

UCL

Religion beyond Equality

By

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DECLARATION

I, Patrick Vance Senga Nogoy, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.



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ABSTRACT

Cécile Laborde proposes a liberal egalitarian view for a liberal state to adopt in its fair treatment of religious citizens. She suggests a method where state neutrality is applied restrictively and religion is “disaggregated” across standard liberal rights. Without recourse to a legal-political category religion, she responds to the problem of religious accommodation by using main elements of a particular liberal right(s) to account for the dimension of religion that an issue of justice makes salient. In reply to the problem of state neutrality, she proposes that a liberal state can be non-neutral in its treatment of religious claims as long as religion is not a marker for social division, does not impose its comprehensive ethics, and provides publicly accessible reasons. I argue that adopting Laborde’s approach has conceptual and pragmatic advantages as a political strategy (*modus vivendi*) in resolving justice claims. However, its content-neutral and procedural framework partially meets the requirements of justice of religious citizens because of its egalitarian motivation. In adopting a minimal political conception of religion defined by elements of other liberal rights, the liberal state employs a narrow understanding of religion as a “collection” of beliefs and practices. This can result in religious citizens exercising partial or even distorted expressions of their religious identities. I suggest a

conceptual refinement in Laborde's theory if it aims at attracting endorsement from religious citizens as a reasonable conception of justice. I will survey some alternative frameworks and ideas (e.g. Raz value-based approach, Riordan's capacity for truth argument) and build on their strengths. I propose vocation as a useful concept for a liberal state to employ in appropriately understanding and assessing religious commitment. My modest proposal presents a liberal understanding of religion-state relationship other than those framed in the themes of neutrality, toleration, exclusion, or limitation of practices.

IMPACT STATEMENT

This research responds to the question: “how ought a liberal state to treat its religious citizens?” Given the rise of Islam, phenomenon of migration and displacement, and the surfacing of minor religions in a democratic state, I consider this as a relevant, crucial, and “live” research question in the area of political philosophy. In 2017, Cécile Laborde published *Liberalism’s Religion*—a liberal-egalitarian view that proposes to “disaggregate” religion in resolving contested issues of justice of religious citizens. By evaluating her theory, this philosophical research contributes to the growing academic literature about the questions and themes of justice pertinent to the relationship of religion and a liberal state.

In providing an alternative to Laborde’s framework, this research can benefit audiences, within and outside of the academic community. It can help guide political leaders and the larger public in thinking about appropriate principles that can aid a liberal state in rendering fair treatment of its religious citizens. In particular, this enquiry provides a solid philosophical reflection for the normative interpretation of religious freedom. It also helps widen the range of contemporary debates about the Free Exercise and Non-Establishment Clauses—two U.S. constitutional provisions related to religious freedom. Through the cases it examines, this study provokes a re-thinking of the manner in which

religious claims have been understood and adjudicated in the scales of justice. This is highly significant and relevant because some religious claims (e.g. doctrines that render differential treatment, practices that require a degree of bodily harm) can run in conflict with anti-discrimination laws such as the Equality Act.

In engaging in the debates and discussion of neutrality, toleration, and equality, this research offers a range of conceptual tools for religious citizens and a liberal state to adopt in their various attempts to determine and exercise justice in a society that we all share.

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Chapter 1

INTRODUCTION

1.1 Liberal state and religion

How ought a liberal state to treat its religious citizens? In response to this question, Cécile Laborde explores two related issues of justice: the justification of religious accommodation in law and the application of state neutrality in resolving religious claims. I will first discuss the case of religious accommodation.

Most legal systems of liberal states assign special protections to religion. For example, two provisions on religion are integral to the First Amendment to the Constitution of the United States. The first prohibits the government from favouring or “establishing” a particular religion. This is the Non-Establishment Clause. The second protects the liberty of religious expression, whereby citizens are granted the right to practise their own chosen religion. This is known as the Principle of Free Exercise. These two clauses, together with other fundamental rights, are found in one sentence of the American Constitution¹. Philippine jurisprudence, notably in the 1987 Constitution and in the 2018 Draft Federal

¹“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Cf. <http://www.uscourts.gov/about-federal-courts/educational-resources/educational-activities/first-amendment-activities>, accessed 10 September 2018.

Constitution, embraces two similar provisions but does so using a more nuanced phrasing that draws attention to the value of religion². Philippine constitutional law refers to this as the doctrine of “benevolent neutrality” and relies on it in adjudicating contested matters between secular goals and interests and religious liberties and interests (Davide 2015, p. 2).

Laborde considers these special protections a serious problem. She points to the Non-Establishment and Free Exercise clauses of the U.S. First Amendment as evidence of the state treating religion as “doubly special” (2016, p. 423). Are liberal states right to assign special protections to religion, as we see in both the United States and the Philippines, and many other places? Should a liberal state remain indifferent to religion as far as it is a comprehensive “conception of the good” or a particular plan of life? With the rise of Islam and the important phenomenon of migration driving cosmopolitanism in various societies, the normative question “how ought a liberal state treat its religious citizens?” has never been more topical, relevant, or crucial to political life.

²“No law shall be enacted that establishes, favours, or suppresses religion or its rejection, or that prohibits the free exercise and public expression of fundamental religious belief. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.”

“Is religion special?” Some say “No!” Proponents of the “egalitarian theory of religious freedom” (ETRF) claim that “religion should be understood as a subset of a broader category called ‘conceptions of the good’ and it should not generate claims to unique, exclusive treatment” (Laborde 2016, p. 249). On this view, religious and non-religious conceptions of the good should be treated on an equal plane, and all citizens deserve equal concern and respect (Ibid.). For example, religious citizens should not be the only ones to be entitled to exemptions from general laws; non-religious citizens deserve equal consideration (Ibid.). Moreover, the liberal state should neither draw from nor promote *any* conception of the good; it should remain “neutral to the good *simpliciter*” (Ibid.). Laborde explains that the ETRF is a popular theory and “intuitively attractive” because (1) it analogizes freedom of religion with other freedoms, (2) it is predicated upon equality and non-discrimination (political values which everyone is reasonably expected to endorse), and (3) it does not deny protection to religion but rather, extends it so as to cover non-religious interests and beliefs (Ibid., p. 250).

On the other hand, some defend the argument that religion is indeed special and should merit certain exemptions from general laws. For example, Michael McConnell argues that “Religion cannot be reduced to a subset of any larger

category” because “it plays such a wide variety of roles in human life—institution, worldview, basis of personal identity, answer to ultimate and transcendent questions” (McConnell 2000, p. 42). Given that religion’s unique complexity is akin to being *sui generis*, it should be specially protected (Ibid.).

Laborde offers an important contribution to this discussion. She observes that the proponents of ETRF prefer a substitution strategy to respond to claims of justice of religious citizens. For example, Ronald Dworkin suggests that religious freedom is “only one implication of a right to ethical independence” (Laborde 2015, p. 587). Laborde claims that ETRF advocates face a serious problem. If religious freedom is only a subset of a general right to ethical independence, it cannot claim any special right of exemption from the law (Ibid.). Some ETRF supporters are not ready to concede this (Ibid.). In order to account in principle for the granting of exceptions from the general law, these ETRF advocates *substitute* the freedom of conscience, as a “substantive theory of the specific good that is protected by the freedom of religion in accommodation cases” (Ibid., p. 588). Laborde finds this substitution strategy insufficient since it cannot account for what she calls “valuable religious practices” (e.g. wearing of the *hijab*, protection of sacred lands, etc.) whose protection does not fall, strictly speaking, under the “demands of conscience” (Ibid., p. 590). Against the political religionists

(e.g. McConnell), Laborde maintains that it is a *non-sequitur* to argue for the special recognition in law of a practice or institution that is simply deemed so complex as to render it “irreducible to anything else” (Ibid., p. 595).

Alternatively, Laborde recommends that religion can be “disaggregated” into a variety of plural goods (e.g. conscience, ethical integrity, membership, cultural belonging, collective expression, etc.) (2016, p. 430). She claims that the different dimensions of religion can “adequately be protected under standard liberal rights, provided these are understood expansively, and provided religion is not reduced to an individual belief or conception of the good” (Ibid.). This indicates that religious freedom is “derivative”—it is implied by, and entails, basic liberal freedoms, and is justified on the same grounds as they are (Laborde 2015, p. 594). Laborde stresses that being derivative does not necessarily mean that religion is less protected; it only means that it is not treated under an exceptional regime (Ibid.). Her disaggregation strategy covers a wide range of religious dimensions without “providing for, and policing, a distinctive category of legal-political concern—‘religion’” (Laborde 2016, p. 430).

Laborde’s proposal aims to show the flexibility and range of a liberal theory that has not been hitherto explored by the proponents of ETRF. In using a spectrum of standard liberal rights as analogues to the different dimensions of

religion, Laborde offers a framework to ground religious accommodation that religious citizens might reasonably endorse. Although I share her ambition to expand the political conception of religion beyond the confines of the freedom of conscience, I want to add some refinements to her disaggregation strategy. I offer these suggestions for improvement by focussing on her method of disaggregating religion under the elements of the freedom of association. I propose that Laborde's principles of centrality and deference be adjusted in order to protect the collective integrity of religious groups in cases where this value is weighed against other liberal interests. These improvements address the challenges and objections arising from the application of her approach to difficult cases like the permitting of Shari'a courts, male infant circumcision in Judaism, and the refusal of medical blood treatments by Jehovah's witnesses. These cases bring into light the need of a liberal state to acquire a substantive understanding of religion in order to appropriately appraise religious claims and reasonably ground state action (e.g. (im)permissibility or limitation of a core religious practice, resolution of unclear cases of wrongful discrimination involving religious practices that exercise differential treatment to women, children, and gender identities). Without these amendments, I maintain that Laborde's use of a content-neutral and procedural justice approach may unfairly

demand of religious citizens that they reform, compromise, or abandon some of their core practices or beliefs in situations where the liberal state privileges other rights and interests. From this, I offer the improved disaggregation approach as a reasonable *modus vivendi* and as a political strategy for resolving a range of justice claims of religious citizens. I defend my suggestion by comparing Laborde's proposal to toleration approaches. In particular, I will show how the disaggregation approach has a non-negative evaluation of religion commitments through its content-neutral and procedural approach. This helps maintain harmony among citizens with competing conceptions of the good and ensures the legitimacy of state action in reasonable disagreements. Furthermore, Laborde's disaggregation strategy promotes the political value of respect by securing equal opportunity for all citizens, religious and non-religious, to exercise their own beliefs and practices consistent with their own conceptions of the good. However, toleration approaches highlight the fact that foundational disagreements and political conflicts arising from competing conceptions of the good run *deep*: a certain religious practice or belief can be subject to strong disapproval from non-adherent citizens. I acknowledge that the disaggregation approach may not provide an adequate response to this phenomenon because of its employment of a minimal political conception of religion normatively derived

from elements of other liberal rights. I advance a modest claim that outside political conflicts or situations of deep foundational disagreements, a liberal state can rely on using a disaggregation approach in its justification of religious accommodation.

Laborde's theory of disaggregating religion also examines the debates of another attendant problem of justice concerning religious claims: the application of state neutrality. This I will discuss in the next section.

1.2 A liberal egalitarian response to the problem of neutrality

Laborde notices that most liberal egalitarians argue for positions that elevate the idea of state neutrality as the normative-interpretative concept of religious non-establishment (Laborde 2017, p. 67). This means that a liberal state should remain totally independent from the different conceptions of the good by not appealing to them in its justification for its action. However, a liberal state's adoption of a neutral attitude has non-neutral effects. Consider the case of subsidising the opera. If a liberal state chooses to be neutral by not appealing to any comprehensive notion of the good, the political outcome may be the non-subsidy of the opera. Those citizens whose conceptions of the good include the opera might need to adjust and revise their ideas (Mulhall and Swift 1992, p. 30). If applied to a

religious practice, a neutral attitude of the state can result in a limited and hindered expression of religious identity.

In adopting Laborde's disaggregation strategy, a liberal state need not always be neutral (understood as strict separation) towards religion. Non-neutrality is invited by religion when it offers publicly accessible reasons, is a non-dominating social identity, or does not insist on being itself a comprehensive ethics for everyone (Laborde 2017, p. 117). Laborde presents this *proviso* of restricted application of neutrality as her theory of "minimal secularism". Under minimal secularism, a liberal state can also partially appeal to a thin theory of the good in its justification of action. This thin theory of the good is composed of political values, which citizens with varying conceptions of the good can reasonably endorse. In doing so, a liberal state can render equal concern and treatment to its citizens and groups, religious and nonreligious, as "expressions of ethical and social pluralism" (Ibid., p. 2).

Laborde's critique of the problem of neutrality benefits from more precision. She does not consider the variety of practical political "attitudes" (versions) of neutrality that generate multiple political outcomes. This, in my view, leads to inconsistencies in behaviour and treatment by a liberal state of its religious citizens. Religious citizens may end up with only a partial and distorted possibility of displaying their

religious identity. They are too dependent on the liberal state's neutral or non-neutral attitude towards their beliefs and practices.

Laborde's discussion of the theme of state neutrality is part of her larger treatment of the disagreements between liberals and communitarians. It is not possible in this dissertation to give full attention to that bigger context, influential as it is. Liberal and communitarians, it seems to me, often misunderstand each other, and not always innocently.³ I will discuss only a few of the most relevant communitarian and liberal positions. Laborde's nuanced analysis of the problem of neutrality is undoubtedly one of her main contributions to the setting-up of a workable egalitarian framework.

1.3 The liberal – communitarian debate

Laborde's liberal egalitarian approach situates her in a wider debate between liberals and communitarians. This debate is largely shaped by Rawls's ideas on justice and the political. In broad strokes, Rawls claims that in deciding matters of basic justice, what is necessary is to eschew what he labels as

³For example, despite liberal insistence on the importance of the distinction between state and society, communitarians still refuse to confront the liberal worry about the inappropriateness of the state to provide the common forum for genuinely shared deliberation and commitment liberals desire. In the same way, liberals tend to take it for granted that the diversity of culture and tolerance are organic and such, the condition under which such free culture can be sustained must be taken seriously into account."—Cf. Will Kymlicka, *Contemporary Political Philosophy: An Introduction*, p. 251.

“comprehensive conceptions of the good” (e.g. moral, religious, and philosophical) and instead, rely on a thin theory of political values and public justification (PL, xx-xxi)⁴. Within this framework, the concept of a person is political—persons are understood *qua* citizens (PL xlv). They determine the “fair terms of social cooperation” that would support their individual pursuit of chosen ends (Ibid.). Rawls identifies pluralism as a practical problem: in a given society, citizens can readily disagree on matters of justice because of their various moral, religious commitments, or chosen ends (PL, xx). In response to this problem, Rawls’ framework demarcates what is essential to justice. He outlines political and social arrangements that citizens could agree upon despite their varying and even conflicting commitments to different conceptions of the good (Mulhall and Swift 1992, p. 29). From this brief sketch of Rawls’s political liberalism, it does not clearly follow that neutrality is the only attitude or solution available to a liberal state in addressing the problem of pluralism.

A general interpretation of state neutrality is that it is an attitude of refusal or indifference, on the part of the liberal state, to making judgments about which conception of the good or plan of life is valuable or worthless (Kymlicka 2002, p. 217). A liberal state acts with conceptual restraint in order to

⁴Here and after, John Rawls’s *Political Liberalism* is referred to as PL.

refrain from influencing its citizens' judgments about which life or conception of the good to take. An important consequence of this is illustrated by the case of the distribution of resources. For example, it is possible that either the free market of ideas or the dominant preferences dictate which conception of the good can reasonably earn state permission or support (Mulhall and Swift 1992, p. 26). These forces can unfairly influence citizens to reform or abandon their conceptions of the good (Ibid.).

Against adopting total neutrality, communitarians argue that human beings are inextricably linked to cultures, religions, and language, which they have created and by which they are sustained (Mulhall and Swift, p. 162). Religion, for an example, is a living reality that significantly determines a citizen's individuality. This assumes that culture and society, resources that are essential to individual flourishing, are products of human communities (Ibid., p. 163). Hence, a liberal state cannot be totally neutral in respect of conceptions of the good because individual autonomy is, to a large extent, dependent upon the community. This is not to deny individual autonomy as a good but rather, to restrict or modify its priority and scope (Ibid., p. 164).

There is wisdom I think in the communitarian intuition that religion is a significant factor in shaping individual autonomy. As a result, religion cannot be understood simply

as one individual choice among many others. One can be born into a religion through membership of a specific human community. The religious element remains a significant part of her identity even if she chooses to revise or abandon it. It is not unreasonable, in my view, to require a liberal state to behave towards religion in a manner respectful of its value as one of the fundamental conditions of human flourishing. Religion operates partly as a communal or shared life that shapes the identities of religious citizens and their understanding of and relation to society. Since religion is not an exclusive product of individual choice and even acts as a reality that shapes individual autonomy, it is unlike other fundamental liberal liberties and may deserve unique treatment.

Laborde's suggestion that religion can be disaggregated adds a fresh layer to this debate. Despite the practical advantages of adopting her liberal egalitarian view, I am concerned about several limitations that may well prevent it from being endorsed by religious citizens. These drawbacks are, in the first place, conceptual. To begin, Laborde's approach does not consider various attitudes of neutrality that have normative implications if applied to justice claims of religious citizens. Although this would not significantly impact a liberal state that is unconcerned with what religion is, its religious citizens may end up with a partial and even distorted

expression of their identities as I have mentioned earlier. Secondly, equality is a family of concepts (e.g. equal treatment, equal respect) that employs various normative criteria. In applying these normative criteria in the cases I have selected, I argue that religious identity is highly susceptible to political mishandling that can leave religious citizens worse off. Laborde uses “respect-worthy beliefs and practices” as a substitute political-legal category for religion. There are some theoretical disadvantages to this. The comparative concept displaces the meaning and value of religious practices and beliefs, coherently understood as the component of religious commitment. This can easily result in unfair comparisons and assessments of religious claims. Laborde’s theory overlooks the way in which religion, properly understood, is a “collection” of beliefs and practices. Lastly, by adopting a minimal conception of religion normatively interpreted by elements of other liberal rights, Laborde’s political conception of religion renders the liberal state prone to misinterpreting the needs of religious citizens because each liberal right varies in aim, rationale, and normative criteria. Bereft of a unified understanding of religion, I fear that a liberal state only partially meets the requirements of justice towards religious citizens under the disaggregation approach.

