde seems thus to be right in affirming that political pluralists do in fact "accept the core intuition behind the notion of state sovereignty" (Laborde, 2017: 167). But why is that so? That is, why - and in what sense - does the church accept the legitimacy of state sovereignty? The argument that I will set forth in the remaining part of this paper is that Muniz-Fraticelli's state sovereignty ultimately results from convention. This is consistent with the doctrine of conventionalism and with Hart's notion of the rule of recognition.

[4] Muniz-Fraticelli well summarizes the characteristics that an association needs to possess in order to have its personality recognized as a matter of right (Muniz-Fraticelli, 2014: 199, 200). First, the association's intentions must be ontologically distinguishable from those of its members. Second, an association must be capable of preserving its identity through time. Third, its members are able to understand the group as a unified entity that evolves thorough time, is guided by past intentions and constrained by past decisions Add something. Fourth, it must be able to act in the world and to place itself and others under obligations. In sum, an association must be able to function similarly to a natural person; it is indeed this affinity that leads to the conclusion that associations, just like individual rational agents, are entitled to legal personality.

Consequently, when it is not clear under what jurisdiction a given matter falls, it is the state that has the final say. This is the accepted norm of recognition of our political and legal system. Muniz-Fraticelli's focus on the role of authority in meta-jurisdictional conflicts has the advantage of taking into account the power dynamics that favour the emergence of an authority's interpretation of the political values in question rather than another. Conflict, however, is endemic and only state authorities are equipped to deal with it. We are thus left struggling with the familiar question of how to strike the just balance between conflicting rights and duties. This is precisely the issue that I tackle in Chapter 4 and Chapter 5.

The second part of this thesis applies Laborde's liberal egalitarian theory of religion and the state to controversies arising from the conflict between rights. The egalitarian theory of religious freedom is grounded upon Rawls' understanding of religion as a subset of the broader category of the "conceptions of the good" (Rawls, 1993). It is egalitarian because it considers religious and nonreligious conceptions of the good as being worth of equal consideration and, consequently, all citizens – whether religious or not – ought to be granted equal concern and respect (Laborde, 2015: 248-9). In sum, there should be no discrimination between religious and non-religion citizens, for they all deserve equal consideration in virtue of the fact that all conceptions of the good are on the same place. Liberal egalitarian theorists of religious freedom include Dworkin (2013), Taylor and Maclure (2011), Eisgruber and Sager (2007), Schwartzman (2012, 2017), and Quong (2011). The fundamental claim advanced by these scholars is that religion ought to be regulated by the state through a framework of equal liberty (Laborde, 2017)

Chapter 4 defends an account which I term tolerant pluralism and which slightly diverges from Laborde's "minimal secularism" in that it accords wider protection to religious manifestations in the public sphere. My aim here is to put forward a plausible account of secularism which meets the necessary condition for liberal legitimacy and which is able to accord adequate protection to individuals' right to freedom of religion. I apply Laborde's approach to cases submitted to the European Court of Human Rights (ECHR) concerning the permissibility of wearing personal religious symbols in the public sphere. I first discuss the headscarf *affair* in Turkey and in France, where the prohibition on wearing the Islamic veil applies to ordinary citizens and argue that the ECHR's ruling is inconsistent with liberal legitimacy as it

justifies restrictions on the right to religious freedom by appeal to a comprehensive notion of secularism. Indeed, the ECHR's treatment of religion in the headscarf *affair* may be described as an instance of militant secularism. I then consider another instance of the headscarf *affair* – this time in Switzerland – where the prohibition targeted a state official. I claim that in the Swiss case the ruling illegitimately violated the applicant's personal liberty. Last, I discuss the permissibility of displaying institutional religious symbols in the public sphere by focussing on the crucifix case in Italy; here, I defend the ECHR's judgment and disagree with Laborde's view that it violates the third condition of minimal secularism – namely civic equality. Broadly speaking, it is my contention that Laborde's notion of minimal secularism is still too secularist with regard to state officials' right to wear – and states' permissibility to display – religious symbols in the public sphere.

Chapter 5 addresses the issue of groups' exemption rights from antidiscrimination legislations and questions whether they constitute unfair privileges or just measures to protect the rights of individuals and groups. Once again, I assess Laborde's framework for the justice of group exemptions, which identifies two salient interests that associations may appeal to so as to be considered for exemption: these are *coherence* and *competence* interests. My aim in this chapter is to object to Laborde's claim that "as soon as an organization claims to serve the public, it is not "religious" in the sense that matters to standing in exemptions from discrimination claims" (Laborde, 2017: 185); for it is my contention that Laborde's restriction dismisses too swiftly the claim of associations that have an interest in serving the public at large or their local community in a way that reflects their ethos. I use as a case study the example of faith-based hospitals that refuse to provide contraceptive and abortion services to their employees and patients and faith-based adoption agencies that do not want to be forced to serve LGBT couples. I argue that, consistently, with Laborde's account of the justice of individual exemptions, those associations' claims are instances of religiously conservative demands and, as such, they are morally ambivalent; further, I emphasize associations' expressive rights which protect their interest in influencing society by conveying a message which is conducive to the pluralism that characterizes democratic societies. Consequently, I posit that associations' exemption claims ought to be balanced against the individual rights of nondiscrimination within the framework of a contextual analysis, which has the

advantage of taking into account the specific contexts in which associations exist and operate. Once again, it is my contention that Laborde's approach retains some traces of secularist ideology. This feature poses serious dangers for the protection of group autonomy; that is, it runs the risk of legitimizing the suppression of the voice and ways of life of "those who would make a *nomos* other than that of the state" (Cover in Inazu, 2012: 18).

Chapter 2 The Pluralist Tradition

2.1 Introduction

The notion of sovereignty expresses the idea that there is an ultimate and unitary source of legitimate authority that governs over itself. In a liberal democracy, state sovereignty is taken for granted; for liberal democratic legitimacy presupposes that the state has final jurisdiction over its territory. In other words, the liberal state enjoys Kompetenz-kompetenz, according to which it may legitimately limit the competence of the associations within its territory. Or, to put it in Laborde's words, "the state has the competence to adjudicate jurisdictional boundary questions. In particular, it adjudicates conflicts of jurisdiction between […] what pertains to the religious and the secular" (Laborde, 2017: 162). This understanding of sovereignty – understood as 'monist' or 'plenary' - is under attack as theories of political pluralism are resurfacing in contemporary literature. This chapter aims at exploring the roots of the pluralist tradition in order to shed light on the main objections they raise against the standard liberal conceptions of sovereignty and legitimacy.

2.2 The German roots: Gierke

The movement known as British pluralism originated in early-twentieth-century England. Inspired by the work of the German jurist, philosopher and historian, Otto von Gierke (1841-1921), British pluralists apply the concept of 'persons' to groups and consider the state as one group among many, thus objecting to the orthodox notion of sovereignty. British pluralism has as its main target the Hobbesian conception of the state and finds its full exposition and defence in the works by F. W. Maitland (1850 – 1906), J. N. Figgis (1866 – 1919), Ernest Barker (1874 – 1960), G. D. H. Cole (1889 – 1959) and Harold Laski (1893 – 1950). Widely considered as one of the greatest philosophers of Western political thought, Thomas Hobbes is the founder of 'social contract theory', the view that rational, free and equal individuals reach an agreement – on enter into a contract – to generate the political principles and arrangements of the society in which they wish to live. In the *Leviathan* (1651), Hobbes reaches the conclusion – appalling to most – that individuals entering into a social contract should voluntarily surrender their rights and freedoms to an absolute

sovereign authority. This Hobbesian conception of unlimited and undivided state power is precisely what the British pluralists raise up against.

In order to grasp the scope and magnitude of the pluralist critique of state sovereignty, it is useful to shed light on the distinction that Gierke draws *Das deutsche Genossenchaftsrecht* between two conceptions of group unity: “unity-in-plurality" and “plurality-in-unity" (Runciman, 1997: 37). By the former, the parts that constitute the group come before the whole, that is the unity of the group is viewed as stemming from an agreement between its members. By the latter, the whole come before its parts, that is the unity of the group is conceived as precedent to and, in some sense, determinant of the individuality of its members (Runciman, 1997: 37). Further, the struggle between the two conceptions of group unity is in turn linked to the cultural conflict between the Romanist and Germanist conceptions of order, which Gierke groups under the two broad categories of “antique-modern” and “medieval” thinking; while Romanicism understands group life in terms of the two associational models of Roman private law – the *societas* and the *universitas* – Germanism focuses on the idea of *Genossenchaft*, or “fellowship”(Runicman, 1997: 35). Hence, as Runicman well puts it:

> ‘Unity-in-plurality' is the ‘antique-modern’ conception, the typical preference for both Roman and natural-law theorists, exemplified by the model of the *societas* and usually couched in the mechanistic language of contract. ‘Plurality-in-unity' is the ‘medieval’ conception, typically associated with the language of organicism (Runciman, 1997: 37).

Gierke explicitly sides with the Gemanist conception, while Hobbes is taken to champion the Romanist counterpart. On Gierke’s view, the problem with the former is that the unity of the group resides in the single person of the sovereign at the cost of the parts, for individuals destroy themselves “...thus enthroning the “bearer” of the State-authority [I.e. the person of the sovereign] as a mortal god” (Gierke, 1934: 61 in Runciman, 1997: 41). The notion of plurality-in-unity, on the other hand, is able to acknowledge the unity of the group without renouncing to the plurality represented by all the individuals and groups which form the society. Indeed, in the period spanning from the second half of the nineteenth century to the early twentieth century, the concessionism theory of associations acquired a significant momentum.

On this view, the individual and the state are the only political agents with inherent legitimacy: the former as a natural person entitled to rights and as the source of state legitimacy, the latter as the representative of the will of the people. Associations, on the other hand, are legal fictions, which only exist at the state's fiat (Hirst, 2000: 110).

Most importantly, on Gierke's account, groups of the former kind can only possess an artificial personality, whereas groups of the latter may be regarded as persons, thus possessing real group personality. Gierke's notion of personality is linked to the idea of rights, for in German jurisprudence rights are ascribed to persons. The right to sovereignty – as Gierke conceives of it – can only exist if there is a single person to possess it; contracts can only create *societas* which – as corporate unities – cannot possess real single personality, but only fictious one, which is hence unable to possess the right to sovereignty (Runciman, 1997: 37, 39). Indeed, Gierke objects to Hobbes' account of state personality on the grounds that it is ascribed to the person of the sovereign and not to his commonwealth, whose personality is thus "purely external" (Gierke, 1934: 61 in Runciman, 1997: 41). Hence, the central critique that Gierke raises is that Hobbes' single state personality begins with single individuals whom voluntarily surrender their authority to the sovereign and ends with the illusory unity which results from the idea that the state's personality may only be attained through representation by a single person or body possessing fictious personality (Runciman, 1997: 41 – 43).

On the plurality-in-unity conception, each part reflects the whole, which entails that their ends must be broadly aligned, that is they ought to share a purpose that is beyond their own internal ends. What is required is a juristic notion of this unity, which renders "groups both equivalent to and independent of the individuals they contain" (Runciman, 1997: 48). The idea of real group personality is peculiarly medieval and it applies to the *Genossenchaft*, which is viewed as a real group person: it is a person because it is a legal entity, and thus a bearer of rights; it is real because – while being a legal entity – it is not the result of a contractual or concessionary legal arrangement (Runciman, 1997: 51, 52). Similarly to natural persons then, the law applies to the fellowship without creating it, just like it does not create the individual. Most importantly, the conception of plurality-in-unity is reflected in the *Genossenchaft* as it exhibits reciprocity between the personality of the groups

and that of its members, both of which are subjects of rights; consequently, the unity of the whole manifests itself in the legal relations of its parts, which is to say that every right exercised by the group is reflected in the rights exercised by each of its members (Runciman, 1997: 52). In this way, Gierke provides the juristically coherent organicism that he was after.

Further, Gierke endorses a strictly Germanic notion of state – the *Rechtsstaat* – which is an extension of the idea of the fellowship in that it is the bearer of rights precisely *because* of the totality of the legal relations within it. The state (the whole) is thus inextricably linked to each of the individuals and fellowships (the parts) within it so that there can be no representative of the state since every part is an aspect of it (Runicman, 1997: 53). Gierke well describes the *Rechtsstaat* as "the idea of a State which existed only in the law and for the law, and whose whole life was bound by a legal order that regulated alike all public and all private relationships" (Gierke, 1900: 73 in Runciman: 53). In sum, Gierke's understanding of state is entirely grounded in the law and yet possesses real personality.

When Gierke's philosophical outlook is adapted to the English tradition, the idea of "pluralism" is the one that best approximates his understanding of the state, for it conveys the sense of diversity inherent among groups of individuals, rather than among individuals themselves; Gierke focuses on groups as the means to achieve individual freedom. As I will show in the next sections, this idea will be inherited by British pluralists.

2.3 British pluralists

2.3.1 Matiland

Maitland is the first author to translate Gierke's *Das Deutsche Genossenschaftsrech* into English and to endorse the doctrine of real group personality. Maitland's core claim is that – in recognizing the personality of groups – law merely tracks something that already exists, rather than creating it *ex novo*. Indeed, he states that "group-personality is no purely legal phenomenon" (Maitland, 1911: 315). The emphasis here is on the social order that predates the birth of the modern state, when guilds represented an integral part of the medieval social fabric. Indeed, Maitland's primary

interest is to seek out the most accurate relationship that may exist between legal ideas and real social facts (Levy, 2014: 247).

Most importantly, Maitland – as well as Gierke and British pluralists more generally – aims to reject the concession theory, which conceives of groups as legal fictions whose capacity to exercise rights depends exclusively on state's concession. In turn, the concession theory stems from the idea that laws are imperatives. H. L. A. Hart draws the distinction between law founded on command – or order – and rule: the former is issued by the sovereign and is backed up by the threat of sanctions, while the latter puts forward guidelines determining what can be done in order to access the resources granted by a legal system – e.g. marriage or will (Runciman, 1997: 113). Contrary to laws founded on command, those founded on rule do not constrain individuals' behaviour. It appears evident that legal systems exhibit laws of both kinds. Runciman claims that "concession theory is a product of the idea that laws are commands... [because] incorporation is here understood as an authoritative act on the part of a sovereign, compelling individuals to behave in certain ways, threatening them with punishment if they do not" (1997: 113). In sum, "corporations must be formed where and when the law insists" (Runciman, 1997: 115)[5]. But then Hobbes has a hard time defending the view that laws are imperatives, for corporations are authorised by general laws which therefore do not force individuals to form corporations (Runciman, 1997: 113). Yet, Hobbes cannot renounce to the idea that the privileges of group personality are linked to the model of concession and hence command (Runciman, 1997: 113).

The imperative mode of legal activity is opposed to what can be referred to as the 'enabling' mode, whereby the legal system allows – but does not force – individuals to take up privileges (Runciman, 1997: 114). A central element in the enabling mode is the requirement that the subject who wishes to access a privilege provided by the legal system performs a given action, whose absence results in his failure to be granted the privilege. An alternative mode of legal activity is hence introduced once the rules no longer demand the performance of an action. Hart identifies these rules

[5] Runciman explains that the concession theory does contain rule-based elements (e.g. guidelines on how to form corporations), but it can nevertheless be considered as an "example of law functioning in the imperative mode" (Runciman, 1997: 116).

as having an ‘external’ rather than ‘internal’ force – e.g. science (Runciman, 1997: 115); in the former case, the mode of legal activity is ‘deterministic’, whereby the law matches the social reality and hence recognises what is ‘really’ there, regardless of individuals’ or groups’ own preferences.

On Maitland’s view then, groups acquire personality on their own; they do not have to rely on the sovereign’s approval. This implies Maitland’s rejection of the concession theory and endorsement of the deterministic mode. Consequently, in moving from fictious to real group personality, Maitland replaces one conception of the law with another. The abandonment of the fictious personality of groups is significant because, when groups are conceived of as fictious, the law is akin the formalisation in a different realm of natural persons’ actions so that it can serve the purpose of the sovereign or the group itself. With real group personality, on the other hand, the law simply accounts for what is already present in the real world. Hence, Runciman well summarises it as follows: “the concept of real group personality closes the gap between the world described in law and the world in which men live” (Runciman, 1997: 117). Yet, as I will argue below, there are reasons to be sceptical of the claim that an account of corporate personality – be it the Real Entity theory, the Concession Theory of the Fiction theory – is required in order to ascribe moral and legal rights to groups (Schragger and Schwartzman, 2016: 353).

2.3.2 Figgis

Figgis’ intellectual efforts focusses on defending the authority and independence of the Church of England. It is for this purpose that Figgis’ strongly relies on the realist account of group personality, rendering it an essential and characteristic precept of British pluralist thought. On his view, the existence of groups is strongly connected to the idea of individuals as social beings. Indeed, in being parts of a group, individuals not only form and develop the group by generating its ethos and practices, but they themselves experience a process of change and enhancement in virtue of their being members of the group (Hirst, 2000: 111). Hence, the state’s interference into the lives of groups irremediably undermines individual freedom and creativity. Indeed, Figgis writes: “this false conception of the State as the only true political entity apart from the individual is at variance not only with ecclesiastical liberty, but with the freedom of all other communal life, and ultimately that of the individual” (Figgis, 1913: 100). Yet, contrary to other pluralists – such as Cole and Laski, who

end up treating the state as one association among many – he does not deny the primacy of state power, whose laws are conducive to the protection of the rights and freedoms of groups. Figgis thus distinguishes between the necessary tool of granting the state legal primacy and the unnecessary evil of ascribing it omnicompetence (Hirst, 2000: 112); that is to say, the pluralist political system requires a primary source of law while, at the same time, granting associations their self-governing powers within their jurisdictions. In this way, the secular state can protect the interests of secular citizens – or religious believers who wish to refer to civil law – while religious groups can impose their own precepts on their members[6].

In his forceful objection to the resolution of the Free Church of Scotland case (Bannantyne v. Overtoun, 1904. AC 515), Figgis attacks concessionism as a doctrine that ascribes excessive power to state, to the detriment of the independent evolution of civil society, and in particular that of the church (Figgis, 1913). The Free Church of Scotland was established in 1843 following a major split in the Church of Scotland that became known as the Disruption. The minority that left the established church and formed the new body supported the principle of establishment, while upholding their freedom to control their internal affairs without state interference; further, they were faithful believers in Calvinism. In 1900, the Assembly of the Free Church decided by majority vote to enter into a union with the United Presbyterians. A minority – known as the “Wee frees” - opposed the union, declaring it *ultra vires*. They contended that the amalgamation would destroy the identity of the Free Church, for the United Presbyterians promoted a more liberal interpretation of the Calvinistic doctrine as well as challenged the principle of establishment. In consequence, the argument advanced by the Wee Frees relied on the preservation of the Free Church’s existence, which they claimed was dependent upon the observance of the terms of the original constitution; were these principles to be abandoned, the church would cease to exist (Runciman, 1997: 134). The Wee Frees thus took the case to court and it eventually reached the House of Lords, which ruled in favour of the minority body, awarding them the name of the Free Church and all its property. This decision generated so much discontent that an Act of Parliament

[6] Figgis regards voluntariness a necessary condition of membership.

finally redistributed the property of the church more equally between the two sections of the original Free Church.

Figgis uses the Free Church of Scotland case to advance his core claim that “life is always stronger than law” (Runciman, 1997: 141); this position well captures the doctrine of real group personality. Indeed, the Free Church of Scotland case is pivotal in the development of Figgis’ thought as well as of British political pluralism more generally. Hence, the question that inspires Figgis is the following:

> Does the Church exist by some inward living force, with powers of self-development like a person; or is she a mere aggregate, a fortuitous concourse of ecclesiastical atoms, treated it may be as one for purposes of convenience, but with no real claim to mind or will of her own, except so far as the civil power sees good to invest her for the nonce with a fiction unity (Figgis, 1913: 40)?

Indeed, Figgis’ opposition to the House of Lords’ decision rests on their failure to consider the church “as a society with a principle of inherent life”, instead considering it rigidly bound “by the dead hand of its original documents” (Figgis, 1913: 33). On Figgis’ view then, the terms of the original constitution ought not to bind future church’s members, for this would effectively deny the church as a body the capacity to grow and change. Figgis thus draws the stark distinction between development, or life, on the one hand, and law on the other: the House of Lords sided with the latter, imposing an understanding of the church as a fixed entity, with Figgis forcefully resisting this ‘legal’ argument as the wrong one (Runciman, 1997: 137).

Yet, Figgis’ endorsement of the doctrine of real personality does not come without cost. If it is indeed true that the Free Church of Scotland had a personality of its own, this had to be defended by the state, in the form of the Lords. For, as Runciman points out, the conflict arose within the church and the state never would have interfered had the church been able to address it internally. A further complication is represented by the fact that Figgis’ preferred solution is consistent with the voice of the church’s majority; but what would Figgis' opinion of harder cases be - where the integrity of the groups is threatened by a majority of members that opposes the change? This indeed occured in the Kendroff case, in the United States, which concerned a dispute about the possession of the Russian Orthodox cathedral in New York between American Orthodox Christians and the church’s patriarchate in

Moscow (Runciman, 1997: 140). Contrary to the Scottish Church case, the Orthodox Church was governed by the Moscow patriarch, rather than by majority vote. In this instance, the defender of real group personality has an uncomfortable choice to make: either he leaves the church free to develop on its own terms, following its own practices, which would result in the isolation of the majority of its members; or, he decides to rely on the state's interference to defend the voice of the majority (Runicman, 1997: 140, 141).

The issue of group personality raised by British pluralists is philosophically interesting because of the peculiar features shared by most associations such as an organised institutional structure, a strong historical identity and a capacity to form the self-conception of their members and to be reflected in them (Muniz-Fraticelli, 2014: 183). Indeed, the question of how to conceptualize associations – both ontologically and normatively – is a recurring theme in political philosophy, one which does not admit of easy solutions[7]. Before considering this question in more detail, I now turn to the pluralist liberals' influence on British pluralist political thought.

