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The Tangled Law and Politics of Religious Freedom

Peter G. Danchin*

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For Kant, freedom was not the indiscriminate realization of one's passions or interests — indeed, this was immaturity. . . Freedom could exist only as a *looking beyond such contingencies*. To be free was to make one's will harmonious to universal reason — a reason according to which one should always act in accordance with what one can simultaneously will as universal law. Where enlightenment lay in reliance on reason, *freedom consisted in the acceptance of what reason dictated as duty*.¹

Religious freedom is an increasingly contested and divisive issue in national and international politics. In *Global Tangles: Laws, Headcoverings and Religious Identity*, Professor Yildirim critically examines what we mean by the right — not just the *liberal*, but the *human* right — to religious freedom in the context of laws that “regulate the female body. . . in the name of grand narratives such as religion, national identity and perhaps the most troublesome, in the name of women's rights and gender equality.”² In the course of the Article, four interrelated themes emerge which are the subject of this Essay.

I. Religious Freedom in International Law

Before proceeding, it is helpful first to discuss the basic logic and structure of religious freedom in international legal discourse. Two predominant features shape modern accounts of the right to religious freedom: first, a conception of political authority as “secular” and “neutral,” and second, a conception of the right in terms of “individual freedom.”³ The hegemonic dialectic between secular neutrality and liberal freedom ensures that the nature of the public sphere, whether within nation-states or in international law, is dynamically related to the scope of the right to religious freedom. As we shall see, the discourse is able to maintain its simultaneous — and ultimately paradoxical — claims to *uniqueness* (because “neutral” towards religion) and *universality* (because securing the “right” to religious freedom) by defining each concept in terms of the other.

A. Secular Neutrality

Consider the notion of neutrality. One of the basic tenets of religious freedom jurisprudence is that the state is required to be neutral “between religion and religion, and between religion and nonreligion.”⁴ The difficulty with this proposition is that it is in fact

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1. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 191 (2001) (emphasis added).
 2. Seval Yildirim, *Global Tangles: Laws, Headcoverings and Religious Identity*, 10 SANTA CLARA J. INT'L L. 52 (2012).
 3. For two recent influential accounts, see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007) (arguing for religious freedom in terms of “Equal Liberty”); MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* (2008) (describing “America's great tradition of religious freedom” in terms of the “essential idea” of “liberty of conscience”).
 4. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); see also *Lee v. Weisman*, 505 U.S. 577, 610 (1992) (Souter J., concurring) (stating that the Establishment Clause applies “no less to governmental acts favoring religion generally than to acts favoring one religion over others.”); see also *Lautsi v. Italy*,

impossible to realize in the governance of any actually-existing pluralistic nation-state.⁵ Not only do religious traditions differ greatly from each other regarding their beliefs, rituals, and practices, they also overlap with, and diverge from, a wide range of non-theistic traditions. This creates two sorts of difficulties for any exercise of state power.⁶

On the one hand, the state must adopt *some* stance toward and identify what falls within the category of “religion.”⁷ This cannot be done in a neutral way.⁸ On the other hand, the state must explain why its response to the first question does not apply equally to persons outside the specified category.⁹ The state is thus caught in a double bind whereby *any*

App. No. 30814/06, ¶ 60 Eur. Ct. H.R. (Mar. 18, 2011) available at http://www.echr.coe.int/echr/resources/hudoc/lautsi_and_others_v_italy.pdf (A majority of the Grand Chamber held that the right to religious freedom under Article 9 imposes a duty on the State of “neutrality and impartiality.”)

5. See WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2005).
6. Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 *Mich. J. Int'l. L.* 663 (2011).
7. The controversy concerns the proper *object* of the right to religious freedom in both national and international law. Like most national constitutions containing clauses guaranteeing freedom of religion, none of the major international and regional human rights instruments define the term “religion.” Increasingly, religious freedom is simply referred to as “freedom of conscience or belief.” This subtle shift in terminology reflects a double transformation in modern secular discourse, the first viewing religion as “conscience or belief” and the second viewing freedom of conscience as “autonomy”. See Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 *MICH. J. INT'L. L.* 663, 675-82 (2011).
8. The difficulty is that any attempt to define the scope and content of religious liberty will necessarily involve assumptions about the underlying nature of religion itself. We see this, for example, in Rawls’s notion of an “equal liberty of conscience” as part of a political conception of justice. The idea is that “by avoiding comprehensive doctrines (i.e., basic religious and metaphysical systems) we try to bypass religion and philosophy’s profoundest controversies so as to have some hope of uncovering a basis of a stable overlapping consensus.” JOHN RAWLS, *POLITICAL LIBERALISM* 151–152 (1993). But as Connolly has observed, the “word ‘avoid’ is revealing because it mediates effortlessly between a demarcation *established* by some philosophical means and one commended because its political acceptance *prior* to introduction of an impartial philosophy of justice would reduce the intensity of cultural conflict.” WILLIAM E. CONNOLLY, *WHY I AM NOT A SECULARIST* 22 (1999). In this move, the “word ‘religion’ now becomes treated as a universal term, as if ‘it’ could always be distilled from a variety of cultures in a variety of times rather than representing a *specific fashioning of spiritual life engendered by the secular public space carved out of Christendom.*” *Id.* at 23 (emphasis added). See also Danchin, *supra* note 6, at 675-80.
9. See Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 *HARV. L. REV.* 1869, 1873 (2009) (reviewing 2 KENT GREENAWALT, *RELIGION AND CONSTITUTION: ESTABLISHMENT AND FAIRNESS* (2008)). In modern accounts of religious freedom where “religion and religious institutions are understood to be subject to the encompassing (and secular) jurisdiction of the state. . . it is hard to explain why religion ought to be treated as a special legal category at all and, consequently, how it should be treated specially.” *Id.* One response is to concede that religious belief should not receive special legal treatment but rather something closer to deep moral conviction should be protected. See, e.g., *Welsh v. United States*, 398 U.S. 333, 360 n.12 (1970) (Harlan J., concurring) (holding that a law confining draft exemptions to claimants who believed in God was discriminatory on the basis of religion on the rationale that Congress was constitutionally required to show “equal regard for men of nonreligious conscience.”). This fails to explain why religious beliefs are often treated specially, for example when they are held to be distinctly burdened or under a special legal disability. Thus, on the basis of state neutrality, the government cannot promote religion (for example, by teaching or promoting religious ideas in public schools or using tax money to help religion) even if a majority of citizens wish it to do so. See *Smith, supra* note 7, at 1905 (stating that some account then needs to be given as to why religion is sometimes treated as “special and sometimes not”). For *Smith*, such an account “would likely require resort to the sorts of more ultimate beliefs that . . . [under a theory of secular equality] government is forbidden to evaluate or

response to either question, no matter how reasonable, will stand in tension with the opening premise of neutrality. This in turn generates different and often competing conceptions of neutrality.

