Democracy, Religious Pluralism and the Liberal Dilemma of Accommodation

Edited by
Monica Mookherjee

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DEMOCRACY, RELIGIOUS PLURALISM AND THE LIBERAL DILEMMA OF ACCOMMODATION

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This volume is dedicated to the memory of my grandfather.

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Chapter 1
Introduction – Liberal Democracy and Religious Pluralism: Accommodating or Resisting the Diversity of a Globalising Age?

Monica Mookherjee

1.1 Religious Pluralism in Democratic Theory and Practice

Do the religious claims of modernity pose distinctive problems for liberal democracies? Thomas Banchoff (2007) suggests that religious pluralism poses twin challenges for contemporary democracies. One is how secular majorities should respond to minority religions; and the other is how religious minorities should react to a secular state. Both of these challenges are acute. They are pressing, first of all, because many claims today intertwine confusingly with territorial and economic concerns which cannot be disconnected entirely from their religious dimensions.[1] Moreover, and in the second place, it is clear that democrats are usually more concerned with fair procedures than with justifying their conclusions to the world at large (see Habermas 1999). While this difference in focus cannot always be defended, the point assists in explaining why democratic support for the majority will appears opposed to a believer's metaphysical certainty in relation to controversial questions like abortion, stem cell research and marital law. This is not to say that democrats must and do always view religious belief as intransigent or uncompromising. Rather, democrats may recognise that, for many citizens today who are committed to the liberal values of fairness and equal respect, religion might be the source of existential comfort, the basis for tolerance, *and* also, in key instances, the ground for discrimination against those who deviate from a theistically prescribed norm. The last of these issues might be labelled the 'undemocratic moment' of religious belief.

To elaborate on this point: the democratic attraction of equality, fairness and due process lies in the hope that political participation regulated by these values will enhance knowledge. Such knowledge is not a question of metaphysical truth but of

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[1] The complex mixture of human reasons for mobilising around a religious cause is strongly evident in the Israel-Palestine situation, and is evident also in the Northern Irish situation. See Allen (2002).

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discovering the nature of the public good in contingent, historically-specific circumstances.[2] The worry is that religious believers would have to reject this shared search for the common good where issues central to retaining faith are concerned. In relation to this point, much democratic theory and practice has lately been preoccupied with the fear that supporting religious identities in the public sphere will ultimately heighten political insecurity, especially after acts of terrorism across the globe (see, e.g., Ozyurek 2009, Cesari 2005). To some extent, the fears of civic disorder and political insecurity motivate democrats to hold that difference can only flourish if public debate is governed by rational secular norms (McConnell 1999). They also seem to support what one thinker calls the 'Religious Silence' (Spinner-Halev 2000) of democratic political theories, which assimilate the claims of religious minorities to issues of culture and ethnicity. This anxiety and silence with regard to religion in democratic political theory reflects an awareness that religious associations are rule-bound communities that can potentially command transnational loyalty to causes informed by sources of justice and the good life that lie beyond (supposedly) sovereign nation-states.

However, responding with silence to the potentially 'undemocratic moment' of religion appears to be a poor solution. In the contemporary era, religious convictions often inform political choices, and these choices can clash. To refuse to meet the challenge of dealing directly with these conflicts is to fail to account for the need to integrate the demands of citizenship with the requirements of faith, which many individuals in democratic states cannot forsake (Audi 1997, 2000, Greenawalt 1988, Nussbaum 2008, Swaine 2006). The task of negotiating this diversity, undertaken by the contributors to this book, is complicated by the fact that religious pluralism today is marked by a complexity that sets it apart from previous times, and which, therefore, calls for more careful theorisation of the principles of accommodation. Here liberal political philosopher John Rawls' desire to treat faith as a private matter in this search for rational principles of justice may be considered (Rawls 1971). His strategy draws self-consciously on the historical experience of the early modern religious wars in Europe. While being acute, these conflicts were more readily containable within particular nations than the diversity experienced by many states today (Sterba 2000, Sommerville 1992).[3]

One issue here is, however, whether the strategy of privatising religion has ever really been an appropriate response to diversity, and another issue is whether this strategy may be *particularly* inadequate in relation to religious pluralism today. On the first issue, it would seem that the wall of separation between religion and

[2]However this point is problematic to the extent that some deliberative democrats would hold that the outcomes justified through deliberation have some claim to justice that are independent of the fairness of the procedure that brought them about. See Michelman (1999: 146).

[3]There are different ways of viewing this matter. In one sense, the Protestant Reformation in Europe raised issues that were decidedly international. The movement broke away from the Catholic Church over religious policy and belief; and after the religious wars, religious dissenters with loyalties to the Pope in Rome were left with a choice between submission to the state and emigration (see Coffey 2000).

politics has almost never been immoveable in practice anyway. In the form of *laïcité,* for instance, French secularism made room for faith in public life by means of the Catholic *concordat* (Weil 2008–2009). In America too, religion-state separationism never excluded religion from politics completely, but 'simply held that the government and religion need mutual protection from certain kinds and degrees of intervention' (Rosenblum 2000: 10). Given the mixture of religion and politics in the history of most states, it seems imperative in the contemporary to think afresh about how the balance between them might be achieved. Moreover, concerning the distinctiveness of religious pluralism today, consider the complex interplay of justice and human rights issues raised by the increasing participation of vulnerable individuals in terror campaigns which are justified in the name of religions which claim to be vulnerable and oppressed themselves (O'Duffy 2008). Consider, also, the fact that, while membership of mainstream religions world-wide is decreasing, membership of recent 'cults' such as the Church of Scientology has increased (Rosenblum 2000). Whilst ostensibly committed to the rights laid down in international charters, this group's reported deployment of forced labour programmes and the charges of commercial corruption in which it has been implicated, raise distinctive concerns about how a 'religion' is to be distinguished from other types of association, and how the contemporary human rights issues that it raises can be ascertained (Kent 1999, Horwitz 1997–1998). In sum, emerging forms of religious pluralism provoke democrats to inquire afresh into the consistency of religious accommodation with democratic equality and human rights. The cultural, economic and political conditions of globalisation produce a 'plurality of pluralisms' (Riis 2007), or a variety of forms of societal and intra-community religious diversity. Accordingly, the situation prompts the need, to which this volume responds, for more nuanced theoretical analysis than in past times.

Before moving on, it is worth commenting further on the fact that, while most citizens in liberal democracies have rights to express their religious identities publicly without fear of civic disability,[4] there is ongoing controversy between democratic theorists of all hues as to the justification and scope of these 'positive' freedoms (see Laborde 2003, 2008, Bader 2007). Even the later John Rawls concedes that it is unrealistic to exclude religious considerations completely from the formulation of public policy (Rawls 1997, Dombrowski 2001). The persistence of the public character of religion in late-modernity provokes all those committed to the protection of diversity to engage in debate about the principles that would accommodate religious associations and about the location of the borderline between accommodation and resistance to religious pluralism in the contemporary age. The matter is acute in view of the long history of support within mainstream religions for restricting the freedoms of apostates, dissenters, and nonconformists (Lerner 1998), a history that confirms the risk of what I have called religion's potentially 'undemocratic moment'.

[4]This point has become particularly salient in relation to contemporary European debates about the Muslim veil. See Jill Marshall (2009).

Briefly, then, the papers in this volume address the need to reconcile liberal democratic values and the potential of today's religious pluralism to destabilise the boundaries between public and private and the nation and the world. The authors approach religious pluralism from widely different perspectives, the tension between which sharpens understanding of the conflicting considerations involved in responding to the unprecedented levels of diversity characteristic of a globalising age. The volume acknowledges not only the international nature of religious diversity today but also the variety of national contexts world-wide, from India to Northern Ireland, in which this 'plurality of religious pluralisms' has found a tense and uneasy home.

1.2 Religious Accommodation in Liberal Democracies: Toleration, Respect and Recognition

Understandably, the idea of religious toleration provides a focus for a number of contributors to this book. In history, the concept has been a staple of liberal thought, gaining significance in campaigns against Anti-Semitism and racism in Europe and America. However, while important figures in the history of political thought argue persuasively for valuing toleration as a means of pre-empting the mediocrity of adhering unthinkingly to majority opinions (McKinnon 2006: 13), Catriona McKinnon notably observes that a democratic justification for this principle is difficult to establish in conditions of pluralism. One possibility appears to lie in the sceptical claim that, if religious claims are expressions of mere opinion, there is no reason to privilege one belief over another (see Mendus 1989). Yet this justification for tolerance seems to involve a dubious move from the premise that religions express opinions to the conclusion that citizens ought to be permitted to act on these views. Moreover scepticism is, in a somewhat obvious sense, not an attractive standpoint for a committed religious believer. And, in a similar vein, any secular justification for religious accommodation may be either too demanding for or even offensive to those who most desire their society's toleration or recognition (Alexander 1998).

For consider: the prospect of a democratic consensus on religious toleration appears problematic too, if grounded in the value pluralism of Joseph Raz (1984) or, earlier, that of Isaiah Berlin (1969). On the face of it, the idea that there is a variety of incommensurable goods in human life promises to lead to the mature and tolerant view that not all beliefs and practices can be evaluated from an impartial standpoint or on a single scale of value. However, one might resist justifying religious toleration in these terms, because the truths espoused by different belief-systems are 'propositional'. That is to say, the goods gained by adhering to one system of belief (say, spiritual liberation) may contradict those promised by another (say, critical reasoning and the intellectual life) (Margalit 1996). In adhering to one world-view, many religious believers are not value pluralists. This point clearly warrants much development, but I state it briefly here in order to emphasise that it is often the centrality of particular religious goods to a person's sense of identity, perhaps goods

associated with the path to redemption, that seems to render religious pluralism less amenable to political toleration than conflicts concerning other social groups (Saul 1999).[5]

Liberals like Will Kymlicka (1996) offer an alternative defence of liberal toleration on the basis of autonomy. Although, as Kymlicka explains, associations such as the Ottoman Empire tolerated religious diversity without protecting the autonomy of their subjects, focusing on this important capacity appears appropriate in pluralist societies today and may even appear uncontestable in late-modern conditions. But consider, by the same token, that some minority groups struggle to secure their members' 'integrated existence' (Rosenblum 2000: 15) by restricting personal choice. Moreover, what seems to matter for the religious adherent is not that they choose their own life-plan (quite apart from that they ensure that others are able to do the same), but rather that they are able to pursue salvation in the manner that their religion prescribes (Mendus 2008). An autonomy-based conception of religious accommodation may, thus, privilege faiths that emphasise personal conscience, as do idealised forms of Protestantism, whilst marginalising or excluding others. Citizens with non-mainstream beliefs may feel alienated on account of perceiving a large gap between their personal convictions and the political values endorsed by the liberal state (Rosenblum 2000: 15).

The difficulties involved in justifying religious toleration are accompanied by complexities involved in specifying its limits. Even if one questions Huntington's (1996) dramatic account of an outright conflict between world-views, the concern is that not all religions are egalitarian, tolerant or respectful of nonconformity and individual differences. Whilst some suggest that the limits of toleration be determined according to an appeal to the 'reasonableness' of liberal citizens (see McKinnon 2006), this view, once again, might risk excluding any person or group that challenges liberal norms. Such a defence of toleration might entrench conventional views of public acceptability, thereby supporting a deal of intolerance. More deeply, such a commitment to tolerance might justify, however paradoxical it might seem, violence against those deemed unreasonable, irrational, barbaric or inhuman (Brown 2008). Understandably, contemporary religious pluralism, which is to say the 'plurality or pluralisms' noted earlier (Riis 2007), prompts the contributors to this volume to question the boundaries that have been assumed historically between the tolerable and the intolerable (see also Mendus 1989, McKinnon 2006, Kymlicka 1995, Williams and Waldron 2007).

Not all contributors to this volume are satisfied, however, that the principle of tolerance constitutes the most appropriate response to religious pluralism today in any event. A reasonable objection to this principle is that religious minorities typically wish not for the grudging acceptance implied by toleration, but for the right to participate with others in authoring their collective lives (Fraser 2003). That is

[5]There are of course many considerations at play here. It could be suggested that one way of challenging this point of view is found in a more liberal conception of religion, as located in the Gandhian view (see Parekh 1997).

to say, they require equal respect for, and not in spite of, their way of life. Charles Taylor (1992) and Axel Honneth (1996) have been particularly important defenders of the claim that we owe all individuals respect in light of their potential for rational agency.[6] Yet problems abound in justifying the principle of 'equal respect'. Consider Thompson's observation (2006: 62) that, while Honneth sometimes constructs his defence of equal respect on human beings' capacities to make moral decisions (which is to say, on the concept of autonomy), elsewhere he bases it on their ability to contribute to democratic deliberation. Whilst each of these capacities may well contribute to a person's sense of dignity and self-respect, the two justifications are not synonymous; and the distinction between them seems important in relation to religious groups such as the Amish or advocates of sectarianism, who substantially reject involvement with their established government. Therefore, in summary, while the connection between private dignity and political participation may hold for members of many socially denigrated groups, this nexus does not necessarily explain the basis for respecting religions equally.

Furthermore, is respect achieved by granting all religious citizens' rights to free conscience across the board? Or must the state's recognition of diversity sometimes depend on an evaluation of the content of the beliefs in question? Without assessing the merits of a belief against a substantive ethical standard, judgements about equal respect can appear meaningless or, paradoxically, disrespectful. For this reason, Taylor (1992) believes that liberals owe a cultural or religious group only a *presumption* for respect, for to respect a community, a belief or a way of life in fact one must first find out if it adheres to standards of humane treatment and equal respect itself. But if this is true, the normative criteria according to which a belief or identity receives social respect are assumed in any case, independent of an initial 'presumption', which appears to do little normative work. Moreover, while the principle of equal respect or recognition for all religions might enable minorities to resist those forms of secularism that deny them authority to legislate on, say, property ownership without state involvement, for highly politicised sectors of traditional religious groups today, who oppose the materialism and what they see as the sexual obsession of mainstream American and European culture (Burtt 1994), what could genuine respect or recognition entail? Committed to the values of individuality and the transgression of historical authority and tradition, how can the liberal state respond meaningfully to such groups' demand for equality?

It is possible to respond to this challenge by holding that the equal recognition of religions only entails that members of faith communities avoid – by means of state support or otherwise – the debilitating self-conception that deep insult and exclusion often entails. On this account, the purpose of any struggle for recognition is to overcome 'everyday moral feelings of injustice' (Honneth 2003: 114) caused by institutionalised patterns of value that denigrate the lives of certain human beings. Of course, a problem arises here in relation to whether the injustice involved in

[6]For a taste of the recent critical analyses on the politics of equal recognition and equal respect, see Cooke (2009) and Galeotti (2010).

social disrespect should be conceptualised as a subjective experience rather than objectively rooted in unequal social structures, such as laws that privilege one religion over another.[7] The problem is that, 'psychologising' the situation may weaken potential for egalitarian political criticism (Fraser 2003). Yet the focus on overcoming moral feelings of disrespect assists, though it does not of course fully resolve, a key issue that frames the debate about religion in liberal democracy, to which contributors in this volume respond. This is that it is often on account of the fact that religious beliefs structure a person's self-conception that they might feel personally outraged, affronted and violated in the context of a conflict between their community and others (McConnell 1999). This need not always be true; but fault-lines in any relationship may emerge when conflicts are so personalised and emotionally charged. Expectedly, then, contributors to this volume seek to theorise the norms governing deliberation that would repair such fault-lines in a pluralist society through principles of tolerance, respect and recognition. Their accounts reflect the need, only too evident today, to locate a form of being with others which defuses the potentially undemocratic moments of religious belief, and guards against acts of violence and contempt in the name of the truths that some defend.

1.3 The Chapters

1.3.1 Religious Pluralism in Liberal Democracies: Toleration and Dynamics of Social Conflict

The volume commences with a set of papers which focus on the apparent tension between the values of liberal democracy and religious pluralism. In such conditions, can one reasonably assume a privileged connection between tolerance and Western secular liberalism? Do religious societies obviously lack a commitment to liberal democratic norms? Veit Bader's rich paper, 'Religions and Liberal Democracy', opens by investigating these questions rigorously. Distinguishing 'tolerance' as a principle from practices of 'toleration', he advocates inquiring whether a society has learned the latter. In addition, differentiating between basic ideas of 'gritted teeth' tolerance and more robust ideas of equal respect enables Bader to argue that many religious societies have learned to show minimal tolerance by encountering diversity practically. For instance, Catholic societies have learned over time to conceptualise peace and order as moral as well as strategic goods. If one accepts that such learning occurred in Christian denominations, it should not, Bader argues, be seen as impossible for religions like Islam. The degree of tolerance in any society depends on a number of contextual factors; and by considering diverse societies around the world,

[7] One example of how the subjective feeling of oppression on the part of minority religious group members is reflected in their explicit expression of anger and frustration, consider the controversy over the publication of Salman Rushdie's *The Satanic Verses*. For a critical discussion, see Jones (1990).

Bader contends persuasively that toleration is a more sophisticated and potentially universalisable achievement than Western liberals often believe.

Glen Newey follows in Bader's critical spirit. In an essay entitled 'How Not to Tolerate Religion', he explains that while liberals typically defend religious toleration, commitments to multiculturalism appear more problematic on account of the perceived risk that accommodating many minority cultures will weaken civic cohesion. However, whether any minority challenges political unity is practical issue that cannot be resolved through theoretical speculation alone. Newey supports this claim by looking back to Locke's seventeenth century liberal arguments for religious toleration. While it seems at first that for Locke the political coercion of minority believers is seldom justified, because sincere religious belief cannot be forced, the question of religious toleration is more complex if the crucial issue is political order. Ultimately for Locke (and, by implication, for later liberal thinkers), the question of whether to tolerate must be evaluated in relation to the good of security, which anticipates a more fundamental question of the purpose of this value. Which human goods or aspects of wellbeing should liberal governments secure for their citizens? The question admits of no easy answer and suggests conflicts at the core of liberal democratic thought.

If indirectly, Newey's paper suggests reasons for Western liberal democrats to question their self-understanding as guardians of tolerance. Doing so is urgent in light of the fact that rights to free conscience and tolerance have often been connected in the liberal tradition to withholding these rights from religious and ethnic others. Anne Norton's illuminating paper, 'On the Muslim Question', pursues this point through a sustained focus on the liberal presumption of an outsider as the negative template against which citizenship is articulated. The recent revival of political theology by writers such as Schmitt, Derrida and Negri evokes Marx's articulation of the 'Jewish Question', in the context of which Marx famously correlated the widespread vilification of the Jews with the failure of the Western bourgeoisie to emancipate itself. Norton suggests that this question now serves as a foil for the *Muslim* Question. The conduct of American soldiers in Iraq, the inhumanities of Guantanamo and relentless debates about the veil attest, she argues, to the anxieties about sovereignty at the heart of Western democracy. On this account, a stereotype of 'the Muslim' marks the limit of civil liberties, of the social contract and even of life itself. Moreover, this predicament affects all of us: for while the threat of repression used to come from those who would silence us, now it comes, paradoxically, from a relentless demand for speech of a particular kind. In reaction, Norton recommends that we pursue a responsible form of democracy which confers freedom to speak out and to contest the lightly concealed prejudices of our time.

Sorin Baiasu echoes and reinforces Norton's concern about the exclusions inherent in supposedly universal principles of religious toleration. A lack of impartiality is to be expected because principles are always apprehended from particular standpoints, he explains in 'Dealing Morally with Religious Differences'. Baiasu defends religious toleration robustly in the face of this problem, arguing that the question is part of a larger issue of how *any* differences can be impartially adjudicated. While

conceding that the difficulty with religious disagreements specifically is that it is not possible to determine the correctness of the views from an independent standpoint, parties must be committed to the fairness of the procedural principles that regulate their disputes. He thus supports an impartial version of toleration, which, drawing inspiration from Kant, enables him to reject to the view that tolerance is only practised when the tolerator possesses the right motivation, such as an attitude of respect. The latter conception of toleration, he believes, would be too demanding.

Indeed, a number of the contributors are uneasy about reconceiving the traditional conception of toleration in terms of a more robust idea of equal respect or recognition. In 'Diversity and Equality: Toleration as Recognition Reconsidered', Andrea Baumeister concedes that the traditional conception is increasingly unable to respond to the forms of pluralism characteristic of modern democracies. However, she disagrees with Elisabetta Galeotti's (2002) claim that the most pressing minority issues today require that we conceive toleration as equal recognition, which is a matter of transforming citizens' attitudes of dislike of those they consider deviant or morally distasteful. Baumeister argues that, while the traditional conception of toleration leaves much to be desired from the point of view of contemporary minority identities, the positive affirmation of difference required by the recognition-based conception would not enable the tolerator to maintain their disapproval of the disputed belief or identity, which is an essential feature of toleration. Moreover, to demand that citizens transform attitudes of dislike risks making it harder for identities which are, rightly or wrongly, disliked by the majority society to gain even a modest type of accommodation in the form of anti-discrimination laws. Finally, she argues, central to a viable politics of recognition must be some criteria on account of which a government could refuse particular demands. Baumeister argues persuasively that theories such as Galeotti's do not demonstrate sufficiently how they would protect vulnerable individuals and enable them to resist their society's or community's established norms.

1.3.2 Cases, Concepts and New Frameworks for Accommodating Religion in Liberal Democracies

The debates addressed by the papers above suggest an acute need for new formulations of concepts and frameworks to accommodate religious pluralism justly. The final set of three papers respond to particular kinds of religious disputes arising today; and they are, accordingly, grouped together as a set of innovative 'case studies'. The first compelling contribution, written by John Horton, argues that when disputes between religious groups span generations, and when the acridity of the past continues to be intensely felt, states must adopt a practical stance. He thus argues in favour of a 'modus vivendi', though not that which is disparaged by Rawls, who takes this idea to signify a settlement so potentially amoral that it cannot motivate citizens to adhere to it. In reconceiving the idea of modus vivendi, Horton presents a persuasive framework for peace and tolerance as the outcome of haphazard reasoning, in which religious values, interests and power might all,

legitimately, figure in the negotiation of disputes. An instance of such a settlement is the 1998 Good Friday Agreement, which restored peace between religious communities in Northern Ireland. This document succeeded on account of its ambiguity with respect to matters of principle. Finally, wary of the concern that his account might be thought to sacrifice too much principle to pragmatism, Horton insists that even resentful pragmatism can increase the chances of a hopeful future than if we are driven by ambitious ideals, after all that we have suffered on their account.

Of all papers in the volume Shraddha Chigateri's is the most empirical and law-based. Her central concern lies with how a secular state's refusal to recognise any religious reasons can fail to be impartial and can thereby enable dominant religions to shore up their power. Secularism conceived in terms of a denial of religious content in public debate obscures struggles over identity within dominant groups whilst also treating minorities unfairly. Thus, in 'Negotiating the "Sacred" Cow', Chigateri argues cogently that the constitutional debates concerning cow slaughter regulations in post-Independence India have developed in such a way that key Hindu figures have been able to invoke dubious non-religious arguments to safeguard their religious motifs, whilst maintaining the appearance of reasoning in purely secular terms. Explicitly, 'the cow' is claimed to be essential to the agrarian economy, but implicitly this claim seems to reveal insecurities within the Hindu elite concerning their perceived loss of religious dominance. These debates highlight the 'crisis of secularism' in India and the need for a more even-handed mode of accommodating religious diversity. Whilst religious toleration must figure in any account of 'constitutional secularism', Chigateri insists that the recognition that this controversy is not only a matter of religion, but that it also conceals a number of religious *differences,* must be the precondition for the formulation of an evenhanded form of the contested but potentially fertile notion of 'constitutional secularism' in relation to matters of faith.

Emanuela Ceva concludes the volume by responding, like Shraddha Chigateri, to the inadequacies of current liberal democratic theories and practices. However, she does so by rejecting the idea that religious claims have special significance over other conscientious objectors' claims. In her *ex post legem* approach, a variant of the rule-and-exemption strategy popular in recent multicultural theory (Loobuyck 2005), one of the situations considered by Ceva is the case of a doctor with pro-life convictions who contests a legal obligation to assist a patient to medically driven suicide. Ceva maintains that this conflict can be mediated in a way that reconciles liberal universalism, by respecting the objector's autonomy, with the aspirations of the politics of recognition to support differentiated rights. Central to this account is a concern about the *moral integrity* of human beings, or their desire to resist being coerced into doing what they regard as fundamentally wrong. This approach is, Ceva claims, preferable to the 'cultural rights' approach, which inevitably ossifies groups in a manner that is difficult to reconcile with the individualist focus of liberal theory. In concluding her case, Ceva carefully specifies that, in order to qualify as an exemption, the claim must meet the conditions of being sincere, morally relevant, and not liable to undermine public order. This fascinating contribution completes the volume by responding to both liberal dilemmas outlined earlier. It investigates

the potential principles for minority accommodation and robustly sets out the limits of those principles in an original and engaging way.

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Part I
Religious Pluralism in Liberal Democracies: Toleration and the Dynamics of Social Conflict

Chapter 2
Religions and Liberal Democracy: Reflections on Doctrinal, Institutional and Attitudinal Learning

Veit Bader

2.1 Introduction

In my recent book *Secularism or Democracy* (2007a) I defend a conception of differentiated morality based in a strong core of minimal morality and basic rights which can be combined with more demanding moral standards provided that they do not infringe this core. Moral pluralism and contextualized political theory are best served by a moderately agonistic associative democracy that shifts the focus from principles to virtues, practices and institutions and also criticizes all varieties of secularism still so prominent in liberal, republican, feminist, and socialist political theory and practice. In this article I elaborate my very short discussion in Chapter 3 of that book by considering whether, and if so how, Christianity and Islam learned to accept priority of liberal democracy.[1]

In the first section, I distinguish between principles/rights of *tolerance* and attitudes/virtues, practices, and regimes of *toleration*. My claim is that the latter are ultimately more important than principles of individual and collective tolerance or individual and associational freedoms of religion, which are often in conflict with each other. I also argue that minimalist conceptions of 'gritted teeth tolerance' should not be infringed by attempts to impose more demanding 'respect'-tolerance or 'pluralistic' tolerance. Gritted teeth tolerance and collective tolerance are part and parcel of any minimalist morality and of any decent polity. Liberal democratic constitutions require not only these basic liberal rights but also more demanding but still minimalist equal respect tolerance. Learning toleration and liberal democracy by doing, that is through attitudinal and institutional learning, is at least as important as doctrinal learning.

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[1] This article is based on a long chapter on Religions and Democracy that I had to exclude from the final text of my recently published book, *Secularism or Democracy.* It has been presented at ECPR panels in Pisa, September 8th 2007, and Keele 12th June 2008. Thanks to Monica Mookherjee for critical comments and queries.

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For secularist philosophers and politicians as well as for 'orthodox' and totalistic religions, religion and liberal democracy are incompatible, in deep or fundamental contradiction with each other. In the second section, I criticize the claim that religion(s) are incompatible with liberal democracy. I try to show that the relationship between religions and liberal democracy is an open and context-specific one. It depends on the specific nature of religions and of the polity. Finally, I try to show that different denominations of Christianity (Section 2.3) and different traditions of Islam (Section 2.4) provide the institutional, attitudinal and theoretical opportunities to resolve the 'fundamentalist dilemma' that, in democratic decision making, their truths have the same right as errors and are treated as 'opinions'. These traditions also show how they have already learned or are learning to make their respective religions compatible with the priority of liberal democracy.

2.2 Tolerance and Toleration: Moral Minimalism and How to Learn Toleration and Democracy

2.2.1 Concepts of Tolerance and Toleration

Tolerance and toleration are essentially contested concepts. As in all other cases, this is due to the fact that they contain many dimensions and conflicting normative and cognitive perspectives. My intent here is not to add yet another perspective on this voluminous debate in the idle hope that conceptual consensus could eventually be found. I only want to clarify my own concepts and defend my minimalist but differentiated approach to the subject under discussion, starting with some terminological proposals. Tolerance/toleration, according to a minimalist, fairly broadly accepted definition by King (1998: Chapter 1) means that the tolerator tolerates beliefs or practices to which he objects even if he has the power not to tolerate. This power to interfere is not something the tolerator forgets (as in the case of acquiescence) or which he omits to use: he explicitly refrains from interference. The reasons and motives to interfere, or not to tolerate, can be as manifold as the reasons and motives for self-restraint.

Tolerance/toleration, first, can refer to (a) an articulated normative principle; (b) an individual attitude, disposition or a personal virtue; and (c) to collective practices and institutional regimes. When I mean an articulated normative principle, I call it *tolerance;* when I refer to attitudes, virtues, practices and institutional regimes I use the term *toleration.*[2]

[2]King (1998) often uses the terms tolerance and toleration indiscriminately though he intends to distinguish between 8 forms of 'toleration' (which all negate intolerance) and calls only two of them tolerance. My terminological choice, as any other, is somewhat arbitrary because (i) the distinction does not exist at all in many languages such as German or Dutch, and (ii) the 'tolerance of pain' is certainly more an attitude than a principle (see Thomassen 2006). To avoid misunderstandings by traditional political philosophers who reduce the realm of the 'normative' to that of 'moral principles', I hasten to say that virtues, good practices and appropriate institutions are also

Second, the object of tolerance/toleration can be an 'individual conscience' or '*belief*' (this I call *individual* tolerance/toleration); and/or 'collective *practices*' (this I call *collective* tolerance/toleration). In terms of freedoms of religion (which are intrinsically related to traditional and recent debates on tolerance/toleration), this distinction can also be framed as 'internal' vs. 'external' religious freedom; or, in the frequently used language of 'autonomy', as 'individual' and/or 'associational'/'collective autonomy'.[3] Some minimal explications may be appropriate here: in the case of individual tolerance, the tolerator (an individual or collective actor) tolerates the beliefs which he considers objectionable, even if he has the power not to tolerate. The tolerated individual raises a claim or a right to freedom of conscience (and to be permitted their religious practices at least 'in private') and related claims or rights to freedom of exit and entry. In the case of collective toleration, the tolerator tolerates the collective practices of individuals, who are taken to belong to a specific group of practitioners or as members of associations or organizations even if, say, states or religious majorities have the power not to tolerate. The tolerated groups, associations, or organizations raise claims or rights to practice their religion collectively and publicly, and also claims or rights to (various degrees of) associational freedom or collective autonomy. The *conditions for the emergence of learning* are also different: the existence of rivaling or conflicting groups, associations or organizations of practitioners that object to one another's practices and of majorities which, having the power not to tolerate, have to learn to tolerate collective practices to which they object, in the case of collective 'agonistic' toleration; and the existence of dissent and conflict emerging from within groups, associations or organizations of practitioners in the case of individual tolerance. The practices that are objected to can be understood broadly (e.g., as relating to sex/gender, age, social class, ethno-national and religious cultures). Or they can be understood narrowly in terms of religious practices, as in my following arguments which focus exclusively on religious tolerance/toleration.[4] Obviously, the different practices as well as the two forms of toleration/tolerance are intrinsically linked.

Third, tolerance/toleration can be confined to a *minimalist* principle or attitude of self-restraint that requires voluntarily enduring something that is objected to (or disliked, disapproved of, etc.), under the condition that the tolerating actor has the power not to tolerate.[5] Or it can require, stepwise, *more demanding* principles such as minimal (agonistic) or more demanding 'equal respect', which is often called

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'normative'. My concept of toleration covers both (b) individual attitudes/virtues and (c) collective practices as well as institutional regimes but this does not mean that I would brush over the important differences between these dimensions and their relationship (see below).

[3] Actually, the distinctions 'individual/collective', 'beliefs/practices', 'inner/outer freedoms' and 'individual/associational autonomy' are not identical though they often massively overlap. A more detailed discussion should distinguish these dimensions and their implications more clearly.

[4] For terminological distinctions see Bader (1997a: 107, 2003: 134–136). For criticism of the language of tolerance/toleration in cases of 'race' and 'ethnicity' see Brown (2006: 129).

[5] For this 'intolerable' aspect of tolerance see King (1998: 9, 21) ('weak tolerance': King's Figure 2); 'permission' tolerance (Forst 2007: 217–222), see also Nicholson (1985).

respect-toleration (Forst 2003). Alternatively, it can even involve a *maximalist* 'positive embrace' or 'enthusiastic endorsement' of cultural and religious pluralism, which is often called '*pluralist*' *tolerance/toleration* (Connolly 2005, Galeotti 1993, 1997) or 'strong tolerance' (King 1998: xiii). Here the important *terminological* issue is whether the more demanding or maximalist concepts should be included in the language of tolerance/toleration or whether they go 'beyond' toleration and hence should better be called, as I think, by their proper names, viz. 'equal respect', 'pluralist-respect' or 'respect for difference' (Burg 1998: 240). The *substantive* issue is: if, and to the degree to which, the normative principles of equal respect and concern, or the more demanding enthusiastic praise of difference, are really 'internalized' as effective, action-motivating dispositions and commitments, the objects of tolerance/toleration are no longer 'merely tolerated' but positively promoted. If one continues to talk about tolerance/toleration, this may be legitimate for two reasons. First, there may be, and usually is, a gap between normative principles of tolerance (and also of 'equal respect' or 'respect for difference' as rights) and actual, more or less 'intolerant' dispositions (and also actions, if they are not prevented). Second, minimalist tolerance and toleration may be thought to be inherently unstable if not backed by more demanding principles or rights and virtues. This point is often related to the misleading claim that minimalist tolerance would only be a matter of strategic prudence, not a moral principle of peace-keeping. I return to this issue below.

With regard to the *first dimension*, I defend a broad conception that criticizes the reduction of toleration to the elaboration and foundation of articulated normative principles of tolerance (whether minimalist or maximalist) because (i) normative principles of tolerance which are not backed by appropriate virtues, conceived as dispositions and commitments,[6] are clearly insufficient for the stable reproduction of regimes of toleration, whether minimally decent or liberal democratic. (ii) When it comes to learning toleration or liberal democracy, learning virtues is at least

[6]See Bader (2007a: Chapter 6.1) for a criticism of replacing principles by virtues and of postmodernists such as Connolly (2005). V. d. Burg also argues against the 'primacy of beliefs' as the primary focus of tolerance which is distinctly Protestant (sola fides, + sola scriptura), and for the 'primacy of practices' (1998: 247, 250). 'Practices or attitudes need not be reducible to principles. The absence of a principle thus does not imply that there is no valuable attitude or practice' (251). If tolerance is perceived as confined to principles then we clearly have to move *beyond tolerance*. Practices of toleration require at least some collective toleration. A 'general reluctance to interfere' (only if there are really strong arguments for interference, interference is considered) may be the 'only' but certainly the most important way 'to prevent divisive strife' (252). 'Grounding' tolerance/toleration in, say, the 'deliberative tradition' (Habermas, Bohmann, Gutmann/Thompson) is contested and tends to go 'beyond' minimalist toleration towards more or less demanding equal respect, mutual agreement, consensus etc. This approach would exclude decent but non-liberal and non-democratic religions (see Thomassen's criticism of Habermas 2006). It would draw the limits of toleration far too narrowly compared with my moral minimalist concept. The virtue of toleration can stand on its own, without 'principles' and certainly without deep foundations of principles. The 'deconstruction of tolerance', indeed, does not imply the 'destruction of tolerance'. Yet, in my view, the focus on the virtue of toleration is much more promising than the ambiguous introduction of 'hospitality' or the ambiguous deconstructive 'optimism' (Thomassen 2006: 457f).

as important as learning principles of tolerance through a received doctrine. Most philosophers think of the relationship between principles and virtues/attitudes as a one-way street from principles that have to be first agreed upon and then 'internalized': without the internalization of the principle, it is impossible to develop the virtue of toleration or to exhibit a tolerant attitude towards difference in practice. They neglect or forget to analyze two other important relations: (i) attitudes of toleration can develop even if principles of tolerance are not spelled out, not agreed upon, or remain highly indeterminate; (ii) our attitudes and virtues massively inform our articulations and interpretations of under-determined principles. I claim that these processes are at least as important as a one-sided 'internalization' of principles.

With regard to the *second dimension*, I defend a conception that (i) criticizes highly individualized, subjectivized, privatized or 'thin' conceptions of religions and the related reduction of toleration to principles of individual tolerance, because such a conception of an idealized Protestant religion (Bader 2007a: 1.2.2, Bader 2005, Jacobsohn 2003, Spinner-Halev 2005) discriminates against other religions and is incompatible with any reasonable accommodation of recent religious diversity (Kaplan 2007: 239f; 293; 328–330; 357). Moreover, it is incompatible with liberal democratic principles and legal freedoms of religion which explicitly take into account not only individual or 'internal' religious freedoms (of belief, conscience, *foro interno*), so exclusively highlighted by secularist defenders of 'individual autonomy', but also associational or 'external' religious freedoms (guaranteeing shared religious practices and some 'collective autonomy'; see Bader 2007a: Chapter 4.1), so often completely neglected or refuted by prophets of individual autonomy.[7] (ii) My conception explicitly takes into account serious tensions or conflicts between 'individual' and 'associational' freedoms or autonomies (Bader 2007a: Chapters 4.3–4.5; Kaplan 2007, for early modernity).

With regard to the *third dimension*, it seems wise to keep considerable distance from the attempt to locate the *foundations* of rights generally, and the *justifications* of tolerance in particular, in 'autonomy, rationality, or reasonableness', in a manner still so prominent amongst most liberal philosophers.[8] Critics of demanding exercise-of-rational-revisability concepts of individual autonomy and of the infringement of collective autonomy (such as Galston, Kukathas and Margalit) have proposed to replace autonomy by tolerance/toleration. However, here again, one finds contested, ambiguous and minimalist as well as more demanding, maximalist concepts. A *minimalist* understanding of individual and of collective tolerance is part and parcel of my general defence of moral and legal minimalism (Bader 2007a: 72: Table 2.1). Both collective and individual tolerance have been developed and learned in situations where protracted warfare did not lead to decisive victories.

[7]Not only by 'philosophers' but also by Justices of Supreme Courts (see for Turkey and India: Bader 2010a).

[8]Bader (2007a: 2.2.1) with Rob Reich; see also Galston (2005) and Khomyakov (2007).

Collective toleration is learned under conditions in which it seemed *strategically* unwise or even impossible for empires or states to extinguish or expel minorities by 'ethnic' or 'religious cleansing'. This is *morally* learned as a principle of collective tolerance in order to keep peace and minimal security and to guarantee the moral values of 'life and security' (e.g. by imperial elites in Alexandria, Rome, in Muslim empires; by philosophers as well as by theologians) that should be respected even if extinction seemed strategically possible.[9] It commonly did not, and need not, include any notion of individual tolerance (or individual freedom of conscience: apostasy; conversion; proselytising; heresy).[10] Moreover, it developed at times when full-fledged concepts of individual autonomy have been absent, both in Christianity (Madeley 2007, extensively Kaplan 2007) and in Islam.[11]

Individual toleration and the moral principle of individual tolerance was learned, first strategically and later morally, when the founders of nation states and political elites saw that the use of state force to change convictions may be spurious or counter-productive; and when believers and religious elites accepted the view that religious convictions, exactly because they are so deep, should not be imposed from the outside, from above, by force, but freely endorsed from the inside.[12]

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[9]It is important to highlight two points here: (i) that moral learning and not only prudential, strategic or instrumental learning is implied here (see my criticism of Hunter 2007/2008 in Bader 2007a, Section 3.2). Traditionally phrased, amongst others by Rawls (1993), it is not 'only a modus vivendi', but a pragmatic modus-vivendi conception which includes both negotiations and deliberations has to be defended against philosophers' cricitism (see Horton's excellent paper, Chapter 7, in this volume). (ii) This moral minimalism is clearly different from more demanding 'liberal' or 'democratic' equal respect (see below).

[10]For a moderate-universalist defence of the three principles of liberty of conscience (rejection, affirmation and distinction) see Kymlicka (2002: 230ff) and Swaine (2006: 49ff). Individual as well as collective tolerance involve moral, not purely prudential-strategic, learning, because keeping peace and guaranteeing security are in itself important moral aims. Collective tolerance has to be part and parcel of any 'tolerable liberalism' (Bader 2007a: 70, 81).

[11]Some important preliminary lessons can be learned from these non-democratic versions of institutional pluralism:

(i) If one is primarily interested in institutions (or 'regimes') and practices of toleration, we can learn more from some non-democratic types of institutional pluralism, such as power-sharing arrangements in early modern cities and states (Kaplan 2007: Chapter 8), or like the Millet system in the late Ottoman Empire (Bader 2007a: 196 f, Barkey 2008) than from contemporary 'liberal democracies' in Europe.

(ii) If one is interested in attitudes or motives of agents explaining practices of toleration, the fairly exclusive focus of liberal philosophers and postmodernists on the 'enthusiastic endorsement of difference' (Walzer 1997: 10ff) is misleading. 'Resigned acceptance of difference for the sake of peace', 'benign indifference' and 'moral stoicism' may be more significant (Bader 2007a: 2.2 and 6.1.1). Everyday practices of toleration in intercultural contexts are surely more important than heroic principles and demanding virtues (see Leeuwen 2010).

[12]See Forst (2003), Hunter (2007) for Franck, Castellio, l'Hospital, Bodin, Erasmus, Coornhert, Grotius, Hobbes, Spinoza, Pufendorf, Thomasius, Locke. '*Proto-liberals*' (*neither liberals, let*

Both collective and individual *toleration by regimes (or toleration 'from above')* have been for long pure '*permission conceptions*', defined by the authorities alone. For long 'freedom and domination', 'inclusion and exclusion', and 'recognition and disrespect' have been mixed and, again, defined by authorities alone. Eventually, slowly and inconsistently, they have been replaced or, as I would say, complemented by *liberal* '*respect conceptions*', demanding a more secure recognition of collective tolerance as well as of individual tolerance as *rights* and, eventually, also that *democratic* citizens respect each other as legal and political equals, following a logic of emancipation rather than toleration (Forst 2007: 224f). In the end, liberal democratic constitutions combine morally minimalist conceptions of toleration with more demanding but still minimalist liberal conceptions of individual and collective tolerance as rights (constrained by other basic rights) and minimalist democratic conceptions of 'equal concern and respect'.[13] Before proceeding, however, we have to pause and try to counter three common misunderstandings of my differentiating account of tolerance and toleration.

First, collective toleration is, and has to be, constrained by individual toleration and by other basic rights. In my view, the recent moral minimum implies a sober respect conception of individual tolerance, incompatible with any ban on, or persecution of, changing or renouncing one's religion.[14] Yet, individual tolerance is also constrained by other basic rights and should not be mistaken for an absolute right.

Second, even if the minimalist and the more demanding liberal and democratic conceptions of tolerance are combined in liberal democratic constitutions, one has to keep them conceptually and also substantively separate. The minimal 'pre-liberal' principle of '*gritted teeth tolerance*' and the related minimal virtue of toleration are clearly different from '*respect*'*-tolerance*. As has been argued: 'no one should confuse this with full and complete acceptance'; to 'tolerate is unlikely to offer all people "equal concern and respect"', but this is no reason to 'denigrate toleration which is far preferable to outright suppression' (Levinson 2003: 91, quoted in Galston 2005: 586; Margalit 1996). The minimalist moral principle of tolerance is a crucial peacekeeping safeguard needed to avoid massive violations of moral values

alone democrats) like l'Hospital, Hobbes and Pufendorf argued for state sovereignty and for state indifference but this included neither the full guarantee of individual tolerance or equal respect nor of collective tolerance. Both are blatantly neglected and violated in *cuius regio eius religio* regimes (Madeley 2007, Kaplan 2007: Chapter 4, 'One Faith, One Law, One King').

[13] Here, as in all other regards, liberal-democratic constitutions are historical compromises between basic moral principles and rights that stand in more or less deep tensions with each other. It took a long time before this 'compromise' has been 'morally learned' (most fully by moral pluralists). 'Priority for liberal democracy' always indicates these two conflicting prongs.

[14] The right to exit is the bare minimum to be defended (vs. some Islamic doctrines and practices). As in the case of states, it cannot be fully compensated by internal voice. Yet my *non-infringement proviso* also applies here: stimulating (or even imposing) freedom of individual conscience and individual tolerance should not be allowed to override collective tolerance because absence of collective toleration is often the major evil.

of 'life and security'.[15] One should be very careful to avoid the conclusion that the more demanding egalitarian and substantive 'respect'-conceptions and, particularly, maximalist principles of 'pluralist tolerance' infringe upon the minimal conception, especially if these more ambitious forms of toleration are imposed upon dissenting people or legally enforced (Bader 2007a: 81). As already stated above: if principles of full equal respect (i.e., modern anti-discrimination) or even of pluralist respect for difference were internalized, then 'strange', 'deviant' or 'obnoxious' beliefs and practices would not be objected to but actually praised, emphatically endorsed and tolerance and toleration would be unnecessary. No self-restraint would be needed because both elites and masses as well as all collective actors (other religious organizations, governments and administrations amongst them) would not even be tempted to act in an intolerant manner: the 'power not to tolerate' would be effectively blocked from the inside and the 'paradox of toleration' would disappear. This idyllic picture of harmonious, deeply diverse societies and polities is clearly utopian. In the real world, minimalist tolerance and all prudent measures of legal enforcement, backed by the virtue of toleration or self-restraint, remain crucial. Obviously, it is most welcome if more demanding principles and virtues are promoted, preferably by avoiding 'evil' and by providing opportunities for people to practise their widely divergent conceptions of a good life. The hope is that these practical experiences of living in diverse, liberal democratic polities (and increasingly, so it is hoped, also societies) eventually convince all to be tolerant, to a greater degree than is possible by argumentative persuasion alone.[16] The replacement of 'liberal toleration' by 'toleration as recognition of difference' (Galeotti 1993, 1997) is most unwelcome in this regard.

Third, as already stated, decent and minimally liberal democratic polities require *virtues* for their proper reproduction and flourishing. The long list of civic and democratic virtues contains two explicit virtues of toleration. (i) A disposition of habitualised *self-discipline* and a commitment to refrain from violence and resolve disputes and conflicts through public debate and peaceful decision-making.

[15]Note that more is involved here than a purely instrumental 'need to secure the stability of the order' because then 'I have no principled reason not to insult or persecute them if there is no threat to political disintegration' (in a personal communication from Monica Mookherjee 2008). My focus is rather on basic moral 'values' of 'life/liberty/security'. Hence I do not defend 'order' per se but only those types of polities that guarantee the moral minimum. Liberal toleration is more demanding than minimalist toleration, and liberal-democratic 'respect' toleration is more demanding than liberal toleration. 'Decent' polities are different from 'liberal/constitutional' ones and the latter from 'liberal democratic' ones. Therefore, I do not agree that 'in any tolerant polity, we inevitably need some form of 'respect toleration' in Forst's/Galeotti's senses' (Mookherjee). When it comes to liberal democratic polities, however, I fully agree that 'we would need to go beyond the moral minimum and include equal respect, however minimally conceptualized. My criticism of Forst's and, particularly Galeotti's position is not that liberal democratic constitutions require 'respect' instead of 'only tolerance' but that they do not distinguish them terminologically and do not sufficiently discuss the substantive issues involved.

[16]For the distinction between policies (of proscribing and of enabling) and (short-, medium-, long-term) processes in the perspective of associative democracy see Bader (2007a: 214, 221).

The corresponding virtues are *civility* (opposed to torture, cruelty and brutality), moderation or *gritted teeth toleration* (Galston 1991: 228; Warren 2001: 73), trustworthiness (Rosenblum 1998) and a sense of 'minimalist justice'.[17] These are basic for any decent polity, liberal democratic or otherwise. (ii) A disposition and commitment to discern the equal rights of others, and the restraint to tolerate and respect them. The corresponding virtues of *minimal respect-toleration* and mutuality are basic virtues for any liberal democratic polity.

The virtue of toleration can thus be interpreted in a minimalist but crucially important way as 'gritted teeth tolerance of some things you hate' (Connolly 2005: 69)[18]; and respect can be seen as '*agonistic respect*' (Connolly 2005: 72; 1999: 614; 1995: 191, 234f) or 'agonistic reciprocity between two contending constituencies, each of which has gained a fair amount of recognition and power in the existing order,' instead of more demanding and maximalist interpretations such as 'mutual recognition', 'openness and curiosity', or even the 'enthusiastic endorsement of difference' (Walzer 1997: 10ff) and harmonious conceptions of respect.

These virtues, as all others, cannot be 'enforced' by law, they have to be learned by doing (Bader 2007a: 183–185). Experiencing minimally adequate practices and institutions, good examples, and adequate or not too miserable social conditions (Bader 2007a: Chapter 9) are decisive in this regard.

2.2.2 Institutional, Attitudinal and Doctrinal Learning of Toleration and Liberal Democracy

I distinguish three different, connected ways in which totalistic or politically fundamentalist religions can learn and have learned to become minimally moral and have eventually accepted, or even actively promoted, the priority of liberal democracy. These are: a practical institutional learning; a practical attitudinal learning; and a more theoretical (theological, doctrinal) learning. First, political institutions at least partly impose their own logic on religions and stem the temptations of theocrats. For reasons of state, states and empires induce at least some minimal differentiation of religion and politics, earthly and divine issues, and authorities (Bader 2007a: Chapters 1.2.3). Living under institutions of constitutional liberal democracy in general, and participating in multi-party competition in particular, contributes to making even these religions more liberal and democratic. Second, practical interactions in everyday life among people of widely divergent religious beliefs and practices teach practices and an ethos of toleration, at least under appropriate or decent regimes of

[17] Sune Laegaard's quest for a 'non-institutional social ethos' and his plea for 'civility' (as an alternative to both 'tolerance and positive respect' is quite similar to my own approach because civility is also minimalist. My list of minimal civic virtues also 'includes but goes beyond mere tolerance and non-violence' (2008: 5). See Bader (2007a: Chapter 6.1).

