Rights, Law and Religion in a Liberal Society - Lecture One Transcript

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The role of religion in liberal societies raises deep questions about the moral basis and legitimacy of liberalism. This is because the legal and regulatory requirements of a liberal political order in many respects challenge religious practices and the ways in which religious beliefs are manifested. In the view of many religious people, it challenges their beliefs as well because of the internal connexion between their beliefs and the way they seek to manifest and practise those beliefs. What is it that gives liberalism such authority and why are its beliefs and values so privileged?

The challenge, however, is not just to the basis of the authority of the liberal state, but also to religion within it and in particular whether a religion seeking a role in a liberal society can do so only if it is a liberalised form of that religion. If this is so, then it may be that being part of a liberal political order will have radical effects on the integrity of the beliefs held by those who espouse them by requiring that such beliefs should be held in a liberal way as a precondition of playing a part in the liberal order.

These are not just abstract, academic questions in normative jurisprudence and political philosophy but are also of current political importance and controversy. They have developed as an important part of the public agenda in western societies at the moment. I give just a few examples of this:

1) The debate in France about whether or not to ban the veil worn by Muslim women in public places – a law which has now been passed.

2) Debates in the UK arising out of the Equality Act 2010 about the rights of religious organisations to discriminate in recruitment in favour of those with sympathy for and in some cases belief in the doctrines and practices taught by that religion.

3) The decision of Roman Catholic adoption agencies to close down rather than offer children for adoption by gay and lesbian couples as the law requires them to do.

4) Controversies over the wearing of religious symbols in both public sector work places such as schools and hospitals and indeed private sector organisations such as British Airways.

5) The disciplining of a nurse who offered to pray for a patient in her care in hospital.

6) The requirement that rooms in guest houses which are also private homes to be available to gay and lesbian couples even if such relationships are against the religious beliefs of those offering the accommodation.

7) The role and function of faith schools in a liberal democratic order when such schools are largely publicly funded.

8) The very categorical dismissal by Laws L.J. of an appeal by an employee of Relate who was dismissed because he would not in principle offer counselling to gay couples on the grounds of his religious beliefs – a judgment which led Lord Carey to claim that Christians were in fact being forced out of the public realm because they were prevented from acting on their conscientious convictions. The Pope has made a similar claim during his visit to Spain when he argued that in western societies equalities and rights legislation is making it more and more difficult for the Roman Catholic Church to articulate its moral objections to homosexuality.
There has also very recently been an interesting development in France on an issue which is at the heart of the problem I am trying to raise. In Le Monde (12 May 2010) it was reported that M. Besson, the then Minister for Immigration, Integration and National Identity announced that Imams planning to officiate in France would have to attend one of two designated public universities to learn how to articulate their Islamic beliefs in a way compatible with French political values and republican culture. This raises the question about the legitimacy of this sort of role for government and the privilege which it claims in relation to other sorts of beliefs.

These issues are likely to become more rather than less prevalent as third sector bodies including faith communities take a greater role in the provision of public services as part of big society programmes and the scaling back of the role of the state as the provider of services to citizens. The problems have become more obvious in recent years and it is arguable that this is the result of a transition from seeing liberal democracy as an ethos to seeing it as a matter of explicit rules and principles, which can be seen as embodied in laws such as the Human Rights Act 1998 and the Equality Act 2010. I will now explore this point in a little more detail.

1. Liberal Democracy: from Ethos to Rules

An ethos is a matter of practice and habit and as such in such a context it is possible for there to be a good deal of fudging of issues and compromises between different points of view and forms of community life based on such differences. Accommodations between religious beliefs and their interaction with secular practices and behaviour can be made in these contexts which do not become explicitly a matter of principle and rule. For example a gay couple seeking a room in a hotel or guesthouse might be told of alternatives to the one whose proprietors are disinclined to provide them with what they want. These accommodations may have caused upset and hurt feelings but the issues involved were not made fully explicit and turned into matters of public policy and law. However there has been a gradual change here that in some respects has culminated in the Human Rights Act 1998 and the Equality Act 2010. This change has made many of the assumptions implicit in the ethos of liberal democracy explicit in terms of rules, laws and regulations which in turn are capable of being made justiciable. Of course, there are differences between these two pieces of legislation with the Human Rights Act being applicable to public authorities and the Equality Act having wholly general application in the commercial and voluntary sectors as well as in the public sector. Many of the influential proponents and critics of the Human Rights Act have been perfectly clear about seeing it as definitive of basic liberal values and principles (Feldman, 2002; Griffith, 2003). Similar arguments have been made in relation to the recently enacted Equality Act particularly in its stance against discrimination in terms of what are called in the Act ‘protected characteristics’ which includes gender, sexual orientation, ethnicity and, up to a point, religion. This has been thought by many to embody a clear statement of liberalism alive to the need to respect and recognise certain forms of difference and identity within the law. Indeed, it could be argued that from a Rawlsian perspective the Human Rights Act and now the Equality Act can be seen as part of the ‘public reason’ of British society – political claims based on whatever set of beliefs have to be advanced and defended in terms embodied in legislation of this sort (Plant 2006).

However, in making liberal principles more explicit in law and regulation, the scope for easy fudging and compromise has been radically reduced. This is particularly true in relation to article 9 of the European Convention on Human Rights incorporated into UK law through the Human Rights Act. This article guarantees an absolute right to freedom of religious belief but is also coupled with a degree of conditionality in relation to the expression or manifestation of religious belief, given that religious manifestation affects or may impact on others. The manifestation of religion is subject in the words of the Convention to limitations as are ‘prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others’. Many of the issues surrounding these conditions at a previous period may have been settled by convention and habit - for example the possibility for a guest house owner to refuse to let a room to a gay couple when this room is part of private accommodation. However, this is now turned into a matter of law. This relationship between an absolute freedom of religious belief and a more qualified right to manifest religion is of crucial importance in current debates in that if a form of manifestation of that belief – for example the requirement on a Muslim that he or she should pray five times a day may- be regarded as intrinsic to the belief so that a constraint of the
manifestation of religion in terms of a practice which is regarded as intrinsic to the belief is tantamount to infringing the absolute right to religious belief. This has led the courts into questions of whether a particular manifestation of religious belief is intrinsic to the religion and if so whether a constraint on that manifestation could be regarded as infringing the absolute nature of the right to freedom of religious belief.