2.4 The pluralist liberal tradition

In *Rationalism, Pluralism, and Freedom*, Levy situates the British pluralist tradition within the broader history of pluralist liberalism. The author compellingly argues that British pluralism in fact puts forward a combination of Gierke's medievalism with Lord Acton's liberal critique of the centralized state (Levy, 2014: 233, 241). Indeed, Levy takes issue with Runciman's treatment of the British pluralist school insofar as he traces it back to Gierke Germanism alone, with no mention of the influence Acton had on its development[8]. Particularly, Maitland and Figgis – whom where Acton's junior colleagues – demonstrate appreciation of Acton's work; indeed, Levy suggests that the fusion between Actonian liberal federalism and Gierkean medievalism can be traced directly to Maitland's and Figgis' own projects. It is in their works that the liberal influences on British pluralist thought become apparent, thus making British Pluralism so distinctive (Levy, 2014: 242). The doctrine of real group personality that British pluralists inherited from Gierke is not shared by pluralist liberals - such as

[7] Hobbes already disscussed it in the *Leviathan* (1651), chapter 22.

[8] David Nicholls - in *The Pluralist State* - is the only author, together with Levy, that links the British pluralist tradition to Acton.

Montesquieu or Tocqueville; yet, it is Levy's contention that real group personality is reconcilable with as well as necessary to pluralist liberal thought (Levy, 2014: 236).

Tocqueville and Mill - two quintessential liberals and contemporaries – both address the tension between democracy and liberty (Levy, 2014: 211-213). In particular, the two authors focus most their efforts on the relationship between intermediate groups and state power and the models of centralization and decentralization, arriving at two antithetical conclusions. While Tocqueville conceives of intermediate groups as guards against centralized state power, Mill is fiercely suspicious of them and ascribes them the danger of giving rise to local tyrannies. On Levy's view, hence, Mill's and Tocqueville's works exhibit some rationalist and pluralist traits respectively; consequently, Levy includes them in his genealogy of political pluralists. Levy's take on the dispute between the two authors mirrors his overall judgment about the rationalist versus pluralists quarrel – namely, both insights are crucial and should be incorporated in a satisfactory liberal theory, for they capture accurate yet rival conceptions of the social world (Levy, 2014: 214).

Tocqueville writes:

> The prerogatives of the nobility, of the authority of the sovereign courts, of the rights of corporations, or of provincial privileges, all things which softened that blows of authority and maintained a spirit of resistance in the nation... political institutions which, though often opposed to the freedom of individuals, nevertheless served to keep the love of liberty alive in men's souls with obviously valuable results... When towns and provinces form so many different nations within the common motherland, each of them has a particularist spirit opposed to the general spirit of servitude (Tocqueville, 1969: 312-313 in Levy 2014: 215).

Lord Acton, quintessential liberal political theorists in nineteenth-century Britain, writes:

> The modern theory, which has swept away every authority except of that of the State […] is the enemy of that common freedom in which religious freedom is included. It condemns […] every inner group and community, class or corporation, administering its own affairs; […] It recognises liberty only in the individual, because it is only in the individual that liberty can be separated from authority […] Under its sway, therefore, every man may profess his own religion more or less freely; but his religion is not free to administer its own laws. In other words, religious profession is free, but Church government is controlled (Acton, 1907: 151, 152 in Levy, 2014: 237).

Acton's aim is to prevent the democratic absolutism defended by Mill, for he considers it as a threat to individual freedom (Levy, 2014: 239); consequently, he resorts to the idea of constitutional federalism - and hence, divided sovereignty. Indeed, Acton praises American political science for giving birth to the model of the

federal system, which "limits the central government by the powers reserved, and the state governments by the powers they have ceded" (Acton, 1999: 34). Hence, "state rights are at the same time the consummation and the guard of democracy". Acton agrees with Lincoln, quoting him at length, in maintaining that "the rights of the states, and especially the right of each state to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of powers on which the perfection and endurance of our political fabric depend" (Lincoln, 1861 in Acton, 1999: 34) On Acton's view, the ever-present evil of democracy is the tyranny of the majority, which can only be curbed with a divided sovereign power that keeps the power of the whole people in check (Acton, 1907: 80).

Acton and Gierke thus share a commitment to individual freedom, which they both regard as closely bound up with the principles of decentralization, multiple authorities and competing institutions (Levy, 2014: 240)[9]. Levy's aim is thus to argue that, contrary to what is commonly thought, British pluralists are part of the liberal tradition. Indeed, part of Levy's purpose in his book is to counter the tendency to equate the history of liberal thought with social contract theory, neglecting other strands of literature – such as ancient constitutionalism. With their focus on the state as the first and most fundamental social organization created by individuals, contractarians were well aware of the rival liberal views grounded on the importance of intermediate groups and developed by thinkers such as Montesquieu, Constant, Tocqueville and Acton (Levy, 2014: 8). Yet, in the twentieth century liberalism became equated with rationalism – that is, the liberal strand "committed to intellectual progress, universalism, and equality before the law" (Levy, 2014: 1); further, rationalist liberalism rested on individualism as a methodological framework and on the social contract as the foundation of state sovereignty and legitimacy (Levy, 2014: 235). Finally, with the aim of favouring the use of state power for the protection of individuals from the potentially harmful influence of groups, rationalist liberalism upheld the subordination of the church to the state as the only viable and promising legal arrangement of modern states.

[9] Interestingly, Acton's federalism is compatible with Gierke's view of divided sovereignty despite Acton's committed refusal of medieval thinking.

Pluralists clearly had no place in a liberalism that saw Hobbes as its only source; Levy thus rescues their intellectual roots and reconstructs the evolution of the pluralist tradition in order to show how it conflates "a strong normative liberalism about freedom of association and freedom of religion with a kind of sociological holism about group life" (Levy, 2014: 249). Indeed, in the footsteps of both Acton and Gierke, British pluralists grounded their political thought on a sociological and metaphysical conception of groups life as well as on a deeply-rooted commitment to the protection of the freedom of group life, which they regarded as essential to – and even constitutive of – individual freedom. Pluralists' descriptive sociology conceives of many sources of social organization, rather than only one; that is to say that the state is only one such source, and it is not even the oldest one (Levy, 2014: 27).

According to Levy, liberalism is primarily a social theory about political power (Yumatle, 2015: 171). Rationalist liberalism conceives of only one political authority – the state – which acquires legitimacy thought the social contract and then confers rights and freedoms to associations; following Hobbes then, it is individuals' consent to an authority that makes it legitimate. Pluralists, on the other hand, regard legitimacy as stemming from individuals' normative commitments and orders they join such that "those entities that attract particularly strong collective commitments and that are held to have authority to direct human conduct will count as significant distinct political units" (Allard-Tremblay, 2018: 690). In this sense then, associations are not creations of the state – as the rationalist perspective assumes – but rather they exist as independent entities, which are sustained by their members' normative commitments and which, in turn, generate obligations on them[10]. In sum, while the understanding of the social order defended by rationalist liberalism depends entirely on the role of a coercer to enforce it, the one promoted by pluralists is bound up with the "emergence and evolution of norms that govern group life in any particular setting" (Levy, 2014: 36). Indeed, at the heart of the pluralists' endeavour there is the urgency to capture "the inner life of associations", which is independent from the state and derives from "the common practices and aspirations of those individuals" who constitute the group (Muniz-Fraticelli, 2014: 1).

[10] In the next chapter, I will specifically discuss Muniz-Fraticelli's pluralist conception of legitimate authority.

Levy's analysis reaches the persuasive conclusion that the tension between rationalism and pluralism is endemic to liberal political and, as such, it is irresolvable. For there are different sorts of threats to freedom and each of the two approaches highlights some of them, while obscuring others. Indeed, Levy suggests that "there is no systematic way to combine all of the virtues and none of the vices of the two mindsets, and no secure middle way that would allow us to know for sure which are the virtues and which are the vices" (Levy, 2014: 3). Hence, he claims that "in any particular case, there may be rationalist reasons for constraining groups and pluralist reasons for deferring to them that might all be valid" (Levy, 2014: 28).

2.5 The ontological nature of groups: is there really a need for inquiry?

As I explained in the previous sections of this chapter, at the beginning of the twentieth century, controversies over corporate personality predominantly concerned three rival accounts: the Real Entity theory, the Concession theory and the Fiction theory (Schragger and Schwartzman, 2016: 353). The former, the one defended by British pluralists, understands associations as unified moral agents, just like natural persons; it is precisely in virtue of their presumed moral personality that groups possess moral, and hence legal, rights. The Concession theory and the Fiction theory both deny the ontological claims on which the Real Entity theory rests. But they differ in so far as the former considers the group as a unified, yet artificial, entity whose existence and rights are conceded by the state and its laws; the latter, on the other hand, regards the group as an aggregate of individuals that the state treats like a legal person out of convenience, for it is in fact nothing but a legal fiction.

As debates about groups rights continued, theories of groups' ontological nature have evolved. A contemporary analogue of the Real Entity theory is to be found in the standard argument for group rights, whose defenders indeed begin by inquiring into the metaphysical or ontological status of groups; hence, they distinguish between the existence of a group as an independent entity and as an aggregate of the individuals who constitute it, thus siding with the former conception – namely, the one that conceives of groups as possessing real personality (Schragger and Schwartzman, 2016: 349). Defenders of the standard argument then proceed to argue that if a group is a real entity, equipped with rational agency, then it has moral

and, consequently, legal personality which make it a “right-duty-bearing unit” (Maitland, 2003: 63). Consequently, the standard argument establishes the conclusion that groups have rights by appealing to three separate but interconnected claims: the metaphysical, the moral and the legal claim (Schragger and Schwartzman, 2016: 353).

But one may question whether the metaphysical or ontological claim is in fact necessary in order to be able to account for groups as right-and-duty bearing units. Indeed, I agree with Schragger and Schwartzman that “one does not need a particular theory of corporation, organization, or group’s metaphysical status in order to generate a coherent account of their moral or legal rights” (Schragger and Schwartzman, 2016: 347). Instead, we ought to consider the interests, values and relationships that groups aim to promote and assess whether they should be protected with rights[11].

Contrary to British pluralists’ expectations, the Real Entity theory is altogether irrelevant when it comes to settling controversies between groups and the state (Dewey, 1926). As Dewey persuasively shows, the metaphysics of groups neither strengthens nor weakens their claims vis-à-vis the state. For instance, the decision of whether to grant religious associations the right to be exempt, in some circumstances, from anti-discrimination legislations requires the scrupulous assessment of moral and political considerations that transcend entirely from the ontological nature of the groups in question. Indeed, as Dewey points out “each theory” - be it the Real Entity theory, the Concession theory or the Fiction theory - “has been used to serve the same ends, and each has been used to serve opposing ends” (Dewey, 1926: 669). By the early twentieth century, legal thinkers and courts conflated the Concession and Fiction theories, thus appealing to either one of them to ascribe legal personality to groups. American jurisprudence effectively neglected the historical and logical divergence between the two theories in so far as it was exclusively concerned with the application of the notion of legal personality to groups. Similarly, for the courts’ purposes, the distinction between the natural or

[11] In this respect, Schragger and Schwartzman’s approach is not dissimilar to Laborde’s disaggregation strategy, which I will amply discuss in Chapter 4 and 5.

artificial conception of groups had no relevance whatsoever, since both were treated as legal persons.

Thus, Dewey's suggestion is to focus on the consequences that right-and-duty-bearing subjects bring about. Here, Dewey is relying on Charles S. Peirce's pragmatistic rule: "Consider what effects, which might conceivably have practical bearing, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object" (in Dewey 661). Instead of looking for an agent's inhering essence, Dewey point us toward an analysis of the specific consequences that agents have. Most importantly, these consequences ought to be of a particular kind: that is, they "must be social in character, and they must be *such* consequences as are controlled and modified by being the bearing of rights and obligations, privileges and immunities" (Dewey, 1926: 661). In other words, Dewey urges us to spot those consequences that are brought about by agents *because* of their rights and duties. Hence, as the author well puts it:

> "molecules and trees certainly have social consequences; but these consequences are what they are irrespective of having rights and duties. Molecules and trees would continue to behave exactly as they do whatever or not rights and duties were ascribed to them; their consequences would be what they are anyway. But there are some things, bodies singular and corporate, which clearly act differently, or have different consequences, depending upon whether or not they possess rights and duties, and according to what specific rights they possess and what obligations are placed upon them" (Dewey, 1926: 661).

Schragger and Schwartzman show the indeterminacy and insufficiency of theories of groups' ontology in settling cases concerning group rights by discussing the U.S. Supreme Court's reasoning in *Burwell v. Hobby Lobby Stores, Inc.* (2014) (Schragger and Schwartzman, 2016: 361-365). Schragger and Schwartzman begin by considering the claim that the corporation is an aggregation, thus representing the individual rights of its owners. This premise has twofold implications. On the one hand, it may justify corporate free exercise rights in virtue of the free exercise rights of its owners, which would otherwise be unfairly violated just because they are part of a corporation. On the other hand, the aggregate theory may deny corporate rights of conscience in so far as individuals are protected by their individual rights, to which they can appeal also when they exercise such rights in the context of associations.

On this view, individual rights trump corporate rights – rendering them *de facto* void – in cases in which the various owners' conscience and expression rights conflict.

Similar implications are derived from the premise that corporations are real unified entities, distinct from their owners. First, the theory of real group personality may lead to the conclusion that corporations have rights of their own, for the "civil liberties of an organization – say, to exercise religion or to speak – must be considered distinct from the civil liberties of any particular member" (Hartz, J. concurring in Hobby Lobby Stores, Inc. V. Sebelius 10th Circ. 2013 in Schragger and Schwartzman, 2016: 362). Yet, the claim that corporations are moral persons does not necessarily entail that they have particular rights – such as the right to vote or to marry; different sorts of argument are required in order to establish that conclusion. For when it comes to assigning rights, what matters is not so much why a group should be granted rights in general, but rather why it should be granted a given specific right.

Applying Dewey's considerations to the present case, Schragger and Schwartzman intend to demonstrate that demands for legal protection cannot be grounded on groups' metaphysical status. In *Burwell v. Hobby Lobby Stores, Inc.,* the Supreme Court stated that closely held for profit corporations may permissibly refuse to include legally mandated contraceptive coverage into their employees' health insurance plans in virtue of the corporation's religious freedom. Before the Supreme Court's final ruling, lower courts advanced several metaphysical interpretations of the status and nature of corporations. Among these, the opinion expressed by the U.S. Court of Appeals for the Tenth Circuit identified a corporation as a "person" for the purposes of the Religious Freedom Restoration Act (RFRA), claiming that "[I]t is beyond question that associations – not just individuals – have Free Exercise rights" (*Hobby Lobby,* 723 at 1133, in Schragger and Schwartzman, 2016: 363). On one possible interpretation - which the Tenth Circuit initially seemed to endorse - this claim entails that associations serve the purpose of enhancing individuals' rights of free exercise. In consequence, corporate rights of free exercise are valuable only insofar as they are instrumental in the promotion of individual rights, which then favours the reading that corporations are merely aggregate of individuals. Yet, the Tenth Circuit also seemed to support the opposite conclusion: namely that associations have rights which are entirely distinct from the rights of their members.

The court used language such as “the corporate or institutional *aspect* of religious belief”, followed by description of associations as *themselves* religious agents and exercisers of freedom of conscience. In sum, Schragger and Schwartzman conclude that “within the span of a few pages, the Tenth Circuit swung wildly between an aggregate theory of the corporation and a unitary one, between an instrumentalist account of the corporation and one that attributes to it an agency of its own” (Schragger and Schwartzman, 2016: 364). This analysis amply demonstrates the inefficacy and irrelevance of groups ontological accounts in order to reach meaningful conclusions regarding which rights they possess and for what reason.

2.6 Conclusion

As the resurgence of debates over the rights of religious association is spurring intense reflections on the nature of intermediate associations – such as churches, profit or non-profit corporations – some scholars are reviving theories for the ontology of groups, stressing their relevance in determining the rights and duties of associations. In this chapter, I have reconstructed the roots of contemporary theories of jurisdictional pluralism in order to prepare the ground for the assessment of Muniz-Fraticelli's constitutional understanding of sovereignty that follows in the next chapter. Finally, I have addressed one of the central elements of the political pluralist tradition, namely the doctrine of real group personality. I have concluded that an inquiry into group’s ontological nature is neither necessary nor sufficient to derive group’s rights; for the question of the ontological nature of groups is entirely separate from considerations about their moral and legal status (Schragger and Schwartzman, 2016: 347).

Chapter 3 State sovereignty and the jurisdictional boundary problem[12]

3.1 Introduction

How should we conceive of state sovereignty vis-à-vis the authority of religious associations? I will attempt to answer this question by discussing two conflicting views of political authority and state sovereignty. The first is the modern conception and it is the dominant one in contemporary political theory and liberalism; it conceives of only one legitimate political authority – the state – which exercises its power over a political society of free and equal citizens (Allard-Tremblay, 2018: 6). The second is the political pluralist conception, which conceives of a multiplicity of equally legitimate political authorities; its main claim is that state sovereignty is externally limited by the authority of other associations, such as religious associations. Jurisdictional political pluralists identify a legitimacy problem in the modern conception of political authority and stress that the state acts illegitimately every time it unilaterally draws the boundary between the religious and public spheres.

This chapter applies Muniz-Fraticelli's political pluralist theory to the resolution of the titanic conflict between the Italian State and the Catholic Church over the legality of divorce. It shows that the existing arrangements between the Italian State and the Catholic Church are compatible with Muniz-Fraticelli's constitutional understanding of sovereignty; hence, on the author's account, the resolution of the conflict by the Italian Constitutional Court would indeed appear to be legitimate. Yet, doubts may be raised on whether the picture of state sovereignty portrayed by jurisdictional political pluralists is fundamentally opposed to the modern and dominant one in political liberalism. Indeed, despite their insistence on the existence of multiple sources of sovereignty, pluralists seem to concede the state a privileged position when a meta-

[12] I borrow the expression "jurisdictional boundary problem" from Laborde, 2017: 160.

jurisdictional conflict arises. This chapter then argues that Muniz-Fraticelli's theory seems to appeal to a conventional justification for state sovereignty, one that relies on Hart's rule of recognition. I then conclude that Muniz-Fraticelli's focus on the role of authority in meta-jurisdictional conflicts has the advantage of taking into account the power dynamics that favour the emergence of an authority's interpretation of the political values in question rather than another. Conflict, however, is endemic and only state authorities are equipped to deal with it.

3.2 Muniz-Fraticelli on legitimate authority

Contemporary theories of jurisdictional political pluralism object to the principle of *Kompetenz-Kompetenz*, for they argue that the liberal state lacks the legitimacy to draw the boundary between the religious and public spheres; their main claim is that state sovereignty is externally limited by the authority of other associations, such as religious ones. On this view then, it is crucial to preserve "a certain ambit of authority for corporate communities which, while not denying the authority of the state, nonetheless refuse to ground their own legitimacy on the state's acquiescence or permission, and insist on their own standing as arbiters of their own normative sphere" (Muniz-Fraticelli, 2014: 32). Jurisdictional political pluralists thus deny that state law should apply to the internal structure, principles and conduct of religious associations; for first-level associations should enjoy an independent authority. As a result, pluralists stress that the state acts illegitimately every time it unilaterally draws the boundary between the religious and public spheres as it oversteps an authority whose legitimacy rests on principles internal to it. Hence, the key problem that jurisdictional political pluralists identify is the curtailment of legitimate authority.

In *The Structure of* Pluralism (2014), Muniz-Fraticelli puts forward one of the most ambitious contemporary theories of jurisdictional political pluralism. His aim is to create a framework in which multiple authorities are able to carve out their own sphere of competence and be the legitimate final arbiters within their jurisdiction. The author appeals to the notion of federalism, which he considers to be "a species of pluralism", in order to show how different matters fall under the competence of different jurisdictions - either the federal or the state ones (Muniz-Fraticelli, 2014: 117). In a similar fashion then, it is possible to apply the federal structure to groups, thus granting complete autonomy to ecclesiastical authorities with regards to the

selection and structure of clergy; or, similarly, it is possible to have different institutions and laws regulating marriage - say, civil marriage under civil law and matrimony in the Catholic Church, under Catholic rules. This, according to Muniz-Fraticelli, exemplifies a division of sovereign power that can only be realized with a constitutional understanding of sovereignty, "one that recognizes the legal order to be prior to the sovereign structures constituted by it" (Muniz-Fraticelli, 2014: 117). For this kind of constitutional order would prohibit the state - or a non-state authority, say a university - from regulating a matter that falls under the competence and jurisdiction of a religious authority.

3.3 Legitimate authority

One of Muniz-Fraticelli's aims is to rescue pluralism from the undesired conclusion that no association can have authority over its members. Indeed, in an attempt to object to the monist conception of sovereignty, some proponents of pluralism – such as Laski – end up eliminating the possibility of establishing the authority of associations altogether. Muniz-Fraticelli thus seeks to show that the state as well as religious groups can – and in fact do – make claims to legitimate authority (Muniz-Fraticelli, 2014: 47).

Authority entails the right to rule – that is, the right to issue imperatives and constrain subjects to obey by resorting to coercive power. Muniz-Fraticelli grounds the authority of associations on Raz's account of authority (Muniz-Fraticelli, 2014: 168). Raz puts forward an instrumentalist account of authority – which he refers to as "the service conception of authority" - according to which authority serves the purpose of providing reasons for action[13]. This idea is encapsulated in the pre-emption thesis, whereby "the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them" (Raz, 1988: 46). That is to say, the fact that an authority issues a directive is *per se* sufficient to give rise to our obligation to obey, pre-empting the reasons that are in

[13] Raz introduces some basic ideas of the service conception of authority in *The Authority of Law* (1979), develops its core features in *The Morality of Freedom* (1986), and revisits it in *Between Authority and Interpretation* (2009). It is this last formulation that It will rely on.

opposition to the directive, *de facto* replacing the background reasons[14]. Authoritative reasons are pre-emptive only if the authority is legitimate (Raz, 1988: 46)[15]. In order for a person to have legitimate authority over another, there must be "sufficient reasons for the latter to be subject to duties at say-so of the former" (Raz, 2009: 136). Indeed, Raz puts forward two conditions that have to obtain: first, the normal justification thesis, whereby "the subject would better conform to reasons that apply to him anyway […] if he intends to be guided by the authority's directives than if he does not" (Raz, 2009: 136, 137). Second, the independence condition, which establishes that "the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority" (Raz, 2009: 137).