[18] See Walzer's 'resigned acceptance of differences for the sake of peace', 'benign indifference', and 'moral stoicism.'

toleration (Walzer 1997). Practical interaction in democratic politics teaches democratic virtues. Third, I am deeply convinced that such institutional and practical learning is at least as important as theoretical learning by scholars, which is so much highlighted by philosophers who try to re-interpret or challenge dogmas and to find religious sources and justifications for moral principles of tolerance, personhood, equality and freedom. Theologians and legal scholars contributed massively to making the monotheistic 'Religions of the Book' orthodox and fundamentalist in the first place (Berger and Luckmann 1987, Bader 1991: 178–181; Kaplan 2007: Chapter 1 'A Holy Zeal' [39 on experts and confessionalism]; see also Leezenberg 2001: 147ff for Ghazali). Consistency and systematic thinking under conditions of doctrinal rivalry are as characteristic of the 'learned fields' as they are inimical to practical toleration. Lay believers, particularly in practice-centred religions, are less prone to these vices than theorists.

2.3 Are Religions Incompatible with Toleration and Liberal Democracy?

For secularist philosophers and politicians and for 'orthodox' religious fundamentalists alike, religion and democracy in general, and Islam and democracy in particular, are incompatible. They are understood to be in deep or fundamental contradiction with each other. I believe that this is a very specific, biased presentation of the real 'problem of "citizenship ambiguity"' that is 'present in any religion that recognizes a divine or transcendent normative authority higher than that of earthly institutions' (McConnell 2000: 92). 'Believers inevitably face two sets of loyalties and two sets of obligations': the demands of faith (or of an 'authority outside the commonwealth') and the 'obligations of liberal democratic citizenship' (Rosenblum 2000). One way of presenting this tension is to stylize or construct 'Conflicting Truths of Religion and Democracy' (Cunningham 2005, see also Bruce 2004: 18, who claims that 'religion taken seriously is incompatible with democracy'), independent of inquiring into the type of religion in question and the conflicting interpretations of it, and also completely independent from the historical context and types of liberal democratic states and policies.[19] The other interpretation insists that 'much depends on the nature of the religion and of the state' (McConnell 2000: 91), and that we should not and cannot talk about a 'fundamental truth' or 'essence'

[19]Cunningham defends a *weak or soft essential conflict hypothesis* based on his interpretation of the following historical phenomena: (i) The long periods of actual theocratic government on the part of the three monotheistic religions, tempered only when internal religious divisions or both internal and external economic, social, cultural pressures made continuing theocratic rule too difficult to maintain. (ii) The pressures toward reversion to theocracy from within the religions even in modern times. Accommodations to democracy, then, would be the result of Churches' (or Mosques') bowing to necessity or taking advantage in inter-faith conflicts of democratic practices and rhetoric. This interpretation is debatable, and the same story could be told for all transitions from secular autocracies to democracy.

of religion – and, obviously, also not of democracy either, without inquiring into the history of particular societies. This interpretation also holds that we should not talk in the abstract about pernicious conflicts between religion and democracy or, vice versa, about any deep harmony. In addition, when distinguishing and comparing the theories and practices of different religions, this perspective also holds that we should not construct some essential, a-historical truth of Christianity or Islam which can be found by researching its 'original intent'.[20] All depends on which interpretations of which religions we think of, and both are very much influenced by context.

Political philosophers should then resist the 'essentialist' temptations so thoroughly at odds with the sociology and history of religions and with any critical theology. If the relationship between religion and liberal democracy is not defined once and for all and quasi-a priori, and if religions are neither inimical nor friendly to liberal democracy by definitional fiat, we can discuss how, when, under which conditions religions can become compatible with liberal democracy from the inside. We can expect that such learning is particularly difficult and urgent for religions that (i) are totalistic, integralistic or 'thick' (subordinating all spheres and aspects of life); (ii) are not minimally tolerant with regard to other believers and non-believers; (iii) are theocratic in the sense that earthly representatives of divine revelation, such as leaders or organizations, claim absolute truth (guaranteed and sanctioned by 'God' or some transcendent reality) and strict obedience of all (believers and non-believers); and (iv) are not only missionary but aggressive and violent.[21]

This has been the typical constellation in the late Middle Ages and early modernity in (Western) Europe, where two rivalling absolutist powers (the Catholic Church and emerging absolutist states) claimed jurisdiction over the same realms. The *first* institutional (and doctrinal) learning step was the domestication of these claims to absolute sovereignty by dividing and separating them over 'earthly matters' and 'religious/divine matters'. This was a pre-liberal version of the (relative) autonomy of the state from religion and of religion from the state. It did not much or nearly nothing to tame claims of absolute sovereignty within the respective realms.

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[20] All critical historians and sociologists of religions and also all historically and sociologically informed critical theologians share these assumptions. Historical research on the early phases of *Christianity* on the selection, streamlining and dogmatization of the various 'gospels' into a misogynist New Testament, demonstrates that it has been at odds with such a fundamental truth of 'theocracy' claimed by later orthodoxies. The same is clearly also true for early *Islam* (see Ahmed 1992). The *task of political philosophers* is not to find the 'true' meaning of holy scriptures in opposition to theologians that seriously disagree, certainly not to criticize the increasing number of 'reformist', 'liberal' or 'democratic' theologians trying to make plausible readings of the Bible and the Q'ran that are compatible with liberal-democracy, let alone to 'replace' them. And it should not be the *task of Justices* of the Indian Supreme Court to authoritatively deal with the 'true' meaning of Hinduism (see Bader 2010a).

[21] These temptations are particularly strong in universal, monotheist, missionary religions like Christianity and Islam. 'Ethnic' religions like Hinduism or Confucianism (both very 'thick' and 'ritualist') and universal but non-theist religions like Buddhism do not exclude or even explicitly allow practitioners to also belong to other religious communities.

For instance, while some legitimations of absolute state sovereignty have been 'secular', almost all absolute states certainly have not (Madeley 2007). But neither the justifications of this 'Leviathan' nor existing absolute states were 'liberal', let alone 'democratic' in any meaningful sense.[22] In a *second* institutional (and doctrinal) learning step, these pre-liberal arrangements had to be tamed from inside the respective realms. Absolute state sovereignty had to be domesticated by *liberal* constitutionalism (constitutional limitations of state powers by the rule of law and the guarantee of basic civil rights against the state); and, eventually, in a *third* step, they had to be *democratized* (by introducing political rights and democratic institutions). 'Secularism' has neither been a pre-condition for minimally decent, nor for liberal and democratic, polities; and, vice versa, secular states in modern history committed as massive violations of basic human rights as did religious states. Whether, and if so how, Catholicism and other Christian denominations had to moderate their absolutist claims from the inside will be briefly analyzed in the next section. Space prevents even the briefest summary of the respective institutional histories, either of 'the West' or of 'Muslim countries'. Assuming that the basic developments are known, the focus in the next sections will be on the links between institutional, attitudinal and doctrinal learning.

We can and should overcome the inherent unfairness of the secularist's neglect of the possibility and existence of principled religious or theological foundations of liberal democracy. Religious believers, like secularist philosophers, professionals and so forth[23] had to learn to resolve the 'fundamentalist dilemma', namely the requirement that they accept that their 'truths' have the same right as 'errors' and should be treated as 'opinions'. They learned to do so in specific ways.[24]

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[22] An anonymous reviewer rightly reminded me that 'an institutional differentiation between religion and state is an institutional requirement for religious tolerance' but simply assumes, as do so many others, that this would be 'secularism' (see Bader 2007a: Chapters 1 and 3, Bader 2008a, 2009b for extensive arguments against this hard core of 'secularism'). 'These institutions had to un-learn, or rephrase (secularize or find alternatives to) religious understandings and religious public language' (quoted from the review). This is indeed so, but 'secularism' has not been the only, nor in my view, the right language.

[23] See Bader (2007a: 113–117) for a criticism of the unfinished doctrinal learning by many leading philosophers.

[24] Habermas also speaks in terms of a learning process: 'Dieser schmerzhafte Lernprozess steht dem Islam noch bevor. Auch in der islamischen Welt wächst die Einsicht, dass heute ein historisch-hermeneutischer Zugang zu den Lehren des Koran nötig is. Die Diskussion über einen erwünschten Euro-Islam bringt uns jedoch erneut zu Bewusstsein, dass es letzlich die religösen Gemeinden sind, die selbst darüber entscheiden werden, ob sie in einem reformierten Glauben den 'wahren Glauben' wiedererkennen können' (Habermas 2008: 10). [Translation by VB: 'Islam has still to go through this painful learning process. Also in the world of Islam the insight is growing that a historical-hermeneutic approach to the teaching of the Qu`ran is needed. The debates on a desired 'Euro-Islam', however, bring again to the fore that, eventually, the religious communities themselves have to decide whether they are able to recognize the 'true belief' in the reformed belief.'] My interpretation of learning of toleration and of minimal liberal and democratic morality is less evolutionary and not tied to meta-narratives of 'modernization' or 'secularism'. It is not restricted to religions but holds for all doctrines (religious as well as secular) that need to learn these lessons

2.4 Christianity and Liberal Democracy

In the Western and mainly Christian tradition, Catholicism for long approximated the ideal type of a fundamentalist political religion. At least from the Reformation onwards, the Catholic Church and all other churches, denominations and theologians had to come to terms with internal religious diversity, with the modern state and with emerging liberal democratic constitutions in a new way.

In a *first step*, they learned to see peace, stability and public order not only as strategic or purely prudential values but as moral ones. In order to make 'religion peaceable' authors like Hugo Grotius and Coornhert started to replace 'dogma and creed with a morality oriented to social peace' (Shah 2000: 125ff, Galston 2002: 24ff). This has not only been a doctrinal learning process ('adiaphora' or the priority of tolerance) but also a process in which doctrines (theoretical, systematic, and scholarly conceptions of religions) became less important than practices of toleration (virtues and cultures).[25] Learning the priority of toleration started to tame fundamentalist theological doctrines and also opened avenues to reformulate parochial, dogmatic and sectarian conceptions of Christianity as a more universal Christian ethics. But it did not profess the priority of liberal democracy.

This only happened in a *second step*: different radical *protestant denominations* – Quakers, Baptists, Separatists, Methodists (Handy 1976: 199ff), and also *Remonstranten, Rekkelijken, and Unitarians* (Israel 1995: Chapters 5, 16, 20)[26] – started to develop conceptions of religion in which liberal democracy explicitly gains priority over denominational truths when it comes to political decision-making. Or they developed denominational truths compatible with democracy, so that the two could not come into conflict. Protestant religions are made compatible

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(and monotheistic religions and aggressive Enlightenment secularism are most certainly amongst them). So one has to specify the terminus ad quem of 'learning'. Learning 'minimal morality' is less prone to be accused of imposing 'Western Imperialism' via the backdoor (see Bader 2007a: Chapter 2 on moderate universalism, moral minimalism and broad and deep intercultural dialogue). In this way I think I can respond to Mookherjee's query: 'learning seems to me to presuppose positive development, and this terminology might beg the question of whether adherents to particular religions would see learning these norms as an ethical gain or as 'progress' in all situations. Is it not possible that some would, often for comprehensible reasons (if not reasons that one positively endorses), resist this assumption?'

[25] Grotius clearly distinguished between theological doctrines (*decreta*) and practical precepts (*praecepta*) attempting to reduce Christian dogmas to an ethos in order to avoid needless controversy. He was persuaded that Calvinism as doctrine and liberalism were utterly incompatible, the task of weakening 'true' Calvinism has been one of the defining projects of his life (see Shah 2000: 130, Simonutti 2003). See Kaplan (2007: Chapter 5, 'The Gold Coin' versus 'confessionalism', p. 132).

[26] See Bader (2007a: 1.3.2), Martin (1990) and Manow (2004), for the distinction between Lutheranism and Calvinism, on the one hand, and on the other radical Protestantism, that prepared theoretical and institutional and organizational sources for modern liberal democracy. Bruce claims that 'there is a strong and non-accidental relationship between the rise of Protestantism and the rise of democracy', tolerance and pluralism (2004: 6) though the strongest links 'are unintended consequences', an 'ironic (and often deeply regretted) by-product'.

with liberal democracy from the inside (Miller 1985: Parts I and II, Eisenach 2000, Thiemann 1996, Jacobsohn 2003: Chapters 2–3). This process allowed for *three distinct ways to resolve the problem of* '*citizenship ambiguity*':

(i) Madison 'maintained that religious obligations take precedence' and was 'willing to sacrifice some degree of social control (on matters not related to private rights or public peace) in exchange for liberty of conscience.' He tried to safeguard this by his radical *liberal anti-majoritarianism* (McConnell 2000: 93, 95f).
(ii) Jefferson, who, like Locke, was convinced that the liberties of a nation 'are the gift of God', assumed 'that civil society is unaffected by the moral and even the theological teachings of its major religions' (McConnell 2000: 96). For this reason, he opted for the '*wall of separation*', attempting to eliminate any 'jurisdictional overlap', the idea being that the less overlap there was, the better.
(iii) Washington, also strongly linking free government to religion in his Farewell Address, 'placed greater emphasis on the contributions of religion to virtue and hence to republican citizenship.' 'The teachings of religion, taken as a whole, tend to foster the virtues on which a democratic republic depends'. Like de Tocqueville and others, he assumes a 'happy coincidence of [religious] freedom and good citizenship', a '*salutary*' or '*happy accommodation*' between religions and democracy instead of 'separationist' or 'anti-majoritarian' options (McConnell 2000: 96ff, see Miller 1985: 244, Delfiner w.y.: 317f, Spinner-Halev 2000: 87ff).

Since the eighteenth century, this liberalization and democratizing of Protestantism, particularly of Calvinism and Lutheranism, has become the predominant interpretation, though it has been heavily contested by earnest Calvinist reformers from the seventeenth century onwards.

In the *third*, much later and still much shakier step, *Catholicism* learned the same lesson. In the 1880s the conservative Catholic bishops in the United States still defended the thesis that the 'ideal situation could only be an established church in a confessional state' (Casanova 1994: 182). The 'Americanists' defending the 'anti-thesis' that 'the principles of the Church are in thorough harmony with the interests of the Republic' could still not 'offer a theological rationale for democracy, freedom of religion, and disestablishment.' Eventually, the Catholic Aggiornamento delivered this rationale before and during the Second Vatican Council,[27] but it is still contested under the recent papacies.

This theoretical learning process has been massively stimulated by institutional conditions, such as the transformative effects of American Constitutionalism on the American Catholic Church (Macedo 1998: 65ff). Kalyvas has demonstrated

[27] American bishops like Murray played an important role in this learning process (Casanova 1994, J. Cohen 2004: 5, 14f, Rawls 1993: 60ff, Weithman 1997: 7, Galanter 1966: 289f.)

astutely how the development of Catholic political parties in Europe paradoxically contributed to making Catholicism more liberal and to expanding and consolidating democracy. Catholicism in the eighteenth and nineteenth centuries in Europe, at least with regard to official Church doctrine and practice, was fundamentalist. Church privileges and religious education in particular were extensively attacked by liberal secularists from roughly 1848 onwards. This provoked Catholic mobilization as a counterrevolutionary reaction against liberalist secularism, and it reinforced the fundamentalist stance of Catholicism. In general, 'an open attack against religion is more likely to reinforce popular religious devotion' (1996: 261). The Catholic Church became internally differentiated along two crucial lines: national and hierarchical (lower clergy quite often opposed the Pope and bishop); and a delicate relationship emerged between the Church and the developing Catholic movement (Catholic Action), many Catholic organizations in civil society and, eventually, Catholic political parties. The increasing involvement and participation of, as well as its reliance on, lay people, unintentionally empowered them. They gained in power even within the Catholic Church. The leaders of Catholic parties formed important counter-elites against clerical elites, and, eventually, Catholic parties became increasingly more independent from the Church.

The original political project was fundamentalist and openly theocratic, intransigent, integralist, and intolerant. As Kalyvas explains:

> Naturally, such an ideology lends itself easily to theorizing about the antithetical relationship of religion (particularly Catholicism) and democracy. Indeed, it has been repeatedly argued that the "injection of religion into political controversies tends to hamper working out the pragmatic accommodations needed by a functioning democracy" (Reichley); that Catholicism "was associated with the absence of democracy or with limited or late democratic development" (Huntington 1993); and that it "appeared antithetical to democracy in pre-World-War II Europe" (Lipset et al). Yet political Catholicism mediated by confessional parties proved to be a factor of mass incorporation and democratic consolidation. No confessional party sought to impose a dominant religious identity on civil society. As Suzanne Berger notes: "Paradoxically, despite the church's hostility to the state... its impact was in many ways to consolidate and stabilize the political and social order". (Kalyvas 1996: 258f).

Moreover:

> By transforming themselves, [confessional parties] transformed their political and societal environment in ways that were hardly anticipated: democracy in Europe was often expanded and consolidated by its enemies. This lesson should not be lost, especially among those studying the challenges facing democratic transition and consolidation in the contemporary world (Kalyvas 1996: 264).

Fundamentalist religions operating in established liberal democracies like the United States, under conditions of multi-party competition, are thus under transformative pressure from the outside which helps eventually to liberalize and maybe even democratize them from the inside.[28] 'The "Christian people", as

[28] As I explain elsewhere (Bader 2007a: Part IV), the specific advantages of 'associative democracy' in this regard are: (i) as a non-establishment option it may help prevent the development of

Poulat (1987: 224) points out, changed: after having remained "on their knees" *within* the church, they "had to stand up and defend religion *outside* the church"' (Kalyvas 1996: 246). Such grass-roots participation in reinterpreting Catholicism eventually had a lasting impact on the Church itself, with the Vatican silently beginning to tolerate modern democracy in 1918, while official acceptance came later in 1944.[29]

Not all secularists, however, believe that these transformations of Christian churches and denominations are sound rather than merely strategic. Whatever modern believers and theologians say, they still claim that all religion is inherently intolerant and persecutory because it has to respond to the human needs to be led, to be told what is right, and to be relieved of the burden of its own conscience. Religion, they believe, must proclaim its infallibility and universality. It must be dogmatic and authoritarian; for if it were to express self-doubt, it would no

religious political parties; (ii) as a variety of 'Democratic Institutional Pluralism', it allows separate religious organizations in public life, religious political parties in particular and increases chances for medium- or long-term learning by fundamentalist religions running against their original intentions and purposes. (These lessons are brought home by Kalyvas 1996).

[29]It is important to note that *liberalizing* Catholicism is not the same as *democratizing* it: 'Liberal Catholics were hostile to mass organization as a method of political action and to ultramontanism as an ideology. Their 'creed was political moderation, parliamentarism, liberal constitutionalism, and a basic (though increasingly disillusioned) conviction of the compatibility of modern society and Catholicism in a liberal, Christian state…' (Grubb 1977: 368).' (quoted by Kalyvas 1996: 259). That the Catholic Church eventually accepts liberalism and democracy in the state, however, does not include their acceptance inside the church.

Unfortunately, Kalyvas's analysis is misguided by uncritical secularist terminology: the 'confessional dilemma' (241) does not require 'secular organizations with secular priorities' (242) but organisational 'declericalization'. The required reinterpretation of Catholicism and redefinition of confessional identity should also not be conceived as 'a secular ideology' (247) and detachment from all religion (245). Finally, the 'politicization of religion contributed to the secularization of politics' (245, 260) only if one calls liberal democratic institutions and politics secular but then secularisation rules by definitional fiat, whereas the actual inclusion of (transformed) religious voices in the democratic political process makes the latter more plurivocal and less 'secular'. 'Secularism' is, certainly, not the only answer to religious fundamentalism. The term 'secularism' clearly also leads to misleading consequences for the analysis of Islamic democratic parties in Turkey (see WRR 2004; Zürcher/v.d. Linden 2004; see for an excellent criticism of the 'infamous' ruling of the ECtHR in the case of *Refah Partisi (The Welfare Party) Erbakan, Kazan and Tekdal v. Turkey* [Grand Chamber Judgement September 13th 2001]: (Moe 2007) and Arab countries (see Al-Azm 2004, 1996) as well as for some varieties of a 'European Islam' (see below). Both the political protagonists (like Erdogan) and social scientists unproblematically use the language of secularism though it is obvious that, in the Turkish case, Kemalist secularism has been authoritarian and elitist and recent Islamic political parties learned to profit from and defend democratization (see Bader 2010a, another excellent example of the cunning of institutional reason). Eisenlohr (2006 pass.) also confuses minimal liberal morality with secular morality and all projects of multi-religious nation-building that guarantee relational state-neutrality and equitable, peaceful coexistence (and their common ground justifications in the Gandhian tradition) as secular projects.

longer posses the claim to certainty that makes it attractive.[30] For Grey too, religion is 'fundamentally incompatible' with 'the intellectual cornerstone of the modern state', which is the realization that 'there can be no sacrosanct principles or unquestioned truths'. Religions fail to 'inculcate the "anti-authoritarian mindset" on which democracy depends' (Grey, cited in McConnell 1992: 739). Lupu also sees religious accommodation as a threat to the project of constitutional democracy, which depends upon a citizenry capable of exercising independent and critical judgment concerning policies and leaders. 'Religious institutions [. . .] frequently claim divine inspiration of their principles and leaders.' They 'discourage scepticism and make intense demands for obedience.' 'Such institutions undermine rather than mutually reinforce habits of mind necessary for democratic decision-making' (McConnell 1992: 738f).

These secularist suspicions[31] are well known from Rousseau, who was the first to articulate the problem of 'citizenship ambiguity'; and who, seeing religion as disruptive, recommended that the democratic state suppress it to guarantee that 'loyalty to the state supersede religious faith' by replacing it with a new *civil* religion (see McConnell 2000: 92f, 99).[32] This *fourth* theoretical response to the problem of 'citizenship ambiguity' by political theorists rightly demonstrates the importance of civic and democratic virtues and habits. This is misleading, however, in two ways: it assumes, contrary to the claims of Washington and de Tocqueville, that all religions would be inimical in this regard; and it requires 'liberal and democratic congruence'

[30] I am paraphrasing Marshall. See also Margalit (1996: 149f) and Greenawalt (1995: 69f). Constitutional Courts in Turkey (and also the ECrHR in 2001 and 2003) and in India follow these arguments (see Bader 2009a on '*takkiyye*' and 'pretext'; in another context, see Bader 2008b) I hope to have made clear that 'secularísts' of all sorts also have to stem their 'need' for certainty and power (the 'dark 'side of science completely neglected by Marshall).

[31] These suspicions are shared even by Walzer (1997: 66–71, 81) and Habermas (see criticism in Shaw 1999). Habermas has only slightly changed his position (see 2001: 22).

[32] Rousseau convincingly argued that none of the three *old* forms of religion (*religion of the priest; religion of the citizen; religion of man*) satisfy the conditions for a good polity (see Casanova 1994: 58ff; all the following quotes from Casanova; see also Bader 1999: 627). Even the most attractive one, the '*religion of man*' is politically useless since it has 'no particular connection with the body politic' and therefore cannot add anything 'to the great bonds of particular societies'. It tends to 'undermine republican virtues'. Rousseau himself 'solves the dilemma by affirming simultaneously and inconsistently the modern right of religious freedom [...] and the need for a purely civil profession of faith'. According to Casanova, Durkheim and Bellah merely reproduce the old unresolved tensions in a new sociological language. Casanova himself thinks that one cannot resolve these tensions 'either politically at the state level as a force integrating normatively the political community or sociologically at the societal level as a force integrating normatively the societal community' because in both regards such a 'civil religion is unlikely to reappear in modern societies' (60). 'The concept of 'civil religion' ought to be reformulated from the state or societal community level to the level of civil society' (61, see 218f). To me, it remains unclear how the tension between particularism and universalism is resolved by a civil religion at the level of civil society. It seems to be only reproduced in the confrontation between 'national' and 'transnational' versions of civil society itself.

deep down (Rosenblum 1998). In this regard it is, contrary to Madison's claim, at odds with freedom of conscience and expression.[33]

Two lessons can be learned from this discussion of developments in 'the West':

First, the relationship between religions and democracy clearly depends on *which religion and which democracy* we have in mind. In the United States, Protestant religions were not only compatible with liberal democracy but have historically been the latter's most important intellectual and attitudinal driving forces. (Madison, Jefferson and Washington were all practising Christians). In contrast, in France the predominance of fundamentalist Catholicism explains both the radical secularist and a-theist character of French Enlightenment philosophy and the fact that institutions of liberal democracy had to be built against the fierce and prolonged resistance of the Catholic Church.[34]

Second, Christian religions, particularly Established Churches, have learned the priority of democracy only as a result of *protracted conflict* (Bielefeldt 2000: 100). Protestant denominations and Free Churches living under conditions of an Established Church had learned this from painful experiences much earlier and deeper than Established Lutheran, and particularly Catholic and Orthodox, Churches. However, under conditions of liberal democratic constitutional states, even churches thinking of themselves as 'depositors of divine truth' (Casanova 1994) eventually learned to accept the notion that, when it comes to public democratic decision making and voting, error has the same rights as truth instead of 'no rights' (Cohen 2004, Galanter 1966: 289f, Rawls 1993: 60ff, Weithman 1997: 7).[35]

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[33]My focus is on how religions respond to religious diversity, the demands of statehood and of liberal democratic politics. Religions clearly cannot accept the option suggested by Rousseau and have trouble with Jeffersonian separationism without sacrificing their *raison d'etre*. McConnell also sees that 'none of the answers will satisfy all legitimate demands, all come at a price' (100). Comparing Rousseau and Washington, he rightly remarks that Rousseau requires much deeper and thicker concepts of society and solidarity, whereas Washington 'desired only enough virtue to allow republican institutions to work' (98). This already hints at an important conundrum: how to find a proper balance between 'schools of democracy' and associational religious freedom (Bader 2007a: Chapters 4 and 10). The important thing, obviously, is not whether institutions (families, schools, workplaces, organizations and so forth) are secular or religious but whether they allow practical teaching of minimally required civic and/or democratic virtues.

[34]See Bader (2007a: Chapters 1.3.2 and 3.1.1), Willems/Minkenberg (2003: 25f), McConnell (2000), and Rawls (1999): Political Liberalism is 'sharply different from and rejects Enlightenment Liberalism'; there 'need be no war between religion and democracy' (176).

[35]My aim, indeed, has been 'to show that justifications for toleration can arise endogenously within the religions that you mention (Christianity and Islam). If so, one possible response is that, while there it is true that *some* religions *can,* under the right institutional conditions, become tolerant of religious diversity and thus become compatible with liberal democracy, and that documenting this process sheds important light on the cultural reproduction of a liberal order, this does not mean that adherents of these religions will *inevitably, in all situations* (italics VB), *prioritise* this commitment to religious tolerance above their other doctrinal truths, (Personal communication from Monica Mookherjee 2008). But this would be asking the impossible because there are no 'necessities' or 'inevitablities' 'in all situations' in these histories. Indeed, some religions may be able to do so in relation to some issues, but not others (particularly those which might be seen to interfere with [what they see as] their path to salvation, in relation to which a politically *laissez-faire* state may

2.5 Islam and Liberal Democracy

If one clearly sees that such learning has been and is possible for Christian denominations in the West, why would it be impossible in 'the Rest', particularly for Islam? The notion of radical difference is nowadays aggressively defended by Picht, Fikentscher, Huntington, Tibi and others.[36] It should be evident that there has not been an inherent tendency towards decent and democratic polities in the West, and it is hardly the case that modern liberal democracy and modern human rights (or, for that matter, modern capitalism) were inevitable historical outcomes of Christendom, Judaism or 'Occidental civilization'. As scholars in comparative history such as Weber, Hintze, Brunner and many others have abundantly demonstrated, these new institutions are the result of a specific configuration of contingent factors and not of any deep logic inherent in 'culture' or 'religion'.[37] The fact that this eventually did not happen endogenously in the 'Islamic world' has nothing to do with Islam (after all, which form of Islam is to blame, and why?); but has to do with economics and politics. In a similar vein: Why should different forms of Islam not learn the same lessons that Christian denominations eventually and painfully learned?

The denial of this possibility is particularly astonishing for the following four reasons:

(1) Islam, compared to Roman Catholicism and Orthodox Christianity, is far *less centrally and hierarchically organized*, knows neither Pope nor 'church', and presupposes a direct, immediate and equal relation of all believers to God.[38]

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be regarded with suspicion). It is also true that solutions to the problem of 'citizenship ambiguity' 'may be unstable because it is always open to further empirical counter-examples.' Mookherjee) In my view, indeed, all is always open for further counter-examples and also for redefinition of our own cherished 'values' and 'principles'. But my strategy is not 'only empirical'; it is contextualized morality, and that is all we can get.

[36] Casanova (2005: 11; 26f) has analyzed the predominant but markedly different varieties of the 'Anti-Islam' syndrome in Europe where 'anti-immigrant xenophobic nativism, secularist anti-religious prejudices, liberal-feminist critiques of Muslim patriarchal fundamentalism, and the fear of Islamist terrorist networks, are being fused indiscriminately (. . .) into a uniform anti-Muslim discourse which practically precludes the kind of mutual accommodation between immigrant groups and host societies that is necessary for successful immigrant incorporation. The parallels with Protestant-republican anti-Catholic nativism in mid-nineteenth America are indeed striking' where Catholicism has been seen as incompatible with modern democracy and with individual freedoms. 'Today's totalizing discourse on Islam as an essentially anti-modern, fundamentalist, illiberal and undemocratic religion and culture echoes the nineteenth century discourse on Catholicism'. In the U.S., the discourse is different (26–30).

[37] See Weber (1972), Eisenstadt (2000), Unger (1987: III) and Stepan (2000: 44) against the 'fallacy of unique founding conditions'. Bielefeldt has thoughtfully criticized both 'cultural or religious essentialism' (2000: 94ff, see 1998: Chapter 5) and its radical rejection. (2000: 114). His own idea of a 'retrospective critical connection' is productive because it is in line with modern hermeneutics but also critical towards cultural relativism and the idea of a total rupture between 'traditions' and 'modernity', particularism and stipulated universalism.

[38] In his comparison of the Catholic party in Belgium in the late nineteenth century and the FIS in Algeria, Kalyvas detected a nice paradox: 'the centralized, autocratic, and hierarchical organization

(2) Partly for this reason, the *differentiation* between polity and religion has been more outspoken in Muslim empires. This institutional differentiation began as early as the seventh century, starting with the *Umayyad* dynasty, was contained by the *Abbasids* who tried to instrumentalize Islam for reasons of state; it was fully developed in the Western Empire by the *Almoravids* and *Almohads*, continued even in the *Mughal* empire, and was, again, fully developed in the late *Ottoman* empire in an analogous way to European, particularly French and Swiss, models.[39]

(3) Decent *regimes of toleration* (of the three 'religions of the book') and remarkably sophisticated *practices of everyday toleration* developed in al-Andalus, and in the Millet system in the late Ottoman Empire, which outstrip everything comparable in the contemporaneous Christian world.[40]

(4) In addition to these practical and institutional aspects, which are, to repeat, the most important ones, the 'original' teachings of Islam were at least as universal, and its social ethics at least as egalitarian, as its Christian counterparts and clearly more in favour of equality of the sexes.[41] There is a long and rich Islamic tradition of competing interpretations by schools of legal theorists, theologians and philosophers.[42] Some of these theoretical interpretations have been fairly radical: e.g., the clear distinction between the *shari'a* and Islamic law (*fiqh*), the interpretation of the *shari'a* as a universalist, egalitarian and solidaristic ethics, and the 'rationalism' of the *mu'tazila theologians* in the ninth and tenth centuries, who insisted on the absolute transcendence of Allah in such a radical

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of Catholicism allowed moderate Catholics to solve their commitment problem, while the absence of a comparable structure in Algeria contributed to the inability of the moderate FIS leadership credibly to signal its future intentions. It is indeed ironic that Islam's open, decentralized, and more democratic structure eventually contributed to the failure of democratization, while the autocratic organization of the Catholic Church facilitated a democratic outcome.' (2000: 390)

[39] See Adanir/Faroqhi (2002), Zürcher/v.d. Linden (2004), WRR (2004: 41–45), Mazower (2005), and Barkey (2008). If one wants to call such a state a 'secular' state (like Zürcher/v.d. Linden 2004, WRR 2004: Chapter 3), then institutional 'secularism' need not be introduced into the Islamic tradition from the outside.

[40] Bader (2007a: 196f), Adanir (2000), Mayer (1991: 148). Practices of toleration have been based on theological reasons against intolerance, persecution and imposed conversion (because 'in religion there is no enforcement'). In practice coexistence has not been reserved for *dhimmi* but proved possible also between Muslims and members of other religions like Hindus, Sikhs, Zoroastrians in India.

[41] Leila Ahmed has analyzed the impact of the predominant sex- and gender relations in pre-Islamic Arabia (1992: 41; see 62) on the role of 'Women in the rise of Islam' (Chapter 3) (the Qur'anic verses in Mekka, in Medina and the *hadith*), in 'The Transitional Age' (Chapter 4) and in the Abbasid era (Chapter 5). In this 'process of diminution of the liberties of women as Islam became established', the role of women became more similar to that in Judaism and even Zoroastrian religion. 'Islam's ethical vision, which is stubbornly egalitarian, including with respect to the sexes, is thus in tension with, and might even be said to subvert, the hierarchical structure of marriage pragmatically instituted in the first Islamic society. The tensions between the pragmatic and ethical perspective, both forming part of Islam, can be detected even in the Qur'an' (63).

[42] See for the competing shari'a-schools or *madhhabs* (hanafites, malikites, shafi'ites, hanabalites, zahirites): Schacht (1964: 6–111), Hallaq (1997), Peters (1998), Bowen (2003) and WRR (2006).

way that God could not even speak (because speaking cannot be a characteristic of a transcendent being). Therefore, even the Qur'an as the word of God could not be eternal or identical with his essence because it has been created in time. Islamic scholars rejected any predestination and developed a theory of 'ethical rationalism', comparable to the much later accounts of Bayle or Spinoza, which claimed that for their knowledge of good and evil, people do not need religious laws or revelation but can trust in human reason only. Human beings have a free will (*ikhtiyar*) and are individually responsible for their choices and actions (*tawallud*).[43]

For roughly a century now, such a learning process is clearly under way again inside Islamic countries and, more recently, among Islamic scholars in different European countries and North America. Here I only summarize different modes of *theoretical learning* distinguished by Bielefeldt (2000). I leave aside institutions and practices.

(i) *Pragmatic reforms in the framework of the shari'a.* 'From early on, Islamic scholars had to face the problem that legal norms and institutions of non-Islamic origin played a role, sometimes an important one, in Muslim societies' (Bielefeldt 2000: 106). Except for some 'puritan' *shari'a* schools, 'flexible interpretation and pragmatic application of the normative rules always have accommodated moderate reforms. As a result, within most *shari'a* schools, a tradition of humanitarian pragmatism has developed' that is 'typical of large currents within Islam today'.[44] It 'permits taking steps toward a gradual reconciliation with modern ideas of freedom and equality' (106).

(ii) *Critical reconceptualization of the shari'a.* Liberal Muslim intellectuals are not content with pragmatic reforms. They demand a frank criticism of Islamic law 'that is meant to lead to a thoroughly revised understanding of the main sources of the *shari'a*, namely the Qur'an and the Sunna' (Bielefelt 2000: 108). Like their liberal theological brothers and sisters within the Christian tradition, they

[43] See Leezenberg (2001: 60ff). Unfortunately, this long tradition is neglected in the praiseworthy overview by WRR (2006: Chapter 2). It is not surprising that they have been praised by nineteenth century Europeans and, more recently, by Islamic modernists as 'the first, if not the last, free thinkers in Islam, who in virtue of their faith in reason and free will came to stand as a symbol for intellectual freedom and modernity' (recently repeated by Abdulkarim Soroush). Yet, the fact that 'for many years, they merely proclaimed state doctrines, and when given the opportunity, they did not hesitate to persecute their opponents' (Leezenberg 2001: 62) again demonstrates that attitudinal learning (*ethos*) may be more important than theoretical learning. Nevertheless, their understanding of reason, free will and responsibility impacted on the political ethics of Farabi (Leezenberg 2001: 103), seducing him into making a claim akin to the philosopher-kings in the Platonian tradition. This 'elitist rationalism' is shared by Ibn Rushd though he disagreed with regard to the religious-independent powers of human reason (190f). As in the Christian tradition, rationalism is in no way intimately connected with tolerance and democracy, another reason why one should more clearly distinguish between 'rationalization' or 'modernization' and 'rule of law and democracy' in the Islamic tradition too.

[44] See examples of such a 'reworking' of 'fiqh to fit France' (Bowen 2004: 333–336) and Indonesia (Bowen 2003). See also Saeed's informative typology (2009).

use historical-critical and hermeneutic methods to demonstrate that the 'original normative guidance' or the 'spirit of the Qur'anic legislation' (Rahman 1966: 39) has to be liberated from the bulk of medieval legal casuistry; and that the core of the *shari'a* (namely, revelatory and ethical guidance) cannot be equated with traditional jurisprudence (*fiqh)* (Ashmawy). This is done so that Islamic law can be analyzed as a result of human history, with all its contingencies, in such a way that opens up conceptual space for historical criticism and liberal democratic political reform. The process emphasised that the 'eternal' ethical core of Islam emphasizes human dignity, freedom and equality generally (An-Na'im 1990,[45] Abu Zaid), between the sexes in particular (Hassan, Othman, Mernissi),[46] and full-fledged religious liberty beyond the limits of traditional Islamic tolerance (Talbi 1991).

(iii) *'Political Secularism in Islam'* or *minimal institutional differentiation between state and religion* (the *two autonomies* as well as individual and collective tolerance). As Bielefelt also explains, Abdarraziq (1925) showed that the *Qur'an* does not contain any detailed guidance as to how to build and govern a state. He clearly distinguished between the 'prophetic and the political roles of Muhammad'. 'His role as political leader was due to the historic circumstance of the first Islamic community in Medina', but even then 'the Prophet made no allusion to anything which could be called an "Islamic state" (. . .) It would be blasphemy to think otherwise'. He claims that the caliph's pretension of religious authority, culminating in the title of 'God's shadow on earth' amounts to idolatry and concludes that 'the end of the caliphate, far from being a religious disaster, can indeed be appreciated as a liberation of Islam: "Muslims are free to demolish this worn-out system (and) to establish the bases of their kingdom and the organization of their state according to more recent conceptions"' (Abdarraziq, cited in Bielefeldt 2000: 113). Like

[45] See An-Na'im's interview in Noor (2002: 5–14); Anwar Ibrahim (1991) (quoted in Mandaville 2001: 140, Rawls 1999: 151, Schwartzman 2005: 697f. See Bowen 2003a: 337 for the fourteenth-century scholar al-Shatabi's distinction between the timeless principles (*maqasid)* and the historically changing *fiqh.)* 'Reasoning from Islamic Principles' (337ff) is famously and effectively done by Tariq Ramadan and the director of the Bordeaux mosque, Tareq Oubrou (341f). In my view, it would be important for second generation Muslim intellectuals to resist the double pressure to form an 'independent secular ethics' and towards a 'Protestantization' of Islam. They could self-consciously defend the ethical core of Islam and resist the *belief-centered and de-culturalized* version of Islam proposed as a remedy by Roy (2002), Schnapper (1994), and Charles Taylor (2002). Both rejections seem easier, indeed, in the American context compared to France where the pressure on Muslim intellectuals to define a 'civic Islam' in secular terms is so strong that it seems nearly irresistible. Iquioussen 'provisionally concludes that Muslims have to be 'secular citizens' (*des citoyens laïques*) and put religion aside' (quoted in Peter 2004: 24). Peter himself also presumes a 'need to translate religious convictions into a secular language and the need to secularize certain domains of life' (2004: 25, see 4). Second generation Muslims in France could learn from Christian and Islamic theologians that endorsing the priority of democracy does not necessitate endorsing any version of secularism.

[46] Ahmed (1992: 21ff) highlights the important role of feminist writers like Alifa Rifaat, Andree Chedid and Nawal El-Saadawi. See also Mandaville (2001: 4, 141ff).

early Protestant critics of establishment, Ashmawy has called the confusion of religion and state politics a 'perversity' because it is destructive to both: 'it debases religion by rendering it an instrument of everyday power politics, and it necessarily results in a problematic sacralization of politics that itself is thereby shielded against critical public discourse. Whereas theocracy, in which earthly rulers claim a quasi-divine authority, comes close to polytheism, the monotheistic dogma of Islam demands a clear conceptual and institutional distinction between state and religion' (Ashmawy, cited in Bielefeldt 2000: 113). The antithesis of 'divine' versus 'human law' is, moreover, unmasked as an ideological construction by Zakariya:

> The real alternative is not one between divine law [. . .] and human law. It is the alternative between two versions of human law, one of which admits frankly to be human whereas the other version pretends to speak in the name of divine revelation. This latter version of human law is dangerous because it tends to base its particular positions on divine law, thus attributing to its passions and errors a sacredness and infallibility to which it has no title. (1989: 115).

Bielefeldt rightly indicates that 'political secularism' is not a popular position and that even liberal Muslims mostly 'show reluctance to endorsing secularist concepts' 2000: 112) but he mistakenly assumes that they should endorse 'political secularism'. I believe that they should rather endorse the 'two autonomies and tolerations' and, in addition, the priority of democracy (see extensively Bader 2007a: Chapter 3).[47] The use of the language of secularism is rather misleading, particularly for their purposes.

Such theoretical learning processes, which made Islam more liberal and democratic from the inside, take place both in Muslim countries and in countries receiving considerable numbers of Muslim immigrants. These discourses, like that of their liberal Christian theological counterparts, are increasingly interconnected and have a reciprocal impact on each other (Mandeville 2001: Chapters 3 and 4). Such an

[47] Various political philosophers in the Islamic tradition try to develop three basic principles: (i)*Tawhid* (Unity of God), (ii) *Risala* (Prophethood), and (iii) *Khalifa* (Caliphate) in a democratic way (Esposito/Voll 1996: 23ff; see extensively Abou El Fadl 2001, 2002, WRR 2006: 35–53, Bayat 2007). The serious tensions become visible particularly in attempts to combine *tawhid* (understood as full mono-theistic 'sovereignty of God' opposed to any notion of 'sovereignty of man') with meaningful notions of democracy. The attempt to develop a 'theo-democracy' (in opposition to European style 'theocracy' and 'secular Western democracy') 'under the suzerainty of God' (24) have to draw on a very flexible and dynamic interpretation of *khalifa* (as deputy, representative, agent of God on Earth, or 'viceregency' limited by an extensive interpretation of *ijtihad* (independent interpretive judgment of all and every Muslim as capable and qualified to give a sound opinion as an equal. In addition, the notion of *shura (*consultation*)* and of *ijma* (consensus) are mobilized in a democratic way as mutual advice by all and as consensus that is not restricted to 'learned scholars'(28). In addition to these conceptual linking and re-thinking, the most important aspect in developing any meaningful notion of an authentic Islamic democracy clearly is 'an adaptation of either the ethical and legal precepts of Islam, or the attitudes and institutions of traditional society, to democracy' (Hamid Enayat, quoted on p. 31). See now the excellent and detailed study by March 2008, particularly Part III 'Islamic Affirmations of Liberal Citizenship'.

internationalization or globalization of Islamic discourse does not, however, prevent the development of many 'nationally coloured' Islams (plural). The influence of diverging institutional and political opportunity structures makes us expect, and primary empirical research actually demonstrates, that this accommodation of Islam takes different forms in France, Germany, the United Kingdom and the United States (Koenig 2003, Fetzer and Soper 2005, Bader 2007c, Maussen 2007a). In this regard, Islam is as contextualized as Christendom always has been. (Compare the relatively liberal American and Dutch Catholic bishops with the conservative or fundamentalist Polish or Irish ones.)

As in the case of Christianity, theoretical and practical learning in Islam depend on institutional conditions, most prominently on the presence or absence of liberal democratic constitutional states. For historically contingent reasons, modern democracies emerged in the West, not in countries with Islamic majorities. According to the Freedom House classification, of the 43 countries that recently show Muslim majorities, only seven can be classified as more or less well-established and stable liberal democracies, but none of them in Arab countries with their strong patriarchal social orders and political autocracies (Brumberg, Plattner and Diamond 2003**,** Minkenberg 2007). The institutional pressure towards the democratic transformation of Islam(s) that can be detected in countries like Turkey or Indonesia and, obviously, for Muslim minorities in the West, is absent there; and this cannot be explained in terms of an 'essential' characteristic of Islam. 'If the political circumstances were right' (Ahmed 1992: 229),[48] we could expect liberal democratic institutions to do their disciplining work and to contribute to making Islam compatible with minimally understood liberal democracy. It is a nice example of the paradoxical nature of the cunning of institutional reason under conditions of multi-party systems that politically fundamentalist Islamic parties in Turkey, like their confessional sister-parties in Europe, emerged in reaction against (authoritarian and elitist Kemalist) secularism, but learned to profit from and eventually to defend democracy and thus contributed to democratising Turkey.[49]

[48]Leila Ahmed has vividly pointed out this difference in political contexts in her thoroughly contextualized interpretation of Islam: 'If the political circumstances were right, if the societies of the Middle East were politically stable and committed to democratic pluralism (...) this could signal the beginning of a period in which the dictates and assumptions of establishment Islam are fundamentally questioned, (it) could lead to a reconceptualization of Islam as a religion and as a system of law and even perhaps to its becoming as intellectually open a system as, for many, Christianity is in many countries today. Unfortunately, the political circumstances are not right.' (1992: 229f)

[49]WRR (2004), Zürcher/v.d. Linden (2004) and WRR (2006) and Al-Azm for Arab countries, particularly for Hamas. Ahmad (2005) explains the transformation of the Jamaat-e-Islami in North India from Islamism to Post-Islamism, mainly as a consequence of its operation in a context of constitutional democracy compared to the authoritarian political systems in Algeria and Egypt that breed Islamism.

2.6 Conclusion

If, and to the degree that, religions have learned to accept liberal democracy from the inside,[50] it is clearly unfair to continue the 'secularist distrust' against all religions as being inherently fundamentalist. Yet one would also have to look at the other side of the coin and defend the priority of liberal democracy, which should be clearly distinguished from 'secularism', against the main religious and theological challenges claiming that the public morality of liberal democracy would be impossible or unstable without religion. This, however, would be another story (Bader 1999, 2007a: 122–125, 2010b).

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[50]This may be interpreted as a regrettable 'flattening of genuine pluralism' (Shah 2000: 129), but such a 'liberalization of religion' is not to be confused with a 'Protestantization of Catholicism', of Lutheranism (Herberg, Miller 1985: 274, Handy 1976: 211), or of Islam, and certainly not as a 'secularization of religion'.

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Chapter 3
How Not to Tolerate Religion

Glen Newey

3.1 Introduction

This paper challenges the basis for current liberal orthodoxy on the toleration of religion. That orthodoxy, supported in the US by constitutional provisions like the Equal Protection clause (Amendment 14) and Title VII of the 1964 Civil Rights Act, extends toleration to religion on grounds of justificatory equality. I refer to this as *the orthodox position.* I shall argue that the orthodox position is unstable, since religious toleration rests squarely on reason of state, rather than, for example, on an abstract justification of political authority.

The widespread acceptance of religious pluralism coexists, at least at the level of public rhetoric, with a marked distaste for 'multiculturalism' In western democracies, multi-faith societies are largely accepted as an established fact. On the other hand, many remain hostile to the notion that immigrant or other minority communities might exist largely in isolation from the host culture, or that a real or imagined indigenous monoculture might give way to pluralism at the public level. However, this conjunction of attitudes is surprising, not least because religion lies deeply embedded in the nexus of attitudes and practices which comprise 'culture'. It is the more surprising, given that religion poses so signal a challenge to political order. This also highlights the singular fact that religion dominated early-modern debates over toleration. With reference to Locke, I shall argue that this centrality has helped to obscure the real stakes in thinking about toleration – particularly the toleration of religion.

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3.2 Multiculturalism and Religion

In early 2008, the Anglican Primate's reported statement that the introduction of Sharia law was 'unavoidable' in the UK met with widespread political condemnation.[1] The Archbishop's opponents tended to see themselves not as advocating curbs on religious liberty but as standing against the commandeering by cultural minorities of the public realm, and raised the spectre of legal (and social) balkanisation.[2] No doubt it was the source of the remarks, the head of the Anglican Communion, as well as their content, which provoked reaction. Meanwhile the few liberal multiculturalists who defended the Archbishop argued that, if adopted at all, Sharia law would only apply in very limited areas and that there were precedents for this in, for example, Jewish family law.

