

Religious Freedom in the Jurisprudence of the Egyptian and European Court of Human Rightsⁱ

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Introduction

The right to religious liberty is often assumed to be a neutral legal instrument designed to protect the right of individuals and groups, particularly religious minorities, to practice their beliefs freely without state coercion and threat of social discrimination. Yet a comparative reading of the jurisprudence produced interpreting this right in Egyptian courts and the European Court of Human Rights (hereafter the European Court) shows that it is a far more ambiguous instrument that often legitimates, rather than simply alleviates, discriminatory practices of the state against religious minorities. At issue is the European formulation of the right to religious liberty—also enshrined in Egyptian law—that is premised on a foundational distinction between the right to “freedom of thought, conscience and religion” in Article 9(1) and the right to “manifest one’s religion or beliefs” in Article 9(2) of the European Convention on Human Rights (ECHR). The former, referred to as the *forum internum*, is held to be absolute while the latter, the *forum externum*, is stated to be subject to limitations where necessary to protect public order, morals, or the rights of others. As we will show in this essay, the second clause of the right to religious liberty authorizes the state to intervene in what appear to be mere expressions of religious belief but in fact involve the state in making substantive judgments about religion, a domain toward which it claims to be neutral.

This essay is an exploration of this dialectic in the reasoning and judgments of a range of cases involving religious minorities in Europe and Egypt. There are important differences between the religious personalities of the states involved: the European Court judgments we discuss involve secular states such as Turkey, Switzerland and France as well as states such as Italy and Greece with strongly Christian national profiles. In comparison, Egypt is a self-avowedly Islamic state that regards the Islamic shari'a to be the source of all its laws even though its legal tradition is based on European (primarily French) law. These important differences notwithstanding, the deployment of the term "public order" in all the judgments we analyze produces two effects: one, it authorizes the state's intervention into the domain of religious belief that it declares to be autonomous and sacrosanct; two, it privileges the values and commitments of the religious majority as the norm against which the religious practices of the minority are judged and sanctioned. Rather than understand these two aspects to be a result of the misapplication of the right to religious liberty, in what follows we will argue they are a product of the contradictions and antinomies internal to the conceptual architecture of the right itself.

Since questions of religion and secularism are at the heart of this essay, it is best to clarify our conceptual use of these terms. Following the recent critical scholarship on secularism, our assumption throughout this essay is that the secular and the religious are not opposites of each other but are closely intertwined in paradigmatic ways in modern nation states.ⁱⁱ The emergence of the modern category of the secular (to be distinguished from the premodern Latin term *saeculum*) is constitutively related to the rise of the modern concept of religion wherein it is impossible to track the history of one without

simultaneously tracking the history of the other. Throughout modern history, secularism, as a principle of state governance, has entailed not so much the separation of religion from politics (as is often assumed) but the ongoing regulation of religion through a variety of state and civic institutions that constantly entwine religion with politics. Through this process has emerged a modular conception of religiosity and a concomitant religious subject that animates various secular discourses, including the juridical, cultural, ethical, and political. The nation-state and its laws are one of the primary vectors for the dissemination of this normative religiosity. Importantly, this dissemination occurs in both non-Western societies whose level of secularity is often questioned and those regarded as paradigmatically secular, such as the United States, France, Britain, Germany, and the Netherlands. Viewed from this perspective, the problem of religious (in)tolerance cannot be simply understood as a product of cultural and social values but must address the various ways in which modern technologies of secular governance contribute to its ongoing life in modern societies.

The first half of the essay focuses on Egyptian jurisprudence produced on the status of the Bahai minority, who constitute a relatively small proportion of the population (less than one percent), but offer the most significant challenge to the constitutionally guaranteed right to religious liberty. Unlike Judaism and Christianity, which the Egyptian state formally recognizes, the practice of the Bahai faith is prohibited in Egypt, a ban that places serious limitations on the civil and political rights of the Bahais as citizens of the state. Bahais have legally challenged this ban with increasing frequency in recent years with limited success. We analyze several of the judgments issued by Egyptian administrative courts that try to reconcile the right to freedom of

belief that the constitution guarantees with the state's right to limit the public expression of the Bahai faith. In the second half of the essay we turn to the analysis of key cases in the jurisprudence of the European Court in which the principle of religious liberty and public order is invoked, including the well-known *Lautsi*, *Dahlab*, *Refah Partisi*, *Şahin*, *Kokkinakis*, and *Otto-Preminger-Institut* judgments. While attentive to the substantive differences between the two bodies of jurisprudence in Egypt and Europe, we also wish to point to the striking similarities and the conundrums entailed in the regulation of religious minorities across the Western and non-Western divide with a particular focus on the contradictions inherent in the concept of the right itself.

The Unrecognizability of Bahais

The Bahai faith is relatively new, originating in Iran in the late nineteenth century as an offshoot of Islam that rejects the finality of the prophecy of Muhammed and the Quran—two of Islam's cardinal principles—while accepting their sacrality, thereby putting Bahaism outside of the doctrinal fold of Islam. The founder of the faith, Baha Allah, declared himself to be a prophet and set down his own principles of the Bahai faith in the *Holy Book* (*Kitab al-Aqdas*). Despite persecution, Bahais have won converts throughout the Middle East, Asia, and Europe and are currently estimated to be six to seven million adherents globally. The Bahai administrative structure is akin to a corporate model, with vertical hierarchies that are connected horizontally with a network of globally dispersed Bahai communities. At the top sits the Universal House of Justice, located in Haifa, Israel, also known as the Bahai World Center, which is the spiritual and administrative locus of the Bahai faith. Given modern geopolitical tensions between

Israel and most Middle Eastern states, the location of their headquarters in Haifa has often made Bahais a national security threat in the eyes of these governments.ⁱⁱⁱ

Bahais have been living in Egypt since the 1860s when a small number arrived to proselytize secretly and won a few converts from Islam as well as Judaism and Christianity. Their numbers have remained small even though in the 1920s they flourished, establishing a temple, and petitioning the government to recognize them as an official religion with its own family law. Their fortunes turned in the 1960s, however, as the tensions between Egypt and Israel escalated and President Gamal Abdel Nasser passed a presidential decree (Law 263/1960) that dissolved Bahai institutions and criminalized their activities. Bahais subsequently withdrew their efforts to have the Egyptian state recognize their religion, but continued to practice their faith under the public radar.^{iv} It is not surprising, however, that the Bahais have periodically encountered the administrative bureaucracy of the state, given that it rules over all aspects of a citizen's life, from the most intimate to the most public. The primary site where Bahais encounter the discriminatory powers of the state is in the domain of civil and family law: when Bahais have to acquire national identity cards with the Ministry of Interior, or register births, marriages, and settle custody/inheritance claims in family law courts. Some of the recent legal cases have centered upon the controversial Egyptian law that requires citizens to declare their religious affiliation on national identity cards. Given that only Islam, Christianity and Judaism are accorded formal recognition, when Bahais have tried to list their religion on their identity cards, it creates a legal conundrum for the Egyptian state. On the one hand, if the state permits Bahais to register their religion on an official document, it amounts to a de facto recognition of their faith; on the other hand, if

the state does not permit them to do so, then it forces Bahais to list their religious identity as Christian, Muslim or Jewish, which constitutes a lie—itsself a violation of state law.

