

A Critique of Ronald Dworkin's Limitation of Passive Forms of Religious Expression in the Public Sphere

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The renowned legal philosopher Ronald Dworkin argues that passive forms of religious expression be stripped of their 'religious character' before being included in the public sphere. Dworkin's understanding in this regard is founded by the view that freedom of religion should constitute a 'general right to ethical independence' rather than a 'special right'. This approach, as postulated in Dworkin's last book, 'Religion without God', evokes critical thought directed at the exclusion of 'passive' forms of religious expression (such as displays, statues, paintings, anthems, mottos, symbols and attire) in the public sphere. In addition, it is argued that public spaces in democratic and so-called plural paradigms should rather be more inclusive of religious forms of passive expression.

I. Introduction

Democratic and, by implication, plural societies harbour (to various degrees) passive forms of religious expression in the public sphere. These forms of expression pertain to, for example, jewellery and attire, national anthems and mottos, financial instruments, electronic communicative platforms, plaques, graffiti, posters, art, statues, tombstones and car stickers. Having said this, efforts at the inclusion of specific passive forms of religious expression in public spaces within such democratic and plural societies have, on many an occasion, either been successfully opposed or placed under a heavy burden to merit inclusion by the judiciary. This is evident in, for example, the approach taken by the American judiciary.¹

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¹ See for example, Steven D. Smith, 'Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test' (1987) 86, *Michigan Law Review*, 276-309, and Julie van Groningen, 'Thou Shalt Reasonably Focus on its Context: Analyzing Public Displays of the Ten Commandments' (2004) 39(1), *Valparaíso University Law Review*, 219-272. The judiciary's approach in this regard has not been spared criticism. See, for example, Smith, 'Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test', *ibid.*, as well as Van Groningen, 'Thou Shalt Reasonably Focus on its Context: Analyzing Public Displays of the Ten Commandments', *ibid.* Although the above sources were published some time ago, the position as described remains generally the same.

Ronald Dworkin's (1931-2013) *Religion without God* condemns the inclusion of official displays of 'organized religions on courthouse walls or public streets'.² Dworkin also states that 'people have a right in principle to the free exercise of their profound convictions about life and its responsibilities, whether derived from a belief in God or not, and that the government must stand *neutral* in policy and expenditure toward all such convictions'.³ This is aligned with American constitutional law scholar Michael Perry's comment that Dworkin presents the 'neutrality' principle according to which 'the government must be neutral on what might be called the question of the good life ...'.⁴ How accommodative or tolerant is Dworkin's approach in this regard against the background of societies that, because of their democratic foundations, naturally should be supportive of substantive diversity? The religious believer's convictions and consequent manner of living (as well as the non-religious believer's convictions and consequent manner of living) do not end at the borders of the private sphere but accompany such a believer wherever he or she may find himself or herself, including the public sphere. Bearing this in mind, where for example governmental policies, legislation or judicial findings on fundamental human rights or moral matters are prioritised above those of religious views pertaining to such matters, there can be no mention of neutrality from the side of the government.

Dworkin's approach is reminiscent of Alasdair Macintyre's labelling of the liberal understanding that 'the government is to be neutral as between rival conceptions of the human good, yet in fact what liberalism promotes is a kind of institutional order that is inimical to the construction and sustaining of the types of communal relationships required for the best kind of human life',⁵ which also relates to the protection of religious interests. A public sphere inimical to religion adversely influences that which for many is viewed as constitutive of a liberated and good life. Therefore, regarding the inclusion of passive forms of religious expression in the public sphere, there is the concern that a strict limitation of passive forms of religious expression in the public sphere (as supported by Dworkin) comes into opposition to aspirations towards the attainment of higher levels of plurality which is, in turn, inextricably connected to

² *RwG* 138. There is also Dworkin's 'Einstein Lectures' (2011). Especially the third lecture titled 'Religion without God' is of relevance to this article and available at <https://cast.switch.ch/vod/channels/1gcfvlebil>, accessed on 15 February 2017.

³ *RwG* 117 (emphasis added).

⁴ Michael J. Perry, 'A Critique of the "Liberal" Political-Philosophical Project' (1987) 28, *William and Mary Law Review*, 224. See *ibid.*, 226 for Perry's explanation of how this so-called neutrality can be impossible to attain in specific instances.