Following the work of Ian Hunter on the political thought of the early modern Enlightenment,¹⁰ I have argued that the religious freedom jurisprudence of the European Court of Human Rights has been shaped by not one, but two rival traditions, each of which embodies different conceptions of neutrality and freedom.¹¹ In the first, older liberal tradition, the public sphere was understood in terms of *social peace* while religious liberty was conceived in jurisdictional terms. This early conception derived from a civil philosophy that sought to desacralize the state, and over time, led to the churches losing their civil and political authority, and to the gradual spiritualization of religion. In the second, later tradition, the public sphere was reconceived in terms of a *moral theory of justice* and religious liberty grounded in a complex (and unstable) notion of freedom of conscience. This conception derived from a metaphysical philosophical tradition that simultaneously sacralized reason and rationalized religion.¹²

These are complex stories both historically and normatively. The important point here is to see how, in each tradition, the concept of neutrality encompasses competing rationalist (whether premised on peace or freedom) and dialogic elements (correlating with the varying histories and religio-political composition of specific political orders). In the former tradition, this double structure has resulted in politically negotiated religious settlements and varying church-state arrangements, which remain in existence in much of Europe today. In the latter tradition, it has generated a new secular morality and theory of liberal political order premised on distinctive (Protestant) conceptions of the individual, freedom, and religion, which stand in considerable tension with these religious settlements. In each case, the demands of rationality, reason, and their political implications for the state have differed along with the forms of negotiation (whether actual or imagined) between the secular and religious. As Connolly suggests, this demonstrates that “secularism is a *political settlement* rather than an uncontested dictate of public discourse itself”.¹³ In this respect, neutrality is the space where political settlements are contested and provisionally concluded. This has two significant implications for our understanding of religious freedom.

First, despite the national variations and theoretical differences between these traditions, each shares a conception of the public sphere and public reason on the one hand, and of the right to religious freedom on the other, which has been conceived *internally* to Western Christianity and its complex relationship with the rise of the “secular” European nation-state. For each tradition then, the neutrality of the public sphere (whether national or supranational) and the scope of the right to religious freedom should be understood as

act upon” with the result that “the constraints of modern secular discourse effectively preclude . . . offering any justification for . . . prescriptions beyond unconvincing appeals to supposedly shared [cultural or traditional] axioms or commitments.” *Id.*

10. See IAN HUNTER, RIVAL ENLIGHTENMENTS: CIVIL AND METAPHYSICAL PHILOSOPHY IN EARLY MODERN GERMANY (2001).

11. See Danchin, *supra* note 6.

12. See HUNTER, *supra* note 10, at 376.

13. Connolly, *supra* note 8, at 36 (emphasis added).

culturally and historically contingent, and neutral towards neither religion in general, nor distinct religious traditions in particular.

Hirschkind has thus observed that the close intertwining of Christianity with secular modernity has not caused any undue theoretical complications for contemporary theorists of religious liberty.¹⁴ Rather, it has confirmed Christianity's unique ability to transcend its own particularity (in the form of secular neutrality) and marked the inexorable rise of modern liberal political orders as a signal achievement of Latin Christendom. The result is that

[t]he incorporation of what had been modernity's other — religion — into its very fabric does not decenter the conceptual edifice of European modernity in any way that might allow a reconsideration of Europe's religious minorities, but on the contrary redoubles it, deepening the fundamental otherness of those who cannot inhabit its Christian genealogy. Both secular politics and private belief emerge as the inheritors of the arc of religion returning to itself.¹⁵

Second, while neutrality in the ethical sense of mutual justification is a necessary condition for religious freedom, the state, or supranational political authority, must at some point assert a position regarding the *limits* of both the neutrality of the public sphere and of the normative demands of mutual respect. Neutrality is thus a formal norm of *inclusion* within a particular political community, which, at the same time, is deployed to justify and legitimize acts of *exclusion*. The liberal technique for achieving this move is to transition seamlessly to the discourse of rights.

B. Liberal Right

By defining legal protections in terms of *freedom* of religion or by prohibiting *discrimination* on the basis of religion, legal inquiry is directed toward the meaning of "freedom" and "discrimination."¹⁶ To say that political authority is neutral towards religious groups and individuals regarding their claims for recognition, non-interference or nondiscrimination is also to say that it respects the right to religious freedom. The question then becomes how to construe the nature and scope of this right.

Again, the conception of the public sphere is indelibly linked to the nature and scope of the right. A jurisdictional account of religious toleration premised on the value of social peace will obviously generate a conception of the right differing considerably from a moral theory of religious liberty premised on freedom of conscience. However, in each case, the need to define

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14. See MARCEL GAUCHET, *THE DISENCHANTMENT OF THE WORLD: A POLITICAL HISTORY OF RELIGION* 3–6 (Oscar Burge trans., Princeton Univ. Press 1997) (1985); CHARLES TAYLOR, *A SECULAR AGE* 15, 20–21 (2007).
 15. Charles Hirschkind, *Religious Difference and Democratic Pluralism: Some Recent Debates and Frameworks*, 44 *TEMENOS* 123, 126 (2008) (noting further that on this argument "it turns out that the modern concept of religion as private belief conforms to religion in its essence" and that a "certain post-Reformation understanding of Christianity is valorized as true religion in its undistorted form, while all other religious traditions and forms of religiosity are recognized as incompatible with modernity, lacking all the doctrinal resources that would enable them to accede to the modern.").
 16. See, e.g., Carolyn Evans & Beth Gaze, *Between Religious Freedom and Equality: Complexity and Context*, 49 *HARV. INT'L L.J. ONLINE* 40, 40 (2008) (discussing the "tension between religious freedom and non-discrimination principles" in international human rights treaties).

freedom inevitably requires its limitation. This is the underlying paradox of the liberal tradition: “to preserve freedom, order must be created to restrict it.”¹⁷

The critical point is that contemporary accounts of religious freedom rely on the language of rights in such a way that neutrality imperceptibly is transformed into some conception of *liberal neutrality* as a political ideal.¹⁸ Under the logic of the individual rights tradition, neutrality ceases to be a negative concept of state non-interference in “religion” (although the inner “conscience” of the individual remains sovereign), and instead becomes a substantive value to be realized by the state. Raz concludes that “Rawls and others arguing for neutrality in similar ways fail to establish their case, and that sometimes they assume too quick or simple a connection between neutrality and personal autonomy.”¹⁹ The result is that many theorists advance a doctrine of neutrality, which “advocates not neutral political concern as a principle of restraint but neutrality between those conceptions of the good which greatly value an autonomous development of one’s life in accordance with one’s rational nature.”²⁰

Liberal theory in this mode inherently connects the case for religious freedom and state neutrality with a liberal conception of the person as a “free and independent self.”²¹ For Sandel, “[t]he respect this neutrality commands is not, strictly speaking, respect for religion, but respect for the self whose religion it is, or respect for the dignity that consists in the capacity to choose one’s religion freely.”²² I have argued that this view of religious freedom rests on a partial and unstable convergence between conscience on the one hand, and personal autonomy on the other, such that today’s freedom of conscience is viewed as autonomy. The notion of religious freedom as “freely chosen” conscience or belief is a result of the complex history of Protestantism. The proposition of a moral duty to follow one’s conscience, however, is commonly elided with an overriding commitment to personal autonomy as a kind of “master value for modern man” taking the form of a “Kantian-style

17. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 44 (1989). The idea can be traced to Kant’s political philosophy, which states:

As Hobbes maintains, the state of nature is a state of injustice and violence, and we have no option save to abandon it and submit ourselves to the constraint of law, which limits our freedom solely in order that it may be consistent with the freedom of others and with the common good of all.

