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Published in:
Freedom of Religion: An Ambiguous Right in the Contemporary European Legal Order

DOI:
10.5040/9781509935895.ch-001

Published: 01/01/2020

Document Version
(Peer reviewed version when applicable)

Document License
Publisher rights policy

Link to publication

Please cite the original version:
Slotte, P. (2020). Religion and Human Rights: Ambiguities and Ambivalences of Freedom. In H. Bernitz, & V. Enkvist (Eds.), *Freedom of Religion: An Ambiguous Right in the Contemporary European Legal Order* (pp. 3–16). (Swedish Studies in European Law; Vol. 14). Hart Publishing. https://doi.org/10.5040/9781509935895.ch-001

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This is a pre-copyedited version of a chapter accepted for publication in *Freedom of Religion: An Ambiguous Right in the Contemporary European Legal Order*, Swedish Studies in European Law, eds. Hedvig Bernitz & Victoria Enkvist (Hart Publishing, 2020), pp. 3-16.

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Religion and Human Rights: Ambiguities and Ambivalences of Freedom

Pamela Slotte

Abstract: This chapter provides an overview of and discusses certain tendencies in contemporary discussions of religious freedom. In order to situate the topic in a broader theoretical framework, and to clarify the position adopted in the chapter, the chapter begins with some reflections about freedom as a philosophical concept. Thereafter, most of the chapter focuses on freedom in relation to religion and ambiguity and ambivalence in relation hereto, and on 'freedom as stipulated in law' as well as on how this law – mainly international human rights law – simultaneously constrains and enables religious life. Thus, the chapter focuses on the subjects of 'codified freedom' and freedom of religion rather than, for example, on freedom in a religious sense: that is, freedom as an existential category. The chapter discusses how international law grapples with the ambivalence and ambiguities of religious freedom today and tentatively explores why this is the case precisely now, and why this situation has arisen. It also comments upon the various scholarly responses to the situation that has arisen. In sum, the chapter contributes to providing an overview of the setting or framework within which issues of freedom to and from religion is currently discussed.

I. Introduction

As Ludwig Wittgenstein remarked: 'How words are understood is not told by words alone'.[1] Indeed, it would be possible to spend plenty of time deconstructing religion and human rights, which are 'capacious categories'[2] in their own right that do not make up 'self-evident unit[s] of meaning'[3]. However, this chapter takes for granted to a certain extent the ongoing scientifically

[1] L Wittgenstein, *Zettel*, edited by GEM Anscombe and G H von Wright, translated by GEM Anscombe, 2nd edn (Oxford, Blackwell Publishers, 1981) §144. The present chapter develops the main points of a keynote address, 'Religion and human rights: ambiguities and ambivalences of freedom', delivered at the IMPACT conference in Uppsala, Sweden in April 2018. The chapter has been written as part of the author's academy research fellow project 'Management of the Sacred: A Critical Inquiry', funded by the Academy of Finland 2013-2018 (grant number: 265887) and work as vice-director of the Centre of Excellence in Law, Identity and the European Narratives, Academy of Finland 2018-2025 (grant number: 312430).

[2] Terminology borrowed from A Pagden, B Straumann and N Bhuta, 'Series Editors' Preface' in M Koskenniemi, M García-Salmones and P Amorosa (eds), *International Law and Religion: Historical and Contemporary Perspectives*. The History and Theory of Interantional Law (Oxford, Oxford University Press, 2017) v.

[3] M Koskenniemi, 'International Law and Religion: No Stable Ground' in M Koskenniemi, M García-Salmones and P Amorosa (eds.), *International Law and Religion: Historical and Contemporary Perspectives*, The History and Theory of International Law 8 (Oxford, Oxford University Press, 2017) 3. '[A]ny study of 'religion' or 'international law' must confront the fact that both terms are complex wholes of ideas and practices whose scope

insightful explorations into 'religion' and 'human rights', and the meanings they are attributed in their diverse roles within social practices.[4] Instead, it is the subtitle of the present chapter that is of particular interest here. It focuses on ambiguity and ambivalence in relation to what is below termed 'codified freedom' in religious matters. Thus it provides an overview and discussion of certain tendencies in contemporary discussions of religious freedom.

The Merriam-Webster Dictionary defines the word 'ambiguity' as 'the quality or state of being ambiguous especially in meaning'. Something that is ambiguous 'can be understood in two or more possible ways'. 'Ambiguity' is defined secondly as 'uncertainty'. A synonym for 'ambiguous' is 'dubious'.[5] Ambivalence, in turn, is defined as 'simultaneous and contradictory attitudes or feelings (such as attraction and repulsion) toward an object, person, or action'. Ambivalence can also mean 'continual fluctuation (as between one thing and its opposite)', as well as 'uncertainty as to which approach to follow', an ambivalence about goals.[6]

Freedom, on the other hand, is usually evaluated positively in the abstract. It is seen as an ideal. Can an ideal trigger an ambivalent response and, if so, in what sense? In what sense is freedom both affirmed and questioned? What kinds of tensions does the subtitle of the present chapter point at? The subtitle could be read as asserting that the concept of freedom contains internal logical contradictions. It is also clear that certain (theoretical) understandings of freedom are championed by some and rejected by others, and may logically cancel each other out.[7] However, the subtitle could also refer to the material configurations of freedom: to how

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and meaning is contested by people most intimately connected to them'. Koskenniemi, 'International Law and Religion', 17.

