6. The Ethics of Establishment: Fairness and Human Rights as Different Standards of Neutrality

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Is any degree of religious establishment compatible with human rights? A number of theorists have recently claimed that respect for human rights or basic rights, rather than complete church and state separation, can serve as a sufficient threshold for justified state action.[1] Yet the truth of that claim requires that some degree of establishment being compatible with respect for those rights. One way to argue respect for human rights and establishment are not compatible is to argue that human rights necessarily require state neutrality. This, indeed, has formed the basis of recent criticism of judgements of the European Court of Human Rights that allow states some discretion on matters of state-church relations.[2] Those who wish to be more permissive about establishment would need, then, an argument for compatibility.

In this paper I argue that there are two standards of neutrality to which we might hold states. Each is morally justified but each has a different emphasis. The first, political liberal neutrality, requires that state institutions do not design policies aimed at

[1] Laegaard, S., 'Religious neutrality, toleration, and recognition in moderate secular states: the case of Denmark', Les Ateliers de l'ethique/The Ethics Forum, 6(2), 2011:85-106 ; Cabulea May, S., 'Democratic legitimacy, legal expressivism, and religious establishment', *Critical Review of International Social and Political Philosophy*, 15(2), 2012:219-238; Laborde, C., 'Political liberalism and religion: on separation and establishment', Journal of political philosophy, 21(1), 2013:67-86.

[2] This is discussed and challenged at, for example, Kyritsis, D. and Tsakyrakis, S., 'Neutrality in the classroom', *International journal of constitutional law*, 11(1), 2013:200-217. I shall address their critique below.

favouring any one conception of the good (lifestyle choice, moral view, religious or otherwise) for people to follow in their personal lives *because* of a judgement about the content or value of that conception. On that view of neutrality states can legitimately interfere with people's life choices only where that limitation is necessary to prevent them impeding each other in freely pursuing their reasonable life plans or where it is necessary to secure a fair share of resources towards pursuing such plans. A reasonable life plan here means one that avoids using inter-personal coercion or state power to gain advantages for a particular conception of the good life.[3] Public institutions cannot, on that version of neutrality, use their powers with the policy aim of giving advantage to any one conception of the good *because* they value that conception as superior. The key condition is that evaluation of a conception as superior cannot be the basis of policy aimed at giving social advantages to a conception for other reasons.

Often this idea of liberal neutrality has been confused with the notion of absolute moral neutrality, which is an incoherent ideal. Human rights, however, imply a second and distinct sense of neutrality. This is less stringent, in that it only requires neutrality with regard to a range of issues. So long as the basic requirements of human rights are upheld, some degree of establishment is compatible with this kind of neutrality. This, different threshold of neutrality, is due to the point of human rights standards being different from the point of a fully liberal political morality. Each addresses different moral competences of the state. I conclude, then, that those who wish to argue that the state must avoid any form of establishment will need to argue

[3] From here on I shall use 'conception of the good' as short hand for any way of life, lifestyle that implies evaluation of options, set of beliefs or commitments by which people guide their life plans.

on the basis of liberal neutrality. Human rights standards can be upheld, and to that extent the legitimacy of state institutions, without complete disestablishment.

After addressing some definitional questions below, I propose the key distinction between the two kinds of neutrality and their distinct points. I sharpen the difference between these two standards of neutrality by showing how discrimination, as a type of prohibited behaviour, also means something different in each case. Discrimination in terms of lack of liberal neutrality is different from discrimination in terms of human rights standards and their point.

1. Defining Establishment

Before considering the two standards of neutrality and their consequences for religious establishment it is worth clarifying what the latter means. That a country chooses a flag with a crucifix on it, or that its national anthem mentions a deity might be taken as forms of establishment. However, unless these expressions of national identity can be shown to impinge on citizens' rights, duties, and privileges, it will not be the kind of establishment that raises serious questions of justice or legitimacy.

In political controversies, instead, we can take establishment to involve the exercise of public power. This means the powers of institutions to assign rights and duties that are socially recognised in a political community as having community-wide authority. This is a very important point. The distinctive abilities of public institutions lie in their ability to assign rights and duties to people. Often political power has been taken to reside in coercion, but coercion is not distinctive to political institutions and even

where institutions do exercise coercive power, in a characteristically monopolistic way, this is through a command hierarchy that assigns socially recognised rights and duties to coerce. The police, acting as a public body, exercise socially-recognised rights and duties, such as the duty to enforce standards of public order, granted by socially authorised chains of command that include legislation; officers of the penal system incarcerate persons as a matter of assigned public duty.

It is important that these institutions and their powers legitimately assign rights and duties that are to be socially recognised. Without that condition we would not be concerned with public authority, in the sense of legitimate political institutions at all. Instead we would have mere coercion and violence on the part of institutions that claim public authority but have none. I will return to one condition for institutions having public authority in that way. However, it is plausible that there are circumstances when institutions have legitimate authority and circumstances when they do not, but merely claim they do.[4]

This account of public power helps us to define establishment more precisely. We can say establishment exists in a society to the degree that decisions on how socially recognised rights and duties are arranged are based on a religious rationale. This would contrast, for example, with a purely personnel-based definition where establishment depended on whether church officers held public positions. A person

[4] I am treating that question distinctly from the question of when citizens have moral obligations to obey their state, also known as the question of 'political obligation'. These two matters are subtly different, and worth keeping apart, Simmons, A. J., *Moral principles and political obligations*, Princeton University Press: Princeton, 1979, pp. 195 ff.

with religious convictions, even one employed by a religious organisation, can participate in policy decision-making and not threaten the disestablishment of public institutions. That would require, however, credible guarantees that her role ruled out appeal to a religious justification for those decisions and that the aim of policy was demonstrably non-religious.[5]

Clear examples of establishment, then, include cases where religious organisations have a say in elections or other direct elements of political life.[6] Establishment also exists where judicial processes that impose and enforce decisions are required to make decisions on a religious basis.[7] There are also more subtle forms of establishment such as where religious representatives, in that capacity, are given rights in decision-making on education policy, say on the content of a part of the official syllabus.[8] Consider too, cases where planning permission for certain types of buildings is subject to religious vetting.[9] In all these cases, we have decisions within

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[5] If a religious body or organization were given decision-making powers, given its commitments, it would have to be assumed that the basis for its decision-making was a religious one. It would, then, be a sufficient basis for claiming establishment had taken place.