⁵ Alasdair MacIntyre, *After Virtue* (Notre Dame, Indiana: University of Notre Dame Press, 3rd edn, 2007), xv. How this materialises in Dworkin's thought is explained below, also indicating how Dworkin's view of community as a source of value comes into tension with religious rights and freedoms.

the ideals of a democracy. A public sphere that is committed towards substantive inclusion (as opposed to substantive exclusion) of religious expression is akin to the progression of diversity and toleration in democratic and plural societies – rather this than vouching for public spaces emptied of religious forms of passive expression. Everyone is a believer, whether religious or non-religious and, therefore, public spaces (which are spaces in which all believers act and participate in) should be inclusive of both religious and non-religious forms of passive expression.

Soon after the publication of *Religion without God*, criticism arose from scholars in support of the public sphere being more inclusive of religious beliefs.⁶ This article adds to such criticism by critically investigating Dworkin's efforts (as especially postulated in *Religion without God*) towards limiting the inclusion of religion in the public sphere. Emanating from this is the concern that such an approach stifles the attainment of higher levels of diversity in democracies. This, in turn, raises the question as to what a more effective approach towards the furtherance of diversity in democratic societies against the background of religious interests should be, with specific reference to passive forms of expression? In addressing this question, this article begins by explaining Dworkin's approach to religious expression in the public sphere, which is followed by a critique of the limiting nature of the said approach by Dworkin. Emanating from this critique are insights related to the importance of the inclusion of passive forms of religious expression in the public sphere, which is followed by recommendations that may assist the attainment of such inclusivity.

2. Dworkin's 'general right to ethical independence'

For more insight into the background of Dworkin's support of a public sphere, which substantively excludes religious expression, Dworkin's underlying aversion towards religion is confirmed in his comment that:

'Books ridiculing God were once, decades ago, rare. Religion meant a Bible, and no one thought it worth the trouble to point out the endless errors of the biblical account of creation. No more. Scholars devote careers to refuting what

⁶ See, for example, Rafael Domingo, 'Religion for Hedgehogs? An Argument against the Dworkinian Approach to Religious Freedom' (2013) 2(2), *Oxford Journal of Law*, 371-392; Stephen L. Carter, 'The Challenge of Belief' (2014) 94(4), *Boston University Law Review*, 1213-1223; P. Horwitz, 'A Troublesome Right: The "Law" in Dworkin's Treatment of Law and Religion' (2014) 94(4), *Boston University Law Review*, 1225-1240; and Shaun de Freitas (2013) 38(2), *Journal for Juridical Science*, 142-151 (Book Review).

once seemed, among those who enthusiastically buy their books, too silly to refute.⁷

Dworkin further hopes that the battles, ‘especially between zealous believers and those atheists they regard as immoral heathens who cannot be trusted’,⁸ will be toned down in the light of his suggested argument.⁹ He points out that the government cannot protect the views of the opponents of, for example, abortion, ‘since they base their views on the will of a god as expressed in sacred texts.’¹⁰ The critical tone that Dworkin directs at traditional religion is enhanced by a more detailed argument in *Religion without God* (founded upon a ‘general right to ethical independence’) to qualify the demotion of religious expression from the public sphere.

Religion without God defines religion so broadly that it includes both theists and atheists (or at least a particular kind of atheist, namely the ‘religious atheist’),¹¹ who can now share ‘the conviction that there is, independently and objectively, a right way to live’.¹² Added to this, and the essential rationale for Dworkin’s opposition to the right to religious freedom as a ‘special right’ (where religion is to be understood also as including beliefs outside the genre of theism), is the concern that the protection of all beliefs as something special may lead to calls for the protection of what can be ‘dubious or eccentric’ belief claims, and consequently to a freedom that hurtles out of control. Dworkin explains as follows:

7 Ronald Dworkin, *Religion without God* (Cambridge, Massachusetts & London, England: Harvard University Press, 2013), 8–9. Dworkin says this immediately after having referred to Richard Dawkins’s book, *The God Delusion* (2006), as an example of a present-day society that is reflective of many who now, unlike in the past, are prepared to come out in public and condemn religion as superstition, *ibid.*, 8. Then there is the comment by Dworkin stating that the promoters of ‘intelligent design’ being taught in public schools do not do so ‘to restore balance to an academic subject ...’ Rather, says Dworkin, it forms part of a ‘national campaign of the so-called religious right to increase the role of godly religion in public life’, *ibid.*, 142–144. Bearing the above in mind, one cannot help but sense some animosity towards religion.

8 Rwg 8.

9 Rwg 9. Dworkin also refers to the ‘division’ between the godly and godless religion, Rwg 29, and the ‘battles’ between believers and non-believers, *ibid.*, 137. This ‘division’ and the ‘battles’ Dworkin refers to are especially applicable (in Rwg) regarding views on abortion, marriage and education. According to Dworkin, the division between atheists and theists is minuscule compared to their common faith in objective value, Rwg 29.