[4] These explorations have generated a rich literature. The following provide just a sample of contributions to the discussion: T Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore, John Hopkins University Press, 1993); C Douzinas, *The End of Human Rights* (Oxford, Hart Publishing, 2000); C Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Abingdon, Routledge-Cavendish, 2007); T Fitzgerald (ed), *Religion and the Secular: Historical and Colonial Formations* (London, Equinox Publishing, 2007); B Nongbri, *Before Religion: A History of a Modern Concept* (New Haven, Yale University Press, 2013); T Stack, N Goldenberg and T Fitzgerald (eds), *Religion as a Category of Governance and Sovereignty*, Supplements to Method & Theory in the Study of Religion 3 (Boston, Brill Academic Publishing, 2015). See also D Decosimo, 'The New Genealogy of Religious Freedom' (2018) 33 *Journal of Law and Religion* 3, 38.

[5] www.merriam-webster.com/dictionary/ambiguity

[6] www.merriam-webster.com/dictionary/ambivalence

[7] See, eg J Modée, 'Frihet till och frihet från religion' in J Modée and H Strandberg (eds), *Frihet och gränser: Filosofiska perspektiv på religionsfrihet och tolerans* (Stockholm, Brutus Östlings Bokförlag Symposium, 2006) 21–38, for an overview of different conceptualisations of freedom. For example, it includes a discussion of negative freedom and positive freedom (Isaiah Berlin), and freedom as an 'opportunity concept' or alternatively as an 'exercise concept' (Charles Taylor). Modée himself talks of this respectively as deregulated negative freedom and regulated positive freedom (that includes societal supportive operations), and he speaks of 'absence of limitation' and 'possibility for self-realisation' which both are important in relation to religious liberty. Modée, 'Frihet till och från religion', 23–28, 31; I Berlin, 'Two Concepts of Liberty' in *Four Essays On Liberty* (Oxford, Oxford University Press, 1969) 118–72; C Taylor, 'What's Wrong with Negative Liberty? in D Miller (ed), *Liberty* (New York, Oxford University Press, 1991) 141–62. Catharina Stenqvist, in turn, considers it 'important to

freedom takes actual political expression, the concrete state of things. Thus the subtitle can be taken to imply that talk of freedom and action in its name, the striving to realise something like freedom, has ambiguous, dubious consequences, consequences we feel ambivalent about. If this is the case, then we can raise the further question of whether this results from freedom in and of itself, or if, on the contrary, the reasons for it can be located in the context in which freedom is being realised, in conditions external to freedom, or indeed in a combination of these two.

The fact that freedom as 'situated freedom' is not limitless, but only 'possible in one bounded form or the other'[8], does not need to be regarded as a sign of ambiguity per se. As the late Swedish philosopher of religion Catharina Stenquist has observed: 'The question of what are the limits of freedom is in fact the question of what is freedom'.[9] Ambiguity and resultant ambivalent attitudes refers to something else, even if it is clear that a connection may exist with how freedom is effectively circumscribed.

This chapter will say no more than the preceding about freedom as a philosophical concept and the ways in which freedom, a complex notion if ever there was one, has been conceptualised through the ages and today, and how different understandings are at variance with each other.[10] Instead, in what follows we will concentrate on freedom in relation to religion, and upon ambiguity and ambivalence in relation hereto, and on 'freedom as stipulated in law'[11]. In addition, we will concentrate on how this law – primarily, albeit not exclusively, international human rights law – simultaneously constrains and enables religious life. Hence, this chapter will say something about 'codified freedom'[12], and about freedom of religion rather than, for example, about freedom in a religious sense: that is, freedom as an existential category.

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distinguish between external and inner freedom, freedom from and freedom to something, absolute freedom, codified freedom and freedom as an existential category'. C Stenqvist, 'Situerad frihet och gränsens problem' in J Modée and H Strandberg (eds), *Frihet och gränser: Filosofiska perspektiv på religionsfrihet och tolerans* (Stockholm, Brutus Östlings Bokförlag Symposium, 2006) 81.

[8] Stenqvist, 'Situerad frihet', 81.

[9] Stenqvist, 'Situerad frihet', 89. My translation. See also Decosimo, 'The New Genealogy of Religious Freedom', 31, 36.

[10] Stenqvist calls freedom a 'porous concept' (*poröst begrepp*). Stenqvist, 'Situerad frihet', 81. She draws on the thought of the philosopher Friedrich Waismann, who according to Stenqvist, in his concept of porosity alludes to 'a vagueness that cannot be expressed and which characterises all empirical concepts'. Stenqvist, 'Situerad frihet', 81 (fn 2) my translation.

[11] Terms taken from Stenqvist, 'Situerad frihet', 82.

[12] Terms taken from Stenqvist, 'Situerad frihet', 81.

II. Navigating Spaces of Anxiety

In his book *Questioning Secularism*, Hussein Ali Agrama observes that as ever more domains of life become the subject of law, a process we can call 'juridification', they are subjected to regulation that enables state intervention and as a rule has afforded interpretative prerogative precisely to the state. Moreover, this regulation time and again generates what Agrama calls 'spaces of anxiety', owing to the fact that law cannot, without exception, regulate human life in a total and fully foreseeable manner. We cannot elude the questions 'what is legal' and 'what is illegal'[13]. This produces uncertainty.

