

A closer look at law: human rights as multi-level sites of struggles over multi-dimensional equality

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In many societies, deep conflicts arise around religious matters, and around equality. Often, religious collectives demand the right to self-determination of issues considered – by them – to be their own, and these demands collide with individual rights to, again, religious freedom. These are thus conflicts of religion v. religion. Then, collective religious freedom tends to become an obligation for all those who are defined as belonging to the collective, which carries the problem that mostly elites define its meaning and they silence dissent. Usually, such obligations are also unequal relating to gender, with different regimes for women and for men, and transgender identities fail to be recognized entirely. Examples include not only the Muslim headscarf, Jewish yarmulke or Sikh turban cases, but also the cases around swimming lessons or litigation for prayer time at school which I use as focal points in this paper. And, at present, such conflicts surface in surprising numbers. Therefore, I will place them in discussions of constitutionalism, secularism, multi-level regulation, and, of course, religious freedom and equality. With this multi-layered analysis, I propose to seek a deeper understanding of these struggles, beyond a portrayal of them as mere clashes of rights. Such an understanding needs the tools of discourse analysis, in that it should uncover which rights are claimed by whom with which effect on whom. We need to acknowledge that rights are often an issue, since human rights are a point of reference both for moral claims as well as for political suppositions, used as illustrations in many academic fields way beyond legal studies. But often, turning to rights does not do justice to the law. Instead, we need to understand law's specificities, as regulation, and decentre law,¹ simultaneously. Then, any doctrinal response to conflicts of religion and equality may be grounded in what is usually called a socio-legal analysis, and what I would call a reflexive understanding of the law. Based on this, I propose to search for solutions to the conflicts by relying on individual and not on collective fundamental rights read in the light of each other, with substantive equality as one corner of a fundamental rights triangle.

1. Introduction

Today, there is an abundance of conflicts surrounding religious freedom throughout the world. To many societies, states, courts, and scholars, these are not entirely new. What some see as a

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1 Michel Foucault emphasizes the need to decentre the state, which I apply to the law. See his *Power/Knowledge*, 1978.

policy against Islam after 9/11 has historical predecessors in policies against Catholicism. There have also been court cases in which religion and equality did collide in the past. However, we seem to frame these differently today. This is why I suggest not only to think about religion and come to terms with belief in light of, say, sex equality, but to think about these conflicts in the context of contested secularism, as an occurrence in a world of multi-level (and thus also contested) regulation, and as a problem of multiple inequalities.

First, religion is back on the agenda, but it is enculturalized, and treated as a group issue, which brings with it a host of problems. In addition, secularism is at stake.² This is not so much the case when collective religious identities already officially form nation states, as in the case of an Islamic Republic, the Jewish State of Israel, in some way Britain with the Anglican Church, or the Vatican. Then, one could argue, we saw some conflicts with minority religions and equality coming. But we observe these conflicts also in states which claim to be and have been mostly seen as secular. These are the more unexpected and more complex conflicts, where it is not the state that explicitly endorses a religion, but when it is social groups in whose name a collective right is claimed, in the context of proclaimed state secularism. Religion is back, one could say in such settings, in rather interesting ways, on the thought-to-be secular agenda. Often, this is subject to controversies around the very notion of the secular, or secularism, or constitutionalism as a secular regime. The varying presence of religion can also be understood as a specific instance of agenda setting, true to an understanding of law as a discursive activity in regulation.

Second, equality is, also in a problematic way, pushed onto a mainstream agenda. In many places, conflicts around religion are described as and reduced to clashes between Islam and women's rights.³ The headscarf, niqab or burka controversies, reaching from Turkey to France, the Netherlands, and Germany, are discussed, by many, as a problem which Islam has with sex equality, as are the conflicts around Shari'a family law and other religious personal status, marriage or divorce norms in several other countries.⁴ So sex equality, or feminism, is, in rather interesting ways as well, on the agenda very prominently, and often that prominent in the mainstream for the first time.

