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TWO CONCEPTS OF RELIGIOUS FREEDOM IN THE  
EUROPEAN COURT OF HUMAN RIGHTS

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## **Abstract**

This paper considers the way in which recent historical work on the history of freedom of religion and freedom of conscience opens up a new interpretation of the decisions of the European Court of Human Rights in the headscarf cases. These decisions have been widely criticized as adopting a militantly secularist approach to the presence of Islamic religious symbols in the public sphere, an approach that seems inconsistent or even overtly discriminatory in light of the court's recent decision in Lautsi that the compulsory display of crucifixes in the classroom did not breach Italy's convention obligations. I argue that the headscarf cases turn less on the balance between state neutrality and religious belief, than on an understanding of certain religious symbols as a threat to public order and as harbingers of sectarian strife which undermine democracy.

## **Keywords**

freedom of religion, European Court of Human Rights, secularism, public order, headscarf

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## TWO CONCEPTS OF RELIGIOUS FREEDOM IN THE EUROPEAN COURT OF HUMAN RIGHTS

*Nehal Bhuta*

### **Introduction – The Historicity of Rights**

The historicity of contemporary claims of right has become the central theme of a new generation of critical scholarship about one of the most influential global political languages of the last thirty years. Perhaps reflecting human rights' marginality in the first three decades after the Second World War, historians and philosophers gave sparse attention to them until their political saliency was dramatically enhanced by a confluence of events in the 1970s (Moyn 2010a; Moyn 2011). Like Hegel's owl of Minerva, the interest in rationalizing, justifying and explicating human rights emerged only after they had acquired some significance in global politics. When it did arrive, such scholarship was celebratory and teleological, caustically summarized by Moyn as "differing primarily about whether to locate the true breakthrough with the Greeks or the Jews, medieval Christians or early modern philosophers, democratic revolutionaries or abolitionist heroes, American internationalists or anti-racist visionaries" (Moyn 2011: 59).

The recent challenge to Whig histories has revealed a very different account of how human rights "came to the world." Instead of an ever-more inclusive concept of the human, or an immanent critique of exclusion fostered by the idealizing suppositions of natural right, we can observe multiple, discontinuous and fragmentary histories of right. The catalogue of rights found today in the Universal Declaration, the Covenant on Civil and Political Rights or the Covenant of Economic and Social Rights represent a word-smithed bricolage of rights-forms derived from heterogeneous traditions and specific political projects: early modern toleration, early modern charters of liberties, the age of democratic revolution, the completion of the bourgeois *rechtstaat*, the new laborist movements of the late 19<sup>th</sup> century, and decolonization struggles. Eckel proposes a "polycentric, ambiguous and discontinuous" history of human rights since 1940: "The development of human rights politics between the 1940s ... and the end of the century was a fitful and multi-faceted process, full of complexities to which linear narratives ... cannot possibly do justice ... [T]he political contexts in which human rights politics occurred were manifold" (Eckel 2010, 2).

Revealing a collection of "warring tendencies and dead projects," (Moyn 2010a: 20) the recovery of the specific histories of human rights also underlines an important philosophical point that rights skeptics had made for some time: "proposing a particular set of rights is always a strategic decision ... [There are] no real grounds for speaking of rights in a way that is independent of the contingent, shifting conjunction of political expediency, institutional convenience and our moral views and feelings" (Geuss 2001: 149). By directing our attention to the intrinsically polemical uses of rights language, and the "contexts of power relations within which it is inserted" (Mahmood 2012, 429) and through which stable meanings fleetingly congeal at certain historical moments, we are perhaps better able to grasp the political stakes of a given rights claim and its contestation.

In this essay, I consider the way in which recent historical work on the history of freedom of religion and freedom of conscience opens up a new interpretation of the decisions of the European Court of Human Rights in the headscarf cases. These decisions have been widely criticized as adopting a militantly secularist approach to the presence of Islamic religious symbols in the public sphere, an approach that seems inconsistent or even overtly discriminatory in light of the court's recent decision in Lautsi that the compulsory display of crucifixes in the classroom did not breach Italy's convention obligations. The cases have become part of a wide-ranging debate on the right to religious freedom, its

foundations and justification, the political order required by a commitment to secularism, and the relationship between secularism, liberalism, democracy and human rights. It is suggested here that incoherence of the courts' jurisprudence reflects not – or not only – a cultural hostility to an increasingly visible Islamic population in Europe nor an unforgiving liberal commitment to secularism and the rigid demarcation of private conscience from public spaces. Rather, the cases – including Lautsi – point us to the way in which diverging histories and theories of state and subject coexist within the capacious language of freedom of conscience, submerging or re-emerging in new ways to refract the contentious political conflicts of the day. To borrow an insight from Ian Hunter's contribution to this volume, the cases should be read as an unsteady and unstable "circumstantial casuistry" of historically embedded political concepts such as democracy, secularism, freedom of conscience and public order. I argue that the headscarf cases turn less on the balance between state neutrality and religious belief, than on an understanding of certain religious symbols as a threat to public order and as harbingers of sectarian strife which undermine democracy. As such, the cases evoke 2 historical understandings of the concept of freedom of conscience: one rooted in an early modern preoccupation with religious plurality as dangerous to public order, and another post-war (Christian) understanding of religious freedom as a spiritual source for the renewal of western civilization after the catastrophes of world war and as a bulwark against the anti-democratic, materialist and totalitarian propensities inherent in modern politics.



