Article

PSC

Philosophy and Social Criticism
2016, Vol. 42(9) 873–896

DOI: 10.1177/0191453715590177
psc.sagepub.com
SAGE

Governing (through) religion: Reflections on religion as governmentality

Muhammad Ali Nasir
University of Heidelberg, Heidelberg, Germany

Abstract

This inquiry examines the question how the category of 'religion' generates a complex form of power oriented to the government of subjects. It does this through a critical reading of the right to freedom of religion, offered from the perspective of governmentality. It is argued that the right to freedom of religion enables the rational goals of government to relate to religiosity in such a manner that those subject to them (religious qua juridical) are made at once freer and more governable 'in *this* world'.

Keywords

European human rights law, Michel Foucault, governmentality, the right to freedom of religion

> We act as though we had some common sense of what 'religion' means through the languages that we believe. We believe in the minimal trustworthiness of this word … Well, nothing is less pre-assured than such a *Faktum* and the entire question of religion comes down, perhaps, to this lack of assurance. (Jacques Derrida, 'Faith and Knowledge: The Two Sources of ''Religion'' at the Limits of Reason Alone', in *Acts of Religion*, ed. Gil Anijdar (New York and London: Routledge, 2001), pp. 42–101 (p. 44)

Corresponding author:
Muhammad Ali Nasir, Institute of Political Science, University of Heidelberg, Bergheimer Straβe 58, Heidelberg 69115, Germany.
Email: muhammad.alinasir@hotmail.com

Introduction

The right to religious freedom is doubly sanctified. By mandating legal protection, this right sanctifies the practices already sanctified by religions. It resultantly establishes a threshold which power may cross into only through desecration. This, however, produces a paradox: the discourse of rights accords a particular respect to religion, even though it is difficult to justify this well-entrenched legal practice from within the discourse of rights itself.[1] It is from this standpoint that the debates in social and political theory structurally oppose personal belief and common interests, thought and action, religion and power, and then try to reconstruct their agonistic interrelationship. The assumption that religion is a 'privileged' limit in the rights discourse can be noted in academic works that either question its elevated status[2] or justify it.[3] The present article, however, does not take this line of approach.

This inquiry examines the question how the category of 'religion' generates a complex form of power oriented to the government of subjects. Instead of then defining in this article *what* religion is, I look at *how* religion works within the human rights apparatus (*dispositif*). The task of seeing how religion functions becomes all the more pressing in the light of the literature that explicitly acknowledges that religion (as a category) is spoken of with effect in policy formulations, political forums and legal arenas; all this despite not needing to use a definition of 'religion' in those very pronouncements.[4] Then, what one needs to scrutinize is 'what gets identified and counted by authorized knowledge as ''religion'': how, by whom, and under what conditions of power'.[5] In this article, the process of constructing a social domain through the category of 'religion' will be shown to enable a specific social reality to become a target, an object, for government's attention.[6] The present article does this through a critical reading of the right to freedom of religion.

I will argue that the right to freedom of religion enables the rational goals of government to relate to religiosity in such a manner that those subject to them (religious qua juridical) are made at once freer and more governable 'in *this* world'.[7] In this sense, the right to freedom of religion will be analysed as one that marks 'religion' as a social object worthy of governmental concerns, that is to say, its tactics. In a nutshell, the contention here is that the religious person, holding the human right to freedom of religion, has a juridical status, and where his or her rights are guaranteed legally by a sovereign who not only has coercive power but also construes religiosity both as a social reality which needs to be protected and as a governmental problematic which needs to be regulated. In fact, it is these lines of force that enable the right to freedom of religion to work effectively.

In order to support this contention, I will rely on two related theoretical tools. The first concept utilized is *dispositif* (apparatus). This is used in order to theorize the working of human rights as it functions as a 'heterogeneous set'.[8] Such a perspective is helpful since the explication of human rights not only relies on legal norms, but is also connected to a wider terrain of socio-political practices and discourses. In fact, human rights become concrete because of such a combination of disparate elements (practices, measures, institutions, knowledge). What gives the apparatus of human rights its specificity is 'the system of relations that [it establishes] between these elements'.[9] On the other hand, the concept of apparatus is also useful in order to flesh out the strategic function of human

rights. This latter point must be kept in mind while reading human rights since it is now something more than the simple 'claims of individuals upon the state and contrary to the state'.[10] Then, this perspective may help us see how human rights intervene 'in the relations of forces, either so as to develop them in a particular direction, or to block them, stabilize them, and to utilize them'.[11]

The second theoretical tool used is 'governmentality'.[12] Foucault used this concept to accentuate the importance of a government of subjects oriented to a calculated administration of lives, in contrast to the traditional problem of political sovereignty that stood, as it were, in a relation of 'transcendence' to its territory and inhabitants.[13] Governmentality thus refers to 'the broad sense of techniques and procedures for directing human behavior'.[14] If the overall terrain of political power has been shaped by such mentality, then this has important ramifications for studies on law and religion. From this perspective, it will mean that if there is an increasing interest in the very lives of people, then the techniques of power are already oriented to the question of religion in a way that would enable the individual and collective conduct of the persons to be shaped in the proper manner. In order that such a power can be exercised, a specific domain of practices has to be disclosed as religious in the first place. The perspective of governmentality is then utilized here in order to appreciate the way there revolves around the question of religion 'a whole series of specific governmental apparatuses, and, on the other [hand], a whole complex of knowledges'.[15] Given such a governmental interest, the relevant question for the theories of sovereignty is to see 'what juridical form, what institutional form, and what legal basis could be given to the sovereignty typical of a state ... given the existence and deployment of an art of government'.[16]

Since human rights are now primarily utilized as a discourse to evaluate the claims based on freedom of religion, the argument presented here focuses on it. The empirical focus of the article is on European human rights law. Apart from convenience, such a focus is useful since a number of commentators have pinpointed the remarkable effectiveness of the European human rights apparatus that has tremendously affected national and constitutional discourses.[17] On the other hand, the theoretical perspective utilized here remains interested in seeking out the regularities that human rights produce: that is, by trying to bring 'into consideration the discourse [of human rights] itself, its appearance, and its regularity'.[18] Further, this focus is in contrast to the customary works, critical or apologetic, on human rights that generally focus on the violations of human rights in the global peripheries with their 'outbursts of ethnic conflicts and slaughters, religious fundamentalisms, or racial and xenophobic movements'.[19]

The perspective with which the article approaches the matter presumes a specific conception of power, so a clarification is required before we can begin our discussion. The thematic of power is not approached from an angle that sees religious practices as enmeshed into the techniques of a certain 'pastoral power'[20] such as those utilized in ascetic initiations, in bodily disciplines and in the elaborate rituals of confessions. Much energy has been expended on the connection of power and religion there,[21] but what is attempted here is different. Here, the focus is on seeing how specific practices, present in and connected to the human rights apparatus, qualify as religious, and what tactics and strategies (understood as power) are then oriented towards those practices that will put them in their 'legitimate [social] space'.[22]

The argument in this article proceeds in three parts. The first part begins by looking at the case law of ECHR article 9. It focuses solely on the protected status of religion in it, and not on freedom of thought or conscience which the article also protects. This section theorizes the way religion is disclosed as a peculiar social category, and how it then fits into the frame of the right to freedom of religion. The second section focuses on the way governmental tactics are oriented to the socio-legal category of religion. After having considered the complex interrelationships that the right to freedom of religion produces between the religious subject and the juridical subject, the next section focuses on a specific case law: *Refah Partisi* v. *Turkey*. This section gives our reading a contrasting effect by allowing us to see how a specific narration, which can be considered as being religious in motivation, stands beyond the pale of religion as regards the human rights law.

