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Religious Rules, State Law, and Normative Pluralism - A Comparative Overview

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Chapter - APPLICATION OF RELIGIOUS LAW IN A MULTI-RELIGION NATION STATE. THE ISRAELI MODEL; Asher Maoz signed non exclusive consent form

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Chapter 2
State Norms, Religious Norms, and Claims of Plural Normativity under Democratic Constitutions

Michele Graziadei

Abstract Contemporary democracies are open to cultural and religious diversity, but encounter problems when prevailing values and norms are questioned in the name of religious or cultural beliefs and practices. In many Western liberal democracies, legal pluralism is high on the agenda of law and religion scholars because State centred legality fails to do justice to the complexity of social and normative interactions. Legal pluralism provides the intellectual tools for understanding how cultural and religious identities and norms are shaped in different sectors of society. Nonetheless, legal pluralism provides no direct and clear answer to the question of how social order and equality can be upheld under democratic constitutions. Pluralism alone does not guarantee that coexistence among people who live their lives in different groups can be sustained by prosocial attitudes, rather than undermined by conflict. Social psychology, cultural anthropology, and political science investigate how those attitudes can be nurtured. This chapter argues that to understand and manage the tensions generated by the intersection of state norms and religious norms, the law should also make use of the insights provided by these disciplines on human behaviour in society.

1. - In contemporary liberal democracies, the relations between State law and religions, both as belief systems and as sets of norms and institutions governing the lives of followers, are characterised by certain tensions that are increasingly visible and that demand fresh approaches to new issues (Foblets et al. 2014; Ferrari 2015). These tensions revolve around the constitutional principle of equality and involve an emerging body of antidiscrimination law applicable to a wide range of conducts and institutional practices. The recognition of full personal autonomy underpinning life in modern liberal democracies may collide with religious norms concerning issues such as abortion, end-of life decisions, marriage and the termination thereof, etc.... Modern liberal democracies do not have a stake in the religious beliefs of their

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citizens and residents, or have moderate claims about them, recognising in principle the value of pluralism in society, despite laws often bearing the traces of a different past. All modern liberal democracies protect religious freedom, which in the contemporary epoch includes freedom from religion. Freedom of religion is indeed an essential part of the constellation of freedoms that modern democracies generally intend to guarantee and uphold. That said, this concept is not always understood in the same way or recognised to the same extent everywhere (Durham et al. 2013).

The essays collected in this volume provide abundant food for thought on these matters by describing and comparing the normative settings governing the relationships between State norms and religious norms. The purpose of this chapter is to explore some of the questions that are left unanswered or are only marginally covered by other contributions in this volume. Among them, the principal one is whether and how the bond of citizenship can be reconciled with the bonds deriving from adherence to a religion, and in particular whether religion is to be considered different from other cultural phenomena in this respect. This is, in a certain sense, a problem that has always existed, since the constitution of the modern States. The advent of democracy, with its promise of the provision of equal legal protection for all, independent of personal and religious beliefs and more broadly culturally determined value orientations, has added an entirely new dimension to this issue, as is demonstrated by a wealth of recent research (see, e.g., Shah et al. 2014; Ferrari and Pastorelli 2013; Alidadi et al. 2012).

2. - To put these issues in perspective, it is necessary to return to the inception of the modern States, and to the reshaping of the relations between political authorities, law, and religions that lies at the origins of modern religious freedom. The making of modern States in the sixteenth century took place amidst bloody wars, vicious fights and controversies that tore the Christian world apart. Here I will concentrate on the French situation, taking as a reference point the ideas of a preliberal, non-democratic thinker, Jean Bodin (1530–1596), whose great political and philosophical work on sovereignty – *Les Six livres de la République* – published in 1576, marked a turn in the philosophical and political views of the epoch.