### **Three concepts of Freedom of Conscience – From Public Order to Bourgeois Freedom, to Spiritual Heritage of Occidental Culture**

For contemporary critics of secularism as a political theory, there is a relatively direct line from the aftermath of the 17<sup>th</sup> century wars of religion to the desacralization of the public realm and the privatization of religious experience in the inviolable *forum internum* of the autonomous subject. All of these facets of secularism are ascribed to “liberal political theory,” the origins of which are traced from Locke through Kant to Rawls. Both in the eyes of its enemies and its proponents, “liberalism” is thought to describe a historically continuous political and theoretical doctrine, which can be applied unproblematically to interpret and understand historical controversies over the meaning of freedom of conscience from 1688 to now. In his well-known critique of secularism, Connolly, for example, adopts the historical narrative of secularization claimed by modern liberal theory, even as he strenuously contests its theoretical claims and normative conclusions (Connolly 1999: 20-29). Geuss (2002) complains that the anachronistic understanding of liberalism as a coherent theoretical program – especially prevalent since Rawls’ attempt to reconstruct a systematic political philosophy of liberalism – obscures the extent to which liberalism is “best understood as a negative phenomenon, a reaction against certain events, theories and social and political tendencies in the late eighteenth and early nineteenth centuries ...” (322).

Rather than understand early modern discourses of toleration as progenitors of state neutrality in matters of religious belief and practice, and the kernel of a pure interiority of conscience reflecting spiritual choices of the rational subject (an understanding that would permit a close kinship with contemporary discourses of the right to freedom of conscience), the history of political thought paints a rather different picture. John Dunn points out that in its early modern inception, freedom of conscience (and the cognate principle of toleration) was not rooted in subjective natural right or an ideal of a sphere of unencroachable autonomy of the individual. It was rather advocated by its exponents as “a discretionary concession on the part of the custodians of the state’s absolute power; and both its scope and its limits were to be decided consistently on the basis of [the custodians] own best judgment of the requirements of the effective discharge of their governmental responsibilities” (Dunn 1996: 101). Even Locke’s account of toleration bases its limit on state interference in individuals’ religious worship on a principle of immunity from legal regulation, to which persons are entitled because of the priority of their religious needs and duties (each person’s duty to save their soul by worshiping God in the manner that he believes God requires) over secular obligations. But even within this limited understanding, the public magistrate retains the power to regulate and prescribe individuals’ interpretations of their religious needs and duties which imperil the civil interests of fellow citizens. Private and theoretical beliefs – the realm of conscience we now think of as *forum internum* – are entitled to toleration, but the magistrate has the authority to decide whether certain theoretical beliefs (such as atheism) could have dangerous practical consequences for the public good if manifested: “it is a central responsibility of the magistrate to watch vigilantly over potential future threats to the civil goods of his subjects” (Dunn 1996: 101). The claim to toleration was subject to the responsibility of the state to ensure that threats to legitimate political order were contained – a preoccupation rooted in a “highly self-conscious practical lesson drawn from the grim experience of sixteenth- and seventeenth century wars of religion” (Dunn 1996: 101).

Far from a neutralization of public power, the first century of Reformation and religious schism resulted in its thorough confessionalization. The competing Christian sects would reconstruct their theologies to render them more exclusive of each other, and imbue “their members with a much clearer sense of faith ... through the negative characterization of the heretical faiths of rival communities” (Hunter 2013: 8). Confessionalization of rival Christian religions coincided with the beginning of the end of the formation of modern territorial states, after a long and uneven gestation (Ertman 1997; Tilly 1975; Spruyt 1994), and confessionalized – and territorialized – churches “offered

emerging dynastic states a powerful pedagogical means of shaping national identity” and consolidating political control (Hunter 2013: 9). The incendiary combination of the concentrated political, financial and military power of the territorial state, with the formation of mutually hostile faith communities identified with particular dynasties as their earthly defenders, led to an internecine civil conflict that devastated European economy and society (Asch 1997). The end of the conflict was not characterized by a sudden de-confessionalization of the states that had endured it, but a variety of national religious settlements aimed at preserving civil peace under the conditions of the balance of forces that prevailed. Thus, the English state remained confessionalized, excluding Catholics and unreconciled Presbyterians from public office and reinstating Anglican hegemony. At the same time, a *modus vivendi* was created by widening the space for toleration of certain doctrines previously penalized as heretical, and deeming them adiaphoric or indifferent with regards to salvation (Hunter 2013: 12). Offences of heresy and blasphemy remained on the books and continued to have a religious content, prosecuted as offences which breached the peace by denying certain doctrinal religious foundations of the civil order. In practice, private worship by Catholics, dissenting Protestants and free-thinkers was admitted, but not on the grounds that religious belief is arrived at through the free exercise of religion. It was admitted to the extent that it did not challenge a public order reconstituted on the basis of Anglican “national worship” after almost a century of civil war.

The termination of religious conflict in the principalities of the Holy Roman Empire produced a different strategy, one in which imperial public law juridified the theological conflict by regulating and mediating the consequences of deep theological divisions without resolving their theological truth (Straumann 2007). The result was not a secularization as much as neutralization (Schmitt 1929; Bates 2012: 22), a suspension through public law of irresolvable questions of religious truth and a granting of juridical recognition and parity to rival confessions. Unsurprisingly, this was regarded by theologians as a temporary measure reflecting a state of emergency that required exceptional steps to end civil war (Straumann 2007: 6),<sup>1</sup> but ultimately inconsistent with the theological foundations of salvation. In its first stage (the Peace of Augsburg of 1555), the juridification intensified territorial confessionalization by consecrating the *cuius regio* principle. The Westphalia treaties repudiated the principle, and required the legal recognition of the confessions and rejected the claim of any religious authority (that is, the Pope) to challenge the validity of the treaties (Osiander 1994). The value horizon of this public law, as Hunter concisely puts it in this volume, was “the establishment of a temporal peace between religions ... where the latter were conceived as legal entities whose inner truths and modes of worship were opaque to law except insofar as they threatened civil peace” (Hunter, this volume: 22).

The diverse constitutional settlements to the age of European sectarian war did not correspond to any *ex ante* political theoretical abstraction or blueprint – although many treatises were penned by participants in regional and national disputations over the terms of different settlements. History, not jurisprudence, teaches the true principle, to paraphrase Jellinek (Jellinek 1901: 97). Nonetheless, some commonalities can be observed. The relativization of religious truth to the supreme value horizon of public order guaranteed by the state and state law is at the heart of these settlements, even as form, structure and conceptual apparatus of each arrangement varies. The state is far from neutral about religious doctrine and practice in general, but the strategy of toleration – in which certain doctrines previously vilified as heretical are treated instead as not threatening to public order provided they remain in their proper place – is a feature of both the English and German experiences. The zone of adiaphora is defined casuistically, that is, on a case-by-case basis, through scrutiny of whether the religious practice does or could threaten civil peace (Hunter, this volume).

