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ESSAY

On an Antinomy in the Discourses of Freedom of Religion and Freedom of Conscience

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Religious freedom, freedom of religious conscience's worst enemy?

In reading closely a recent celebrated anthology on religious freedom, *Politics of Religious Freedom* (Danchin, Hurd, Mahmood and Sullivan, 2015), I found myself both highly stimulated and informed by the discussions therein, even when I found myself disagreeing. Yet, one irritating feature of the logic of discourse that turns up in this collection kept nagging at me. This would ordinarily be a small point but I believe the same oddity turns up in almost everything I have read about religious liberty. This is the failure to distinguish two senses of the term, "religious liberty." The first sense refers to institutional freedom or sovereignty. I shall apply the convention, "freedom of religion" (FR) for this first sense of "religious liberty." But, a second sense, denoting individual freedom of conscience, belief, practice and so on, also circulates in the discourse of religious liberty. This, I call "religious freedom" (RF). And, in order to avoid confusion with the term, "religious liberty," I shall reserve that term for general uses bringing both "freedom of religion" with "religious freedom" under the same umbrella. This means that term, "religious liberty," as commonly used in the literature thus includes both the institutional, "freedom of religion" and individual, "religious freedom."

Why does this distinction matter? Why, in particular, does it matter to "freedom of conscience"? Untangling these two usages, so often smuggled in under the cover of "religious liberty," can, I urge, make a difference to discussions of freedom of conscience, because freedom of conscience often suffers at the hand of freedom of religion, as does religious freedom itself.

In applying this convention, I am also aware that, although conceptually distinct, some FR and RF may have practical, material relations to one another. Thus, it may be the case that, FR, such as freedom of conscience, or freedom to practice one's religion, are only possible given FR, given some degree of sovereignty of the religious community of which a given individual can form

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a conscience. How then are these two notions of freedom distinct – both logically, and as it happens, in their historical genesis?

The first, "freedom of religion" arose from a Papal declaration of freedom, made by 12th and 13th century pontiff, Pope Gregory VII, marking what legal historian, Harold Berman called the Papal Revolution. Gregory laid down a statement of Papal sovereignty over that of the Holy Roman Emperor. We may be more familiar with this principle from Thomas Becket's opposition to King Henry II. The *raison d'être* for his martyrdom was the defense what Beckett called "the freedom of the Church," an institutional matter. Later, in 1215, in the *Magna Carta*, King John affirms the very same *institutional* freedom in the following words: "First, that we have granted to God, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired." (England, 1215) Interestingly, in the decision of the *Hosanna-Tabor* case, the justices cited this very clause of the *Magna Carta*.

> Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of *Magna Carta*. There, King John agreed that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." The King in particular accepted the "freedom of elections," a right "thought to be of the greatest necessity and importance to the English church." (Alito and Kagan, 2012)

In the US Supreme Court decision, Hosanna-Tabor v. EEOC ruling, SCOTUS forbade the government from applying equal opportunity employment law to the case of a worker fired from her job with the church. The worker had fallen ill, and after recovering, wanted to reclaim her job. But, the firing was upheld, and the freedom of the church to do so was accommodated at the expense of the civil rights of the employee, because the employee was classified as a "minister" by the church.

Critically, neither the *Magna Carta* itself nor the *Hosanna-Tabor* case affirms *individual freedom of conscience*, or religious freedom. From Alito's decision, it should be clear about what (or whose) freedom is being affirmed, both by the *Magna Carta* and by SCOTUS. Plainly, it is institutional sovereignty, not personal liberty that both documents affirm. It is not, therefore, the right to believe according to the dictates of conscience *against* the authority of his religious community. It is, rather, the freedom (or sovereignty) of religious *institutions* that is affirmed – indeed, often to rein in believers with deviant consciences.

