

## The International Human Right to Freedom of Religion or Belief: Referring to Foucault to Achieve the Descriptive Moment

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### Abstract

Recognising the inherent problems associated with the international human right to freedom of religion or belief, this article proposes an alternative approach to the right.

One can begin to address the right by clarifying the importance of knowledge and the role that it plays when combined with power. Adopting notions proposed by M. Foucault provides the groundwork for a transgressive interpretation of religion or beliefs such as to account for assertions of a religion or a belief as part of the ongoing social discourse. Manifestations of a religion or belief need not be understood as a struggle between the individual and state, but rather within a broader framework. Consideration could be made of additional factors towards understanding a belief, including the assertions of a believer, without necessarily weighing the merits of the belief.

**Keywords:** Foucault; Religion; Freedom; Alternative Approach.

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## Introduction

Similar to other basic international human rights like the right to freedom of expression, one may refer to the human right to freedom of religion and belief as an entrenched international human right. It is recognised in all important and relevant human rights treaties<sup>1</sup> and is a constant focus of discussion and examination in a variety of international human rights bodies.<sup>2</sup> Academic research also recognises the importance and seminal role of the human right to freedom of religion or belief.<sup>3</sup>

Yet, a religion or a belief, and the freedom to manifest same, pose fundamental problems for the international human rights system. For example, a belief system might conflict with other human rights, as evidenced by state reservations to the Convention to Eliminate Discrimination Against Women (“CEDAW”) due to domestic laws based on religion that impede elimination of differential treatment towards women.<sup>4</sup> On a broader level, one cannot avoid the internal social structure’s link to a specific religion or the incapacity to acknowledge the emergence of another belief system. One sees actions by fundamentalist states to eradicate non-state religions and remove their presence from the state, such as the call in Afghanistan for the eradication of all Buddhist symbols based on the majority religion. The nature of an entrenched religious belief within a state and the connection to group action makes it difficult to conform to an international human rights system that generally adopts an individual oriented approach.<sup>5</sup> This also stymies manifestation of other beliefs. The typical example is recognised religious military conscientious objectors, as opposed to the rejection of individual conscientious objectors.<sup>6</sup> There also is a problem within secular states. Germany for example does not recognise Scientology as a viable belief system and can treat the adherents to Scientology in a negative fashion. The Falun-Gong cult in the PRC also is subject to

1. See: Universal Declaration of Human Rights, Article 18; International Covenant on Civil and Political Rights, Article 18; European Convention on Human Rights and Fundamental Freedoms, Article 9; American Convention on Human Rights, Article 12

2. Notably, the Commission on Human Rights has appointed a specific rapporteur on the matter of freedom of religion. See: E/CN.4/2000/65.

3. See: Hammer, 2001; Evans, 2000: Article 9 and the ECHR; Evans, 1997; Tahzib, 1996; Witte & Van der Vyver (eds), 1996.

4. See: Brandt & Kaplan, 1996: 105.

5. See: Human Rights Committee’s General Comment to Article 18, CCPR/C21/Rev.1/Add.4 (1993)

6. The majority of articles and books that address conscientious objection in international law approach the issue as being rooted within a formal religious belief. See: Marcus, 1998: 507; Moskos and Chambers (eds), 1993; Major, 1992: 349; Cf. Hammer, 2001: Chapter 6.

harassment and discrimination because of the potential threat that it poses to the authority of the government. In that instance, there exists a link to concerns regarding state security and control.

An additional problem is decisions that tend to delve into an analysis of the limitations to the right rather than consider the manner in which the right is to apply.<sup>1</sup> This leads to a dearth of analysis concerning the significance of the "right" to freedom of religion or belief for either the individual believer or the group making the assertion. The meaning of "manifestation" of a religion or belief, as enunciated in human rights treaties,<sup>2</sup> is not fully grasped. Further, the human rights system is only now coming to grips with the group dimension to the freedom of religion<sup>3</sup> especially when considering that the right as articulated in the treaties specifically stipulates the right to worship<sup>4</sup> or to educate one's children pursuant pursuant to ones belief.<sup>5</sup> There is no doubt an inherent societal significance to religion, particularly as a cultural dimension, that signifies a broader role for religious beliefs beyond the typical state-individual dichotomy, where an individual is asserting an autonomous right without interference from the state.<sup>6</sup> The role of religion is recognised even within states that espouse a strong separation of church and state by not ignoring the importance of some form of belief system as a social prop.<sup>7</sup>

A recent example that in a sense personifies these issues is European Court of Human Rights case *Sahin v. Turkey*.<sup>8</sup> Sahin was denied the right to wear a headscarf in accordance with her religious beliefs since the university deemed it a threat to the public order (especially as creating tension with non-believers) and contrary to the constitutional principle of secularism. While the Court recognized the headscarf as a

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1. See: 14307/88 *Kokkinakis v. Greece* 17 EHRR 397 (1993); 16278/90 *Karaduman v. Turkey* 74 D&R 93 (1993) (ECHR Commission upheld university's requirement that Muslim student remove head scarf for an identification photo based on lack of manifestation as well as limitation). Scolnicov, A. (2001) *Children's Right to Freedom of Religion in a Multi-Religious Society* (Centre for Studies on New Religions)
  2. See: ICCPR Article 18.
  3. See: 39023/97 *Holy Council of the Muslim Community v. Bulgaria* 16/12/04.
  4. See: ICCPR Article 18(1).
  5. See: ICCPR Article 18(4).
  6. See: Van Bijsterveld, 2000: 165. *Religion, International Law and Policy in the Wider European Arena: New Dimensions and Developments in Ahdar, R. (ed.) Law and Religion, UK: Ashgate.*
  7. See: Connelly, 1999. *Why I am not a Secularist* (University of Minnesota Press, USA) noting the importance for secularists to establish a positive capacity for enunciating moral practice via discourse with existing alternative beliefs.
  8. See: 44774/98 *Leyla Sahin v. Turkey* 10/11/05 Available at: <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=1132746FF1FE2A468ACBCD1763D4D8149&key=17671&sessionId=5856548&skin=hudoc-en&attachment=true>

proper manifestation of a religious edict,<sup>1</sup> it deferred to the state's domestic law as acting to uphold a legitimate and necessary aim within democratic society.<sup>2</sup> Specifically, the Court deemed the state as the key neutral actor sufficient to determine the means for upholding public order and preserving the basic principles of secularism and equality vital to democratic survival.<sup>3</sup>

