The Structure of Pluralism

On the Authority of Associations

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

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It furthers the University's objective of excellence in research, scholarship,
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First Edition published in 2014

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013953297

ISBN 978–0–19–967388–9

Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Introduction

> L'imagination ne saurait inventer tant de diverses contrariétés qu'il y en a naturellement dans le cœur de chaque personne.
>
> —François de La Rochefoucauld

Many associations in liberal democracies claim to possess—and attempt to exercise—a measure of legitimate authority over their members, and assert that this authority does not derive from the magnanimity of a liberal and tolerant state but is grounded, rather, on the common practices and aspirations of those individuals who choose to take part in a common endeavour. This endeavour, moreover, they often defend as one motivated by values different from (and sometimes incompatible with or hostile to) those that purport to justify liberal and democratic institutions. Some of these associations may covertly or overtly want to supplant the values and institutions of liberal democracy with their own, but most would simply like their authority and autonomy recognized, acknowledged, and respected within the broader society. Beyond a demand for toleration, theirs is an appeal to *political pluralism*: to the coexistence of several sources of (putatively) legitimate authority within a territory, or more accurately, over a part of its population, among which the authority of the state is but one among many such sources.

Political pluralism is a coherent philosophical tradition that makes distinctive and radical claims about the sources of political authority and about the structure of the relationship between associations and the state. The coherence of these claims is well-grounded in both historical ideas of sovereignty and in contemporary philosophical accounts of authority. The pluralist account recommends an approach to legal structures that can accommodate the relations between associations and the state in ways that correspond to the self-understanding of members of various organized groups and to the demands of a stable social order. It is nonetheless aware that there is an irreducible conflict between associations that claim independent authority over their members, and the state, which can admit no challenge to its jurisdictional supremacy.

This book is a response to recent developments in political and legal philosophy and the (re-)emergence of conflicts over state and associational authority. Over the last two decades, there has been a considerable revival

of interest in the work of the early British pluralists, and an attempt to rehabilitate their ideas about the autonomy of associations as a more accurate account of social phenomena and for its contribution to the maintenance of a free and diverse society. Most participants in this revival have approached pluralism as a chapter in the history of ideas, or have mined pluralist theses for their support of democratic governance or their implication to current policy debates, and on both fronts they have made important contributions. But too little attention has been paid to explaining the actual content of pluralist propositions and to resolving their ambiguities and moments of incoherence through a rigorous and systematic reconstruction of pluralist arguments.

Despite this resurgence, many of the problems that plagued the original pluralist literature remain unaddressed. First, the central contention of the British pluralists regarding the inherent authority of associations has been cited, even approvingly, by contemporary theorists, but their arguments have not been carefully reconstructed: the central pluralist concepts have not been subjected to rigorous conceptual analysis and insufficient work has been done to point out what is distinctive about the pluralist critique, what sets it apart from ordinary liberal defenses of freedom of association. Second, although one of the central theses of political pluralism is that groups have a source of legitimate authority independent of the state, the grounds of that authority are unclear. The British pluralists often grounded such authority on medieval accounts of natural law or on the simple sociological fact that groups exist and people have an allegiance to them. Third, the idea of sovereignty is invoked as a concept by both pluralists and their opponents—pluralists deny it to the state and claim it for associations, while their opponents do the reverse—yet there has been no convincing attempt to provide a definition of the concept which reconciles the pluralist idea of multiplicity with the common understanding of sovereignty as final and absolute. Scholarly interest in pluralism has coincided with significant economic, religious, educational, and political developments that could be fruitfully addressed by the pluralist paradigm: the assertion of constitutional rights of free expression by corporations in the United States, the various crises in the Roman Catholic Church and the Anglican Communion, the recent attempts by liberal governments on both sides of the Atlantic to control both the content of and entry into institutions of religious instruction, the broader questioning of the independence of academic institutions, and the proliferating conflicts of authority between federal and sub-federal orders in liberal democracies. The time is right for a thorough reassessment of the political pluralist tradition.

My purpose in this book is analytical and conceptual rather than historical or prescriptive. I aim to elucidate the arguments of the leading figures in the

political pluralist tradition and their present-day sympathizers, explain how pluralist arguments cause us to re-examine our ideas of authority and sovereignty, and examine concrete legal and political institutions that can structure interaction and intercourse both among associations and between them and the state. I do so through an interdisciplinary approach which, though grounded in analytical political and legal theory, draws extensively from current debates on meta-ethics, moral psychology, legal sociology, and comparative legal doctrine. In order to build a rigorous pluralist theory, I undertake a reconstruction of the arguments of both early twentieth-century and present-day political pluralists, a regrounding of the pluralist critique of sovereignty in the analytical framework of contemporary legal positivism, and a projection of a pluralist polity onto legal and institutional structures which at once acknowledges the possibility of radical conflict between associations, individuals, and the state, yet makes the terms of this conflict intelligible and negotiable. As such, this project stands, on the one hand, against the prevalent position in political theory that upholds the primacy of the state as an incontestable arbiter of disputes in society and, on the other, against various agonistic positions which deem the plurality of cross-cutting loyalties and allegiances of modern society to be impervious to a stable and structured constitutional and legal compromise.