[6] The *Guardian Council of the Constitution* plays this role in Iran for example.

[7] For example the introduction of *Sharia* courts in some states of Nigeria since 1999.

[8] *UK Education Reform Act 1988*, section 11, mandates that Community Schools and Voluntary controlled faith schools have their RE syllabus drawn up by local committees (Standing Advisory Councils on Religious Education) made up of teachers, local faith groups, local churches, the Church of England, and the local authority. Non-religious, or anti-religious groups have minimal representation, and no voting rights (unlike the other groups).

[9] For example, in Greece until 2006 Greek Orthodox clergy had a say in a number of decision-making processes including planning permission such that to build any religious building and use it as such, an applicant had to have their planning application vetted by an Orthodox Greek Bishop. This law was

public bodies that will extend rights or impose duties, and religious perspectives are given a role in defining the content of those rights and duties. By establishment, then, I will mean *any powers or privileges given to persons to decide the content of citizens' publicly recognised rights and duties with the aim of advantaging or disadvantaging a conception of how citizens should live their lives, based on an evaluation of the religious content or lack thereof in that conception.*

Consider a case where people make decisions on the basis of religious views, yet those decisions are consistent with no special advantage being given to, or withheld from, any one conception of the good. This is probably true of most electoral systems where the voters are not vetted. However, given the right to make such decisions is not itself grounded in the evaluation of conceptions of the good, this is not a case of establishment. If the clergy, however, are given decision-making powers permitting appeals to an evaluation of the content of religious views, even if they do not currently act to favour one view, this is nevertheless a case of establishment. That is because there is here a right to configure the distribution of social advantage and disadvantage based on evaluation, in this case religious, of the content of conceptions of the good.[10] The powers allow that advantage and disadvantage can be allocated on

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amended in 2006 to remove these decision-making powers, though conditions still remain (given Art. 13.2 of the Greek constitution) prohibiting proselytising by religious groups.

[10] Note that the account of establishment here (and the corresponding account of neutrality below) combine three conditions: evaluation on the basis of the content of a conception of the good life, aiming at advantaging or disadvantaging such a conception on the basis of the evaluation, and that the this done in terms of allocating social advantages and disadvantages. This deals with counter-examples like Patten's who thinks aiming at associating a particular religion with the state, but not for religion-favouring reasons, is non-neutral because it still seems like establishment. The question is what

that basis, even if they presently result in neutral decisions. Alternatively, if a legislative body decides to accord special privileges to a religious association, for reasons not to do with the content of its views but, say, because it is the only way to preserve certain historical buildings, again we do not have establishment. It may at times be a misguided policy, but establishment requires the evaluative component and being empowered to allocate advantage or disadvantage on that evaluative basis.[11]

By contrast, neutrality applies to the correct choice of principles for distributing social benefits and burdens. Neutrality is where such principles are not justified by reference

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"associating with" means – as in Patten's example being associated with the sate is deliberately left open-ended, potentially long term, and its basis is unclear. If it means a policy might favour a group because this benefits society at some juncture, then it is unclear why that is establishment any more than the fact that a policy that accidentally benefits a religious group is establishment. If, on the other hand, it means giving powers to that group to decide policy on the basis of religious evaluation (as in "association with the state" seems to imply) then this is establishment on the above definition, and non-neutral on the corresponding account below. See Patten, A., 'Liberal neutrality: a reinterpretation and defence', Journal of Political Philosophy, 20(3), 2012:249-272, pp. 255 ff. The view of neutrality I propose below is based in fair treatment, it is to that extent compatible with Patten's approach.

[11] So note that I am not exactly working with the distinction between justification of a policy and its aims or the distinction between intention and effect. In the above tri-partite account of establishment non-neutrality involves both a certain type of justification and a certain type of aim: one manifested in terms of allocating social rights and duties. That there is any difference in advantages must be plausibly justified on grounds that do not evaluate the content of conceptions of the good. CF. Laborde, C., 'Political liberalism and religion', pp. 75 ff. For the slightly different distinction between neutrality of intention and neutrality of effect, Larmore, C., *Patterns of moral complexity*, Cambridge: Cambridge University Press, 1987, p. 44; Waldron, J., 'Legislation and moral neutrality', in his *Liberal rights: collected papers 1981-91*, Cambridge: Cambridge University Press, 1993, pp. 149 ff; Rawls, J., *Political Liberalism*, Columbia: Columbia University Press, 1993, 49 ff.

to a particular conception of how citizens should live their lives, whether religious or otherwise, based on an evaluation of the beliefs or values in such a conception. This is importantly different from *secularism*, which is anti-religious rather than neutral in the relevant sense. In its modern political manifestation, secularism is the view that public institutions can impose rights and duties with the aim of defining an aspect of citizens' identity, and so an aspect of their lives, as non-religious. This is based on an evaluation of what counts as an acceptable identity or way of life. For example, consider a ban on religious clothing in public places or institutions because the state asserts a non-religious civic identity is a secularist policy. It is non-neutral because some aspect of personal choice is constrained on the basis of a negative evaluation of the expression of religious identity and with the aim of disadvantaging that expression and so that choice in life.

