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## 5. The modern architecture of religious freedom as a fundamental right

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[T]he modern state and its political rationality have played a [...] decisive role in transforming pre-existing religious differences, producing new forms of communal polarization, and making religion more rather than less salient to minority and majority identities alike. Furthermore, [...] inasmuch as secularism is characterized by a globally shared form of national-political structuration, the regulation of religious difference takes a modular form across geographical boundaries.<sup>1</sup>

### 1. INTRODUCTION

What do the following pairs of cases have in common?

1. The European Court of Human Rights (ECtHR) holds that the wearing of an Islamic headscarf by a schoolteacher in Switzerland is a “powerful external symbol” that may be legally proscribed to protect the religious beliefs of pupils and parents, and applies the principle of neutrality toward religion;<sup>2</sup> while in a later case it finds that the compulsory display of a crucifix in Italian public school classrooms is an “essentially passive symbol” which neither threatens the religious beliefs of students or parents nor infringes the state’s duty of neutrality in the classroom.<sup>3</sup>
2. The U.S. Supreme Court holds that the sacramental use of peyote is an “outward physical act” which can claim no exemption or accommodation on the basis of religious liberty from neutral laws of general application;<sup>4</sup> while in a later case it recognizes on the basis of religious liberty a “ministerial exception” to generally applicable employment discrimination law which is held to interfere with an “internal church decision that affects the faith and mission of the church itself.”<sup>5</sup>
3. The U.K. Supreme Court upholds a racial discrimination claim brought by a Jewish student who is denied admission to a Jewish school in London on the basis that he is not recognized as Jewish according to Orthodox interpretation of *halakhah*;<sup>6</sup> while in earlier cases the

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<sup>1</sup> SABA MAHMOOD, RELIGIOUS DIFFERENCE IN A SECULAR AGE: A MINORITY REPORT 2 (2016).

<sup>2</sup> *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 463.

<sup>3</sup> *Lautsi v. Italy*, App. No. 30814/06 (Grand Chamber, March 2011).

<sup>4</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>5</sup> *EEOC v. Hosanna-Tabor*, 132 S. Ct. 694, 706 (2012).

<sup>6</sup> *R. (on the application of E) v. The Governing Body of JFS*, [2009] UKSC 15, [2010] 2 A.C. 728 (S.C.).

- U.K. courts consistently recognize the right of religious schools under English law to deny admission to or limit the clothing of students on the basis of “religion.”<sup>7</sup>
4. The European Commission on Human Rights decides that the British government’s refusal to apply its blasphemy laws to the publication of Salman Rushdie’s *The Satanic Verses* is not a violation of religious freedom;<sup>8</sup> while an earlier case decided by the ECtHR case upholds the British government’s seizure of a film on the basis it constituted an attack on the Christian religion by its “provocative portrayal of objects of religious veneration,” thus violating respect for the “religious feelings of believers” as guaranteed by the right to religious liberty.<sup>9</sup>
  5. The Egyptian Administrative Court of Justice upholds the right of Bahais to have their religion listed on national identity cards on the basis of Islamic jurisprudence that indicates that “Muslim lands have housed non-Muslims with their different beliefs;”<sup>10</sup> while on appeal, the Supreme Administrative Court holds, on the basis of the right to religious freedom as enshrined in the Egyptian Constitution, that such a listing on national identity cards is a violation of public order in “a country whose foundation and origin are based on Islamic sharia.”<sup>11</sup>

Despite their differences in spatial geography, culture and religious traditions, and despite divergences in reasoning and result, the first thing we might notice in common about these cases is that they are all contested in terms of the right to religious freedom. This, in itself, is not contested. In every case, the parties assert their claims in terms of the right to religious freedom before a national or international court or commission, which then proceeds to interpret the right and issue a legally binding judgment.

Despite such differences, then, the thesis of this chapter is that we may discern a distinctive logic or common grammar that simultaneously grounds and shapes the normative structure of religious freedom as a modern constitutional or international right.<sup>12</sup> Importantly, this logic is shared across the Western and non-Western divide. As the epigraph to this chapter suggests, this logic operates in two main forms: first, in the political rationality of the modern state (“political secularism”); and second, in the legal adjudication and realization of the right to religious freedom, with the result that “the regulation of religious difference takes a modular form across geographical boundaries” (“universal right.”)

The juxtaposed cases in (1) to (5) above are drawn from a wide variety of jurisdictions and nation states, and involve a diversity of both majority and minority religious traditions and claims of right. Nevertheless, there is an unmistakable similarity in the conundrums entailed

<sup>7</sup> <sup>7</sup> *R. (X) v. Headteachers and Governors of Y School*, [2008] 1 All ER 249; *R. (Begum) v. Governors of Denbigh High School*, [2007] 1 AC 100.

<sup>8</sup> <sup>8</sup> *Choudhury v. United Kingdom*, App. No. 17439/90 (1991).

<sup>9</sup> <sup>9</sup> *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) (1994).

<sup>10</sup> <sup>10</sup> *Husam Izzat Musa & Ranya Enayat Rushdy v. Ministry of Interior*, Case 24044 of the forty-fifth judicial year, issued on 4 April 2006 (Court of Administrative Justice).

<sup>11</sup> <sup>11</sup> Cases No. 16834 and 18971 of the fifty-second judicial year, issued on 16 December 2006 (Supreme Administrative Court).

<sup>12</sup> <sup>12</sup> Cognizant of the many differences between national and international legal orders, I use the word “constitutional” here in a broad sense to include the right to religious freedom as recognized in regional and global human rights treaties such as Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 18 of the International Covenant on Civil and Political Rights.

in regulating religious differences that crosses the Western and non-Western divide, and that reveals a distinctive set of contradictions internal to the concept of the right to religious liberty itself. The reasoning in the apparently conflicting cases in (1) and (2) can be seen to be premised on a shared distinction between *internal* and *external* spheres of religiosity, with ensuing consequences for conceptions of legal authority and the scope of state regulation. The cases in (3), (4) and (5) illustrate how the form of demarcation and meaning of these spheres is fiercely contested in terms of competing understandings of the *object* of the freedom protected by the right – whether construed as “belief,” “conscience,” or “religion.”

The cases in (2) and (3) further illuminate how such contestation is complicated by unsettled questions concerning the proper *subject* of the right – whether an “individual,” a majority or minority “religious group,” a “religious institution” (e.g. “the Church”) or an entire “discursive tradition.” The cases in (5) finally present a yet deeper puzzle concerning what the terms “secular” and “religious” mean in modern accounts of political secularism, and how this question relates to competing justifications of the right to religious freedom itself.

While the subject, object and meaning of the right are contested by the parties in all these cases, two matters remain beyond dispute: first, the need to apply the right to religious liberty itself to resolve the case at issue; and second, the authority of the courts of the sovereign state (whether at the national or international level) to determine what religion *is* for legal purposes, and the spaces and sensibilities it may inhabit in the legal and political order.

This raises a second common feature: the deep anxiety generated by the adjudication of the right to religious freedom regarding contemporary conditions of secularity and individual freedom. Questions concerning the meaning of the right and the ensuing need to delimit the “religious” from the “secular” are axiomatically viewed as having the utmost consequence for the protection of fundamental rights and freedoms, and affecting the conditions more broadly of pluralism in a diverse polity. As observed by Agrama, this question is “always suffused with affects, sensibilities, and anxieties that mobilize and are mobilized by power,”<sup>13</sup> as challenges to extant understandings of the secular and religious are viewed as posing threats to the continued existence of liberal rights and freedoms.

