Helsinki Law Review 2011/2 p. 365–400

The European Court of Human Rights, Islam and Foucauldian Biopower

Keywords: foucault, biopower, islam, muslim, European Court of Human Rights

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Abstract

This article studies the Islam-related cases of the European Court of Human Rights through the lens of Foucauldian theory of biopower and governmentality. It is argued that Muslims, and especially the veiled Muslim woman, are profiled as risks to the Western neoliberal societies by different biopolitical risk technologies. As such they must be either 'normalized' – shaped into unattached, non-particularistic subjects through different disciplinary techniques – so that they disappear into the mass of the mainstream population, or be excluded from the society. This biopolitical aim is accomplished through an impenetrable net of seemingly insignificant practices and discourses that not even the participants to the practices are aware of. It is, therefore, argued that the judges of the Strasbourg Court are sincere in their attempts to balance conflicting interests in the difficult Islam cases, but that they cannot avoid being affected by myriad non-judicial norms, executing biopolitical aims, that penetrate the judicial defence mechanisms especially through discourses that they judges partake of and in cases where the margin of discretion of the Strasbourg judges or the national authorities are increased.

Full Article

1 Introduction[1]

The Islamic headscarf has been a topic of fierce debate in European liberal societies for at least the past two decades.[2] It has, as such, also been the topic of much academic interest. This article aims, nevertheless, to provide one more contribution to the debate. Instead of trying to tackle the whole discussion, however, I take a much more narrow approach and focus solely on studying the European Court of Human Rights' (ECtHR) rulings in the cases dealing with Islam and Muslims through the lens of the Foucauldian theory of biopower – even though the term 'Foucauldian' must be interpreted widely in this context, for I draw also from other thinkers, such as Giorgio Agamben and Judith Butler, who have developed Foucault's theories further, but also extended them to areas that Foucault probably would not have wanted to go. The text also lacks, because of the limitations set for a single article, the genealogical approach typical for Foucault's studies and should therefore be treated, first and foremost, as a hypothesis of blurring of different forms of power in the ECtHR's jurisprudence – a hypothesis that could later be developed into a proper genealogical study by the author or someone else interested in the topic.

The article begins, in Chapter 2, with a short, general overview of the Strasbourg Court's Islam cases. It is my aim to show that the cases give a sign of mistrust towards Islam, especially if the outcome of the cases is compared to that of the cases dealing with Christianity. I do not believe, however, that it has been the aim of the judges of the Court to consciously discriminate against Muslims – in fact courts all over Europe have played a crucial part in restricting measures that could be seen to discriminate against Muslims.[3]

1 The author would like to thank Jarna Petman, from whose work and lectures on the ECtHR a bulk of this article draws insiration from; Miia Halme-Tuomisaari for her comments on an earlier version of the article and for all other help; Tapio Rasila and Matti Keinänen for their help and ideas in editing; and the two unanimous referees who provided several insightful comments on improving the article. Not all of the suggestion could be carried out within the limits set for the length of the article and the time set for editing it, but the author will certainly take advantage of them in his later studies.

2 Joppke 2009, p. 108.

3 See Joppke 2009, *passim*.

It seems, rather, that the judges have not been able to find an optimal way of balancing competing interests in difficult and politically important cases, despite honest attempts. I argue, therefore, that in order to understand the twisted outcome of the cases, we must study the Foucauldian theories of biopower and governmentality. The theories are explained in Chapter 3, in which I aim to demonstrate how Islam is profiled as a threat to our neoliberal societies – a threat that must be either neutralized by absorbing it into the mainstream, or by eliminating or excluding it. The operation of biopower, acting non-subjectively through seemingly insignificant discourses and practices, is studied in Chapter 4. The margin of appreciation doctrine and the proportionality test play an important role in this respect, opening room for these discourses and practices to influence the Court's decisions. The article ends with a Conclusion.

2 An Overview of the Islam Cases

In 2003, the Grand Chamber of the European Court of Human Rights (ECtHR) decided that Turkey had not violated its human rights obligations by abolishing the Islamic Refah Partisi Welfare Party,[4] which seemed poised to win the upcoming Turkish parliamentary elections. The court held that the party – which, according to Turkish authorities, supported a pluralist legal system where *sharia* law would be applied to Muslim citizens, and demanded the freedom to wear the Islamic scarves, *hijabs*, in schools – constituted a threat to democracy and pluralism and thus could not be allowed to seize power. The abolition of the party was, therefore, "necessary in a democratic society" and in accordance with the principle of proportionality. It did not, consequently, violate Turkey's obligations under the European Convention on Human Rights (ECHR).[5]

By declaring that "the [Turkish] Constitutional Court was justified in holding that Refah's policy of establishing *sharia* was incompatible with democracy",[6] and by emphasizing terms such as "religious fundamental-

4 *Refah Partisi (The Welfare Party) and Others v. Turkey*, 13 February 2003.
5 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953), Council of Europe Treaty Series – No. 005, Finnish Treaty Series 19/1990 .
6 *ibid.,* para 125.

ism" and "totalitarian movement",[7] the Court seems to have given a signal of mistrust towards Islam: the *Refah* decision seems to declare that Islam is not compatible with the values of the Convention. A similar conclusion could be drawn from the Court's decisions in the 'veil cases', namely *Dahlab v. Switzerland*[8], *Leyla Sahin v. Turkey,*[9] *Dogru v. France*[10] and *Kervanci v. France,* [11] in all of which it held that the state authorities had not violated their human rights obligations in prohibiting the Islamic scarf, *hijab*, in schools. In *Dahlab* the court stated that the scarf worn by a teacher could have a "proselytizing effect" on the students, and that it would give a negative sign on gender equality. Quite similarly, in *Sahin* it came to the conclusion that the banning of the veil in a Turkish university was necessary in a democratic society for the guarantee of pluralism, tolerance and equality. Finally, in *Dogru*, where the applicant was forced to remove the veil in sports class, it changed tone and emphasized the dangers that the veil could have in doing sports and the alleged unwillingness of Dogru to cooperate with authorities – a curious claim seeing that Dogru had herself suggested that she could replace the scarf with some kind of hat or a balaclava in sports class.

These cases are especially interesting when compared to those dealing with the Christian fate, as Jarna Petman notes.[12] In *Otto-Preminger-Institut v. Austria*, where the authorities had confiscated a film portraying God as an old senile man, Jesus as a mentally challenged 'momma's boy' and Maria as a wanton, before it could be shown, the ECtHR came to the conclusion that the authorities should be afforded a wide margin of appreciation. The authorities had not, therefore, violated the principle of proportionality, nor their obligations under the Convention, as the confiscation of a film that could offend the majority of the population, had been necessary for the protection of the freedom of religion. This was despite the facts that the film was supposed to be shown only in a small movie theatre meant for art films, that the audience had been warned in advance of the content of the film,

7 On the critique of the utilization of these terms, see especially the Concurring Opinion of Judge Kovler.
8 *Dahlab v. Switzerland*, 15 Febuary 2001.
9 *Leyla Sahin v. Turkey*, 29 June 2004 and *Leyla Sahin v. Turkey*, 10 November 2005.
10 *Dogru v. France*, 4 December 2008.
11 *Kervanci v. France*, 4 December 2008.
12 Petman 2006, p. 83.

and that the film had an age limit of 17.[13] The result was the same in *Wingrove v. United Kingdom*, where the authorities had again confiscated a film that could offend Christians – portraying this time Saint Teresa of Avila's ecstatic religious experience, including erotic interaction first between Teresa and a woman representing apparently her psyche, and later with a statute of the Christ that for a moment seemed to respond to Teresa's kisses.[14] The only significant difference between this case and *Otto-Preminger-Institut* is that the case was decided solely on the grounds of the freedom of speech, whereas in OPI the freedom of speech was mixed with freedom of religion.

Thus we can see that although both in the Islam and Christianity cases the ECtHR came to the conclusion that the freedom of religion and pluralism must be protected, they were guaranteed in a very different way. In the *Refah* case the court achieved this result by allowing the abolishment of Turkey's largest Islamic party, and in the veil cases pluralism was protected through banning the wearing of the *hijab*. In fact, in both *Dahlab* and *Sahin*, the veil was put explicitly in a different position than other religious symbols. In *Dahlab* the Swiss courts came to the conclusion that wearing the *hijab* is not directly comparable to wearing a cross necklace or having a crucifix on the class room wall, and the court found no reason to meddle in this conclusion, [15] and in *Sahin* no other religious symbols than the veil and a beard were forbidden at the university.[16] In other words, Islam was perceived as a threat that makes free exercising of one's religion impossible through its strangely proselytizing effect.[17] In the cases dealing with Christianity, on the contrary, pluralism was guaranteed through hindering the presentation of a film meant for a very limited audience and through confiscating a questionable 'art film'. The underlying understanding behind these rulings, then, seems to be that offending Christians hinders the exercising of their religion – and therefore violates pluralism – in such a dramatic way that preventing these offences is necessary in a democratic society. It is not difficult, therefore, to agree with Jarna Petman's conclusion that "[w]hile the Court has