The instrumental nature of Raz's account of authority is manifest in the normal justification thesis in that it entails the justification of authority whose role is to assist our rational capacity in its purpose – namely, to conform with reason. Hence, if the two conditions are right, legitimate authority is a device that allows one to conform to reason better than she could in its absence, while preserving one's autonomy insofar as it is one's judgment which guides her to recognize the authority of another (Raz, 2009: 140 - 142). The soundness of the pre-emptive thesis is grounded on the idea that before authorities' directives are produced, the relevant background reasons are considered and, consequently, a decision is reached regarding what it is that we ought to do. But what if the authority is mistaken about its decision? Raz claims that its directive is binding even in these cases – and, in ideal cases, it is so entirely for authority-dependent reasons.

Finally, Raz addresses the issue of the link between the rulers and the ruled, stating that – ideally - subjects ought to identify themselves with their authority. Yet, this cannot be conceived of as one of the conditions of legitimacy – and, instead, it should be kept as an aspiration; for it is hard to reconcile with our intuition about

[14] In many instances, we have reasons - independent from the authority's directive – to perform the action prescribes by the authority. This is perfectly fine. What matters crucially is that a legitimate authority's directive excludes the reasons that conflict with its directives.

[15] This is indeed to differentiate it from *de facto* authorities – which either claim legitimacy or are acknowledged by others as legitimate.

authorities - namely that, for instance, our state has legitimate authority over us, regardless of whether we identify with it or not (Raz, 2009: 165).

In sum, authorities claim legitimacy in that they claim their right to constrain their subjects; hence, authorities are not mere exercises of power. Further, Raz draws a distinction between theoretical and practical authorities: only the latter can demand obedience, whereas the former – as experts – can only expect to be believed. To put it differently, a doctor's pronouncements are mere good reasons for action – that is, they are reasons for belief; it is up to the individual to decide whether to observe them or not. An authority's directive, on the other hand, by virtue of being a practical authority, expects its directives to be obeyed. As the pre-emption thesis indicates, the agent has to consider them as reason for action, regardless of whether she agrees with their reasoning or not. (Raz 1986)

The state, the church and most organised groups are practical authorities. State's laws are not there to advice citizens on what actions are most conducive to collective coordination[16]; but rather, they exist to constrain citizens to perform the actions that are deemed to be the right – or more appropriate – ones in a society. Similarly, the Catholic Church's prohibition of abortion is a religious imperative. The fact that some believers disagree with it and disregard it does not entail that the Church intends its prohibition to be merely advisory. But are these directives legitimate? By endorsing Raz's account, Muniz-Fraticelli takes the normal justification thesis as one of the conditions of legitimacy; hence, the Church claims authority over the believer in prohibiting abortion because – on its view – this prohibition is justified by reasons that apply to the believer anyway. In turn, the believer accepts the authority of the Church as legitimate because she is more likely to conform to those reasons if she is guided by the authority's directives than if she is not. Crucially, all that has been stated thus far says nothing about the rightness or wrongness of the content of the authority's directives; it just explains how and why associations come to claim legitimate authority – that is, they do so because, after considering the background reasons, *they* believe that their directives are right and binding on its subjects (Muniz-Fraticelli, 2014: 173).

[16] This seems to be the implication of Laski's argument, which Muniz-Fraticelli seeks to counter.

Let us now consider the authority of the state. Muniz-Fraticelli applies the same reasoning both to associations and to the state. Hence he concludes that “a citizen is more likely to abide by the reasons that apply to her – contributing her share in common burdens, or coordinating complex activities like automotive traffic or pre-trial discovery – by submitting to the state’s authority, than by attempting to abide by her reasons directly” (Muniz-Fraticelli, 2014: 174). Crucially, however, Muniz-Fraticelli provides an additional justification for state authority – namely, that “a person may have good reason to submit to the authority of the state when doing so will make it more likely that she will be able to submit to those associations to which she should submit in accordance with the” normal justification thesis (Muniz-Fraticelli, 2014: 174). That is to say, under Raz’s account of authority, a person may legitimately submit to another’s authority if, in so doing, she will be more likely to comply with the reasons that apply to her anyway. This view does not rule out the possibility that a person may have good reason to submit to more than one legitimate authority; indeed, Muniz-Fraticelli acknowledges that one may be subjected to a general authority – such as the state – as well as to a particular authority – such as the Catholic Church. In this way, the state acquires first-order authority over persons *qua* citizens as well as second-order authority over persons *qua* members of associations. The legitimacy of the latter rests on the value of associational autonomy, which is indeed secured by the state (Muniz-Fraticelli, 2014: 175). The crucial issue, however, concerns cases in which a conflict over jurisdiction arises. In the next section, I will address the problems raised by meta-jurisdictional conflicts – that is, conflicts between the authority of the state and that of an association, such as the Catholic Church. In other words, when it is not clear under what jurisdiction a given matter falls, how ought we to determine the legitimate authority to adjudicate the case? This is precisely the problem that arose in the battle for divorce in Italy as state and church authorities disagreed as to whether the legality of divorce ought to extend to the marriages contracted under Canon Law.

3.4 Divorce in Italy

The Lateran Pacts, which were made in 1929 between the Kingdom of Italy and the Holy See, are constituted of two parts: the “Roman question” and Concordat. The former is an international treaty whereby the Holy See recognizes the Italian state – and Rome as its capital – and whereby the sovereignty of Vatican City is

established. The latter regulates the relations between the Italian state and the Catholic Church. The Lateran Pacts are recognised in Article 7 of the Italian Constitution, which recognizes the Catholic Church as a sovereign and independent body and establishes that the relation between the church and the state is to be regulated by the Concordat (Rosa, 1970: 256).

Article 7, however, has given rise to several interpretations and debates since it was first introduced into the Constitution, in 1947. Indeed, among the majority of the Constituent Assembly that voted in favour of the article there were, on the one hand, the Catholics who believed that it would grant the Church a large constitutional autonomy and, on the other hand, the 'laics' or secularists who considered its formulation to be vague enough to allow the state to vindicate its sovereignty on several important issues (De Vigili, 2000: 14).

The crucial question regarded the interpretation of Article 34 of the Concordat, which established that the Italian State recognises the civil effects of marriages performed by the Catholic Church and in consequence of their regulation by Canon Law rather than Civil Law. Specifically, the Catholic Church and the Italian state disagreed on whether Article 34 was consistent with Article 2 of the Fortuna-Basilini law, which extends the validity of divorce to the marriages contracted in keeping with the Concordat. In the dispute, the Catholic Church appealed to Article 34.4 of the Concordat, which stipulated that "causes concerning nullity of matrimony and dispensations from matrimony ratified but not consummated are reserved to the competence of the Ecclesiastical Tribunals and their departments". Thereby, the Church interpreted Article 34 as specifying that the state has limited power to legislate on matter of marriages contracted under Canon Law.

Since Article 7 of the Italian Constitution recognizes the validity of the Concordat and the Catholic Church considered the introduction of divorce in Italy to be in breach of Article 34 of the Concordat, the Church's strategy was first to appeal to Article 7 of the Constitution, thus vindicating the sovereignty of the Catholic Church on the indissolubility of all marriages contracted under Canon Law and declaring the Fortuna-Basilini law to be unconstitutional. Defenders of divorce, on the other hand, stressed that divorce only impinges on the civil effects of marriages and hence would not affect the sacrament of marriage itself. Hence, they do not consider the Fortuna-

Basilini law on divorce to be unconstitutional on the grounds that it relies on the sovereignty of the Italian State with regards to the civil effects of marriages – also those contracted under Canon Law (Lombardi, 1970: 128). Furthermore, on their view, was the State prevented from legislating on the civil effects of marriages, it would have its sovereignty violated.

Second, had the first strategy failed, the Catholic Church supported the possibility of calling a referendum against the introduction of divorce (De Vigili, 2000: 27). Indeed, Article 7 of the Constitution stipulates that, in case of a violation of the Concordat, either the two parties are able to agree on a modification of the Lateran Pacts or they have to resort to a referendum. Indeed, as early as 1967, during the CEI's General Assembly, Monsignor Franco Costa – the most influential mediator between the Pope and Italian politicians – insisted on calling a referendum on divorce (De Vigili, 2000: 59). This marks an important change of direction in the Vatican's relations with Italian politics: for the Catholic Church used to exert its influence behind the scenes, upon individual members of the Christian Democratic party. Mons. Costa's insistence on the referendum may therefore represent an attempt to achieve more transparency in the Vatican's relations with Italian institutions and political affairs (De Vigili, 2000: 60).

After the Parliament's approval of the Fortuna-Basilini law in 1970, the question of the unconstitutionality of divorce was brought before the Constitutional Court, which concluded that the extension of the validity of divorce to marriages contracted under Canon Law was within the sovereignty of the Italian state. Under pressures from the CEI, Catholic organizations and members of the civil society, a referendum against divorce was announced in 1974, when a large majority of voters supported the law.

3.5 Discussing the case of divorce in light of the political pluralist conception of sovereignty

The main argument advanced by the Catholic Church focused on the relation between the civil effects of marriage and its nature as a sacrament. That is, the Church insisted that the civil effects of marriage derive from the marriage contracted under Canon Law. In consequence, when the State recognizes the marriages contracted in keeping with the Concordat, it inevitably also recognizes them as sacraments and as indissoluble in nature (Rosa, 1974: 136, 137). In other words, in

its own judicial system, the Italian State ought to recognize the same characteristics of the marriage contracted under Canon Law that the Catholic law ascribe to it (Rosa, 1974: 137). The crucial point here is that the two authorities give different meanings to the practice of marriage: on the one hand, the Church regards it as a moral union or commitment, on the other hand the State views it as a legal act or transaction (Rosa, 1974: 138).

As Muniz-Fraticelli explains, jurisdictional boundary problems stem from a contestation between two authorities that attribute different meanings to a given practice; the authority which gets to define the practice will also regulate it (Muniz-Fraticelli, 2014: 48, 49). Indeed, Muniz-Fraticelli writes:

> Jurisdictional boundaries cannot be abstractly defined, but involve the attribution of meaning to a social practice, which is an exercise of meta-jurisdictional authority. That is why the focus falls on which of the contesting authorities gets to define the social arena, not on the subject matter over which they contest (Muniz-Fraticelli, 2014: 48).

Muniz-Fraticelli refers to the example of employment regulations and claims that "whether the sub-matter of hiring practices in a school … falls under the social arena of education … is precisely the issue" (Muniz-Fraticelli, 2014: 48). Similarly, the way in which an authority defines the social practice of marriage determines the policy considerations that it deems more appropriate for its regulation. Clearly, both in the case of employment regulations and marriages the activities overlap, thus giving rise to a meta-jurisdictional problem; in short, in order to settle the controversy about which authority will exercise its sovereignty over the practice in question, it is necessary to settle the question of meaning (Muniz-Fraticelli, 2014: 48).

On the pluralist view, a tragic loss of authority will necessarily result every time two competing parties advance their sovereign claims. Indeed, according to Muniz-Fraticelli, the resolution of meta-jurisdictional conflicts may amount to a compromise between the two parties, or a net loss for one of them; yet, it will never result in the supremacy of both claims (Muniz-Fraticelli, 2014: 23-25). This is due to the twofold role that pluralists ascribe to authorities: they define the meaning and boundaries of a practice and they set out the modalities of participation in a practice, which in turn ensures that failure to submit to the authorities' directives amounts to a failure to

engage in the given practice. For instance, “to be a Roman Catholic involves, at a constitutional level, submission to the Magisterium, the teaching function of the Church carried out by the Pope and the bishops. To deny this authority, is not to be a bad Catholic; it is to be Protestant’. Or, ‘to submit questions of academic merit to political judgment not exclusive to professional peers … is not to make a bad academic decision … but to make a decision that is no longer academic” (Muniz-Fraticelli, 2014: 54).

In sum, when there is a conflict between two or more authorities over the merits of a controversy, there are two separate questions to address: firstly, which is the authority that will decide on the merits of the controversy? Secondly, what will be the authority’s judgment of the merits themselves? The ever-present possibility of tragic conflict is due to the fact that the meaning and boundaries of social interactions - e.g. marriage - “are themselves constituted by the authorities that contest the loyalty of subjects” (Muniz-Fraticelli, 2014: 54). The central point that associational pluralists want to make is that even if the conflict between authorities may not be so evident at first, it “will inevitably surface, at least at the margin, just in those existential moments when the identity of a practice … is at stake” (Muniz-Fraticelli, 2014: 55). With regard to the case of divorce then, the fact that the state’s definition of marriage prevailed resulted in a loss of the Catholic Church’s authority.

Let us now turn to question of legitimacy – that is, was the fact that the state’s interpretation of marriage prevailed legitimate? Or, to put it differently, was the adjudication of the conflict between the state and Church authorities legitimate? If so, on what grounds? The question of the constitutionality of divorce was settled by the Italian Constitutional Court, which agreed with the State’s interpretation of marriage in its civil effects and thus concluded that it was within its sovereignty to legislate on this matter. This seems to be consistent with Muniz-Fraticelli's view.

Muniz-Fraticelli explicitly endorses legal positivism and uses it as the analytical framework on which to ground his pluralist critique of sovereignty (Muniz-Fraticelli, 2014: 3). His pluralist account seeks to develop legal and institutional structures which acknowledge and accept the ever present possibility of tragic conflicts between associations, individuals, and the state; yet, contrary to agonistic views, he does not conceive of the conflict stemming from citizens’ multiple loyalties and cross-

cutting memberships as being detrimental to “a stable and structured constitutional and legal compromise” (Muniz-Fraticelli, 2014: 3). For he believes that conflict can be regulated so as to become “intelligible and negotiable” (Muniz-Fraticelli, 2014: 3). Muniz-Fraticelli seeks to find a middle ground between liberal monists, who do not question the state’s role as final arbiter, and agonistic theories (Muniz-Fraticelli, 2014: 3).

On Muniz-Fraticelli's account, when a conflict over jurisdiction arises, it is the state that can legitimately exercise its authority in the adjudication of the dispute, but it can only do so if it internalizes the external limit imposed by the competing association’s own claim to authority (Muniz-Fraticelli, 2014: 179). In other words, Muniz-Fraticelli advocates the establishment of an hybrid polity in which the state has two sources of legitimate authority, each in tension with the other: the state has “both a direct or first-order authority over persons qua citizens, and an indirect or second-order authority over persons qua members of various groups” (Muniz-Fraticelli, 2014: 162). The state’s second-order authority is legitimate because the state is able to provide the constitutional conditions required in order to ensure the autonomy and the effective functioning of associations. Hence, in meta-jurisdictional conflicts, the two sources of state’s authority will inevitably conflict as the first-order authority will seek to defend the interests of individuals as free and equal citizens whereas the second-order authority will seek to advance the reasons of individuals as members of associations.

If we are to apply Muniz-Fraticelli's constitutional theory of sovereignty to the resolution of the conflict over divorce, we may conclude that the Constitutional Court - i.e. the state – legitimately exercised its authority in the adjudication of the dispute because it had internalized the external limit imposed by the Catholic Church’s own claim to authority. Indeed, by recognizing the sovereignty of the Catholic Church and the validity of the Concordat in its constitution, the Italian state may be regarded as having both direct and indirect authority over its citizens.

Yet, doubts may be raised on whether the picture of state sovereignty portrayed by jurisdictional political pluralists is fundamentally opposed to the modern and dominant one in political liberalism, according to which the state is the only sovereign. For, despite the pluralists’ insistence on the existence of multiple sources

of sovereignty, they seem indeed to concede the state a privileged position when a meta-jurisdictional conflict arises. Laborde is thus right in affirming that political pluralists do in fact “accept the core intuition behind the notion of state sovereignty” (Laborde, 2017: 167). But why is that so? That is, why - and in what sense - does the church accept the legitimacy of state sovereignty? The argument that I will set forth in the remaining part of this chapter is that state sovereignty ultimately results from convention[17]. This is consistent with the doctrine of conventionalism and with Hart’s notion of the rule of recognition.

3.6 State sovereignty and the rule of recognition

In the political liberal tradition, state authority has most often been justified by appeal to the notion of consent. This account however is not without criticisms. In search of more stable and convincing grounds on which to justify the authority of state power over citizens, Hume turned the focus of his analysis on the notion of social convention.

The idea underlying the concept of state authority as a convention is that of a consistent regularity of behavior, which is both valuable and arbitrary (Greene, 1985: 331). That is, state authority is founded on a convention that is valuable because it serves a purpose; and it is arbitrary in the sense that another authority could have been chosen to achieve the same aim. Driving on the right side of the road is another instance of a valuable, arbitrary convention. It is valuable because is establishes a regularity in the practice of driving with the aim of avoiding accidents; and yet it is arbitrary because the same goal would be achieved by deciding to all drive on the left-hand side.

On Hume’s account, “the general interests or necessities of society are sufficient to establish" state authority (Hume, 1899: 456). In other words, these interests induce citizens to regulate their behavior and the convention is the tool that allows them to do so (Greene, 1985: 333). The theory of coordination games developed by Lewis (1969) reaches similar conclusion. Lewis links the notion of convention to “a general sense of common interest”, which leads all the members of the society to abide by some rules to regulate their conduct (Lewis, 1969: 3, 4). In a coordination problem

[17] I am thankful to Cécile Laborde for raising this point with me.

situation, two or more agents must choose between several alternative courses of action. The agents must choose strategically insofar as the outcome they want to produce depends on the action of other agents[18]. That is, in an equilibrium combination, whilst it is possible that the agents would have preferred that the others acted differently, "it is not possible that any one of the agents would have been better off if he alone had acted differently and all the rest had acted just as they did" (Lewis, 1969: 8). In consequence, agents' expectations about what the others will do are essential. When a given coordination problem recurs over time, agents' behaviour may begin to exhibit certain patterns and regularities. For instance, if agent A and agent B are speaking on the phone when the are suddenly cut off and agent A calls back agent B, then if the call drops off again the latter will wait again. When these regularities emerge as the solutions to the coordination problem, then they become coordination norms. It is not relevant *why* a given solution was achieved in previous cases; it may have occurred by luck and agents would still follow the precedent set (Lewis, 1969: 39)[19]. Consequently, as Lewis puts it:

> Our experience of general conformity in the past leads us, by force of precedent, to expect a like conformity in the future. And our expectation of future conformity is a reason to go on conforming, since to conform if others do is to achieve a coordination equilibrium and to satisfy one's own preferences. And so it goes - we're here because we're here because we're here because we're here. Once the process gets started, we have a metastable self- perpetuating system of preferences, expectations, and actions capable of persisting indefinitely (Lewis, 1969: 42).

This is the phenomenon that Lewis calls convention, which he defines as follows:

> A regularity *R* in the behaviour of members of members of a population *P* when they are agents in a recurrent situation *S* is a *convention* if an only if, in any instance of *S* among members of *P*,
>
> 1. everyone conforms to *R*;
> 2. everyone expects everyone else to conform to *R*;

[18] "We might say that coordination problems are situations in which several agents try to achieve uniformity of action by each doing whatever the others will do" (Lewis, 1969: 12).

[19] Indeed, it is this the sense in which conventions are somewhat arbitrary.

3. everyone prefers to conform to *R* on condition that the others do, since *S* is a coordination problem and uniform conformity to R is a proper coordination equilibrium in S (Lewis, 1969: 42).

It is easy to see now how the authority of the state can be grounded on the notion of convention. Indeed, that state authority is conducive to social coordination is a widely shared view. The state is commonly regarded as fundamental to ensure social order, the protection of rights and freedoms of citizens, and so on. The problematic element in a coordination problem situation, however, is represented by the presence of at least two proper coordination equilibria. Hence, what is needed is an alternative that is salient.

Raz offers a solution to the saliency challenge. Raz puts forward an individualistic and instrumental justification of authority by putting forward a conventionalist thesis for obedience to authority, whereby authority is justified by the need to achieve coordination (Greene, 1985: 332). Indeed, Raz's aim is to presents us with an explanation of why the surrender of one's judgment – which is encapsulated in the notion of authority - is *necessary* to coordinate action (Greene, 1985: 335). In order to solve coordination problems in society, it is necessary to know what particular option other people will choose; "sometimes […]", Raz writes, "there is no option in the designated set that will be the obvious choice. In such cases, what one needs is something that will make a particular option the one to follow. This is something practical authorities often do (or attempt to do). They designate one of the options as the one to be chosen and, if their action is regarded as a reason to adopt that course of action, then a successful resolution of the problem is found" (Raz, 1981: 108). Raz explicitly suggests that "[…] authority [is] based on the need to co-ordinate the action of several people. *All political authority rests on this foundation* (though not only on it)" (Raz, Practical Reasons and Norms: 63). Here, it is worth quoting a passage in length:

> Our purpose is to show that if authority is to be justified by the requirements of co-ordination, we must regard authoritative utterances as exclusionary reasons. The proof is contained in the classical analysis of authority. Authority can secure co-ordination only if the individuals concerned defer to its judgment and do not act on the balance of reasons, but on the authority's instructions. This guarantees that all will participate in one plan of action, that action will be co-ordinated. But it requires

> that people should regard authoritative utterances as exclusionary reasons, as reasons for not acting on the balance of reasons as they see it, even when they are right. To accept authority on these grounds is not to act irrationally or arbitrarily. The need for an authority may well be founded in reasons. But the reasons are of a special kind. They establish the need to regard authoritative utterances as exclusionary reasons (Raz, 1999: 64).