As far as international law and religion are concerned, Martti Koskenniemi notes in an edited volume on international law and religion, which investigates how religion and theology has contributed to the development of modern international law and continues to interrelate and be in an alliance with it, that anxiety about speaking of matters related to religion has taken root in the international legal context and community at the expense of 'self-confident secularism'.[14]

Of course, religious matters and freedom in relation to these have never been totally uncontroversial. Still, Koskenniemi directs our attention to something important, to a change that he situates in the wider context of what he calls 'the deformalization of international law', and which focuses attention on precisely the kind of spaces that Agrama speaks of explicitly as spaces of anxiety. According to Koskenniemi, law, despite far-reaching detailed regulation, houses an inescapable space for discretion - a void of sorts. Outcomes are not determined in advance, as applying the law inevitably means that choices, decisions, must be made. Power is exercised. This usually will involve, at least as far as other than completely technical decisions are concerned, value-based considerations that could be perceived of as arbitrary, ambiguous and unpredictable, and also be contested. According to Koskenniemi:

> The deformalization of international law by recourse to broad standards of equity, reasonableness, and 'balancing' between conflicting values that characterizes practical work across the field is … [among other things] the result of a certain running-out of rules and the reason that seeks to deduce judgments from them. Practitioners are called upon to exercise contextual

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[13] H A Agrama, *Questioning Secularism: Islam, Sovereignty, And The Rule Of Law In Modern Egypt* (Chicago, University of Chicago Press, 2012) 35. For a general discussion of juridification as it pertains to religion in particular, see H Årsheim and P Slotte, 'The Juridification of Religion?' (2017) 1 *Brill Research Perspectives in Law and Religion* 2, 1–89.

[14] Koskenniemi, 'International Law and Religion', 4.

> sensitivity, to be responsive to the call of the moment, and to adjust conflicting principles reasonably. The turn to the hermeneutics of judging is all about how to reach that moment of when, in an indeterminate environment everything will fall into place.[15]

Koskenniemi claims – and I assume that at this point he has in mind in particular a 'western context' and history of international law – that there used to exist a vocabulary (for example, the talk of virtues) for capturing what it could mean to exercise power in a legal as well as morally and theologically responsible manner. However, 'the modern political and legal culture' is not very good at equipping people for what the task requires, 'even if it relentlessly points beyond its internal principles and rationales'.[16] Law is porous. And so, those 'trying to operate the institutional vocabularies of modern law and governance … grapple between the formal demands of the law and the knowledge that the legal vocabularies fall short of fully dictating what is a 'right' or 'good' or 'just' thing to do'.[17]

Thus there exists this space, this void, which cannot be filled on purely legally internal grounds, a place in which you will necessarily be drawing on things from 'outside' strict law. This matter has not been necessarily fully theorised, even if recent years have seen attempts to theorise the 'void' at the heart of international law: for example, in a politico-theological manner.[18] Nor are all practitioners necessarily so equipped to handle this situation, at least according to Koskenniemi.

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[15] Koskenniemi, 'International Law and Religion', 7.

[16] Koskenniemi, 'International Law and Religion', 7: 'Moral theology and Kantian moralists discussed this predicament in terms of the virtues needed to operate power in a way that is legally – and thus both morally and theologically – responsible'.

[17] Koskenniemi, 'International Law and Religion', 8.

[18] See in general J D Haskell, 'Political Theology and International Law' (2018) 1 *Brill Research Perspectives in International Legal Theory and Practice* 2 1, 1–89, for an insightful overview and analysis. For the purposes of his article, Haskell stipulates that 'political theology might be most usefully viewed as a rhetorical mechanism, or species of disciplinary sub-genre, that generates certain types of arguments in an attempt to reconcile anxiety-producing contradictions that animate the various doctrinal positions and thematic of international law itself - or even more modest, not of international law broadly, but simply those of us who identify as international law academics'. Haskell, 'Political Theology and International Law', 6–7.
For his part as well, Koskenniemi points out that a theological frame of reference may actually play a role in decision-making. But it is not something acknowledged earlier, or something one continues to tone down in favour of emphasising (absolute) openness as to how justice might materialise in law. 'In the absence of a formal discussion of 'virtue' in global governance today … legal professionals [are left] in a bind: [with the options] either to espouse an openly [broadly conceived] theological understanding of the 'ultimate ends' to which legal practice looks, or to face an existentialist predicament where the gap between what they *know* and what they *should do* appears only as a void'. Koskenniemi, 'International Law and Religion', 7–8.

The present chapter suggests that certain ways of applying the law may seem so self-evident that one does not acknowledge the aforementioned void and the value positions one actually falls back on. In actuality, one feels – or has felt until now – rather equipped to apply the law. For it is possible to see the change that Koskeniemi identifies as a kind of calling into question of the unflinching authority with which the international legal community, despite everything, has expressed itself for a long time about religion and its place in human life, including when it comes to managing and circumscribing religious diversity. To be sure, this authority has itself presupposed a kind of transcendence, at the very least 'the alleged transcendental righteousness in the name of which it operates'[19]. However, until now the transcendence did not require explicit acknowledgement. It was possible to tone it down, suppress it, and perhaps overlook it altogether.