Third, and finally, it is striking how the apparently conflicting reasoning in each pair of cases correlates with the outcome in each case being in favor of the majority religion in the state. A Muslim schoolteacher in Switzerland loses in her bid to wear religious symbols in the classroom, while the Catholic Italian majority is accorded a wide margin of appreciation in the same sphere. A Klamath Indian loses his claim to manifest his religion; while the Evangelical Lutheran Church is accorded a sphere of associational religious autonomy immune from general antidiscrimination law. The Jewish Free School in London loses its bid to maintain the freedom to apply its own criteria and authority regarding religious identity and membership, in contrast to the purportedly neutral criteria regarding religious subjectivity and discrimination employed by the Protestant majority. Speech directed at ridiculing, insulting or otherwise attacking Islamic symbols and traditions in Europe is defended as protected expression not violating religious freedom; while similar speech directed at Christian symbols and icons

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<sup>13</sup> HUSSEIN ALI AGRAMA, QUESTIONING SECULARISM: ISLAM, SOVEREIGNTY, AND THE RULE OF LAW IN MODERN EGYPT 27 (2012). For Agrama, political secularism is “a set of processes and structures of power wherein the *question* of where to draw a line between religion and politics continually arises,” and the ensuing distinctive sensibilities and anxieties are “indissolubly linked to the sovereign power of the modern state.” *Id.*

evokes different (albeit varied) responses in legal, moral and ethical registers. In the final pair of cases, the Bahai community in Egypt ultimately loses, while the Muslim majority prevails as regards the recognizability of the Bahai faith in the realm of religion and of the Bahais themselves in the realm of civil affairs.

The discussion that follows explores these themes against the background of the paired sets of cases in order to advance two primary arguments. Section 2 argues that a core element of modern political secularism is the doctrine of state neutrality toward religion (the “neutrality thesis”). The genius of modern discourse is to define secular neutrality in terms of the right to religious freedom itself: that is, the state is neutral toward religion when, and indeed because, it protects the right to freedom of religion and belief. As we shall see, this move has significant implications not only for the constitutional relation of the modern state toward religion, but also for contemporary conceptions of religion and religious subjectivity.

Section 3 then argues that a central and inescapable feature of the right to religious freedom is a bifurcation internal to the right itself between an inner domain of religious thought, conscience and belief on the one hand, and an outer domain of manifestation of religion or beliefs on the other. Modern constitutional and human rights law regard the former – known as the *forum internum* – to be absolute and immune from state interference; while the latter – known as the *forum externum* – is subject to state limitation where necessary to protect public order, morals or the rights of others (the “universality thesis.”) The bifurcated structure of the right explains the central paradox in modern religious freedom discourse: on the one hand, the constant intervention by the state and making of substantive judgments about religion, a domain toward which it claims to be neutral; on the other, the tendency of the courts to privilege the values and sensibilities of the majority religion and discriminate against minority religions, especially through recourse to the secular concept of public order.

## 2. POLITICAL SECULARISM AND STATE NEUTRALITY TOWARD RELIGION

The conventional wisdom of modern constitutional doctrine is that the separation of religion and state is foundational to liberal democracy. On this view, the political authority of the state is understood not in terms of any formal relation between the state and religion(s), but rather in terms of *secular neutrality*. Consider the cases in (1) to (3). The question at issue in (1) is whether the presence of an Islamic headscarf or a crucifix in public school classrooms violates the state’s duty of neutrality toward religion. Similarly, the question in (2) is whether certain exemptions should be granted by the state on religious grounds from so-called neutral laws of general application. And in (3) the question is what it means exactly for the state to be neutral in the application of antidiscrimination law to both a majority (Christian) and minority (Jewish) religion.

Today, we still see a tremendous variety of constitutional arrangements in the world prescribing different forms of relation between the state and religion(s).<sup>14</sup> This includes a variety

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<sup>14</sup> <sup>14</sup> On the relation between religion and state in various national constitutions, see Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARVARD INTERNATIONAL LAW JOURNAL 249, 297–307 (2008).

of forms of recognition of, and formal relation to, both majority and minority religions.<sup>15</sup> In the United Kingdom, for example, British legal policy toward majority and minority religious groups has moved through at least three phases, with the first in the early nineteenth century consisting of political compromises accommodating conflicting interests.<sup>16</sup> But increasingly, such forms of negotiated relation are viewed as either historical anachronisms or obstacles to be overcome in order to achieve a properly neutral state.

The result is that state neutrality toward religion is today understood in terms of the right to religious freedom itself. The neutrality of the political order is said to be achieved by the constitutional guarantee of the right to religious liberty. In this conceptual maneuver lies the genius of modern rights discourse: the neutrality thesis is in fact defined, and constitutionally interpreted, in terms of the universality thesis and, as we shall see in Section 3, *vice versa*. This applies as much to European states, with their deep history of church-state entanglement, as to states such as France or Turkey, with their traditions of *laïcité*; and the United States, with its tradition of nonestablishment.<sup>17</sup>

In this move, however, a seismic shift occurs in the relationship between conceptions of religious subjectivity, normativity and authority. The disciplinary structure and secular practices of the public sphere combine to *produce* the freely believing subject and concomitant Protestant conceptions of religion (especially in relation to scripture and rituals) and religious subjectivity (especially as regards moral and ethical sensibilities). Rather than neutrality toward *religion*, it is more accurate to say that the right to religious freedom purports to treat all rights holders equally.

There is a rich and complex history behind the emergence of this particular conception of political secularism. Its roots lie in the civil enlightenment of the mid-seventeenth century,

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<sup>15</sup> <sup>15</sup> For example, both Spain and Italy have established “concordat” systems of recognition that provide different rights and privileges to religious communities which are characterized by the use of negotiated agreements between the state and federations of religious institutions often formed for the purpose of concluding and administering the agreements. See Gloria M. Morán, *The Spanish System of Church and State*, BRIGHAM YOUNG UNIVERSITY LAW REVIEW 544 (1995); Silvio Ferrari, *The Emerging Pattern of Church and State in Western Europe: The Italian Model*, BRIGHAM YOUNG UNIVERSITY LAW REVIEW 428–29 (1995).

<sup>16</sup> <sup>16</sup> Christopher McCrudden, *Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered*, 9 INT’L J. CONST. L. 200 (2011). This approach has two features: first, judicial abstinence, on the theory that matters of religious controversy are better left to the legislature; and second, pragmatic empiricism in the legislature, where compromises are sought in direct negotiations between religious communities and the government, often resulting in technical and nuanced statutory schemes as opposed to disputes of high constitutional principle. *Id.*

<sup>17</sup> <sup>17</sup> Unlike the United States and France, a number of European nation states – including Greece, Denmark, Iceland, Norway, Sweden and the United Kingdom – have official or established churches; while others have different forms of endorsed church or cooperationist regimes. This is an embarrassment for liberal theories of religious freedom and the notion of state neutrality. The ECHR contains no non-establishment norm and thus does not prohibit states from either endorsing or cooperating with religions, provided they respect the right to religious freedom in Article 9 and the right to nondiscrimination on the basis of religion in Article 14. The ECHR regime thus illustrates how neutrality is understood to mean protecting the right to religious freedom rather than any particular relationship or degree of separation or attachment between religion and the state, notwithstanding the obvious tension this generates in states with established or dominant religions (see the *Lautsi* case in (1)). See further Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICHIGAN JOURNAL OF INTERNATIONAL LAW 663, 671 (2011).

when the public sphere came to be understood in terms of social peace and religious liberty conceived in jurisdictional terms.<sup>18</sup> The goal of the civil enlightenment strategy was not to protect religious freedom as a natural right against the state, but to end religious civil war by establishing a “neutral” juristic mode of governance over a multi-confessional society as the means of maintaining a legally enforced toleration between rival religious communities. Employing philosophical-theological notions such as *adiaphora*, the crucial point was that “should any form of worship pose a threat to public peace then, as something morally indifferent, it was legitimately subject to the civil sovereign, who had absolute authority over all matters capable of threatening public order.”<sup>19</sup>

In this civil philosophy, we can already see the emergent features of modern political secularism: the statist drawing of a line between a private sphere of religiosity understood to be free from sovereign interference and a public sphere of secular law which maintains the right to limit manifestations of religion where necessary to protect social peace and public order. This early philosophy, which predated the philosophical or “metaphysical” *Aufklärung* by more than a century, sought to desacralize the state and led over time to both the churches losing their civil and political authority and to the gradual “spiritualization” of religion.<sup>20</sup>

The notion of religious authority as axiomatically “private” in relation to the public authority of the state explains only in part, however, the modern picture. Another central strand of the story traces its origins to developments later in the eighteenth century and explains how the normativity of religion comes to be understood not only as privatized, but now as “interiorized” relative to a radically new conception of individual subjectivity.