Freedom of conscience as toleration did not render the *forum internum* sacrosanct and immune from state intrusion; nor did it ascribe any particular value to the plurality of religious views – on the

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<sup>1</sup> Straumann notes that as late as 1955, on the 400<sup>th</sup> anniversary of Augsburg, Pope Pius XII referred to the Peace of Augsburg as founded on emergency rules (Straumann 2007, 6 n.18).

contrary, plural views about how to achieve one's salvation were potentially very dangerous, but the attempt to completely suppress them carried with it the risk of conflict between religious communities and may reignite a new round of civil conflict. The state's regulation of worship served civil peace; depending on the specific historical circumstance, such regulation and discrimination between practices and doctrines may have been understood to constitute the condition for civil peace. In either case, it did not entail freedom to believe or say whatever one pleased, in the manner which we might today understand as captured by the idea of freedom of conscience. As Geuss points out, it was not until the end of the 18<sup>th</sup> century that toleration came to be construed as something other than "inherently negative, as a form of self-restraint or a failure to attack with all one's force something which it would in principle be good to be without, but which it was perhaps too costly fully to suppress" (Geuss 2001: 80).

Perhaps the earliest version of a right of liberty of conscience that approximates contemporary notions of a sacrosanct *forum internum* was an esoteric one: held by Congregationalist sects in sixteenth century England, and radically asserting an unrestricted demand for liberty of conscience because it was "not granted by any earthly power and there fore by no earthly power to be restrained" (Jellinek 1901: 60). The historical realization of this tenet of a branch of Protestantism awaited the founding of settlements in the American colonies by communities of believers, whose radical Christian individualism in part contributed to their exile from European states. Their political community was a "religious community, exercising inherent rights derived from God and recorded in the Covenants that founded the new settlements (Jellinek 1901: 74).

The emergence of the right as a legally-established principle which could be invoked to set limits for state action owed much to the colonial charters of the American colonists and the subsequent revolutionary declarations. This iteration of the concept would return to Europe in the 19<sup>th</sup> century debates over the nature of the state, and in particular through the idea of the *rechtstaat* (Kelly 2004). As Kelly notes, from the early nineteenth century there was "a movement away from 'enlightened absolutism' and toward a broadly 'liberal' political theory of individual liberty ... The traditional focus on promoting the happiness of citizens as the principal purpose of the state did not disappear but was instead modified ... Rather than actively pursuing policies designed to show the ability of the ruler or the prince to support the common good, the state's purpose was redefined and limited according to the idea that there exists an inviolable sphere of individual liberty into which it should not penetrate" (Kelly 2004: 507).

The state's practical authority to regulate social, political and economic life was not radically curtailed as a result – the centrality of *polizeiwissenschaft* remained. But a new emphasis on administrative procedure paved the way for arguments about the purpose of the state and its relationship with individual right. Schmitt's stylization of the *rechtstaat* ideal is helpful in grasping the distinctiveness of this thinking (although, as with so much of his argument, the stylization aims partly to exacerbate a perceived contradiction between concepts in order to demonstrate that the ideal is now defunct):

For a concept that is useful in scholarly terms, one must affirm that the basic rights in the bourgeois *Rechtstaat* are only such rights that can be valid as rights prior to and superior to the state ... [T]he state recognizes that these rights are given prior to it and protects them on this basis. The state also accepts that it may intrude on these rights only to a degree that is in principle definable and then only through a regulated procedure. According to their inner nature, therefore, these basic rights are not legal entitlements but rather spheres of freedom ... Under this idea, freedom of religion, personal freedom, property, right of free expression of opinion exist prior to the state and receive their content not from any statute ... The state facilitates their protection and herein finds the justification for its existence.

... From this absolute and in principle unrestricted quality of individual freedom, it does not follow that intrusions and limitations are completely excluded. But they appear as an exception that is calculable, definable, and controllable according to presupposition and content. (Schmitt 2007: 203, 213)

The requirement that state intrusions on basic rights be calculable, definable and controllable is of course the echo of early doctrines of proportionality, a consequence of the tension between *polizei* and *rechtstaat* concepts of the state. The proportionality doctrine in German law emerged as an administrative law technique for scrutinizing claims of police power by the state (Porat and Cohen-Eliya 2010; Stone Sweet and Mathews 2008; Ledford 2004). The language of natural right was invoked to place the onus on the state to justify rights-infringing policies as necessary for the protection of public order or the realization of public welfare, in a context where other modes of political accountability were ineffective. Determining “necessity” required an assessment of whether the state measures exceeded the extent necessary for the specific goal related to public order, safety or welfare. In the ideal-typical – and perhaps caricatured – way in which Schmitt describes it, the *rechtstaatliche* concept of right here is not one set of social values to be balanced with others (security, welfare, etc) but a bedrock for the legitimacy and legality of state action, and a horizon against which priority, value and expediency of infringing state policies must be calibrated. The resulting approach to the evaluation of state measures is, as a result, stricter in its notions of necessity and in the weight it would give to the value of the infringed right.<sup>2</sup>