13 *Otto Preminger Institut v. Austria*, 20 September 1994.
14 *Wingrove v. United Kingdom*, 25 November 1996.
15 Evans 2006, p. 60.
16 *Leyla Sahin v . Turkey*, Court (Fourth Section), para 88.
17 See Evans 2006, p. 71–73; Gozdecka 2009, p. 224.

deemed Islamic Faith a threat to pluralistic values in a democratic society, it has deemed pluralistic values a threat to the Christian faith."[18]

There is an important caveat, however. It must be noted that the time-span between the cases is quite long. Where the cases dealing with the Christian fate are from the late 1990s, all of the Islam cases have been decided on the 21st century. Furthermore, it could be claimed that the court's jurisprudence has recently taken a big leap towards a more equal approach by taking a stricter policy towards measures and policies that seem to favor the Christian faith in detriment of other religions. In *Folgero and Others v. Norway*[19] it held that Norway's school system that had the teaching of Lutheran values as one of its primary goals was not in accordance with the Convention. Furthermore, in the first judgment on the recent case *Lautsi v. Italy,*[20] the Second Section of the Court decided that a crucifix hanging on the class room wall violates the principle of neutrality required in public schools. It should also be noted that there is nothing scandalous in any of these decisions. Although there are some details in each of these cases that have been deservedly critiqued (I will return to this later), the cases are still quite well argued and legally totally plausible. In trying to combine the universality and relativity of human rights, the ECtHR had to do some careful balancing and it is clear that its decisions could not please everyone.

There is, therefore, no great conspiracy behind these decisions. But despite ECtHR's more neutral approach in *Folgero* and its first decision in *Lautsi*, and its alleviated use of language in *Dogru* and *Kervanci,* in comparison to the former veil decisions, it is clear that the case law has not been positive from a Muslim point of view. This is not simply because of the completely changed opinion of the ECtHR in the Grand Chamber in *Lautsi*,[21] but also – and much more so – because of the religious differences between Muslims and Christians. It could be argued that the external part of the religious exercise is simply much more important for Muslims than for Christians, especially in the context of Europe, where Muslims are continuously surrounded by Christian values and practices. Secularism does not,

18 Petman 2006, p. 83.
19 *Folgero and Others v. Norway*, 29 June 2007.
20 *Lautsi v. Italy*, 3 November 2009
21 *Lautsi and Others v. Italy*, 18 March 2011.

therefore, affect these believers in the same way. Perhaps the ECtHR could have grasped the positive aspects of universalism and relativism – equality and tolerance, respectively – more effectively through emphasizing openness towards different cultures and religions, rather than through secularism that, despite its admirable goal, has the danger of igniting the 'dark sides' of universalism: intolerance towards different cultural practices.

But what could explain this incapability of the ECtHR to take the needs of Muslims into consideration, then? As I have already stated, I do not find it plausible that the judges would consciously discriminate against Muslims. A much more compelling answer to this puzzle would approach these rulings, rather, a result of almost unnoticeable practices, discourses and mistakes. Hence below I will suggest that in order to fully understand the Court's Islam decisions and to alleviate the difficult situation of Muslims in Europe, it could be useful to study Michel Foucault's theories of biopower and governmentality.

3 Foucauldian Biopower

Foucault developed his theory on biopolitics and biopower especially in his work *The History of Sexuality: An Introduction,*[22] and during his lecture series *Society Must Be Defended* in the Collège de France. Foucault observes that as the birth of capitalism changed the requirements of production, and advancements in medicine, biology and statistics increased the possibility of the sovereign to control its subordinates, a new form of power started to replace the traditional sovereign power that had been interested in them mainly as tax payers and military force, and which did not have the means nor the desire to control their lives in detail. This form of power, emerging first as disciplinary power that concentrated in the shaping of individuals, and developing later into biopower, saw its subordinates as biological, living creatures, and concentrated on the detailed control of *human life*. Where sovereign power could be described as the power to take the life of his subordinates – a power demonstrated in grandiose punishment shows, where disobedient subjects were horribly tortured or executed in order to arouse

22 Foucault 1978.

fear and respect – or to let them live, biopower could be described as the power to make life live, or let it die: it fosters life or disallows it to the point of death.[23] As Foucault himself puts it:

> Power would no longer be dealing simply with legal subjects over whom the ultimate dominion was death, but with living beings, and the mastery it would be able to exercise over them would have to applied at the level of life itself; it was the taking care of life, more than the threat of death, that gave power its access even to the body.[24]

Through the application of statistics, medicine and biology, this biopower concentrates on shaping the population as a whole in order to maximize its capacities, effectivity and productivity. By 'massifying' its citizens, biopower can treat them as a species instead of mere individuals. It has not completely replaced other forms of power, such as sovereign power and disciplinary power, however, as these other forms still live alongside, or inside, biopower. Especially disciplinary power is an extremely important tool from a biopolitical perspective. Like sovereign power, disciplinary power also focuses on the individual, but it has a differing aim. Where sovereign power punished to arouse fear, disciplinary power, born in the 19th century, uses punishments to shape individuals into functional parts of the society. The aim of disciplinary techniques is not, thus, punishment as such, but controlling individuals in order to build a perfect machine. Disciplinary power and biopower are therefore very similar to each other, but disciplinary power focuses on individuals, whereas biopower centers its attention on the population as a whole. These forms of power are, thus, more complementary than mutually exclusive: they need each other in order to be perfect. Disciplinary power shapes individuals into functional parts of the society in different institutions, such as kindergartens, schools, prisons and the army, while biopower maintains and manipulates the thus formed machine or biomass at the national (or nowadays perhaps global[25]) level. [26] In fact, biopower has become so successful in this that an individual can no longer materially survive without the societal institutions taking care of her health, livelihood and well-being.

23 Foucault 1978, p. 138; C. Taylor 2011, p. 41, 43.
24 Foucault 1978, p. 142–143.
25 For a critical assessment of this topic, see Chandler 2009.
26 Foucault 2004, p. 107–110; C. Taylor 2011, p. 44–45; Alhanen 2007, p. 141–142; Tuori 2002, p. 3–5, 15–16; Dillon – Reid 2009, p. 84–85; Hardt – Negri 2001, p. 24.

Perhaps an example drawn from cinema could be illuminating here. Does not the Wachowski brothers' movie *The Matrix* depict biopower in its extreme form? In the movie, humans have been enslaved into energy sources for highly sophisticated machines. Humans 'live' plugged in machines in massive bio fields, where every bodily function, nourishment and reproduction of each individual is in the precise surveillance of a computer. Humans are not aware of the situation, however, for the computer controlling them has programmed the 'Matrix', where people 'live' their virtual lives without realizing that they are simply virtual figures in a complicated computer program. Humans are, therefore, under the strict surveillance that biopower aims for, and their productivity is at its peak. Moreover, the identity of each individual is carefully shaped and their apparently free choices are predefined by the rules and structures of the program.

What does all this have to do with Muslims or the ECtHR, then? In order to answer this question, we need to consider Foucault's theory a bit further. Especially two matters require closer examination. First, we must understand the protective mechanisms of the society: biopower can also take a violent and racist form in order to protect the population, which can help us explain the mistreatment of Muslims. Secondly, we must examine how biopower actually functions. Only then can we understand how the aforementioned protective mechanisms reject Muslims, while authorities at all levels of administration think that they are protecting them.

Although the primary objective of biopower is to foster life, this does not mean that a biopolitical society would not be violent.[27] Violence has changed its form which makes it more difficult to observe. But how can a society fostering life justify violence? Foucault's answer is racism.[28] Racism must be understood widely in this context however. By controlling the population and by maximizing its functionality, biopower must also carefully assess all the risks facing the society. When the biopolitical society detects a risk facing the population, it reacts by trying to neutralize this risk factor. The best way to achieve this is "to fragment, to create caesuras within the biological

27 Dillon 2005, p. 41; Oksala 2010, p. 38.
28 See Foucault 2003, p. 254–258; Dillon – Reid 2009, p. 32, 87.

continuum addressed by biopower."[29] A biopolitical society necessarily becomes racist, although this racism is not necessarily related to race in such a sense that the word 'racism' is usually interpreted to mean: humans are classified into different groups and those groups that constitute a threat to the population as a whole must be eliminated. The exclusion of this part of the society makes the remaining population stronger and guarantees it more room and resources to live.[30]

The elimination of an entire part of the society may sound dramatic, and it surely can be – the most extreme example of biopolitical racism is the holocaust.[31] As was already mentioned, however, biopolitical violence is often more discreet and difficult to detect. Risks that do not threaten the genetics of the population can be shaped through disciplinary power into functional parts of the society in different institutions, making these threats 'disappear' into the mass.[32] Biopower is, therefore, fundamentally productive: it deploys law and practices as a tactic, producing the kinds of subjects that the society needs. But not everyone can be shaped into this mold and sometimes the biopolitical practices may lead to unwelcome consequences, nurturing life that threatens the population. In these kinds of situations the practices must be renewed and reproduced. If an individual is irreparable (s) he must be excluded from the society or otherwise eliminated. It is on these occasions that we see how biopower is actually linked not only to disciplinary power but also to sovereign power. This aspect of sovereign power and biopower is absent from – even against – Foucault's theories, but has been studied by other thinkers, such as Giorgio Agamben and Judith Butler, who have combined Foucault's thought with that of Walter Benjamin and Carl Schmitt.[33] Sovereign power, operating primarily by constituting states of exception where the sovereign enjoys an unlimited margin of discretion, allows biopower to suspend the law that no longer fulfills biopolitical aims:[34] to "step outside the law in order to (re)establish the biopolitical regularity

29 Foucault 2003, p. 255.
30 ibid. See also Oksala 2010, p. 38–39; C. Taylor 2011, p. 50; Dillon 2005, p. 41–42, 44.
31 On Nazis, the Camp and biopolitics, see Agamben 1998, p. 166–180 and Foucault 2003, p. 259–260. See also C. Taylor 2011, p. 50.
32 See Hardt – Negri 2001, p. 23.
33 See Agamben 1998; Butler 2004, p. 50–100.
34 See Butler 2004, p. 55.

or normalcy of life – –"[35] The state of exception, characteristic of sovereign power, becomes therefore an important tool also for biopower, allowing it to diverge from its regular practices, aimed to make life live, and to eliminate threats to the population. In this sense, the sovereign, pushed away by different governmental techniques, emerges again, but this time from within, intertwined with, the practices of managing the population.