It also is worth considering the *Cha'are Shalom Ve Tsedek v. France*<sup>4</sup> case, where the applicant claimed that the French Government had violated Article 9 (freedom of religion or belief) of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). France refused to register the claimant's organisation as legally capable of carrying out the ritual slaughtering of animals in accordance with the claimant's strict interpretation of the Jewish law. This minority faction was acting pursuant to their unique application of Jewish law that differed from the majority of the rest of the Jewish community in France.<sup>5</sup> The Court decided in favour of France by holding that the minority faction within the Jewish community need not engage in their more stringent method of slaughter because they could obtain such meat from sources outside the country. The Court therefore held that there was no interference with the manifestation of a religion or belief.<sup>6</sup> Furthermore, the Court noted that it was imperative for France to impose public order, especially when addressing the matter of promoting religious harmony and tolerance.<sup>7</sup>

What is sorely lacking in the Court's analysis is an understanding of the implication for the manifestation of a religious belief, as well as a proper analysis of the extent by which state-imposed limitations are to take affect. In the *Sahin* case for example, mere deference to a state's underlying principle of secularism does not translate into grounds for limiting manifestation of a belief in a university. Indeed,

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1. See: *Sahin*, para. 78.

2. See: *Sahin*, para. 110.

3. See: *Sahin*, para. 111.

4. See: 27417/95 *Cha'are Shalom Ve Tsedek v. France* Decision of 27/6/00.

5. The issue entailed state regulation of the Jewish "shechita" process, whereby animals are slaughtered pursuant to the demands of the religion. The Government had regulated this ritualistic slaughtering process in order to minimise any undue pain to the animals, with only one religious authority that represented the majority of the Jewish community being granted permission to carry out slaughter in accordance with the Jewish law. The minority faction claimed that its method more fully adhered to the Jewish law particularly as it required rigorous inspections of the internal organs of the slaughtered animal.

6. See: 27417/95 *Cha'are Shalom Ve Tsedek v. France* Decision of 27/6/00, paragraph 83.

7. See: 27417/95 *Cha'are Shalom Ve Tsedek v. France* Decision of 27/6/00, paragraph 84.

one can contend that it reflects the very opposite of a secularist society – especially within the confines of a university where ideas and notions are to be discussed and refined. It is important to consider the role of a right and its position within the human rights context when compared to the implication of a limitation that has been imposed by the state in a manner that does not tend to eviscerate the right being recognized.

While the European Court was rather deferential to the state in these cases, and in the Shain case possibly reflective of its own possible bias towards headscarf wearers, it is not enough to criticize the Court and call for a more reasoned balancing or proper acknowledgement of an individual's belief.<sup>1</sup> Issues concerning freedom of religion demand a different form of approach given the context of operation (a belief system generally relates to an external force other than the state) and the broader social effects that are not always considered at times simply because it is difficult for a court or reviewing body to engage such a process. The contention herein is that a descriptive understanding of the right to freedom of religion or belief can allow for a better assessment of the manner in which to allow for the manifestation of a belief (and its limitations) as well as provide an opening for incorporating a more social-oriented context to the right. Such an approach of course begs the question of what is the relation between the individual believer and surrounding society? How can we explicate the social interaction that occurs for a person attempting to manifest a belief and can that manifestation be disengaged from the social context? Similarly, how can we begin to incorporate social factors without eviscerating the individual right, and vice-versa?

More particularly, offering an alternative account of the right to freedom of religion is important because the human right to freedom of religion or belief is not necessarily solely coming to protect an action per se', such as when contrasted with the right to freedom of expression or assembly. Asserting a human right as the basis for a particular action entails an individual claiming the right to conduct a particular action, such as the capacity to express a particular view, or alternatively, referring to immunity from certain state actions. The social implications generally relate to the effect on state functions as a regulator of the greater population, aspects that are reflected within the limitations to the right.<sup>2</sup> As such, the human right to freedom of religion or belief might emanate from a claim or immunity as grounds for asserting the right. Nonetheless,

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1. The dissent in Sahin at para.s 7-13 offers a solid critique of the Court's reasoning.

2. See: ICCPR Article 18(3).

the underlying basis for making the assertion derives from broader considerations concerning one's overall relation to other individuals and the understanding one has of their own unique purpose and role as well as broader position in the world. A religion or belief, as envisioned within the human rights treaties, can provide positive direction for an individual and a broader framework of operation. The indication is that discerning the human right to freedom of religion entails not only the assertion of individual rights, but also incorporates considerations regarding the social process. Thus, moving away from a prescriptive context that focuses exclusively on the importance of the individual right to a more descriptive explication could provide a sounder understanding of "manifestation" and a better position from which to assess the assertion.

The freedom of religion and belief is touching upon seminal ideals for the individual believer that relate to broader issues concerning one's individual and social position. Indeed, one of the interesting developments of the past century is the emergence of religion as a key social force, contrary to the expectations of secularists who espoused the importance regarding separation of church and state. Religion seems to be playing a more central social function in a host of diverse societies, such as to call into question the notion of religion as a private individual right when considering the necessity for some form of public manifestation of religious beliefs.<sup>1</sup> It is possible then that a descriptive insight into the social role of religion, as reflected in individual manifestations of a human right, can assist to provide a platform from which to consider manifestation.

This article will begin to propose an alternative insight for approaching the right to freedom of religion or belief by referring to Michel Foucault and his understanding of the acquisition of knowledge and the use of power within society. Based on Foucault's understanding of the truth, we can come to a firmer grasp of the meaning and significance of religion and other forms of belief. Furthermore, the manner in which he addresses social interaction and understands power, particularly upon recognising his transgressive approach towards social relations, can provide a platform for addressing the variety of issues that arise for the human right to freedom of religion, and create a framework for considering the role that alternative beliefs can play in a society.