The constitution of religion as an object of power

> 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.
>
> 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. ECHR article 9: Right to freedom of thought, conscience and religion

We begin by reading two occurrences from the year 1998 in order to build our narrative. First occurrence: on 21 July 1998, a complaint was lodged with the European Commission of Human Rights (ECmHR) by Ms Leyla Şahin, a Turkish medical student, alleging that her rights under article 9 have been violated.[23] The applicant was not allowed to wear a headscarf at Cerrahpaşa Medical Faculty, İstanbul University, as per the 23 February 1998 circular issued by the university's vice-chancellor that prohibited the wearing of an 'Islamic' headscarf at university premises in accordance with 'the Constitution ... the case law of the Supreme Administrative Court and the ECmHR, and the resolutions adopted by the university administrative boards' (para. 16). The applicant, since she nevertheless wore a headscarf, was denied admission to the written examinations and her enrolment for two of the subjects she was studying was cancelled. Her subsequent appeals at İstanbul Administrative Court and the Supreme Administrative Court alleging violation of her right to freedom of religion were unsuccessful. She later submitted her complaint to the ECmHR. Nonetheless, before focusing on the ruling of the European Court of Human Rights (ECtHR) in *Leyla Şahin* v. *Turkey*,[24] two points are worth noting.

First, it is important to note that before the wearing of the headscarf qualifies for legal protection as a 'religious' practice, there is a certain dynamic at work in advance that constitutes the headscarf as religious in the first place. There is more to the headscarf's being religious at present than the apparent reason that it is 'imposed on women by a

precept which is laid down in the Koran', as the ECtHR noted in *Dahlab* v. *Switzerland* ('The circumstances of the case'). For, there are many other Koranic imperatives which cannot be seen, even from the perspective of human rights law, to have a religious signification alone. One can note here by way of example the principles relating to trade-related transactions and business ethics ('the economic'), or sympathy and counselling ('the social'), or consultation and war ethics ('the political') that are also mentioned in the Koran. In this sense, not every precept simply stated in the Koran, itself a 'religious' text, by default means religious, and is therefore by default legally protectable. This does not simply mean that certain practices based on Koranic principles cannot merit legal protection accorded to religious practices, but that certain practices may never cross the threshold of the protectable as religious. It means that as the Word is related to the World, the 'religious' text itself splits up into religious and non-religious folds. What is important to note is the way this split is both revealed through and reveals a specific historicity. Therefore, the event that informs one of religion is based on a congealed temporal process that constitutes the moment as essentially religious in the first instance.

This means that apart from the Koranic command and its historical incorporation, there has been a confluence of disparate elements at work that reveal the headscarf as religious. In *Şahin*, these include: developments in the Ottoman society with gradual changes in the attire; Turkey's violent transition to republicanism in which the removal of 'religious constraints' became tantamount to modernization (para. 32); the overlap of a painful social transition with the concerns of appearance (ban of turban, fez, beard, veil) and dress codes (promotion of 'modern' European style attire vis-à-vis 'traditional' clothing of the Ottoman society) (paras 30–5); constitutional principles that protect the secular nature of the Turkish Republic as espoused by the nationalist narrative of Kemalism, and distancing the republican law, as need be, from the legal past of the Ottoman Empire (paras 29, 39–43); proliferation of headscarves in the Turkish urban centers, especially from the 1980s onwards, at a time when fundamentalist parties at large were being tackled (para. 35); the contrast between the traditional *başörtüsü* (Anatolian headscarf, worn loosely) and the *türban* (a tightly knotted headscarf hiding the hair and the throat) (para. 35). Coupled with this was Turkey's special status of being a staunch secularist state in the Council of Europe with a predominant Muslim population (para. 115), and the higher education imperatives that require that education be imparted in view of a state's administrative policy that eschews the intermixture of higher education with religion (paras 47–51). It is on such a differential terrain that a specific object (piece of cloth) is maintained in a specifically assumed face (religious). The legal decision concerning the right to freedom of religion not only feeds upon such a history, but more fundamentally requires that there be such an analytically specifiable social domain in order to function. The disclosure [*offenbarung*] of the object in a specific form concomitantly makes it amenable to the techniques of government.

Thus, the fact that the headscarf is designated as religious, and not, for instance, as 'aesthetic', 'national', 'ethnic', 'cultural', or 'hygienic', is decisive. In this sense, the historicity of the object is not simply the summation of its forming historical fragments, but more importantly the very basis of its operation.[25] This apparently trivial formation has significant implications for politics and policy. It means that instead of being an effect of

discursive formations, religion becomes a causal principle in its own right and conveys its essence as such onto the headscarf. As religious, the headscarf then bears particular effects: religious message for the onlookers, religious identity for the wearer, and religious effects on the social body. Tied up with institutional measures and social objectives, the solutions to the problematic are then tailored in view of the way a thing has been disclosed. In other words, it means that the disclosure of the object then renders that very object amenable to the techniques that 'seek *to arrest its movement*'.[26] This observation is related to the second point that needs to be made.

Thus, it is not that the subject gives a certain meaning to the object or contrariwise. In fact, the process of interrelation produces 'subject effects'.[27] It is so because the subject is defined through a peculiar identity and the object becomes amenable to reallocation. As identity, it is meant that the subject is defined in a twofold sense: first, as a religious being placed with and in religion (paras 14, 76); second, as a juridical being placed into law (para. 70). This also means a curious equation of the juridical subject of rights and the religious subject in the framework of the right to freedom of religion, where the subject of the right to freedom of religion is always already before law. By reallocation, it is meant that the object then takes its bearing from the subject, so that addressing the subject reflexively affects the object. Consequently, in *Şahin*, when one dons a cloth over a specific body part in a certain way (the headscarf), enters certain premises (public universities, examination halls, lecture rooms) and lives in a specific milieu (threat of *l'islamisme*, assertive *laïcité*) that one's religiosity comes to the fore to require tactical handling. At this point, it is important to note that the performative, as regards the logic of the right to freedom of religion, does not arrest the subject determinatively, despite establishing a relation between the holder of rights (the juridical subject) and the object (the headscarf as religious). This means that the constraints that enable the performative themselves operate through freedom. Therefore, the subject of the right to freedom of religion relates itself, as Asad observes, to '*displaceable* signs'.[28] With this, now let us look at the way argumentation operates in *Şahin*.

What is important in the cases relating to the right to freedom of religion is not simply the judgment of the court. It is the way different rationalities are brought to bear on the religious practice that is remarkable. Let us turn to the case in order to illustrate this point. First, the extra-religious effects that the religious practice may produce are evaluated. These include: possible political use, as the headscarf was becoming more of a political tool manipulated by active Islamist parties (early in 1998 the Refah Party had then been recently banned by the Constitutional Court of Turkey) (paras 35, 114); possible gender marginalization, as the practice of covering themselves up in public space was stipulated for adult women alone (para. 115); possible social repression, as the proliferation of headscarves may go on to socially affect those women who choose not to wear them (para. 115); and possible public disorder, since the campaigns in favor of allowing headscarves at universities had reached a point where they were causing disorder and unrest at university campuses (para. 44). On the general level, there are more elevated concerns. These include: manifestation of religion in a manner that is consistent with the political principles of Turkish secularism (para. 114); the important role of neutral education formations that produce free, well-integrated and law-abiding citizens (para. 116); the headscarf's impact on and its place in democracy and human rights (para.

114); and, measuring the headscarf as regards the ideals of sexual equality (para. 39) and 'true religious pluralism' (paras 110–11).

Second, the religious practice is measured with respect to the 'truths'. This does not mean the denial of the 'religious' truths that the religious object itself bears. It nevertheless means that the legal protection accorded to a religious practice is located at the friction (overlap, gradations, discordance) of these truths. In the present case, the headscarf is evaluated with respect to the scientific narratives, among others. Remember that the wearer was a medical student. So, the headscarf is located within the requirements as dictated by health measures and the scientific standards relating to the dress code of medical staff, since assisting a doctor in a maternity ward or operation theatre requires that the clothes be worn in the most suitable manner (paras 43, 119). This requirement is not only in line with the professional standards guiding medical tasks, but is also dictated by the rights of the patients, who are both constituted primarily with respect to the scientific discourse and bear the right that they be treated in accordance with it (para. 44). The way the headscarf is disclosed as religious thus already entails a circumscription that causes it to stand apart, say, from 'the artistic' or 'the scientific'.[29] On the other hand, another dynamic also steps in: what is to be qualified as 'modern' and how religion may relate to it (para. 38). The rhetoric of modernity as a political project both tries to carve religion away from non-religious and then attempts to harmonize the two. This entails that knowledge (scientific, political, legal), narratives (emancipation, pluralism), tools (projections, established standards, expert prognosis) and measures (administrative regulations, legal rules, educational norms) approach the relevant object in question from various angles.