Without ignoring the benefits of Laborde's liberal egalitarian view, I propose a conceptual "tweaking" so it can attract endorsement from religious citizens, acting reasonably and consistently. I suggest relying on a "thicker" political conception that understands religion as a unified, multi-dimensional reality and right. I offer other philosophical routes—frameworks that allow a liberal state to understand and regard religious citizens consistent with their commitment. Here, liberals should seriously consider the communitarians' emphasis on religion as one of the fundamental conditions of human flourishing. In expanding liberal theory to accommodate such a concern, the state can treat religion in a way consonant to its true value. Raz's theory proposes exactly such an accommodation. Another approach, also helpful to this analysis, is that of Patrick Riordan who argues that the ground of religious commitment is the human capacity to search for and live out a comprehensive and foundational account of reality. I propose that the liberal state understands religious commitment as a form of vocation. The religious citizen has a meaningful plan of life which is reasonably pursued. Under this conception, the liberal state adopts a partially substantive view of religion in its justification of the differential treatment it accords to religious members. In understanding religious commitment as a vocation, religion is appreciated and treated appropriately in

its individual and collective expression. One of the chief outcomes of my suggestion is an alternative liberal understanding of a plural society as composed of citizens belonging to various cultures and religions, akin to Raz's vision of liberal multiculturalism.

1.4 Aims of the thesis and chapter summaries

The main task of this thesis is to evaluate Laborde's disaggregation strategy in light of the normative question about the relationship between state and religion: "how ought a liberal state to treat its religious citizens?" Through the appraisal of Laborde's disaggregation approach, I aim to contribute to the literature and on-going debate between the proponents of liberal theory and those who advocate other frameworks (e.g. critical religionists, communitarians) in responding to the challenges a liberal state confronts in treating its religious citizens with justice. This will be accomplished in two parts: (1) focussing on the case where religion is disaggregated under freedom of association, and (2) assessing the disaggregation strategy as a plausible alternative conception of justice.

In this first chapter, I have provided a sketch of the wider debate in which Laborde is engaged. I have demonstrated the rationality of her position and indicated some benefits of her proposal to disaggregate religion. I have taken account of the opposition of her main critics. The first

chapter also includes the articulation of the research question, the outline of the scope of the dissertation, and a summary of the succeeding chapters.

The second chapter is an evaluation of the method of disaggregating religion under the freedom of association. Laborde suggests key elements of the freedom of association (e.g. coherence interests, competence interests). This chapter explores several limitations and challenges to the disaggregation approach. It also proposes nuancing of some of its key elements (e.g. the centrality principle and the principle of deference). I will argue the case that, when the proposed amendments are made, Laborde's disaggregation strategy can better withstand more difficult objections (e.g. competing rights and administrability objections). Lastly, by comparing it to some toleration approaches, I claim that Laborde's theory can be a plausible *modus vivendi* in resolving a range of religious claims that are outside the scope of political conflicts or foundational disagreements.

The third chapter is an assessment of the disaggregation strategy as Laborde's liberal egalitarian response to the problem of state neutrality. I will argue that her approach does not consider the various practical attitudes of neutrality that significantly affect a liberal state's political conception of religion. A serious unintended consequence of this is that, religious citizens can end up permitted to identify

themselves in partial or even distorted ways. For example, a non-neutral effect of state neutrality can demand religious citizens to bracket or revise their own conceptions of the good in ways which can be inconsistent to the integrity of their religious commitment. This inconsistency can be exacerbated, I venture to suggest, if a liberal state adopts Laborde's disaggregated view because it relies on a minimal political conception of religion that is normatively defined by elements of other liberal rights. I am concerned that some core religious practices and functions that ought to attract differential treatment in fact become *ipso facto* cases of objectionable inequalities. As an improvement on Laborde's theory, I propose alternative routes for a liberal state to take to achieve its aim of rendering fair treatment of its religious citizens (e.g. value theory, human capacity to search for truth). I suggest that the liberal state should understand religious commitment as a form of vocation—a meaningful pursuit of a plan of life. Religious practices find their value and worth, it will be argued, in helping realise a citizen's vocation.

The fourth chapter contains the conclusion of the thesis. It also suggests recommendations for further research.

Chapter 2

RELIGION AND DISAGGREGATION

Cécile Laborde asserts that the dimensions of religion can “adequately be protected under standard liberal rights, provided these are (1) understood expansively, and (2) religion is not reduced to an individual belief or conception of the good” (2016, p. 430). As a specific application of her disaggregation strategy, she presents “a substantive theory of just exemptions from general laws, derived both from freedom of association (the collective dimension of religious freedom) and individual integrity (the individual dimension of religious freedom)” (Laborde 2017, pp. 170–71). This chapter dissects this method and appraises it in a broader range of religious claims.

The chapter is divided into three broad parts. The first part examines the disaggregation approach in the context of the freedom of association. Laborde claims that an “expansive” notion of freedom of association can ground reasons for exemptions raised by religion from general laws. This section shows (1) the process of disaggregating religion under the elements of the freedom of association in light of (2) contested cases between religion and liberal interests (e.g. employment, ministerial exception).

The next part scrutinizes and improves on Laborde’s disaggregation proposal by responding to objections and

challenges in light of other cases than the dress code (e.g. state regulation of Shari'a courts, refusal of blood treatments, body mutilation, etc.). Although Laborde's strategy can accommodate some religious practices (e.g. dress code), it remains insufficient and requires amendments. I will discuss the suggested enhancements on the principles of deference and centrality in Laborde's disaggregation strategy. They define the coherence and competence interests of religious groups. This protects collective integrity in cases where it is weighed against claims based on other liberal interests.

The last section of the chapter is an examination of the conceptual advantages of adopting the disaggregation approach. In part, I argue that the disaggregation strategy can reasonably accommodate the needs of religious citizens. It does so by avoiding instances of misrecognition of the needs of religious citizens and providing them equal opportunity to exercise their own beliefs and practices. This does not discount the effectiveness of tolerance theories, especially if applied to resolve situations of foundational disagreements or political conflicts. It can be the case that toleration may be the best that a liberal state can do in those instances. My modest claim shows that a liberal state need not be limited to toleration approaches. My hope is to argue convincingly for the disaggregation approach as a plausible and effective *modus vivendi* (a political strategy or

compromise) that a liberal state can also adopt in its fair treatment of religious citizens.

2.1 Disaggregating religion under freedom of association

In this section, I will explain how religion is disaggregated under elements of freedom of association. Firstly, Laborde describes two constitutive elements of a group or association, which can be applied analogously to religious groups: (1) voluntary (there is an exit mechanism that does not incur excessive cost) and (2) identificatory (members join in order to pursue a conception of the good integral to their identity) (2017, p. 174). These two elements distinguish groups that have an “interest in maintaining their own collective integrity, including by enforcing their own norms of membership and leadership and by enjoying some immunity from the reach of anti-discriminatory legislation” (Ibid.). Collective integrity is valuable insofar as it provides the structure for its members to “live by their deep commitments and beliefs”, enabling them to “live with integrity” (Ibid.). As applied to religious groups, their collective integrity should be protected because of their strong identificatory relationship with individual member integrity. This can ground the bearing of rights, including rights for special exemptions from general laws.

Aside from the voluntary element, Laborde maintains that only those groups whose primary mode of association is identificatory can claim rights to exemption from the general

law based on coherence interests (Laborde 2017, p. 182). The identificatory criterion expresses the aspect of collective integrity that allows “members to integrate core aspects of their personal beliefs and commitments with associational goals and values” (Ibid.). Laborde draws the line between those groups that enjoy rights of discretion based on their identificatory elements (e.g. the church) and organizations or corporations who enforce the religious norms of their leaders/owners onto its non-adherent employees (Ibid.). Her argument is a critique of the landmark decision of U.S. Supreme Court (*Burwell v. Hobby Lobby*, 2014), whereby the Supreme Court ruled that “a closely held business association run by a religious family (i.e. *Hobby Lobby*) could be exempt from the contraception mandate imposed under authority of the 2010 Affordable Care Act” (Ibid.). She claims that *Hobby Lobby* does not pass her normative identificatory test of “tight coherence” and, therefore, should not have been granted exemption from the Act. Her test evaluates the “coherence or alignment of identificatory associations among their purpose, structure, and membership.” (Ibid., p. 184). The test involves three “fits”: “there must be a fit between (1) the main purpose of the association and the main purpose of its members in associating, (2) the association’s purpose and the public it intends to serve, and (3) the association’s main purpose and the specific activity or function for which it claims an

exemption from non-discrimination laws” (Ibid.). Laborde argues that *Hobby Lobby* did not meet the first condition since it is “a large chain of 500 stores with 13,000 employees who cannot be assumed to share the owners’ religious ethos and moral commitments” (Ibid., p. 185).

Laborde claims that “while religious groups do not have any uniquely special feature, some of their activities exhibit an array of normatively relevant features that, put together, justify special treatment” (Laborde 2017, p. 174). These activities include religious practices whose adherents can avail themselves of exemptions from the law because they meet what Laborde proposes as her normative criteria of coherence and competence interests. These are the values that collective integrity safeguards. I will discuss each concept in turn.

2.1.1 Coherence Interests

Coherence interests refer to the ability of a group to adhere to or live by their standards, purposes, commitments, roles and functions (Laborde 2017, p. 175). They form the general structure which allows members to pursue their chosen conception of the good (Ibid., p. 178). Laborde further comments that an association or group needs to attain a level of coherence in their purpose, structure, and ethos in order to possess that minimum collective integrity (Ibid.). She argues that coherent interests ground the right of a group or

association to refuse or even rescind membership in order to preserve their own general doctrines, purposes, or ethos (Ibid.). Moreover, associations have the privilege of requiring individual member adherence to their doctrines, authority and standards (Ibid.). Analogously, religious groups have the right to excommunicate heretics, refuse entry to non-believers, and refuse their members anything that their doctrines hold to be “sinful”, in order to preserve and promote their collective integrity (Ibid.).

The only groups or associations that can invoke rights to exemption from the general law based on coherence interests are those that are (1) formally constituted as voluntary and (2) those whose primary mode of association is identificatory (Ibid., p. 180). Laborde’s conditions stem from her concern over the power that these types of exemptions grant groups, especially from anti-discrimination laws. There is a well-grounded fear that these special rights will exacerbate the vulnerability of segments within a religious group (e.g. women, children, gender identities) (Laborde 2017, p. 181). She addresses this concern by qualifying that a group that seeks “to discriminate on impermissible grounds” should be (1) formally organized as a voluntary association that (2) assures freedom of exit for its members, and (3) have “an open doctrine that justifies (to its members) the differential treatment it takes to be central to its doctrine” (Ibid.).

Laborde further clarifies that, regarding her third condition, “coherence interests apply only to the association’s core purpose and only to the activities and functions that are closely related to such purposes” (Ibid., p. 186). Her theory assumes a differentiated set composed broadly of (a) core functions, doctrines, beliefs, practices, activities and (b) peripheral functions, practices, or activities. Laborde argues that “as a practice (or function, doctrine, etc.) becomes more distant from the central doctrines, function, and practices of a group, it also becomes less relevant to associational coherence” (Ibid.). For example, she concludes that “the activities of a priest or a teacher of religion are relevantly religious, but the activities of a janitor in a gymnasium are not” (Ibid.). This prevents religious employers from invoking exemptions using “religious grounds—or on any other impermissible ground—in relation to employees not doing religious work” (Ibid.).

Laborde contends that only groups or associations that meet her criteria have a right to exemptions from the law based on coherence interests. She further comments that, given her restrictive criteria, “some religious associations will qualify, and some will not; some of the activities that associations engage in will qualify, and others will not” (Ibid., p. 187). In her disaggregation approach, it is the mode of

association that does the normative work and not the concept of a “religious” institution (Ibid.).

2.1.2 Competence Interests

Competence interests revolve around the group or association’s expertise in interpreting their standards, doctrines, purposes, practices, etc. (Laborde 2017, p. 191). Laborde qualifies a religious group’s competence interests by restricting them to “theological” matters. She assigns paramount importance to defining the nature, and regulating the scope of competence interests. This means that some religious practices are inappropriate as far as public policy is concerned and some of them are “inaccessible” to public reason as a basis for state interference in the internal life of groups (Ibid.).

To illustrate, Laborde explains that “courts should not take a position on the theological rationale of religious employment decisions—in particular; they should not adjudicate disputes concerning the selection and dismissal of clergy” (Ibid., p. 192). If, in Laborde’s hypothetical case, “a church dismisses Mark, a homosexual priest, because he has failed to show the requisite spiritual qualities or he has preached an inaccurate interpretation of the Gospels”, the courts would be hard-pressed to determine if “circumstances and justifications are merely pretexts for heterosexist prejudice” (Ibid.). Laborde asserts that courts must “accept

the *prima facie* validity of religious justifications” since religious groups have the expertise to interpret such qualities (e.g. spirituality, accurate interpretation, etc.) (Ibid.).

Laborde suggests that public courts should defer to the competency of a group or association in interpreting their doctrines, standards, purposes, etc. (Ibid., p. 193). I shall refer to this element as the “principle of deference”. Aside from this restriction, Laborde places the final jurisdictional authority in resolving contested matters in state powers (Ibid., p. 195). This does not mean, though, that the state can do anything it wishes or interfere arbitrarily with religious affairs (e.g. *ultra vires* acts). To defer on the grounds of competence interests presents a dialectic type of relationship between the exercise of the state’s juridical power and religion’s right of self-regulation. Laborde argues that although religious groups have strong competence interests, they cannot appeal to them to identify and define their own sphere of competence (Laborde 2017, p. 196). Religious groups, for example, cannot claim total immunity from state scrutiny in terms of settlement of disputes of the roles and duties of their members or employees (Ibid.). In conclusion, Laborde asserts that “religious groups have interests both in coherence and in competence, but they do not have a right of jurisdictional self-definition” (Ibid.).

This subsection completes the discussion of the method of disaggregating religion under the freedom of association. The collective integrity of religious groups is protected by tracking their coherence and competence interests. If applied to cases of exemptions from general laws (e.g. anti-discrimination), Laborde provides an alternative strategy that is both egalitarian (other associations or groups can also avail themselves of such exemptions provided they meet Laborde's specific criteria) and in the case of religion, a comprehensive protection of their interests (including tenets that call for differential treatment of its members).

2.1.3 Challenges to the disaggregation approach

I will survey some of the arguments against the disaggregation strategy as a general alternative and argue that these objections merit improvements in some of the key elements of her framework. I will appraise Laborde's strategy by the use of cases other than religious dress code or dietary laws (e.g. the state's treatment of Shari'a courts, bodily mutilation (e.g. circumcision), and refusal of blood treatments by Jehovah's witnesses, etc.). The discussion of these cases supports the need for amendments to Laborde's disaggregation strategy in order for it to emerge as a plausible alternative for a liberal state to use in resolving cases of religious accommodation.

2.1.3.1 Jurisdictional boundaries

Firstly, jurisdictional issues can be raised against this approach. This occurs when the application of some of the comprehensive tenets of religion that challenged as instances of wrongful discrimination in state courts. Jean Cohen explains that the overlapping jurisdictional boundaries is a “live” question as contested matters cover a wide range of the key areas in life (e.g. family law, sexuality, education) that conflicts with religious commitments (Cohen 2018, p. 15). In this debate, proponents that protect church autonomy (e.g. religious jurisdictional pluralists and theocrats) have been vigilant in addressing state interference and make state action appear as *ultra vires* when it regulates religious institutions (Ibid.). While in this discussion any state interference is *pro tanto* suspect, Laborde asserts to the contrary that, beyond gross violation of human rights, there can be reasonable disagreement about the matter of justice in state intervention (Ibid., p. 14). Cohen finds this too quick of a dismissal. She emphasises the formidable jurisdictional struggles of identifying (1) which areas of social life are justice-apt and (2) the authority to decide on this meta-jurisdictional question (Ibid., p. 15). This concern is exemplified in the case of the permissibility and regulation of Shari’a courts by a liberal state.

Shari'a is a complex system of Islamic politics, economics, morality, and religious practices shaped by the interpretation of primary sources—the Qur'an (divine revelation vouchsafed to the Prophet) and the Sunnah (or the ways of the Prophet)—and secondary sources (interpretations by judges [*qadis*], the consensus of legal scholars [*ulama*], and legal reasoning) (Turner and Possamai 2015, p. 4). In other words, Shari'a is a comprehensive range of Islamic interpretation of justice and ethics. It is closer to common law in terms of its codified justice system and comparable to rabbinic law because of its strong advisory function in defining what is proper Islamic practice and ethics (e.g. diets, dress code, ablutions) (Ibid., p. 5). In the Philippine case of establishing an autonomous territory for Muslims, part of the agreement comprises provisions that enable the creation and regulation of Shari'a courts.⁵ For example, these religious courts can rule on cases involving marital rights, marriage and divorce, customary dowry [*mahr*], property disputes, and guardianship and paternity suits, among others (RA 9054). Furthermore, it is stipulated that the decisions of the Shari'a High Court are final and executory except on questions of law which may be brought before the

⁵This is known as the "Bangsamoro Organic Law" in the Philippines. Cf. Republic Act No. 9054, https://www.scribd.com/document/384454421/BOL-Final-Bicam-report#download&from_embed.