IMMANUEL KANT, CRITIQUE OF PURE REASON 601-2 (Norman Kemp Smith trans., 1933).

18. See BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10 (1980); RONALD DWORKIN, A MATTER OF PRINCIPLE 191-204 (1985) (discussing the traditional liberal arguments); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 33 (1974). See also ROBERT E. GOODWIN AND ANDREW REEVE, LIBERAL NEUTRALITY (London: Routledge 1989); Jeremy Waldron, *Legislation and Moral Neutrality*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991 at 143-67 (J. Waldron ed. 1993) (neutrality is “far from a straightforward concept” and “the course of recent debate has shown that it is not one that is particularly amenable to uncontroversial logical analysis.”)
19. JOSEPH RAZ, THE MORALITY OF FREEDOM 133 (1986) (discussing neutral political concern).
20. *Id.* See also Joseph Raz, *Liberalism, Autonomy and the Politics of Neutral Concern*, 7 MIDWEST STUD. IN PHIL. 89 (1982); WOJCIECH SADURSKI, MORAL PLURALISM AND LEGAL NEUTRALITY (1990).
21. See Peter G. Danchin, *Who is the ‘Human’ in Human Rights? The Claims of Culture and Religion*, 24 MD. J. INT’L. L. 94 (2009).
22. Michael J. Sandel, *Religious Liberty: Freedom of Choice or Freedom of Conscience*, in SECULARISM AND ITS CRITICS 73 (Rajeev Bhargava ed., 1998).

injunction to be Enlightened, to 'think for yourself,' and to make your own judgments without reliance on external authorities like tradition, churches, or books of scripture."²³

The difficulty, however, is that "[n]ot all religious beliefs can be redescribed without loss as 'the product of free and voluntary choice by the faithful.'"²⁴ Such a stridently individualist conception of the human subject rules out many forms of traditional and customary ways of life as well as those centered on community. It raises the fundamental question of why individual conscience or belief, and not religion *per se*, should be the proper object of legal protection and accommodation. Muslims, for example, regard themselves more as claimed by a religious community they have not chosen. In this sense, Islamic notions of religious belonging and community, as opposed to the Lockean notion of religious belief, define for many Muslims a way of life in which the individual does not own herself. This has profound implications for how the operative meanings of ritual and symbol are understood in different religious traditions and in their interrelationship with secular presentations of public reason. Furthermore, many non-Western religious traditions, such as Islam, do not make the same distinction between the domains of the secular and the sacred, or, as in the case of Hinduism, hierarchically subsume "the secular under the sacred."²⁵

These two issues, conflicting conceptions of the nature and scope of the right and varying forms of public/private divide in different religious and cultural contexts, leads to a radical contestation of solely liberal accounts of the right to religious freedom. To deal with this normative crisis, a move is now being made back to the discourse of neutrality as political authority seeks to engage the claims to justice of actually existing religious communities and individuals. This inevitably leads to a pluralization of the right as distinct claims gain official recognition whether in the form of rights to self-determination,²⁶ minority rights,²⁷ or different types of institutional or legal autonomy.²⁸ This also leads to varying political

23. Danchin, *supra* note 6, at 680-81 (citing Steven D. Smith, *The Phases and Functions of Freedom of Conscience* 16 (Univ. of San Diego Sch. of Law, San Diego Legal Stud. Res. Paper No. 10-024, 2010) available at <http://ssrn.com/abstract=1615625> (footnotes omitted).)

24. Sandel, *supra* note 22, at 85.

25. T.N. MADAN, *MODERN MYTHS, LOCKED MINDS: SECULARISM AND FUNDAMENTALISM IN INDIA* 15 (1997).

26. See Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 *YALE J. INT'L L.* 1, 12-13 (2008) ("[T]he nation-state itself embodies the recognition that there is a morally significant connection between human freedom and a collective cultural life" and that "[n]ational self-determination is thus a 'cultural right' in the sense that national, cultural, and religious communities seek and require not private but 'public spheres' of their own in order to flourish and, ultimately, to survive.").

27. International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR] ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."). See generally Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities art. 1(1), G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992); Framework Convention for the Protection of National Minorities art. 8, Feb. 1, 1995, E.T.S. NO. 157 (adopted by the Council of Europe); Conference on the Security and Co-Operation in Europe, Copenhagen, Den., June 5-29, 1990; *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, ¶ 32, (June 29, 1990) (containing other provisions concerning the rights of minorities).

28. See, e.g., Gerhard Robbers, *Church Autonomy in the European Court of Human Rights — Recent Developments in Germany*, 26 *J.L. & RELIG.* 281 (2010-2011) (discussing the concept of church

settlements in the form of purported domain restrictions drawn between, for example, public (secular) and private (religious) spheres²⁹ and doctrines of restraint such as the “margin of appreciation” accorded by national and supranational judicial bodies.³⁰ This, of course, returns us to the problem with which we began, the limits of neutrality.

The central argument in this Essay is that the endless oscillation between neutrality and freedom means that the right to religious freedom is not a singular, stable principle existing outside of culture, spatial geographies, or power, but is instead a contested, polyvalent concept existing and unfolding within the histories of concrete political orders. In each case, *nomos* (secular neutrality) and *logos* (individual right) are ineliminably contextual. Any account of *nomian* neutrality will quickly devolve into hypostasis or reification of a historically specific political order and thus a particular definition of “religion and belief” and a specific form of demarcation between “public and private” spheres. Conversely, any account of universal reason, when viewed historically, reveals that rival intellectual traditions, and normative dissonances and conflicts, are *internal* to the right itself. If correct, we need to view religious freedom as both historically relative and normatively plural.

II. The Paradox of Religious Freedom

It is against this complex background that we now turn to Professor Yildirim’s four interrelated themes. The first is the paradoxical language of freedom in struggles over attempts to proscribe the wearing of the *hijab*, especially regarding the principles of gender equality and women’s rights. In *Dahlab v. Switzerland*, the European Court of Human Rights upheld the “necessity” of a restriction on the wearing of the Islamic headscarf by a Swiss public school teacher on the basis, *inter alia*, of gender equality.³¹ In a remarkable passage, the Court stated that

[i]t cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be *imposed on women by a precept which is laid down in the Koran*, and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality

autonomy as encompassing not only the individual but also the *collective* and *organizational* dimensions of freedom of religion and the right to self-determination of religious bodies).