Part of the reason for this logical difference may be the different genealogies of these two notions. The differences between institutional freedom of religion and religious freedom (of individual conscience) have been traced to their difference geneses by historians like John Neville Figgis, Harold Berman, Martha Nussbaum and others. Pope Gregory VII's so-called 12th century "Papal Revolution" asserts the freedom of the Church, of religion, while the value of religious freedom (of conscience) arises in the liberality of the 17th century Dutch Republic and the colonial experiments of Roger Williams. (Berman, 1983; Figgis, 1997; Figgis, 1998; Nussbaum, 2008)

It has become commonplace; however in the West, to regard the religious liberty to be identified exclusively with *sacrality of conscience*, the right to believe whatever one chooses. Historically speaking, this conception of religious liberty ignores that sense of religious liberty understood as the freedom of an institution, people, nation and such. It further tends falsely to collapse the notions of institutional freedom and freedom of belief or conscience into each other. This results in the irony of Becket being held up as a paragon of religious freedom or independent conscience when, in fact, he was simply obeying hierarchically derived order in representing the claims of the Roman Church against the kingdom of Henry II!

The differences in these two notions of religious liberty are thus at the very least *historically deep*. The depth of logical difference can better be appreciated by the frequent way claims to the rights of conscience are asserted *against* the authority or freedom of religious institutions, rather than in their behalf. I submit that while institutional freedom of religion may indeed "protect the individual" from a predatory State, it may also disadvantage the individual with respect to their church. In the *Hosanna-Tabor* case, the United State Supreme Court's siding with the church over against the rights of an individual freedom of conscience demonstrates just such conflict within the notion of religious liberty. Sometimes freedom of religion, freedom of a church, for instance, demands compromising of the freedom – religious or otherwise – an individual's freedom or well-being. For instance, any number of critical Roman Catholic theologians, trying to assert theological *Lehrfreiheit* at Catholic institutions, as well as Roger Williams, William Robertson Smith, Galileo Galilei, Ridley and Latimer, Michael Servetus, Thomas Moore, Hans Küng, or the Network's "Nuns on the Bus" might complain of being oppressed by their churches. In their cases, the State stood by, exposing them to the predations of their religious institutions. In such cases, I think we can fairly say that freedom of religion (FR) militates against religious freedoms (RF).

Other burdens of freedom of religion's unburdening

One might extend this line of thought further and look anew at cases where the freedom of religion, that is, of religious *institutions*, is asserted to the disadvantage of the individual enjoyment of *civil* goods. In the United States, two recent and quite different cases, US Supreme Court decision, *Burwell v. Hobby Lobby* (2014) and compounded case of *Zubic v. Burwell* (2015) serve nonetheless as examples of the kinds of rulings in which judicial exemptions granted to religious institutions, at least on the face of it, *disadvantaged* individual enjoyment of legitimate civic goods, including freedom of conscience, made possible by general laws. Both rulings, and adjustments made to them, make these cases complex.

Without wanting grossly to oversimplify them, I simply want to shift the point of view from that of a putatively burdened religious institution to the other side. Yes, one can understand how the federal mandate to offer contraceptive support to women employees of Hobby Lobby, the Little Sisters of the Poor, and so on, might conceivably put these organizations into moral straits. And, yes, governmental

officials did accommodate the scruples of the religious plaintiffs so that their women employees could receive contraceptive services from non-religious, public sources. Still, the women involved were "burdened" – keep waiting through periods of uncertainty and deprivation of their legitimate civic goods, guaranteed to them under general law.