The Egyptian government’s refusal to grant state recognition to the Bahai faith is a complicated issue. Notably, President Nasser’s criminalization of the Bahais in 1960 was based on a presidential decree that provided no religious or legal justification and was primarily understood to be a result of the national security policy of the Nasser regime in relation to Israel and the increasing animosity between the two states.^v Since the Bahai administrative-spiritual center was located in Israel, Nasser’s government came to view Bahais as potential collaborators and informants for the state of Israel. While Bahai community and religious property was seized, most ordinary Bahais continued to conduct their political and civic affairs in Egypt unless they had to go before the courts to settle particular kinds of claims in which their religious identity was consequential. In response to Bahai legal challenges, the Egyptian courts (administrative and family law courts) have produced a checkered jurisprudence, often invoking not only the presidential decree of 1960 but also “Islamic shari’a” that ostensibly does not recognize religions other than the three monotheistic faiths—Christianity, Judaism, Islam—collectively referred to as “People of the Book” (*ahl al-kitab*), “heavenly religions” (*al-adyan al-samawiyyah*) or “recognized religions” (*mu’tarif biha*).^{vi} This collective category dates back to the period of Ottoman rule in Egypt (1517–1798) when Christians and Jews were regarded as *ahl al-dhimma*, a legal category that obliged the state to extend protection to their life, property, and right to worship in exchange for which they pledged their loyalty to the state and paid a special poll tax. This system was slowly dissolved with the establishment of the nation-state and its promise of civil and political equality. Yet an

important aspect of it lives on in Egypt in the juridical autonomy “People of the Book” are accorded over personal status or family law.^{vii} While most of Egypt’s Jews have left the country in the postcolonial period, it is Christian family law that is most consequential to the conduct of minority affairs, particularly of Coptic Orthodox Christians who constitute over ten percent of the population. In fact, the Coptic Orthodox Church successfully lobbied to have Article 3 added to the new constitution of Egypt approved in 2012 that enshrines the right of Christians and Jews to have their own religion-based family laws.^{viii} For those religious minorities outside this entente—the Bahais but also the increasingly visible Shi’a minority—the possibility of gaining formal state recognition seems impossible. A significant difficulty lies in the necessary relationship posited between the religious status of a community and their autonomy over family law: to extend state recognition to these groups would require government bodies to enforce aspects of that religion that govern personal status issues.^{ix}

In the last three decades when Bahais have taken their case to the Egyptian courts, they have encountered the argument that the state’s recognition of the Bahai religion is a violation of the shari’a, which, according to Article 2 of the Egyptian constitution, is the source of all laws in Egypt. This position, however, cannot be historically justified because there is no consensus in the shari’a about how to treat religious minorities that hail from traditions other than the three Abrahamic faiths. In the premodern period, a variety of different arrangements existed depending on the diversity of faiths among the people Muslim empires ruled over. While the populations living under Ottoman rule were primarily Christian, Jewish and Muslim, in other parts of the world Muslim rulers had to contend with a variety of nonmonotheistic faiths that were indigenous to the lands they

conquered (such as Zoroastrians, Hindus, Buddhists).^x The Muslim empires could not afford to treat these religious groups as juridical nonentities, heretics, unbelievers or apostates, but had to integrate them into the economic and governing structures of the state. This historical heterogeneity of shari'a norms notwithstanding, Egyptian courts of the modern period have refused to extend formal recognition to the Bahai faith, justifying their stance through recourse to a supposedly singular and unified interpretation of the shari'a regarding the status of non-Abrahamic religions within a Muslim polity.

There is a further complication to the Egyptian courts' assertion of compliance with the shari'a that is important to note. In postcolonial Egypt, shari'a rules only pertain to family law and are supposed to have no direct application in the domains of administrative, criminal or civil law. As a result, when Bahai cases have come up in administrative or criminal courts, they fall under the domain of civil law that contains few if any religious injunctions. The administrative courts' invocation of putative shari'a norms therefore is often justified through recourse to the problematic and unwieldy Article 2 of the Egyptian constitution that declares Islamic shari'a to be the chief source of all legislation.^{xi} Not only is this formulation of Article 2 relatively new (1979), but in the absence of legislative and executive guidelines about how to interpret it, the jurisprudence on Article 2 is markedly *ad hoc* and checkered. Clark Lombardi (2006), in his book on the Egyptian Supreme Constitutional Court's (SSC) Article 2 jurisprudence, shows that initially the SSC deferred to the executive branch to provide guidance on how to implement Article 2. Following the executive's failure, the SSC has made an attempt to articulate a theory of legal interpretation for Article 2 that exhibits two key features: (a) it confers broad authority to the SSC justices to pronounce on religious matters (rather

than to religious scholars [*ulama*] familiar with historical shari'a jurisprudence); and (b) seeks to reconcile existing secular laws of the state with what it interprets to be the "universal rulings" and "goals" of the shari'a (the former prohibiting any conflicting statutory rule and the latter requiring *ijtihad* [a form of Islamic legal reasoning] to develop presumptive rulings advancing the collective goals of the shari'a) (Lombardi 2006, 180). This is a tricky enterprise since none of the Egyptian judges are trained in Islamic jurisprudence nor is the vast majority of Egyptian law based on the shari'a. The ambiguities of what it means to interpret Article 2 compound when one considers the fact that Egypt's lower courts—including the administrative courts where most of the Bahai cases have been litigated—have little or no relation to the SSC, nor do the lower court justices use SSC judgments as precedents for their rulings. Given this situation, it is far from clear what it means to evoke "principles of the shari'a."

In order to pronounce on matters they are ill equipped to judge or interpret, the administrative court judges increasingly resort to the principle of "public order" to pronounce on the status of non-Muslims (including Bahais).^{xii} It would be easy to regard the use of public order in these cases as an instrumental use of an otherwise secular principle that departs from its foundational reasoning. Yet as we hope to show, public order is a complex and amorphous concept that accords the modern state the right to intervene in the private domain of religious belief while at the same time maintaining that it is a place of autonomy from state regulation. In what follows, we want to elaborate on this point by a close reading of three recent judgments from Egyptian administrative courts regarding Bahais in all of which shari'a, the identity of the state, and the right to religious freedom are invoked. Of particular interest to us is how the courts uphold the

constitutional right of the Bahais to religious liberty while at the same time restricting state recognition of their faith in the public domain.

Regulation or Recognition?

Things came to a head for Egyptian Bahais in 2004 when the government computerized the system that issues national identity cards, requiring all locally issued paper identity cards to be replaced with computerized ones. National identity cards, while crucial to the conduct of civil and political life, had been issued in the past in an irregular fashion and local officials often allowed for the Bahai religion to be recorded on the cards. Centralizing the system produced a crisis when state computer programs did not allow for a “Bahai” entry thereby alerting local officials of the legal violation. The government requirement also created a new vigilance among the employees of the Ministry of the Interior and its Civil Status Department (CSD) in relation to the presence of the Bahais as a demographic entity in Egypt that was unprecedented. Several Bahai families had their birth certificates, national identity cards, and other documents confiscated that listed their Bahai religion under the old system. Unable to proceed with their daily life, these Bahais took their case to administrative courts to challenge the decision of the Ministry of Interior and CSD.^{xiii}

<<SUBHEAD2>>The Izzat-Rushdie Case in the Court of Administrative Justice

Among these was a case brought by Husam Izzat and his wife Ranya Rushdie. While their three daughters’ and Husam’s religious identification was listed as “Bahai” on their official documents, Ranya’s was left blank. When the family tried to procure passports, their documents were confiscated by the Civil Status Intelligence Unit in

Alexandria without explanation. After failing to retrieve these documents, the Izzat-Rushdie family filed a lawsuit in the Court of Administrative Justice against the Ministry of Interior and the CSD for the violation of their right to religious liberty (enshrined in Article 46 of the 1971 constitution of Egypt).^{xiv} On April 4, 2006, the administrative court issued a decision in favor of the Izzat-Rushdie family (henceforth referred to as AC 2006a).^{xv} The decision drew liberally on an earlier decision of the Supreme Administrative Court (SAC) issued in 1983.^{xvi} It is interesting to parse the AC 2006a decision because it lays out the state's operative framework, one in which the "unrecognizability" of the Bahai religion is conceded while upholding the civil rights of Bahais *qua* citizens. The Court of Administrative Justice argued that:

[A]uthoritative reference books on Islamic jurisprudence indicate that Muslim lands have housed non-Muslims with their different beliefs; that they have lived in them like the others, without anyone of them being forced to change what they believe in; but that the open practice of religious rites was confined to only those recognized under Islamic rule. In the customs of the Muslims of Egypt this is limited to the People of the Book, that is Jews and Christians only.