29. In this respect, the “neutrality” of the ever-expanding “public” sphere of the modern state is continually being defined through a process of reasoning that balances and interprets the various individual and collective values that are in conflict. This may require different forms of cooperation, accommodation and toleration of religious practices. The state in this way both regulates and tolerates religion according to the evolving jurisprudence of its rights discourse — the degree of regulation and toleration in any particular state correlating with the majority’s (changing) conception of the appropriate relationship between the right and the good.
30. Thus, the majority in *Lautsi* held that “the decision whether or not to perpetuate a [religious] tradition falls in principle within the margin of appreciation.” *Lautsi v. Italy*, App. No. 30814/06, 68 Eur. Ct. H.R. (Mar. 18, 2011). Noting the divergent views of the Italian courts on the meaning of the crucifix, the majority further notes that the Court must “take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development.” *Id.* For the minority, however, the Court should accord a narrower margin of appreciation, especially in states with a dominant majority religion such as Italy. *See id.*, at 47–51 (Malinverni and Kalaydjieva, JJ., dissenting).
31. *Dahlab v Switzerland*, 5 Eur. Ct. H.R. 449 (2001).

and non-discrimination that all teachers in a democratic society must convey to their pupils.³²

This passage was expressly relied upon in the Court's subsequent judgment in *Şahin v. Turkey*, which again upholds as a valid limitation the restriction of the right of a fifth-year medical student at the University of Istanbul to manifest her religion by wearing the headscarf.³³ As noted by Carolyn Evans, the use of the word "imposed" here is inherently problematic given that "[m]ost religious obligations are 'imposed' on adherents to some extent and the Court does not normally refer to the obligations in such negative terms."³⁴ But what is more troubling is the Court's approach to

the 'precept' and the particular part of the *Qur'an* to which it was referring. There is no detailed discussion of the teaching on clothing or of the different interpretations that it is given in different Muslim societies and by different Muslim scholars. The vague, broad-brush approach to the issue by the Court seems to rely on the popular Western view — that the *Qur'an* and Islam are oppressive to women and there is no need to be more specific or to go into any detail about this because it is a self-evident, shared understanding of Islam.³⁵

The paradox here is that the promise of liberation and equality — the freeing of Muslim women from their patriarchal religious and cultural traditions and the freeing of Muslim children from the repressive practices and traditions of their families and communities — takes the form of regulation and governance. Following Janet Halley, Professor Yildirim refers to this as "governance feminism," something that has become a "totalizing ideology" seeking the *forced uncovering* of Muslim women within the liberated space of secular modernity and the enlightened rationality of the public sphere.

I have discussed this issue at length elsewhere³⁶ and concur broadly with Professor Yildirim's analysis. For present purposes, I wish only to mention the path-breaking work of Saba Mahmood on the question of agency and the feminist subject in the context of the women's mosque movement in Egypt.³⁷ One of Mahmood's central arguments is that feminist scholars, drawing on humanist intellectual traditions, have located their conception of human nature and agency in "the political and moral autonomy of the subject."³⁸ On this account, agency is understood as "the capacity to realize one's own interests against the weight of custom, tradition, transcendental will, or other obstacles (whether individual or collective)."³⁹ The asserted "universality of the desire . . . to be free from relations of subordination" thus means that "[f]reedom is normative for feminism, as it is to liberalism, and critical scrutiny is

32. *See id.* at 463.

33. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 99, 110, 112–13 (2007) (discussing the Turkish Constitution); *see id.* at 127, 128–29 (discussing ECHR jurisprudence); *cf. id.* at ¶ 11 (Tulkens J. dissenting) (criticizing the majority for refusing to allow Ms. Şahin to act in accordance with her personal choice on the basis of an essentialized and unexamined set of assumptions regarding the "connection between the ban and sexual equality."); *see also* Yildirim, *supra* note 2 at 81 (discussing Tulkens' dissent).

34. Carolyn Evans, *The Islamic Scarf in the European Court of Human Rights*, 7 MELB. J. INT'L. L. 52, 59–60 (2006).

35. *Id.* at 65.

36. Danchin, *supra* note 26.

37. SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* (2005).

38. *Id.* at 7.

39. *Id.* at 8.

applied to those who want to limit women's freedom rather than those who want to extend it."⁴⁰

The critical point here is that some notion of "positive freedom" — defined by Mahmood as "the capacity to realize an autonomous will, one generally fashioned in accord with the dictates of 'universal reason' or 'self-interest,' and hence unencumbered by the weight of custom, transcendental will, and tradition" — has become the criterion by which courts in Europe have sought to *limit* claims to religious freedom by Muslim women seeking to wear the Islamic headscarf. It is the almost axiomatic equation of *self-realization* (a notion recognized in many theistic and non-theistic traditions alike) with *individual autonomy* ("the ability to realize the desires of one's 'true will'" rather than actions resulting from "custom, tradition, or social coercion"⁴¹) that shapes the normative structure of the right to religious freedom.

But as Mahmood has shown, this account of agency and subject formation is not universal. The urban women's mosque movement in Cairo is "critically structured by, and serves to uphold, a discursive tradition that regards subordination to a transcendent will (and thus, in many instances, to male authority) as its coveted goal."⁴² It is worth quoting the mosque movement's goals at length:

According to participants, the mosque movement had emerged in response to the perception that religious knowledge, as a means of organizing daily conduct, had become increasingly marginalized under modern structures of secular governance. The movement's participants usually describe the impact of this trend on Egyptian society as 'secularization' (*almana'* or *almaniyya'*) or 'westernization' (*tagharrub*), a historical process which they argue has reduced Islamic knowledge (both as a mode of conduct and a set of principles) to an abstract system of beliefs that has no direct bearing on the practicalities of daily living. In response, the women's mosque movement seeks to educate ordinary Muslims in those virtues, ethical capacities, and forms of reasoning that participants perceive to have become either unavailable or irrelevant to the lives of ordinary Muslims. Practically, this means instructing Muslims not only in the proper performance of religious duties and acts of worship but, more importantly, in how to organize their daily conduct in accord with principles of Islamic piety and virtuous behavior.⁴³

What Mahmood describes is a nonliberal movement which views human agency not in terms of the "autonomous will," but rather "embodied capacities" and the "multiple ways in which one *inhabits* norms."⁴⁴ The conceit of liberal neutrality is to assert a right to judge such accounts of human freedom and agency from a "vantage point of epistemic neutrality above

40. *Id.* at 10.

41. *Id.* at 11.

42. *Id.* at 2-3.