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1. One of the key problems with US jurisprudence regarding the separation of church and state is exactly this issue. Deeming religious manifestation as an individual right tends to ignore the very nature of the subject that is undergoing analysis.

Particularly when accounting for international human rights, given the current changes to the overall international structure that have resulted from economic globalisation, the movement towards some form of global governance, the breaking down of human barriers due to enhanced communication, and the capacity for acquiring a host of information via modern technology, the indication is that social relations with other individuals as well as with the state have undergone a change that merits consideration. Foucault's approach toward the individual subject and the function of the state serve to explain and clarify the variety of social changes as well as provide a framework for an alternative analysis. This article therefore will consider some of the benefits presented by Foucault's analysis and offer a possible alternative context from which to consider the operation of the international human right to freedom of religion or belief.<sup>1</sup>

#### **Foucault and Human Rights**

While this article will not analyse Foucault's understanding of law, it is important to consider that Foucault "understood" law, and human rights, within the framework of the role of power and the influence of knowledge. This will assist in understanding the relationship between Foucault's ideas and the freedom of religion.

Unlike a deconstructionist like Derrida, Foucault was not necessarily concerned with the indeterminacy of law. Indeed, for Foucault the sovereign's law did not hold the central position of importance in structuring society. Hence deconstructing (or reconstructing) the meaning and significance of law, a common preoccupation of a number of post-modern legal scholars, was not a factor for Foucault. Rather what interested Foucault were the disciplinary role of law and the imposition of such discipline by the ruling authority. In the words of Foucault:

...instead of privileging law as a manifestation of power, it would be better to try and identify the different techniques of constraint that it brings into play.<sup>2</sup>

Law then is not unique because of the capacity to control, but rather due to the manner in which such control is achieved. What merits consideration is the manner in which the attempt to control via the law was derived and the significance of such an attempt on our social relationships.

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1. Note that the article is not proposing an alternative normative framework or an improved legal argument, as that tends to stretch Foucault's ideas beyond their reach and intent. Rather, the purpose is to develop alternative themes that derive from his work. See: Baxter, 1996: 476, 449.

2. See: Foucault, 1997: 59.

What distinguished Foucault is that he understood power and its application as being subject to constant change and alteration. The legally derived power of the ruling authority or of the sovereign entity as the case may be, is rather fragile. There exist a host of influences that derive from a diverse array of actors external to the state that might be using their notion of power for their benefit. Power is an ongoing development that, because it is ever changing, alters the context for examination. Given the multiplicity of actors that assert power or maintain the capacity to do so, the real examination is the complex interplay of social relations between the various actors.<sup>1</sup> Hence deeming the state as the sovereign creator of law is an exaggeration of sorts due to the variety of influences and external developments that go into the development of laws.

Thus upon considering the law and Foucault, one is immediately confronted with the notion that gauging the influence of the law is not solely a matter of sovereign command or actual force by the state, but is more precisely one of resistance among the variety of social forces.<sup>2</sup> Law is not a final result from which emanates decisions or directives, but rather is part of the social power system. While law provides some form of framework for action,<sup>3</sup> and law, like other social influences, assists in constituting disciplinary power, it does not sit above the disciplinary power. The law then like other social phenomenon or influence is not solely a preventive mechanism but maintains some form of creative and productive aspect.<sup>4</sup>

The importance of perceiving what is normally understood to be a restrictive mechanism, i.e., law as limiting one's actions, as a productive one is acknowledging the role of a variety of social forces. A host of social influences, including the role of human rights as well as assertions of a religious belief, are components in maintaining some form of influence within society. Similar to a variety of other

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1. See: Ivison, 1998. *The Disciplinary Moment: Foucault, Law, and the Reinscription of Rights in Mass*, J. (ed.) *The Later Foucault* (Sage Publications, UK). See also discussion *infra* for an amplification of this point.

2. See: Baxter, 1996: 453.

3. Foucault's approach to law derived from a broader understanding or re-interpretation of the role of the sovereign. Our understanding of the state as the elite power source was incorrect and misguided according to Foucault, an understanding that resulted from his view of power and the inter-playing role that knowledge plays when considered alongside power. See discussion *infra*.

4. See: Tadros, 1998: 77-78. *Between Governance and Discipline: The Law and Michel Foucault* 18 *Oxford Journal of Legal Studies* 75. See also discussion *infra* regarding the irony of greater regulation in present legal systems as a means of upholding rights that are more individual. The increased regulations and laws need not be understood as preventive, but rather as acknowledging the role of various individuals or entities and their specific capacities that must be addressed, such as to bring into play their role regarding the use of power.



social interactions, the disciplinary nature of the law itself does not singularly control individuals but produces particular subjects and in turn is the result of these particular subjects. That is, the law maintains some form of influence but that influence is part of a broader framework relating to the interaction of individuals and the manner in which they might assert their influence. The law does not serve a regulatory role between the state and the individual but rather functions as part of the process in shaping individuals and allowing for their reactions that in turn further serve to shape and influence the social process. The law however does not sit above such a process but tends to be part of the ongoing change and assertions that individuals might adopt.

What is important for a human rights understanding of this approach is the transformative notion of social interaction, including interaction between the individual and the state. All entities exercising power, or espousing the right to a particular belief system, are part of a broader framework of social relations. The state, like other created or artificial entities, is super structural as its power derives from sources that are external to its framework.

As a result of greater acquired information and the manner in which information and knowledge is applied, there exist new modalities of power. Power results from a set of social relations that involves not only the state, but also other units such as international institutions, both public and private, as well as individual influences. The result is that power does not act solely as a disciplinary mechanism imposed by the state, but as part of the process for distributing goods and meeting the decided ends of the actors involved. Concomitant with this approach, while power is part of the overall conditioning of one's actions, it is not the sole means for regulation. Rather, power also is subject to the influences of previous and concurrent conditioning of one's actions by the variety of influences and social interactions that take place around us. As others exercise power, one's knowledge is affected that in turn will influence the individual's use of power.