Steven D. Smith has noted that, despite the presence of faith in a multitude of forms, 'a 'secular' worldview' has dominated particular areas of life, and that judicial discourse has taken place in a 'cage of secular discourse'.[20] A cage can be a prison, but we can also think about a cage as offering protection and a clear framework. But now the (self-) description of law and legal practice, the embedded preferences, have been destabilised, the cage has been 'shaken'. As John Haskell has phrased it: 'the claimed non-partisan/non-confessional disposition of international law's cosmopolitan spirit' has been challenged.[21]

III. Shaking the Cage

What has happened? In a discussion of the concept of 'post-secularism', Zachary Calo calls attention to the altered circumstances for making statements about what is meaningful, a situation in which what he terms the 'post-secular condition', among other things, 'refers to a fragmentation in meaning that undermines the universal aspirations of the secular'.[22] We can ask: is it not the case that we also earlier have lived in a world consisting of different universes of meaning, so that the difference with the situation we face today is simply that the balance of power between different normative perspectives and epistemic metrics has shifted?

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[19] U Soirila, 'The Law of Humanity Project: An Immanent Critique' (LL.D. thesis, University of Helsinki 2018). See also eg M Koskenniemi, 'International Law as Political Theology: How To Read the *Nomos der Erde*?' (2004) 11 *Constellations* 492, 507. For a recent study with a focus somewhat related to but also different from the present chapter, see: C McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (Oxford, Oxford University Press, 2018). McCrudden points to both 'ideological' and 'institutional' reasons for the tensions which he identifies as having resulted in a rise in conflicts between 'the human rights system' and 'organized religions'.
[20] S D Smith, *The Disenchantment of Secular Discourse* (Cambridge, Harvard University Press, 2010) 23.
[21] Haskell, 'Political Theology', 5.
[22] Z Calo, 'Religion, Human Rights, and Post-Secular Legal Theory' (2011) 85 *St. John's Law Review* 495, 506.

Among other things, what has surely played a role when it comes to 'shaking the cage' are the ways in which critics in a multifaceted way have stripped international human rights law of its facade of neutrality. Such critics have unveiled the limits of 'sober', 'dispassionate' reasoning[23], exposing hereby spaces of anxiety and indeterminacy as well as the ways in which the 'void' actually is being filled with meaning.[24]

One example of this dismantling can be found in the work of Helge Årsheim, who discloses the different understandings of religion that contribute to the political and legal ordering of freedom in the United Nations committees tasked with offering authoritative interpretations of key treaties.[25] The titles of recent works reveal the contours of this dismantling: *The Politics of Religious Freedom*[26], *Beyond Religious Freedom*[27], *The Impossibility of Religious Freedom*[28] and others. These works expose in particular the distinctive character and special interests of an allegedly liberal perspective[29] as far as the conceptualisation of codified religious freedom is concerned, including how this codified religious freedom is circumscribed for reasons of safeguarding, for example, 'public order'.

> [L]egal and political enforcement of rights to religious freedom and other related regimes of management, including toleration and accommodation of religious diversity necessarily involve a dividing of legal religion from illegal religion – good religion from bad religion. Those separations are effected along an ongoing set of unresolved and competing dichotomies dividing religion as individual or communal, private or public, spiritual or material,

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[23] Terminology borrowed from Smith, *Disenchantment*, 8.

[24] In her recently published book *Liberalism's Religion*, Cécile Laborde observes that the self-understanding of 'liberal egalitarian theory', including as it pertains to governance of religion through law, is being attacked on several fronts, historical and/or contemporary. The contemporary critique has taken the form of 'the *semantic* critique' (the term religion), 'the Protestant critique', and 'the *realist* critique'. Laborde, *Liberalism's Religion*, 6. See Laborde, *Liberalism's Religion*, ch 1, for a more in depth analysis of these critiques, and an assessment of their relevance. David Decosimo, for his part, identifies five types of criticisms directed at 'religions freedom *as such*': 'the *incoherence* criticism', 'the *systemic bias* criticism', 'the *tool of oppression* criticism', 'the *ideology* criticism', 'the *essentialist* criticism'. Decosimo, 'The New Genealogy of Religious Freedom', 7–8.

[25] H Årsheim, *Making Religion and Human Rights at the United Nations*, Religion and Society 67 (Berlin, DeGryter, 2018).

[26] W F Sullivan, E S Hurd, S Mahmood, and P G Danchin (eds), *The Politics of Religious Freedom* (Chicago, The University of Chicago Press, 2015).

[27] E S Hurd, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton, Princeton University Press, 2015).

[28] W F Sullivan, *The Impossibility of Religious Freedom* (Princeton, Princeton University Press, 2005).

[29] '[F]reedom of religion has often been seen as a core liberal right and part of the liberal architecture of neutrality as to conceptions of the good'. A A Jamal, 'Considering Freedom of Religion in a Post-Secular Context: Hapless or Hopeful?' (2017) 6 *Oxford Journal of Law and Religion* 433, 439.