Bodin's world was populated by people who did not understand why civic and religious obligations should be treated as pertaining to different life ambits. This world was marked by intense conflicts that involved religious dimensions, culminating in the massacre of St. Bartholomew's Day (1572), when mass killings of French Calvinists (Hugonots) instigated by the Catholic King of France took place. In those hard times, how to contain violence that resulted or was associated with the plurality of polarized religious beliefs was a question of capital importance. Bodin considered peace as a precondition for the prosperity of a nation, and ultimately preferred peace to religious uniformity across the kingdom. Peace was difficult to achieve as "the people everywhere are most jealous of their religion" and "cannot endure any rites and ceremonies differing from the religions by themselves generally received" (Bodin 1962: III, 7; 381). Many of his contemporaries considered civil wars necessary if the alternative was sharing the country with heretics. Confronted with the deep sectarian divisions of his time, Bodin prudently distanced himself from the opinion that religious uniformity formed the foundation of civil

coexistence, and suggested that the King should not try to use force against religious minorities, whenever those minorities were established and rooted on the territory. He also did not accept the *cuius regio, eius religio* principle for France, which was favoured by sectors of the nobility and would have torn the country apart. He rejected the segmentation of France into semiautonomous units, each with its own religion. Civic life in polities traversed by divisions such as those experimented by sixteenth century France required a new solution: each person should have the possibility to practice his or her religion in private. Hence, Kings and rulers should abandon attempts to use violence to impose the true religion, to save souls, or to punish heretics, but rather consider the example of the Romans, who insisted on the public worship of the Roman gods "…yet for all that did they easily suffer every man privately within the city to use his own manner and fashion, and his religion" (Bodin 1962, IV, 7, 538).

The opinions expressed in *Les Six livres de la République* raised the opposition of the *dévots* who condemned Bodin's work as a mischievous defence of religious pluralism. To reject their arguments, Bodin accepted that religion remains a source of legitimacy for temporal powers. Having conceded this, he also maintained that even a false religion can help preserve peace in a kingdom. According to Bodin, repression is not an effective strategy in such matters, as it is self-defeating. Violence will generate further violence: "minds resolved, the more they are crossed, the stiffer they are" (Bodin 1962, III, 7, 382). This line of argument is linked to a wider theme, namely the possibility of strengthening the authority of the State by limiting its jurisdiction, and establishing constraints on its actions. This theme reflects a religious motive, mirroring as it does in the political sense the possibility - accepted by theologians - that God may decide to set limits on his infinite powers in this regard (Holmes 1995). One of the implications of this rational was that Christian kings must keep their promises to the infidels as well, an assumption that was crucial in the formation of modern liberal democracies, as well as for laying down the foundations of an international mercantile society in the medieval and modern period. This stance on the relations between political authority and religions was accompanied by a theory of legislation that was associated with positivism. Bodin held that *voluntas, not veritas, facit legem.* This doctrine worked in a society divided into factions, where endless disputes and fights concerned precisely what "reason" or "religion" required. However, Bodin was careful not to overplay what legislation based solely on sovereignty can achieve, by noting that habits and customs fixed boundaries on sovereign commands and sovereign authority (Holmes 1995).

At its inception, this inchoate form of religious freedom was justified by an eclectic set of considerations concerning religious behaviour. Bodin held that conscience, by natural necessity, cannot be constrained; he maintained that persecution begets hypocrisy, and that tributes coming from pure hearts please God, no matter the religious beliefs implicated in the offering. Ultimately, however, all these considerations are inscribed in the theoretical framework of political philosophy, according to which rational thinking and political prudence is the key to stable political authority.

3. - Legal positivism is thus established as a first response to the problem of how to impose authority in a divided society, and yet realism concludes that civil laws can govern society only insofar as coercion is not used every time they must be applied. This point is not as banal as it appears at first sight. Although religions often provide support to ruling powers, religious beliefs may also hinder the smooth application of civil laws and thus undermine governments.