If we return to our primary topic, i.e. Muslims, it is not difficult to deduct that they constitute a risk to the society from a biopolitical perspective. Especially since the 9/11 terrorist attacks, Islam has been pictured as a violent ideology that threatens Western values and way of life. As Jacobsen and Stenvoll explain, Islam has come "to fill some of the Soviet empire's functions as the 'other' to the liberal West – –".[36] It is this kind of creation of a threatening enemy, of course, that opens the space for the state of exception that allows the diminishing of the rule of law and the increased margin of discretion for authorities.[37]

We must also remember that a major rationale behind biopower is economical productivity. Biopower is, therefore, deeply embedded in the global neoliberalism supporting the current capitalist system. A necessary prerequisite for this kind of system is an "unattached, nonparticularist and spaceless subject"[38] capable of operating rationally in accordance with market signals. These kinds of subjects are produced through countless regulative and disciplinary techniques in various state institutions and myriad societal processes and practices outside them.[39] These disciplinary techniques are not as effective against Muslims, however, for Muslims are bound by other, religious laws that they believe to stand above state regulation or mundane social customs.[40] Moreover, Islam is fundamentally at odds with secularism that

35 Hannah 2008, p. 59.
36 Jacobsen – Stenvoll 2010, p. 271. See also Petman 2006, p. 77.
37 See Hardt – Negri 2006, p. 6–7; Agamben 2001; Agamben 2005; Goldstein 2007, p. 54; Dillon – Reid 2009, p. 89.
38 Gökariksel – Mitchell 2005, p. 149
39 ibid. Schools are very important in this respect and as such natural sites of conflict, for example in France (see Joppke 2009, p. 42–43).
40 See Joppke 2009, p. 111–112.

has, according to Gökariksel and Mitchell, become "a contemporary political ideology with which to cultivate and regulate 'modern' state subjects."[41]

The schism between global (biopolitical) neoliberalism and Islam is emphasized especially in the figure of the veiled Muslim woman. To quote Gökariksel and Mitchell again:

> From the secularist point of view religious symbols mark religious, ethnic or cultural differences onto bodies that are supposed to be neutral, rational, equal and competent in neoliberal terms.[42]

If the aim of biopower is to shape free-floating and universal bourgeois subjects "free of any particularist spatial ties that prevent him or her from competing effectively in the global marketplace",[43] represented by the Western male figure, it is not difficult to see that the veiled Muslim woman is the antithesis of this ideal. And not only do the veiled women not partake sufficiently of the circulation of goods and capital, but they are also not a part of the circulation of bodies and genes – as covered they are outside the governmental technologies centered on desire, on the one hand, and repression, on the other. As Slavoj Žižek explains:

> [W]hen the French state prohibits Muslim girls from wearing the veil in school, one can claim that they are thus enabled to dispose of their bodies as they wish. But one can also argue that the true traumatic point for critics of Muslim 'fundamentalism' was that there were women who did not participate in the game of making their bodies available for sexual seduction, or for the social exchange and circulation involved in this.[44]

Escaping sexual control techniques is especially troublesome from a biopolitical perspective, for sex is "a means of access both to the life of the body and the life of the species."[45] This leads us to the second question under examination, the functioning of biopower. As already mentioned, I do not find believable that individual ECtHR judges, or other authorities for that matter, would consciously discriminate against Muslims. It seems much

41 Gökariksel – Mitchell 2005, p. 150. See also Joppke 2009, p. 115. This is, of course, in an interesting contrast to Soviet times, when Christianity was used to combat communism.
42 ibid.
43 ibid.
44 Žižek 2005, p. 119.
45 Foucault 2003, p. 32–33.

more likely that they want to achieve a society of tolerance and equality, while Muslims continue to experience mistreatment, which remains largely unnoticed. To be able to comprehend this result, we must further explore Foucault's notions of power and governmentality. According to Foucault:

> Power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them – – Power is everywhere, not because it embraces everything, but because it comes from everywhere – – It is simply the over-all effect that emerges from – – mobilities, the concatenation that rests on each of them and seeks in turn to arrest their movement – – Power is the name that one attributes to a complex strategical situation in a particular society.[46]

Power is not, therefore, a personal skill or a capacity of an individual, nor is it an institution or a structure. Power is rather a complicated ratio of different forces.[47] *Force* means the ability to carry out different tasks – labor force or coercive force are good examples – and *power* is therefore an attempt to manage and control these forces in order to achieve some aim.[48] When this kind of situational power becomes settled, it transforms into planned, calculated governmentality.[49] Kai Alhanen has clarified this abstruse, even mystical, notion of power by interpreting Foucault's analysis of power from the perspective of practices. [50] According to Alhanen, "the use of power transforms into governmentality when practices generate and maintain planned and long-span relations of power."[51] Governmentality is, thus, possible because different practices maintain and renew relations of power. For example, prisoners are constantly exposed (often without noticing) to the power of the prison guards, and this maintains power, and allows the result that a small group of prison guards are capable of governing a significantly larger number of prisoners.[52]

46 Foucault 1978, p. 92–93.
47 Lynch 2011, p. 21.
48 Douzinas – Gearey 2005, p. 59; Alhanen 2007, p. 119–120.
49 Alhanen 2007, p. 124.
50 *ibid., p.* 102–150. Different practices were a vital part of Foucault's historical studies (See Alhanen 2007, p. 34–47).
51 Alhanen 2007, p. 125. Translated by me from Finnish. The quote goes in original language as follows: "vallankäyttö muuttuu hallinnaksi, kun käytännöt synnyttävät ja pitävät yllä suunnitelmallisia ja pitkäjännitteisiä valtasuhteita."
52 Alhanen 2007, p. 126–127.

When relations of power are transformed, through practices, into governmentality, they become relatively independent of the aims of the subjects partaking of the practices. Foucault himself came to the conclusion that power, and especially governmentality, is fundamentally non-subjective. Governmentality certainly has its aims (as we have learned), but it is not dependent on the will of its executor. Foucault explains that large strategies of power are "anonymous, almost unspoken strategies which coordinate the loquacious tactics whose 'inventors' or decision makers are often without hypocrisy."[53] Richard A. Lynch illuminates this complex conclusion with an apt example. What kind of clothes a youngster wears in school tells a lot about that person and her status in school. How she dresses in the morning is part of a complicated strategy or tactic, a very conscious and rational decision, and guided by power relations. Clothes are part of power and governmentality, but the crucial notion is that no single student, group or supervisor can choose what is to be interpreted as 'cool' or 'geeky'. That which is 'in' today can be 'out' tomorrow, which again affects the status of different groups of people. [54]

The contemporary society is based on governmentality. Through governmentality, the (bio)political power governs, arranges, maintains and controls the population and goods. Governmentality, therefore, enables biopolitics. States have become dependent on governance that is actualized through different practices, rituals, norms and tactics, not through clear political decisions or laws.[55] This replacement of clear rules with *norms* – a term which in Foucauldian studies refers to the regulative power of normal (the way people normally act) that tries to absorb all 'otherness' inside it, instead of a judicial norm that separates legal from illegal – generates areas of discretion gives biopower more room to operate. The power of the normal rises out of the community and is therefore more internalized by different actors, more difficult to detect, and more saturated by biopower than judicial rules.[56]

53 Foucault 1978, p. 95.
54 Lynch 2011, p. 23.
55 Foucault 2004, p. 99, 104–110; Butler 2004, p. 51–53.
56 My gratitude to an unanimous referee who encouraged me to make this clarification regarding Foucauldian norms, lacking from the original manuscript, and helped therefore to make the article more accessible.

