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**Seyla Benhabib**

## The return of political theology

### The scarf affair in comparative constitutional perspective in France, Germany and Turkey

**Abstract** Increasingly in today's world we are experiencing intensifying antagonisms around religious and ethno-cultural differences. The confrontation between political Islam and the so-called 'West' has replaced the rhetoric of the Cold War against communism. This new constellation has not only challenged the hypothesis that 'secularization' inevitably accompanied modernity but has also placed on the agenda political theology as a potent force in many societies. This article analyzes the contemporary revival of political theology by focusing on the headscarf debate in comparative constitutional perspective. It compares the well-known decision of the French Parliament banning the wearing of the headscarf in public schools (2004) with the decision of the German Constitutional Court concerning whether Fereshta Ludin, an Afghani-German teacher wearing the *hijab*, could teach in German schools (2003) and with the more recent judgment of the Turkish Constitutional Court (summer 2008) upholding the ban on the wearing of the scarf or the turban in institutions of higher learning. At stake in these debates is not only the meaning of fundamental human rights but also why women and their bodies become the object of disciplinary conflicts in culture, law and religion.

**Key words** constitutional courts · disciplinary conflict · 'headscarf' debate · political theology

Increasingly in today's world we are experiencing intensifying antagonisms around religious and ethno-cultural differences. Since 11 September 2001 the vocabulary of 'the clash of civilizations' (Huntington) of the

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**PSC**

1980s has given way to what is called a 'global civil war' between the forces of political Islam and western liberal democracies. The confrontation between political Islam and the so-called 'West' has replaced the rhetoric of the Cold War against communism.

Unfortunately, this rhetoric is not restricted only to the destructive foreign policy of the old Bush Administration and American neo-conservatives. Since the bombings in Madrid (2004) and London (2007), the Danish caricature controversy over the representations of the Prophet Muhammad (2005), the murder of Theo van Gogh in the Netherlands by a Moroccan militant (2004), and the French 'scarf affair' (1989–2004), the confrontation between the so-called forces of 'political Islam' and western liberal democracies has come to dominate European discourse and politics as well.<sup>1</sup> In view of these developments, we need to begin by reconsidering the 'secularization' hypothesis.

### The end of the secularization hypothesis

Since Max Weber's essay 'Wissenschaft als Beruf' (1919), it had been axiomatic that modernity is characterized by '*Entzauberung*', by the loss of magic in the everyday world and the rationalized differentiation (*Ausdifferenzierung*) from one another of the spheres of science, religion, law, aesthetics and philosophy.<sup>2</sup> Max Weber was giving expression thereby to a widely held view since the Enlightenment that the spread of knowledge and science would mean not only 'holding religion within the bounds of reason', as Kant had thought, but dispensing with religion altogether in the name of modern reason and an emancipated society, as Feuerbach, Marx and Nietzsche had postulated.

Yet this juxtaposition of modernity against religion was not as simple as some would have us believe: already Karl Löwith and Hans Blumenberg had uncovered the theological sources of the Enlightenment's own faith in the secularization hypothesis by arguing that the idea of a united mankind, capable of cumulative learning and progressing toward a common Enlightenment, had its sources in religiously inspired salvation myths.<sup>3</sup> The Enlightenment was not beyond theology but was itself based on theological premises of a '*Heilsgeschichte*' (salvific history). And even early sociological students of modern societies, such as Alexis de Tocqueville, pointed out in the mid-19th century that the great modern experiment with democracy required religious foundations. The most egalitarian modern society of Tocqueville's time, the United States, remained deeply religious. The secularization hypothesis then always had its critics and skeptics.

Today we are witnessing the worldwide growth of religious fundamentalisms and the intense challenge to one crucial aspect of the

modernization process in particular: the separation between religion and politics, between theological truths and political certitudes. The ever-fragile walls of demarcation between religion and the public square have become increasingly porous. Certainly, this phenomenon is most strikingly observed with the rise of political Islam, which not only challenges the separation of religion from politics but which threatens the very boundaries of Muslim nation-states altogether, in the name of the call to '*Dar-ul-Islam*' (the domain of Islam) to prevail over '*Dar-ul-Harb*' (the domain of the infidels).

In this respect Turkey is unique: modern Turkey has been a republic since 1923 and has emerged as a nation-state after the collapse of the Ottoman Empire, and the abolishment of the caliphate in 1924. Discarding the theological trappings of the Ottoman state, where the sultan was also the caliph (the religious leader of the Muslim world), Turkey opted for the privatization of the Muslim faith, along the model of liberal democracies and for a version of republican secularism, called '*laiklik*'. The revolutionary ideology of the founders of the modern Turkish republic, *Kemalism*, was also a dirigiste ideology, granting the state a great deal of control over religious affairs, and, for that matter, over the economy and civil society as well. Religion became a matter of the private faith of individuals and the state abolished theological vocabulary from its own affairs, all the while acknowledging that the Muslim faith was the official religion of Turkish society. Through the influential 'Imam-Hatip Okullari', the Turkish state still educates the *hafiz* and *muezzins* (cantors of the Koran) and *imams* or *hocas* (Muslim clerics) who are responsible for the obligatory Friday prayers in millions of neighborhoods across the country.

Today *political theology* is on the agenda in contemporary Turkey: in the last decades the *cordon sanitaire* that tried to keep the Muslim faith out of public-political life has broken down, and Turkey, like the rest of Europe, is experiencing its own dilemmas of how to situate 'Muslim religion in the public square'.<sup>4</sup>

Women's bodies in particular have become the site of symbolic confrontations between a re-essentialized understanding of religious and cultural difference and the forces of state power, whether in their civic-republican, liberal-democratic or multicultural form. A principal reason for the emergence of these public debates, with their constantly shifting terms, is a sociological one which I have characterized in other works as 'reverse globalization'.<sup>5</sup> The distinction between the cultural and the religious as well as the identification of actions and customs as being one or the other is occurring against the background of the history of colonialism and of the West's encounter with 'the rest'. Whereas at one time it was the historical experience of western colonialism in facing its cultural and religious 'others' that forced European political thought to

clarify and solidify the line between the religious and the cultural, today it is mass migration from Africa, Asia and the Middle East to the shores of resource-rich liberal democracies – the EU, the USA, Canada and Australia – that is leading to the reframing of the distinction between the cultural, the religious and the political. Under conditions of immigration, a destabilization of identities and traditions is taking place and tradition is being ‘reinvented’ (Eric Hobsbawm). Certainly among the best known of such contemporary controversies which continues to preoccupy public opinion throughout Europe and Turkey is the so-called ‘scarf affair’, ‘*l’affaire du foulard*’, or ‘*la voile*’ in French, ‘*der Kopftuch Affaire*’ or ‘*die Schleieraffaire*’ in German, and the ‘*turban meselesi*’ in Turkish.