The bourgeois *rechtstaat* concept of legal right bears a closer resemblance to the form of civil and political right found in contemporary human rights instruments, and ideals of constitutional limitation on state power informed mid-twentieth century drafters of the treaties. But even here the lineage is complex and circuitous, traveling through the (failed and irrevocably tainted) experience of the first attempt at internationally guaranteed rights under the system of minorities treaties (Mazower 2004; Lindkvist forthcoming; Mahmood 2012). In the specific instance of freedom of conscience, recent scholarship has revealed two important influences on the formulation of the right as it appears in the Universal Declaration and in the European Convention: Christian personalism, and ecumenical missionary movements. The latter’s emphasis on the right to change religion had its origins in the long preoccupation of Christian missionaries with the right to proselytize within the Ottoman empire, and with an inter-and post-war attempt to secure protection of Christian interests (“shrines and souls”) in the looming territorial and national conflict developing in Mandatory Palestine (Lindkvist forthcoming). The Joint Committee for Religious Liberty, created by the American Federal Council of Churches and the Foreign Mission Council in the early 1940s, declared its intention to work for a human rights charter that would have a “satisfactory place for the protection of religion and conscience” within it (Lindkvist forthcoming). The study of the meaning of religious liberty written by missionary Searle Bates for the League – itself indebted to Jacques Maritain’s Christian personalist thought - emphasized the centrality of the “moral freedom to choose among good courses” to religious freedom, and condemned Communist Russia, Fascist Spain and “Moslem Countries” for their denial of this freedom: “Orthodox Islam is the contrary of religious liberty and finds no room for the concept as developed in Western lands. In principle it forbids apostasy under dire penalty and provides for change of faith only towards Islam” (quoted in Lindkvist, forthcoming).

The importance of what Moyn calls the “epoch-making reinvention of conservatism” (Moyn 2010b: 87) for the origins of post-war human rights is especially clear in the case of freedom of conscience. In his ground-breaking research, Moyn (2010b, 2011, 2008) demonstrates the improbable transformation in European Christian (primarily Catholic, but also Protestant) social and political thought from a rejection of bourgeois individualism, to a “personalist” embrace of the “absolute value of the human person” by key intellectual figures such as Maritain and Malik (Moyn 2010b). Early twentieth century Christian political thought largely dismissed rights as individualist and materialist, accoutrements of an enfeebled and crisis-prone liberal parliamentarism that was unable to resolve the social, moral and economic pathologies of modern politics, whether capitalist or communist (Kaiser 2007: 55; Mazower

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<sup>2</sup> Stone Sweet and Mathews (2008) note that in modern proportionality analyses, necessity is disaggregated into 2 distinct steps: an evaluation of whether the state’s measure is no more rights restrictive than necessary to achieve policy objective (“least restrictive means”) and, if the measure passes this threshold, whether the benefit of the measure outweighs the costs incurred by the infringement of the right.

1998: chapter 1). Christian politics' preference for neo-corporatist organic community or the revival of traditional foundations of moral and social authority led it unsurprisingly to flirt with or embrace Fascism and other authoritarian movements against socialism and communism (Kaiser 2007: 60-61). But the Catholic Church's anti-totalitarian turn after 1937, and the exile of prominent inter-war Catholic activists such as Sturzo and Maritain, led to a pivotal change in orientation: "Catholic political refugees came back from Britain and the United States with a changed normative hierarchy in which individual liberty was ... more important than before, thus pointing the way towards the more liberal Christian democracy of postwar western Europe. ... They increasingly discarded mysticism with its peculiar notion of 'community' ... in favour of a greater emphasis on the individual person" (Kaiser 2007: 150).

In his sketch of Jacques Maritain's intellectual trajectory, Moyn shows how Maritain's embrace of rights was part of an attempt to provide a "plausible alternative to secularism east and west" (Moyn 2008). The concept of the person meant not a liberal solipsism of the rational subject, but emphasis on the primacy of the spiritual dimension of human life which could never be assimilated to a purely material, secular politics and ought to be nurtured as a bulwark against totalitarian tendencies. Although inter-war personalist currents were far from committed to democracy, Maritain's reconstruction of a personalism rooted in prepolitical natural rights also envisioned a Christian democracy in which the preservation of the value of the human person was the guiding ideal of a democratic political order. The Christian inter-war castigation of bourgeois democracy and parliamentarism was quietly buried, and in its place emerged a decidedly non-neutral political theology of democracy in which the pathologies of a purely secular mass politics could be contained only through a political reconstruction committed to the dignity of the person – understood to be a specifically western Christian inheritance. Thus, German Protestant historian Gerhard Ritter blamed the catastrophe of Nazism for European culture on "the advancing secularization of the Occidental world" (quoted in Moyn 2011: 66), and urged the refoundation of western spiritual unity through ecumenicalism and human rights. Human rights overcame the abstraction and unreality of liberal rights only if they were self-consciously understood as emerging from and resting upon "the continued existence of Occidental culture" (quoted in Moyn 2011: 62).

Freedom of conscience was, unsurprisingly, understood as the cornerstone of this new carapace of institutional and legal limits on secular politics. It was understood to protect the innermost spiritual core of the person, against the excessive claims of the state and materialist ideologies such as Communism. In one striking continuity with inter-war Christian conservative thought, Communism remained the political enemy which still threatened occidental civilization, not the least because of its radical and unlimited secularism that went hand in hand with the total claims made by the Soviet system on the individual.<sup>3</sup> As Duranti has argued, the design of a transnational judicial mechanism of legal guarantees in Europe was heavily influenced by conservative political notables concerned to constrain the economic agenda of socialist parliamentary parties, and signal a commitment to Christian democracy against rival materialist ideologies (Duranti 2012; Duranti, forthcoming). In this volume, Moyn has noted that drafting record of the European Convention reveals an unchallenged rhetorical equation of western European democracy and human rights with Christian civilization, and a rejection of the possibility that religious values (understood, obviously, as Christian values) could be incompatible with the needs of a democratic society.