10 Rwg 144–145.

11 Rwg 10–12; also see Rwg 146–147.

12 Rwg 155. According to Dworkin, there is the common ground of ‘value and purpose’ accompanying the individual and this is related to a religious attribute, see Rwg 1. Dworkin states that ‘The religious attitude accepts the full, independent reality of value. It accepts the objective truth of two central judgments about value. The first holds that human life has objective meaning or importance ... The second holds that what we call “nature” – the universe as a whole and in all its parts – is not just a matter of fact but is itself sublime: something of intrinsic value and wonder’, Rwg 10.

'The Native American Church uses peyote, a hallucinogenic drug, in its religious rituals. The drug is generally banned because it is dangerously addictive. If an exception is made for a tribe because the drug plays a role in its rituals, then the law discriminates on grounds of religion against, for instance, followers of Aldous Huxley who believe that the best life is lived in a trance. If the law, therefore, recognizes godless religion and exempts everyone who thinks that hallucinogenic drugs allow special perception into the meaning of life, then the law discriminates, also on religious grounds, against those who only want to get high.'¹³

Consequently, Dworkin's solution to the problem of 'wild eccentricities' that may emanate from both religious and non-religious beliefs is to demote the 'special right to freedom of religion' to a mere aspect of the 'general right to ethical independence',¹⁴ and such a general right now becomes the category under which religious and non-religious beliefs should resort.¹⁵ Dworkin explains the difference between religion as a 'special right' and religion as 'a general right to ethical independence' as follows:

'A special right fixes attention on the subject matter in question [e.g. religion, speech or due process]: a special right of religion declares that the government must not constrain religious exercise in any way, absent an extraordinary emergency. The general right to ethical independence, on the contrary, fixes attention on the relation between the government and citizens: it limits the reasons [e.g. improving the general welfare] the government may offer for any constraint on a citizen's freedom at all.'¹⁶

¹³ *RwG* 125-126. See *RwG* 124-128 for further examples.

¹⁴ *RwG* 132. See *RwG* 129-130, where Dworkin describes the 'general right to ethical independence' and 'special rights' as two distinct components of political liberty which a just state must recognise, an example of a special right being freedom of speech – 'Special rights ... place much more powerful and general constraints on government. Freedom of speech is a special right: government may not infringe that special freedom unless it has what American lawyers have come to call a "*compelling*" justification,' *RwG* 131.

¹⁵ Some years before the publication of *RwG*, Dworkin already reflected this line of thinking namely: 'So any right to freedom of choice that gave special protection to religious people or religious practices would be regarded in such a society as discrimination in their favor because it would leave other people open to constraints on their freedom in the exercise of choices that, for them, reflect values of the same ethical character and function as the religious values of religious people. A tolerant secular community must therefore find its justification for religious freedom in a more basic principle of liberty that generates a more generous conception of the spheres of value in which people must be left free to choose for themselves. It must treat freedom of religion, that is, as one case of a more general right not simply of religious but of ethical freedom', Ronald Dworkin, *Is Democracy Possible Here? Principles for a new political debate* (Princeton and Oxford: Princeton University Press, 2006), 61.

¹⁶ *RwG* 133.

In terms of this general right to ethical independence, ‘the government may not impose its view on what it means to live a good life, *however, it may restrict ethical independence for certain and specific reasons, such as protecting people from harm or protecting natural wonders*’.¹⁷ Dworkin argues that abandoning the special right to freedom of religion and accepting the general right to ethical independence, results in religions being ‘forced to restrict their practices so as to obey *rational*, non-discriminatory laws that do not display less than equal concern for them.’¹⁸ Dworkin concedes that exceptions may be granted to the burdening of sacred duties only when there is ‘no significant damage to the policy in play’.¹⁹

Therefore, to summarise, all beliefs, says Dworkin, have something in common (‘the conviction that there is, independently and objectively, a right way to live’) and that, consequently, all foundational beliefs should have equal status by belonging to the encompassing genus called religion (but of course, religion understood as by Dworkin). However, says Dworkin (and as explained earlier), in order to avoid eccentric claims that may emanate from any foundational belief, the protection of freedoms related to foundational beliefs need to be categorised under a ‘general right to ethical independence’. Furthermore, the protection of such a right is secondary when weighed against a government’s responsibility towards the protection of the individual (or society) from ‘harm’ or when weighed against a government’s responsibility towards the ‘protection of an important societal policy’ or when rational non-discriminatory laws have to be obeyed.