In this article, I explore how political theology under conditions of globalization refers to a space of instability between religion and the public square; between the private and the official; between discourses of individual rights to freedom of religion versus state considerations of security and public well-being. The ensuing difficulties are pithily suggested by a question recently posed by Jürgen Habermas: ‘How should we see ourselves as members of a post-secular society and what must we reciprocally expect from one another in order to ensure that in firmly entrenched nation-states social relations remain civil despite the growth of a plurality of cultures and religious worldviews?’<sup>6</sup> But what is ‘political theology’?

### Carl Schmitt's *Political Theology*

In 1922 Carl Schmitt published *Political Theology: Four Chapters on the Concept of Sovereignty*.<sup>7</sup> Reissued in 1934 with a new Preface by Schmitt, this text, along with *The Concept of the Political* from 1932, and the earlier *The Crisis of Parliamentary Democracy* [*Die geistesgeschichtliche Lage des heutigen Parlamentarismus*]<sup>8</sup> from 1923, established Schmitt as one of the most trenchant critics of the liberal-democratic project. Schmitt documented not only the sociological transformation of liberal parliamentarianism into the rule of special interest groups and committees which destroyed parliaments as deliberative bodies, he also drove home the rationalistic fallacies of liberalism until its ‘limit concepts’ – *die Grenzbegriffe* – were uncovered. These ‘limit concepts’ constituted the secret and ‘unthought’ foundations upon which the structure of the modern state rests. Sovereignty is one such limit concept; the principle of government by discussion and the assumption that opinions will eventually converge through deliberation are others.

Schmitt’s sociological and philosophical critiques have proven formidable and have inspired thinkers on the right as well as the left. From Otto Kirchheimer and Walter Benjamin to Hans Morgenthau and Leo Strauss, to Chantal Mouffe, Ernesto Laclau<sup>9</sup> and many others in our

times, Schmitt is the *'éminence grise'* to whom one turns when the liberal-democratic project is in deep crisis. There is no need here to document the extensive Schmitt Renaissance which has flourished in Europe as well as the United States. Instead, I would like to briefly recall some theses of Schmitt's *Political Theology* in order to demarcate the continuities as well as discontinuities between contemporary concerns that may be gathered under 'political theology' and Schmitt's own preoccupations.

There are at least three interrelated, and not always clearly distinguished, theses in Schmitt's *Political Theology*. First is a thesis in the history of ideas, sometimes referred to by Schmitt as the 'sociology of concepts' as well,<sup>10</sup> and best articulated through the following claim: 'All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver . . .'<sup>11</sup> In the second place, Schmitt explores *legal hermeneutics*, that is, the dialectic of the general and the particular, the law and the instances to which it applies. In the third place, Schmitt articulates a thesis about the *construction and prerogatives of sovereignty* as the seat of legitimacy in the modern state. What resonates most in contemporary debates is neither the first nor the second of Schmitt's theses but rather the third – his theory of the exception. It is as if the political *Zeitgeist* has given new life to the famous opening lines of Schmitt's *Political Theology*, 'Sovereign is he who decides on the exception'.<sup>12</sup>

The 'exception', this most notorious concept, which has now become a *bon mot* for our time, ranges in meaning from what defies a norm, or lies outside the norm, to the more technical sense in constitutional law of a situation in which martial law is declared, and some, if not all liberties, are suspended, and an 'emergency situation' – a *Notstand* – develops. But the 'state of exception', unlike the 'state of emergency', is not about the constitutional suspension of liberties and the assuming by the state of extraordinary powers alone; rather, the state of exception is a moment of utmost crisis when the very foundations of the order of the political as such are challenged. In Giorgio Agamben's *State of Exception*,<sup>13</sup> this wide-ranging ambivalence of 'the exception', vacillating between a theory of the particular and the unique in the context of legal hermeneutics on the one hand, and a situation in constitutional law and state theory of the suspension of the law and of liberties on the other, is retained and well articulated.<sup>14</sup>

Although the concept of 'political theology' is widely used, when uncoupled from Schmitt's doctrine of sovereignty and the exception, the phrase refers to quite a different set of issues than it did for Schmitt. In fact, in addressing *our* politico-theological predicament Carl Schmitt is of little use.

### Political theology beyond Schmitt

In his Introduction to a recent collection of essays, *Political Theologies: Public Religions in a Post-Secular World*, Hent de Vries asks:

... what *pre-*, *para-* and *post-*political forms do religion and its functional equivalents and successor beliefs or rituals assume in a world where the global extension of economic markets, technological media, and informational networks have contributed to loosening or largely suspending the link that once tied theologico-political authority to a social body determined by a certain geographic territory and national sovereignty? Is a disembodied – virtual, call it transcendental – substitute for the theologico-political body politic thinkable, possible, viable, or even desirable?<sup>15</sup>

By situating political theology within a global economic, technological and mediatic context, which loosens the ties that once moored theologico-political authority within ‘a certain social body determined by geographic territory and national sovereignty’, de Vries marks an important contrast between the past model of the theologico-political and today’s deterritorialized, transnational, televisually mediated and sometimes electronically transmitted contemporary religions and religious movements. In this respect, there is very little difference between the communicational forms of evangelical Churches in North and South America, Jehovah’s Witnesses in Russia, Wahhabism in Saudi Arabia, and Al-Qaeda’s sophisticated use of the internet and other contemporary media also through the itinerant powerful new voices of Islamic interpretation such as Al-Madoodi’s. In the global age, deterritorialized religions not only challenge the authority of the nation-state but dislodge national senses of collective identity as well. Particularly in societies of the Middle East such as Turkey, Egypt, Jordan and Iraq, which were created after the abolition of the caliphate, the collapse of the Ottoman Empire, and the retreat of British and French imperialisms from this region, the replacement of the spiritual authority of the Islamic *umma* by the authority of the nation-state as the principal site of solidarity, identity and self-definition was always fragile and contested. The principle *cuius regio, eius religio*, ‘whose rule, whose religion’, and the ‘territorialization of ecclesiastical authority’ were always contested experiences in Islamic societies that did not experience the ‘Westphalian’ demarcation process between religion and the state.