The link between power and knowledge arises from the recognition that the role of knowledge, as derived from discourse to form an ever-changing notion of our material reality, forces one to account for the changes that knowledge creates. Initially one might conclude that with the increase of the ability to acquire greater extensive knowledge, the means for controlling others also will increase. Nonetheless, concomitant with the acquisition of greater extensive knowledge is the development of more intrusive inquiry by all actors who are involved in the discourse, an important realization for

perceiving the role of human rights.<sup>1</sup> Considering the underlying utility of the freedom of expression,<sup>2</sup> the acquisition of knowledge by society also will create a more insightful discourse by the parties involved in the process. While this point might be obvious, what it demonstrates is that the role of knowledge not only serves as a means for disseminating information to other actors, but also knowledge serves a material function by creating change in one's understanding and interpretation of an event that will have a material effect on one's actions.

Such an acknowledgement of the role of knowledge gives rise to Foucault's link between knowledge and power. Power is not a unilinear relationship since so called relations of power are interwoven with other forms of relations like social and political relations that serve to condition and influence each other. The relations of power, as developed in an information-oriented world, are multiform and are not found in a dichotomous relationship between the dominator and dominated.<sup>3</sup> Rather, in the words of Foucault, "it [power] produces reality; it produces domains of objects and rituals of truth." (Foucault, 1977: 194) Pursuant to this understanding, "individuals are the vehicles of power, not its point of application...The individual, that is, is not the vis-à-vis of power; it is, I believe, one of its prime effects." (Foucault, 1980: 98)

Because power is so pervasive and has such far-reaching affects, it tends to encroach upon all areas of life and influence our modes of thinking and acquisition of knowledge. What develops from this link between knowledge and power is not power as an overarching form of exertion of control over a particular group, but the creation of an inter-linked system of influences and changes between the relating parties. Thus, human rights assist in this inter-linked system as a mechanism of power both by the state as a disciplinary technique and by the individuals as an assertion of a right.<sup>4</sup>

Power is not a conscious decision deriving from a state's exercise of sovereignty to assert a state's so called will. The latter is too diffuse a concept and is subject to a host of influences. Rather, power can be better understood as a transgressive notion that is external to a conscious decision given the role that all individuals maintain in creating such a reality. The contribution of Foucault lies in the

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1. The intrusive inquiry is particularly apt for the international human rights context as the individual or group strive for a louder voice and broader role when moving to uphold their rights.

2. For example, as Mill understood it to spread social truth.

3. See: Foucault, 1977.

4. See: Ivison, 1998: 132.

realisation that power is not simply a relationship between entities, for example as between the individual and the state, nor is it a matter of dividing up power between various entities, such as between international organisations and the state. Rather, power is distributed throughout complex social actions which serve to modify the actions of others, and not because a dominant agent possesses power in any structured sense.<sup>1</sup> As a result, in the words of Foucault:

One cannot confine oneself to analysing the state apparatus alone if one wants to grasp the mechanisms of power in their detail and complexity...I do not mean in any way to minimise the importance of effectiveness of State power. I simply feel that excessive insistence on its playing an exclusive role leads to the risk of overlooking all the mechanisms and effects of power which don't pass directly via the State apparatus, yet often sustain the State more effectively than its own institutions, enlarging and maximising its effectiveness. (Foucault, 1980: 72-73)

What develops then when considering the role of power, especially in the course of international human rights, is that power is not an entity unto itself that develops following a variety of state assertions but is recognised as a subjective notion given its source as deriving from an external plane and its relationship with knowledge. In the words of Foucault, "power is everywhere not because it embraces everything, but because it comes from everywhere."

While unstable in the micro level, power is a constant factor that circulates throughout all social relations. In a sense, the actions of peripheral social agents serve to create alterations and indicate shifts in the so-called sovereign power's actions and directions. The existence of power as understood by Foucault is a series of multiple points of resistance<sup>2</sup> that serve to assist in identifying power. Because power is a multiple layered process, whereby many individuals or bodies will attempt to exercise their power, the assertion of such power becomes part of an ongoing process of domination and resistance. As a result, one can maintain that power relations are immanent in the social spaces occupied by the variety of actors. Power is a relational aspect as it depends on a multiplicity of targets and influences.

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1. See: Rouse, 1995: 106.

2. Foucault played on Clausewitz in noting that pursuant to our current world structure, politics is the continuation of war.

Additionally, it is important to note, upon considering the role of power as a source of delimitation, that power is not only influenced by social forces coming to the fore, but also of course tends to influence social forces. Power is part of an ongoing and ever-changing relationship of resistance to the assertion of power. While influencing other actors, the actor asserting power also will be subject to influences and thus changes in the understanding of power accorded to the actor. Resistance to the assertions of power are not exterior to the power process but form an important role not only in creating or in shaping a new understanding of power but also in identifying and clarifying the power relations. As a result, Foucault asserted that the entrenchment of disciplinary mechanisms (for example, from the state) served to highlight the significance of the one subject to discipline. The attempt to create a regulatory system for example forced society to address various social members, such that the imposed discipline results in an elevation and greater recognition of the one receiving the discipline.<sup>1</sup>

Upon considering the variety of points of influence in the current international structure, one can understand how non-state entities maintain a rather powerful and influential role. For example, the power of a human right norm is not only that it represents a right per se, but also that it serves as a form of producing a reaction and creating a continuing social discourse. Asserting a right becomes the means for making a demand and asserting one's power similar to any form of assertion.

Power also is omnipresent due to its distribution between social networks. Social alignments mediate power such that even a so-called powerful entity like the state is still dependent upon its subordinates as grounds for maintaining and upholding power. Claims to rely on a right or some form of emerging international norm reflect assertions of power by various entities. One does not have greater control over the other but rather all are subject to complex social relationships. The result is not that modernity is a dangerous development because of the greater reliance on regulations as a means for ensuring our enhanced freedom, but rather the regulation is merely one aspect of a social force that is exercising power. Power is now dispersed across a wide-ranging plane of interactions, be it the state, an international organisation, a non-governmental organisation or an individual.