Legislators and the machinery of the law may fail to persuade on many grounds, but opposition to political power and to the law based on religious grounds is notoriously difficult to overcome or to override, for a variety of reasons, including the possibility that many religions have to call upon beliefs relating to an after world, or to a supernatural world, to take position on every aspect of social life. This move tends to undermine the core tenet of political realism as a method of achieving stable government, namely the possibility to calculate the consequences of individual actions by relying on assumptions that prioritise worldly considerations in the weighing of the pros and cons of each possible choice, or course of action..[1] Major theorists of modern sovereignty, such as Thomas Hobbes, were acutely aware of this aspect of religious dissent and of the dangers associated with it for the political order and the authority of the State. But to be true to Hobbes, his arguments did not apply to religious dissent only. Hobbes pointed to other factors - secular factors - as the source of trouble for the stability of governments, such as the rhetoric based on the readings of classics prevailing in his time at the Universities.[2] Hobbes' work thus stands out in this respect as a manifesto against motivational reductionism, which would instead pick the instinct of self-preservation of a person's life as the granitic foundation of political power (Lloyd 1992; Holmes 1995). According to Hobbes, the basic decisions that reasonable individuals should be able to make regarding the choice between, subjection to sovereign powers or incurring the consequences of disobedience, including death, does not necessarily lead to choosing the first over the second. Surprisingly, contrary to the instinct of self preservation, one may choose death over the violation of religious precepts or the betrayal of a certain ideology, simply because personal choices are shaped by opinions and beliefs, and the prospect of death may in some cases be more attractive than life without dignity or damnation, especially if death promises salvation. Ultimately, as Hobbes makes clear, even political power is dependent on opinion, because the powers of the mighty have no foundations except in the beliefs and the opinion of the people (Hobbes 1990, 16). Therefore, even when not backed by the sword, as Hobbes duly noted, "words" and "breath" have an enormous political impact

[1] This is possibly why Max Weber advanced the distinction between value rationality and instrumental rationality, the former being much more mysterious than the latter. Whether that distinction is defensible in terms of coherence is altogether a different matter, of course (on that distinction, in a critical vein, see: Oakes 2003). In any case, the work of Habermas on the relationship between religious beliefs and civic participation in political debates clearly draws upon it (Habermas 2008). Once more, one can ask whether his work resists criticism.

[2] Although it may be anachronistic to represent Hobbes' position in this way, he was anticipating the argument made in full by Cavanaugh, according to whom the distinction between religious and secular violence is problematic to say the least (Cavanaugh 2009).

(Hobbes 1986, II, Ch. 18, 231). The lesson is that force alone fails to persuade. Political realism suggests that legal positivism is an empty box if public opinion is dominated by passions that may completely destroy respect for the common good and authority, be they religious or secular.

4. - The arguments discussed above concerning the troubles that legal positivism has when confronted with rules of conduct grounded on religious beliefs raise a few uncomfortable questions. I will try to sum them up as follows. Are these rules in any sense different from other normative or cultural manifestations entering the public sphere and governing social interactions? Does the public regulation of conduct conforming to religious beliefs pose any special challenge when compared with the public regulation of other conducts that confront State authority?

Such questions cannot be answered completely here, because just as not all religions are the same, not all States are same, as is made abundantly clear by the contributions collected in this book and other studies (Foblets et al. 2010). Some religions regulate the beliefs and conduct that believers must adhere to with greater severity. On the other hand, contemporary States have been formed under different historical conditions and thus the governments of these States must take into account disparate dynamics and forces in deciding what policies to implement. Even Europe's liberal democracies do not all share the same stance towards conduct that is inspired by religious precepts in the public sphere. Hence, different historical and institutional paths of State formation result in different constitutional settings and governmental policies concerning religious matters. Furthermore, history shows that both civic and religious obligations may change over time, even within a single State, with respect to the same religion. To generalise about the relations between State norms and religious norms is impossible without considering the temporal dimensions of comparisons and how these concepts are construed across time and in different places (in a critical vein: Cavanaugh 2009).