2. Liberalism, Equality and Identity

It seems fairly clear that the growing explicitness of the basic values and rules of a liberal order comes into question when such explicit rules seem to conflict with forms of identity and practice which many people regard as essential to their lives. The Human Rights Act and the Equality Act provide a basic set of rights for all citizens and yet the impact of these rights may be to limit freedom of religious belief if the manifestation of belief is regarded as intrinsic to the belief but at the same time is held to infringe the rights and liberties of others. If people are prevented from acting on their basic beliefs or ‘ground projects,’ as Bernard Williams calls them in *Moral Luck* (Williams, 1981:13-15), in the public realm whether political, commercial or voluntary then this clearly raises the question of how the values, principles and rules of a liberal society which constrain the behaviour of the citizen are to be justified to a citizen who holds what might be regarded as identity constituting beliefs. What is the basis for the liberal claim to privilege in this context? Why should an individual with such beliefs accept the legitimacy of the principles which constrain his/her behaviour in this way?

It also seems that faith communities have learned something from the growth of the politics of identity/recognition/difference within liberal societies. This has also coincided with the growth of strands within liberal thought which have argued for a greater degree of accommodation to identity rather than liberalism being seen as identity or difference blind. Crucial to this development within liberalism itself have been the arguments of thinkers such as Michael Sandel in *Liberalism and the Limits of Justice* (Sandel, 1982), Will Kymlicka in *Liberalism Community and Culture* (Kymlicka, 1989) and Anne Phillips in *The Politics of Presence* (Phillips, 1995). These authors point out the need for liberal theories of legitimacy to take account of forms of specific identity found within liberal societies. In addition, the rise of multiculturalism in both theory and practice has posed questions about difference blind forms of liberalism which liberals have been forced to recognise.

In terms of political and legal theory many of these forms of identity politics and claims have been focused on gender, ethnicity and sexual orientation, demanding from the liberal state some specific form of recognition. Religion has been rather left out of this picture hitherto since it is frequently seen as a form of *self-chosen* identity, or a life style choice. It has been argued that gender, sexual identity and ethnicity are *given* and not *chosen*, they are matters of destiny rather than faith and the conclusion is drawn that, for example, in terms of religious based discrimination against gays, citizens should not be able to discriminate against an identity which is *not* a matter of choice from the standpoint of one that is. The claim here is that religion is, so to speak, a matter of lifestyle choice; being gay is not but is rather a form of given identity. However, the success of identity politics exemplified in the Equality Act in the legal protection of protected characteristics, has certainly led religious groups to argue that religion is as much a form of fundamental identity even if based on faith as are some of the given or naturalised forms of identity mentioned. I shall return to these points later.

Such forms of identity, it is argued, have an internal or necessary relationship to particular forms of public expression. They might be regarded in the words of Anthony Appiah as ‘the normative requirements of identity’ (Appiah, 2005). As we shall see later these may prove contestable from within and outwith a particular form of identity and faith community but for the moment let us assume that the normative requirements of religious identity involve dress, methods of slaughter of animals, the public wearing of symbols – the crucifix, the burka, the turban and dagger – and other individual and collective behavioural manifestations of belief. Equally they can be broader and more pervasive if a religion is thought to have as part of its own identity demands about the nature of the public realm, the nature of social morality and so forth. This can be seen as quite a fundamental challenge to a liberal understanding of the role of religion, which on the whole liberals have wanted to see as a set of private beliefs and rituals rather than as having an intrinsic public dimension coupled with a demand for recognition of this public dimension. As Catherine Audard has argued in *Qu’est-ce que le liberalisme?* (Audard, 2009: 622ff.), liberals thought that they had accommodated religion through protecting freedom of choice in religion within a private sphere but in doing so they have failed to understand
the internal relationship between religion and what it sees as intrinsic aspects of its claims in the public realm, or to put the point another way between belief and intrinsic forms of its manifestation. If this is so then again the issue of what it is that privileges the liberal view of the public realm comes into direct focus and indeed question.

3. Liberalism and Justification

So, we are faced with the following issue. If religious beliefs are thought of, at least by those who hold them, as identity conferring or identity constituting then such beliefs fall into what Bernard Williams calls ‘ground projects’ which are central to the meaning that an individual gives to his or her life. In these circumstances the question has to be asked as to what authority liberal principles can claim over a religious believer when he/she sees the application of principles such as equal negative liberty, equal rights, a discussion based view about the nature of truth in matters of politics and morality, and state neutrality in respect of conceptions of the good and the comprehensive doctrines on which they rest. How should he/she respond to positions, policies, legislation and regulations of the sort identified earlier which may well be deeply inconsistent with these religious ground projects? Why should ground projects be limited, compromised, undermined or constrained by the neutralist principles of a liberal society – one which puts the right before the good and the framework of values of a liberal society before conceptions of the good? Bernard Williams has posed this dilemma very well:

‘There can come a point at which it is quite unreasonable for a man to give up, in the name of the impartial ordering of the world of moral agents, something which is a condition of having any interest in being around in the world at all’ (Williams, 1981:14).

These questions lead directly to issues of the authority and legitimacy of the liberal order. This issue is fundamental to liberalism because of the centrality of the idea of consent and of rational or reasonable justification within the liberal tradition. In its own self conception liberalism does not seek to impose itself by force or power but by consent – an idea which goes back to section 172 of John Locke’s Second Treatise on Civil Government, one of the foundational texts of philosophical and political liberalism. It can also be seen as a central theme in the work of modern liberal thinkers such as Rawls, Nagel and Waldron. It has also been seen as central by critics of liberalism such as Carl Schmitt. In his Crisis of Parliamentary Democracy (Schmitt, 1985), Schmitt argues for the view that consent, justification, and deliberation are foundational to the liberal position and the source of what he sees as its chronic weakness namely that it cannot act decisively on the basis of its power because it is constrained by the demand for agreement and consensus. In Schmitt’s view this shows something deep about the nature of liberalism namely that truth in politics and ethics – in so far as issues of truth arise at all – does so out of debate and discussion. This is why J.S.Mill’s essay On Liberty is so important to the liberal position. This discussion based view of truth is one not typically shared by the religious believer in respect of the beliefs held.