What is important to note, particularly when considering the assertion of a religious belief, is the inherent relationship between

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1. See: McHoul and Grace, 1997: 72.

knowledge as a form of understanding and power as a means of exercising such knowledge. The social discourse operates within the framework of power to influence and change. For Foucault, power is not a matter of displaying what power capacity one maintains. Power is not a zero-sum game with the most powerful being the last person standing or yielding the greatest influence. What is significant is the manner of using such power at a particular target. Foucault linked such an approach with knowledge since as we acquire greater disposal knowledge we also attain greater capacity for control. Hence, new forms of knowledge create new forms of power.<sup>1</sup>

What merits consideration then is the formation of such a sense of power. Why one understands an idea to be the truth and how that came about is more important than understanding the eventual use of power. Granted there might be social forces that will assert themselves at the expense of other individuals by virtue of their position. The state for example generally commands greater capacity for control. Yet power as understood by Foucault is more of a transgressive vehicle and not a form of subjection, since the subject that constitutes power is actually part of the overall mechanism.<sup>2</sup> It is not a dichotomy of subject-object but a matter of using power as part of the overall process that ebbs and flows with the tides of power.

Within the context of human rights, the dichotomous relationship between the sovereign state and the individual according to Foucault is misplaced. The focus is not on the sacrifice or deference to the sovereign entity nor what is the scope of power available to the sovereign state. These are issues that pertain to the eventual domination or use of power that results from an entity having the capacity for power, or, to use the language of Foucault, as a result of an entity asserting what it understands to be the truth concerning its role and status as a means of exercising its power. Rather, the sovereign entity is part of the overall power framework not because it is the final "power user" but because of the manner in which it uses power and how power is used against it. That is, the state, like any other user of power is not above the power framework but actually part of that framework. The result is that a transgressive approach moves a reviewing body to consider the broader interplay among the various actors and the implementation of their understanding of knowledge within society.

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1. See: Rouse, 1995: 96.

2. See: McHoul & Grace, 1997.

For Foucault, the state is a creation of our discourses and is not representative of a unified whole. The state can be understood in a historical sense as being the result of an attempt to de-personalise our forms of relationships.<sup>1</sup> Because power is coextensive with all forms of relationships, the state is merely one aspect of such power relationships given the possibility for influence as well as to be influenced by the actions of others. The state is merely another spoke in the wheel and not necessarily the wheel itself.

#### **Freedom of Religion or Belief**

Within the arena of the human right to the freedom of religion or belief, this approach begins to legitimise the social role of individuals espousing beliefs external to the inherent religious framework. One may begin to contemplate a potential social role for an individual asserting a belief by considering the social relations that are taking place and the significance such an assertion has on social discourse. Consideration turns towards the impact on social relationships due to reliance upon a human right. The proposed emerging broader domain is transgressive to the social structure, given the constant interaction that ensues from individual claims to rely on a particular human right. The possibility is open for the development of alternative themes that can assist to explain the social function of a belief and not be entrenched in an atomist context. The unavoidable interaction between individual beliefs and society implies the necessity for turning to an alternative understanding of religion and individual beliefs, one that accounts more for the social significance of the belief within the overall social discourse.

Foucault's discussion regarding epistemology indicates an approach that can have merit for consideration of the significance of the human right to freedom of religion. Foucault indicated that even in more objective fields such as the natural sciences, discoveries solely do not occur because of scientific, empirical, experiments, but also as a result of changes in the political and social arena that alter our perception and understanding of certain processes; discoveries happen as different discourses become acceptable and society removes previous social or language barriers.<sup>2</sup> Similarly, scientific developments and their social acceptance also will have an impact upon one's understanding of how society incorporates such changes. Abortion for example had a major impact upon the role of the women and her capacity to control her body, such that one may interpret the initial attempts to criminalize abortion as a desire to control such changes in

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1. See: Constable, 1991: 268.

2. See: Foucault, 1980: 115.

the relationships between men and women.<sup>1</sup>

The point is that external social changes and developments will create inherent shifts in one's understanding of events and perception of one's role, such as also to influence the development of a religion or belief. Knowledge is a social condition. An individual maintains certain information because of one's social understanding. Given that reason and knowledge are embedded in socio-cultural contexts, we can come to grasp the development of ideas by viewing them in the context of the social practices in which they figure.<sup>2</sup> Asserting a belief by the state, a group of individuals, or an individual believer is part of this ongoing social process that serves to form the social framework. Part of the significance of a religion or belief is not the belief itself, but the events and changes occurring in society that prompt one to consider assertions regarding a religion or belief. It is more of a transgressive accounting of a belief that turns ones attention towards the underlying social process rather than being rooted in an almost impossible framework of individual rights that does not reflect surrounding developments nor offer a descriptive context from which to analyse an assertion.

Additionally, for Foucault, thought is not necessarily a subjective, interior, process, but is an external transgressive idea that defines an attitude of what we are ontologically.<sup>3</sup> This point could have rather far-reaching effects when accounting for an individual who is asserting a particular belief. We are exposed to a number of different and contrasting ideas and notions that constrain our interpretations and understandings; public ideas precede private changes. Discursive formations arise because of the necessity to fragment ideas and new approaches in order to examine and understand the assertion. The result is that we recognise the existence of a host of competing theories and ideas, such that the focus becomes an outline on the systems of thought as objects in their own right. For example, the study of linguistics recognises that the importance of language is not merely the communicative benefits of language, but also the fact that it signifies and encapsulates the surrounding social and political background of a society or an individual. Foucault asserted that upon considering language, or other social developments, one must consider not only the social interaction that is involved, but also the social development that gives cause to reflect upon the social condition. Furthermore, language is not only a form of influence and change, but it also is subject to

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1. See: Siegel, 1992: 261. Foucault addresses the significant of such changes in his historical analysis of the treatment of the criminally insane.