Having studied how Muslims have become profiled as risks from a biopolitical perspective and how power operates, we can finally comprehend, on a very general level, the difficult situation of Muslims in the West, even if it is important to acknowledge that how the problems materialize on a particular level will certainly vary place by place and community by community.[57] Although judges and other authorities are consciously discriminating against Muslims, this often becomes inevitable in practice, since power is fundamentally non-subjective. An individual or even a group does not really have much power, but power is actualized through different practices aiming for governance. This governmentality executes biopolitical aims, and since Muslims constitute a risk to the society from the biopolitical perspective, different control mechanisms try to fuse them into the mainstream population or to exclude them from the society. This non-subjectivity is illustrated bluntly by revisiting a scene in *The Matrix*, which begins with people standing in red lights, although cars are nowhere to be seen. The rebel leader Morpheus (Laurence Fishburne) is trying to describe Neo (Keanu Reeves), the protagonist of the story, how the Matrix operates:

> The Matrix is a system, Neo. That system is our enemy. When you are inside [the Matrix] and look around, what do you see? Businessmen, teachers, lawyers, carpenters. The very people whose minds we are trying to save. But until we do, these people are still our enemies. You must understand that most of these people are not ready to be unplugged, and many of them are so hopelessly dependent on the system that they will fight to protect it.

The scene ends when a woman, who Neo was eyeing during Moprheus' monologue, suddenly transforms into one of the 'Agents' that act as the guardians of the Matrix and points a gun at Neo. The point is made clear: anyone can become an 'Agent', anytime, and without even realizing it. The effect is repeated throughout the movie, emphasizing that, in the 'Matrix', the Agent is no one and yet anyone.

57 See Joppke 2009 in which it is demonstrated, in a brilliant way, how the schism between Western liberalism and Islam is approached in a differing way in France, Germany and The United Kingdom, even though the problem and the suggested solution — normalization of Muslims — is fundamentally the same. A similar study, but from a Foucauldian perspective, would be extremely interesting, but unfortunately out of the scope of a single article.

The non-subjectivity of power is also a key to reconciling a fundamental problem inherent in the article, namely the fact that there seems to be a clear conflict between the juridical case law approach taken, and the socio-theoretical framework utilized. Although both relate to control and individual freedom, the juridical question posed is 'to what extent can the state limit the freedom of the individual in name of secularism or the rights of others', whereas Foucault and other social theorists aim to study how power operates and to apply this knowledge say something about the society. However, because of the non-subjectivity of power, operating through normalizing practices and norms, it can be concluded that even judges and other legal actors cannot escape from being shaped by biopower. It is, therefore, argued that the approaches obtained are not mutually exclusive, since through certain norms and ways of thinking, internalized and naturalized by judges and reflected also in certain legal practices, biopower has penetrated legal defence mechanisms and operates silently from within legal institutions, especially in those cases where clear rules are blurred and the margin of discretion of the authorities increased. Studying how this happens in practice, and has affected also the ECtHE in the Islam cases, is the aim of the following Chapter.

4 Biopower in Action: Discourses and the Islam Cases from a Foucauldian Perspective

As noted above, non-subjective biopower operates through discourses and practices. Small, seemingly insignificant details accumulate and multiply, creating an impenetrable and inescapable whole. It is not difficult to detect these small details in the ECtHR's Islam decisions and in the whole discussion on THB, if one knows what to search for – although it is near impossible to predict how each of these details links up with others and what kind of consequences this may have.

It is perhaps the easiest to start from discourses, for according to Foucault, discourses function as a way of exercising power. They articulate and distribute all of the norms and practices that we follow in our day-to-day actions.[58]

58 See Weedon, 1997, p. 105.

Regarding Islam, it is easy to detect at least two large discourses that combine to generate a harmful picture of Islam. On the one hand, we have the security discourse. In this paradigm, Islam is seen as a security threat to the state and the individuals inhabiting it: the population. Terrorist attacks, and other security problems, such as alleged rapes, and the general inequality of women are put into the center of the discussion. The language invoked is that of panic. It is described how a never-ending flow of migrants from the East engulfs our national identities and crime increases. Shocking expressions, such as 'fundamentalism' and 'terrorism' are utilized. This is highlighted especially outside the mainstream media, for example in different Internet message boards and forums, but it should be noted that, because of their function, the mainstream newspapers and news broadcasts also report on Islam mostly in the context of terrorism, fundamentalism, honor killings and other shocking topics.[59]

On the other hand, there is the more humanitarian victim discourse. In this discourse, "produced and circulated across many sites, including governmental institutions, NGOs, the media, art and literature, as well as health, pedagogy, and law",[60] attention is directed away from the security paradigm and concentrated on individuals, the victims of Islam – the oppressed veiled women. Instead of a language of risk and panic, a language of pity is invoked. The sufferings of individual Muslim women are emphasized and every horrible detail is highlighted. The stories of corporal punishments, domestic violence, honor killings, genital mutilation and forced marriages are retold and retold again. Alternatively, individual success stories, such as that of Hirsi Ali, who, after a close escape from forced marriage to her cousin and hardships as an asylum seeker, is now listed among The Times' hundred most influential persons in the world, are celebrated.[61] As Jacobsen and Stenvoll explain, this kind of success story is then immediately contrasted with the faceless, generalized Muslim woman who is portrayed in the following way by Ali in one article written about her:

59 See generally Richardson 2004, Jacobsen – Stenvoll 2010, *passim*.; von Kemnitz 2002, p. 20–21; Heine 2002, p. 40; Beck 2002, p. 64; Schmidt di Friedberg 2002, p. 98; Martin – Phelan 2002; Hussain 2010. Bankoff 2003, p. 420–424; Korteweg – Yurdakul 2009; Joppke 2009, p. 47.

60 Jacobsen – Stenvoll 2010, p. 276.

61 For a much more detailed analysis of the portrayal of Hirsi Ali in public, see Jacobsen – Stenvoll 2010, p. 277–278.

> [Muslim] Women are not at all free. Religious people and especially Muslims do not think independently. They do not create their own future. They are always dependent on Allah and the Prophet.

The message here is clear: any Muslim woman could be like Hirsi Ali, were they not oppressed by Islamist fundamentalists and patriarchal males. Through the victim discourse, then, different groups can gain recognition, sympathy and rights. On the other hand, this kind of discourse can also mark certain groups "as groups different from the norm and as permanent victims."[62]

It must be noted that despite their almost opposite starting points – the security discourse aiming to protect the society from external threats and the victim discourse striving for the protection of suffering 'Others' – the security and victim discourses are by no means contradictory. In fact, they seem mutually reinforcing and intertwined. The stories told of violent Muslim terrorists serve to emphasize the plight of Muslim women, whereas the stories of innocent Muslim women at the hands of their oppressors instigate panic of barbaric Muslim men. It is also important for the security discourse that it is seen to lead to the protection of innocent victims, and the suffering of these poor souls can be used to "legitimate interventionist policies in the name of universal rights."[63]

Together these discourses create a stereotypic myth of Islam, consisting of mindless religious fundamentalism, barbaric terrorists, and oppressed, innocent victims. This creation of stereotypes, of course, corresponds to the more general paternalistic symbolism criticized in international law and politics.[64] It is common, especially in the context of human rights, to picture the perpetrators as vicious savages, the victims as innocent and completely helpless creatures, and the saviors as virtuous white knights who gallop to the scene to save the day. In this process, both the victims and the savior are depoliticized. In stark contrast to the active villains, victims are pictured as non-autonomous subjects who are acted upon and that have in no way impacted their distress (for it is a well known fact that "[p]ity cannot work

62 Jacobsen – Stenvoll 2010, p. 275
63 *ibid., p.* 274.
64 See for example Mutua 2001.

for those who are deemed responsible for the ills that have befallen them or those who are considered dangerous to the community"[65]). They are not, therefore, political subjects, but closer to what Giorgio Agamben calls *homo sacer* – a term borrowed from archaic Roman law where it described someone who could not be sacrificed, yet (s)he who killed this person was not condemned for homicide –[66], meaning life reduced to bare life, "biological life that has been politicised in being included in the political community, but only through its exclusion."[67] The humanitarian saviors, in turn, observe the situation from a universal position, with no political interests or cultural biases.