Nonetheless, the fundamental questions posed above remains interesting, despite the variety of models reflecting the relations between State norms and religious norms. To answer them requires understanding religions and how they work in society. Quite apart from what religions hold, sociologists, anthropologists, philosophers, economists and natural scientists, have often highlighted the many positive effects that religious beliefs and rituals bring to believers and more generally, to society. These positive effects include, among other things, improved social cohesion, increased sense of control over one's life, and so on. On the other hand, religions have often been examined in a critical vein, as a pernicious form of superstition, or false consciousness.

I need not to review this evidence, but rather to consider the wider picture concerning the working of religions in society. This includes religious strife with strong destabilising effects on society. This possibility is disturbing because compromise over religious matters - as mentioned above - is often difficult to reach, and religious disputes are thus often left without resolve even in the long run. But why should religions in particular be a source of concern in this respect?

As it often happens, discussing the question from a broader perspective, such as that offered by scholarship relating to conflict studies, will better illuminate this point.

Research in this area points to two key factors that work as powerful leverage for conflicts; scarcity and unequal distribution of resources. Scarcity of resources, or the fear thereof, triggers rivalries and conflicts. Whenever a community or a population, hears that "there is not enough left to satisfy everybody" the possibility of conflict rises. Spreading this message in the canonical form – "the more there is of mine, the less there is of yours"[3] – makes conflict both very likely and very harsh. On the other hand, although resources may abound, such as during periods of rapid economic growth, an unequal or unjust distribution of the surplus can still stir social conflicts, especially if attributed to policies enacted by governments, pressures by mighty social actors and so on, rather than being considered as God given, or the fruit of "chance" or "fate".

Are religions implicated in similar dynamics? Are religions able to produce scarcity (or the impression of scarcity) of some resources, and how they do so? Do they sanction controversial distribution of resources that are not scarce, and if so, how?

To this regard, I am largely unconcerned with the distribution of material resources dispensed through religious institutions, although distribution of material benefits has been a function of some religious institutions. I am focussing instead on religion as a way of gaining access to immaterial resources that are perceived as vital, or at least as very attractive, by a certain community. Whether such resources can make life better in this world by fostering the well-being of believers, or guarantee salvation in the after world, is not really the issue. Rather, it is how religions regulate access to those immaterial resources that can only be gained through adherence to religious beliefs and practices.

To delve further into this point, one has to take a second, less conventional look at what religions do in the socio-cultural sphere. Religions defined as belief systems concerned with transcendent dimensions of life apparently have little to do with distributional problems. Nonetheless, on closer scrutiny, one can argue that religions do regulate access to resources that many people consider essential or precious, as they are considered or perceived as the sources of spiritual or physical well being. An analysis of religions from this standpoint casts light on the nature of the conflicts in which religions or religious affiliations play a role (Avalos 2005, 2012, for a broader coverage of the topic: Jerryson et al. 2012).

Religions offer resources that are often viewed as scarce, and subject to restricted or limited access. Inscripturation, namely the notion that God reveals himself only through a select corpus of texts and to a select group of people, is of course central to this type of discourse. Sacred places or objects that are necessary to believers have this quality as well (think, for example, of descriptions of the sacred land). Scarcity is also the mechanism at the basis of group privileging, a feature of both ethnic and non-ethnic religions. Salvation – be it physical, spiritual, or both – is once more not for all, but for believers only, or for selected believers who share certain qualities. Purity, which is a concept central to many religious discourses, is an instantiation of the same logic, as it sets one condition to be included in a group

[3] Also known as the Duchess' law, after the dictum of the Duchess in Lewis Carrol's *Alice's adventures in Wonderland* (1865), ch. IX.

with positive features. One can easily multiply similar examples for a variety of religions.