2. See: McCarthy, 1998: 246.

3. See: Simons, 1995: 89.

influence and change. Hence, one can begin to discern the value of the transgressive approach for the human right to religion. Religion certainly will maintain some form of social influence, especially when factoring in a proselytising religion. Yet, such religion or belief system is subject to constant change and influence by surrounding social factors. Permutations and different interpretations will arise not only due to internal decisions, but also because of changes in the broader social context.

Such an understanding affords an insight into the consideration of manifestation of a belief. While Foucault was fiercely descriptive, a reviewing body can better assess the social processes by understanding the framework of the assertion. The social context and development can afford more constructive insight and better reflection on the assertion of a belief. The important element thus becomes an attempt to understand the implications of a discourse and the manner by which such discourse was formed, rather than examining the assertions being made within the discourse, because the push and pull that derives from the discourse will in turn influence another. The actual content of the belief is not the key issue, thus making it easier to address inherent contradictions between a belief and other rights or the implications of a group versus individual assertion. The subject, while an important factor, is still linked to the external ideas that are being developed and manifested as such assertions and their manner of formation are what go towards the make up of the individual. Given the difficulty in identifying the truth behind an assertion, or, regarding a religious belief, the capacity for balancing between a variety of beliefs or recognising a minority belief, what could be deemed even more important is the manner in which such assertions conform to the ongoing social discourse. Foucault proposed that the issue regarding the truth is one's striving to acquire knowledge, and not necessarily the struggle between what is and what is not the truth. As we accept novel uses of ideas and words given different time periods and developments, so too the social understanding of belief or the truth will be contingent.<sup>1</sup> Similar to the 18th and 19th century class struggle where the battle was not between the powerful "haves" and the resisting "have-nots" but was a series of ongoing clashes that formed the social body of the time,<sup>2</sup> a belief system can result from, or be a response to, the surrounding social regime.

It is important to recognize that in forming a belief, the individual is subject to a host of internal and external influences that derive from

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1. See: Foucault, 1989: 52.

2. See: Foucault, 1989: 187-188.



constant interaction with society.<sup>1</sup> A person is subject to many influences that will provide shape and coherence to a particular belief and even to a particular religious group. The manner in which one practices a belief similarly will shift as social influences and cultural developments encroach upon one's epistemological sources and create shifts in one's priorities. For example, the role of women in many religious belief systems has changed due to shifting social practices that has resulted in a sounder social position for women. While not fully attained, greater social acceptance has translated to changes regarding their position and role within the religious realm.

The implication of this relationship between the individual and society highlight the importance of how we go about acquiring knowledge. The shaping of a particular standard of belief and determining the influence of social relationships is where the significance of a belief will come to the fore. What merits analysis when considering the human right to freedom of religion is the dynamic of the relation between the individual's belief with the external world, for that is where the assertion of the right will be felt and that can be understood as part of the driving source of the belief. Discerning the interplay of social factors, where manifestation of a belief becomes part of the social discourse, is important for forming a viable human right to freedom of religion. The belief itself is not the focal point; rather one must account for the surrounding factors of the broader considerations that went into the individual's attempt to manifest the belief.

Approaching an emerging belief system, or any religious system for that matter, from a social perspective might appear counterintuitive to the very nature of religion. Religion or belief is generally understood as a rather closed affair that derives from specific sources or individuals within the group who in turn assist others in understanding and implementing the practices of the belief system. Nonetheless, theologians understand the inclusion of social considerations and external factors as a necessary element for religious beliefs. Unlike prior religious thinkers who mandated that religious edicts reflect the underlying social morality,<sup>2</sup> present day scholars recognise the difficulty in declaring an objective moral standard that is universally applicable. Present day theologian strives

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1. See: generally Taylor, 1989; Hammer, 2001: Chapter Four. (discussing the significance of a conscientious belief).

2. An inherent tautology that derives from the history of religion as a basis for moral reasoning is the problem of how to reconcile a moral standard as reflected by a religion that does not approve or refuse individuals who are not believers yet maintain a moral lifestyle.

for a combination of the subjective and objective elements to arrive at an acceptable moral standard<sup>1</sup> thereby acknowledging the derivation of a religious standard from internal as well as external influences. Religious systems therefore are accounting for the external world and the manner in which it influences the development and manifestation of a religious belief. As social changes or developments occur, religious systems will tend to either incorporate such changes or react in some responsive manner because of their religious beliefs. In either event, there is an inherent reaction to social developments that in turn cause a change to the religious system.

One may interpret a belief or ideology not as a truism, but as resulting from the “effects of truth [that] are produced within a discourse which in themselves are neither true nor false.”(Foucault, 1980: 118) The knowledge at one's disposal produces what the individual or society understands to be the truth. Truth, be it a result of experiments, an assertion of a religious belief, or the reflection of an individual's belief, is an ongoing process that need not be defined because it is a matter of continuous discourse subject to change.

A similar understanding can begin to address some of the problems relating to the assertion of an individual belief that might be contrary to an existing religious framework. Understanding a religious or individual belief not as a reflection of a truth but as a matter of ongoing discourse within society provides for a more flexible approach. The entrenched religion is subject to constant influences and external exertions that would suggest the occurrence of ongoing change. The truth is not what is attained but rather what is reflected in the continuing discourse, such that the entrenched religion or newly asserted belief are not truth in themselves but rather an exercise of what the individual understands to be the truth. Hence the inherent tension between an entrenched belief and a potentially conflicting individual belief is not a threat per se to the majority religion, but rather is a form of maintaining ongoing discourse between social elements.