On the other hand, consider a policy that is credibly based on a principle that certain roles should be facilitated and advanced in a society not because they advance a particular conception of the good, but because they facilitate citizens in choosing and pursuing their reasonable conceptions, whatever they might be. The role of medic would fit this description, and the principle would justify certain restrictions in how the role is pursued, based on making the role effective. So, if certain religious robes prevent the effective pursuit of the role of medic, as they get in the way of treatment, neutral principles justify public restrictions on the use of that attire for medics. The principle does not evaluate the content of personal religious commitments or identity behind wearing such robes in any sphere and acting on the principle does not distribute advantages and disadvantages on that basis.

Below I define neutrality more carefully for each of the senses I argue it must have given the application of different standards. However, it is important to avoid a common mistake early on. This is the assumption that neutrality is impossible because no state can be neutral, as making any policy decision will involve adopting an evaluative stance. If one were to understand neutrality as being neutral with regard to any value, principle, or moral justification this argument would be right. Such a notion of absolute moral neutrality is incoherent as any policy, even the most pragmatic, will be motivated by some notion of what is valuable, or valuable enough to be pursued pragmatically.

Political neutrality is the idea that, in exercising their powers, public institutions have overriding moral reason to act on principles for the configuration of social benefits and burdens that are not justified at by evaluating citizens' commitments, ways of life, or conceptions of the good. Neutrality means evaluating and adopting policies guided by neutral principles such as (plausibly) giving fair opportunity to citizens to pursue their chosen plans of life. Neutral principles can even justify policies designed to disadvantage certain conceptions of the good, say through education policy. This is would be where the consequences of people adopting such conceptions are bad for social peace, rather than because of the value for an individual in pursuing such conceptions. This sense of neutrality, then, is explicitly based in a moral evaluative stance about political relations, just not one based in considerations of what is best for individual lives.

2. Neutralities

Political Neutrality

Liberal political neutrality is a feature of principles and their justification. It is the constraint that principles for public institutions avoid guiding policy on the basis of an evaluation of the content of conceptions of the good, within a broad range. Neutral principles will find a way of assigning fair opportunities to pursue reasonable conceptions of the good: ones that do not contain the aim of using private coercion or public power to gain advantage for any one conception over others. A religious view that included the aim of capturing public institutions to use to its advantage, or the aim of intimidation, threats, or coercive restrictions to other religious or non-religious ways of life, would be unreasonable. Public institutions are permitted to thwart, dis-incentivise, and educate against such conceptions. Importantly, on this view of political ethics, policies need not express equal opportunities or freedom in the pursuit of unreasonable views. Reasonable views are those that accept that the only way a conception of the good life should be advanced, or come to be adopted in people's personal lives, is through non-coercive means, like reasoning with others.[12] Neutral principles require that public institutions do not interfere with people's adherence to such conceptions. They do not require that public institutions refrain interfering with people holding unreasonable conceptions.

The value behind such a political ideal of neutral principles is that it describes how we might exercise public authority *fairly* in a society where citizens hold a plurality of different conceptions of the good. A principle based on positively evaluating any one conception of the good or negatively evaluating any other would fail to treat people holding such conceptions with equal concern, and implies an unfair use of public powers. Even where that conception is not directly imposed on people in their

[12] Rawls, op cit., 58 ff. and 194 ff.

personal lives, advancing it politically implies using state resources derived from imposing social burdens on citizens who do not adhere to this conception. So, for example, republics like France and Turkey use state resources and impose legal burdens in order to promote a secularist public civic identity, or at least hinder non-secularist ones. Costs are imposed on some for the sake of promoting the life choices and values of others. In other words it is based on an evaluation of which life choices are worth promoting and which are not. This is unfair, not only where some have different conceptions of the good to the one they are asked to resource, it is also unfair to people given they might (given the chance) change their conceptions over time. Nevertheless, unfairness of this kind is not in itself a ground for questioning the legitimacy of public institutions, as we shall see. It describes one grade of injustice and illegitimacy describes another.

To reiterate, on this ideal there is no obligation to treat conceptions of the good in the same way, only those conceptions that are reasonable. People are unreasonable if they aim to use private coercion or public power to give advantages to their conception of the good. It is permissible to impose disadvantages on the pursuit of such conceptions and pursue education policies that stigmatise them, because of they fail to respect others adopting and pursing their own commitments and they fail to allow public institutions to show equal concern for people adopting and pursuing their own commitments. So, the common refrain that fairness-based neutrality is not neutral 'all the way down' is correct. Whilst fairness-based neutrality does not *promote* conceptions of the personal good, it is based on moral values such as equal respect and concern. All that it does allow policies to promote is other-regarding reasonableness. Thus, even deeply religious views that ultimately value salvation, yet

accept a duty to pursue the advancement of their views by non-coercive discussion, are protected from interference on the grounds of neutral principles for designing policy.

Political neutrality is ultimately grounded in equal concern. Justifying principles on the basis of equal concern requires that we do not judge people by the content of their conception of the good. If the justification of a principle were to show preferences for a way of life on the basis of its content, beliefs, or values it would imply that we should treat people according to whether they adopt that way of life rather than as persons who happen to pursue certain ways of life, who might not have pursued it or might stop pursuing it and adopt another. This implies giving advantages to those who adopt a favoured way of life over those who do not. In turn, it implies that the way of life itself is more important than any person's choices and priorities, and so fails to show equal concern for all persons in developing, prioritising, and pursuing their commitments, irrespective of the conception of the good they presently prioritise and pursue.