Some passages in the holy scriptures of religions justify resorting to violence to affirm religious values and norms, but this is not really an essential point in understanding how religions can be instrumental in provoking conflicts and strife. Rather, what should be noted is the tendency to foster a mentality in which religion is considered the (only) way to benefit from resources that are otherwise difficult to obtain, and that are therefore limited. Empirical evidence for this thesis comes from the field of social psychology. Social psychologists have noticed that religions exacerbate in-group bias, namely the tendency to favour members of one's group and to exhibit prejudice towards members of other groups (for a review of the literature, which for the moment does not cover all religions, and the discussion of the state of the art: Galen 2012a, b).

Turning to the second argument mentioned above, namely the adverse social effects deriving from the unequal or unjust distribution of certain resources, the salient point to consider is that the overall growth of available resources for a community does not necessarily result in a more peaceful social coexistence. Analysing the social effects of economic growth in the 1960s, Mancur Olson made an important observation regarding this point (Olson 1963). Economic change fostering growth often brings with it distributional effects that marginalize individuals or social groups, or that reduces their weight and salience in society. Members of the community may perceive new distributive patterns emerging during a phase of growth driven change as unjust, when compared to previously established distributions of wealth. Therefore, economic growth can go hand in hand with social troubles and turmoil because those who suffer the adverse effect of change will resist it. This key observation can also be applied to the religious realm. If society's *mores* change and personal autonomy is expanded, as it happens when previously impermissible conduct becomes legitimate, those who consider legitimacy as a scarce resource may oppose such change, although the range of choices available to individuals and groups expands. Current religious objections to laws on gay marriage reflect this logic. To affirm that these laws uphold marriage as a central institution in society will not appease those who think that legislation introducing gay marriage as a legitimate form of marriage undermines marriage as an institution reserved for heterosexual couples, even though this novel legislation concerns civil marriages only, not religious marriages. It will not appease traditionalists, because they consider the concept of "marriage" as belonging to them, and they do not intend to share it with others.

I have hinted above to the fact that religious beliefs defy empirical validation or falsification through tests applicable to scientific propositions. But the question of why religious struggles are so difficult to control, and why religious confrontations are so enduring and so hard to bring to an end, has perhaps little to do with these aspects of religions as belief systems. Many cultural wars share similar characteristics: they are not easily resolved by rational arguments or by those based on empirical evidence. Oliver Wendell Holmes, a famous US Supreme Court

Justice, once quipped: “you can’t argue a man into liking a glass of beer”.[4] He was right, many preferences linked to cultural conditioning cannot be changed by resorting to rational arguments, or to empirically grounded observations (and yet they are still part of the normal spectrum of preferences permitted in a community!). Hence, to think over the dilemmas raised by State regulation of religious phenomena requires knowing more about other types of conflicts and confrontations as well; to highlight what can be learnt about these conflicts when they are approached in a broader, cultural perspective. To do so, let us turn to one of the central norms of the constitutions of liberal democracies – namely the principle of equality. One of the biggest challenges faced by legal theorists is the interpretation of this principle and its reconciliation with the increasing diversity of viewpoints related to values and cultural practices that are emerging in contemporary democracies. My point is that equality as a key constitutional principle can only be preserved through the development of new awareness of what cultural differences and conflicts involve for the making or unmaking of social order. Social psychologists and political scientists, among other social scientists, have explored these dimensions of social life in depth. Their finding may help to harness and subdue tendencies that would instead work to escalate cultural conflicts - including religious conflicts - out of control.

5. - The universal recognition of the principle of equality by liberal democracies stands in opposition to ancient regimes that were rooted in the division of societies into estates. Such divisions were sanctioned by social custom and inscribed into law. To overcome them, a State centred notion of legality was designed and joined with the foundation of democratic governments under modern constitutions.[5] In Europe, a uniform national concept of citizenship was the ultimate outcome of this revolutionary project in all States. However, this notion is not universal (see, e.g. Segzin 2013; Parolin 2009, 2014).

This new political bond was forged to overcome the peculiar and different legal conditions of subjects and communities that existed in the territory. Corresponding civil institutions were created *ex novo* to expand the powers of the States to ambits of social life that were previously regulated by religious institutions, such as civil marriage, state schools, public hospitals, cemeteries and so on.