We see this emerging already in John Locke’s late seventeenth century argument for religious toleration. Unlike the civil philosophers, for whom religious toleration was a right of the state against intolerant religious communities, toleration for Locke was a right of individuals against an intolerant state.<sup>21</sup> Locke’s empiricist epistemology led to a conception of civil power as directed to the regulation of things that can be “objectively known,” whereas religious belief was relegated to the status of “subjective conviction.”<sup>22</sup> On this view, the neutrality of civil law

<sup>18</sup> <sup>18</sup> Although this “civil” jurisdictional conception differed markedly from the older “Two Realms” or “Two Kingdoms” tradition of church-state separation, under which all authority was viewed as ultimately derived from God and only question was to demarcate what was properly God’s and what was Caesar’s.

<sup>19</sup> <sup>19</sup> This employed a “juridical-ecclesial category to narrow the array of doctrine and liturgy where salvation was at stake and to expand the array that could be regarded as soteriologically indifferent and hence to be seen not from a sacramental-religious standpoint but from a juridical-political one.” Ian Hunter, *Religious Freedom in Early Modern Germany: Theology, Philosophy, and Legal Casuistry*, 113 *SOUTH ATL. Q.* 37, 56 (2014).

<sup>20</sup> <sup>20</sup> The civil enlightenment resulted in a remarkable shift in the understanding of religious authority as Erastian control of churches by the state was effected to deny the coercive authority of religious institutions in enforcing the demands of conscience. This was the condition of freedom in the private sphere – a sphere defined, protected, delimited and increasingly regulated by the state itself: see Danchin, *supra* note 17, at 731.

<sup>21</sup> <sup>21</sup> Hunter, *supra* note 19, at 40.

<sup>22</sup> <sup>22</sup> Locke’s theory of toleration thus equally relies on a particular conception of *adiaphora*: religious matters, properly understood, have no civil bearing as properly religious practices concern only a *care for salvation* and cannot harm the life, liberty or estate of civil subjects. Conversely, there can be no coercion in “religious matters,” as one cannot correct *belief*, which is a matter of private concern. Kirstie McClure, *Difference, Diversity, and the Limits of Toleration*, 18 *POLITICAL THEORY* 361, 377 (1990).

with respect to religion and the truth of particular religious practices was guaranteed epistemologically by relegating religious belief to the “realm of speculation.”<sup>23</sup>

The idea of religion as a “subjective belief” which is unable to be coerced because located in a private mental space marks the beginning of a new religious psychology and corresponding shift from the privatization of religious authority in the early modern period to its normative interiorization in modernity. As Talal Asad has suggested, it is the idea that the *mind* is the impregnable bastion of true religious experience that provides the modern view with its plausibility – that is, that coercion of religious belief is irrational because impossible.<sup>24</sup>

Given that force can only secure an insincere profession of faith and outward conformity, true authenticity rests on the modern subject’s ability to choose his or her beliefs and act on them. This conception of belief as “singular and inaccessible to other locations” reinforces the idea of an autonomous “buffered” subject able to separate itself from objects by contemplation, reasoning and interpretation and choose from available beliefs.<sup>25</sup>

On this view, the essential nature of religion is understood in creedal terms – that is, as a “set of beliefs in a set of propositions (about transcendence, causality, cosmology) to which an individual gives assent.”<sup>26</sup> Importantly, this conception of religion “emphasizes the priority of belief as a state of mind rather than as constituting activity in the world.”<sup>27</sup>

Noting that the boundary between the secular and religious has been constantly redrawn in the history of Christianity, Asad similarly traces the major shift in understanding of the category of religion to the mid-seventeenth century, when the Roman church lost its authority to make these distinctions: “What comes to be called ‘religion’ is now both universal in the widest sense, as in ideas about Natural Religion, existing in every society, and individual in the deepest sense, that is really in the inner beliefs of individuals.”<sup>28</sup>

This intellectual disposition and religious sensibility prefigured the second, later liberal tradition which saw the public sphere reconceived in terms of a moral theory of justice and religious liberty grounded in a complex (and unstable) notion of a *right* to freedom of conscience and belief. This conception derived from a metaphysical (or more accurately “transcendental”) philosophical tradition that simultaneously sacralized reason and rationalized religion in a morally grounded state.<sup>29</sup>

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<sup>23</sup> <sup>23</sup> It is the “discursive separation from other-worldly concerns” that therefore underpins the capacity of civil discourse to convert incommensurable expressions of religious “difference” into a politically indifferent “diversity” of religious practices. McClure, *supra* note 22, at 385. On this account, religion as a matter of facticity loses its epistemological privilege joining other mundane objects subject to civil regulation.

<sup>24</sup> <sup>24</sup> See Talal Asad, *Comments on Conversion*, in *CONVERSION TO MODERNITIES: THE GLOBALIZATION OF CHRISTIANITY* 263, 269 (Peter van der Veer ed., 1996) (discussing the new psychology adopted by Locke of “identifying ‘religious belief’ as a phenomenon of ‘consciousness’ along with other internal phenomena”).

<sup>25</sup> <sup>25</sup> CHARLES TAYLOR, *A SECULAR AGE* 27 (2007) Part I (The Work of Reform).

<sup>26</sup> <sup>26</sup> Saba Mahmood, *Can Secularism Be Other-wise?*, in *VARIETIES OF SECULARISM IN A SECULAR AGE* 283 (Michael Warner, Jonathan VanAntwerpen and Craig J. Calhoun eds., 2010).

<sup>27</sup> <sup>27</sup> TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* 47 (1993).

<sup>28</sup> <sup>28</sup> Peter van der Veer, *Review Article: The Modernity of Religion*, 20 *SOCIAL HISTORY* 365, 367 (1995).

<sup>29</sup> <sup>29</sup> IAN HUNTER, *RIVAL ENLIGHTENMENTS: CIVIL AND METAPHYSICAL PHILOSOPHY IN EARLY MODERN GERMANY* (2001).

This late eighteenth century Kantian philosophy generated a new secular morality and theory of liberal political order premised on broadly Protestant conceptions of the individual, freedom and religion. Unlike the civil philosophy of the early modern period, the subject of this moral philosophy was not “religion” *per se*, but the individual as both the subject and bearer of rights. The category of religion was rationalized and naturalized into a generically Protestant notion of conscience or belief understood as internal to human subjectivity, while the notion of autonomy was asserted as the universal basis for political authority.<sup>30</sup>

While Kant himself maintained the distinction between public and private spheres – reason for him being “submissive” in the private sphere on account of the moral duty to follow one’s conscience, while “free” in the public sphere by virtue of the right to “use reason publicly in all matters”<sup>31</sup> – over the last two centuries these distinctions have substantially been reversed in the modern secular imaginary.<sup>32</sup>

This has had a profound effect on conceptualization of the public and private spheres. If, for the civil philosophers and Kant alike, a spiritualized notion of religion as faith or conscience characterized the private sphere, today the *duty* to follow conscience has been reimagined as *freedom of conscience*, now understood in terms of autonomy as an individual right to do what one believes is right.<sup>33</sup>

The private sphere remains a (reconceptualized) space of freedom from state interference; but the basis for this restraint is not respect for religion or conscience *per se*, but rather respect for the individual’s right to choose not only the dictates of his or her religion or conscience, but indeed any belief at all. This is reflected in the contemporary formulation of the *forum internum* of the right as “freedom of thought, conscience and religion,” which comprises the modern category of the essentially religious – that is, as purportedly not subject to limitation by the state.<sup>34</sup>

This modern conception of the right to religious freedom as essentially grounded in individual belief has generated three recurring paradoxes or puzzles for contemporary rights jurisprudence concerning first the subject, second the object and third the justification or source of the right itself. Let us consider each briefly in turn.