Supreme Court (RA 9054). The coverage of the “questions of law” is the only part that refers to state regulation of Shari’a courts. Questions of law can either be matters of grave abuse of discretion, evidence appraisal, or procedural scrutiny. They do not include settlement of actual contested issues.

Laborde proposes the idea of coherence interests to resolve the issue of jurisdictional boundaries in cases where there is wrongful discrimination. However, her approach faces a serious concern. Her criteria of voluntary exit and open justification for religion to invoke coherence interests appear weak in addressing for example, Shari’a courts’ exemption from state scrutiny. Since the aim of the Shari’a courts is to administer Islamic justice and interpret proper Islamic ethics to its members (including those non-Muslims who voluntarily submit to it), it can be argued, following Laborde’s criteria, that such strictures constitute coherence interests. Furthermore, by invoking competence interests, public courts such as the Supreme Court must accept, *prima facie*, the validity of the Shari’a courts’ religious justifications, given their interpretative expertise. If cases involve questionable interpretations of discriminatory treatment, Laborde’s theory would appear to be insufficient when it comes to resolving the competing claims of, for example, women’s rights to challenge wrongful discrimination versus the rights of religious groups to preserve their collective integrity. Her

theory only requires an open explanation from religious authorities about a norm or a practice that exhibits differential treatment. This seriously risks undermining her strict discrimination test. This occurs whenever religious groups invoke coherence and competence interests to justify rulings, norms, or practices of differential treatment as exemptions from anti-discrimination laws. The various marriage laws, rulings on customary dowry and sexual conduct, and the ban preventing married women from working or accessing education are some examples of relevant cases.⁶ If, in some cases, the Shari'a courts cannot invoke exemptions from further state scrutiny apart from "questions of law", given the higher costs of wrongful discrimination, state interference in these religious matters could inflict serious damage on religious group's collective integrity and violate the non-establishment clause.

An immediate remedy to the Shari'a concern is the availability of multiple settlement options. For example, the Bangsamoro Organic Law (BOL) in the Philippines provides litigants a choice whether to go before the Sharia court or the secular court. Furthermore, there is a stipulation that requires

⁶"While the network's focus was on the Code of Muslim Personal Laws, the network also worked on reproductive rights, sexuality, and social justice in the context of Muslim customary and statutory laws, which govern not only the life but also the sexual behaviour of women." Cf. Isabelita Solamo-Antonio, "The Philippine Shari'a Courts and the Code of Muslim Personal Laws", *The Sociology of Shari'a: Case Studies from around the World*, DOI 10.1007/978-3-319-09605-6, p. 85.

that the implementation of BOL should conform to domestic and international human rights legislation.⁷ However, one can push the jurisdictional boundary issue by emphasising that such arrangement will not be without conflicts in implementation. For example, Cohen raises the difficulty of applying coherence interests because core and peripheral doctrines can change over time (Cohen 2018, p. 17). Furthermore, the primary socialisation into religion is involuntary (Ibid.). To illustrate, gender injustice is learned at an early stage and if religiously sanctioned (i.e. core doctrines that render differential treatment), it tends to infect and spread into other domains of life (Cohen 2018, p. 17). In this instance, as Cohen asserts, religion is unlike any voluntary association (Ibid.). This raises serious doubts about the compatibility of Shari'a courts to domestic and international human rights laws and standards.

Since the disaggregation approach does not go any further than recommending the state to defer to religious interpretations and weigh them in its attempt to evaluate their claims, it needs to be ameliorated in that area. However, other problems challenge Laborde's criterion of competence interests.

⁷Cf. Republic Act No. 9054,
https://www.scribd.com/document/384454421/BOL-Final-Bicam-report#download&from_embed.

2.1.3.2 Problems related to competence interests

Part of the disaggregation approach is asking a liberal state to defer to the competence interests of religion given their expertise in interpreting their own doctrines. Laborde restricts the scope of the competence interests of religions to “theological matters”. Upon closer examination, the practice of deference can be unclear and contentious. There is still ambiguity as to (1) which doctrines, norms and practices comprise “theological matters” and (2) which different types of theological interpretation apply. Theological interpretations vary and each kind carries a level of obligatory force. They can be broadly categorized either as matters of obedient belief or matters left to the individual decision. If the theological interpretation is a matter of immediate belief (e.g. a dogma), it carries a higher obligatory force (i.e. immediate belief) than matters left to individual decision. Usually, matters of immediate belief are in the areas of primary sources and core doctrines. Secondary sources, such as tradition or disciplinary rules, are, in large part, within the sphere of individual decision. They usually command a lesser degree of obligation.

This is crucial in adjudicating cases involving religious practices that entail bodily harm. For example, although male circumcision is typically regarded as a religious and cultural practice in Islam, there is reasonable disagreement among

scholars of the Shari'a and other sources pertaining to its theological interpretation and value as a religious practice and its concomitant obligatory force. This creates a significant room for individual decision.⁸ The same is the case for female circumcision.⁹ This is unlike the rabbinic law, where male circumcision is interpreted with a consensual understanding as one of the core tenets of Judaism, both in value and form.¹⁰ Laborde does not consider this tier of "disputed"

⁸"Among Sunni Muslim jurists, there are some differences in religious rulings on male circumcision. Jurists of the school of Imam Ahmad and al-Shafi'i consider circumcision to be compulsory. The Al-Shafie school considers it recommended, during childhood, but obligatory after puberty. Imam Abu Hanifa and Imam Malik consider circumcision to be recommended but not obligatory. This means that if done, its doer is rewarded by God, and if not done, there is no punishment or reward. The scholars agree that circumcision entails the removal of all or the majority of the foreskin that covers the glans only. It has to be done during or at the end of the childhood." Cf. Alahmad, Ghiath and Wim Dekkers, "Bodily integrity and male circumcision: an Islamic perspective" *Journal of IMA* vol. 44, 1, 44-1-7903. 20 Mar. 2012, doi:10.5915/44-1-7903.

⁹"Female Genital Mutilation in Arabic is customarily called "Kh1itanl al-Inath". Though the term *Khitan* is not correct in the female context, it is used in reference to women in order to avoid 'calling a spade a spade'; the Arabic term, which means 'cutting the external female genitalia', is *Khafd* (also *Khifad*) which means 'excision'. ... The anti-circumcision view is based on the fact that female circumcision is not an Islamic practice; indeed, it is rarely performed in the Arab peninsula or many other Islamic states, and in Egypt is carried out by Moslems and Christians (Copts) alike. It originated during the Pharaonic period, or migrated to Egypt via Sudan from Africa, where it is widely practised by many Moslem and non-Moslem communities. ... The circumcision perspective asserts that 'female circumcision is performed in all Arab states to varying degrees'. This assertion is puzzling because there are no sources indicating that this custom exists in Lebanon, Syria or Jordan. Al-Sha'b quotes several 'ulama' (religious scholars) who use two types of justification for the practice, one functional-physiological and the other religious." Cf. Mordechai Kedar, *Islam and Female Circumcision: The Dispute over FGM in the Egyptian Press*, 404, 407–408.

¹⁰"Jewish ritual circumcision also involves removal of the entire foreskin, and Jews too circumcise infants, traditionally on the eighth

theological interpretations, which expose reasonable disagreements on core matters, norms, practices, and institutions of faith. In the case of child circumcision, the state is enmeshed in a non-neutral situation in its attempt to balance the interests of the rights of parental authority (based on freedom of conscience) against the rights of the child to protection from irreversible bodily harm (based on individual consent).

Another similar case is the refusal of Jehovah's Witnesses, on religious grounds, to accept blood transfusions. Parental authority invoked upon religious grounds clashes with individual consent, especially in cases of serious medical crisis. However, upon closer examination, there are tiers within this theological interpretation as regards the kinds of procedure that are acceptable, unacceptable, or matters of individual decision.¹¹ A liberal state, whenever it

day of life. ... It initiates the newborn male child into a covenant established between God and Abraham, as recorded in the seventeenth chapter of Genesis. There God tells Abraham that he will make him 'exceedingly fertile' and will deliver to him and his descendants 'all the land of Canaan', provided that he circumcise himself and promise that all his male descendants will be circumcised on the eighth day of life ... male infant circumcision became a religiously mandated requirement, sanctioned by the single key text, Genesis 17... circumcision was a definitive Jewish custom, even *the* definitive Jewish custom; part of the trio including dietary regulations and Sabbath observance—but, for obvious reasons, in a class by itself." Cf. Leonard B. Glick, *Marked in Your Flesh: Circumcision from Ancient Judea to Modern America*, Oxford Scholarship Online, DOI: 10.1093/019517674X.001.0001.

¹¹Acceptability of blood products and transfusion-related procedures in Jehovah's witnesses: Unacceptable (whole blood, packed red cells, plasma), Acceptable (cardiopulmonary bypass, renal dialysis, acute hypervolaemic haemodilution), and Maybe

defers to religion, must be further aided in its attempt to respond to this type of contested case. To defer owing to competence interests is partly a substantive matter: what kind of theological interpretation is the state accepting based on the competency interests of the religious group? A serious worry arises from this case: a liberal state flirts with the option of adopting an internal or “religious” point of view thus, it risks overstepping the limits of its competency. In resolving these matters, it is not uncommon for a liberal state to adopt an attitude of neutrality.

2.2 Improving the disaggregation approach

I have noted tiers in theological interpretations that define levels of obligatoriness of a belief or practice. This can be used to assess the substance of claims for exemption of religious groups from general laws. This complements the principle of centrality, which limits the scope of collective integrity to core doctrines, functions, practices. Paul Billingham similarly argues for the role of obligatoriness and centrality in measuring the importance that determines the weight of religious claims. He asserts that a religious claim is weightier, the more obligatory and/or central the relevant practice is (Billingham 2017, p. 7). In amending Laborde’s

Acceptable or “Matters of Conscience” (platelets, clotting factors, albumin, cell saver). Cf. Chand, N Kiran et al. “Management of patients who refuse blood transfusion” *Indian Journal of Anaesthesia* vol. 58,5 (2014): 658–64. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4260316/>.

disaggregation strategy under the main elements of the freedom of association, I suggest using extensively the principle of centrality in conjunction with the principle of deference. These two elements help clarify and protect the collective integrity of religious groups under the freedom of association.

2.2.1 Centrality principle

The first dimension is the principle of centrality. If the doctrine, function, or practice is part of the core tenets of the religious group, this exacts strong obligation for members to comply, even if, in some cases, they do not actually follow the practice consistently. For example, participating in regular Sunday worship mass is deemed a core practice of Catholics, even if some of its members do not actually go to mass every Sunday. Core tenets of the religious group provide substantial weight to religious practices by locating them in the spectrum of relevance and importance to the group's collective integrity, regardless of the actual observance or level of sincerity of its members. In a similar vein, Paul Billingham cites the requirement of European Courts of Human Rights (ECtHR) for religious acts to demonstrate an intimate link to the underlying belief (Billingham 2017, p. 7). This means that "the burdened religious practice does need to be somewhat central to the individual's faith in order to ground a claim for an exemption, but it need not be mandatory" (Ibid.).

The principle of centrality in the disaggregation strategy delineates the scope of coherence interests. Following Laborde's interpretation of associational coherence, "as a practice (or function, doctrine, etc.) becomes more distant from the central doctrines, function, and practices of a group, it also becomes less relevant to associational coherence" (Laborde 2017, p. 186). "Less relevant" does not mean that any religious practice that falls under such label is automatically impermissible. It only denotes its importance and value within the wider coherence interests. This is crucial in determining what constitutes "substantial burden". Hence, if there is an absence of or a "weaker" countervailing interest, I argue that "peripheral" religious practices can still be allowed. "Less relevant" is indicative of the weight of a certain religious practice. In this instance, a liberal state only requires "weaker" reasons in favour of countervailing interests to outweigh the religious practice in question. There can be cases where the exemption of the religious practice is granted even if the practice is not central or mandatory because of the compelling reasons grounded on the individual interests (e.g. valuable to her ethical integrity, pursuit of conception of the good, and exercise of religion).

Furthermore, in Laborde's theory, the principle of centrality acts as a strong condition for justifying exemptions

for religious practices, doctrines, or functions that call for differential treatment (Laborde 2017, p. 186). This means that those practices, or functions, or doctrines that exercise differential treatment but are “distant” from the core tenets require substantial arguments for exemptions from anti-discriminatory laws, for example. On the other hand, the core tenets that render differential treatment exact stronger reasons from the state in its justification of favouring countervailing interests (e.g. women discrimination, individual claims). Take the case of the Supreme Court decision in Kerala, India that decided to “open” to women a temple dedicated to a Hindu god with a centuries old tradition that bans the entry of women of menstrual age due to their impurities.¹² The central orthodox teaching of the religious group was found to be an instance of wrongful discrimination (Krzysztof 2018, p. 2). The Supreme Court upheld the right of women to choose and enter places of worship. There has

¹²“The Sabarimala temple, an immensely popular pilgrimage place, is located in the hills of Kerala in southern India and devoted to a Hindu god, Ayyappa (Ayyappan). Until recently, the temple was open only to men... Ayyappa is usually considered a celibate god (though in some places, not Sabarimala, he is depicted with wives). For the traditionally minded temple authorities, visits of women of menstruating age could act as potential distractions on the deity’s path of purity. “Menstruating age” is considered in this context as 10 to 50 years old. These limitations, however, are already a thing of the past, as on September 28 the Supreme Court of India ruled that the shrine should open its doors to all female pilgrims, no matter their age.” Cf. Iwanek Krzysztof, “India’s Sabarimala Temple and the Issue of Women’s Entry”, *The Diplomat* (Oct 3, 2018), <https://search.proquest.com/docview/2115739743?accountid=14511>.

been serious political backlash and group conflict since the decision was released and this has forced the Supreme Court to review its decision.¹³

In employing the centrality principle, a liberal state exercises a reasonably justified weighing approach to resolve conflicting interests. This is accomplished by considering the orthodox teaching that allows differential treatment as part of the core tenets of the Hindu cult group. This constitutes the group's coherence interests. Since they exercise competence interests over core tenets, the state accepts, *prima facie*, their interpretations of a core doctrine that exercises differential treatment. A liberal state has interests to protect both the collective integrity of the group and women's rights against wrongful discrimination. If it decides to favour women's interests, the Supreme Court could have established in a more convincing manner that (a) such core doctrine or

¹³“India has been seized by an increasingly divisive national debate over the issue. Many, including the local communist politicians who govern Kerala state, said the rule was outdated and discriminatory and should have been scrapped. But others, such as women and politicians from both Indian Prime Minister Narendra Modi's Hindu nationalist Bharatiya Janata Party as well as the main opposition Indian National Congress, said the court should not intervene in what they view as a matter of faith and tradition. ‘We knew that the communists do not respect Indian history, culture and spirituality. But nobody imagined they would have such hatred,’ Modi said during a recent political rally in the state. The debate is set to return to the Supreme Court on Tuesday when it considers petitions calling for a review of its September ruling.” Cf. Nikhil Kumar and Manveena Suri, “Defying protests, 51 women entered India's Sabarimala temple in January”, CNN (January 18, 2019), <https://edition.cnn.com/2019/01/18/asia/india-temple-entry-intl/index.html>.

practice constitutes wrongful discrimination and (b) this type of wrongful discrimination is compelling enough to outweigh the collective integrity of the Hindi cult group. In using the centrality principle, the state can exercise a consistent and non-adhoc weighing approach in determining the collective interests of religious groups whenever it is weighed against countervailing interests.

2.2.2 Obligatoriness principle

The second dimension is obligatoriness. There are different levels of obligatoriness among religious doctrines and practices that can assist the state in its adjudication of contested cases of basic justice. There are core doctrines and practices that are matters of utmost obedience. If not strictly held and expressed in practice, it can endanger the collective identity of the community and the individual integrity of its members. For example, in Christianity, all Christians attest that Jesus Christ is the Son of God. It is to be accepted as dogma and demands immediate belief. This does not preclude multiple interpretations and some level of dispute within the community. Some central doctrines command a high degree of obedience but there is a plurality of options about its form and execution. A liberal state with a general awareness of varying levels of obligatoriness of a religious belief or practice can determine an appropriate approximation of the substantial burden a general law can impose on the

collective and individual member integrity of its religious citizens. This aids the state in justifying the (non)permissibility of such practice or doctrine in relation to countervailing interests. An example of such case is the religious practice of male circumcision.

Male circumcision is considered part of the core tenets of Islam and Judaism. However, prescriptions of the proper form to be followed in Islam (e.g. supposed age that a male should undergo circumcision) are not matters of strict obedience. Different schools of thought in Islam are divided about the age at which circumcision should be performed but they all agree that (1) it should be performed before the end of puberty and (2) on the amount of foreskin that should be removed. In this case, obligatoriness to the central doctrine would not be seriously compromised if the state decides to protect the individual's interest of bodily integrity by having boys circumcised at the age of consent. However, this concession is not possible with Judaism since the prescriptive form of infant male circumcision is a matter of strict obedience and directly shapes Jewish identity. In this case, a liberal state must recognize the substantial burden a circumcision ban or even a law that only allows male circumcision at the age of consent. The state must provide compelling reasons if it chooses to privilege the individual's interest on bodily integrity over the collective integrity of a religious group. The

authority of parents and guardians over their children can be liable to unfair restrictions if a liberal state is not sensitive to core religious practices that either exhibit *prima facie* harm or accord differential treatment to vulnerable segments (e.g. women, children, gender identities) within a religious group.