Third, the religious object and subject are evaluated with respect to the logic of freedom. This is necessary in order that they be given room in a socially viable manner. In the present case, this point turns onto analysis of various important issues: whether the wearing of a headscarf takes place through the consent of its wearer; whether it entails free self-expression (entailing autonomy) or manifestation of religion (entailing agency); whether its wearing signifies equality or its prohibition discrimination; whether it can be reconciled with gender equality, because if it cannot, then it may mean that it be more strenuously measured even as the wearing takes place through free choice (para. 111). Such a reading then also engages the 'positive' (increase of pluralism, toleration of religious difference, sign of cultural diversity) or 'negative' (lack of respect for others' convictions, unduly influencing others, exerting social pressure) effects the headscarf has on others (paras 101, 111, 115).[30] Both these readings – i.e. impact on oneself and impact on the others – travel back and forth. In this sense, the human rights apparatus guaranteeing freedom of religion works through an investment of power and histories. To look at the dynamics of subject closely, let us refer to a similar case law.

Second occurrence from 1998: on 16 May, a complaint was lodged under article 9 by Ms Lucia Dahlab, a Swiss national.[31] The applicant was not allowed to wear a headscarf at a primary school in Châtelaine, Canton de Genève, where she had been teaching since the 1989–90 school year. She had converted to Islam in 1991 and started wearing a headscarf. After five years of teaching, she was issued a notice by Directrice générale de l'enseignement primaire in 1996 that required her to 'stop wearing the headscarf while carrying out her professional duties, as such conduct was incompatible with § 6 of the

Public Education Act' (*Dahlab*, 'The law'). The rationale behind prohibition was that the headscarf constituted 'an obvious means of identification imposed by a teacher on her pupils, especially in a public, secular education system' (*Dahlab*, 'The circumstances of the case'). Although ECtHR deemed the application inadmissible, the way a subject is approached in this case remains intriguing.

Here, one has not only a divide between oneself and the others: between one's right to manifest one's religion and the right of others to be free from such manifestations of other's beliefs, as the ECtHR noted in the landmark *Kokkinakis* v. *Greece* (paras 44, 48).[32] Similarly, there is not only a gulf between the internal freedom of thought and religion (*forum internum*) as per article 9(1) and the limitations imposed on the external manifestations of thought and religion (*forum externum*) as per article 9(2). If this is not so, how can one conceptualize the test of proportionality that balances the rights of an individual and the interests of others or the manifestation of a thought and the societal imperatives?[33] If one can discern a multiplicity of practices in which subjectivities are already situated, then it becomes difficult to sustain a gulf between individuality and sociality, thought and manifestation, internal and external. It is from this differential field that the subject of the right to freedom of religion is approached.

Viewed from article 11 and protocol 4 article 2, there is a subject who maintains freedom of association and movement, and who has other alternatives (employment, relocation) open to her (*Dahlab*, 'The law'). Alternatively, viewed from article 11, there is a subject who has of her own accord opted to associate with the primary school. Viewed from article 4, there is a free laboring body that chose to bind itself freely with its employment regulations (presentation, skills), roles (teaching vulnerable minors in the hierarchical structure of schools) and objectives (denominational neutrality, public service, nurturing young minds). Viewed from article 10, there is a subject with freedom of expression who can express herself, consult media, give interviews and relate herself freely with her body through clothing and the like (*Dahlab*, 'The circumstances of the case'). Alternatively, viewed from article 10, there is a subject whose very act of bodily veiling may possibly inhibit its freedom of expression by making its participation in the public space conditional. Viewed from article 14, there emerges a subject that is seen through the concerns of equality and non-discrimination, given that the wearing of the headscarf remains hard to 'square with the principle of gender equality' (*Dahlab*, 'The law'). Alternatively, viewed from article 14, there may be someone discriminated against on the basis of gender at workplace. Similarly, for the purpose of article 17, the subject must be handed over its rights in such a manner that the abuse of those very rights does not take place, in a spirit that is, for example, contrary to equality or freedom. What enables singularity of the human rights apparatus to materialize is the way it is able to relate these variegated practices with each other in order to sustain freedom. The religious subject invoking law as a holder of juridical rights is connected to this network. If the subjects can thus be seen to be constituted differentially,[34] then the right to freedom of religion addresses those subjects differently.

True, the right to freedom of religion offers an important protection to the individuals against state power by, for example, forbidding the state to compel a religion on its citizens or to take explicit sides when the conflict of religious claims takes place. True, the religious subject is indeed offered room for a certain legal protection for its religious

practices. What is important, however, is focusing on the dynamic that determines 'the protectable' in the first place. For a practice to be protected as religious, it has not only to bear religious significations, but also to relate itself with the broader social practices as religious practices do and ought to. In *Dahlab*, it is not simply her claims as a religious subject that determine what is to merit legal protection as religious under article 9. Albeit her claims are not without weight, the legal decision bases itself on the way those claims relate with the social objectives, regulatory practices and institutional measures associated with education, among others. This means the practices in which a subject finds herself or himself – such as employment, public service, or citizenship in *Dahlab* – are not only different from religion beforehand, but more importantly have to be cognizant of religion in order to maintain the optimum distance. The juridical subject not only has this circumscribed field within which he or she may claim that his or her religiosity be legally protected, but needs to formulate its religious claims in such a way that law may be assured that those claims will not inhibit the working of such a social field. The governmental problem of placing religion fittingly therefore merges with the legal problem of handling religion and the political problem of containing religion. It is therefore required that the governmental tactics be ever more sensitive to the 'dense field of relations between people and people, people and things, people and events'.[35]

Cannot one see then that in *Şahin* and *Dahlab* the legal authority is interested in the particulars of the belief (*forum internum*) which it reads through its manifestation (*forum externum*)? The question before the law is not to identify the way pastoral care functions but to determine the place a legally protected religion has to have. The right to freedom of religion requires that inside relate to outside and outside relate to inside optimally. Thus, there are two things simultaneously being done. First, the domain of *forum internum* is diversified and intensified. Second, practices and bodies are consequently arranged in *forum externum*. As a result, the optimization of freedom through *forum internum* requires unique and specific techniques through which *forum externum* could be made open (recognition, registration, approval) and managed (exemptions, incentives, restrictions). So, one has two diverging projects. On the one hand, there is the circulation of difference.[36] On the other hand, there is formulation of strategies and regulation of conditions under which difference is to be accommodated.[37] It is the human rights apparatus that causes these two projects to coincide.

Thus, if multiple practices can be consequently brought under the ambit of article 9, then the category of religion produces and governs subjects in the human rights apparatus. This consequently entails two things. First, due to the intransigence of practices, sovereign power may falter or fall short in reading religion and is thus always involved. Second, due to the possible inclusion or exclusion of practices, the limits of religion (and not its essence) remain contingent. If a domain is already disclosed as being 'religious' alone, such as, for example, the institutional traditions of the Roman Catholic Church hierarchy, the process of legal protection is less twisted than those where 'the social', 'the political', 'the economic', or 'the urban' become a site of religious claims. It means that the way specific practices are disclosed as religious simultaneously enables the power measuring them to take various regulatory stances (protection, exception, indifference, restriction, limitation, suppression) towards them.[38] Of course, a certain social violence is involved in the process that separates religion from non-religion so neatly,[39] yet

this process of unraveling is constitutional of the very way the right to freedom of religion functions.

The process of social change therefore requires that practices be constantly read in order that the contours of religion can be (re)identified. This means that the frontiers of religion are determined as they are crossed into by: taxation,[40] social security,[41] military discipline and decorum,[42] health insurance,[43] farming and rearing,[44] employment obligations,[45] photography and biometrics,[46] planning concerns,[47] voting and electorate,[48] institutional rules and constraints,[49] prison regulations,[50] physical education,[51] agriculture and animal welfare,[52] medicinal and technological innovations,[53] or broadcasting and media.[54] The fact that there is an 'ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power',[55] which is oriented towards the status of religion that takes religiosity as its problem, and its government as its main task, makes religion a governmentality in the human rights apparatus.