These stereotypes are embodied sometimes in smaller scale discourses that can take interesting forms. One such example is the beauty discourse in the context of Muslim women, studied by Mimi Thi Nguyen.[68] Shocked by the undeserved 'ugliness' of the oriental 'Other', that acted as a clear sign of their oppression, fashion industries decided to do something in the enthusiasm in the wake of freeing the Afghans. As Nguyen puts it: "[a]cting on the hope that beauty can engender a new world order, in 2003, the new nongovernmental organization – – Beauty without Borders opened the Kabul Beauty School, administered by North American and European fashion industry and nonprofit professionals." This endeavor was tightly connected to the human rights discourse picturing the *burqa* "as anticivilizational, a life-negating deindividuation that renders the Afghan woman passive and unwhole", with the result that beauty came to be seen as "a life-affirming pathway to modern, even liberated, personhood."[69] This is reflected, for example, on a speech given by the First Lady Bush, who insisted that "the fight against terrorism is also a fight for the rights and dignity of women," a fight, in other words, against the monsters who want to "pull out women's fingernails for wearing nail polish" and "impose their world on the rest of us".[70] But as Nguyen notes, these kinds of missions, discourses and practices

65 Aradau 2004, p. 258.
66 Agamben 1998, p. 71.
67 Oksala 2010, p. 30. According to Agamben, this exclusion is what constitutes sovereignty by creating a zone of indistinction where the sovereign power can operate as the one who decides on the exception.
68 Nguyen 2011.
69 *ibid., p.* 367.
70 Quoted in *ibid., p.* 365.

are by no means innocent (although the individuals taking part in them can surely be sincerely willing to help). Instead, they work as biopolitical disciplinary techniques *par excellence.* Through the import of presumed expert knowledge, these charitable projects serve to "programmatically train targeted population to transform their conduct as well as their sensibilities."[71] The end-result is a Western, liberal, feminist figure that achieves its "status as a subject only through a civilizing process defined by twinned, and entwined, attachments to beauty as a politics of life."[72] Only when she meets certain prescriptions for gender and sexuality does she realize her human wholeness and dignity. And only then can she extend this external and internal beauty also to others. Beauty – or rather, the Western perception of beauty –becomes a form of right living.[73]

When these stereotypes and myths are repeated enough, they come to seem like self-evident truths and begin to live their own lives through different discourses, processes and practices. None of us can truly escape from this in Western societies, not even the judges of the ECtHR, willing to find the right balance in extremely complicated and open-ended cases. It is, therefore, no wonder that these stereotypes are clearly visible also in the Court's Islam decisions. The choice of terminology was, indeed, perhaps the most criticized aspect of the *Refah* case. Even some of the judges objected to the phrasing of the verdict. Judge Kovler writes in his concurring opinion, for example, that he

> would prefer an international court to avoid terms borrowed from politico-ideological discourse, such as "Islamic fundamentalism" (paragraph 94 of the judgment), "totalitarian movements" (paragraph 99 of the judgment), "threat to the democratic regime" (paragraph 107 of the judgment), etc., whose connotations, in the context of the present case, might be too forceful.[74]

In a similar vein, Carolyn Evans and Christopher A. Thomas note that the Court used the terms 'legal pluralism' and '*sharia*' as catch-words that immediately proved the incompatibility of the party's political line with the values of the Convention, without studying the use and meaning given to

71 *ibid., p.* 373.
72 *ibid., p.* 376.
73 *ibid., p.* 364.
74 *Refah*, concurring opinion of Judge Kovler.

these terms by the party, or the way that such systems work in different societies in the world at the moment.[75] Finally, Jarna Petman criticizes the ECtHR for having given *jihad* the meaning of a holy war for spreading Islam, even though this is only one, very extreme and controversial, interpretation of the term.[76]

In the scarf decisions, again, the ECtHR has emphasized the veil's political symbolism, its connection to an "'Islamic' subjectivity, and implicitly to 'extremist political movements … which [seek] to impose on society as a whole their religious symbols and conception of a society founded on religious precepts'."[77] As Anastasia Vakulenko demonstrates, in *Dahlab* the court did not interfere with the Swiss Federal Court's interpretation that there was "no doubt that the appellant wears the headscarf and loose-fitting clothes not for aesthetic reasons but in order to obey a religious precept which she derives from . . . the Koran." The lack of interest concerning this matter is especially puzzling, she continues, taking in consideration that it was the applicant's main argument that "her clothing . . . should be treated not as a religious symbol but in the same way as any other perfectly inoffensive garments that a teacher may decide to wear for his or her own reasons." [78]

Furthermore, the court's main argument, that the veil could have a proselytizing effect on her students, who were in a vulnerable age, is not very convincing. First, the court did not give any evidence to claim that Dahlab would have tried to proselytize her pupils. In fact, when the students had asked her about her veil, she had not mentioned her religious beliefs, but had told that she wears the scarf to keep her ears warm. There were also no other signs of any political agendas, and Dahlab had, indeed, never received any complaints from the parents of her students.[79] Secondly, neither were there any evidence of any unintentional proselytizing effects. As Carolyn Evans notes, the mere fact that the court uses expressions such as "'it cannot be denied' (rather than it is true) that there 'might' be 'some kind' of proselytizing effect – – is a roundabout way of saying that there was no evidence

75 Evans – Thomas 2006, p. 710–712. See also Ssenyonjo 2007, p. 663; Petman 2006, p. 80.
76 Petman 2006, p. 80.
77 Gökariksel – Mitchell, p. 158. See also Gozdecka 2009, p. 260.
78 Vakulenko 2007, p. 188.
79 Cumper – Lewis 2008–2009, p. 609.

whatsoever presented to the Court – –"[80] Finally, it must be wondered why the Court was not willing to even consider the possibility that perhaps a veil-wearing teacher could in fact have a positive, instead of negative, effect on tolerance and pluralism: a Muslim teacher in a school full of Christians could have provided the students a valuable channel to learn more about other cultures and religions.[81]

Sahin was quite similar in this respect. If anything, the veil is contrasted even more harshly to enlightenment and tolerance. The Grand Chamber cited approvingly the earlier Chamber decision that gave the following statement:

> The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts – – It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (see *Refah Partisi (the Welfare Party) and Others*, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university.[82]

The veil, and those wearing it, were, therefore, associated with religious fundamentalism.[83] This is especially striking, taking in consideration that "non-Muslim students had not been subjected to disciplinary proceedings; since Christian students were not prohibited from wearing the crucifix or Jewish students the skullcap, the Court in effect affirmed a discriminatory practice against Muslim women".[84] A key argument of the court was that the banning of the veil was necessary for the protection of gender equality. But just like in *Dahlab*, the term 'gender equality' was not defined in any way, neither was it stated who this equality seeks to protect. Clearly the applicant did not believe that it protected hers, for she was ready to take the case all the way to the Strasbourg court.[85] The gender equality defended,

80 Evans 2006 , p. 63.
81 Evans 2006, p. 64–65; Petman 2006, p. 82.
82 *Leyla Sahin v. Turkey*, 10 November 2005, para 115: the Grand Chamber citing the former decision of the ECtHR in Sahin (approvingly).
83 See Gozdecka 2009, p. 224, 260; Evans 2006, p. 71–73.
84 Petman 2006, p. 83.
85 On the veil as an identity choice, see generally Weldmölder 2007, p. 155–165; Gozdecka 2009, p. 224–225.

therefore, an abstract concept of woman, separated from the true identity of the applicant.[86]

What these rulings seem to imply, then, is that the women could not have made the choice to wear the veil completely voluntarily. Instead, these women are victims that simply do not understand that their actions add to their own oppression. Their actions are therefore depoliticized. But at the same time as they are pictured as passive victims, they also have a dangerous dual nature. Until they are freed, until they cast of the veil, they act as beacons of religious fundamentalism with a strange, disturbing proselytizing effect: the political surplus left from the neutralization of women is transferred to the faceless enemy. The Court, therefore, reproduced the view of veiling "as a patriarchal practice that limits and enslaves women",[87] as noted by Gökariksel and Mitchell. But, as they add, "it also went one step further, presenting the veil as inherently threatening to the rights and freedoms of unveiled [women]" – the veil was pictures as a "tool of oppression that extends beyond patriarchal family ties and religious connections to comprise an outside pressure on others."[88]

But there is more than stereotypes and discourses at work here. These stereotypes also create important biopolitical consequences, generated through different seemingly insignificant practices and processes – partly the same ones that allow these stereotypes to enter the judgments in the first place. As we have learned, the operation of biopower is dependent on spaces of exception and discretion, where the rules binding on authorities are blurred and the rule of law diminished. In this respect, the most interesting element of the ECtHR's jurisprudence are the doctrine of margin of appreciation and the principle of proportionality, both of which have been developed in the Court's case law. The margin of appreciation is the Court's way of guaranteeing solidarity and subsidiarity in its case law by showing a certain amount of latitude towards the decisions of the authorities of Member States.[89] It is based on the idea, spelled first in the *Handyside* case, that

86 See Vakulenko 2007, p. 192.
87 Gökariksel – Mitchell 2005, p. 158.
88 ibid.
89 Bakircioglu 2007, p. 711, 717–719; Brauch 2005, p. 115–116; Yourow 1987–1988, p. 153–154; Benvenisti 1999, p. 846.

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content [of varying requirements of morals] as well as on the "necessity of a "restriction" or "penalty" intended to meet them – – It is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.[90]

The doctrine is, therefore, linked mainly (but not solely) to the Articles of the Convention that have accommodation clauses, i.e. articles 8–11 which allow the limiting of individuals rights, when such a limitation is "necessary in a democratic society".[91] But the doctrine is very fluid, the width of the margin being determined especially by the following factors: the importance of the protected right; the background of the protected society; whether there exists a European consensus (unanimity leads to a narrow margin, but the lack of consensus leads to a wide margin); and which rights the possible limitations protect. It should be noted, according to Harris, O'Boyle and Harris, that individual factors cannot be given too much weight, but the width of the margin of appreciation must be decided with an overall assessment.[92]

The principle of proportionality is inextricably linked to the margin of appreciation doctrine. It is not enough for the national authorities to show that the infringement of a right was necessary, the restriction must also be proportionate in relation to the aim pursued.[93] As Clare Ovey and Robin White explain, the margin of appreciation has to do with the legitimacy of the aim pursued with the restriction of an individual's rights, whereas the principle of proportionality deals with the actual measures taken to achieve this aim. These doctrines have become so intertwined, however, that the principle of proportionality is often used to study, whether a state has exceeded its margin of appreciation.[94] With the help of the proportionality test, the Court holds back the ultimate power to decide, whether the restriction can be justified or not.[95] It is easy to agree with Christopher E.