This argument weaves the language of Islamic jurisprudence with the European conception of religious liberty premised on the distinction between the right to freedom of belief and the right to manifest that belief, a distinction that also informs Egyptian law. On this latter view, even though all citizens of a polity are free to hold their private religious beliefs (*forum internum*), the state has the authority to regulate and limit the manifestation of that belief in public (*forum externum*) in accord with what it deems to be consonant with the social and moral order of the polity.^{xvii} It is this reasoning that enables the court simultaneously to assert that Bahais cannot be forced to change their religious beliefs while subjecting the expression of these beliefs (in the form of rites and rituals) to

state prohibition. Interestingly, in the quote above, the source of the right to religious liberty is not stated to be Article 46 of the Egyptian constitution that was in place at the time of the judgment. Instead, the court grounds it in the “authoritative precedents in Islamic jurisprudence.” In the absence of any specified shari’a norms on the governance of non-Muslim minorities, this claim appears intended to provide assurance that the court’s interpretation of the *forum internum* does not infringe, and indeed finds its justification in, the norms of the majority religious tradition.

One would imagine that if, in accord with the principle of “People of the Book,” no religion other than Judaism and Christianity are allowed to exist in a Muslim polity, then the court could outright reject all Bahai claims. The court, however, does not do so. Instead, it requires the Ministry of Interior and the CSD to issue the Izzat-Rushdie family with identity cards (as their legitimate right to civil status) that states their religious affiliation as “Bahai” based on the following argument:

Islamic jurisprudence requires a disclosure that would allow [a distinction to be made] between the Muslim and non-Muslim in the exercise of social life, so as to establish the range of the rights and obligations reserved to Muslims that others cannot avail [themselves] of, for these [rights and obligations] are inconsistent with their beliefs. Thus, the obligation by the Law of Civil Status no. 143 of 1994 concerning the issuance of an identity card to every Egyptian on which appears his name and religion and the same on birth certificate is a requirement of the Islamic shari’a. It is not inconsistent with Islamic tenets to mention the religion on a person’s card even though it may be a religion whose rites are not recognized for open practice, such as Bahatism and the like. On the contrary, these [religions] must be indicated so that the status of its bearer is known and so he cannot enjoy a legal status to which his belief does not entitle him in a Muslim society.

Notably, in the reasoning above the court upholds the position that Bahatism is not a legitimate religion in the eyes of the state, but makes a crucial distinction between the *unrecognizability* of the Bahai faith in the realm of religion and their *recognizability* in the realm of civil affairs. In a society where the distinction between Muslims and non-

Muslims is central to the distribution of rights and obligations, to *not* recognize the Bahais, the court argues, is to make a category mistake that contravenes the state's ability to govern effectively. The court therefore concludes that for the state to govern effectively, it is obliged to list the Bahai religion on the identity cards of its followers but also immediately qualifies that this should not be construed as the state extending formal recognition to the religion. While the court grants that non-Muslims lived under Muslim rule in which they were allowed to hold their religious beliefs, it also asserts that this does not mean that Muslims and non-Muslims are equal in the eyes of the state with respect to their rights and obligations. While Christians and Jews supposedly fare better in this logic, Bahais have a distinctly lower status in that they are not from among the "People of the Book." As such, they cannot be granted the same rights as the Christian and Jewish minority. Consequently, the court casuistically argues that it is precisely to be able to preserve the *unequal* status of the Bahais in a Muslim majority polity that their religion *must* be recorded on their civil status documents.

While the Islamic contours of this argument are apparent, it is also important to recognize how this inequality is parasitical upon the distinction between the privacy of religious belief and the publicity of civil status. In other words, the AC 2006a judgment's separation of the religious beliefs of the Bahais from the requirements of a civil law (the religious identity of all citizens be listed on national identity cards) that governs *all* the citizens regardless of their religious affiliation depends upon a prior distinction internal to the discourse on religious liberty, namely that between the privacy of belief and the demands of public order—a distinction that cuts across the European and Egyptian legal contexts and about which we have more to say below.

This judgment quickly went viral and Bahais, whose faith nor legal status was well known among ordinary Egyptians, burst upon the public scene with force. Muslim extremists opposed to the ruling misrepresented it as an official recognition of the Bahai religion by the state that stood in violation of the shari'a. Those who defended the court's judgment cast it as a victory for the civil and political rights of Bahai citizens. For many Bahai activists who had struggled in the anonymity of the bureaucratic maze, the judgment was a welcome relief because it solved an immediate practical problem and allowed them to make their case in public. As one of the leaders of this movement put it: "I am as equally a citizen as any other Egyptian. Even if the state doesn't recognize my faith, you cannot commit me to a 'civil death'—I cannot even open a bank account without an identity card. And why would you want me to list myself as a Muslim, Christian or Jew on the card? Would this not be a lie, and would this not put me in violation of the shari'a?"^{xviii}

Appeal to the Supreme Administrative Court

Members of the parliament from the ruling National Democratic Party and the Muslim Brotherhood, despite their longstanding animosity toward each other, were unanimous in their condemnation of the decision and moved to challenge the lower court's ruling in the Supreme Administrative Court (SAC).^{xix} On December 2, 2006 the SAC declared that the state was prohibited from listing the Bahai faith on identity cards or birth certificates of Bahai Egyptians, effectively overturning the lower court's earlier decision and also reversing its own 1983 judgment.^{xx} In contrast to the lower court, the SAC in its 2006b decision (henceforth SAC 2006b) specifically challenges the appellant's (Izzat-Rushdie) invocation of Article 46 of the Egyptian constitution that

guarantees the right to religious freedom. The SAC focuses on the normative implications of the distinction between the right to religious belief and the right to manifest this belief in public by invoking the state's prerogative to protect public order in two distinct but intertwined ways.

The SAC grants the inviolability of freedom of belief: "It is clear that all Egyptian constitutions guaranteed the freedom of belief and the freedom of religious rites, as they constitute the fundamental principles of all civilized countries. Every human being has the right to believe in the religion or belief that satisfies his conscience and pleases his soul. No authority has power over what he believes deep in his soul and conscience". Having granted this right, the SAC goes on to distinguish between the right to believe and the right to express this belief in public: "As to the freedom of practicing religious rites, this is subject to the limitation . . . of respecting the public order and public morals." The court then turns to the argument that inasmuch as Islamic shari'a, which is foundational to the Egyptian state, does not recognize the Bahai faith, it follows that to list the Bahai faith on the national identity cards is a violation of public order: "[N]o data that conflict with or disagree with [public order] should be recorded in a country whose foundation and origin are based on Islamic shari'a."

Several points are noteworthy in this judgment. The SAC 2006b ruling construes the listing of the Bahai religion on state required identity cards as a manifestation of religion. This contradicts the lower administrative court's earlier decision (AC 2006a) that had permitted the Bahai religion to be listed on the identity cards precisely as a means of *limiting* its open practice and manifestation in public. This contradiction, we want to argue, is not simply a mistake on the part of the courts but emanates from the

fraught and contested distinction between the *forum internum* and *externum* that is at the heart of the conceptual formulation of the right itself. What appears most of concern to the court in SAC 2006b is not the manifestation of Bahai practices *per se* in the *forum externum* but recognition by the state of the Bahai faith itself as a *religion*. This is a question that implicates the meaning and scope of the *forum internum* itself and raises issues of status and value prior to any questions of recognition or limitation on manifestations of religious belief. One important consequence of this elision is that the SAC 2006b decision in fact substantially erases the civil status of Bahais and reduces them to nothing more than heretics from the truth of Islam and to a lesser degree from Christianity and Judaism. Unlike the lower administrative court's earlier decision that recognized the problem of the civil status of Bahais in a state that does not recognize their religion, the SAC makes no mention of how such a minority is to be governed, regulated and categorized.

What is so challenging and difficult in the reasoning of the SAC 2006b judgment is the genuine ambiguity and oscillation between what exactly constitutes the *forum internum* and what the state should recognize or limit in the *forum externum*. Note that the SAC first agrees with the earlier argument made by the lower administrative court in AC2006a that individual freedom of *belief* is absolute: "every person may believe in whatever he desires from the religions and beliefs of which his consciousness assures him and with which his soul feels at peace" (SAC 2006b). However, the SAC's construal of the freedom to have and maintain a *religion* can be read as being subject to the demands of public order in two distinct senses.