This same dilemma is encountered in the case of Jehovah's Witnesses' refusal of blood treatments. However, the key difference between the Jehovah's Witnesses case and the male infant circumcision in Judaism is that the former has tiers of interpretations that give much credence to individual decision in the type of blood treatment involved (see footnote 11). Thus, even if it is a core doctrine to refuse blood treatment given religious reasons, there are available medical procedures that require blood treatment that do not violate the parent's freedom of conscience and authority and, at the same time, save their children. By being sensitive to these levels of obligatoriness related to each religious belief and practice, a liberal state adopts a partially "internal" view that enables it to exercise differential treatment that is fair to the interests of religious citizens and public health, for example.

The crucial advantage of Laborde's framework is two-fold: (1) its ability to mirror to religious groups the harmful effects of some of their core doctrines and practices to their vulnerable members (e.g. women, children, and gender

identities) and (2) to inform the state of the substantial harm to the collective integrity of religious groups. Substantial harm, in my amendments to Laborde's disaggregation strategy under freedom of association, is determined by the emphasis on the principle of centrality and specifying within the principle of deference, the degrees of obligatoriness vis-à-vis core doctrines, functions, and practices.

2.2.3 Weighing religious claims

The group's coherent and competence interests are key determinants of religious claims. They supplement the liberal state's assessment of individual claims that advance permissibility or restriction of a religious practice. This accommodates Billingham's concern about the importance of the claimant's assertion in determining the value of the religious practice in her ethical life. Billingham emphasises that,

“What matters is what the claimant believes about the practice (whether it is religiously obligatory, recommended, or merely desirable), how central it is to her religious and moral identity, and the place that it has within her lifestyle and actions. It is therefore up to the claimant to demonstrate the importance of the practice to her. She should explain her beliefs about it, and the reasons that she holds those beliefs, and show that she puts those beliefs into practice in how she lives” (2017, p. 10)

Without considering the coherence and competence interests of the religious group, a liberal state may be in danger of allowing a wider range of religious practices based solely on individual sincerity. This can tip the balance towards

an overtly religious political society. The improved disaggregation approach does not create such an effect since the principles of centrality and obligatoriness act as reasonable “filters” (together with the criterion of individual sincerity) for the state to use in examining justice claims. Against the objection that the state will be drawn into “excessive entanglements” with religion, I argue that, in determining the weight of religious claims, a liberal state should be supported with a framework that will properly equip it in rendering an appropriate assessment of religious claims. This is accomplished by locating the religious practice within the coherence and competence interests of religious groups.

One can argue against the aspect of obligatoriness in instances of multiple or even conflicting interpretations about the value and meaning of a core religious practice. I agree with Billingham that it is not in the position or the role of the courts to resolve disagreements on interpretations of standard doctrines of religious group (Billingham 2017, p. 11). However, this does not mean the state should completely adopt a hands-off approach and simply defer to religious interpretations. In measuring the importance of religious claims, the courts must be able to appreciate the different levels of interpretations and obligatoriness in a variety of religious doctrines and practices. In doing so, as I have argued, a good measure of internal point of view is necessary

in order to make a fair assessment of religious claims. This does not entail that the outcomes of judgment are grounded on “religious” reasons. Part of the public justifiability of state action includes inputs from different sources in order to make a fair assessment. For example, in the case of varying interpretations on the supposed age of circumcision for Muslim boys, a liberal state and its religious citizens can agree on a law delaying circumcision to the age of consent in order to also protect the individual freedom from irreversible bodily harm. In the case of male infant circumcision for Judaism adherents, the state can grant an exemption (if there is a law against circumcision) based on coherence interests or religion disaggregated under the rights of cultural minorities. Billingham expresses similarly, that “courts will be drawn into some theological adjudication and interpretation. This is unavoidable. It is better to accept this and to allow it to a limited extent than to deprive courts of a major way of assessing the place of the claimant’s practice and the sincerity of their claim” (Billingham 2017, p. 11).

In the next subsections, I defend the improved disaggregation strategy against stronger objections: the competing rights argument and the administrability problem.

2.2.4 Competing rights objection

A serious challenge against the use of the disaggregation approach is the competing rights objection. Since different

liberal rights account for the different dimensions of religion under the disaggregated approach, Enzo Rossi notes that instances of religious freedom are more likely to conflict (Rossi 2017, p. 63). He gives an example of a typical case: some religious groups effectively discourage their members from joining associations that contradict their religious principles. In this case, religion as a totalizing institution is likely to conflict with religion as association (Ibid.).

Rossi does not discuss his example extensively and thus, it is unclear how it supports his argument against the disaggregation approach. If I provide the lack by following his intuition, problems relating to Laborde's disaggregation approach may likely occur in instances where religious collective integrity clash with other standard liberal rights. Since the scope of religious tenets is comprehensive, in cases of conflict, religious groups can simply invoke coherence and competence interests to ground their claims. For example, women's rights to protection from wrongful discrimination can run contrary to Shari'a councils' decisions on dowry, marriage, etc. In a wider perspective, the objection argues that the disaggregation approach cannot resolve cases of competing rights. As seen in the cases of Shari'a, male infant circumcision in Judaism, and Jehovah's Witness' refusal of blood treatment, exemptions based on religious grounds translated into rights of collective integrity and

parental authority must be weighed against individual rights of bodily integrity and non-discrimination.

I accept that there will be hard cases in which political outcomes would sometimes demand a compromise or worse, a giving up of a set of rights in favour of another on reasonable grounds. If applied to those types of cases, the advantage of using the disaggregation approach is its ability to provide fair and reasonable basis for weighing claims. It guides a liberal state in having a consistent and coherent use of proportionality in adjudicating religious claims.

In cases where competing rights are difficult to adjudicate, there are undeniably grey areas. Take for example, the case of freedom of association being weighed against individual rights. Decisions on those cases do not only impact religious groups but secular associations as well, in terms of the state privileging other rights and in doing so, limits and shapes the collective interests of a group. Christopher McCrudden likewise maintains that human rights involve varying degrees of proportionality that require public reasoning, and “those who argue for particular human rights, such as freedom of religion, or who argue for the limits on other rights in the name of freedom of religion, are also required to articulate such public reasons” (McCrudden 2011, p. 37). Although the disaggregation approach may deliver contested political outcomes (i.e. grey areas) or imperfect

arrangements, its main elements ensure procedural equality that can secure legitimacy of state action.

Moreover, having a legal-political category “religion” can exacerbate the problem of competing rights because (1) religion will be treated in a special way and (2) a liberal state is liable to render decisions that either favour or restrict religious groups in an inconsistent and sometimes, excessive manner, and (3) it can wrongfully discriminate minor religions. The insistence of using “religion” as a legal-political category generates warranted fear and suspicion on the state’s exercise of its juridical authority in defining what religion is. In this case, the state can overstep its competency and erect itself as chief regulator and “definitior” of religions.

In using the disaggregation approach, a liberal state avoids objectionable instances of paternalism by not having to define religion, whilst being sensitive to the different dimensions of religion that a particular issue makes salient. The innovation of Laborde’s proposal lies in the equal treatment she gives to religions within its category (e.g. major and minor religions) and as it compares with other groups that have similar normative interests of collective integrity (e.g. Alcoholics Anonymous, Boy Scouts, etc.). Since their normative interests will still be weighed by the state within reasonable conceptions of justice, it does not necessarily

follow that any and all particular religious practices would be permissible (e.g. infant sacrifice or female genital mutilation).

2.2.5 Administrability objection

Another challenge to the improved disaggregation approach is its implementation. Billingham claims that theories of religious accommodation should have the capacity to be applied consistently in a wide range of cases (2017, p. 20). He asserts that a major drawback for a theory is its failure to pass the administrability test (Ibid.). This occurs whenever (1) the weighing approach calls for “complicated judgments across several dimensions”, or (2) that “there is always going to be vagueness and uncertainty in determining how ‘central’ a religious practice is, or how the weight of a religious claim measures up against the weight of the countervailing interests” (Ibid.). One might further claim that the rule of law is undermined since different judges could assess similar cases and arrive at reasonably different conclusions, thus cases would be dealt with in inconsistent ways (Ibid.).

The disaggregation approach can pass the administrability test. Firstly, its content-neutral elements (e.g. coherence and competence interests) are not complicated to use in approximating substantial burden to religious citizens. The principles of centrality and deference assist the state in its assessment of an individual’s claim for exemption for a particular religious practice by indicating its degree of

relevance vis-à-vis the coherence interests of the group. They specify the necessary factors and sufficient conditions that are involved in measuring collective integrity. This reduces ambiguity especially in contested religious claims. This set of criteria is also available to other groups and other individual commitments of such nature (e.g. integrity-protecting commitments). The disaggregation approach provides a liberal state with a reasonable non-adhoc criteria and a political conception of religion that prevents it from overstepping the limits of its competency.

Secondly, contested matters of basic justice are serious challenges for proper discernment and fair determination of a liberal state's use of its coercive power. Although it cannot eliminate grey areas, the disaggregation approach reduces their scope. This is accomplished by (1) using elements and principles that can also be readily applied to other groups, and (2) eliminating the burden of misinterpreting what religion is. The disaggregation strategy enables a liberal state to exercise a wider "margin of appreciation" in cases where competing rights appear to be "equal" in force and reasons. In these types of cases, there will be reasonable disagreements. Billingham argues that "only way to reduce the scope for reasonable disagreement would be to say that exemptions should only ever be granted in a very specific set of cases, such as when the religious

claim is based on a strictly obligatory practice that is directly prohibited by law” (Billingham 2017, p. 22). Such a limited response does not grant the state the capacity to adjudicate religious claims fairly. The disaggregation approach provides the state with a practical and reliable strategy in resolving a wider range of religious claims.

Lastly, I argue that it is the complexity of the cases that generates instances of “inconsistent” adjudication of religious claims. Take for example, the Shari’a courts’ jurisdiction on theological and moral matters that involves differential treatment. Moral matters pertaining to divorce in marriages and dowry can be unclear cases for wrongful discrimination of women. Through the disaggregation approach, a liberal state is made aware that it has compelling interests to protect both sets of rights—the religious group’s collective integrity and individual freedom. But political and social factors can only permit a range of imperfect arrangements that might favour a set of rights over the other. This “complication” caused by weighing competing interests and rights can be mitigated in a disaggregation strategy fairly assesses claims using coherence and competence interests and principles of centrality and obligatoriness. It enables the state to discern deeply the course of action it will take and the resulting substantial burden to religious citizens.

I have defended that the disaggregation strategy with its amendments can be a plausible alternative for a liberal state to use in cases of religious accommodation. In the last section, I will evaluate the disaggregation approach as a conceptual framework against toleration approaches.

2.3 The disaggregation approach as a *modus vivendi*

Evidently, Laborde presents a version of liberal egalitarianism that is more sensitive to the social and other benefits of religion. This is her proposal of treating religious citizens with fairness in the context of justifying religious accommodations in law. In this last section, I extend the assessment of Laborde's meta-legal approach against toleration theories. Toleration theories are also examples of *modus vivendi* and political strategies that respond to highly contextual issues of justice. I do not purport to discuss all toleration theories in detail but only those pertinent to my claim. My claim is that, outside the scope of intractable political conflicts and deep reasonable disagreements, the disaggregation approach can be a plausible alternative.

By this assertion, I do not intend to ignore the political value of tolerance. I only advance the thought that the liberal state is not confined to adopting toleration approaches in resolving religious claims. Nor is tolerance the lone political value that needs protection. The state can also secure the political value of respect through equal opportunity. The use

of Laborde's disaggregation approach assists a liberal state in safeguarding and nurturing such value.

I begin by examining Laborde's account of the needs of religious citizens.

2.3.1 Recognizing the needs of religious citizens

In arguing against Charles Taylor and Jocelyn Maclure's concept of collapsing religion into a category of "conscientious duties" (Laborde 2017, p. 66), Laborde puts forward an expansive notion of what religious is, and from it, derives some essential needs of religious citizens that Taylor and Maclure's theory fails to capture:

"For many Catholics and Muslims (but also other Christians, Jews, Hindus, and Buddhist) the religious experience is fundamentally about exhibiting the virtues of the good believer, living in community with others, and shaping one's daily life in accordance with the rituals of the faith. These rituals are meaning-giving and connected to believers' sense of their moral integrity. Yet they are not strictly speaking duties of conscience, and therefore do not meet the criteria that Taylor and Maclure ultimately settle for. The good religious life is a life of constant, difficult, ritual affirmation of the faith against the corrupting influences of the secular world. It is not always—not often—one in which one single obligation (say, wearing the hijab, going to Mass) is so stringent as to promise eternal damnation if it is not fulfilled. Taylor and Maclure, then, reinterpret acts of habitual, collective religious devotion into Protestant duties of conscience." (Laborde 2017, pp. 66-67)

Laborde offers a dense list of needs which requires unpacking. She identifies three fundamental necessities of a religious citizen: (1) the desire to exhibit the virtues of a good believer and (2) shape one's daily life governed by the rules and rituals of faith (3) in communion with fellow believers. The

first two elements describe the individual dimension of religion while the third emphasises its communal or social dimension. Within the individual dimension, the daily manifestation and living out of one's faith happens in words (e.g. speech, thoughts) and deeds (e.g. religious practices, self-determination). The force that unites these individual and collective dimensions of religion is the particular faith experience. This provides epistemic content to rituals and beliefs, determines the normativity of what a good believer is and her relationship with the world, and is the substance that forms a distinct collective integrity. There is an inextricable link between individual and communal dimensions, and it can be argued that the relationship is not hierarchical but rather, complementary.

A faith motivated citizen who also adopts liberal values would agree to Laborde's list, since from them, one can reasonably address her basic needs: (1) free and equal expression of her chosen identity as a religious in whatever situation she confronts (e.g. public debate, employment, education, etc.), (2) protection and promotion her chosen community that continually shapes her identity and defines her self-narrative, and (3) recognition that her rules and rituals of faith are integral to her personhood and manner of relating to wider society (e.g. political participation). These basic needs go beyond the scope of conscientious duties or ethical

independence since religion is not merely an individual affair. As Laborde asserts, not all religious practices share the same level of demand of conscience and, without the freedom to perform those, the development of individual and collective religious identities would be impeded. The problem with the ETRF proponents is the exclusive use of freedom of conscience either as a substitute or proxy good for religion. This conceptual move assumes that all religious practices have the same level of obligatoriness. Even if the freedom of conscience can be expanded to include a category of “conscientious duties”, there should be proper recognition of the value of different religious practices in the shaping of individual and collective integrity. As Laborde points out, an individual obligation (e.g. wearing Hijab or going to Sunday mass) does not exhaust the reality of religious commitment. In contested cases of basic justice such as Shari’a courts, male infant circumcision, religious arbitration, several dimensions of religion become salient and go beyond an expanded notion of freedom of conscience.

The disaggregation strategy allows a liberal state to capture the needs of religious citizens comprehensively. The extensive use of an array of available liberal rights and interpreting them in an “expansive notion” track individual and collective needs of religious citizens. This equips a liberal state with a flexible understanding of the spectrum of religious

practices that shape individual and collective integrity. As demonstrated in the case of disaggregating religion under the elements of the freedom of association, the categories of core and peripheral practices act as conditions in determining the weight of coherence and competence interests. This comprehensive protection secures parity for religious citizens since it recognizes and explicates what constitutes substantial burden as determined by their particular life commitments.

Disaggregating secularism is another advantage of Laborde's framework in response to the needs of religious citizens. This takes her strategy to another level since Laborde asserts that neutrality can be restricted and secularism can be applied minimally (2017, p. 116). She further claims that under the interpretive and normative standards of her liberal egalitarian doctrine, "there is more variation in legitimate state-religion relationships than liberal egalitarians have recognized" (Ibid.). I will discuss her argument in greater detail. If she is right, then there are more convincing reasons for religious citizens to endorse her framework.

2.3.2 Disaggregating secularism

Laborde focuses her enquiry on the capacity of liberal democratic principles to be transcultural (or even trans-religious) that only carries a minimal secular core (Laborde 2017, p. 116). This results in a form of liberal democracy that

(1) “does not require a strict wall of separation”, (2) “allows a greater variety of state-religion arrangements than liberals have realized”, and demonstrates that (3) “symbolic recognition of religion, conservative laws in matters of bioethics, religious accommodations from general laws, and religious references in public debate are not incompatible with minimal secularism and liberal legitimacy” (Ibid., p. 117). She claims that a “liberal state need not be separate from religion when religion is not inaccessible, divisive, or comprehensive” (Ibid., p. 150).

From it, she deduces three principles of minimal secularism: (1) “when a reason is not generally accessible, it should not be appealed to by state officials to justify state coercion, (2) when a social identity is a marker of vulnerability and domination, it should not be symbolically endorsed and promoted by the state, and (3) when a practice relates to comprehensive ethics, it should not be coercively enforced on individuals” (Ibid.). Beyond these conditions, the state is permitted to endorse religion or relate to it in a non-neutral manner. As an example, Laborde presents a fictional state called “Divinitia” that meets the requirements of minimal secularism¹⁴. Laborde defends that Divinitia is a reasonable

¹⁴“Divinitia is a form of state that: (1) symbolically recognizes one religion, but not in a way that infringes on the equal citizenship of non-adherents, (2) some laws are religiously inspired, but justification for them is accessible and the laws do not infringe on the personal liberty of non-adherents, (3) there is wide range of

liberal state because “it broadly honours and respects citizens as free and equal” by way of public accessibility of reasons for state action, respect of personal liberty, and guarantee of equal citizenship (Laborde 2017, p. 152).