43. *Id.* at 4. Thus, the practices of the mosque participants are "the products of authoritative discursive traditions whose logic and power far exceeds the consciousness of the subjects they enable." *Id.* at 32.

The women are summoned to recognize themselves in terms of the virtues and codes of these traditions, and they come to measure themselves against the ideas furnished by these traditions; in this important sense, *the individual is contingently made possible by the discursive logic of the ethical traditions she enacts.*

Id. (emphasis added).

44. *Id.* at 15.

history, politics and culture, from which other histories and political formations can be marked as either tolerable (assimilable, non-recalcitrant, redeemable, universalizable) or intolerable (barbaric, inhumane, backward-looking, pure particularity).⁴⁵

By contrast, Mahmood directs us to pay closer attention to bodily behavior and embodied action in the realization of moral and ethical norms. Like Professor Yildirim, her work draws on Foucault and his notion of the “paradox of subjectivation” — the idea that “the capacity for action is enabled and created by specific relations of subordination.”⁴⁶ Like the Muslim women described in Professor Yildirim’s article, the women in the mosque movement in Cairo do “not regard trying to emulate authorized models of behavior as an external social imposition that constrain[s] individual freedom” but rather to treat “socially authorized forms of performance as the potentialities — the ground if you will — through which the self is realized.”⁴⁷

The critical challenge of this account of subject formation to contemporary theories of religious freedom — in which liberal assumptions have been naturalized — is as follows:

How do we conceive of individual freedom in a context where the distinction between the subject’s own desires and socially prescribed performances cannot be easily presumed, and where submission to certain forms of (external) authority is a condition for achieving the subject’s potentiality? In other words, how does one make the question of politics integral to the analysis of the architecture of the self?⁴⁸

III. Religious Freedom as a Technology of Governance

The second theme is the comfort that this governance project exhibits with the “[s]tate imposition of new (presumably woman liberationist) norms, including, and perhaps primarily[,] that of revealing Muslim women’s hair.”⁴⁹ At the level of international human rights law, governance feminism utilizes “state apparatuses to achieve its goals through legislation, case law and enforced punishments.”⁵⁰ Institutions such as courts act not only as independent protectors of rights, but also as instruments of governance maintaining a particular social order. The difference here is between a rights-based culture of justification on the one hand, and a managerial culture of rights as *téchne* on the other.

The view of religious freedom set out in Part I above — the public sphere defined in terms of secular neutrality and the right defined in terms of individual freedom — imposes significant constraints on both the individual and the state. The individual must restrain her

45. Nehal Bhuta, On Common Ground 2–3 (Oct. 2010) (unpublished manuscript) (on file with author).

46. MAHMOOD, *supra* note 37, at 29 (referring to the example of a “virtuoso pianist who submits herself to the often painful regime of disciplinary practice, as well as to the hierarchical structures of apprenticeship, in order to acquire the ability — the requisite agency — to play the instrument with mastery.”) The point is that her “agency is predicated upon her ability to be taught” which is not a passive abandonment of agency but rather “one of struggle, effort, exertion, and achievement.” *Id.*

47. *Id.* at 31.

48. *Id.* See also CONNOLLY, *supra* note 6, at 25 (“[w]ith the emergence of secularism and Protestantism, a symbol, in its dominant valence, becomes the representation of an inner state of belief that precedes it; and ritual is now understood to be the primitive enactment of *beliefs* that could also be displayed through cognitive representation.”).

49. Yildirim, *supra* note 2 at 59.

50. *Id.* at 58.

will according to the dictates of universal reason by transcending any “distracting sensuous inclinations”⁵¹ and by confining her religion to the private sphere of conscience or belief. The state, for its part, must remain neutral between all religions and beliefs, and between religion and non-religion, by both rigorously protecting the neutrality of its public sphere and not interfering in the (private) autonomous sphere of conscience and belief.

Saba Mahmood insightfully describes the implications of this view of religious freedom for secular liberalism as follows:

[C]ontrary to the ideological self-understanding of secularism (as the doctrinal separation of religion and state), secularism has historically entailed the regulation and reformation of religious beliefs, doctrines, and practices to yield a *particular normative conception of religion* (that is largely Protestant Christian in its contours). Historically speaking, the secular state has not simply condoned off religion from its regulatory ambitions but sought to remake it through the agency of the law. This remaking is shot through with tensions and paradoxes that cannot simply be attributed to the intransigency of religionists (Muslims or Christians).⁵²

The public sphere is not, on this account, merely a space of deliberation but also an important disciplinary space “of *formation*, in which both coercive, regulatory, and rhetorical power is necessary in order to produce the *right kind of citizen subject* who can inhabit the norms of a liberal democratic polity.”⁵³

Professor Yildirim’s discussion of religious freedom in Turkey, and the case of *Şahin v. Turkey* in particular, vividly illustrate this difference in rights cultures and the results of the Kemalist project of forcibly reforming religion in accordance with a particular normative model of religiosity.⁵⁴ Here, I wish also to mention the other important case discussed by Professor Yildirim in the Court’s Article 9 jurisprudence.⁵⁵ In *Refah Partisi v. Turkey*, the Grand Chamber upheld a ban on the largest political party in Turkey, the Welfare Party, on the basis that its activities violated the constitutional principles of secularism and democracy.⁵⁶ In its reasoning, the Court endorsed the findings of both the Turkish Constitutional Court and the majority of the Chamber of the Third Section of the European Court of Human Rights (ECHR) “that shariah [sic] is ‘incompatible with the fundamental principles of democracy, as set forth in the Convention’ because it is a ‘stable and invariable religion’ in which principles ‘such as pluralism in the political sphere or the constant

51. Ian Hunter, *Kant’s Regional Cosmopolitanism*, 12 J. HIST. INT’L L. 165, 174 (2010). For Kant, man was “the empirical harbinger of a pure rational being” (*homo noumenon*) who, by intelligizing “the pure forms of experience, and [governing] the will by thinking the ‘idea’ or form of its law [was] supposed to free himself from the ‘sensuous inclinations’ that otherwise tie the will of empirical man (*homo phenomenon*) to extrinsic ends or goods.” *Id.* at 173-74.
52. Saba Mahmood, *Religious Reason and Secular Affect: An Incommensurable Divide? in IS CRITIQUE SECULAR? BLASPHEMY, INJURY, AND FREE SPEECH* 64, 87 (2009) (emphasis added).
53. Saba Mahmood, Comments on Una’s Lecture “Religion and Freedom of Speech: Cartoons and Controversies” delivered by Robert Post 2 (Mar. 14, 2007) (second emphasis added), http://townsendcenter.berkeley.edu/pubs/post_mahmood.pdf.
54. Yildirim, *supra* note 2 at 64–73. In particular, Professor Yildirim notes Kemalist reformed in the 1920s, which fundamentally changed the state-religion relationship in Turkey and sought to reform Islam under new types of governmental control. *Id.* at 68–70.
55. See Yildirim, *supra* note 2.
56. See *Refah Partisi (the Welfare Party) v. Turkey*, 37 Eur. Ct. H.R. 1 (2003).