> belief or practice, chosen or given, Protestant or Catholic, Western or Eastern, peaceful or violent, utopian or locative, universal or particular.[30]

The criticised legal regimes are understood to privilege the former at the expense of the latter, for example, the individual at the expense of the communal and the private at the expense of the public.[31] Thus, according to the critics, what has been considered and portrayed as neutrality comes across instead as partially-selective blindness, 'subtly encoded with … biases', like 'the strict separation between private and public spheres' and 'the emphasis on individual rights at the expense of communal duties'[32] and so on. Or, as Haskell has put it in the context of examining international legal scholarship: what is exposed is an approach that 'ultimately tends to rely on extremely parochial, if not metaphysical, arguments – what we might term, 'transcendental nonsense' – that reinforces the authority of distinctly Western, liberal, institutional actors'.[33]

Cécile Laborde, Daniel Steinmetz-Jenkins and Udi Greenberg have recently pointed out that we should not 'confuse genesis with justification'.[34] Nevertheless, the critique has also included a historical turn as a destabilizing move. This turn can be seen in the work of Peter

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[30] W F Sullivan, E S Hurd, S Mahmood, and P G Danchin, 'Introduction' in W F Sullivan, E S Hurd, S Mahmood, and P G Danchin (eds), *The Politics of Religious Freedom* (Chicago, The University of Chicago Press, 2015) 7.
[31] Decosimo, 'The New Genealogy of Religious Freedom', 14. See also eg Hurd, *Beyond Religious Freedom*, 13.
[32] J D Haskell, 'The Religion/Secularism Debate in Human Rights Literature: Constitutive Tensions between Christian, Islamic, and Secular Perspectives' in M Koskenniemi, M García-Salmones and P Amorosa (eds), *International Law and Religion: Historical and Contemporary Perspectives*, The History and Theory of International Law 8 (Oxford, Oxford University Press, 2017) 144. *Cf* Decosimo, 'The New Genealogy of Religious Freedom', 12–13.
[33] Haskell, 'The Religion/Secularism Debate', 136, referring for the term 'transcendental nonsense' to F Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Colombia Law Review* 809, in the context of describing how international legal scholarship approach 'secularism' and 'religion' as far as human rights are concerned.
[34] Laborde points out in responding to the critical legal theorists that at least some of them tend to exactly 'confuse genesis with justification'. Yet, according to her, 'a *historical* critique' cannot 'serve as a *philosophical* critique of liberalism'. Laborde, *Liberalism's Religion*, 16. See also U Greenberg and D Steinmetz-Jenkins, 'The Cross and the Gavel' (2018) 65 *Dissent* 2 106, 112–13; Decosimo, 'The New Genealogy of Religious Freedom', 15–16. For another in-depth assessment of different scholarly pursuits to critically investigate religious freedom discourses, which he jointly labels 'a new genealogy of religious freedom' and subject to a so-called 'immanent critique', see Decosimo, 'The New Genealogy of Religious Freedom'. See also eg J T Mauldin, 'Contesting Religious Freedom: Impossibility, Normativity, and Justice' (2016) 5 *Oxford Journal of Law and Religion* 457; J A Springs, 'Tentacles of the Leviathan? Nationalism, Islamophobia, and the Insufficiency-yet-Indispensability of Human Rights for Religious Freedom in Contemporary Europe' (2016) 84 *Journal of the American Academy of Religion* 903.

Danchin,[35] Marco Duranti,[36] the late Saba Mahmood,[37] Samuel Moyn[38] and Linde Lindkvist,[39] among others. Such scholars have argued that '[t]he conceptual artifice and implementation of secular liberal rule of law [including in relation to freedom in matters spiritual] is deeply enmeshed in [among other things] the colonial experience, and maintains its past inequalities, conceptually and materially'.[40] Besides, we should not forget that legal frameworks and institutions other than domestic Western ones are also being revisited.[41]

Critical remarks such as those described in this section have themselves not gone unquestioned. They have been criticised, for example, for being very theoretical, discursively analytical and too preoccupied with the legal texts that articulate a codified religious freedom. While their critique of the failures of law to address matters of faith is considered partially convincing, the limited analytical emphasis which is likely to examine 'law on the books' rather than 'law in action'[42] is viewed as generating reductive readings of what actually happens when matters of faith are negotiated through law.[43] In another context, the present author has called for '[a]n in-depth, comprehensive and contextual understanding of the purposes, issues and perspectives that are afforded significance in adjudication processes and decision-making in

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[35] Eg P G Danchin, 'The Emergence and Structure of Religious Freedom in International Law Reconsidered' (2007/2008) 23 *Journal of Law and Religion* 455.

[36] M Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford, Oxford University Press, 2017).

[37] Eg S Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton, Princeton University Press, 2015).

[38] Eg S Moyn, *Christian Human Rights*, Intellectual History of the Modern Age (Philadelphia, University of Pennsylvania Press, 2015).

[39] L Lindkvist, *Religious Freedom and the Universal Declaration of Human Rights,* Human Rights in History 12 (Cambridge, Cambridge University Press, 2017).

[40] Haskell, 'The Religion/Secularism Debate', 144.

[41] See, eg Y Sezgin and M Künkler, 'Regulation of "Religion" and the "Religious": The Politics of Judicialization and Bureaucratization in India and Indonisia' (2014) 52 *Comparative Studies in Society and History* 448; B Schontal, *Buddhism, Politics and the Limits of the Law: The Phyrric Constitutionalism of Sri Lanka* (New York, Cambridge University Press, 2016); J L Neo, 'Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication' (2018) 16 *International Journal of Constitutional Law* 574; T Moustafa, *Constituting Religion: Islam, Liberal Rights, and the Malaysian State*, Cambridge Studies in Law and Society (Cambridge, Cambridge University Press 2018).