A religious citizen who is also committed to liberal values can find Laborde’s theory of disaggregating secularism plausible. Religion, as I have argued, is not merely a conception of a good or a set of behaviours and beliefs. It is fundamentally committed to a particular way of living shaped by its shared faith experience. Divinitia, as a reasonable conception of a just liberal state, accommodates a civic identity that is heavily shaped by a particular commitment without being unfair to non-adherents. But even in a secular context, religious citizens will be more accepted and welcomed as equal political stakeholders in Laborde’s approach. If anti-discriminatory laws limit religious group rights to self-jurisdiction or schools are secular for example, there is more flexibility in supporting religious accommodation (i.e. exemptions in general laws) following Laborde’s proposal of minimal secularism and disaggregation of religion.

provision for both secular and religious education within the school system, (4) religious groups enjoy extended rights of collective autonomy in the name of freedom of association, and (5) there are numerous exemptions and accommodations for religiously motivated behaviour, both individual and collective.” Cf. Laborde, *Liberalism’s Religion*, pp.151-152.

Laborde's innovative liberal-egalitarian framework has conceptual advantages against some toleration theories. To this I turn in the next subsection.

2.3.3 The disaggregation approach and toleration theories

The disaggregation strategy enables a liberal state to treat religious citizens with equal respect compared to adopting toleration theories. By way of illustration, Brian Leiter presents a framework in support of the argument against the special treatment of religion in law. He asserts that (1) religion is not morally and epistemically distinctive compared to secular conscience in a way that merits special treatment, and (2) there should be no exemptions for religious or secular conscience, unless those exemptions do not shift risks to others (Leiter 2013, p. 4). Although there are similarities with the disaggregation approach in terms of aims (e.g. no special treatment, limited exemptions), Leiter's principled toleration raises suspicion and harbours a negative attitude towards religion. He explains that principled toleration occurs when (a) one dominant group with (b) the means to end or change (c) disapproving beliefs or practices held by a disfavoured group, nevertheless (d) permits those belief or practices because of (e) moral or epistemic reasons to allow the disfavoured group to keep on believing and doing what it does (Ibid., p. 13). From this explanation, one can be presented with a negative

view of religion as being marked with disapproval from the majority, or incompatible with the dominant standard.

Furthermore, the epistemic and moral starting point of toleration is more sensitive to the interests of difference and dominance. There is already an implicit assumption of a “dominant group” that has the means to end or change a practice or belief of disfavoured or minor group. This dominant group can set the baseline that limits or excludes certain practices in the name of co-existence. Another disadvantage of adopting Leiter’s proposal is the fact that it lumps religion into the category of conscience. It, therefore, suffers from a restricted or partial view of religion. In contrast, by using the full range of standard liberal rights, the disaggregation approach comprehensively protects the different dimensions of religion. By not committing to religion as a legal-political concept, it unburdens religious citizens from suffering suspicion, negative attitude, or the anxiety of being marked as a problem for legitimacy.

The disaggregation approach avoids the problems of Leiter’s theory because it primarily tracks instances of objectionable inequalities between citizens, religious or non-religious alike. In addition, by disaggregating secularism, Laborde’s proposal eschews favouring any comprehensive secular or liberal doctrine as a preferred way of life. Granting exemptions, for example, is a means to address significant

burdens citizens suffer from a general law because of their religious identities and commitments. Since it uses the array of liberal rights, the disaggregation approach accommodates the different dimensions of religion, not exclusively understanding and assessing religious practices and beliefs under one particular right or dimension.

However, in cases of foundational disagreements, toleration theories seem to perform better because they recognise and work within situations of real and deep conflicts—competing and sometimes, antagonistic values and conceptions of the good that determine differing conceptions of justice (Horton 2011, p. 298). They work with realistic assumptions, where it is highly demanding that citizens positively regard each other's views, recognise them as equally valid as their own, or reform them in order to be more “inclusive” (Ibid., p. 299). As an example, Horton describes a case of mutual antagonism between a secular homosexual who sincerely believes that homosexuals are entitled to social rights (e.g. marriage, adoption of children) and a Christian fundamentalist who holds that the practice of homosexuality is unnatural and sinful (Ibid., p. 301). To ask each other to be tolerant, Horton argues, only demands that they exercise self-

restraint¹⁵ in acting on these attitudes, and to do more than this is to infringe on the integrity of their held beliefs (Ibid.).

In toleration frameworks, a liberal state is significantly aware of the depth and intractability of disagreements in contested matters of justice: they not only involve a “clash of reasons” but also “conflicts of deep sentiments” rooted in each citizen’s particular worldview. Tolerance demands not only epistemological restraint but more so, individual restraint for the sake of maintaining political stability. Some citizens demand the suppression of a religious practice they find “intolerable”. For example, some citizens and political leaders can be apprehensive of the compatibility of seemingly illiberal religious laws (e.g. Shari’a) to liberal values. The only acceptable political arrangement(s) a liberal state may be able to offer to resolve those cases are those generated by the use of toleration approaches.

In reply, Laborde relies on a procedural and content-neutral framework of justice that eschews the use of “religion” as a normative-interpretive category. In doing so, it avoids the

¹⁵“Toleration in this sense is a deliberate exercise of self-restraint, a willed refusal to interfere coercively with what is regarded as the objectionable behaviour of others... It can, perhaps, be represented as a cross between Michael Walzer’s ‘resigned acceptance of difference for the sake of peace’ and ‘a principled recognition that ‘others’ have rights even if they exercise these rights in unattractive ways’, but falling some way short of being ‘passive relaxed, benignly indifferent to difference’, let alone positively embracing differences (Walzer 1997, p. 10)”. Cf. John Horton, “Why the traditional conception of toleration still matters”, p. 290.

political and historical “baggage” attached to the concept of religion that makes it a divisive category. Moreover, Laborde is also aware of the epistemic obstacles in identifying the fact of the matter about what justice requires in a set of circumstances (Laborde 2017, p. 157). Through her use of an array of liberal rights, the common language of rights can be a plausible alternative in responding to cases of deep reasonable disagreements or even mutual antagonism. Laborde’s sensitivity to the interests of equality and non-discrimination is expressed in her proposal of trying to guarantee equal civic status among citizens who harbour different conceptions of the good. Since one recognises the other’s civic status as a political stakeholder, the effects of antagonism arising from competing beliefs can be mitigated. This is one of the chief results of using a procedural justice approach (i.e. equal weighing of interests, public justification). Within the disaggregation strategy, “a state can support religious activities and practices, not because it endorses and affirms the good that they pursue, but in the name of the public values of religious freedom or equality between citizens” (Laborde 2017, p. 72). This does not advise a liberal state to abandon the use of toleration approaches. Laborde’s theory encourages us to see all citizens as having a similar stake (in principle) in a range of different rights claims. Her approach conceives of religious and non-religious people as

being citizens of the same category, with the same kind of interests, to be protected via the same suite of rights.

Proponents of toleration theories may argue that Laborde's framework of procedural justice underestimates the reality of foundational disagreements. Cases like Shari'a laws differential treatment of women and religious practices that involve serious degrees of harm (e.g. bodily integrity, refusal of blood treatment) challenge normative interpretations of political values. Those who advocate for equal respect or equal treatment, for example, face a serious problem in setting a threshold that meets the standards of equality (Newey 2013, p. 82). It demands further clarification about the aim of equal respect: Is it a right to *treatment as equal* or right to *equal treatment*? (Ibid.). If the standards fall under the latter category, equal treatment becomes too demanding especially in cases of political conflict since everyone cannot be treated in the same way (Ibid.). If it is the former, then the justified treatment does not necessarily result in religious citizens receiving equal treatment (Ibid.). This is counter-productive to liberal egalitarians since equality is not fully achieved.

A plausible reply to Newey's objection would be an understanding of respect as an acknowledgment of the worth and dignity of citizens as persons that have ends (Nussbaum 2011, p. 18). This view is political and not metaphysical. It

provides sufficient room, in principle, for citizens to treat each other with respect or equal concern despite them maintaining competing or antagonistic conceptions of the good (Ibid.). This should not be too demanding since the disaggregation approach offers equal opportunity for citizens to practice their own chosen beliefs. By using elements of different liberal rights, religious practices that are important to the development and maintenance of individual member and collective identities are weighed reasonably against other interests and rights.

Newey and other proponents of toleration theories can still raise the depth of political conflicts that makes it almost impossible to draw the line between political respect and religious/metaphysical. The nature of political conflicts and foundational disagreements involve strong attitudes of disapproval together with the exercise of perfectionist judgments grounded on a particular worldview or chosen way of life. It is worth revisiting Horton's case between a Christian fundamentalist and a secular homosexual to demonstrate how foundational disagreements involve mutual antagonism or even hostility among various ways of life or worldviews. They cannot easily be resolved easily by using procedural justice approaches or justification through public reason because of the epistemic differences or obstacles arising from competing worldviews. In addition, they also incite a range of

extreme attitudes (e.g. contempt, condemnation, pity, etc.) given the strong convictions citizens hold in contested matters of justice. I admit that principled toleration (Leiter) or toleration as the idea of self-restraint (Horton) may provide a more acceptable political outcome in these particular instances. Toleration approaches acknowledges the serious and sometimes, insurmountable political divide on a contested matter of justice exposed in foundational disagreements. This, in my perspective, is due to the “thicker” identities of citizens, identities shaped by religion and culture that mark their particular response and relation to society. In generating imperfect but acceptable political outcomes in foundational disagreements, a liberal state may need to rely on a framework that provides with it with a substantial and unified understanding of religious commitment.

This limitation does not discount the plausibility of Laborde’s approach as an alternative in resolving a range of justice claims of religious citizens. Notwithstanding the practical political advantages of toleration frameworks, a liberal state can also secure the political value of respect by ensuring equal opportunity as determined by Laborde’s theory. This broadens the range of political strategies a liberal state can use in resolving religious claims.

Conclusion

Laborde justifies religious accommodation in law through a disaggregation approach. This means that freedom of religion is a derivative of other standard liberal rights. The corollaries of her approach are (1) the avoidance of admitting a contentious, substantive, legal-political category, religion, and (2) not reducing religion to “conscientious obligations” by subsuming its different normative interests under other standard liberal rights. She puts forward a strategy within which the state, despite being the final juridical authority, is able to treat religion with a concern equal to that accorded to all who come under its jurisdiction. Laborde cites this as an example in her outline of disaggregating religion with freedom of association. Aspects of the freedom of association (voluntary and identificatory elements, coherence and competence interests) become the normative drivers for religious groups’ rights to exemption. But, as per Laborde, this is not exclusive to religion, since the same elements cover the rights of other groups as well. Laborde aims to present how, under the rule of law, “religion is special but not uniquely so” (Laborde 2017, p. 25).

However, the attractiveness of her proposal is confronted by serious limitations and challenges that may, I venture, call for some refinement and further explanation. Cases such as the Shari’a Courts, infant circumcision and

refusal of blood transfusions challenge the feasibility of the disaggregation approach in the area of competing liberal rights (e.g. bodily integrity, freedom from harm). Competing rights (e.g. parental authority vs. bodily integrity) can be difficult to adjudicate since these cases put the state in a challenging position as to which type of interests it will privilege: collective interests, individual interests, both, or none. Laborde's differential exception argument is also susceptible to debate, since some religious practices and their interpretations (e.g. Shari'a court cases) can be cases of wrongful discrimination that invite state jurisdictional scrutiny. Furthermore, Laborde's principle of deference must be further supplemented given the variance in the theological interpretations that determine the obligatory force of a particular religious practice. These principal elements, namely the deference and centrality principles, are adjusted to accommodate the hard cases presented above. I argue that with these amendments, the applicability of the disaggregation approach can be broadened to accommodate cases beyond benign religious practices.

The disaggregation approach operates partly as a conceptual framework that can accommodate the needs of religious citizens. Religious citizens have a particular way of living animated by a shared faith experience. This faith commitment regulates the life of a religious group and its

individual members. The particularity of religious commitment should not be seen as divisive or exclusionary. This is accomplished by disaggregating both religion and secularism in order to cultivate an equal level of political stakeholdership.

However, in cases of deep foundational disagreements or political conflicts where a religious practice is exposed to strong attitudes of disapproval, it can be the case that toleration is a more effective approach. A liberal state should be aware of the depth of plurality as expressed in foundational disagreements and political conflicts between its citizens. These are concrete instances where the line between the political and metaphysical respect is unclear or impossible to draw. Toleration is an important political value to realise because it can generate acceptable political outcomes in those cases. But, as argued, it need not be the prevailing norm. The disaggregation approach, with its elements of content-neutral weighing of interests, public justification, and procedural fairness, is a plausible and effective alternative for a liberal state. As a key outcome, a liberal state can cultivate the political value of respect by making sure its citizens have equal opportunity to exteriorise beliefs and practices based on their particular worldviews and ways of life.

Chapter 3

RELIGION BEYOND DISAGGREGATION

In the last chapter I examined and improved on the disaggregation approach. I also compared Laborde's method to toleration theories as an alternative *modus vivendi* (or political strategy) in grounding religious accommodation. Some conceptual limitations in Laborde's proposal came to light. However, these limitations do not rule out her framework as a feasible option in resolving a range of justice claims of religious citizens. In this chapter, I extend the assessment of Laborde's theory in her response to the problem of neutrality. She considers state neutrality to be part of the requirements of justice of religious citizens.

Briefly, neutrality demands that a state refrain from appealing to any comprehensive conception of the good in its justification for action (Kymlicka 2002, p. 217). This enables the state to achieve impartiality and exhibit equal concern to all its citizens with varying worldviews and ways of life. This is not without cost to religious citizens because the neutral attitude of a liberal state can have non-neutral effects in action. For example, it can unfairly demand from religious citizens to reform or abandon some core religious practices. Laborde maintains that a liberal state need not be neutral to religion (or to the good in general) (Laborde 2017, p. 70). She uses the concept of disaggregation to construct a reasonable

framework of justice that offers various state-religion configurations that are non-neutral to religion.

A closer examination of her theory reveals conceptual limitations mainly due to its egalitarian framework. Concretely, since religion is disaggregated across a range of liberal rights, there is an absence of a referent that undergirds the original value and meaning of beliefs and practices as a coherent whole. Furthermore, the adoption of an “external” point of view of religion, in my view, limits a liberal state’s perspective of religion as a general category of beliefs and practices normatively defined by the criteria of equality. Against Laborde’s framework, I propose that a liberal state needs a unified political conception of religion if it envisions treating its religious citizens fairly. This can be supported by frameworks other than those predicated upon equality and non-discrimination.

My first step is an enquiry into the value of religious pluralism and its relationship with the application of state neutrality. I offer a critique of Laborde’s response to the problem of applying state neutrality as a default means for a liberal state in treating religious claims. From this critique, I draw out possible limitations of adopting a disaggregation strategy as a reasonable conception of justice. These serious limitations are (1) the tendency to reduce religion to a “collection” of practices and beliefs; (2) equality is a “family” of

concepts, each having its own normative criteria that can lead to partial and distorted views of religion; and (3) its lack of a unified political conception of religion leaves religious claims susceptible to unfair comparisons and assessments. Without ignoring the benefits of Laborde's theory, I will explore some potential alternatives (e.g. value-based approach and capacity for truth argument) and build on their strengths. I present the idea of vocation as a useful concept for a liberal state to use in adjudicating religious claims. This concept provides a liberal state a "thicker" political conception of religion that understands it as a unified, multi-dimensional reality and right. In my suggestion, a liberal state may exercise differential treatment to its religious citizens. This does not necessarily imply "special treatment". Nor is it a qualified case of objectionable inequality.

3.1 Religious pluralism and state neutrality

I begin this subsection by examining the value of religious pluralism as a central democratic principle. Zachary Calo asserts that the principle of pluralism seems to be the main driver in the ECtHR's interpretation of religious freedom and jurisprudence (2011, p. 261). Citing the court's majority opinion in *Kokkinakis v. Greece*, Calo describes ECtHR's intuitions in its protection and promotion of religious pluralism:

"As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the

most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”¹⁶ (Calo 2011, p. 262).

From this interpretation, Calo argues that the ECtHR considers pluralism “not only a (a) good in itself but (b) nourishes the health of democratic life more widely” (2011, p. 263). He considers Robin Lovin’s theory of normative religious pluralism as having similar aims: “religious diversity is held to be a positive force in social life, giving moral and spiritual depth to civic discourse, enriching personal and family life, and even making the diverse religious communities themselves better representative of their faiths and traditions” (Ibid., p. 263). Calo emphasises that religious freedom stands in service of a pluralism that the ECtHR deems essential in sustaining the moral life of European democracy (Ibid.). He asserts that the discernible pattern of ECtHR decisions regarding religious claims show that religious pluralism is not one democratic value among many—it is “(a) the cornerstone of a human rights regime and (b) the norm by which other norms are assessed” (Ibid.).

This should be a form of assurance to religious citizens. Their particular life commitments are deemed non-threatening and are credible sources that contribute to the

¹⁶Kokkinakis v. Greece, App. No. 14307/88, 260 Eur. Ct. H.R., § 31. Cf. Zachary Calo, “Pluralism, Secularism, and the European Court of Human Rights”, p. 262.

robustness of a democratic and plural society. However, the resolutions of contested issues of justice reveal the wide gap between the aim of promoting religious pluralism and the actual pattern of decisions and political outcomes. Calo observes from the pattern of ECtHR decisions that whenever religion is perceived as a threat to maintaining Europe's secular identity, state neutrality is applied (2011, p. 264).

In resolving contested claims of justice, a liberal state can opt to be "neutral" between conceptions of the good. This mostly occurs at two levels: justification for state action and outcomes of state action (Mulhall and Swift 1992, p. 31). It can be the case that the effects of a particular liberal state action may not be neutral, but its justification for such action is (Ibid.). Put differently, when a liberal state refrains from judging which conceptions of the good are valuable or worthless for example, it has non-neutral effects in privileging certain ways of life (Ibid., p. 30). Consider the case of subsidising opera. If the state is not permitted to subsidise the opera because it is a very expensive art form and available only to a certain segment of society, then those citizens who include opera as part of their conception of the good can be forced to revise their ideas (Ibid.).