Paradoxically, by undermining the authority of the nation-state the deterritorialization of religion under conditions of globalization evokes memories of pre-modernity, and enflames the power of the tribes which are now busy renewing themselves with the means provided by decentralized means of postmodern communication, exchange, commerce and information. Hans Jonas observes that “Post-Secular” doesn’t mean,

then, an increase in the meaningfulness of religion or a renewed attention to it, but a changed attitude by the secular state or in the public domain with respect to the continued existence of religious communities and the impulses that emerge from them'.<sup>16</sup>

I would like to examine the challenges posed by the deterritorialization of religious faith to the formation of complex democratic identities in liberal democracies by focusing on the so-called 'scarf affair'. The politics of the scarf has become a transnational struggle, revealing complex moves and counter-moves taking place among the sovereignty of the secular state, constitutional negotiations, and the symbolic markings of the female body.

For all three countries which will be considered below, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights to which France and Germany as well as Turkey are party, provide the discursive frame of legal reference. Both ICCPR and ECHR use article 18 of the UDHR as a template. It reads: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and the freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'<sup>17</sup>

### **'L'affaire du foulard' (the scarf affair)**

'*L'affaire du foulard*'<sup>18</sup> refers to long public confrontations<sup>19</sup> which began in France in 1989 with the expulsion from their school in Creil (Oise) of three scarf-wearing Muslim girls and continued to the mass exclusion of 23 Muslim girls from their schools in November 1996 upon the decision of the Conseil d'Etat. Finally, after nearly a decade of confrontations, the French National Assembly passed a law in March 2004 with a great majority banning not only the wearing of the 'scarf', now interestingly referred to no longer as '*le foulard*', but instead as '*la voile*', but the bearing of all 'ostentatious signs of religious belonging in the public sphere'. The Commission headed by Bernard Stasi and presented to the President of the Republic, considered the wearing of the scarf as part of a growing political threat of Islam to the values of '*laïcité*'.

The affair, referred to as a 'national drama' (Gaspard and Khosrokhavar, *Le Foulard et la République*: 11) or even a 'national trauma', occurred in the wake of France's celebration of the second centennial of the French Revolution and seemed to question the foundations of the French educational system and its philosophical principle, *laïcité*. This concept is hard to translate in terms like the 'separation of Church and state' or even secularization: at its best, it can be understood as the public

and manifest neutrality of the state toward all kinds of religious practices, institutionalized through a vigilant removal of sectarian religious symbols, signs, icons and items of clothing from official public spheres. Yet within the French Republic the balance between respecting the individual's right to freedom of conscience and religion, on the one hand, and maintaining a public sphere devoid of all religious symbolisms, on the other, was so fragile that it took only the actions of a handful of teenagers to expose this fragility. The ensuing debate went far beyond the original dispute and touched upon the self-understanding of French republicanism for the left as well as the right, on the meaning of social and sexual equality, and liberalism vs republicanism vs multiculturalism in French life.

The French sociologists Gaspard and Khosrokhavar capture this set of complex symbolic negotiations as follows:

[The veil] mirrors in the eyes of the parents and the grandparents the illusions of continuity whereas it is a factor of discontinuity; it makes possible the transition to otherness (modernity), under the pretext of identity (tradition); it creates the sentiment of identity with the society of origin whereas its meaning is inscribed within the dynamic of relations with the receiving society . . . it is the vehicle of the passage to modernity within a promiscuity which confounds traditional distinctions, of an access to the public sphere which was forbidden to traditional women as a space of action and the constitution of individual autonomy . . . (*Le Foulard et la République*: 44–5; my translation)

'*L'affaire du foulard*' eventually came to stand for all dilemmas of French national identity in the age of globalization and multiculturalism: how to retain French traditions of *laïcité*, republican equality and democratic citizenship in view of France's integration into the European Union on the one hand and the pressures of multiculturalism generated through the presence of second- and third-generation immigrants from Muslim countries on French soil on the other hand. Would the practices and institutions of French citizenship be flexible and generous enough to encompass multicultural differences within an ideal of republican equality?

What exactly was the meaning of the girls' actions? Was this an act of religious observance and subversion, one of cultural defiance, or of adolescents acting out to gain attention and prominence? Were the girls acting from fear, from conviction or from narcissism? It is not hard to imagine that their actions involved all these elements and motives. The girls' voices were not heard much in this heated debate; although there was a genuine public discourse in the French public sphere and a soul-searching on questions of democracy and difference in a multicultural society; as the sociologists Gaspard and Khosrokhavar pointed out, until they carried out their interviews the girls' own perspectives were hardly

listened to.<sup>20</sup> Even if the girls involved were not adults and in the eyes of the law were still under the tutelage of their families, it is reasonable to assume that at the ages of 15 and 16, they could account for themselves and their actions. Had their voices been heard and listened to, it would have become clear that the meaning of wearing the scarf itself was changing from being a religious act to one of cultural defiance and increasing politicization. Ironically, it was the very egalitarian norms of the French public educational system which brought these girls out of the patriarchal structures of the home and into the French public sphere, and gave them the confidence and the ability to *resignify the wearing of the scarf*.

There is sufficient evidence in the sociological literature that in many other parts of the world as well Muslim women are using the veil as well as the *chaddor* to cover up the paradoxes of their own emancipation from tradition.<sup>21</sup> To assume that the meaning of their actions is purely one of religious defiance of the secular state denigrates these women's own capacity to define the meaning of their own actions and, ironically, reimprisons them within the walls of patriarchal meaning from which they are trying to escape.