The success of the postwar transvaluation of "Christian values" as transcendent political ones, secular in form but not in substance, thus seem to have had a decisive impact on the conceptualization of the right of freedom of conscience during the drafting of the European Convention. The conceptualization of the right was embedded in a political ethos defined by a polemical opposition to two alternative possibilities: implicitly, a formal liberal ideal of freedom of conscience which sets clear and calculable

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<sup>3</sup> As influential Lebanese delegate to the UN committee drafting the Universal Declaration Charles Malik expressed it, men needed protection against "a new form of tyranny: that exercised by the masses and by the State."

limits to state interference on individual autonomy, and; explicitly, a radical materialist secularism identified with the Communist bloc. Even as Christian democratic thought embraced rights, it did so on an understanding that rights formed an important part of the imbuelement of the state with a moral-cultural political substance which overcame the weaknesses of liberal forms in the face aggressive non-liberal antagonists. This ethos, I would suggest, is a “militant” one, wittingly or unwittingly absorbing a key lesson of Carl Schmitt – that a political order is necessarily a concrete value order shaped in antagonism to other active political visions. The implication of this ethos is that the boundaries of freedom of conscience – the terms of its limitation – are not drawn by reference to an empty or unoccupied space of formal individual autonomy, but by reference to a concrete value order in which the idea of freedom of conscience has a specific determination and political function; in this case, it would seem, as the incarnation and embodiment of occidental civilization, and an anchor of its hoped-for postwar revival.

## **The Headscarf Cases in the Strasbourg – the Buried Order of Political Theology**

The deep puzzle posed by this historical account for the headscarf cases, is how a Christian democratic anti-secularist ethos could underpin decisions expressly predicated in their reasoning on a seemingly strong conception of secularism, in which religious symbols are deemed properly excluded from the public sphere because of their incompatibility with a neutral state. We can make sense of this paradox only through a careful scrutiny of the language of the court in these cases, and it will be my argument that the language – despite being associated with claims of secularism – reveals an understanding of religious freedom which combines the post-war moral-cultural political theology of democracy as transvalued Christianity, with the early-modern preoccupation with the threat to public order posed by rival theological commitments.

The cases of Sahin v Turkey and Dahlab v Switzerland are by now well known, and have attracted considerable criticism of their reasoning. I will not rehearse all of these criticisms here and only briefly recount the facts. Both cases were brought by women who wished to wear the hijab, either in their place of work (Dahlab, a Swiss primary school teacher) or at university (Sahin). Dahlab, a convert to Islam, had commenced wearing the hijab to work in 1991 based on her belief in “a precept laid down in the Koran whereby women were enjoined to draw veils over themselves in the presence of men and male adolescents” (para 2). No complaints were received from parents, but in 1996 the Directorate General for Primary Education in the Canton of Geneva prohibited the applicant from wearing a headscarf in the performance of her professional duties, on the grounds that it constituted an “obvious means of [religious] identification imposed by a teacher on her pupils, especially in a public, secular education system,” violating section 6 of the Public Education Act. Section 6 provides that “The public education system shall ensure that the political and religious beliefs of pupils and parents are respected.” The Swiss Federal Constitution states in Article 27(3) that “it shall be possible for members of all faiths to attend state schools without being affected in any way in their freedom of conscience or belief.” Mrs. Dahlab appealed through several levels of government, until her claim reached the Swiss Federal Court. The court dismissed her claim, for reasons which will be discussed below.

Leyla Sahin also considered it her religious duty to wear the hijab. She was a medical student at Bursa University and enrolled in her fifth year at the medical faculty of Istanbul University. She wore the hijab during all her years of study at Bursa, and until 1998 in Istanbul. In February 1998, Istanbul University issued an administrative regulation prohibiting the admission to classes of students wearing the hijab, with the result that Leyla Sahin was refused admission to classes and examinations. She was subjected to disciplinary proceedings and was suspended for a semester in 1999, in part due to her joining a protest against the rules on dress. In the meantime, the regulations were appealed to the Istanbul Administrative Court, which dismissed the complaint because the regulatory power of the university had been exercised in accordance with the relevant legislation and judgments of the Constitutional Courts and the Supreme Administrative Court. In 1999, Leyla Sahin abandoned her medical studies in Turkey, and enrolled at Vienna University in Austria.

Both women complained to the European Court of Human Rights of a violation of their right to freedom of religion, particularly their right to manifest their religion, under Article 9 of the European Convention. Article 9 provides:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for

the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The structure of “rule-and-limitation” in Article 9 (and several other rights in the ECHR) is of course the textual foundation for the application of proportionality and balancing by the court (Van de Schyff 2005): state sanctioned limits on the rights must be “necessary” in the sense that they are rationally related to the protection of the legitimate interest (usually understood as a “pressing social need”) said to be at risk by the exercise of the right; that the measure is the least restrictive of the right or freedom concerned, and (proportionality *stricto sensu*); that the diminishment of the right is not disproportionate to the value of the other interests protected (balancing). The outcome of any given application of the proportionality and balancing method is deeply context-dependent, a function of stylized facts and interpretive judgments about not only how to accord weight to competing values and interests, but also about whether and in what way the values and interests are competing and in need of balancing. Not even the selection of the interests and how to characterize them is self-evident, but these interpretive glosses have decisive effects for how a proportionality analysis unfolds. As Kumm concludes, “there is nothing particularly law-like about the proportionality test. The test provides little more than a structure for reasoned policy-assessment ... Proportionality has become the lawyers’ framework to engage in policy analysis in a way that is neither directly guided or constrained by legal authority” (Kumm 2009: 110). Stone Sweet and Mathews similarly note that “in balancing situations, it is context that varies, and it is the judge’s reading of context – the circumstances, fact patterns, and policy considerations at play in the case – that determines outcomes” (Stone Sweet and Mathews: 89).

A striking feature of the Dahlab and Sahin is that there is no discussion of whether the veil ban in each case is the least rights-restrictive measure available to achieve the state’s objective, or whether the measure has been factually demonstrated as strictly necessary to protect the rights of others. This would be the approach that flows from a “*rechstaatliche*” understanding of the right as setting clear and calculable limits on state intervention into a realm of individual autonomy. Rather, as set out further below, the “balancing” that takes place is a balancing of abstract stipulated inconsistencies (secularism and democracy vs. the religious symbolism of the veil; women’s equality and tolerance vs. Islamic religious obligation) rather than evidentially demonstrated *in concreto* conflicts of rights with other rights, or of rights with important public interests. As will be shown, this highly abstract analysis is in part facilitated by the court’s invocation of the margin of appreciation doctrine, by which it defers to national authorities’ articulation of the domestic needs and conditions which justify the rights-limiting laws. But the analysis, the language through which the competing values are framed and constructed, and the way in which the margin of appreciation doctrine is applied, betray much about the extent to which Islamic religious practices are understood as an intrinsic or categorical threat to public order and civil peace – regardless of whether the state limiting the rights has demonstrated this to be the case.