The authority's utterance thus renders an option salient.

Hart's theory of law rests on the fundamental claim that law results from convention. Crucial to Hart's account is the doctrine of the rule of recognition, which indicates the criteria of validity of ordinary rules of law. To put it differently, a law is valid – and hence part of the system - if it has passed the tests supplied by the rule of recognition (Hart, 1961: 100). The crucial point is that the rule of recognition justifies the application of the law, but if it is itself challenged, the law loses its justificatory grounds as judges can only insist on their recurring and habitual practice (Greene, 1985: 343). Hence, as Postema puts it: "At bottom, his claim is that the authority of criteria of validity ultimately rests not on the justice, correctness, or truth of the criteria as a matter of critical morality, but rather on convention" (Postema, 1982: 171).

The norm of recognition takes the form of "social rules embedded in the law-identifying and law-interpreting activities of officials, legal practitioners, and perhaps others" (Postema, 1982: 166). Indeed, a core tenet of positivist jurisprudence is to ascribe significant prominence to the institutional character of law; for the authority and validity of law depend entirely on a social fact, rather than on truth or morality, insofar as law "is a function of its relationship to the activities of primary institutions of the legal system" (Postema: 167). Most importantly, the rule of recognition "can neither be valid nor invalid but is simply accepted as appropriate for use […]" (Hart, 1961: 106). "[…] The rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact" (Hart, 1961: 107). That is to say, it exists *because* it is actually practiced – unlike other laws whose existence is entirely independent from their observance.

Hart explains that in a simple system – which he refers to as “the world of Rex” - where Rex I has absolute and unlimited legislative power, there is only one criterion for identifying the law – namely, “a reference to fact of enactment by Rex I” (Hart, 1961: 97). Complex legal systems, however, necessitate complex rules of recognition. In the everyday practice of legal systems, the rule of recognition is not usually expressly stated as a rule, but rather “its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers” (Hart, 1961: 98). It is rules that attribute authority to the declarations of officials.

The rule of recognition has two core features: it is an ultimate rule and it has supreme criterion for assessing the validity of other rules (Hart, 1961: 102, 103). Hart explains the latter idea as follows:

> we may say that a criterion of legal validity or source of law is supreme if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria, whereas rules identified by reference to the latter are not so recognized if they conflict with the rules identified by reference to the supreme criterion (Hart, 1961: 103).

With regard to the former idea, Hart suggests that it implies that in order to assess the validity of a rule, we must refer to a criterion of validity supplied by another rule - i.e. the rule of recognition. E.g. of Oxfordshire County Council (Hart, 1961: 103, 104). Further, there are two perspectives from which the rule of recognition can be considered: “one is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law” (Hart, 1961: 108).

In order to better grasp the functioning of the rule of recognition, it is useful to illustrate the example presented by Hart and concerning the legal system of the Commonwealth (Hart, 1961: 116-118). When the United Kingdom retained the legal competence to legislate for its colonies, it had set up a constitutional framework whereby it had the power to amend or revoke any law enacted by its colonies. In consequence, the legal systems of the colonies were subordinated to a wider system whereby law is ultimately enacted by the Queen in the Westminster Parliament: this was precisely the norm of recognition in place at the time. With the independence of

the British colonies, the norm of recognition changed and - even though former colonies' constitutional structure was still retained in the original statute of the United Kingdom Parliament – the newly accepted norm of recognition specified local ultimate criteria of legal validity.

Thus far, I have discussed Muniz-Fraticelli's political pluralist approach and I have applied it to the dispute over the legality of divorce in Italy. I have showed that the existing arrangements between the Italian State and the Catholic Church seem to be consistent with Muniz-Fraticelli's constitutional understanding of sovereignty. For the Italian Constitution recognizes the sovereignty and autonomy of the Catholic Church; furthermore, the Constitution stipulates that the relations between the two parties are to be regulated by the Concordat. Hence, when state and church authorities disagreed as to whether the legality of divorce ought to extend to the marriages contracted under Canon Law, the question was brought before the Italian Constitutional Court. The resolution of the meta-jurisdictional conflict thus rested in the hands of the state, which legitimately exercised its direct and indirect authority over citizens and associations – consistently with Muniz-Fraticelli's account. I have then argued that Muniz-Fraticelli's reliance on the role of state in settling jurisdictional boundary questions stems from an understanding of state sovereignty as a convention. That is, Muniz-Fraticelli acknowledges the importance of state authority in coordinating complex activities such as automotive traffic, pre-trial discovery, and more broadly the implementation of a burden sharing system for the provision of public goods (Muniz-Fraticelli, 2014: 174). Society faces recurring coordination problem situations and a possible solution lies in citizens' choice to rely on the utterances of state for regulating their behaviors. Muniz-Fraticelli thus endorses Raz's conception of authority, which addresses the saliency challenge in coordination problem situations. Further, I have suggested that Hart's doctrine of the rule of recognition allows us to capture the sense in which Muniz-Fraticelli relies on state sovereignty to solve meta-jurisdictional question – and hence why and in what sense the Catholic Church accepted the authority of the Italian State in the resolution of their conflict over the legality of divorce. That is, in jurisdictional boundary challenges, when it is not clear under what jurisdiction a given matter falls, it is the state that has the final say. This is indeed the accepted rule of recognition, which represents a solution to recurring complex coordination problems, giving rise to

individual citizens' and groups' obligations to comply with the utterances of the state authority.

3.7 Pluralist versus liberal monist conception of sovereignty

If meta-jurisdictional conflicts are then resolved by the state, we might question whether the political pluralist approach brings any novelty at all. Indeed, the picture of state sovereignty – with the conflict between the two sources of state authority suggested by Muniz-Fraticelli – seem to entail precisely the sort of conflict that liberals commonly interpret in terms of conflict of rights: the right of the individual to be treated as free and equal - and thus not to be discriminated against - and the right of religious associations to a degree of self-governing autonomy. In turn, these conflicting rights give rise to conflicting duties on the part of the state. We are thus left struggling with the familiar question of how to strike the just and legitimate balance between conflicting rights and duties.

Let us consider, for instance, the question of whether religious associations may be allowed to discriminate on morally arbitrary grounds when accepting new members, hiring their employees or serving their customers. According to many liberals, these sorts of questions give rise to reasonable disagreements, for both sides of the debate can be justified by appeal to public values that all reasonable citizens may understand and accept. Indeed, the decision to grant religious associations the right – albeit only in specific circumstances – to be exempt from anti-discrimination legislation may be grounded on freedom of association. Thus, the issue at stake here concerns the interpretation of the political value of freedom of association[20]. We all agree on the importance of such a value, but what rights does it entail? Does it entail the right of religious associations to discriminate on morally arbitrary grounds? Further, liberals conceive of this disagreement as entailing a conflict between the political values of equality and liberty: the right to all citizens to be treated equally against the freedom of religious associations to decide who to hire based on their own religious precepts. This conflict of rights requires a balancing, which is the state's duty to strike.

[20] Laborde, 2017

It seems to me that pluralists are on to something here. Even though liberals rightly point out that reasonable disagreements stem from competing public values, it is important to acknowledge that it is how those values are interpreted that determines the result of the balancing. Consequently, it is important to inquire into the source of the prevailing interpretation. Here, pluralists are right in claiming that interpretations are put forward by some authority. Hence, we might conclude that behind reasonable disagreements there are authorities, with their own interpretations of political values and their own evaluation of what is the right balance to strike between them. Power, thus, becomes crucial in understanding what interpretation prevails.

The problem with liberal theories is that they fail to take into account power relations and their relevance in shaping the policy choices that are pursued and ultimately implemented. The fact that slavery was abolished or abortion legalized was due to the fact that those ideas – those particular interpretations of rights – supported by interest groups started to prevail to the extent that they became the dominant interpretations of the political values in question. Yet, this was only made possible by the influencing power that citizens and interest groups acquired. This is ultimately what brought those issues up on the agenda of governments. In consequence, it is essential that groups – particularly minority ones - have the opportunity to express their views and to have their case heard, which is precisely what the pluralist framework purports to do. Indeed, pluralists, on the other hand, admit and accept that conflicts rooted in ontological disagreements inevitably arise and there may not be a principled solution to them. Consequently, “any solution “should be seen as the provisional result of complex acts of creation, not be reified as the basic stuff of social and political reality”’[21]. As a result, this enables the establishment of a continuous dialogue, interaction and negotiation over the scope of religious associations’ rights - or jurisdictions, as pluralists would say - in jurisdictional boundary questions. This is a promising solution when it comes to controversies rooted in reasonable disagreements.

3.8 Conclusion

[21] Enroth (2010) in Muniz-Fraticelli, (2014):179

In this chapter, I have showed that Muniz-Fraticelli - just like other pluralists - does concede the state a privileged position when meta-jurisdictional conflicts arise. Yet, Muniz-Fraticelli's state sovereignty ultimately results from convention. This is consistent with the doctrine of conventionalism and with Hart's notion of the rule of recognition. I have claimed that Muniz-Fraticelli's focus on the role of authority in meta-jurisdictional conflicts has the advantage of taking into account the power dynamics that favour the emergence of an authority's interpretation of the political values in question rather than another.

Liberalism as a political doctrine justifies the legitimate use of state coercion by appealing to political values that all citizens can reasonably understand and accept.

The relation between state, groups, and individuals – as well as the different ways in which they seek to influence society – cannot be satisfactorily apprehended without an understanding of the power dynamics among them (Yumatle, 2016: 171). Rights theories alone are sometimes unable to fully explain why a given policy was implemented or a given court sentence was issued. This is particularly the case when we are in the face of reasonable disagreements: it is here that we witness the inconclusiveness of public reason. Jurisdictional political pluralist theories – with their focus on the role of authorities in promoting values and ascribing meaning to practices – can capture the power relations rooted in the social nexus of the political community and that irremediably affect public discourse and political decisions. In sum, what a political liberalism has to take into account is that political values do not exist by themselves, but they are advanced by citizens, groups and state; consequently, the power that these political agents hold is crucial and it influences the decision that will be taken on questions such as whether religious associations may be allowed to discriminate on religious grounds when hiring employees. Nonetheless, in liberal democratic societies conflicts are endemic and only state authorities are equipped to deal with it.

Chapter 4 Militant secularism versus tolerant pluralism[22]

4.1 Introduction

In the previous chapter, I argued that, despite their insistence on multiple sources of sovereignty, political pluralists do in fact accept the role of the state as the final arbiter in contentions concerning the proper scope of the rights and freedoms of religious groups and citizens. We are thus left struggling with the familiar question of how to strike the just balance between conflicting rights and duties. My aim in this chapter is to put forward a plausible account of secularism which meets the necessary condition for liberal legitimacy and which is able to accord adequate protection to individuals' right to freedom of religion. I do so by assessing cases submitted to the European Court of Human Rights (ECHR) concerning the permissibility of wearing personal religious symbols in the public sphere.

Europe is witnessing a resurrection of religion and – with it – a re-emergence of old and long-debated controversies concerning the appropriate place of religion in liberal democratic societies. Needless to say, this is a profoundly divisive matter, especially in a time in which European states desperately try to fight the 'invasion' of refugees and migrants – most of whom are Muslim – by building walls, weakening refugee protection, and promoting European values and traditions.

Over the past decades, the European Court of Human Rights (ECHR) has acquired a central role in determining the appropriate space of religion in public life. This has not been an easy task, especially considering the wide range of different government-religion relations that European states exhibit; these "are the result of a variety of historical, social, political and cultural factors [and – as such – they] should in principle be respected" (Martínez-Torrón, 2012a, p. 331). Hence, the ECHR has attempted to achieve a balance between diversity and universality in the protection of religious freedom across Europe by appealing to the doctrine of the 'margin of appreciation' (Martínez-Torrón, 2012a, p. 332), which is "an international law doctrine of judicial self-restrain or deference" (Lewis, 2007, p. 397). The key idea is

[22] A slightly modified version of this chapter is published in L. Bialasiewicz and V. Gentile, eds., *Spaces of tolerance. Changing geographies and philosophies of religion in today's Europe*. London: Routledge.

that even though liberal democracy requires some degree of separation between state and religion, there is no unique formula that can – or should – be applied to all countries.

The ECHR has been accused of promoting a form of 'militant secularism', which authorizes a state to act in a militant manner – by imposing strict restrictions on the exercise of religious freedom – in order to safeguard its democracy's core constitutional commitment to secularism (Macklem, 2012). The aim of this chapter is twofold. First, it urges the ECHR to adopt an approach to religion similar to Laborde's minimal secularism, which is designed to set out the necessary conditions for liberal legitimacy, while allowing states to pursue their own reason- able interpretation of the principles of justice (Laborde, 2017). This framework seems to be particularly well suited for the European context, where the ECHR's doctrine of the 'margin of appreciation' may be regarded as the tool that allows for the creation of a European space of tolerance understood figuratively – that is, as the realm of possibility within the domain of reasonable liberal conceptions of justice.

Second, it assesses whether the ECHR's protection of the right to religious freedom is sufficient at the bar of liberal legitimacy by discussing some its most debated rulings on the presence of religious symbols in the public sphere. This exercise allows me to highlight some points of disagreements with Laborde's approach and suggest a revised version of her account that I term tolerant pluralism. Broadly speaking, it is my contention that Laborde's notion of minimal secularism is still too secularist with regard to state officials' right to wear – and states' permissibility to display – religious symbols in the public sphere.

This chapter proceeds as follows: I begin with briefly explaining the ECHR's approach to religious freedom and the notion of minimal secularism that Laborde develops in *Liberalism's Religion*. I then discuss cases concerning the permissibility of wearing personal religious symbols in the public sphere and assess them against the value of liberty entailed in minimal secularism[23]. I first discuss the headscarf *affair* in Turkey and in France, where the prohibition on wearing the Islamic veil

[23] I borrow the distinction between personal and institutional symbols from García Oliva and Cranmer, 2013, p. 559. The former reflect an active and voluntary choice of the individual, whereas the latter are somehow imposed on citizens by the state.

applies to ordinary citizens and argue that the ECHR's ruling is inconsistent with liberal legitimacy as it justifies restrictions on the right to religious freedom by appeal to a comprehensive notion of secularism. Indeed, the ECHR's treatment of religion in the headscarf *affair* may be described as an instance of militant secularism. I then consider another instance of the headscarf *affair* – this time in Switzerland – where the prohibition targeted a state official. I claim that in the Swiss case the ruling illegitimately violated the applicant's personal liberty. Last, I discuss the permissibility of displaying institutional religious symbols in the public sphere by focussing on the crucifix case in Italy; here, I defend the ECHR's judgment and disagree with Laborde's view that it violates the third condition of minimal secularism – namely civic equality.

4.2 The ECHR and minimal secularism

Unlike some domestic constitutions, the European Convention on Human Rights does not mandate a particular degree of separation between religious and political institutions, nor does it proscribe establishment (Evans and Thomas 2006, p. 699). Indeed, the signatory states to the Convention exhibit significant differences in their individual relationships between church and state, with some countries upholding a strict principle of secularism (e.g. Turkey and France) and others supporting an established church (e.g. United Kingdom, Denmark, and Greece). As Evans and Thomas point out, however, the ECHR does "indirectly regulate the permissible forms of relationship between religious institutions and the state by reference to religious freedom" (Evans and Thomas, 2006, p. 699).

The European Convention on Human Rights contains three provisions that deal with religion. Article 9 sets out the basic framework for the protection of the right to religious freedom:

1 everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his or her religion or belief, in worship, teaching, practice, and observance.

2 freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety,

for the protection of public order, health or morals, or for the protection of the rights and freedoms of others (Council of Europe, 1950).

Article 14 ensures that the enjoyment of the rights laid down in the Convention shall be free from religious discrimination; finally, Article 2 of the first Protocol to the Convention requires that "the State shall respect the right of parents to ensure [. . .] education and teaching in conformity with their own religious and philosophical convictions" (Council of Europe, 1950).

Article 9 is the central provision regulating the right to freedom of religion; it is this Article that is the focus of the chapter. This article acknowledges the two- fold dimension of religious freedom: the *forum internum* (the internal dimension), which entails the freedom to *hold* one's religion or belief, and the *forum externum* (the external dimension), which protects the freedom to *manifest* one's religion or belief either in public or private (Martìnez-Torrón, 2012b, p. 367). The former dimension of religion is absolute and inviolable. It is only the latter dimension that may be subject to limitations as indicated under the second paragraph of the Article. The rationale behind paragraph 9.2 lies in the assumption that the conduct of a religious believer who publicly manifests his or her religion will be more likely to affect others negatively than the conduct of someone whom holds his or her belief within the private domain (Lewis, 2007, p. 400). At the same time, an area of uncertainty exists because the precise meaning of 'public sphere' was never specified (Ringelheim, 2012, p. 285).

The doctrine of the 'margin of appreciation' is the main instrument used by the ECHR to achieve a balance between diversity and universality – that is, between the respect for national church-state relations and the commitment to offer an equal degree of protection of religious freedom across Europe (Martínez-Torrón, 2012a, p. 331, 332). The ECHR tends to employ a wide margin in areas where there is a lack of consensus or lack of common practices across Europe – such as in the fields of morals and religion (Lewis, 2007, p. 397). As the ECHR has repeatedly pointed out, "it is not possible to discern throughout Europe a uniform conception of the significance of religion in society […]; even within a single country such conceptions may vary" (*Otto-Preminger-Institut v. Austria*, 1994, p. 50). Consequently, "where questions concerning the relationship between State and religions are at stake", the ECHR grants national authorities a degree of flexibility as to how they protect the

right to religious freedom (*Leyla Sahin v. Turkey*, 2005: para 109); in other words, it is the case that the domestic context strongly determines "the meaning or impact of the public expression of a religious belief"; in consequence "the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order" will vary from state to state (*Leyla Sahin v. Turkey*, 2005: para 109). National authorities are therefore in principle considered to be in a better position than the ECHR to assess whether restrictions on religious freedom are necessary or justifiable.

Political liberalism is committed, at least minimally, to some degree of separation between the state and religion. In *Liberalism's Religion*, Laborde defends her notion of minimal secularism, which she conceives as "a minimal normative requirement of liberal legitimacy [. . .] a political doctrine specifying the rightful place of religion in the state" (Laborde, 2017, p. 113). The chief argument of Laborde's liberal egalitarianism is that the notion of religion should be interpreted and disaggregated into its multiple dimensions (Laborde, 2017, p. 2). Framing the issue of religion in terms of the values that it realises has the straightforward implication of making religious and nonreligious beliefs analogous to one another. That is to say, whatever protection or containment is appropriate with regards to religion, it is so because of some feature that it shares with non-religious beliefs (Laborde, 2017, p. 3).

Minimal secularism appears as a central component of Laborde's liberal egali- tarian account of religion and the state. Contrary to existing liberal egalitarian theories (Dworkin, 2013; Eisgruber and Sager, 2007; Taylor and Maclure, 2011; Schwartzman, 2012, 2017; Quong, 2011), Laborde seeks to articulate an understanding of the secular state that goes beyond the ideal of state neutral- ity toward the good. Disaggregating religion thus allows us to identify the three dimensions of religion that directly affect liberal legitimacy. The liberal state may not endorse or recognise a religious belief or practice that is inaccessible, com- prehensive, or divisive. In turn, these three features of religion relate to the three liberal values that constitute minimal secularism: epistemic accessibility (the jus- tifiable state), liberty (the limited state) and civic equality (the inclusive state) (Laborde, 2017, p. 117).

The strength of Laborde's approach consists in her acknowledgement that liberal egalitarianism is consistent with a wider variety of state-religion relations than liberals have commonly assumed; that is, according to the normative standards of liberal egalitarianism, many different models of secularism – or separation between state and religion – are legitimate (Laborde, 2017, p. 116). The crucial point here is that, in her view, political liberalism allows for some degree of inconclusiveness with regard to the interpretation of the principles of justice. Hence, once the three liberal values of minimal secularism are set out – accessibility, personal liberty, and civic equality – there is still room for reasonable disagreement about how these ideals are to be interpreted.

As I argue throughout the chapter, it is my contention that Laborde's approach is still too secularist with regard to the presence of religious symbols in the public sphere. Consequently, I defend a revised account – which I term tolerant pluralism – aimed at according wider protection to religious manifestations; particularly, as I show in my discussion of *Dahlab* and *Lautsi*, I am in favour of a more per- missive stance on state officials' right to wear and states' permissibility to display religious symbols in the public sphere. While maintaining the core structure of Laborde's minimal secularism – with its three conditions for liberal legitimacy – my account allows for a more tolerant balancing of the interests and values at stake when assessing the permissibility of religious manifestations in public.

The language of toleration and pluralism – rather than secularism – is closer to Rawls' understanding of the relation between religion and democracy as well as to the lexicon used by the ECHR. Indeed, Rawls never uses the term 'secularism', but rather appeals to the ideals of toleration or – more rarely – neutrality. In her contribution to this volume, Gentile stresses how – according to Rawls – tolerance is first and foremost a *political* value, which is built on the overlapping consensus between incommensurable comprehensive doctrines and is committed to a "neutrality of aim" whereby "liberal institutions must secure the equality of opportunities to pursue any 'permissible' worldview" (Gentile, 2019: 26); indeed, "it would be at odds with tolerance to suppress religious practices and ways of life" (Gentile, 2019: 27). In this way, the notion of tolerant pluralism captures the ECHR's role of impartial protector and organizer of religious pluralism.

Further, it is possible to discern some principles that have progressively emerged in the ECHR's case law on religious freedom; these closely mirror the principles underpinning the right to religious freedom that have been prominently defended in the liberal tradition, and they are pluralism, autonomy of religious communities and state neutrality. In sum, I endorse an approach which is built on the framework provided by Laborde's minimal secularism and yet allows for greater variety in state-religion relations, while using a language that is more faithful to the Rawlsian tradition and the ECHR's increasing effort at "building a theory" of religious freedom that is valid across Europe (Ringelheim, 2012, p. 284).