So, if liberalism has to base itself on consent and thus on justification how might such justification proceed? Thomas Nagel, for example, argues that in fact there have to be two aspects of the justificatory process of liberalism (Nagel, 1991):

1) The elaboration of general reasons for liberalism, which is applicable to all and are neutral and impartial in respect of conceptions of the good such as religious conceptions.

2) A justification based on reasons that are salient to the personal beliefs of citizens and to the possibly comprehensive doctrines underwriting such projects.

As Nagel says:

‘The problem is that since any system must be justified twice, it may be impossible to devise a system which is
acceptable from the point of view of what would be impersonally desirable, and from the point of view of what can be reasonably demanded of individuals... the problem for political theory is to increase the degree to which both personal and impersonal values can be harmoniously satisfied.

A fully realised social ideal has to engage the impersonal allegiance of individuals while at the same time permitting their personal nature some free play in the consent required by the system’ (Nagel, 1991:31).

Appiah commenting on the same issue argues that what we need therefore is some idea of a mixed theory of value – one that has space for project dependent and also objective or more impartial opinions; for obligations that are moral and universal and for obligations that are ethical and relative to our thick relations to our projects and our identities (Appiah, 2005: 234). This is a particularly clear statement of the problem which I have tried to identify, but it does not move us any way towards a solution when clearly as we have seen impersonal values applied equally, say about non discrimination, completely cut across values embodied in ground projects.

Liberalism has to see the general framework of rights, equality, negative freedom, state neutrality, impartiality and putting the right before the good as basic but nevertheless there is the hope and perhaps the expectation that such foundational principles at least in general and thin terms may engage with the values implicit in the comprehensive religious doctrines underpinning ground projects. Unless liberals are happy with essentially schizophrenic citizens in a way that increases the psychological burden on religious believers in being members of a liberal society – as Habermas has suggested (Habermas, 2010) – there has to be a link between the impersonal rules of a liberal order and such ground projects and agent relative views. Indeed, some have argued in a positive way that for example the Christian position can support the liberal position on issues about rights, freedom, dignity and equality and indeed that the Christian tradition has played a crucial role in forming these ideas. There are others with a more negative view of the legal structure of a liberal order who have equally pointed out the debt that liberalism owes to the Christian religion historically even though liberalism is engaged in a wholesale distortion of that heritage (Burleigh 2006). This is a difficult argument since it seems to commit the genetic fallacy of assuming that the origins of a way of thinking have a logical bearing on the current validity of the system of thought which those historical circumstances have engendered. More important though, would be a philosophical point namely that some of the ideas central to the impersonal aspects of liberalism and in particular the principle of universalisability and impartiality have a lot in common with the golden rule of Christianity.

This assumption that there might be a pathway between a liberal order linked to central features of Christian belief may be far too optimistic particularly in the light of what I said before. Firstly, it is of course obvious that Christianity has a strong doctrine of human dignity and it might be argued that this idea underlies the liberal commitment to an impartial order and non discrimination. However, it might well be argued that unlike liberalism, Christianity’s conception of human dignity is intrinsically linked to a specific conception of the good and indeed equally with a conception of sinfulness, the pursuit of which from the point of view of at least some Christians may well detract from the God-given dignity which we all have. If our dignity derives from being created in his image then a failure to live up to that image in our own lives may well detract from that dignity. This is certainly one strand in the thinking of conservative Christians about homosexuality. On the other hand, liberalism cannot link its account of human dignity to any specific moral view about the good, on account of its commitment to respecting moral pluralism and diversity through ideas like neutrality. Secondly, and as a consequence of this first point, while it may be true to say that liberals and Christians share the same concept of human dignity, for example, they may well have different conceptions of it. Or to put the point another way: there may be agreement over ‘thin’ concepts but disagreements over ‘thick’ versions of these concepts, just because the grounds on which these conceptions rest are different in each case. Finally it might be argued that the only comprehensive doctrines which could underwrite, from their own point of view, liberal principles would be ones which themselves had been liberalised. That is to say, the beliefs of a faith community might well support some or all of the central values and principles of liberal society but would only be likely to do this if that faith community held its beliefs in a liberal manner. This would raise in turn at least two questions: what is a liberal way of holding such beliefs? and how far would it be legitimate for a liberal state to seek to influence how beliefs are held, since historically liberals have believed in a free civil society and the autonomy of the private sphere?

This is the issue raised by M. Besson the French minister in the report in Le Monde cited earlier.
The answer to the first question is complex and had led to a lot of controversy. In the literature, to hold religious beliefs in a liberal way is the same as holding them in a reasonable way. So what does ‘reasonable’ mean in this context? Apart from John Rawls, the philosopher who has written most about this is Thomas Nagel who has argued that ‘reasonable’ in this context means that the religious believer recognises that it is reasonable for others to disagree with him or her. Nagel elaborates this to mean that one can hold an internal attitude of complete faith in one’s position believing it to be true while at the same time taking an impartial perspective, looking at one’s beliefs from a standpoint outside one’s own circle of belief and in so doing recognising that others disagree and that in so doing they have reasonable grounds (Nagel, 1987). Part of engaging in what Kymlicka calls the liberalisation of faith communities would be to encourage or even require the development of such attitudes, since the legitimacy of liberalism is staked on this: that its values and principles will be supported by those who hold to reasonable comprehensive doctrines. However, Nagel’s position has been attacked here on two grounds. Raz argues that it is in fact incoherent: my holding X to be true does not follow from my belief in it but from my evidence for it. Given this link between belief and evidence I cannot both claim that X is true and that it is reasonable for others to hold that it isn’t (Raz, 1995: 88f.). Brian Barry insists that a reasonable standpoint on religion as understood by Nagel is in fact exactly the same as a sceptical attitude towards belief (Barry 1995 179). It would be odd for a liberal order predicated on the idea of individual freedom to require that people should hold their beliefs in one way rather than another.