The idea of equality underpinning this new civic status was intended to be inclusive, and the State thus became the key reference point for the life of the entire national community. This process involved the construction of an abstract, egalitarian notion of subjectivity, one that freed people from the bonds held in place by previously existing customary regimes, as well from religiously imposed status. As

[4] Full citation: “Deep-seated preferences can not be argued about - you can not argue a man into liking a glass of beer - and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.” (Holmes 1918).

[5] As far as Europe is concerned, a new concept of citizenship is emerging at the European level, the implications of which are still to be fully worked out.

it often happens with major change, this too turned out to be a mixed blessing (Macdonald 2005).[6]

Detaching law from everyday life to justify the equal treatment of subjects whose life trajectories would otherwise be governed by the accidents of birth or belonging, also meant separating people from their traditional sites and modes of symbolic interaction. As a consequence, this new form of legality - sanctioned by the State - was rather distant from the life experience of communities and individuals. State centred legality denied that the overlapping communities, in which people live their lives as children, parents, spouses, neighbours, workers, etc., are sites rich with normativity, in which personal identities are discovered, negotiated, ordered and reordered. This can only be perceived by individuals as paradoxical given the centrality of the experience gained in those communities for the realisation of personal autonomy (Macdonald 2005). Religious fundamentalism can be understood as an extreme reaction to this state of affairs, purporting, as it does, to impose an idealised model of society that should be governed as if civic bonds did not exist. It is not by chance that some scholars argue that fundamentalism originates in urban, rather than in rural ambiences, because it explodes as a consequence of contact with modernity (Ozzano 2014).

Much time has gone by since the realisation of the constitutional project that led modern democracies to adopt and extol that notion of civil subjectivity. The assimilationist model that backed up the original idea of a national citizenship has softened over the past few decades. It has been rendered more inclusive by mellowing the reference to dominant social values that it implicitly endorsed - a case in point is the evolution of blasphemy laws in modern democracies - and by opening it up to diversity. Recognition granted to minority groups and subordinated identities now takes a variety of forms, from the purely symbolic - such as an apology for past crimes or wrongs, gay pride parades, etc. etc.- to more inclusive policies formulated in terms of reasonable accommodation for practices required by religious beliefs (Bribosia et al. 2013; Alidadi et al. 2012). But the State centred model of legality that is connected to the rise of the nation state has hardly been challenged as far as its core mechanism is concerned. State centred legality still tends to deny the overlapping communities in which people live their lives and in which personal identities take shape, the nature of competing normative communities. For the State those social sites cannot generate competing legal regimes, therefore the order which provides structure to these social spheres is represented by the State in terms of "brute" or "mute" facts (Macdonald 2005). The State may establish coordination mechanisms with those alternative sources of normativity, but this is not to be taken for granted, and for good reason. The strategy of fostering a notion of citizenship based on a very selective approach to the construction of citizens' national identities was considered to be the most inclusive strategy that public institutions could follow at the time. Reluctance to change this model is not too surprising, and should not be

[6] In the history of political thought, Tocqueville's analysis of democracy points to the same conclusion highlighted above: Jaume (2014).

confounded with recent moves such as the enactment of anti-sharia laws, which are the expression of an entirely different political inspiration.

In our epoch this classic model is challenged by the open recognition that a monist notion of legality is not really all we have, even in countries that have traditionally adhered to it.

The dynamics of the law both within State borders and beyond them at the international level, highlight the unmaking of the strong notion of sovereignty, cast light on a renewed interest in legal pluralism at all levels of analysis (see the contribution of Turner 2016, Chap. 4 in this volume; on pluralism on a global scale: Berman 2012; Michaels 2009). In this context, State courts may silently acknowledge the need to coordinate their jurisdiction with that of alternative adjudicatory bodies: if justice is best served by a collaborative approach, implicit recognition of the existence of alternative fora may be the rule of the game. On the other hand, the decline of sovereignty, and the rise of legal pluralism as a form of legality in highly complex democratic societies and at the international level, has not ended the debate over what legal pluralism brings in modern contemporary democracies.