The role of the ECHR can thus be conceived as that of ensuring that states meet the three conditions of liberal legitimacy as entailed by Laborde's minimal secularism, while allowing them to pursue their own reasonable interpretation of such ideals. The ECHR's doctrine of the 'margin of appreciation' can be regarded as the tool that allows for the creation of a European space of tolerance understood figuratively – that is, as the realm of possibility within the domain of reasonable liberal conceptions of justice[24]. In other words, the ECHR should endorse a notion of tolerant pluralism so as to be able to accommodate, by appealing to the 'margin of appreciation' doctrine, the national variations in the reasonable interpretations of the principles of justice across Europe.

The rest of chapter focuses on the liberty and equality conditions, for the requirement of accessibility – which Laborde conceives as "public reason *stricto sensu*" [emphasis added] (Laborde, 2017, p. 119) – "is a necessary but not sufficient condition for the law's liberal quality" (Laborde, 2017, p. 123). Indeed, "the accessibility condition is intended not as a final test but as a prior test of permissibility. It [. . .] does not specify which reasons are conclusive enough to provide a full justification for public policy and law" (Laborde, 2017, p. 130). As I show in the next sections, the ECHR's defence of the headscarf bans and the display of the crucifix in public schools relies on public reasons; the problematic aspects of the ECHR's rulings, however, concern an all-things-considered judgment about the values of liberty and equality.

[24] For Laborde's argument that both separation and establishment can theoretically realise the principles of justice, see Laborde, 2013 (a).

4.3 Personal religious symbols and the limited state

Political liberalism is strongly committed to the value of personal liberty. Citizens' ability to develop as self-determining agents prevents the state from enforcing comprehensive doctrines that would interfere with each individual's right to form judgments about how to lead their lives (Laborde, 2017, p. 143, 144). Laborde suggests two ways in which a coercive law violates personal liberty: (1) if the law is justified by appeal to a comprehensive conception of the good; (2) if, regardless of the law's justification, it limits one's liberty to live with integrity (Laborde, 2017, p. 146). Before turning to the discussion of the headscarf cases, I should explain why Laborde distinguishes between conditions (1) and (2).

In her discussion of state neutrality, Laborde distinguishes between the scope (broad or restricted) and the focus of neutrality (Laborde, 2017). The latter implies that both the justification as well as the subject-matter of a policy ought to be neutral. "At the level of justification, neutrality applies to comprehensive conceptions of the good" – i.e. the state ought not to justify a policy by appeal to a comprehensive worldview – condition (1) (Laborde, 2017, p. 146). At the level of the subject-matter, on the other hand, neutrality applies to "integrity-related liber- ties" – condition (2) (Laborde, 2017, p. 146). Indeed Laborde claims that, first, a law may be justified by a comprehensive conception of the good without impinging on salient freedoms for instance, if the state implements restrictions of free movements on Shabbat[25]; this law is impermissible if it is justified on the grounds that it allows "citizens to live virtuously, according to an authentic and true conception of the good life" (Laborde, 2017, p. 146). Second, a law may be justified by "partial ideas about the good (such as the badness of addiction, or attachment to tradition) and public goods (social cohesion, public health, rules of social coordination, and so forth)" and yet be impermissible because it infringes upon an integrity-related interest (Laborde, 2017, pp. 146, 147). The distinction between conditions (1) and (2) is crucial in order to understand the difference between the cases to which I now turn.

[25] Salient freedoms, unlike ordinary ones, relate to "individuals' basic moral powers and their ability to make "strong evaluations" about how to lead their lives" (Laborde, 2017, p. 147). In this case, restrictions of free movement on Shabbat does not limit a salient freedom as it is not connected to an integrity-related interest. But ordinary freedoms can becomes salient (Laborde, 2017, p. 148).

4.4 Religious symbols and ordinary citizens

In *Leyla Sahin v. Turkey*, the applicant is a female medical student at Istanbul University who was prohibited from wearing the Islamic headscarf within university facilities. The ECHR upheld the Turkish Constitutional Court's decision to ban headscarves and other forms of religious dress in Turkish universities. The ban was motivated by the necessity to protect secularism – a fundamental pillar of Turkish democracy. Indeed, Turkey has an explicit constitutional commitment to secularism as indicated by Article 2, which describes it as a "republican, democratic, secular and social state", and Article 4, which ensures the irrevocability of these basic principles (Evans and Thomas, 2006, p. 705).

In its reasoning, the ECHR declares that the headscarves ban pursued the legitimate aims of protecting the rights and freedom of others and securing public order. The ECHR granted Turkish national authorities a wide margin of appreciation as it sought to respect the delicate domestic relations between state and religion. Consequently, the ECHR justified restrictions on individuals' right to freedom of religion as "necessary in a democratic society" in the meaning of Article 9.2.

With regards to the protection of public order, the ECHR stresses that the headscarf ban is necessary to ensure the "peaceful coexistence between students of various faiths" (*Sahin v. Turkey*, 2005: para 111). This, however, seems to be an unwarranted assumption for – as pointed out in the dissenting opinion of Judge Tulkens – there was no "disruption in teaching or in everyday life at the university, or any disorderly conduct, as a result of the applicant's wearing the head- scarf" (*Sahin v. Turkey*, 2005: para 8).

With regard to the protections of the rights and freedom of others, the ECHR agrees with Turkish authorities that the Islamic headscarf is a "powerful external symbol" which may exert pressure on those who choose not to wear it (*Leyla Sahin v. Turkey*, 2005: para 111). The ECHR recognizes that "this religious symbol has taken on political significance in Turkey in recent years". This was held to be particularly worrisome due to the presence of "extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts" (*Leyla Sahin v. Turkey*, 2005: para 115). Yet, as the dissenting opinion of Judge Tulkens points out, there was no evidence to

assume that the applicant wore the headscarf in an “ostentatious or aggressive” manner, or that it was used to “provoke a reaction, to proselytize or to spread propaganda and [. . .] undermine [. . .] the convictions of other[s]” (*Leyla Sahin v. Turkey*, 2005: para 8). Further, Judge Talkens recognizes that “merely wearing the headscarf cannot be associated with fundamentalism [. . .]. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views” (*Leyla Sahin v. Turkey*, 2005: para 10).

The ECHR further declares the headscarf ban necessary in order to protect the rights of women and ensure gender equality, which is one of the core principles underlying the Convention. The dissenting opinion, however, questions the connection between the ban and sexual equality. It points out that “wearing the headscarf has no single meaning [. . .]. It does not necessarily symbolize the sub-mission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women” (*Leyla Sahin v. Turkey, 2005*: para 11). Most importantly, the ECHR fails to take into serious consideration the perspective of the applicant who affirms that she was wearing the headscarf of her own free will.

The ECHR’s ruling in Sahin has a significant impact on the way in which the headscarves controversies were dealt with in other European states. In *Dogru v. France*, the applicant was an 11-year-old girl who was expelled from her secondary school because she refused to take off her Islamic headscarf during physical education classes (*Dogru v. France*, 2008).[26] As in *Sahin*, the ECHR does not find a violation of the applicant’s right to freedom of religion. Indeed, the European Court explicitly follows the doctrine endorsed in *Sahin*, thus acknowledging that “in France, as in Turkey [. . .], secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of primary importance” (*Dogru v. France*, 2008: para 72). In 2004, France passed a law on religious symbols in public schools (but not universities) whereby it banned “the wearing of signs or clothes through which pupils ostensibly express a religious allegiance” (quoted in Laborde, 2008, p. 52).

[26] This case is identical to that of *Kervanci v. France,* 2008. For simplicity, I only refer to *Dogru.*

As in Sahin, restrictions on individuals' right to religious freedom are considered to be necessary to preserve the secularity of public schools, which serves the purpose of protecting the rights and freedom of others and maintaining public order. Once again, however, the ECHR fails to provide sufficient reason to convince that the wearing of the Islamic headscarf does in fact undermine the protection of the rights and freedom of others and the protection of public order. As a result, the restrictions on individuals' right to freedom of religion upheld by the European Court cannot be regarded as "necessary in a democratic society" in the meaning of Article 9.2.

The Turkish and French governments explicitly justify the bans by appeal to the principle of secularism, which the ECHR considers to be consistent with the values underpinning the Convention and necessary to protect the democratic system in these two countries (*Leyla Sahin v. Turkey*, 2005: para, 46, 47; *Dogru v. France*, 2008: para 62). Yet, as I have previously stressed, the legitimate aims that the bans are supposed to protect were not in fact jeopardized by Muslim students wearing the headscarf. Consequently, the ECHR unreflectively accepts the Turkish and French conception of secularism as legitimate justifications for the headscarf bans for the purposes of protecting democracy.

It has been argued that the ECHR's judgments in the field of religious freedom have recently begun to treat religion as a threat to the democratic state. Macklem (2012) stresses the principle of militant democracy, which was originally designed to protect the democratic process of a political community, is now advocated in order to defend substantive conceptions of democracy from the influence of religion.[27] In particular, the perception of religious fundamentalism as a new form of threat to the democratic state has incentivized states to view religion with increasing fear. Consequently, while originally conceived as a means for preventing anti- democratic parties from gaining power in the political arena, militant democracy has recently begun to broaden its range of targets. In sum, Macklem suggests that the ECHR has begun to uphold what he refers to as "militant secularism", which authorizes a state to act in a

[27] The notion of militant democracy was originally formulated by Lowenstein (1937) who argued that democracies had to become militant and enable the goverenment to use the emergency power of restricting fundamental rights for the purpose of protecting the regime from subversive, de-stabilising movements.

militant manner in order to safeguard its democracy's core constitutional commitment to secularism.[28]

According to Laborde, minimal secularism is a normative requirement of liberal legitimacy; hence, ensuring that the three conditions of minimal secularism are met is not only permissible but mandatory for the protection of liberal democracy. Yet, two remarks have to be made here: first, as Laborde's approach amply shows, secularism "should not be reduced to one value, but explicated in relation to a constellation of liberal values" – namely, justifiability, equality and liberty. (Laborde, 2017, p. 115). Second, the three conditions of minimal secularism apply to the state and not to the citizens. Indeed, as Laborde puts it: "the state should be secular so that citizens do not have to be secular" (Laborde, 2013b, p. 169). Hence, secularism is a political doctrine that specifies the obligations of state institutions and officials *towards* citizens. In sum, tolerant pluralism – just like Laborde's minimal secularism – *may* require restrictions on state officials' – but not ordinary citizens' – right to religious freedom for the purpose of protecting the legitimacy of the democratic state. Yet, as I will argue in my discussion of *Dahlab v. Switzerland*, tolerant pluralism is more permissive when it comes to accommodating state officials' right to manifest their religions in the public sphere.

What are we to make then of the ECHR's judgments on the headscarf *affaires* in Turkey and France? It is my contention that the bans violate the third condition of minimal secularism – namely, personal liberty – on the grounds that their justification appeals to a comprehensive conception of secularism. As Plesner suggests, this notion of secularism is "fundamentalist" as it imposes a secularist ideology and way of life on all citizens when they enter the public sphere (Plesner, 2005, p. 115). As a result, secularism becomes the 'religion' endorsed and promoted by the state.[29] I will now illustrate this point further.

[28] For a different yet related discussion of the securitisation of religion and its effects on religious toleration, see Laegaard, 2019.

[29] Here it is worth quoting a passage from *The idea of public reason revisited* , where Rawls distinguishes between public and secular reasons: "I define secular reasons as reasons in terms of comprehensive nonreligious doctrines. Such doctrines and values are much too broad to serve the purposes of public reason. Political values are not moral doctrines [...]. Moral doctrines are on a level with religion and first philosophy. By contrast, liberal principles and values, although intrinsically moral

Turkey and France endorse a distinctively republican understanding of secularism – that is, *laïcité* – which requires a neutral public sphere in order to secure equal religious rights for all. As Laborde explains, "republican *laïcité* endorses a more expansive conception of the public sphere than political liberal- ism, as well as a thicker construal of the "public selves" which make up the citizens of the republic" (Laborde, 2005, p. 307). In order to understand this claim, it is necessary to consider what Taylor refers to as "the independent ethic mode of secularism" (Taylor, 1998, p. 33).

Rawls' political liberalism is committed to build a political community grounded on political values that all citizens can agree upon, regardless of their particular comprehensive conceptions of the good. In order to realise this objective, Taylor suggests that, historically, two distinct strategies – or 'modes of secularism' – have been employed (Taylor, 1998, p. 33). The first is the 'common ground' strategy, which sought to identify those doctrines that were common to all theists. The second is the 'independent ethic' approach, which required citizens to abstract from their religious views altogether and identify an independent ground for political morality (Taylor, 1998, p. 33). With the identification of a common ground of convergence, the independent ethic approach was able to promote a strong sense of common identity where it did not previously exist (Taylor, 1998, p. 44).

In the public sphere religion was irrelevant, for it was the independent ethic which reigned sovereign. In the private dimension, on the other hand, the faithful were free to obey to his or her religious commands. As a result, it was necessary to strengthen individuals' identity as citizens so that it would take precedence over other poles of identities, such as class, gender, and, especially, religion; this may occur through the promotion of an express ideology, as in the case of French Republicanism (Taylor, 1998). Indeed, French *laïcité* promotes a robust republican identity grounded on the values of democratic and egalitarian citizenship; in this way the French Republic seeks to transform 'believers' into 'citizens' (Laborde, 2005, p. 316). Republican *laïcité* is therefore the clearest expression of "the independent ethic mode of secularism" (Bhargava, 1998, p. 17).

---

values, are specified by liberal conceptions of justice and fall under the category of the political" (Rawls, 1997, pp. 775, 776).

The Republic has thus to engage in a strong formative project that can allow citizens to develop a robust public identity grounded on the public values of democratic and egalitarian citizenship (Laborde, 2005, p. 317). This imposes strict restrictions on citizens' right to manifest their religion in public as indi- viduals' attempts to express their confessional allegiances are easily perceived as signs of proselytism, which infringes the requirement of state neutrality. Schools are especially important as they are "miniature communities of citizens", where students learn the values of public citizenship (Laborde, 2005, p. 327). Under- stood in this light then, the Islamic headscarf is perceived as an illegitimate act of religious propaganda, which ought to be excluded from the public sphere (Laborde, 2005, p. 327). The headscarf ban is thus understood as a "universal non-monetary tax imposed on Muslims for the maintenance of the secular state" (Laborde, 2005, p. 329).

Two points have to be made here. First, it now appears clear that the head- scarf bans were motivated by a commitment to a comprehensive notion of *laïcité*, which sought to marginalise the role of religion so as to reduce its influence in social life (Laborde, 2013b, p. 183). Hence, Plesner is right in arguing that the ECHR accepted a notion of 'fundamentalist secularism' which violates individuals' personal liberty and is thus impermissible at the bar of liberal legitimacy. Second, republican *laïcité* ought not to be rejected as necessarily inconsistent with the requirements of minimal secularism and liberal legitimacy, for, when properly understood, it is compatible with the wearing of religious signs by pupils.

Indeed, in defence of a what she coins 'critical republicanism', Laborde presents a more nuanced interpretation of the values promoted by *laïcité* and suggests that the demands of secular neutrality ought not to apply to ordinary citizens – in these cases, schoolchildren and university students. While it was true from the start that the school itself had to be subject to a requirement of neutrality, this was only "meant to apply to teachers, the content of teaching and school building, not to pupils themselves" (Laborde, 2008, p. 59). For, as Laborde succinctly puts it: "the demand, made in the name of French *laïcité*, that state school pupils, or users of public services, show restraint in the expression of their religious beliefs is an illegitimate extension of the demands of secularism from the state to citizens"(Laborde, 2013b, p. 169). In sum, the suitably amended notion of *laïcité* is fundamentally committed to religious freedom, civic inclusion, and fairness; when properly interpreted, it is not

inconsistent with the wearing of religious symbols in the public sphere by ordinary citizens.

4.5 Religious symbols and agents of the state

In *Dahlab v. Switzerland*, the applicant was a primary school teacher who was prohibited from wearing the Islamic headscarf when she was performing her professional duties (Dahlab v. Switzerland, 2001). The applicant appealed to the ECHR and complained of an infringement of her right to manifest her religion.

The ECHR considers that the measure prohibiting the applicant from wearing a headscarf while teaching was "necessary in a democratic society" (Dahlab v. Switzerland, 2001, p. 12) for the protection of the rights and freedoms of others, public order, and public safety. Indeed, the ECHR notes that the Federal Court justifies the prohibition on the grounds that teachers are under a strict obligation to respect the principle of denominational neutrality in state schools, which ensures the protection of the religious beliefs of pupils and their parents and the promotion of tolerance and religious harmony. In particular, as civil servants, teachers represent the state; hence, their con- duct should not suggest that the state sides with one religion rather than another (*Dahlab v. Switzerland*, 2001: p. 9). Further, the ECHR acknowledges that the Islamic headscarf is a "powerful external symbol" (Dahlab v. Switzerland, 2001, p. 13) whose proselytising effect may influence the applicant's pupils given their tender age (they were between four and eight years old). Consequently, after weighting the applicant's right to manifest her religion against the need to ensure religious harmony in schools and protect pupils' and parents' religious beliefs, the ECHR concludes that it was within Switzerland's margin of appreciation to prohibit the wearing of the veil to teachers in state schools and hence finds no violation of the applicant's right to religious freedom.

Yet, doubts may be cast on whether the prohibition of the wearing of the Islamic headscarf was indeed necessary for the protection of the legitimate aims recognised by the ECHR. For, as the applicant argues, the fact that the she wore an Islamic headscarf had gone unnoticed for years and no complaints had been made by pupils or parents during a period of more than five years. Further, the applicant always had always experienced tolerance towards her and, as a result, religious harmony had never been disturbed within the school (*Dahlab v. Switzerland*, 2001, p. 11). Hence,

this seems to imply that the fact that applicant wore the headscarf did not cause any disturbance in her pupils. In sum, just as in *Sahin* and *Dogru*, there seems to be no evidence in support of the ECHR's conclusion that the violation of the applicant's right to manifest her religion is necessary within the meaning of Article 9.2

It is thus plausible to question whether the prohibition was once again motivated by a comprehensive notion of secularism. Indeed, the principle of denominational neutrality advanced by Swiss national authorities and supported by the ECHR stems from the secular nature of the state and its separation from religion. Further, just like Turkey and France, Switzerland endorses the notion of republican *laïcité*, which, as I have discussed in the previous section, has been interpreted in ways that justify illegitimate violations of religious freedom. Contrary to the previous cases, however, the principle of denominational neutrality applies to state institutions and representatives, rather than to users of public services – such as pupils. As Laborde suggests, the permissible prohibition of religious sign should depend on the public function of the state official in question and on the vulnerability of the users of the service (Laborde, 2008, p. 87). Consequently, "government ministers but not tax inspectors, primary school teacher but not university lecturers, may be subjected to an obligation of religious restraint while on duty" (Laborde, 2008, p. 87).

Nonetheless – contrary to Laborde – it is my contention that in the case at hand the prohibition violates the third condition of minimal secularism, namely personal liberty, for it limits the applicant's liberty to live with integrity. Indeed, as Laborde herself suggests, "if a law is justified by appeal to sound neutral reasons, but nonetheless burdens a central Muslim practice, it might not be all-things-considered justified if it gravely infringes a salient interest" (Laborde, 2017, p. 201). Laborde argues that Muslim women have an integrity-related claim to wear a headscarf. Consequently, Muslim veiling "cannot simply be trumped by any appeal to the general welfare, public order, and so forth" (Laborde, 2017, p. 199). This idea is grounded on Rawls' thin theory of the good, according to which certain rights and freedoms are considered to be essential to the exercise of basic human capacities and hence acquire priority over other freedoms or aims. These essential freedoms include conscience, speech, and association.

Integrity entails coherence between one's actions and one's ethical commitments so that if one is forced to act in a way that is contrary to his or her ethical commitments, he or she will inevitably feel shame, guilt, and remorse (Laborde, 2017, pp. 203, 204). Laborde refers to these as integrity-protecting commitments (IPCs): "commitments, manifested in practice, ritual, or action (or refusal to act), that allow an individual to live in accordance with how she thinks she ought to live" (Laborde, 2017, p. 203). The integrity-protecting commitment must be non- trivial and important for the individual (thick sincerity test). Further, it must not be morally abhorrent (thin acceptability test). Muslim veiling can thus be regarded as an instance of obligation-IPCs – which Laborde distinguishes from the less stringent identity-IPCs (Laborde, 2017, p. 215) – since most women experience it as an obligation. On Laborde's interpretation of freedom of religion, what matters is not whether veiling is in fact a core practice in the Islamic religion, but rather whether women perceive it as a practice that directly affects their integrity; as such, legal burdens upon them are particularly severe (Laborde, 2017, p. 223).

Obligation-IPCs should be protected against disproportionate burden. Laborde puts forward four criteria to assess whether a burden is disproportionate in relation to the aims pursued by the law (Laborde, 2017, p. 221). Let us see how these criteria are fulfilled in *Dahlab*.

1. *Directness*. "The directness of a burden is measured in relation to the costs incurred by individuals in avoiding subjection to the law or regulation in the first place" (Laborde, 2017, p. 221). The prohibition of the wearing of the Islamic headscarf in the case at hand was directly burdensome. The applicant did not have the choice to teach in a private school as many were not in the Canton of Geneva and, furthermore, they were not of Muslim faith. Failure to comply with the school's directives would de facto prevent her from working as a teacher.

2. *Severity*. "The more an IPC is perceived as an obligation, the more severe the burden is" (Laborde, 2017, p. 255). Muslims women generally experience the wearing of the Islamic headscarf as a religious obligation. This was certainly so in the case of *Dahlab*.

3. *Aim of the law. "*The more tightly a law promotes a goal of egalitarian justice and the more it requires a universal and uniform compliance for its effective-

ness", the harder it will be for the claimant to be alleviated from the law's burden (Laborde, 2017, p. 226). The purpose of the law is egalitarian as it sought to protect children's right to religious freedom and religious harmony.