90 *Handyside v. United Kingdom*, 7 December 1976, para 48
91 See Arai-Takahashi 2002, p. 8; Brauch 2005, p. 125.
92 Harris – O'Boyle – Warbrick 1995, p. 293–299. See also Macdonald 1993, p. 123; Bakircioglu 2007, p. 716–717 ; Hutchinson 1999, p. 640.
93 Pellonpää 2005, p. 231–232.
94 Ovey – White 2006, p. 240.
95 Harris – O'Boyle –Warbrick 1995, p. 300.

Belelieu, when he asserts that "the principle of proportionality exists as an undeveloped and, somewhat 'crude', concept in [ECtHR] jurisprudence", noting that "proportionality has taken different forms and meanings as a judicial construct of the court, being "an inherent concept of the Court when evaluating and individual's right and the general public interest at issue", while also playing " a role in evaluating the necessity of a measure within 'democratic society.'" [96]

Both the margin of appreciation and the principle of proportionality are, thus, quite ill-defined judicial concepts that leave a lot to the discretion of the court.[97] The width of the margin of appreciation varies case by case, whereas the whole meaning and form of the proportionality test remains vague. It should be noted, in particular, that the Court has not settled on a clear understanding of what the proper balance between the measures taken and the aim pursued is regarding proportionality. Sometimes the principle is taken to mean that the interference with the restricted right was the minimum needed for the achievement of the aim pursued. But sometimes the principles is taken to only require a reasonable relationship between the aims and the means.[98] At times, the proportionality test seems like a mere rhetorical device for the Court to argue its decisions. This can allow an excessively wide margin of appreciation for state authorities in individual cases, as well as cause contradiction between the Court's decisions.

This vagueness is completely understandable, taking in consideration the fact that the ECtHR must be able to apply these concepts into a very wide array of different cases, involving complicated balancing acts between hierarchically equal rights,[99] but is also particularly intriguing from a Foucauldian perspective. As we have noted, wide margins of discretion and spaces of exception, where the rule of law has diminished, and the role of different discourses, norms and practices emphasized, are absolutely necessary for biopower to operate. If we accept the central arguments of this article, namely that Islam has been profiled as a threat to our societies that biopolitical de-

96 Beleieu 2005–2006, p. 592–593.
97 Brauch 2005, p. 126–150;Hutchinson 1999, p. 641, 649; Yourow 1987–1988, p. 153–154. See also Mahoney 1998, Shany 2005; Benvenisti 1999, p. 853–854.
98 Belelieu 2005–2006, p. 593–594.
99 See Bakircioglu 2007, p. 732–733.

fense mechanism aim to eliminate, and that these biopolitical mechanisms necessarily operate also within the Strasbourg court, then it is no surprise that the margin of appreciation and the principle of proportionality have played a decisive role in the Islam cases in forming a negative outcome from the applicant's perspective. This is perhaps most visible in *Sahin*.

In *Sahin*, the Court assessed whether there existed a "reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference."[100] It therefore only adopted the mildest version of the proportionality test, which it utilized to determine, whether the government measures were "necessary in a democratic society". This means, according to Belelieu, that "necessity as an element of proportionality disappears from the test; instead proportionality becomes part of the larger test as to whether the limitations on the freedom manifest one's religion are 'necessary in a democratic society.'"[101] Furthermore, the Court "does not once cite its previous cases law for precedential value", but "relies entirely on Turkey's case law in assessing the proportionality of the university measures", which is strange, taking in consideration that the Court had started the case by declaring that Turkey should be afforded a wide margin of appreciation. In fact, as Carolyn Evans notes, "the Court seemed to extend the margin in *Sahin* beyond respecting the decisions of democratically elected governments to respecting university authorities who are also –or so the Court found – better able to understand the needs of their education community than the Court", meaning that, "the Court effectively defers twice – first to the views of the Government and then to the views of the university – –"[102] The proportionality test does not, therefore, act as a counterweight to the margin of appreciation doctrine, but becomes merely a rhetorical tool, indistinguishable in practice from the latter. This is naturally problematic, since a wide margin of appreciation does not guarantee that the actual measures taken are proportionate to the objectives pursued. It is also in clear contradiction to its earlier decision in *Gündüz*, where the Court used a tripartite proportionality test that allowed it to restrict the utilization of the margin of appreciation doctrine, as noted also by Judge Tulkens, who

100 *Leyla Sahin v. Turkey*, 10 November 2005, para 117.
101 Belelieu 2005–2006, p. 609.
102 Evans 2006, p. 58–59.

in his dissenting opinion demanded the Court to use a tripartite test (although his test differed slightly from that in Gündüz).[103] Finally, it should be noted that ECtHR's central argument justifying the wide margin of appreciation, i.e. that there is no common European standard on the veil in universities, is not very convincing. In fact the overwhelming majority of the Member States does not restrict one's choice of outfit on the university in any way.[104]

The end-result of the utilization of stereotypes and the wide margin of appreciation given to state authorities is that the threat of Islam creates an exceptional circumstance, a state of exception, where exceptional measures can be taken in the name of democracy, "public safety," "public order," "health" or "morals," or the "rights and freedoms of others, and where the rule of law has diminished, further increasing the discretion of authorities. In this state, threats to public order require elimination by any means necessary. Govermentality uses, therefore, as Judith Butler demonstrates, laws and jurisprudence, as part of its tactic. When the interpretation of laws becomes part of the bureaucratic machine and into the hands of different experts, clear rules are vanished and the discretion of the authorities is increased.[105] Since the authorities are still guided by biopolitical practices and structural biases, the blurring of rules leads to the vanishing of the rights of the threats to the population. The diminishing of the rule of law combines sovereignty with governmentality and opens them more space to operate. Laws are either narrowed in the name of the sovereign or used to control the population. And the stronger the sovereign grows, the weaker the laws protecting the rights of its subjects become, and the more governance there is, for the ultimate goal of sovereignty is always to strengthen itself, and this is possible (in the contemporary society) only through biopolitics. As already stated, the replacement of sovereign power with biopower and governmentality does not mean the evanescence of sovereignty or the decline of the state. It is exactly the diminishing of the rule of law that enables the revival of sovereignty inside governmentality.[106]

103 *Gündüz v. Turkey*, 4 December 2003.
104 *ibid.*, p. 57–58.
105 See also Petman 2011.
106 Butler 2004, p. 53–67. On the relation between governance and laws, see also Tuori 2002, p. 18–19.

But interestingly, and fittingly for our neo-liberal biopolitical societies, this state of exception will not lead to a war for the eradication of the enemy. Rather, it simply leads to a situation, where the Muslims will need to make a choice: either they adopt the Western way of life and perceptions of freedom and beauty, or they are excluded from the society. This Sophie's choice is masked as a freedom: the freedom for everyone to dress and exercise their religion as they want. But there is really no such freedom, for as Jacobsen and Stenvoll explain, "[t]hose who go against the prevailing norms of unmarked femininity may be construed as oppressed, whereas choices made in line with these norms are understood as manifestations of one's freedom."[107] 'We' make rational choices, whereas 'their' decisions are predetermined by their oppressive cultural practices, i.e. irrational and forced. This is framed best by Slavoj Zizek, who explains the pseudo-choice of wearing the veil in the following way, and deserves to be quoted in some length:

> [According to the liberal view, the wearing of the veil is] acceptable if it is [the Muslim women's] own free choice rather than imposed on them by husbands or family. However, the moment a woman dons the veil as the result of personal choice, its meaning changes completely: it is no longer a sign of belonging to the Muslim community, but an expression of idiosyncratic individuality. In other words, a choice is always a meta-choice, a choice of the modality of the choice itself: it is only the woman who does not choose to wear a veil that effectively chooses a choice. This is why, in our secular liberal democracies, people who maintain a substantial religious allegiance are in a subordinate position: their faith is 'tolerated' as their own personal choice, but the moment they present it publicly as what it is for them–a matter of substantial belonging–they stand accused of 'fundamentalism'. Plainly, the 'subject of free choice', in the 'tolerant', multicultural sense, can only emerge as the result of an extremely violent process of being uprooted from one's particular life-world.[108]

This sentiment of pseudo-choice, created through the accidental utilization of stereotypes and through the areas of discretion and exception, managed with the margin of appreciation and principle of proportionality, is, indeed, what permeates the veil decisions, as well. In no point of the decisions did the ECtHR consider the cases as having to do with the freedom of independent women to dress as they like, although this seemed to be the argument of the applicants, but the court focused all their attention to the veil as a fundamentalist, religious symbol, with a potentially proselytizing, and

107 Jacobsen – Stenvoll 2010, p. 283–284.
108 Zizek 2005, p. 118.

certainly disturbing, effect. This politicization of the Court's jurisprudence is, of course, far from unique for human rights jurisprudence, but permeates all juridical functions. It is especially troublesome regarding human rights, however, for through the expansion of the human rights phenomenon and the human rights rhetoric, previously non-judicial areas of life are becoming judicial and included in the jurisdiction of courts.

