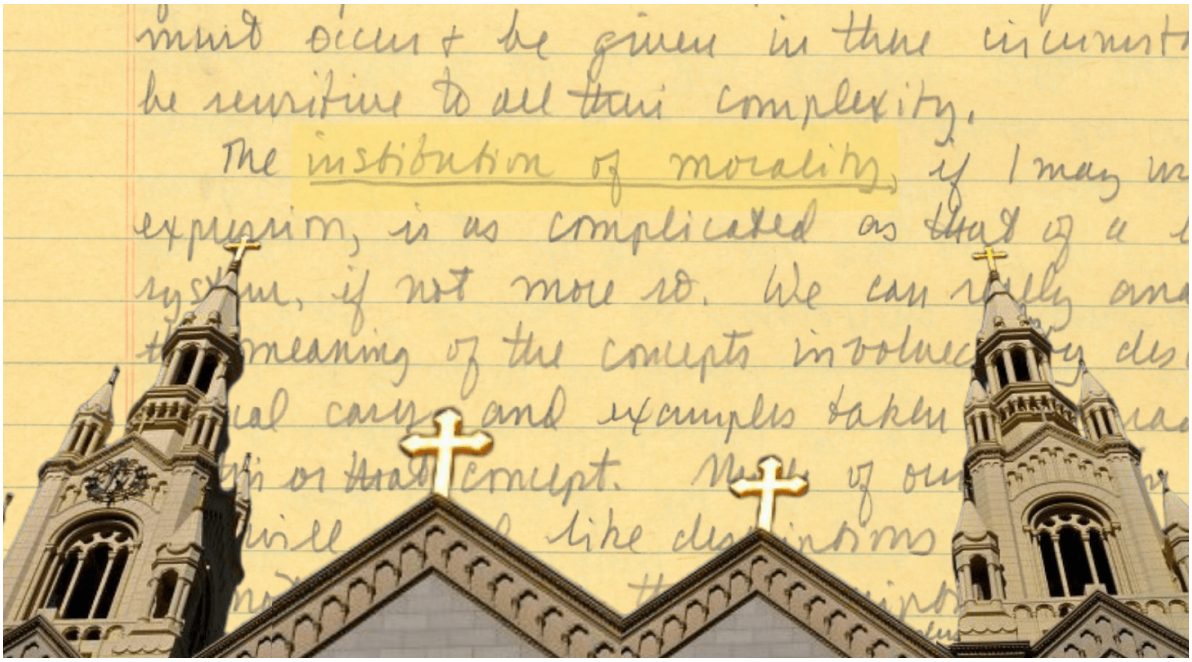
INSTITUTIONS AND FREEDOM

Rawls' critique of the secular state

Faviola Rivera Castro



Manuscript from the John Rawls Papers (Harvard University Archives). Graphic design: Maria Oliva Campabadal (CETC).

In the book *A Theory of Justice*, John Rawls condemns the secular state for failing to adequately protect the "freedom of conscience" [1]. He points out that justice as fairness rejects this type of institutional order as it is incompatible with the principles of justice that it proposes. Given that secular states have always established constitutional protection of freedom of conscience, Rawls' critique highlights a fundamental disagreement on how to interpret this freedom and the institutions necessary for its protection. In this article, my aim is to identify and examine the causes of this disagreement [2].

The concept of secular state

By "secular state", we mean an institutional order based on the protection of freedom of conscience and the equality of people. In pursuit of adequate protection for this freedom, a secular institutional order keeps the state separate from the church within a legal framework whereby the former has supremacy over the latter, and maintains the independence of official institutions and discourse with respect to expressions of adherence to or criticism of religion (whether in general or of one in particular). Independence from

the church has historically been understood as church-state separation, while the independence of official institutions and discourse around expressions of adherence to or rejection of religion has been understood as being “neutral” on the matter [3]. The central mission of this secular institutional order is to impede any form of official recognition of churches and religions and correct those that still exist.

Secular church-state separation means, above all, that the former does not operate as an instrument to further interests and purposes of a religious nature. This separation, thus understood, impedes the state from supporting any religion or granting material resources to any church; prevents churches or ministers of worship from participating in the performance of official functions, such as the organisation of official education or the design of official codes of ethics; prevents ministers of worship from acting as public servants; prevents the coercive power of the state from being used to force compliance with religious demands or prohibitions; prevents political parties from being affiliated with a church; prevents ministers of worship from being candidates for positions of popular election; prevents the occupation of a public office from being conditioned to the membership or rejection of any church, and impedes the state from interfering in the internal organisation of worship, among other measures employed to establish the state’s independence from the churches.