<sup>30</sup> <sup>30</sup> Danchin, *supra* note 17, at 733–34.

<sup>31</sup> <sup>31</sup> Immanuel Kant, *An Answer to the Question: What Is Enlightenment?*, in WHAT IS ENLIGHTENMENT? EIGHTEENTH-CENTURY ANSWERS AND TWENTIETH-CENTURY QUESTIONS 58, 59–60 (James Schmidt ed., 1996).

<sup>32</sup> <sup>32</sup> As Foucault observed, Kant’s conception of public and private is “term for term, the opposite of what is ordinarily called freedom of conscience.” Michel Foucault, *What Is Enlightenment?*, in THE FOUCAULT READER 32, 36 (Paul Rabinow ed., 1984).

<sup>33</sup> <sup>33</sup> Thus, in *Religion Within the Boundaries of Mere Reason*, Kant develops the notion of a purely “rational religion,” which is premised on the exclusion of theology from theoretical reason and the grounding of faith in solely practical (moral) reason. In this way, religion is to be controlled by and subject to the demands of (secular) morality. Immanuel Kant, *Religion within the Boundaries of Mere Reason*, in RELIGION WITHIN THE BOUNDARIES OF MERE REASON AND OTHER WRITINGS 31 (Allen Wood and George di Giovanni eds., trans., 1998).

<sup>34</sup> <sup>34</sup> The formulation “[e]veryone has the right to freedom of thought, conscience and religion” is repeated identically in all the major international human rights instruments: see, for example, Universal Declaration of Human Rights art. 18, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (12 December 1948); ECHR art. 9, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222; International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 171; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief arts. 1, 6, G.A. Res. 36/55, U.N. Doc. A/36/684 (November 25, 1981).



## 2.1 The Individual as Subject of the Right

While at an epistemological level, there is considerable divergence in the interpretation and application of religious freedom norms in national and international jurisdictions, at an ontological level there is a remarkable underlying convergence and consensus on the question of the subject of the right. Consider the two primary modern genealogies of the right: one understood as grounded in apodictic reason and viewed in broadly Kantian terms as an *a priori* subjective right that the individual gives to himself or herself in accordance with a universal moral law;<sup>35</sup> the other understood as grounded in natural reason and viewed in broadly Thomist and later Lockean terms as an objective right to conscience in accordance with natural law.<sup>36</sup>

Despite deep differences in their modes of justification and authority, these two genealogies interestingly converge, from opposite directions, on the same basic normative picture: the individual as subject either *autonomously choosing* (as a classic liberal right) or *freely believing* (as a natural right) his or her ultimate ends and values. Despite their internal tensions, the two conceptions are often fused together and asserted in a single form as a universal *human* right to “freedom of thought, conscience and religion.”

As a matter of ontology, it is now the rational, autonomous human being, as opposed to heteronomous “religion,” that is the proper *subject* of normativity. The individual – now as a matter of right – decides for himself or herself (as authority) questions of religion, conscience and belief (as object). As discussed above, religion is thereby reformulated in accordance with a distinctive normative model of religiosity: a privatized belief in a set of creedal propositions to which an autonomous individual gives assent. This generates the distinctive and unstable co-imbrication of conscience and autonomy as the “buffered” self simultaneously chooses autonomously and believes freely.<sup>37</sup>

Virtually all modern rights theories trace the genealogies of some version of this proposition to the legacies of nominalism, the collapse of medieval scholasticism, the Protestant Reformation, humanism and the civil and philosophical Enlightenments. Charles Taylor’s landmark *A Secular Age* is a prominent recent example.<sup>38</sup>

Importantly, these accounts are all told from *within* the Western Christian tradition – often expressly in opposition to religious traditions such as Judaism and Islam, where individual choice or belief is not the normative starting point in comparison to more collective concep-

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<sup>35</sup> <sup>35</sup> As noted by Connolly, Kant elevated a universal philosophy of “rational religion” above Christian theology by anchoring “rational religion in the law of morality rather than anchoring morality in ecclesiastical faith.” This “shifts the proximate point of command from the Christian God to the moral subject itself,” with the result that “morality as law now itself becomes anchored only in the ‘apodictic’ recognition by ordinary human beings of its binding authority.” See William Connolly, *The Conceits of Secularism*, in WHY I AM NOT A SECULARIST 30–31 (2000).

<sup>36</sup> <sup>36</sup> See, for example, John Finnis, *Why Religious Liberty is a Special, Important and Limited Right*, NOTRE DAME LEGAL STUDIES PAPER no. 09–11 (April 22, 2009) at 8 (citing John Paul II, Encyclical *Veritatis Splendor* (1993): “In any event, it is always from the truth that the dignity of conscience derives. In the case of the correct conscience, it is a question of the *objective truth* received by man; in the case of the erroneous conscience, it is a question of what man, mistakenly, *subjectively* considers to be true.”)

For an analysis of the natural law arguments of Aquinas and Locke, see Ginna M. Pennance-Acevedo, *St. Thomas Aquinas and John Locke on Natural Law*, 6 STUDIA GILSONIANA 221 (April–June 2017).

<sup>37</sup> <sup>37</sup> See Danchin, *supra* note 17, at 708 ff.

<sup>38</sup> <sup>38</sup> See TAYLOR, *supra* note 25. For another perceptive recent account, see MICHAEL ALLEN GILLESPIE, *THE THEOLOGICAL ORIGINS OF MODERNITY* (2008).

tions of religious subjectivity. Consider, for example, Immanuel Kant's depiction of Judaism in his *Religion within the Boundaries of Mere Reason* (1793):

Strictly speaking, Judaism is not a religion at all but simply the union of a number of individuals who, since they belonged to a particular stock, established themselves into a community under purely political laws, hence not into a church [...] We cannot, therefore, begin the universal history of the Church [...] anywhere but from the origin of Christianity, which, as a total abandonment of the Judaism in which it originated, grounded an entirely new principle, effected a total revolution in doctrines of faith [...] The subsequent discarding of the corporeal sign which served wholly to separate this people from others is itself warrant for the judgment that the new faith, not bound to the statutes of the old, nor, indeed, to any statute at all, was to contain a religion valid for the world and not for one single people.<sup>39</sup>

Or in the present day, consider the depiction of Islam in *Refah Partisi* where the ECtHR found that both *sharia* and “plural religiously-based legal systems” were – even if democratically adopted – inherently incompatible with the European Convention on Human Rights and its concomitant notions of democracy and the rule of law.<sup>40</sup>

Even within these Western narratives, however, unsettled questions remain regarding the moral status, scope and justification of the right to religious liberty as regards institutions and collective subjects such as “the church” (*libertas ecclesiae*)<sup>41</sup> and religious majority and minority groups.