[42] See, eg J Witte Jr and J A Nichols, '"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad' (2017) 92 *Notre Dame Law Review* 427, 436.

[43] Årsheim and Slotte, 'The Juridification of Religion?', 18–19; Springs, 'Tentacles of the Leviathan?'. However, see also Sullivan, Hurd, Mahmood and Danchin, 'Introduction', where this critique is implicitly countered: 'The present volume [shows]…, through the work of various scholars working in a variety of geographical regions, that the meaning and practice of a right to religious liberty varies and shifts depending on the particular configuration of state-religion accommodation and the impact of other historical and transnational forces. Far from being able to be reduced to a question of compliance or noncompliance with a stable, uncontested norm that is being progressively disseminated globally (despite occasional setbacks), promoting a right to religious freedom shapes political and religious possibilities in particular ways, though always differently in different contexts'. Sullivan, Hurd, Mahmood and Danchin, 'Introduction', 9.

individual cases would be key so as to – in the words of Jason A. Springs – counteract "excessive discursive analytical tendencies"'.[44]

This does not mean, however, that the critique has not struck a chord. To summarize, we could perhaps say that a reading of freedom in questions of faith stands out as ambiguous and generates an ambivalent response – to the extent that it does this – because one has earlier considered the law's way of approaching matters of faith, and one's own way of adjudicating such matters, as positive: if not entirely, then at least overwhelmingly so. There has not been hesitation with regard to what is the goal (of adjudication) is, or the correct course of action, and instances of spaces of anxiety as far as religious freedom is concerned have not been recognised.[45]

Certainly, for others the ambiguities have been evident for a long time, if not always, for example, based on their perspective and/or based on the experience that the outcomes of legal processes have constantly been unfavourable to them. One example of such unfavourable outcomes are those for certain religious minority positions before the European Court of Human Rights. Law has become a source of distrust. Moreover, all this is not to say that an 'internal' critique vis-a-vis the treatment of religion on part of international law and the international legal profession has not previously existed.[46]

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[44] Årsheim and Slotte, 'The Juridification of Religion?', 19; Springs, 'Tentacles of the Leviathan?', 3. See also Springs, 'Tentacles of the Leviathan?, 4.

[45] In a certain sense, this unveiling results in a simultaneous disclosure of authority and undermining of the same, an authority that may constitute a disquieting fact. As David Kennedy observes in his new book *A World of Struggle* (here in the words of Samuel Moyn), 'international lawyers have interpreted their own plight and kept the reality of the power they exercise as experts at length'. S Moyn, 'Knowledge and Politics in International Law' (2016) 129 *Harvard Law Review* 2164, 2176; D Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton, Princeton University Press, 2016) 172. Moyn notes: 'Even when international lawyers insist doggedly on the reality of international law, Kennedy says, they are loath to view their own expertise as a form of authority that inevitably privileges and distributes. "Rather than seeing the hand of power in the glove of law, mainstream international lawyers focus on the glove," Kennedy writes: "They see law acting everywhere in the world and celebrate the ability of civil society organizations, individuals, or national judges to participate in global rule making. Where the outcomes are not desirable or when bad things happen in the name of law, they prefer to see the misrule of power dressing itself in legal justification."' Moyn, 'Knowledge and Politics', 2176, quoting Kennedy, *A World of Struggle*, 240.

[46] See eg D Kennedy, 'Images of Religion in International Legal Theory' in M W Janis and C Evans (eds), *Religion and International Law* (The Hague, Martinus Nijhoff Publishers, 1999) 145–53; D Kennedy, 'Losing Faith in the Secular: Law, Religion, and the Culture of International Governance' in M W Janis and C Evans (eds), *Religion and International Law* (The Hague, Martinus Nijhoff Publishers, 1999) 309–19. See also Karen Engle for an analysis of what she takes to be an 'increasing tendency toward self-critique' within the human rights movement, an analysis in which the work of David Kennedy also figures. K Engle, 'Self-Critique, (Anti) Politics and Criminalization: Reflections on the History and Trajectory of the Human Rights Movement' in JM Beneyto and D Kennedy (Eds), *New Approaches to International Law: The European and the American Experiences* (The Hague, TMC Asser-Springer, 2012) 41–73.

IV. Responding to the Challenges of Legal Governance of Religion

What follows from this recognition of the ambiguities of freedom in a state of diversity (including concerning what is true, good and right) is a different thing. Clearly, the critique that I have outlined above calls for fresh approaches. One alternative might be to insist on more persuasive reasoning, including with regard to that which has earlier been hidden from view. To paraphrase Samuel Moyn: What once could simply be asserted, now has to be argued.[47] You may still be able to make a case for a particular ordering of society, but you are pushed to justify it in a way you have not had to before.