5 Conclusion

What should we conclude, then? If not even the ECtHR can escape biopower, have human rights become useless for Muslims? I do not think that the situation is this bleak. As Foucault puts it, "where there is power, there is resistance."[109] As long as human rights allow us to wage emancipator struggles, there is hope. What human rights provide, then, is, as Jacques Rancière explains, formal equality, something to base substantive claims on. As Rancière notes, they are, as written rights, more than just "predicates of a nonexisting being." They are not only "an abstract ideal", but also "part of the configuration of the given", and therefore provide "a form of visibility of equality".[110] It is my opinion that the decision of the Second Section of the ECtHR in the Lautsi decision demonstrates that this visibility has paid off, and that the Court has started to reconsider its previous policies. The first Lautsi decision was, therefore, a brave step towards change. It was a misstep, of course, emphasizing secularism and leading therefore to an even more difficult situation for non-Christian believers, despite its contradictory aim, and the Grand Chamber decision should not, therefore, be condemned as treachery in part of the Court, but celebrated as a necessary corrective move. But it showed, nevertheless, that human rights can bring change, and that the ECtHR is sincerely trying its best in balancing conflicting rights in a fair, just way. Perhaps already the next attempt is more successful, although it must also be considered carefully, whether the changes in the Court's practice could also be an outcome of a changing approach towards Muslims within biopolitical staregies, resulting perhaps from a westernization of

109 Foucault 1978, p. 95.
110 Rancière 2004, p. 302–303.

Muslim women who are increasingly accessing the labor market and thus increasing their productivity.[111]

There is an inherent paradox in human rights. They are a vital tool for resisting biopower – not because they reflect some divine power or the core of humanity (at least in their written form), but because they provide us the means to challenge power. Yet, every time the victims invoke their rights, they set in motion biopolitical practices through invoking expert power and bureaucratic mechanisms. It is pointless, however, to reject human rights because of this paradox. As Martti Koskenniemi explains"[h]uman rights are like love, both necessary and impossible."[112] We have, therefore, only one possibility: to hold on to rights, but to examine them critically. We must resist discourses that claim that more human rights make everything good and ponder every decision carefully. Human rights must be approached as a useful, yet dangerous tool. We need, therefore, an "ethic of critical engagement with human rights, with-in and against human rights, in the name of an unfinished humanity":[113] a never-ending cycle of protest, activism and critique for the continuous interrogation of the limits of the human of rights. If we stay sincere, alert and open-minded in this process, we can approach, step by step, the raw emancipatory potential that human rights may possess.

111 I owe this last point to Tapio Rasila
112 Koskenniemi 2001, p. 33.
113 Golder 2010, p. 356. It is his claim that this is what Foucault was aiming at, during his last years, instead of rejecting his former views and becoming suddenly a great humanist, as it is often claimed.

Bibliography

Literature

Agamben, Giorgio: Homo Sacer: Sovereign Power and Bare Life. Stanford University Press. Stanford 1998. (Agamben 1998)

Agamben, Giorgio: Security and Terror. Vol. 5, No.4, Theory and Event 2001. Available at http://muse.jhu.edu.libproxy.helsinki.fi/journals/theory_and_event (last visited 1.8.2011). (Agamben 2001)

Agamben, Giorgio: State of Exception. University of Chicago Press. Chicago and London 2005. (Agamben 2005)

Alhanen, Kai: Käytännöt ja ajattelu Michel Foucault'n filosofiassa. Gaudeamus. Helsinki 2007. (Alhanen 2007)

Aradau, Claudia: The Perverse Politics of Four-Letter Words: Risk and Pity in the Securitisation of Human Trafficking, Vol. 33, No. 2, Millenium: Journal of International Studies 2004, p. 251–277. (Aradau 2004)

Arai-Takahashi, Yutaka: The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR. Intersentia. Antwerpen 2002. (Arai-Takahashi 2002)

Bakircioglu, Onder: The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases, Vol. 8, No. 2, German Journal of International Law, 2007, p. 711–734. (Bakircioglu 2007)

Bankoff, Greg: Regions of Risk, Western Discourses on Terrorism and the Significance of Islam, Vol. 26, Studies in Conflict & Terrorism, 2003, p. 413–428. (Bankoff 2003)

Beck, Herman: A Hidden Agenda or Hidden Prejudices? Building a Turkish Mosque in Tilburg, in Intercultural Relations and Religious Authorities: Muslims in the European Union (Shadid, W.A.R. – van Koningsveld, P.S. (eds.). Peeter. Leuven, Paris and Dudley 2002, p. 49–66. (Beck 2002)

Belelieu, Christopher D.: The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam through a European Legal Prism in Light of the Sahin Judgment, Vol. 12, No. 2, Columbia Journal of European Law, 2005–2006, p. 573–624. (Belelieu 2005–2006)

Benvenisti, Eyal: Margin of Appreciation, Consensus, and Universal Standards, Vol. 31, International Law and Politics, 1999, p. 843–854. (Benvenisti 1999)

Brauch, Jeffrey A.: The Margin of Appreciation and the European Court of Human Rights: Threat to the Rule of Law, Vol. 11, Columbia Journal of European Law, 2005, p. 113–150. (Brauch 2005)

Butler, Judith, Precarious Life: The Power of Mourning and Violence. Verso. London and New York 2004. (Butler 2004)

Chandler, David: Critiquing Liberal Cosmopolitanism? The Limits of the Biopolitical Approach, Vol. 3, No.1, International Political Society, 2009, p. 53–70. (Chandler 2009)

Cumper, Peter – Lewis, Tom: 'Taking Religion Seriously'? Human Rights and Hijab in Europe – Some Problems of Adjudication, Vol. 24, No. 2, Journal of Law and Religion, 2008–2009, p. 599–627. (Cumper – Lewis 2008–2009)

Dillon, Michael, Cared to Death: The Biopoliticised Time of Your Life, No. 2, Foucault Studies 2005, p. 37–46. (Dillon 2005)

Dillon, Michael – Reid, Julian: The Liberal Way of War: Killing to make life live. Routledge. London and New York 2009. (Dillon – Reid 2009)

Douzinas, Costas – Gearey, Adam: Critical Jurisprudence: The Political Philosophy of Justice. Hart Publishing. Oxford, Portland and Oregon 2005. (Douzinas – Gearey 2005)

Evans, Carolyn: The 'Islamic Scarf' in the European Court of Human Rights. Vol.7, No.1, 2006, Melbourne Journal of International Law, p. 52–73. (Evans 2006)

Evans, Carolyn – Thomas, Christopher A.: Church-State Relations in the European Court of Human Rights. Vol. 1 Brigham Young University Law Review, 2006, p. 699–725. (Evans – Thomas 2006)

Foucault, Michel: The History of Sexuality, Vol. 1: An Introduction. Penguin Books. Hammonsworth 1978. (Foucault 1978)

Foucault, Michel: Society Must Be Defended: Lectures at the Collège de France, 1975–1976. Picador. New York 2003. (Foucault 2003)

Foucault, Michel: Security, Territority, Population: Lectures at the Collège de France, 1977–1978. Palgrave Macmillan. New York 2004. (Foucault 2004)

Foucault, Michel: The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979. Palgrave Macmillan. New York 2008. (Foucault 2008)

Golder, Ben: Foucault and the Unfinished Human of Rights, Vol. 6, No. 3, Law, Culture and the Humanities 2010, p. 354–374. (Golder 2010)

Goldstein, Daniel M.: Human Rights as Culprit, Human Rights as Victim: Rights and Security in the State of Exception, in Goodale, Mark – Merry, Sally-Engle (eds.): The Practice of Human Rights: Tracking Law between the Global and the Local, p. 49–77. Cambridge University Press. Cambridge 2007. (Goldstein 2007)

Gozdecka, Dorota Anna: Religions and Legal Boundaries of Democracy in Europe: European Commitment to Democratic Principles. Helsinki 2009. Available at http://urn.fi/URN:ISBN:978-952-10-5803-5 (last visited 29.11.2011). (Gozdecka 2009)

Gökariksel, Banu – Mitchell, Katharyne: Veiling, secularism, and the neoliberal subject: national narratives and supranational desires in Turkey and France, Vol. 5, No. 2, Global Networks, 2005, p. 147–165. (Gökariksel – Mitchell 2005)

Hannah, Matthew: Spaces of Exception and Unexceptionality, in Cowen, Deborah – Gilbert, Emily (eds.): War, Citizenship, Territory, p. 57–72. Oxon, Routledge. New York and Abingdon 2008. (Hannah 2008)

Hardt, Michael – Negri, Antonio: Empire. Harvard University Press. Cambridge and London 2001. (Hardt – Negri 2001)

Hardt, Michael – Negri, Antonio: Multitude: War and Democracy in the Age of Empire. Penguin Books. London 2006. (Hardt – Negri 2006)

Harris D.J. – O'Boyle, M. – Warbrick, C.: Law of the European Convention on Human Rights. Butterworths. London, Dublin, Edinburgh 1995. (Harris – O'Boyle – Warbrick 1995)