The state’s supremacy over the church means the latter are subject to official regulation, must obey official provisions and be open to the possibility of internal reform to comply with constitutional, legislative and judicial decisions. Secularism implies that the church must be made compatible with constitutional democracy. Separation, by itself, requires reforms aimed at preventing the church from engaging with political power in order to use it for purposes of a religious nature. Furthermore, although the state is obliged not to interfere in internal affairs related to the organisation of worship, it is also obliged to assert individual rights against the church’s practices in cases of conflict. For example, the state must assert individual rights against church labour practices that are incompatible with non-discrimination based on gender, sex, or ethnicity. Accordingly, the church must ensure the internal organisation of religious worship is compatible with the protection of the individual rights of the participants.

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In a secular state, the protection of freedom of conscience and the equal treatment of people in religious matters require restrictions on religious freedom in official spaces. Because of these restrictions on religious freedom, Rawls argues that freedom of conscience is not adequately protected. Although his objection refers implicitly to French republican secularism, his reasoning, if correct, would be valid for secular states in general, as I have just described.

Freedom of conscience

Rawls assumes the legal definition of freedom of conscience, according to which "individuals have this basic liberty when they are free to pursue their moral, philosophical or religious interests without legal restrictions that require them to engage or not to engage in any particular form of religious or other practice, and when others have a legal duty not to interfere" (*A Theory of Justice*, 177). In relation to religion, this principle only excludes the use of civil coercion to force or impede participation "in some particular form of religious practice".

His objection to the secular state occurs in the second part of *A Theory of Justice*, when the participants in the original position choose the institutions that will apply the principles of justice (*A Theory of Justice*, 171). For the application of the first principle, which specifies the basic liberties and rights of citizenship, the original position is conceived as a constituent congress. The veil of ignorance is partially removed to allow, in addition to the knowledge of the principles of social theory (which had already been permitted when choosing the principles of justice), general and relevant facts about the society to which they belong (natural circumstances and resources), the degree of its economic development and its political culture and institutional structure (*A Theory of Justice*, 172-3 & 175).

His critique of the secular state is made from this perspective. Rawls repeatedly mentions the free practice of religion, which he also refers to as "religious freedom" (*A Theory of Justice*, 181, 186-187). This suggests the participants in the original position, conceived as a constituent congress, deliberate based on information from the political culture and institutional structure of the United States. From this perspective, Rawls assumes an interpretation of freedom of conscience that places great emphasis on the free practice of religion. As it is well known, this is a freedom protected in the first amendment to the US Constitution. Conventional interpretations of the United States constitution dictate that protecting the free practice of religion requires the state to abstain from obstructing, without due justification, anything that the church, religious associations or individuals consider part of their spiritual practice.

> In his critique of the secular state, Rawls assumes an interpretation of freedom of conscience that places great emphasis on the free practice of religion

My point is that, by all reasoning, the secular state would be unacceptable from the perspective of the traditional school of political thought and practice in the US. However, the possibility remains that a secular institutional arrangement, with its restrictions on religious freedom in official spaces, could be acceptable, from an open perspective, to the political culture and institutional structure of states that have affirmed secularism.

The secular interpretation of freedom of conscience and the institutions necessary for its protection has always responded to a type of political conflict in religious matters that is very different from the one that Rawls assumes. While he bases his argument on the conflicts derived from the diversity of religious groups and the social demand for the free practice of religion, secularism has always been motivated by the political challenge posed by powerful churches or religious associations that seek to make use of official institutions to further religious interests and purposes. The secular response to this political challenge has always been focused on preventing any form of official recognition for churches and religions and ensuring that official institutions remain independent from them within a legal framework whereby political authority has supremacy over the church [4].

In response to this challenge, the secular interpretation of freedom of conscience, unlike the one Rawls favours, does not privilege the free practice of religion. While the protection of religious freedom places great value on the freedom to practice any religion, the secular protection of freedom of conscience does not privilege the practice of any religion over the freedom to reject all religions. A secular conception does not presuppose that the freedom to affirm and practise any religion has greater intrinsic value than the freedom to reject all religions and live accordingly. From the perspective of the constitutional protection of freedom of conscience in a secular state, both ways of exercising it are equally legitimate and on the same normative plane.