The women's movements and organizations were split in their assessment of the ban against the wearing of the scarf: while the members of the organization Ni Putes Soumises ['Neither Whores nor Downtrodden'] celebrated the ban, organizations such as the Parent-Teacher Federation, SOS Racisme, Une Ecole pour Toutes et Tous ('A School for All') argued that the girls' human rights to freedom of religion, to education, to freedom from discrimination, were violated. Outside observers, including Human Rights Watch, the Islamic Human Rights Commission, and the US-based KARAMAH, Muslim Women Lawyers for Human Rights, agreed.<sup>22</sup>

Likewise, the interpretation of these events remains controversial in the literature: while Joan Scott considers the headscarf ban as manifesting a sexist and Eurocentric repressive French republican tradition, Christian Joppke, in *Veil: Mirror of Identity*, argues that 'At the critical moment, when the national allegiance of French Muslims was tested, they passed the test with flying colors, advancing from "victims" to "heroes" of the republic'.<sup>23</sup> Joppke is referring to the spectacular kidnapping of two French journalists by radical Islamists in Iraq, who then demanded a repeal of the headscarf ban, thereby provoking an unprecedented closing of ranks behind the French state. Joppke also provides some sobering numbers: in September 2004, after the law was passed only 639 pupils showed up with the headscarf and 100 refused to take it off; one year later there were only 12 at the start of the school year. When compared to 1,123 cases out of 9 million students in 1994 and to 1,256 in 2003, we see that the law has accomplished its goals. But unlike Joppke I am not

convinced that the successful integration of Muslim youth into French society has been achieved. The riots of spring 2005 in the predominantly migrant neighborhoods of Paris show that the flames of resentment, alienation and defiance against the French state can easily be stoked.

### The German 'scarf affair': the case of Fereshta Ludin

In recent years, the German public and the courts have dealt with a challenge quite akin to the scarf affair in France.<sup>24</sup> An elementary school-teacher in Baden-Württemberg, Fereshta Ludin, of Afghani origin and a German citizen, insisted on being able to teach her classes with her head covered. The school authorities refused to permit her to do so. The case ascended all the way to the German Supreme Court and on 30 September 2003 the court decided as follows. Wearing a headscarf, in the context presented to the court, expresses that the claimant belongs to the 'Muslim community of faith' (*die islamische Religionsgemeinschaft*). The court concluded that to describe such behavior as lack of qualification (*Eignungsmangel*) for the position of a teacher in elementary and middle schools, clashed with the right of the claimant to equal access to all public offices in accordance with article 33, paragraph 2 of the Basic Law (*Grundgesetz*), and also clashed with her right to freedom of conscience, as protected by article 4, paragraphs 1 and 2 of the Basic Law, without, however, providing the required and sufficient lawful reasons for doing so.<sup>25</sup> While acknowledging the fundamental rights of Ms Fereshta Ludin, the court nevertheless ruled against the claimant and transferred the final say on the matter to the democratic legislatures.<sup>26</sup>

Though it acknowledged the fundamental nature of the rights involved – that of freedom of conscience and equal access of all to public offices – the German Supreme Court, much like the French Conseil d'Etat, refused to shield these rights from the will of the democratic legislatures. But note that in the German case the headscarf ban applies to teachers only and not to students, since it has never been questioned that the pupils' wearing of the headscarf is protected by religious liberty rights, according to articles 4 and 2 of the German Basic Law. By not leaving the matter in the exclusive jurisdiction of the school authorities, and by stressing the necessity for the state to maintain religious and worldview neutrality, the court signaled to democratic law-makers the importance of respecting legitimate pluralism of worldviews in a liberal democracy. Still, the court did not see itself justified in positively intervening to shield such pluralism, but considered this to be the jurisdiction of the 'Länder'.<sup>27</sup> Undoubtedly, the fact that teachers in Germany are also 'Beamten', i.e. civil servants of the state who stand under the special jurisdiction of various civil service acts, may have played a role.

Nevertheless, it is hard to avoid the impression that the real worry of the court was the more substantive rather than the procedural question as to whether a woman who ostensibly wore an object representing her as belonging to 'the traditions of her community of origin' could carry out the duties of a functionary of the German state. As Baden-Württemberg's Minister of Education, Annete Schavan, argued in the opening salvo of the German headscarf controversy: 'The headscarf . . . also stands for cultural segregation [*Abgrenzung*], and thus it is a political symbol [which puts at risk] social peace.'<sup>28</sup>

Despite the fact that Ms Ludin was a German citizen of Afghani origin who had successfully completed the requisite qualifications to become a teacher, the two dimensions of her citizenship rights – the entitlement to the full protection of the law and her cultural identity as an observant Muslim woman – seemed in contradiction with one another.

Again, the German court's decision had some paradoxical implications: on the one hand, all existing regulations protecting or banning religious symbols in public schools were immediately nullified, and state governments 'intent on prohibiting the headscarf for teachers were required to pass legislation to that effect in that respect instantly'.<sup>29</sup> President Johannes Rau as well as the then-Cardinal Ratzinger, now Pope Benedict XVI, argued that the legislation had the effect of prohibiting *all* religious symbols from public schools, and unless otherwise decided by the legislatures, this would set Germany on the road towards *laïcité*. Since Germany is not a laic state but one deeply wedded to the 'Christlich-Abendländische' (Christian-Western) tradition, in which the three recognized denominations – Protestant, Catholic and Jewish – are financed by a tax known as 'Kirchensteuer', directly levied on the believers, the only way to prevent French-style *laïcité* was to pass legislation singling out Islamic symbols as inherently political and provocative. As Joppke observes, 'with the exception of Berlin, the anti-headscarf legislation passed in seven other *Länder* (Baden-Württemberg, Bavaria, Hesse, Lower Saxony, Saarland, and more recently Bremen and North Rhine-Westphalia) more or less exempted Christian and Jewish symbols from its reach'.<sup>30</sup>

Baden-Württemberg's anti-headscarf legislation which is contained in three new sentences introduced into paragraph 38 of the state's educational law is blatant in its discriminatory treatment of Islam: 'The representation of Christian and occidental values and traditions corresponds to the educational mandate of the [regional] constitution and does not contradict the behavior required according to sentence 1.' Sentence 1 in turn states that 'Teachers are not allowed . . . to give external statements of a political, religious [or] ideological nature' which could endanger or disturb neutrality towards pupils and parents.<sup>31</sup> There seems to be no question at all that the headscarf, much like a 'corporate logo', has

an ‘intrinsic meaning’, and it does not matter what the user intends thereby.