Of course, religious toleration had already long been an accepted fact in the United Kingdom. The modern regime of religious toleration originates with the repeal of the Test and Corporation Acts in 1828 and Roman Catholic emancipation the following year. Many other modern liberal democracies have institutionalised religious toleration constitutionally. For example, the United States Constitution enshrines religious toleration via the so-called 'Free Exercise' clause of the First Amendment, which provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. Meanwhile, Article 9 of the European Convention on Human Rights, incorporated into UK statute law via the Human Rights Act 1998, stipulates that:

> 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 religion or belief, in worship, teaching, practice and observance.[3]

While the jurisprudence of the UK Human Rights Act remains in its infancy, the US Supreme Court has long interpreted the Free Exercise clause in an expansive way, as in landmark judgements such as *Yoder*.[4] In this case, the Burger Supreme Court unanimously ruled that the attempt by Wisconsin state to compel the children

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[1] For example, Christopher Howse, 'Sharia is no law for Britain', *Daily Telegraph*, 8 February 2008, at http://blogs.telegraph.co.uk/christopher_howse/blog/2008/02/08/sharia_is_no_law_for_britain

[2] For example, the Conservative Party leader David Cameron described the Archbishop's remarks as 'dangerous and illiberal'. A former Archbishop of Canterbury, Lord Carey, remarked that the extension of Muslim law would be 'disastrous' and the former Home Secretary David Blunkett said such a step would be 'catastrophic'.

[3] It is worth noting that this clause of Article 9 is immediately followed by a second, which provides that: 'Freedom to manifest one's religion or beliefs shall be subject only to such limitation 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.'

[4] *Wisconsin v. Yoder*, 406 U.S. 205 (1972). It should be added that subsequent US Supreme Court judgements could be seen as less expansive in their interpretation of religious liberty. In *Employment Division v.* Smith et al., for example, the Court ruled that Oregon could ban the sacramental use by native Americans of peyote in religious ceremonies and could deny unemployment

of Amish parents to attend state school beyond the eighth grade conflicted with the latter's free exercise interests.

The rise of 'Pastafarianism',[5] and the fact that over 400,000 respondents to the UK 2001 Census identified themselves as adherents of the fictitious Jedi religion,[6] indicate one of the difficulties facing a vigorous commitment to imposing freedom of religion legally: namely, that it licenses claims to special treatment on the grounds of real or feigned religious scruple. However opportunistic the invention of Pastafarianism may appear, the serious intent behind the religion is plain: to discredit appeals to religion in justifying derogations from the public education curriculum, for example because of Creationist objections to the teaching of evolutionary theory. But the fact that secularists perceived a need to respond to religion in this way shows the strength of religion, at least in the US. Wide-ranging protection for religion is a legal fact. In this case, at least, the fact of diversity between acculturated beliefs is not seen as threatening the legal order – on the contrary. The diversity promoted by religious toleration, far from being seen as a threat to social cohesion, is seen as promoting it, or even as its necessary condition.

As the response to the Archbishop showed, matters are different in the case of multiculturalism, often seen as a symptom or catalyst of social disintegration. Hostility to multiculturalism – often conflated with the rejection of tolerance *tout court* – is widespread, and its expression was triggered by his remarks. Writing apropos of Dr Williams' remarks, Christopher Howse observed that: 'The Archbishop of Canterbury seems to have lost the use of his senses. He told the BBC today that the application of Sharia in Britain "seems unavoidable". This would entail lashing for fornication and amputation for theft.'[7]

The intense hostility which the Archbishop's remarks attracted seem to have stemmed from their apparent renunciation of a unitary legal order. His many critics in the press and in politics charged him with foreshadowing a society disaggregated into legally autonomous bantustans. Few of the Archbishop's defenders were prepared to argue that such a form of legal fragmentation would be desirable. Both sides took the view that society must protect itself against subversion, and that it requires a unitary legal order in order to do so. Howse continued:

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benefits to a person dismissed from his job for violating the state's prohibition of drug use. I am indebted to an anonymous reader for pointing this out.

[5]The 'Pastafarian' religion professes belief in a Flying Spaghetti Monster as the creator of the universe. Its aim is to debunk the claims made on behalf of traditional religions in the US to inclusion in public school educational programmes. Pastafarianism was devised in protest against the Kansas State Board of Education, which had decided to teach so-called 'intelligent design' as an alternative to evolutionary theory.

[6]http://www.statistics.gov.uk/census2001/profiles/commentaries/ethnicity.asp. The large number of Jedis is partly explained by an internet campaign preceding the census, which urged respondents to reply to the Census question regarding religion with 'Jedi Knight'.

[7]Christopher Howse. For the context of these remarks, see the *Daily Telegraph* online at http://blogs.telegraph.co.uk/ukcorrespondents/christopherhowse/february2008/sharianolawforbritain.htm.

> Sharia . . . is translated as "law", but it governs without restriction, as an infallible doctrine of duties, the whole of the religious, political, social, domestic and private life of those who profess Islam.[8]

The spectre of balkanisation arises when civil-society diversity extends to subverting the very basis of unitary legal and political authority.[9] To this extent, the reaction to the Archbishop's remarks expressed what is at root a Hobbesian worry: that a realm divided within itself cannot stand, and to juxtapose a clerical source of jurisdiction with the secular one is to import just such a division into the body politic.[10] Any toleration extended to religious groups presupposes that these groups unite under the sway of law to which they are all equally subject. One striking feature of the reaction against Dr Williams is that it subjected religion to charges similar to those levelled against alien cultures in debates over such matters as language, dress, and the public education curriculum. And the dominant concern which such charges express was that there are limits to the amount of diversity that any cohesive society can accommodate.

This hostility to multiculturalism is somewhat puzzling, when set alongside the generally strong commitment, not only among *soi-disant* liberals, to religious toleration. On the one hand, the current orthodoxy does not merely permit religion on sufferance, but actively incorporates it within the legal framework of the body politic. On the other hand, multiculturalism – at least in the form of the proposed introduction of Sharia in the UK – is seen as threatening this framework, and this indicates the flimsiness of the distinction on which the differing rhetorical treatment of multi-faith and multi-cultural societies rests.[11] The divide between hegemonic and multiculturalist liberal positions is then defined by contrasting views of the conditions needed for socio-legal cohesion. Some, like Barry (2000), argue that cohesion can be achieved only by a legal order committed to universal norms, while others maintain that society can either withstand diversity in norms, or that in modern conditions society may not survive without it.

In response to the hegemonic position, it can be said that exemption is integral to the fabric of the law. Well-known examples to benefit cultural minorities, such as the exemption of Sikhs from the legal requirement to wear helmets while riding motorcycles, form only one limited example of a much broader legal phenomenon – the differential application of legal incidents as between different groups. The entire

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[8] http://blogs.telegraph.co.uk/ukcorrespondents/christopherhowse/february2008/sharianolawforbritain.htm.

[9] In the academic literature this is a point which was argued strongly by Brian Barry (2000).

[10] Needless to say, the Archbishop's position was more subtle than it was depicted as being by hostile commentators and politicians. The lecture on which hostile reaction focussed was in fact an exercise in political philosophy, which argued on communitarian grounds that the entitlements of religious groups such as British Muslims could be met only by offering them a choice of jurisdictions within carefully-circumscribed areas of law (such as family law).

[11] Of course, in the UK the multi-faith position coexists, incongruously enough, with an established Church. While the civic disabilities attached to membership of other churches have long been abolished, Anglicanism remains the beneficiary of state sponsorship. As such, it offers a good illustration of how toleration need not entail equality of treatment.

tax and benefit system administered by modern states offers a clear example of this phenomenon. The system treats individuals differentially depending on whether or not they are high-earners, drinkers, smokers, parents, drivers, car-owners, shareholders, disabled, elderly, and so on. Whether or not a given cultural practice such as wearing the turban should benefit from legal exemption can be debated, but the decision cannot be based on a pseudo-principle which holds that exemptions must dissolve or undermine the law.

It may be said in response that the difference with the Sharia case is that the tax-benefit system issues from a unitary legal and political authority, one sanctioned by Parliament. But the devolving of law-making powers is equally an established feature of the legal system. For example, statutory instruments account for several thousand items of legislation in each UK Parliamentary session, compared with only a few dozen Acts of Parliament. Those thereby endowed with legislative powers under the Parent Act include Government ministers, local councils, devolved government, quangos, and the Church. Hence there is ample precedent for creating areas of devolved jurisdiction via primary legislation. Of course the possibility arises that the exercise of powers conferred by a statutory instrument may conflict with extant primary legislation, by the conferee's acting *ultra vires*. But this risk inheres in the very idea of delegated legislation. It is not then clear why, in line with current practice regarding the administration of Jewish family law, for example, Parliament could not devolve certain areas of the law on to Sharia courts if it so wished.

Law is a highly flexible instrument for regulating society. I have suggested that this makes puzzling the contrasting treatment of religion on the one side and multiculturalism on the other.[12] It is mistaken to think that there is something, law, which can coexist with diversity when in religious belief and practice, but not religious, but not with other manifestations of 'culture'. The very arbitrariness of such a position, once it is brought to light, suggests that other concerns may underlie it. Arguments ostensibly about the law seem to express deeper misgivings about the integrity of the polity. They articulate conflicting views about what forms of diversity the polity can and cannot accommodate. In saying this, I do not mean to side with multiculturalism against a more 'robust' or universalist defence of liberal hegemony. It is rather to show that the law can be made more or less encompassing, depending on whether the arguer aims to make a case for the toleration or exclusion of a certain group. Of course, part of the problem raised by the term 'Muslim' as currently used is that it is habitually applied not simply as a religious label but as a badge of cultural, even of ethnic, identity. Thus 'Muslims' benefit from the liberal norm of religious freedom insofar as this results from undergirding principles such as free exercise or freedom of association. Meanwhile the assimilation of Islamic culture into other areas of social life provokes disquiet even though this is consonant not only with Islamic religious teaching but that of other tolerated religions as well.

These debates are not new. They raged in England during the early modern period, when the principal question concerned the civic inclusion or otherwise

[12] Of course, a simpler route to the same conclusion would note that arguments over multiculturalism often take the form of disagreements about religious differences.

of non-Anglican Protestant sects, including freedom of worship. In markedly similar vein, those who proposed the 'comprehension' of Dissenters within the Anglican Church in England after the Restoration were opposed by a narrower High Anglicanism, which sought the exclusion of Nonconformists (see, e.g., Marshall 1994). In other words, judgment is driven by asking, first, whether or not a certain group or its credo is acceptable. A legal or theological rationale is then provided to underwrite it. In each case the driving question is: can we live with these people and/or their beliefs?

In this respect the decisions facing modern liberal states in addressing religious fundamentalism parallel those which early-modern rulers had to take in mapping the due limits of religious dissent. The dispute over Sharia law in the UK broached the question of the limits of the law – whether toleration can be extended to those religions which challenge, or are thought to challenge, the basis of a unitary legal framework. I have suggested so far that the surface arguments fail to convince, because their normative content can be made to point either way. In the next section I shall trace similar questions raised by Locke's account of toleration.

3.3 Locke on Toleration

Locke argues in the first *Letter* that religion lies outside the secular magistrate's jurisdiction. In line with such critics as Locke's contemporary Jonas Proast (1690), and with the earlier account of religious toleration by Hobbes, I shall suggest that it is not the secular ruler's claims to spiritual authority, but the temporal threat posed by spiritual leaders' claims to secular authority, which provides the best argument for intolerance of religion – and hence the argument which defenders of religious toleration have to defeat.

I shall make this argument via a re-reading of Locke's arguments for toleration, both in the 1667 and in the later *Letters* – particularly the first *Letter.* Though revisionary, the argument is not intended as a critique of Locke, but as an exercise in hermeneutic charity, the aim being to reduce apparently conflicting claims to coherence. Locke's withholding of toleration from Roman Catholics and atheists is well known. His best-known argument for toleration focuses on the alleged irrationality of coercing belief: since, according to Locke and others, belief cannot be induced by force, the ruler who uses fire and fescue to make his subjects believe in religious orthodoxy is attempting the impossible.[13]

> For laws are of no force at all without penalties, and penalties in this case are absolutely impertinent, because they are not proper to convince the mind. Neither the profession of any articles of faith, nor the conformity to any outward form of worship, can be available to the salvation of souls, unless the truth of the one, and the acceptableness of the other unto God, be thoroughly believed by those that so profess and practise. But penalties are no

[13] Of course, this would still not mean that the ruler must be acting irrationally, so long as he (the ruler) thought it was possible to induce belief in this way. Below I give independent reasons for thinking it is not irrational.

> ways capable to produce such belief. It is only light and evidence that can work a change in men's opinions (Locke 1867: 7).

This position was reiterated by a number of defenders of toleration among Locke's contemporaries.[14] Critics have frequently pointed out examples of this supposedly impossible feat (see, e.g., Waldron 1991, Bou-Habib 2006, Schwartzman 2005). In some cases it is indeed impossible forcibly to induce belief: for example, it is plausible to think that I cannot force myself to believe that *p* by sheer effort of will, if I in fact believe that not-*p*.[15] But it does not follow that one person cannot forcibly bring another to form a belief. This is true *a fortiori* if force includes the use of propagandistic, subliminal and other non-rational methods of inducing beliefs. Along with advertising and propaganda, education would be pointless if the intentional induction of a belief that *p* in someone currently disposed to believe that not-*p* were impossible. Insofar as Locke's argument rests on an empirical generalisation about the ontogenesis of belief, it is unsound.

The argument, moreover, can be made to cut the other way, as Hobbes observed.[16] Suppose it is true that belief cannot be induced forcibly, and that salvation requires the sincere inward conviction of the believer. Then the believer's salvation is immune from whatever earthly penalties may be inflicted by the magistrate. So, just for that reason, the defender of toleration cannot argue that a ruler who does inflict penalties on the heterodox must be endangering their immortal souls. If doxastic impossibility refutes the argument that magistrate may attempt to procure salvation through intolerance, it must also, according to Hobbes, refute the argument that changing men's minds at the point of a sword will tend to their damnation. The mere fact of a grave external threat cannot change what those subject to it actually believe, so insofar as salvation depends on belief, it will not be jeopardised by external compulsion.

However, an act may be irrational not only because it is impossible: it may be irrational because the only available means of doing it removes the *point* of the action, for example by destroying the basis for its having value. On this reading, Locke's argument relies on the claim that the value of religious belief depends on its not being forcibly induced. The religious believer can only attain salvation through an inward movement of conscientious conviction, as a free assent of the believer's

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[14] Other exponents of this view included writers such as Philipp van Limborch. See Marshall (1994: 647ff).

[15] Even this claim needs some qualification, since it is not impossible that someone could set herself, as a long-term goal, the acquisition of the belief that *p* when she currently believes that not-*p*. An example is the regimen which Pascal envisaged for the unbeliever who recognises that the wager on salvation requires religious belief (which is then acquired through developing habits of worship, etc.).

[16] See Hobbes (1991: Chapter 42, pp. 343–344), discussing the case of Naaman the Syrian. As I interpret him, Hobbes makes of the inviolability of private conviction a *ground* for religious uniformity, since given this inviolability, nothing the sovereign can do can jeopardise the subject's chances of salvation insofar as the latter depends on private conviction. See my *Hobbes and* '*Leviathan*' (London: Routledge 2008), pp. 151ff.

spirit. So, whatever the subjects may be frightened into accepting, a belief that merits salvation cannot be achieved by the secular magistrate's threats of fire and faggot.

> The power of using force to bring men to believe in faith and opinions and uniformity in worship could not serve to secure men's salvation, even though that power were in itself infallible, because no compulsion can make a man believe against his present light and persuasion, be it what it will, though it may make him profess indeed. But profession without sincerity will not set a man forwards in his way to any place (Locke 1997b: 276).

Thus glossed, as a case for toleration, the argument still fails to convince. Even if it were impossible forcibly to induce belief, it would not follow that the magistrate's attempts to secure conformity in the outward tokens of belief must be in vain. To this extent Locke's argument misses the point. He assumes that the magistrate's uppermost concern must be the actual credal states of the subjects, rather than the behaviour which expresses those states. But of course the would-be intolerant magistrate may care far less about inward conviction than outward conformity. The motive for intolerance may be not that the magistrate wishes to engineer subjects' salvation, by ensuring that they enter the afterlife equipped with true religious beliefs, but to ensure that subjects observe the official religion – and nobody disputes that behaviour, as distinct from belief, is coercively modifiable.

So the secular magistrate may well have business other than salvation in mind. The ruler might not even believe in the official religion but enforce it anyway, as with the Roman auguries discussed by Machiavelli, to win acceptance of the political regime (Machiavelli 1983: Book I, xvi). If so, the argument needs a further claim of Locke's, often treated as a separate argument – that religion and politics are fundamentally distinct, and the methods of one cannot be used to promote the goods of the other. But this would still not give the persecuting magistrate reason to tolerate religious beliefs which threaten the state with sedition. In assuming that the magistrate cares about salvation rather than security, Locke blurs the very distinction which he takes pains to draw elsewhere in the *Letter*.

I have set out the familiar version of Locke's doxastic argument, and the less familiar version from the value of religious conviction, to show how clearly they rely on an appeal to religious rather than political goods. This is not to say that Locke's arguments for toleration always do so. The most important political consideration in support of toleration is that persecution will prove counter-productive: the victims of intolerance will be embittered against a regime which denies them religious freedom.[17] If so, a would-be persecutor has prudential reasons for tolerating religious heterodoxy.[18] This is a political argument. But in the nature of the case, it can point either way. The claim that intolerance will jeopardise security by embittering its victims against the regime can always be met by the argument that tolerating sedition cuts at the foundations of the state.

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[17] The converse form of the argument – that tolerant regimes will be self-reinforcing – figures prominently in Rawls's account of stability in the theory of toleration he presents, see Rawls (1972: §34, §35).

[18] A modern version of this argument is put by John Rawls in his argument for the stability of the principles of justice in Rawls (1972: Chapter 8).

Perhaps commentators have been set on a false trail by failing consistently to adopt the standpoint of the magistrate, for whom the *value* of belief, rather than the fact of it and its behavioural consequences, may be of little account. At the same time, the doxastic argument vacillates between the perspective of ruler and ruled: Locke *seems* to adopt the magistrate's perspective in arguing that enforcing doctrinal orthodoxy is bad in purely self-interested terms. He tries to present the coercive induction of belief as a practical impossibility for the magistrate. But, as I have suggested, this matters only if inward conviction rather than outward conformity is what the magistrate aims to achieve. And that is likely to be true only if the fundamental concern is with the individual believer, rather than the effects which belief, or its profession, will have in society at large.[19]

It is, then, not surprising that commentators should have failed consistently to take a ruler's view of the argument, since it is a standpoint which Locke himself only sporadically adopts. The *Letter*, in particular, wavers between the standpoints of *Realpolitik* and soteriology. This is particularly clear when Locke discusses his famous exclusions from the scope of toleration. With regard to atheists, Locke could be represented as consistent: the atheist has no soteriological beliefs, and as such the value attaching to religious conviction could be thought to be absent. But in fact Locke makes nothing of this point and rests his case on an appeal to what he regards as the atheist's self-evident perfidy[20] – even though, as has often been pointed out, one could argue that only atheists' motives for moral action are untainted by the self-interest of seeking other-worldly salvation.

With Roman Catholics, however, the case is different. Presumably the argument which rests on an appeal to the value of uncoerced religious belief will apply as much to Catholics as to, say, Dissenters. So Locke should be able to argue that no value will attach to the enforced orthodoxy of would-be recusants. But his argument appeals only to the threat to the security of the state which is posed by Catholic fifth-columnists. At this point, Locke's arguments – his appeal to the distinctness of political and religious goods, to the value of uncoerced conviction, to the arbitrariness of resigning one's eternal destiny to the doctrinal whims of the secular ruler, to the counter-productiveness of efforts to root out 'seditious' religions, and so on – cede to *raison d'état*. This is despite the fact that Locke notes that Roman rituals are, in themselves, no more deleterious to the standing of the state than are Protestant ones.[21]

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[19] Alex Tuckness has suggested in his 'Locke's Main Argument for Toleration' (Tuckness 2007), that Locke came, in the course of his exchanges with Proast, especially in the *Third Letter*, to adopt a 'universalisation' argument for toleration: since all humans are fallible, there is insufficient ground to believe that God would have authorised earthly rulers to impose what they regard as the true religion by force.

[20] 'Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist' (Locke 1991: 33).

[21] 'Is it permitted to worship God in the Roman manner? Let it be permitted to do it in the Geneva form also. Is it permitted to speak Latin in the market-place? Let those that have a mind to it, be permitted to do it also in the church.' (Locke 1991: 35).

A cynical reading of Locke might represent the *Letter* as putting the ideological cart before the justificatory horse. It would accuse him of first lighting on political positions – such as the desirability of 'comprehension' for Nonconformists, and the intolerability of Catholicism – and then casting about for philosophical vindications of them. The defence of the status quo is prior, on this reading, to the justification cited in its support.[22] But it is more interesting, as well as hermeneutically charitable, to seek underlying consistency beneath the appearance of contradiction. And in fact a consistent position is not hard to elicit. The consistency lies in Locke's insistence on reason of state as a trump card in arguments over toleration.

Locke provides an example of such an argument in his exclusion of atheists from the scope of religious toleration. Modern readers are likely to be struck by the implausibility of Locke's case for excluding atheists. It is indeed implausible to believe that atheists' failure to be cowed by the prospect of punishment in the hereafter will make them generally untrustworthy here and now.[23] The reason why the grounds for this exclusion are faulty lies not in the invalidity of the argument, but in its reliance on a false factual premise, the claim that atheists are necessarily perfidious. In other words, though unsound, the argument is valid, having the following generic form:

1. If the state rationally judges that some person(s), group, or doctrine will prevent or gravely threaten its survival, it is justified in acting intolerantly towards them.
2. The state rationally judges that person(s), etc. P (such as atheists) will prevent or gravely threaten its survival.
   So
3. The state is justified in acting intolerantly towards P.

But the major premise of Locke's implicit argument – that if someone poses a grave threat to the survival of the state, he cannot be tolerated – remains persuasive. If atheists really were perfidious, and as such, a threat to security, the case for withholding toleration from them would be strong. It is not the denial of toleration to the seditious which undermines Locke's argument, but the fact that no good ground exists for thinking that atheists will inevitably foment sedition. The widespread acknowledgement that Locke's justification for refusing toleration to atheists fails has obscured the merits of his *argument* for doing so. The argument above is plainly valid. The false factual premise mentioned earlier arises when 'Atheists' acts as the substituend for 'P' in premise 2. Political power can be reasonably exercised against atheists, in Locke's view, because not doing so will undermine the state, and therewith subvert the very basis for exercising power. Similar remarks apply to Roman Catholics, as we shall see.

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[22] For a parallel argument with regard to western discourses on toleration, see Brown (2007).

[23] In the course of their polemics Proast uses Locke's opposition to tolerating atheism in order to gain leverage against his toleration of dissenters, arguing that the latter would lead willy-nilly to the proliferation of atheism. See Locke, *Third Letter*, pp. 386–387.

Nor is Locke's position here merely the expression of some clannish Protestant prejudice against the unreformed religion. For 'perhaps the Quakers, were they numerous enough to become dangerous to the state, would deserve the magistrate's care and watchfulness to suppress them' (Locke 1997a: 148). As we have seen, Locke does not think that the purely doctrinal content of Roman Catholicism (such as belief in the Real Presence) is seditious, insofar as this is separable from a particular view about the due objects of secular allegiance. The more general point is that toleration lasts only for as long as the tolerated pose no danger to political stability. When

> any such distinct party is grown or growing so numerous as to appear dangerous to the magistrate and seem visibly to threaten the peace of the state, the magistrate may and ought to use all ways, either or policy or power, that shall be convenient, to lessen, break and suppress the party, and prevent the mischief (Locke 1997a: 147).

Unlike some of his contemporaries,[24] Locke accepts that in principle the Jewish religion should be tolerated. 'What hinders but that a Christian magistrate may have subjects that are Jews?' Locke asks rhetorically (1991: 26); if 'a Jew do not believe the New Testament to be the word of God, he does not thereby alter anything in men's civil rights' (1991: 35).[25] Indeed, '[n]ot even [native] Americans, subjected unto a Christian prince, are to be punished, either in body or goods, for not embracing our faith and worship' (1991: 30). In sum, 'neither pagan, nor Mohametan, nor Jew ought to be excluded from the civil rights of the commonwealth because of his religion' (1991: 46).[26]

But this toleration has a clear limit. That limit is reached when the doctrine or practice of a religion delivers its votaries into the hands of a foreign prince, or otherwise threatens the commonwealth. Locke reserves the clearest statement of his position in the *Letter* when arguing for the toleration of Muslims:

> It is ridiculous for any one to profess himself to be a Mahometan only in religion, but in everything else a faithful subject to a Christian magistrate, whilst at the same time he acknowledges himself bound to yield blind obedience to the Mufti of Constantinople, who himself is entirely obedient to the Ottoman emperor (Locke 1991: 41).

Similar justified grounds for denying toleration hold, in Locke's view, with regard to Roman Catholics. Like Muslims, Romanists did indeed acknowledge the dominion of a foreign prince, the Pope. In the *Essay* Locke considers the relation between secular and religious doctrines. He argues that, at least in the case of Catholics, these cannot be kept apart. Accordingly, Catholicism must be intolerable: not because of its doctrinal content, but because of Catholics' divided allegiances. Here, at least, the fact that belief cannot be induced forcibly, or that its value depends on not having been elicited by force, no longer matters. Nor does it matter in this

[24] See Marshall (2006: 19).

[25] Locke argues in the *Essay* that the variation of the Sabbath between Christianity and the Muslim and Jewish religions should not be the subject of civil penalties.

[26] For similar remarks on Muslims, see the *Third Letter on Toleration*, in Locke (1867: e.g., 275).

case that the forcing of men's consciences makes their salvation depend on an accident of birth.

> It often happens that [people] mix with their religious worship and speculative opinions other doctrines absolutely destructive to the society wherein they live, as is evident in the Roman Catholics that are subjects of any prince but the pope. These, therefore. . .ought not to be tolerated by the magistrate in the exercise of their religion unless he can be secured that he can allow one part without the spreading of the other, and that those [i.e. relating to secular matters] opinions will not be imbibed and espoused by all those who communicate with them in their religious worship, which, I suppose, is very hard to be done (Locke 1997a: 146).[27]

The problem Catholicism posed for Locke's official position is clear. That position relies heavily on a sharp distinction between secular allegiance and religious belonging. The distinction supports Locke's view that Jews, Muslims and pagans may be tolerated when they pose no threat to political authority. But, of course, certain religious doctrines themselves make claims about who should hold secular power, as illustrated by the later Catholic belief in papal infallibility and that secular sovereigns may lawfully be deposed.[28] So the distinction cannot justify the toleration of Catholics, to the extent that they subscribe to seditious religious doctrines. Rather the distinction overlays a more fundamental one in Locke's argument, between those who do and those who do not threaten the survival of the state.

For Locke, religious and political goods are indeed distinct, despite his failure (as I have contended) to maintain a clear argumentative distinction between them. But as often with arguments from plural goods, the practical decision can go one way or the other in cases of conflict. Locke's argument would then be that *unless* there is a clear and present threat to the security of the state, the good of uncoerced religious conviction should be allowed to flourish. For atheists, of course, there is no such good to be had, in Locke's view, while the threat remains, as in their own minds atheists can face no eschatological sanction for breaches of faith. Catholics, on the other hand, owe their allegiance to a foreign *temporal* prince – not merely to one whose kingdom is not of this world.

Thus Locke equivocates over whether or not to tolerate religious deviance. The arguments he gives prove either more or less than he needs to support his political position. The doxastic impossibility argument extends toleration to some from whom Locke wishes to withhold it, such as atheists. Meanwhile, his argument from a strong distinction between church and state threatens to deny toleration to those, such as Roman Catholics, to whom Locke, at least in certain moods, wishes to grant it. The uncertain status of his arguments for toleration is exemplified by his wavering between the standpoint of the religious believer and the magistrate. When he

[27] The passage 'and that those . . . religious worship' replaced the manuscript version, which at this point has 'and that the propagation of these opinions may be separated from their religious worship'.

[28] Locke seems to have grappled with the practicalities of enforcing this distinction in respect of Catholics. He is the likely author of *The Particular Test for Priests*, a manuscript (Locke, *Political Essays*, ed. Goldie, pp. 222–224, cf. Marshall 2006: 689), devoted to setting out a test which Roman Catholic priests might take to demonstrate their allegiance to a Protestant sovereign.

unambiguously adopts the latter's perspective, Locke's arguments – whether for toleration or against it – are rooted firmly in reason of state.

I argued in the previous section that a similar flip-flop marks the recent debate over the introduction of Sharia law in the UK. Legal arguments can be run either way, to explain how incorporating Sharia either would wreck the integrity of law, or could be fitted with the devolved structures already typical of legal procedure. I suggested that these arguments about law, just because they can point either way, conceal a more fundamental disagreement over what is tolerable. Ultimately this disagreement concerns which persons, groups or doctrines can be encompassed within a unitary polity. Here again, the argument is driven by reason of state.

3.4 Modern Liberalism After Locke

In some ways despite himself, Locke is strongly drawn to the idea of salvation as the *Ur*-good. That is why the doxastic argument attracts him. However, the argument relies on the assumption that the political and religious *Ur*-goods do not conflict with one another. When they do conflict – that is, when the absolute separation between political and religious goods proposed in the *Letter* proves unsustainable – Locke reasserts the primacy of the state over the individual conscience. The political arguments from public order then come to the fore, that intolerance is counter-productive even when judged purely on a political basis. Of course, even here the argument risks doing more than Locke wants, given that he aims to exclude those whose allegiance is directed either to foreign princes, such as Catholics, or to no prince at all, namely atheists. Intolerance is held preferable to risking the dissolution of civil society.[29]

One implication of this reading is that Locke cannot as readily eschew the making of specific religious truth-claims as he would like. Some commentators discern in the *Letter* and his subsequent polemics with Proast an argument of the following form[30]: we cannot know what true religion is; since there is only one true religion and many false ones, it is more likely that an earthly prince will enforce a false religion rather than the true one; but enforcing a false religion on his subjects will ensure their damnation[31]; therefore the ruler should enforce no religion at all.[32] It may be that Locke held that – at least at a suitably high level of doctrinal resolution – religious truth was not to be had by fallible human beings. This seems

[29]This conclusion is of course the more striking, given that Locke – at least the Locke of the *Second Treatise*, which was composed five or six years before the *Letter* – did *not* believe that civil society should be preserved at all costs.

[30]Locke seems drawn to this argument in some passages in the lengthy *Third Letter*.

[31]As already noted, of course, this premise is at odds with the doxastic argument for toleration.

[32]Tuckness sees this as the strongest of Locke's arguments for toleration. In general, it faces problems familiar from other attempts to justify toleration on sceptical or fallibilist grounds (see Newey 1999: Chapter 5); but the point here is that these grounds are not available to Locke, since what drives his arguments about toleration are specific truth-claims about what doctrines, and what groups, pose an unacceptable threat to the state.

to be his position, for example, on variations in forms of worship between different churches.[33] But the argument from *religious* scepticism or fallibilism is overshadowed by Locke's concern with the stability of the polity. He has to decide between the value of free exercise – where this may raise the spectre of sedition – and that of political security. Of course, if the religion thus suppressed were the true one, presumably Locke would regard this as an ultimate bad. It is because he does not regard as true those religions which suffer civil penalties because they threaten the basis of political order, that he thinks suppressing them is justified.

I have suggested that Locke's ambiguity about the toleration of minority religions parallels latter-day wavering on the same subject. In each case, the ostensible rationale for inclusion or exclusion proves to rest on claims about security – about whether or not the polity can absorb the inclusion of marginal groups or doctrines. This is not to say that the argument should not rest on this ground. On the contrary, the absolute limit of the tolerable must lie where failing to exercise intolerance would undermine the basis for exercising tolerance itself. The tolerance frontier, defined in terms of what the state *can* accept without ceasing to exist as an executive agency, trumps other arguments about toleration. The absolute political value of security outweighs appeals to other values when the survival of the polity really is in question.

The peculiar challenge posed by religion now becomes clear. The arguments rehearsed above about tolerating religious minorities – be they modern-day Muslims, or early-modern Catholics, atheists, Jews and pagans – are double-edged. They can be pressed into service to support the inclusion of one group or, handy-dandy, the exclusion of another. I believe this is true of arguments about toleration generally, as I have argued elsewhere (see Newey 1999: Chapter 5; also Newey 2001a). However, the case of religion poses special problems of its own. This is because religion concerns itself with *ultimate* goods – with what has absolute value, overriding and remaining independent of other valuable things.[34] In general terms, the threat posed by religion to the state is clear: it has the resources to challenge the very basis of the political order. This fact both underlies Locke's insistence on separating politics and religion, and makes that separation untenable.

For the state, security constitutes the *Ur*-good – that is, *summum bonum* or at least the *sine qua non* of political life. That means that the state has to give priority to underwriting the conditions of public order. For (Christian) religious believers, however, security ultimately consists in *salvation*. It is this rival notion of security which makes religion such a problem for the state – and conversely: each threatens the other's *summum bonum*. Schematically put, the state can be seen as threatening salvation, i.e. religious security, while religious goods may threaten state security. So religious toleration is double-edged: on the Lockean argument it should be extended

[33] 'If we consider right, we shall find that for the most part they are such frivolous things as ... without any prejudice to religion or the salvation of souls, if not accompanied with superstition or hypocrisy, might either be observed or omitted' (Locke 1991: 20).

[34] I argue that security is such a value in Newey (2009).

to religions to buttress secular authority, even while those for whom salvation is the highest good cannot offer wholehearted allegiance to it. This was true, or thought to be true, of Roman Catholics in the late seventeenth century and is true of some Islamic groups today.

Religion casts a long shadow over the modern liberal project of political justification. This is not because some specific religion is true. It is rather because religious people think that their favoured religious doctrine is true, and draw the consequences regarding ultimate goods. I may believe some religion and as a result believe that I have a duty of proselytism towards infidels, even to the point of converting them at the point of a sword. Of course, most people in liberal democracies do not take this view. But that is not because some general or abstract notion of the reasonable shows that doing so is contrary to reason.[35] It is because such a view runs counter to the embodied standards of reasonableness in public institutions and opinion. That is, there is no general or abstract standard by which the person who regards salvation in the hereafter as more important than security in the here and now can be judged unreasonable. The argument becomes more pointed still given modern liberals' willingness to accept that religious belief, with its attendant eschatological or soteriological content, is reasonable in itself.[36]

This has serious implications for modern liberal defences of religious toleration. For modern liberals such as Rawls, Barry and Scanlon (Barry 1995, Scanlon 1998), political power, including power in matters of religion, may justifiably be exercised only on grounds which nobody could reasonably reject.[37] This constraint on justification extends to the enforcement of the legal order via the exercise of political power. Reasonable rejectability is taken to license the orthodox position. But it seems that religious doctrine may lead individuals reasonably, or at least, not unreasonably, to reject the basis on which political power is justified, simply because that basis ignores the goods which they regard as ultimate. The reasonable rejectability basis for justification cannot do its job of justifying liberal politics without relying on a conception of the reasonable which has already been filtered for that very purpose.

If so, security either trumps the reasonable rejectability criterion of justification, or else it constrains the content of the reasonable in such a way that it justifies the repression of seditious doctrine. The fact that some religious doctrine is such that all other doctrines may reasonably be rejected in favour of it must be consistent with its being reasonable to reject that doctrine itself, since on the standard view all such doctrines are reasonably rejectable. And, in censoring such a doctrine in the name

[35] Liberal theories such as Rawls's which purportedly work from such a conception make the disposition to accept liberal norms criterial of reasonableness.

[36] As Rawls explicitly argues; see Rawls (1993: 52ff). Rawls reiterates the position elsewhere in his later writings, e.g. Rawls (1999a: 16 and fn); also Rawls (1999b).

[37] Similar remarks apply to Rawls, whose argument from the burdens of judgement in *Political Liberalism* is designed to show that it would be unjustifiable to institute a political regime based on any single 'comprehensive doctrine', since it is in the nature of such doctrines that they may reasonably be rejected.

of security, the state is not asserting the truth of any specific competing religious doctrine, contrary to the dictates of neutrality. If it is held to be unreasonable to use state power to suppress any doctrine which is reasonable (not unreasonable), there is nothing to preclude the judgment that seditious doctrine is, in its nature, unreasonable. The rejection of the political order, for example by excluded religions, undermines the justification of their exclusion – unless that rejection is unreasonable, as would widely be thought to be true of fundamentalist imams in the UK. However, what is reasonably rejectable varies circumstantially. Only when the fundamental good of security has been achieved can the state turn to protecting specific religious sensibilities.

However, what 'security' encompasses is itself an intensely political question. That this is so, provides further reasons for thinking that the project of political design,[38] conceived as a ground-up philosophical attempt to shape political institutions and procedures, must be misguided. The task of deciding what limits to impose on political inclusion must begin *in medias res*. Any attempt to foreclose the issue, for example by pronouncing certain agents or attitudes as reasonable and others as not, will serve only to politicise the values or concerns underlying the conception of the reasonable. As a result, political philosophy is, more than is usually realised (for example, by political philosophers), an act of *bricolage*.

It is plausible to think that security involves the protection of fundamental goods. But, again, the content of those goods is not given. The difficulty posed by the circumstances of religious toleration is that they show both that the fundamental goods are not given, and that basic political conflicts may arise from attempts to specify them. Insisting on a firm separation between the goods of politics and religion, as Locke does, will not advance matters much: it is likely merely to repeat the original conflict. That is perhaps why Locke finds himself tempted by the thought, offered by the doxastic argument, that ultimate religious goods can coexist with political ones: it offers the comfort of thinking that the conflict can be defused.

3.5 Conclusion

To this extent, the twenty-first century state finds itself in a bind curiously familiar from the early modern period, between 'comprehension', that is inclusiveness, and suppression. At a purely descriptive level, this could be seen as having to decide whether security is better served by religious tolerance or intolerance. But it would be mistaken to think that such decisions can be made without normative commitments. The state has to decide when security demands the proscription of seditious malcontents, rather than according them civic equality. Since judgments about security always involve deciding what is valuable,[39] the state has to decide when, for example, justice or equality has to be sacrificed or compromised in order to protect other goods. The 'fundamental' principle of civic equality is thus contingent on

[38] A term I use in Newey (2001b: e.g. Chapter 1).

[39] I develop this idea further in my unpublished paper, 'What Good is Security?'

safeguarding civic peace. For us now as for Locke, the task of the secular magistrate is to determine how – and on what terms – this is to be done.

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Chapter 4
On the Muslim Question

Anne Norton

The Jewish question was fundamental for politics and philosophy in the Enlightenment. In our time, as the Enlightenment fades, the Muslim question takes its place.

Marx's essay 'On the Jewish Question' marks the Jew as the site where post-Enlightenment Europe confronted the specter of theology in the question of citizenship. Long before Marx, Spinoza's political theology made the Jewish question central for the determination of the place of religion in the state, and the achievement of enlightenment in politics (Spinoza 2001, see also Yoval 1992, Smith 1997). Hegel's political theology constructed Abraham as the father of individuality, the prototypical individual (Hegel 1958). In Schmitt's (2005) view, the individual, fathered by the Jew, was to be the undoing of the state. The revival of political theology, in Schmitt, Derrida, Levinas, Agamben and Negri has the Holocaust at its heart.

There has been, in the shadow of the Enlightenment, a second Jewish question bound with the first. As politics and theology worked in the world, the question of the place of Jews, the discourse around Jews, the treatment and mistreatment of Jews, and the practices of anti-Semitism presented wrongs to be righted, challenges to the promise and ambitions of the Enlightenment. It was characteristic of the Jewish question in its practical and historical form that Jews were marked out as a political threat even as they were subject to political assaults; marked as evil even as conduct toward them testified to the failure of the ethical systems that had abandoned them.

In our time, the figure of the Muslim has become the axis where questions of political philosophy and political theology, politics and ethics meet. Islam is marked as the pre-eminent danger to politics; to Christians, Jews, and secular humanists; to women, sex and sexuality; to the values and institutions of the Enlightenment.

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The Muslim question does not displace the Jewish question, rather it emerges out of it as 'the general question of the age'(Marx 1978: 30). Like the Jewish question before it, the Muslim question reveals the imbrication of politics, theology and ethics in theory and in practice. Amnon Raz-Krakotzkin and Gil Anidjar (2003) have argued that the making of the state, of the European state system, of what was once called Christendom, turned on the exclusion of the Jew, the Arab. The Arab is continually concealed in the Jew, the Jew in the Arab, the Muslim in the Arab, and the elusive form of this Trinitarian enemy, the Jew, the Arab, the Muslim – the iridescent object of anti-Semitism – is itself concealed in the disavowal of political theology. Modern sovereignty disavows, or more precisely, conceals this origin. Theology is hidden in the secular language of politics and right, in the ethnic nominative 'Arab' that disguises the presence not of one faith, but three. The constitutive enmity that founded Europe (and through Europe, the Americas and that broader terrain we call 'the West') is concealed in a pattern of alternating enmities and disavowals, an oscillating pattern of 'we are not's.

The liberal and social democratic states of our time hesitate before Muslims: hesitate to include them, hesitate to extend them the rights and privileges of citizenship. American citizenship has not protected America's Muslim citizens from surveillance, detention, imprisonment. The American confrontation with the Muslim question has exposed non-Muslim Americans to the same threats of discrimination, surveillance, detention, imprisonment. Europe has furnished no stronger, surer, protection of rights. The atrocities committed by American soldiers (and mercenaries) in Iraq and at Guantanamo, the collusion of American and European governments in extraordinary rendition, testify to the importance of the Muslim question to the discourses that shaped post-enlightenment West: the rights of man and the sovereign state.

European politics is roiled by riots in the French *banlieux*, by controversies over the *foulard* and the *niqab*, by debates over immigration and the possible inclusion of Turkey in the European Union. The conditions (formal and informal) set for the inclusion of Turkey in the European Union provide an institutional and juridical map of European anxieties: the status of women, the place of religion and the family, the permissibility of ethnic identification, the use and limits of state violence. These concerns do not simply reflect an anxiety over the Muslim world; they map sites of domestic anxiety. European states – indeed all the states of the liberal and social democratic West – are faced with continuing questions concerning the status of women, sex, sexuality, and secularism. The European constitutional crisis is impelled in part by an uncertainty over the status of Christianity in the constitution of Europe. Here, the question is not the inclusion or exclusion of a nation predominately Muslim in culture and faith, but the identity of the receiving nations. Europe is asked if it is Christian or secular, and cannot find an answer.

In America, the Muslim Question takes a different form. America is, as Tocqueville (2000) and Hartz (1955) observed, a liberal nation, born in and from and to the Enlightenment. American Christians and American secularists were both able to give the same answer to the Jewish question, the answer of inclusion that turned on partial and reciprocal assimilation. Jews were, like other immigrant groups,

able to retain elements of difference, and American gentiles adopted foods and phrases previously seen as Jewish. Elements of Jewish identity were incorporated into a broader American national imaginary. One sees this in American literary and political culture, from Israel Zangwell's *The Melting Pot* to Tony Kushner's *Angels in America*; from Arendt and Howe to Strauss and Kristol; in national efforts to preserve the memory of the Holocaust and the survival of Israel. This did not free the United States from anti-Semitism, but it provided a limit and omnipresent counter to it, and placed the idea of the Jews at the heart of America.

America confronts the Muslim question without this imperative to identification. The figure of the Muslim does not bridge the divide between the Christian and the secular, or provide a model for the chosen. For Americans, who see themselves in the place of Isaac and Jacob, as people of the covenant, wrestling with the angel, the figure of the Muslim raises the problem of Ishmael and Esau, of those in the desert, outside the covenant. That question is both global and domestic. The War on Terror takes place on this terrain, but so too does the conversion of Malcolm X and the spread of Islam in the African-American community.

The West as a whole is confronted by changes in the practices and understanding of sovereignty, and by challenges to those liberal and neo-liberal institutions that have thus far held a potentially refractory democracy in check. As it was with the Jewish Question, so it is with the Muslim Question: in the most fundamental sense, the interrogation is directed not at Islamic, but Western, civilization. The figure of the Muslim stands like a sentinel marking the limits of the Europe, the state system, human rights, civil freedoms, democracy, sovereignty, even bare life.

Like the Jewish question before it, the Muslim Question is connected to fears for national and international security. In the nineteenth century, the Jewish anarchist was the feared agent of global terrorism, using the weapons of terror, operating across state lines, acknowledging no state. Now it is the Muslim terrorist, the Islamic extremist who presents a threat not only to the security of states, but to the security of the state system. In each case, the Muslim and the Jew are marked as both before and after the state in time. They are tribal, never having achieved the state, a state that Hegel marked as essential to the fullness of civilization. They are, moreover, understood to be after the state in a second sense: pursuing it, opposing it, seeking its end.

The figure of the Muslim also marks the boundaries of the discourse of rights. Political philosophers and popular discourse alike, in Europe and the United States, have cast the Muslim as the exemplary case for the violation of human rights. Muslim practice and, indeed, Muslim identity are presented as challenges to human rights in the political sphere: particularly to freedom of speech and expression, and the human rights of women.

In the controversies surrounding Salman Rushdie, Theo van Gogh, Ayaan Hirsi Ali, and the cartoons published first in the Danish press and later around the world, Muslims are portrayed as presenting special challenges to the exercise of freedom of speech. The gravity – even the presence – of this challenge is highly contestable. One might insist, in addressing the question, on consideration of political and legal contexts. This would require a critical engagement with the asymmetric regulation

of speech in the United States and Europe. In each case, freedom of speech becomes absolute when Muslims are the target, but is strictly regulated with regard to the Holocaust, anti-Semitism and, in the United States, by considerations of private property. (One cannot, for example, exercise one's right to free speech in a shopping mall.) One might examine how the challenge to freedom of speech by Muslims was made a license for the expression of sentiments calculated not only to offend, but to ensure the continuance of a racial, ethnic, and sexual order. Thus the commemoration of Theo van Gogh's death involved the repeated employment of a sexually explicit ethnic slur for Muslims: 'goat-fuckers.' Muslims were reified in this slur – rendered childlike and amiable by the employment of stuffed-toy goats – as hypersexual rustics, always masculine, never feminine, outside the order of urbanity and civility. One might observe – and critique – the importance of conventional and formulaic narratives (the Rushdie affair, the cartoon controversy) in the construction of the question.

There is, however, a greater political problem visible here. The Theo van Gogh case, and the Danish cartoon controversy, both point to a troubling transformation in the strategies of repression. The political effects of these strategies fall not on Muslims alone, but on us all.

In the period of the enlightenment – in the past – threats to freedom of speech came from those who would silence speakers. Political expression, self-determination, the organization of those forces of resistance and solidarity necessary to democracy (and to reason) depended on the freedom of people to speak their minds. They still do. We tend to think of freedom of speech as existing in the right to speak freely or 'say anything.' Now, however, the most effective threats to free expression come not from those who would silence speech, but from those who would compel it. Muslims are not permitted to speak freely. They are obliged instead to engage in specific speech acts, dictated to them by others. These compulsory speech acts are a prominent part of contemporary political discourse. They include the demand that 'moderate Muslims' or 'more Muslims' denounce the 9/11 attacks; the demand that Yasser Arafat, the Palestinian Authority, or 'Palestinians' recognize Israel or denounce terrorism.

The right to speak freely or to 'say anything' has also been subject to a political perversion in connection with Islam. The right to speak or write or publish has been transformed from a license to an imperative. It is not that one may speak or write or publish things offensive to Muslims but that one *must* speak and write and publish them. The production of *Submission*, the film made by Theo van Gogh and Ayaan Hirsi Ali; or the solicitation, publication, and repeated re-publication of the Muhammad cartoons were not the exercise of a freedom, they were instances of acquiescence to a political demand.

Early modern liberalism recognized, and protested against, compulsory speech acts in resistance to loyalty oaths. Later modern thought, particularly that of Michel Foucault (1978), recognized the imperative to confession – *the requirement that one speak, and speak endlessly, in compulsory self-disclosure* – as a strategy of surveillance, repression, and control. We must also recognize that the compulsory

speech acts required of Muslims – and in regard to Muslims – mark a broader political deployment of this strategy. If we are to protect freedom of speech and expression effectively, we must recognize that the greatest threats now come not from those who would silence speech, but from those who would replace free with compulsory speech.

The Muslim Question reveals similar strategies of diversion and occlusion at work in critiques of Islam, Muslims and Arabs on issues of sex, gender and sexuality: above all, on the place of women in the social order.

The Muslim Question produces strange bedfellows. A plethora of Western philosophers and theorists, from all corners of the academy, from the old left to neo-conservatives, Zizek to Ratzinger, have joined in an uneasy alliance to condemn Muslims for the oppression of women. Okin, Nussbaum, and Elshtain, among many others, argue that the *hijab* and *niqab*, female circumcision, polygamy and arranged marriage present special, perhaps insurmountable, challenges to the human rights of women in Muslim cultures (see Okin 1999). It is worth noting that for both Zizek and Okin, the case of Islam precludes – or rather decisively indicts – multiculturalism. Hélène Cixous (1998), Assia Djebar (1999), Ayaan Hirsi Ali (2007), again, among many others, argue that Europe and America offer a refuge for Muslim women who must leave their own cultures to find their voice and themselves. Zizek, characteristically, goes farther. He argues that Islam 'is grounded on a disavowed femininity' on 'the inexistence of the feminine'. 'And this brings us back to the function of veil in Islam: what if the true scandal this veil endeavors to obfuscate is not the feminine body hidden by it, but the INEXISTENCE of the feminine?' (Zizek 2006a).