Is not there a lacuna in the fact that religion is referred to in all of this without a precise definition?[56] The optimization of freedom operates with a certain 'lack of assurance' (to use Derrida's phrase) because the question is not one of protecting this or that religion but of evaluating what and how something can be placed as 'religion'. What makes religion governmental in the human rights apparatus is that the free subject is then governed and required to regulate itself within the domain formed as religion. What makes religion a technical tool in the human rights apparatus is that it makes it possible to identify a specific social domain (i.e. 'religion') as both a reality and a legal issue; this is where the legal decision entrenches it as a reality and the reality out there opens up more in order that legal regulation take place.

On religion as a technique

> In order to protect politics from religion (and especially certain kinds of religiously motivated behavior), in order to determine its acceptable forms within the polity, the state must identify 'religion'. (Talal Asad, 'Trying to Understand French Secularism', in Hent Vries and Lawrence Sullivan (eds) *Political Theologies: Public Religions in a Post-Secular World* [New York: Fordham University Press, 2006], pp. 494–526 [p. 524])

Has the point been so far that the form religion takes is politically shaped? Of course, from the logic of human rights, politics should not, and does not, tell people that their religions should be shaped politically. The conclusion so far is this: what is to be construed as religion (and even what is seen to fall within the sphere of politics in contrast to the administrative, for instance), and the way it is tackled, is governmental. This means that the power guaranteeing religious freedom has to mark religiosity as a problem which requires that as a fact religiosity realize itself in line with the logic of human rights. At the moment that politics suppresses religion completely or politics merges with religion wholeheartedly, human rights apparatus breaks down. One therefore needs to locate the problematic of religion in 'the tactics of government'[57] on the one hand, and 'the problematization of conduct'[58] of the subjects on the other.

By saying that to protect religion there must be a social domain transparently revealing itself to be that way, is it not meant that there exists nothing 'religious' per se prior to its inclusion as religion in the human rights apparatus? Obviously, human rights work through and with the givens. The strength of human rights is to work with the present to pattern the givens patiently.[59] In this vein, in an oft-cited observation in *Arrowsmith* v. *the United Kingdom*, the ECmHR noted that article 9 'does not cover each act which is [said to be] motivated or influenced by a religion or belief'.[60] This point identifies an important sense of the category of religion itself. In the human rights apparatus, the same dynamic that allows some practices to be included as religious also causes some practices to be excluded as religious. The politics of human rights then is oriented to the regulation of the included (with certain tactics) and the relegation of the excluded (under certain conditions). It is because of such a tricky dynamic that a diverse field fits into the peculiar mold of 'religion' without in turn unsettling its broader contours.

This, however, produces two connected conundrums for the subjects invoking the right to freedom of religion. First: within the givens, there may be practices, apparently religious, that do not merit legal protection in the human rights law. Second: there may be practices that are legally protected without their protection taking place on the basis of the understanding that those practices ascribe to themselves. This dynamic where one is not included without being excluded and where the other is protected without being included means that the patterning on which human rights rely not only precedes but also exceeds the legal domain. What does it then mean for the practices disclosed as religious ones? How does religion function as a peculiar technique? In order to address aspects of these questions, this section reads a lecture by Jürgen Habermas: 'What is Meant by a "Post-secular Society"?'[61] The text, a theoretically sophisticated attempt to clarify the social place of religion (its subtitle is 'A Discussion of Islam in Europe'), is critically read here from the perspective of governmentality. Its reading will work as a foil for our present reflections.

The lecture, despite perhaps being a somewhat minor text in Habermas' subtle *oeuvre*, is of utility because it trails the trajectory that the category of religion follows: in identifying what is religion (social fact), a description is offered on what religion means (normative social functioning), which then requires that there be a correspondence between the two (social normalization).[62] For sure, a boundary around religion is necessary, in a philosophical sense, lest there be inclusion of practices in it that not only overturn the way this category is construed in the human rights law, but may also collapse the entire human rights apparatus itself (see *Refah* judgment in the next section). On the other hand, the text also pinpoints a paradoxical process: sustenance of religion as religion in the constitutional states within whose social fabric 'religious bonds' loosen up while leaving 'religious habits and convictions' more or less intact.[63] Behind this idea is a remarkable presumption that religion functions uniformly, i.e. religion as such; this is so even when its societal status and meaningfulness are historically changed. What is interesting to note here is the presumption that accords a certain analytical permanence to the category of religion even when, so to speak, the 'sacred relics [are conveyed] from one shrine to another'.[64]

From the perspective of human rights, religion can neither be equated completely with the entire society nor be done away with. In the first case, the conditions of freedom

will themselves be eliminated. In the second, an immense violence is required in the first instance that may not be justified with recourse to human rights. As a consequence, religion is to be delimited to an area where it performs its 'proper function':[65] 'pastoral care'.[66] This means that the concrete substance of this core and the changes in its content can be identified once religion is placed into and then contrasted with the 'other social domains'.[67] This juxtaposition betrays a certain constitutive connection in the first place. The medicalization of the knowledge of the human body is an obvious example here, which, despite occurring within the scientific domain, has had obvious repercussions on the other domains as well (law, religion, society).[68] Further, this entails not only that religion becomes religion as such when separated from 'law, politics, public welfare, culture, education, and science',[69] but even the social spaces that intermingle (say, religious education, religious welfare) are '*analytically* identifiable'.[70] The fact that such amalgamations can be unraveled makes it possible to determine what the right combination is and works as an enabling condition for those projects that try to work out how the combination ought to be achieved. Religion as a peculiar construct therefore requires an 'other' on which it is logically dependent.[71]

In a pragmatic sense, the fact that religion is functionally differentiable allows it to be taken up, a working report paradigmatically suggests, as a 'policy issue'.[72] What this means, more fundamentally, is that at a time when functional differentiation does not function of itself as a social fact, falling back on focused strategies and techniques of power is a must. Now, of course, even if religion is identifiable, it surely does interact with the other domains to produce murkier forms. What shape may such an interaction then have? There is a curious suggestion here in the above-mentioned working report that tells us that religions gain general social weight when their societal contribution expands into the somewhat preferable domains of 'poverty reduction or questions related to social inclusion'.[73] Now, of course, only when religiosity is inscribed in a governmental frame can it contribute in the matters relating to economic disadvantage or social integration without in turn overwhelming the economy or the society with its religious bearing.

Therefore, the moment religion is given its legal space with respect to the 'rule of law',[74] its contribution in the public space is to operate in a 'translated' manner.[75] This act of translation is not required for those veritable truths that fall under the rubric of science, for example.[76] For religion, it is nevertheless required so that specificity and generality accurately correspond. The rationale behind the requirement of translation is of political weight at present: the religious subjects do not simply have to address but must also identify the others '*as citizens* … [of] *one and the same* political community'.[77] The *political* identification as citizens is necessary since the *juridical* framework of *human* rights presupposes an institutional assemblage guaranteeing the operative rules by appending a coercive force to it.[78] It entails that a religion protected by law is required to 'loosen its holds on individual members'[79] and undergo 'painful learning processes'.[80] But, how can those practices whose understanding of the self may possibly differ from the discourse of human rights, citizenship and the rule of law ensure that such commitment takes place from within them?[81] The relevant governmental problem therefore is to constitute subjects whose performativity extends 'beyond mere obedience to the law'.[82] In order to ensure that subjects are both free and governed through freedom, a proper

investment has to occur. This includes, among others, 'full integration in kindergartens, schools, and universities … and equal access to the labor market'.[83] It is only when a subject has been made 'free in specific ways'[84] that it is able to exercise agency in the most suitable way. On the other hand, such an investment of power not only makes it possible that the subjects construe their freedoms in sight of the juridical field as humans or citizens, but it also makes it possible that those subjects may bring those structures of subjectivity (and agency) into the fold of religion.

