The Power of Majorities and Church-State Separation

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Summary

This dissertation addresses the debate about the proper role of religion in the public sphere. However, this is not 'yet another thesis' on the subject, because it is approached from a point of view that is usually overlooked by contemporary political philosophers. Namely, the relationship between majoritarian social norms, usually reinforced by religious institutions and the law, and oppressed social groups.

The current diagnosis of the debate about "public religions" is that the western notion of the secular state and the liberal conception of toleration need to be reshaped. The steady, or even increasing, presence of religion in the public sphere has led many scholars to think that the secular state is in crisis.[1] The traditional separation between the state and the churches, or between politics and religion, is not perceived anymore as promoting the bases for respectful coexistence. Recent controversies in Europe, such as the headscarves affair in France or the Swiss ban on constructions of minarets, are interpreted as signs of the incapacity of the secular state to deal with the challenges of contemporary pluralism.

Consequently, the dominant position among political philosophers addressing the question of the proper role of religion in the public sphere is

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[1] Rajeev Bhargava, "Rehabilitating Secularism," in *Rethinking Secularism*, ed. Craig Calhoun, Mark Juergensmeyer, and Jonathan VanAntwerpen (92-113: Oxford University Press, USA, 2011); Lorenzo Zucca, "The Crisis of the Secular State—A Reply to Professor Sajó," *International Journal of Constitutional Law* 7, no. 3 (July 1, 2009): 494–514, doi:10.1093/icon/mop010; András Sajó, "Preliminaries to a Concept of Constitutional Secularism," *International Journal of Constitutional Law* 6, no. 3–4 (July 1, 2008): 605–29, doi:10.1093/icon/mon018; Jürgen Habermas, "Religion in the Public Sphere," *European Journal of Philosophy* 14, no. 1 (April 1, 2006): 1–25, doi:10.1111/j.1468-0378.2006.00241.x; Jean Baubérot, "The Two Thresholds of Laicization," in *Secularism and Its Critics*, ed. Rajeev Bhargava (New Delhi: Oxford University Press, 1998), 94–136.

that the secular state cannot insist on its traditional requirements given the diversification of immigration and the transformation of religious beliefs in contemporary democracies. It is concluded that, in its traditional conception, the secular state is unable to deal with diversity. As a response to this diagnosis, philosophers have developed more flexible interpretations of the requirements of secularism and therefore have made the separation between politics and religion more permeable. This position receives several names and all suggest some degree of openness towards diversity: liberal pluralism, value pluralism, ethics of diversity, post-secular ethics, open secularism, multicultural secularism, post secular liberalism and so on.[2]

In the dissertation I argue that such developments do indeed address some of the challenges deep religious and cultural pluralism raise to democracies. However, I argue that they leave some important issues unaddressed, particularly in societies where there is a politically and socially influent religious institution that claims to be representative of the religious and cultural identities of the majority of the population. I analyze cases in which new expressions of moral pluralism challenge consolidated social norms and their respective crystallizations into legislation. Hence, the fundamental question the dissertation addresses is:

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[2] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience*, trans. Jane Marie Todd (Harvard University Press, 2011); William A. Galston, *The Practice of Liberal Pluralism* (Cambridge University Press, 2004); William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge University Press, 2002); Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford University Press, 2012); Habermas, "Religion in the Public Sphere"; Alessandro Ferrara, "The Separation of Religion and Politics in a Post-Secular Society," *Philosophy & Social Criticism* 35, no. 1–2 (January 1, 2009): 77–91, doi:10.1177/0191453708098755; Gérard Bouchard and Charles Taylor, *Building the Future. A Time for Reconciliation* (Quebec: Government of Quebec, 2008); Jean Baubérot, *Une laïcité interculturelle : Le Québec, avenir de la France ?* (La Tour d'Aigues: Editions de l'Aube, 2008); Kevin Vallier, *Liberal Politics and Public Faith: Beyond Separation* (New York: Routledge, 2014).