The construction of the Muslim world as hyper-masculine accomplishes several useful objects for the West, particularly the United States. Attention to the plight of women in the Muslim world turns the gaze of feminists and other potential critics away from the continuing oppression of women in the West. Western women are told how very fortunate they are. They are enlisted, with Western men, in the old project of 'saving brown women from brown men' and in so doing they learn to look upon Western models of sex and sexuality as liberating, universally valid, and exempt from critique. They are turned away from projects of resistance at home and enlisted in projects of imperial domination. Discourses of human rights become the justification for military adventures and imperial rule.

Muslim women, and critics, male and female, of Western models of sex and sexuality, are silenced. The price of speech for a Muslim woman in the West may become the disavowal of Islam. Speech in defense of Islam is read as the speech of subjection. The wearing of the *hijab* or speech in defense of polygamy is read as the product of coercion or delusion. No woman, in her right mind could defend these, we are told, thus any woman who does must be deluded or compelled against her will.

Western women, enlisted in the project of liberating – or simply defeating – the Muslim world become tangled in a particularly perverse enterprise in which a

project of universal liberation is made the occasion of a double subjection. Consider, for a moment, the case of Lynndie England. England was the young American soldier whose smiling face figures in a number of the photographs from Abu Ghraib. She was photographed by her lover (her unfaithful lover, as it turned out) and superior, Spc. Graner.[1]

Call to mind the photograph of Lynndie England, holding a man on a leash. This was one of the most recognized of the Abu Ghraib photos, and one of the most discussed. Lynndie England became an icon for abuse: the abuse she did and the abuse she endured. The ambivalence of her role, abuser and abused, captures an important aspect of the structures oppression in the post-enlightenment West.

Lynndie England's round-faced, smiling innocence was belied by pain and humiliation of the man on the end of the leash. Her power, implicit in the pose, could not survive knowledge of her rank, her class, her relation with a man who was both an exploitative superior and an exploitative lover. England's almost perfect ignorance of Iraq and the conflict in which she was engaged belonged not to her alone, but to an army sent to the field blind. The use and misuse of that ignorance belongs not to Spc. Graner alone, but to a chain of command extending to the Commander in Chief. The abuse of Lynndie England reminds us (if we needed reminding) that false consciousness may have several dimensions. England portrayed herself as a woman with power over a man; men had power over her. She presented herself to be read as a woman with power, as evidence for the equality of women in the West, serving with men as their equals, yet the use of her sexuality as a tool of state, by her superior officers testifies to her subjection.

The iconic photograph of Lynndie England confronts us with an architecture of abjection. The junctures of class and racial or ethnic difference; of gender and religion; of sex, sexuality and human rights, mark points of diversion and support. Emancipatory struts or structures reach their ends, are diverted and transformed to serve as supports for old established structures of hierarchy and abjection. Affirmations of the equality of women are diverted into supports for a system that renders Arabs and Muslims abject; and in this transformation women are rendered abject as well. In this way, the discourse concerning the subjection of women by Muslims is made the justification for the abuse of Muslims, and of western women.

We have already seen aspects of the Muslim Question mapping sites of Western anxiety and occluding political developments that ought to inspire us with a more profound anxiety. Debates over the shape and power, culture, composition and institutional structures of a changing Europe also reveal themselves in the Muslim Question.

Slavoj Zizek, citing the debates over the preamble to the European constitution argued, in the best (as he would have us say) Stalinist fashion for atheism as the apex of the Enlightenment. 'Where,' he asked, 'was modern Europe's most precious legacy, that of atheism? What makes modern Europe unique is that it is the first and only civilization in which atheism is a fully legitimate option' (Zizek

[1] See 'The Abu Ghraib Files' at www.salon.com/news/abu_ghraib/2006/03/14/Introduction

2006b). Zizek's endorsement of the Enlightenment exclusion of religion is, however, haunted (like the Enlightenment itself) by the return of the repressed. The proof that 'Atheism is a European legacy worth fighting for' is that it 'creates a safe public space for believers', even Muslims (Zizek 2006b). In Zizek's view, the history of the modern West -that is to say of the West, of modernity – is the overcoming of religion by atheism, of theology by Enlightenment. The local means for advancing that project come from a Europe in which atheism is (historically) aligned with Christianity. Thus he writes in *A Glance into the Archives of Islam*: 'We usually speak of the Jewish-Christian civilization – perhaps, the time has come, especially with regard to the Middle East conflict, to talk about the *Jewish-Muslim civilization* as an axis opposed to Christianity'(Zizek 2006a). Zizek's endorsement of atheism drives him, by his own account, to an endorsement of a Europe – one might most accurately say an atheistic Christendom – against Islam and Judaism. Zizek's case reminds us that neither Marx nor socialism has been proof against the antipathy to Muslim and Jew embedded in an Enlightenment that continues to be held within the limits of Christendom.

Zizek identifies Muslims as the proper object of tolerance – a disposition he has elsewhere subjected to a more searching critique (see Zizek 2008). Marking Muslims as the target of tolerance marks them as other, and as undesirable. Tolerance is not required toward that which is ordinary, familiar; or toward that which is welcome, desirable or good. The object of tolerance is marked as alien and undesirable. It is not, however, merely Islam or Judaism that Zizek would mark as alien and undesirable, it is religion. Christianity's merits reside in its ability to produce that tolerant atheism which stands, for Zizek, as proof of western political superiority. That tolerant atheism – or, if you prefer, secularism – protects certain individuals, certain groups, whose presence in Europe is still deprecated. The greatest threat to the irreligious and the atheist, the rootless cosmopolite or the openly gay comes not from a Muslim minority that still lacks political power, but from the conservative Christians of Europe. These are indeed threatened by the return of religion, but it is not Islam but Christianity that poses the most powerful threat.

Consideration of the Muslim Question in Europe is imbricated with questions of democracy and sovereignty as well as questions of culture and religion.

In his late work Derrida made Islam 'the other of democracy (Derrida 2005). He sealed off 'Greco-Christian' and 'globalatinizing' traditions from the Islamic sources with which they were bound, on which they fed, and in which they found shelter in hard times. He linked Islam to fascism and Muslims to excessive procreation, while identifying a French *laïcité* with the liberty, equality and fraternity in which it is (for its Muslim citizens) notably deficient. In these respects, Derrida's construction of the Muslim as the other of democracy would seem to be merely a commonplace, if distressing, instance of the failure of intellect before chauvinism, but it is more.

Islam appears in *Rogues* as 'the other of democracy'. Muslims are, like Ishmael, cast out of the Abrahamic inheritance that runs in Derrida's writing, as in Jewish and Christian scripture, from Abraham to Isaac. They are cast out too, from the inheritance of democracy. Muslims are alien to democracy which belongs to a

'Greco-Christian and globalatinizing tradition'. One can read a similar argument in 'Faith and Knowledge' (2002). Derrida writes that the concepts of democracy and secularization, 'even of the right to literature' are not 'merely European, but Graeco-Christian, Graeco-Roman' (Derrida 2002: 46). Derrida works, in *Rogues* as he did in *Politics of Friendship* (2006), to mark the Muslim as the altogether alien, then enemy, the one who must be cast out of the Abrahamic tradition which is, in his reading, a tradition stretching from Jerusalem to Athens.

Mindful that the Greeks were read by the children of Ishmael as well as those of Isaac, and that Rome had an Eastern as well as Western Empire, we might (taking liberties with the text that it not take liberties from us) argue against restricting the heritage of democracy to the 'merely European.' These adjectives – Greco-Christian, Greco-Roman, globalatinizing – which would seem to send the descendants of Ishmael into the desert as exiles from democracy, might serve instead to remind us that there is a 'Greco-Muslim' world, and that Constantinople became Istanbul. If democracy is an inheritance from the Greeks then it, like the philosophic city of speech, is our al Andalus holding Jews, Christians, and Muslims. If 'globalatinization' proceeds through invasion and conversion, from the pagan to the Christian (and back again) in the Western Empire, it is no less present in the invasions and conversions that led Rome's eastern empire from the pagan to the Christian to the Muslim. If 'globalatinization' leads to the democracy to come, then its past and future heartland encircles the Bosphorus.

There is, however, something both correct and profound in Derrida's reading of Islam as the other of democracy. Muslims have indeed been shown to be democracy's others. They lack democracy, and it must be supplied them, albeit by undemocratic means. The advancement of liberal democratic institutions in the political realms inhabited by Muslims, like neo-liberal institutions in their economic realms, is sought within a regime of conditionality. The objects of efforts to 'democratize' the Middle East are required not merely to win the consent and satisfy the demands of their own electoral constituencies. They must also conform to the will of the European Union and the United States. The elected government of Palestine must recognize Israel, the elected government of Iraq must forego its choice of Prime Minister.

Derrida's writings on Muslims indicate not only his anxieties about this all too alien other, but about democracy itself. He writes, in *Voyous* that the name *voyous*, rogues, belongs to the rioting *shebab* of the *banlieux* – and he recognizes an aggrieved democracy in them. The rogue belongs, he writes, 'to what is most common and thus most popular in the people. The *demos* is thus never far away when one speaks of the *voyou*' (Derrida 2005: 28). The rioting *shebab* of the *banlieux* are close to the *demos*, close to democracy. So too were other *voyous*, other *shebab*, those of Algeria, whose participation in democratic elections voted the *Front Islamique du Salut* into power. They were close to democracy, only to have it snatched away. Derrida endorsed the Algerian state's intervention. 'The Algerian government and a large part, though not a majority of the Algerian people (as well as people outside Algeria) thought that the electoral process would lead democratically to the end of democracy [...] They decided to suspend democracy [...] for its own good' (Derrida

2005: 33). Derrida accepted – indeed, propounded – the view that this democracy, the democracy of Islamists, would have put an end to democracy. Yet he shows us a democracy ended not by Islam, but by the partisans of '*laïc* subjectivity' and the 'Enlightenment'. Perhaps we can see democracy otherwise.

If politics is founded not in enmity but in friendship, perhaps we can think '*an alterity without hierarchical difference at the root of democracy*' (Derrida 2006: 232). If we read the Greeks as a common heritage (one that extends beyond their national or cultural offspring to all who might find themselves in a city of speech), we need not bind ourselves within the confines of the merely European. If we can make common cause with the rebellious *shebab*, the rogues of the *banlieux*, we will find ourselves closer to democracy. We will find ourselves not as Westerners, but as democrats. Making common cause with the *shebab* comes closer to justice for us all, as it places us in an altered, and more democratic relation to sovereignty.

Derrida, and many if not all of those philosophers who have turned their work toward the Jewish question, bearing witness to the Holocaust and to the question of sovereignty in our time, have followed, however reluctantly, in the footsteps of Carl Schmitt. They have followed Schmitt in accepting the foundation of politics on the distinction between friend and enemy and in accepting the tenet: 'Sovereign is he who decides on the exception.'

Derrida's acceptance of this understanding of sovereignty is linked to his construction of Muslims as 'the other of democracy.' Muslims, like Jews before them, serve as the historical and practical instantiation both of the enemy and the exception.

Monarchical, authoritarian rule is the form that animates Carl Schmitt's concept of sovereignty, effectively eliding the distinction between the sovereign and the executive. Schmitt is committed to the elision of the distinction between executive and sovereign power; to an understanding of sovereignty as 'decisionistic and personalistic' for political and religious reasons. Politically, Schmitt seeks to strengthen executive power, to reinstall the powers of the sovereign in the executive and thus recapture what the revolutions of the Enlightenment had stripped from monarchy. Religiously, Schmitt is committed to the primacy of the incarnation; to the presence of God's divine sovereignty in the person of Christ. Schmitt's religious imperative may be attractive to those Christian evangelicals who, committed to the notion of a personal God in a quite different sense, likewise insist upon the primacy of the incarnate form of the divine sovereign. It is attractive to the partisans of what Derrida called 'ambiguous secularization' who wish to preserve the political theology undergirding the not quite secular state. Schmitt's political imperative has also found contemporary allies in the neoconservative advocates for what Carnes Lord has called 'a more authoritarian Presidency.' These commitments are hardly compelling to democrats – or to republicans. But this is not the only reading available within a secularized Christian theology, even within Schmitt.

In *Political Theology*, Schmitt gestures, briefly and allusively, to another form of sovereignty:

> In America, this [form of sovereignty] manifested itself in the reasonable and pragmatic belief that the voice of the people is the voice of God – a belief that is at the foundation

> of Jefferson's victory or 1801. Tocqueville in his account of American democracy observed that in democratic thought the people hover above the entire life of the state, just as God does above the world, as the cause and end of all things, as the point from which everything emanates and to which everything returns (Schmitt 2005: 49).

If the installation of sovereignty within the executive is the secularization of incarnation, perhaps we might look to the confluence of language and diaspora in Pentecost to find a recognition of the sovereignty of the people.[2]

I said earlier that the Muslim, the Arab and the Jew are bound together in an iridescent object of enmity. Let me show you that figure in its modern form. It is the *Muselmann* of the camps.

In our time, when memory of the Holocaust is preserved in documentary records, in novels and poetry, in monuments and in the minds of the living, the term 'Müselmanner' may be too familiar to require translation. For Primo Levi (1958), the Müselmanner were at once the initiation of an inexorable logic and the site of an unanswerable question. 'If this is a man...' We know the images of the *Müselmanner,* the descriptions of their states, the place they hold in reflections on the Holocaust. Yet if the term is familiar, the translation remains strangely alien, discordant. We forget that *Muselmann* means Muslim.

The name *Müselmanner* does not belong solely to those it names in the camps of National-Socialist Germany. *Müselmanner* names Muslims: it names those who inhabit the camps at Guantanamo and Abu Ghraib, and certain other sites that only some can name. It names those Muslims who inhabit camps awaiting deportation. In each of these moments, the name of Muslim is given to the most reduced, to bare life.

We have been taught, by Schmitt and Derrida to see the Müselmanner as Jews, as the exception, and to see their exclusion as the operation of sovereignty. I think we must see the Müselmanner of our time as Muslims, and come to a rethinking of sovereignty. Before the bare life of the Muslims of the camps: we can turn away from Schmitt and the Christological conception of sovereignty, and recall the words of the democratic revolutionary Thomas Paine: 'the earth belongs to the living.' Sovereignty belongs, in this view, not to 'he who decides on the exception' but to the people, whose spirit animates democracy like tongues of fire.

This is what democratic sovereignty requires of us in the most extraordinary of circumstances. What is required of us in the ordinary, quotidian course of democracy? I think we are required to say something to the rogue, to the Muslim *shebab* whom Derrida called 'the other of democracy.' I think we can find the words in Arabic: '*Marhaba*' there is room enough for you, and '*ahlan wa sahlan*' you are among your people here.

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[2] A link between language and a comprehensive divinity is present in all the Abrahamic religions, among others. The ideas of *vox populi, vox dei*, and 'My community will not be agreed upon an error' are also widely available.

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Chapter 5
Dealing Morally with Religious Differences

Sorin Baiasu

5.1 Introduction

It has repeatedly been noted in the literature that the concept of toleration is a difficult one – fraught with tensions and paradoxes, difficult to define and dependent on normative contexts, rather than freestanding. Both when it is used to refer to practices and to values, 'toleration' is presented as depending on the motivation with which certain practices and attitudes are performed and manifested. This, however, raises a considerable obstacle in political contexts. For not only are there specific and very difficult problems related to the identification of motivations, but politics is usually concerned with the actions of responsible agents and their intentions as expressed by these actions, and not with the real motivations with which actions are actually performed.

Independently of this problem, however, 'toleration' refers to a phenomenon which must meet a condition which seems difficult, if not impossible to satisfy. Thus, toleration refers to something which is in a certain sense objectionable, but which, at the same time, commands our respect. The latter condition presupposes a standard (principle or value) in virtue of which toleration is justified. Yet, our already acquired attitudes, beliefs and virtues considerably inform the way in which we formulate standards of toleration. For they affect our understanding of the needs, views and practices of other groups, and may, as a result, also affect our conception of fair treatment and accommodation of differences. But, if what we take to be tolerant, turns out to be a standard which subtly discriminates against other groups and enforces a particular view of the good life, then all we end up with is another form of intolerance.[1]

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[1] I am working here with a few metaethical assumptions. While it is not possible to defend these assumptions within the confines of this paper, it is I think useful to mention those which are most relevant here. First, I understand moral objectivity in a Kantian sense to refer to a stronger normative status than that offered by subjective states of mind – sensible incentives of all sorts, but

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In what follows, I will, however, defend both the possibility of a politically relevant notion of toleration and the possibility of practices of toleration which are fair towards differing groups. I will argue that raising the question of dealing fairly or morally with religious differences is one of the few questions which justify an appropriate *political* use of the notion of toleration. I will suggest that this notion applies correctly to justifications of policies and laws concerning the treatment of differing groups, rather than to specific practices, attitudes and actions of particular persons and groups. The latter use of the notion may in fact lead to forms of toleration which are too demanding. Moreover, I will argue that the problem of dealing fairly or morally with religious differences, which represents in fact a version of a more general moral question, has an answer and I will outline an approach to this problem, which I claim to be a promising one.

5.2 Religious Toleration and Unfair Discrimination

In his contribution to this volume, Veit Bader usefully identifies three significant dimensions along which issues related to toleration can be explored. The first dimension is perhaps the most difficult to characterise. Roughly and with approximation, it refers to that which guides us in our tolerant reaction to objected beliefs. Hence, although I may have the power not to tolerate a certain objected belief, I do tolerate it by following this guiding element. Call this the 'Prescriptive' dimension. As including guiding elements, the Prescriptive dimension may refer to articulated principles and norms or to the existence of either an individual attitude, disposition, virtue or of collective practices and institutional regimes (Chapter 2 by Bader, this volume).[2]

The second dimension, call it 'Referential', has to do with the object towards which toleration is manifested.[3] Here, one can talk about individual toleration, when the tolerator tolerates objected beliefs (practices, attitudes, etc.) of individuals,

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also 'intuitions' accepted without justification on the basis of personal insight or claims of self-evidence. At the same time, however, this moral objectivity does not presuppose moral realism. Morally objective principles or values are not necessarily existing in some Platonic world; they depend on the agent's rationality, insofar as they are structures of this rationality and make possible moral judgement. I make these assumptions in order to avoid problems related to the demanding character of moral realism and its weak account of justification; also, I hope in this way to offer a stronger account of normativity than that based on intersubjectivity – whether one established by an actual or by a hypothetical agreement. (On the problems of actual and hypothetical agreement as a ground of normativity, see Onora O'Neill (1989); see also Matthew Festenstein (1999)). I can only state here that, although I think that epistemologically some versions of contemporary constructivism can properly account for moral objectivity, ontologically they need some stronger commitments, although not as strong as those of moral realism. See also Baiasu (2009).

[2]In the first case, (when toleration is prescribed by a principle) Bader talks about 'tolerance'; in the second, (when toleration is prescribed by attitudes, dispositions, virtues of practices – whether individual or collective), he talks more specifically about 'toleration' (Chapter 2 by Bader, this volume).

[3]I talk about 'toleration' in general as including tolerance and the more specific sense of toleration distinguished by Bader. (See n. 2 above.) For the purpose of this paper, I need not distinguish between this general sense of toleration and the more specific sense.

although s/he has the power not to tolerate them. Alternatively, one can talk about collective toleration, when the tolerator (although s/he has the power not to tolerate) tolerates objected collective practices (beliefs, attitudes, etc.) of individuals who belong to a specific group of practitioners, members of associations, organizations or similar.

Finally, the third dimension, which I call 'Quantitative', refers to the scope of toleration. In this respect, toleration may be confined to a minimalist principle or attitude or may extend to include more demanding principles and attitudes, which may range from those merely accepting pluralism, to those enforcing equal respect for diversity and even to those advocating positive embrace and enthusiastic endorsement of differences (Chapter 2 by Bader, this volume).

In talking about the Referential dimension, Bader offers an interesting defence of the following aspect of his conception of toleration[4]: on his account of toleration, the object of toleration should not be seen as limited to individual belief and to claims to internal freedom of religion. He defends this aspect of his account with the claim that tolerating only such beliefs amounts to a highly individualised, subjectivised and privatised or 'thin' conception of religion. The problem with such a view of religion, he argues, is that it is akin to an idealised Protestant religion and discriminates against other religions. Defining toleration along the Referential dimension as only standing for individual beliefs is incompatible with any reasonable accommodation of recent religious diversity. In particular, it cannot make room for external or associational freedoms, which are so important for other religions (Chapter 2 by Bader, this volume).

An implication of this argument is that, sometimes, the attempt to accommodate religious differences may lead to principles, attitudes and virtues, which, although purporting to bring about toleration, may in fact give unfair advantage to certain religions and discriminate against others. To be sure, we can still talk about toleration, insofar as all believers are enjoying the same internal freedoms to practice their religions in private. Yet, this form of toleration turns out to be intolerant towards certain aspects of particular religions, while being wholly tolerant of other religions (say, those similar to the religion of the tolerator).

5.3 Narrow and Broad Religious Toleration

In the previous section, I have identified a specific version of a more general problem which I call the problem of 'Dealing Morally with Differences'. Within the argumentative framework offered by Bader, this is a problem of dealing morally with *religious* differences. Given the distinct focus of his paper, the significance and difficulty of this problem are not emphasised in their broad purview. Nevertheless, one of the problem's favouring conditions can easily be noticed in his discussion of the Prescriptive dimension of toleration. Thus, he notes that his view of toleration is broad, including both normative principles of toleration and attitudes and

[4]His view on the governance of religious diversity is developed in *Secularism or Democracy?* (2007).

virtues which indicate the predisposition to be tolerant. Yet, Bader adds, normative principles without appropriate virtues are insufficient for the stable reproduction of regimes of toleration. Moreover, he argues, in order to learn toleration, learning virtues is as important as learning principles.

By contrast, he says, the standard picture of toleration is reductive: toleration is presented as amounting to the formulation, justification and internalisation of principles. And, yet, attitudes of toleration may develop even when principles of toleration are not spelled out, agreed upon or precisely determined. Moreover, and this is perhaps most interesting for my purposes, attitudes and virtues massively inform our articulations and interpretations of under-determined principles (Chapter 2 by Bader, this volume).

This final claim, very plausible in fact, represents a favouring ground for a potentially very significant worry concerning the genuine accommodation of religious diversity. For, if already existing attitudes and virtues massively inform articulations and interpretations of under-determined principles, then it is not surprising that such articulations and interpretations of principles of tolerations may turn out to be much less accommodating than they should. If the tolerator's attitudes towards religious diversity are informed by, say, her positive attitude towards Protestant faith, then she is going to be biased in the formulation of under-determined principles of toleration and will give an unfair advantage to those religions which are similar to hers.

What is more, although she may strive to be as fair as possible in her formulation of the principles of accommodating religious diversity, she may unwillingly be biased in her formulation of the principles of toleration, because of her familiarity with specific religious practices or because of, say, lack of understanding of other religious practices or lack of understanding of any form of religion (say, in the case of an atheist brought up in a secular family and society or in the case of an atheist who is trying to forget whatever she knew about religion).

5.4 Minimalist and Demanding Religious Toleration

Consider now the third dimension of toleration, the Quantitative one. Along this dimension, Bader asserts, toleration can be minimalist, starting from a 'gritted teeth' tolerance, but can move towards more demanding forms of toleration, such as 'equal respect', and furthermore slide as far as to reach an attitude of enthusiastic endorsement of pluralism for the diversity's sake. Such a move from minimalist to more demanding forms of toleration can be justified as a possible solution to the problem I have just formulated. Let me explain this further.

I have said, with Bader, that an appropriate form of religious toleration along the Referential dimension presupposes the formulation of appropriate principles of toleration or tolerant attitudes, virtues and predispositions. Moreover, I have claimed, again with Bader, that a condition that may make one err in the formulation or development of such prescriptive elements is the fact that the formation of such elements is influenced by whatever principles, attitudes and predisposition one might

have had up to that point or whatever practices one might have followed until then. Finally, I have indicated some possible factors which may make erring in such respect more likely, such as lack of understanding of other religions.

One way to compensate for this is precisely by formulating more demanding forms of toleration, which may not only make it more unlikely that some religions be discriminated against, but may also contribute to the knowledge of, and familiarity with, other religions. 'Gritted teeth' tolerance may require nothing, apart from an attitude of subdued critical reaction to other people's objected beliefs. Enthusiastic endorsement will most likely require some understanding of the beliefs to be endorsed.

A particular worry one may formulate in relation to the problem of dealing morally with religious differences, refers more specifically to tolerant attitudes, virtues and predispositions. For even if we get to formulate appropriate principles of toleration and even if these principles are promptly and consistently applied by giving practitioners of all religions adequate internal and external religious freedoms, there may still be at least one other important element missing. Thus, one important good, which must be distributed fairly in society, is self-respect. One important aspect of self-respect is, of course, being appreciated and respectfully considered by those whom we appreciate and with whom we would like to associate.[5]

The implication is that, unless practitioners of a minority religion feel appreciated and valued, they will be unfairly disadvantaged. This can be remedied again by introducing more demanding forms of toleration. 'Gritted teeth' toleration may be supplemented by some form of 'equal respect', whereby the state should not only make sure that it and other groups do not interfere with the religious practices of a group, but also positively promote such practices and the religion itself by offering the same facilities all other religions have – public holidays for their religious festivals, tax reductions for donations, places in local and national committees and councils. But, as I have mentioned, still more demanding forms of toleration exist and may be required by such arguments.[6]

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[5]Thus, on Rawls's account, one aspect of self-respect is 'finding our person and deeds appreciated and confirmed by others who are likewise esteemed and their association enjoyed' (1999: 386).

[6]Of course, insofar as these more demanding forms of toleration aim to internalise acceptance of the practices of minority, they are self-defeating, since toleration implies that the object of toleration be in some sense objectionable. My point here is different: internalisation of acceptance of practices presupposes the creation of a certain set of motivations for performing those practices; but motivation cannot be controlled and monitored by political power. As a result, more and more demanding forms of toleration will be required, although the aim of bringing about that set of motivations is unachievable or at least ineffective by democratic means. (See also Section 5.11) A possible reply to the objection that more demanding forms of toleration are self-defeating is that what members of the majority are expected to endorse, appreciate and approve of are not practices, but the status of the members of the minority, the fact that they are fellow citizens capable of having and leading a valued plan of life (Jones 2006). But, first, I do not see how this will be able to avoid the problem of motivation I have just mentioned. Secondly, assuming that it does somehow avoid it, one could formulate a Rawlsian rejoinder and question the possibility of having our persons and deeds appreciated and respected as generic persons and deeds. But this leads precisely to the problem of dealing morally with differences. For the majority will understand the generic person

So far, I have discussed the general problem of dealing morally with differences in the particular case of religious toleration. It is, in fact, a more general issue and the next section articulates it in its most general form.

5.5 Dealing Morally with Differences

The more general philosophical problem of dealing with pluralism arises when racial, gender, cultural or religious differences must be accommodated morally.[7] On the one hand, one suggestion could be that we must reject the exclusion of a group when exclusion is based on reasons which merely invoke differences of some kind (racial, sexual, cultural, religious etc.). Diversity *per se* is not sufficient to justify unequal treatment. At the same time, however, one can point out that an equal treatment of all based on the affirmation of a common set of characteristics might overlook *significant* differences between persons. In this case, treating all in the same way, that is, considering all equally on the basis of the same laws, would be unfair. The assumption here is that the common set of characteristics constitutes all that needs to be considered as morally relevant in the formulation of the norms. And this assumption is sometimes false.

Hence, we face the following problem: a moral standard which would be valid for all would constitute an appropriate basis for the fair judgement of every person's claims and for the establishing of equality in the relationships between persons; yet, any attempt to formulate such a moral standard runs the risk of asserting as universal a principle or a value, the validity of which depends in fact on the particular circumstances in which the formulator is situated, and hence can overlook significant differences between persons and make an unequal arrangement pass for an equal and fair one.

Examples are not difficult to find. I have mentioned above the case of religious differences, where the worry was that a Protestant model of faith is imposed as universally valid. From this perspective, the privatisation of religious practices and an emphasis on internal freedoms of belief may be entirely appropriate and satisfactory. From the perspective of other faiths this would clearly be insufficient and would represent unfair discrimination. More obvious requirements have to do with concrete needs such as the granting of public holidays or optional leave on the occasion of major religious festivals. National holidays coinciding with major religious festivals of specific religions can be seen as concealing unfair support for the religion of the majority.

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and deed on the models currently influential in their group, and this may well result in treatment of others which is not only inappropriate, but also unfair. Granting internal freedoms of belief to minorities may be the way the member of the majority thinks she appreciates and respects persons and their deeds in general. As we have seen, this is in fact discriminatory.

[7] In fact, any difference which has the potential of becoming morally relevant can pose this problem in the appropriate context.

But other specific examples can be identified for sexual, racial and cultural differences.[8] In the next section, I would like to illustrate this problem with a case which is more general than that of sexual, racial, religious and cultural differences, but which nevertheless offers a more specific formulation of the problem than the formulation I offered at the beginning of this section.[9] The formulation at the beginning of this section is the most general version of the problem of dealing morally with differences within moral philosophy.[10]

Before turning to this, however, one clarification may be useful. One way in which we can deal morally with differences is by establishing which of the differing parties is right and which is wrong, and by adjudicating accordingly. The case which we are going to face more often, however, is that where, for various reasons, we cannot establish which party is right and which is wrong. This is the case of religious differences presented above. The discriminatory policy identified above is classed as discriminatory and, hence, unfair not because it fails to acknowledge that what one religion says is right. So, there is no assumption here that parties are looking for an objective decision concerning the truth of their religious claims. Yet, I think the assumption must be that they are looking for an objective decision concerning the fairness of their claims on how they should be treated.[11]

5.6 The Self-Defeating Nature of Liberalism

Consider the following model of political impartiality: The state is supposed to arbitrate neutrally and impartially between various groups. Tensions emerge almost necessarily between these groups as a result of pluralism and diversity; the state affirms the rights of all citizens to equal consideration and to equal opportunity to form and express convictions. As members of the society, citizens endorse the state and, hence, endorse the acceptance of the other groups as regulated by state. This is an implication of the assumption that citizens are at least in agreement with the founding principles of the state.[12]

Of course, the grounds of this shared belief need not be moral. Yet, one powerful and popular (among philosophers) account supporting this belief is the Kantian value of autonomy: political power is justified as making possible the autonomous

[8] I illustrate the case of sexual and racial differences elsewhere (Baiasu 2002, 2007).

[9] The case discussed in the next section is used by Bernard Williams to illustrate the difficulty of finding a virtue or value of toleration (Williams 1996).

[10] I think an even more general formulation can be provided, which refers to justification and normativity, but it is not specifically tied to moral normativity and justification. The problem can, for instance, occur in relation to epistemic or aesthetic justification.

[11] For a discussion of an objection to this assumption, see Section 5.14 below.

[12] As Williams puts it, citizens 'must have at least a shared belief in the system itself' (Williams 1996: 22).

lives of citizens, their freedom to choose and pursue their own views of what is good against any attempt to impose one such view on all.[13]

The problem of dealing morally with differences is illustrated by the standard puzzle that this account of the liberal state faces in its claims to argue for an impartial authority. The puzzle is that, as a matter of fact, the liberal state endorses subtly certain principles (individualism, consumerism and business efficiency), while the convictions of groups are relegated to the private sphere. What groups may do is to pursue their beliefs in private, as long as they do not overstep the limits of the private spheres as drawn, allegedly impartially, by the neutral and tolerant state.

A reply to this is available.[14] To formulate this reply, a threefold distinction has to be introduced. There may be, first, a policy which enforces directly a particular view of the good life (say, individualism). Secondly, there may be a policy which endorses such a view indirectly, for instance, by allocating more resources to institutions that promote the view. Finally, there may be a policy which does not enforce a view of the good life either directly or indirectly, but may still have consequences which are to the advantage of a particular group. For example, once the policy is implemented, membership of a particular group increases.

With this in mind, one could say that the liberal state explicitly tries to keep a neutral attitude towards groups in the first two senses, although this attitude may lead to consequences of the third type. The further interesting objection at this point, however, is that the very distinction between the three types of policy and, more specifically, between the procedures of the liberal state and substantive liberal values are skewed in the liberal direction.[15] Whereas the liberal happens to think the matter of procedure is important, the non-liberal would take consequences as more important. Yet, the distinctions assume the liberal is right.

Hence, if the liberal model of toleration is defended on the basis of a distinction which already gives pride of place to liberalism over nonliberal views, then the defence is circular and lacks normative force.

The policy which gives right to internal freedoms to all religions may be seen as the best way to promote religious diversity, but it can be seen in this way only by the party for whom religions need only internal freedoms. For the other parties, the diversity encouraged by this policy is not genuine: it makes impossible certain

[13] Free persons are those who make their own lives and determine their own convictions, and power must be used to make this possible, not to frustrate it by imposing a given set of convictions (Williams 1996: 22–23).

[14] Williams refers here to Thomas Nagel's distinction between enforcing individualism and adopting the practices of the liberal state. On Nagel's account, 'the consequences of making such a conception [namely, an individualistic one] the basis of policy would be quite different from the position of liberal toleration'. (Nagel 1991: 165) Nagel also makes the threefold distinction between types of policy to which I will refer next. (Nagel 1991: 165–166)

[15] This is, again, Williams's point; on his account, the distinction between the procedures of the liberal state and substantive liberal values 'is not a distinction that is neutral in its inspiration. It is asymmetrically skewed in the liberal direction. This is because it makes a lot out of a difference of procedure, whereas what matters to a nonliberal believer is the difference of outcome' (Williams 1996: 24).

religions (which need external or associational freedoms) and gives support to one type of religion (roughly the Protestant one). This position is, therefore, not very different, as far as genuine difference is concerned, from that of the religiously or secularly absolutist state.

The problem is therefore precisely that, in the attempt to deal morally with differences, the very norms which are supposed to arbitrate morally between groups are formulated in a way which subtly supports one of those particular groups and unfairly discriminates against the others. Hence, the problem is precisely the general philosophical problem of dealing morally with differences.

5.7 What Kind of Challenge?

Before I present what I take to be an approach which can answer the standard puzzle of liberalism, let me make a clarification concerning the nature of the challenge presupposed by the standard puzzle. There is one type of challenge which, although extremely interesting, would move the debate beyond the point where philosophical discussion would be effective. This is the type of challenge a radical sceptic of the Pyrrhonian kind would raise.

On the basis of such an account, whatever claim we consider, in order to show that it is true, we need a proof; yet, such a proof presupposes a criterion of the truth of the claim – on the basis of such a criterion, the proof shows that the claim meets the criterion; one way to accept the validity of the criterion is by assuming that the proof is correct, but the proof is correct if we assume that the criterion is valid.[16] Hence, we start with disagreement and end up with a circular argument.[17]

The puzzle of liberalism also starts from the objection that autonomy cannot hope to escape disagreement and that the liberal argument for neutrality is circular.[18] Nevertheless, to understand the liberal puzzle as a particular version of a Pyrrhonian sceptical argument would be misleading. As it is well known, the sceptical Problem of the Criterion has a very radical aim, which is that of reaching suspension of judgement and mental tranquillity.[19]

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[16]This is the so-called radical sceptical Problem of the Criterion, initially formulated by Pyrrho and then reasserted by Pyrrhonian sceptics, such as Sextus Empiricus.

[17]For one (Kantian) way of dealing with the sceptical Problem of the Criterion, see Westphal (2009).

[18]At one point, talking about the values of individual autonomy, Williams notes that the point of the challenge is not that these values 'are misguided or baseless', but that they 'like others, may be rejected' (Williams 1996: 25). He also adds that toleration cannot be based on such values 'and also hope to escape from substantive disagreements about the good' (Williams 1996: 25).

[19]Sextus 1985: x. Williams's aim is less radical. In general, he defends a version of ethical particularism and, in this context, he attempts to show that the value or virtue of toleration which is available to us is 'less ambitious than the pure value of liberal toleration' and closer 'to a tradition that can be traced back to Montesquieu and to Constant'. (Williams 1996: 26; see also Williams 1985) Interestingly, however, Nagel says that his aim is 'to achieve a certain peace of mind' (Nagel 1991: 158).

In a context in which the aim is to show that a particular set of claims or a particular position is right or wrong, a radical Pyrrhonian sceptical challenge would be misplaced. For, to reiterate, such a challenge has the purpose of questioning all judgements in order to bring about suspension of judgement. So, in the context of the liberal puzzle, radical scepticism would at most take the form of an idle scepticism which can raise doubts with regard to any claim or position, rather than find support for or against particular claims or positions.

By contrast, the objection to liberal neutrality has a more limited aim. Thus, the claim that the value of autonomy cannot escape disagreement is not an application of the objection that no claim can escape disagreement, but it refers specifically to the liberal claim to neutrality or impartiality. The objection is that the liberal claim of impartiality relies on the value of autonomy and, hence, it is not impartial, but biased towards individualism, consumerism and other similar modern trends. The objection is made from the perspective of impartiality and genuine neutrality, for how else could we identify an unfair bias? Since I take the challenge which generates the liberal puzzle to be a good illustration of the problem of dealing morally with differences, the same can be said about this latter problem: its challenge is not of the nature of radical scepticism, but more specifically about the moral justification of norms.

5.8 A Further Clarification

How do we determine whether a particular norm I formulate as a way of dealing morally with different groups is skewed in the direction of my particular values and, hence, unfairly advantages those groups who happen to have similar values? In principle, the fact that the state happens to endorse through its decisions the beliefs of particular groups, while discouraging the practices and beliefs of other groups is not necessarily a sign of unfair discrimination or of moral wrongdoing.

To see this, consider the very simple example of a conflict of opinions concerning the colour of an object. Whoever must adjudicate in this case will probably first make sure there is a genuine conflict by checking, say, whether the parties in dispute use words in the same way. Then, she will have to try to get access to the object to see it. Imagine that one claim is that the object is blue, whereas the other claim is that it is not blue. Whatever the decision will be, one party will have its claim endorsed and the other party rejected. Yet, there need not be anything wrong with the decision.

Consider now a case when something is wrong with the decision, because the criterion on which the case is being judged is such that it favours a particular response. Say, the criterion is that the colour of the object is that colour which the object will have when its surface will be polished in such a way and it will be placed in such a light that it will break light with a wave length corresponding to the length of the colour indicated by the first party. In short, the criterion is that the object will have that colour the first party says it has. Of course, this is a criterion skewed in the direction of the first party, but, in this case, too, the decision will endorse the belief of one party and will reject the belief of the second.

Going back to the liberal puzzle, what is important, therefore, is not that the state will eventually endorse the position of some party or other, but that the decision be fair and the parties be morally dealt with. The good reason for thinking that there is something wrong with the policies of a state is that the decisions the state makes are based on criteria which are not independent in the morally relevant sense from the positions to be adjudicated.[20] Hence, what we should focus on is not the fact that the state's decisions on abortion or education may turn out to favour one group or set of groups, but the claim that the liberal state is not neutral, and its practices are asymmetrically skewed in the liberal direction.

In very general terms, we have two or more conflicting claims, *a* and *b*, concerning a certain situation, S. To determine whether *a* or *b* is the case, we need a criterion on the basis of which to judge how S actually is. This criterion must be independent from *a* and *b*. Of course, the example with which I started this section makes reference to a simplified situation, in which there is such a criterion. Most of the time, however, identifying such a criterion is much more difficult, perhaps even impossible. When *a* and *b* refer to a view of what things in life are worth doing or living, or when they refer to a conception of transcendence, criteria are lacking or are quite different from tradition to tradition.[21]

But, even when this is the case, the principle on the basis of which we treat the parties must still be fair. Fairness here still means adjudicating without giving unjustified advantage to one party over the other. In this case, we can no longer establish fairness by adjudicating in accordance with which party is right, since the assumption is that we cannot establish this; what we need in this case is precisely not encouraging or discouraging one party more than the other, for instance, through a principle which is biased towards the view of one party.[22]

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[20] I claim that the appropriate principle or criterion on the basis of which we must decide how to treat differing parties or how to adjudicate on conflicting claims must be independent in the relevant sense from the positions being adjudicated on. Could one not then say that what is deemed relevantly independent from one perspective may not be relevant from another? The problem with this question is, first, that it can be raised about whatever claim one makes and at whatever moment; secondly, however, if we consider the specific case in which I need to decide whether A or B is right, and I try to judge this on the basis of the criterion that A is always right, then there might be some argument that the criterion is independent in a certain sense, say, because in its formulation three words do not refer to A or B. But could A say that this sense of independence is relevant? On what basis?

[21] For many religions, the law of non-contradiction does not hold, especially for the most important aspects of their doctrines, which are usually regarded as 'mysteries'. Sometimes a mystery is considered to be even the way in which decisions are made as to which aspects of the religious doctrine to maintain, change or reject. This is, for instance, the case in Orthodox Christianity: 'This inner Tradition 'handed down to us in a mystery' is preserved above all in the Church's worship. *Lex orandi lex credendi*: our faith is expressed in our prayer. Orthodoxy has made few explicit definitions about the Eucharist and the other Sacraments. . .' (Ware 1997: 205).

[22] Imagine the following reply: although we cannot determine which party is right and although the policy we enforce gives advantage to one party, members of that party will claim that it does not matter the policy is skewed towards them or biased, since this is justifiable as leading to the 'right answer'. Two points can be noted here: first, this goes against the assumption that there is no right and wrong answer, that it cannot be said that one party is right and the other, wrong; secondly,

One word of caution must be added here. Willingness to subscribe hastily to a view which accepts that a criterion of adjudication cannot, or is too difficult to, be formulated may easily lead to unfair disadvantage. For such a view implies a distribution which may turn out to be quite different from the right distribution and, hence, will necessarily disadvantage one party unfairly.

One final qualification: the example concerning the colour of the object may seem inappropriate in a further way, apart from the fact that it seems simplistic. It may suggest that the assumption here is that, when two conceptions of some (religious, ethical, social, political) good are in conflict, one is right and the other one, wrong. This may also suggest the state needs to endorse one and forbid the other. While I do not want to exclude such a scenario (think for instance of an issue, such as capital punishment, where we need to endorse one view and reject the other), the more frequent situation will be given by cases of determining the appropriate accommodation, the appropriate conditions under which the views in conflict can survive fairly without conflict.

Hence, the situation will not be a matter of endorsing one view of the good and dismissing the other, but of endorsing one *claim* and dismissing its contradictory. If capital punishment is supported in general by groups with more conservative views, whereas against this form of punishment will argue mostly liberals, the state will have to adjudicate on this specific issue by finding appropriate conditions for the coexistence of these political positions, but it cannot find conditions for the coexistence of their claims concerning capital punishment.

5.9 An Answer to the Problem

Provided that we deal with a conflict on which it is in principle possible to adjudicate, the problem is to find an independent criterion, a criterion which is independent in the relevant sense from the positions between which it must adjudicate. As I have already mentioned, once such a criterion is found, a proof can also be formulated which would show how one claim, rather than the other one, is correct, since what the claim says corresponds to what the criterion says must be the case.

As a matter of general strategy, the problem of finding a criterion can be tackled in the following way.[23] First, the criterion can acquire the required independence from the claims between which it must adjudicate, if we place it on a different

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the notion of justification in the claim that it is justifiable to have a biased principle becomes normatively almost powerless, since it amounts to the assertion that, when I say 'this principle is right because I want it to be so', I provide a justification for it.

[23]Michael Barber has recently offered a cogent and promising approach to this problem. (Barber 2001) Elsewhere, I have presented in detail and evaluated Barber's approach. (Baiasu 2004) Here I can only outline Barber's project and indicate how it answers the problem of dealing ethically with differences. I have argued that this project has considerable merit, but some of its aspects undermine its feasibility; nevertheless, I have indicated how these problems can be remedied (Baiasu 2004: 209–214). The project combines in an original way Karl-Otto Apel's transcendental

level than that of the claims. The standard move in this case is to inquire into the conditions which make possible the object of the claims. For instance, in order for the state to be regarded as neutral towards the particular conceptions of the good of the citizens, political decisions must be taken on the basis of an independent criterion of adjudication. To acquire this neutrality, the state will not discuss the merits of particular conceptions, but will try to ensure fair distribution of the conditions which make possible the choice, pursuit and realisation of these conceptions.

This will also take care of the worry that, in formulating the criterion, I may be under the spell of various evaluative assumptions which skew the criterion in my direction. The worry, however, is displaced, rather than answered, for the same problem can be raised with regard to the evaluation of a claim on the basis of the criterion. Think, for instance, of the example offered above about the norms which regulate attitudes towards religion from a Protestant perspective. If we consider internal freedom of belief as a condition which the state must guarantee as an expression of fair treatment of religious views, then the criterion of equal conditions will yield the conclusion that the state is neutral towards different religious views, since it guarantees internal freedom of belief. Yet, the application of the criterion of equal conditions to the case of religious views yields a norm (of equal internal freedom of belief) which cannot be justified to all religions as equally tolerant. Hence, what we need in addition is a dialogue between religions which enables one to enlarge one's perspective.[24]

In the moral domain, one way in which we can find a criterion is by identifying and formulating the presuppositions which any person who is engaged in the justification of a claim must necessarily make.[25] For instance, a claim whereby the speaker engages in a discourse with the others presupposes, among other assumptions, that every discourse partner is equally entitled to take part in the discourse, to introduce questions, to express attitudes, desires and needs.

Of course, not all discourse operates under this equal part presupposition; however, when talking about 'discourse', I mean a particular type of exchange, more exactly I refer to an exchange aimed at justification. Hence, an exchange which does not take place under the presupposition of equality need not presuppose this condition of equality, but, then, it follows that the aim of the exchange is not to identify the claim which is correct.

When I argue for a claim with the aim of justifying its validity, but I assume that those whom I address are not equally entitled to raise claims about my argument, then I do not in fact justify my claim, but, for instance, I impose it upon them, or I teach it to them, or I let them know it. A scientist who explains his theories to laymen will very likely expose his views with the aim of sharing the results of his work, and not in order to prove the theories are valid.

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pragmatism and Emmanuel Levinas's phenomenology of alterity, and although I do not subscribe completely to either, I think the project offers one of the best approaches to this problem to date.

[24] Apel's and Levinas's theories are expected to address these two worries, respectively.

[25] See, for instance, Apel (1980).

To argue for a claim with the assumption that those whom I address are not, for instance, equally entitled to raise questions concerning my argument can easily lead to situations in which my argument is questioned by them and I do not take those objections into account, or I try to silence them, or I make appeal to my authority; hence, in such situations I am not concerned about the validity of the claim that I allegedly want to defend. This is what Apel means when he claims that all discourse presupposes the equality of participants. Hence, these necessary conditions constitute a criterion for the evaluation of ethical standards.

Once such a criterion is formulated, the next problem is to apply it in the evaluation of specific norms or standards. An evaluation presupposes an understanding of what is to be evaluated. Such an understanding requires reflection on the norm or standard which is to be understood. The problem here is that we reflect from our particular perspectives and, hence, our understanding can be affected by the assumptions and implicit claims associated with that perspective. The problem is not only to realise the limited nature of our perspective and of our claims, but also to understand properly the claims made by others from their own perspectives.

Key here is to be able to question an understanding which grasps the other position from a third-person perspective. When the other's claims are regarded as a reiteration of one's own position, one's descriptions of alterity miss the other's irreducible character.[26] For instance, if another religious group's claims to equal treatment are interpreted as claims to equal provision of internal freedom of belief, the initial claims are misunderstood. Therefore, the approach to the problem of dealing morally with differences will have to provide a method able to question and challenge such a reductive comprehension of moral claims.[27]

To be sure, a better understanding of the other's position will also involve an understanding of the other's background assumptions, including prejudices, unquestioned presuppositions and false beliefs, along with experiences that may lead the other to the claims to be understood. But it is precisely this understanding which is required by a process of enlarging one's perspective and of appropriately evaluating the claims made by others.

If, as I have claimed so far, we can successfully deal with these problems, then, we have a promising approach to the question of dealing morally with differences.

5.10 Identifying Toleration

I have argued that one of the problems of identifying and formulating principles of toleration is a specific case of the more general problem of dealing morally with differences. In the previous sections, I have, then, presented two challenges raised by this general problem and I have shown how they can appropriately be approached. It is now time to return to the problem of toleration and discuss it in more detail. I will

[26] See, for instance, Levinas (1999).

[27] Levinas's phenomenology is supposed to help us precisely in this way.

first look at a difficulty raised by the way the concept of toleration is understood in the literature.

Consider the distinction between the practice and the value of toleration. On Williams's account, for instance, the practice of toleration refers to the way one group puts up as a matter of fact with the existence of another group. Similarly, the disposition or outlook which favours such a reaction can also be considered a practice of toleration (Williams 1996: 19). By contrast, the value of toleration represents one possible basis of the practice of toleration. In this case, members of the tolerant group are motivated by the moral good of putting up with beliefs they find offensive and, in this way, acknowledge the value of toleration (Williams 1996: 198).[28]

Scepticism about the possibility of deciding whether beliefs which may seem offensive are right or wrong and, hence, really offensive stands for another possible ground for the practice of toleration. A commitment to ecumenism and religious pluralism is still another basis for the practice. Yet another ground is simple indifference and lack of interest for the area where differing beliefs may be manifested. Finally, a Hobbesian equilibrium, under which acceptance is the best groups can get from each other, is still another possible basis for the practice of toleration (Williams 1996: 20–21).