The German Constitutional Court failed to present a robust constitutional defense of pluralism. By turning over to the legislators the regulation of the wearing of the headscarf via statute, it failed to protect a fundamental human right and furthermore gave the green light to a series of highly discriminatory and punitive legislation singling out Islam in particular.<sup>32</sup>

### The Turkish ‘turban affair’

In February of 2008, the ruling Turkish party, the AKP (Adalet ve Kalkınma Partisi), decided to reform the law that banned the wearing of headscarves and turbans in institutions of higher learning in Turkey. In June of 2008, the Turkish Constitutional Court overturned the new legislation, arguing that it was subversive of the secular nature of the Turkish state.<sup>33</sup> Opponents of the AKP tried to have the party itself banned for seeking to subvert Turkey’s ‘*laik*’ (secular) constitution altogether. Contrary to many fears and expectations, the court declared in August 2008 that the AKP would not be shut down; rather, it would be fined for actions contrary to the *laik* constitutional order.

Initially, the decision to reform articles 10 and 42 of Turkey’s Basic Law (*Anayasa*), included another motion to reform the notorious article 301, which prohibits ‘insulting Turkishness’, and which was used by many nationalist and ultra-nationalist prosecutors to bring charges against liberal writers and intellectuals such as Orhan Pamuk, for example. This proposal was dropped and one of the most anti-democratic and anti-liberal articles of the Turkish Constitution remained in place.

Article 10 concerns ‘Equality before the Law’, and proclaims that ‘Everyone, regardless of distinctions of language, race, color, gender, political belief, philosophical conviction, religion, ethnicity and like grounds, is equal in the eyes of the law’. In addition, it is stated that ‘Women and men possess equal rights. The state is responsible to ensure that this equality becomes effective.’ The changes come in the 4th paragraph of the article, which in its older version read: ‘Organs of the state and administrative authorities are obliged to act according to the principles of equality before the law in all their transactions.’ The new version reads: ‘Organs of the state and administrative authorities are obliged to act according to the principle of equality before the law in all their transactions and *in all activities pertaining to the provision of public services*’ (emphasis added). The Turkish Parliament thus upheld the principle of non-discrimination, reaffirming that gender discrimination was against the law and also that discrimination on the basis of language and ethnicity as well was illegal.

Within the Turkish context, where approximately 15 million Kurds live in the country and speak their own language as well as Turkish, this parliamentary re-affirmation of the non-discrimination principle had multiple meanings. If some deputies of the AKP and others entertained the hope that Turkey one day would adopt *Shari'a* law, introducing the inequality of the sexes, they would now have their own legislative actions to contend with. Ironically, the egalitarian and civic-republican legacies of the Turkish Kemalist tradition led the Parliament, with its Islamicist majority, nevertheless to formulate a resounding restatement of the principle of non-discrimination for all Turkish citizens in their procurement of public services.

Yet it was left ambiguous whether the *providers* as well as the *receivers* of public services would benefit from non-discrimination. Did the law intend to protect only religious women against discrimination in receiving educational, medical and other services or did it also intend to protect those who provided such services from discrimination? The difference between the two is enormous. If the law protects not only the recipients but also the providers of public services, then teachers, government officials, doctors, attorneys, and indeed, the President's own wife, would be able to wear the headscarf in their official capacity and in the performance of official functions.

From a moral standpoint, one could argue that any distinction between the *receivers and providers* of public services is indefensible. What matters is that the state protects the individuals' freedom of conscience and rightful claim not to be discriminated against on account of their faith. These considerations are directly analogous to the Fereshta Ludin story. In the Turkish case as well, it is often asserted that in the public sphere, *laïcité*, understood as the strict banning of sectarian religious symbols in the provision of *state services*, such as education, healthcare and transportation, must be upheld.

The legislative revision of article 42 of the Turkish Basic Law, which pertains to 'The Right of Education and Instruction', was more straightforward, although this article is riven by many clauses of ambivalent, and even repressive, political import. It reads: 'No language other than Turkish can be taught . . . in any institutions of learning and instruction as a mother tongue.' This is a militant assertion of the 'homogeneity' of the *ethnos* upon which the *demos*, the political nation, is based. It reveals the tension between the *demos* of the Turkish republic which consists of Turkish citizens, regardless of their religion, ethnicity, creed and color, on the one hand, and the imaginary unity and supposed homogeneity of the *ethnos*, a nation which is supposed to have no other mother language than Turkish, on the other. The reforms of 10 February 2008 left the gist of this article untouched. It was simply added that 'No one can be denied their right to attain higher learning on the basis of reasons not clearly

formulated in writing by law. The limits of the exercise of this right are determined by law.' This clause aimed to censure those instructors, such as professors, as well as administrators who took it upon themselves to ban by administrative fiat women and girls wearing the headscarf from entering these institutions or sitting for their exams with their heads covered. But even after the legislation was passed, such incidents did not stop. Even local officials in public healthcare clinics were reported to have refused to serve women wearing the scarf.

One may object that all this is now ancient history since both amendments were rescinded and the *status quo ante* re-established by the Turkish Constitutional Court. But it is important to note that between February 2008 when the new legislation was passed and June 2008 when it was overturned, Turkey missed the chance to embark on the long process of creating a new *demos* and a new political identity for a truly pluralistic society. It missed the chance to recognize the cleavage between observant and non-observant Muslims as only *one*, and by no means the principal one, among the many differences and divisions currently surfacing in Turkish society.

Civil society in Turkey today is showing unprecedented effervescence and self-examination. Atrocities committed against the Ottoman Armenians in 1915; repressive measures directed at the non-Muslims with the passing of the so-called 'Varlık Vergisi', which redistributed the wealth of Jews, Greeks and Armenians primarily to the nascent Turkish bourgeoisie; the repressive Kemalist ideology of the ruling elites; and the origins of the Kurdish problem, which go back to the compromises reached between these very Kemalist elites and Kurdish feudal landlords – all these topics are being examined by the media, by newspapers, by works of art and theatre, and in contemporary scholarship.<sup>34</sup> Seen against this background, the headscarf debate essentially centers around the pluralization of identities in a post-nationalist and democratic society. It is not about regression to an Islamist republic, as many secularists claim. The Kemalist elites – the army; the civil bureaucracy; teachers; lawyers; engineers; and doctors – look upon these developments as *failures* of the republican experiment. On the contrary, they can be seen as manifestations of its success. Whereas Kemalist republican ideology, despite its Enlightenment pretensions, equates citizenship with ethnic Turkish and religious Muslim identity, today we see not only the proliferation of ethnicities but also the reclaiming of different ways of being Muslim. It is not only the right *to* wear the headscarf which must be defended but also the right of girls and women *not* to wear the headscarf – and not to observe mandatory fasting during Ramadan, and so on – that must be asserted. But neither the ruling AKP nor the oppositional CHP (Republican People's Party) are deep democrats in this sense. It is altogether possible that had the Turkish Constitutional Court decided to accept the new

legislation as constitutional, the AKP would have seen a green light to ban the public drinking of alcohol, to impose further restrictions on the dress habits of non-observant Turkish girls, and to demand that everyone fast during Ramadan. In other words, the public face of Turkish civil society could have come to resemble that of Saudi Arabia and Malaysia rather than that of Israel or Canada, countries in which religious groups enjoy great freedoms and some degree of self-government in many areas of civil and political life.