Discrimination in terms of the standard of political neutrality is where state institutions either impose disadvantages or give positive advantages to the pursuit of some conceptions of the good over others, based on an evaluation of those conceptions. It is discrimination against the pursuit of a reasonable conception of the good, not necessarily with regard to the condition of specific individuals. So, a state that gives monetary advantages to a specific religion and not others could be said to be discriminating against those other religions in this sense. That would be even where the advantages to the one religion did not make worship of any other religion

impossible or even more difficult. This kind of discrimination is not individual-directed, in that no individual need suffer a personal disadvantage. Neutrality would be threatened even by a state giving additional resources to a group with fewer resources than others in order to give its members equal opportunities for worship. What is problematic from the point of view of neutrality, even in those cases, is state resources and legal power being used for these ends, and people bearing the social burdens that make this possible.

Social Justice

There is another standard which is part of liberal political morality that might be confused with neutrality and when breached is also potentially described as discrimination. This is the positive standard of social distributive justice. A liberal account of social distributive justice is an account of how advantages and disadvantages should be distributed in a society, through the allocation social rights and duties.[13] The standard of political neutrality, by contrast, is a constraint: a requirement on accounts of liberal distributive justice with which such accounts should be consistent. Neutrality does not tell us which of the possible candidate forms of neutral distributive justice we should adopt. Consider three options: a welfare maximising conception of distributive justice, and equal opportunity conception, and a conception that prioritises improving the conditions of the least advantaged. [14] None

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[13] Meckled-Garcia, S., 'Giving up the goods: rethinking the human rights to subsistence, institutional justice, and imperfect duties', *Journal of Applied Philosophy*, 30(1), 2013.

[14] A version of the last of these is put forward by Rawls, J., *A Theory of Justice*, Cambridge, Mass.: Harvard University Press, 1971, Sections 11-17. Others include equality of resources, as put forward by Dworkin, R., *Sovereign Virtue*, Cambridge, Mass.: Harvard University Press, 2000, pp. 65 ff.; a

of these need be justified on the basis of evaluating individual's conceptions of the good on the basis of their content. They are all potentially consistent with political neutrality, yet we must assess each on its merits as to whether it is the right account of distributive justice. If there is a right account, then views can be politically neutral and yet wrong about the complete account of justice. That is, political neutrality is a necessary condition for principles of justice, but it is not sufficient.

If an individual fails to receive her fair share of benefits and/or burdens, as it is set out by whatever the right principle might be, we can say that she has suffered a social injustice. If the cause of this is not a policy but merely some arbitrary decision or personal preferences on the part of officials, whether motivated by simple caprice or by group characteristics like gender or race, we might say that she has suffered personal discrimination. If, however, the injustice results from aiming to advance or thwarting a particular conception of the good it would be accurate to say that people had suffered as a result of non-neutrality. So, of these different possible forms of discrimination in such a case, only the last is properly described as discrimination that violates political neutrality.

Human rights neutrality

As if this was not complicated enough, I wish to introduce another kind of neutrality. Political neutrality, and accounts of social justice that conform to it, can be distinguished from human rights standards in an important way. To show this, I will first look at how neutrality is used in European Court of Human Rights jurisprudence,

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version of the second is put forward by Richard Arneson, 'Equality and equal opportunity for welfare', *Philosophical Studies*, 56, 1989:77-93, and there are of course many others.

and then give an account of the moral value of human rights that explains and justifies this use. That distinct role for human rights brings with it a special kind of neutrality, reflected in ECHR practice, but reflecting a different value to political neutrality or fair distribution.

The ECHR (the Court from now on) employs a principle of neutrality in interpreting and applying the rights of the Convention.[15] This involves a subtle rendering of the implications of Convention rights. It would appear, sometimes, to be a principle of neutrality in all dealings and uses of public authority, similar to the political neutrality discussed above. However, it is not. Rather, it is a principle of neutrality in the protection of Convention rights such that public authorities are not permitted to assign social privileges and responsibilities in a way that undermines the enjoyment of these. As I will show, there are some instances where political neutrality would go further than this principle.

The Court interprets freedom of religion as an individual right that can also imply certain collective rights.[16] The right to freedom of religion also means the right to pursue one's religion. But, given the collective component of most religious traditions, being denied the ability to pursue one's religious observance in association with others would render the right meaningless. In addition, the right to freedom of association, also explicitly protected by the Convention, protects this ability to pursue

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[15] By the Convention I shall from here mean the *European Convention on Human Rights and Fundamental Freedoms*, Council of Europe, 1950, including all its additional *protocols*.

[16] *Religionsgemeinschaft der Zeugen Jehovas and others v Austria*, ECHR no. 40825/98, 2008, para 62.

religious aims in association with others. The test the court has used, then, in interpreting whether an infringement of religious freedom has wrongly taken place is to ask whether a measure by a public body makes it impossible for citizens, meaningfully, to act collectively in pursuit of their religious views. Any imposition, or omission, that renders that collective right meaningless is taken to interfere with a citizen's religious freedom rights, and only special circumstances could justify that interference.[17]

Legal recognition for an association is, in certain contexts, pivotal to exercising religious freedom rights. Without it an association would not be able to even hold a bank account, retain association property such as temples, land, paraphernalia, or even make collective representations on behalf of those who have chosen to consociate. Without the right kind of legal status, the association cannot meaningfully maintain an identity as the kind of entity that it is. Given that religious worship can require collective, congregational activity and a recognised place of worship, absence of legal recognition for those rights effectively undermines the possibility of meaningful association. It thereby removes a religious freedom right from those who need to form an association in order to meaningfully pursue their convictions.