Now, it may seem that, as far as the practice of toleration is concerned, there is no problem in identifying toleration, since the practice is not motivation-sensitive. Identifying the value of toleration is a different and quite problematic story, since an acknowledgement of this value by members of a group depends on the motivation of the members. Thus, by definition, a tolerant practice is based on the value of toleration, when it is performed because it is the good or right thing to do.

But, then, if in a society there is a law enforced by the state, which protects the freedom of the members of the minority to perform those practices, then we have a problem in determining to what extent the majority acknowledge the value of toleration in acting tolerantly. For, if we assume that the punishment through which the law is enforced is sufficient to outweigh the motivations people might have to break the law, then it is not clear to what extent observance of the law is a sign of the value of toleration or of prudent action.

Even where there is no law enforced by the state which will protect the religious practices of that minority, we may still have the same problem. This is because there are several ways in which people might be determined by force to continue to refrain from interfering with the practices of a minority and, hence, of behaving tolerantly. In this case, too, tolerant attitudes, virtues and principles are developing along lines of force which are not merely normative.

Consider, for instance, a situation where the majority don't discriminate against the religion of a minority, because of international pressure. Or consider a situation

[28] In what follows, when I talk about the value of toleration, I refer to this notion as defined by Williams. In this sense, the value of toleration is *one* possible basis for the practice of toleration, namely, the thought that there is something good or right about performing the practice in a particular case.

where a group develops practices of toleration towards another group through peer pressure. Even when international and intranational pressures are absent, a group may still need to behave tolerantly when its very existence would be threatened by intolerant behaviour. One thing seems to be clear: if agents do not have available moral reasons for behaving tolerantly, then their practice of toleration will not manifest an acknowledgment of the value of toleration.

This may seem fine, especially from a political perspective, since motivations do not seem to be enforceable through political power.[29] In this case, all it would matter would be tolerant practices, whether or not performed by acknowledging the value of toleration. And the focus on practice, rather than value seems to suggest that we also escape the problem of motivation and, hence, that the identification of the practice of toleration is a relatively easy task. In fact, it is not.

5.11 Toleration and Motivation

According to John Horton, it is usually agreed that 'the core of the concept of toleration is the refusal, where one has the power to do so, to prohibit or seriously interfere with conduct that one finds objectionable' (Horton 1996: 28). It is unclear yet whether by 'toleration' this definition refers to the practice of toleration, to the value of toleration or to both, and I will leave this unspecified for the moment. It follows that it must be accepted as equally plausible that a necessary condition of toleration is that the tolerator have the power to prohibit or seriously interfere with the objected conduct.[30]

The 'power' not to tolerate cannot simply refer to the actual capacity a person or group of persons has to be intolerant and to manifest this intolerance. True, the condition is formulated to eliminate situations in which persons simply suffer or endure something without the power to do anything about it. The fact that a person could be intolerant indicates that tolerant behaviour is not merely enduring behaviour. But we may also have a case where, say, a group may object to a certain practice, be unable to do anything to stop it, and nevertheless be motivated by tolerance to accept it.

The thought here is counterfactual: had the group had the power to act intolerantly, they would have still refrained from acting in this way, since they actually

[29] In this volume, Glen Newey's objection to Locke's argument for toleration relies precisely on the opposite claim. Thus, Newey's objection is directed to Locke's claim that 'laws are of no force at all without penalties, and penalties in this cased are absolutely impertinent; because they are not proper to convince the mind' (Locke 1991: 19). Newey denies that 'one person cannot forcibly bring another to form a belief'. (Chapter 3 by Newey, this volume) One reason for such a claim could be given by experimental psychology, in particular the theory of cognitive dissonance. As David Velleman notes, however, although the classical demonstration presented by Festinger and Carlsmith 'has been replicated hundreds if not thousands of times, [. . .] its interpretation remains controversial'. (Velleman 2000: 351)

[30] The condition is formulated, for instance, by Preston King as constitutive of the ''intolerable' aspect of the concept of toleration (King 1998: 9). See also the texts referred to by Horton (1996: 41 n. 1).

thought that the practice, although wrong in some sense, was tolerable and, moreover, in a distinct sense, it was right for it to be allowed (Horton 1996: 29). More exactly, the group which may be powerless against a certain situation, may be motivated to accept the situation by the fact that they think it is in some sense right, rather than simply having to accept it in virtue of their powerlessness.

Here we have a case where not only do we have a practice of toleration, but we also have the value of toleration as a basis for this practice. This leads to the following problem.

The distinction between the practice and the value of toleration presented above allows for all sorts of bases for the practice, including a value of toleration. The suggestion, as we have seen, is that we can have a practice of toleration performed, because there is no other alternative (or this is the best groups can expect from each other). On Horton's account, however, we can only talk about toleration when we have also the appropriate motivation; otherwise, we deal with a situation where a person is suffering or enduring, rather than tolerating. This seems to imply that to talk about toleration even in relation to practices we need a specific motivation.

5.12 Toleration and Dealing Morally with Differences

If, in order to talk about toleration, even in relation merely to practices, we need the appropriate motivation, and given that the question of religious toleration in this paper is considered as a political problem, the difficulty will be in determining when an action which seems to be tolerant actually is, rather than representing, say, powerlessness, indifference or scepticism.[31] For, as a political issue, the issue of toleration concerns the juridical principles and laws that the state must enforce, no matter with what motivation people will eventually act. If an action is enforced by political power, then the action is lawful no matter with which motivation it has been performed.[32]

In addition, juridical principles and laws are sometimes justified for non-moral reasons – they need to take into account considerations of feasibility, enforceability,

[31] Scepticism concerning the possibility of deciding which claim is right can be a reason for considering it as right, say, not to impose a certain prohibiting policy and, hence, to act tolerantly. But global scepticism of the Pyrrhonian kind could not lead to toleration, since it cannot entertain the thought of some practice's being right to perform.

[32] Of course, those who think that it is problematic to talk about being motivated morally to do something, in a situation in which one is compelled to do that anyway, will have a problem in making sense of this condition. For instance, Christine Korsgaard offers the example of one of her students, who is facing the prospect of taking a compulsory course: 'While you may very well grasp the reasons why we require the course, and it may even be true that for those reasons you would have taken it anyway, there is something odd about saying that is your motive'. (1996: 27). Nevertheless, her comments later on in the book seem to suggest that she is not necessarily excluding an action on such a motivation. (Korsgaard 1996: 105–107) By contrast, Marcus Willaschek (2002) excludes moral motivation in a situation in which one is coerced to perform a particular action.

possibility of being monitored and they may sometimes be the result of compromise, procedures, pragmatic decisions. For this reason, the problem of dealing morally with differences is particularly apposite in the context of toleration, since it raises the issue of the possibility of a *moral* justification of principles, laws and policies for the accommodation of differences.

To be sure, the fact that a law is morally justified does not necessarily imply that it will be followed from duty and, hence, in the case of a practice of putting up with objectionable beliefs, it does not necessarily mean that it will be a practice of toleration which manifests an acknowledgement of the value of toleration. Still, the fact that the law is morally justifiable shows that it is at least justifiable as an expression of toleration. Moreover, and this is perhaps the most important conclusion in this respect, one may regard toleration as an issue to be discussed when policies for dealing with pluralism and diversity are to be decided. It is in this context that various (including moral) reasons for adopting specific policies and norms are discussed and evaluated.

At this point, I would like to return to the discussion, in Section 5.9, of the solution to the problem of dealing morally with differences. What I have discussed there was the problem of dealing morally with differences under a specific assumption. Recall that the problem is that of identifying a moral principle on the basis of which we can adjudicate objectively between conflicting claims which may stem from sexual, religious, cultural, ethical or, in general, any morally relevant differences.

The specific assumption under which I discussed this problem was that the conflict between claims was of a kind which could be adjudicated morally. This condition, however, seems to suggest two problems. First, it seems that the discussion is no longer relevant in the context of toleration. Secondly, it seems that it is no longer relevant in the context of serious religious conflict, which characterises current situations in world politics.

Consider, for instance, two religious groups, both of which make claims of ownership in relation to the same churches. The conflict between these groups, although related to religious differences, is in principle morally decidable. One only needs to make some empirical investigations concerning the original owner and the existence of any lawful transfer of ownership from one group to the other. Hence, the fact that these groups are distinct *religious* groups is not an important aspect of the conflict.

But consider now again also the notion of toleration. One important feature of the notion is given by the fact that the group, practice or belief to be tolerated is objectionable. As Horton argues, however, this condition needs further qualification. As it stands, it psychologises the notion; any psychological reaction of rejection I may have towards something may trigger a second reaction of putting up with that thing, and, according to the definition (refusal to prohibit conduct one finds objectionable), this would represent toleration, if motivation were appropriate.

One way to make this notion less dependent on psychological states is to make explicit the fact that 'some things should not be tolerated, because they should not be permitted' and 'some things should not be objected to, hence are not appropriate objects of toleration' (Horton 1996: 33). Racism, for instance, is a reaction of

rejection of groups of a certain race, and race is something to which we should not object. Moreover, racism is something that should not be tolerated. It is for this reason that it is sometimes argued that we cannot talk about toleration of racial differences (Horton 1996: 33–34, Brown 2006: 129).

But, then, consider again the situation where I can adjudicate morally in a conflict: there is a moral criterion on the basis of which I can determine which claim is right and which is wrong. If my claim proves wrong, then I cannot be said to be tolerant of the opposite claim (which proved right), since this is something I should not object to and, hence, it is not an appropriate object of toleration. Nor is my claim to be tolerated by the opposite party appropriate, since my claim proved wrong and, hence, should not be permitted. It follows that the moral solution to the problem of dealing morally with differences makes the problem irrelevant for the issue of toleration.

This is only a misleading conclusion, however; to clarify the sense in which we can talk about a relevant problem of dealing morally with religious differences, a further clarification is in order. I turn to this in the next section.

5.13 Dealing Morally with Religious Differences

We can distinguish between two types of impartiality.[33] First, simple impartiality is related to a person's conception of the good life and makes that person want this conception not only for herself, but for all persons; hence, she will try to get the power of the state behind it, to promote it. Other persons may pursue different conceptions of the good life and, led by simple impartiality, will want their conceptions of the good life promoted by the state. The ensuing conflicts presuppose, therefore, simple impartiality.

There is, however, also a second-order impartiality, which can be adopted in the attempt to solve the conflict between simple impartial conceptions of the good. The second-order impartiality tries to solve this kind of conflict by adopting a fair attitude towards the first-order or simple impartialities informed by the conflicting conceptions of the good. Consider now the following two examples.

First, conflicts may be handled politically, that is, as part of a political process, each party tries to gain majority for policies inspired by its conception of the good life. Secondly, some conflicts cannot be handled politically, because they are deep and acute, and an adjudication through political processes would not command the reasonable acceptance of the losers; these are usually religious differences or differences concerning the ultimate meaning of life. For these intractable differences, state power must be limited, so that it does not infringe on some party's liberty on account of values that that party finds inadmissible.

In both cases, conflicting claims are not examined in order to reach a decision as to which is right and which is wrong. This is not surprising, since, as we have

[33] I follow here Nagel's distinction (1991: 154–155).

seen, this type of adjudication makes toleration irrelevant. The position which is right must be affirmed, rather than tolerated, that which is wrong, rejected, rather than tolerated. The challenge this raises for an account of toleration is to find a case where there are grounds for coercion a person should not simply affirm as right, but towards which, at the same time, she cannot be indifferent or accept as a result of a political process (Nagel 1991: 159–160).

Now, a conflict between religious groups which claim the support of the state in virtue of the fact that each would represent the true religion involves a difference in doctrine. To make a decision as to which doctrine is right would involve an examination of each of the group's claim that it represents the true religion. It is not clear, however, to what extent such an issue is decidable in an objective way, in the sense discussed above.[34] If an objective decision is not possible, the best one can do is to give equal consideration to both parties and, hence, make sure none is unfairly discriminated against.

This answer makes an implicit distinction between three normative realms: that of values one fully affirms, that of values one judges ethically wrong, but tolerable (for they are not morally wrong in a more objective sense), and that of values which are morally wrong (and, hence, intolerable).[35] Hence, a person will accept to be coerced by norms which protect the tolerable values of other groups, but will not affirm these norms; at the same time, such norms would not be accepted as a result of a political process, since they refer to values which those other groups consider too important to be decided by a majority rule.[36] In this context, the problem of dealing morally with religious differences is in place and is relevant for the issue of toleration.

[34] See Section 5.8.

[35] The distinction is presented in these terms by Rainer Forst (2004: 316). Practices of toleration, Forst says, 'do not deny basic forms of respect to others and do not illegitimately enforce their ethically rejectable views' (Forst 2004: 317).

[36] A note is here required on terminology. I use 'moral' in a general sense, which includes both the ethical and the juridical. Any decision taken on normative grounds with a view to determining what is good or right is in this sense moral. I take ethics to be concerned with norms which ought to regulate the actions of responsible agents, but without being enforced by any other means apart from the persons' own realisation that performing the actions is the right thing to do. Hence, for ethics, motivation is relevant and enforceability is not. The other part of morality, juridical morality, has to do with norms which ought to regulate the actions of responsible agents and will be enforced by state, if individuals do not observe them. Ethical motivation is not a main concern in this case, but enforceability, feasibility, capacity for being monitored are relevant and important. So, instead of talking, with Forst and Jürgen Habermas, about ethical reasons to refer to norms which are specific for particular groups, I prefer to talk explicitly about religious prescriptions, morals or views of the good life (Forst 2004, Habermas 1993). There is a certain sense in which, choosing an appropriate policy of toleration of certain practices is a moral issue, insofar as it is constrained by the criterion of equal consideration of all parties and may result in right or wrong decisions. But, as Nagel notes, it is a moral issue in a higher-order sense. It does not apply to the beliefs of citizens, but to the practices of the state and of other citizens towards those beliefs.

5.14 An Answer to Williams's Challenge

As we have seen in Section 5.6, the possibility of a fair adjudication on conflicts where we cannot simply decide which position is right, can be defended through the liberal model of the impartial state. On that account, we can distinguish between enforcing individualism and adopting the practices of the liberal state and 'the consequences of making such a conception [namely, an individualistic one] the basis of policy would be quite different from the position of liberal toleration' (Nagel 1991: 165). Yet, by itself, this cannot offer an answer to the problem of dealing morally with differences, a problem of dealing *fairly* with differences. This is the problem that any attempt to deal fairly with differences will be made from within a particular perspective and may influence unfairly the results of the process.

One possible answer is the following: consider the notion of an 'unconditioned moral respect' which exists at the core of democratic morality and is firmly anchored in the identity of citizens; consider also that, although this is '"freestanding" in the sense of being an autonomous 'human' insight, not dependent on other kinds of reasons', it is still 'historically and culturally situated [...] as the central lesson from a history of exclusion and violence characterising a given political community' (Forst 2004: 321).

One can easily see, I think, how Williams's challenge would still apply. For this lesson of a specific community might differ from that of another community whose members may nevertheless be displaced and have to live in the first community. Enforcing this lesson, this unconditioned moral respect, looks like an attempt to impose as universal a particular norm or procedure. The move is similar to the application of what Forst calls a 'permission conception' of toleration (Forst 2004: 315–316) or to the unfair discrimination I described in relation to the problem of dealing morally with differences, when different groups are treated in the same way, without concern for their differences (Section 5.5).

To answer Williams's challenge, I would like to go back to the simple example I used in Section 5.8: we have two conflicting claims concerning the colour of an object and we need a criterion on the basis of which to decide which claim is right. A criterion which is already skewed in the direction of one of the claims is not an appropriate criterion. The appropriate criterion will be independent from the two claims. In our case, looking at the object and focusing on its colour will help us determine its colour and, hence, will help us to adjudicate on the conflict.

What Williams challenges in the case of liberalism is that autonomy or unconditional moral respect (respectively) is independent from the situations to be judged and the conflicting options on which they must adjudicate.[37] Now it may well be the case that particular formulations of the criteria of decision might be skewed in one direction or another, but this means that they can in principle be reformulated to acquire objectivity, that is, independence from the particular positions to be

[37] Forst's solution can be challenged in the same way.

evaluated.[38] A criterion which says that the object has the colour that the first party attributes to it can be reformulated to exclude reference to the opinion of any of the parties in conflict.

The only problem is if Williams has in mind an impossibility of principle for a criterion to acquire this required objectivity or independence.[39] But the problem then is that the objection to liberalism or to a discursive conception of justification is no longer an objection. In fact, if there is no objective way to determine how an object is, then whatever claim is being made is going to be correct for the person who formulates it and conflict between distinct claims purportedly formulated about the same object will no longer exist. There will be nothing to adjudicate on and, hence, no reason to advance objections to such adjudications.

The only option left is to accept that an objective criterion for decision is possible, and objections similar to those offered by Williams will point to specific problems which can be remedied by a reformulation of the criterion. The distinction between enforcing a certain view through a criterion which is skewed in that direction and enforcing a certain view as a result of an objective adjudication on the basis of an independent criterion is a distinction which is constitutive of the problem of objective moral decision, it is not a different way of seeing unfair discrimination. It is this distinction which helps us make sense not only of the problem of objective moral decision, but also of objections to criteria which are not independent from the options on which they are supposed to adjudicate.[40]

5.15 Conclusion

At the beginning of this paper, I have distinguished between three dimensions of toleration: Prescriptive, Referential and Quantitative. I have shown that, along all these three dimensions, the concept of toleration is undermined by the problem of

[38] I do not mean to suggest here that objectivity can be reduced to independence. Recall that, in Sections 5.8 and 5.9, I talked about objectivity as involving independence in the relevant sense. Hence, there are more conditions to objectivity than independence. My claim here is only that, insofar as the other conditions of objectivity are met, but the condition of independence is not, the reformulation of the criterion in a way which leads to the satisfaction of the condition of independence will lead also to objectivity.

[39] This seems to be the suggestion defended sometimes by Horton (Chapter 7) in his contribution to this volume.

[40] One clarification must be made at this point: the problem of dealing morally with religious differences and the approach I formulated here do not imply an attempt to identify and articulate principles which will be able to deal once and for all with every challenge and every objection which will then be raised. As I have mentioned, one very problematic feature of our agency is that we are not always aware that we are biased even when we make genuine efforts not to be so. Hence, principles will sometimes have to be reformulated, for instance, by introducing exceptions or adding further conditions, as the case requires. In this respect, the approach I advocate here is compatible with Emmanuela Ceva's '*ex post legem*' approach defended in her contribution to this volume. (Chapter 9 by Ceva, this volume).

dealing morally with differences. This is a problem about the justification of standards of actions, but it points to the difficulty of a correct account of justification in a particularly acute form: it shows that, even when we do all we epistemically can to formulate such standards fairly, we may still end up with principles or values that discriminate against certain groups.

We can understand the problem of dealing morally with differences as reflecting a radically sceptical position, which tries to demonstrate that there is no objective or fair principle of action and that it is better to suspend moral judgement altogether. I have argued that, while such an argument has been constructed, it makes an assumption of infallibility that is indeed difficult to sustain. By contrast, I have shown that the same problem can be understood along the lines of a methodological scepticism and that this is the appropriate reading in the context of the debate concerning religious toleration.

On this alternative reading, the standard that we will eventually formulate will not be infallible; yet, any objection to the fairness of this standard will also indicate how the standard can be changed in order to respond appropriately to the objection. This may all be correct, but how do we begin to formulate such a standard? I have suggested that the best approach to date is a combination of the method of identifying the necessary presuppositions of discourse and the method of comprehending the claims made by religious groups (or more generally, by the groups whose differences must be accommodated).

Next, I have considered two conceptual issues related to religious toleration. First, the usual definition of the notion, even when we consider merely practices of toleration, introduces motivation as an important element. Yet, there seems to be no reliable method for ascertaining motivation. In response, I have suggested that we focus on the justification of standards and practices of toleration and sidestep the question of the motivation with which such standards or practices are to be acted upon or performed.

Secondly, the notion of toleration implies both that what is to be tolerated must be regarded as in some sense objectionable and that there must be some good reason for tolerating this objectionable thing (practice, belief, claim). There are things which cannot be the object of toleration, precisely because they cannot be objected to from a moral point of view or because they cannot be morally tolerated. For instance, racism cannot be morally tolerated and race is something to which we cannot morally object. I have then concluded that, in a situation in which we have two claims in conflict, one which is morally right and one which is morally wrong, there cannot be a question of toleration: what is morally right cannot be morally objected to and what is morally wrong cannot be tolerated. 'Toleration' seems to have no place here.

In response, I have argued that this second conceptual issue is not in fact a problem, but simply a feature of toleration, and furthermore that this feature brings to light more clearly why it is particularly apposite to talk about toleration in the context of religious differences. It is difficult to judge the epistemic merits of the distinct religious claims made by various religions. From particular perspectives, the claims of a religious community may be objectionable, yet, given that we cannot judge

the epistemic merits of such claims, rejecting them altogether would be even more objectionable. Toleration of religious differences involves, therefore, a second-order impartiality, which does not endorse any of the claims which must be reconciled, but tries to find the fair principle of accommodation. It is not difficult to see here a similarity with the liberal approach to questions of justification of principles of justice in contexts of pluralism. The objections such an approach usually invites apply therefore to this second-order impartiality too.

I have shown, however, that the approach to the problem of dealing morally with differences that I presented in the paper can respond to such objections. If my argument is right, then we have a correct approach to the question of dealing morally with differences and, hence, we also have a solution to the question of the justification of standards of religious toleration.

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Chapter 6
Diversity and Equality: 'Toleration as Recognition' Reconsidered

Andrea Baumeister

6.1 Introduction

Although toleration is widely recognised as a fundamental political principle in liberal societies, for critics of traditional liberal conceptions of toleration, such as Anna Elisabetta Galeotti (2002), the well-established idea of toleration as non-interference is increasingly ill-suited to respond adequately to the type of pluralism characteristic of contemporary liberal societies. While traditional conceptions equate toleration with the liberty of individuals to pursue their freely chosen personal beliefs in the non-political private realm, for Galeotti the most important non-trivial cases of toleration in contemporary liberal societies arise not due to a plurality of individual values and beliefs, but stem from the coexistence within society of diverse groups and cultures with unequal standing. To analyse contested issues such as the wearing of the Islamic veil in public schools, the recognition of same sex marriages, the admission of gays into the army, and regulations relating to speech that incites violence and hatred, in terms of the conflicting values and beliefs of individual citizens is to fail to grasp the asymmetries of power at the heart of contemporary debates regarding toleration. Differences relating to race, ethnicity, sexual orientation, culture and often religion are not freely chosen, but often act as markers for ascriptive collective identities that are disliked by the majority of society and which are perceived by the majority as a threat to established social standards, rules and social conventions. On Galeotti's account the most pressing contemporary cases of toleration arise when members of such traditionally invisible and marginalised minorities seek to exhibit their differences in public political spaces in an attempt to secure equal social standing and respect. In the face of these challenges Galeotti (2002: 10) argues for an extension of the concept of toleration from 'the private to the public domain, and ... from the negative meaning of non-interference to the positive sense of acceptance and recognition'. Such positive

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'toleration as recognition' is to be achieved by removing the stigma that attaches to traditionally marginalised collective identities through the symbolic inclusion of these groups in the political public realm.

This paper will argue that while Galeotti's analysis offers a powerful critique of conceptions of pluralism that seek to confine difference and diversity to the non-political private sphere, her notion of 'toleration as recognition' ultimately fails to provide an adequate response to the complex issues of power and identity central to her critique of traditional conceptions of toleration. Not only does her conception of 'toleration as recognition' remain ambiguous, Galeotti pays insufficient attention to the social and political processes that shape the very identities that are to be recognised. Group identities are not fixed or 'given' but are constructed and reconstructed in response to changes in the wider social and legal environment that groups inhabit. Given the dynamics of identity-formation, a social and legal framework informed by a politics of 'toleration as recognition' not only runs the risk of exaggerating the solidity of and differences between groups, but may also shore up significant inequalities of power within minority groups by reinforcing dominant interpretations of which practices and symbols define the collective identity of a group. If 'toleration as recognition' is to secure equal citizenship for all members of the polity, it must be sensitive to the degree to which group identities are historically contingent and internally contested. Thus, while the ambiguities inherent in Galeotti's definition of 'toleration as recognition' raise doubts about the extent to which her project can indeed be regarded as a plea for toleration, her failure to consider the social and political processes that shape group identities highlights flaws in her conception of recognition.

6.2 Toleration as Recognition

While Galeotti endorses the widely shared view that a commitment to toleration is intricately linked to the core liberal values of neutrality and impartiality and implies a negative appraisal of what is tolerated, she contends that the standard liberal analysis of the types of social conflict which give rise to instances of toleration is fundamentally flawed and consequently cannot accommodate the most significant demands for toleration in contemporary liberal societies. To secure the equal standing of all citizens, traditional liberal conceptions of toleration guarantee all citizens the liberty to pursue their values, beliefs and ways of life in the private sphere, while insisting that in the public political realm the liberal state must remain neutral vis-à-vis competing conceptions of the good. In essence, difference and diversity is confined to the private sphere, while equal citizenship for all is secured by insisting that the liberal state be 'difference-blind'. For Galeotti this widely endorsed liberal answer to the 'problem of pluralism' rests on a partial and ultimately misleading analysis of what is at stake in many of the most pressing cases of toleration in modern liberal societies. For liberals, Galeotti (2002: 60) argues, the problem of pluralism arises first and foremost 'from irreducible disagreement about

what is worthwhile in life and how life should be lived'. While the classical liberal framework of toleration as non-interference in the private realm coupled with public neutrality may well constitute an adequate response to pluralism conceived in these terms, it fails to recognise that 'behind "irreducible" worldviews and "incompatible" conceptions of the good [. . .] are in fact groups in marginalised and subordinate positions which demand to be recognised on an equal footing with majority groups' (Galeotti 2002: 65/6).

Differences relating to race, ethnicity, sexual orientation and culture typically do not reflect the freely chosen beliefs and values of individuals, but tend to act as markers for identities that are disliked and perceived as deviant by the majority. Such dislike typically stems from the perception that the characteristics, physical traits, habits, or practices of the minority differ from what is defined by the majority as the norm and thus, from the majority's point of view, constitute a threat to the established social and political order. According to Galeotti, any aspect of a powerless group may be regarded by the majority as 'different' and thus may act as a marker for the group's collective identity. While some, such as race or ethnicity, are by their very nature ascriptive, others, like culture or morality, are construed as if they are ascriptive, that is to say as if they constituted 'a fixed characteristic of the group, which readily identifies them and marks them off from other people' (Galeotti 2002: 89). This negative evaluation of certain differences by the majority has far reaching political consequences. While members of disliked minorities enjoy the legal rights of citizenship, the public disdain for their collective identity, coupled with persistent social discrimination, prevent members of such groups from developing an adequate level of self-respect and self-esteem. The subsequent feelings of shame, humiliation and self-hatred systematically undermine the capacity of individuals who belong to such groups to make 'full use of the rights and opportunities inherent in the status of citizen' (Galeotti 2002: 96).

At the same time, the liberal doctrine of a 'difference-blind' public sphere effectively renders such minorities invisible. The idea of a neutral public realm demands that individuals 'leave behind' their distinctive characteristics, traits and values when they enter the public realm. Thus individuals are incorporated into the polity not as members of social groups, but as abstract individuals. Indeed, citizens who belong to minority groups disliked by the majority are admitted into the public realm not because, but *in spite of* what the majority regards as their disagreeable particular traits and characteristics. Such inclusion, however, constitutes at best a 'fragile admission, which is always undermined by the majority's negative perception of the group' (Galeotti 2002: 97). Members of the majority, however, experience none of these disadvantages. Despite the liberal promise of neutrality and impartiality, the social standards, rules and conventions that define what is regarded as 'normal' conduct in the public realm typically reflect the norms, values, traits and characteristics of the majority. For example, being white, Christian or heterosexual is not considered a 'difference', but forms part of the taken for granted background that informs the established social standards, norms and conventions that govern the public realm. Thus, while the background assumptions that govern the public realm affirm and reflect the identity of the majority, minorities are effectively

rendered invisible. This invisibility, coupled with public disdain and social discrimination, consigns members of marginalised minorities to a *de facto* second-class citizenship. According to Galeotti (2002: 98), these disadvantages cannot be adequately addressed via some form of compensatory distribution, such as affirmative action programmes or schemes for economic redistribution, which aim to free 'individuals from the disadvantages and burdens associated with a different identity'. While the idea of compensatory distribution acknowledges the existence of social differences, it views these differences as disadvantages and thus fails to question the manner in which 'different' and 'normal' are defined. Compensatory distribution therefore falls significantly short of the legitimate aspiration on the part of minorities to enjoy equal standing in the public realm.

For Galeotti, the most pressing cases of toleration in contemporary liberal societies arise when a minority, whom the majority dislikes and perceives as a threat to the established social and political order, is willing and able to resist attempts to marginalise them and starts to assert its 'differences in some public-political space' (Galeotti 2002: 85). While in contemporary liberal societies citizens already enjoy toleration as non-interference in the private sphere, such minorities are fighting against the *public* exclusion of their identities by demanding *public respect* for their particular traits and characteristics. On Galeotti's (2002: 10) account such demands are best viewed as attempts to extend the concept of toleration from the private to the public sphere and 'from the negative meaning of 'toleration as non-interference' to a positive sense of acceptance and recognition'. It is this extended conception of toleration which Galeotti terms 'toleration as recognition'. 'Toleration as Recognition' rests on the premise that marginalised minorities will only be able to feel fully accepted and respected for what they are, if their identity, 'purified of its negative connotations', is publicly recognised (Galeotti 2002: 99). To allow minorities to assert their differences in the public-political realm not only increases the liberty of group members by 'opening up public spaces which are currently closed to them', but, more importantly, it also 'symbolically affirms the legitimacy of that behaviour and corresponding identity' and thus 'signifies their inclusion in the public sphere on the same footing as those whose practices and behaviour are "normal"' (Galeotti 2002: 101, 100).

To allow the wearing of the Islamic veil in public schools, to admit gays into the army, or to recognise same sex marriages, can be seen as symbolic acts of public toleration that affirm the legitimacy of these identities and signal the inclusion of these groups in the public realm. For this symbolic meaning of acts of toleration to be effective, the reasons given should explicitly address the problem of exclusion and should acknowledge that the current asymmetries in power between the dominant cultural standards and practices and the life-style of the minority give rise to a particular type of social injustice which undermines the respect for and dignity of these minorities. Since public recognition of minority identities seeks to remove the unfair advantage enjoyed by the majority to exclusively define societal standards and norms, Galeotti argues that 'toleration as recognition' is not just compatible with the liberal commitment to neutrality, but is essential if liberalism is to deliver on the promise of a truly neutral public sphere. Furthermore, since toleration

thus conceived can be extended to all groups that pass the standard liberal 'harm test', it also respects the liberal commitment to impartiality.[1] Rather than seek to compensate minorities for the disadvantages attached to their difference, 'toleration as recognition' aims to ensure that *all citizens* are 'positively at ease with their full-blown identities in public as well as in private' (Galeotti 2002: 105). Hence, for Galeotti, 'toleration as recognition' provides the foundations for a truly neutral and impartial public realm.

6.3 Equality, Diversity and Recognition: The Limits of 'Toleration as Recognition'

Galeotti's insightful analysis of the role of social differences and the impact of power asymmetries in contemporary social conflicts constitutes a powerful critique of models of pluralism that seek to confine difference and diversity to the non-political private realm, and highlights the significant obstacles that minorities face in their quest for full and equal inclusion in the public realm. What is, however, less certain is whether her notion of 'toleration as recognition' does indeed offer an adequate response to the complex issues of power and identity that are central to her critique of traditional liberal conceptions of toleration. Her proposals in this regard remain problematic on at least two counts: (1) the ambiguities inherent in her conception of 'toleration as recognition' and (2) her failure to systematically analyse the social and political processes that shape the very identities that are to be recognised.

As critics such as Peter Jones (2006) have been quick to point out, the very idea of 'toleration as recognition' is indeed somewhat puzzling. Given that by definition 'toleration' entails a negative appraisal of what is to be tolerated, while the notion of recognition implies some form of positive evaluation, to be asked to simultaneously 'tolerate' and 'recognise' appears paradoxical. One potentially promising way of resolving this apparent paradox is to conceive of 'toleration as recognition' in purely institutional terms. On this account, a tolerant political order is one that 'vetoes the use of political power to prohibit beliefs or practices, even though some of its citizens may disapprove of those beliefs and practices' (Jones 2006: 130). Such a state is tolerant not because it itself engages in acts of toleration, but because it upholds the ideal of toleration. This way of conceiving of 'toleration as recognition' resolves the apparent paradox of simultaneously tolerating and recognising by distinguishing between the agents engaged in acts of toleration and those who grant recognition: while the state *recognises* the right of minorities to exhibit their traits and characteristics in the public realm, the disapproving majority is expected to *tolerate* such

[1] As Galeotti states: 'However conceived of, it is clear that toleration must have limits, because there are some forms of behaviour and practices that cannot be tolerated: for example, homicide, rape and robbery are obviously not candidates for toleration (2002: 22).

conduct. Although this lends a sense of coherence to Galeotti's project, conceiving of 'toleration as recognition' in purely institutional terms arguably falls well short of Galeotti's aspirations. After all, it is difficult to see how, in the face of the majority's grudging toleration, minorities could begin to feel genuinely respected and 'positively at ease with their full-blown identities in public as well as in private' (Galeotti 2002: 105). Indeed, Galeotti's own discussion of the limits of toleration suggests that stable recognition requires more than just a change in the institutional framework.

While Galeotti stresses the importance of symbolic acts of 'toleration as recognition' in changing what is perceived as 'normal' conduct in the public realm, she acknowledges that such steps are liable to be insufficient to secure the full inclusion of oppressed, marginalised and invisible identities. To safeguard minorities against persistent prejudices and stereotypes it may at times be necessary to grant newly admitted groups special protections against practices, such as racist or sexist language, which are seen by the minority as offensive to their image and, which are, 'consequently, likely to undermine the stability of their public presence' (Galeotti 2002: 110). While Galeotti acknowledges that such measures require careful evaluation since they entail restrictions of traditional liberal rights such as freedom of speech, she nonetheless maintains that at least in some instances 'taking a public stance against racism, sexism and homophobia' may be vital to ensure that minorities can participate in the public realm on an equal footing (Galeotti 2002: 111). Yet, while a refusal to tolerate speech and attitudes that threaten to undermine the equal standing of minorities may well be essential to ensure that minorities feel at ease with their full-blown identities, such attempts to eradicate prejudice and stereotypes within society at large go well beyond purely institutional recognition. Indeed, given that minorities will only feel fully at ease in both the public and the private realm if they can secure genuine endorsement by the majority in their day to day interactions, the success of Galeotti's project appears ultimately to rest on what Seglow (2003) terms 'wide recognition', that is to say the according of status, respect and legitimacy by society at large. Yet, if the overall success of the project depends on changing the underlying attitude of the majority, so that the identities of previously disliked minorities are now endorsed as legitimate and are accorded equal status, Galeotti's project would appear to leave little room for true acts of toleration. At best, toleration could play a temporary role in the transition from an initial phase of purely institutional recognition, during which the majority come reluctantly to accept the characteristics and traits of the minority as an unavoidable and everyday feature of public life on the one hand; and on the other Galeotti's ultimate goal of stable recognition marked by the according of status, respect and legitimacy to minority identities by society at large. Yet, once the majority come to regard the identity of the minority as legitimate, valuable and worthy of respect, the original source of dislike or disapproval has been removed. In these circumstances it is difficult to see how the recognition of such identities could be construed as an act of toleration.

Galeotti seeks to guard against such a conclusion by distinguishing her conception of 'toleration as recognition' from the strong forms of recognition that inform

the accounts of writers such as Charles Taylor (1992). Thus, on Galeotti's (2002: 103) account, recognition does not entail 'acknowledging or even endorsing the intrinsic value of the difference in question'. Indeed, recognition on these terms would, Galeotti insists, be incompatible with the fundamental liberal commitment to neutrality and impartiality. Differences should not be acknowledged because they are valuable per se, 'but because they are important for their bearers and because expression of public contempt for them on the grounds that they depart from the social "norm" are a source of injustice' (Galeotti 2002: 104). Therefore 'toleration as recognition' merely signifies the acceptance that this practice or life-style falls within the 'normal range of viable options in society' (Galeotti: 2002: 104). However, it is far from clear that recognition thus conceived does indeed sidestep the normative implications associated with stronger forms of recognition. As Jones (2006) notes, recognising differences as legitimate, normal and viable arguably still entails a public endorsement or validation of the kind Galeotti wants to avoid. Although the presence of minority symbols and practices in the public realm may well help to break down majority disapproval grounded in incomprehension, unfamiliarity and ignorance, genuine cases of toleration typically arise when 'people possess different and conflicting value horizons' and therefore 'hold different and conflicting views on the merits of one another's differences' (Jones 2006: 135/6). Yet to recognise a practice as part of the 'normal range of *viable* options' requires more than a grudging acceptance that in a diverse society this practice constitutes an inevitable feature of public life. For example, while a person who views homosexuality as morally abhorrent may well come to accept that in a diverse society this practice constitute an everyday and unavoidable aspect of public life, such a person is unlikely to endorse homosexuality as legitimate and viable (in the sense of worthy of respect). Given a genuine diversity of ways of life and conceptions of the good, some citizens may well believe that some forms of life are 'illegitimate and properly assigned to the abnormal' (Jones 2006: 139) Thus, if 'toleration as recognition' is to amount to more than a mere adjustment to the current institutional arrangements, 'recognition' must be accompanied by a change in the attitudes and sensitivities of all citizens. Ultimately, symbolic acts of recognition will only help previously marginalised minorities to feel at ease with their full identities in both public and private[2] if they 'symbolise a positive regard that the wider society (the majority) has for the minority' (Jones 2006: 130). However, 'recognition' in these terms does not leave much room for acts of toleration. As Mendus (2003: 701) notes 'toleration enters the scene when (rightly or wrongly) the majority deny that the

[2]According to Jones (2006), we could recognise a group we disapprove of by combining general recognition (i.e., recognise members of the group as fellow citizens); subject recognition (i.e. include the group within a category that already enjoys recognition); and mediated recognition (i.e. include the group within a more general identity, which in turn provides a reason for the subsequent recognition of the group's specific identity). Yet, Jones argues, such forms of recognition fall short of Galeotti's demand for the direct, unmediated recognition of particular identities. Thus, on Galeotti's account, 'only if Muslims secure recognition as Muslims, and gays as gays, will we surmount the obstacles to their full inclusion' (Jones 2006: 137/8).

views and beliefs of the minority are worthy of respect or recognition or inclusion'. Thus Galeotti's attempt to develop a less demanding conception of recognition fails to allay the worry that, on her account, acts of genuine toleration will only play a temporary role in the transition from an initial phase of purely institutional recognition, accompanied by the non-toleration of attitudes and speech that undermines the public standing of newly admitted minorities, and the ultimate goal of stable recognition and full inclusion marked by a shift in public attitude vis-à-vis previously marginalised minorities.[3] What is more, as 'mere' acts of toleration become construed as failures of recognition, there is a danger that Galeotti's model will indeed undermine the commitment to and appreciation of the importance of genuine acts of toleration. A politics that emphasises 'recognition' may give rise to a 'slippage' whereby that which cannot be respected or recognised comes to be perceived as 'intolerable'. This may well be to the detriment of minorities whose conception of the good or way of life is, rightly or wrongly, regarded by the majority as not worthy of respect or recognition.

6.4 The Further Limits of 'Toleration as Recognition': Questioning Galeotti's Defence of the Politics of Recognition

While the concerns above raise doubts about the extent to which demands for the recognition of particular identities can indeed be construed as pleas for toleration, Galeotti's failure to explore the social and political processes that shape the very identities for which she seeks to secure recognition gives rise to a potentially even more troubling set of worries. Group identities are not 'fixed' or 'given', but are construed and re-construed within the context of the social and legal environment that groups inhabit. Given that cultures are ever-changing, we cannot readily identify a set of universally acknowledged 'sacrosanct cultural practices' or 'pre-existing authentic cultural essences' that require recognition (Seglow 2003: 63). What a particular identity entails and what constitutes due recognition of such an identity is fluid; and the extent to which a group assimilates or asserts its differences, the kind of differences that are emphasised and the type of recognition that is demanded are all issues at least in part determined by the wider social and legal climate. This fluidity gives rise to the worry that a politics informed by 'toleration as recognition', which emphasises the importance of difference and diversity, may tempt minorities to exaggerate their differences and consequently may encourage them to seek ever more substantial forms of recognition, such as demands for public resources to maintain the integrity of the minority's culture. Such demands may at times be less a reflection of long-standing grievances, but an attempt to bolster and entrench

[3] As Seglow (2003) notes, while Galeotti assumes that purely institutional recognition will gradually lead to wide recognition, there are, of course, no guarantees that this will indeed be the case. Purely institutional recognition may just as well give rise to a backlash on the part of the majority.

the distinctiveness of the group in order to lend weight to the group's claim to a clearly defined identity that deserves recognition.[4] At other times, they may simply constitute a way of securing particular advantages for group members. While Galeotti (2002: 209) acknowledges that demands for strong forms of recognition, such as claims for public support for minority cultures, must be carefully scrutinised to establish 'whether they are supported by reasons of justice or whether the claimants are simply being opportunistic and using identity as a means of pursuing the group's interest' to secure a greater share of economic resources, she fails to consider that the very perception of what a particular identity entails and hence what justice demands will itself be shaped in part by the social and legal framework that groups inhabit.[5] Indeed a politics informed by 'toleration as recognition' may not only tempt minorities to exaggerate their distinctiveness to lend weight to their demands, recognition may also ossify minority identities as members of minorities who seek to assert their identity in the public realm are pressurised to conform to the symbols, practices and values that are recognised by the state as expressions of their 'authentic' identity. Once recognition has been granted, the state exerts a subtle, but none the less potentially powerful, influence upon the dynamics that shape the identity of minorities across time.[6] Finally, what constitutes due recognition for a particular identity is often contested and may constitute an issue on which 'minority and majority may have sharply differing attitudes' (Lukes 1997: 218). Such differences may be particularly pressing in the case of minorities, such as certain religious communities, whose values, concerns and priorities cannot be readily accommodated, or for that matter understood, within the context of a liberal public realm. For example, while controversies such as the Rushdie affair and the Danish cartoons have highlighted the extend to which religious minorities may struggle to express their most pressing concerns regarding the respect due to God and his prophet in terms of the secular language that informs public reasoning in contemporary liberal

[4]Given that states, confronted with numerous demands for recognition, will have to decide which demands are justified and in what order of priority, it may well be in a group's interests to make stronger rather than weaker claims for recognition, given that the former may well be seen as an indicator of a greater degree of exclusion and may thus be regarded as more pressing.

[5]While Galeotti's main examples – the wearing of the Islamic veil in public schools, the admission of gays into the army and the recognition of same sex marriages – focus on potentially less radical and controversial demands for changes in public standards, rules and conventions to accommodate the needs and desires of minorities, she offers a sixfold typology of potential group-differentiated laws and policies, ranging from claims for the public toleration of social differences and claims for limiting toleration to demands for special support to secure the integrity of a minority and claims for collective rights to group autonomy and group liberty (see 197–219). Although Galeotti maintains that claims for collective liberty fall outside the scope of a politics of 'toleration as recognition', since these are demands for 'separation' rather than inclusion on equal terms, she acknowledges that in cases of serious group conflict and enmity, where the only alternatives are cultural domination, repression and terrorism, it may well be appropriate to grant such demands. While this may well be true, Galotti fails to consider the extent to which a politics informed by 'toleration as recognition', may encourage groups to exaggerate their differences and thus may itself help to stoke up levels of conflict and enmity.

[6]I would like to thank Monica Mookherjee for this point.

democracies, the significance that many Muslims attach to Islamic personal and family law cannot be readily reconciled within traditional liberal conceptions of the nature and extend of the religious realm.[7] In instances such as these, 'toleration as recognition' cannot avoid entanglement with difficult debates regarding fundamental values and conceptions of the good, which Galeotti seeks to consign to 'old' forms of purely negative liberal toleration.

Galeotti's failure to systematically address the impact of the social and political processes that shape identity formation arguably stems in part from her belief that: (1) recognition is non-exclusionary, that is to say that recognition of one identity does not preclude the recognition of others; and (2) that once a particular identity is recognised it is up to individuals to decide whether or not they wish to identify themselves in these terms. Thus, according to Galeotti (2002: 105/6):

> Once the Islamic veil is admitted in school, or the gay in the army, it is up to individuals to decide whether or not to wear it and whether or not to declare their sexual preference; they need not feel committed to asserting their difference.

Yet this rather optimistic picture of non-exclusionary forms of recognition of identities, which individuals may or may not choose to claim as their own, fails to take account of the power dynamics *within* minority groups. A politics informed by 'toleration as recognition' may not only lead to pressure upon individuals to identify themselves primarily in terms of their membership of a particular group, but may also shore up significant inequalities of power within minority groups by reinforcing dominant interpretations of which practices and symbols define the collective identity of a group.

In modern societies individuals typically belong to many and sometimes opposing groups, and membership of a particular cultural, religious, ethnic or sexual minority constitutes only one of many potential sources of identity. A person's occupation, social status or choice of neighbourhood may all contribute to her sense of self. While for some individuals a particular collective identity may carry special significance, for others it may be just one of a whole range of different affiliations, while yet 'others may have a strong interest in denying or avoiding one or more such affiliations' (Lukes 1997: 221). In the face of such a range of possible sources of identity, a politics that emphasises the significance of membership of particular kinds of minorities may lead to pressure upon individuals to identify themselves in these terms. Indeed, as Amelie Rorty (1994) notes, in the context of the American multiculturalism debate, members of Jewish American and African American communities have at times been pressurised to identify themselves primarily in terms of their cultural identity. These communities tend to expect their members actively to participate in promoting specific policies associated with Jewish or Black interests and to vote along ethnic lines. While individuals may choose to resist such pressures, such resistance often carries with it costly personal consequences in terms of

[7] While Parekh (2000) offers a useful analysis of the Rushdie affair, Loenen (2002) provides an insightful discussion of the significance of Islamic personal and family law for Muslim identity.

losses of alliance and friendship. Similar constraints may well arise within the context of Galeotti's own examples. Once gays are admitted into the army, members of the gay community who work in the armed services may well face considerable peer group pressure publicly to declare their sexual preferences as a sign of group loyalty and failure to do so could well lead to ostracism or a loss of friendship.[8] Given a politics informed by 'toleration as recognition', it is far from certain that individuals will be as free as Galeotti assumes to endorse or reject the group identity that is being publicly projected and for which recognition is sought.

This is not to deny that marginalisation and group hostility can also lead to pressure on group members to conform to established group norms and values. Faced with either external hostility or pressure to assimilate, groups at times emphasise the importance of strict adherence to traditional group laws, norms and practices in an attempt to 'clearly mark off the group's boundaries by walling it off from the outside world' (Shachar 2001: 36).[9] However, to respond to such 'reactive culturalism' with policies of recognition designed to uphold the validity of established customs, norms and traditions is liable merely to shore up inequalities of power *within* minority groups. Group identities are not only fluid, they are also often strongly internally contested. In the face of such contestation, the public recognition of particular identities always runs the risk of re-enforcing (through public acknowledgement) the dominant interpretations of group practices, values and symbols. Recent debates regarding the complex relationship between a commitment to gender equality and demands for cultural justice have highlighted some of the potential dangers in this regard. While many established cultural and religious customs discriminate against women, cultures typically attach great significance to the cultural expectations that shape gender roles.[10] Indeed in struggles for the recognition of minority cultures, women and their bodies often assume a particular significance (Benhabib 2002) Not only do women reproduce future members of the group, they usually also play a vital role in the transmission of the collective identity from one generation to the next as well as the public demarcation of group membership through symbols such as dress. The subsequent desire to uphold traditional gender roles can be particularly acute in the case of cultures that seek to preserve their identity and way of life in the face of what are perceived as unwelcome forms of assimilation. Yet to analyse the ensuing tension between a typically liberal commitment to gender equality and

[8] Occasional campaigns to publicly 'out' so called 'closet gays' provide one example of the possible peer group pressures in this regard.

[9] According to Shachar (2001: 36) such 'reactive culturalism' is evident in religious communities ranging from 'Orthodox Judaism to Islamic traditionalism to Evangelical Protestantism'. Such groups typically seek to control significant aspects of their members' everyday lives and frequently 'petition the state for legal permission to do so'.

[10] Here feminists frequently express concern about the impact on women of practices such as female circumcision (which Galeotti regards as beyond the limits of 'toleration as recognition'), polygamy, child marriages or forced marriages and gender-differentiated rules regarding divorce. In addition there are worries relating to gender equality in relation to access to education, employment and vulnerability to violence.

demands for cultural recognition as a fundamental clash of values or as a conflict between clearly delineated essential identities may be misleading. As feminists such as Deveaux (2006), Phillips (2007) and Shachar (2001) have shown, such struggles often reflect disruptions in social power relations and hierarchies and are thus often best analysed in terms of power. Indeed tensions between liberal norms and many of the cultural practices that have given rise to concern among feminists expose not just *intercultural* disputes, but often also highlight *intracultural* disagreements over the interpretation, meaning and legitimacy of particular norms. Such conflicts are often strategic or political in character, reflecting interests and power relations both within the community and between the community and the wider society. For example, in recent years there has been considerable debate within Jewish and Muslim communities regarding the origin, nature and interpretation of the communities' personal and family law (Shachar 2001). In this context Muslim women's rights activists, such as the transnational network Women Living Under Muslim Law (WLUML), have sought to reinterpret existing law and to promote greater gender equality via an appeal to alternative readings of the Qur'an or by pointing to inconsistencies in current practices (Sunder 2006).