Consider, for example, the *Lautsi* case in (1). In 2009, the Second Chamber of the ECtHR held unanimously that the presence of crucifixes in Italian public school classrooms violated the right of children to religious freedom under Article 9.<sup>42</sup> The decision was immediately met with outrage in Italy which, in conjunction with seven other intervening European states, appealed to the Grand Chamber of the ECtHR.

The argument of the Italian government was that the presence of crucifixes in classrooms was:

the expression of a ‘national particularity,’ characterized notably by close relations between the State, the people and Catholicism attributable to the historical, cultural and territorial development of Italy and to a deeply rooted and long-standing attachment to the values of Catholicism.<sup>43</sup>

Further, the government contended that “account must be taken of the fact that the Catholic religion was that of a large majority of Italians;” and that the ECtHR should “acknowledge and protect national traditions and the prevailing popular feeling, and leave each State to maintain a balance between opposing interests.”<sup>44</sup>

The Grand Chamber by a majority of 15:2 reversed the judgment of the Second Chamber, holding that “the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State,” and

<sup>39</sup> Kant, *supra* note 33, at 132.

<sup>40</sup> *Refah Partisi v. Turkey*, App. No. 41340/98, 37 Eur. H.R. Rep. 1, 41 (2003).

<sup>41</sup> The term *libertas ecclesiae* is often traced to Pope Gregory VII in 1079 and encompasses the notion of freedom of ecclesiastical authority from secular or temporal power. See HAROLD BERMAN, *LAW AND REVOLUTION* 87 (1983).

<sup>42</sup> *Lautsi v. Italy*, App. No. 30814/06, paras. 48–58 (Eur. Ct. H.R. Second Section, 3 November 2009).

<sup>43</sup> <sup>43</sup> *Lautsi v. Italy*, App. No. 30814/06 (Grand Chamber, March 2011), para. 36.

<sup>44</sup> <sup>44</sup> *Ibid.* para. 37.

that this did not infringe the State's duty of neutrality and impartiality.<sup>45</sup> What remains deeply unresolved in the ECtHR's reasoning, however, is what right exactly a majority people or religion can assert as a matter of constitutional or international law and how such a claim relates conceptually and doctrinally to the right to religious freedom.<sup>46</sup>

Finally, consider also the recent *Hosanna-Tabor* case in (2). In its interpretation of the Religion Clauses of the First Amendment, the U.S. Supreme Court recognized a new "ministerial exception" to antidiscrimination law. The dilemma for the court was how to justify religious liberty as a collective right, here attaching to religious groups and institutions, as opposed to individual persons. Religious institutions do not have consciences *per se*; only their individual members do – although religious entities do have texts, traditions, rituals and practices. If such groups or institutions are bearers of rights, what is the scope of that right, what forms of conduct and activity does it include, and with what legal consequences? Does the right correlate to a duty on the state not to interfere in some "autonomous" sphere (as yet undetermined) or officially to recognize certain group manifestations of religious practice? If so, why does this not pose the same threat to the modern administrative state recognized in *Employment Division v. Smith*, where Justice Scalia argued that "permitting [a person] by virtue of his beliefs 'to become a law unto himself,' contradicts both constitutional tradition and common sense"?<sup>47</sup>

Writing for a unanimous court, Chief Justice Roberts neatly distilled and wove together distinctly Protestant terms such as "church," "minister," "ecclesiastical," "belief," "faith," and "mission" to hold that "the authority to select and control who will minister to the faithful – a matter 'strictly ecclesiastical' – is the church's alone."<sup>48</sup> In so doing, the court made two doctrinal maneuvers: first, by broadening the liberal notion of autonomy to include "the church" as a legal subject with a right to a certain sphere of freedom; and second, by analogizing the "inner conscience of the church" to individual conscience conceived in some sense as extra-legal and pre-political. The court thus sought to justify a realm not merely of autonomy but of *sovereignty* – a jurisdiction in some sense independent of the state.<sup>49</sup>

Such lines of jurisprudence in both the U.S. Supreme Court and the ECtHR seeking to justify recognition of claims to collective religious autonomy remain in deep tension with the normative structure of modern rights discourse. The difficulty is that some argument is needed to justify this particular conception of collective religious subjectivity and demarcation of spheres – an argument which itself must not violate the core tenets of liberal political secularism; that is, it must be neutral toward "religion," while at the same time respecting the right to religious freedom.<sup>50</sup>

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<sup>45</sup> <sup>45</sup> *Ibid.* paras. 60–8.

<sup>46</sup> <sup>46</sup> For discussion, see Danchin, *supra* note 17, at 720–23.

<sup>47</sup> <sup>47</sup> *Employment Division v. Smith*, 494 U.S. 872, 879 (1990).

<sup>48</sup> <sup>48</sup> 132 S. Ct. 694, 706 (2012).

<sup>49</sup> <sup>49</sup> See further Peter G. Danchin, *Religious Freedom in the Panopticon of Enlightenment Rationality*, in *POLITICS OF RELIGIOUS FREEDOM* 249–50 (Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood and Peter G. Danchin eds., 2015) (arguing that "[i]n this set of historically and culturally contingent moves, a Protestant understanding of 'the church' and an Enlightenment conception of freedom are simultaneously asserted and naturalized.")

<sup>50</sup> <sup>50</sup> On the one hand, it is difficult within the strongly individualistic and humanistic structure of modern religious freedom discourse to justify recognition of religious institutions ("the church") and collective religious subjects ("peoples," "nations," "minorities") as subjects of the right, as illustrated

## 2.2 Belief or Conscience as Object of the Right

The second recurring puzzle for religious freedom discourse concerns the *object* of the right. This is currently a matter of deep controversy in the field: certain law and religion scholars, such as Winnifred Fallers Sullivan, argue for the impossibility of religious freedom on account of the impossibility of defining religion;<sup>51</sup> while certain legal philosophers, such as Brian Leiter, argue that current forms of constitutional accommodation and toleration of religion are rationally unjustifiable.<sup>52</sup>

As discussed above, when constitutions or international treaties speak of freedom of “thought,” “conscience,” “religion” or “belief” as the object of the right, they do so as if these terms are conceptually related in some self-evident way. But this assumption fails to pay attention to the closely intertwined ontological and theological genealogies of these terms. If on a Kantian view, for example, “belief” is an object of choice by an autonomous individual, what conceptions of God or the divine does such a moral economy imagine or even make possible? Is God thereby a “concept” or “postulate” internal to human thought and practical reason? What authority does God have if posited as a concept *subject to* the overarching authority of universal reason and the rational discipline of the categorical imperative?<sup>53</sup>

Conversely, if on a more Thomistic view, “conscience” or “belief” is a feature of or deduction from natural reason, to what extent is this a universal moral category as opposed to being entangled with and resting on premises internal to Christian moral thought and doctrine?<sup>54</sup> Does the meaning and normative valence of “conscience” differ if considered internally to *halakha* or *sharia*-based traditions of thought and deliberation?<sup>55</sup>

by cases such as *Lautsi* and *Hosanna-Tabor*. On the other hand, adopting “the individual” as the sole or primary subject of the right leads to distorting effects and failures of recognition in cases involving non-Western, or even simply non-Protestant, religious traditions and conceptions of religious subjectivity, as cases such as *Smith* illustrate, where a claim to religious freedom was brought by the member of a Native American religious tradition.

<sup>51</sup> <sup>51</sup> WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2005).

<sup>52</sup> <sup>52</sup> BRIAN LEITER, *WHY TOLERATE RELIGION?* (2012). For a discussion of these two arguments, see Silvio Ferrari, *Religion Between Liberty and Equality*, 4 *JOURNAL OF LAW, RELIGION AND STATE* 179 (2016).