Importantly, this right to legal recognition is not based in social justice, as it is not about giving all members of such associations equal or fair opportunities. Nor is it focused on making sure that policies that impact on religious observance are not based on the religious (or anti-religious) evaluation of ways of life. So it is not based

[17] These are set out in the limitation clauses to a number of Articles of the convention, *European Convention on Human Rights and Fundamental Freedoms*, 1950, Arts 8.2, 9.2, 10.2, and 11.2.

on political neutrality. The core consideration is rather whether individuals are protected in adopting and pursuing a religious conception.

To use another example, the Court distinguishes between two types of case. Firstly, there are those where state interference with individual aims is serious enough for it to look more closely at the case, assessing whether a correct balance has been reached. Secondly, there are those where it allows the state in question discretion to get the balance right between collective interests and individual freedoms. In the former the margin of discretion given to states is taken to be "narrow" (less discretion) and in the latter "wide" (more discretion). A key test for whether it ought to scrutinise the balance in freedom of religion, especially in education cases, has been whether individuals face indoctrination or pupils face "undue influence". If they can be plausibly said to face such interference, the Court will not allow the state discretion in balancing the competing interests in the case.[18] If, on the other hand, it is not plausible or well supported that the individual has faced indoctrination, the Court will give a wide margin of discretion to state authorities to decide how best to balance individual freedoms and collective aims.[19] The test is not based in social justice or political neutrality, as I have defined these standards above.

In the *Lautsi* case the Court took the question of whether to apply a narrow or wide margin to turn on whether crucifixes on the walls of classrooms in Italian state

[18] *Lautsi and others v Italy*, ECHR [GC] no. 30814/06, 2011, para 62; *Dahlab v Switzerland*, ECHR no. 42393/98, 2001, section 1; *Følgerø and other v Norway*, ECHR [GC] no. 15472/02, 2007, paras 84(h) and 102.

[19] *Lautsi*, Ibid.

schools constituted indoctrination of the students. This was irrespective of the justifying source for the state policy and irrespective of its effect on opportunities for people from different religious or non-religious groups. It was found that no adequate evidence had been presented to the Court to show that it did. So, the test for adequate 'neutrality' here concerns the effect of the policy on the ability of individuals to adopt and pursue their chosen religious convictions. Indoctrination would have failed that test. Previously, however, the court had taken the view that a female teacher wearing an Islamic headscarf did threaten to indoctrinate students, even though in that case too no adequate evidence had been presented to prove this.[20] So the Court could be said to have been inconsistent with regard to the evidential base that it takes as adequate for the test to be passed. It has not, however, been inconsistent on the test itself – whether the policy challenges something more fundamental than equal opportunities or what the source of the policy might be.

So, where the state imposes certain duties and extends benefits to associations that are necessary to enjoy any meaningful recognition as an association, the right to freedom of religion demands neutrality from public institutions in how these benefits are allocated. Access to such fundamental benefits should not be decided on the basis of evaluating the religious or non-religious stances in question. The only ground for evaluating an association is whether it tangibly threatens the political order that makes human rights possible.[21]

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[20] *Dahlab*, ibid.

[21] See note 14 above.

These requirements for *human rights* neutrality by public institutions, however, are not and need not be based in a general commitment to politically neutral policies. A state can extend privileges and rights to religious organisations and lifestyles based on an evaluation of these and with the aim of advancing them, or disadvantaging others, yet not violate individuals' individual or collective human rights to freedom of religion. It is only where doing so additionally restricts the *core* of a person's right, her ability to adopt or pursue a religious view to any meaningful extent, that human rights neutrality is infringed. A standard approach, however, in the literature has been to think that political neutrality actually explains the content of human rights to religious freedom.

So consider a state that allows religious voices and evaluations to have an input into public institutional decision-making, such as on the curriculum or the allocation of planning permission. So long as public power is not used to prevent individuals adopting a religious view, or withdraw the kind of public rights, such as legal recognition for associations, that makes it possible for them meaningfully to collectively pursue it, no violation of human rights can be asserted. There is no discrimination in the enjoyment of human rights, even if there is absence of political neutrality.

So what justifies this limited human rights approach to religious rights? Why not apply the more far-reaching test of whether institutions give any advantage to a religious or non-religious way of life over any other, based on an evaluation of such ways of life? To make sense of such restrictions—as opposed to simply accepting them as legal artifice or the arbitrary results of history—one would need to argue that

there is a moral value in play with human rights, different from that behind political neutrality or social justice, that justifies this different approach.

Let us call this alternative value, equal respect (to distinguish it from the fairness behind political neutrality and social justice). It is valuable that public institutions respect the capacity of all persons to adopt, develop, and pursue commitments and personal attachments. If anything is inherently and minimally valuable about human life it is each of us exercising sovereignty over that capacity in ourselves. Those capable of challenging this sovereignty have a duty not to do so. Political agents that have a claim to act authoritatively on our behalf can over-extend their powers to claim authority over this capacity in us, and so over what commitments individuals can and cannot adopt, develop, prioritise, or pursue. They can challenge our sovereignty over this capacity by imposing socially recognised rights and duties on us and on others, such as duties to repress us because of our views, to indoctrinate us, or to purposefully undermine our ability to exercise this sovereignty through social stigma and starvation. Given these special powers, political institutions must then have special duties to respect our sovereignty over this human capacity. Without such respect there could be no genuine sense of political community or society, because individuals could not be guaranteed to authentically accept their legal order and political practices without that guarantee. Without basic protections these might easily be in place through a purely coercive imposition and through interference in people's ability to form commitments, prioritise them, and pursue them.