While Galeotti is sensitive to the ways in which power asymmetries shape the relationship between the majority and marginalised and vulnerable minorities, she pays remarkably little attention to the impact of power relations *within* minority communities. For example, while in her nuanced debate of the dispute regarding the wearing of the Islamic headscarf in French public schools, Galeotti is rightly critical of arguments that simply equate the Islamic veil with women's subordination and thus seek to prohibit it in public schools in an attempt to protect girls from the harmful effects of a patriarchal culture, she fails to consider that veiling itself is a highly contested practice within Islamic communities. While some Muslim women may freely choose to wear the veil and may indeed regard it not as a symbol of subservience, but of empowerment and resistance, the degree to which veiling should be viewed as an essential aspect of an Islamic identity and if so what form of headcovering this entails is highly contested.[11] In the face of such contestation to simply endorse the wearing of the Islamic veil as a quintessential public expression of an Islamic identity is to ignore some of the complex issues inherent in such struggles for recognition. Not only may the public recognition of the veil make it harder for individual women who do not wish to wear the veil to resist family and community pressure to veil in public, it may also serve as a symbol in *intra*-community struggles between traditionalists and reformers regarding women's role and obligations. Leaders, spokespersons and other powerful members of the community often have a strong vested interest in suppressing or denying the fluidity and historical contingency as well as the internally contested nature of established cultural practices and values. In such a context public acknowledgment for the dominant interpretation of a group's values, norms and symbols runs the risk of shoring up existing power inequalities within the group. Once the dominant interpretation of a group's identity has been publicly recognised, it becomes more difficult to publicly assert the

[11] For a discussion of this point see Honig (1999) and Carens (2000).

legitimacy of alternative conceptions of the group's identity. Such worries are liable to be become yet more acute in the face of more substantial demands for recognition, such as demands for public support to maintain the integrity of the minority's culture.

This in itself should not be seen as a conclusive argument against permitting practices such as the wearing of the Islamic veil in public schools. Some Muslim women clearly do freely choose to wear the veil and regard it as an important symbol of their identity. To fail to permit such women to express their identity in public is disrespectful of both their cultural and religious identity and their autonomy. It does, however, highlight that power struggles over the meaning, interpretation, and legitimacy of cultural practices and norms take place as much within communities as between the minority and the majority. While Galeotti (2002: 209) stresses that political authorities faced with demands for public support to maintain the integrity of a minority's culture should carefully assess such claim to ensure that they do not constitute merely strategic attempts to further group interests and, more specifically, the power of the group's spokepersons, her model offers little guidance as to how such claims are to be adjudicated. In the absence of well-defined institutional mechanisms that promote intra-community debate and enable marginalised and vulnerable group members to voice their concerns and to challenge established interpretations of community values and norms, political authorities will be ill-equipped to reach such decisions. While recent debates regarding gender equality and cultural justice have given rise to a number of sophisticated models that combine public recognition with institutional mechanisms for intra-community debate and contestation (e.g. Shachar 2001, Deveaux 2006), Galeotti's account remains notably underdeveloped in this regard.

Ultimately Galeotti's picture of identity politics remains profoundly problematic: In the absence of a systematic exploration of the social and political processes that shape group identities, Galeotti is confronted with the uncomfortable choice of defending an account of recognition that rests either (1) on a reified and essentialist account of group identify, which assumes that we can readily identify a group's authentic values, norms and practices, or (2) on the equally implausible notion that once a particular identify has been publicly recognised, individual group members can freely choose whether or not to endorse this identity as their own. Both accounts ignore the often bitter intra-community struggles to control the meaning, interpretation and legitimacy of the values, norms and symbols that define group identity, and fails to acknowledge the very real pressures that individual group members may face to uphold the group identity that is being publicly projected and for which recognition is sought.

6.5 Conclusion

While Galeotti's analysis in 'Toleration as Recognition' undoubtedly offers a powerful critique of conceptions of pluralism that seek to confine difference and diversity to the non-political private sphere, her notion of 'toleration as recognition', fails

to offer an adequate response to the complex issues of power and identity central to her critique of traditional liberal conceptions of toleration. The recognition for minorities that Galeotti demands requires a significant shift in the attitudes of the majority away from disapproval and dislike and towards acknowledging the identity of the minority as legitimate, normal and viable. However, once this shift in attitude has been accomplished, it is difficult to see how such acts of recognition could be construed as toleration. Indeed, there is a danger that an emphasis on recognition may undermine the commitment to genuine acts of toleration. While these worries raise doubts about the extent to which Galeotti's project can indeed be regarded as a plea for toleration, her failure to consider the ways in which power dynamics within minority communities shape struggles for recognition highlights the limitations inherent in her account of recognition and identity politics. Although her model addresses the power asymmetries between the majority and marginalised minorities, it fails to consider the impact of intra-community struggles to control the meaning, interpretation and legitimacy of the values, norms and symbols that define group identity and the subsequent need for intra-community mechanisms which facilitate debate and empower marginalised and vulnerable group members. This failure leaves her account of power struggles regarding identity and citizenship in contemporary liberal societies ultimately flawed.

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Part II
Cases, Concepts and New Frameworks for Accommodating Religion in Liberal Democracies

Chapter 7
Modus Vivendi and Religious Conflict

John Horton

7.1 Introduction

> I recall a remark made to me by Stephan Korner, which I found a compliment, after a paper on moral conflict: "You said it's all a mess, and it is all a mess" (Williams 2005: 52).

Conflict of one sort or another, of a wide variety kinds and of differing degrees of seriousness, is endemic to almost all societies, and there is no reason at all to think that this will ever cease to be the case. Indeed, in so far as conflict can sometimes be valuable, for instance, in facilitating lively debate and the pursuit of better informed views and opinions, as a motor of social improvement, or because we value some measure of human diversity, we should surely not want conflict to be entirely eliminated, even if *per impossible* it could be. However, there is also no doubt that some conflicts, particularly if they have the potential to lead to hatred and violence, pose a threat of disruption to social and political order, and at their most extreme they have the potential to destroy it. And, even when the threat that they pose is less severe than that extreme, conflict can be the source of some intensely negative experiences. It is this negative or problematic side of conflict that will be of concern here, and I mention its positive side primarily because it is important to appreciate that while it is necessary to some degree to 'manage' and contain conflict in the interests of maintaining a stable social order and the multitude of other goods that makes possible, it would be a mistake to think that this negative side is all that there is to conflict. It certainly can be a problem, but it is not always that, and even when it is a problem it is often not only a problem, but may have valuable aspects too. This is also a reason why it is often (not always, of course) best to think in terms of containing conflicts rather than resolving them.

One of the most profound sources of social conflict in human history has been religion. It may have been felt in some quarters a few decades ago that, at least

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in Western democratic societies, the kind of religious conflict that posed a serious threat to social order was largely a thing of the past. We now know better: religion remains a site of serious social and political conflict. I shall have more to say specifically about conflicts in which religion plays a primary role later, but while it is important to acknowledge the many specificities of religious conflicts I want to begin by addressing the issue of managing conflict more generally. In particular, I shall seek to sketch a general approach to dealing with social and political conflict, including religious conflict, associated with what I call 'a political theory of modus vivendi'. This is an approach that lies somewhere among the broadly 'realist' strands of contemporary political theory that William Galston has helpfully set out, which although marked by important differences between them, are all a reaction against the moralism, legalism and parochialism of American liberal theory' (Galston 2010). Historically, such an approach owes more to Hobbes and Machiavelli than to Kant, or even to Locke; and includes among recent theorists, for instance, John Gray (2000), Raymond Geuss (2008), Patrick Neal (1997), Glen Newey (2001), Judith Shklar (1989) and Bernard Williams (2005). What follows is much indebted to many of these theorists, but does not follow any them in terms of the details of its approach.

Before specifically addressing issues of religious conflict, therefore, I need to begin by explaining what is meant by a political theory of modus vivendi, and how my understanding of how such a theory differs from some other uses of the idea of modus vivendi in contemporary political theorising, and in particular contrasting it with probably the two most familiar deployments of the term; those of John Rawls (1993) and John Gray (2000).

7.2 Modus Vivendi

The currency of the term 'modus vivendi' in contemporary political theory is due principally to John Rawls. However, Rawls introduces the idea of a modus vivendi, or a 'mere modus vivendi' as he typically calls it, with the express purpose of rejecting it, and compares it unfavourably with his own theory of justice. He characterises a modus vivendi as a form of political settlement based solely on a balance of political forces, rather than being grounded in a set of moral principles: it is, in short, simply the best deal that the parties, each pursuing their own interests, think they can get at that moment in time. Rawls rejects such a settlement primarily because, he claims, it must be inherently unstable. By this, Rawls does not mean only that *in fact* such settlements are highly unlikely to persist for very long, for his main point is a more subtle one: this is that a modus vivendi provides no reliable or entrenched motivation for people to adhere to it. Because the only reason people adhere to any modus vivendi is that they cannot lever more out of the situation at an acceptable cost to themselves, so their motivation to uphold the settlement is entirely dependent on the balance of political forces (and their perception of their own interests) remaining pretty much as they are. Thus, as soon as the balance of forces shifts in one group's favour, they have a good reason to defect from the settlement and seek a revision in its terms more advantageous to them (Rawls 2001: 194–195). While

more than Rawls allows could be said by way of its defence (Dauenhauer 2000, Hershovitz 2000), *if* this is what is meant by a modus vivendi then there is also certainly something to be said in favour Rawls's critique of it as a basis for any lasting political stability. But, this is a very narrow and limited interpretation of the idea, and unsurprisingly it is not quite what I mean by a political theory of modus vivendi.

I also mean something rather different from John Gray, who, by contrast with Rawls, positively embraces a form of modus vivendi. There is much in what Gray says in this context that is highly congenial to the position developed here, but the particular difference between us concerns the relationship that he maintains holds between modus vivendi and a particular theory of value: value-pluralism. For Gray:

> Modus vivendi expresses the belief that there are many forms of life in which humans can thrive. Among these are some whose worth cannot be compared. Where such ways of life are rivals, there is no one of them that is best. People who belong to different ways of life need have no disagreement. They may simply be different (Gray 2000: 5)

While I have considerable sympathy with this view of value, and indeed the kind of picture that Gray paints more generally, I do not want to tie the political theory of modus vivendi, as he does, to the truth of value-pluralism. For, value-pluralism is a highly controversial account of the nature of value, and one that is quite widely rejected. Moreover, even though I find value-pluralism an attractive view, Gray's account of it is not without some puzzling features and potential philosophical difficulties (Horton 2007). It is perhaps pertinent to note, too, that not all value-pluralists are supporters of modus vivendi (Raz 1986), which itself perhaps suggests that the connection is not as strong as Gray implies.

More importantly, though, from the perspective of the argument developed here, to make the defence of modus vivendi depend upon the truth of value-pluralism is not only to base it on a metaphysical view that may turn out to be false, but one that, even if it is indeed the correct view about the nature of value, because it remains highly controversial, is not a satisfactory basis for adopting a political theory of modus vivendi. Value-pluralism is not a view that is accepted by a wide range of people: it and cannot, at least for them, explain why they should accept a political theory of modus vivendi. It is for this latter reason in particular that value-pluralism is less than ideal as the grounding for a political theory of modus vivendi, which (at least on my account) seeks to minimise – it cannot be avoided altogether – the role of any contentious philosophical or metaphysical claims. So, to be clear, while not denying that value-pluralism, if it can be satisfactorily defended against criticism, may be one, potentially powerful route by which such a political theory could be advanced, what is being rejected is any claim that this is the *only* way to do so, and also any suggestion that the political theory of modus vivendi and value-pluralism must stand or fall together (a position that would of course also be rejected by those theorists who endorse value-pluralism, but do not embrace modus vivendi).

The conception of modus vivendi that I seek to articulate, therefore, should be understood neither as merely a perpetually precarious balance of political forces, nor as necessarily tied to the truth of some version of the theory of value-pluralism. It is rather an account of political arrangements conceived as the practical outcome of processes of discussion, negotiation, persuasion, bargaining and compromise

prompted by conflict and disagreement, which at a particular point in time cannot be resolved in a such way that the parties no longer continue to disagree about the substantive merits of whatever is at stake; that is, the dispute is not resolved by all but one of the parties being persuaded of the error of their ways, and the conflict therefore being effectively dissolved. Basically, a modus vivendi can be understood as 'an arrangement between. . .groups that effects a workable compromise on issues in dispute without permanently settling them' (Dauenhauer 2000: 219). It could also be called, in the everyday sense, as distinct from its philosophical meaning, a 'pragmatic' settlement.

As such, it does not require the parties to accept the validity of value-pluralism. But nor need it be (and generally it will not be) simply a matter of the playing out of the balance of political forces. For, a modus vivendi emerges through the deployment of whatever moral, intellectual, cultural, rhetorical, emotional, motivational and other resources that the parties can bring to the political process of dealing with conflict. These may be grounded in self-interest, prudence or morality, or most likely some unsystematic and inchoate amalgam of them all. In particular, though, I want to stress that these resources include, *contra* Rawls, whatever moral principles and ethical commitments the parties bring to the conflict that can contribute constructively to the emergence of an effective and workable compromise. This is likely to include whatever relevant values happen to be common between the conflicting parties, but can also draw on values that only some parties to the conflict hold, which nonetheless may have the effect of contributing towards the achievement of a viable modus vivendi. However, what resources are available and whether they are sufficient to generate a modus vivendi is always, both in principle and in practice, an open question, subject to the vicissitudes of contingency in its many manifestations. Moreover, a modus vivendi is also always historically conditioned and, in a sense, contextually specific; and it need claim no theoretical validity beyond its effectiveness in a given situation. The aim of a modus vivendi is to address a particular problematic conflict in a specific historical and cultural setting, and while principles and practices of more general applicability may emerge, these are not the point of a modus vivendi.

There are two aspects or dimensions that are fundamental to this conception of modus vivendi as a workable compromise: one might be said to concern its form, the other its content. The first is that implicit within the idea of a modus vivendi is the requirement that it must be in some sense 'acceptable' to the various parties to it. The parties to the conflict must be able and willing to live with it, even if with some significant degree of reluctance, at least as a basis for possible further bargaining, negotiation and compromise, and the subsequent creation of a new modus vivendi. Although the arrangement is not what any of the parties would most desire, they nonetheless accept it as authoritative, at least for the time being. This means that for a political order to be one of a genuine modus vivendi it cannot be imposed simply by *force majeure*, which is not to say that, for example, threats to be disruptive or uncooperative cannot be part of the political process through which a modus vivendi may emerge. Nor is it to imply that force is not important in upholding a modus vivendi, as there is always the possibility of parties succumbing to temptations to

defect. Indeed, part of what is involved in a political modus vivendi is accepting the legitimacy of its coercive enforcement. There is a balance to be struck here between on the one hand, an over-idealised conception of the conditions of 'acceptance' and a failure to acknowledge the often indispensible role of coercion even in maintaining arrangements that are accepted, and, on the other, making a modus vivendi indistinguishable from an effective political order coercively based only on repression and fear. And it must be conceded that this both stands in need of further elaboration and that any such elaboration is likely to leave considerable room for differences of interpretation.

Secondly, a modus vivendi is an ordered arrangement that is marked by a tolerable level peace and security. This is not, it should be emphasised, to make peace and security a *summum bonum* or super-good, but only to recognise that virtually all parties to a conflict have some interest in these goods as at least instrumental to realising their more fundamental goals and values. Nor, as they are always matters of degree, is there any precise measure or threshold for what counts as a peaceful and secure state of affairs, although we are likely to be in little doubt as to when they are clearly absent. Often in political contexts a modus vivendi includes within it acceptance of some institutional structures and processes as ways of dealing with ongoing conflict and disagreement. Although a modus vivendi certainly can be the result of a one-off compromise over a particular issue, it can also, therefore, be about creating, embedding, or reforming institutions and processes for dealing with such conflict and disagreement on a regular basis (Hampshire 1999). Legislation, too, is one common and obvious way in which a modus vivendi may be given a more lasting form. Institutions and laws help to stabilise a modus vivendi and make it less transient, which is essential to sustainable conditions of peace and security. Thus, while what is open to legislation within a modus vivendi is in principle unrestricted, this does not mean that in fact everything is being constantly renegotiated, or that many matters are not settled and uncontentious. Again, much more needs to be said to flesh out this skeletal presentation. Although this cannot properly be undertaken here, before considering how this approach can be brought to bear specifically on religious conflicts, it may be helpful to say just a little more in general terms by further contrasting this conception of modus vivendi with some features of Rawls's political theory.

One difference between Rawls's position and this conception of modus vivendi becomes very evident if we focus, for example, on the role of compromise in the two approaches. Claudia Mills has gone so far as to claim that:

> It is odd that throughout *Political Liberalism* 'compromise' is treated as a dirty word, as though the last thing we would ever want is (curled lip, sneering tone) a *compromise*. Rawls insists that an overlapping consensus involves "a balance of reasons as seen within each citizen's comprehensive doctrine and not a compromise compelled by circumstances" (Rawls 1993: 169). Or concerning the overlapping consensus "No one accepts the conception driven by political compromise" (Rawls 1993: 171, Mills 2000: 196)

Although this is perhaps slightly misleading, in that Rawls does allow a place even within his ideal theory for some notion of a fair compromise, it is substantially accurate; for it is the prior conception of fairness, of course, rather than compromise,

which bears the normative weight in Rawls's position. Moreover, while it may also be the case that there is a wider role for compromise in what Rawls calls 'non-ideal theory', as he says almost nothing about that, it is hard to know. Within his ideal theory, however, the space for compromise seems to be very limited, and is always circumscribed by the lexical priority of the principles of justice. Any compromise *with* the principles of justice is deemed unacceptable, as too it would seem are bargaining and negotiation, if they in any way reflect inequalities of power, weight of numbers or intensity of feelings, rather than what are regarded as appropriately principled political motivations.

Furthermore, the distinction between ideal and non-ideal theory is itself a distinction of which the political theory of modus vivendi is naturally suspicious, and for which it has little use. One of the defining features of such a theory is its acknowledgement that in politics we are pretty much always dealing with the non-ideal (indeed, often, in truth, seeking to promote or protect the not very good when faced with the prospect of the even worse), and that any adequate political theory should be sensitive to this characteristic feature of political life. Nor does it accept in any substantial sense that we need ideal theory to guide non-ideal theory – we can often identify an improvement without any clear idea of what the ideal would be (Horton 2005: 31–33). Thus, by contrast with Rawls's generally negative assessment of compromise, the political theory of modus vivendi regards it as an essential feature of any viable political process, and willingness to compromise in the face of conflict as one of the cardinal political virtues. Compromise, negotiation, bargaining and similar practices lie at the heart of a politics of modus vivendi, being crucial means for containing the potentially damaging consequences of serious social conflict.

Both interests and values are typically central to achieving a modus vivendi. If, as is usually the case, it is possible to appeal to some common interests then this is one potential basis for grounding a modus vivendi. The appeal to peace and security is, of course, partly grounded in (what are generally taken to be) interests that are very widely shared. But, as mentioned earlier, values and principles are also important in grounding a modus vivendi. However, this perhaps needs more explanation, as it might reasonably be asked what the point of appealing to moral values could be in a conflict where in many cases, especially the most troubling ones, it is precisely values that divide people and are responsible for conflict in the first place. And, indeed, any sort of political settlement would be even more of an uphill struggle than it often is if people shared no moral ground whatsoever. But that is not usually the case; and it is of some significance that it is not. Thus, it is an important source of support for the conception of modus vivendi as it is understood here that moral disagreement generally does not, so to speak, go all the way down. Thus, for example, under most circumstances, ideas such as that one should negotiate and argue in good faith, that one should keep one's promises, that physically attacking people who represent no threat to you is wrong, that other people are entitled to some sort of hearing (Hampshire 1999), that peace is generally preferable to war, and so on, all have salience for a whole range of differing ethical codes, cultures and ways of life. Although they are, of course, violated from time to time, values like these seem to be shared by contending parties to pretty much all the conflicts that divide at least

modern societies, even non-liberal societies. Conflict on some matters is invariably combined with the absence of deep disagreement on others. All the leading religions of the modern world have complex and elaborate ethics that contain extensive overlap between them, and between them and most secular ethics. This may not be enough to secure a modus vivendi – I shall return briefly later to the issue how any desire to find a viable modus vivendi can be overwhelmed by more powerful imperatives, especially religious ones – but it does mean that there are often powerful factors that incline people towards trying to seek such an arrangement.

Central to Rawls's case against modus vivendi (at least as he understands it) are the claims that compromises and bargains can only offer an inadequate motivational basis for political community; something that is likely to be exacerbated if they are also fundamentally unfair, although this latter point also has independent weight for Rawls and other liberals (as it is *morally unacceptable* that political arrangements should be unfair, even if they are *in fact accepted*). To begin with the first point: Rawls claim is that a modus vivendi does not give us reason enough to comply with what has been decided, if we think we can get away with defecting, and it leaves us dissatisfied as, by definition, we have not got all that we think we should have. Yet, if one thinks about actual examples of bargaining leading to compromises, for instance wage negotiations, then, empirically at least, this seems far from always the case. Often both parties come out believing that they have driven a hard bargain and done a good deal, and they are quite willing to honour the resulting 'agreement'. There may, at least for some, even be satisfaction to be gained from these rather messy, highly imperfect processes. Arguably, it is when the stakes are raised and we conceive issues in terms of fundamental moral principles, and especially once we think of conflicts as being about our 'rights', that we are likely to find compromise very much more difficult. For, while we are often quite willing to compromise in the face of conflict, to compromise our 'rights' tends to be taken to mean that we are being exploited or unfairly treated; that we have compromised on something on which it would be wrong to compromise.

This is not, it should quickly be added, to recommend that we should dispense altogether with the language of rights; the point here is only that this way of formulating matters has a significant potential downside by comparison with the language of compromise, negotiation and bargaining that is the natural discourse of a political theory of modus vivendi. Moreover, as was mentioned earlier, in so far as any modus vivendi is translated into settled patterns of behaviour, processes or institutions, while it may attract allegiance initially simply on the grounds that it works, it can over time win widespread support because a particular form or setting comes to be seen as expressing 'our' way of dealing with things, part of our political culture or traditions. Nor, as Jacob Levy aptly remarks, need this be unprincipled, for 'a modus vivendi can give rise to principles that garner support that is more than merely tactical or temporary, *even though* those principles would not be willed as first best ones' (Levy 2007: 192). Thus a modus vivendi can generate allegiance from many from many sources and for diverse reasons: it need not be thought of as merely a 'tactical or temporary' suspension of conflict that will be resumed as soon as anyone thinks it is to their short-term advantage to do so.

What, then, of Rawls's second charge: that a modus vivendi may be fundamentally unfair, because it does not screen out all inequalities of power? As indicated earlier, the political theory of modus vivendi does require that the 'acceptance condition' be met. This would exclude at least crude and transparent exercises of naked power; and it is important to distinguish a modus vivendi from just any political order that is marked by peace and stability, no matter how that peace and stability is achieved. So, a tyranny, even a stable and peaceful tyranny, is not a modus vivendi. Why not? Because, by definition, a tyrannical political settlement is not one that is broadly accepted by those subject to it. How, though, do we know when a political settlement is broadly accepted, given that generally all the parties to a modus vivendi would *ex hypothesi* prefer some other arrangement more favourable to their own interests or values? This is not an easy question to answer, but, as a rough rule of thumb, it could be claimed that parties achieve a modus vivendi when they are willing to seek whatever further changes they want within those political processes, including modes of expressing dissent, that are accepted as legitimate within that polity. In this way the conception of modus vivendi contains its own limits. The complexity or 'twist' lies in these limits being almost entirely formal in that they are set only by whatever people find acceptable; and not only is there no single answer to that question, there is no determinate substantive limit to what answers can be given in the abstract. It is in this sense that there are no a priori constraints on the content of a modus vivendi, so it looks as if obviously unfair arrangements could be compatible with a modus vivendi. But at least some of what is likely to be thought objectionable about this is mitigated once we allow, as is surely the case, that people are most unlikely to accept arrangements that they believe to be seriously damaging to themselves. This may still allow a lot of room for arrangements that Rawls and many other liberals would regard as unfair; so, this answer will not satisfy them, but at least the scope for serious injustice, as they see it, would be much less than initially envisaged. However, it would only be right to acknowledge that much more needs to be said about all this.

Moreover, one complaint that may be pressed especially hard at this point and needs briefly to be addressed is that the account of acceptance does not allow sufficient place for the possibility of 'false consciousness'. That is, because there is nothing very determinate about the conditions of acceptance, it leaves open the possibility that some people may accept because they do not fully or properly understand their situation, and this in turn may be because the dominant group in society has systematically deceived them. My response to this challenge is fairly robust, although it should certainly be acknowledged that people can be systematically duped, or kept in a position such that they cannot acquire knowledge that, if they had access to it, would make them unlikely to accept the political arrangements. This might seem to make a modus vivendi open to manipulation and simulation by the powerful. However, the notion of false consciousness also needs to treated with considerable care; our knowledge is always imperfect and what we believe is necessarily influenced by our own histories and idiosyncrasies, and as a result there is no agreement in many areas on what the truth is or what knowledge is relevant. Politics is primarily a sphere of opinion rather than of demonstrable truth. After all,

according to orthodox Marxists, among those who suffer most seriously from false consciousness are political liberals, who fail to understand how capitalist societies work and how social justice (at least for those Marxists willing to use such a term) can come about only in a communist society. I do not want to exaggerate this mild form of practical scepticism, but one the few things we surely do learn from history is that even some of our most fundamental ideas can undergo seismic change over time. A political settlement is always in fact the creation of particular people in a particular place at a specific time: it is never the product of the deliberations of fully informed, free and equal individuals, but of flawed, ignorant, unequal, socially embedded ones. So, we should treat the objection based on false consciousness with a good deal of caution, although avoiding any suggestion that it is entirely without force.

A political theory of modus vivendi operates close to the *actualitie* of politics, and in part aspires to theorise politics as we experience it. But this very closeness to the day to day reality of practical politics is also likely to leave a suspicion of at least implicit conservatism, perhaps even an uncritical fatalism, and it is partly this that generates the concern with false consciousness. However, that suspicion should also no doubt be addressed directly. Although the political theory of modus vivendi is undeniably anti-utopian in its temper, this need not imply political conservatism. The mildly sceptical outlook that it tends to inhabit and its concern to prioritise avoiding the unacceptable rather than promoting the most desirable are entirely compatible with a genuinely reformist political agenda (Horton 2005). A political theory of modus vivendi is in essence about the search to find ways of living together peaceably that people are willing to accept, and cleaving dogmatically to the status quo is scarcely more likely to avoid the dangers of destructive conflict than pursuing utopian dreams of political harmony. A political theory of modus vivendi may not be inspired by anything beyond a low level concern with peace and security, but it has to confront the fact that many people will aspire to rather more; and while there may not be a strong inherent motivation to initiate change, it inevitably has to embrace it if it is to be true to itself.

7.3 Religion and Modus Vivendi

How, then, does all this bear specifically on questions of religious conflict? 'Religious conflicts' can encompass a whole gamut of conflicts, including those within a religion (typically, between the orthodox and reformers or dissenters), between different religions, and between religions and non-believers, or, as it tends to be seen by believers, between faith and secularism. While it is important not to fall into the trap of thinking that religion must always be a 'problem' or that all religious conflicts must be over matters of supreme significance – although what is of significance is itself open to interpretation, as many fierce intra-faith disputes over seemingly small details of liturgy or ritual amply illustrates – for fairly obvious reasons, conflicts involving religion can present a major challenge to a political theory of modus vivendi, just as they do (arguably, even more so) to Rawlsian and other

liberal political theories. For the stakes in conflicts that revolve around religion certainly *can* be as high they come for the parties involved. They can involve issues that matter to people, literally, more than anything else, such as salvation of the soul, and even where the issues are not as important as that, they are often highly sensitive.

Moreover, the 'currency' of conflicts around religion can sometimes be particularly problematic, in that appeal is made to considerations that one party regards as absolutely fundamental (ideas such as God, salvation, the afterlife, the sacred, the authority of the text or a religious leader and so on) but that other parties to the dispute may find simply mistaken or even quite unintelligible. This is one understandable motive for some liberals wanting to develop the notion of public reason as the only suitable basis for political debate and discussion, as not only is there little prospect of a 'rational' resolution of these matters at the level of belief, even finding common ground is likely to be more difficult when doctrinal claims are involved. Yet, for all that they may not persuade their opponents, the contention that parties should in some sense be disallowed from stating their case in their own terms is one that many find hard to accept: it seems to place undue restriction on the terms of political engagement, and at least to many religious believers appears to favour the secular. The political theory of modus vivendi puts no such constraints on political discourse, but simply leaves it open to the parties to find whatever basis for mutual accommodation that they can.

But, it may be asked, what reason do we have to think that any mutually acceptable accommodation must be possible in the face of such conflicts, especially given the potential Babel of reasons and arguments that the political theory of modus vivendi permits? In essence, there are two broad lines of response to this question. First, and on some views worryingly pessimistically, it is readily conceded that there is no *must* here; there are no guarantees that in practice it will be possible establish some sort of modus vivendi. Discomforting though it may be; why should it be expected that there is a modus vivendi in relation to every conflict that all the parties to it can be brought to accept? But it also stresses that empirically, in practice, whether there is the possibility of a modus vivendi is always an open question. On this practical question of whether a proposed way of dealing with an actual conflict will in fact succeed there is unlikely to be much disagreement between political theorists. Where the political theory of modus vivendi typically parts company from ideal liberal theories, however, is that it denies that there is necessarily a theoretical answer, too. That is, even if all the parties to a conflict are deemed by some criterion to be 'reasonable', it finds that there are no grounds for thinking that there must exist terms on which they should be able to reach a mutually acceptable settlement. Rather, the process of creating of a modus vivendi is a matter of political practice; it depends on the ingenuity, courage, imagination and persuasive argument that can be brought to the political process, and is not something for which we should expect 'theory' to provide a 'solution'. Political theorists may, indeed, be able to contribute something to this process, as theories can open minds as well as close them. Furthermore, some element of detachment may afford political theorists some advantages in 'thinking outside the box' or seeing 'angles' or the potential for common ground that may be opaque to those subject to the pressures of political

action, and with little time for reflection; but, ultimately, it is what people are actually willing to accept, not theoretical elegance or logical rigour, which is the test of the value of their contribution. In so far as theory is intended to have a direct impact on practice, it has to become part of the political process, and political theorists should not expect to be deferred to as independent authorities on political morality. Thus, liberal political theorists, like everyone else, can bring their values, principles, arguments and aspirations to the political table, but they have to accept that this makes them *political* actors, and subject to the conditions of political argument and deliberation. What they cannot lay claim to, at least on this view, is a special right to determine the rules of the political 'game', standing outside of or above any actual conflict by virtue of some theoretically vouchsafed superiority.

Secondly, however, and more positively, defenders of modus vivendi can point to the rich array of practical solutions to religious conflicts that have been conjured into existence in various times and places. This is the optimistic side of modus vivendi. For, once we get away from the idea that a political settlement has to be within the rather restricted parameters of much ideal liberal theory, we also have more reason to be hopeful that some form of acceptable accommodation may be politically possible even in apparently unpromising circumstances. Of course, a 'liberal option' is among those available to be canvassed, and in many contexts it will be a powerful and attractive one with much to be said for it, especially in societies that have developed a broadly liberal political culture. But, the parties to a dispute may quite possibly favour a non-liberal accommodation; and it may be especially true that what is acceptable in Britain or the USA may not be in Iran or Malaysia. Liberalism is not necessarily the only game in town. The political theory of modus vivendi works with the resources to hand in dealing with the particular conflict to be faced. It will try to evade direct doctrinal confrontation, seek whatever common ground can be found, use arguments that may be highly contextual and generally deploy stratagems on the basis of their effectiveness and not on their philosophical standing. What will 'work' is typically a matter of trial and error that needs patience, commitment, practical wisdom and an acute sensitivity to the particular, rather than an ability to make fine philosophical distinctions, a gift for logic-chopping or the capacity to construct unrealistic, hypothetical examples. But, as we are always dealing in generalities, even these latter qualities may, in exceptional circumstances, have their political uses.

Inevitably, some conditions are more favourable to a modus vivendi than others. Elucidating these conditions carefully and thoroughly is not a task that can be undertaken here, but a brief mention of one of them that especially bears on religious conflicts may be helpful. This is that the prospects of achieving a modus vivendi are much enhanced when there is at least some commitment from all parties to the value of the mundane, the diurnal, the terrestrial, the prosaic, the quotidian. For, those for whom everyday life offers nothing much of value even in prospect, and especially those who do not value their own mortal life – for whom, perhaps, their earthly life is but a service station on the fast lane to the life everlasting, paradise or heavenly bliss – are likely to be most resistant to the motivations and values that are the driving force behind a modus vivendi. Those without such commitments, because

of their indifference to the value of the ordinary, and to the core motivating values of peace and security (not at any price, but at least at some cost), always have the potential to play a card that trumps the best hand of a modus vivendi. Of course, this is certainly not the exclusive prerogative of religious believers, as twentieth century history amply demonstrated. For a kind of secular political utopianism, including that despair or cynicism sometimes born of a thoroughly disillusioned utopianism, can represent at least as large a threat as religious 'fanaticism' to the prospects of achieving a modus vivendi. Whatever explains the monstrosities created by Hitler, Stalin, Pol Pot, Idi Amin and sundry others, the blame can hardly be laid at the door of religion. Yet, religion also undeniably has 'form' in this area, and, given the other-worldly dimensions of many religions, there is a standing temptation for some believers to be contemptuous of the compromises and conditionality of everyday life, and of politics of modus vivendi in particular.

7.4 The Good Friday Agreement

It might be useful to leaven these rather general observations with a more concrete indication of how the politics of modus vivendi can be effective in the context of a particular religious conflict. One example of an approach to a conflict located around religious factionalism – although like many apparently religious conflicts how far it is actually rooted in religion rather than other factors is a matter of some debate – that fits well with the political theory of modus vivendi is the so-called 'Good Friday (or 'Belfast') Agreement' of 1998 in Northern Ireland (Cox et al. 2000). This formed the basis for 'power-sharing' between the two religious communities and effectively restored 'normality' to Northern Ireland. Arguably, Tony Blair's greatest political achievement while British Prime Minister, although of course not only his, political theorists have predictably taken little interest in it. Those few that have, or political theorists speaking 'off-duty', so to say, were mostly deeply suspicious of it, inclined to be dismayed, even affronted, by its deliberate ambiguity and evasiveness on so many apparently key issues of principle; by the way it was interpreted by politicians to have different meanings, sometimes even apparently contradictory, depending on the audience; and ultimately by the sheer intellectual incoherence of it, leading to the conclusion that it was nothing more than a sham, spin or a dishonest fraud.

While the Good Friday Agreement is not immune from the influence of political principles – for example, the idea of parity of esteem between Catholic and Protestant communities in Northern Ireland – one would be hard pressed to identify any coherent set of principles of justice, say, which could be said to have informed it as a whole. It is a messy, ragbag of a document, sometimes inconsistent, frequently unclear, with a number of ad hoc features, addressing a hotchpotch of specific issues, such as policing, constitutional reform, cross-border bodies, the release of paramilitary prisoners, the decommissioning of paramilitary weapons and many economic, social and issues. Moreover, it was agreed by a variety of groups, who were party to it, although other groups, such as the Democratic Unionist Party and some fringe

Republican groups, did not participate in the process, which was chaired by a former US Senator. The Agreement was then subject to referenda in Northern Ireland and the Republic. However, this was all pretty much made up as the process developed and followed no established procedure, theory or principle. Yet, it was, or so I want to contend, nothing less than a work of political genius, and this for the simple reason that it worked in a context in which numerous other attempts to secure peace and security in Northern Ireland over more than 30 years had failed. And there seems to be little doubt that its success – that is, the winning of broad support from both the Protestant and Catholic communities and their leaders – in no small measure depended on many of those qualities, for instance the ambiguity and lack of transparency, which most dismay liberal political theorists.

Certainly, there were, especially in the first 3 or 4 years after the Agreement, moments of real danger when it threatened to unravel. Moreover, like all political successes it needed *Fortuna* as well as *virtu*. It needed some things to happen, and other things not to happen, many of which could not be controlled by the Blair government or the leaders of the Republican and Protestant communities. But nor was it simply a matter of serendipity – it involved will, determination, imagination, patience, shrewd judgement, courage and a great many other qualities that tend to be ignored in an excessive concern with political principles. And, it has succeeded to a degree that could scarcely have been hoped for even at the most optimistic moments in the conflict during the last 40 years. Who would have predicted just a few years earlier the almost comradely relations between Martin McGuiness and Ian Paisley on the latter's effective political retirement, or the startlingly rapid regeneration of Belfast in less than a decade, or that one would be able to take an open-top, tourist bus along what is now informally known, apparently, as 'the terrorist trail', including such unlikely high spots as the Crumlin Road (although the jail is no more) and the still bullet marked, Divis flats, while taking in along the way the aesthetic delights of, in particular, the IRA murals? Although increasingly viewed as 'history', there is no guarantee that the 'troubles' will not return at some point in the future, as the efforts of some dissident Republicans in particular periodically remind us, but even if they do it will be too late for that to be blamed on the Good Friday Agreement. Proponents of modus vivendi will be ever alert to the fact that there can be no *guarantee* of anything in politics; but even the greatest political pessimist would surely have to agree that there is more reason to be optimistic about the situation in Northern Ireland than at any time since the troubles began, and perhaps since the very act of partition.

It should be readily apparent that there is no way that the Good Friday Agreement could somehow be 'derived' or 'deduced' from a political theory of modus vivendi. Moreover, it cannot even be claimed that the Good Friday Agreement was necessarily the *best* political settlement, as it is impossible to know what the realistic comparisons would be. To think that the theory could prescribe just that Agreement or indeed any other particular settlement is to misunderstand the nature of the theory. What it does articulate is a broad approach, a way of looking at conflicts and how they can be dealt with politically. This is another respect in which it is different from the sort of ideal theory elaborated by more high-minded liberal political theorists.

Principles of justice may well play a role in a modus vivendi, especially if treated non-dogmatically, but they will be principles that the parties *actually* accept – or can *really* be persuaded to accept – and that are used constructively in dealing with whatever the issues are at hand. For, as has been mentioned earlier, a distinctive feature of such a theory is its recognition of the limits to the role of theory itself, and by contrast a much enlarged space for the activities of political players, including indispensably, although not exclusively, for politicians and political leaders. Constructing accommodations such as the Good Friday Agreement is what politics is about, and they depend not upon knowledge of a theory of justice of the Rawlsian kind, but on the political creativity, imagination and commitment of those involved in or trying to mediate or defuse the conflict.

The Good Friday Agreement, therefore, is but one example of how a modus vivendi can successfully detoxify a deep-rooted and persistent religiously-defined conflict, and is not in any substantive sense intended to serve as a model. It may be possible to learn specific lessons from how the Agreement was effected and sustained, but any such lessons will have to be applied and adapted to the no doubt very different circumstance of any other conflict. Clearly, there is much that is unique to the Northern Ireland situation, and it also lacks some seminal features that are present in other religious-based conflicts. One of the crucial elements in establishing a workable modus vivendi is to know how to adapt what may have been successful in other circumstances and a shrewd judgement of how and when circumstances make a difference. For, another feature of a political theory of modus vivendi is that it draws our attention to the importance of features of any political process, such as political judgement and the role of leadership, which are rendered largely invisible within contemporary liberal theory (Horton 2009). Michael Oakeshott once famously, or notoriously, likened politics to cookery, arguing that just as using a good recipe book is not enough not make one a good cook, so simply applying a supposedly theoretical knowledge of politics is far from sufficient to guarantee political competence, let alone success (Oakeshott 1962: 119–120). In politics, however, the situation is even worse, for the theoretical treatises that might pass as the equivalent of cookery books, more often than not, contain only recipes for disaster: a political theory of modus vivendi is not in the business of setting down recipes for conflict resolution.

7.5 Conclusion

In sketching the approach of a political theory of modus vivendi to religious conflict it must be reiterated, therefore, that it does not aspire to offer any kind of a panacea. Indeed, the very idea of panaceas is antithetical to such an approach. Sometimes, as I have readily acknowledged, even this modestly conceived idea of modus vivendi may not be achievable – nothing is written into the fabric of the political world to mean that there must always be a way of dealing with religious conflict (or any other form of conflict) that escapes escalation and violence; and human imagination,

ingenuity and a willingness to negotiate and compromise may, and indeed do, from time to time fail us. Moreover, any political settlement is only good for as long as it lasts, and experience suggests that none last forever; and that old conflicts are prone to resurface or new ones emerge in often unexpected and unpredictable ways. An established modus vivendi is always needs to be reaffirmed or reformed. This is one reason why politics is much like the labour of Sisyphus; and, whether we like it or not, in any fundamental sense, it is hard to see how in our world it could ever be otherwise.

No doubt, for some political theorists this is too pessimistic or depressing, setting both our political and theoretical aspirations far too low. By contrast, I want to suggest that by lowering our aspirations for politics, if that is how one wants to see it, and appreciating what it can do, we may do more to restore our faith in politics, and lessen the disenchantment with it that is all too widespread. And, for those for whom this is too theoretically unambitious and inchoate, all too redolent of a typically British predilection for an anti-theoretical empirical 'pragmatism' and muddling through, I can do no better than refer them back to the slightly whimsical quote from Bernard Williams with which I prefaced this chapter: politics is all pretty much a mess, and largely unavoidably so, and the political theory of modus vivendi, unashamedly and without apology, seeks to some extent to reflect that fact.

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Chapter 8
Negotiating the 'Sacred' Cow: Cow Slaughter and the Regulation of Difference in India

Shraddha Chigateri

8.1 Introduction

Cow slaughter and the consumption of beef are highly volatile, emotive and politicised subjects in India. At the heart of the debates on cow slaughter and the consumption of beef is the avowed sacredness of the cow in Hindu India. In an apparent paradox, however, 'bovine' meat, according to statistics published by the Food and Agricultural Organisation, is the most highly produced and consumed meat product in the country (FAO 2005).[1] Moreover, it is the ethic against cow slaughter that finds legal expression in the prohibitions and restrictions on the slaughter of cows across several states of the country. Whilst the cow is not granted 'constitutional immunity' from slaughter (Baxi 1967: 347), cow slaughter is the subject of legal prohibitions and restrictions in several states in India. These prohibitions and restrictions on cow slaughter are variously tempered by the 'use value' of the cow and by varying definitions of what cannot be slaughtered. The legal justifications for the prohibitions are to be found in Article 48 of the Constitution of India, which is framed in terms of a scientific organisation of animal husbandry,

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[1]Whilst poultry has seen an exponential growth of about 11% in terms of both consumption and production between the years, 1990–2002, it is still beef and buffalo meat taken together that comprise the largest meat product that is both produced and consumed in the country (FAO 2005). Similarly, according to statistics produced by the Indian Department of Animal Husbandry, Dairying and Fisheries, which has compiled figures in relation to meat production from FAO statistics for the years 1981–2004, in 2004, India produced 1,483,000 tonnes of beef and veal. In comparison, India produces 1,715,000 tonnes of poultry (which is the highest meat product taken as a category by itself), and 239,000 tonnes of mutton and lamb. If the figures for bovine meat were to be taken together however, the total tonnage of both would be 2,966,000 tonnes, making it the most produced meat product in the country (see Report of the Department of Animal Husbandry, Dairying and Fisheries 2006: 73).

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rather than a *religious* belief in the sacredness of the cow. Whilst the language of the protection of cattle within a 'scientific-agrarian development' frame elides the question of 'religious/cultural difference' in the regulation of cow slaughter, this has not gone unchallenged either by case law brought by Muslim butchers, tanners and cattle dealers, or even by the numerous calls over the decades by Hindu groups of various hues for a *total* ban on cow slaughter.[2]

In this paper, I am interested in analysing the ways in which juridical discourse has engaged with the religious bases of the prohibitions and restrictions on cow slaughter. I examine the Constituent Assembly debates on Article 48, and the significant body of Supreme Court case law on the scope of Article 48 in order to identify whether or not juridical reasoning recognises and accommodates religious *differences* in the regulation of cow slaughter. Given that secularism and constitutional secularism in particular, purportedly provide the legal framework for analysing how the state is to deal with religious questions in a democratic, plural society, the further concern at the heart of this paper is – do the stipulations on cow slaughter abide by the principles of constitutional secularism?

The argument that this paper makes is that juridical discourse on cow slaughter, supposedly based on an economic and ecological understanding of the *use* value of cows in a predominantly agrarian economy, is predicated on a fundamental constitutive elision of the religious aspects of cow slaughter. This elision both masks the prioritising of dominant-caste Hindu identity in the regulation of cow slaughter *and* it glosses over religious *differences* over the sacredness of the cow.[3] The 'secular' garb of a dominant-caste Hindu ethic in effect creates a chimera that results in the persistent non-recognition of the diversity of conceptions over the human relationship to ecology in the specific context of an agrarian economy. Such a move is at the expense of the even-handed recognition of all religious sensibilities, and strikes at the heart of Indian secularism. The paper further argues that whilst it is important to question the *legitimacy* of state intervention in cow slaughter *within* the frameworks of secularism, the juridical discourse against cow slaughter also poses questions for the stability of the category of constitutional secularism.

[2] A total ban on cow slaughter is a peculiar expression which usually refers to a ban on the slaughter of a cow of any age, and a ban on the slaughter of bulls, bullocks and calves as well. It sometimes also includes buffaloes. See further in the next section.

[3] I use the term 'dominant-caste Hinduism' throughout this paper to invoke the complex histories of dalit engagement with Hinduism, cognisant both of the oppressive meanings of Hinduism for dalit communities, as well as the struggles of dalit communities to be a part of a more humane and diverse Hindu community. The debates between Gandhi and Ambedkar on the relationship between caste and Hinduism can be seen as emblematic of this history. See especially Ambedkar (1936a, b, 1948, 2002) for a dalit critique of the relationship between caste and Hinduism. All references to Hindu, Hinduism in the rest of the paper are to be read in terms of a deeply contested terrain of what constitutes Hinduism.

8.2 Mapping the Regulation of Cow Slaughter in India

Article 48 of the Constitution of India, a Directive of State Policy, provides the basis for legislative efforts at regulating and prohibiting cow slaughter in India. It reads:

> The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and other milch and draught cattle.

Drawing their legitimacy from this article, most states in India[4] have varying prohibitions and restrictions on the slaughter of cattle, on the transport of cattle for the purpose of slaughter, and even on the sale, usage and possession of beef. These prohibitions and restrictions are tempered by differing conceptions of the 'use value' of the cow and other bovine animals.[5] For instance, older *cows* maybe slaughtered in West Bengal and Assam upon licence, whereas in Gujarat, the so-called 'total' ban on 'cow slaughter' in fact translates into a prohibition on the slaughter of cows, bulls and bullocks of any age. The state of Karnataka currently provides something of a halfway house between Gujarat and West Bengal – the slaughter of cows, and the calves of cows and buffaloes is prohibited, whilst the slaughter of bulls, bullocks, and buffaloes is permitted upon the issuance of a certificate that either the animal is over 12 years old or permanently incapacitated from providing milk or being used as draught cattle.[6] However, the law in Karnataka is all set to change with the recent enactment of the Karnataka Prevention of Slaughter and Preservation of Cattle Bill, 2010, which extends the prohibitions on slaughter to any cow, calf, bull, bullock or buffalo, thereby promulgating a total ban on the slaughter of cattle, a wide-ranging and stringent prohibition indeed.[7]

In spite of the legal prohibitions on cow slaughter across the country, beef is both produced and consumed by several communities in the country. The communities that contravene the taboo on beef-eating in India are historically marginalised,

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[4]The parliament and state legislatures derive their power to legislate under Article 246 of the Constitution of India, read with Schedule 7, which divides subject matters in terms of a union, state and concurrent list. The regulation of cow slaughter is understood to be a state subject-entry 15 of List II to the seventh schedule (which enumerates the state list) reads – 'Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice'. This is the source of authority of states to legislate on the matter.

[5]For an enumeration of the state laws on cow slaughter, see the report of the National Commission on Cattle 2002, available at and last accessed on 23 June 2009.

[6]See the Karnataka Prevention of Cow Slaughter and Cattle Preservation Act, 1964.