<sup>53</sup> <sup>53</sup> In *Opus Postum*, Kant argues that “[t]he commanding subject is God [where] [...] this commanding being is not outside man as a substance different from man.” As Insole observes, this is a quasi-theological proposition: “our giving to ourselves the moral law has the mark of divinity, such that, in a sense, we are God-like in this function. We have a sort of *theosis*, where human beings become transformed in the image of God; but where God disappears into the human being as this happens.” In Kant’s transcendental idealism, this *theosis* in fact “eclipses God, rather than being an increasing participation in God.” CHRISTOPHER J. INSOLE, *KANT AND THE CREATION OF FREEDOM: A THEOLOGICAL PROBLEM* 170 (2013). See also Christopher J. Insole, *Kant’s Transcendental Idealism, Freedom and the Divine Mind*, 27 *MODERN THEOLOGY* 608 (2011).

<sup>54</sup> <sup>54</sup> See, for example, Talal Asad, *The Construction of Religion as an Anthropological Category*, in *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* 48 (1993) (discussing the “assumption that belief is a distinctive mental state characteristic of all religions” and arguing “[i]t is preeminently the Christian church that has occupied itself with identifying, cultivating, and testing belief as a verbalizable inner condition of true religion.”) See also Talal Asad, *Medieval Heresy: An Anthropological View*, 11 *SOCIAL HISTORY* 345 (1986).

<sup>55</sup> <sup>55</sup> For an extended discussion of this issue, see Peter Danchin and Louis Blond, *Unlawful Religion? Modern Secular Power and the Legal Reasoning in the JFS Case*, 29 *MARYLAND JOURNAL OF INTERNATIONAL LAW* 419, 467–75 (2014).

Finally, if it is in fact “religion” *per se* that is the proper object of the right, how can we speak meaningfully today of entire discursive traditions encompassing their own sources, justification and hermeneutics, and thus their own conceptions of religious identity, membership and practice, as being the objects of and subject to the regulation of individual rights?

The elision of the term “religion” with “belief” is arguably the most striking feature of contemporary rights discourse. Any non-Christian or non-Western religion which deviates from this notion of religion as private belief and subjective experience thus faces a double charge: not only is it a threat to the secular political order, but it is also not religion in its true, modern form.<sup>56</sup> This applies as much to the Coptic Orthodox Church in Egypt or the Russian Orthodox Church as to traditions in Islam, Judaism, Buddhism or African traditional religions.

### 2.3 The Source or Justification of the Right

The third, and arguably deepest, puzzle concerns the theoretical justification and apparent unity of the right itself. What is the ontology and normative source of the right? What is “universal,” “apodictic” or “natural” reason exactly? Are these metaphysical claims to some form of natural reality, or transcendental claims to some form of non-natural or, in Kantian terms, *noumenal* reality? In either case as we have seen, the modern picture is grounded on and dominated by the concept of a knowing moral or rational subject understood *itself* to be the proper source of normativity which simultaneously chooses autonomously as a matter of moral right and believes freely as a matter of theological conviction.

It is the apparent convergence and complementarity of these moral and theological claims – and the ever-present danger that their latent antinomies will pull them apart – that provides the momentary appearance of a unified theory of religious liberty. While there are conflicting accounts of how to understand post-Enlightenment conceptions of modernity, in all of them it is the autonomous self-legislating individual that stands as the ontological foundation. This in itself is not contested: the right is a “human” right, not a right ultimately derived from or dependent on any divine heteronomous order or source.

If in certain religious traditions norms are divinely revealed or given by revelation to humans as objects, then in the modern secular imaginary the human as subject stands in an entirely new relation to normativity and authority. An end independent of choice internal to which morality stands (“religion”) is now itself an object of choice of a knowing subject in the form of freely chosen conscience or belief. This is the work that rights discourse and secular morality seeks to do.

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<sup>56</sup> <sup>56</sup> Charles Hirschkind, *Religious Difference and Democratic Pluralism: Some Recent Debates and Frameworks*, 44 TEMENOS 123, 126 (2008) (regarding secular modernity in Europe, “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”).

### 3. UNIVERSAL RIGHT AND CONSTITUTIONAL ADJUDICATION

Each of these puzzles regarding the subject, object and justification of the right raises serious tensions and sites of contestation internal to the modern architecture of religious freedom discourse. This helps to explain the paradox we see in the pairs of cases in (1)–(5) of seemingly opposed outcomes on the one hand, but commonly structured “modular” reasoning on the other. This in turn raises the question of how the right to religious freedom operates in the praxis of constitutional and international rights-based adjudication and jurisprudence.

Here, there is a reversal of the logic of defining the neutrality of the political order toward religion in terms of the right to religious liberty. Rather, it is now the universality of the right that is understood in terms of construing and securing the neutrality of the public sphere toward religion. As a matter of legal praxis, this requires the state or supranational judicial bodies constantly to recognize or limit claims regarding the manifestation of religious belief and practice. It is this process of ever-deepening constitutional and supranational adjudication of rights claims that generates the distinctive entanglement of religion and law we see in different domains of the public and private spheres.

Before proceeding, it is important to observe how this aspect of modern secular governance generates a paradox at the heart of the logic of political secularism. Recall again that the neutrality thesis is premised on the need for the separation of religion and politics as being foundational to liberal democratic governance.<sup>57</sup> But rather than withdraw from the religious domain, the modern state has been shown constantly to intervene and seek to reconfigure substantive features of religious life by distinguishing between what is properly religious and what is not in order to render certain practices indifferent to religious doctrine and bring them legitimately under the domain of civil law.<sup>58</sup> The result is the constant intertwining of religion and governance as modern secular power operates incessantly to determine the scope of religion in the political order.<sup>59</sup>

As a matter of both constitutional and international jurisprudence, this is achieved doctrinally through the bifurcated structure of the right as between a putative *forum internum* and *forum externum*. The *forum internum* is regarded as absolute, conventionally in the form of the unstable co-imbrication between autonomy and belief or conscience discussed in Section 2 above; but in certain cases courts have held this to be broader, encompassing wider aspects of religious doctrine and practice. The *forum externum*, on the other hand, encompasses the

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<sup>57</sup> See, for example, Cécile Laborde, *Dworkin’s Freedom of Religion Without God*, 94 BOSTON UNIVERSITY LAW REVIEW 1255, 1260 (2014) (stating the doctrine as requiring that “government respects citizens’ ethical independence when it only appeals to neutral justifications in the pursuit of its policies – in particular, when it does not endorse the truth of one religious or ethical view”).

<sup>58</sup> See *supra* note 22 and accompanying text discussing Locke’s empiricist epistemology, and how the neutrality of civil law with respect to religion and the truth of particular religious practices was guaranteed epistemologically by relegating religious belief to the “realm of speculation.”

<sup>59</sup> Hussein Ali Agrama, *Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or Religious State?*, 52 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 495, 499 (2010) (noting that recent critical scholarship on the nature of secularism emphasizes that it “involves less a separation of religion and politics than the fashioning of religion as an object of continual management and intervention, and the shaping of religious life and sensibility to fit the presuppositions and ongoing requirements of liberal governance”).

manifestation of religious belief and practice and is held to be subject to state limitation where necessary to protect public order, morals or the rights of others. Let us consider each domain briefly in turn.

### 3.1 *Forum Internum* as “Rational Religion”

In its modern liberal guise, the *forum internum* encompasses religion in its rational form (“rational religion” in Kantian philosophy), which is internal to the rational subject and thus presumes or depends on a particular genealogy of rationality. For Kant, rational religion is “pure religious belief.”<sup>60</sup>

As William Connolly has observed, Kant elevates a generic Christianity called “rational religion” above sectarian faith, anchoring the former in a metaphysics of the supersensible that, so the story goes, is presupposed by any agent of morality. In the process, Kant degrades ritual and arts of the self without eliminating them altogether, for these arts work on the ‘sensibility’ rather than drawing moral obligation from the supersensible realm, as practical reason does. The point is to deploy them just enough to render crude sensibilities better equipped to accept the moral law drawn from practical reason.<sup>61</sup>

Both the U.S. Supreme Court and the ECtHR have long struggled with the issue of how to define the content and scope of the *forum internum*, and the religious liberty jurisprudence of both jurisdictions unsurprisingly provides no clear guidance on the proper object of the protected sphere of the *forum internum*. The two recent cases of *Hosanna-Tabor* in (2) and *Jews Free School* in (3) provide powerful illustrations of this doctrinal indeterminacy.