4. Liberalism and Pluralism

We now need to explore further the role of the recognition of pluralism in liberal democracy and how faith groups might react to different claims about the nature of pluralism. This is a complex issue as there are different views about the nature of pluralism in modern societies, but consider first what seems to be the problem posed for liberalism by pluralism and why it will just not do to assume that pluralism entails liberalism. The problem is this: if pluralism involves the idea that values are incommensurable – that is to say that we either do not have some perspective which will reconcile all values into one coherent whole, or more radically that we cannot have such a perspective, then this applies to liberalism itself. Liberalism involves a constitutional structure which gives weight to values such as liberty (usually of a negative sort), civil and political equality, civil and political rights and so forth. Its weight and ordering of these values is quite different from those embodied in other political positions. So if divergent values are incommensurable how can one set of such values – say those of liberalism – be given a privileged position? Indeed, if incommensurability is so pervasive how can such values be rationally chosen? If, as sometimes is assumed to be the case, pluralism shades into relativism, then on this view the liberal commitment to freedom is only one choice within a world of pluralism. No particular choice is more or less valuable than another. To justify liberalism in such a context looks like trying to pull liberalism up by its own bootstraps. So let us look into the nature of pluralism a bit further.

First of all pluralism might be noted as a fact about modern societies as it is, for example by John Rawls (Rawls, 1996: Introduction), on the basis of sociological observations and generalisations. Such claims are not based on controversial philosophical claims about the nature of value. Equally though it might be difficult on the basis of purely factual observation alone to arrive at more general philosophical generalisations about pluralism, such as the claim that values are incommensurable or that no monistic account of value can be philosophically feasible. So, for example, to claim that values are incommensurable and that no monistic perspective is possible would require a rejection of utilitarianism, which assumes the opposite. This rejection cannot be based on merely noting the fact of pluralism.

This contrasts with much more philosophically sophisticated accounts of pluralism as for example the one elaborated by Isaiah Berlin. This arises out of a critique of the nature of monism and its assumptions. In his essay introducing Berlin’s Concepts and Categories Berlin’s position is rather oddly described by Bernard Williams as an ‘absolute and fundamental truth’ about the human situation as revealed by human history (Williams, 1999: xix). This is odd in two respects: first of all is the fact that if such an absolute truth is revealed by history then one needs some rather strong account of history to justify such a claim; secondly the standpoint of philosophical pluralism itself makes the claim that its own truth is in some sense absolute intensely problematic. Williams’s own position on pluralism and liberalism is first, that if there is a range of competing values which monists repress and which liberals tolerate then in some sense more (values) must mean better to some extent and thus liberalism is to be preferred. Secondly, Williams claims that a liberal position is justified in the sense of truthfulness. It is an attempt to live truthfully in the light of the nature of pluralism as revealed in history (Williams, 1999).
A philosophical account of pluralism may also seem to be difficult for the religious believer just because it seems to be inconsistent with a central strand in theism namely the view that there is *One God, One Morality*, as Stuart Hampshire puts it (Hampshire, 1999). If part of the justification of liberalism lies in the fact that it is responsive to the context of pluralism, then at least as a philosophical theory this may be rejected from the start by the theist just because theism seems to deny the possibility of an authentic pluralism about values. Thus the idea that there is some kind of shared moral ground between liberals and religious believers arising from a mutual recognition of pluralism may not be available, since the nature and indeed possibility of that pluralism may in fact be contested.

However, for the moment I want to concentrate on the problem which pluralism poses for liberalism. Why should liberalism be ceded the fundamental political authority when there is a clash of basic values? There seem to be various answers to this question:

1) Liberalism is a way of coping with the stresses and strains embodied in a society marked by pluralism (Madison 1961). This cannot be enough of a justification of its own because there are other ways of coping with pluralism – for example, getting rid of it as Fascists believed was important and necessary for the homogeneity of society. The philosophical basis for this was developed by Carl Schmitt in *The Crisis of Parliamentary Democracy* (Schmitt, 1985) and also Adolf Hitler in *Mein Kampf* (Stern, 1975: 49).

2) Liberalism is a basic existential choice as it is treated, for example, by Raymond Aron and in some moods Isaiah Berlin (Aron, 1938: 106, 109, 385, 396, 410; Berlin, 1969: 172; Berlin, 2009: 467-8). The difficulty with this is that many liberals want to privatise religion because it is based on faith and commitment and does not meet the canons of liberal public reason. It is, in Rorty’s words, a ‘conversation stopper’ (Rorty, 1999: ch. 11). It would therefore be utterly inconsistent to privilege liberalism on the basis of existential choice, because this would embody similar faith and commitment. If liberalism is based on a choice of this sort then such an idea seems to consort rather badly with the claim which as we saw earlier is essential to liberalism namely consent and rational persuasion.

3) Liberalism is justified in the context of deep and unreconcilable value differences in terms of looking at the undesirability of the alternatives. If a state sought to impose an overall conception of the good in the context of diversity of views about the good this would have to lead to high levels of coercion and violence. Rejection of cruelty and violence seems to be a universal value and in so far as liberalism seeks to avoid this it is supported by such universal human values. (Shklar 1998)

4) It can of course be argued, following Rawls and Nagel, that liberalism can be supported by an overlapping consensus drawn from a range of comprehensive doctrines and that this is essential to preserve liberalism’s salience for those with strong comprehensive beliefs. But does this apply only if such comprehensive doctrines are held in a liberal way and indeed may have been liberalised by such a liberal state? If this is so then this will not help the legitimacy of liberalism. Liberalism will have to answer the question about the legitimacy of its own position before it can reasonably seek to liberalise, for example, the beliefs of faith communities.

5) Liberalism has a thick moral position of its own which elaborates and defends a substantial moral position underpinning liberal principles – what has come to be called, wrongly I think, ‘perfectionist’ liberalism. The work of Joseph Raz would be of central importance to such a position (Raz, 1986). However, the problem with this as seen by its many critics is that it makes a conception of liberalism with its own thick conception of the good – for example autonomy – a further part of the problem of pluralism over the good which liberal political principles were designed to solve. If liberalism has its own substantial good, if all goods are part of a social context in which goods are controversial and subject to disagreement, what is to make the liberal conception of the good authoritative amidst all of this diversity?