It means that one has to rely on political and governmental arrangements, apart from the legal ones, in order to ensure that religion operates within its social space.[85] That is to say, for human rights it means that before it may effectively deal with the rights-based claims, it requires for its sustenance a peculiar institutional assemblage and an appropriate production of subjects. It is because of such a prior and ongoing dynamic of power that religion as a category is already somewhat tenuous (so that the freedom to or for religion is also always freedom from religion), in contrast to others that are not (for instance, citizenship). Precisely because of the connection of the juridical subject and the religious subject in the human rights law, a paradoxical formula operates since the juridical subject may disavow its religious being on the basis of freedom but the religious subject may never disavow its juridical being on the basis of religion. The strength of human rights apparatus thus consists in its 'tactical polyvalence' (to use Foucault's phrase) that allows it to exhibit, with respect to the specific milieu, 'different combinations of practices, discourses, expertise, and institutions in which the different elements vary in their role and significance'.[86]

Meanwhile, the politically important question is which specific guarantor is qualified to ensure these rights and to repel transgressions, under what conditions, with what methods, and what effects this process has on the guarantor itself. In order to briefly comment on this issue, let us move away from Habermas' lecture and focus on a guideline issued by the Council of Europe (CoE) Foreign Affairs Committee on the right to freedom of religion. It says: Since this right protects 'individuals as right holders'[87] and not 'religion or belief as such',[88] its guarantee falls directly on the states that have a 'primary duty to protect all individuals living in their territory'.[89] As both the juridical subject and sovereign power typical of a state are tied to each other, in a fundamental jurisprudential sense, in between them there are 'therefore no mediations'.[90] Then, like all juridical protocols, the right to freedom of religion solidifies those conditions of political power under which the guaranteeing of the right takes place. In this important sense, the state power legally guaranteeing human rights is a fundamental part of the human rights *dispositif* that realizes its sovereign capacity as existing when those rights are guaranteed. This means that the sovereign is not the one who primarily 'decides on the state of exception',[91] but one interlocked in between the legal norms of human rights on the one hand and the governmental practices optimizing the lives of the population on the other. This not only transforms the sovereign power of state, but also alters the workings of the concept of sovereignty itself, since sovereignty now requires that population be governed in the best way, and governmentality requires that there be a sovereign capacity ensuring the continuance of operative rules.

Furthermore, if sovereignty is transmuted so, one may also discern a certain appropriation of sovereignty on behalf of the architectures that work exquisitely at the

intersection of state structures, like the CoE, for instance. In this specific case, the right to freedom of religion 'Europeanizes'[92] member states as derogations from 'common values'[93] call for administrative and judicial scrutiny.[94] In order to 'set [religion in Europe] in its proper social place',[95] there are thus various institutions and mechanisms (experts, courts, policy advisers) that by determining the manageability of religion (incentives, supports, restrictions) reflexively make CoE tangible, among others. Apart from a projection within, it also means an external projection, since the incidence of a misplaced religiosity spread globally (with its violation of rights, suppressions of freedoms, or insufficiency of state capacity) projects the political power interested in religiosity onto a global scale.[96] What is thus required is not simply pinpointing violations, but an anticipatory take, an investigative gaze, that studies the possible violations through the immanent laws of religiosity and normalcy. Establishing the threshold of religious normalcy not only makes reality intelligible and accessible, but also makes it amenable to the technologies of security that then require that the subjects be governed with regard to such mediated reality.[97] Thus, policy-making is aligned to the legal rules relating to freedom of religion, while legal rules have constantly to orient themselves to the regulatory practices. Not only are the presentation, the implementation and the evaluation of the standard of the right to freedom of religion rooted in the technique of government and politics, but also the intersection of the religious subject and the notions of justice with the juridical subject and the sovereign is intriguing.

Let us now note a few points relating to the working of the right to freedom of religion. First, we have already noted how the right to freedom of religion equates one's religious subjectivity with one's juridical right-holding capacity. The point that this section has tried to make is that if religiosity is marked as a certain problematic, then the governmental strategies oriented towards religion are not merely restricted to the legal grid. It entails that when knowledge coordinates and modalities of power operate in the social field in order to achieve an optimum result, this not only orients politics and politics in line with the right to freedom of religion, but more fundamentally (re)produces those conditions that make the right workable. This point is important when one notes the effect such a process has on the sovereign guaranteeing the right to freedom of religion. For if there is an interconnection of the right to freedom of religion, like all other human rights, with a concrete political guarantor,[98] then the process of guaranteeing this right reflexively makes the guarantor 'more real'.

Religion beyond the pale of religion

> Politics, public affairs and legislative provisions … are not matters to which religious requirements and thought apply, only scientific data, with consideration for the needs of individuals and societies. (The Constitutional Court of Turkey, Decision no. 1998/1)

For the practices not protected, the right to freedom of religion holds two dynamics. First, a religious practice may not be protected because it is unable to find its social place. Second, a practice may be disclosed in such a manner that it may never fit into the mold of religion, even if it is religious in motivation. In order to see how 'religion' may go

beyond the pale of religion, this section refers briefly to another case law for a contrasting effect: *Refah Partisi (The Welfare Party)* v. *Turkey*.[99] This case is of interest because one can see in it how a religiosity which is to be 'legally' protected but not governed halts the functioning of human rights.

Refah Partisi (the Welfare Party) was a Turkish political party that had obtained 22 per cent of the votes in the general elections of December 1995 and had formed a coalition government in June 1996 (para. 11). On 16 January 1998 the Constitutional Court of Turkey dissolved Refah on the ground that it had become a 'center of activities contrary to the principle of secularism' (para. 23). Refah was subsequently banned, its government removed and its leadership suspended. This dramatic measure was propelled by three fears. First, it was sensed that Refah intended to set up a plurality of legal systems based on the plurality of religious denominations as in the Ottoman times. Second, Refah intended to apply shariah over the Muslims. This meant that in contrast to the specific formulations subsumed under the construct of religion, there were to be particular formations of religion from which both legality and legitimacy would be derived. Finally, Refah invoked the use of jihad (glossed over as 'force') both as a possible political method and as a concept legitimizing politics (para. 116). In this case, for our present purpose, not primarily the court decision but again the tactics of argumentation touching the question of religion are of note.

What is initially important is to note the peculiar rationale that took religion beyond the pale of religion as it works in the human rights law. We have already noted how human rights establish a coincidence between the juridical subject and the positive or negative obligations of a state. Now, to say that there be intermediaries between the two, such as specific established churches or community elders, severs this link by transmogrifying both the holder of rights and the state (paras 90, 91, 93–4, 119). Thus, a divide between the political idea of citizenship and the social consciousness of nationhood is the obvious result (para. 30). In doing so, the basis of 'scientific' knowledge that gives unity to the society through plurality could not be but removed (para. 40). Religiosity therefore would not be the concern of law, not because there is no 'positive' law corresponding to it, but more fundamentally because there is no specifically delineable religion as such since religion 'overspills' socially. When Refah lobbied in favor of such an arrangement, it denied the substance of religion (para. 40). What is problematic is that there is government of subjects but not through freedom, and a production of subjects but not within the practices of freedom (para. 40).

As a result, the subject would always already be one, even before its acts, depending on its standpoint [*Standpunkt*]. True, this can cause traditional affiliations to become 'consequential to the distribution of civil and political rights'.[100] The crucial thing, however, is that if one is a doer before the deed, then the subject always precedes itself before its acts. The subject is thus ontologically determined. So, there is already an inscription on the subject containing its freedom.[101] Conversely, the contemporary idea of freedom places a free subject at the intersection of uniformity (in institutional hierarchy or voting statistics) and specificity (in modes of self-expression or group affiliations). On another note, it is correct to observe that such a stance as Refah's may produce a possible modus vivendi where different religious groups would become 'estranged from each other'.[102] The crucial political matter, however, is that such a stance had the power to make social

reality refer to this non-optimum circuit. Therefore, there stood behind the 'plurality of legal systems' (paras 29, 39) advocated by Refah 'discrimination' (para. 80) and a 'static' and 'invariable' social landscape (paras 119, 123). Such a take accentuated religious difference by conserving it (paras 28, 82, 119). This stance is in visible contrast to the human rights apparatus that requires that social difference be both promoted and judiciously regulated (paras 86, 91).[103]

Therefore, through opinion polls and forecasts that projected that Refah's share of the vote will increase tremendously over the coming years giving it an absolute majority (paras 11, 107), assertive headscarf claims at a time when the Turkish courts had ruled that the banning of headscarves in educational quarters fell in line with the constitution (paras 11, 25), public statements by leaders on the revocation of the existing legal system of the Turkish Republic and the establishment of a state in line with Islamist ideals (paras 11, 28, 31, 39, 41), a reception given by the party head to the leaders of various religious movements who 'had attended in vestments denoting their religious allegiance' (para. 32), campaign declarations and interviews that promulgated installing a regime based on shariah (paras 17, 31, 34–8), through footprints left by Refah the likely end-point of its political journey was traced (paras 101–2, 108).[104] In this sense, the legal decision against it was because of, not in spite of, religion. Further, Refah invoked human rights at a time when it was in a position to misinterpret human rights – a liberticidal act which ECHR article 17 pre-empts (paras 20, 99).[105] For sure, what may conflict with or terminate human rights cannot be protected by it. In other words, participation in the democratic process does not mean that one may then be allowed to disenchant the spirit of democracy (paras 19, 25, 67). Democracy is both an ongoing political process and an end of politics and those who 'use democracy' (para. 40) as a means to 'destroy democracy' (paras 98, 78, 86, 107) as an end stand beyond the pale of protection afforded by the human rights law.[106] On the other hand, by entering the legislative chambers, Refah could not be allowed to tamper with the specific rules and conventions elevated as the law (paras 19, 25, 57, 61–2, 82, 93).[107] The inability to use religion as an object of government inscriptively determined the subject. On behalf of the guarantor of freedom of religion, this means an inability to govern 'freely' through religion.