While these are not cases where the interests of (institutional) freedom of religion *directly* conflict with religious freedom (of conscience), they are cases where (institutional) freedom of religion does "burden" the enjoyment of legitimate civic goods. Here, it is not freedom of conscience that suffers, but simply the enjoyment of common civic goods ensured by general law. An individual citizen's legitimate enjoyment of civic goods that has, thus, been "burdened" by the claim of a religious institution to have been "burdened," in turn, by general law. I should immediately note, however, that the courts have commonly tried to balance these burdens upon the general citizenry over against those of religious plaintiffs. In the Little Sisters of the Poor case, for instance, the Federal government provided the contraceptive services from which the nuns sought exemption. The "burdening" of the general citizenry seems to be the social cost of freeing religious institutions from "burdens." I believe that the equity of such civic burdening ought to be given further scrutiny. As to freedom of conscience, I have noted how institutional "freedom of religion" differs *conceptually* from this "religious freedom" – an individual liberty. This difference even extends to one of different historical origins – religious freedom, the free conscience, emerging later in the 17th century Dutch Republic, while freedom of religion dated from the assertion of Papal independence from the Holy Roman Emperor. Interestingly, freedom of religion (FR) often excludes conscience-linked religious freedom (RF), as admirers of Roger Williams, William Robertson Smith, Galileo Galilei, Ridley and Latimer, Michael Servetus, Thomas Moore, Hans Küng, or the Network's "Nuns on the Bus" and a whole parade of religious dissenters can variously testify.

More frequently than optimal, no attempt is made to distinguish the two – with the notable exceptions in the Danchin, Mahmood, Shackman, Sullivan collection of Elizabeth Castelli (Castelli, 2015), Saba Mahmood (Castelli, 2015), Winni Sullivan (Castelli, 2015). Readers suspicious of my insistence upon this distinction might rightly ask at least two questions straightaway. First, can the two really be separated in reality? Does not the one actually require or entail the other? Second, why would it make a difference to distinguish the two kinds of discourse? What is gained?

The first question can be answered easily, and in fact has implicitly been so by Castelli. She argues that – institutional – freedom of religion, such as that enjoyed by the Roman Catholic Church, does not *necessarily* establish religious freedom for the individual. In fact, it creates a circle of sovereignty around its member, ruling out recourse to, say, US courts, to overrule the Church. Think how this ring of sovereignty was breached – and thankfully so – in the case of the Catholic Church pedophile scandals. Nevertheless, religious freedom means that the freedom of the church sanctions a regime of discipline of – individual – religious freedom, such as in the case of doctrinal dissidents or irregulars. Freedom of

religion entails the actual requirement of "submission to the Magisterium," as Castelli reminds us. (Castelli, 2015).

It is important to make this distinction because the only reason Castelli thinks her analysis catches the Vatican in a contradiction about religious freedom is that she fails to understand the difference institutional freedom of religion from individual religious freedom. Of course, in the Catholic context, "Religious freedom emerges as nothing more than a mode of shoring up the Magisterium… not a set of values that shelters and protects acts of conscience…" (Castelli, 2015) That's what freedom of religion is all about! The Church's assertion of religious freedom is an assertion of institutional sovereignty, the right to rule within its own domain. In fact, this principle of institutional sovereignty very principle giving it jurisdiction over the consciences of its adherents, and which denies them religious freedom. Castelli has no cause for surprise, nor reason to think she has pulled "gotcha" move on Magisterial autocracy, by pointing to what is not really an inconsistency at all. Castelli's dare that "bishops should put their money where their collective mouth is and to defend religious freedom in their own polity," reflects Castelli's fundamental confusion about the difference between institutional sovereignty or freedom and individual freedom of conscience. (Castelli, 2015) Not only do the two differ, but the sovereignty won in freedom of religion is precisely what makes denial of individual religious freedom possible and legally unassailable. Of all American heroes of individual religious freedom, Roger Williams again knew this best of all, given his own experience of religious oppression constructed in the interests of the freedom of religion of the Massachusetts Bay Colony.

An interesting experiment might be to see which has been the greater oppressor of religion, its free exercise and so on – sovereign – free – religious institutions or the Erastian state, as so often posed today as oppressor-in-chief of religion? Given how long sovereign religious institutions have engaged in censure, ostracism, expulsions – or worse – of dissidents, heresy operations, excommunications, enforced or regulated orthodoxy and orthopraxis, regulations daily life, and so on, what are the odds? Compared to this history could state limitations upon religion, in retrospect, then have been cumulatively greater? The results of such an inquiry would, at the very least, be interesting.

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