The protection of freedom of conscience, thus conceived, is perfectly compatible with a secular state's restrictions on the practice of religion in official spaces in order to maintain the independence of official institutions and discourse with respect to churches and religions. Among these restrictions, which go far beyond the "common interest in public order and safety", are, as is well known, restrictions on the freedom of action of both churches and individuals in public service positions. These restrictions prevent churches and ministers of worship from participating in the performance of official functions, such as the organisation of official education, the design of official codes of ethics, or any other involvement in public administration. Similarly, these restrictions prevent acting public servants from expressing their personal positions of adherence to or criticism of religion (in general or to any one in particular) in their official communications and from appealing to values of a religious nature to found official provisions, whether legislative, judicial or for public policy. With restrictions of this type, the secular state prevents the free practice of religion in official spaces that must be kept free of any expressions of *official* adherence to churches and religions, as well as criticisms of them. These types of restrictions are compatible with freedom of conscience insofar as they do not require individuals to "participate or refrain from participating in any particular form of religious practice".

> Religious diversity is central to secularism: religious minorities often highlight the multiple ways in which official recognition of majority or dominant churches and religions takes place, especially through social practices

Although the demand for freedom of conscience in a secular state is not directly motivated by conflicts of religious diversity, this does not mean the latter is not relevant to secularism. Far from it, even minimal religious diversity is central to secularism in two main ways. Firstly, it is often religious minorities who highlight the multiple ways in which official recognition of majority or dominant churches and religions takes place, especially when this recognition presupposes widely accepted social and religious practices. Secondly, religious diversity gives rise to the need for equal treatment in religious matters, which, today, is a fundamental commitment of the secular state.

Conclusions

The conclusion I want to stress is that there is no single correct interpretation of what freedom of conscience requires and which institutions are necessary for its protection. Different interpretations may be appropriate in relation to the different types of political conflicts from which they arise and propose to resolve. In light of the political conflict to which secularism responds, freedom of conscience cannot be understood as the free practice of religion. Given that the political problem lies in the need to contain powerful churches that seek to instrumentalise the state for their own religious purposes and interests, the central requirement is to prevent all forms of official recognition of churches and religions.

In short, in rejecting the secular state, Rawls assumes that any correct interpretation of freedom of conscience and the institutions necessary for its protection must be drawn from the type of political conflict in religious matters that exists in his own country. The underlying problem with this assumption is not its rejection of secularism but the implicit rejection of the diverse types of political conflict in religious matters that motivate or may motivate the need to protect freedom of conscience. The recognition of this diversity calls for greater modesty when presenting the scope of his reasoning in favour of freedom of conscience and the institutions necessary for its protection. While his reasoning may be correct from the perspective of the type of political conflict he bases his argument on, it is irrelevant for the purposes of the secular state. In fact, one of the fundamental teachings of his theory of justice throughout the entire work is, precisely, that any conception of justice can only be correct when evaluated in light of the political problem it intends to resolve.

REFERENCES & FOOTNOTES

1 — Rawls, John (1999). *A Theory of Justice*, revised edition. Cambridge, Mass.: Harvard University Press.
2 — Defenders of contemporary secularism often identify it with constitutional democracy, by which rationale even justice as fairness would be a secular proposal. However, Rawls’ argument raises the need to examine the relationship between secularism and constitutional democracy.

3 — Secular religious neutrality does not signify the equal treatment of different churches or religions. Nor does it imply neutrality between religion and non-religion. I'm referring to the specific sense in which secular neutrality, as opposed to religion, is understood in Rivera Castro, Faviola (2021). "Neutrality without Pluralism". *European Journal of Political Theory*, 20 (2): 249-272.

4 — Diego Valadés has insisted on this point concerning the state's supremacy over the church. See Valadés, Diego (2021). *Estado laico. Reflexiones constitucionales* (Secular state. Constitutional reflections). Mexico: Tirant lo Blanch.



Faviola Rivera Castro

Faviola Rivera Castro holds a PhD in Philosophy from Harvard University and is a professor in the Department of Philosophy at the National Autonomous University of Mexico (UNAM). Her research interests revolve around the History of Modern Moral and Political Philosophy, with a special focus on Liberalism and Social Contract Theory and delving into authors such as Hume and Kant. She is also a specialist in Contemporary Political Philosophy (Liberalism, Citizenship and Global Justice).