In sum, two points can be noted here for our purposes. The question in this case is not matching up the protection of religion as per article 9(1) with the limitations on its manifestations as per article 9(2). In fact, a specific 'political' program had been advocated by Refah leaders that could never fit into the mold of 'religion' with respect to the right to freedom of religion. In both its substance and its effect, such a practice can only overturn the very functioning of human rights itself. Further, it means that such a program undoes the complex transactions that the right to freedom of religion establishes with the subject and the sovereign – a right which is traversed by complex lines of force with their peculiar power coordinates. In a nutshell, these lines of force, with their particular configurations which allow the right to freedom of religion to function effectively, are: the *religious* subject holding the *human* right to freedom of religion is a *juridical* subject whose rights are guaranteed *legally* by a *sovereign* who not only has a *coercive power* to ensure those rights but also construes the *religiosity* of the subject both as a *social reality* which needs to be protected and as a *governmental problematic* which needs to be regulated.

In place of a conclusion

> A free society has to substitute for despotic enforcement a certain degree of self-enforcement. Where this fails, the system is in danger. (Charles Taylor, 'Modes of Secularism', in Rajeev Bhargava [ed.] *Secularism and Its Critics* [New Delhi: Oxford University Press, 1998], pp. 31–53 [p. 43])

Human rights need to analytically identify religion in order to allot religion its 'legitimate space'.[108] On behalf of human rights, this logically means drawing on history while intervening in the present in order to shape it. In other words, in order to be socially effective, the human rights apparatus needs to identify religion which it then legally regulates (protection, containment, exception), that is, by governing religiosity and governing through religiosity. The right to freedom of religion requires that there be a domain delineable as religion in order to work itself through. This entails that even when a practice is legally freed as religious, that practice is nevertheless subjected to as being primarily religious. This point is also politically important since in human rights the legal protection that the artistic has is different from the political, and in the same vein the political merits different consideration than the religious.[109] On behalf of the subjects, it also means 'a certain degree of self-enforcement' (to use Taylor's phrase) in order that religiosity remains sufficiently aligned with the dictates of a free society.

The historical interplay of discourses then already holds a specific posture towards the practice determined to be religious. Among others, this reveals religion to be both a socio-legal problem (to be separated from politics and society in specific manner) and a site for legal claims (to be legally protected, restricted, or ousted). What is important to study is what truths and conditions underpin the qualification of specific practices as religious in legal and political discourses, what tactics keep religion in its place, and what tactics follow when it oversteps its confines. The analytical vocabulary that structurally separates power and freedom cannot therefore account for such a governmental exercise of power. In contrast to the narratives that inform one how freedom is shielded from or acts as a counter-weight to power, the very fact that the former requires that it be 'freed' through appropriate mechanisms in order to assume its weight is an exercise of governmentality. As an apparatus, human rights not only draw on the historicity that codifies an object as religious, but also connect the ensemble of discourses that make subjects 'at once freer and more governable *in this world*'.[110]

Acknowledgements

I would like to thank Talal Asad, Richard Bronaugh and Michael Haus for their feedback and suggestions on an earlier version of this article.

Notes

1. Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton, NJ: Princeton University Press, 2006), pp. 60–2. Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006), p. 134.

2. Christopher Eisgruber and Lawrence Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007).
3. John Finnis, 'Does Free Exercise of Religion Deserve Constitutional Mention?', *The American Journal of Jurisprudence* 54 (2009): 41–66 (45).
4. Peter Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', *Michigan Journal of International Law* 32 (2011): 663–747 (675–6). Jeremy Gunn, 'The Complexity of Religion and the Definition of "Religion" in International Law', *Harvard Human Rights Journal* 16 (2003): 189–215 (191). Winnifred F. Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ and Oxford: Princeton University Press, 2007), p. 151.
5. David Scott, 'Conversion and Demonism: Colonial Christian Discourse and Religion in Sri Lanka', *Comparative Studies in Society and History* 34 (1992): 331–65 (333).
6. This interest resonates with the recent critical scholarship that sees religion and the secular as not exclusive but entangled categories. See, for instance, Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore, MD: Johns Hopkins University Press, 1993); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003); William Connolly, *Why I Am Not a Secularist* (Minneapolis: University of Minnesota Press, 2000); Jean Baubérot, *Histoire de la laïcité en France* [History of Secularity in France] (Paris: Presses Universitaires de France, 2000); Charles Taylor, *A Secular Age* (Cambridge, MA: the Belknap Press of Harvard University Press, 2007); Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton, NJ: Princeton University Press, 2011).
7. Asad, *Formations of the Secular*, p. 157; original emphasis.
8. Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–77*, ed. Colin Gordon, trans. C. Gordon, L. Marshall, J. Mepham and K. Soper (New York: Pantheon, 1977), p. 194. Later, on p. 196, Foucault notes that 'the *dispositif* consists in: strategies of relations of forces supporting, and supported by, types of knowledge'.
9. Foucault, *Power/Knowledge,* p. 194.
10. Leo Strauss, 'Notes on Carl Schmitt: The Concept of the Political', in Carl Schmitt, *The Concept of the Political* (Chicago, IL: University of Chicago Press, 2007), pp. 97–122 (p. 114).
11. Foucault, *Power/Knowledge,* p. 196.
12. Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978*, ed. Michel Snellart and François Ewald (Basingstoke, Hants: Palgrave Macmillan, 2007), pp. 144–5.
13. ibid.: 136–42.
14. Michel Foucault, *Essential Works of Foucault, 1954–1984,* vol. 1, *Ethics: Subjectivity and Truth*, ed. Paul Rabinow (New York: New Press, 1997), p. 82.
15. Foucault, *Security, Territory, Population*, p. 144.
16. ibid.: 142.
17. Peter Danchin and Lisa Forman. 'The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities', in Peter Danchin and Elizabeth Cole (eds) *Protecting the Human Rights of Religious Minorities in Eastern Europe* (New York: Columbia University Press, 2002), pp. 192–221 (p. 192). Göran Therborn, 'Europe's Breaks with Itself: The History, Modernity, and the World Future of Europe', in F Cerutti and E Rudolph (eds) *A Soul For Europe: On the Cultural and Political Identity of the Europeans*, vol. II (Leuven: Peeters, 2001), pp. 73–94 (p. 83).