On one reading, the court can be seen as simply recognizing the freedom to manifest a particular limited category of religious beliefs (“the three heavenly religions”) in the *forum externum*. As we suggested above, this is because the relevant shari’a norms are recognized to be part of the public order of the state. This approach employs the same logic as the reasoning of the lower administrative court in AC 2006a, but reaches an opposite conclusion. The public order limit is not on the manifestation of specific beliefs *per se* but on which religions and religious communities are recognized in the first place to practice their rituals. The implication of this view is that *all* manifestations of religion are subject to state authority and regulation and must be either recognized or accept limitation. It is primarily because Islam is the religion of the majority of the population that its rites and rituals are so freely practiced and recognized by the state. This is not responsive, however, to the argument advanced in AC 2006a that recognition on identity documents is precisely to ensure that Bahaism is not openly practiced and pertains instead to how *religious identity* bears on one’s civil status as a citizen.

This suggests another way to read the SAC 2006b judgment. What is most deeply at issue in the case is not the belief/action distinction as between the *forum internum* and *externum* but rather the distinction between individual belief as an inner dimension of human consciousness and religion as a discursive tradition and collective identity of distinct communities. This is a question that goes beyond public order limitations imposed on religious rites and rituals according to the “values, traditions and heritage of the Egyptian people.” It is the question of what constitutes the very category demarcated as “religious” in the *forum internum* in the first place. This reading implicitly challenges

the equation of the *forum internum* with individual belief alone. We return to this point at the conclusion of the essay.

Another Tactic?

The SAC decision was widely condemned by human rights organizations in Egypt, and global Bahai networks mobilized to put pressure on the Egyptian government to address this discriminatory ruling. Prominent Islamist lawyers in Egypt criticized the decision on different grounds arguing that it created an impasse in the state's ability to govern effectively because it compelled Bahais to list their religion as Christian, Muslim and/or Jewish which was tantamount to forcing Bahais to lie to the state (itself a crime) or coercing them to give up their faith which is a violation of Islamic principles. It was precisely this contradiction that opened a window for the human rights organization Egyptian Initiative on Personal Rights (EIPR) to intervene on behalf of another Bahai family, the Rauf Hindi family, whose case was at the time pending in a lower administrative court. Since the ruling of the SAC could not be appealed, EIPR decided to amend its plea on the Rauf Hindi case from asking the court to allow the Bahais to list their religion on the identity card to the request that they be given the right to leave the required field blank (referred to as a "dash"). In an interview with one of the authors, a leading lawyer for this case commented, "This was a pragmatic decision on our part. We are principally opposed to the state requirement that Egyptians should have to declare their religious affiliation on government documents. But we knew that we would not win on the basis of such an argument. So we decided to change our appeal to force both the courts and the Muslims to face the contradictions inherent in our system and to create a space for a different kind of a discussion about Bahais, namely their civil and political

status in our country.”^{xxi}

It turns out that EIPR’s strategy worked and the lower Administrative Court of Justice delivered the following verdict (henceforth referred to as AC 2008):^{xxii}

In keeping with the principle of not forcing any citizen to embrace a divine religion . . . issuing a national identity card with no space for religion or with a symbol indicating that he does not belong to any of the three divine religions . . . would conform with the law and reality. [Pursuant with the Supreme Court decision on 1/3/1975 in case no 7/2 J] . . . the court concludes that the constitutional guarantee of freedom of belief is limited to the followers of the three divine religions and that the exercise of Bahai rites is against the public order [that is] essentially based on Islamic shari’a.

The court emphasized that its judgment did not constitute a “recognition of the Bahai ideology or a way to allow its followers to record it in the space reserved for religion.”^{xxiii} The purpose of the judgment was to prevent the greater harm that would be visited upon “People of the Book” if the Bahais listed their religion incorrectly as either Muslims or Christians: such an act would allow the Bahais to insinuate “themselves among the members of the divine religions” that “would present a grave prejudice to the religion that will be untruly recorded” (AC 2008, 6). Notably, the public order clause is used here to not only limit the manifestations of the Bahai faith but also to define the *substantive* meaning of “religion.” Furthermore, the state far from being neutral is partisan to the Islamic majoritarian religion, which is regarded as consubstantial with public order.

In many ways this ruling is similar to the one issued by the lower administrative court in AC 2006a (and the 1983 SAC ruling) in that it reinserts the separation between what is construed as a religious (shari’a) requirement to deny formal recognition to the Bahai religion, and the civil law requirement of documenting the true identity of its citizens for the purpose of governance and regulation. Recall that AC 2006a had argued that while the principle of fairness pertained to the domain of civil law (all Egyptian

citizens had the right to national identity cards and the privileges that ensued from it), when it came to religious and doctrinal rulings on the status of the Bahais, the court had no jurisdiction over it. The court justified this position by asserting that it did not constitute the violation of the Bahai right to religious belief. The AC 2008 judgment here follows a similar reasoning in allowing the Bahais to leave the religion space blank on the identity cards instead of requiring them to list their correct identity: while the latter runs the risk of publicly recognizing the Bahai faith, the former does not. In so doing, the court seems to close the chasm that is opened up between the principle of civil and political equality and the principle of religious inequality that the Egyptian state simultaneously upholds.

While the AC 2008 judgment, by allowing the Bahais to have national identity cards, made it possible for them to be able to carry on their political and civic life, the blank space in lieu of their religious affiliation also rendered them vulnerable to religious discrimination. Inasmuch as no other religious group has this distinction, their identity cards clearly mark them as Bahais, the empty slot an indication of their violation of a Muslim norm and for some a sign of their apostasy from Islam. In Egypt's increasingly sectarian climate, this is not an easy burden to carry and is a reminder that legal remedies are only partial resolutions of deep prejudices and social inequalities.

What is notable is that, in comparison to all other rulings on the Bahais, this judgment makes the clearest argument for the legal distinction between the right to religious belief guaranteed by the Egyptian constitution (*forum internum*) and the right to manifest this belief (*forum externum*). This distinction is consequential inasmuch as it accords the state a margin of appreciation to limit the latter while allowing the former in

the name of public order defined in accord with the majority Islamic religion. The court argues:

[A]lthough Egyptian constitutions since that of 1923 guaranteed the freedom of belief and to practice religious rites as one of the inherent rights of the human being, these constitutions drew a clear line separating these two freedoms and laid down different clauses for each of them. The freedom of belief was made absolute, but the freedom of practicing religious rites was made conditional on compliance with the public order and public morality.

The court then proceeds to define public order:

Considering that the concept of public order has no exclusive and inclusive definition, and that it changes from one society to another according to the fundamental principles included in its constitution, legislation or the customs of the majority of its population, it is clear that the conceptual elements of the public order in Egypt are drawn from the fact that it is a state whose official religion is Islam, which is the religion of the majority of the population, and from the fact that Islamic shari'ah is the principal source of legislation. Even though this constitutional provision addresses the legislator, other authorities of the state are [still] bound by it in the fulfillment of their duties. The state of Egypt recognizes three divine religions, i.e. Judaism, Christianity and Islam, and its legislation regulates the religious establishments of only these three religions.

The court notes that the concept of public order is a neutral mechanism, one that was introduced by the British colonial administrators, and enshrined in Article 18 of the ICCPR which Egypt is obliged to uphold. However, the court argues, that Egypt's compliance with Article 18 of the ICCPR is conditional upon "taking the provisions of the Islamic shari'a into consideration" made explicit at the time of the "ratification of the covenant." The court further notes that inasmuch as the public order clause gives the state the authority to limit the expression of religious beliefs that contradict the social order and public morality of a given polity, then it follows that the Egyptian state can place limitations on the public expression of the Bahai religion because it contradicts Islam, the religion of the majority of Egyptians and therefore the basis of the nation's social order. This line of argument, as we show below, has parallels with a number of European Court cases involving the right to religious liberty.