4 *Cost shifting*. The fact that she wore the headscarf did not result in any disturbance in the school. Hence, the applicant's failure to comply with the prohibition would not result in any cost shifting.

In sum, in the present case, the balance of these reasons renders the burden disproportionate. Hence, I object to the ECHR's ruling in *Dahlab* on the grounds that the prohibition to wear the Islamic headscarf resulted in a violation of the applicant's personal liberty. According to my understanding of tolerant pluralism, the prohibition is impermissible at the bar of liberal legitimacy.[30]

4.6 Institutional symbols and civic equality

In *Lautsi v. Italy* the applicant is the parent of two children who attended a state school that displayed a crucifix in each classroom (*Lautsi v. Italy, 2011*). After the husband's applicant raised the issue of the permissibility of the presence of crucifixes in classrooms, the question was put to a vote and the majority of the school's governors decided to keep the religious symbol in place. The applicant brought the case before the national authorities without success. The applicant then complained before the ECHR arguing that the display of the crucifix in state schools illegitimately violated her children's right to religious freedom (Article 9) and education (Article 1 of Protocol No. 1). However, The ECHR found no violation of Article 9 and 1 Protocol No. 1 and concluded that the issue of the presence of religious symbols in classrooms is a matter falling within the margin of appreciation of the state.[31]

It is possible to identify two main arguments advanced by the Italian government in support of the display of the crucifix: I will refer to them as the liberal and as the

[30] Here Laborde disagrees with me and arrives at a different all-things-considered judgment about the value of liberty, thus concluding that because of her role as teacher of young pupils, the applicant does not have her rights violated.

[31] In 2009, the Chamber ruled in favour of Lautsi, thus finding a violation of the aforementioned Articles.

cultural argument respectively.[32] The former emphasises the liberal content of European Christianity, which, in its recent history, has helped promote the liberal values of "tolerance, mutual respect, valorization of the person, affirmation of one's rights" (*Lautsi v. Italy, 2011*: para 16). As a result, the crucifix becomes the symbol of equal inclusion, rather than an implicit message of sectarianism. In the words of the Italian government, "the cross, as the symbol of Christianity, can there- fore not exclude anyone without denying itself" (*Lautsi v. Italy, 2011*: para 15). The crucifix may thus acquire an educational symbolic function as it affirms - rather than undermines - the values underpinning the Italian constitutional order and the principles of secularism itself.

Yet this line of argument encounters two criticisms: first, there might be more effective ways of promoting the liberal values at the foundation of Italian society and its constitutional order, for instance through the presence in the school curriculum of a subject that teaches the values and history underpinning the Italian political order. Second, it might be difficult for people who are not Christian to find any educational value in the crucifix, since its meanings might not be accessible to them – precisely because of its Christian origins.

The latter argument advanced by the Italian government detaches the crucifix from its theological origins and instead focusses on the cultural dimension that it has acquired through history, thus becoming a secularised symbol of the Italian national identity. Indeed, the Italian government points out that "keeping crucifixes in school was therefore a matter of preserving a centuries-old tradition" (*Lautsi v. Italy, 2011*: para 36).

According to Laborde, however, it is not sufficient to deprive the symbol of its religious significance in order to make it permissible at the bar of liberal legitimacy. Indeed, Laborde explicitly disagrees with the ECHR's decision in *Lautsi* because, according to the expressionist theory of non-endorsement that she defends, religious symbols may have exclusionary valence; that is, if a religious symbol has a social meaning which may cause social discrimination, then the state ought not to display it (Laborde, 2017, pp. 137–140). Laborde explicitly mentions the crucifix in schools as an example of impermissible display of a religious symbol by the state. It is the case

[32] I draw this distinction from Laborde and Laegaard (2019.

that throughout history religion has been “a socially salient category of membership and exclusion” in European societies (Laborde, 2017, p. 137). As *Lautsi* evidently shows, European states have begun to re-describe the crucifix as a cultural rather than religious symbol; yet, their attempt to secularise the meaning of the crucifix and to ascribe it to the cultural and national identity does not make it less problematic for “both faith and culture can be used as markers of exclusion and vulnerability, as ways of signifying inequalities of status between those who belong and those who don’t” (Laborde, 2017, p. 139,140). According to Laborde, the display of a religious symbol with exclusionary valence by the state, such as the crucifix in schools, violates the third condition of liberal legitimacy that constitutes minimal secularism, namely civic equality.

Scholars are divided on the ECHR’s final judgment in *Lautsi*; defenders of the ruling have appealed to reasons including the freedom of the majority to shape its country’s policies (Witte, 2011), *realpolitik*’s need to avoid the rise of populism (McGoldrick, 2011), and liberal nationalists’ concerns for the protection of a society’s historically given national identity (Miller, 2019)[33]. I instead intend to ground my defence of the ECHR’s judgment in *Lautsi* on Italy’s right to self-determination or – in Walzer’s words – “communal integrity”. The central idea is that any political community has the right to shape its own political institutions and every citizen of that community has the right to live under institutions so shaped (Walzer, 1980, p. 220). Hence, Italians have the right – both as individuals and as a group – to live in a society of an *Italian* sort. The ideal of communal integrity stems from the rights of individuals “to live as members of a historic community and to express their inherited culture through political forms worked out among themselves” (Walzer, 1980, p. 211). Walzer’s argument for communal integrity amounts to a defence of the political life, which is unique for each community and “depends upon shared history, communal sentiment, accepted conventions” (Walzer, 1980, p. 228). Italy thus enjoys the presumptive right to have its internal life respected; this includes its tradition to display the crucifix in schools. Surely this communal right has to be balanced against individuals’ rights to religious freedom and non-discrimination; yet, as considered in the concurring

[33] Miller does not explicitly refer to Lautsi; yet he defends a notion of liberal religious establishment, countering the claim that the symbolic recognition of religion is inadmissible because it fails to treat citizens as equals. Hence, I consider his argument to be a defence of the ECHR's ruling.

opinion of Judge Rozakis and Judge Vajić, the Italian educational context demonstrates toleration towards atheists and members of religious minorities and accords sufficient protection to their rights. Indeed, the wearing of religious symbols by pupils is permitted; whenever possible, schools try to fit in non-majority religious practices; the school curriculum does not include compulsory teaching about Christianity; and optional religious education could be taught to all recognised religious creeds (*Lautsi v. Italy, 2011*: para 74).

It might nonetheless be argued that religious minorities' equal inclusion in the imagined community of citizens ought to be given greater importance. If it is indeed true that symbolic religious establishment may result in citizens' alienation, then the ECHR ought to take this factor into account when balancing the competing interests at stake. Laegaard suggests that symbolic religious establishment can affect civic equality either subjectively or objectively (Laegaard, 2017). Understood subjectively, the effects of symbolic religious establishment are measured in terms of the experiences of minority religions' members. More empirical works needs to be done in this area; yet one recent study fails to find evidence in support of the claim that religious establishment marginalises or alienates religious minorities, thereby creating second-class citizens (Perez, Fox and McClure, 2017). Specifically, the authors find no correlation between religious establishment and lower levels of confidence in state institutions.

Understood objectively, on the other hand, symbolic religious establishment is detrimental to civic equality if it is *reasonable* – from a normative standpoint – to regard it as sending a message of exclusion (Laborde and Laegaard, 2019). Indeed, Laborde specifies a person-independent criterion – that is, the impermissibility of a state-endorsed religious symbol does not depend on individuals' subjective feelings of exclusion or whether "they positively associate with the group or identity that is excluded from state endorsement" (Laborde, 2017, p. 140); for the absence of a subjective feeling of alienation is not sufficient as a criterion for establishing the legitimacy of symbolic religious establishment.

Here I disagree with Laborde's view and claim that the effects of symbolic religious establishment ought to be understood subjectively, according to the actual impact that they have on citizens, rather than rejecting them by appeal to some abstract rule

(Miller, 2019). I do agree with Laborde that "it is *only* when religious divisions map onto socially salient markers of vulnerability and domination that expressive symbolism" [emphasis added] may be a problem (Laborde, 2017, p. 140 n. 66). Arguably, however, inclusiveness and civic equality are not undermined in a state where all citizens are able to express their religious beliefs in public and to have their rights and freedom recognised. As Miller points out, it is not sufficient to emphasise that religious identity may be a source of social vulnerability in order to conclude that symbolic religious establishment ought to be abolished. It is also necessary to show whether the presence of institutional religious symbols does in fact cause or magnify social vulnerability: to date, this claim is not supported by the evidence (Miller, 2019).

In sum, I defend the ECHR's judgment in *Lautsi* on the grounds that the display of the crucifix in schools may be regarded as a tradition that ought to be respected in virtue of Italy's right to self-determination. The display of the crucifix does not impinge on human rights and there is not enough evidence to conclude that it marginalises or excludes religious minorities from the imagined community of citizens. Hence, I defend the ECHR's decision to grant Italy a wide 'margin of appreciation' as it was not within the its competence to decide on this question. I believe that the value of the ECHR's doctrine of the 'margin of appreciation' lies precisely – to use Walzer's words – in "the respect that we are prepared to accord and the room we are prepared to yield to the political process itself. [. . .] It has to do with the range of outcomes we are prepared to tolerate, to accept as presumptively legitimate, though not necessarily to endorse" (Walzer, 1980, p. 229). This is precisely one of the core tenets that my notion of tolerant pluralism seeks to encapsulate.

4.7 Conclusion

In this chapter, I have endorsed a revised version of Laborde's minimal secularism – that I have termed 'tolerant pluralism' – and applied it to the headscarf *affaires* and the crucifix case to assess the most debated of ECHR's rulings concerning the appropriate place of religious symbols in the public sphere. I have showed that the headscarf ban in *Sahin* and *Dahlab* is illegitimate because it violates personal liberty as it is justified by a comprehensive view. The prohibition to wear the Muslim veil in *Dogru* also violates personal liberty but on the distinctive grounds that the prohibition

infringes on the applicant's ability to live with integrity and is disproportionate to the aims pursued by the law. Finally, I have defended the ECHR's judgment in *Lautsi* as the display of the crucifix in state schools does not result in human rights' violations and is protected by Italy's right to self-determination. In my analysis, I have emphasised some points of disagreements with Laborde's view, for it is my contention that her approach is too secularist with regard to state officials' right to wear – and states' ability to display – religious symbols in the public sphere. I now turn to the assessment of Laborde's approach on freedom of association.

Chapter 5 Freedom of Association

5.1 Introduction

In this chapter, I address controversies about the right to freedom of association and question if, and in what circumstances, religious groups may permissibly be exempted from generally applicable laws, focusing particularly on laws prohibiting discrimination.

Following liberal egalitarians such as Lawrence Sager, Jean Cohen, Richard Schragger, and Micah Schwartzman, Laborde grounds groups' rightful claims to exemptions from general laws on the liberal value of freedom of association (Laborde, 2017: 161). Once again, Laborde's approach consists in disaggregating the different values protected by the right to freedom of association. Specifically, Laborde identifies two salient interests that associations may appeal to so as to be considered for exemption: these are *coherence* and *competence* interests. One of the strengths of Laborde's approach is that, by singling out the normatively relevant features that freedom of association secures, it equips us with a tool for recognizing the suitable group candidates for exemption rights, irrespective of the religious or non-religious nature of the group in question. Indeed, it is a core tenet of Laborde's theory that "religious associations are not uniquely special *qua* religious" (Laborde, 2017: 161). I endorse Laborde's argument yet, for the purpose of this thesis, I choose to restrict myself to the assessment of cases concerning religious associations.

A further advantage of Laborde's disaggregation strategy is that it avoids the unnecessary complications that political pluralists run into in their attempt to determine the ontological nature of groups. Indeed, within Laborde's framework, all that matters is that groups exhibit specific features that may justify their right to a certain degree of autonomy. This is for two reasons: first, "collective exemption rights are power *over* others" in a normatively significant way – that is, they determine the rights and entitlements of groups' members (Laborde, 2017: 173). Second, Laborde endorses a progressive theory of egalitarian justice, whereby the state treats its citizens as free and equal by first and foremost protecting them against discrimination on morally arbitrary grounds. Hence, if groups are ever granted

exemptions from anti-discrimination laws, they ought to be groups of a very specific kind (Laborde, 2017: 173, 174).

My aim I this chapter is to challenge Laborde's claim that "as soon as an organization claims to serve the public, it is not "religious" in the sense that matters to standing in exemptions from discrimination claims" (Laborde, 2017: 185); for it is my contention that Laborde's restriction dismisses too swiftly the claim of associations that have an interest in serving the public at large or their local community in a way that reflects their ethos.

5.2 Laborde on freedom of association

On Laborde's account, to have a *pro tanto* right to discriminate, a group must be *i)* voluntary – that is, it must ensure its members the right to exit at no excessive cost – and *ii)* identificatory – in other words, it is constituted by individuals for the pursuit of a conception of the good that defines the groups' identity and integrity (Laborde, 2017: 174)[34]. Or, to put it differently, identificatory associations form the identity of their members. The former condition aims to protect "minorities within minorities", such as children or other vulnerable members. The latter requirement is significant because, in advancing their exemption claims, groups seek to preserve a fundamental interest – namely their collective integrity – in virtue of which they may sustain and enforce their own community norms. As Peter Jones reminds us, groups are right-holders precisely because they exhibit a particular level of unity and identity that forms their integrity (Jones, 2016). But how are we to evaluate whether a given group has exceeded the threshold of unity and identity required for it to be able to bear rights? This inquiry risks leading us to an impasse akin that already encountered by political pluralists in their slippery and fruitless pursuit of real group personality. Yet, Laborde's strategy prevents us from going down that road: instead of measuring the level of integrity manifested by a group, she points us towards two

[34] For an explanation of Laborde's conception of the value of integrity, see my discussion of *Dahlab v. Switzerland* (2001) in Chapter 4.

integrity-related interests that – if met – independently justify exemption rights. Laborde refers to them as *coherence* and *competence* interests[35].

5.2.1 Coherence interests

Laborde identifies coherence interests as “associations’ ability to live by their expressed standards, purposes, and commitments". (Laborde, 2017: 178) They are “interests that associations have in sustaining their identity, that is, their ability to maintain a structure through which their members can pursue the purpose for which they have associated”. Indeed, if a group is to preserve collective integrity, it is vital that it aligns its mission with its structure and ethos. For instance, coherence interests explain why a Catholic association may permissibly refuse membership to Muslims, why a university is legitimated to take disciplinary action against a student who is caught cheating during an exam and why a religious association may prohibit blasphemy for their members; were groups compelled to act any differently in such cases, their integrity would be dangerously compromised and, with it, the freedom of their members to live according to their preferred conception of the good. Fundamentally though, the differentiated treatment implemented by the group must be mandated by its doctrine. In other words, if a certain kind of discrimination is not entailed by the religious dogma of the group, there is no ground for considering it for an exemption right[36].

The kernel of Laborde’s argument for the permissibility of collective exemption rights consists in the identification of three core features that identificatory groups must exhibit. First, “there must be a fit between the main purpose of the association and the main purpose of its members in associating” (Laborde, 2017: 184). This criterion serves to distinguish between a nonprofit religious association – which immediately stands out as an identificatory group – and a large-scale for-profit corporation, which does not exhibit the relevant coherence among its mission and its employees’ goal in

[35] To put it in Laborde’s own words, she presents with an approach that “is interpretative, rather than focused on the semantic or ontological question of what groups “really” are” (Laborde, 2017, 181).

[36] This explains the US Supreme Court’s decision to convict a publishing corporation affiliated with the Seventh-Day Adventist Church for salary discrimination against a female employee; indeed, the Court declared that “preventing discrimination can have no significant impact upon the exercise of Adventist beliefs because the church proclaims that it does not believe in discrimination against women” (in Laborde, 2017: 179) EEOC v. Pacific Press Publishing (1982).

participating in the enterprise. The latter is thus a mere organization. Laborde offers this argument to object to the US Supreme Court's decision in *Burwell v. Hobby Lobby* (2014), which granted a large arts-and-craft chain run by a religious family an exemption from the contraception mandate present in the 2010 Affordable Care Act (Laborde, 2017: 182, 185). It is Laborde's contention that the associations "13.000 employees cannot be assumed to share the owners' personal investment and moral commitments" (Laborde, 2017: 185).

Billingham rightly points out that people join associations – such as churches – for many different reasons, including "social opportunities, a sense of belonging, in search of a partner habit, boredom" (Billingham, 2019: 119); consequently, if members associate for reasons other than the conception of the good that is being promoted, then the group fails to play any significant part in the identity of its members. But if the identity concern fails to be an appropriate decision criterion, how are we to distinguish between groups that do and groups that do not qualify for exemption? Billingham suggests two solutions. First, a group may be allowed to enforce its standards only on those members who share its purpose; yet, this would effectively prevent all internally diverse groups – that is, almost all groups – from claiming exemption rights (Billingham, 2019: 119). Second – and this is my preferred solution - associations may be considered as identificatory - and their standard may permissibly be enforced on all members - as long as many members share the associations' central mission; the question then becomes one of numbers: "how many members must share the purpose, and indeed who defines that purpose, in the face of diversity and internal dissent" (Billingham, 2019: 120)? Here, however, we are in the domain of competence interests, which will be the focus of the next section.

Second, "there must be a fit between the association's purpose and the public it intends to serve or the customers it caters for" (Laborde, 2017: 185). Once again, it is identity that does the key work; for what matters is that the association's customer base is aligned with its ethos so as to be self-selecting. Laborde's claim here is very strong – and, as I argue below, illegitimately intolerant – as she states that "as soon as an organization claims to serve the public, it is not "religious" in the sense that matters to standing in exemptions from discrimination claims" (Laborde, 2017: 185).

On her view then, ethical investment companies and kosher supermarkets, but not religious hospitals or charities, exhibit the relevant coherence interest.

Third, “there must be a fit between the association’s main purpose and the specific activity or function for which it claims an exemption” (Laborde, 2017: 185). That is to say, not all the activities undertaken by an identificatory association – one which meets the two aforementioned conditions – and that require an exemption from the law may be permitted. The same religious group may have a coherence-interest based claim for one activity, but not for another. The distinction here lies in the relevance of the activity to the group’s purpose; or, to put it differently, the question that needs to be answered affirmatively is the following: is this an activity that the identificatory association regards as closely related to its core purpose? Hence, “as a practice becomes more distant from the core religious practices and activities of the association, it also becomes less relevant to associational coherence” (Laborde, 2017: 186). In consequence, Laborde concludes that the activities of a priest or a religion teacher, but not the activities of a gym janitor may be subjected to exemption rights. Before putting Laborde’s notion of coherence interest to the test, it is useful to turn straight to her discussion of competence interest; for the two are inextricably linked.

5.2.2 Competence interests

On Laborde’s view, “competence interests refer to associations’ special expertise in the interpretation and application of […] [their professed] standards, purposes, and commitments" (Laborde, 2017: 191)[37]. Competence interests have much to do with the accessibility condition of Laborde’s minimal secularism; for “if some reasons, doctrines, and ideas, are inaccessible in public reason […] then, *ceteris paribus*, they are also inaccessible as a basis for judicial interference in the internal life of associations” (Laborde, 2017: 191). In sum, it is the fact that associations’ purposes and norms are inaccessible and, more generally, that the state lacks the competence to evaluate them that makes them ill-suited as objects of inquiry on the part of courts. The crucial interest here is to preserve the wall of separation between church and

[37] The relevance of competence interests to the right to freedom of association has been generally overlooked in the literature; particularly, it has never been put forward as a criterion on which to ground special rights for associations.

state, whereby the government does not impermissibly interfere in the settlement of theological controversies.

Competence interests justify judicial deference to the association's own interpretation of its precepts; for instance, courts' may legitimately defer to churches' employment decisions in controversies about the selection and dismissal of clergy[38]. Most importantly, Laborde's approach does not grant full jurisdictional autonomy in all churches' employment decisions – as argued by defenders of the U.S. theory of ministerial exemption (Laborde, 2017: 193). Courts ought to hear such cases before deciding whether to the defer to the associations' judgment – because, for instance, the debate is about the spirituality of a minister – or whether to assess the validity of the charge pressed by the church – was this an objectively testable matter, such as the case of adultery. As Billingham points out, however, Laborde fails to provide a developed account specifying the sorts of examinations that the court may legitimately perform (Billingham, 2019: 123). Laborde's approach offers us valuable guidelines when dealing with extreme cases such as *Lombardi Vallauri v. Italy* (2009), where even the less demanding standards of procedural fairness were breached, such that no justification was offered to Professor Lombardi Vallauri as to his dismissal. Yet, doubts remain as to the treatment of less clear-cut cases.

In sum, coherence rights justify *narrow* associational rights, only applicable to a limited set of practices; but these rights are *deep* in so far as they justify full exemption from laws of general application. Competence interests, on the other hand, justify *broad* associational rights, which entail minimum judicial deference on questions that can only be resolved by appealing to the association's precepts or expertise; yet these rights are *shallow* as they do not entail jurisdictional immunity and, consequently, the court retains its power of inquiry into the reasons provided in support of an employment decision, without necessarily enmeshing itself with theological issues (Laborde, 2017: 175, 176). With her approach, Laborde aims to counter the "ministerial exemption" in the US (Laborde, 2017: 177, 177) which has been forcefully criticized by many scholars for creating a broad and robust right of corporate religious freedom. Laborde favors the balancing approach adopted by the

[38] See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Gonzales v. Archbishop*, 280 U.S. I (1929).

European Court of Human Rights, which she hopes to ameliorate by providing a more principled and structured framework with which to weigh groups' autonomy against the rights of its members (Laborde, 2017: 177). Fundamentally, the state retains its power to draw the line between questions that can be resolved entirely by religious authorities and questions that pertain to the public sphere and hence have to be adjudicated by the court (Lapu and Tuttle, 2014). In other words, "religious groups have interests both in coherence and in competence, but they do not have a right of jurisdictional self-definition", for it is the state that holds *Kompetenz-Kompetenz* (Laborde, 2017: 196).