Third, it is a problematic version of equality, or in fact, a claim of a difference, which is back in such settings, while the conflicts in fact call for a more nuanced understanding of equality to address multiple inequalities. What we see is that religion and equality do not peacefully coexist. But what we need is a better understanding of both rights to find legal answers to conflicts at hand.

Fourth, rules are challenged and it is then obviously insufficient to claim but one right or only one principle to address the conflicts at hand. Beyond a better understanding of these rights and principles, we need to understand the multiple levels of regulation and thus the plurality of

2 By secularism, I invoke the concept according to which societies are secular if there is a secularized political sphere, thus a basic separation of state and church. I do not discuss a Weberian notion of secularisation which informs modernization. That this is no causal connection is evident in the case of the United States, a rather religious yet modern society, and seems to be a widely accepted consensus in sociological discussions of the topic.

3 See, for example, the special issue of the *Women's Studies International Forum on Islam*, 2006, and for an overview regarding different religions and human rights N. Ghanea et al., *Does God Believe in Human Rights?: Essays on Religion and Human Rights*, 2007. For a brief comment on Germany, see S. Baer, 'Religionsfreiheit und Gleichberechtigung', in H. Bielefeld et al. (eds.), *Religionsfreiheit – Jahrbuch Menschenrechte 2009*, 2008, pp. 105-115. A thoughtful Swiss perspective on constitutionalism is offered by W. Kälin, *Grundrechte im Kulturkonflikt*, 2000; Th. Fleiner & L. Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalised World*, 2009.

4 In Egypt, the focal point is Art. 2 of the Constitution which endorses Islamic law. The Supreme Constitutional Court has held that this can only refer to principles of law which are uncontested in Islam, and not to the many rules where different interpretations exist. See Supreme Constitutional Court of Egypt, Case No. 8 of Judicial Year 17 (May 18, 1996), annotated translation by N. Brown & C. Lombardi, 2006 *American U. International L. Rev.* 21, pp. 437-460 (religious garb of pupils). See also P. Fournier, 'Flirting with God in Western Secular Courts: Mahr in the West', 2010 *International Journal of Law, Policy and the Family* 24, pp. 1-28.

rules which govern a case. In this global legal environment, I will however argue that we should not return to a traditional public-private distinction which is back on the agenda, too, yet particularly problematic.

I start the discussion with an analysis of the discussions we have, the frames which are employed to mark conflicts within human rights. To illustrate the problem, I will then discuss some cases, and eventually return to the frames, but in what I hope to be a more nuanced understanding of them. The cases refer to headscarves, swimming lessons and prayer at school and they made it to the courts in Germany as well as in other countries, of which I will mention the Netherlands, Switzerland and the UK. What are we, in light of all the layers I invoke, to think of these?

2. Political agenda setting: religion and sex equality

Conflicts around religion and equality are conflicts in human rights with a specific flavour, and it is a flavour added in larger political discourse. It gives legal discussions of cases in the area a specific taste, too. So before I discuss legal cases, I will briefly outline the most relevant discursive dynamics in the area. First, there is the culturalization of religion, which implies groupism as a dangerous dynamic. Then, there is the *othering* of sex inequality, which uses religion or culture as a stigma to shield a majority from critique and change. In addition, there is a problematic mainstream frame of tolerance, and fetishism around law.

2.1. ‘Enculturalizing’ religion and groupism

In many societies perceived or portrayed as secular, and after times in which religion was not a prior concern for scholars outside of this field of specialty, religion is back on the agenda. There are many factors which give rise to this, and I will name just three of them. One causal factor is certainly the terrorist attacks in the US, Madrid and London, the murder of a film-maker in the Netherlands, death threats to cartoonists and newspaper editors in Denmark – all associated with Islamist terror. Another factor is global migration, with more people of diverse religious beliefs in societies which were dominated by one or few religions and which had generously granted privileges they may not be willing to grant to the newly arrived. Religious diversity is not new to states like India, but it is certainly new to many Western and Eastern European states. In addition, religion has made it back to our agendas because of several calls for it, be it the emphasis on values forcefully articulated by moral minorities which even succeed in being labelled ‘Moral Majority’, or be it problematic binary constructions of clashes between cultures, or be it diagnoses of modern societies as lacking guidance and orientation for people, estranging them, creating a need for community, rituals, or metaphysics.