What is required by the commitment to protect pluralism in cases where social groups are oppressed by social norms that are reinforced by the majority, the law, or powerful religious institutions?

Contemporary debates on secularism and the role of religion in the public sphere focus primarily on the controversies related to the new religions that today populate western democracies. After all, the liberal notions of secularism and toleration are in dealing with religious diversity. However, these debates cannot leave aside expressions of pluralism that are not related to religion. A challenge that the developments on the understanding of secularism bear is that it tends to assign religion a special status and therefore attributes a higher value to religious-based claims over claims of conscience that are not grounded on religious convictions.

It is sometimes argued that religion serves to protect a distinct and unique human good from state interference. Accordingly, it is argued that freedom of religion and freedom of conscience are separate freedoms and that religious claims for exemptions and accommodation are to be treated separately. In order to tackle the immediate objection this view receives, the notion of 'religion' is extended to cover a broad set of commitments of conscience searching for ultimate meaning. Thus, not only institutionalized religions, but also individual, non-theistic, naturalistic, polytheistic, and secular commitments of conscience are considered to provide with special claims against state's interference.[3]

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[3] For instance, during the Vietnam War, The U.S Supreme Court had to decide numerous cases of conscience objection. Equal treatment to religious and non-religious conscience-commitments required a criterion to grant the exceptions. The Supreme Court came up with this standard: [an exception is granted whenever…] "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exception," Nussbaum, *Liberty of Conscience*, 171.

Egalitarian criticisms to these accounts argue that by singling out religion as a phenomenon that requires special treatment and protection, the state is creating a division between first and second class citizens.[4] First, since it is grounded on the recognition of special status to religion, it faces the difficult task to define what religion is. The risk this task carries is to dismiss as non-religion what other definitions would have considered as such. Or to consider as 'religion' commitments that do not have any appeal for being treated as such. And second, it draws a distinction between citizens with deep commitments of conscience and citizens without them, deeming the latter to a second-class category.[5]

In their search for a 'meaning in life,' individuals can appeal to a wide array of options, some of which are religious, while some others are not.[6] However, pluralism is not reduced to different ways individuals to find answers to their existential questions. Pluralism also refers to the transformation in the social norms that define social relations within a particular community. Societies are more open, or more permeable, to new definitions of what is considered to be "normal." The long-lasting marriage

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[4] For a recent account of the main thesis of egalitarian theories of religious freedom, see Cécile Laborde, "Equal Liberty, Non-Establishment and Religious Freedom," *Legal Theory*, 2013.

[5] This is a rather paradoxical claim. One of the most common criticisms liberalism receives is that it is hostile towards religious citizens, for it unfairly requires them to subsume their religious beliefs to the norms of the state. Accordingly, a good deal of the defenses of liberal politics deals with demonstrating why there is no hostility against religion. For this debate, see Vallier, *Liberal Politics and Public Faith*; Eberle, *Religious Conviction in Liberal Politics*; Robert Audi, *Democratic Authority and the Separation of Church and State* (New York: Oxford University Press, 2011); Robert Audi, "The Separation of Church and State and the Obligations of Citizenship," *Philosophy & Public Affairs* 18, no. 3 (July 1, 1989): 259–96; Nicholas Wolterstorff and Robert Audi, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham, Md: Rowman & Littlefield Publishers, 1996); Cristina Lafont, "Religion in the Public Sphere: Remarks on Habermas's Conception of Public Deliberation in Postsecular Societies," *Constellations* 14, no. 2 (June 1, 2007): 239–59, doi:10.1111/j.1467-8675.2007.00436.x.

[6] Charles Taylor, *A Secular Age*, First Edition (Belknap Press of Harvard University Press, 2007), Introduction.

between liberalism and pluralism made democracies a favorable environment for transformations in the social norms regulating relations among individuals. Consequently, democratic institutions need to be flexible enough as to adapt in such a way that new social norms find a place. The obvious question here is whether democratic institutions are flexible enough.