In relation to this kind of alternative, John Haskell has noted that, if inevitably at stake are choices that ultimately could be called 'personal and often discrete', then the goal is 'to become self-reflective of one's particularity, to practice rigorous hermeneutics of suspicion that is aware of its subjective limitations and that knowledge requires openness, whether it comes in the form of cultural expressions, new ideas, and so forth'.[48]

> Between competing fantasies within the human rights regime, the role of the international lawyer is to develop an analytic set of tools that is built out of an attention to the blind spots and margins of law or political manoeuvers, of their risks and unexpected consequences, and which can encourage more active inclusion and participation in legal decision-making and exercise responsibility to others as the conditions of reason itself (discussed in terms, such as 'margin of appreciation', 'dialogical intersubjectivity', 'responsibility to others'). International legal practice becomes a reflective balancing act that is receptive and mediates competing fantasies, interests, and passions.[49]

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[47] Moyn, 'Knowledge and Politics', 2172.
[48] Haskell, 'The Religion/Secularism Debate', 145.
[49] Haskell, 'The Religion/Secularism Debate', 145; referring to N Berman, '*Legalizing Jerusalem*, or, of Law, Fantasy, and Faith' (1996) 45 *Catholic University Law Review* 823. This is, as Haskell also observes elsewhere, a salient focal point of both American Legal Realism and so-called Critical Legal Studies: '… every right or principle or value or rule is always matched with a countervailing right or principle or value or rule. The judge is required to balance these competing claims, which ultimately becomes a thing of discretion, of policy. Exactly what legal reasoning is supposed to guard against. And more often than not, between equal rights, force decides'. Haskell, 'Political Theology', 74, referring to D Kennedy, 'The Critique of Rights in Critical Legal Studies' in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 199–218.

What is required is refined reasoning that takes seriously the spaces of anxiety and in an at least partly novel way clarifies the substantive values, criteria and conceptions of freedom in matters of faith upon which choices and decisions are made. The project of Eva Brems and others, which has involved a close reading and re-reading of judgments and decisions from supranational human rights monitoring bodies, can be viewed as a way to advocate precisely this kind of reasoning.[50]

Another way to respond to and handle the ambiguities could be the way in which the European Court of Human Rights and the European human rights system more generally, and for some time now, has pondered the division of labour between contracting states and the European Court of Human Rights as far as the interpretation of freedom of religion or belief and also other rights is concerned. The question here is: who is best equipped with the contextual sensibility that is called for?[51]

Even so, it is important to keep in mind the distinction between questions of jurisdiction per se and what could be viewed as bad-quality judgments.[52] Sometimes the object of critique is such bad judgments, whereas, for example, the authority of a particular court per se is not questioned. At other times, however, the critique that the uncovering of ambiguities triggers is of a more foundational kind. What this suggests is that we need to seriously reflect on what we wish to make an object of judicial decision-making in the first place. For by making such a move, we authorise certain instances and meaning is 'closed down' in certain respects. As Smith points out, the end result is a 'binary conclusion' with one party to a conflict as the winner, and the other as the loser.[53]

Of course, we cannot but note, for example, as Hans Lindahl does in *Authority and the Globalisation of Inclusion and Exclusion*, that it is impossible to have global law without exclusion. Every attempt to formulate an understanding of law, every legal concept, includes inevitable contextualisation (which also means that the critique has to be contextual in order not to become too general and blunt). Every legal order will always be 'bounded' and simultaneously inclusive and exclusive.[54] Such is also the case with human rights vocabulary,

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[50] E Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge, Cambridge University Press, 2012), see in particular Part III.
[51] See also McCrudden, *Litigating Religions*, 85–88.
[52] See, eg Laborde, *Liberalism's Religion*, 7–8.
[53] Smith, *The Disenchantment*, 11. Whether or not it is possible at a general level to distinguish between what can or cannot be made the object of judicial decision-making, is a separate question beyond the scope of this chapter.
[54] See, eg H Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge, Cambridge University Press 2018) 189. See also, eg Haskell, 'Political Theology'.

which in its legal form aspires in theory to capture that which is foundational for all 'decent' human life, provided we will be able to continue calling it 'human'.[55]

Still, the situation has provoked the question of whether it is meaningful to regulate religion in law, including treating religion as a special category when it comes to legal protection. Obviously, the question is not new. However, the discussion has been rather intense in recent years, with positions both for and against.[56]

At least for some, this question relates to the difficulty of ascertaining in the first place what religion is. If religion has no clear-cut meaning, is it then reasonable to ascribe special legal status to it? What is it that we consider worthy of protection in precisely this way? Could we think of more adequate and less ambiguous ways of safeguarding (also) freedom in matters of faith than by means of a tailor-made special legal right? And to do so in ways that do not come across as favouring religious beliefs at the expense of other life views and convictions? In other words, in ways that are more even-handed?[57]

Related to this, Laborde notes in *Liberalism's Religion* that 'not all values can, or indeed should be expressed by the law'. The law can 'put forward an interpretative notion' of, for example, the value of religion, but cannot in any way capture 'the whole of the value of religion'.[58] According to Laborde, what we seek to protect when it comes to faith could be protected via other fundamental rights and freedoms such as freedom of association and freedom of opinion and expression.[59] James Nickel adopts a similar position in his 2005 article entitled 'Who Needs Freedom of Religion?'.[60] The question arises: to what extent does this kind of 'disaggregation' – to borrow Laborde's terminology – neutralise ambiguity? Even though one does not seek to endorse a special right of religious freedom, the conceptualisation

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[55] See, eg P Slotte, *Mänskliga rättigheter, moral och religion: Om de mänskliga rättigheterna som moraliskt och juridiskt begrepp i en pluralistisk värld* (Turku, Åbo Akademi University Press 2005) 129-30.