If applied in the case of a religious claim, a liberal state that decides to be neutral determines the permissibility of a religious practice, or even that it might be encouraged. This is

not without cost to religious citizens. The application of neutrality defines a liberal state's fair treatment of its religious citizens. If applied to the ECtHR's ambition to promote and protect religious pluralism as a democratic value, state neutrality as an expression of justice draws the limit to the good—it can draw the limit too “narrowly” (to borrow a Rawlsian phrase¹⁷). This does not discount, however, the practical value of state neutrality. In some cases, state neutrality might deliver the most favourable political outcome based on best information and evidence. However, outside such instances, a liberal state need not be neutral to religion.

In a similar vein, Laborde vigorously responds to the impact of applying state neutrality to religious claims. She notices that most liberal egalitarians hold that the U.S. non-establishment clause should be interpreted as state neutrality about the good in general (Laborde 2017, p. 69). She expresses serious doubts about this proposal. She claims that a liberal state need not be neutral to religion or to the good in general but only towards “a restricted subset of religion or the good” (ibid.). I will assess Laborde's explication of the problem of neutrality and from it, point out some conceptual deficiencies of her theory.

¹⁷John Rawls, *Political Liberalism* (PL) V, p. 174.

3.2 The problem of neutrality

The problem of neutrality arises from the various motivations behind its use as justification for state action. Laborde dissects this problem through an incisive assessment of three prominent liberal egalitarian views. They propose state neutrality as the normative-interpretative concept of religious non-establishment.¹⁸ By unearthing key motivations behind

¹⁸“The first view claims that state neutrality restrains a liberal state in interfering with a citizen’s right to make judgments about the ethical dimensions of their lives. A liberal state fails in showing equal concern to all citizens, when justification for state action endorses or favours one conception of the good life over others. As an example, a ban on same sex marriage is predicated upon impermissible ethical judgments about others’ way of life. Laborde points out that this argument privileges ethical independence as a substantive liberal value that is protected and promoted by state neutrality. Here, state neutrality is justified only on what Laborde categorises as a restricted set of conceptions (in this case, ethical conception) and does not extend to all conceptions of the good. Laborde concludes that a liberal state may reasonably appeal to notions of the good provided that, in doing so, it does not infringe on the ethical dimension of its citizens’ life. There are other kinds of goods (e.g. culture, arts, and environment) that are outside the scope of personal ethics, which the justification of a liberal’s state action can be non-neutral. If applied to religion, there are dimensions of religion that do not fall, strictly speaking, under the domain of personal ethics. Furthermore, religion can act as an impersonal good like culture, arts, or the environment and be deserving of state support on the grounds of its capacity to contribute to the richness of cultural structure (e.g. cultural heritage). With her engagement with Dworkin’s position, Laborde defines the problem of neutrality as a problem of *scope*—the application of neutrality need not be broad, a total independence from all conceptions of the good.

This point is further emphasised in her discussion of another liberal egalitarian position. This view prohibits state endorsement of any religion for the reason that such act is a symbolic expression that favours particular religious perspectives and undermines others. Laborde construes that this symbolic expression is sustained by social meaning which makes concrete displays of endorsement objectively disparaging. Religion carries sociological and cultural features and it is by nature, comprehensive. This can exacerbate the vulnerability of religious citizens to wrongful discrimination, exclusion, or neglect by a majority of non-adherents. In reply,

state neutrality, she concludes that strict neutrality, understood as total independence (separation) from any conception of the good, need not be broadly applied. In addition, Laborde makes one complex proviso: a liberal state can be non-neutral to religion in its justification of state action as long as religion does not act as a comprehensive personal ethics, a social identity which is a significant marker for vulnerability or domination, or provides inaccessible reasons (Laborde 2017, p. 70). Furthermore, the resolution of some cases of foundational disagreements does not preclude a liberal state from partially appealing to some general ideas of the good in its justification of action. A partial appeal enables some general ideas of the good to act as reasonable and shareable premises that do not exclude religious views or comprehensive conceptions of the good from the sphere of public reason.¹⁹

Laborde states that religion is not uniquely special in this case. Cases of racial segregation also harbour such problems since identities are significant markers of social division. Thus, a liberal state can be non-neutral in its treatment of religious citizens when religion does not behave as a divisive social identity.” Cf. Cecile Laborde, *Liberalism’s Religion*, pp. 70-86.

¹⁹ “The last liberal egalitarian position presents foundational disagreements as reasons for framing the non-establishment clause in the concept of state neutrality. In assuming the fact of reasonable pluralism—divergent and sometimes, competing conceptions of the good—as a permanent and structural feature of modern society, a liberal should remain neutral because the disagreement about the good is deep and intractable—foundational. It is foundational in a sense that (1) in large part, conceptions of the good contain perfectionist judgment about what constitutes human flourishing and therefore (2) does not provide any premise that all citizens can reasonably share. Laborde contends that foundational disagreement about the good need not

I offer two comments. Firstly, in a practical (i.e. policy-making) level, the application of neutrality, whether broad or restricted, does not only suffer from the problem of motivation. The concept of neutrality is also expressed in multiple attitudes that generate serious misunderstanding at different levels (Leigh 2013, p. 38).²⁰ These attitudes have their own normative criteria that shape a liberal state's view of religion. It can be the case that a liberal state ends up with partial and even, distorted views of religion in its inconsistent display of several "attitudes" of neutrality. If a liberal state opts to be neutral in the issue of permitting infant male circumcision for adherents of Judaism, its practical expression of neutrality can deliver a mixture of messages. For example, a neutral state can allow such practice under

rule out a partial appeal to ideas of the good. Laborde defends her argument by (1) enumerating cases where a shared and partial idea about the good does not violate liberal neutrality (e.g. badness of addiction), (2) stating that reasonable disagreement also occur, at an almost similar level, in the domain of justice and (3) noting that even the boundaries of the domain of justice are inconclusive such that a liberal state often needs to rely on contested ideas about the good in order to draw the line between the right and the good. Therefore, a liberal state can be non-neutral by appealing to partial ideas of the good in resolving religious claims." Cf. *Ibid.*, pp. 92-104.

²⁰ Neutrality as normatively expressed can mean (a) "the equidistance of the state from all religions so they are treated evenhandedly and none is favoured", (b) equality of treatment of religions by state, (c) "equal respect" as the permissibility of varying treatment by the state of religions in situations either where fundamental rights are not engaged or where differences in treatment can be justified, and (d) objectivity, the treatment of religions as subjective belief systems so that, at best, the state is indifferent towards them or, at worst, they are seen as equally irrelevant or misguided. Cf. Ian Leigh, "The European Court of Human Rights and Religious Neutrality", p. 39.

the attitude of “indifference”. This is in contrast with a neutral state that endeavours to promote equality of treatment or equal respect to Jewish citizens given its specific political context. Religion, once exteriorised in belief and practice, is shaped significantly by the different attitudes of neutrality that a liberal state chooses in its resolution of contested claims of justice. The display of religious identity can be limited and inconsistent as a result. This also affects the configurations of religious pluralism that ECtHR allows in pursuit of its vision. Julie Ringelheim affirms the same observation. She cites *Leyla Sahin v. Turkey* (2005) where the ECtHR “uncritically praises the principle of secularism (understood as strict separation)”, declaring it (1) “consistent with the values underpinning the Convention and (2) necessary to protect the democratic system in Turkey (Ringelheim 2011, pp. 302-303). This, according to Ringelheim, has far-reaching implications: “by virtue of this principle, the state may prohibit any religious manifestation for the sole reason of it being public. The state’s neutrality is seen as being jeopardised as soon as a person exteriorises his or her religious convictions in public, regardless of whether he or she is a state agent” (Ibid., p. 303). This can lead to counter-intuitive versions of religious pluralism that stifles religious freedom and promotes a negative attitude towards religion. It further confirms Calo’s

earlier observation that state neutrality can be used as a pretext in protecting Europe's secular identity.

This may not be a problem for a liberal state that opts for a disaggregation approach. By eschewing the use of the category "religion", it is indifferent to what religion is. However, in having a "disaggregated" conception of religion, its religious citizens may find it difficult to exteriorise their beliefs and practices as a coherent identity. There can be instances of disjunctive or split personality type of living out religious commitments in the public sphere depending on the kind of neutral attitude a liberal state displays. In reply, one may argue that the private/public and identity (civic/religious) divide is unavoidable in the political sphere. One can advance the case for the disaggregation approach by its capacity to allow a liberal state to be non-neutral to religion. This can mitigate the effects of the divide that religious citizens struggle with given their worldview and way of life. As a response, I maintain that, since reasonable disagreements can run deep and the fact that there are various attitudes of neutrality, the scope of the application of neutrality is hard to determine. In contested religious claims, it can be helpful to draw the line such that Laborde's proviso offers only a narrow range of situations where a liberal state can treat its religious citizens in a non-neutral manner.

My objection is not blind to the importance of political compromise since religious citizens share public life and common resources with non-adherents, some of whom have illiberal conceptions of religion. Furthermore, the present historical, social, and political conditions may only be ripe for a particular political compromise that secures a level of peaceful co-existence in a given society. I want to highlight that each practical definition of neutrality has its normative implication on religion that a liberal state needs to track if it wants treat its religious citizens in a consistent manner. Laborde may need to clarify further the normative implications of the various attitudes of neutrality.

Secondly, in Ian Leigh's list of the many practical attitudes of neutrality, it is noticeable that neutrality is defined by a "family" of concepts of equality (e.g. equi-distant, equal treatment, and equal respect). This gives the impression that neutrality and equality are conceptually the same. In arguing against adopting neutrality as the normative interpretive concept of religious non-establishment clause, Laborde presents how equality as a normative concept can be used to justify the adoption of a non-neutral attitude to religion. Her *proviso* (minimal secularism) is a plausible argument for a liberal state's non-neutral treatment of religious citizens. Although I agree with the practical political benefits of her proposal, I still find the need to examine the theoretical

limitations of adopting equality as a primary motivation in determining the application of (non)neutrality to contested cases of justice. My concern stems from the fact that equality carries multiple meanings, each with its own normative implications. Take the case of equal treatment and equal respect. The normative standards of equal treatment do not often result in equality of respect since respect seems to conceptually demand a rather robust appreciation of religion from a liberal state. If applied in case of the disaggregation approach, Laborde's strict discrimination test may ensure equal treatment of women in cases of wrongful discrimination in dowry or marriage disputes in Islam. However, equal respect can further require that Shari'a related doctrines that render differential treatment on women be subject to state scrutiny and possible interference. Without recourse to the value and importance of these Shari'a doctrines to Islamic view of women, a liberal state may end up with a narrow and unfair assessment of Shari'a doctrines and rules as cases of wrongful discrimination. I claim that the interests of equality and non-domination are not sensitive enough to the value of a religious belief or practice grounded on a unified view of religion. In adopting Laborde's disaggregation approach, the liberal state relies on a "minimal" political conception of religion animated by egalitarian principles that determine the application of (non)neutrality. I argue that the state can also

rely on other concepts such as a value theory that presents a unified view of religion that can incorporate the normative benefits of Laborde's framework.

3.3 The problem with disaggregation

I expound my critique by discussing conceptual limitations in Laborde's theory that I have indicated in my comments in the previous section. In adopting Laborde's political conception of religion, I fear that the liberal state is prone to: (1) reduce religion into a "collection" of practices and belief, (2) execute unfair comparisons and assessments that are largely driven by egalitarian standards, and (3) misinterpret the needs of religious citizens given its lack of a unified view of religion. I will discuss each one in turn.

3.3.1 Religion as a "collection" of practices and beliefs

By disaggregating religion, Laborde shifts the rationale of religious practices from a religious standpoint to a general category of respect-worthy beliefs and practices. She argues that, by doing so, a liberal state avoids misinterpreting religion because it substitutes an array of liberal rights for a normative interpretation of the different dimensions of religion pertinent to an issue of justice. The main concern with such a manoeuvre is that religious beliefs and practices lose their meaning and value. They also acquire new ones under the category of "respect-worthy" beliefs and practices, which a liberal state is considered competent in administering via a

disaggregation approach. One may ask, "What makes a belief or practice respect-worthy such that religious practises are fairly compared to non-religious beliefs or practices?" A fair evaluation of respect-worthiness invites a calibration into degrees that is determined by several factors. It puts a liberal state, almost unavoidably, in the position of misinterpreting and even marginalising minor religions. Its competence can also be questioned in its attempt to sift "respect-worthy" beliefs and practices from non-"respect-worthy" ones. This influences the normative interpretation of the substantial burden of a religious citizen such that it misinterprets her needs. It also diminishes the merit of differential treatment accorded to religious citizens. A supposed fair treatment would be consistent with their religious commitment. This is exemplified if we apply Laborde's framework to the case of some of the general provisions of charity laws.

In U.K. charity laws, there is a provision for tax-related exemptions if an activity or practice is considered for "the advancement of religion". The state employs a two-fold evaluation in granting tax exemptions. Firstly, the purpose or activity should fall under the category or the *Pemsel* set stipulated in charity law. The purpose "for advancement of religion" is one of the four oldest general categories of the *Pemsel* set (Harding 2014, p. 11). In recent years, the *Pemsel* set was expanded to include other purposes that the state

deemed “charitable”. Once the purpose is judged to be charitable, it needs to pass the second criterion: the public benefit test. On a simple view, this test means ensuring that the said purpose should satisfy the “public” and “benefit” components of the test (Harding 2014, p. 13). “The public” refers to a class of persons that is determined as sufficiently “public” by the state (Ibid., p. 14), whilst the “benefit” tracks the positive effect on general welfare (Ibid., p. 21). These two components are rather broad. This has resulted in unclear cases that contest the decision-makers’ justifications of what constitutes “public” and “benefit”. For example, in *Gilmour v. Coats*, the House of Lords refused to recognize the intercessory prayers of Carmelite nuns as of public benefit because the alleged spiritual benefit is not possible to identify or measure based on the sort of evidence normally used to calculate such a benefit (Ibid., p. 22). It is observed that, in the current pattern of decision-making, the state authorities do not defer to the beliefs or doctrines of the particular organization or person (Ibid.). Instead, they exclusively rely on an analysis of benefits and detriments based on available evidence and arguments (Ibid., p. 11).

One can argue that Laborde’s approach can provide a consistent and fair political outcome in this case. A liberal state is recommended to defer to the justification of religious authorities for a practice or function for which they seek an

exemption. By invoking competence interests, a state can understand, for example, the public benefit of intercessory prayers as “benefits of well-being”. Without having to incur significant entanglement with religion, those who are defending the Carmelite nuns’ claims for tax exemption via “advancement of religion” can use their doctrines and rules to argue for the significant contribution of intercessory prayers and their contemplative way of life in uplifting general welfare of the public in the area of spiritual wellness. A liberal state, through the disaggregation strategy, is invited to consider such arguments in its weighing of interests.

However, a deeper problem arises when, in a public benefit test, cases arise in which the outcome of the weighing of the benefits and detriments results in the withholding of exemption. In using the disaggregation approach, the procedure may be fair, but the political outcome may mean either a giving up of what is considered an accompanying benefit of religion or, taxing a practice that falls under “for advancement of religion”. This is so because, in eschewing “religion”, a liberal state alludes to a broad category of respect-worthy beliefs and practices. If applied in the case of Carmelite nuns, intercessory prayers understood and argued outside its meaning within religion may not be as convincing and reasonable. This weakens the argument for substantial burden because of the absence of a theory of value to

appropriately ground these religious practices in relation to “advancement of religion” and the kind of benefit the public will have. In cases of religious practices that are discriminatory, they become *pro tanto* candidates for restriction or non-exemption from general liberal laws. In my view, Laborde’s use of a general category would benefit from a unified understanding of religious commitment if it aims to be fair in comparing various respect-worthy beliefs and practices that are defined by particular ways of life.

Laborde’s use of a general category is a function of her egalitarian motivation. In the next section, I explore the concerns related to adopting egalitarian principles.

3.3.2 Problems with an egalitarian framework

It is characteristic of Laborde to be sensitive to the interests of equality and non-discrimination. In particular, her use of content-neutral elements and public justifiability assures equality and non-discrimination since non-religious citizens can employ these same measures to justify their cases. Her strict discrimination test helps vulnerable segments (e.g. women, children, gender identities) in their appeal against instances of objectionable inequalities that may occur in religious doctrines and practices that render differential treatment. This secures equality of treatment. However, egalitarian approaches such as a disaggregation framework can limit the protection and promotion of religious freedom.

To illustrate, I will discuss some cases related to distributive justice (e.g. tax exemption).

The main issue concerning religion and tax exemptions is the uniform application of the tax system assumed to preserve the conditions of fairness. This takes the form of impartiality and consistency. Impartiality deals with distributing tax burdens fairly among citizens, religious and non-religious alike. This means that, if there is an exemption granted to religious citizens, this should be reasonably grounded and not exclusive to them. In terms of consistency, there should be a discernible pattern of fairness in the application of exemptions.