In Dahlab, the European Court dismissed the applicant’s claim at the admissibility stage, declaring it to be manifestly ill-founded. In reaching this view, the court relied on the margin of appreciation doctrine to conclude that the Swiss Federal Court’s reasons for upholding the prohibition on wearing the hijab were relevant and sufficient, and proportionate to the stated aims. It is therefore important to consider the Federal Court’s decision. The Federal Court understood freedom of religion as requiring the state to “observe denominational and religious neutrality,” which meant that “in all official dealings it must refrain from any denominational or religious considerations that might jeopardize the freedom of citizens in a pluralistic society ... In that respect, the principle of secularism seeks both to preserve individual freedom of religion and maintain religious harmony in a spirit of tolerance” (my emphasis). Because teachers employed by state schools are representatives of the state, “it is important that they should discharge their duties ... while remaining denominationally neutral.” The individual’s right to freedom of religion and manifestation of that religious belief is thus to be balanced against the state’s interest in the principle of denominational neutrality. The question remains, however, as to what is meant by denominational neutrality, and how a given interpretation of



the concept is to be justified. It is here that the court's reasoning develops a distinct preoccupation with religious conflict:

The impugned decision [to ban the hijab] is fully in accordance with the principle of denominational neutrality in schools, a principle that seeks both to protect the religious beliefs of pupil and parents and to ensure religious harmony ... [S]chools would be in danger of becoming places of religious conflict if teachers were allowed to manifest their religious beliefs through their conduct and, in particular, their clothing [my emphasis].

... [Here] the appellant's interest in obeying a precept laid down by her faith should be set against the interest of pupils and their parents in not being influenced or offended in their own beliefs, and the concern to maintain religious harmony in schools.

The requirement of denominational neutrality is thus understood to require limits on religious attire worn by teachers because the risk that schools will become places of religious conflict, due to offence taken by or influence exercised over pupils and parents. There was no evidence led that Mrs. Dahlab had in fact sought to promote her religious beliefs – or even discuss them – or that any child or parent had complained. But the wearing of the headscarf was held in and of itself to violate denominational neutrality in a way that threatened religious conflict, because

her pupils are young children who are particularly impressionable ... [and] ... the appellant can scarcely avoid the questions which her pupils have not missed the opportunity to ask [about why she wears the hijab] ... It is therefore difficult for her to reply without stating her beliefs. ... Furthermore, religious harmony ultimately remains fragile in spite of everything, and the appellants attitude is likely to provoke reactions, or even conflict, which are to be avoided.

This passage considers a symbol which invites curious inquiry into religious beliefs as provocative and risking conflict; as such, in the balancing exercise between individual right and state interest the latter is understood as the prevention of religious strife – a weighty concern indeed, but scarcely demonstrated to be coextensive with the mere presence of religious symbols on the teacher's person. As such, the implied notion “necessity” at work here is expansive, even preventive. Less restrictive measures need not be entertained, because the contradiction between the symbol and religious peace is so sharply drawn.

In its approval of this reasoning as adequately justifying the limitation on the applicant's religious freedom (which, it should be noted, meant that she had to choose between her profession and her faith because infant education was largely the realm of the state), the European Court underscored the apparently categorical equation of an Islamic religious symbol as ex hypothesi a potent threat to religious harmony and toleration:

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 religion of very young children ... In [the case of children aged four to eight] it 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 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 and non-discrimination that all teachers in a democratic society must convey to their pupils.

Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the court considers that ... the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable (my emphasis).

Many justified criticisms have been made of the court's claim that the hijab is “imposed” on women (see Evans 2006). Of greater significance for my argument are the assertions concerning its proselytizing effect, and the European Court's framing of an Islamic religious precept as threatening to “democratic values” of tolerance, equality and non-discrimination. The subjunctive and conditional

language connecting the wearing of the hijab with the threat of undue influence or even coercion of the pupils' religious beliefs is significant: it cannot be denied outright that the veil might have a proselytizing effect. This language is the marker of an absence of evidence, and effectively reverses the burden of demonstrating the necessity of the rights restrictive measures. In my view it is properly understood as a "preventive" conception of necessity, which equates Islamic symbols with the threat of religious conflict and which expands the authority of the state to repress even speculative risks of religious strife. 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 as we shall see when we turn to its recent decision in Lautsi, this is not the case at all. When it comes to Christian religious 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 thorough-going rationalist secularism, but rather a political theology of Christian democracy in which the identity of democratic values with an imagined Christian civilizational tradition is unquestioned.

In Sahin, the university regulation that prohibited the headscarf relied on a line of Turkish jurisprudence which characterized the headscarf as a symbol of political Islam, and thus a threat to republican values and civil order in Turkey. Turkey's constitution declared the state to be democratic and secular (laik) "based on the rule of law that is respectful of human rights in a spirit of social peace..." (Constitution of Republic of Turkey, quoted in Sahin: para.29). Article 24 protects freedom of conscience but expressly prohibited any attempts to cause "the social, economic, political or legal order of the State to be based on religious precepts." The Turkish court decisions authorizing the headscarf ban evince a very expansive notion of what must be regulated in order to preserve the secular nature of the state. The headscarf is characterized as "in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic" (Supreme Administrative Court decision of 13 December 1984, quoted in Sahin: para.37). A secular regime requires that "religion is shielded from a political role. It is not a tool of the authorities and remains in its respectable place, to be determined by the conscience of each and everyone." To wear a religious symbol which might be understood as an expression of political Islam is to threaten secularism and equality, justifying a complete prohibition of the headscarf in public institutions such as universities. While it is commonly observed that the Turkish state is laic, I would note here that this reasoning emphasizes the preemption of potential or emerging threats to civil order, as defined and understood by the state. What is necessary to preserve public order is expansive, as is the authority of the state to pursue its understanding of the common good. Putting certain manifestations of religious belief back in their "respectable place" is essentially the function of the magistrate in the early modern conception of toleration.