3. Assessing Dworkin’s approach to passive forms of religious expression

The supplanting of a ‘special right to religious freedom’ by a ‘general right to ethical independence’ cannot escape the dominance of a particular value and consequent purpose in accordance with Dworkin’s sense of what should be of importance to the authorities as well as to what constitutes the public good. Although the dominance of particular values and consequent purposes are subscribed to by any governing paradigm, Dworkin’s approach against the background of a ‘general right to ethical independence’ remains

¹⁷ RwG 130-131 (emphasis added).

¹⁸ RwG 136 (emphasis added). As to what Dworkin understands ‘rational, non-discriminatory laws’ to mean, it also remains an open question as ‘rational’ can be interpreted differently by different foundational beliefs, which include religious beliefs. In this regard, however, it is pointed out by Shaun de Freitas that if religious freedom is retained as a special right, the courts or the legislature ‘will in any event require obedience to rational, non-discriminatory laws ...’, De Freitas (2013), 146.

¹⁹ RwG 136.

limiting towards the attainment of higher levels of diversity in the public sphere in which all beliefs, whether religious or non-religious, should be more effectively included on condition that the public order is not seriously violated or threatened. In what follows, there are some essential concerns related to Dworkin's approach to the protection of religious interests (which in turn strengthens the argument for a more accommodative model), concerns which are posed by eminent scholars in the field of the protection of religious rights and freedoms. Professor of Law, Stephen Carter critically explains that:

'If the state can [according to Dworkin] override ethical independence by taxing its people to support forests on the ground that forests are good, why can't the state also override ethical independence by taxing its people to support churches on the ground that churches are good? ... What matters [for Dworkin] is that 'forests are in fact wonderful.' This is precisely the sort of objective truth, presumably, on which theistic and atheistic religionists might agree. But notice what happens when the government's truth comes into conflict with the opposing truth claims of the religionist: in all but a handful of cases, whether under Dworkin's model or the Supreme Court's, the religionist loses.'²⁰

Carter is sceptical towards the view that the goodness of forests is less contestable than the goodness of churches, and even if this were the case, says Carter, 'the difference would seem to be one of degree'.²¹ This example of Dworkin's overriding of ethical independence is illustrative of the limitation of religious interests in accordance with, as Carter puts it, that which is perceived by the government (according to Dworkin) to be the truth. Note that in this regard, the orthodox religious believer's understanding of the truth, which may include the understanding that it is right to have tax money apportioned to churches as well, is excluded. Also, regarding Dworkin's criteria to determine whether ethical independence may be flouted namely, whether there is 'harm', whether it is 'rational non-discriminatory' and whether there is an 'important societal policy', the following applies: what makes the allocation of taxes for churches harmful, discriminatory and of lesser societal policy importance? The concern in this regard is that practices related to orthodox religion should, according to Dworkin, no longer be viewed as enjoying protection as a special right and consequently those non-religious matters that, according to Dworkin, constitute the good for society, and which seem to enjoy a large consensual base (such as support towards the maintenance and protection of forests), are mostly victorious whilst religion frequently loses.

²⁰ Carter, 'The Challenge of Belief', 1217.

²¹ Carter, 'The Challenge of Belief', 1217.

Professor in constitutional law namely, Rafael Domingo, is of the view that religious freedom as a special right should be maintained, and that this should not imply the exclusion of the protection of the freedoms connoted to non-religious beliefs. Domingo argues that Dworkin's right to ethical independence is of its essence individual hereby not catering to all the dimensions of the human person, namely on individual, social and transcendental levels.²² Therefore, what is required is the inclusion of the individual, the communal and the transcendent; an understanding which Domingo relates to his idea of 'personal autonomy'.²³ Domingo points to the paradox in Dworkin's right to ethical independence that Dworkin advocates for no political community to dictate ethical convictions to its citizens and yet such a right constitutes in itself an ethical conviction that harbours the understanding that religion 'is by definition a *res privata*, a mere attitude'.²⁴ Domingo adds that:

'As an essential expression of pluralism and a "precious asset" for believers and non-believers, a democratic constitutional model has to protect both transcendent and immanent religions and beliefs, with the only limit being imposed by public order. To regard religion only as an immanent phenomenon [as Dworkin does] is a negative way to protect religious freedom; it protects only a part of religion, not religion in its fullness. This unjustified reductionism, which could be called the tyranny of legal secularism, would impose a unique secular religion. On its face, it seems to be broader and more open, because it is presented as such, as a good alternative to the very narrow, old-fashioned view of religious freedom. But on inspection, it is narrower than the previous