Note that the value here, in equal respect, is not like the aim of promoting people's access to opportunities to exercise this capacity, as it would be if it were based in

promoting autonomy. Rather it is the minimal respect required so as not to challenge a person's sovereignty over her own attachments, commitments, the way she prioritises and pursues these in her life, individually or in association with others. A commitment to equal respect is a commitment to not targeting or for that matter negligently creating conditions that undermine that sovereignty. So one way to understand the distinctive role of human rights is to see them as setting out the limits of respect for people's human integrity. In this sense, equal respect for citizens and non-citizens sets the limits to political sovereignty, the limits to legitimate political institutional action. Any policy proposal based in aims that imply disrespect for human integrity is, on this view, based on reasons we can discount as illegitimate in inception.

The above helps to distinguish the value of equal respect from social justice. Accounts of social justice aim to describe what counts as a fair allocation of socially recognised rights and duties, together with the distribution of goods and costs these imply. It is possible for states to get it wrong as to the best account of this kind of social distribution. But they can get it wrong and still act legitimately. A political society can democratically uphold laws and policies with a religious basis and that favour a religious conception. In fact, in order for societies to embark on a process of developing the right answers to the social justice question it must be possible for their institutions to act with some legitimacy. This is also true for political neutrality, which is a requirement of liberal accounts of social justice. So there is a difference between institutions acting unfairly and acting illegitimately.

Equal respect, on the other hand, focuses on certain absolutes: does a measure challenge people's sovereignty over their adoption and development of certain

commitments? Does it rely on reasoning about collective policies that disallows the making of laws that limit people's ability to pursue such commitments in any meaningful way? It can, as one would expect of human rights standards, be a standard both for how institutions should treat people within a political community and outside it. After all, the justification for avoiding being engaged in torture, slavery, detention without trial, or the suppression of speech on the basis of its content is not that these give unfair advantages to any one reasonable view of the good life over any other. It is rather that such actions inherently fail to respect human integrity. One could appeal to politically neutral reasons to challenge peoples' right to pursue their prioritised commitments, such as that pursuing personal priorities detracts from contributing to the common good. It is a well-known complaint against utilitarianism that it implies this. Equal respect, however, rules out such appealing to neutral grounds for policy that nevertheless challenge human integrity.[22] Whilst equal respect and fairness (equal concern) are of course related in that they focus on the value of individual lives, they nevertheless answer different kinds of questions about how institutions should treat people.

A government can rule legitimately if it fulfils certain conditions such as somehow garnering public consensus (whether democratically of by other forms of public consultation), respects the rule of law, and treating people with equal respect, which is

[22] Indeed, one objection to a utilitarian account of social fairness is that whilst it is neutral it nevertheless challenges equal respect when it benefits overall social utility to do so, see Rawls, J., *Theory of Justice*, p. 26-27, see also Scanlon, T., 'Contractualism and utilitarianism', in Williams, B, ed., *Utilitarianism and beyond*, Cambridge: Cambridge University Press, 1982, p. 123.

to say respecting their human rights.[23] It may nevertheless develop unfair and unjust social policies, unfairly disadvantaging the poor, say. But, whilst this lacks social justice, it would not be a sign that the government was illegitimate, lacking all authority, or at least that any of its laws were.[24] For so long as governments try in good faith to get it right about social fairness, which is to say about what terms they should extend to partners in social cooperation, they cannot be said to undermine the kind of fundamental respect for individuals that is necessary to underwrite genuine political community. Those human rights that express equal respect are indeed a threshold for whether governments do indeed act in good faith, guaranteeing respect for human integrity in people's interactions with public institutions and against being outweighed by other social projects. [25]

I should also point out that whilst the ECHR jurisprudence is principally within the framework of "negative" rights, the notion of equal respect is not restricted in this way. Rather, the view helps us understand any kind of rights claim. Where public bodies use or threaten people's access to elements of their wellbeing, such as food, shelter, and health provisions, in such a way that implies a right over those people's

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[23] Meckled-Garcia, S., 'Which comes first, democracy or human rights?' *Critical Review of International Social and Political Philosophy*, 17(6), 2014:681-688.

[24] Cohen, J., 'Is there a human right to democracy', in Cohen, J., and Sypnowich, C., eds., *The egalitarian conscience: essays in honour of G. A. Cohen*, Oxford: Oxford University Press, 2006:226-250, pp. 234 ff.; Cabulea May, S., 'Democratic legitimacy, legal expressivism, and religious establishment', p. 219; Meckled-Garcia, 'Which comes first, democracy or human rights?'.

[25] The idea that human rights set the threshold for legitimacy, among other things, is explored in Dworkin, R., *Justice for Hedgehogs*, Cambridge Mass.: Belknap Press, 2011, pp. 332-44, although Dworkin does not supply any content for these rights.

sovereignty over the attachments they can make, how they prioritise them, and whether they pursue them we have a human rights issue. So, a government adopting a policy that starves a people shows disdain for their ability to form, prioritise, and pursue their commitments. Even where people starve through government neglect, this is still a violation because governments' special powers over people given them special stewardship duties. Governments control the conditions in which citizens can operate, through the allocation of socially recognised rights and duties. That means that any choices governments make, whether to act or omit to act, is a way of setting terms of social interaction that affects how those rights and duties are configured. States are, for that reason, responsible if that configuration leads to the undermining of people's capacity for adopting, prioritising, and pursuing their commitments, as it is by starvation. Configuring conditions that allow it to be undermined amounts to failure to respect human integrity.