As discussed above,<sup>62</sup> in *Hosanna-Tabor* the U.S. Supreme Court employs and broadens the notion of liberal autonomy to include “the church” as a legal subject with a right to a certain sphere of collective freedom. But unlike in *Smith*, as soon the *forum internum* is interpreted to include certain broader manifestations of religious practice, potential conflicts arise with the legal authority and sovereign interests of the state. The court responds to this by shifting to the language of “conscience” and in effect analogizing the “inner conscience of the church” to individual conscience conceived as a sovereign realm free from state interference.<sup>63</sup>

But how exactly does the court know which matters are “strictly ecclesiastical” or which affect “the faith and mission of the church”? From a religious point of view, the scope of the “inner conscience of the church” is likely to be more broadly conceived than that permitted under the ministerial exception as delimited in *Hosanna-Tabor*. Conversely, from a secular point of view there are likely to be a host of activities and actions pertaining to the “inner conscience of the church” that raise interests and concerns pertaining to the proper exercise of legal jurisdiction.<sup>64</sup>

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<sup>60</sup> Immanuel Kant, *The Conflict of the Faculties*, in RELIGION AND RATIONAL THEOLOGY 273 (Allen W. Wood and George di Giovanni trans. and eds., 1996).

<sup>61</sup> Connolly, *supra* note 35, at 30–31.

<sup>62</sup> See *supra* note 49 and accompanying text.

<sup>63</sup> As Winnifred Sullivan has observed, the idea appears to be that “Churches are prior to conscience,” for it is in churches that the individual conscience is *formed*. As I have argued elsewhere, this is a deeply theological argument which seeks to identify the proper attributes of religion and religious subjectivity: see Danchin, *supra* note 49, at 250.

<sup>64</sup> This has become an acute subject of contestation, as antidiscrimination law is increasingly seen to apply within the sphere of religious liberty traditionally understood as being free from sovereign

Given these complexities, the nature and scope of the relation between autonomy and conscience remain unclear in the court's formulation of the ministerial exception. What appears pivotal for the court is that the church "freely decide" ecclesiastical matters as a matter of right, and that it have autonomy to control matters, even on non-religious grounds, provided these pertain to the "inner conscience of the church." As I have argued elsewhere, the first argument defines conscience in terms of autonomy, while the second defines autonomy in terms of conscience, thereby intertwining and naturalizing a Protestant view of "the church" and a classical liberal conception of freedom.<sup>65</sup>

A similar ambiguity is evident in the reasoning of the U.K. Supreme Court in the *Jews' Free School* case concerning the right of a Jewish school in London to deny admission to a student not recognized as being Jewish according to Orthodox interpretation of *halakhah* (the student's family practice of Judaism notwithstanding). As the reasoning in the majority, concurring and dissenting judgments unfolds, we see the same antinomies and contradictions that are present in *Hosanna-Tabor* as the twin premises of neutrality toward religion and universality of the right are continually entangled with and defined in terms of their opposites.<sup>66</sup>

The five-judge majority implicitly interprets the *forum internum* as encompassing the right to choose one's beliefs, but not the immunity of those beliefs themselves.<sup>67</sup> The two-judge concurrence, however, expresses anxiety about the direct interference by the majority's reasoning in the *forum internum* of the Jewish religion and adopts a more internal perspective that seeks instead to accommodate, subject to the constraints of liberal autonomy in the *forum externum*, the duty to comply with Orthodox religious law.<sup>68</sup> Finally, the two-judge dissent relies on more classical liberal ideas of negative liberty and judicial abstention to recognize a space of collective religious freedom where the questions of religious identity, authority, membership and practice are not subject to English antidiscrimination law or judicial supervision.<sup>69</sup>

Finally, it is important to recognize again that this modular form of reasoning and need to demarcate a *forum internum* as integral to the right to religious freedom is a phenomenon that cuts across the Western/non-Western divide. We thus see strikingly similar patterns of normative legal contestation in countries such as Egypt, which is a self-avowedly Islamic state that regards the Islamic *sharia* to be the source of all of its laws. As Saba Mahmood and I have discussed regarding the Bahai cases in (5), the "dilemma of how to demarcate the meaning and scope of the *forum internum* has been shown necessarily to involve the courts in making sub-

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interference: see, for example, David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 *MISSOURI LAW REVIEW* 83, 138 (2001) (noting that "[a]s the scope of antidiscrimination laws has grown, the political constituency supporting such laws at the expense of constitutional rights has grown apace"); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 *BOSTON UNIVERSITY LAW REVIEW* 391 (1987).

<sup>65</sup> Danchin, *supra* note 49, at 251.

<sup>66</sup> For analysis of the reasoning in the case, see Danchin and Blond, *supra* note 55.

<sup>67</sup> Any inquiry into the reasoning behind the matrilineal test and related conversion criteria and how these are understood within Jewish religious law are viewed by the majority as "subjective" motives which are then rejected as irrelevant to the factual question of direct racial discrimination: JFS [2009] UKSC 15, ¶ 35 (Lord Phillips). Implicit in this reasoning is the assumption that religion is a matter of choice (assent to beliefs), while race and ethnicity are immutable, unchosen characteristics.

<sup>68</sup> JFS [2009] UKSC 15, ¶ 201 (Lord Hope); ¶ 227 (Lord Roger).

<sup>69</sup> JFS [2009] UKSC 15, ¶ 258 (Lord Brown).



stantive judgments on what falls within the protected category.”<sup>70</sup> Paradoxically then, courts must make judgments that are entangled with and premised on religious criteria and concepts in order to identify and demarcate a private sphere “free” from state authority.

### 3.2 *Forum Externum* and Public Order

The second part of the bifurcated structure of the modern right to religious freedom ensues from the first. Unlike the *forum internum*, the notion of the *forum externum* is understood to be subject to the authority of the state in two respects: first, in terms of state recognition of religious practices and rites – as we see, for example, in cases such as *Lautsi* in (1) and *Hosanna-Tabor* in (2); and second, in terms of state-imposed limitations on and regulation of such practices on grounds of public order – as we see in cases such as *Choudhury* in (4) – or to protect the rights of others, as we see in cases such as *Dahlab* in (1).

Here, the dilemma for the courts is to specify what constitutes both a recognized manifestation of religion or belief and an exceptional ground of limitation. In both cases, the jurisprudence in all jurisdictions reflects how, over time, the shape and content of the *forum externum* inevitably result in privileging the religious sensibilities, values, traditions and customs of the majority, which become intimately linked with the legal and political order. In this respect, there is a dynamic relation between the *forum internum* and *forum externum*, as the space demarcated by the state as both essentially religious and free from sovereign interference is increasingly entangled with, and indeed presumed by, what the state recognizes in the *forum externum* as falling within the right to manifest religion, conscience or belief.

This dynamic generates the second great paradox of modern secular governance. Not only does the right to religious freedom lead to constant intervention and reconfiguration of substantive features of religious life; but the values and commitments of the religious majority become ever more suffused within the normativity of the public sphere as the norm against which the religious practices of minorities are then either recognized or limited.