²² Domingo 2013:385. Here it is worth mentioning Carter's criticism of Dworkin namely: 'He [Dworkin] sees belief as Hume did, as simply a state of mind, an arrangement of the mental faculty. To think otherwise would require Dworkin to accept the notion that the government must accommodate bona fide religious beliefs, unless the statute in question is narrowly tailored to further a compelling state interest – an argument he explicitly rejects', Carter, 'The Challenge of Belief', 1220. According to Domingo, 'The starting point of a proper understanding of the right of religious freedom is neither the idea of value nor even the idea of religion, freedom or right, but the human person, as a unique free, moral, ethical, legal and religious being. The unity of the person harmonically integrates the three essential dimensions of the human person namely the: individual, social and transcendent. The individual dimension refers to the person as a self ('I'). The social dimension refers to the person in relation with other persons ('we'). Lastly, the transcendent dimension develops when a person embraces the ultimate sense of his or her own life, aware of his or her creaturely condition and searching for the divine plan of the creator ('He')', *ibid.*, 389. In the social dimension 'the right to religious freedom allows individual persons to live their faith in community and protects political communities against religious and secularist fundamentalism as rejections of legitimate pluralism', *ibid.*, 390. Also see *ibid.*, 382-384 for Domingo's argument in support of the inextricable relationship between human dignity and freedom of religion as a right.

²³ Domingo 2013:385.

²⁴ Domingo 2013:386-387.

view insofar as it excludes any openness to transcendence and any consideration of God as a source of morality.²⁵

In the above, we see that Carter and Domingo proffer essential concerns regarding Dworkin's approach, an approach that hampers the furtherance of true diversity in democratic societies. The inclusion of passive forms of religious expression in public spaces is another case in point. According to Dworkin, 'official displays of the insignia of organized religions on courthouse walls or public streets are condemned by "ethical independence" unless these have genuinely been drained of all but ecumenical cultural significance'. The reason for condemning the inclusion of 'official displays of the insignia of organized religions on courthouse walls or public streets', says Dworkin, is that 'otherwise such displays use state funds or property to celebrate one godly religion ...'²⁶ In this regard, the absence of freedom of religion as a special right, as proposed by Dworkin, bolsters the argument for excluding the display of the Ten Commandments from a courtroom wall. How conducive is such an approach for the furtherance of diversity in a democratic society? It is argued that public spaces should be allowed to 'celebrate one godly religion' on condition that such an allowance is not made to the exclusion of the celebration of non-religious or other religious passive forms of expression. The public sphere in democratic societies should be accommodative towards the whole of the spectrum of beliefs, whether religious or non-religious. Rather this than ascribing towards an absolute (or even substantive) exclusion of passive forms of expressions related to religious beliefs. The essential dimensions of the unity of the person as explained by Domingo namely, the individual, social and transcendent dimensions; also understood against the protection of human dignity, necessitates the inclusion of passive forms of religious expression in the public sphere. Consequently, freedom of religion is protected, and diversity is celebrated. This does not negate the inclusion of passive non-religious forms of expression in the public sphere and it is for church leaders and civil society to set the ball rolling regarding the placement of such forms of expression in public spaces.

The removal of religious symbols from a courthouse wall, for example, can be viewed as introducing an empty morality that is naturally exclusive to other moral views and, therefore, cannot be neutral. A naked wall has a non-religious connotation in that such a wall explicitly excludes, for example, the beliefs of

²⁵ Domingo 2013:388. Domingo adds that: 'Dworkin absolutizes a reductive and rationalistic model of freedom of religion, meticulously avoiding any transcendent meaning and underestimating any idea of God. This theoretical strategy, rather than fairly protecting religious freedom, gives rise to a model of uniform liberal political society in which the *principles of pluralism and self-determination* are not sufficiently respected, at least in their social dimension,' *ibid.*, 391 (emphasis added).

²⁶ *RwG* 138.

Christians or Muslims.²⁷ According to Joseph Weiler, a naked wall is not empty of belief expressions, since it is 'open to accommodate and endorse' non-religious beliefs to the apparent exclusion of religious beliefs.²⁸ With special relevance to democracies that naturally are inseparably connected to the furtherance of diversity, enforcing a blanket exclusion of passive forms of religious expression in public spaces (and hereby having a naked wall) is anything but neutral; rather such exclusion denotes an approach (or view of the truth) in opposition to anything religious and consequently being paradoxical to the tenets of democratic ideals themselves, such as the furtherance of plurality. This is why the judgment in *Lautsi and Others v. Italy*²⁹ is supported in that if the removal of crucifixes from the classroom walls of public schools in Italy were to be an order of the said Court then this would surely have comprised an averse approach (or view of the truth) towards religious freedoms. Having said this, it is argued that if there were to be convincing and well-supported calls for the inclusion of other orthodox religious or non-religious forms of expression (together with that of the crucifixes) on the walls of such classrooms in Italian public schools, then such calls should be accommodated to fulfill the expectations of tolerance and diversity (and this irrespective of the dominant Catholic ethos in Italy). In other words, the concern here is the enforcement of 'nakedness' in public spaces rather than the cultivation of inclusivity in democratic societies. In addition, as Stephen Carter points out, Dworkin is surprisingly silent on the presence of non-religious or 'secular' symbols that might violate the general right to ethical independence.³⁰ Many forms of passive expression might initially seem to be non-supportive of a belief, yet on deeper reflection bring about the realisation that some or other foundational belief is represented. An example in this regard would be a plaque against a courthouse wall, expressing the doctrinal tenets of 'liberty (*liberté*), equality (*égalité*) and fraternity (*fraternité*)', ideological tenets emanating from the French Revolution (popularly accepted as foundational to humanist ideologies).³¹ Joseph Weiler comments that:

²⁷ Support of this understanding is found in Justice Bonello's concurring judgment in *Lautsi and Others v. Italy* [European Court of Human Rights (Grand Chamber), 30814/06 (GC), 18 March 2011], which dealt with whether 'crucifixes' may be displayed on the walls of public schools in Italy. According to Justice Bonello, the removal of crucifixes from the walls of Italian public schools would not be a means to ensure neutrality in the classroom. Instead, such a removal would impose a 'crucifix-hostile philosophy over the crucifix-receptive philosophy', par. 3.6.

²⁸ J.H. Weiler, 'Lautsi: A Reply' (2013) 11(1), *International Journal of Constitutional Law*, 230.

²⁹ European Court of Human Rights (Grand Chamber), 30814/06 (GC), 18 March 2011.

³⁰ Carter, 'The Challenge of Belief', 1221. This also takes into consideration Dworkin's referral to the American judiciary, which confirmed that 'secular humanism' should be viewed as a religion. See *RwG* 4-5.

³¹ Here the comment by Joseph Weiler is apt, namely 'displaying in the classroom the portraits of "heroes" of the secular State (in other words, "purely" cultural symbols) also does not comply with the broad interpretation of State neutrality (according to which the space must be free from religious symbols). Why is it more neutral to hang Voltaire's portrait on the wall promoting the ideals of "liberty, equality, and fraternity" than to display the crucifix? Why does it not violate the principle of neutrality if other ideological symbols (such as the universally used peace

'At the entrance of every elementary school in France, you will find inscribed: *Liberté, Égalité, Fraternité* – the battle cry of the French Revolution. I would be delighted to send my children to a school which displayed such rousing words, embodying such ideals. But if I were a Monarchist, I might feel, well, upset. Were I a Monarchist and were to complain to the school board of the city or region, I would be told: win the next election, and have it removed, and then you can put up instead, *La France est Moi*. I would never dream of telling my children that *Liberté, Égalité, Fraternité* is a neutral principle. On the contrary, it is an ideological position which I favor, and for which much blood was spilled. I would mobilize to defend it – democratically, of course – and hope my children would be equally so mobilized. But neutral?'³²

Dworkin's fervour for the limitation of religion in the public sphere, thereby serving the idealistic endeavour towards neutrality, and that such neutrality is ruled by a universal reason, leads him towards supporting the inclusion of a non-religious ideology in the public sphere and in the process the marginalization of religion takes place. Consequently, Dworkin's endeavour to level interests related to foundational beliefs ends up in a futile exercise in balancing such interests and forms part of what Michael Perry refers to as 'liberalism's continuous failure in finding the Holy Grail of official normative impartiality'.³³

4. Recommendation

Bearing the above in mind, it is recommended that for example, the inclusion of the placing of the Ten Commandments against a courthouse wall be allowed, where such inclusion does not exclude other forms of expression such as, for example, a painting depicting the French Revolution and on which the humanist doctrine of liberty, equality and fraternity are inscribed. Such a generous and inclusive approach substantially overlaps with

sign) are displayed instead of religious ones?', cited in András Koltay, 'Europe and the Sign of the Crucifix: On the Fundamental Questions of the *Lautsi and Others v. Italy Case*', 355-382 in Jeroen Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden & Boston: Martinus Nijhoff Publishers, 2012), 367.

³² Weiler, 'Lautsi: A Reply', 230. In the words of Richard Duncan, 'a naked public square, open to an abundance of secular displays but cleansed of all religious displays, may be neutral among religions – all of which are excluded from public culture – but is most certainly anything but neutral between religion and non-religion, between religious and nonreligious displays. In a pluralistic society, a neutral public culture should reflect not merely five hundred points of strictly secular light, but rather a thousand points of both religious and secular light', Richard F. Duncan, 'Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto' (2013) 18, *Texas Review of Law & Politics*, 277-278. Also see *ibid.*, 279.