6) It might be argued that instead of looking for philosophical underpinnings of liberalism in a context of pluralism we should rather see it in historical terms. It is a doctrine which has emerged in Western history through circumstances such as religious wars which have made its appeal intelligible even if it lacks some ultimate philosophical sanction. It is an achievement nota philosophically grounded theory. However, this will hardly do as it stands as a thesis about legitimacy, unless despite fine words about consent and rational justification the liberal is just prepared to impose liberal values and their consequences on, for example, faith groups who may regard these as illegitimate. This is just how we do things around here – to echo Richard Rorty’s view. Of course this might be a different matter if the
position of liberalism in the West could be seen as underwritten by a philosophy of history of the sort provided by Francis Fukuyama in *The End of History* (Fukuyama, 1992). However those like Richard Rorty and Raymond Aron, who have taken the view that liberalism should be seen as an historical achievement rather than a philosophical system, have also been in the forefront of regarding history as a series of contingencies (Aron, 1938; Berlin, 1969, 2009; Rorty, 1989). Such a view of history can hardly provide a firm justification of the priority of liberalism in the face of dissenting comprehensive doctrines particularly when some of those doctrines – Christianity would be a prime example- may well have their own philosophies of history and theodicies underpinned by their own comprehensive doctrines.

7) Finally in this list we might draw attention to natural law ideas of liberalism. It is, of course worth pointing out that John Locke, a founding father of liberalism rooted his arguments in a theistic/natural law view of politics and society. The issue of natural law relates to pluralism in the following way. One of the major natural law thinkers, St Thomas Aquinas, argued in *Summa Contra Gentiles* that natural law which could be known by reason and by revelation provided a kind of bridge between the pagan and the Christian and that this bridge was important for communication across cultures and ways of life such as the Christian and the non Christian. The core idea here is that the nature of human nature and what we are to understand by intelligible forms of human flourishing in the light of that nature provides an important horizon and indeed limiting point for pluralism and diversity. This point is also made at least implicitly by Isaiah Berlin when he argues in *The Crooked Timber of Humanity* that there is a big difference between pluralism and relativism. The pluralist recognises the fact that the nature of human life provides an horizon based on what is recognisably human as a limitation on the diversity of values, which would otherwise be so great as to lead to relativism (Berlin, 1990: 80).

So there are a large number of different and incompatible answers to the question of what it is that privileges the liberal legal and political order over first order identity creating and sustaining beliefs and this diversity of justificatory strategies weakens the claim to privilege liberalism over other forms of belief.

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5. The Neutrality of the Public Realm

It has been argued that neutrality is essential to modern liberalism in the context of diversity. In a situation of first order disagreement over conceptions of the good liberalism has to legitimise itself and does so as a doctrine which is neutral between these first order controversies. This is why in the view of such thinkers perfectionist liberalism, based on its own substantial moral standpoint, will not work as it will become a further part of the problem of pluralism rather than its solution. Neutrality in public doctrine seems to be quite a powerful tool because its position is that public reason within a neutrally determined public space can only deploy principles and arguments which are not drawn directly from and do not directly embody contentious comprehensive beliefs and doctrines. The consequence of this is that there can be no directly religious input into debate in the public realm. It may be that people of faith will be able to find and utilise neutral arguments or secular arguments which are widely accepted and may be regarded as part of public reason as means of backing up their religious position. For example, the ubiquitous health and safety concerns which are part of public reason might be used in certain circumstances to back up religious arguments about sexuality and that in this context the religious person may well be able to make his or her argument about some aspect of sexuality in a secular way to achieve what is a religious aim but which would violate the canons of public reason and neutrality if argued on a religious basis alone. However, all of this, which follows from the idea of the neutrality of the public realm in a liberal society, may be doubted if it can be shown that some of the central principles of the public realm as envisaged by liberals are themselves intensely moralised. It would be good to have time to show that this is true of freedom, justice and rights, but in the time available I will concentrate on freedom, although the case here will indirectly bear on rights too, whether these are understood to be protections of negative liberty or for that matter ways of protecting basic human interests.

A liberal society is a free society and central to it is the ideal of equal freedom. For most liberals freedom is essentially negative and is defined in terms of the absence of coercion.
The two paradigm cases of coercion are:

A prevents B from doing X (or, A makes it impossible for B to do X) which he/she would otherwise do;

and

A requires B to do Y (or, A makes it impossible for B not to do Y), which otherwise he/she would not do.

If freedom is the absence of coercion, then it is essential to have an account of the nature of coercion which is neutral between different belief systems otherwise whether someone was coerced or not would depend upon that person’s beliefs and values. That would collapse the distinction between being free and feeling free. In subjectivising freedom to this extent it would render the idea of equal freedom meaningless. The ‘being free’ may be objective if we can have an objective account of coercion; feeling free is subjective in that it engages the individual’s beliefs and desires. If freedom and coercion are moralised relative to disputed, controversial and incommensurable conceptions of the good, then there can be no meaning to the phrase ‘equal freedom’ since each judgement about freedom and coercion would in fact be subjective. However, this assumes that there can be some value-free conception of coercion. It is very doubtful that this can be so. It might be argued that if coercion is defined in terms of prevention and impossibility then this might be so; after all, prevention and impossibility are wholly empirical states of affairs and therefore to invoke one or the other is not to make a morally engaged claim. This can be doubted but for the moment let me pursue a different line. Even if prevention and impossibility are not moralised, most forms of coercion are not covered by them. The law certainly is not. The law works not by prevention and not by impossibility but by threats: if you do X you will go to prison for five years; if you do Y you will be fined £100 and so on. However, threats engage peoples’ sense and scale of values – what matters to them and what is important to them. A threat is only coercive relative to a person’s values, indeed given a different set of values it may seem like an offer. The legal notice: Parking Prohibited: Penalty £50 may be taken by a rich man to be an offer: ‘fancy! I can park in this really good spot for only £50!’ To a poor person it may well be a form of coercion in that relative to his scale of values the threat deters him from parking there, which is what he would otherwise do. The same words to one person can be a threat and to another an offer. Take another case: a thief in a church threatens to desecrate the consecrated host unless the priest gives him the keys to the safe. For the priest the host is the body of Christ, the threat is credible and he thinks that he has to comply yet that is not what he wants to do; exactly the same threat may be made to a secular cleaner in the church and it will not be seen as a threat or not that much of a threat. Threats engage our values, and in order to have a common idea of a threat which we would all regard as a form of coercion we have to be able to invoke common values. This is even recognised by Hayek, that great proponent of negative liberty (Hayek, 1960: 138). We have to have a sense of common human goods, a threat against which would be regarded as a basic harm (Plant, 2009).