Notably, in the quote above, the court specifically refers to the provisions of Article 2 of the constitution that requires “Islamic Shari’a” to be the “principal source of legislation.” While this article has been interpreted mainly by the Supreme Constitutional Court, the judges opine that it equally binds the administrative court in the “fulfillment of its duties.” In the beginning of this essay we had alluded to the force Article 2 commands in Egyptian law today. Given the absence of legislative or executive guidelines on the article’s implementation, the question of how shari’a stipulations are to be interpreted remains an open issue. It becomes more complicated if we consider the fact that shari’a rules apply only to the domain of family law: what does it mean for the administrative courts to adhere to “the universal rulings and goals of shari’a” in relation to matters of civil governance? Not only are the judges and the lawyers not trained to perform such an interpretive task, but there is no single shari’a norm that exists historically in relation to the governance of religious minorities outside of the three monotheistic religions. Given this ambiguity, the fact that the administrative court takes it upon itself to define what is or is not compatible with shari’a in effect puts the state judges in the position of arbitrarily selecting and pronouncing upon conflicting opinions from among the long tradition of Islamic jurists. Notably, in the recently approved constitution of 2012, Article 4 was introduced for the first time that requires religious scholars from the University of al-Azhar be consulted in matters pertaining to Islamic law, a requirement that may well pitch the legislative and executive powers against religious scholars in a battle over the meaning and scope of the shari’a.^{xxiv}

The question of what is or is not shari’a is fraught in another important sense. Scholars of Islamic law have increasingly come to argue that the nature of what used to

be called “shari’a” has radically changed in the modern period. Not only has the scope of shari’a been sequestered to the domain of family law, but the entirety of social and juridical life that classical shari’a assumed no longer exists (Messick 1996; Hallaq 2004; 2007). As a result, what remains of shari’a norms and principles has little resemblance to what they were in the premodern period. A clear example of this is manifest in the logic deployed by the Egyptian courts regarding the Bahais. On the one hand, the Egyptian constitution upholds the principle of formal equality between Muslims and non-Muslims, but on the other hand, in invoking the classical concept of *ahl al-kitab* (“People of the Book”) Egyptian courts conjure a world in which Muslims were formally and substantively superior to non-Muslims. The two systems are markedly different not only by virtue of the principle of formal equality but in the model of governance each one is predicated upon (Mahmood 2012a; 2012b). The principle of political and civil equality is premised on the modern nation-state’s indifference to the religious, ethnic, racial, class and linguistic affiliations of its citizens (the persistence of discrimination along these lines notwithstanding). The “People of the Book” principle contradicts the formal logic of this system in that it makes the religious affiliation of a citizenry consequential to the distribution of civil and political rights. Indeed, the varying and contradictory rulings of the Egyptian courts may be seen as a product of these dueling principles. However, one may ask at this point if these contradictions are unique to the Islamic character of the Egyptian state or if similar paradoxes are at play in legal traditions that are self-avowedly secular? In what follows, we want to consider this question by analyzing the similarities and differences between the Egyptian jurisprudence and that of the European Court.

The Dialectics of Right and Public Order in ECHR Jurisprudence

From an international and comparative legal perspective, what is most striking about the judgments in the Bahai cases is how the logic and structure of their reasoning bears a close similarity to religious freedom jurisprudence of the European Court. As already noted, the right to religious liberty in the ECHR, like the Egyptian tradition, is premised on a foundational distinction between the right to “freedom of thought, conscience and religion” and the right to “*manifest* one’s religion or beliefs” (Articles 9(1) and (2) respectively). The former, referred to as the *forum internum*, is held to be absolute while the latter, the *forum externum*, is stated to be subject to legally permissible state limitations. The dialectic structure between the *forum internum* and *externum* has generated two series of dilemmas for the European Court. The first concerns the subject and object of the protected sphere of the *forum internum*. Is it the individual as subject who has the right to autonomously choose as object her own beliefs or convictions, religious or not? Or is the object instead the right to have and maintain a certain category of belief, such as conscience or faith, understood in some specified sense as unchosen? Or is it not just individuals but also groups and religious institutions as subjects who have the right to profess and maintain a comprehensive religious tradition free of sovereign interference (Danchin 2011, 675–682)?

The court has struggled with these questions and its Article 9 case law provides no clear guidance on either the scope or content of the *forum internum*. Consider the recent case of *Lautsi v. Italy* (2011) which involved a challenge brought by Mrs. Soile Lautsi, a dual Finnish and Italian citizen, on behalf of her two minor sons against the School Council of a public school in Padua. Mrs. Lautsi argued that the compulsory

display of crucifixes in the school's classrooms *inter alia* violated her and her children's right to freedom of thought, conscience and religion protected in Article 9(1). The Second Chamber of the Court agreed and found a violation of Article 9(1) on the basis that first, the "[s]tate's duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions" and that second, the compulsory display of crucifixes clashed with the individuals' "secular convictions" and was "emotionally disturbing for pupils of non-Christian religions or those who professed no religion" (*Lautsi* 2011, para. 31).

Central to the Second Chamber's reasoning was the proposition that the decision to affix a crucifix to the wall of a classroom constitutes "an assessment of the legitimacy of a particular religious conviction." The state's decision, in other words, rested on a normative position *internal* to the *forum internum* itself and was thus entangled with the category demarcated as "religious." At the same time, we can see how the court's conception of the *forum internum* of Mrs. Lautsi and her sons seamlessly runs together with notions of autonomy and conscience without distinguishing their different rationales and genealogies.

As is now well known, the Grand Chamber reversed this finding, construing the crucifix instead as an "essentially passive symbol" not infringing on the *forum internum* in either of the two senses discussed above. It did not infringe the *forum internum* in the latter sense as it could not be "deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities." And it did not infringe the *forum internum* in the former sense as it was merely a *symbol*, only a representation of

“an inner state of belief that precedes it” (Connolly 1999). It was thus being recognized by the state in the *forum externum* only: as part of Italy’s “civil religion” or Italian culture or, as the Government of Italy itself argued before the Grand Chamber, as a (secular) symbol of tolerance, pluralism and religious freedom. As we discuss further below, this argument provided the justification for the court’s finding that the presence of religious symbols in state schools fell within “the margin of appreciation of the respondent State.” But even though the public presence of crucifixes had been argued by the government and many Italians to be integral to the public order of the state itself, the Grand Chamber saw no need to proceed to a public order limitations analysis under Article 9(2) given its prior determination that the crucifix is only a “passive symbol” which implicitly does not infringe the *forum internum* of either Mrs. Lautsi or her children, each of whom remain free to “believe or not to believe.”

As many scholars have observed, the Grand Chamber’s judgment stands in tension with the court’s earlier judgment in *Dahlab v. Switzerland* in which an Islamic headscarf worn by a schoolteacher was held to be a “powerful external symbol” that could be proscribed to “protect the religious beliefs of the pupils and their parents and to apply the principle of denominational neutrality in schools” (Danchin 2011, 720–723; Bhuta this issue). As it would confirm again four years later in *Sahin v. Turkey*, the court thus construes the wearing of the headscarf as an act of proselytizing when worn in a public school or university but not when the state itself officially adopts a majority religious symbol in its public schools.

In a series of recent cases, the European Court has also held that it has limited jurisdiction to review the processes, reasoning or substantive decisions made by religious

bodies within an area covered by religious autonomy.^{xxv} In similar terms, the US Supreme Court recently recognized a “ministerial exception” to generally applicable employment discrimination laws in *EEOC v. Hosanna-Tabor*. The premise of such a jurisdictional approach to issues of religious autonomy is based on the notion that it is not for secular courts to make determinations on matters “strictly ecclesiastical” or involving religious teachings or orthodoxy. What again is striking here is how the US Supreme Court in *Hosanna-Tabor* draws a remarkably similar distinction to that advanced by the European Court to justify its contradictory rulings in *Lautsi* and *Dahlab*. The US Supreme Court asserts that its prior holding in *Employment Division v. Smith* that the right to religious liberty does not require religious exemptions or accommodations from so-called neutral laws of general application was limited in that case to “outward physical acts,” whereas *Hosanna-Tabor* concerned “government interference with an internal church decision that affects the faith and mission of the church itself” (*Hosanna-Tabor*, 15).