³³ See Perry, 'A Critique of the "Liberal" Political-Philosophical Project', 231.

the idea of ‘open neutrality’. Stijn Smet explains this open neutrality as ... *principally allowing all (non-)religious convictions and their symbols in the public sphere*. Since it is also premised on equality, the aim of neutrality – ensuring equal respect for the convictions of all citizens in a pluralistic democratic society – is maintained. Under open neutrality no particular (non-)religious view is favoured, nor disfavoured. At the same time, the conception of secularism based on open neutrality has the advantage that it takes everyone’s freedom to manifest his or her religion seriously.³⁴

According to Iain Benson, what is required is:

‘a reconfiguration based upon the re-understanding or re-imagining of law in relation to alternative frameworks. Law needs to let religion do its job. Religions, on the other hand, need to let the law do its job. The symbiotic relationship will be made easier once the law starts to speak in encouraging ways about religion.’³⁵

This also relates to the inclusion of passive forms of religious expression in the public sphere, such as in shopping malls, public schools and universities, parks, theatres, town and city halls as well as recreational venues. Such reconfiguration and re-understanding will come with its challenges, but such challenges far outweigh the marginalisation flowing from a restrictive approach towards religion, as demonstrated by Dworkin’s approach, and that runs contrary to the progression of diversity. Such progression of diversity is what John Inazu speaks of as acting as a unique counterweight to consensualist proposals that have arisen, with Inazu calling for embracement of a deep difference in both law and society.³⁶ Inazu argues that the government has a responsibility toward protecting society against substantive harm, a harm that constitutes ‘violence

³⁴ Stijn Smet, ‘Freedom of Religion v. Freedom from Religion: Putting Religious Dictates of Conscience (Back) on the Map’, 113-142 in Jeroen Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden & Boston: Martinus Nijhoff Publishers, 2012), 134 (emphasis added). In the words of Richard Duncan, ‘a naked public square, open to an abundance of secular displays but cleansed of all religious displays, may be neutral among religions – all of which are excluded from public culture – but is most certainly anything but neutral between religion and non-religion, between religious and nonreligious displays. In a pluralistic society, a neutral public culture should reflect not merely five hundred points of strictly secular light, but rather a thousand points of both religious and secular light’, Duncan, ‘Just Another Brick in the Wall: The Establishment Clause as a Heckler’s Veto’, 277-278. Also see *ibid.*, 279.

³⁵ Iain T. Benson, *An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion* (Unpublished PhD thesis, University of the Witwatersrand, 2013), 161.

³⁶ John Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference* (Chicago: Chicago University Press, 2016), 6-7.

and criminal activity'.³⁷ This implies that practices potentially resulting in instability,³⁸ disruption³⁹ or offence,⁴⁰ or practices that may lead to emotional, psychological or reputational injury (save practices constituting defamation or libel),⁴¹ should not serve as qualification for prohibiting certain practices – the practice needs to be *substantively disadvantageous* to merit limitation or prohibition.⁴² Following this understanding, passive forms of religious expression in public spaces generally do not fuel violence or result in criminal activity and should, therefore, be included and tolerated in democratic societies. This is part of the hallmark of what plurality (and, by implication, tolerance), an essential attribute of democracy, is all about.

5. Conclusion

Dworkin's argument for the limitation of religious freedom in the public sphere is symptomatic of an approach that substantively and unfairly relegates religion to the private sphere. This is of relevance regarding the inclusion of passive forms of religious expression in the public sphere. The inclusion of passive forms of religious expression in the public sphere has

³⁷ Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference*, 48.

³⁸ Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference*, 52.

³⁹ Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference*, 58.

⁴⁰ Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference*, 101.

⁴¹ Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference*, 95.