In the weeks following the reform of the headscarf ban, a group of nearly 800 women wearing the headscarf signed a petition stating that 'If freedom of expression is at stake, nothing can be considered a detail. We are not yet free.' These women took aim at what they call 'repressive governmentality'; they demanded the abolition of the Turkish Council on Higher Education (YOK); they wanted assurances that the rights of Alevis (a dissident Muslim sect) would be protected, that there would be a solution to the Kurdish problem, and that article 301 would be abolished. The right to wear the headscarf was seen in the context of broadening civil rights for other groups.

## Conclusion

What can we conclude from our review of this legal landscape – a landscape which shows convergences as well as divergences? Clearly, in all three countries, and now increasingly in the UK as well, the headscarf is not simply as a religious item of clothing, expressing a subjective choice and attitude, but view it a political symbol requiring state regulation.<sup>35</sup> All three states construe the wearing of the headscarf not primarily as an act of religious conscience but a political threat and regulate it at that level.

In this process of confrontation and negotiation between state power and girls and women with the headscarf, the meaning of the symbol itself is undergoing changes: for the girls and women involved, the headscarf and turban are no longer simply expressions of Muslim humility but symbols of an embattled identity and signs of public defiance. The wearing of the headscarf itself has politicized them in all three countries and has transformed some of them from being 'docile objects' into increasingly confrontational subjects. I am personally convinced that such confrontations will not end: newer modes of symbolization of ethno-religious identity will appear and courts will be confronted with ever-newer cases concerning the integration of Islamic religious and cultural differences into modern liberal democracies. There are already controversies about whether Muslim girls can be forced to attend coeducational gym classes; about wearing '*burkinis*' in public swimming pools; and so on. There will

be many iterations to come. Let me clarify in conclusion the concept of 'democratic iterations', which I use to diagnose both the liberating and repressive potentials of these confrontations.

'Democratic iterations' are processes in which meanings – religious well as cultural, legal as well as political – are renegotiated in the public sphere of liberal democracies. These renegotiations are also learning processes. 'Iteration' is a term which was introduced into the philosophy of language through Jacques Derrida's work.<sup>36</sup> In the process of repeating a term or a concept, we never simply produce a replica of the original usage and its intended meaning: rather, every repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever-so-subtle ways. In fact, there really is no 'originary' source of meaning, or an 'original' to which all subsequent forms must conform. It is obvious in the case of language that an act of original meaning-giving makes no sense, since, as Wittgenstein famously reminded us, to recognize an act of meaning-giving as precisely this act, we would need to possess language itself. A patently circular notion!

Nevertheless, even if the concept of original meaning makes no sense when applied to language as such, it may not be so ill-placed in conjunction with documents such as laws and other institutional norms. Thus, every act of iteration might be assumed to refer to an antecedent which is taken to be authoritative. The iteration and interpretation of norms, and of every aspect of the universe of value, however, is never merely an act of repetition. Every iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is repositied and resignified via subsequent usages and references. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority upon us as well. Iteration is the reappropriation of the 'origin'; it is at the same time its dissolution as the original and its preservation through its continuous deployment.

Democratic iterations are linguistic, legal, cultural and political repetitions-in-transformation, invocations which are also revocations. They not only change established understandings but also transform what passes as the valid or established view of an authoritative precedent. The dialectic of rights and identities is mobilized in such processes of democratic iteration. Rights, and other principles of the liberal-democratic state, need to be periodically challenged and rearticulated in the public sphere in order to retain and enrich their original meaning. It is only when new groups claim that they belong within the circles of addressees of a right from which they have been excluded in its initial articulation that we can come to understand the fundamental limitedness of every right claim within a constitutional tradition as well as its context-transcending validity. The democratic dialogue, and also the legal hermeneutic one, are enhanced through the repositioning and rearticulation

of rights in the public spheres of liberal democracies. The law sometimes can guide this process, in that legal reform may run ahead of popular consciousness and may raise popular consciousness to the level of the constitution; the law may also lag behind popular consciousness and may need to be prodded along to adjust itself to it. In a vibrant liberal multicultural democracy, cultural-political conflict and learning through conflict should not be stifled through legal maneuvers. The democratic citizens themselves have to learn the art of separation by testing the limits of their overlapping consensus.<sup>37</sup>

Sterile, legalistic or populist jurigenerative processes are conceivable. We may use Robert Cover's term 'jurispathic' to refer to such processes.<sup>38</sup> In some cases, no normative learning may take place at all, but only a strategic bargaining among the parties may result; in other cases, the political process may simply run into the sandbanks of legalism or the majority of the *demos* may trample upon the rights of the minority in the name of some totalizing discourse of fear and war. Violence may ensue. Jurigenerative politics is not a politics of teleology or theodicy. Rather, it permits us to conceptualize those moments in which a space emerges in the public sphere when principles and norms which undergird democratic will formation become permeable and fluid to new semantic contexts, which enable the augmentation of the meaning of rights. I have suggested that we are traversing such a moment in history when 'jurigenerative' and 'jurispathic' politics face each other around the controversies over religio-cultural differences. We are far from having achieved that 'civility in social relations', of which Habermas speaks, 'despite the growth of a plurality of cultures and religious world views'.<sup>39</sup>