One clear example of these transformations—and how difficult is for societies' institutions to adapt to new dynamics—is the way gender roles have changed during the last decades. The idea that men and women have fixed roles in contemporary societies is not plausible anymore. Yet societies are still struggling to adapt their institutions as to avoid interfering with new social dynamics that challenge the historical gender division. Contemporary debates about abortion, paid maternity leave (in the U.S), discrimination laws, or marriage laws, portray the difficulties contemporary democracies face in adjusting themselves to new expressions of pluralism that challenge the gender divide.

Similar circumstances are found in debates about homosexuality. Although laws prohibiting sodomy have been removed in liberal regimes and homosexuals are granted free and equal citizenship, they still experience several civil disabilities. Particularly noticeable is the case of same-sex marriage. On the one hand, levels of social acceptance of homosexuality are increasing and activists for the rights of sexual minorities have instituted organized movements that can form real political forces. On the other hand, political communities have been very reluctant in accepting reforms in the institutions that discriminate against gay people. In most liberal and

democratic states, the state does not recognize on equal grounds non-heterosexual families.

Although none of these cases is a clear-cut case of the role of religion in the public sphere, religion certainly gets involved in the way these issues are addressed—particularly in the latter one. Religions, more specifically institutionalized ones, have strong stands about gender roles and homosexuality. These opinions, however, are not homogeneous across religions: some defend strict gender roles and discriminate women, while others proclaim gender equality. Some religions condemn homosexuality and fiercely oppose to state recognition of same sex couples as families; others ordinate homosexuals and welcome them in their community. Still, religious institutions and organizations have a public say in debates concerning their fundamental beliefs. When dealing with issues related to sexual conduct, such as female liberation from the traditional institution of family and acceptance of homosexuality, these public voices become more stringent.

In the dissertation, I focus on the public and political opposition the Catholic Church displays against advancements seeking transformations of social and legal norms. In particular, the focus is on cases in which social and legal norms are supported by powerful and majoritarian institutions (e.g. the Roman Catholic Church in southern Europe) and on how they interact with 'new' expressions of pluralism.[7] The dissertation is divided in two parts. The first one, "Toleration and Majorities," deals with problems in which

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[7] In recent decades, the Catholic Church has adopted the principal role in political opposition to reforms favoring same sex marriage. For an account of this activity in the U.S.—where it has replaced Christian Evangelical Churches—,Mexico, and Colombia, see Julieta Lemaitre, "By Reason Alone: Catholicism, Constitutions, and Sex in the Americas," *International Journal of Constitutional Law* 10, no. 2 (March 30, 2012): 493–511, doi:10.1093/icon/mor060.

majoritarian social and legal norms hinder the free development of new forms of pluralism. The three chapters contained in this part address questions such as: Is deliberative democracy biased in favor of majoritarian or well entrenched social norms? What is the proper relation a democratic state, which is committed to toleration and non-domination of powerless social groups, should establish with majorities that support illiberal social and legal norms? And, can a democratic state promote the reduction of domination of powerless social groups in contexts where oppressive social and legal norms seem to be widely shared by the whole society?

Accordingly, in Chapter One, "Deliberative Democracy and the Power of Majorities", I explore the advantages and disadvantages of the deliberative conception of democracy to deal with a particular expression of pluralism, namely, reasonable moral disagreement. I argue that the 'politics of compromise,' which is one of the most salient features of deliberative democracy for dealing with reasonable disagreements, does not account for the misbalances of power in which the parties to a disagreement might find themselves. By neglecting power inequalities, the politics of compromise fails to advance political moderation, which is one of the virtues to which it is usually associated. As a consequence, the politics of compromise has problems of legitimacy because it is prone to legitimize policies that otherwise would have been considered as unreasonable and, in some cases, oppressive. Solving moral disagreements by appealing to the politics of compromise, I conclude, risks leaving social groups defending unpopular moral claims systematically and unfairly overheard.