The jurisprudence on discrimination in the human rights sphere has merely focused on differential treatment for which there is no good, or objective, or reasonable justification.[26] However, the different standards of non-neutrality I have set out identify different ways one can fail to have a good reason. Human rights standards rule out any reason that that implies a breach of equal respect. So, a policy permitting or imposing racial discrimination uses racial features to decide whether people have a right to adopt, prioritise, or pursue their own commitments, or at least some of their

[26] Viz. in *Savez crkava "Riječ života" and Others v. Croatia* (no. 7798/08, 2010), para 85. However, the court restricts discrimination to rights and freedoms protected within the Convention and even then only recognizes discrimination on the basis of certain "protected characteristics" (which include a person's religious convictions), *Eweida and others v United Kingdom* (no. 48420/10, 59842/10, and 36516/10, 2013), paras 85 and 86.

own commitments.[27] Claiming a right to decide people's sovereignty, over which commitments they should pursue whether in private interactions or public relations, is an infringement of equal respect. To this extent this is distinct from the question of whether society gives them fair opportunities. Of course it will also clash with any reasonable account of social fairness to individuals. It will not, however, obviously clash with political neutrality, as it is not about treatment on the basis of competing conceptions of the good.

3. What is wrong with confusing these standards?

The problem with running together human rights neutrality, political neutrality, and social fairness, is that the standards imply different things in our assessment of a society. Applying the wrong standard to a case can lead to the wrong evaluation. If one was testing for whether a state upholds political neutrality one would ask what kind of arrangements its political community has adopted through legitimate political mechanisms. Are these designed to favour or disfavour certain conceptions of the good and is this on the basis of an evaluation of the content of those conceptions? If one were asking about human rights, then the question to ask is whether public bodies adopt policies that fail to accord equal respect to any individual. In the latter case we have a challenge to the legitimacy of a policy, law or action. In the former case, it is a challenge to its fairness or liberal justice, but not necessarily the political community's right to adopt it. Claiming that a state has failed in its human rights obligations because it is not fully politically neutral, would be a confusion of the two standards.

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[27] There are of course many reasons why racism is wrong. However, here I am focusing on discrimination by public institutions as a special wrong.

Unfortunately some authors do exactly that. They have taken human rights to require disestablishment in public institutions.[28] This is on the assumption that human rights standards require a fully non-religious state, based on the further assumption that human rights require public institutions to be neutral in all respects when developing policy.[29] One way to sharpen that argument is through the claim that establishment inherently implies discrimination in the distribution of privileges and resources. Any kind of discrimination, on this view, is a human rights violation and it seems to then follow that establishment violates human rights standards.

So, criticism of the Court over the Lautsi case has centred on the assertion that schools placing crucifixes in a classroom where non-Christian, or non-religious, pupils might attend is an insufficiently neutral policy.[30] This implies an assumption that non-neutral institutions, because they are non-neutral, violate human rights to freedom of religion and conscience. The Court avoided pronouncing on whether the symbols are or are not compatible with neutrality. But for the Court to be able to avoid pronouncing on neutrality, the policy needed to pass an important test. It had to

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[28] Especially Kyritsis, D. and Tsakyrakis, S., 'Neutrality in the classroom', pp. 211ff; Panara, C., 'Lautsi v Italy: the display of religious symbols by the state', *European Public Law*, 17(1), 2011: 139-168; Zucca, L., 'Lautsi: a commentary on a decision by the ECtHR Grand Chamber', *International Journal of Constitutional Law*, 11(1): 218-229; Mancini, S., 'The crucifix rage: supranational constitutionalism bumps against counter-majoritarian difficulty', *European Constitutional Law Review*, 6(1), 2010:6-27; Evans, M., 'Lautis v Italy: an initial appraisal', *Religion and Human Rights*, 6(3), 2011:237-244;.

[29] Kyritsis and Tsakyrakis, op cit., p. 205.

[30] Kyritsis and Tsakyrakis, op cit.

be shown that what is at stake is not the active teaching of a particular religious perspective that might constitute *indoctrination*.[31] The presence of the symbol was not taken to represent a serious imposition of that kind of incursion, based on religious reasons. And so, whether it represented a neutral, secular, or religious symbol in itself was a matter left to the state to interpret, and to decide in terms of its legitimately adopted ends.[32] The same treatment is adopted in giving societies committed to secularism a margin of discretion in their regulation of religion in public institutional contexts.[33]

Establishing non-indoctrination in an educational context means establishing that at least on one heading the practice does not prevent people meaningfully adopting or pursuing their own religious, non-religious, or anti-religious views or the possibility of entering into associations that make pursuing these views possible as an associative activity. *Lautsi* illustrates, then, the distinction between human rights standards and the kind of neutrality they require as opposed to political neutrality. States can legitimately adopt non-neutral laws but not human rights-violating laws. The former renders the state open to criticism as not fully fair or liberal, and potentially to movements for social change but does not challenge the legitimacy of its laws, as is implied by the Court judging there has been a violation. If the business of the Court were to enforce fairness-based neutrality in Council of Europe states then it would have to pronounce on decisions of any kind that can be seen to favour one group or

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[31] *Lautsi v Italy*, para 62.

[32] *Lautsi v Italy*, paras 68-72.

[33] *Leyla Sahin v Turkey* ECHR [GC] no. 44774/98, 2005, sections 114-16; Dogru v France ECHR no. 27058/05, 2009, sections 65-72.

disfavour another. As I have said, the court did not even pose that question of relative advantage and disadvantage when addressing religious symbols, or in secular states religious attire in public places. The form of interpretation of the different standards I have presented makes sense of this jurisprudence, and provides a justification for it. It also challenges the argument that runs together human rights and political neutrality under the heading of discrimination.