⁴² This slots in with William Marshall's comment regarding American jurisprudence, namely that 'the establishment clause claim that governmental use of a religious symbol improperly endorses religion is, at least in part, a claim that the religious symbol *offends* non-adherents to the favored religion', William P. Marshall, 'The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence' (1991) 66(2), *Indiana Law Journal*, 352 (emphasis added). In this regard, Marshall comments that neither 'the establishment test nor its free exercise test, explicitly mentions offense as a relevant factor', and yet says Marshall, 'offensiveness' has been inextricably connected by the US judiciary to both of these inquiries, *ibid.*, 354. Marshall adds that it is difficult to define what precisely the meaning should be pertaining to the concept of 'offense', *ibid.*, 353. Added to this, Marshall emphasises that there are many activities performed by the government that offend, and yet such activities enjoy acceptance, *ibid.*, 358-359. In this regard, the following are presented as examples: decisions to invade another State; decisions to use fluoridated water or to trade with a State that substantively violates the human rights of its people; the funding of abortion; the erection of monuments dedicated to wars; and the incorporation by states in the US of the Confederate symbols in their flags and public buildings and dedications to the Unknown Child. All these offend sectors of the community, such as pacifists, pro-lifers or blacks, *ibid.* Also see *ibid.*, 366. What Marshall calls for are elements of 'tangible disability' and not merely a psychological affront to constitute the limitation of a right (such as religious freedom), *ibid.*, 366. Bearing this in mind, Marshall warns that a judiciary 'that upholds intolerant responses to offensive stimuli will result in intolerance being legitimated as an appropriate means of response', *ibid.*, 375. Related to this, Marshall states that 'religion clause jurisprudence should resist the temptation to still expression solely because it is provocative', 376.

everything to do with a society that prides itself on diversity and freedom. Public spaces in democratic (and by implication, plural) societies⁴³ are expected to reflect the beauty of the multiplicity of divergent (and overlapping) belief-driven interests, including those of the religious and, therefore, applies to the inclusion of passive forms of religious expression as well. Deeper forms of diversity are required to further the democratic project, and this especially pertains to the protection of the right to freedom of religion in the public sphere. This article has argued for the inclusion of passive forms of religious expression in public spaces which in turn serves as a good example of instances where the furtherance of diversity can be accomplished even though this may be difficult and uncomfortable at times.

Bibliography

Benson, I.T., 'An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion' (Unpublished PhD thesis, University of the Witwatersrand, 2013).

Carter, S.L., 'The Challenge of Belief' (2014) 94(4), *Boston University Law Review*, 1213-1223.

De Freitas, S.A., 'Book Review: Religion without God' (2013) 38(2), *Journal for Juridical Science*, 142-151.

Domingo, R., 'Religion for Hedgehogs? An Argument against the Dworkinian Approach to Religious Freedom' (2013) 2(2), *Oxford Journal for Law and Religion*, 371-392.

Duncan, R.F., 'Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto' (2013) 81, *Texas Review of Law & Politics*, 255-301.

Dworkin, R., *Is Democracy Possible Here? Principles for a new political debate* (Princeton and Oxford: Princeton University Press, 2006).

⁴³ The author is well aware of the different types of relationships there are pertaining to 'religion and the state' when looking at the plethora of constitutional democracies around the world. In this regard, there are democracies classified as for example, secular whilst others are classified as non-secular, and sometimes there may even be contrasting views on whether a specific democratic nation is secular or non-secular. Dworkin for example, refers to religious nations that tolerate the non-religious and secular nations that tolerate religion, see Dworkin, *Is Democracy Possible Here? Principles for a new political debate*, 55-57. Democratic societies, for purposes of this article, denote those democratic nations where the Rule of Law is supreme and consequently where aspirations towards higher levels of diversity are implied.

Dworkin, R., 'Einstein Lectures: Religion without God' (2011), <https://cast.switch.ch/vod/channels/1gcfvlebil>, accessed on 15 February 2017.

Dworkin, R., *Religion without God* (Harvard University Press, 2013).

Horwitz, P., '“A Troublesome Right”: The “Law” in Dworkin's Treatment of Law and Religion' (2014) 94(4), *Boston University Law Review*, 1225-1240.

Inazu, J.D., *Confident Pluralism: Surviving and Thriving through Deep Difference* (Chicago University Press, 2016).

Koltay, A., 'Europe and the Sign of the Crucifix: On the Fundamental Questions of the *Lautsi and Others v. Italy Case*' in J. Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden/Boston: Martinus Nijhoff Publishers, 2012).

Macintyre, A., *After Virtue* (3rd edn University of Notre Dame Press, 2007).

Marshall, W.P., 'The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence' (1991) 66(2), *Indiana Law Journal*, 351-377.

Perry, M.J., 'A Critique of the “Liberal” Political-Philosophical Project' (1987) 28, *William and Mary Law Review*, 205-233.

Smet, S., 'Freedom of Religion v. Freedom from Religion: Putting Religious Dictates of Conscience (Back) on the Map' in J. Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden/Boston: Martinus Nijhoff Publishers, 2012).

Van Groningen, J., 'Thou Shalt Reasonably Focus on its Context: Analyzing Public Displays of the Ten Commandments' (2004) 39(1), *Valparaiso University Law Review*, 219-272.

Weiler, J.H.H., 'Lautsi: A Reply' (2013) 11(1), *International Journal of Constitutional Law*, 230-233.