[7]The Bill was recently passed by the two Houses of the Karnataka Legislature amidst widespread protests. It is currently (September 2010) pending the approval of the Governor of the State who has sent it to the President for assent. Apart from the category of animal that falls within the purview of prohibition, state enactments also prohibit activity *around* the slaughter of cows, for instance, prohibiting the export of cattle for the purpose of slaughter (Delhi). Some states even prohibit the sale and purchase of cows for the purpose of slaughter [Madhya Pradesh], as well as the possession of beef that has been slaughtered in contravention of the law [Madhya Pradesh]. The state of Karnataka is the latest to promulgate a total ban. The recent law also prohibits the sale, usage and possession of beef. Contravention of the law incurs imprisonment from 1 to 7 years, with a fine of Rs 25,000–50,000, a draconian law indeed!

minority communities: Muslim, Christian, dalit and indigenous communities.[8] Given the hegemonic sway that the dominant discourse on cow slaughter and consumption of beef have had, in many states, this has meant that the production of beef has gone underground: either through the mass transport of cattle to states where slaughter is permitted, or through the production of beef through illegal slaughter houses. It is estimated that along with the 3,600 legal slaughterhouses in the country, there are a further 32,000 unlicensed ones (Krishnakumar 2003).

However, the prohibitions against cow slaughter in India are either seen as too 'lenient' or too inadequately implemented by a continuously multiplying and increasingly legitimate Hindu-right.[9] The Hindu-right has mobilised, deployed and re-deployed the symbol of the cow as both a marker of religious difference and of historical injury and impotency – that in a newly independent Hindu dominant India, cows were not granted complete constitutional protection through a total ban on cow slaughter.[10] This is evidenced by the recurrent calls over the decades for a total, national ban on cow slaughter.[11]

The circulation of the symbol of the cow as a marker of historical injury and impotency, and as a marker of cultural difference extraordinaire, is especially potent when it comes to discourses that seek to justify as well as 'explain' instances of communal violence. For instance, in the National Commission on Cattle report

[8] See KS Singh (1995), Osella (2008) and Chigateri (2008).

[9] The traditional Hindu right, or the Sangh Parivar of the BJP-RSS-VHP-Bajrang Dal now operates along with several new and breakaway groups. For instance, in Karnataka, groups such as the Sri Ram Sene (which gained notoriety with their brutal moral policing of women in Karnataka over the last year, and which is drawn from the ranks of the Bajrang Dal and the Shiv Sena) along with groups such as the Hindu Yuva Sena in Mangalore, Karnataka Komu Souharda Vedike in Udupi, have been involved in a range of activities which the media and the intelligentsia have in recent times evocatively termed 'Hindutva Talibanisation'. Some of the concerns that have been central to these groups are culturally divisive issues – religious conversion, cow slaughter and the moral policing of women. (See for instance, Sanjana 2008, 2009). Much has been written about Hindutva, as a violent majoritarian ideology of 'true, native nationalism' of the Hindu right, and it is beyond the scope of this paper to reprise these. Suffice it to say that at the heart of Hindutva 'lies the myth of a continuous 1,000-year struggle of Hindus against Muslims as the structuring principle of Indian history' (Basu et al. 1993: 2).

[10] The story of the mass mobilisation of the symbol of the cow has a longer history, of which the cow protection movements of the late nineteenth century (which came to a head when in 1888 the North-Western Provinces High Court decreed that a cow was not a sacred object) are an integral part, DN Jha (2002: 18–20); also see Sandria B. Freitag (1980). Also see the National Commission on Cattle, 2002, supra n. 5.

[11] See Jha (2002). More recently, in the run up to the 2004 general election, the BJP led government sought to introduce a central Bill banning cow slaughter. This Bill was introduced as a result of the report of the National Commission on Cattle in 2002, which suggested a comprehensive ban on the slaughter of the cow and its progeny. One of the more controversial recommendations of the report was that a person who contravened the legal prohibitions on cow slaughter was to be tried under the Prevention of Terrorism Act (POTA), 2002. Although the Bill was not passed owing to a lack of consensus on the issue, and the erstwhile BJP-led government has not been in power in the centre since 2004, the issue of cow protection is by no means a dead one, as attested to by the various laws on cow slaughter that have been passed by BJP led state governments in the last several years, viz., Gujarat, Uttarakhand, Karnataka.

on cow slaughter, an entire appendix based on Zenab Banu's survey of communal violence in India from the eighteenth century, catalogues violence attendant upon infringements of Hindu sentiment in relation to the cow. Similarly, Asghar Ali Engineer catalogues the 'causes' of communal violence in his record of such violence to be, amongst other reasons, alleged cases of cow slaughter and the purchase of calves for slaughter (Asghar Ali Engineer 2004, 2005). Recent newspaper reports from Karnataka also attest to the links between cow slaughter and communal violence. For instance on March 4, 2008, the newspapers carried the news that two Muslims and a Dalit were stripped, beaten and publicly humiliated by Bajrang Dal activists in Shantipura in Karnataka's Chikmaglur district for allegedly killing a cow.[12]

The causal links between cow slaughter and communal violence are however, by no means self-evident, and may in fact speak more to the *production* of a communal politics in India.[13] As Jodhka and Dhar note in their analysis of the killings of five dalit men in Dulina near the Jhajjar town of Haryana for an allegedly mistaken impression of cow slaughter being committed openly, the facts are not only difficult to ascertain in the midst of violence given the varying versions of the event, but are also far more complicated than a 'case of spontaneous response of an "innocent crowd" to an "emotive" issue, albeit by "mistake"' (Jodhka and Dhar 2003). Whilst it is far from my argument that each instance of communal violence is somehow self-evidently caused by dominant-caste Hindu sentiment around cow slaughter, the argument that is at the heart of this paper is that the symbol of the cow is indeed a potent symbol of religious difference, and that this symbol has been mobilised, and deployed for particular ends by the Hindu right.

Further, it is my argument that the law has been a site of this production of difference, both in the ways in which it upholds the dominant-caste Hindu ethic against cow slaughter through the various state legislations, as well as by the consistent non-recognition of the varying meanings of cow slaughter for diverse communities. As I will show in the next few sections, the legal arguments, which are purportedly based on an economic, ecological understanding of the *use* value of cows in a predominantly agrarian economy, mask and elide the prioritising of dominant-caste Hindu identity in the regulation of cow slaughter. This elision is at the expense of the even-handed recognition of all religious sensibilities, and strikes at the heart of Indian constitutional secularism. By analysing the ways in which the ethic against cow slaughter is validated and reiterated within constituent assembly and wider judicial discourse, this paper seeks to shed light on the processes of juridical normalisation of the ethic against cow slaughter in India.

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[12] See Statesman news report (2008). Also see Menon (2005).

[13] The literature detailing the 'causes' of communal violence, and indeed how one may analyse mass violence is vast and complex, (see especially Baxi 2002, Das 1990) as is the literature accounting for the relationship between communal violence and cow slaughter (Pandey 1983, Freitag 1980, Robb 1986, Yang 1980). An analysis of the relationship between communal violence and the deployment of the symbol of the cow is not within the scope of this paper, as these call for detailed ethnographic contextualising and accounting for events, in the manner of Anupama Roy's analysis of Sirasgaon (Rao 1999).

8.3 The Constituent Assembly debates on Cow Slaughter and Hinduism . . . 'Now You See It, Now You Don't'

Cow slaughter was presented as a subject worthy of constitutional debate and inclusion through an amendment (no. 72) to Article 38-A, mooted by Pandit Thakur Dass Bhargava in the proceedings of the Constituent Assembly of India, the body which wrote and adopted the Indian Constitution.[14] This amendment was to eventually find its way, largely un-amended, into the present Constitution as Article 48. Prior to the introduction of this amendment, there were calls from a few members of the Assembly to include an article prohibiting cow slaughter in the Fundamental Rights of the Constitution, which indeed would have given the cow unique constitutional protection.[15] However, it was upon the insistence of Babasaheb Ambedkar, understood to be the father of the Indian Constitution, and importantly, the pioneer of the dalit movement in India, that the Art on cow slaughter not only was included as a Directive Principle of State Policy rather than as a Fundamental Right, but also took its current wording – in terms of a scientific organisation of animal husbandry, rather than reflective of Hindu sentiment on cow slaughter.[16] Prof T.N. Madan, however, attributes the 'secular' character of the article to Pandit Jawaharalal Nehru, who he argues 'had to threaten to resign in order to have this ban given a secular character'.[17] Whatever the provenance of the article, the inclusion of the article as a Directive Principle of State Policy, rather than as a Fundamental Right was understood by Pandit Bhargava both as a 'sacrifice' on the part of the Hindu community, and, given the justiciability, i.e. the legal enforceability, of Fundamental Rights as opposed to Directive Principles, as reflective of a sentiment of non-coercion towards non-Hindus. However, as another member of the Constituent Assembly, Seth Govind Das, who called instead for a wider ban on the slaughter of cows,

[14]The amendment read as follows: '38-A. The State shall endeavour to organise agriculture and animal husbandry modern and scientific lines and shall in particular take steps for preserving and improving the breeds of cattle and prohibit the slaughter of cow and other useful cattle specially milch and draught cattle and their young stocks.' Two of the key players in the inclusion of this article in the Constitution were Pandit Thakur Das Bhargava, member from East Punjab and Seth Govind Das, member from CP and Berar. See the Constituent Assembly Debates (Proceedings) – Vol. VII, Wednesday, the 24th November 1948, available at parliamentofindia.nic.in/ls/debates/debates.htm last accessed 23 June 2009. All quotations and references to the Constituent Assembly debates are drawn from the debates on this day, unless stated otherwise.

[15]This unique constitutional protection would have meant that the protection of the cow would have been treated on par with other *human* fundamental rights such as right to life, right to equality, etc. This would have given new meaning to ecological concerns about discrimination on the basis of species. Of course, given that the laws in India *do* protect the cow, it seems that in effect, the protection of the cow does indeed supersede human rights, as I have argued with regard to the fall outs of the food hierarchy in relation to dalit communities (Chigateri 2008).

[16]See Pandit Thakur Das Bhargava's statement to the Constituent Assembly, *supra* n. 12.

[17]He notes, 'the Hindu lobby, which had the informal patronage of the President, Dr Rajendra Prasad, had wanted a general ban, and Nehru none of it. As early as 1923, when he was the Mayor of Allahabad, he had persuaded the municipal Board to reject a proposal to prohibit cow slaughter' (Madan 1993: 687).

bulls, bullocks and calves[18] argued, the reason for the inclusion of the article into a Directive Principle of State Policy was because the Fundamental Rights dealt with *human* rights, and envisaged no scope by the drafters for the protection of *animal* rights in the same vein as human rights.[19]

One of the central planks of the arguments for the protection of the cow made both by Pandit Bhargava and by Seth Govind Das was in relation to the *usefulness* of the cow in an agrarian economy. This argument especially for Pandit Bhargava was couched in terms of the centrality of the cow in agricultural production (draught power, manure, transport) as well as to food sufficiency (cereal and milk production and sufficiency):

> To grow more food and to improve agriculture and the cattle breed are all inter-dependent and are two sides of the same coin. [...] The best way of increasing the production is to improve the health of human beings and breed of cattle, whose milk and manure and labour are most essential for growing food. [...] From both points of view, of agriculture and food, protection of the cow becomes necessary.

Whilst Pandit Bhargava was careful to explicitly state that he appealed to the Assembly not in the name of *religion*, but in the light of the economic requirements of the country, Seth Govind Das's argument was more critical of those who were contemptuous of 'religiously minded' people. Further, he complicated the understanding of religion that underlay the ethic of cow protection, '[...] cow protection is not only a matter of religion with us; it is also a cultural and economic question'. Whilst the ethic for cow protection could be justified in religious, cultural and economic terms, and whilst Seth Govind Das wanted a country that was culturally unified even though they followed different religions, he argued however, that cow slaughter was *not* an integral aspect of Muslim religion, echoing the 'essential practices doctrine' that would come to entrench itself in the debates in the Supreme Court on the meaning of religion[20]:

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[18] Seth Govind Das mooted an amendment to Pandit Thakurdas Bhargava's amendment on the following lines: 'That in amendment No. 1002 of the list of Amendments in article 38-A the words and other useful cattle, specially milch cattle and of child bearing age, young stocks and draught cattle' be deleted and the following be added at the end: 'The word "cow" includes bulls, bullocks, young stock of genus cow'. See the Constituent Assembly Debates, *supra* n. 13 – this amendment was not passed by the Assembly.

[19] See statement by Seth Govind Das, *supra* n. 12.

[20] Ronojoy Sen in his paper on the Indian Constitution and secularism traces the history of the essential practices doctrine within the discourse of the Supreme Court. He explains, 'Courts are frequently asked to decide what constitutes "an essential part of religion", and therefore off-limits for state intervention or what is "extraneous or unessential" and therefore an area in which it is permissible for the state to interfere' (2007: 9). Sen elaborates amongst other things that as the doctrine played out, the Court appointed itself the gatekeeper of what qualified as religious practice and doctrine, it 'rationalised' and 'marginalised' practices that did not meet the Court's test, and it deemed as superstitious or irrational certain religious practices (Sen 2007, also see Sen 2010). For further elaborations on this doctrine, see Baxi (2007b) and Cossman and Kapur (1999).

> The Muslims should come forward to make it clear that their religion does not compulsorily enjoin on them the slaughter of the cow. [. . .] I have read the life of Prophet Mohammad Sahib. The Prophet never took beef in his life. This is an historic fact.

Another interlocutor in the debate, Prof. Shibban Lal Saksena, member from the United Provinces (general) was far more unequivocal in his recognition of the difficulty of separating the religious aspects of cow protection from the economic aspects. Further, he found it difficult to see why, if the ethic of cow protection was based on a religious argument, it could not be enacted as law.

It was left to the Muslim members of the Constituent Assembly then to provide dissenting voices to the arguments in favour of cow protection. Rather presciently, Mr. Z. H. Lari (United Provinces) argued that it would be best if the article was included in the Fundamental Rights, rather than it being left vague and open to state governments to adopt one way or the other. He reasoned, 'Mussalmans of India have been, and are, under the impression that they can, without violence to the principles which govern the State, sacrifice cows and other animals on the occasion of Bakrid'. 'Therefore', he argued, 'if the House is of the opinion that slaughter of cows should be prohibited, let it be prohibited in clear, definite and unambiguous words'.

On the question of the integral nature of cow sacrifice to the Muslim religion, Mr Lari was equally clear, making the argument that while Islam 'does not necessarily say that you must sacrifice cow: it permits it'. Another significant argument made by Mr Lari was to locate the inconsistency of talking together about modern and scientific agriculture and of banning cow slaughter. He joined the debate with both Prof Saksena and Seth Govind Das on how the scientific management of agriculture and animal husbandry was to be carried out by reasoning, 'modern and scientific agriculture will mean mechanisation and so many other things. The preceding portion of the clause speaking about modern and scientific agriculture and the subsequent portion banning slaughter of cattle do not fit in with each other'.

Syed Muhammad Sa'adulla, another Muslim member from Assam was far more unequivocal about his opposition to the amendment. His argument was again similar to that of Mr Lari, and in some sense echoed those of Prof Saksena – if the prohibition on cow slaughter was based on religious sentiment, which Syed Sa'adulla thought it was, then it should be made clear that this was the basis of the bans, because according to him, if one were to base it on economic factors or even the scientific organisation of animal husbandry, one would have to show more robustly why cow slaughter was problematic from an economic standpoint. It is worth quoting his statement at some length:

> I do not want to obstruct the framers of our Constitution [...] if they come out in the open and say directly: "This is part of our religion. The cow should be protected from slaughter and therefore we want its provision either in the Fundamental Rights or in the Directive Principles [...] But, those who put it on the economic front [...] do create a suspicion in the minds of many that the ingrained Hindu feeling against cow slaughter is being satisfied by the backdoor. If you put it on the economic front, I will place before you certain facts and figures which will show that the slaughter of cows is not as bad as it is sought to be made out from the economic point of view [...] The motion of Pandit Bhargava is that, in order

> to improve the economic condition of the people, we should try scientific measures. That presupposes that the useless cattle should be done away with and better breeds introduced.

Syed Sa'adulla also complicated the picture of cow slaughter as a Muslim practice by making several points, each of which require attention – that there were hundreds of thousands of Muslims who did not eat cow's flesh; that it was not only Muslims who slaughtered cattle (given the population of Muslims, and the numbers of cattle slaughtered); and importantly, that for Muslim agriculturalists, cattle were as much as a capital asset as for Hindus; and further that, given that they were meat eaters, and the price of other meat was so high, they occasionally resorted to eating the flesh of the cow, albeit the barren cow. Moreover, Syed Sa'adulla questioned the argument that Hindu reverence for the cow was always reflected through a taboo on slaughter, arguing that in Assam, when there was a shortage of cattle and a prohibition on the slaughter of milch or draught cattle, it was Hindus who resorted to slaughtering cows with the argument that the cattle were unserviceable and 'dead weight'.

Syed Sa'adulla's arguments hit at the heart of the claims made in the Constituent Assembly against cow slaughter, whether these were framed in terms of avowedly secular or religious terms. As with Dr Lari, he seemed to be willing to concede ground to the arguments based on Hindu sentiment. However, pertinently, in his statement, Syed Sa'adulla questioned the scientific basis of the arguments against cow slaughter. Further, he joined debate on the ethical relationship of both Muslims and Hindus to the cow whilst calling into question the understanding that the Hindu reverence to the cow could only be expressed in terms of a taboo against cow slaughter. In fact, as he argued, this was not how it obtained – Hindus also killed cows. If the central claim of the ethic against cow slaughter rested on the usefulness of the cow, then *both* Hindus and Muslims had the same ethical relationship. Underlying Syed Sa'adulla argument are two further claims – one, that the reverence towards the cow need not be expressed only in terms of taboos on cow slaughter. In this sense, his reasoning is close to Kancha Ilaiah's (1996) who argues that 'love towards animals and eating their meat for survival is not a contradiction but a dialectical process'. Second, that the ethic of the usefulness of the cow was *not* a Hindu preserve. This rationale complicates both the relationships between Hindus and Muslims with the cow, and importantly, it leaves open to *contestation* the Hindu ethic against cow slaughter. In a similar vein, Upendra Baxi, in an early article interrogating the insertion of Article 48 into the Directive Principle of State Policy, questions the identification of the ethic against cow slaughter as expressive of indigenous social values:

> It is, indeed, an open question as to what extent [Article 48] really represents cultural or social or religious values of India of past or present. At best, sociological or theological research in both these areas may yield formidable support to protagonists of both viewpoints, though our feeling is that it may even conclusively establish that it is erroneous to think of cow-preservation or probation as 'values' in any context (Baxi 1967: 347).

Drawing on TT Krishnmachari's (a member of the Constituent Assembly) characterisation of the directive principles as a 'veritable dustbin of sentiment', Baxi

suggests that 'this would seem especially true of the [principle] pertaining to prohibition of cow-killing [...]' (Baxi 1967: 346). He argues instead that 'some articles embodied expedient intra-party compromises rather than fundamental principles of social policy. The Assembly had neither time nor inclination [...] to deal with the anxieties and fears of the few about the advisability of incorporation of the [directive]. These were tempered by the overwhelming need to offer what then seemed minor concessions in the hope that in the future they would not present major obstacles' (Baxi 1967: 347).

How then are we to make sense of the constituent assembly debates on cow slaughter? That the article was written (and assented to) in terms of the scientific organisation of animal husbandry, rather than in terms of Hindu sentiment, is without question.[21] That this article, as understood by the interlocutors to the debate, *reflected* Hindu sentiment on the matter, is also without question.[22] It is this double move, of at once reflecting Hindu sentiment while purportedly *not* doing so that has been at the heart of the juridical relationship with cow slaughter. In this double move, religious considerations come into view and then disappear, allowing for the myth that Article 48 is indeed not about religion at all, but in fact about the scientific organisation of agriculture and animal husbandry. It is this constitutive elision that simultaneously reiterates the Hindu basis of cow slaughter that has predicated the Supreme Court engagement with the issue. The consequence of this elision is that it becomes difficult to subject the Hindu basis of the taboos on cow slaughter to any serious interrogation. Instead, it provides the courts a free reign to declare upon and reiterate the Hindu sentiment behind the article. It is to the Supreme Court engagement with the religious bases of the cow slaughter bans to which we now turn.

8.4 Interrogating the Judicial Discourse on Cow Slaughter

The Supreme Court in *Mohd Hanif Quareshi and others v State of Bihar and connected petition,*[23] had the first opportunity in post-independent India to adjudicate on the constitutionality of laws banning cow slaughter. In this case, 12 petitions which challenged the constitutional validity of three enactments banning the slaughter of 'cows' passed by the States of Bihar, Uttar Pradesh and Madhya Pradesh (traditionally considered to be the cow belt of India, given their historical

[21] Whether this is reflective of a pragmatic concession as Prof Baxi suggests, or as reflective of possibly a misguided investment in secular values is open to further investigation.

[22] Though on this issue, it must be reiterated that Syed Sa'adulla sought to complicate both Hindu sentiment as well as the Muslim relationship to the cow.

[23] 1958 AIR 731, available online at http://www.commonlii.org/in/cases/INSC/1958/46.html Pandit Thakur Das Bhargava, who was an architect of Art 48, was permitted to appear as *amicus curiae.*

involvement in the cow protection movement) were heard together by the court.[24] The constitutionality of these acts was challenged by Muslim butchers, cattle dealers and meat vendors from the three states on the grounds that the Acts infringed their right to equality, their right to practice any profession, or carry on any occupation, and their right to freedom of religion which were all guaranteed as Fundamental Rights in the Constitution.

The petitioners' argument in relation to the right to equality was that the impugned Acts unfairly discriminated between those who butchered goats and sheep and those who butchered bovine cattle. This argument was given short shrift by the Supreme Court which reasoned that the basis of the classification between the two groups was a valid one. In establishing the basis of this validity, the court reprised the argument about the usefulness of cows (and female buffaloes) as opposed to sheep and goats, to conclude that the butchers who kill each category could be placed in distinct classes as well.[25]

The second ground on which the petitioners challenged the constitutional validity of the impugned Acts was on the basis of their right to freedom of religion. Chief Justice Sudhi Ranjan Das, who delivered the unanimous judgement on behalf of the five judge bench, acknowledged, based on Hamilton's translation of Hedaya Book XLIII, that there is a 'duty of every free Mussalman, arrived at the age of maturity, to offer a sacrifice on the Yd Kirban, or festival of the sacrifice [. . .] The sacrifice established for one person is a goat and that for seven a cow or a camel'.[26] However, the eminent justice was not convinced that this then translated into a negation of the right to freedom of religion of the petitioners. According to him, the duty enjoined by the Hedaya did not amount to an *obligatory* duty as it provided for an *option* of sacrificing a goat for one person, or a cow or camel for seven. To the petitioners' argument that the practice was for poor members of the community to sacrifice one cow for every 7 members as it was considerably more expense to sacrifice one sheep or goat for each member, Das CJ reasoned that even though there may be an economic compulsion on the part of the poorer Muslim brethren, there was no *religious* compulsion. Das CJ's vexation in relation to the arguments of the petitioners was that there was no reference to any particular Surah of the Quran that required cow sacrifice, and what was proffered as evidence in terms of enjoining Muslims to pray and make sacrifice, did not also provide evidence of the 'implications of those Verses or throw any light on this problem'.

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[24] Specifically, the impugned statutes laid down, in the case of Bihar, a total ban on the slaughter of all bovine cattle; in the case of UP, a total ban on the slaughter of 'cows', which included bulls, bullocks, heifers and calves – but not buffaloes; and in the case of MP, a total ban on the slaughter of cows and female calves, while the male calf, bulls, bullocks, buffalo (male or female, adult or calf) could be slaughtered by obtaining a certificate. Each of the statutes minimally protected the cow and female calf from slaughter; whilst the Bihar legislation extended this ban to all bovine cattle, UP extended the ban to the cow and her progeny but not buffaloes, and MP allowed for the slaughter of all other bovine cattle upon obtaining a certificate.

[25] Supra, n. 22.

[26] Ibid.

To the argument that Indian Muslims had been sacrificing cows since time immemorial, and that the practice is 'sanctioned' if not 'enjoined' by their religion, the Chief Justice holding onto the interpretation of 'obligatory' practice opined along with the respondents that there were many Muslims who did not sacrifice a cow on Bakr Id Day. Pointing to the tolerance of Muslim rulers who also prohibited cow slaughter, the court dismissed the claim of the petitioners on the grounds of religion.

The only argument of the petitioners that was considered positively by the court was that the impugned statutes infringed their right to practice any profession or carry on any occupation. In assessing this claim, the court subjected each of the impugned statutes to a reasonableness test. The court took note of the vast numbers of Muslim butchers and those involved in ancillary occupations that would be affected by the statutes. Significantly, the court also acknowledged that beef or buffalo meat was an item of food for a large sections of poorer people belonging to the Muslim, Christian and Scheduled Castes communities, demand for which was based on the low prices of beef and buff.

However, in reaching its conclusion on the constitutionality of the impugned statutes, the court reprised the arguments on the usefulness of the 'cow' – in the production of milk for food, the use of bulls for draught power and manure for agriculture.[27] Interestingly, the court also examined the history of the status of the cow in *Hindu* India, and utilised quotes from the Rg and Atharva Vedas to analyse the contradiction of the killing of cows for food in Rg Vedic times, as well as the cow's eventual rise to divinity. In analysing whether to take into consideration the passionate Hindu sentiments against cow slaughter, Das CJ opined:

> There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has in the past even led to communal riots. It is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been intensified. While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions.[28]

Based on all these considerations, the Supreme Court reached the decision that the total ban on the slaughter of cows of all ages, and the slaughter of calves of cows and buffaloes was to be upheld. Further, it laid down that the ban on buffaloes and bulls, bullocks was valid so long as they were capable of being used in milch and draught cattle. However, the Court reasoned that the ban on buffaloes and bulls after these ceased to be capable of yielding milk or of breeding or working as draught animals was not in the interests of the general public and was invalid. Here, the court relied on the usefulness of bovine animals as milch and draught cattle, reasoning

[27] Ibid.
[28] Ibid.

further that once the bovine animals were no longer of any use, they were in fact a burden on resources.[29]

One of the stark issues that this judgement raises is the *differential* treatment by the Court of Muslim and Hindu practices in relation to cow sacrifice and reverence. As Upendra Baxi writing in 1967 suggests:

> One gets the impression that the rigorous methods employed by the Court for the ascertainment of the Islamic precept were *not* extended to the determination of the Hindu's reverence for the cows [...] it is extremely doubtful if scrupulous research in Hindu religious traditions (in the same manner as the Supreme Court investigated the contention of the Muslims that they were enjoined by their religion to offer the sacrifice of the cows on their holy day) will endorse the view that cow-killing is prohibited by these traditions (1967: 349, 353).

As Baxi suggests, the argument that the petitioners did not bring forth a robust argument in support of their right to religion is untenable because the court did seek out resources to make the argument that the cow sacrifice was not obligatory on Muslim communities. The court, on the other hand, did not hesitate to make proclamations on the nature of Hindu sentiment on cow reverence, drawing only on a couple of citations from Kane, despite as Baxi suggests a 'formidable diversity of scriptural and doctrinal opinions on this matter' (1967: 353). Further, the court reiterated and entrenched as legitimate the argument that the *cow* was to be protected because it was useful. But this argument relies on a tenuous distinction between the cow and the buffalo. Whilst it was acknowledged by the Court that the buffalo was more useful as it yielded more milk, it was the total bans on *cow* slaughter that were upheld, and not the *total* bans on buffaloes, as female buffaloes, once they were past the age for yielding milk could be slaughtered. Why the cow did not become a burden on resources past milk-yielding age remains unclear, unless one locates the basis of cow protection in *uncontested* Hindu sentiment.

There have been several other cases on cow slaughter that have come before the courts and especially the Supreme Court, over the years.[30] Whilst there was no

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[29] In upholding a total ban on the *cow*, the argument made was that since the buffalo has a higher yield of milk, it was the cow that was in more need of the protection of the law. The presumption behind the justice's argument ironically was that buffaloes would not be slaughtered because they were more useful, whereas the cow because it was not as useful as the buffalo required protection – thereby compulsorily enjoining all agriculturalists to the usefulness of the cow.

[30] Apart from the cases that involved the constitutionality of bans on cow slaughter, there were also a series of cases in the 1960s and 1970s that sought Supreme Court intervention on questions of whether or not appeals to votes and speeches made to voters in the name of cow slaughter violated the sections of the Representation of the People Act 1951. See for instance – *Narbada Prasad v Chhagan Lal & Ors [1968] INSC 166; Maubhai, Nandlal Amersey v Popatial Manilal Joshi & Ors [1969] INSC 2; Kanti Prasad Jayshanker Yagnik v Purshottamdas Ranchhoddas Patel & Ors [1969] INSC 13; Virendra Kumar Saklecha v Jagjiwan & Ors [1972] INSC 91.* These cases are part of a larger group of cases, which culminated in the decisions of the Supreme Court in what have been termed the Hindutva judgements (see Cossman and Kapur 1999, Sen 2007, Baxi 2007b). Whilst these judgements have made a lasting impact on the nature of Indian secularism, a detailed engagement with these cases is outside the purview of this paper. However, it is important to note that in his analysis of constitutional secularism, Baxi (2007b) distinguishes between two forms of secularism: rights oriented secularism and governance oriented secularism, and according to this

shift in the position of the Court on the refusal to the recognise cow sacrifice as an essential aspect of *Muslim* practice,[31] and whilst many of the decisions of the Court continued to reflect the *Hindu* basis of the regulation of cow slaughter,[32] one of the features of several decisions of the Court over nearly a 40 year period was the understanding that a *total* ban on slaughter was *unreasonable*. As Kirpal, J. noted in his decision in *Hashmatullah v State of Madhya Pradesh & Ors*[33]*:*

> Three different constitution Benches of this Court [. . .] have held that the total ban on slaughter of bulls and bullocks in ultra vires the constitution [...] The consistent view of this court since 1958 [has been] that [a] total ban on slaughter of bulls and bullocks which had become old amounted to an unreasonable restriction on the fundamental rights of the butchers.[34]

However, this long-held position of the Supreme Court was to see a marked shift in 2005, when a seven-judge bench presided over the case of *State of Gujarat vs Mirzapur Moti Kureshi Kassab Jamat and Ors.*[35] In this case, the constitutionality of the Bombay Animal Preservation (Gujarat Amendment) Act, 1994 was challenged as it provided for a *total* ban on cow slaughter, viz., it called for a complete ban on all cows and her progeny, viz., cows, bulls, bullocks, heifers and calves. As will be recalled, in *Hanif Quareshi,* the court argued that it was only useful cattle (apart from the cow itself and calves) that could be protected from slaughter. Bulls and bullocks, as per the later decisions of the Supreme Court, became useless past the

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distinction the cases related to the Representation of People Act falls within governance oriented secularism and the 'rights' claims that the body of the paper deals with under rights oriented secularism.

[31]The judgement in *State of W.B v Ashutosh Lahiri [1994] INSC 587* is a case in point. In this case, the petitioners challenged the validity of the exemption from slaughter of cows on religious grounds on the day of Bakr Id. In this case, the West Bengal government had, it was contended, wrongly exempted the slaughter of healthy cows on the occasion of Bakr Id from the laws against cow slaughter on the ground that such exemption was required to be given for the religious purpose of the Muslim community. The Supreme Court, speaking through Majumdar, J. on behalf of a three judge bench, reiterated the decision of the larger bench in the case of *Hanif Quareshi* (above) with the reasoning that cow sacrifice was indeed not an obligatory practice on the Muslim religion.

[32]For instance, in the case of *Municipal Corporation of the City of Ahmedabad & Ors. v Jan Mohammed Usmanbhai & Anr 1986 [INSC] 85* the reasonableness of two standing orders that directed slaughter houses to remain closed on seven days (the 'birthdays' of important Hindu figures) was upheld on the grounds of 'public' interest. RB Misra, J, speaking for the court reasoned that, 'Rama and Krishna are the beloved of the Hindu Pantheon and are worshipped by large sections of the people. [...] Their birthdays are generally observed by the people not merely as days of festivity but also as days of abstinence from meat. One cannot, therefore, complain that these days are ill chosen as holidays. [. . .]'. This case is illustrative of two things – the *Hindu* basis of the bans, and a conflation of Hindu interest with public interest without an interrogation of what this means for Muslim and other minority communities. There are other decisions of the court that also receive similar treatment. See *Haji Usmanbhai Hasanbhai Qureshi & Ors v State of Gujarat [1986] INSC 84.*

[33][1996] INSC 716.

[34]Ibid.

[35]2005 8 SCC 534.

age of 15. The impugned amendments to the Act in this case sought to once again change what could constitutionally be prohibited from slaughter.

By a majority of six, the Supreme Court upheld the validity of the impugned amendment. The reasoning that the court used in order to distinguish the present case from *Hanif Quareshi* was as follows. Since the time of *Hanif Quareshi,* there were several changes in India – firstly, a holistic environmental policy had been inserted into the constitution, of which the judges in *Hanif Quareshi* did not have the benefit.[36] Further, according to the court, food security was a significant concern then, whereas now, 'our socio-economic scenario has progressed from being gloomy to a shining one'. This reasoning of the court was critical of both the understanding that useless cattle were a drain on the resources, and that beef and buff contributed to food security by providing sustenance to a diverse range of communities.

Instead the court reasoned that in fact bulls and bullocks continue to be useful past a certain age, in terms of the added benefits of urine, dung – manure and biogas, especially in this age of alternate sources of energy (the usefulness of the cow, whatever its age, the court noted was already a constitutionally settled position, qua *Hanif Quareshi).* Moreover, the court opined, even though Article 48 used the language of 'protecting' cattle based on functionality, it could not be interpreted to mean the lack of protection for cattle that were no longer functional. In strengthening its case for the protection of useless bulls and bullocks, the court relied on Article 51 A(g) to note that showing compassion towards animals meant *protecting useless cattle from slaughter*. Furthermore, by speaking of compassion for living creatures in universal terms, the court excluded the possibility of any discord and debate on the issue of whether compassion towards living creatures *always* meant prohibitions from slaughter. In this sense, the court showed a complete lack of empathy with the diversity of sentiment on the question of cow slaughter:

> The concept of compassion for living creatures enshrined in Article 51A (g) is based on the background of the rich cultural heritage of India -the land of Mahatama Gandhi, Vinobha, Mahaveer, Budha (sic) Nanak and others. No religion or holy book in any part of the world teaches or encourages cruelty. Indian society is a pluralistic society [...] The religions, cultures and people may be diverse, yet all speak in one voice that cruelty to any living creature must be curbed and ceased. A cattle which has served human beings is entitled to compassion in its old age when it has ceased to be milch or draught and becomes so-called 'useless'. It will be an act of reprehensible ingratitude to condemn a cattle in its old age as useless and send it to a slaughter house [. . .] We have to remember: the weak and meek need more of protection and compassion.

The compassion of the court towards the 'weak and meek' did not however extend to the Muslim butchers' claims that the impugned laws impinged on their livelihoods. The court, contra *Hanif Quareshi,* opined:

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[36]The policies that the court referred to are to be found in Articles 48A and 51A which were inserted into the Constitution through the 42nd Amendment in 1976. Article 48A reads, 'The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'. The relevant portion of Article 51A reads, 'It shall be the duty of every citizen of India (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

> In the present case, [...the] ban is not on the total activity of butchers (kasais); they are left free to slaughter cattle other than those specified in the Act [...] There is no escape from the conclusion that the protection conferred by impugned enactment on cow progeny is needed in the interest of Nation's economy. Merely because it may cause 'inconvenience' or some 'dislocation' to the butchers, restriction imposed by the impugned enactment does not cease to be in the interest of the general public.

And on the question of the consumption of beef which *Hanif Quareshi* had recognised as an aspect of food consumption patterns of communities in India, the court was even more unequivocal:

> Desirable diet and nutrition are not necessarily associated with non-vegetarian diet and that too originating from slaughtering cow progeny. Beef contributes only 1.3% of the total meat consumption pattern of the Indian society. Consequently a prohibition on the slaughter of cattle would not substantially affect the food consumption of the people.[37]

There are several moves that the Supreme Court makes in arriving at its decision that the cow and her progeny are inviolable in India, whether or not they were useful[38]; that it is an *Indian* ethic to show compassion (to useful animals, or animals which have once been useful?) *through* non-slaughter (evincing a particular conception of ecological harmony); that beef conception was not high[39] and neither was it necessarily desirable; that *prohibition* of cow slaughter was the means with which to protect the national economy, reliant as it was on agriculture; and further that for the greater national economic good, some people (Muslim butchers) would have to be 'inconvenienced' or 'dislocated'.

All these formulations that the court upheld as *Indian* values, as necessary for the *Indian* economy are, as I have argued throughout this paper, highly contested values, evoking a diversity of conceptions of modes of living, of the human relationship to ecology and other living beings, as well as on the nature of the relationship between law and society. Central to much of the preceding sections has been my argument that the courts have consistently upheld the Hindu conception of cow slaughter, without properly interrogating the nature of this conception as regards Hinduism, whilst they have simultaneously *rejected* other conceptions of cow slaughter. If anything, by the time the court pronounced upon *Gujarat* v *Mirzapur,* these understandings had hardened into an even more brutal negation

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[37] Supra, n. 36 I have written elsewhere on how the links between the ethic of non-violence towards animals (evoked here in terms of compassion towards animals) and the superiority of the vegetarian ethic have been powerfully contested by dalit communities (see Chigateri 2008).

[38] The court did not subject the buffalo and her progeny to the same level of scrutiny. On the question of the difference between the buffalo and the cow, in *Haji Usmanbhai* supra n. 31, it was held that there was a valid distinction (in relation to the right to equality) between butchers who dealt with buffaloes and those who dealt with cow progeny, as bulls and bullocks were used as draught power, whereas, male buffaloes were not. This argument unravels, however, if the 'usefulness' of cow progeny no longer provides the basis upon which slaughter is prohibited. As Kancha Ilaiah asked in his inimitable several years ago – was the buffalo not worthy of worship?

[39] This is in spite of FAO and DAHD figures to the contrary – see supra, n. 1.

of difference and diversity.[40] The question that has been fundamental to much of these elucidations is on the *legitimacy* of the legal intervention in the context of cow slaughter. On what basis can we question the legitimacy both of the non-interrogation of the Hindu basis of prohibitions on cow slaughter, as well as the persistent negation of diverse modes of being? This is the question that I turn to in the next section of this paper, which deals with secularism and particularly, constitutional secularism. Before moving on, however, I would like to point out the only upshot to this judicial scenario in recent years is that in *Akhil Bharat Goseva Sangh v State of AP and Ors; Umesh and Ors v State of Karnataka and Ors*,[41] in deciding upon the constitutionality of a partial ban on cow slaughter in the states of AP and Karnataka, the Supreme Court held that the decision in *Mirzapur* did not mean that the slaughter of cattle by itself was unconstitutional.

8.5 Secularism, Cow Slaughter and the Regulation of Difference

There is much that has been written on the meanings, history and nature of secularism in India, as well as on its effectiveness as an arbiter of religious differences.[42] In this section, I am interested in engaging briefly with the more discrete juridical discourses on secularism, which has been characterised as *constitutional secularism.* I do so with two purposes, in order to ascertain the legality and legitimacy of state intervention in the arena of cow slaughter within the terms of constitutional secularism, and secondly, to interrogate what the juridical discourse on cow slaughter may tell us about the nature of constitutional secularism.

Upendra Baxi, one of the foremost and distinguished interlocutors of the debates on constitutional secularism characterises constitutional secularism as 'a set of adjudicatory/interpretive practices and policies concerning the meaning and scope of the state-religion nexus' (2007b: 48). He argues that whilst debates on the wider category of secularism may proceed with barely any reference to the precise nature of this adjudicatory/interpretive process, constitutional secularism theorists take as their starting point the importance of analysing the contours of the adjudicatory/interpretive process to an analysis of secularism.[43]

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[40] That the issue to cow slaughter has been harnessed for a politics of difference based on religious lines is evident from the Gujarati case. For instance, after this judgement, the Gujarat government set about giving effect to this ban by proposing mobile laboratories equipped with instruments that will detect 'on the spot' whether the meat being transported or sold is of 'cow progeny', Gujarat State News (22 Aug. 2006).

[41] MANU/SC/1795/2006.

[42] For some of the landmark texts on secularism in India, see Smith (1963), Galanter (1971), Madan (1987, 1993, 2006), Nandy (1997, 2002, 2007), Bhargava (1997), Needham and Rajan (2007), Cossman and Kapur (1999). Also see Nigam (2006) for an interesting elucidation of the Indian debates on secularism.

[43] Prof Upendra Baxi, in his several pieces on constitutional secularism in India has chastised the interlocutors to the debates on secularism for their repeated neglect of this discourse. He writes,

The history of constitutional discourse on secularism however, is a chequered one. Although the Indian constitution incorporated the term secularism into the Constitution only in 1976 through the 42nd Amendment to the Constitution, as Prof Trilokinath Madan notes: 'words apart, the spirit of the Constituent Assembly breathed the ideal of freedom of religion [into the Constitution]' (Madan 2006: 36). Moreover, this did not prevent the judiciary from not only enunciating on the principles of constitutional secularism, but also inscribing it as an essential feature of the basic structure of the Constitution even prior to its inclusion.[44]

Constitutional secularism in India, Cossman and Kapur argue, has been based on the Gandhian model of equal respect for all religions and is characterised by three principles, freedom of religion, equality and non-discrimination, and toleration (1999: 56, 60, 61).[45] They note that 'in stark contrast to the western liberal democratic model, which insists that the relationship [between religion and the state] must be characterized by non-intervention, the "equal respect for all religions" model allows for state intervention in religion, provided that such intervention is in accordance with the principles of equality and freedom of religion' (1999: 60). It is widely acknowledged that this understanding of secularism envisages both an interventionist as well as a reformist role for courts.[46]

However, the history of state intervention in religious matters, as it has played out in the courts, has not been without problems. One of the criticisms against the court's interventionist role centres on the ways in which the courts have determined the scope of the 'religious' domain. Ronojoy Sen argues that the 'court's use of the 'essential practices' doctrine has served as a vehicle for legitimating a rationalized form of high Hinduism and de-legitimating usages of popular Hinduism

'Constitutional secularism is a singularly absent category in the landscape of Indian social theory. The canonical texts have little or no use for the categories and structures of constitutional adjudicative interpretation. Reading secularism is either archaeology of ambivalence in Nehruvian patrimony (Madan; but see Bilgrami), or an aspect of totalizing critique that demonizes secularism as an integral element of the arsenal of the technology of the modernizing Indian state (Nandy). These luminous minds remain unmarked by any serious concern with constitutional interpretive labors and the social costs of their critique of secularism' (2007a: 291). For a detailed analysis of constitutional secularism, see Baxi (1999: 211–233, 2007a, b), Sen (2007, 2010), Dhavan (1987) and Cossman and Kapur (1999).

[44]The celebrated cases of *Keshavananda Bharati*, *Indira Nehru Gandhi* v *Raj Narrain* and the 1994 *Bommai* decision are understood to have cemented secularism into the legal fabric of the country.

[45]They argue that this third principle is what makes Indian secularism different from Western liberal democratic model, which insists on neutrality marked by non-intervention, rather than an intervention which ensures equal treatment (Cossman and Kapur 1999: 60).

[46]The reformist character of state- religion relationship is based on Art 25 of the Constitution which declares that the state shall have the power to regulate any "economic, financial or other secular activity" associated with religious practice [Art 25 (2) (a) of the Constitution] and that the state shall have the power through the law to provide for 'special welfare and reform or the throwing open of Hindu religious institutions of public character to all classes and sections of Hindus' (Article 25 (2) (b) of the Constitution). Furthermore, Article 17 of the Constitution also outlaws the practice of untouchability.

as superstition'.[47] This argument resonates in the context of Muslim practices as well, as evidenced by the decision of the Supreme Court in *Mohd Hanif Quareshi*, where the court refused to recognise a practice that was not 'obligatory' as worthy of protection in the name of the right to religion. The judicial discourse on the privileging of the Hindu sentiment on cow slaughter, as evidenced by several cases, including *Mohd Hanif Quareshi, City of Ahmedabad v Usmanbhai* and *State of Gujarat vs Mirzapur Moti Kureshi Kassab Jamat (*see above), are indicative of the ease with which the court's legitimise a high form of Hinduism without the same level of interrogation to which it is has subjected Muslim practices.

Ironically, one of the most stinging criticisms that has been laid at the door of Indian constitutional secularism is that its reformist role has been reserved for the majority religion, especially when it comes to the arena of personal laws.[48] This in fact forms the bulk of the Hindu right characterisation of left-leaning secularists as pseudo-secularists.[49] Cossman and Kapur argue that it is precisely because the kind of intervention envisaged by the 'equal respect for all religions' model of secularism was left ambiguous (by decision of the courts in Bommai[50]) that religious and fundamentalist forces have endeavoured to claim the terrain of secularism as their own (Cossman and Kapur 1999: 1). A serious blow to constitutional secularism came with the series of judgements which have together been called the Hindutva judgements, in which the court concluded, amongst other things, that an appeal to Hindutva is not per se an appeal to religion.[51]

In such a context, Cossman and Kapur have called for a radical revisioning of each of the principles of secularism in order that they may be put to work towards a secularism of 'equal respect for all religions'. In relation to equality for instance, they argue for a conception of substantive equality to inform the jurisprudence on state intervention, as this, they suggest, allows for a consideration of the 'way in which dominant social and legal practices may be informed by the unstated assumptions of the majority' (Cossman and Kapur 1999: 103). On the right to freedom of religion, they argue that this cannot be based on an *individual* right, but through a recognition that 'religious identity is necessarily constituted in and through a

[47] Sen (2010: 87).

[48] For a discussion of the problematic intervention of the Central govt. post *Shah Bano,* see Baxi (2007a), who along with four others has challenged the constitutionality of the Muslim Women's Act.

[49] Baxi elaborates, 'manifestly, what the redefiners [moderate BJP or Hindu voices] of secularism are directing their energies is on what they perceive as unequal exercise of power of the state "providing for social welfare and reform" of religious practices. The gravamen of their "critique" is that while the state, supported by "pseudo-secularists," has energetically used this power over, and against "Hinduism" it has not deployed this power in relation to Indian Islam, especially in relation to personal law reform' (1999: 223). In relation to this, see Aditya Nigam, on the crisis that the Mandal agitation as well as the growth of dalit politics in India has wrought on the nature of secularism in India.

[50] See footnote 44.

[51] See especially Cossman and Kapur's criticism of the Hindutva judgements. Also see Sen (2007).

broader community', that it is a matter of the collective survival of a community (1999: 109). On the difficult concept of toleration, they argue along with Martha Minow that it cannot mean non-interference, but a 'more active demand [. . .] that may call for changes in dominant institutions' (Cossman and Kapur 1999: 126). They also argue along with Partha Chatterjee (on the terrain of secularism rather than in opposition to it) that the dominant community should extend toleration to the sub-group so long as the pre-requisite of the existence of some structures of accountability and democratic representation within the sub-group are fulfilled. In Cossman and Kapur's assessment, what is appealing about both Minow's and Chatterjee's recommendations is 'the insistence on the importance of group rights and of the rights of cultural minorities to some degree of self-governance and self-determination' as this contributes towards 're-democratizing the principles of Indian secularism' (1999: 132, 133).

The task undertaken by Cossman and Kapur in re-envisioning the category of secularism is a difficult one indeed. Each of the conceptual categories of substantive equality, freedom of religion as a collective right and toleration are the subjects of serious contention, as several of the papers in this volume attest. If the dilemma of accommodating diverging and opposing beliefs and practices in the context of a religiously plural society is to be posed in the context of cow slaughter, a legitimate question to ask would be- 'how are the contesting claims on the regulation of cow slaughter to be dealt with'? However, I believe that in the context of juridical discourse on cow slaughter, we are several steps removed from talk of an 'equal respect of all religions'. Where does the question of accommodating diverging and opposing beliefs and practices arise when such diversity is systematically and persistently controverted through the legitimisation, normalisation and prioritisation of a dominant-caste Hindu ethic masquerading as a wide-spread Hindu belief? At the heart of the debates on cow slaughter are contested ethical claims, and diverse cultural practices. This diversity has been glossed over in favour of the entrenchment of a dominant-caste Hindu ethic. Ecological concerns as they have played out in juridical discourse on cow slaughter have not engaged with the diversity of ecological conceptions that do not neatly equate non-violence and prohibitions on cow slaughter, as the only form of showing either reverence or compassion for the cow. In order to address the question of how the state should deal with religious differences, an essential pre-requisite is the recognition that there *exists* a plurality. In this sense, the juridical discourse on cow slaughter strikes at the heart of constitutional secularism in India.

In his analysis of constitutional secularism, Upendra Baxi has argued that 'we find two sharply divergent figures of law: one which seems deeply subversive of constitutionally cherished conceptions of 'secularism;' the other suggestive of their resilience. The capsule formulation of constitutional ideology of 'secularism' and the vignettes of judicial play with it [...] confirm these contradictory images. (1999: 225)'. It is within the domain of these contradictions that I want to ask the question of what the juridical discourse on cow slaughter tells us about the nature of constitutional secularism in India. There is I believe a productive tension between an

argument that Article 48 provides a constitutive repudiation of the tenets of constitutional secularism and the argument that *within* the domain of constitutional secularism, the state has not *legitimately* intervened. In relation to the first argument, the central difficulty with constitutional secularism is its self-referential nature[52] – and this is especially so, when one considers the problems that are posed by the stipulations *in* the Constitution on cow slaughter. When Baxi asks, 'does the ban on cow slaughter violate constitutional "secularism"'? (Baxi 2007a: 291), the question is – *where* does one seek the answers? In the text of the Constitution, in the Constituent Assembly debates, in the decisions of the Supreme Court (or in a *normative* conception of those principles)? If the tenets of constitutional secularism are derived from the Constitution and the interpretations put to them by the courts, how does one read Article 48 and the judicial discourse on cow slaughter? As an expression of constitutional secularism or as a fundamental constitutive repudiation of its principles? One could argue that because judicial discourse has consistently upheld Article 48, it instances a modification of constitutional secularism to *include* state intervention not for the reform of majority religion but for upholding its purported principles. Whilst this argument has some merit as it undercuts the critiques of pseudo-secularism, the fundamental flaw with this argument is that within the domain of constitutional secularism, understood in terms of substantive equality, the state has not *legitimately* intervened. Instead, juridical discourse has consistently reiterated and prioritised a dominant caste Hindu ethic on cow slaughter.