Foucault's descriptive understanding provides the contextual element that can serve to define many of the problems relating to freedom of religion and better assessment of the manifestation of a belief. The development of a belief could be the result of a host of influences based on our particular regime of understanding; a belief need not relate to the truth of one's existence or to some lofty ethical standard. Rather, asserting a belief that differs from the accepted

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1. See: Fuchs, 1987, in: Zecha and Weingartner.

religious structure of society is indicating another way in which we can understand the truth. Similarly, a state also must realise that its conception of religious reality is subject to change. It too is not a reflection of the truth but a development that is subject to the social forces and social change given the ongoing push and pull between individuals within the state who assert their power in different forms. While the exteriority is limited for an individual belief since it emanates from the individual's subjective understanding of the changes and discourses surrounding the individual, social factors also tend to influence and shape one's internal belief structure.<sup>1</sup> Relying on a belief need not entail an individual's strive for the search for a universal truth, but rather can be understood as an ongoing search for a new understanding of one's position in the world and a sharper focus on the freedom that defines an individual's distinguished role in life.<sup>2</sup>

The key factor then is to acknowledge our derivation of knowledge and understand our social interactions, with a view towards shaping a new understanding of ourselves.<sup>3</sup> This assists to identify the underlying goal when considering a belief. As the external world shifts and different alternatives become available, one's approach to the truth of a particular belief also will be subject to change. Beliefs then become contingent ideas, given different levels of knowledge and understanding in societies.

### **Significance for the Right to Freedom of Religion and Belief**

Pursuant to this understanding of power and knowledge as creating an ongoing form of interaction and influence, asserting the right to freedom of religion or belief also will be of more tactical use since the human right is a form of asserting oneself and using the available power tools.<sup>4</sup> One's subjective understanding of discourse regarding the truth or a belief can become a powerful tool in shaping and influencing society and producing a particular effect.<sup>5</sup> This transformative process places the focus not on bilateral oppositions, but rather on the notion of perpetual differences. One should not only discern what "is", but also how the "is" becomes a

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1. Walzer makes a similar point in discussing the potential universality within Judaism. [speech at Carnegie Council]

2. See: Bernauer and Mahon, 1994: 153.

3. See: Rouse, 1994: 111. Noting that understanding Foucault as striving for an ongoing process of attaining truth can begin to address critics such as Taylor and Rorty, whose analyses were tied to the epistemic or political sovereign such that they could not avoid the conclusion that Foucault was caught in a never-ending cycle of power.

4. See: Ivison, 1998.

5. See: Foucault, 1977: 123.

transformable unit.<sup>1</sup> Social interactions, in particular religious or individual beliefs, derive from discourses that influence, but also have been influenced by, surrounding social factors. The significance of this is that we do not only alter our modes of operations because of a particular belief but, because of the transformative process, we also modify the rules of formation.

The implication of Foucault's structuring social interaction based on power is the relegation of individual liberty and autonomy to being a minor factor. Individual liberty could be construed as the flipside of state sovereignty whereby just like sovereignty is a term that does not describe the true relationship and power structuring between the state and the individual, so too concerning individual liberty. The individual asserting a claim to liberty via the exercise of a right is simply utilising the same power relationship that existed between the individual and the state. The description does not reflect the underlying reality or the inherent link between power and knowledge.

Yet, what is important for Foucault, and for our understanding of the significance of the freedom of religion or belief as a human right, is that individuals critically evaluate and modify systems. Autonomy is a form of aesthetic self-invention rather than some strive for a universal understanding of the truth.<sup>2</sup> Liberty is an internal notion focused on the self, whereas the social interaction that derives from asserting a belief or exercising a right is part of the strategic interaction that brings to the fore the use of power.

One can approach religion or belief in a manner similar to the construct proposed by Foucault regarding power and knowledge, especially when considering the conflict that arises between states and emerging religious or individual beliefs. The development of religion or belief is a result of alterations in our understanding. As we strive for a specific social understanding that derives from a religion or belief, we see an emergence in which the individual is making use of one's knowledge within the context of exercising power. Because the achievement of truth is part of the eventual goal for a religious or individual believer, the assertion of a belief is in a sense a personification of what that individual understands to be the truth. In a broader sense, the assertion is a part of the social discourse that goes towards contributing to the overall knowledge. This knowledge in turn is asserted against society not only as a power tool so to

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1. See: McHoul and Grace, 1997.

2. See: McCarthy, 1998: 268-269. Noting however the distinction between some of Foucault's earlier works that tended to treat the individual as a nodal point that shied away from subjectification in favour of seeking overall networks of power.

speak, but also as a means of effecting change in society's understanding of the truth. In turn of course society or the majority or other forces will respond with their understanding of the truth as well with the view towards asserting its knowledge that might emanate from a more accepted religious belief and with the attempt to assert its power as well over other individuals. That is part of the interlinked system of influences between power and knowledge.

Upon considering the manner in which one is to uphold the rights of varied belief interests, the issue is not a matter of balancing rights between say an accepted religion and a minority group or a discriminatory practice and freedom of religion, but rather one can comprehend an interplay of social reactions among various individuals. Because we all maintain some form of power whose purpose is not to subject others or dominate others with our views<sup>1</sup> but to create some form of social change, individual beliefs maintain a significant social effect. A reviewing body considering manifestation of a belief need not focus solely on the individual assertion of a right, but on the manner in which the assertion plays a role in the social process.

In the Cha'are Shalom case, the European Court would have done better to acknowledge the role that these minority bodies play within the social discourse. Court seemed to overlook the importance of the social discourse that was occurring between the majority and minority factions within the Jewish community. The factions differed as to the proper scope of various Jewish legal edicts. In essence, the factions were raising the issue of what is the "true" opinion for ritual slaughter. Upon considering manifestation of a belief, it is important to recognise that the assertions are subject to ongoing dialogue and constant change. This point was alluded to in the Court's dissenting opinion when stating that the seminal issue actually was that of upholding pluralism within society by providing for the manifestation of a particular belief, rather than dismissing the minority faction's assertion due to the possibility of acquiring meat from outside the country.<sup>2</sup> Even more so, however, the Court should have taken into account the surrounding factors that led up to the manifestation. A group of individuals deemed a particular form of ritual slaughter to be a method that did not conform to their beliefs. It was not an issue of accounting for the potential to achieve a compromise within the Jewish community or even the right to assert

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1. Although the possibility of domination is ever present.