So there are reasons why religion is back and no wonder it is a hot topic in theoretical discussions and academic contexts concerned with secular varieties of power, like political theory and political science, social and legal philosophy, sociology and legal studies. One catalytic moment may be the debate between the social philosopher Jürgen Habermas and the now Pope and then Cardinal Ratzinger,⁵ while others would refer to the study of secularism by the political theorist Charles Taylor,⁶ by the sociologist José Casanova⁷ or the critical account by Talal Asad.⁸

5 J. Habermas & J. Kardinal Ratzinger, *Dialektik der Säkularisierung*, 2005.

6 Ch. Taylor, *A Secular Age*, 2007; see also Ch. Taylor et al. (eds.), *Secularism, Religion and Multicultural Citizenship*, 2008.

7 J. Casanova, ‘Public Religions Revisited’, in N. De Vries (ed.), *Religion Beyond a Concept*, 2008, pp. 101-119; J. Casanova, *Public Religions in the Modern World*, 1994.

8 T. Asad, *Formations of the Secular: Christianity, Islam, Modernity*, 2003.

In legal studies, the comparative constitutionalist and currently the European Court of Human Rights Justice Andras Sajó recently restarted the debate.⁹ So we observe a return of a topic which has been a starting point for much theory in the field, but has been considered less relevant in the last 50 years or so. Note that Karl Marx¹⁰ and Emile Durkheim,¹¹ and then most prominently Max Weber¹² started, more or less explicitly, the sociological study of law, states, and administrations with a clear albeit not always explicit investment in religion, in Weber's case more specifically despite its universal tone, German Protestantism. Thereafter, sociologists have devoted attention to religion as one sub-system of our societies, such as the systems theoretician Niklas Luhmann.¹³ But mainstream political theory and legal studies have, in the late 20th century, not spent much time on religion. Put differently, secularization infected theory, but it did not result in the end of religion. So religion is back.

However, nothing ever returns to a discursive agenda unchanged. Today, religion mostly appears dressed up. Specifically, it appears in the guise of culture, which, in turn, is often a guise of ethnicity, and eventually, though clouded in taboo, racism.¹⁴ When people argue in defence of cultural pluralism, it is often religion which is at stake. When people defend problematic versions of multicultural politics, affirming the difference of 'cultures' rather than emphasizing commonalities and cooperation, such strategies often endorse a stereotyping of the 'other', which is, often, a religion, and ultimately paternalistic and racist, politics.¹⁵ At the same time, many discussions of religious pluralism explicitly employ multiculturalism or cultural diversity as a normative frame.¹⁶ Religion is then, in specific ways, 'enculturalized'. This is not just a problem of confusing terminology. It also invites additional concerns. The most problematic is what Rogers Brubaker has defined as 'groupism'. He describes this as one dimension of nationalism, and as a problematic element of claims of national self-determination.¹⁷

More generally, groupism characterizes any claim by any collective.¹⁸ Whenever a 'culture' or a 'religion' claims recognition, we have the problem of reification, in that this suggests that the culture or religion is homogenous. We also usually have the problem of elitism, since and when such collective claims are not defined by all members of the relevant entity. In addition, as Brubaker notes, we have the problem of mapping the world in exclusionary blocs. Thus, groupism is what is wrong with identity politics, an observation theorized in critical race, feminist and gay studies extensively.¹⁹ Now I suggest considering groupism also as a problem

9 A. Sajó, 'Preliminaries to a Concept of Constitutional Secularism', 2008 *INT'L J. CONST. L. (I•CON)* 6, pp. 605-629.

10 K. Marx, 'Critique of Hegel's Philosophy of Right, 1843 ('Die Religion (...) ist das Opium des Volkes', translated as religion is 'opium of the people').