In its earlier decision upholding the banning of the major Islamist party in Turkey as necessary to preserve liberal democracy, the European Court had already indicated its acceptance of this posited incompatibility between political Islam and democracy in Turkey (Refah Partisi). In Sahin, the Court reiterates its acceptance of the Turkish state's rationale for taking a "stance against [extremist political movements] based on its historical experience" (Refah Partisi cited in Sahin: para.115) and defers to the state's judgment that any person wearing the headscarf in public institutions should be understood as making a statement promoting political Islam and endangering civil order. Once the headscarf is assimilated with political Islam, and political Islam assimilated with a threat to democracy, the limitation on Sahin's right to manifest her religious beliefs becomes "necessary" to maintain democracy; with this degree of deference to the state's characterization of the circumstances – and no real evidentiary obligation to demonstrate the imminence or gravity of the threat to democracy posed by this symbol – proportionality reasoning has little work to do except to reaffirm the balance between the threat to an essential public interest and the rights-limiting measure taken by the state. In effect, the European Court has adopted the Turkish state's understanding of what toleration requires, and along the way has also underlined a construction of Islam as inherently threatening to values of democracy,

equality and toleration. Indeed, the court reiterates its statement from *Dahlab* that the headscarf cannot be reconciled with tolerance, equality and non-discrimination (*Sahin*: para. 111).

In both *Sahin* and *Dahlab*, the European Court's light scrutiny of the bases for the claimed threat to public order posed by this religious symbol, and the necessity of prohibiting the practice, is explained formally by its reliance on the "margin of appreciation" doctrine. Various characterized as a doctrine of deference, subsidiarity, or even democracy (Yourow 1996; Kratochvil 2011; Spielmann 2012), the notion that states should have a certain "measure of discretion" (*une certain marge d'appréciation*) in the interpretation and application of their Convention obligations was coined in the context of reviewing a state's measures taken in response to a public emergency (*Greece v. United Kingdom*) and in derogation from the Convention under Article 15. But the term is now used to refer to a general principle that state authorities are "in principle in a better position than the international judge to give an opinion" (*Handyside*) on the facts requiring restrictions on a convention right, and to conduct the balancing of interests necessary to justify such restrictions in a given national context (Spielmann 2012). But the margin of appreciation doctrine has been shown to be applied with great unevenness (Kratochvil 2011), although it is invoked in almost every case decided by the European court. In some cases (such as *Dahlab* and *Sahin*), the margin is relied upon to accept the reasoning of national authorities without serious examination of the necessity or proportionality of their rights-restrictive measures. In other cases, the margin is mentioned, but does no work as the European court delves deeply into the facts and reasons advanced by the national authorities and conducts its own review of the proportionality of restrictive measures. The width of the margin (and thus the level of scrutiny undertaken by the court) is theoretically calibrated by reference to, *inter alia*, the nature of the rights restricted and the degree of consensus among European states concerning appropriate limitations on the right. However, neither of these factors is applied with any consistency, making it difficult to see the margin doctrine as more than a casuistic flexibility device. In the headscarf cases, the margin is used essentially to defer to national states understanding of the threat to public order and democratic values represented by the headscarf; states are accorded a "wide" margin on the grounds that it is "not possible to discern throughout Europe a uniform conception of religion in society" (*Sahin*: para.109). Strictly speaking, when applying a "wide margin" the court need not endorse the reasoning of the national authorities, but only concluded that the reasoning was within the measure of discretion afforded to states in their balancing of rights with pressing social needs. Yet in both *Dahlab* and *Sahin*, the court goes further, accepting the states' contention of the connection between the headscarf and the risk of religious conflict, proselytization and intolerance, and endorsing the judgment through its observation that the headscarf is "difficult to reconcile ... with the message of tolerance, respect for others and, above all, equality and non-discrimination ... in a democratic society..." (*Dahlab*; *Sahin*: para.111). While in recent decades, the European Court has developed a more skeptical stance towards states' claims to limit rights in the name of public order, (see *S. and Marper v United Kingdom*; *A. and Others v United Kingdom*; *Gul and Others v Turkey* and *Kilic and Eren v Turkey*) by requiring proof of "a clear and imminent danger" to civil peace and scrutinizing strictly whether the rights-limiting measures were necessary, these tests were not applied to the alleged risk to public order posed by the veil.

Not all religious symbols axiomatically threaten public order and democratic values. In the European Court's Grand Chamber decision in *Lautsi*, it concluded that regional Italian regulations requiring the prominent display of the crucifix in public school classrooms fell within the margin of appreciation accorded to member states to "perpetuate a tradition" which derived from their "cultural and historical development" (*Lautsi v Italy*, 2011: para.68-9). The obligation of denominational neutrality was interpreted in this case as forbidding the state from pursuing "an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions" (para.62). The cross is accepted as "above all a religious symbol," but in contrast to the court's willingness to find a proselytizing effect in the absence of evidence in *Dahlab*, in *Lautsi* it is noted that "there is no evidence ... that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot be asserted that it does or does not have an effect on young persons whose convictions

are still in the process of being formed” (my emphasis, para.66). The crucifix is essentially a “passive symbol” which “cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities” (para. 72). One of the fears concerning Mrs. Dahlab’s headscarf was that it might invite curious questions from pupils leading to a discussion of her religious beliefs, and thereby, a risk of offence or coercion of children and their parents. The crucifix poses no such threat, and the possibility that it could stimulate a dialogue about religious beliefs is welcomed as conducive to tolerance: “The display of a religious symbol does not compel or coerce an individual to do or refrain from doing anything. It does not require engagement in any activity though it may, conceivably, invite or stimulate discussion and an open exchange of views ... A truly pluralist education involves exposure to a variety of different ideas including those which are different from one’s own” (Lautsi v Italy, concurring opinion of Judge Power: para.45-6).