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## Notes

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- 1 There is, of course, a great deal of essentializing and geo-political mystification in all of this. Islam is taken as if it were a block, without any sense of its historicity, any in-depth appreciation of the complexity of its evolution, or any deep knowledge of differences between Sunnism, Shi'ism, Alevism, Sufism, etc., let alone any appreciation of the distinctions between Indonesian and Indian Islam; or Turkish versus Iranian Islam. These geo-political shorthands are another version of the 'west' and 'the rest' thinking, with

Islam now coming to stand in for the ‘rest’ at large. Not only is the geopolitics of this debate based on ignorance, but the very instability of the terms of the opposition – Islamism; political Islam; Islamic fundamentalism; Jihadism, etc. – reveals that we are dealing in muddles and metaphors rather than analytical categories. I will use the term ‘political Islam’, following Olivier Roy, to refer to a very diverse, contradictory set of theologico-political movements, riven by their own rivalries and antagonisms. See Olivier Roy, *Secularism Confronts Islam* (New York: Columbia University Press, 2007); see also for recent accounts, Ian Buruma, *Murder in Amsterdam: The Death of Theo van Gogh and the Limits of Tolerance* (New York: Penguin, 2006); Jytte Klausen, *The Cartoons that Shook the World* (New Haven, CT: Yale University Press, 2009).

- 2 Max Weber, ‘Wissenschaft als Beruf’, (1919), translated as ‘Science as a Vocation’, in *From Max Weber: Essays in Sociology*, ed. and trans. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946).
- 3 Hans Blumenberg, *The Legitimacy of the Modern Age*, trans. R. M. Wallace (Cambridge, MA: MIT Press, 1983); Karl Löwith, *Meaning in History: The Theological Implications of the Philosophy of History* (Chicago, IL: University of Chicago Press, 1949).
- 4 See Bora Kanra, *Islam, Democracy and Dialogue in Turkey: Deliberating in Divided Societies* (Farnham, Surrey: Ashgate, 2009).
- 5 Seyla Benhabib, *The Claims of Culture: Equality and Difference in the Global Era* (Princeton, NJ and London: Princeton University Press, 2002).
- 6 Jürgen Habermas, ‘Notes on a Postsecular Society’, available at: <http://www.signandsight.com/features/1714.html> Accessed 20 June 2008. Also delivered at the RESET Istanbul conference on 3 June 2008.
- 7 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. and intro. G. Schwab (Chicago, IL and London: University of Chicago Press, 1985), based on the revised edition of 1934. All references in the text are to the English translation.
- 8 Carl Schmitt, *The Concept of the Political*, trans. and intro. G. Schwab, expanded edn (Chicago, IL: University of Chicago Press, 2007); Carl Schmitt, *Crisis of Parliamentary Democracy*, trans. and intro. E. Kennedy (Cambridge, MA: MIT Press, 1988).
- 9 Otto Kirchheimer, ‘Remarks on Carl Schmitt’s Legality and Legitimacy’, in *The Rules of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, ed. William Scheuerman (Berkeley: University of California Press, 1996), pp. 64–98. On the influence of Carl Schmitt on Walter Benjamin who wanted to dedicate his doctoral dissertation on German baroque drama to Schmitt, see Richard Wolin’s work; on Hans Morgenthau and Carl Schmitt, see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002), pp. 413–40 and William Scheuerman, ‘Carl Schmitt and Hans Morgenthau: Realism and Beyond’, in Michael C. Williams (ed.) *Realism Reconsidered: The Legacy of Hans. J. Morgenthau in International Relations* (Oxford: Oxford University Press, 2007), pp. 62–92; on Leo Strauss and Carl Schmitt, see Leo Strauss, ‘Notes on Carl Schmitt, The Concept of the Political’, in Schmitt, *The Concept of the Political*, trans. G. Schwab,

- pp. 81–109 and Heinrich Meier, *Carl Schmitt, Leo Strauss und 'Der Begriff des Politischen'* (Stuttgart: J. B. Metzler Verlag, 1998); Chantal Mouffe, *The Challenge of Carl Schmitt* (London: Verso, 1999) and Chantal Mouffe and Ernesto Laclau, *Hegemony and Social Strategy: Towards a Radical Democratic Politics* (London: Verso, 1986; 2nd edn 2001).
- 10 Schmitt, *Political Theology*, p. 45.
  - 11 *ibid.*, p. 36.
  - 12 *ibid.*, p. 5.
  - 13 Giorgio Agamben, *State of Exception*, trans. K. Attell (Chicago, IL: University of Chicago Press, 2005), pp. 1–11.
  - 14 *ibid.*, pp. 23–35.
  - 15 Hent de Vries, 'Introduction: Before, Around, and Beyond the Theologico-Political', in *Political Theologies: Public Religions in a Post-Secular World*, ed. Hent de Vries and Lawrence E. Sullivan (New York: Fordham University Press, 2006), p. 3.
  - 16 Hans Jonas, *Braucht der Mensch Religion? Über Erfahrungen der Selbsttranszendenz* (Freiburg im Breisgau: Herder, 2004), pp. 124–5; quoted in de Vries, 'Introduction', p. 4.
  - 17 'Universal Declaration of Human Rights', available at: <http://www.un.org/en/documents/udhr/> See Article 18 of 'The International Covenant on Civil and Political Rights', which was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976. See: <http://www1.umn.edu/humanrts/instr/b3ccpr.htm> Accessed 13 November 2009. The European Convention on Human Rights' article 9 'provides a right to freedom of thought, conscience and religion'. This includes the freedom to change a religion or belief, and to manifest a religion or belief in worship, teaching, practice and observance, subject to certain restrictions that are 'in accordance with law' and 'necessary in a democratic society'. See: <http://www.hri.org/docs/ECHR50.html#C.Art9> Accessed 13 November 2009.
  - 18 Earlier versions of this discussion have appeared in Benhabib, *The Claims of Culture*, ch.5 and Seyla Benhabib, *The Rights of Others: Aliens, Citizens and Residents* (New York and London: Cambridge University Press, 2004), ch. 5. Since this case is the most widely known in the literature, I will briefly update it in the light of recent literature. The pioneering work remains Nilufer Gole, *The Forbidden Modern: Civilization and Veiling* (Ann Arbor: University of Michigan Press, 1996).
  - 19 A note of terminological clarification first: the practice of veiling among Muslim women is a complex institution that exhibits great variety across many Muslim countries. The terms *chador*, *hijab*, *niqab*, *foulard* refer to distinct items of clothing which are worn by Muslim women coming from different Muslim communities: for example, the *chador* is essentially Iranian and refers to the long black robe and the headscarf worn in a rectangular manner around the face; the *niqab* is a veil that covers the eyes and the mouth and only leaves the nose exposed; it may or may not be worn in conjunction with the *chador*. Most Muslim women from Turkey are likely to wear either long overcoats and a *foulard* (a headscarf) or a *carsaf* (a black garment which most resembles the *chador*). These items of clothing have a symbolic