This is not the result of any malfeasance or bad faith on the part of the state. Rather, it is a product of the two propensities *internal* to modern political secularism of constructing the category of religion as a space free from state intervention on the one hand (*forum internum*) and increasingly regulating religious life on the other (*forum externum*). As Saba Mahmood observes:

Secularism, in this understanding, is not simply the organizing structure for what are regularly taken to be a priori elements of social organization – public, private, political, religious – but a discursive operation of power that generates these very spheres, establishes their boundaries, and suffuses them with content, such that they come to acquire a natural quality for those living within its terms.<sup>71</sup>

The two primary grounds of limitation on the manifestation of religion or belief which we see embedded in the textual structure of virtually all modern human rights instruments in

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<sup>70</sup> Saba Mahmood and Peter Danchin, *Immunity or Regulation? Antinomies of Religious Freedom*, 113 THE SOUTH ATLANTIC QUARTERLY 129, 154–55 (2015) (discussing how in the Izzat-Rushdie case the Administrative Court of Justice and Supreme Administrative Court construct the *forum internum* in different ways in terms of either “belief” or “religion,” the latter encompassing the collective identity and religious practices of distinct communities).

<sup>71</sup> MAHMOOD, *supra* note 1, at 3.

fact mirror and trace their genealogies to the seventeenth and eighteenth century civil and philosophical Enlightenments discussed in Section 2 above. Each of these genealogies thus points us today to “how diverging histories and theories of state and subject coexist within the capacious language of freedom of conscience, submerging or reemerging in new ways to refract current contentious political conflicts.”<sup>72</sup>

The legal rubric of “public order” traces to the early modern civil Enlightenment tradition and the notion that regulation of worship is necessary to ensure civil peace and ameliorate the risk of conflict between rival religious communities. It is this underlying logic that animates the recent decisions of the ECtHR in (1). In cases such as *Dahlab* and subsequent cases such as *Sahin v. Turkey*,<sup>73</sup> the ECtHR’s reasoning reflects a preoccupation not just to preserve individual freedom of religion (the rights of others), but to avoid religious conflict in the name of “denominational and religious neutrality.”<sup>74</sup> But as we see in cases such as *Lautsi*, not all religious symbols – such as the crucifix – are axiomatically seen to threaten public order and social peace. As observed by Bhuta:

The equation of Islamic religious practices with intolerance, discrimination and inequality could be understood as evincing a rationalist critique of religious values per se and a purely secular vision of democratic politics. But in *Lautsi*, this is not the case at all. When it comes to Christian values, their potential inconsistency with democracy, equality, and tolerance is never in doubt, revealing sharply the degree to which this line of cases rests not on a thoroughgoing rationalist secularism but on a political theology of Christian democracy in which the identity of democratic values with an imagined Christian civilizational tradition is unquestioned.<sup>75</sup>

Arguably more hegemonic in modern rights discourse, however, is the legal rubric of protection of the “rights of others” as a ground of limitation. This traces directly to the later eighteenth century Kantian liberal philosophical tradition and runs seamlessly through the religious freedom jurisprudence of the ECtHR. Thus, the wearing of a headscarf by a Muslim schoolteacher in *Dahlab* is said to pose a risk to both parents and children who may be “influenced or offended” in their own beliefs by such a powerful “external” symbol;<sup>76</sup> whereas in *Lautsi* the compulsory display of the crucifix is said to be a “passive” religious symbol which “cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.”<sup>77</sup>

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<sup>72</sup> Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 THE SOUTH ATLANTIC QUARTERLY 9, 11 (2014).

<sup>73</sup> *Leyla Sahin v. Turkey*, no. 44774/98 [2005] E.C.H.R.

<sup>74</sup> In *Sahin*, the ECtHR more explicitly accepts a line of Turkish jurisprudence which characterizes the headscarf as a symbol of political Islam and thus a direct threat to republican values and civil order in Turkey. See Danchin, *supra* note 17, at 35–39.

<sup>75</sup> Bhuta, *supra* note 72, at 26.

<sup>76</sup> “The court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religious of very young children [...] [I]t cannot be denied outright that the wearing of the headscarf might have some kind of proselytizing effect, seeing that it appears imposed on women by a precept which is laid down in the Koran.” *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 463 (“The Law”).

<sup>77</sup> *Lautsi v. Italy*, App. No. 30814/06 (GC, March 2011), at para. 72.

This Kantian mode of reasoning is what Ian Hunter has referred to as the “sacralization” of reason, which animates modern liberal rights discourse in the form of “public reason.”<sup>78</sup> The effect has been the steady “rationalization” of religion as the process of constitutional and international rights-based adjudication has both strengthened and deepened. In many respects, however, this constitutional politics founded in moral self-governance in Kantian and Rawlsian modes remains in deep tension with the statist character of early modern liberalism and the project of maintaining external order by withdrawing civil power from the moral domain.

### 3.3 The Double Structure of the Right to Religious Freedom

If we view these two elements together, we can see that the double structure of the rationality of the *forum internum* on the one hand (religion as individual belief), and the reason of the *forum externum* on the other (manifestation of religion as subject to the demands of public reason), necessarily generates two interrelated paradoxes.

First, by defining the secular neutrality of the public sphere in terms of the right to religious freedom as discussed in Section 2, the authority of religion is privatized relative to state authority and its normativity interiorized relative to individual subjectivity. Second, and as a result, religious freedom is secured through the subordination of religion to the secular power and public reason of the sovereign state as discussed in Section 3. In differing ways, in each case religion is not only “tamed,” but also “free.”<sup>79</sup>

By defining the meaning and scope of the freedom protected by the right in terms of secular neutrality, the claims of individuals and communities to religious liberty are in fact limited through a continuing praxis of legal recognition and regulation. Inevitably, this prioritizes the values and sensibilities of the majority religion through recourse to the secular concepts of public order and the rights of others with corresponding discriminatory implications for minority religious traditions. As Mahmood acutely observes:

despite the commitment to leveling religious differences in the political sphere, modern secular governance transforms – and in some respects intensifies – preexisting interfaith inequalities, allowing them to flourish in society, and hence for religion to striate national identity and public norms.<sup>80</sup>

This normative structure is what generates the three key controversies concerning the subject, object and justification of the right discussed in Section 2. This becomes especially evident when the right to religious liberty becomes internally conflicted – that is, when *both* sides to the dispute assert their claims in terms of the right to religious freedom. Each of the paired cases in (1) to (5) reflects the dynamics of these tensions and propensities internal to political secularism and the right to religious freedom.

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<sup>78</sup> See HUNTER, *supra* note 29; JOHN RAWLS, A THEORY OF JUSTICE (1971); ID., POLITICAL LIBERALISM (1993).

<sup>79</sup> Peter G. Danchin, *Exceptional and Universal? Religious Freedom in American International Law*, 3 CRITICAL ANALYSIS OF LAW 175, 178 (2016) (discussing religion as “tamed in the form of ‘inner conscience’ and free as a matter of ‘individual authority,’” but also tamed “under the constitutional authority of the state, but also free as a matter of normative right as an object of autonomous choice”).

<sup>80</sup> MAHMOOD, *supra* note 1, at 2.

#### 4. CONCLUSION

This chapter has argued that a distinctive bifurcated logic simultaneously grounds and shapes the normative structure of religious freedom as a modern constitutional right. Today, this logic is global and is shared across the Western/non-Western divide. Such a constellation of intelligibility has far-reaching implications for our understanding not only of the modern category of religion and conceptions of religious subjectivity, but also of conceptions of religious freedom understood as a fundamental right subject to the political rationality of the modern secular state.

The paradoxes and antinomies we observe of constant state intervention in the domain of religion despite the norm of religious neutrality on the one hand, and the constant privileging of majoritarian values and sensibilities despite the norm of religious equality on the other, are thus neither accidental nor outside of the discursive operation of modern secular power.