5.3 Assessment

The question of whether faith-based organisations are to be let free to serve the general public according to their own creeds raises serious perplexities and disagreements. This is especially true whenever discrimination is involved. On one hand of the spectrum, there are those who strive for the supremacy of conscience, on the other, there are the hardcore defenders of equality for all. It thus immediately appears evident that this debate reproposes the unresolved tension between liberty and equality - with Laborde siding with the latter extreme. Instead, representative of the liberty horn are the words of Cardinal Timothy Dolan, Archbishop of New York and President of the U.S. Conference of Catholic Bishops, who fiercely opposed the Obama administration for refusing to exempt religious organisations that serve the general public - including Catholic schools, charities and hospitals - from the ObamaCare's requirement to provide contraception, including abortion-producing drugs, and sterilisation coverage for all employees (Cardinal Dolan 2012)[39]. Cardinal Dolan's argument emphasises the role of conscience at play in Catholic hospitals' treatment of the general public, inferring that no coherent distinction may be drawn between those exercises of religion and the legally protected ones concerning religious institutions' control of their internal affairs.

The question at the heart of this debate is thus the following: is there a legitimate justification for treating the Church's employees differently from employees working for other employers such that the former's interests in healthcare are afforded

[39] The administration did propose a "religious employer" exemption, but this was constructed so narrowly that it could only apply to religious associations that served people of the same faith.

weaker protection? Lever replies in the negative: “no one has a conscientious obligation to provide goods and services to the general public for a fee, whatever their duties of charitable care to the poor and needy” (Lever, 2017: 236). Lever distinguishes starkly between the charitable provision of care to the faithful and the provision of services to the general public for money - including nonprofit services; while the Catholic Church undisputedly has a conscientious obligation to supply the former - and, consequently, a legitimate claim against state interference - the same cannot hold true for the provision of the latter. On Lever’s view then, the state’s commitment to equality prohibits all providers of public services to act in ways that are discriminatory; this entails, for instance, the requirement of Catholic hospitals to provide abortions - or partner with facilities that do so (Lever, 2017: 240). Similar considerations apply in the case of faith-based adoption agencies that refuse to provide their services to LGBT couples.

My aim in the remaining part of this chapter is to argue that, contrary to Laborde, faith-based hospitals and adoption agencies have at least some coherence-interest-based claim in being exempt from anti-discrimination legislation in the provisions of their services. In other words, I object to claim that “as soon as an organization claims to serve the public, it is not “religious” in the sense that matters to standing in exemptions from discrimination claims” (Laborde, 2017: 185); for it is my contention that Laborde’s restriction dismisses too swiftly the claim of associations that have an interest in serving the public at large or their local community in a way that reflects their ethos. In his discussion of Laborde’s account, Billingham shares my intuition that “it is a bit quick” to *a priori* deny groups the freedom to “discriminate in carrying out their external activities” (Billingham, 2019: 120). Indeed, I agree with his claim that “surely Catholic hospitals that do not wish to provide abortion services and family-run bakeries that do not want to provide cakes endorsing gay marriage have at least *some* coherence-interest-based claim – whether or not this is ultimately weighty enough to justify exemptions”. As Billingham rightly points out, there are always costs to third parties, but this is true also in cases of refused membership, which Laborde does concede. But what justifies the Catholic hospitals’ and Catholic family-run bakeries’ coherence-interest-based claims? It seems that if we are to share Billingham’s intuition, then we ought to make some adjustments to Laborde’s framework. This is the task that I now embark on.

5.3.1 Morally ambivalent claims

I want to start my argument by considering a recent case submitted to the Supreme Court in the United Kingdom – *Lee v. Ashers Baking Company Ltd and others* (2018). The case concerns the owners of a family-run bakery business ('Ashers') who refused to supply a cake iced with the statement 'Support Gay Marriage' to Mr. Lee, a gay man who volunteers with an organization supporting the LGBT community in Belfast, QueerSpace. Mrs. McArthur initially took the order and accepted the payment, but later contacted Mr. Lee explaining that they could not in conscience fulfill the order because they were a Christian business and they objected to the statement requested, offering Mr. Lee full reimbursement. Mr. Lee sued the McArthurs for direct and indirect discrimination on grounds of sexual orientation, religious belief or political opinion (*Lee v. Ashers Baking Company Ltd and others* 2018, para 14)[40]; yet the Supreme Court's sentence defends the rights of the McArthurs to refuse to express a message with which they deeply disagreed[41].

The Supreme Court states that there was no discrimination on grounds of sexual orientation, for "the reason for treating Mr. Lee less favorably than other would-be customers was not his sexual orientation but the message he wanted to be iced on the cake. Anyone who wanted that message would have been treated in the same way" (*Lee v. Ashers* 2018*,* para 23). The reason of the McArthurs refusal to fulfill the order was their objection to gay marriage on religious grounds, hence "in a nutshell, the objection was to the message and not to any particular person or persons" (*Lee v. Ashers* 2018, para: 34). In consequence, the Supreme Court concludes that "the SORs do not, at least in the circumstances of this case, impose civil liability for the refusal to express a political opinion or express a view on a matter of a public policy

[40] Discrimination in the supply of goods, facilities or services on groups of sexual orientation is prohibited by the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 ('the SOR's'); discrimination in the supply of goods, facilities or services on grounds of religious belief or political opinion is contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998 ('FETO').

[41] The opposite conclusion was reached by the district judge in the county court - arguing that there was discrimination on all three grounds - and by the Court of Appeal - holding that Mr. Lee had been discriminated against on grounds of sexual orientation. Neither Court had deemed it necessary to consider the SORs or FETO in light of the McArthurs' ECHR rights.

contrary to the religious belief of the person refusing to express that view" (*Lee v. Ashers* 2018, para 36).

With regards to the charge of discrimination on grounds of religious belief or political opinion, the Supreme Court declares that "the objection was not to Mr. Lee because he, or anyone whom he associated, held a political opinion supporting gay marriage. The objection was to being required to promote the message on the cake" (*Lee v. Ashers* 2018, para 47). Once again, "the less favorable treatment was afforded to the message not to the man" (*Lee v. Ashers* 2018, para 47). Hence, the treatment is not comparable to the refusal of job positions to people of a given religious faith. Instead, the Supreme Court equates it to a situation in which a Christian printing business is required to print leaflets conveying an atheist message. Nonetheless, the Supreme Court recognizes that there is a strong relation between the message that the man wishes to support and his political opinions, such that they could be "indissociable for the purpose of direct discrimination on the ground of political opinion" (*Lee v. Ashers* 2018, para: 48). Thus, the Supreme Court decides to assess the impact of McArthurs' ECHR rights under Article 9 and 10 (freedom of religion and freedom of expression, respectively) upon the meaning and effects of the law prohibiting discrimination on political grounds (FETO). The Supreme Court concludes that the right to freedom of expression has been long considered to entail the right *not* to express an opinion – even though it does not mention it explicitly[42]. The Court thus concludes that "FETO should not be read [...] in such a way as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so" (*Lee v. Ashers* 2018, para: 57); thus, to oblige the McArthurs to provide a caked with a message with which they profoundly disagree would impermissibly violate Article 9 and 10 of the ECHR[43].

[42] Indeed, the Supreme Court refers to *RT (Zimbabwe) v Secretary of State for the Home Department* (2012) UKSC 38; (2013) 1 AC 152; the case concerns an asylum seeker who should be sent back to Zimbabwe where he would be most likely be persecuted for his refusal to actively support the regime. Here, Lord Dyson states that "Nobody should be forced to have or express a political opinion in which he does not believe" (para 42, quoted in *Lee v. Ashers Baking Company Ltd and others* 2018, para 52). The Supreme also cites the US jurisprudence where "the right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all" in para 52.

[43] In its decision, the Supreme Court refers to the *Masterpiece Bakery* case, whose sentence was pronounced a few months prior to the *Ashers Baking Company*'s judgment. The facts of the case are different here. Specifically, Jack Phillips - the owner of Masterpiece Cakeshop, Ltd. - refused to create

In her defence of the theory of the justice of individual exemptions on religious grounds, Laborde explicitly refers to the Northern Ireland bakery case as presenting an instance of a morally ambivalent claim, which is to be distinguished from a morally abhorrent claim. Indeed, Laborde envisages the possibility of a two-pronged test for assessing the permissibility of granting individual exemption: first, it is necessary to evaluate which practices exhibit the appropriate interpretative values so as to qualify as *pro tanto* claims to be heard; second, there needs to be a final assessment for the practices that are ultimately granted an exemption (Laborde, 2017: 202). Let us remind ourselves that integrity entails coherence between one's values and one's actions. Integrity-protecting commitments are relevant for exemption purposes - e.g. refusal to supply a cake with a pro-gay marriage message or serve gay couples or provide contraception services (Laborde, 2017: 203). Laborde grants integrity-protecting commitment the status of pro tanto candidates for exemptions. But two conditions ought to be met for a practice to fall in the category of integrity-protection commitments. First, the thick sincerity test, which aims to ensure that the individual claiming the exemption does in fact perceive the practice in question as central to his integrity. Second, the thin acceptability test, which concerns morally abhorrent claims – that is, "claims that are flatly incompatible with the basic rights of others" (Laborde, 2017: 207). According to the thin acceptability test then, "practices must meet a threshold of moral acceptability" (Laborde, 2017: 209); for liberal justice is incompatible with basic rights violations - e.g. murder, cruelty, etc. Instances of morally abhorrent claims are demands by Nazi or fundamentalist terrorists, infant sacrifice, attacks to doctors performing abortions, and so on. Even though morally abhorrent claims are advanced by one in sincerity - thus constituting a central part of her sense of self - they are not eligible for the second stage of Laborde's two-pronged test.

---

a cake for a same-sex couple's wedding celebration because, being a devoted Christian, he is opposed to same-sex marriages. Phillips's defense rests on the claim that the creation of the cake involves "using his artistic skills to make an expressive statement" and this "has a significant First Amendment speech component and implicates his deep and sincere religious beliefs" (2018: 2). The Supreme Court ruled in favour of the baker, raising fierce opposition on the part of LGBT social movements (*Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 2018).

Laborde distinguishes morally abhorrent claims from morally ambivalent claims. The latter pass to the second stage, for these "are claims that can be fitted into one or other recognizably liberal conception of justice" (Laborde, 2017: 210). They might nonetheless be rejected at the second stage. Indeed, these are claims that originate from reasonable disagreements about justice. Here, Laborde explicitly refers to *Lee v. Ashers Baking Company* as an instance of morally ambivalent claim in that it is a religiously conservative claim. Laborde writes: "the shop owner might be wrong that his freedom of speech is properly implicated; but to think so is not a morally abhorrent failure of judgment" (Laborde, 2017: 211). Laborde continues:

> On my theory, because these morally ambivalent claims are claims that can be inserted into one or other conception of liberal justice, they should be allowed at the first stage (even if they are turned down at the second stage). If we accept that there is not one but several conceptions of liberal justice, we must accept, as pro tanto IPCs, commitments that are compatible with one or another of such conceptions of justice - even if it is not the conception that we (as political theorists) personally favour, nor the one that has been endorsed through fair democratic procedures. Citizens ought to get a hearing for those claims that conflict with the publicly endorsed conception of liberal justice, insofar as their claims are not morally abhorrent (Laborde, 2017: 212).

It is my contention that the claims advanced by Catholic hospitals and adoption agencies are instances of religiously conservative demands and, as such, they are morally ambivalent. Consequently, I argue that there is an inconsistency internal to Laborde's framework for the justice of exemptions on religious grounds. For with respect to individual exemptions, she allows for morally ambivalent claims to pass to the second stage of the two-pronged test; yet Laborde does not apply the same treatment to the case of collective exemptions.

I now turn to the argument that I intend to defend, namely that a group's practices are strictly linked to its freedom of expression and that this relation has to be taken into account when balancing the claims of association against individuals' right to nondiscrimination. This consideration has to be taken into account at the second stage of Laborde's two pronged test, which entails the evaluation of the exemption claims by reference to their compatibility with the publicly endorsed conception of liberal justice. The rationale here is that demands of exemption from anti-discrimination laws can be justified by appeal to a reasonable interpretation of liberal rights - such as the right to free speech, free association, privacy, etc. (Laborde,

2017: 213, 214). I want to argue that one reasonable interpretation of the right to free speech grounds Catholic hospitals' and adoption agencies' exemption claim from antidiscrimination legislations. These ought thus to be balanced against individuals' right to nondiscrimination within the framework of a contextual analysis.

5.3.2 Expressive associations

In U.S. jurisprudence, associations' right to be excluded from antidiscrimination laws has been recently derived from the First Amendment's right to free speech. Prior to *Boy Scouts of America at al. v. Dale* (2000), the Supreme Court followed what has been termed a "message-based approach": that is, "if an association is organized to express a viewpoint, then constitutional difficulties are raised by a statute that requires it to accept unwanted members if that requirement would impair its ability to convey its message" (Koppelman and Wolff, 2008: xi). Koppelman and Wolff explain that *NAACP v. Alabama ex rel Patterson* (1958) was the first case in which the Supreme Court linked freedom of speech and to freedom of association, stating that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the … freedom of speech" (in Koppelman and Wolff, 2008: 18).

The most comprehensive explanation of expressive associations and justification of their special rights are found in *Roberts (Robert v. United States Jaycees,* 1984), which concerned an organization for young business leaders, the United States Jaycees, that originally only accepted men as members, but then subsequently modified its internal statute so as to admit women without however granting them voting privileges. Women were thus only qualified as associate, rather than full, members. Two Minnesota chapters, who had been violating the bylaws for years by admitting women as full members, were threatened by the national Jaycees that their chapters would be revoked; the chapters then brought the case to Court, filing discrimination charges. Jaycees' defence was grounded on the claim that the admission of women would violate its right of association; indeed, it argued that constraining it to accept women as full members would violate its First Amendment right to expressive association. For the organization purpose was to "foster the growth and development of young men's civic organizations in the United States".

Justice Brennan's opinion for the Court in *Roberts*, argues that freedom of association exhibits an intrinsic as well as an instrumental feature (Farber, 2001: 1486). The intrinsic feature concerns the protection of associations *because* they are associations[44]. The Jaycees, however, were not considered as an intimate association[45]. The instrumental feature, on the other hand, is what grants an association the qualification of "expressive association" and entails "the right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion" (*Roberts*, 1984: 618). Since expressive associations are valuable in liberal democratic societies in order to preserve the political and cultural diversity and to protect dissident expression from suppression by the majority, the Court has recognized a right to "associate with others in the pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" (*Roberts*, 1984: 622). Yet, limitations on the rights of expressive association may be justified by "regulations adopted to serve compelling state interests, unrelated to suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms" (*Roberts,* 1984: 623). In the present case, the Supreme Court addressed the issue of a right to exclude based on free speech by appealing to a balancing test: the association's expressive practice – in this case, the United States Jaycees' exclusion of women as voting members – was weighed against the state interest in ensuring protection from discrimination. The considerations relevant to the Court's decision were: *i)* the association's convincing showing of the anti-discrimination norms' burden on its expressive practice – which entails the demonstration that the prohibition of the practice undermines the promotion of the association's core creed; and *ii)* the magnitude of the state interest, including considerations of less restrictive alternatives. In consequence, restriction on expressive association may be permitted "by regulations adopted to serve compelling state interests, unrelated to suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms" (in Farber, 2001: 1487). In *Roberts*, the Court concluded that the admission of women

[44] The reason is that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme" (1984: 617-618).

[45] Indeed, the organization had approximately 295,000 members and 11,915 associate members.

would most likely not affect the content of the association's expressive activities and that, even if it did, the state's compelling interest in eradicating discrimination would outweigh the association's expressive right claim. The Court indeed stated that the Jaycees "failed to demonstrate that the [anti-discrimination] Act imposes any serious burdens on the male members' freedom of expressive association" (*Roberts,*1984: 626).

In her concurring opinion, Justice O'Connor challenges the Supreme Court's view according to which a group's right of association depends on the group's showing of a relation between the group's membership and its message, such that the admission of unwelcome members would "change the message communicated by the group's speech" (*Roberts,* 1984*:* 632 in Farber, 2001: 1498). Justice O' Connor, however, focuses on the selection of the members, stating that "the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice" (*Roberts, 1984:* 633 in Farber, 2001: 1498). Further, Justice O'Connor draws the distinction between commercial and non-commercial associations: only the marketplace of ideas is protected by the First Amendment (Farber, 2001: 1499). Indeed, she makes the example of the Jaycees who were a commercial rather than an expressive association.

The distinction between commercial and noncommercial associations, which has been employed in several occasions by U.S. Courts in order to limit the definition of expressive associations, originates from neolibertarian accounts. Indeed, neolibertarians draw a stark distinction between commercial and noncommercial associations, granting an absolute right to discriminate to the latter but not to the former. As Koppelman and Wolff argue, neolibertarian arguments exhibit significant similarities with the classic libertarian objections to antidiscimination law (Koppelam & Wolff, 2009: xii-xiii). Indeed, the old minimal-state libertarianism upholds three assumptions: 1) any state that performs anything more than the functions and role performed by the minimal state is bound to violate citizens' rights; 2) the only responsibility that the state can be trusted to fulfill concerns the prevention of force and fraud; 3) an unregulated private sector can foster and facilitate the production of benign results. The failure of classical libertarian normative theories stems precisely from their reliance on these three assumptions; consequently, neolibertarians restrict the application of those core assumptions to noncommercial associations.

There are plausible grounds for employing the distinction between commercial and noncommercial associations with regard to expressive associations' rights. For instance, economic activities can more easily be regarded as instrumental rather than expressive; another reason has to do with the state's compelling interest in eradicating discrimination in the provision of goods and services (Farber, 2001: 1499).

Nonetheless, it is my contention that it is wrong to affirm that an association is that is commercial can no longer qualify as expressive. As Justice O'Connor herself concedes, the distinction between commercial and noncommercial associations cannot accurately capture the nature of expressive associations. A newspaper, for instance, is expressive, albeit commercial. Whereas a children's soccer league is non-expressive and noncommercial; yet, we deem it appropriate to apply anti-discrimination laws in the latter case (Farber 2001: 1500). Justice O'Connor does indeed acknowledge that "[t]he considerations that may enter into the determination of when a particular association of persons is predominantly engaged in expression are therefore fluid and somewhat uncertain" (*Roberts*, 1984: 637).

The appeal of the speech-based right to discriminate is persuasive: associations are crucial in the organization and mobilization of citizens around ideas which span across the broad spectrum of questions concerning public discourse (Koppelman and Wolff, 2008: 22). In turn, the promotion of competing ideas is essential to preserve pluralism. As Justice Brennan acknowledges with regard to the instrumental feature of freedom of association, in liberal democratic societies it is vital to protect the existence of minority views and unpopular expressions.

I want to argue that freedom of association has a twofold dimension: the former is inward looking, it concerns the members and the association's key role in forming *their* identity and influencing *their* lives; the latter is outward looking, it relates to the influence that the association seeks to exert on society. This latter dimension concerns the message that the association wants to convey to the public at large and, hence, it is linked to freedom of expression. My claim is that Laborde's approach fails to pay due consideration to the outward looking dimension of freedom of association, resulting in an inadequate protection of group's autonomy.

In fact, Laborde does question whether her interpretation of coherence interests infringes associations' freedom of expression (Laborde, 2017: 187); her focus, however, is on the association's members as – to put it in her own words – "its freedom to select (and discipline) *its members* consistently with its expressive purpose is essential to its members' exercise of free speech through the association" (Laborde, 2017: 187). My claim is that associations' expressive purpose also aims at influencing society by conveying a message which is conducive to the pluralism that characterizes democratic societies.

In consequence, if we consider the case of faith-based hospitals that refuse to provide contraceptive services to their employees as well as faith-based abortion agencies that refuse to serve LGBT couples, it seems to me that they associate for the purpose of engaging with society by providing services which they regard as central to their doctrine (e.g. helping those who suffer, protecting the lives of individuals, helping people build a family). Further, in providing their services, these organizations also send a message to society about their value of life and their conception of the family.

5.3.3 Contextual analysis

Thus far I have argued that the exemption claims advanced by faith-based hospitals and adoption agencies are instances of religiously conservative demands and they might thus be regarded as morally ambivalent claims. In consequence, they ought to be treated as *pro tanto* claims to exemptions. Contrary to Laborde, I do not believe that "as soon as an organization claims to serve the public, it is not "religious" in the sense that matters to standing in exemptions from discrimination claims" (Laborde, 2017: 185). For I argue that two considerations have to be taken into account before ruling out the possibility of granting exemptions to organizations that serve the public. First, it is necessary to assess the relation between the practice in question and the doctrine of the organization. This is precisely Laborde's third condition with regard to coherence interests. That is to say, if we consider the case of Catholic hospitals and the provision of abortion or contraceptive services, it seems to me that we are dealing with a practice that touches upon a core element of the Catholic doctrine – namely, the value of life. The same reasoning applies to the case of

Catholic adoption agencies, whose activity concerns the creation of a family, which is once again an area which is deeply regulated by Catholic values.

Second, it is necessary to put forward a contextual analysis similar to the one suggested by Inazu (2012). In his challenge to the current U.S. approach to the constitutional protection accorded to group autonomy, Inazu claims that strong protections ought to be accorded "for the formation, composition, expression, and gathering of groups, especially those groups that dissent from majoritarian standards" (Inazu, 2012: 4). Inazu puts forward a contextual analysis in order to balance the interests at stake when a group claims an exemption right from anti-discrimination laws. He suggests that "protections for assembly ought to be constrained when a private group wields so much power in a given situation that it prevents other groups from meaningfully pursuing their own visions of pluralism and dissent" (Inazu, 2012: 14). The advantage of Inazu's proposal consists in the fact that it requires courts to assess the challenges to the exercise of the right to association not by reference to some abstract principle, but rather through the evaluation of the specific contexts in which associations exist and operate (Inazu, 2012: 15).