How then do we deal with the regulations on cow slaughter? If secularism is to have any coherence as a fundamental principle of democratic India, then both Article 48 as well as the laws on cow slaughter have to be repealed.

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[52]Drawing on Professor P. K. Tripathi's arguments on secularism as a 'product of India's own social experience and genius, Upendra Baxi terms the nature of constitutional secularism its *sui generis* nature' (1999: 220–221). To me, this analysis means that Indian constitutional secularism is a distinct phenomenon; however, the question is whether there are *any normative* principles that distinguish discourses of Indian constitutional secularism.

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Chapter 9
An *Ex Post Legem* Approach to the Reconciliation of Minority Issues in Contemporary Democracies

Emanuela Ceva

9.1 Introductory

The reconciliation of minority issues is one of the most pressing challenges with which contemporary democracies are confronted. It has been addressed in at least two distinct ways. The first, *ex ante legem*, focuses on the deliberative phase and establishes criteria for the distribution of rights to participate in the public debate. The second, *ex post legem*, looks at the post-law-enactment phase and finds the key to reconciling minority issues in the possibility of repealing or amending a controversial law. This chapter will critically consider the former approach and defend the latter, paying special attention to its formulation in terms of granting particular exemptions from generally applicable laws. It will do so with a view to answering the following question: *how should a liberal democratic polity reconcile minority claims whilst preserving the autonomy of all of its citizens?*

To circumscribe the area of concern, I shall concentrate on what I see as a particularly challenging sub-set of minority claims: those raised by citizens holding minority convictions against compliance with a democratically chosen law, voted in by the majority, on the grounds of incongruence between conformity to that law and some other ethical or religious commitment of theirs.[1] As an example, consider a doctor with pro-life convictions contesting the obligation to assist a patient to medically driven suicide, or parents opposing the legal provision that all children should be vaccinated against some common contagious disease. As should become clear, such issues pose extreme challenges to some crucial features of liberal democratic theory (including the binding capacity of democratically reached outcomes or the priority assigned to citizens' autonomy). They thus represent a test of the cogency of its institutional arrangements.

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[1] I should like to emphasise that, although it goes almost without saying that the minority views with which I am concerned include religious beliefs, the latter will not play any distinctive moral or legal role in my account.

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In posing my question, I am not claiming that there is something intrinsically unjust in majority rule or in the consequences of its application. To borrow from Jeremy Waldron, within a democracy,

> a person must expect (unless he is very lucky) to find himself from time to time bound by social arrangements he regards as unjust. That is almost bound to happen, seeing that it is the function of law to lay down rules in circumstances where people disagree about justice [and the good] (Waldron 1999: 246).

However, the acknowledgement of this "normal predicament" of democracy cannot be taken to mean that the decisions of the majority should never be contested, whether on the grounds of justice or on the basis of values informing someone's conception of the good. In particular, and as argued elsewhere (see Ceva forthcoming), I shall maintain that democratically achieved outcomes should be open to revision (subject to certain conditions and in ways to be specified) when their coercive application would jeopardise the moral integrity of some citizens and their capacity for self-legislation.

More specifically, I shall defend the following claims:

1. that liberal democracies do and should have a primary concern for the autonomy of their citizens and, therefore, for rescuing those holding minority convictions from risks of heteronomy (Section 9.2);
2. that, despite a common tendency in the literature to concentrate on what I have termed the *ex ante legem* phase, the struggle against the problem of heteronymous minorities emerges in all its urgency, and may be fought (and won) at the *ex post legem* level (Section 9.3);
3. that, from this perspective, a promising option is to adopt the Rule and Exemption (hereafter R&E) approach, responding to minorities' claims by allowing them, under certain conditions, to request exemption from certain controversial legal provisions (Section 9.4);
4. adopting the R&E approach is promising from a twofold perspective: (a) it reconciles liberal universalist individualism (if exemptions are granted out of respect not for someone's culture, but for her capacity to self-legislate) and the claims to differential treatment put forward by supporters of the politics of recognition; and (b) it offers a promising instrument for reconciliation of the two milestones of democratic theory: collective self-government (as secured by majority voting) and individual self-legislation (through opposition to the results of democratic decision-making) (Section 9.5).

9.2 Preliminaries

Before addressing the diverse forms which the *ex ante legem* approach has taken in the literature, I should like better to qualify (i) the focus of my intended study and (ii) the working conception of autonomy I shall employ throughout the chapter.

(i) My focus is not on how a democratic and liberal polity should respond to cultural diversity or, more specifically, to culture-based claims. Rather, I am

interested in investigating how a liberal democratic polity should reconcile minority issues. The focus is accordingly on neither culture nor the role it may be thought to play either in politics or in the processes of formation of someone's identity.[2] My focus is, rather, on the risk that citizens happening to hold minority views, however defined, will be doomed to heteronomy, having to comply with norms they find morally wrong. As I shall try to show, they may well hold their minority views for cultural reasons, but it is not important to establish this. Moreover, as religion and culture are often hard to distinguish, I shall not attribute – for my current purposes – to religious beliefs and sensibilities any specific status in shaping someone's views about justice and the good, but consider them by the same yardstick as any other ethical conviction.

(ii) I shall employ an admittedly simplified conception of autonomy, conceiving of an autonomous agent as one who should not be coerced into complying with a norm she finds morally wrong: a norm she would have never chosen to abide by were she left to act in her capacity of self-legislator, compliance with which risks jeopardising her moral integrity. Relatedly, I postulate that someone's moral integrity is respected when that person can act in accordance with her conscience.

The idea of autonomy on which I shall draw is thus much weaker than that upheld in liberal thought from Mill to Rawls, according to which autonomy is intrinsically connected with the capacity of an agent *rationally* to choose, pursue and revise her ends. To limit the contentiousness of my starting stipulation, I shall make no assumptions regarding the rationality of agents, nor shall I design my arguments so as to presuppose that a rationally examined and chosen life is qualitatively superior to any other. The only assumption I shall make is that, in a liberal democracy, citizens should be allowed to act in accordance with their conscience, within certain limits, as this is a fundamental condition for them to exercise their capacity of self-legislation (however rationally that is conducted).

One last but necessary specification is as follows. When I say that it is a basic tenet of any (liberal) democratic theory to grant citizens' autonomy, I do not mean it in any liberal perfectionist sense. Specifically, unlike Joseph Raz (see Raz 1986 and 1994), I do not mean to suggest that it is the state's duty to promote and sustain autonomy and those value systems consistent with it. My take on the matter is, again, rather weaker. My assumption boils down to claiming that, whatever account of democracy one might favour, whether procedural or epistemic or deliberative, for its very idea to make sense, citizens must be conceived as self-legislating agents. Accordingly, it should be a priority for liberal democracies to concern themselves with those among their citizens who cannot regard themselves as self-legislators as, since they hold minority convictions, they are coerced into following norms that may be at odds with their moral beliefs.

[2] I shall address in due course the multiculturalist contrasting view according to which culture (including religion) could be the source of absolute morality that renders (the prohibition of) certain acts the source of personal shame or loss of identity.

9.3 *Ex Ante Legem* Approaches: A Critique of Liberal Egalitarianism and the Politics of Recognition

It is one of the main tenets of liberal democracy that citizens should regard themselves as both authors and addressees of those norms binding their conduct. Collective self-government and individual self-legislation have usually been combined by granting citizens equal rights to political participation. Borrowing from David Held, this basic democratic commitment to autonomy may be translated into the following principle:

> Individuals should be free and equal in the determination of the conditions of their own lives; that is they should enjoy equal rights (and, accordingly, equal obligations) in the specification of the framework which generates and limits the opportunities available to them so long as they do not deploy this framework to negate the rights of others (Held 1987: 290).

On these grounds, rights to political participation should be distributed equally among citizens so as to provide them with an equal share of opportunities to act in public life. On the same note, Jeremy Waldron defines the right to participation as the 'right of rights', an essential guarantee that citizens can act as self-rulers (Waldron 1999).[3]

Although this position has attracted an unsurprisingly wide consensus among theorists committed to democracy, a wide spectrum of positions have been developed on what makes for an equal distribution of rights to participation. On the one hand, liberal egalitarians have proposed to assign 'difference-blind' political participation rights to all citizens. On the other hand, supporters of the so-called 'politics of recognition' have argued in favour of granting special rights to participation to minorities. After touching briefly on their relative merits and limits, I shall argue that no *ex ante legem* strategy can be devised to give a full and convincing solution to the problem of reconciliation of minority issues in a liberal democracy. More specifically, no theory of deliberation can possibly be sufficiently nuanced to prevent all (or even a large number of) possible sources of minority-issue-based contestation, and reasonably to foresee what sort of bearings any given law or policy could have on the capacity of self-legislation of a heterogeneous and ever changing population.

9.3.1 Liberal Egalitarianism: Universal Participation and Difference-Blind Institutions

According to universalistic declinations of liberal egalitarianism, democratic institutions should concern themselves primarily with ensuring impartial social and

[3] I shall set aside for my current purposes all issues related to the rationality of political participation through voting, and the capacity of an individual actually to make a difference with her individual expression of preference. Similarly, for the purposes of the present work, I will not address issues related to the engineering of electoral and voting systems.

political institutions and an equal distribution of participation rights to all citizens, regardless of their ethical commitments. Once such basic rights are secured, the state's role is accomplished and citizens should conform to the laws or policies democratically selected.

Brian Barry (2001) offered one of the most prominent accounts of liberal egalitarianism thus conceived. According to Barry, it is not intrinsically unjust if compliance with a democratically deliberated norm is more demanding for some citizens than others, by virtue of their cultural commitments. Quite the opposite: laws, by their very nature, protect some interests against others, and the fact that the bearers of these latter pay some costs as a consequence is inherent in the way social life works (Barry 2001: 34). In other words, the impact that any given decision has on diverse citizens is not a matter of injustice, but a contingent upshot of a just and impartial deliberative game governed by the majority rule. Rather than being addressed through the concession of specific rights, minorities' claims should be confronted with a shoulder-shrugging "this is the way we do things around here" (Barry 2001: 279–291).

Positions like Barry's have been extensively criticised as they seem to underestimate the impact of cultural and religious belonging and personal ethical convictions on someone's capacity to conform with a democratically deliberated norm and with the standard model of citizenship underlying it (see Kelly 2002 and, specifically, Squires 2002). Although I shall revisit Barry's position when defending the R&E approach against his critique, I would like to anticipate here a problem which seriously damages his argument. Barry may be right in maintaining that there is nothing intrinsically unjust in the idea that a law has a different impact on different people, and that, as a result, some may be burdened more heavily than others. However, I submit that this is acceptable only to a certain extent. More specifically, if my starting claim regarding the democratic commitment to citizens' autonomy holds, liberal democratic institutions should make sure that such a diverse impact is accepted only insofar as it does not undermine the moral integrity of some citizens, that is their capacity to act in accordance with their conscience, without being coerced into doing something they regard as morally wrong. If this were not the case, citizens' very capacity to act as self-legislators would be jeopardised, in open contrast with the spirit of a democracy.

A different version of liberal egalitarianism, generally thought of as better equipped than Barry's to address minority-related issues, is proposed by Will Kymlicka. His position qualifies as liberal egalitarian by virtue of three of its basic tenets: (i) it cherishes autonomy, defined as the capacity rationally to form and revise one's own conception of the good; (ii) it requires the state to be neutral between different conceptions of the good; and (iii) it specifies that morally arbitrary inequalities should be rectified and be the object of egalitarian policies of redistribution (see Kymlicka 2002). However, Kymlicka's argument parts company with Barry's once we consider that he includes among the resources that a state should redistribute in an egalitarian way those necessary to secure one's own cultural identity, without access to which it would be impossible for an individual to form, pursue and revise her conception of the good. Culture (or rather 'societal

culture': a territorially concentrated national group) provides the context of choice for any individual action. Accordingly, morally arbitrary inequalities in accessing one's own culture translate into unjustified differences in the actual capacity to choose of different individuals and thus require rectification (see Kymlicka 1989, 1995, 2001).

More precisely, Kymlicka's *ex ante legem* strategy consists in assigning (permanent) minorities (with a distinctive societal culture) veto power on certain issues crucial to their culture, or granting them rights to territorial and linguistic autonomy, so as to legislate in accordance with their cultural identity on issues on which they would be inescapably outvoted by the majority were they to discuss them in the state-wide legislature. A different sort of treatment is proposed for another set of minorities: those constituted by voluntary immigrants.[4] Their situation is considered dissimilar to that of national minorities in that their claims, Kymlicka argues, should not be read as requests to preserve the distinctiveness of their culture, but rather as calls for a differentiated form of integration. This is made possible through the concession of a class of 'polyethnic' rights, including rights to exemptions from the law (see Kymlicka 1995, 2001).

Despite its inherent merits and limits, which I am not interested in assessing here, Kymlicka's account seems to fare better than Barry's as regards acknowledgement of the political relevance of citizens' ethical commitments. However, the tenability of his approach seems to be affected by his favoured account of minorities. More specifically, Kymlicka's account appears to be capable of accommodating only permanent minorities to which special political and civil rights should be granted. Moreover, on Kymlicka's view, not all cultural groups could be the addressees of state policies: only those characterised by a shared societal culture. This approach seems, therefore, incapable of responding to the claims and requests of those minorities that (i) do not share a societal culture and (ii) do not have a permanent character. Consider for example parents objecting to the legal provision that children should be vaccinated against some common contagious disease. In most countries, they constitute a minority contesting a majority-voted legal provision, but they do not count as a cultural group sharing a societal culture (some of them would oppose vaccination on the ground of libertarian claims against state's coercion in matters of health, while others might adhere to a naturalistic ethics). Moreover, they do not form a permanent minority: one isolated from the rest of the social community by virtue of its beliefs. Limiting the state's response to minority claims to the *ex ante legem* phase and granting special rights to political participation to identifiable and permanent cultural groups risks overlooking a significant set of issues. As a result such an approach falls short of providing institutional responses to the calls for autonomy coming from citizens who find themselves in a minority position following the outcome of the decision-making process.

[4]For a criticism of the "hard and fast" distinction between national minorities and communities of immigrants see Festenstein (2005: 76–77).

9.3.2 The Politics of Recognition: Group-Based Participation and Differential Treatment

In line with Kymlicka's reformulation of liberal egalitarianism, a number of scholars have rejected the difference-blind approach to minority issues as incapable of going beyond mere formal equality. This would not be enough to avoid discriminatory dynamics of substantial inequality to the detriment of minorities. This reduces, so it is argued, equality to a mere formal value which, to acquire meaning, must allow for inequalities taking the form of special, culturally derived rights or exemptions from generally valid obligations. On this basis, theorists of multiculturalism have highlighted the need to guarantee special (group-based) participation rights to (permanent) minorities, so as to give their views political visibility and free them from oppression.

This kind of claim is the centrepiece of Iris Marion Young's *Justice and the Politics of Difference*. According to Young, groups should be granted special rights, including rights to formulate policy proposals, veto powers and access to funding to exercise their freedom of association. Such provisions substantiate what Young calls "differentiated citizenship", according to which "a democratic public should provide mechanisms for the effective recognition and representation of the distinct voices and perspectives of those of its constituent groups that are oppressed or disadvantaged" (Young 1990: 184). Group-based representation may seem a way publicly to recognise cultural belonging as a milestone of someone's identity and an essential condition for interpreting the social and moral world and so making truly autonomous choices.

An influential account of this position can be found in Charles Taylor's formulation of the politics of recognition. Democratic institutions should grant public visibility to individual identities, which are not monologically defined but the product of culturally situated, dialogical interactions with significant others (Taylor 1992: 25). From this perspective, difference-blind liberalism would risk "forcing people into a homogeneous mould that is untrue to them" and so preventing them from discovering their authentic self (Taylor 1992: 43). What is more, so Taylor argues, the "mould" into which people would be forced in fact embodies the values of the dominant culture, thus having discriminatory effects on those who do not conform to the mainstream way of life.

Against this backdrop, Taylor develops a model of democracy in terms of 'participatory self-rule'. Citizens must share the basic same commitment to a conception of the common good (which must be in turn welcoming enough to accommodate cultural difference without discriminating any citizen, or forcing her to assimilation) on the grounds of which they can join public deliberation and exercise their rights to political participation.

The main complaint one might have against this account, from the perspective adopted in this chapter, is its lack of concern with minority issues as they emerge *following* deliberation. Taylor's account seems to suggest that, if deliberation is actually carried out in the name of the common good, the problem of dissenting

minorities should not emerge in the first place or, at any rate, should it emerge *during* deliberation it should be reconciled in a way consistent with the good for the whole community. In other words, as in Kymlicka's case, democracy is theorised here only as far as the *ex ante legem* phase is concerned.

Efforts have been made, on many sides, to reform the way participatory rights are distributed. This is certainly commendable but I argue that it is not enough to instantiate adequately the typical liberal democratic commitment to treat citizens as self-legislators, thus respecting their moral integrity. This is for three main reasons, which I shall discuss in the following sub-section.

9.3.3 Three Shortcomings of Ex Ante Legem Approaches to the Reconciliation of Minority Issues

First, *ex ante legem* strategies have an inbuilt pro-majority bias as they risk condemning minorities to be repeatedly outvoted, no matter how impartial deliberative procedures and rules of participation are, and regardless of quotas. This concern has animated the writing of the supporters of the conception of public deliberation as public dialogue, according to whom an appropriate model of deliberative decision-making is the key to reconciling diversities in a democracy. An inclusive, rational and legitimate deliberative mechanism, requiring all participants freely to give and accept reasons in support of their claims, would be the best way to ensure the actual participation of minorities and their readiness to accept any outcome that would thus emerge.[5] Deliberation is viewed, on this account, as an ongoing process through which disagreements must be articulated and along which political and legal outcomes are viewed as temporary stops on the way to consensus.

This approach displays a creditable concern for the revision of democratically deliberated outcomes. However, it seems to rely too heavily on the capacity of citizens to participate directly in public discourse and make use of public reasons with a view to reaching a unanimous consensus. Once the prospects of direct participation and unanimous agreement lose credibility (and this is bound to happen, given the conditions under which deliberation is carried out – including moral disagreement), and, as a consequence, representative democracy is implemented and majority voting is used, the gap between laws' authors and addressees will grow, making it more difficult for all citizens to regard themselves as self-legislators.[6]

Supporters of deliberative democracy may protest here that they are well aware of this and that they regard deliberation as an ongoing process, through which contested outcomes may be re-discussed. This reply is fair enough, but two other difficulties arise. Firstly, re-opened deliberation would be exposed to the same

[5]For an influential account of deliberative democracy see Gutmann and Thompson (1996).

[6]For a multi-voiced criticism of Gutmann and Thompson's account of deliberative democracy see Macedo (1999).

pro-majority bias affecting the first round of consultation. For there to be any real possibility of overturning the outcome, there would have to be a change of opinion by some of the other parties involved in the deliberation. But this may never happen in practice, especially if the claim is based on minority views. Moreover, reopening deliberation may be a very costly and time-consuming operation that the majority in power may regard as unjustified.

The other, related, concern regards the sort of behaviour expected of the minority while the re-opened deliberation is carried out. Should the minority conform to the contested law until it is repealed or amended, or should the law be frozen until a decision is made? The first solution would risk undermining the minority's autonomy, by coercing it to comply with a law its 'members' find morally wrong; the second scenario would risk limiting the majority's autonomy, by preventing its 'members' from abiding by the law for which they had voted. Thus we come back to my initial question: how can a liberal democracy respond to minority issues while preserving the autonomy of *all* of its citizens?

A second reason why *ex ante legem* approaches to minority issues are unsatisfactory is that no theory of deliberation can possibly be sufficiently nuanced to prevent all (or even a large number of) possible sources of minority-issue-based contestation, and reasonably to foresee what sort of bearing any given law or policy could have in terms of the autonomy and moral integrity of a heterogeneous and ever changing population. If we acknowledge, with H. L. A. Hart, that there are a number of variables that cannot be accommodated and taken into account when deliberating on a law or a policy (as they cannot be foreseen – see Hart 1994), there seems to be no hope of coming up with a deliberative process sufficiently well engineered to prevent *ex post legem* contestation from arising, no matter how equally rights to political participation had originally been distributed.

It is also worth stressing the openness of contemporary liberal societies, which are exposed to significant migration flows both inwards and outwards. These make constituencies quite changeable in their composition. Compelling recent migrants to abide by a law on the grounds that all voices were aired in public on an equal footing during the *ex ante legem* phase would hardly qualify as respectful of their autonomy and moral integrity. On the other hand, re-opening a law for a further round of deliberation, as it were, and exposing it to repeal or reformulation, might appear disrespectful of the autonomy of those who had voted for it. Thus, once again, we return to the question central to this work: how could a liberal democracy reconcile minority issues in a way respectful of the autonomy of *all* of its citizens?

A third reason why *ex ante legem* approaches to minority issues look defective regards those inspired, in diverse degrees, by the 'politics of recognition'. These consider membership of some (permanent or, at any rate, publicly recognised) cultural group as a precondition for being entitled to some form of differential treatment. This strategy, however, is affected by two main problems. In the first place, it tends to crystallise people as belonging to a certain group (or groups), thus risking entrapping them in suffocating categories potentially the victims of stigmatisation. Multicultural policies thus devised risk violating the autonomy of group members

holding minority positions within their groups.[7] This is a frequent claim in regard to women within cultural groups. The recognition of spheres of political and social independence to such groups may reinforce the position of conservative men within them, thus worsening women's conditions and furthering their oppression (see Okin et al. 1999).

Associated with this problem is the idea that multiculturalists tend to see cultural groups as much more homogeneous than they (i) are and (ii) one would want them to be.[8] As a result, to borrow from Anne Phillips, "multiculturalism then appears not as a cultural liberator but as a cultural straitjacket, forcing those described as members of a minority cultural group into a regime of authenticity, denying them the chance to cross cultural borders, borrow cultural influences, define and redefine themselves" (Phillips 2007: 14).

Secondly, approaches based on the 'politics of recognition' seem to assign normative priority to cultural belonging over any other ethical commitments a citizen may have. But, what is so special about culture? I have no argument to offer on this point which cannot be reduced to ideas outlined by such scholars as Matthew Festenstein and Anne Phillips regarding the exaggerated primacy that has been attributed to culture by theorists of multiculturalism. Cultural (including religious) commitments are certainly important components of someone's identity and worldview, but this does not imply that they are all-inclusive *determinants* of someone's conduct. I believe this criticism holds also facing the recent deliberative accounts of multiculturalism, recognising the importance of multi-level dialogue between and within groups (see Parekh 2006). Undoubtedly, these accounts have amended importantly, in more dynamic terms, the (descriptive) view of culture as embodying enduring and deterministic features. However, this would do little to solve the *normative* problem of whether it is morally justifiable and politically cogent to propose that cultural (including religious) membership constitute the primary basis on which democratic institutions should establish how to treat their citizens. If one of the main tenets of liberal democratic theory is that citizens should be respected individually *qua* self-legislators, this cannot go hand in hand with a culture-based theory, according to which the qualifying property entitling citizens to certain rights is their being members of certain groups.

9.4 *Ex Post Legem* Approaches and the Specificity of Minorities' Claims

In the previous section, I tried to show that *ex ante legem* approaches to the reconciliation of minority issues suffer three main shortfalls: (A) they are affected by a

[7] See Eisenberg and Spinner-Halev (2005). This raises the issue of the possibility of granting a right to exit as a means to preserve the autonomy of dissenting group members and protect them against cultural oppression. I shall leave this important issue aside for the purposes of the present chapter and treat it separately in another work. For a discussion see Barry (2001), Kukathas (2003) and Phillips (2007).

[8] The "billiard-ball" conception of culture has been attacked also in Tully (2002).

pro-majority bias; (B) they are too static and unable to be responsive to the varied declinations minority issues may take; and (C) when employing the language of cultural membership, they tend to exaggerate the influence of culture on people's behaviour and so end up entrapping them in pre-constituted identities. To overcome such limitations, I shall argue in favour of *ex post legem* strategies, as capable of capturing the specificity of minorities' requests and adaptable to their inherent diversity.

The idea on which I build my case is that democracies' basic commitment to protecting citizens' capacity for self-legislation is not exhausted by granting them equal participatory rights. An equally important component is the responses institutions may give to requests arising in the post-law-enactment phase, when citizens are expected to comply with whatever has been deliberated through the process in which they took part. This is not to say that citizens holding minority convictions are likely to question the overall legitimacy of the democratic game. They may well recognise the legitimacy of the outcome, but still find it morally wrong to comply with it.

As anticipated when addressing Brian Barry's proposal, I do not mean to suggest that there is something inherently wrong with the idea that compliance with a law would carry different costs for different people. Compliance with a ban on smoking would be certainly more costly for a heavy smoker than for someone who has one cigarette after her morning coffee every Sunday. But these are not the sorts of legal decisions which, I believe, constitute a problem for a theory of liberal democracy, at least from the perspective adopted in this chapter. Consider, rather, all those laws regulating medical treatments at the beginning or end of someone's life. Compliance with such rules is certainly more costly for doctors than nurses, and for opinionated doctors than those blindly abiding by whatever their job demands. But this is not the point.

I believe that attention should be paid to what the democratic commitment to autonomy requires in the event a doctor is expected to either perform an abortion or interrupt someone's artificial ventilation, regardless of her strong pro-life convictions. If the doctor were compelled by law into performing such acts, she would hardly count as autonomous, despite having taken part, on an equal footing, in the deliberation that lead to the decision. Not all differences in the impact of a law on different people matter morally, but only those that constitute a threat to the person's moral integrity and capacity of self-determination. More precisely, the latter condition should be read as a general framework for the former, meaning that not all obstacles to self-determination should be considered a sufficient basis to refuse compliance with a democratically deliberated law, but only those threatening the person's moral integrity. Accordingly, unless the heavy smoker shows that smoking at the restaurant is an inherent component of the conception of her own moral self and that not smoking would put her moral integrity in jeopardy, her protest against the ban on smoking would not qualify as a morally relevant issue. Similarly, the doctor objecting to medically-assisted suicide should show that interrupting someone's artificial ventilation would not only entail high psychological or physical costs, but a moral wrong.

Although some such issues may be foreseen during the decision-making process, in order for them to emerge fully, it is necessary to wait for the law to be enacted

and respond to minority-related issues as they emerge. This is the main reason why I think *ex post legem* approaches are more apt to capture the specificity of minority claims than their *ex ante legem* counterparts. An additional reason has to do with the capacity of *ex post legem* approaches to grant consideration to individuals' claims as they emerge, independently of their being made as part of a group with institutionally approved legal status. In other words, being responsive to law contestation, this approach does not presume that the minorities pre-exist deliberation on a certain law or policy decision, and so allows greater flexibility in taking into consideration a number of instances that the traditional *ex ante legem* approach seem to overlook. To revisit an example introduced above, parents claiming exemption for their children from compulsory vaccination would count as a minority on this account, although they are an ethnically, ethically and religiously heterogeneous bunch of people.

In what follows, I shall try to develop this approach further, by distinguishing two cases and two instruments that may be thought to belong to an *ex post legem* approach to the reconciliation of minority issues. On the one hand, I shall pick out contestations of a law based on the claim that it is unjust for the whole society. This would amount to the claim that the majority happened to get it wrong, and requires a general revision of the contested law. On the other hand, I shall address contestations of a law based on the claim that compliance with it would be incongruent with some person's other ethical commitments. This would mean that the majority probably got it right for the general rule, but the accommodation of minority claims requires some form of differential treatment. The former case is the traditional domain of judicial review, the latter may be successfully addressed by endorsing the so-called Rule and Exemption approach.[9] I shall discuss each of these cases in turn, but, before I turn to this task, I would like to emphasise that I do not see them, in particular, and the *ex post legem* approach, in general, as alternatives to *ex ante legem* solutions. Rather, I believe – and so I have tried to argue – that a theory of democracy committed to the principle of autonomy should not focus on the latter alone, as both of them are needed in order to give a full and appropriate answer to minority claims.[10]

[9] I should add that the R&E approach might be useful to address also those situations in which those holding minority views *about justice* fail to convince the state, or enough of their fellow citizens, that the contested law is unjust and should be changed, and thus seek at least to be sheltered from this injustice.

[10] Another *ex post legem* strategy, which I shall not address here in full, is known in criminal law as cultural defence. A "cultural defence maintains that persons socialized in a minority or foreign culture, who regularly conduct themselves in accordance with their own culture's norms, should not be held fully accountable for conduct that violates official law, if that conduct conforms to the prescriptions of their own culture" (Magnarella 1991: 67). Despite its obvious interest, I shall not dwell on this legal instrument as it suffers from the "cultural-membership" bias I have already contested above. For some critical remarks on the issue, see Phillips (2007: pp. 80ff).

9.4.1 Judicial Review

Judicial Review (JR) is the faculty of the court to review the lawfulness (and thus possibly annul) the acts of a public body. JR may take diverse forms and cover diverse types of issues according to the legal system embedding it. Two such forms are the following:

- In the US legal system, JR applies to the review of primary legislation to verify its constitutionality;
- In England and Wales, where the principle of the supremacy of parliament applies, JR concerns the procedures followed for making a certain law, rather than its actual content.[11]

What role may JR have within a theory of liberal democracy concerned with preserving the autonomy of all of its citizens? According to Ian Shapiro, the need for JR derives from the idea that a democracy has an inherent tension between commitment to the majority rule and that to individual self-determination: "if majoritarian processes are employed to promote domination of some by others, the contradiction latent in democratic politics becomes manifest. In such circumstances, democracy goes to war with itself, and an institutional mechanism is needed to resolve the conflict." (Shapiro 2001: 59) Following Robert Burt, Shapiro identifies such a mechanism as JR (see Burt 1992).

However, one might wonder how such a role for the courts could be made consistent with a commitment to majority ruling. If this latter is conceived as one of the main components of democracy, how could it be justified to resort to courts to overthrow majority-voted decisions? In order to limit the loss of democratic value, according to Shapiro, the role of courts should be that of preventing domination and encouraging parties to negotiate another solution. In so doing, courts should be reactive rather than proactive: they should refrain from imposing ready-made new solutions on the parties, but should declare the injustice of the contended provision and encourage the parties to revise it with the instruments of democratic deliberation and in line with the principles of justice (constitution).[12]

From this sketchy account, it seems that JR is well suited an *ex post legem* mechanism to respond to two kinds of minority issue: (I) JR is intended primarily to avoid intentional domination of the majority over the minority (either through the misuse of legal procedures or the vicious interpretation of constitutional principles), and thus seems to be justified in response to the risk of democracy turning into a

[11] Conformity of primary legislation to the Human Rights Act 1998 and EU law constitutes an exception.

[12] This reading envisages a more modest role for judicial review than that suggested by Ronald Dworkin. According to Dworkin, courts should exercise an active and creative control over the output of legislation so as to ensure that basic rights and liberties are in fact respected. Dworkin's position may be found in Dworkin (1977, 1990). For a discussion see Waldron (1999: esp. pp. 211–231).

tyranny of the majority; (II) JR is likely to lead to a general revision of the contested law, recognising it as unjust, either because it was produced through an unjust process or because its provisions are inconsistent with the constitution (considered as the repository of the principles of justice). In either case, JR is meant to test the consistency of a deliberated law (or policy) with higher order principles, in either procedural or substantive terms. Therefore, it seems to be well suited to respond to minority issues when they concern diverse conceptions of justice for the whole society.[13] An example of one such kind of issue may concern policies for the regulation of immigration. Consider a law, voted by the majority, which – with a view to contrasting illegal migration flows and enhancing national security – required medical doctors to signal to the competent legal authorities any patient who turned out to have no residence permit. A law of this sort, grounded in a conception of justice as security, may be contested by a minority believing that national security cannot be granted at the expenses of a general right to health (presuming that such a law would discourage illegal migrants to seek medical assistance). In such a case, resorting to JR looks a promising way to establish whether such a law is in fact consistent with constitutionally granted rights and principles of non-discrimination. Should the contested law fail such a scrutiny, it would have to be repealed or, at any rate, undergo general revision.

Would the implementation of a system of JR give a full answer to the question of reconciliation of minority issues in a democracy? I contend that it would be an important but not exhaustive component. Consider a law allowing anticipated directives on matters related to the end of someone's life. Such a law may be just both procedurally (as arrived at through a just process) and substantively (as congruent with the principles embodied in the constitution). However, compliance with such a law might still be regarded as morally wrong by a doctor holding minority pro-life convictions. And this would be the case not (necessarily) because the doctor thinks the law unjust according to the shared conception of justice for that society (if any). In fact, she might well recognise that, in a secular and liberal society, people should be entitled to a living will expressing the desire to be assisted to suicide under certain conditions. However, it would be too morally hazardous for her to comply with the norm. And, were she coerced into complying with it, she would be incapable of regarding herself as a self-legislator. In this case, an instrument would be needed to preserve a generally just law whilst allowing some deviations from it in cases where compliance would violate a citizen's autonomy. It is to the development of such an account that I now turn.

[13]The idea that JR increases justice in a democracy is contested in Waldron (1999: esp. pp. 282–312). I have no room to enter into Waldron's challenging criticisms here, but it will suffice to say that I endorse Shapiro's arguments in full as they seem very well-equipped to rebut Waldron's reservations.

9.5 The 'Rule and Exemption' Approach: A Qualified Defence

To rewind my argument thus far and prepare the ground for my proposal, it may be useful to give full formulation to an example already evoked several times. A liberal democratic society is to decide on a morally controversial matter: the permissibility of medically assisted suicide and whether anticipated dispositions to this effect may be part of someone's living will. A parliamentary debate originates articulating both pro-life and pro-choice positions, supported by a number of diverse reasons. After all voices have been heard on an equal footing (it is not important to establish here whether a difference-blind or culturally-sensitive conception of equality was employed), a voting procedure is carried out governed by the majority rule. As a result, a majority gathers in favour of granting a right to medically assisted suicide (to be discharged in a state hospital) and the possibility of inserting dispositions to this effect in someone's living will. After careful scrutiny (possibly even through filing a case for JR), the law is declared in line with the principles of the constitution granting freedom of choice and condemning the imposition of any medical treatment against the patient's will.

Sophie, a doctor holding pro-life convictions (it is not important to establish whether these are religiously-derived) finds herself in a minority position: she objects to the law, as compliance with it would jeopardise her moral integrity. Indeed, she claims that conforming to the law would require acting in denial of one of her deep moral beliefs: that it is a doctor's duty to defend the patient's life under *all* circumstances. If she were to turn off, say, a patient's ventilator, she would contradict her conscientiously held conviction and would thus not act as an autonomous agent.

How should liberal democratic institutions address such a situation? My proposal is that a liberal theory of democracy committed to the principle of autonomy as self-legislation should provide for an institutionally embedded process through which agents in Sophie's position could request exemption from a democratically enacted law, which would still be binding on all other citizens. For such a process to be *politically effective* and *institutionally viable*, its details should be left for formulation to institutional engineers on consideration of local political and legal systems. As a political theorist, I shall try to offer only a few considerations regarding the conditions under which resort to the R&E approach could be *morally justified* in a democracy. Specifically, in order to make it compatible with the twofold democratic commitment to the principles of collective self-government, on the one hand, and individual self-legislation, on the other, I submit that the use of the R&E approach be made dependent on some 'entry' and 'exit' conditions applying to the 'exemption-requesting' process.[14]

In the first place, the exemption request should satisfy the following two-fold entry condition: (w) the claim must be genuine (not opportunistic) and (x) it should

[14]For an expanded discussion and qualification of such conditions see Ceva (2010) and Ceva (forthcoming).

have moral relevance. To demonstrate (w), Sophie would have to provide publicly accessible reasons showing that her case is not merely an excuse to work less, or avoid psychologically distressing situations.[15] For the reasons offered above, a mere appeal to cultural membership will not do.[16] Instead, for instance, she could show that she is a very hard worker and that she is willing to be involved in all sorts of other psychologically distressing tasks normally associated with the medical profession (for instance children's chemotherapy). Moreover, she could demonstrate her good-faith by showing herself willing to discharge alternative burdens, such as either working longer hours or covering extra shifts in the casualty department. To demonstrate (x), she must show that compliance with the law does not merely stem out of one idiosyncrasy of hers, but is based on a moral conviction that abiding by the contested law would jeopardise her moral integrity and impair her capacity to act as a self-legislator.[17] To this end, she will have to insist, for instance, that she would see assisting a patient to suicide as a betrayal of the moral commitment of a doctor to operate only to save the patient's life, not to put an end to it. The need to verify the 'authenticity' of requests for exemption has been crucial to the negotiation of many conscience-based claims for differential treatment in contemporary democracies. As a paradigmatic example, consider the treatment granted to those requesting exemptions from compulsory military service on the grounds of conscience. For example, before the abolition of conscription in many European countries, civil service (discharged as an alternative to military service) would last longer months and those exempted from the draft on conscientious grounds would be prevented from obtaining a gun license or to apply for such jobs implying the use of weapons as the security guard. Whilst provisions such as the latter seem to be intended to test the consistency of the request with the moral beliefs of the requester on other related issues (condition x), the former provision – by imposing an additional burden on the requester – aims to discourage opportunistic behavior (condition w).

In order to overcome possible resistances, on the part of the majority, against her claim and to show that it is genuine and morally relevant, Sophie might declare herself publicly a conscientious objector, and accept the legal consequences of the

[15] This specification seems important as, to be sure, some claims that are of great relevance to a person may be seen as trivial by others. Accordingly, their translation into a 'common currency' may help in revealing their exact extent. What makes for a publicly accessible case would depend on the public values informing the political life of the liberal democratic polity within which the claim for exemption is negotiated. The task of developing a more precise formal account of this matter exceeds the limited ambitions of this work and will have to be carried out elsewhere. Nonetheless, it is plausible to presume that accessible reasons would be those appealing to either generally accepted principles (e.g. freedom of conscience, non discrimination) or widely spread – though controversial – ethical views (e.g. protection of life in all its forms).

[16] This is particularly important to avoid that exemptions be requested on obscure cultural grounds against the application of legal (and penal) norms meant to grant specific individual rights vis-à-vis certain offences (for example, honor killing). Such a preoccupation has been central to the literature discussing the moral justification of the so-called cultural defense in criminal law. See Renteln (2004) and Waldron (2002).

[17] For a similar account see Quong (2006: 53–71).

act. This could help citizens holding minority convictions to overcome also the pro-majority bias inbuilt in democratic decision-making. Specifically, pursuing such a course of action may contribute to freeing dissenting minorities from the formal, majority-based constraints imposed by legal channels of participation, and enlist their claims in the political agenda following a more direct route. The possibility of requesting an exemption may thus be seen as a way to regularise an act of conscientious objection against the law.[18] In more general terms, the role of illegal methods of law contestation seems to be part and parcel of the preference for *democracy* over other forms of electoral institutional arrangements. The presence of some space for issues close to citizens' hearts, as it were, to emerge and influence the political agenda and for controlling actively those who are in power is a fundamental condition for the exercise of citizens' self-legislation.

Should Sophie's claim satisfy the twofold entry-condition described above, should she actually be exempted from the requirement to assist patients to medically supported suicide? I submit that this should be the case only if her claim satisfies an additional twofold 'exit condition': any given specific exemption from a law (y) shall not undermine the latter's general validity and the values/goods/interests it was meant to protect; and (z) must take into due consideration the threshold of 'collateral damages' that a democratic society can tolerate. As far as (y) is concerned, Sophie should show that her acting in derogation of the law would not constitute a violation of any patient's legal right to refuse medical care. Similar considerations have often been raised in debates on the impact of medical doctors' conscientious exemptions from practices of abortion which, to be justifiable and sustainable, should not impair women's legal right to have their pregnancy terminated. Regarding (z), a series of contextual considerations (inevitably open to revision and renegotiation) should enter the scene. In particular, the granting of the exemption would depend on its expected consequences in social terms. Would this encourage other people to contest the law? Would Sophie's exemption have a negative impact on the ability of the hospital in which she works to fulfil the law's requirement? All these and other contingent questions should be addressed in order to evaluate what Sophie's exemption would imply for the majority of citizens. This is fundamental to uphold Sophie's autonomy (by letting her follow her conscience and thus preserving her moral integrity) without undermining that of the majority of citizens, who voted for the law and want to continue to abide by it. The case of abortion is relevant also in this context, for exempting some doctors on conscientious grounds may have a negative impact on other, non-objecting doctors (who may end up finding themselves performing only this kind of operation with negative consequences on their

[18] Such an evolution from instances of conscientious objection against the law to legal exemptions has characterised a case involving animalist protests in the country where I live, Italy. In 1989, the staff of a research laboratory at the Rizzoli hospital in Bologna refused on the grounds of conscience to comply with the management's decision to employ animals in tests and experiments. The protest lead 3 years later to a formal recognition of the exemption for objecting technicians and, in 1993, to a law recognising a right to conscientious exemptions to all medical staff from being involved in laboratory tests on animals nationwide.

career prospects), as well as on the hospital's capacity to perform the operation in accordance with the law requirements.

This characterisation makes my proposal immune to the limitations imputed to the *ex ante legem* approaches presented in the first part of the chapter. In particular, it seems to be apt to capture the specificity of minority's demand as it is open to individual requests put forward by concerned citizens as they emerge (point B above). Moreover, its focus on citizens' autonomy makes its rationale extraneous to the logic of culturally-derived exemptions favoured by such liberal culturalists as Will Kymlicka (point C above). Finally, the idea that requests for exemptions may be seen as a way to legalise acts of conscientious objection may help to get round the pro-majority bias affecting most deliberative processes, as the claim could thus find an unrestricted channel of communication (point A above).

The proposal I have laid out seems capable of combining two of the main preoccupations underpinning the universalistic liberal egalitarian and multicultural approaches addressed above. It upholds the typical liberal concern for the individual as the ultimate moral agent entitled to equal treatment and autonomy. The egalitarian requirement is met by granting *all* citizens (despite their belonging to a legally recognised cultural group, but subject to conditions w and x) an equal right to *request* an exemption on ethical grounds (whose actual concession is to be negotiated on a case by case basis, upon satisfaction of conditions y and z), thus preserving also some room for ethics-based differential treatment in line with what championed by the advocates of the politics of recognition.

9.5.1 Some Common Criticisms Addressed[19]

Before closing, I would like to engage briefly with some of the most common criticisms in the literature against the multicultural version of the R&E approach, to show how the account given and the qualified defence provided can immunise it against them.

The more general objection to the R&E approach is, essentially, that the appropriate response to minorities' protests is simply to say 'Tough luck!'. I consider this reply disrespectful of citizens holding minority convictions, as their position of dissent is not a matter of luck but an inevitable, systematic by-product of any democratic decision-making process governed by the majority rule. Accordingly, it seems that an equally systematic reply should be given so as to grant citizens actual equal opportunities to act as self-legislators and preserve their moral integrity.

A famous line of criticism derives from Brian Barry's attack on the 'politics of difference', which is seen to include (in its negative formulation) the provision for rights to exemptions from generally applicable laws. According to Barry, "either there is a good enough case for having a law to foreclose exemptions or alternatively the case for having a law is not strong enough to justify its existence at all" (Barry

[19]This section draws heavily on materials presented in Ceva (forthcoming)

2001: 312). From this it follows that, if the claim is strong enough to overthrow the law, the way to go is to "work out some less restrictive alternative form of the law that would adequately meet the objectives of the original one while offering the members of the religious or cultural minority whatever is most important to them" (Barry 2001: 39). Alongside its denial of culture-based arguments, the approach I favour is better equipped than Barry's suggested solution as it respects both the autonomy of the dissenting minority *and* that of the majority that voted for the law.

As Simon Caney has convincingly explained (Caney 2002), situations in which there is a good case for having a law (supported by majority consensus) as well as good minority arguments to be exempted from it are much more common than Barry is ready to concede. The examples I have provided are meant to give a taste of how pervasive such forms of minority dissent may be. In such cases, the R&E approach (when exemptions are subject to the 'entry' and 'exit' conditions proposed above) seems capable of maintaining the autonomy of the majority (preserving the law for which they had voted) and that of the minority (allowing for some deviations from the contested law). This, I claim, is part and parcel of a conception of democracy concerned with citizens' autonomy, and by no means reducible to considerations of either political prudence or generosity, as Barry seems reluctantly willing to concede.

A further possible line of criticism is the following: instead of resorting to complicated *ex post legem* procedures, why not adopt a more libertarian stance and limit the state's interference with ethically-laden matters? If the state refrained from intruding into such issues, citizens would be left free to associate as they like and jointly pursue their controversial conceptions of the good. This suggestion would be in line with the model of the society as an 'archipelago' of associations theorised by Chandran Kukathas (2003). To answer this question, consider the following two examples of rules, borrowed from Simon Caney: (a) "One must not trade on Sundays with exception of Jews who may do so" and (b) "One must not trade on (at least) 1 day in the week" (Caney 2002: 89). As Caney lucidly argues, what matters here is the outcome, i.e. that Jews are allowed to trade on Sundays and rest on Saturdays, not the way the outcome is achieved. But this example seems to work only because the rule 'on Sunday one shall not work' does not cover a fundamental interest of the society. What matters is that people rest from work at least 1 day.

Consider now the following alternative pair of rules: (a1) 'All doctors should perform abortions with exception of conscientious objecting doctors' and (a2) 'Each doctor may decide what medical operations to perform'. The outcome here is the same (conscientious pro-life doctors are allowed not to perform an act that they regard as murder) but, on careful scrutiny, the general situations are very different: should (a2) prevail, the right of a woman to terminate her pregnancy would no longer be matched by a legal obligation to have it guaranteed and could be jeopardised for futile reasons. By this I intend to suggest that there are certain issues on which a liberal democratic society can hardly refrain from legislating, including those connected with public health and security. In such cases, given the need for a rule and the presence of a dissenting minority, the concession of space to ask for exemptions seems to be the most suitable way in which democratic institutions may

combine respect for the autonomy of the majority (who had voted the law) and that of the minority (objecting to it on the grounds of conscience).

One last challenge concerns the institutional viability of the suggested approach. Although this is a task for institutional engineers, the critic would object, a political theorist cannot surely want to uphold a proposal suggesting that every time a citizen finds herself in a minority position, she should file a case in court to ask for an exemption from the democratically deliberated norm. This would overload courts to a frightening degree and risk trapping citizens in distressing and endless legal trials. But if it is not the courts' role to adjudicate the claimant's issues, who is supposed to verify the entry and exit conditions outlined above? I agree that ordinary courts cannot be called in to adjudicate on this matter, but I see no general objection to the establishment of dedicated courts or commissions. The challenge would be to finds ways to appropriately elect or nominate them so as to avoid bias in favour of the *status quo* and reduce their arbitrariness. Having said that, I trust institutional engineers to devise practicable ways in which this normative proposal could be implemented.

9.6 Conclusion

Given the problems affecting *ex ante legem* approaches to the reconciliation of minority issues through the concession of equal participatory rights, this chapter has defended an *ex post legem* response to the following question: *how should a liberal democratic polity reconcile minority claims whilst preserving the autonomy of all of its citizens?*

I have argued that, while judicial review, properly restricted, may be seen as a promising mechanism to bring about the revision and amendment of unjust laws, the Rule and Exemption approach is the appropriate way to reconcile minority issues resulting from incongruence between compliance with a majority-voted law and some controversial moral commitment held by some citizen. To this end, institutionally embedded processes should be established through which any citizen can request a legal exemption, provided that the claim is (w) non opportunistic and (x) has moral relevance. These granted, exemptions would be conceded on consideration of two further conditions: that the exemption (y) does not undermine the general validity of the law and (z) is sensitive to the threshold of collateral damages a society can tolerate. Far from reducing the cogency of claims to exemption, these conditions are meant to temperate the claims to autonomy of those who find themselves in either the majority or the minority position and make their realisation compatible.

So characterised, my proposal is distinct from those put forward by 'cultural liberals' such as Kymlicka and 'democratic cultural pluralists' such as Young in that it does not need to place any specific emphasis on culture (or religion) as a component of an individual's identity. What is crucial to my proposal is the intention not to condemn citizens holding minority convictions to heteronomy and to grant them a morally justified and context-sensitive instrument to preserve their moral integrity without hindering the overall cogency of the democratic system.

It may be protested that my argument is undermined by circularity: the *ex post legem* approach to the reconciliation of minority issues I offer seems to be better suited than its *ex ante legem* counterparts as the sort of minority issues with which I engage are those emerging once a law has been approved and compliance with it proves problematic. However, this is no more vicious a form of circularity than that into which one may run while setting out to build an aeroplane and ending up with something that flies.

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