The essays in this collection cast light on this changing landscape, as far as religious norms are concerned, and I do not need to say more on the point. I would rather insist on a point that is all too often neglected in these debates, namely that State legality itself, although often presented as monolithic, is actually rather porous and malleable, being the result of a complex set of social forces, checks and balances, discretions, habits, and values often pointing in different directions. Every lawyer will quickly admit this when considering the wavering of legislatures over controversial and divisive issues, the manifestation of bureaucratic discretions, or judicial dissent linked to different judicial ideologies in difficult and not so difficult cases. State law is in itself a mishmash of very different things.[7]

Captured through the lenses of legal pluralism, State law is not stable, it is constantly made and unmade, it is not self-contained and it is subject to centre-periphery tensions. What is true in Texas may not be true in Massachusetts, and what holds in Jerusalem may be rejected in Tel Aviv. The credibility of State law owes much to the fact that of all the organisations on a certain territory, the State is usually - but not always - the actor with the most resources at its disposal. Nonetheless, when called to operate in conflict-ridden contexts, State officials know that State law, from which their authority stems, has no monopoly of normativity. Rather, as it has been aptly said, it is "…nothing more, and nothing less, than a hypothesis about social life." (Macdonald 2005; Nichols 2015).

6. - Once these points are clarified, the question of how equality should be reconciled with the plurality of identities and competing normativities that exist in society beyond the realm of State law remains open. Legal pluralism as a theory, or as a set of theories, does not necessarily address how diversity can be turned into a resource for individuals and for society as a whole, rather than becoming a cause of fragmentation and anomie. That said it would be an exaggeration to claim that this

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[7] The point is well put by Ramsted's contribution Chap. 3 in this volume: "Western law does not constitute universal law, *not even in Western societies*." (emphasis added).

is unchartered territory. By now we know that the State's pretence to rank personal identities, to model them, and to decide in favour of one identity over another, is nothing but a bet on the lasting validity of dominant values and social orientations. In the worst-case scenario, it is a recipe for tragedy, which will materialise when dominant values and social orientations are imposed on people thorough violence. We also know that no catalogue of rights can hope to capture the constant evolution and destruction of identity claims through which agency is asserted in society. A table of values and prescriptions set in stone will not stop change, evolution, and differentiation in society. Personal autonomy and free consent as the rules of the game may be resisted in the name of a secular ideology, or religious beliefs, and they do not necessarily favour social cohesion.

How to address the riddles that are posed by the paradoxical juxtaposition of equality and diversity?

One possibility is to reconsider the role of the State by highlighting that the equality discourse was initiated to cater for increased diversity and inclusion, rather than to enforce exclusion and uniformity. By embracing that principle, the State abandoned policies leading to religious persecutions, forced deportation, oppression of minorities and so on. Equality therefore does not need to be the enemy of diversity. Equality was once the surrogate catchword for more diversity and less exclusion, and to an extent it still is (see Foblets et al. 2014). If new identities introduce more diversity in the public space, this dynamic should not automatically be labelled as an attempt to undermine equality, or the possibility of civic coexistence. Social life becomes troublesome only when one social group is perceived by the others as an obstacle to achieving their own goals. In that case, each group will dislike the other, devalue them and reject the idea of collaborating with them, assuming to have nothing in common with them (Kessler and Mummendey 2008).