I have so far argued that there are different kinds of neutrality to which one might be committed. One is concerned with how institutions representing members of a political community should be used in order to be fair or exhibit equal concern for all members. Another focuses on how public institutions ought to treat people in order to treat them with equal respect. In some cases treatment in line with equal respect is invariant between persons in or outside a political community, as with a right to freely adopt one's own religious or non-religious commitments. In other cases it will draw in an already existing institutional component, as where, due to the way access to rights is legally structured, religious associations need legal recognition in order to be able to collectively pursue their religious aims in a meaningful way. I have also proposed that states can pursue mistaken conceptions of political neutrality and social distributive justice without that fact rendering their laws illegitimate. Human rights, however, seem to precisely focus on the limits of legitimacy.

One might, at this stage, ask why we should consider one set of concerns to be more than human rights and the other merely human rights. Why not call all of it 'human

rights standards'?[34] In fact, the authors of views I have cited that run together political neutrality and human rights seem to think that it is sufficient for a human rights violation that public institutions are not entirely fair. For them it is enough that a question of moral right is in play for it to be a human rights matter. [35] Labels indeed do not matter. However, if I am right about the different features and focus of these two different types of standards, it matters that they are not confounded. Doing so would lead to incoherence in practice, leading us to challenge the legitimacy of certain laws because they are not neutral. It would lead to claiming that resourcing religious buildings because of a state commitment to a religious outlook is a fundamental violation of human rights that no society is allowed to pursue, at pain of rendering its laws illegitimate. Similarly, the taint of illegitimacy would apply with equal force to societies advancing a secular outlook. Even if these non-neutral conceptions are wrong, confusing the two standards would mean political communities had no right to get these matters wrong or for that matter to find their own winding way towards the correct account of justice.

There is one view, however, that cannot help but run these standards together. That view holds that human rights, and in fact any rights, are justified by reference to the importance of human interests that need protecting—interests the importance of which needs to be weighed in order to decide what must be done about anyone's rights. On that view, what defines these rights is a set of important targets: to maximise the enjoyment or protection of certain interests. How the targets are reached

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[34] There are authors who take human rights to be simply a subset of the rights of justice, e.g., Tasioulas, J., 'Taking rights out of human rights', *Ethics*, 120(4), 2010:647-678, pp. 650 and 654.

[35] Kyritsis and Taskyrakis, op cit. p. 211 ff.

or who is charged with reaching them is a matter of practicability or at best efficiency, it is not a matter of a specific value that can be honoured or disrespected. So, on that view, there is indeed no reason for a state to respect religious freedoms that is not also a reason for that state to give fair advantages to people in accessing the means to pursue their religious aims. Both are about advancing interests, only one advances them through standards of respect that will protect citizens interests whilst the other sets out standards for promoting the interests of members of a community.

The problem with this view is that it either adds nothing to the above account of the distinct values of equal respect and political neutrality, or it undermines the valuable point of treating them as distinct standards. The view could say that different values guide us in how to balance people's varying and different interests. Public institutions should show equal respect where they are capable of threatening it. For those over whom they exercise authority to distribute socially allocated rights and duties, they should establish conditions of fairness for people to pursue their different and sometimes competing conceptions of the good. That understanding of the view, as I say, adds nothing to an account based on respect and fairness, and furthermore it tells us nothing new about the attitude public institutions should adopt towards establishment. All the work is done by the values of respect and fairness, and the distinct role played by these values and the standards they justify.

The alternative way to understand this view is as boiling down other values, like respect and fairness, to the single value of protecting interests of high importance to people's wellbeing. However, on that version one loses an important distinction. A value like equal respect disqualifies certain considerations as irrelevant yet one like

fairness gives us a way of balancing competing considerations. Sometimes it makes more sense to appeal to one type of value and in other cases the other type. Consider two people that have competing aims or conceptions of the good life in a society, such as a religious and a non-religious conception. That each one has a particular and distinct conception of the good is a consideration that we have to consider against the other. We need a rule or principle that treats the people holding these conceptions fairly. For example, an equal opportunity rule for accessing resources would be fairer than a rule that the strongest or most popular view gets all the resources. The human right not to be enslaved, on the other hand, is different. It does not try to balance considerations such as the importance to a person's wellbeing of not being enslaved versus competing considerations such as the opportunity costs for another person in refraining from enslaving others. The latter "consideration" is not a competing consideration at all; it is irrelevant for the purpose of deciding what the right should protect. The relative importance or weight of interests for people cannot help us make this distinction, as highly important interests are involved in both types of case. Only appeal to different types of standards can uphold the distinction, such as the difference between equal respect (respect for each person's sovereignty over her forming, prioritising, and pursuing commitments and attachments) on the one hand and social fairness on the other.

So one either adopts the version of the view that does not challenge the political neutrality *versus* human rights distinction or one adopts the version that gives up what matters in it. If this argument is right, then there is good reason to have these different values and to keep them, and the different standards they imply, apart. Certainly, for the purposes of evaluating policies that imply establishment they imply different

things. In one case a standard that if breached attracts the charge of unfairness, but nevertheless may still be legitimately adopted by as society, in the other a standard setting, among other things, the limits of legitimacy for public policy.

4. Conclusion

In conclusion, I have set out two different kinds of standards for state neutrality, with special reference to neutrality across religious points of view. The standards require different things, for different reasons, from public institutions. This difference is most acute when we ask whether a state is permitted to adopt policies aimed at giving some advantage to certain religious perspectives, i.e., in terms of establishment. This would be compatible with human rights standards, but not with political neutrality. The upshot, I have also proposed, is in terms of laws that can be unfair yet legitimate, and those which breach moral conditions for legitimacy itself. Anyone, then, wishing to argue that public institutions should never aim to give advantage to any religious conception of the good is better off deploying arguments for fairness-based neutrality and social justice. But they cannot challenge the legitimacy of public choices on that basis. Human rights standards, on the other hand, are a ground for challenging legitimacy but will not help in pursuing this kind of neutralist aim.

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