Upon examination of the Italian government’s arguments before the European Court and the decisions of the national tribunals upholding the regulations, it becomes clear that the “historical tradition,” which it was within Italy’s margin of appreciation to perpetuate through the display of the crucifix, was nothing other than the anti-secularist revaluation of Christian values as democratic, civilizational ones – albeit laundered of explicit anti-secular language and deemed reconcilable with philosophers who were “non-believers or even opponents of Christianity” (Lautsi v Italy, 2009: para. 35). Before the European Court’s second section, the Government of Italy had pleaded that the crucifix evoked principles of

non-violence, the equal dignity of all human beings, justice and sharing, the primacy of the individual over the group and the importance of freedom of choice, the separation of politics from religion, and love of one’s neighbor ... [T]he democratic values of today were rooted in a more distant past, the age of the evangelic message. The message of the cross was therefore a humanist message which ... was composed of a set of principles and values forming the foundations of our democracies. (Lautsi v Italy, 2009: para.35).

The government’s submissions were an echo of the decisions of Italian national courts, which had rejected Ms. Lautsi’s challenge to the constitutionality of the regulation requiring the display of crucifixes. Her claim had been that the regulation violated the principle of secularism enshrined in the Italian constitution. The regional Administrative Court’s judgment demonstrates the way in which the “transformation of the political meaning of Christianity” (Moyn 2010b: 103) undertaken in the post-war period comprehensively informs the understanding of democracy and secularism, rendering them – astonishingly – as emanations of the true historical content of Christianity. Christianity in the logic of the court is a civilizational marker, reflecting an underlying unity of European culture even as really-existing Christianity bitterly opposed secular political revolutions.

Looking beyond appearances it is possible to discern a thread linking the Christian revolution of two thousand years ago to the affirmation in Europe of the right to liberty of the person and to the key elements of the Enlightenment ... namely, the liberty and freedom of every person, the declarations of the rights of man, and ultimately the modern secular state ...

... It can therefore be contended that in the present-day social reality the crucifix should be regarded not only as a symbol of a historical and cultural development, and therefore of the identity of our people, but also as a symbol of a value system: liberty, equality, human dignity and religious toleration, and accordingly also of the secular nature of the state ...

The reaffirmation of this civilizational inheritance is all the more urgent in light of the need to preserve it in the face of the increasing presence of those do not share this tradition, and who must therefore be educated into this moral-political culture.

[A]t present Italian state schools are attended by numerous pupils from outside the European Union, to whom it is relatively important to transmit the principles of openness to diversity and the refusal of any form of fundamentalism ... Our era is marked by the ferment resulting from the meeting of different cultures with our own, and to prevent that meeting from turning into a collision it is indispensable to reaffirm our identity ... especially as it is characterized by the values of respect for the dignity of each human being and of universal solidarity...

The decision of the Administrative Court was affirmed on appeal to the Supreme Administrative Court, which also concluded that the crucifix expressed the religious origin of values which characterize “Italian civilization,” such as “tolerance, mutual respect, valorization of the person, affirmation of one’s rights, consideration for one’s freedom, the autonomy of one’s moral conscience vis-à-vis authority, human solidarity and the refusal of any form of discrimination.”

The explicit differentiation between Christian and non-Christian symbols, on the basis of the former’s inherent compatibility with democracy and toleration, is not limited to Italy. Baden-Wurttemberg’s anti-headscarf legislation differentiates between Islamic religious symbols worn by teachers (which are banned) and Christian and Jewish religious symbols (which are permitted) by declaring that “the representation of Christian and occidental values and traditions corresponds to the educational mandate of the [regional] constitution and does not contradict the behavior required according to sentence 1,” where sentence 1 reads “Teachers are not allowed ... to give external statements of a political, religious [or] ideological nature” which could endanger or disturb neutrality towards pupils and parents (Benhabib 2010: 461). Unlike Christian and occidental traditions, the headscarf is construed as representing “cultural segregation, and thus it is a political symbol [which puts at risk] social peace” (the Minister of Education of Baden-Wurttemberg, quoted in Benhabib 2010: 461). Similar anti-headscarf legislation was passed in seven other German lander and survived constitutional challenge before Germany’s Federal Constitutional Court (Joppke 2009; Human Rights Watch 2009). Based on the jurisprudence of the Strasbourg Court, it is unlikely that a challenge to these laws under Article of the European Convention has any prospects of success.

## **Conclusion**

The freedom of religion jurisprudence of the European court in the headscarf cases is not adequately understood as principles governing the delimitation of a forum internum, or of determining conclusively the proper meaning of “secularism.” Rather, the invocation of secularism as a state interest to be balanced against certain kinds of exercise of freedom of religion is striated with anxiety about the regulation of alien cultures, and about the anticipation of threats to civil peace. The reasoning embeds elements from different historical formations of “freedom of conscience.” In particular, I have argued that making sense of the cases requires us to grasp a particular regional history of the concept of freedom of conscience, and especially its post-war iteration as the keystone of a new politics of the “human person” in Europe. This ideal was predicated on the recovery of a moral-cultural foundation for European civilization, and a transformation of religious values into secular political ones. The particularism of this foundation is largely invisible beneath the formal legal language of human rights instruments, but the headscarf cases and the crucifix case allow us to see sharply its continuing role in shaping the terrain of the argument over the place of Islamic religious practices in Europe. The institutionalized casuistry of a human rights court becomes the conduit for a resuscitation of an idea of European identity that had perhaps become dormant in light of the declining religiosity of the people of Europe since 1960. Whether this idea will receive new currency, and in what ways it may return, remains to be seen. But what cannot be missed is that it is a human rights court, and arguments over the meaning of rights and their limitations, which has brought this political theology back to the surface.

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