This is not as simple as it appears. In a quick survey of charity and tax laws, it appears that the state confers on religion certain privileges, (e.g. tax exemptions). Some question such privileges in the light, for example, of possible violations of the non-establishment clause. A quick egalitarian solution to these concerns is the extension of such privileges to non-religious institutions that are deemed charities. However, the matter is complicated. Some of the practices and beliefs inherent to religious groups merit “special treatment” in tax law. For example, religious citizens need spaces for communal worship. Putting a monetary (and, hence, a taxable) value to these places of worship and its fixtures would place a liberal state in an unwelcome

relationship with religion. Secondly, the rendering of justice in contested matters of distribution goes beyond “levelling down (or up)”. This means that, in resolving claims for distributive justice, the approach is not as simple as “equalising” the benefits (e.g. by extension of the exemption to everyone to all) for the sake of reducing the differences of benefit among citizens. T.M. Scanlon criticizes this “levelling down (or up)” approach because it can be the case that plain “equalising” does not make any one better off and even results in leaving some people worse off (Scanlon 2018, p. 3). Consider the Court’s decision in the case of the non-payment of social services tax by an Amish employer because of a violation of his religious belief. The Court held that broad public interest in maintaining a sound tax system is a higher value compared to religious belief (Bittker, et.al 2015, p. 417). This decision shows that inequalities in distribution arising from religious beliefs must be grounded by an appreciation of the religious belief in relation to the non-payment of a social tax. It can be the case that granting an exemption to an Amish employer is not *ipso facto* an objectionable inequality.

In Laborde’s theory, a religious group can only invoke coherence and competence interests if they are constituted as “identificatory associations”, where individuals identify with the projects and commitments that are at the core of the association’s integrity (Laborde 2017, p. 182). In the case of

the Amish employer, two key considerations come into play: (1) religious belief and (2) the nature of the company. It may be a key religious belief that the social services tax of fellow Amish employees should not be paid, but if the company is a public and legal entity similar to other corporations, it weakens the argument for tax exemption based on identificatory coherence. In other words, the religious belief may be protected by religion disaggregated in the freedom of conscience but this is undermined by the fact that a religious owner is engaged in a corporate activity that serves the general public. In applying the identificatory condition, a religious owner cannot invoke coherence and competence interests for tax exemptions because his corporation does not pass Laborde's "tight" coherence test as described in the last chapter. Laborde cites the important US case of *Burwell vs. Hobby Lobby*, where she disagrees with the court's ruling favouring the exemption. She explains that "*Hobby Lobby*, despite the religious ethos of its owners, is not an identificatory association because it is a large art-and-craft chain of shops with over 500 outlets whose 13,000 employees cannot be assumed to share the owners' personal investment and moral commitments" (Laborde 2017, p. 185).

This may not sit well with religious citizens, especially owners who are engaged in for-profit activity or business. They can argue that religion, insofar as it manifests under the

freedom of conscience, is curtailed by the identificatory coherence test of Laborde's approach. Since the disaggregation framework is framed by an egalitarian intention, it is not surprising that Laborde's framework can be stricter in granting exemptions from anti-discrimination laws. This results in (1) a limited application of coherence and competence interests and (2) the adoption of a narrower or stricter identificatory test. She even admits holding a strong claim: "as soon as an organization claims to serve the public, it is not 'religious' in the sense that matters for submitting requests for exemptions or for claims of discrimination. If faith-based hospitals or charities are to serve the public, they must do so on a non-exclusive basis, on par with secular organizations" (Laborde 2017, p. 185). Against Laborde's condition, one can reasonably raise a serious concern about the curtailment of the freedom of conscience.

Since it is the elements of an association (and not religion) that does the normative work in Laborde's theory, her objective approach limits the evaluation of objectionable inequality in the theme of procedural equality. An acute effect of using procedural equality as normative criterion is the susceptibility of some core religious doctrines or beliefs to inappropriate limitation or exclusion. These religious beliefs and practices can be assessed as cases of objectionable inequalities by a liberal state that does not have a unified

view of religion. Scanlon points out that one of the main problems egalitarians face is finding convincing arguments to establish (1) what are deemed to be objectionable inequalities, and to show (2) why equality is a good to be sought (2018, p. 2). Scanlon's challenge is significant since egalitarian frameworks are damaged by arguments against the "levelling down" objection. These frameworks intend only to preserve a certain pattern of distribution (Ibid., p. 3). In the case of religion, one can reasonably argue against Laborde that the privileges or "special treatment in law" that religion enjoys are not *ipso facto* objectionable inequalities.

In using the disaggregation framework, the fair treatment of religious citizens is limited by the egalitarians' comparative method. This results in (1) a narrow range of exemptions and (2) a set of countervailing reasons, for example, in meeting the public benefit test. The application of an egalitarian comparative framework to religion, a complex reality, may result in leaving religious citizens worse off. For example, Laborde relies on a strict discrimination test to curb instances of wrongful discrimination against vulnerable segments (e.g. women, children, and gender identities) arising from religious doctrines or practices that render differential treatment. As I have argued in the previous chapter, her discrimination test can risk undermining the use of coherence and competence interests to protect such core

religious doctrines or practices. Take the case of ministerial exception. Laborde claims that the Catholic Church is reasonably permitted to not ordain women based on a core tenet (that forms part of its coherence interests) that only men could be ordained priests (Laborde 2017, p. 180). I can apply the discrimination test by arguing, for example, that women, qualified as they are yet deprived of an opportunity to exercise such sacred role, suffer diminished dignity since Christ did not directly institute the priesthood exclusively for men and that by early tradition there had been women deacons. A liberal state that is not concerned with what religion is can reasonably conclude from its weighing of interests (coherence interests versus women's rights) that ministerial exception contradicts anti-discrimination laws. Laborde's reliance on content-neutral elements (e.g. coherence and competence interests) and her employment of a strict discrimination test track equal opportunity at the risk of giving up or reforming core religious practices that render differential treatment. Conceptually, it shows a narrow understanding of religion as a collection of beliefs and practices.

As another illustration, the discrimination test can inappropriately regulate Shari'a councils. This is demonstrated in the recommendations from an independent review of Shari'a councils in the UK commissioned by then

home secretary Theresa May.²¹ The discrimination test can limit the scope of permissible Shari'a laws and interpretations by its strict normative criteria determined by other liberal rights. I argue that the value of Shari'a councils to Islam in general and in the formation of women according to Islam in particular can also provide reasonable justifications for state regulation of Shari'a councils without ignoring interests of equality and non-discrimination. This can be a plausible argument to achieve equality between religions that the same report highlights.²² It is a result of a liberal state having an appropriate understanding of Shari'a councils beyond the category of an ordinary judicial court.

²¹"Alongside this is the need to ensure that sharia councils operate within the law and comply with best practice, non-discriminatory processes, and existing regulatory structures. In particular, a clear message must be sent that an arbitration that applies sharia law in respect of financial remedies and/or child arrangements would fall foul of the Arbitration Act and its underlying protection." Cf. Executive Summary of *The independent review into the application of sharia law in England and Wales*, Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, February 2018, www.gov.uk/government/publications, p. 6.

²²"Common misconceptions around sharia councils are often perpetuated by the use of incorrect terms such as referring to them as 'courts' rather than councils or to their members as 'judges'. These terms are used both in media articles but also on occasion by the sharia councils themselves. It is important to note that sharia councils are not courts and they should not refer to their members as judges. It is this misrepresentation of sharia councils as courts that leads to public misconceptions over the primacy of sharia over domestic law and concerns of a parallel legal system. The recommendations included in this report, such as changes to marriage law, are designed to promote equality between religions in ways that should challenge misconceptions of a parallel legal system and encourage integration." Cf. *Ibid.*, pp. 23.

Furthermore, liberal rights vary from each other in aim, rationale, and normative criteria. It can be the case that the main elements cannot be assumed to perform a fair assessment regarding the value and meaning of a religious practice or belief because of overriding interests of equality and non-discrimination. In addition, they do not provide a liberal state a coherent understanding of practices and beliefs appropriate to the idea of religious commitment. Against Laborde's approach, such view supports a strong claim that religion, a unified and multi-faceted reality, is not fairly comparable to an "aggregation" of liberal rights.

Lastly, equal opportunity may not be the best normative criteria to use in resolving these types of justice claims. In cases like the ministerial exception and permissibility and regulation of Shari'a courts, it can well be that reasonable disagreement runs deep—"all the way down"—that "equalising" is a means to tolerate. This emphasises the conundrum that egalitarians face: "equality of what?" Religious practices invite comparative assessments but it need not be confined within the standards of equality and non-domination. The next subsection elaborates more on this critical thought.

3.3.3 The lack of a unified view of religion

In the concept of disaggregation, religion is normatively interpreted with respect to an aggregate of different liberal

rights. This minimal political conception of religion, Laborde argues, ensures equal concern and opportunity since all citizens can appeal to liberal rights to ground their justice claims. Although I support and even highlighted this aspect as one of the intuitively attractive features of Laborde's theory, I contend that achieving equal opportunity does not necessarily secure fair treatment in all cases. In opting for the use of content-neutral concepts and public justification to ensure procedural equality, a disaggregated approach does not necessarily resolve reasonable disagreements by appeal to liberal rights. As an example, Michael Ignatieff points out that religious and secular arguments can meet Laborde's public reason requirements by being accessible and intelligible but it does not settle the debate about the permissibility of abortion (Ignatieff 2018, p. 1). As I have argued, some valuable religious practices (e.g. Shari'a laws, ministerial exception) that render differential treatment cannot easily earn exemption from anti-discrimination laws given Laborde's criteria of procedural equality. In the above case of tax exemptions, one can only have a narrow set of reasonable religious accommodation. I am concerned that the fair opportunity to perform a valuable religious practice may become a casualty because it was not assessed appropriately in terms of its value to religious identity. This strongly supports Newey's argument I mentioned in the

previous chapter. He raises some conceptual ambiguities as regarding what “equal” is in equal treatment (or, respect). I argue that in trying to achieve a version of equality by a set of normative criteria, a liberal state will benefit from a unified understanding of the commitments they are comparing.

Furthermore, fair treatment, in my view, can be grounded reasonably in a liberal state’s differential treatment of citizens who hold worldviews circumscribed by particular ways of life. I find wisdom in the insight of proponents of toleration theories who seriously consider the friction between different ways of life and worldviews. Each citizen has a “thicker” identity, largely defined by a way of life (e.g. religion, cultures, and philosophies), that is unavoidably expressed in the public sphere. Contra Laborde, religious commitments are intrinsically different from secular ones even if they share some general normative form and purpose. Beliefs and practices have coherent meaning and value in preserving the integrity of a particular identity and human community. Laborde’s theory is not sensitive enough to the depth of these differences unlike the proponents of toleration theories. Her lack of a unified view of religion displaces the coherent meaning and value of religious practices and beliefs. Coherence and competence interests do not go deep in determining the value of the practice or belief. As a key consequence, the living out of religious identity, both

individual and collective is highly susceptible to political outcomes that can diminish the value and meaning of their religious commitments.

The limitations I have outlined are cautions for a religious citizen in adopting Laborde's disaggregation approach. As Patrick Riordan rightly observes, the proposals and arguments of liberal egalitarians (e.g. Dworkin, Laborde, and others) reverse the direction of the analogy: "religious belief is understood by comparison with the role of other life-shaping choices in anyone's story" (Riordan *forthcoming*, p. 6). This is a result of an ongoing political movement to achieve equality through non-discrimination (Ibid.). Riordan argues that if there is a conflict between liberty and equality, the balance of justice's scales is tipped in favour of equality (Ibid.). Notwithstanding the benefits of liberal egalitarian frameworks, I argue that a liberal state can employ other political conceptions of religion that can address the conceptual limitations of a disaggregation approach.

3.4 Religion beyond disaggregation

In my suggestion, a liberal state need not confine itself to an egalitarian motivation for its (non)neutral treatment of religious citizens. Moreover, religion is understood as a unified multi-faceted reality. Religious citizens reasonably warrant differential treatment from a liberal state and this does not imply "special treatment". Nor is it a case of

objectionable inequality or an instance of liberals showing “too much” respect to religion as Laborde fears (Ignatieff 2018, p.1). I will explicate some possible routes we can take in the next subsections.

I begin with the value-based approach.

3.4.1 Value-based approach

In presenting principles of justice that would be reasonably endorsed by citizens, religious and non-religious alike, religion can be treated with sufficient respect grounded on the concept of value. The value-based approach I suggest draws mainly from the framework of Joseph Raz. A liberal state can opt to view religion as one example of a multi-dimensional reality that can be of value even to non-adherents of some or all of its components.

Raz offers a “minimum” model of respect as a correct response to value. He distinguishes three basic stages: (1) the regard for objects in a manner consistent with their value, (2) the general reason to preserve what valuable, and (3) engaging with value in appropriate ways (Raz 2004, pp. 161-162). He explains that the first two stages generate reasons for respect “in the way we treat objects of value in thought and expression and the reasons for preserving them” (Ibid., p. 164). This is the minimal form of engagement with value (Ibid.). Following his thought, although value is realised at the third stage, we do not expect people to engage with all

valuable objects. But, respect (as described in two stages) is the right reaction to what is of value even if when we do not care for it (Raz 2004, p. 164). The two stages are deemed as universal requirements, whether the value is intrinsic or instrumental (Ibid.). This brief sketch of Raz's framework can be a reasonable ground for a conception of justice that citizens can reasonably endorse. This can also be consistent in how a liberal state appeals to partial notions of the good in resolving religious claims.

One may argue against this approach by bringing up the analytic demand of determining the necessary and sufficient conditions of value for us to correctly assess our relation with the object. This requires the setting of a threshold of value for example, or trying to determine the proper value of a religious practice that is different from tastes, goals, or preferences. Furthermore, in adopting a value approach, questions about the kind of value— instrumental or intrinsic— of religious practices should be taken into account. This can lead into instances of state entanglement with religion since a liberal political community may not be persuaded to judge a permissible range of religious practices based on value. This should be avoided because of the state's lack of competency on those matters. Lastly, a possible political outcome of employing a value-approach is a society that is overtly "religious".

In reply, Raz qualifies that the reasons for respect are independent of our goals, tastes, or even our desires (Raz 2004, p. 168). He explains that, although taste or preference largely determines which valuable pursuits one will engage in (Ibid., p. 169), the reasons for respect are more general in a way that they safeguard the possibility of a particular value, whether pursued or not, to be realised (Ibid., p. 167). Here, Raz differentiates respecting the value from engaging with the value. The first two stages are the proper conditions in which a particular value of an object is permitted to be realised, whether one cares about that object or not. If applied in the case of religious practices, respect means giving a fair opportunity for such practice to be performed in order to help sustain a religious commitment. In doing so, it creates “a social-cultural climate which makes engagement with these values conceivable and respectable” (Ibid., p. 167). In terms of avoiding entanglement with religion, a liberal state can employ Laborde’s competence interests (i.e. deference to religious justification) but operating under the principle of value as understood in Raz’s framework.

I assert that adopting Raz’s value-respect model can lead to an extensive discussion about religious commitment as a value worthy of respect. By following Raz’s intuitions, the first two stages of respect can help correct a liberal state’s treatment of religious citizens in terms of the value of their

religious practices in relation to their religious commitments. This approach has a comparative aspect but it is not of the kind that suffers the limitations of an egalitarian approach that I discussed in the previous sections. One can compare two things and accord them differential treatment consistent to their value. It addresses the deficiency of Laborde's use of "respect-worthy beliefs and practices" as a category for religion by guiding a liberal state in implementing the disaggregation approach consistent with the value of religious commitment. If a liberal state reflects and weighs religious practices in a perspective of value as Raz proposes for example, it can reasonably adopt a non-neutral justification for its action.

However, the value approach still lacks clarity. As argued, a liberal state must be further aided in its justification for the permissibility of a religious practice if its recourse is an appeal to value. I claim that Raz's intuitions about reasons for respect of value are more convincing if we complement them with a particular human capacity that grounds religious freedom. I will expound on Patrick Riordan's idea about the human capacity to search for the truth in the next subsection.

3.4.2 Capacity for truth argument

Patrick Riordan presents two main arguments that support the distinctiveness of religious freedom: (1) philosophical argument that rests on the human capacity to seek the truth

and (2) political and pragmatic reasons for retaining religious freedom (e.g. historical experience of religious persecution, contemporary instances of imposing religious doctrines) (Riordan *forthcoming*, p. 6). I will focus on the philosophical argument. I claim that the human capacity to pursue and live out an ultimate and comprehensive explanation of reality gives meaning and value to beliefs and practices.

Riordan claims that the human capacity to wonder and be open to the “most ultimate and comprehensive explanation of reality, whatever it turns out to be” frames religious freedom (Riordan *forthcoming*, p. 7). He argues that freedom interpreted as autonomy or ethical independence is not the only key value that can play a foundational role (*Ibid.*). His assertion distinguishes religious freedom from the freedom of conscience. Dworkin and ETRF proponents argue that religion is only a subset of ethical independence. Laborde already identifies the limitation of using the freedom of conscience as a proxy or substitute for religion and even the idea of conscientious duties to account for religious practices. Similarly, Riordan cautions that the overemphasis on freedom of conscience as ethical independence leads to relativism, scepticism on the human capacity for the truth, and deprivation of dialogue because “all positions are equally valid” (*Ibid.*). He proposes that the human capacity to search for the truth is another central value that can play a

foundational role alongside freedom. For example, religion, as one of the fundamental conditions of human flourishing, enables a person to weave a self-narrative based on a comprehensive explanation of reality. Religious practices find their value in relation to a person's expression of this comprehensive view of life. A good example is public worship. An act of public worship expresses, in part, an individual's (or a group's) doctrine about the universe through song, praise, or ritual action. Thus, the importance of religious freedom is two-fold: (1) for a believer to develop and share her views about our place in life and universe and (2) for non-adherents to engage with these alternative views (McCrudden 2018, pp. 139-140). A liberal state that is sensitive to this basic human need opens a political space where the interaction of different outlooks about the world and our place in it nourishes, as well as, critiques a citizen's self-understanding (Ibid., p. 140).