evolution of public freedoms have no place.”⁵⁷ Further, the Court found that both *Shari’ah* and “plural religiously-based legal systems” were — even if democratically adopted — inherently incompatible with the ECHR and its concomitant notions of democracy and the rule of law.⁵⁸

But as Judge Kovler observed in dissent:

[T]he concept of a plurality of legal systems . . . is linked to that of legal pluralism and is well-established in ancient and modern legal theory and practice. Not only legal anthropology but also modern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of personal status. Admittedly, this pluralism, which impinges mainly on an individual’s private and family life, is limited by the requirements of the general interest. But it is of course more difficult in practice to find a compromise between the interests of the communities concerned and civil society as a whole than *to reject the very idea of such a compromise from the outset*.⁵⁹

What this passage illustrates is the degree to which the reasoning of the majority assumes — rather than seeks to justify — certain unarticulated premises regarding both the scope and nature of the right to religious freedom. By holding *a priori* that such claims to legal pluralism are repressive and threaten both state secularism and individual freedom, the majority obscures the degree to which these are in fact *competing claims* to freedom, autonomy, and self-determination.

The Court’s analysis misconstrues the true nature of the conflict in Turkey, which, quite apart from questions of liberal rights and freedoms, centers on the *locus* of Islam as a source of political legitimacy among different elite groups in the historical context of Kemalism as a state-building project. Macklem has thus concluded that *Refah* “signals an ominous shift in the way in which the European Court of Human Rights comprehends the relationship between religion and state power” and that the court “has begun to reframe religious freedom as a threat to democracy and immunize states from judicial oversight when they take preemptive measures to curb its exercise.”⁶⁰

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57. David Dyzenhaus, *Headscarves, Extreme Speech, and Democracy* 16 (unpublished manuscript), available at http://www.law.uwo.ca/publiclaw/PublicLaw_Documents/Headscarves_ExtremE_Speech.pdf (quoting *Refah Partisi*, 37 Eur. Ct. H.R. at 36, 44).
58. *Refah Partisi*, 37 Eur. Ct. H.R. at 42. (holding that a regime of plural religious legal orders would run counter to the ECHR’s guarantees of both equality and the rule of law. This was because it “would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms.” *Id.*
59. *Id.* at 50–51 (emphasis added) (footnotes omitted). Judge Kovler further stated that the notion of legal pluralism is critical to the assessment to be made of *Shari’ah* which constitutes the “legal expression of a religion whose traditions go back more than 1,000 years, and which has its fixed points of reference and its excesses, like any other complex system.” *Id.* at 51.
60. Patrick Macklem, *Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe* 3 (Apr. 17, 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1660649. See also Kevin Boyle, *Human Rights, Religion and Democracy: The Refah Party Case*, 1 ESSEX HUM. RTS. L. REV. 1, 3, 12 (2004) (arguing “that the Grand Chamber judgment in the *Refah* case was unfortunate and wrong” and noting that “*Refah* did not challenge democracy as such, but rather sought to question an ideology imbued in the institutions of the State and enforced by the Turkish military” and on the basis of “such questioning that implicitly challenged the undemocratic control of the military over Turkish political development . . . it was removed”).

IV. Religious Freedom as a Right of Groups

The third theme follows directly from the second: the normative power of liberal rights discourse, especially in relation to the claims of religious minorities in Western European nation-states. The danger of rights managerialism is that certain substantive conceptions of both the scope of religious freedom and the nature of the public sphere become instrumentalized through state or, in the case of the ECHR itself, supranational power. This is most evident in how courts have defined the concept of secular neutrality and demarcated the public/private divide.⁶¹

Consider the case of *Dogru v. France*, in which the ECHR concurred with the French government's position that the purpose of an internal school rule requiring students to attend physical education classes in "sports clothes" (thus prohibiting the wearing of the headscarf) was "to adhere to the requirements of secularism in state schools."⁶² The reasoning in this case was broadly similar to that in *Şahin* and *Refah*, but it also marked an important difference. In the previous two cases, the Court was confronted with contestation over the meaning of the public sphere and right to religious freedom *within* a single majority nation (Turkey) and religious tradition (Islam). But in *Dogru*, the understanding of the French public sphere in terms of *laïcité* — which is said to require the state to be "neutral, blind, and indifferent" to religious diversity — was deployed to deny public recognition to the claims of right of a religious *minority*.⁶³

This raises complex questions of the relationship between majority and minority rights and between the relevant individual and collective goods and interests at stake.⁶⁴ For present purposes, what I wish to argue is that it is precisely this type of situation involving vulnerable minority groups that we should be cautious about the purportedly benevolent power of the state and unilateral assertions of authority to define terms such as neutrality/secularism and freedom/equality. Claims of religious difference are too quickly portrayed as religious extremism or fundamentalism, and solutions are too quickly proposed in terms of state power and state violence (while at the same time being justified in terms of individual freedom).

The point is not that issues of gender violence, coercion and discrimination are unimportant, or that there is not internal disagreement and struggles within different religious and cultural groups,⁶⁵ but rather that issues of *collective* religious freedom and

61. See Yildirim, *supra* note 2 at 81 (noting that in ECHR cases involving the hijab, the "State acts with partial (for revealed hair is the norm), prejudiced (against what Islam and Islamic symbols mean) and very much political might.").

62. *Dogru v. France*, App. No. 27058/05, 49 EUR. H.R. REP. 179, 186 (2008).

63. Given that public schools are the primary means by which French Republican citizenship is to be fostered, the prohibition of all religious symbols is merely a "reaffirmation of the boundaries of the secularized public sphere against any religious interference." ANNA ELISABETTA GALEOTTI, *TOLERATION AS RECOGNITION* 123 (2002). This is not regarded as intolerance by either the French majority or the Strasbourg Court, but rather as a "limit to liberal tolerance in order to preserve the neutrality of the public school and the equality of the students as would-be citizens, beside and beyond any particular memberships." *Id.* at 123–24.

64. Danchin, *supra* note 26, at 60.

65. It is curious that feminist scholars such as Bennoune repeatedly argue that critics of European laws restricting the wearing of the headscarf offer accounts in which "the mass of white French citizens

identity are themselves vital human rights concerns which the state is required to respect and ensure. This is not a debate primarily *within* religious communities, but *between* religious communities and the state (or majority group) itself. Regardless of the merits of competing positions, the interesting question is why such debates within religious communities create different normative claims to those between religious communities and the state. Here, the idea of value pluralism allows us to see that there is in fact more than one substantive equality claim at issue.⁶⁶ If correct, the critical question is why the ECHR has recognized and privileged only one of the substantive equality claims at issue. Further, if both claims are to be given their due, how are the conflicts between them to be resolved?