18. Michel Foucault, 'The Discourse on Language', in his *The Archaeology of Knowledge* trans. A. Sheridan (New York: Pantheon, 1972), pp. 215–37 (p. 229). Unsurprisingly, religion is accorded an important position in the European human rights law as the article 9 of ECHR and article 10 of the EU Charter of Fundamental Rights refer to it, and national and regional courts interpret it. This also requires that policy (immigration, integration, education, anti-discrimination) and politics (citizenship, liberties, democracy) operate in line with the relevant right. On the other hand, this right is also referred to in the articles dealing with education or the rights of children, for instance.
19. Jacques Rancière, 'Who is the Subject of the Rights of Man?', *South Atlantic Quarterly* 103 (2004): 297–310 (297).
20. Foucault, *Security, Territory, Population*.
21. See, for instance, Asad, *Genealogies of Religion* and Asad, *Formations of the Secular*.
22. Talal Asad, 'Responses', in David Scott and Charles Hirschkind (eds) *Powers of the Secular Modern: Talal Asad and His Interlocutors* (Stanford, CA: Stanford University Press, 2006), pp. 206–41 (p. 209). An important caveat needs to be added here: one does injustice to the concept of power if one sees it as exertion of complete control or the denial of liberties. Power is productive, not privative: forming subjects as free (and free through religion in this case), since power, as Foucault reminds us, manages 'free subjects, and only insofar as they are free'; Michel Foucault, 'Afterword: The Subject and Power', in Hubert Dreyfus and Paul Rabinow (eds) *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago, IL: University of Chicago Press, 1983), pp. 208–28 (p. 221).
23. With the implementation of Protocol no. 11, the European Commission of Human Rights (ECmHR) was abolished in November 1998.
24. *Leyla Şahin* v. *Turkey* [2005], Application No. 44774/98, Judgment 10 November 2005, European Court of Human Rights.
25. '[Dasein] *stretches* itself along in such a way that its own Being is constituted in advance as stretching-along'; Martin Heidegger, *Being and Time* (New York: Harper & Row, 1962), p. 426; original emphasis.
26. Michel Foucault, *The History of Sexuality*, vol. I, *An Introduction*, trans. R. Hurley (New York: Pantheon, 1978), p. 93; original emphasis.
27. Gayatri Chakravorty Spivak, *In Other Worlds: Essays in Cultural Politics* (London and New York: Routledge, 2006), p. 204. Nikolas Rose, *Inventing Our Selves: Psychology, Power, and Personhood* (Cambridge: Cambridge University Press, 1998), p. 171.
28. Talal Asad, 'Trying to Understand French Secularism', in Hent Vries and Lawrence Sullivan (eds) *Political Theologies: Public Religions in a Post-Secular World* (New York: Fordham University Press, 2006), pp. 494–526 (p. 501); original emphasis.
29. For a similar case law dealing with the 'religious' status of beards, see also *Tığ* v. *Turkey* [2005], Application No. 8165/03, Judgment 24 May 2005, European Court of Human Rights. For a more recent case-law where the human face and its effacement became the object of analysing the religious, see *S.A.S* v. *France* [2014], Application No. 43835/11, Judgment 1 July 2014, European Court of Human Rights.
30. For an interesting viewpoint on a similar topic, see the Resolution 1743 and the Recommendation 1927 of the Parliamentary Assembly of the Council of Europe on 'Islam, Islamism and Islamophobia in Europe'.
31. *Dahlab* v. *Switzerland* [2001], Application No. 42393/98, Judgment 15 February 2001, European Court of Human Rights.

32. *Kokkinakis* v. *Greece* [1993], Application No. 14307/88, Judgment 25 May 1993, European Court of Human Rights.
33. Robert Alexy, 'Individual Rights and Collective Goods', in Carlos Nino (ed.) *Rights* (New York: New York University Press, 1992), pp. 163–83 (pp. 163, 169); Ronald Dworkin, 'Rights as Trumps', in Jeremy Waldron (ed.) *Theories of Rights* (Oxford: Oxford University Press, 1984), pp. 153–67 (p. 153). Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', *Modern Law Review* 62 (September 2003): 671–96.
34. Anastasia Vakulenko, 'Islamic Headscarves and the European Convention On Human Rights: an Intersectional Perspective', *Social & Legal Studies* 16 (June 2007): 183–99.
35. Nikolas Rose, Pat O'Malley and Mariana Valverde, 'Governmentality', *The Annual Review of Law and Social Science* 2 (2006): 83–104 (87).
36. Justice and Home Affairs, '2807th Council meeting Justice and Home Affairs Luxembourg, 12–13 June 2007', *Press Releases Database* (12 June 12, 2007), accessed 15 June 2014, accessible @: http://europa.eu/rapid/press-release_PRES-07-125_en.htm?locale=en
37. Justice and Home Affairs, '2618th Council Meeting Justice and Home Affairs Brussels, 19 November 2004', *Press Releases Database* (19 November 2004), accessed 15 June 2014, accessible @: http://europa.eu/rapid/press-release_PRES-04-321_en.htm
38. Therefore, the general secular formula that 'the state must have an effective monopoly of coercive power and that religious associations must have no coercive power at all' (Michael Walzer, 'Drawing the Line: Religion and Politics', *Utah Law Review* 3 [1999]: 619–38 [620]) presupposes more importantly that there is something already disclosed neatly as being religious on the one hand and non-religious on the other. The 'secularized' partitioning of legitimate violence and then the monopoly over its exercise (Weber's *das Monopol legitimer physischer Gewaltsamkeit*) is fundamentally an effect of this power formulation.
39. See Sullivan, *The Impossibility of Religious Freedom.*
40. *C* v. *the United Kingdom* [1983], Application No. 10358/83, Commission Decision 15 December 1983. *Darby* v. *Sweden* [1990], Application No. 11581/85, Judgment 23 October 1990, European Court of Human Rights.
41. *Reformed Church of X* v. *the Netherlands* [1962], Application No. 1497/62, Commission Decision 14 December 1962.
42. *Kalaç* v. *Turkey* [1997], Application No. 12875/87, Judgment 1 July 1997, European Court of Human Rights. *Larissis* v. *Greece* [1998], Application Nos. 23372/94, 26377/94, 26378/94, Judgment 24 February 1998, European Court of Human Rights. *Grandrath* v. *Federal Republic of Germany* [1966], Application No. 2299/64, Commission Decision 12 December 1966. *Yanaşık* v. *Turkey* [1993], Application No. 14524/89, Commission Decision 6 January 1993.
43. *X* v. *the United Kingdom* [1978], Application No. 7992/77, Commission Decision 12 July 1978.
44. *X* v. *Netherlands* [1962], Application No. 1068/61, Commission Decision 1962.
45. *Arrowsmith* v. *the United Kingdom* [1978], Application No. 7050/75, Commission Decision 5 December 1978.
46. *Karaduman* v. *Turkey* [1993], Application No. 16278/90, Commission Decision 1 January 1993
47. *Manoussakis and others* v. *Greece* [1996], Application No. 18748/91, Judgment 26 September 1996, European Court of Human Rights.

48. *X* v. *Austria* [1972], Application No. 4982/71, Commission Decision 22 March 1972.
49. *Valsamis* v. *Greece* [1996], Application No. 21787/93, Judgment 18 December 1996, European Court of Human Rights. *Efstratiou* v. *Greece* [1996], Application No. 24095/94, Judgment 18 December 1996, European Court of Human Rights.
50. *X* v. *Austria* [1963], Application No. 1747/62, Commission Decision 13 December 1963. *X* v. *the United Kingdom* [1975], Application No. 5442/72, Commission Decision *circa* 1975.
51. *Doğru* v. *France* [2008], Application No. 27058/05, Judgment 4 December 2008, European Court of Human Rights.
52. *Cha'are Shalom Ve Tsedek* v. *France* [2000], Application No. 27417/95, Judgment 27 June 2000, European Court of Human Rights.
53. *Hoffman* v. *Austria* [1993], Application No. 20704/92, Judgment 23 June 1993, European Court of Human Rights.
54. *Brook* v. *the United Kingdom* [2000], Application No. 38218/97, Judgment 11 July 2000, European Court of Human Rights.
55. Foucault, *Security, Territory, Population*, p. 144.
56. Gunn, 'The Complexity of Religion': 189–90. Thus, the ECtHR noted: 'It is clearly not the Court's task to decide *in abstracto* whether or not a body of beliefs and related practices may be considered a "religion"' (*Kimlya and others* v. *Russia,* para. 79). However, a notable exception in this regard is the Qualification Directive 2004/83/EC of 29 April 2004 that for the purpose of asylum defines religion as 'the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief'. Such a broad demarcation has problems of its own, as, in a useful article originally prepared as a report for the UN High Commissioner for Refugees, Karen Musalo identifies the difficulties adjudicators face as to how the persecuted may 'prove' that there was a religious rationale behind their persecution in the cases of asylum and refuge; see Karen Musalo, 'Claims for Protection Based on Religion or Belief: Analysis and Proposed', *International Journal for Refugee Law* 16 (2004): 165–226. In the case of the EU, Carrera and Parkin note: 'The *undefined* categories used at EU policy level to deal with religion are hugely diverse, heterogeneous and contested as regards both their material and personal scope'; see Sergio Carrera and Joanna Parkin, 'The Place of Religion in the European Union Law and Politics', Working Paper, Brussels: accessible @: www.religareproject.eu (2010: 3). In another context, the same authors note: 'There are no commonly agreed definitions around any of the key terms which are currently being used when "dealing with" the religious dimension in EU policies' (ibid.: 35).
57. Foucault, *Security, Territory, Population*, p. 145.
58. ibid.: 307.
59. Michel Foucault, 'Politics and the Study of Discourse', in Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect: Studies in Governmentality* (Chicago, IL: University of Chicago Press, 1991), pp. 53–72 (p. 68). In this context, one can appreciate the stance of legal positivism, one of whose central claims as a descriptive theory of law is that social morality is to be considered legally binding in a society insofar as it is recognized by the positive law; see, for instance, Herbert Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994).