What these cases reveal is that however the content and scope of the *forum internum* is demarcated, courts must unavoidably make substantive judgments on what constitutes or falls within the protected category. This requires considering how any set of restrictions will seem from the internal point of view of the category demarcated as “religious.” Paradoxically then, courts must make determinations that are inescapably entangled with and premised on religious criteria and concepts in order to define a sphere “free” from state authority—a private space of exception—which ostensibly limits legislative and other forms of governmental authority. This ever shifting and contested

process of construction and demarcation of the *forum internum* is an integral part of the public order of the state itself.

The second dilemma is a product of the first. Unlike the *forum internum*, the *forum externum* is subject to the authority of the state in two respects: on the one hand in terms of state recognition of religious practices and rites and on the other in terms of state-imposed limitations on and regulation of these practices on the grounds of public order or to protect the rights of others. This then creates a public space of exception that, as we shall see, is both contradictory and indeterminate (Agrama 2010, 504).

As before, the dilemma for the court has been to specify both what constitutes a recognized manifestation of religion or belief and an exceptional ground of limitation to protect public order. The latter has broadly been understood to encompass those fundamental rules, values or principles that together define and are incorporated into the collective identity of the state itself. This conception inevitably results in privileging those majoritarian sensibilities, traditions, and customs that have become intimately linked with the legal and political order.

It is important to note that what is within the space of exception in the *forum internum* (the category of religion, conscience or belief) is inextricably entangled with and presumed by the right to manifest religion, conscience or belief in the *forum externum*, while the norm demarcating the *forum internum* (a domain of secular freedom) is itself limited by a space of exception in the *forum externum* (the category of public order). These paradoxical and isomorphic relations generate not one but two incommensurate notions of public order which in turn create a recurring ambiguity as to whether protection of religion or belief in any case is being asserted within the space of

exception of the *forum internum* or as a norm subject to either recognition or limitation in the *forum externum*.

In order to see the normative implications of this double-structure, consider the first Article 9 case decided by the European Court in 1993 of *Kokkinakis v. Greece*. This case has some instructive parallels with the Bahai judgments. The Greek government had prosecuted a Jehovah's Witness for proselytism directed toward a member of the dominant religion, Christian Eastern Orthodoxy. In response to Mr. Kokkinakis's claim that Greece's proselytism law violated Article 9 of the ECHR, the European Court held that Greece had a legitimate aim in criminalizing proselytism in order to protect the rights and freedoms of others but that a distinction was needed between "proper" and "improper" proselytism.

For present purposes, what is interesting about *Kokkinakis* is the difference in reasoning between two judges in the majority and dissenting opinions. For Judge Martens joining the majority, the freedom of thought, conscience and religion of the individual protected by Article 9(1) is "absolute." This leaves no room for interference by the state (for example, by criminalizing proselytism) which must maintain a position of "strict neutrality" (*Kokkinakis*, 13–14). Further, the argument advanced by the Greek government—that protection of public order as a ground of limitation under Article 9(2) must take account of the fact that the majority of the population is Greek Orthodox and the dominant religion is central to the identity of the Greek nation-state—must be rejected because it enforces the majority's conception of the good, raising the danger of discrimination against members of religious minorities. Judge Martens criticizes the

majority for not directly addressing this danger and deferring instead to the ambiguous proper/improper proselytism distinction (*Kokkinakis*,15).

For Judge Valticos in dissent, however, the freedom to manifest one's religion does not include the right to attempt "persistently to combat and alter the religion of others" (*Kokkinakis*, 2, 8). On this view, the Jehovah's Witnesses were a "sect . . . involved [in] . . . systematic attempt[s] at conversion and consequently an attack on the religious beliefs of others" (*Kokkinakis*, 9–10). The case thus involved not a limitation on the right to freedom of belief on the basis of public order as suggested by Judge Martens but rather a genuine conflict of rights between the freedom of the proselytizer to manifest her religion and the freedom of the target of proselytism to have or maintain her religion without being subject to proselytism.

In privileging the latter claim over the former, Judge Valticos addresses a different conception of public order, one that goes not to the question of limitation of the right in the *forum externum* but to the very nature and scope of the right itself in the *forum internum*. In seeking to resolve the conflict between two competing claims of right, this reasoning tacitly relies on a privileged conception of the collective good—that of Eastern Orthodoxy as the established, majority, or dominant religion—to protect the dominant religious group from being subjected to attempts to convert them to another religion.

This oscillating tension between public order as a limitation on the right on the one hand and as a means of construing the meaning and scope of the right on the other is a recurrent theme in the European Court's Article 9 jurisprudence. Thus in *Otto-Preminger-Institut*, the court held that injury to the religious feelings of Christian

believers by a film *Das Liebeskonzil (Council in Heaven)* was held to violate the “peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines” (*Otto-Preminger-Institut*, 22, 47). Two years later in *Wingrove v. United Kingdom*, a case involving the British government’s refusal to permit circulation of the film *Visions of Ecstasy*, the court held that the right to freedom of expression under Article 10 could be limited to protect the rights of others in the case of offensive attacks on “matters regarded as sacred by Christians” (*Wingrove*, 57). The former construes the right in terms of a conception of the religious tradition of the majority (Christianity) deemed essential to the public order of Austria while the latter limits the right on the basis of a conception of public order based on the majoritarian values, sensibilities and customs that have become intimately linked with the legal and social order (see Mahmood 2013).

The differences in reasoning between Judges Martens and Valticos are strikingly similar to those between the AC 2006a and SAC 2006b decisions in the Izzat-Rushdie case. Like Judge Martens, the lower administrative court (2006a) upholds the absolute freedom of any citizen of a polity to hold (private) religious beliefs in the *forum internum*. The freedom to manifest beliefs in the *forum externum*, however, is subject to recognition and limitation on the grounds of public order. Unlike Judge Martens, the trial judges in AC 2006a do not question the association of the values, principles and customs of the majority religious tradition with public order as a ground of limitation. Rather, they *recognize* that association for the purposes of civil governance, holding that Bahaism “*must* be indicated so that the status of its bearer is known and so he cannot enjoy a legal status to which his belief does not entitle him in a Muslim society.” This is necessary not

only to “establish the range of rights and obligations reserved to Muslims” but also, as the SAC had held in its prior 1983 judgment cited with approval by the AC, to “prevent any legal problems [Bahais] might face due to practicing their religion within the Muslim community.” As we noted above, the limitation of the right to manifest religion in order to protect public order is what justifies the state to record it on every citizen’s civil status and identification.

The reasoning of Judge Martens and the judges in AC 2006a is similar in two significant respects: first, both advance a conception of the *forum internum* solely in terms of individual belief and thus nothing the state sought to do in the civil sphere was understood to interfere with individual freedom of belief; and second, both see what is at stake in the case as being a conflict between the individual’s freedom of belief and any limitations on manifestation of that belief due to the demands of public order as opposed to a genuine conflict of rights which, at a deeper level, would implicate competing conceptions of the good advanced by different religious *groups* (not just individuals).

The distinctly different logic in the reasoning in the SAC 2006b judgment reflects these two concerns. Like Judge Valticos in *Kokkinakis*, the SAC in 2006b refocuses the analysis on the nature and scope of the right itself. This is a critical move, as any shift in conceptualizing the *forum internum* will impose a corresponding limit on the legislative power of the state itself. The SAC thus engages in a careful reading of the history of the development of the right to religious liberty in various Egyptian constitutions noting, in particular, the text proposed by Lord Curzon, then Foreign Minister of England at the time when Egypt was under British control, which would have extended “the right to undertake . . . the rituals of any community or religion or belief . . . to . . . [a]ll the

residents of Egypt.” This language was rejected in favor of the final text that was adopted in the 1923 constitution, which provided that “The state protects the freedom to practice religious rituals and beliefs according to the observed customs of the lands of Egypt, so long as it does not harm the public order and does not contradict morals.” The SAC further explains how the right to religious liberty must be interpreted against the normative background of Article 2 which, as the Administrative Court later makes the point in AC 2008, confirms that the “conceptual elements” of the Egyptian public order are “drawn from the fact that [Egypt] is a state whose official religion is Islam, which is the religion of the majority of the population, and from the fact that Islamic shari’a law is the principal source of legislation.”