2. One wonders whether the Court would uphold a complete ban on such ritual slaughter using the same reasoning (i.e., that acts of slaughter are not deemed a manifestation of a religious belief).

fiscal control over the received taxes from the slaughtering process,<sup>1</sup> but rather a matter of understanding the context in which the claimant raised the assertions. Due to changes within the social discourse of the Jewish community, there arose a necessity by the minority faction to adopt a more stringent stance in interpreting the dictates of the Jewish law. In essence, this minority faction is part of the ongoing discourse regarding the accorded interpretation of the Jewish law and to the meaning of what it is to manifest a belief. Therefore, the assertion by this minority faction within the Jewish community is essentially within the social context of what it means to manifest a belief, such that a supposedly pluralist state would inherently provide for the manifestation of the belief rather than dismiss the right.

Manifestations are assertions of power that pertain to conditioning the actions of others and contribute to the social dialogue; they need not be understood as individual assertions that require state oversight. Denying the assertions for reasons like acquisition of meat from outside the state does not address the asserted right but rather avoids the issue. It is important to acknowledge the social function of these beliefs both in forming additional avenues of understanding and in recognising the necessity for social development. Laws or rights are inadequate in this sense because they are not a final address to assert against the state but rather are a tool used in the broader social struggle to assert oneself in shaping and structuring the practices of the political order.<sup>2</sup> Hence the role of the minority belief is significant, such as to call into play issues like why did such an assertion arise and to consider the broader social interplay of the minority belief.<sup>3</sup>

Similarly, in the Sahin case, the majority interestingly noted that the “meaning or import of the public expression of a religious belief will differ according to the time and context” dependent on national conditions.<sup>4</sup> While the Court used this to justify the limitations imposed by the state, it might have done well to consider the importance of the religious belief being asserted within the overall social context, and not just as perceived by the state. The manifestation was an inherent and seminal part of the ongoing social discourse that gives rise to new meanings and interpretations of the

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1. These are points that the majority of the Court alluded to in its discussion, based on the contentions of the State.

2. See: Ivison, 1998.

3. Note that this is not meant to serve as an acknowledgment of the margin of appreciation as deference to the state. It is the opposite – the social construct actually derives from a host of sources and influences that are external to the state and its capacity.

4. See: Sahin, para 110.

belief system. Foucault's proposal of a transgressive understanding to describe instances of social relations opens the door for a reviewing body to consider a belief without weighing the merits or significance of the belief. Rather, one can begin to understand the manifestation via consideration of the function of the assertion and the social significance of these assertions for the individual and particular group. One's attention is turned towards the social role of beliefs, such as to transgress the individual context, by considering how these new assertions arose and what is their social position. How will assertions affect future understanding of manifestation and what can be understood from these manifestations concerning social discourse? What is the approach to the asserted belief and how does that encapsulate a current understanding of the contingent truth, which will certainly alter as new forms of manifestations arise?

In demonstrating an alternative form of approach towards social interactions in general and in the relationship between the individual and the state, an assertion of a religious belief takes on a different level of understanding. One need not assess the manifestation of a belief that conflicts with an entrenched religion as a social struggle whereby the more powerful force dominates or the religion more closely linked to the state prevails. Adopting a transgressive approach provides allows for an understanding of such social interaction as an attempt at amelioration within society. The belief that is being asserted is to be considered within the broader social framework, from outside the social sphere and from within the belief itself. The actual merits of the belief are not the focus but the formulation of the belief is what matters. In essence, beliefs are contingent and represent an ongoing discourse between social elements. The battle or struggle is not between the state and individual or between social forces, but entails a broader vista than is being played out as various individuals assert their rights. A minority faction within a religion or belief system will attempt to manifest a belief, whether it is correct or not. What matters however is the recognition of the importance of such assertions for the overall social discourse. This also can assist societies in transition, such as in many European countries with a burgeoning Muslim population. One may understand new assertions of beliefs, like wearing a headscarf to school, in a transgressive manner.

In applying the right to manifest a belief, the general tendency to focus on the belief and determine whether it conforms to the intentions of the treaty drafters, or is a so-called viable belief in the social system, is misplaced. Rather it might do well to consider why a particular belief came about, what is occurring within the social

framework such as to witness the emergence of a belief, and how did the belief emerge. While these questions are somewhat awkward, they tend to focus on the relevant questions concerning the right to freedom of religion. As a result of the diffusion of power across the broad spectrum of society, the entitlement of all social forces to assert a belief is part of this larger dynamic.

To turn to the state construct or to rely on a margin of appreciation doctrine as grounds for limiting a belief or defining the right to freedom of religion is overly narrow. The problems noted at the outset rise to the fore. Judicial tribunals must look beyond the temptation to engage in some form of social balancing by considering the broader social interplay that is at work. For example, a margin of appreciation doctrine could account for the social roles of all individuals who are involved in social discourse, including the individual believer, and not merely rely on state assertions regarding the desired social construct<sup>1</sup> as was done in the Sahin case. The role of power derives from all individuals not just the state, such that all actors maintain a level of importance when considering the manifestation of beliefs.

#### **Conclusion**

This article proposed an alternative form for understanding the human right to freedom of religion and belief. The key factor is that the context of the right is not to be solely understood as taking place simply as a matter of clashes between two opposing social forces, such as the state versus the individual, two opposing belief systems, or the clash between a religious belief and another human right. Each component should be understood as maintaining a capacity for assertion. Rather, it is an issue of asserting power and recognising that all social forces, including the state, are part of this process, not above it.

Given the enhanced role of individuals and other non-governmental and international entities resulting from the international human rights system, the capacity for asserting one's power takes on a different dimension. The apparent influential capacity that all actors play in defining and shaping society indicates the necessity for a different approach to the right to freedom of religion. A new belief or a minority belief has an important role to play within society, as does a contrary view or an externally affected group. The approach suggested in this article allows for the inclusion into the equation of social considerations apart from state interests. Adhering to a descriptive framework, it is important to recognise these

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1. See: Prebensen, 1998.



developments in a transformative sense as part of the overall social change and not as outside elements that are to be avoided or deemed insignificant to an individual oriented human rights system.

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