One possibility is for the State to exercise its overriding power — what Robert Cover once called the state’s “jurispathic” mode — to dominate autonomous religious communities under a unitary law. But if so, what principle should the state employ? Feminist scholars such as Bennoune presumably believe the state ought to privilege whatever is best for women according to some account of liberal substantive rights. Of course, if certain (nonliberal) religious communities are themselves strongly represented in state-based processes of democratic deliberation, then this may defeat this objective (or, alternatively, may show the inadequacy of state law to protect the religious freedom of various minority groups).

Such advocates must then either be assuming a particular type of state (which, like France, does not accord full legal recognition to minority groups) or the applicability of international human rights norms such as Articles 5 and 16(1) of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).⁶⁷ But in either case, what is the conception of equality that is to be deployed and who is to decide both its substantive meaning and its scope of application? This necessarily requires the state to take a

support the law, while the undifferentiated ‘Muslims’ oppose it,” with the result that all “internal politics and debate among Muslims, and those of Muslim, North African, and Arab heritage, on this topic are thereby ‘disappeared.’” Karima Bennoune, *The Law of the Republic Versus the Law of the Brothers: A Story of France’s Law Banning Religious Symbols in Public Schools*, in HUMAN RIGHTS ADVOCACY STORIES 155, 156 (Deena Hurwitz et al. eds. 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411873. As I have argued previously, it is precisely these types of internal/external conflicts and forms of political contestation that value pluralist accounts of religious freedom both anticipate and celebrate. See Peter G. Danchin, *Whose Rights? Which Equality? A Reply to Professor Bennoune*, OPINIO JURIS BLOG, <http://opiniojuris.org/2008/06/09/whose-rights-which-equality-a-reply-to-professor-bennoune/>.

66. Consider the demand of the Muslim community in India for an autonomous regime and legal recognition of religious and other “personal” laws. This is a demand against the Indian state for substantive equality on the basis of religion or belief. In a case such as *Shah Bano*, where a conflict arose between a Muslim personal law requiring the return of the marriage settlement upon divorce and the payment of maintenance only for the period of *iddat*, and the Indian Code of Criminal Procedure requiring monthly maintenance in specified situations of need, we are thus faced with a genuine conflict, not between a liberty claim on the one hand and an equality claim on the other, but between two competing conceptions of equality: one protecting India’s Muslim minority against other majority and minority groups and the other protecting the equal rights of women in India regardless of religion. Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 3 S.C.R. 844 (India).
67. It is interesting to note that India has a reservation to both of these provisions agreeing to abide by them only “in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent”. Convention of the Elimination of All Forms of Discrimination against Women (CEDAW), *India Declarations* U.N. Doc. CEDAW/SP/2006/2 (July 9, 1993), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/309/97/PDF/N0630997.pdf?OpenElement>.

controversial position on the nature and scope of religious freedom, which, as we have seen in Part II, requires consideration of the norms and practices of specific religions, and a definition of what constitutes religion and proper religious subjectivity.

The French Law of 2004, for example, does not proscribe the wearing of religious symbols in public schools in cases of coercion, discrimination or harm by non-state groups. It bans *all* ostentatious religious symbols.⁶⁸ This conception of state neutrality and secular equality is vulnerable to the two objections discussed in Part I above.⁶⁹ First, how is the state to draw the line between the public sphere and private values given that it is supposed to be neutral and blind to differences of personal choice and character? As suggested by Galeotti, “[n]eutrality seems to preclude an evaluation of the content of differences . . . The result is that the prohibition of the headscarf in school for the sake of neutrality would derive from an argument which infringes the very principle of neutrality.”⁷⁰ Second, not all behavior classified as “public” receives equal treatment. A statement of fashion — for example, “punk style” — is accepted in French schools even though it is an “ostentatious” symbol in the public sphere, whereas a manifestation of religion — the Islamic veil — is not.⁷¹ In this sense, the public sphere cannot be said to be “neutral” between secular and religious expression.⁷²

The French Law of 2004 can be seen to rest on a contingent and historically and culturally specific conception of both religion and the public/private divide. Again, as Galeotti observes, “[b]efore the headscarf case broke out, no one was even aware of whether religious symbols were present in school or not. This might suggest that, as the critics of liberalism have remarked, neutrality is not so neutral after all, and the secular state not so thoroughly secularized.”⁷³ Indeed, we may query whether the ultimate goal sought under the twin banners of secularism and gender equality is not so much negotiated reforms *within* religious legal systems so much as their complete abolition and replacement by uniform systems of civil law.⁷⁴ The story told by Professor Yildirim of Kemalist reforms affecting women’s rights in Turkey in the 1920s certainly suggests that this is the case.⁷⁵

68. Loi 2004-228 du 15 Mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of Mar. 15, 2004 Regulating, in Accordance with the Principle of Secularism, the Wearing of Symbols or Clothing Denoting Religious Affiliation in Public Primary and Secondary Schools], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190.

69. See *supra* note 5 and accompanying text.

70. GALEOTTI, *supra* note 63, at 126.

71. The difference here is between fashion or lifestyle on the one hand, and a religiously-inspired practice on the other. Again, state officials are deciding what constitutes fashion and what constitutes religion (i.e. assessing the meaning and validity within the public sphere of “private” concerns, commitments and sentiments).

72. GALEOTTI, *supra* note 59, at 126. Thus, the rights of Muslim students seeking to manifest their religious beliefs and traditions are limited to protect a particular conception of the public sphere (*laïcité*). Ironically, this is the same form of imposition on the “rights of others” that secular liberals accuse religionists of seeking.

73. *Id.* at 124.

74. See, e.g., SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? 22-23 (Joshua Cohen, Matthew Howard, & Martha C. Nussbaum eds., 1999) where Okin states that “[i]t is by no means clear, from a feminist point of view, that minority group rights are ‘part of the solution’,” and in the case of nonliberal minority groups in liberal states:

Ironically, for the state to be right in its codification of the demands of substantive gender equality, it must ignore or override the nuanced and contested *internal* arguments within religious communities themselves. There are, thus, strong normative reasons why the state ought to exercise considerable deference to the arguments going on there and that the struggle over the *status quo* ought not to be decided solely by the state according to what prevailing national majorities or secular liberal academics, judges or bureaucrats decide. Of course, how such claims are to be mediated is essentially contested but requires at a minimum an intersubjective and dialogic understanding of rights discourse which leaves open at least the possibility of transformation within the state's own political and analytical norms and modes of governance.

V. Value Pluralism and Religious Freedom

The fourth and final theme is the need critically to interrogate not just the claims of Muslim communities and individuals to religious freedom, but also the normative structure and underlying assumptions of international human rights norms themselves. On this point, both conventional and customary human rights law is a useful corrective to liberal theory's claims to universality.