In chapter two, "On Tolerating Majorities," I challenge the idea that a morally sound conception of toleration entails a relationship between a liberal majority and illiberal minorities, who seek exceptions and permissions to lead a life according to their illiberal traditions and practices. I argue that a morally sound conception of toleration can also be between a liberal state and an illiberal majority. State's commitment to values of free and equal citizenship requires it to provide the means to all citizens to enjoy such status. This might entail that the state expresses its disapproval towards certain beliefs the majority holds, including religious institutions representing the religious feeling of the majority, while at the same time restraining from using its coercive power to eliminate them. The legitimacy of such a practice is particularly evident when it comes to the acceptance of full equal rights to citizens demanding that their non-traditional, but liberal, conceptions of the family be respected and recognized.

Chapter three, "Majoritarian Beliefs and Neo-republicanism," expands on the previous argument and provides an interpretation of such relation of toleration in neo-republican terminology. This chapter keeps the attention on the relation powerful majorities hold with powerless social groups (whether or not minorities). In this chapter, I address the challenge that majoritarian and oppressive beliefs pose to democratic states. On the one side, the state must be committed to reducing domination and oppression. On the other, it has to act in a way that is acceptable to the community, in order to preserve its legitimacy. In particular, I address recent criticisms raised to neo-republican political theory pointing out that the conception of freedom as non-domination falls short in reducing domination of social groups whose—legitimate—

interests might not be considered as part of the common good of the political community. I argue that the neo-republican account of freedom as non-domination provides promising normative tools for pursuing citizens' independence from dominating agents, including religious institutions and traditionally entrenched social norms. This potential, I believe, is greater than some feminist criticisms to neo-republicanism are willing to acknowledge.

The two remaining chapters of the dissertation form part two, titled "Church-State Separation and Minorities." They focus on the duties the state is supposed to meet in contexts where powerless social groups do not find channels of participation that make it possible to advance their claims. In particular, I focus on cases where this situation is determined by the presence of a politically active and institutionally powerful religious institution. The question that part two addresses is: what is the best institutional arrangement for protecting pluralism in contexts where there is a politically active and institutionally powerful religious institution?

Accordingly, in chapter four, "On Separation and Anticlericalism," I explore the possibility of interpreting 'anticlericalism' within the framework of the values of a democracy respectful of freedom and equality of all. I argue that not all historical and conceptual understandings of anticlericalism are antireligious and therefore that, as a normative concept, it should not be discarded. The characteristic feature I associate with the notion of anticlericalism is that while it confronts the excessive power of a religious institution, it does not display a negative attitude against religion and its public expressions. It is a political concept that is meant to guide the design of political institutions in their relation to religious institutions. I proceed to

identify cases in which this notion of anticlericalism has been implemented and explain in which conditions it serves to advance moral claims of traditionally marginalized social groups. I argue that if a democratic state is committed to guaranteeing non-interference against meaningful choices of its citizens by private associations, it has to implement an anticlerical principle of separation that undermines such power of interference.

In the fifth chapter, "Italy and the Principle of (Strict) Church-State Separation," I analyze the Italian 'crucifixes controversy' and the official Italian conception of secularism. I also analyze the alternative proposals (e.g. post-secular ethics and liberal pluralism) that have been made in recent years and assess whether they properly protect diversity in the Italian context. I conclude that while liberal pluralism is well equipped to address some problems related to immigration and integration, it does not properly address the political problem of associating the state with a powerful and hegemonic Catholic Church (or Christian tradition). I propose a principle of strict separation that offers possibilities for advancing claims of excluded minorities in contexts like the Italian one. I argue that this principle enables excluded minorities to advance their claims in a context where social and legal norms are designed as to impinge on them.