If there are such moral considerations entering our understanding of the nature of freedom and coercion, why should beliefs about basic goods and harms held by people from within comprehensive doctrines such as religious beliefs be excluded from an account of these basic goods and harms? The answer is essentially epistemological; that is to say the claim is that such beliefs should be excluded because they do not meet the demands of public scrutiny, they are based upon faith, commitment and so forth rather than objective and intersubjectively shareable evidence. Before this claim is considered we need to notice that even prevention and impossibility as forms of coercion cannot be regarded as de-moralised concepts either. Take impossibility. What I regard as impossible for me to do, leaving aside forms of logical impossibility like drawing a round square or physical impossibilities like being in two places at once which have nothing to do with coercion, it seems clear that even this idea impacts upon our scale of values: it may for example be impossible for me to do X if I am to retain my integrity and my beliefs; it may be impossible for me, given my relatively timid character, to make that political speech when I have been threatened with assassination if I do; it may be impossible for me not to comply with your order to do X since you have said that you will kill my wife and children if I do not – and my love for them is the most important thing in my life. So even impossibility is linked to the scale of values entertained by individuals. Most people would regard these as being so important that a threat against them is coercive because it makes it practically impossible not to comply with the threat.

If all this is so then it is not possible to give a de-moralised account of freedom which is an essential building block of a liberal public sphere.
Parallel arguments apply in the case of rights. On the liberal model, rights exist to prevent coercion and to protect negative liberty but if I am right about the relationship between a common conception of coercion and a common set of goods then rights also have to be linked to an idea of such goods and their place in human life. So, whether we think that rights protect negative freedom or more broadly as, for example, in Joseph Raz's work, that they exist to protect basic and important interests, rights cannot be detached from the good. There can be no question of putting the right before the good if by that is meant the claim that there can be a morally freestanding account of the nature of rights.

There is an additional way too that the argument linking negative freedom and central human goods can be made. It is central to neutralist forms of liberalism (Berlin, 1969 p.153 n.1) that there can be no moral assessment made of the ends which people choose when they exercise their freedom. The only thing that justifies the restriction of freedom is not a moral and therefore contested critique of the ends for which freedom is used, but rather if A in pursuing Y infringes the rights or negative freedom of B. This has to be so because a moral critique of goals would destroy the neutrality of the liberal order. It follows, at least for Hayek, that the number and significance of the range of choices open to a person have nothing to do with freedom. Freedom is the absence of coercion and that is all. It is not and cannot be linked to disputed accounts of the range and significance of the choices made. However, as Charles Taylor has argued, such views lead to very paradoxical results (Taylor, 1985). If a neutralist liberal is asked what makes society A freer than society B, the answer has to be in terms of the number of coercive rules and regulations in one society compared with another. It cannot be answered by citing the greater moral importance of the choices available in society A compared with B. However, this quantitative rather than qualitative approach to the issue will lead us to the view that the simpler a society is the freer it is likely to be. A society with little or no traffic, with little or no financial and property transfer system, with little industry and trade requiring laws to do with contract and the like is likely to have far fewer laws than a complex western society. So however oppressive the first sort of society may be, it is freer in quantitative terms than the other. Taylor cites Western societies versus Hoxha's Albania as an example. Surely Taylor is right to argue that what makes Western societies freer than Albania is what people are able to do and how these things relate to accounts of the human good: they are allowed to be mobile, to leave the country, to participate in politics if they wish to, to criticise the government, have a wide variety of cultural goods available to them etc. On the quantitative approach none of these things can enter into the judgement since to do so would moralise the concept of negative liberty, which in a context of moral diversity would undermine one of the building blocks of the neutral state.

So both in terms of an understanding of coercion and the understanding of why freedom matters to us we have to invoke a conception of goods which we have in common. This is why, as I said earlier, it seems to me that something like a natural law approach which presumes some agreement over the central goods of human life in the context of what human beings need to flourish is central to making sense of freedom and coercion.

If a conception of the good or goods lies at the heart of an account of liberal society and any attempt to banish such ideas will lead to illusion, why should not the religious perspective with its view of the good and of human flourishing have a role in deliberating about what the core or essential goods are? In the recent literature on liberalism one can find two positions. One position would effectively privatise religious belief and debar it from having any kind of legitimate voice in the public realm; the other would demand the reshaping of religious belief as a prerequisite of entry into the public realms and would in all probability have the effect of privatising religion as much as the first position.

The first position is that in so far as participation in the public realm is concerned there has to be an exacting epistemological standard met, namely that for public reason to operate claims in the public realm have to be made subject to public scrutiny, testing and contestation. The sources of authority for claims made in particular must be capable of being open to such scrutiny. This is not the case, so it is argued, with faith based claims. They depend on personal faith and commitment, they may be based on revelation and on personal religious experience. On the liberal view we are examining they do not meet the threshold to have a place in the public realm.
The second position is less radical at first sight. It involves the idea that in order to be part of the public realm faith claims need to be reasonable and the criterion of reasonableness which is held in very broadly the same way by Rawls and Nagel is that I hold to my faith or to my comprehensive doctrine in a reasonable way if I recognise that it is reasonable for others to disagree with me. The reason for this account is that public justification has to have some sort of impersonal or impartial character. So in terms of public reason one has to be able to take both the personal position of faith in my own position while at the same time being able to take on the impersonal position too; stepping as it were outside of my belief, I recognise that it is reasonable for others to disagree with me. This is very close to arguing that in order to be part of the public realm religious belief itself has to be of a liberal form. Indeed Kymlicka makes this achievement part of his own liberal project (Kymlicka, 1989).

There is a great deal to be said about both of these claims, but here I will just make two points which bear upon the legitimacy of liberalism in the context of debarring the religious voice. As regards the first argument, it would be very odd for a liberalism which at least in the terms of some of its most prominent proponents depends upon a kind of basic commitment or existential choice – the whole point of which is that this has to happen when we run out of shared rational grounds for belief. If liberalism itself depends upon some kind of faith which cannot be given an ultimate foundation, then it is hardly on strong grounds in attempting to block the religious voice in public debate which in turn depends on faith and commitment. Equally many of those arguing for the debarring of the religious voice do so because they take scientific reasoning as their paradigm of right reason and there is a lot to argue about here. However one small point can be made and that is that it is not at all clear how scientific or factual evidence is going to be able to provide a justification for liberal principles to define the public realm if as I have argued those such as freedom, rights, justice and so forth are normative principles. The reason why factual and scientific enquiry cannot do this is because of the fact-value distinction which is usually taken to be central to empiricism. If all the reasoning that we are allowed is factual reasoning, then that is going to underdetermine in a radical way the normative realm of liberalism and again we are left with a commitment to liberalism as just that – a commitment. So on this basis it seems that liberalism itself has to be open to faith in itself and commitment to itself, and it would then be wholly inconsistent to rule out faith based claims from the public realm.