Heine, Susanne: Islam in Autria: Between Integration Politics and Persisting Prejudices, in Shadid, W.A.R. – van Koningsveld, P.S. (eds.): Intercultural Relations and Religious Authorities: Muslims in the European Union, p. 27–48. Peeter. Leuven and Paris and Dudley 2002. (Heine 2002)

Hussain, Amir, (Re)presenting: Muslims on North American Television, Vol. 4, No. 1 Contemporary Islam, 2010, p. 55–75. (Hussain 2010)

Hutchinson, Michael R.: The Margin of Appreciation Doctrine in the European Court of Human Rights, Vol. 48, International and Comparative Law Quarterly, 1999, p. 638–650. (Hutchinson 1999)

Jacobsen, Christine M. – Stenvoll, Dag: Muslim Women and Foreign Prostitutes: Victim Discourse, Subjectivity, and Governance, Vol. 17, No. 3, Social Politics: International Studies in Gender, State and Society, 2010, p. 270–294. (Jacobsen – Stenvoll 2010)

von Kemnitz, Eva Maria: Muslims as Seen by the Portuguese Press 1974–1999: Changes in the Perception of Islam, in Shadid, W.A.R. – van Koningsveld, P.S. (eds.): Intercultural Relations and Religious Authorities – Muslims in the European Union, p. 7–26. Peeter. Leuven, Paris and Dudley 2002. (von Kemnitz 2002)

Korteweg, Anna – Yurdakul, Gökce: Islam, Gender, and Immigrant Integration: Boundary Drawing in Discourses on Honour Killing in the Netherlands and Germany Vol. 32, No. 2 Ethnic and Racial Studies, 2009, p. 218–238. (Korteweg – Yurdakul 2009)

Koskenniemi, Martti: Human Rights, Politics, and Love, Mennesker & Rettigheter 4/2001, p. 33–45. (Koskenniemi 2001)

Koskenniemi, Martti: Human Rights Mainstreaming as a Strategy for Institutional Power, Vol. 1, No. 1, Humanity: An International Journal of Human Rights, Humanitarianism, and Development, 2010, p. 47–59. (Koskenniemi 2010)

Lynch, Richard A.: Foucault's Theory of Power, in Taylor, Dianna (ed.): Michel Foucault: Key Concepts, p. 13–26. Acumen. Durham 2011. (Lynch 2011)

Macdonald, Ronald St. John: The Margin of Appreciation, in MacDonald, Ronald St. John –Matscher, Franz –Petzold, Herbert (eds.): The European System for the Protection of Human Rights, p. 83–124. Martinus Nijhoff Publishers. Dordrecht 1993. (MacDonald 1993)

Mahoney, Paul: Marvellous Richness of Diversity or Invidious Cultural Relativism, Vol. 19, Human Rights Law Journal, 1998, p. 1–6. (Mahoney 1998)

Martin, Patrick – Phelan, Sean: Representing Islam in the Wake of September 11: A Comparison of US Television and CNN Online Messageboard Discourses, Vol. 20, No. 3, Prometheus, 2002, p. 263–269. (Martin – Phelan 2002)

Merry, Sally Engle: Introduction: Conditions of Vulnerability, in The Practice of Human Rights: Tracking Law Between the Global and the Local (Goodale, Mark & Merry, Sally Engle eds), Cambridge, Campbridge University Press 2007, 195–203. (Merry 2007)

Mutua, Makau: Savages, Victims and Saviors: The Metaphor of Human Rights, Vol. 42, No. 1 Harvard International Law Journal, 2001, p. 201–245. (Mutua 2001)

Nguyen, Mimi Thi: The Biopower of Beauty: Humanitarian Imperialism and Global Feminism in an Age of Terror, Vol. 36, No. 2, Signs, 2011, p. 359–383. (Nguyen 2011)

Oksala, Johanna: Violence and the Biopolitics of Modernity, No. 10, Foucault Studies, 2010, p. 23–43. (Oksala 2010)

Ovey, Clare – White, Robin: Jacobs & White: The European Convention on Human Rights, Fourth Edition, Oxford, Oxford University Press 2006. (Ovey – White 2006)

Pellonpää, Matti: Euroopan ihmisoikeussopimus, 4. uudistettu painos, Helsinki, Talentum 2005. (Pellonpää 2005)

Petman, Jarna: Human Rights, Democracy and the Left. Vol. 2 Unbound: Harvard Journal of the Legal Left 2006, p. 63–90. (Petman 2006)

Petman, Jarna: Deformalization of International Organizations Law, in Klabbers, Jan – Wallendahl, Åsa (eds.): Research Handbook on the Law of International Organizations, p. 398–430. Edward Elgar. Cheltenham and Northampton 2011. (Petman 2011)

Rancière, Jacques: Who Is the Subject of the Rights of Man?, Vol. 103, No. 2, The South Atlantic Quarterly, 2004, p. 297–310. (Rancière 2004)

Richardson, John E.: (Mis)Representing Islam: The Racism and Rhetoric of British Broadsheet Newspapers. John Benjamins. Amsterdam and Philadelphia 2004. (Richardson 2004)

Schmidt di Friedberg, Ottavia: Being Muslim in the Italian Public Sphere: Islamic Organisations in Turin and Trieste, in Shadid, W.A.R. – van Koningsveld, P.S. (eds.): Intercultural Relations and Religious Authorities: Muslims in the European Union, p. 87–106. Peeter. Leuven, Paris and Dudley 2002. (Schmidt di Friedberg 2002)

Shany, Yuval: Toward a General Margin of Appreciation Doctrine in International Law? Vol. 16, The European Journal of International Law, 2006, p. 907–940. (Shany 2006)

Ssenyonjo, Manisuli: The Islamic Veil and Freedom of Religion, the Rights to Education and Work: a Survey of Recent International and National Cases, Vol. 6, No. 3, Chinese Journal of International Law, 2007, p. 653–710. (Ssenyonjo 2007)

Taylor, Chloë: Biopower, in Taylor, Dianna (ed.): Michel Foucault: Key Concepts, p. 41–54. Acumen. Durham 2011. (C. Taylor 2011)

Taylor, Dianna: Introduction: Power, freedom and subjectivity, in Taylor, Dianna (ed.): Michel Foucault: Key Concepts, p. 1–9. Acumen. Durham 2011. (D. Taylor 2011)

Tuori, Kaarlo: Foucault'n oikeus: Kirjoituksia oikeudesta ja sen tutkimisesta. WSOY Lakitieto. Helsinki 2002. (Tuori 2002)

Vakulenko, Anastasia: 'Islamic Headscarves' and the European Convention on Human Rights: An Intersectional Perspective, Vol. 16, No.2, Social and Legal Studies, 2007, p. 183–199. (Vakulenko 2007)

Weedon, Chris: Feminist Practice and Poststructuralist Theory. Blackwell Press. Cambridge 1997. (Weedon 1997)

Weldmölder, Hans: Headscarves at Public Schools: The Issue of Neutrality Reconsidered, in Goldschmidt, J.E. – Loenen, M.L.P. (eds.): Religious Pluralism and Human Rights in Europe: Where to Draw the Line? Intersentia. Antwerpen and Oxford 2007. (Weldmölder 2007)

Yourow, Howard Charles: The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, Vol. 3 Connecticut Journal of International Law, 1987–1988, p. 111–159. (Yourow 1987–1988)

Žižek, Slavoj: Against Human Rights, Vol. 34 New Left Review, 2005, p. 115–131. (Žižek 2005)

Cases

Handyside v. United Kingdom (Application 5493/72), European Court of Human Rights, Court (Plenary), 7 December 1976.

Otto Preminger Institut v. Austria (Application 13470/87), European Court of Human Rights, Court (Chamber), 20 September 1994.

Wingrove v. United Kingdom (Application 17419/90), European Court of Human Rights, Court (Chamber), 25 November 1996.

Dahlab v. Switzerland (Application 42393/98), European Court of Human Rights, 15 Febuary 2001.

Refah Partisi (The Welfare Party) and Others v. Turkey (Applications 41340/98, 41342/98, 41343/98 and 41344/98), European Court of Human Rights, Court (Grand Chamber), 13 February 2003.

Gündüz v. Turkey (Application 35071/97), European Court of Human Rights, Court (First Section), 4 December 2003.

Leyla Sahin v. Turkey (Application 44774/98), European Court of Human Rights, Court (Fourth Section), 29 June 2004 (Fourth Section).

Leyla Sahin v. Turkey (Application 44774/98), European Court of Human Rights, Court (Grand Chamber), 10 November 2005.

Folgero and Others v. Norway (Application 15472/02), European Court of Human Rights, Court (Grand Chamber), 29 June 2007.

Dogru v. France (Application 27058/05), European Court of Human Rights, Court (Fifth Section), 4 December 2008.

Kervanci v. France (Application 31645/04), European Court of Human Rights, Court (Fifth Section), 4 December 2008.

Lautsi v. Italy (Application 30814/06), European Court of Human Rights, Court (Second Section), 3 November 2009.

Lautsi and Others v. Italy (Application 30814/06), European Court of Human Rights, Court (Grand Chamber), 18 March 2011.

Treaties

Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953), Council of Europe Treaty Series – No. 005, Finnish Treaty Series 19/1990 (ECHR).