Under a naive form of social theory, one would think that individual attitudes determine social interactions among groups. Social psychology shows instead that attitudes towards "the others" are determined by the conditions of group interdependence and interaction, which may be negative or positive (Sherif 1966). Even groups that initially share homogeneous features may end up displaying prejudice and hostility as they interact in a competitive setting (for a review of the literature: Hewstone et al. 2008: 293 ff.). Perhaps, the most startling discovery made by social psychologists was that classifying individuals into arbitrary distinct social categories was sufficient enough to produce in-group–out-group discrimination and bias although they did not share a history of competition or conflict between them (Tajfel et al. 1971; see also Rabbie and Horwitz 1969). Changing the conditions of interdependence and turning negative interdependence into positive interdependency is a way of unlocking prosocial, collaborative behaviour if all groups in society are accorded equal status and are not set in competition one against the others (Allport 1954; Pettigrew and Tropp 2006). One way of establishing positive interdependency is by creating superordinate goals that may unite groups that have otherwise an incentive to compete one against the other (Deschamps and Brown 1983).

One can hope to forge new loyalties to overcome the tendency of social groups to discriminate out-groups also by exploring the notion that social life today takes place in a variety of arenas, facilitating contacts and intersections of various groups that shape the self and self perception in different ways, which would make the most of their positive distinctiveness and mutual superiority across various dimensions (Hewston and Brown 1986; Brown and Hewstone 2005). Another finding by social psychologists illuminates the dynamics of group conflict, namely so-called discontinuity effect. In the presence of a conflict over scarce resources, the competitiveness displayed when individuals interact with other individuals is less intense than the competiveness displayed among groups. This is because the willingness to collaborate at the individual level may be overshadowed by the competitive orientation of a group driven by factors that psychologist are still exploring (Wildschut and Insko 2007).

On the other hand, the dynamics of identity building across social boundaries make it clear that cultural variation happens along a continuous rather than discontinuous line, and that the ecology of the ambience in which an individual or a group operates shapes it, as anthropology and political science show (Barth 1998; Ozzano 2009). Evidence from the legal field, relating in particular to patterns of litigation over wealth distribution upon the dissolution of marriage confirms this observation (Fournier 2010).

Research in the field of social psychology and anthropology thus introduces new ways to understand the dynamics of social conflicts. The theories developed in those fields speak more generally about the limits of the law in addressing problems concerning the coexistence of religious and State norms.

One last reflection concerns the role of political parties and/or movements claiming a religious identity in the making of laws. The literature on law and religion seldom covers this aspect, but political scientists pay attention to it (Ozzano and Cavatorta 2014). The main question is whether the inclusion of radical religious parties in political games contributes to moderation of their discourses and their initiatives, or not. The arguments favouring inclusion of these parties in the representative system, so that they may shift towards moderate positions that are compatible with democratic regimes, rely on a number of factors. The extremist party that participates in the political game is bound to accept political diversity in the first place, and to dilute its ideology to attract outside voters. If a radical party is power-driven, it is also likely to rely on alliances with parties that do not share its extremism whenever absolute majority is not in sight. Lastly, while extremist parties may develop ideas from ideological social movements obsessed with doctrinal purity, the step from niche to mass party usually brings about emancipation from them. The empirical testing of this hypothesis returns a mixed picture, however. Although there are examples confirming the hypothesis, research shows that inclusion of radical political parties in parliamentary regimes does not always result in a stable moderate approach (Jaffrelot 2014), while their exclusion from the political game can sometimes produce moderation (Cavatorta and Merone 2014).

Conclusions

Contemporary democracies are open to cultural diversity, but have problems when prevailing values and norms are questioned in the name of religious or cultural beliefs and practices. In many Western liberal democracies, legal pluralism is high on the agenda of law and religion scholars because State centred legality fails to do justice to the complexity of social interactions. Legal pluralism provides the intellectual tools to understand how cultural identities, including religious identities, are shaped in different sites in society.

Nonetheless, legal pluralism provides no direct and clear answer to the question of how social order respecting equality can be upheld under democratic constitutions. Pluralism as such does not guarantee that coexistence among people who form different groups shall be sustained by prosocial attitudes, rather than undermined by conflict. Social psychology, cultural anthropology and political science investigate how those attitudes can be fostered.

This chapter argues that to understand and govern the tensions generated by the intersection of state norms and religious norms, the law should benefit from the insights about human behaviour in society that these disciplines provide as well.

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