The second argument about liberalising faith groups in a way raises the same question namely: what is the authority of liberalism to do this? What is the basis of its legitimacy such that it can challenge the way others interpret and understand their own beliefs. As we have seen, this is not an easy question to answer unless liberals are prepared to leave their unsustainable comfort zone of neutrality and argue their case in terms of a basis for liberalism in terms of a substantive good or set of goods which in turn have some salience for the substantive beliefs of those whose faith commitments they wish to liberalise. So the question then is how could this possibly be done?

One possible answer would be to look at some sort of account of natural law. Recall that Aquinas argued that natural law can be a bridge between the pagan and the believer; could it also be a bridge in the case of contending comprehensive doctrines and liberalism? One thing that might be repeated at this juncture is that many who have embraced moral pluralism have wanted to say that this can be differentiated from relativism (see Berlin 1990) since the values embodied in pluralistic moralities are all in some sense universal or objective and that the nature and circumstances of human nature and human life constitute a kind of moral horizon within which diversity occurs. So how might such views be built upon?

There are two complementary ways. The first owes a lot to Alan Gewirth in *Reason and Morality* and *The Community of Rights* (Gewirth, 1978, 1996), the second is indebted to John Finnis in *Natural Law and Natural Rights* (Finnis, 1980).

The argument derived from Gewirth would go like this. Any moral or religious doctrine is going to have to have a place for the ideas of agency and responsibility. Even the most authoritarian set of religious doctrines has to have a place for
agency. After all, its proscriptions on evil or sinful behaviour only have a point and a purpose if the adherents of that religion have some capacity either for following its dictates or being condemned because they do not. The idea of agency therefore can be seen as being centrally important to any comprehensive doctrine that seeks to guide action. However, agency has its own generic goods, which are universal or general aspects of agency rather than agency exercised within the perspectives of one comprehensive doctrine. Such goods of agency will be both negative and positive. The negative ones will involve typical negative forms of liberty to be free from coercion. When I spoke earlier about coercion I suggested that the idea itself had to be linked to the idea of some goods a threat against which would always be regarded as coercive. The approach I am now outlining would give some analytical framework within which to think about that idea. Agency will also involve some account of positive goods – a case which was developed by Rawls in his account of primary goods. One cannot exercise agency without some degree of education, some degree of physical security some degree of healthy functioning and some degree of power in order to exercise agency. These are the basic goods of agency a threat against which will be coercive. Such goods would also provide us with a general account of harm so that either threatening these goods which are crucial to agency or withholding them would constitute harm. On this view therefore we can develop the idea of the generic goods of agency which have to be seen as general since, as I have said, any comprehensive action-guiding doctrine has to presuppose a capacity for exercising agency.

The second argument is indebted to Finnis’s position in *Natural Law and Natural Rights* and it is an attempt to meet the need in any plausible theory of freedom pointed out by Charles Taylor for freedom to be linked to an idea of the good and human flourishing. Otherwise freedom is purely a quantitative matter of counting up restrictions rather than considering what one can do with it. One response to such an argument will be to say that is all very well but people will differ fundamentally in their conceptions of the good and therefore freedom will be subjective. Finnis provides reasons for doubting that the goods associated with human flourishing and fulfilment are as diverse and subjective as this. To put his point in an absurdly brief form he argues that there are a variety of human goods reference to which provides a kind of stopping place in justification. If I seek to explain why I am doing something then, depending on the context, I will stop my justification by invoking some kind of basic good which an interlocutor would normally find an intelligible reason for doing something. Life and beauty are to straightforward examples. If my ultimate justification for my course of action is that without pursuing that course I will die, then this will be taken as an ultimate reason giving intelligibility to what I am doing. Equally beauty or more generally aesthetic experience can provide a foundational form of intelligibility in a different context. Similarly the point is the same in relation to the good of reason and rationality. These are not to be seen as sociological observations about the point at which people run out of arguments, but can be given a rational basis by forms of a reflexive argument focused on the idea of self-refutation. This is clear enough in the case of rationality. Any argument that I mount against the case for acting in a rational way will itself involve the use of the very forms of rational argument which I am seeking to undermine. So the process of critique confirms what it is seeking to undermine.

On such a view the role of rights is to protect and facilitate access to such goods.

An elaborated account of the generic goods of action would also enable us to provide a rationale for rights and justice. Generic goods of both a negative and positive sort would provide the foundation for rights, because as necessary goods for all human agents any threat to such goods would be coercive. This approach tends to favour the interest or benefit theory of rights rather than the will or choice theory just because of the fact that while negative liberty is part of the core set of generic goods of agency this approach is broader and emphasises positive goods too which can be turned into positive rights. These generic goods go beyond the importance of will and choice and encompass what must be regarded as basic interests of all human agents.

So there is a case for saying, against the pluralist view that we are faced with incommensurable comprehensive doctrines that in fact there can be some types of universals in human life and practice rooted in the common idea of agency and common values relating to those forms of human flourishing which when invoked provide for the intelligibility of practical activity. In particular, this will help to provide an account of the moral context of the public realm, rather than one rooted in the idea of neutrality.
6. Identity and Difference Blind Politics

Where does such an approach leave us in terms of the question of whether a liberal political order should recognise specific forms of identity including religious identities and grant them legal privileges and legal immunities? To do this would or could sanction the legal protection for the ways identities would manifest themselves in the public realm in dress, in the utilisation of symbols and so forth. I would favour the alternative view that, as far as possible, a legal and political order should be difference blind if it can draw upon a normative structure – a set of goods – which are universal, as I have suggested that it can.