First, as noted in Part I above, the right to religious freedom in international law includes both individual and collective rights.⁷⁶ Indeed, there are at least four specific rights recognized in international and regional human rights instruments that are directly related to religion and belief: the right to freedom of thought, conscience, and religion,⁷⁷ the right to equal protection of the law, including the prohibition of discrimination on the basis of religion,⁷⁸ the right of persons belonging to religious minorities to profess and practice their

female members of the culture . . . might be much better off if the culture into which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women — at least to the degree to which this value is upheld in the majority culture.

75. See generally Yildirim, *supra* note 2. Yildirim notes that “[i]n 1926 the Swiss Civil Code was adopted as the new Turkish Civil Code,” and this had the effect of rendering “Islamic personal laws void.” *Id.* at 14. “The Kemalist reforms were not concerned with legitimizing . . . existing women’s movements or giving effect to their demands[,]” but “[r]ather, nation building meant *modernizing*, which in turn meant becoming European, and women’s status was a major defining factor of being European . . . This also meant women had to distance themselves from religion and the way religion had defined them so far.” *Id.* at 14-15.
76. See Danchin, *Suspect Symbols*, *supra* note 26 and accompanying text.
77. See, e.g., *International Covenant on Civil and Political Rights*, U.N. CCPR, art. 18 (1966); *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, U.N. GAOR, arts. 1, 6, U.N. Doc. A/RES/36/55 (1981); *European Convention on Human Rights*, U.N. ECHR, art. 9 (1950); *Cairo Declaration on Human Rights in Islam*, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, arts. 10, 18(a), 24, 25, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993).
78. See, e.g., *International Covenant on Civil and Political Rights*, U.N. CCPR, arts. 2(1), 26 (1966); *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, U.N. GAOR, arts. 2 - 4, U.N. Doc. A/RES/36/55 (1981); *European Convention on Human Rights*, U.N. ECHR, art. 9 (1950); *Cairo Declaration on Human Rights in Islam*, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, art. 14, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993); *Cairo Declaration on Human Rights in Islam*, Aug. 5, 1990, U.N.

religion,⁷⁹ and the right to protection from incitement to discrimination, hostility, or violence.⁸⁰

There is, in fact, an enormous variety of normative arrangements and patchwork of dispensations actually existing in the world on the question of religious freedom and, accordingly, a wide diversity in normative settlements both within and between different ways of life. Much interesting work is being done today in countries around the world seeking to incorporate the full array of human rights norms recognized in international law regarding self-determination, minority rights, freedom of religion, and substantive equality.⁸¹

Second, on the question of the nature of the public sphere, there is no equivalent in international law to the Establishment Clause of the First Amendment to the U.S. Constitution. Whatever else neutrality means at the international level, this must be something closer to nondiscrimination rather than nonestablishment.⁸² Furthermore, the question of the place of religion within the state is left open in international law. The identity and foundation of the state is an aleatory political question answerable only by “the coordination of socially and politically powerful groups who have the capacity to legitimate the relationship of supremacy and subordination which is essential to an effective state order.”⁸³ The relationship of the state to religion is thus an open question answerable in a wide variety of historically and culturally contingent ways.⁸⁴ In this respect, some constitutional or “higher” narrative, which both legitimates and constitutes a normative point of reference for the state, is necessary and unavoidable.⁸⁵ Following Robert Cover, I have

GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, art. 1, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993).

79. See, e.g., *International Covenant on Civil and Political Rights*, U.N. CCPR, art. 27 (1966); *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, U.N. GAOR, arts. 1, 6, U.N. Doc. A/RES/36/55 (1981); *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, G.A. Res. 47/135, arts. 1–4, 8(3), U.N. Doc. A/RES/47/135 (1993); *Framework Convention for the Protection of National Minorities*, U.N. FCNM., Feb. 1, 1995.
80. See *International Covenant on Civil and Political Rights*, U.N. CCPR, arts. 19, 20(2) (1966); *International Convention on the Elimination of All Forms of Racial Discrimination*, U.N. GAOR, art. 4 (1965); *Framework Convention for the Protection of National Minorities*, U.N. FCNM., art. 6, Feb. 1, 1995; Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, art. 22, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993).
81. See Danchin, *Islam in the Secular Nomos*, *supra* note 6, at 61–63.
82. The ECHR does not prohibit member states from either endorsing or cooperating with religions, including through recognition or presence of religious symbols in official settings, provided the state respects all ECHR norms including the rights to religious freedom (Art. 9) and equality and nondiscrimination (Art. 14). See Carolyn Evans & Christopher A. Thomas, *Church-State Relations in the European Court of Human Rights*, 2006 BYU L. REV. 699, 699 (2006).
83. Nehal Bhuta, *New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation*, 60 U. TORONTO L.J. 799, 806 (2010).
84. See, e.g., Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT’L L. REV. 379 (2006) (discussing Article 2 of the Egyptian and other constitutions in the Middle East); HUSSEIN ALI AGRAMA, *SECULAR PARADOX: ISLAM, SOVEREIGNTY, AND THE RULE OF LAW IN MODERN EGYPT* (University of Chicago, forthcoming 2012).
85. See, e.g., JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) (arguing that “the American constitutional project is based in faith, hope, and a narrative of shared redemption” and that “our belief in the legitimacy of the Constitution requires a leap of faith

referred to this idea in my work as a *nomos* — a normative world where law and narrative are inseparably related and together constitute a space of simultaneous discourse and exclusion.⁸⁶

The ECHR's apparent willingness to adopt, often without argument, state justifications regarding militant democracy, secularism, and the nature of Islam is therefore troubling. The Court has too readily adopted an excessively rationalistic mode of reasoning in its cases involving Islam, while forgetting the rival dialogic mode which has been so pivotal to the existence of pluralism in the history of religious freedom in Europe (even though this has emerged both *internally* and *externally* within the historical development of Western Christianity).

This has had two distorting effects. First, it created the paradox that the form of secularism said to be *necessary* in a democratic society in cases involving Islam neither exists in fact, nor have its various non-ideal alternatives precluded the flourishing of democratic values in European nation-states. Second, this has generated the managerial culture of governance discussed in Parts III and IV whereby the Court's reasoning has sought to instrumentalize certain antipluralist and substantive conceptions of both the scope of religious freedom and the nature of the public sphere.

As Professor Yildirim's article makes clear, the result has been that the Court has devoted its efforts to defending and reaffirming its own beliefs in certain secular conceptions of liberty and attachment rather than addressing the claims to justice and real harms facing the claimants before it. It is only by gaining a better appreciation of the plural normativity of the right and the contingent history of its emergence and structure that space may conceivably be found to re-imagine the current limits and contours of contemporary discourse on religious freedom.

– a gamble on the ultimate vindication of a political project that has already survived many follies and near-catastrophes, and whose destiny is still over the horizon.”

86. ROBERT COVER, *Nomos and Narrative*, in *NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* 95, 96 (Martha Minow, Michael Ryan & Austin Sarat eds., 1995).