As we discussed at the conclusion of the section “Another Tactic?” the ambiguity and oscillation between the various administrative courts’ judgments regarding the Bahais goes to the very heart of the conceptual architecture of the right to religious liberty. As with the question of what constitutes “conscience” in any claim for conscientious objection or what conception of “freedom from injury to religious feelings” may fall within the scope of Article 9(1) as contested in *Otto-Preminger-Institut*, the issue of what falls within the category specified “religious” requires taking a point of view internal to the religious tradition itself. Broadening the *forum internum* beyond individual belief creates a different concept of the right and necessarily institutes different criteria for inclusion and exclusion.^{xxvi} By reading the right to religious liberty in Article 46 against the foundational principles of the Egyptian public order as required by Article 2, the SAC in 2006b may be read as advancing a conception of the *forum internum* that

extends beyond the right to freedom of individual belief and encompasses instead the three heavenly religions.^{xxvii}

While Bahais and presumably other members of “non-heavenly religions” retain the individual right to freedom of belief, they do not have any right to *public* recognition as having a “religion” within the Egyptian political order. Indeed, the Report of the State Commissioner’s Authority which the SAC relies upon in its 2006b judgment states that the Bahai religion, being contrary to the public order, is “completely void” (Report of State Commissioner 2006, 20). The implication of this view is that the state has no authority to revise or contravene this conception of what constitutes a religion. On this basis, the interpretation in AC 2006a of Law No. 143 of 1994 on civil status contravenes the public order by violating the *forum internum* of the right to religious liberty which is absolute. As the State Commissioner’s Report concludes, any law requiring Bahaim to be identified in the “religion” field of identity cards is unconstitutional as infringing “the public order and morals in which Egyptian society is rooted and on which it is built in all its parts” (Report of the State Commissioner 2006).

Just as Judge Valticos framed the *Kokkinakis* case as a conflict of rights between proselytizer and target of proselytism and employed the collective good of the majority religion to define both the scope of the right and the conception of public order employed as a ground of limitation on the activities of the Jehovah’s Witnesses, so the SAC in 2006b further relies on arguments of public order and the rights of others to justify its decision not to permit the administrative authorities to enter “Bahai” onto identity cards. In strongly polemical terms, the SAC thus speaks of the ties of the Bahai movement with “the colonialists old and new, who embrace and protect them” and of the dangers of

“systematic proselytization actively deployed for the purpose of the Christianization and Judaization of Muslims under the name of Bahaism.”

The logic of this reasoning is again strikingly similar to that employed by the European Court in its post-2001 Article 9 case law. In cases such as *Refah Partisi*, *Şahin* and *Dogru* involving Islam, the court has advanced a wide conception of public order to encompass substantive notions of secularism and democracy. Thus in *Şahin* the Court clearly linked the principle of secularism to the notion of militant democracy accepted in *Refah Partisi* to hold that the Islamic headscarf is a symbol of political Islam and thus a “genuine threat to republican values and civil peace” (*Şahin*). And in cases such as *Dahlab*, *Şahin* and *Dogru*, the court has also invoked the rights and freedoms of others to justify imposing limits on the freedom to manifest Islamic beliefs or practices. This has taken the form of protecting the right of students to be free from the display of religious symbols that individually or collectively are found to constitute an exercise of pressure, provocation, proselytizing or propaganda. Just as in the Bahai cases, it is often difficult to disentangle these two grounds of limitation which the European Court tends to run seamlessly together (Danchin 2011, 728–731).

What is quite distinct between the European and Egyptian cases is that the former do not cite canon law or engage in theological reasoning or scriptural interpretation to justify their arguments; nor do most of the states involved espouse an explicit religious identity. Thus the detailed reasoning in AC 2008 on matters such as “the chronological lineage of [the three divine] religions in revelation from God” and ensuing understandings of apostasy is a clear point of divergence in comparison to the Article 9 jurisprudence of the European Court. Their similarity consists instead in the two courts’

privileging of the majority religious sensibilities and tradition to define public order. Just as the judgment of Judge Valticos recognized the intergroup dimensions of the conflict of rights in *Kokkinakis* but was insensitive to the collective good of the minority religious group, so too is the SAC 2006b judgment insensitive to the rights claims of the Bahai plaintiffs by privileging the conception of the collective good of the majority religious tradition. The AC 2008 judgment notes that by being compelled to choose either Islam, Christianity or Judaism as their religion on identity documents, Bahais are not only coerced to declare a false religious identity in contravention of the “principle of not forcing any citizen to embrace a divine religion” but that this presents “a grave prejudice to the religion that will be untruly recorded.” As discussed above, it is this contradiction that led to the compromise solution of recording a dash indicating nonmembership in any of “the three divine religions.”

Formal Equality in States without an Established or Official Religion

It may be argued that the danger of these two conceptions of public order to the promise of formal equality for religious and other minorities can be avoided in those states where there is no established or officially recognized religion. On this view, the difficulty with states such as Greece or Egypt is that they constitutionally entrench a dominant religion which necessarily creates discrimination against any nonmajority or nontraditional religious group. But this is a misunderstanding of how the concept of right is used by the state as a modern technology of secular governance.

The defining characteristic of modern secular power is that it incessantly raises the question of where to draw the line between the religious and secular and empowers

the state to make this determination by demarcating the nature and scope of the right. This requires the state constantly to define and delimit what is “religious” either as an absolutely protected category in the *forum internum* or as a category of simultaneous recognition and regulation in the *forum externum*. The state thus always decides what the scope of religion should be in the political order.

As Winnifred Sullivan has shown in the context of religious freedom jurisprudence under the US Constitution, American courts have over time consolidated a “protestant *de facto* establishment that continues to mark legal and political discourse about religion” (Sullivan 2006, 923). This takes the form of a public sphere defined strongly in terms of individual freedom of conscience while the scope of the freedom to manifest conscience is defined according to the values of the majority. In US Supreme Court cases such as *Lyng* (1988) and *Smith* (1990) involving claims by members of Native American minority religious groups, a particular conception of religious liberty is discernible that implicitly draws upon and assumes a particular (Protestant) religious subjectivity and interpretive frame (Sullivan 2005, 104). Similarly in France, Muslim and other religious minorities confront a strongly individualistic conception of the right delimited according to a substantive background conception of *laïcité* as public order while, as we have seen, in Turkey claims to religious freedom in cases such as *Refah Partisi* and *Sahin* confront Kemalist conceptions of secularism as public order.

The ways in which this dialectic unfolds and is negotiated across time and spatial geographies is infinitely complex and varied and we thus see a tremendous variety of constitutional arrangements in the world today recognizing different forms of relation to both majority and minority religions. But in all states we can see a consistent pattern of

protecting state sanctioned traditions or dominant religions and a corresponding insensitivity to and denial of the claims of minority, nontraditional or unpopular religious groups.

The role of the two conceptions of public order in determining (a) the nature of the right as both an exercise of and limit on state power and (b) the nature of the public sphere as either recognizing or limiting the right to manifest religious belief is integral to this calculus of modern governance. As we have seen, the terminus of this logic is the judgment of the Grand Chamber in *Lautsi* where Italy's claim to have the freedom to affix crucifixes to public school classrooms was recognized by the European Court as not infringing the *forum internum* of schoolchildren "to believe or not to believe" while at the same time placing limitation on the display of Muslim signs on grounds of public order as in *Refah Partisi* and *Sahin*.

Conclusion

In this essay, we have argued that these two features of the right to religious liberty—the distinction between a putative *forum internum* (encompassing the category of religion or belief) and *forum externum* (encompassing the category of manifestation of religion or belief) and corresponding conceptions of public order either recognizing or limiting claims to religious freedom in each sphere—are what underlie the striking similarities in the jurisprudence of both the Egyptian and European courts. The dilemma of how to demarcate the meaning and scope of the *forum internum* has been shown necessarily to involve the courts in making substantive judgments on what falls within the protected category. We thus saw in the Izzat-Rushie case the different ways in which the AC 2006a and SAC 2006b judgments construct the *forum internum* in terms of either

“belief” or “religion” understood more broadly as a discursive tradition defining not only the collective identity of distinct communities but, on the basis of Article 2 of the Egyptian Constitution, the public order of the state itself.