- function within the Muslim community itself: women coming from different countries signal to one another their ethnic and national origins through their clothing, as well as signifying their distance from or proximity to tradition in doing so. Seen from the outside, this complex semiotic of dress codes gets reduced to one or two items of clothing which then assume the function of symbols in complex negotiations among Muslim religious and cultural identities and western cultures.
- 20 Françoise Gaspard and Farhad Khosrokhavar, *Le Foulard et la République* (Paris: Decouverte, 1995); all references in the text are to this edition. For some girls' perspectives, see Alma and Lila Lévi, *Des Filles comme les Autres*, interviews by Véronique Giraud and Yves Sintomer (Paris: La Decouverte, 2004).
  - 21 See Gole, *The Forbidden Modern*.
  - 22 Nusrat Choudhury, 'From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls', *Columbia Journal of Gender and Law* 16(1) (2007): 205.
  - 23 Joan Wallach Scott, *The Politics of the Veil* (Princeton, NJ: Princeton University Press, 2007); see Christian Joppke, *Veil: Mirror of Identity* (London: Polity Press, 2009), p. 52 (all references in the text are to this edition).
  - 24 I have discussed this case previously as well in Benhabib, *The Rights of Others*, pp. 198–202.
  - 25 BVerfGe (German Constitutional Court), 2BvR, 1436/02, IVB 1 and 2 (my translation).
  - 26 BVerfGe, 2BvR, 1436/02, 6.
  - 27 The German legislators responded to the mandate of the court rather speedily, and after Baden-Württemberg, Bavaria as well passed a bill banning the wearing of headscarves in the schools. Christian and Jewish symbols were not included in this ban. Civil rights organizations and groups representing Muslims living in Germany (estimated at 3.2 million) have criticized the proposed ban.
  - 28 Quoted by Joppke, *Veil: Mirror of Identity*, p. 53.
  - 29 *ibid.*, p. 70.
  - 30 *ibid.*, p. 71.
  - 31 *ibid.*, pp. 72–3.
  - 32 Emcke points out that in an earlier decision concerning the presence of crucifixes in the classroom, what the German Supreme Court declared to be unconstitutional was not the existence of religious symbols in public spaces or public schools, but rather the obligation to display the crucifix regularly. 'In this sense', she concludes, 'there are no constitutional grounds against religious symbols as such.' Carolin Emcke, *Kollektive Identitäten. Sozial-philosophische Grundlagen* (Frankfurt and New York: Campus Verlag, 2000), p. 284.
  - 33 As the sociologist Faruk Birtek points out, the parliamentary vote to reverse the ban on the headscarf, *strictu sensu*, contradicted the supplement 17 to the legislation known as 'YOK Kanunu', i.e. the Law of the Council of Higher Education. In order for the wearing of the headscarf to become fully legal this clause needed to be rescinded and this was never the case. See interview

- with Faruk Birttek in Taraf by Nese Duzel, available at: <http://www.taraf.com.tr/Detay.asp?yazar=7&yz=21> Accessed 29 June 2008.
- 34 Rifat Bali, *Cumhuriyet Yillarında Turkiye Yahudileri: Bir Turklestirme Seruveni* [Turkish Jews in the Epoch of the Republic: An Adventure in Turkification (1923–1945) (İstanbul: İletisim, 1999).
- 35 The discussion prompted by the remarks of Archbishop of Canterbury on *Shari'a* courts continues across many countries, including failed attempts to introduce Islamic Arbitration Boards in Canada with the jurisdiction to decide in matters of family law. See BBC News, 7 February 2008, 'Sharia Law in UK is "unavoidable": [http://news.bbc.co.uk/2/hi/uk\\_news/7232661.stm](http://news.bbc.co.uk/2/hi/uk_news/7232661.stm) Accessed 13 November 2009. For a lucid discussion of the Canadian case, see Audrey Macklin, 'Particularized Citizenship: Encultured Women and the Public Sphere', in *Migrations and Mobilities: Citizenship, Borders and Gender*, ed. Seyla Benhabib and Judith Resnik (New York: New York University Press, 2009), pp. 276–304.
- 36 See Benhabib, *The Rights of Others*, pp. 179–81.
- 37 On the relationship between normative validity and democratic legitimacy, see Seyla Benhabib, *Another Cosmopolitanism*, with Jeremy Waldron, Bonnie Honig and Will Kymlicka, the Berkeley Tanner Lectures, ed. Robert Post (New York and Oxford: Oxford University Press, 2006), pp. 45 ff. For a clarification of the status of democratic iterations as processes of generating democratic legitimacy, see the symposium on 'The Rights of Others', in *European Journal of Political Theory* 6(4) (2007): 395–463 and Seyla Benhabib, 'Democratic Exclusions and Democratic Iterations: Dilemmas of "Just Membership" and Prospects of Cosmopolitan Federalism: Reply to my Critics', in the same issue, pp. 445–63.
- 38 Democratic iterations are not always processes of meaning-enhancement and enrichment; they can lead to stifling, sterile interpretations and to narrowing the circle of interpreters of norms as well. We may name such processes 'jurispathic', following Cover at a distance. See Robert Cover, 'Foreword: Nomos and Narrative', the Supreme Court 1982 Term, *Harvard Law Review* 97(4) (1983/4): 4–68; for 'jurispathic', see 18. Let me clarify that my reliance on Cover's concept of 'jurisgenerativity' does not mean that I minimize or disregard the 'legal origins of legitimacy'; jurisgenerativity is not a process of law-making but one of law-interpreting, or, more properly speaking, it is about the interplay of legal and non-legal sources of normativity. See for further discussions, Seyla Benhabib, 'Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty', *American Political Science Review* 103(4) (November 2009): 691–704.
- 39 Habermas, 'Notes on a Postsecular Society'.