Yet, despite my purpose, I acknowledge that legal and political pluralism have broader theoretical implications both for our understanding of modern liberal democracy and for our moral deliberation on the limits of state action and the obligations of citizenship. As to the first, the associations that I most often refer to in the book are churches, universities, professional and trade groups, and cities. These associations are the ones that have in the past and continue to make the boldest claims of autonomy, and that have the best developed institutions through which to exercise authority over their members. But it should not escape anyone that they are also holdovers of the 'ancient constitution', remnants of medieval constitutionalism.[1] It was the Roman Catholic Church that first asserted corporate independence from secular authority, and despite its eventual reconciliation with the liberal and

[1] Two associations that are nearly absent from the book, but which could also be brought under the pluralist paradigm, are the family and the business corporation. There are good reasons to include both, but ultimately they present problems that I think are unique to each and are too complex for the quick attention that I could give them here. It is difficult to see the family as *an* association, rather than a series of associations similarly constituted; in this way it is even different from a series of churches, since families do not usually claim the same kind of authority over their members or intend to convert members of other families. Business corporations are also different though mainly in the instrumental use to which their members put them, which contrasts with the inherent value that members of other associations attribute to their groups. It is not clear, too, that businesses would like the kind of meta-jurisdictional authority that some groups claim since it may make them less reliable as vehicles for investment. In any case, those are subjects of a different study.

democratic state, it still makes the same claims. Academics, likewise, jealously guard their collegial institutions and resent as illegitimate (and not just ill advised) state and corporate incursion into the university, although perhaps with less zeal than that displayed by the masters and students of the University of Paris in the great strike of 1229 CE. Modern constitutionalism was born of these twelfth century struggles too, not only of the settlement of the Wars of Religion four to six centuries later. If my account of political pluralism is convincing it should also suggest a re-examination of the genealogy of liberal democracy and a reconsideration of the exclusive focus on the Enlightenment as the fount of all that is modern.

As to the normative implications, they are suggested in chapter 8, but should be developed further. If political pluralism is true, then some of the central claims of republicanism must be false, or at least be subject to perpetual contestation. Rousseau was right to note that any sufficiently strong loyalty to any group but the political community would prevent the state's monopolistic exercise of sovereignty. That this is so is a salutary effect of pluralism. If the state acknowledges the authority of associations and accepts that one of its functions is to facilitate the associative ties of its citizens—ties which it neither defines nor controls—then direct regulation of the conduct and policy of groups should give way to policies that set incentives or encourage alternative sources of public goods. Conversely, associations that acknowledge the state as facilitator of their normative structure should accept certain normative conditions for reciprocal attenuation of conflict.[2]

The book is divided into three parts. The first lays out the idea of a pluralist argument and explains its central theses. For associational pluralism, these are the claim that the authority of formally constituted associations is foundationally independent of any other authority, even that of the state, that its basis is incommensurable with that of the state, and that these two factors always harbor the possibility of a tragic conflict between the claims to authority of various associations. I then use this conceptual framework to distinguish pluralism from other arguments that have accorded a significant role to groups of various kinds: multiculturalism (in chapter 2), subsidiarity (in chapter 3), and associative democracy (in chapter 4). I find that none of these paradigms takes associations seriously as foundationally autonomous.

[2] The best development of such conditions that I have encountered is Dwight Newman's account of 'community conditions' in *Community and Collective Rights* (Hart, 2011). These involve a Service Principle—'a normative requirement that collectivities serve their member's interests' (107)—and a Mutuality Principle—the principle that 'a collectivity's claims to rights must be respectful of equivalently weighty interests of non-members' (131).

In the second part, I examine the idea of the authority of associations and its relation to the authority of the state. I begin (in chapter 5) by tracing the conception of sovereignty to its medieval and early modern antecedents, and explain why the medieval constitutionalist conception, which makes legal norms constitutive of sovereign authority, is preferable to the early modern voluntarist conception. With the idea of legal authority in mind, I turn to a reconstruction of pluralist authority from the analytical framework of contemporary legal positivism. I first refute (in chapter 6) the criticism that legal pluralists, especially legal anthropologists, have lodged against positivism as antithetical to a pluralist understanding of law and then justify (in chapter 7) the intelligibility of associational authority on a positivist foundation. I finish this part (in chapter 8) by offering an account of the authority of the state under conditions of pluralism.

The last part is concerned with the idea of group personality, which was a central tenet of the British pluralist movement but has fallen out of favour. I first explain (in chapter 9) the arguments that pluralists like John Neville Figgis advanced in defence of the idea that associations possessed a personality analogous to that of individual human beings. Through the latest philosophical research on group agency I then defend (in chapter 10) the intelligibility of a robust conception of group moral personality that entitles groups to claim legal personality as a matter of right, not of convenience or state concession. I conclude this third part by illustrating (in chapter 11) how the institutions of private property can help in the exercise and development of the personality of groups.

I conclude on an uncertain note. Pluralism does not recommend specific institutions, although it can pass judgment on their adequacy to capture the inner life of associations. It remains true, however, that no set of legal institutions can capture this completely and retain its legitimacy from the perspective of the state. Some unresolved tension remains always and can be a source of freedom or of conflict depending on the willingness of political and legal actors to recognize the limits of their claims to authority.