In order to provide more reasons for this point of view we need to look at some of the negative aspects involved in claims about identity. I can only go into these in a skeletal way but they include the following. At the most abstract level it is arguable that the ascription of identity is always open-ended in two senses. The character Daniel in Sartre’s novel *Le Sursis* (Sartre, 1972: 151) says that he wants to be a pederast as an oak tree is an oak tree, so that he can come to be what he is, to realise his nature (*être ce que je suis*), but this is impossible for a human being because one cannot turn oneself into a kind of an object defined by an essential nature. For Sartre, and indeed de Beauvoir in *Le Deuxième Sexe* (de Beauvoir, 1949: part I), there is no essence either in general for human beings to fulfil nor an essence in respect of particular roles. There is always a strong element of belief and of construction about social roles and to believe that one can assume or be defined in terms of an essential identity neglects this fact that what we regard as essences are in fact social constructions.

Secondly, even if we regarded our identities as essentially fixed whether by biology or inherited culture, Sartre considers it possible for any person in any circumstances to take up an attitude of their own towards whatever they perceive their essential nature to be. To assume that in human life one has to fulfil one’s nature as an oak tree is an oak tree is always to extinguish the radical freedom which human beings have, even if it is a freedom limited to taking up an inner mental attitude towards one’s identity. To see one’s identity as fixed is for Sartre to *eteindre le regard interieur*. If this has some salience then identity is always going to have highly contestable features, just because of its constructed and intentionalist nature. For a liberal state to recognise identities as ineluctable and as part of some kind of fate is in the light of the Sartrean critique to freeze something about types of human flourishing and development at important moments.

This freezing may well also empower conservative elements within any group claiming a specific identity to determine what the nature of that identity is, what claims to political and legal recognition are implied and what forms of behaviour in the public realm are required by that religious identity. Another way of making the same point would be to claim that this presupposes a high degree of essentialism – that there is an essential core to a religious community which legitimates and indeed requires behaviour and appearance of a particular sort. However, there is quite a literature on the contestability of religious identities and there is also the point that any kind of legal recognition of religion in identity terms requires treating a religion in a rather generic way, whereas there might be quite substantial doctrinal and denominational differences, which in turn may sanction or for that matter constrain public forms of manifestation of those beliefs. The same points apply to other forms of identity including gender and sexual orientation.

One further point about the philosophy of identity. Some will of course argue that identity does have an essence and that it is fixed by biology say, for example, in relation to gender and sexual orientation. Even if the biology supports the view that some aspects of human life are genetically determined this still leaves two questions unresolved. Given that claims to identity in the law and politics are going to be normative – that is to say how people with such an identity ought to be treated and the kind of self expression of their identity ought to be tolerated and/or ought to be protected by rights – because of the fact/value distinction the factual nature of the biological underpinnings of identity will wholly underdetermine the normative aspects of identity, which is what matters for politics and the law. These claims also
leave untouched Sartre’s point about attitudinal and behavioural freedom (as a consequence) in relation to any such identity claim.

In political debates about issues of identity and discrimination there is a contrast that looms large. It is often argued that gender, race and sexual orientation are given or naturalised forms of identity and religion is not. Naturalised forms of identity are things that you discover about yourself whereas religious identity is something that one chooses to assume. Therefore there is no case for special protection of religious identity any more than any other life style choice. In particular the law should not allow self assumed identities to be a basis on which to discriminate against those with given or naturalised identities. As it stands, however, this contrast is far too stark. In both cases we are talking about the normative aspects or more controversially requirements of identity – how should people with a particular identity be treated and what sorts of claims ought they to be able to make on the basis of their identity. We cannot just read off answers to these questions from only an account of the giveness of the identity any more than we can read off what should or should not be allowed in terms of the manifestation of religious identity. In all of these cases there has to be deliberation about these sorts of questions in a democratic society. So what might count as important in such deliberation. For some it will be the identity itself which in their view will embody in some way the authentic forms of expression appropriate for that identity. On this view given that a liberal state will protect given forms of identity it should also protect authentic forms of the manifestation of that identity. However this cannot be so as its stands for two reasons. The fist is that if what makes the giveness of identity or its naturalised form is some kind of biological basis then that in and of itself cannot sanction an account of how a person with that identity ought to be treated or what sorts of claims he or she ought to be able to make on others. The empirical account of the biological nature of identity cannot of itself provide an account of why others should be put under an obligation in respect of this identity. To do this we have to explain how and why the identity so given should be respected and protected by others. This is a normative argument and not an empirical one. This point in itself parallels the situation in respect to religious identity where similar moral arguments arise. It is not that we have one type of identity which is given and naturalised with no contestation about what its requirements are in terms of its manifestation on the one hand and the contested requirements of religious identity on the other. Both types of identity involve strong normative claims and in this sense the contrast between naturalised and self assumed identity is far too stark at least in terms of what is claimed to follow from these identities. Secondly we have to consider what follows from a manifestation of identity given that in both the naturalised and chosen form they involve the rights and interest of others. Ways of manifesting an identity of any sort are likely to be constrained by the rights and interests of others and whether others may be harmed by particular ways in which identities of any sort are manifested. The idea of harm and our understanding of that in respect of rights, interests and basic goods are crucial here. And my own view is that that politics and the law have taken a wrong turn here and we would be much better turning back towards a difference blind type of politico-legal system. Threats and potential harms to any of the basic goods of agency are to be regarded as coercive irrespective of questions about identity. In these circumstances something akin to laws against threatening words and behaviour ought to be enough without qualifying them or constraining them with religious or other types of identities. On this view what we need to consider is harm to basic goods. If a form of religious expression can be shown in a court to pose a threat or do potential or actual harm to others who also have the same rights to the same goods, then that is a good basis for constraining the forms of expression in question. If such forms do not pose threats or forms of harm to basic goods they should be tolerated without having to get into metaphysical disputes about whether or not they are essential to the form of religious identity being claimed. Emphasis on harms and the threat of harm would allow us to conduct debate about the toleration of various ways in which religion is manifested in a public and accessible discourse which is in fact denied when the focus is on identity, the normative requirements of identity and the authoritative articulation of these requirements by religious authorities. It might be argued that my proposal will not work because the idea of harm differs in a pluralistic society between the various groups making up such a society. However two responses can be made to this. The first is to reiterate the point already just made that in trying to determine the harmfulness or otherwise of tolerating a particular manifestation of religious belief we can conduct the debate about that in an accessible public discourse. Secondly, there is a benchmark of harm that can be shared across all groups within a pluralistic society, because of the link between harm and the basic goods of agency already noted. We need a citizen focused approach to these issues, not one based upon an hermetic appeal to religious authority and claims about the internal requirements of religious identity.


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