Inazu exemplifies his account with the case of the African American voters in Fort Bend County, Texas, when, in the 1950s, they challenged their exclusion from the Jaybird Democratic Association – a private group not subject to state election laws. For over sixty years, the candidate selected during the Jaybird Association's internal election went on to win the Democratic primary and the general election. Inazu acknowledges that the Jaybirds would qualify as a peaceable, noncommercial association; yet, he concludes: "most people would also recognize that the Jaybirds had so skewed the balance of power in Fort Bend County that they deserve to be denied the protections of assembly" (Inazu, 2012: 15). Inazu also refers to *Roberts* and considers how the Justice's opinions lack any contextual analysis. Indeed, he writes:

> Nothing in Justice Brennan's majority opinion or Justice O'Connor's concurrence tells us anything about how the Jaycees in Minneapolis and St. Paul had overreached their private power to the detriment of women or why compelling the Jaycees to accept women as full members rather than as associate members would have remedied that power disparity. The justice simply assumed that the state's interest in

> eradicating gender discrimination warranted trumping the autonomy of the Jaycees. Nobody offered any explanation of why *this* remedy helped to eradicate gender discrimination in *these* circumstances sufficient to trump the autonomy of *this* group. (Inazu, 2012: 16).

In sum then, Inazu's consideration of the power dynamics in which associations operate is the central element of his contextual analysis with regard to the exercise of freedom of association. On his view, limitations to the exercise of the groups' right ought to be limited to specific circumstances, for instance when the group operates under monopolistic or near-monopolistic conditions (Inazu, 2012: 14).

Hence, if we are to apply a similar analysis to the case of faith-based hospitals, we ought to take contextual factors into consideration. For instance, what is the proportion of faith-based hospitals that deny contraceptive or adoption services compared to the proportion of hospitals that do instead provide such services in the geographical area in question? I believe that the state ought to ensure that citizens are ensured access to the good and services they need; consequently, if the number of hospitals that deny contraceptive and adoption services is so small that it does not affect citizens' opportunity to benefit from those service, then they may permissibly be granted an exemption from antidiscrimination legislations[46]. A similar reasoning applies in the case of adoption agencies.

5.4 Conclusion

In this chapter I have discussed Laborde's framework for the justice of collective exemptions from antidiscrimination legislation. I have specifically focussed on coherence based claim. My account is more permissive than Laborde's when it comes to accommodating the exemption claims of organization that serve the public. For I have emphasized associations' expressive rights which protect their interest in influencing society by conveying a message which is conducive to the pluralism that characterizes democratic societies. Further, I have pointed to an inconsistency internal to Laborde's framework for the justice of exemptions on religious grounds. For with respect to individual exemptions, she allows for morally ambivalent claims to

[46] Arguably, it may be easier to choose what hospital to choose as a patient, rather than as an employee. Hence, I grant that the state ought to be less permissive with regard to exemptions in the case of contraceptive coverage for employees.

pass to the second stage of the two-pronged test; yet Laborde does not apply the same treatment to the case of collective exemptions. Hence, I have concluded that the final assessment as to whether organizations that serve the public ought to be granted exemption rights revolves around a contextual analysis of power dynamics in which these organizations operate. In sum, it is once again my contention that Laborde's approach retains some traces of secularist ideology. This feature poses serious dangers for the protection of group autonomy; that is, it runs the risk of legitimizing the suppression of the voice and ways of life of "those who would make a *nomos* other than that of the state" (Cover in Inazu, 2012: 18).

6 Conclusion

In this thesis, I have addressed ccontroversies over the appropriate relationship between religion and politics by focusing on the role of state sovereignty and liberal legitimacy. The re-emergence of theories of jurisdictional political pluralism has called into question the legitimacy of state authority in drawing the boundary between the private and the public spheres. On their view, the state acts illegitimately every time it unilaterally enforces and limits individuals' and groups' rights; for state sovereignty is externally limited by the sovereignty of other sources of authority, such as religious ones. I have shed light on the origins of political pluralist thought, highlighting its points of connection to the liberal tradition. I have argued that mainstream political liberal theories and pluralist accounts both share a commitment to state sovereignty in settling meta jurisdictional boundary questions. Yet, I have showed that Muniz-Fraticelli's pluralist account relies on a conventional understanding of state sovereignty, one that is consistent with Hart's notion of the rule of recognition. Hence, when it is not clear under what jurisdiction a given matter falls, it is the state that has the final say. This is indeed the accepted rule of recognition, which represents a solution to recurring complex coordination problems, giving rise to individual citizens' and groups' obligations to comply with the utterances of state authority. I then addressed the question of how to legitimately solve controversies concerning the conflicts of rights. I did so by assessing Laborde's liberal egalitarian theory of religion and the state. I defended a plausible liberal account of secularism, which I termed tolerant pluralism, with the aim of providing a useful framework for the adequate protection of the rights of individuals and groups. My account slightly diverges from Laborde's "minimal secularism" in that it accords wider protection to religious manifestations in the public sphere. Finally, I have addressed questions concerning the right to freedom of association and argued that Laborde dismisses too swiftly the claim of associations that have an interest in serving the public at large or their local community in a way that reflects their ethos. Once again, I suggested a modest modification of Laborde's approach so as to eliminate the traces of secularist ideology that it is retained.

7 Bibliography

Chapter 1

Bailey, T. and Gentile, V. (2015). *Rawls and Religion*. New York: Columbia University Press.

Buzan, B., Waever, O., de Wilde, J. (1998). *Security: a new framework for analysis.* Boulder, Colo: Lynee Rienner Pub.

Cover, R.M., (1983). Foreword: Nomos and narrative. *Harv. L. Rev*, *97*, p.4.

Dworkin, R. (2013). *Religion without god*. Cambridge, MA: Harvard University Press.

Eisgruber, C. and Lawrence, S. (2007). *Religious freedom and the constitution*. Cambridge, MA: Harvard University Press.

Fahmy, D. (2018). Americans are far more religious than adults in other wealthy nations. *Factank. News in the Numbers.* 31 July. Available at: https://www.pewresearch.org/fact-tank/2018/07/31/americans-are-far-more-religious-than-adults-in-other-wealthy-nations/

Finnis, J. (2011). When Most People Begin. In: J. Finnis, ed., *Collected essays, Volume II: Intention and Identity.* Oxford: Oxford University Press, pp.287-92.

Horton, J. (2003). Rawls, Public Reason and the Limits of Liberal Justification. *Contemporary Political Theory,* 2(1), pp.5-23.

Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission (2012). U.S. Supreme Court.

Huysmans, J. (1998). The question of the limit: desecuritization and the aesthetics of horror in political realism. *Millennium – Journal of international studies.* 27.3, pp. 569-589.

Inazu, J.D., (2012). *Liberty's refuge: the forgotten freedom of assembly*. Yale University Press.

Koyama, M. (2015). Jacob T. Levy: Rationalism, Pluralism, and Freedom. *Public Choice*, 163(3-4), pp.409-412.

Kramer, M. (2017). *Liberalism with excellence.* Oxford: Oxford University Press.

Kukathas, C., 2003. *The liberal archipelago: A theory of diversity and freedom*. Oxford University Press.

Laborde, C. (2015). Liberal neutrality, religion and the good. *Religion, secularism, and the constitutional democracy.* In J.L.Cohen and C. Laborde. 1st ed. New York: Columbia University Press, 2015.

Laborde, C. (2017). Liberal neutralism, abortion and 'cognate problems'. *Pavia Graduate Conference in Political Theory.* University of Pavia, 12\13 Sept. 2017.

Laborde, C. (2017). *Liberalism's Religion.* Cambridge MA: Harvard University Press.

Laegaard, S. (2019). Religious toleration and the securitization of religion. In: L.Bialasiewicz and V. Gentile, eds., *Spaces of tolerance. Changing geographies and philosophies of religion in today's Europe.* London: Routledge, pp. 103-120.

Levy, J. (2014). *Rationalism, pluralism, and freedom.* Oxford: Oxford University Press.

Muñiz Fraticelli, V. (2014). *The structure of pluralism*. Oxford: Oxford University Press.

Patterson, R. (2004). Reviewing Public Reason: A Critique of Rawls' Political Liberalism and the Idea of Public Reason. *Deakin Law Review*, 9(2), p.715.

Pew Research Center (2017). Europe's growing Muslim population. *Religion & Public Life.* 29 November. Available at: https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/

Quong, J. (2013). Public Reason. *Stanford Encyclopedia of Philosophy.* Available at: https://plato.stanford.edu/entries/publicreason/

Rawls, J. (1993). *Political liberalism*. New York, N.Y.: Columbia University Press.

Rawls, J. (1997). The Idea of Public Reason Revisited. *The University of Chicago Law Review*, 64(3), p.765.

Rawls, J. and Kelly, E. (2001). *Justice as fairness. A Restatement.* Cambridge MA: Harvard University Press.

Redazione Scuola (2019). “La recita di Natale non si farà. Anzi, sì, ma sarà inclusiva”. Polemiche. *Corriere della Sera.* 14 November. Available at: https://www.corriere.it/scuola/primaria/19_novembre_14/recita-natale-non-si-fara-anzi-si-ma-sara-inclusiva-polemiche-d4a38a02-06f9-11ea-8c46-e24c6a436654.shtml

Sherwood, H. (2018). How many believers are there around the world?. *The Guardian*. 27 August. Available at: https://www.theguardian.com/news/2018/aug/27/religion-why-is-faith-growing-and-what-happens-next

Schragger, R. and Schwartzman, M., (2013). Some realism about corporate rights. *Virginia Public Law and Legal Theory Research Paper*, (2013-43).

Schwartzman, M. (2012). What if religion is not special? *University of Chicago Law Review*, 79, pp. 1351–1427.

Schwartzman, M. (2017). Religion, equality, and anarchy. In: C. Laborde and A. Bardon, eds., *Religion in liberal political philosophy*. Oxford: Oxford University Press, pp. 15–30.

Taylor, C. and Maclure, J. (2011). *Secularism and freedom of conscience*. Cambridge, MA: Harvard University Press.

Chapter 2

Acton, (1907). The Protestant Theory of Persecution, in *The History of Freedom and Other Essays* (London: Macmillan).

Allard-Tremblay, Y. (2018). The Modern and the Political Pluralist Perspectives on Political Authorities. *The Review of Politics*, 80(4), pp.675-700.

Burwell v. Hobby Lobby Stores, Inc. (2014) (U.S. Supreme Court).

Dewey, J. (1926). The Historic Background of Corporate Legal Personality. *The Yale Law Journal*, 35(6), p.655.

Figgis, J. N. (1914). *Churches in the modern state*. Longmans, Green and Company.

Figgis, J. and Laurence, R. ed., (1999). *Lectures on the french revolution*. London: Batoche Books.

Gierke, O. von (1934). *Das deutsche genossenchaftsrecht,* 4 vols. Berlin, 1968-1913. *Political theories of the middle age,* trans. F. W. Maitland. Cambridge, 1900 *Natural law and the theory of society*, 1500-1800, trans. E. Barker. Cambridge.

Hirst, P. (2000). J. N. Figgis, Churches and the State. *The Political Quarterly*, 71(s1), pp.104-120.

Hobbes, T. and Crooke, A. (1651). *Leviathan*. [London]: Printed for Andrew Crooke at the Green Dragon in St. Pauls Church-yard.

Koyama, M. (2015). Jacob T. Levy: Rationalism, Pluralism, and Freedom. *Public Choice*, 163(3-4), pp.409-412.

Laborde, C. (2017). *Liberalism's Religion.* Cambridge MA: Harvard University Press.

Levy, J. (2014). *Rationalism, pluralism, and freedom.* Oxford: Oxford University Press.

Lincoln, A. and Jefferson, T., (2000). *First Inaugural Address*.

Maitland, F. and Fisher, H. (1911). *The collected papers of Frederic William Maitland*. Cambridge: The University Press.

Maitland, (2003). *Moral personality and legal personality,* in State, trust and corporation (2003), Cambridge University Press.

Muñiz Fraticelli, V. (2014). *The structure of pluralism*. Oxford: Oxford University Press.

Nicholls, D. (2016). *The Pluralist State*. London: Palgrave Macmillan Limited.

Runciman, D. (2005). *Pluralism and the personality of the state*. Cambridge: Cambridge University Press.

Schragger, R. and Schwartzman, M., (2013). Some realism about corporate rights. *Virginia Public Law and Legal Theory Research Paper*, (2013-43).

Tocqueville, A. (1969). Democracy in America, J. P. Mayer, ed. (New York: Harper & Row Publishers.

Chapter 3

Allard-Tremblay, Y. (2018). The Modern and the Political Pluralist Perspectives on Political Authorities. *The Review of Politics*, 80(4), pp.675-700.

De Vigili, D., (2000). *La battaglia sul divorzio: dalla Costituente al referendum* (Vol. 73). Franco Angeli.

Enroth, H., (2010). Beyond unity in plurality: Rethinking the pluralist legacy. *Contemporary Political Theory*, *9*(4), pp.458-476

Green, L., (1985). Authority and convention. *The Philosophical Quarterly (1950-)*, *35*(141), pp.329-346.

Hart, H.L.A., (1961) *The concept of law*. Oxford: Oxford university press.

Hume, D., (2003). *A treatise of human nature*. Courier Corporation.

Laborde, C. (2017). *Liberalism's Religion.* Cambridge MA: Harvard University Press.

Lewis, D., (2008). *Convention: A philosophical study*. John Wiley & Sons

Muñiz Fraticelli, V. (2014). *The structure of pluralism*. Oxford: Oxford University Press.

Postema, G.J., (1982). Coordination and Convention at the Foundations of Law. *The Journal of Legal Studies*, *11*(1), pp.165-203.

Raz, *The authority of law: essays on law and morality* (1979), Oxford: Clarendon Press.

Raz, J., (1986). *The morality of freedom*. Clarendon Press.

Raz, J., (1999). *Practical reason and norms*. OUP Oxford.

Raz, J., (2009). *Between authority and interpretation: On the theory of law and practical reason*. Oxford: Oxford University Press.

Rosa (1970). Divorzio e concordato. *Dibattito sul concordato*. Pp. 253-258.

Rosa, L. (1974). Costituzione repubblicana, concordato e divorzio. *Concordato e divorzio. p*p. 121-140.

Quong, J. (2011). *Liberalism without perfection*. Oxford: Oxford University Press.

Yumatle, C., (2016). Jacob T. Levy: Rationalism, Pluralism, and Freedom.(Oxford: Oxford University Press, 2015. Pp. xi, 322.). *The Review of Politics*, *78*(1), pp.170-173,

Chapter 4

Bhargava, R. (1998). *Secularism and its critics*. Oxford: Oxford University Press.
Council of Europe (1950). European convention for the protection of human rights and fundamental freedoms (as amended by Protocols Nos. 11 and 14, 4 November 1950). ETS 5. Available at: https://www.refworld.org/docid/3ae6b3b04.html.
Dahlab v. Switzerland (2001). App. No. 42393/98.
Dogru v France (2008). App. No. 43563/08.
Dworkin, R. (2013). *Religion without god*. Cambridge, MA: Harvard University Press.
Eisgruber, C. and Lawrence, S. (2007). *Religious freedom and the constitution*. Cambridge, MA: Harvard University Press.
Evans, C. and Christopher, T. (2006). Church-state relations in the European court of human rights. *Brigham Young University Law Review*, 3, pp. 699–725.
García Oliva, J. and Cranmer, F. (2013). Education and religious symbols in the United Kingdom, Italy and Spain: Uniformity or subsidiarity? *European Public Law*, 19(3), pp. 555–582.
Laborde, C. (2005). Secular philosophy and Muslim headscarves in schools. *The Journal of Political Philosophy*, 13(3), pp. 305–329.
Laborde, C. (2008). *Critical republicanism*: *The Hijab controversy and political theory*. Oxford: Oxford University Press.

Laborde, C. (2013a). Political liberalism and religion: On separation and establishment. *The Journal of Political Philosophy*, 21(1), pp. 67–86.

Laborde, C. (2013b). Justificatory secularism. In: G. D'Costa, E. And Malcolm, T. Modood, and J. Rivers, eds., *Religion in a liberal state*. Cambridge: Cambridge University Press, pp. 164–186.

Laborde, C. (2017). *Liberalism's religion*. Cambridge, MA: Harvard University Press.

Laborde, C. and Laegaard, S. (2019). Liberal nationalism and symbolic religious establishment. In: G. Guestavsson and D. Miller, eds., *Liberal nationalism and its critics: Empirical and normative dimensions*. Oxford: Oxford University Press.

Lægaard, S. (2017). What's the problem with symbolic religious establishment? The alienation and symbolic equality accounts. In: C. Laborde and A. Bardon, eds., *Religion in liberal political philosophy*. Oxford: Oxford University Press, pp. 118–131.

Lautsi v Italy. (2012). App. No. 30814/06.

Leyla Sahin v. Turkey. (2005). App. No. 44774/98.

Lewis, T. (2007). What not to wear: Religious rights, the European court, and the margin of appreciation. *International and Comparative Law Quarterly*, 56(2), pp. 395–414.

Loewenstein, K. (1937). Militant democracy and fundamental rights, I. *American Political Science Review*, 31(3), pp. 417–432. DOI:10.2307/1948164.

Macklem, P. (2012). Guarding the perimeter: Militant democracy and religious freedom in Europe. *Constellations*, 19(4), pp. 575–590.

Martínez-Torrón, J. (2012a). Freedom of religion in the European convention on human rights under the influence of different European traditions. *Universal Rights in a World of Diversity: The Case of Religious Freedom. Pontifical Academy of Social Sciences*, pp. 329–355.

Martínez-Torrón, J. (2012b). The unprotection of individual religious identity in the Stras- bourg case law. *Oxford Journal of Law and Religion*, 1(2), pp. 363–385.

McGoldrick, D. (2011). Religion in the European public square and in European public life: Crucifixes in the classroom? *Human Rights Law Review*, 11(3), pp. 451–452.

Miller, D. (2019). What's wrong with religious establishment. In: G. Gustavsson and D. Miler, *Liberal nationalism and its critics: Empirical and normative dimensions*. Oxford: Oxford University Press.

Otto-Preminger-Institut v. Austria (1994). App. No. 13470/87.

Perez, N., Fox, J. and McClure, M. (2017). Unequal state support of religion: On resentment, equality, and the separation of religion and state. *Politics, Religion and Ideology*, 18(4), pp. 431–448.

Plesner, I.T. (2005). The European court on human rights between fundamentalist and liberal secularism. Paper presented at the seminar *'The Islamic Head Scarf Controversy and the Future of Freedom of Religion or Belief'*. Strasbourg, France, 28–30 July. Quong, J. (2011). *Liberalism without perfection*. Oxford: Oxford University Press.
Rawls, J. (1997). The idea of public reason revisited. *University of Chicago Law Review*, 64(3), pp. 765–807.
Ringelheim, J. (2012). Right, religion and the public sphere: The European court of human rights in search of a theory? In: L. Zucca and C. Ungureanu, eds., *Law, state and religion in the new Europe: Debates and dilemmas*. Cambridge: Cambridge University Press, pp. 283–306.

Schwartzman, M. (2012). What if religion is not special? *University of Chicago Law Review*, 79, pp. 1351–1427.

Schwartzman, M. (2017). Religion, equality, and anarchy. In: C. Laborde and A. Bardon, eds., *Religion in liberal political philosophy*. Oxford: Oxford University Press, pp. 15–30.
Taylor, C. (1998). Modes of secularism. In: R. Bhargava, ed., *Secularism and its critics*. 6th ed. Oxford: Oxford University Press, pp. 31–53.

Taylor, C. and Maclure, J. (2011). *Secularism and freedom of conscience*. Cambridge, MA: Harvard University Press.

Walzer, M. (1980). The moral standing of states: A response to four critics. *Philosophy & Public Affairs*, 9(3), pp. 209–229.

Witte, J. (2011). Lift high the cross? An American perspective on lautsi v. Italy. *Ecclesiasti- cal Law Journal*, 13(2), pp. 341–343.

Chapter 5

Billingham, P. (2019). State Sovereignty, Associational Interests, and Collective Religious Liberty. *Secular Studies.* 1.1. Available at: https://brill.com/view/journals/secu/1/1/article-p114_7.xml?rskey=FbCKLp&result=10

Boy Scouts of America at al. v. Dale (2000), U.S. Supreme Court.

Burwell, at al. V. Hobby lobby Stores, Inc. (2013), U.S. Supreme Court

Cardinal Dolan (2012). Obama care and religious freedom. *WSJ.* Available at: https://www.wsj.com/articles/SB10001424052970203718504577178833194483196

Cover, R.M., 1983. Foreword: Nomos and narrative. *Harv. L. Rev*, *97*, p.4.

EEOC v. Pacific Press Publishing (1982), U.S. Court of Appeals, Ninth Circuit.

Farber, D.A., 2000. Foreword--Speaking in the First Person Plural: Expressive Associations and the First Amendment. *Minn. L. Rev.*, *85*, p.1483.

Jones, P. (2016). "Group Rights", *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, available at: https://plato.stanford.edu/entries/rights-group/

Koppelman, A. and Wolff, T.B. (2009). *A right to discriminate? How the Case of Boy Scouts of America v. James Dale Warped the Law of Free Association.* New heaven: Yale University Pres.

Inazu, J.D., (2012). *Liberty's refuge: the forgotten freedom of assembly*. Yale University Press.

Laborde, C. (2017). *Liberalism's Religion.* Cambridge MA: Harvard University Press.

Lapu, I. C, and Tuttle R.W. (2014), *Secular government and religious people.* Cambridge: William B. Eerdmans Publishing Company.

Lee v. Ashers Baking Company Ltd and others (2018), UKSC 49.

Lombardi Vallauri v. Italy (2009), ECHR (application no. 39128/05).

Masterpiece Cakeshop v. Colorado Civil Rights Commission, 2018. U.S. Supreme Court.

NAACP v. Alabama ex rel Patterson (1958), 357 U.S. 449.

*Robert v. United States Jaycees, (*1984), U.S. Supreme Court 468 U.S. 609.