60. *Arrowsmith* v. *the United Kingdom* [1978], Application No. 7050/75, Commission Decision 5 December 1978, 3 EHRR 218, para. 71.
61. Jürgen Habermas, 'What is Meant by a "Post-Secular Society"? A Discussion on Islam in Europe', in his *Europe: The Faltering Project* (Cambridge: Polity, 2009), pp. 59–77.
62. ibid.: 59.
63. ibid.
64. Asad, *Genealogies of Religion*, p. 2.
65. Habermas, 'What is Meant', p. 60.
66. ibid.: 63.
67. ibid.
68. See, for instance, Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (New York: Vintage Books, 1994), and Nikolas Rose, *The Politics of Life Itself: Biomedicine, Power, and Subjectivity in the Twenty-First Century* (Princeton, NJ: Princeton University Press, 2006).
69. Habermas, 'What is Meant', p. 60.
70. Asad, *Genealogies of Religion,* p. 28; original emphasis.
71. 'The concept of the profane and its cognate, profanation, always presuppose the sacred ... There is no such thing as profaneness in itself': Hans-Georg Gadamer, *Truth and Method*, trans. J. Weinsheimer and D. Marshall (London: Continuum, 2003), p. 150.
72. Carrera and Parkin, 'The Place of Religion' p. 3.
73. ibid.: 24.
74. Habermas, 'What is Meant', p. 68.
75. ibid.: 76.
76. Cf. Foucault, 'Politics and the Study of Discourse', p. 58.
77. Habermas, 'What is Meant', p. 68; original emphasis.
78. Cf. Max Weber, in Max Rheinstein (ed.) *Max Weber on Law in Economy and Society* (Cambridge, MA: Harvard University Press, 1954), p. 13. This point has been perspicuously read by many theorists, albeit with an altogether different focus. See, for instance, Hannah Arendt, *The Origins of Totalitarianism* (London: Harcourt Brace, 1973), pp. 267–303, and Asad, *Formations of the Secular*, pp. 127–58.
79. Habermas, 'What is Meant', p. 68.
80. ibid.: 75.
81. ibid.
82. ibid.
83. ibid.: 69.
84. Nikolas Rose, *Governing the Soul: The Shaping of the Private Self* (London: Routledge, 1989).
85. Habermas, 'What is Meant', p. 69. In this sense, Habermas concedes that 'with the cognitive preconditions of an ethics of democratic citizenship [one] runs up against the limits of normative political theory which can justify only rights and duties' (ibid.: 75).
86. Alan Hunt, 'Encounters with Juridical Assemblages: Reflections on Foucault, Law and the Juridical', in Ben Golder (ed.) *Re-reading Foucault: On Law, Power and Rights* (London: Routledge, 2014), pp. 64–84 (p. 80).
87. Council of Europe. 'EU Guidelines on the promotion and protection of freedom of religion or belief', *Council of the European Union* (24 June 2013), p. 4.

88. ibid.
89. ibid.
90. Asad, *Formations of the Secular*, p. 3.
91. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (Chicago, IL: University of Chicago Press, 2005), p. 1.
92. Carerra and Parkin, 'The Place of Religion', p. 1.
93. European Commission, 'The Consolidation of the EU Framework on Integration Report to the 2010 Ministerial Conference on Integration', *European Commission* (19 March 2010), p. 4.
94. Carrera and Parkin, 'The Place of Religion', pp. 10–11, 16.
95. Asad, *Formations of the Secular*, p. 196.
96. Council of Europe, 'EU Guidelines', p. 3.
97. In case of violations, the document reads, the Council of Europe will be required, the guidelines tell us, to 'condemn' (ibid.: 5), 'demand accountability' (ibid.), 'denounce' (ibid.: 6), 'protest' (ibid.), 'lobby' (ibid.), 'observe trials' (ibid.: 10), or 'support pertinent initiatives' (ibid.: 7). Among others, the Council of Europe will support, fund, train, and publicize relevant 'international, state, and non-state actors in their efforts' (ibid.: 8, 10).
98. Arendt, *Origins*, pp. 267–303.
99. *Refah Partisi (The Welfare Party) and Others* v. *Turkey* [2003], Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, Judgment 13 February 2003, European Court of Human Rights.
100. Saba Mahmood and Peter Danchin, 'Immunity or Regulation? Antinomies of Religious Freedom', *South Atlantic Quarterly* 113 (2014): 129–159 (145).
101. Therefore, the ECtHR observed in *Refah*: '[Shariah is] incompatible with the fundamental principles of democracy as set forth in the Convention … [particularly] its criminal law and criminal procedure, its rule on the legal status of women, and the way it intervenes in all spheres of public and private life' (para. 123). In the context of Ottoman millet reforms, Will Kymlicka perceptively notes that this 'non-liberal mode of pluralism' has remained 'antithetical to the ideals of personal liberty endorsed by liberals' including 'those within each community [of the Ottoman Empire that had] pushed for constitutional restrictions on the power of millet's leaders'; see his 'Two Models of Pluralism and Tolerance', in David Heyd (ed.) *Toleration: An Elusive Virtue* (Princeton, NJ: Princeton University Press, 1996) pp. 81–105 (pp. 81, 83, 84). Thus, Lewis and Braude observe in the same vein that such an arrangement creates a 'willingness to coexist' but 'not the separate principle of individual freedom of conscience'; see Benjamin Braude and Bernard Lewis, 'Introduction', in their *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society* (New York: Holmes & Meier, 1982), pp. 1–34 (pp. 22–3). This leads Asad to remark that 'the process of mediation enacted in ''pre-modern'' societies includes the ways in which the state mediates local identities without aiming at transcendence': *Formations of the Secular*, p. 5.
102. Habermas, 'What is Meant', p. 67.
103. Is it surprising then that in a large body of jurisprudential literature pluralism is an ideal to be achieved, a social fact to be conserved and protected, and a politico-legal problem to be addressed?
104. This is in contrast to a similar case law, *Gündüz* v. *Turkey*, where ECtHR held that defending shariah without invoking violence could not be labeled as 'hate speech' and may be protected

under ECHR Article 10 on freedom of expression. However, in *Refah*, the very fact that a political party moved away from speech into the domain of action and 'had the real potential to seize political power' (para. 108) meant that the expression now meant something more than its exercise of 'free speech'.

105. In the landmark *Lawless* v. *Ireland*, the ECtHR noted: 'The purpose of Article 17 (art. 17), insofar as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention' (para. 17).
106. In a Schmittian manner, Derrida calls the process whereby democracy suspends itself in order to defend itself against those that seek to undermine it 'auto-immunity'. See, Jacques Derrida, *Rogues: Two Essays on Reason*, trans. P.-A. Brault and M. Naas (Stanford, CA: Stanford University Press, 2005).
107. In a related judgment, the ECtHR noted: 'A political party whose leaders incite to violence or put forward a policy which does not comply with one or more of the rules of democracy and ... [flout] rights and freedom recognized in a democracy cannot lay claim to the Convention's protections against penalties imposed on these grounds' (*Yazar* v. *Turkey,* para. 49).
108. Asad, *Genealogies of Religion*, p. 45.
109. In *X and Church of Scientology* v. *Sweden*, the ECmHR noted that 'the level of protection [accorded to ''commercial'' speech] must be less than that accorded to the expression of ''political'' ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention [were] chiefly concerned' (p. 73).
110. Asad, *Formations of the Secular*, p. 157; original emphasis.