From this brief sketch, Riordan's argument supports the intellectualist tradition rather than a voluntarist one. However, in adopting this view, religion can easily be mistaken for an intellectual pursuit. To his credit, Riordan was quick to point out that the dignity of humans is not solely measured by the rational pursuit of the truth (Riordan *forthcoming*, p. 7). Although I share his intuitions, there is a need to amend his position. As I have argued, Laborde's description of the needs of religious citizens includes an

acknowledgement of the shaping role of rituals, living in communion with others, and the opportunity to publicly exhibit religious virtues. These active expressions of religion go beyond a mere intellectual pursuit or a conception of a good life. Religious practices are means to experience, develop, and sustain the life of faith that is shared by a particular community. It is to not only search for the truth but also to have the opportunity to express what is found, live it out, and shape one's identity to it. Concretely, it is to *be* a Christian, Muslim, or Jew. In the case of religious practices, their instrumental value lies in their capacity to realise the truth of religion in the believer's life. It is a daily manifestation of truth in practice, observance, ritual, or worship. A robust religious freedom recognises the value of religious practices because through them, a person is able to maintain and sustain her integrity and sense of belonging in a community that strives to conform to the truth of their religion. This is encapsulated in Article 9 of the European Convention of Human Rights (ECHR)²³ that clearly indicates (1) a separate category

²³Article 9 of the Convention – Freedom of thought, conscience and religion:

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

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

“religion” from conscience and thought, and (2) ensures the manifestation of religion in worship, teaching, practice, or observance, whether in public or private, individual or in community.

I present an alternative proposal that integrates the strengths of Raz and Riordan’s frameworks. This alternative view sees religious commitment as a vocation.²⁴ As a political concept, vocation aids a liberal state in appreciating the value of religious practices to a citizen’s pursuit of a shared identity that expresses a particular worldview, accessible to non-religious citizens.

3.4.3 Vocation as a political conception of religion

I propose a basic understanding of vocation as a meaningful pursuit that shapes the identity of the individual or group. For example, a life dedicated to painting or singing can be considered a vocation. More than a career or the perfection of a technique, a vocation integrates activities and beliefs into a coherent identity. It also goes beyond tastes or preferences since following a vocation demands commitment that endures through changing tastes or preferences. There is a deep calling or desire to orient one’s life according to the pursued truth and to belong to a community that shares the same

the rights and freedoms of others.” Cf. European Courts of Human Rights, “Guide on Article 9 of the European Convention on Human Rights”, https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf.

²⁴I give credit to Veronique Munoz-Darde for this suggestion.

calling. In a vocation, a citizen exercises her human capacity of searching for the truth as a comprehensive explanation of reality and, in the process, weaves a particular kind of self-understanding shaped by such search. But beyond an intellectual pursuit, the concept of vocation captures the active expression of such pursuit. A vocation gives meaning and value to practices and beliefs that realise it as having instrumental value in the formation and maintenance of one's identity and sense of belonging to a particular community. For example, if the person's vocation is to be a painter, then the activities, beliefs, techniques, and resources, be they core or peripheral, have a corresponding value in relation to the person's pursuit of painting.

A believer who is committed to liberal values sees this set of values as instrumental in her living out of a vocation. Freedom, as Riordan rightly argues, serves as an instrument for a religious citizen to use in realising her vocation. Similarly, Rawls emphasises the use of primary goods for a citizen's pursuit of life plan (TJ 63, p. 360)²⁵. Religious commitments are valuable because they serve as means for a citizen to express her religious identity. By way of illustration, a woman's vocation in Islam is treated appropriately if she is allowed (and even) supported by a liberal state to *be* Muslim. This means, among other things,

²⁵Hereafter, John Rawls' *A Theory of Justice* is referred to as TJ.

granting state permission for the wearing of the *burka*, not preventing access to mosques and Sharia' courts, and assuring fair opportunity to celebrate Ramadan and other holy feasts. If a liberal state wants to preserve and promote religious pluralism, it can choose to understand religious freedom as a fundamental right of a citizen (1) to pursue her vocation, and (2) to engage with other citizens in ways that are appropriate to her vocation to live meaningfully according to the requirements of Islam.

If applied to cases where religious practices involve the restriction of the scope of parental authority by individual right (e.g. Jewish infant male circumcision, Jehovah's Witnesses rejecting blood transfusions for their children), the concept of vocation can provide an alternative plausible ground. Respect for value aids a liberal state is in its discernment to not to usurp parental authority. There are religious practices that involve several degrees of harm but they can be weighed in a manner which recognizes the value of these practices in accordance with their religion. This does not open the floodgates, so to speak, for various practices to be permitted. The concept of vocation acts as a "filter", similar to the principles of centrality and obligatoriness, by providing a coherent view of religious beliefs and practices. It is an appropriate framework for a liberal state to weigh justice claims of religious citizens since they are understood and

assessed consistent with the particular identities and commitments they have.

This fits with Raz's concept of liberal multiculturalism. Raz claims that guided by multiculturalism, we should go beyond the categories of majorities and minorities, and instead, think of society as constituted by diverse cultural (and religious) groups (Raz 1998, p. 197). By adopting this precept which fosters the flourishing of cultural and religious groups, a liberal state should, in the first instance, reconceive its self-image (Ibid.). Against toleration theories, liberal multiculturalism does not simply advocate mere co-existence but rather, the development and flourishing of cultural groups through fair opportunity of self-expression, participation in economic life, and development of political culture (Ibid., p. 199). Against Laborde's liberal egalitarian view, doctrines of non-discrimination cannot support a view of deep plurality (Ibid., p. 200). Raz argues that people's well-being consists of their success in valuable relationships and their sense of dignity is bound significantly with their sense of belongingness to their culture and religion (Ibid.).

If I were to expand Raz's idea, a liberal state is invited to reflect on the manner in which it envisages fair terms of social cooperation and social stability. This thought is not far from Rawls' intuitions in political liberalism. His theory aims at securing social stability (i.e. fair terms of social cooperation)

among citizens with different conceptions of the good (PL xx). In particular, Rawls intends that fair terms of social cooperation should not be simply achieved by any means (e.g. political accommodation) but be endorsed for the right reasons (PL xl). Rawls can only guarantee the allegiance of a citizen to the fair terms of social cooperation if this duty becomes part of her conception of the good (PL xliv). This, I hazard, can only occur if the fair terms of cooperation enable a citizen to reasonably achieve her life plan as determined by her conception of the good. Put differently, a Muslim cannot be expected to reasonably endorse a set of terms of social cooperation if this hinders her use of available freedoms and primary goods in her *becoming* a Muslim. This does not mean a free-for-all privilege since she must recognise also that she lives with citizens who may have illiberal conceptions of religion. In this case, a liberal state can adopt any reasonable political conception of justice (e.g. justice as fairness) that would reasonably foster religious commitment. Furthermore, the concept of vocation as applied to general life plans or chosen ends (e.g. musician, artist, religious commitment) can be part of the thin theory of the good which a liberal state can appeal to in its justification of state action.

In the idea of vocation, religion is not a disaggregated reality. Religious commitments retain their uniqueness since their way of life is not comparable to an expansive notion of

conscientious duties, an “aggregation” of liberal rights, or a general category of beliefs and practices. Furthermore, it grounds differential treatment of religious citizens, which is not *ipso facto* a case of objectionable equality. Using the Shari’a court case as an example, judges or external observers should be careful about assessing a statute that exacts differential treatment as an instance of wrongful discrimination and therefore, requiring of state interference. Shari’a court statutes have instrumental value in realising a Muslim vocation. Laborde’s suggestion of competence interests can be used. However, the principles motivating such an application should not be exclusively determined by equality and non-discrimination. It should be also sensitive in its role in helping the person (or group) realise their vocation as Muslim. This captures more effectively Laborde’s intuition about doctrines and practices that render differential treatment. Her intuition includes protecting those core doctrines and allowing the robustness of the freedom of association (Laborde 2017, p. 180).

Moreover, since the concept of vocation captures public manifestation of religious commitment, it allows non-adherents to inquire and understand the value of religion. Part of developing self-respect is for others to recognise or even admire our own endeavours (TJ 67, p. 387). Rawls concludes that activities that display intricate and subtle

talents, and manifest discrimination and refinement, are valued both by the person himself and those around him (Ibid.). The concept of vocation aids a liberal state in cultivating the social climate of respect by recognising the role of religious practices in manifesting religious commitment to others. This can elicit both admiration and critique from others. Some practices can be open to reform via democratic deliberation if not found compatible with liberal values. A religious citizen becomes a better representative of her tradition because she is politically engaged through her particular vocation.

One might object by arguing for necessary and sufficient conditions of legitimacy to ensure that such social arrangements would not result in an overtly religious society (e.g. theocracy). Another contention would be the difficult task of distinguishing “bad” minority rights that restricts individual rights from “good” minority rights that supplement individual rights (Kymlicka 2002, p. 340). “Minority” includes what Laborde earlier identified as vulnerable segments within a religious group (e.g. women, children, homosexuals) that are protected by her strict discrimination test. Religious doctrines and functions that render differential treatment as applied to vulnerable groups can be unclear cases of objectionable inequalities.

In response to the first objection, I argue that understanding religion as a vocation would not result to sets of principles of justice that would undermine the balance of plurality such that the arrangement of social institutions and distribution of primary goods will likely result in an overtly religious society. Such sets of principles of justice would not be reasonably endorsed by non-adherents and thus, would not command allegiance as duties of justice. Moreover, such principles and modes of justice would fail to be impartial and would generate political conflicts. I argue for understanding vocation as a political concept that is part of the thin theory of the good. This means that proposed principles of justice should take into serious account religious identity by understanding it as examples of meaningful ways of life that each citizen reasonably pursues. The concept is also sensitive to the role of religion as one of the fundamental conditions of human flourishing.

Furthermore, the concept qualifies the “special treatment” that religion enjoys in law such that these claims may not be cases of objectionable inequality or instances of “too much” respect. For example, male infant circumcision in the Jewish tradition encourages the articulation of the value of the practice in relation to a becoming a Jew. Under the concept of vocation, a liberal state understands the value of such religious practice to the individual and group’s integrity.

In its discernment of action, a liberal state may either use elements of the disaggregation approach or adopt an attitude of neutrality to justify “special treatment” that respects the value of such religious practice. In response to the last objection, claims of “bad” minority rights are cases of competing rights that are not easily resolvable. The advantage I see in using the concept of vocation is its ability to provide an appropriate interpretation of what constitutes “bad” in a practice, doctrine, or function that allegedly restricts individual rights.

My modest ambition is to present some convincing arguments for an alternative concept that provides a liberal state with a partly substantive view in its response to the challenges of rendering fair treatment to its religious citizens. In particular, I have argued that the value of religion as one of the fundamental conditions of human flourishing must be captured. Vocation can be a useful concept in treating religion as a unified multi-dimensional reality and right. It emphasises the aspects of active expression and the shaping role of the pursued truth, life plan, or conception of the good in the believer’s life and identity. As such, practices, doctrines, and functions find their corresponding value in their manifestation of religious commitment. This helps a liberal state to reconceive its self-image as a plural society. This also guides a liberal state in considering reasonable conceptions of

justice other than those endorsed by proponents of equality theories.

Conclusion

State neutrality, understood as total independence from appealing to any conception of the good, can have non-neutral effects. These effects shape the revision and living out of religious identity. To mitigate the effects, Laborde offers a proviso that allows a liberal state to behave in a non-neutral manner to religion. This takes the concept of disaggregation in another level—restricted application of neutrality. However, in my view, Laborde fails to consider the different practical attitudes of neutrality that can result into a liberal state exercising an inconsistent treatment of its religious and having a partial and distorted view of religion. Furthermore, her egalitarian strategy has rendered religion unfairly comparable to the broad category of respect-worthy beliefs and practices. The disaggregation approach suffers from the limitations of a comparative framework that primarily tracks interests of equality and non-domination. For example, the use of Laborde's content-neutral elements (e.g. coherence and competence interests) is subject to strict identificatory and anti-discrimination tests. A crucial outcome of applying her framework is a narrow range of religious accommodation. This unfairly restricts the treatment of religious citizens and

may put an unreasonable pressure on them to reform or abandon some of their valuable religious practices.

Moreover, the use of content-neutral elements of a particular liberal right other than religious freedom can produce unclarity in state permissibility and reasonable support of religious commitment. As discussed in the case of “advancement of religion” and public benefit in UK charity laws, the disaggregation approach provides an insufficient and even a counter-productive response. Since religion is disaggregated across liberal rights, there is no reference for the value of religious practices. As the primary motivation is equality and non-discrimination, the normative standards of these values dictate what constitutes as substantial burden in religious claims. A chief outcome can be an unfair stripping of traditional privileges religion enjoys *qua* religion.

Although Laborde has correct intuitions about the social benefits of religion, her conceptual framework suffers from serious limitations due to the absence of a unified view of religion. I claim that, if a liberal state ought to treat its religious citizens fairly, a conceptual tweaking in Laborde’s theory is necessary. The proper treatment of religion cannot be a simple matter of “equalising”.

I have explored some alternative routes that can provide a sufficient response to the requirements of justice of religious citizens. I have built on the ideas of Raz about

respecting and engaging with value. A liberal state need not engage with the value of religious commitment but it is exhorted to respect it: to safeguard and promote religion as one of the fundamental conditions of human flourishing. This is accomplished in its granting of permission or even support of some religious practices because of their instrumental value in helping a religious citizen live out her religious commitment. This idea is complemented by Riordan's suggestion about the human capacity to search for the truth. Freedom and equality are instrumental values for a religious citizen that seeks and lives out a particular worldview and way of life. This human capacity to be open to the comprehensive explanation of reality does not only ground the distinctiveness of religious freedom but also provides value and meaning to religious practices.

However, religion is not a merely an intellectual pursuit. I have proposed vocation as a concept that a liberal state can use to appraise religious practices. Vocation sees religion as a meaningful pursuit that shapes the identity of a believer and her community. This accommodates the value of religious practices insofar as they help the citizen live out her vocation. Norms and practices (e.g. dress code, dietary laws, and public worship) have instrumental value in realising religious commitment in the life of a religious citizen. They also shape her political participation. Vocation can also be

applied in other types of meaningful pursuits (e.g. musicians, artists, etc.) since it is a part of the thin theory of the good which a liberal state can appeal to in its justification of action. In the concept of vocation, religious citizens may demand differential treatment but this is not *ipso facto* a case of objectionable inequality or an instance of “too much” respect as Laborde fears. It is a liberal state’s attempt to relate well to religion and show an appropriate respect for its value, both to its adherents and the general society.

Chapter 4

CONCLUSION AND RECOMMENDATIONS

Cécile Laborde puts forward an innovative proposal to help a liberal state treat its religious citizens fairly. She suggests disaggregating religion: different dimensions of religion that a particular issue of justice makes salient are defined by the main elements of an appropriate liberal right(s). Against Dworkin and ETRF proponents, she argues that religion cannot simply be a subset of freedom of conscience or a general category of ethical independence. Laborde maintains that even an expansive notion of freedom of conscience as conscientious duties cannot serve as a sufficient proxy or substitute in capturing valuable religious practices for example. Against critical religionist theorists, she asserts that religion as a complex reality can be protected adequately by the range of liberal rights. This means that we can do without a legal-political category religion since protecting religion is derivative of other liberal rights. In applying Laborde's framework, a liberal state secures equality between citizens, religious and non-religious alike. Religion is not special but not less protected.

I have shown the advantages of adopting Laborde's liberal egalitarian approach. Her content-neutral elements provide a non-negative valuation of religious commitment. Furthermore, it allows religious citizens to use liberal rights as

“common language” to substantiate their claims for exemption. Religious citizens are not treated specially and are welcomed as equal political stakeholders. Given my suggested amendments (e.g. centrality and obligatoriness principles), a liberal state may opt for a disaggregation approach as a useful political strategy in resolving a range of religious claims.

I have also explicated some limitations and challenges in adopting a disaggregation approach. Pragmatically, it may be a more effective and fair non-adhoc method that a liberal state can use to render equal concern and treatment of religious citizens. However, its egalitarian motivation can restrict state permissibility and even support of valuable religious practices. This occurs whenever religious practices do not meet the normative standards of equality and non-discrimination. More importantly, its lack of a unified view reduces religion into a collection of beliefs and practices normatively determined by other liberal rights. Laborde’s minimal conception of religion deprives a liberal state of an appropriate understanding and assessment of the needs of religious citizens that is consistent to their commitment.

I have explored several alternatives to Laborde’s disaggregation approach. I have discussed Raz’ framework, which requires a liberal state to respect the value of religious commitment. Respecting the value means allowing the

possibility of the value of the object to be realised, whether that object is pursued or not. Patrick Riordan also suggests that the capacity of human beings to search for a comprehensive meaning of reality as a foundational value that is served by freedom. I offer a political concept of vocation—a profound and meaningful pursuit—to ground religious commitment. Religious practices find their instrumental value in aiding a citizen to live out a pursued worldview. The vitality and depth of religious commitment is expressed in worship, rituals, dress code, and other activities. Through this suggestion, a liberal state can have a coherent view of religious commitment, which enables it to appropriately assess the value of religious practices and beliefs and ground religious freedom. It can also render differential treatment to religious citizens. This does not mean special treatment or *ipso facto* a case of objectionable inequality. Lastly, it promotes an idea of a plural society that is comprised of many cultural and religious groups, striving to live with one another in stable and fair terms of social cooperation.

Further research can be pursued in the related themes of religion and distributive justice. If religious citizens demand differential treatment given their vocation, how should social institutions and primary goods be arranged so as to render fair distribution? An alternative interpretation of Rawls'

difference principle can be a good candidate for research in this context. Another idea of continuing research is the compatibility of Rawls political liberalism to religious citizens' pursuit of their vocation. Particularly, I continue to wonder about the application of the idea of vocation to the capacity of Islam as a reasonable comprehensive doctrine. This also applies to emerging minor religions.

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