[56] See, eg C Eisgruber and L Sager, *Religious Freedom and the Constitution* (Cambridge, MA, Harvard University Press 2007); M A Hamilton, *God vs. the Gavel: The Perils of Extreme Religious Liberty,* 2nd edn (New York, Cambridge University Press, 2014); A Koppelman, *Defending American Religious Neutrality* (Cambridge, MA, Harvard University Press, 2013); Laborde, *Liberalism's Religion*; B Leiter, *Why Tolerate Religion?* (Princeton, Princeton University Press, 2013); A Sarat (ed), *Legal Responses to Religious Practices in the United States: Accommodation and its Limits* (Cambridge, Cambridge University Press, 2014); M Schwartzman, 'What if Religion Is Not Special?' (2012) 79 *University of Chicago Law Review* 1351; Sullivan, *Impossibility of Religious Freedom*; Witte and Nichols, '"Come Now Let Us Reason Together"'.

[57] For example, ways that, when taking a stand on what is allowed, do not take into account the fact that one is dealing explicitly with *religious* belief. See H Strandberg, 'Livsfrihet i stället för religionsfrihet' in J Modée and H Strandberg (eds), *Frihet och gränser: Filosofiska perspektiv på religionsfrihet och tolerans* (Stockholm, Brutus Östlings Bokförlag Symposium, 2006) 244.

[58] Laborde, *Liberalism's Religion*, 31. Laborde finds that we should not get fixated upon the category of 'religion', nor confuse semantics and interpretation. Laborde, *Liberalism's Religion*, 202.

[59] C Laborde, 'Religion in the Law: The Disaggregation Approach' (2015) 34 *Law and* Philosophy 581, 594.

[60] J W Nickel, 'Who Needs Freedom of Religion?' (2005) 76 *University of Colorado Law Review* 941.

and legal ordering of relations and freedom will include making distinctions and setting limits. Ambiguity, as well as the ambivalent response it may generate, is not excluded.

V. Concluding remarks

I do not intend here to give further examples of ways to seek to respond to the ambiguities to freedom in matters of faith, but I will simply return now to the metaphor of a cage as constraining and simultaneously offering protection, and as a frame (a structure). Agrama describes secularism in a somewhat similar fashion. With reference to Wittgenstein, he explains secularism as a picture that holds us captive with its categories, with what it identifies as being at stake as being meaningful questions and solutions.[61] The picture itself can limit our understanding of it, so that even when we question it – if we question it, for example, following the realisation that it is ambiguous – 'all we end up introducing is the negative. The assumptions that frame the picture remain the same, and we remain beholden to it'.[62] Hence, we 'remain captive to its own image which draws us away from thinking outside the possibilities its framework provides, or more importantly, the modalities of power that the framework articulates'.[63] This is something Haskell also critically highlights as something to be aware of in relation to those positions that underline the need for self-reflection and refined reasoning.[64]

When they contemplate codified freedom in matters of faith, some new openings stay closer to the original picture or cage, some seek to keep more distance, some perhaps unreservedly endorse the original. What is certain is that in the effort to give the desire to institutionalise freedom[65] new forms in a (politically) relevant fashion, we are dealing with restructuring of power rather than the setting of absolute confines to it.[66] Returning to what has been said above: laws and judgments convey standpoints. Or, as Koskenniemi has put it: 'You need to choose the law that will be yours; you need to vindicate a particular understanding, a particular bias or preference over contrasting biases and preferences. The choice is not between law and politics,

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[61] Agrama talks of secularism as 'a problem-space'. Agrama, *Questioning Secularism*, 28.
[62] Agrama, *Questioning Secularism*, 24.
[63] Agrama, *Questioning Secularism*, 25.
[64] Haskell, 'The Religion/Secularism Debate', 146.
[65] Paraphrasing Samuel Moyn in a different context. Samuel Moyn, 'Human Rights in Heaven' in A Etinson (ed), *Human Rights: Moral or Political*? (Oxford, Oxford University Press, 2018) 75.
[66] Soirila, 'The Law of Humanity Project', referring to E Jouannet, 'What Is the Use of International Law - International Law as a 21st Century Guardian of Welfare Essay' (2006) 28 *Michigan Journal of International Law* 815, 854. I am not here using 'power' in an evaluative sense. Exercises of power can be judged both positively and negatively, that power is exercised as such, however, is an inescapable feature of human life. As Decosimo puts it, eg: 'Any act of defining is an act of power'. Decosimo, 'The New Genealogy of Religious Freedom', 40.

but between one politics of law, and another'.[67] The question is: in this process, 'in the thick of history and politics',[68] who are the new 'bedfellows'?

[67] M Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113, 123. See also, eg Haskell, 'Political Theology', 58: 'the necessity of coercion and faith … grounds and sustains any system of governance. We cannot escape serving a master, and we cannot avoid coercion. We are always already coerced into an order that does not need to be so. Freedom is not from coercion, but to have clarity in how violence is appropriated and toward what ends'.
[68] Moyn, 'Human Rights in Heaven', 78.

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