The second dilemma of when and how the state should recognize or limit manifestations of religious belief in the *forum externum* was equally shown to be entangled with the *forum internum* and the corresponding ways in which majoritarian sensibilities, traditions and customs have become linked with the legal and political order. This in turn generates insuperable difficulties for religious minorities to practice their beliefs and live free of discrimination. Each of the successive AC 2006a, SAC 2006b and AC 2008 judgments thus advance competing understandings of this recognition/limitation dialectic of public order, holding first that Bahaism must be recorded on identity documents for the express purpose of its public order limitation; second, that the state is prohibited from recording Bahaism on identity documents because only the three heavenly religions are recognized by the Egyptian public order; and third, that the issuing of identity documents with no space for religion or simply a dash would “conform with the law and reality.” The last is an implicit recognition on the part of the courts of the irreconcilability of the contradictions inherent in each of these positions *and* the fact that the right to religious liberty is limited to the three heavenly religions thereby making any manifestation of Bahai rites to contravene public order.

This normative structure of the right to religious liberty explains the close intertwining of the religious and the secular, whether in the Middle East or Europe, and illustrates the error in viewing these as separate or opposing worldviews. To notice these striking similarities is not to suggest that one should not be equally attentive to the

substantive differences between these bodies of jurisprudence. The ways in which the shari'a is understood and interpreted, for example, and the resulting normative implications for the right to religious liberty as a matter of Egyptian law raise conceptual questions markedly distinct from those at issue in Article 9 cases (Lombardi 2006). But unfamiliarity with the distinctive logic and grammar of claims made in the language of the shari'a should not obscure either the embeddedness of this legal contestation within the problem-space of modern secular power or the use of the right to religious liberty as a technology of state governance.

Endnotes

ⁱ The authors would like to thank Nathan Brown for his comments on an earlier version of this essay; to Mona Oraby for her research assistance; and to Connie Canon and Maram Salaheldin for their translation of key documents related to the Bahai court cases.

ⁱⁱ See, for example, Asad 2003; Agrama 2012; Baubérot 2000; Connolly 1998; Keane 2007; Taylor 2009.

ⁱⁱⁱ See Cole 1998.

^{iv} This law (263/1960) was challenged in the Constitutional Court (which became the Supreme Constitutional Court in 1979), an appeal that was rejected on the grounds that the practice of Bahai religion presented a threat to public order and therefore could not be accorded constitutional protection (reserved for Islam, Christianity and Judaism).

^v Egypt and Israel formally went to war in 1967, but the animosities between the two states reached a climax in 1956 over Israeli access to the Suez Canal under President Nasser.

^{vi} The first recorded instance of this reasoning occurs as early as 1948 when a Bahai state employee married to a Bahai woman was denied family and child allowance. He took his case to the Administrative Court and argued that, like Jews and Christians, he was a protected citizen of the state (*dhimmi*), which entitled him the right to claim the family and child allowance. The court rejected his case on the ground that inasmuch as Islam was the religion of the state (in the 1923 constitution), under the shari'a Bahais could not claim the *dhimmi* status that was reserved only for Christians and Jews (Pink 2003, 421).

^{vii} Currently in Egypt, of the fifteen religious communities of Jews, Christians and Muslims recognized by the state, nine religion-based family laws are on the books.

^{viii} Article 3 of the new (2012) constitution reads: “For Egyptian Christians and Jews, the principles of their religious laws are the main source of legislation in personal status and religious matters as well as in the selection of their spiritual leaders.”

^{ix} We are grateful to Nathan Brown for pointing this out.

^x Anver Emon in his book on *ahl al-dhimma*, for example, writes: “[W]hen Muslims conquered Persia and encountered Zoroastrians, commanders allowed the local religious population there to reside peacefully in the empire and maintain their faith, as long as they paid the *jizya* [poll tax]. Likewise in India, when Muslims conquered that region, polytheists were allowed to pay the *jizya* and live a ‘tolerated’ existence under Muslim rule. . . . Although all these groups were able to live peacefully within the Muslim empire on condition of payment of *jizya*, the People of the Book were held in higher esteem than others” (Emon 2012, 73).

^{xi} Article 2 was introduced for the first time in 1971 in the Egyptian constitution that made Islamic shari’a “a” (not “the”) source of legislation. This itself was a radical departure from Article 149 of the constitution (in place since 1922) that had loosely asserted that “Islam is the religion of the state” without ever making it clear what this meant in practice. It was in 1979 that President Sadat further modified Article 2 to make the shari’a *the* chief source of Egyptian legislation.

^{xii} Hussein Agrama argues that this is equally true of cases pertaining to Muslims when it comes to regulating their religious affairs (Agrama 2012).

^{xiii} For an account of these court cases, see EIPR’s report *Prohibited Identities* 2007, 30–37.

^{xiv} In the new constitution of Egypt (2012) the right to religious liberty is enshrined in Article 43 which reads: “Freedom of belief is an inviolable right. The State shall guarantee the freedom to practice religious rites and to establish places of worship for the divine religions, as regulated by law.”

^{xv} Case 24044 of the 45th judicial year, issued on April 4, 2006. For a translation of this judgment, see http://www.bahai.org/persecution/egypt/2006april_en. Throughout this essay, we have used this translation at times modified by Mahmood to give a more accurate translation of legal terms and idiomatic phrases.

^{xvi} The Supreme Administrative Court case no. 1109/29, issued on January 29, 1983.

^{xvii} While the Egyptian constitution from 1923 referred to this distinction, it was dropped in the constitution drafted in 1953. The State Commissioner’s report to the Supreme Administrative Court in the *Izzat-Rushdie* case (2006) as well as the court’s decision (discussed below) cite this history.

^{xviii} Interview with Mahmood, October 2008, Cairo, Egypt. The name of activist is withheld to preserve confidentiality.

^{xix} EIPR 2007, 38.

^{xx} Case 16834 and 18971 of the 52nd judicial year, issued December 16, 2006. We have used the following translation

http://info.bahai.org/pdf/EGYPTSAC_16DEC06_ENGLISH.pdf modified by Mahmood for legal terms and idiomatic phrases.

^{xxi} Mahmood, personal interview with Ade Rafea, chief lawyer for EIPR, May 2008.

^{xxii} Case number 18354 of the 58th judicial year, issued on January 29, 2008. For translation, see [insert web link.]

^{xxiii} The ruling in AC 2008 is expressly restricted to those Bahais “to whom birth certificates or identity cards had previously been issued with “Bahai” mistakenly mentioned in the space reserved for religion or . . . with a dash in the said space.”

^{xxiv} For early signs of this struggle, see Ali and Brown 2013. For a cogent analysis of Article 4 and others pertaining to Islamic law in the new Egyptian constitution, see Lombardi and Brown 2012.

^{xxv} *Obst v. Germany*, no. 425/03, 23 September 2010; *Lombardi-Valluari v. Italy*, no 39128/05, 20 October 2009; *Sciüth v. Germany*, no. 1620/03, 23 September 2010.

^{xxvi} This line of inclusion/exclusion is an inescapable consequence of the double-structure of the right to religious liberty. Whatever is held to fall within the *forum internum* is to be regarded normatively differently to what falls both outside it and within the *forum externum*. It is this apparent inequality of treatment between the “religious” and “nonreligious” that leads many contemporary theorists to abandon the tradition altogether in favor of some other overriding principle such as autonomy which privileges not freedom of religion, conscience or even belief, but freedom of choice. See Sandel 1998; Leiter 2012.

^{xxvii} The Report of the State Commissioner provides explicit support for this interpretation. As regards Article 2 of the constitution, the Report states that “the religion of Islam is both a creed [belief system] and a law [way] combining doctrines of belief and systemic rules and is not limited to ‘*ibadat* [worship of God] but also regulates the *mu’amalat* [the interaction and exchange between people]. Thus, it is not proper to resort to this religion as a belief without resorting to it as a law, for the matter of the doctrines of belief is the matter of the systemic rules, each following the shari‘a of Islam taken from the Holy Qur’an and the honorable Sunna, and in accordance with this, the State, if the constitution did not say that Islam was its religion, would be required to draw from the rulings of this true religion in its doctrinal and systemic aspects.”

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