11 E. Durkheim, *Die elementaren Formen des religiösen Lebens*, 2005 (first published in 1912, *The Elementary Forms of the Religious Life*, transl. K. Fields, 1995).

12 M. Weber, *Die protestantische Ethik und der 'Geist' des Kapitalismus*, 2006 (first published in journals in 1904/05, *The Protestant Ethic and the Spirit of Capitalism*, reprint edited by T. Parsons, 2003) (arguing that a specific modern rationality results from Protestant ethics).

13 N. Luhmann, *Die Religion der Gesellschaft*, 1997.

14 Compare M. Chon & D. Arzt, 'Walking While Muslim', 2005 *Law and Contemporary Problems*, pp. 215-254, more generally R. Frankenberg (ed.), *Displacing Whiteness: Essays in Social and Cultural Criticism*, 1997.

15 M. Dustin & A. Phillips, 'Whose agenda is it?: abuses of women and abuses of "culture" in Britain', 2008 *Ethnicities*, pp. 405-424; M. Verloo, 'Multiple inequalities, Intersectionality and the European Union', 2006 *European Journal of Women's Studies*, pp. 211-228 (discussing the Netherlands).

16 M. Deveaux, *Gender and Justice in Multicultural Liberal States*, 2006; J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, 1995; A. Phillipps, *Multiculturalism without Culture*, 2007.

17 R. Brubaker, *Ethnicity without Groups*, 2006. Also note the patterns of wars fought in the name of religions; H. Kippenberg, *Gewalt als Gottesdienst. Religionskriege im Zeitalter der Globalisierung*, 2008.

18 Brubaker observes that it has however only been an issue in relation to certain groups, and not others, in St. May et al. (eds.), *Ethnicity, Nationalism, and Minority Rights*, 2004, pp. 51-52.

19 I.e., K. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color', in K. Crenshaw et al. (eds.), *Critical Race Theory: The Key Writings That Formed the Movement*, 1995, p. 357.

of rights. Then, groupism is what is wrong with claims of collectives, a challenge I will return to below.

Let me illustrate the problem of groupism in the context of human rights. It starts with the problem of who is considered a collective which deserves recognition, as a religion, or a culture in need of minority rights or, if it is a political majority, to inform a nation, or a disadvantaged group in need of affirmative action. Consider the list of specified inequalities in constitutions or human rights treaties as well as in other rules to regulate equality: who is mentioned, and who agrees to mention who? Regarding religion, many regulatory regimes recognize religion as such. But also, states have mechanisms in place to decide which one will enjoy the privileges which may come with it. For example, Germany has granted many privileges to churches and now withholds these from Muslim communities because, officials state, the religion of Islam is not organized in a way that the state has a representative to talk to. Here, the state creates a representational requirement which suits its need to not only talk, but also to govern, control, and in fact follow the pattern of state-church relations established with Catholics and Protestants, rather than accepting a difference when religions work in different ways. Legally, groupism thus translates into rights, or the denial of rights, of very specific collectives.

In addition, groupism in human rights means modelling people to conform to standards which human rights should allow to contest, to dissent from. Consider minority rights, where ‘minorities’ are often limited to designate mostly rather well-established, visible groups within nation states.²⁰ Consider nations, where collectives form the hegemonic legal regime. In religious matters, as the German example illustrates, states have religious communities conforming to their model, although religious communities are organized in very different forms of governance. Sects differ from other religious communities, and traditional religious associations may differ from recent offsprings of larger established ones. Therefore, models of group representation and minority models of group rights do not work in more heterogeneous settings.

The even more problematic aspect of groupism in law is, however, that a collective freedom tends to trump individual rights. The political theorist Susan Okin made that point when asking whether ‘Multiculturalism is Bad for Women’, an argument which has been refined since then.²¹ Many are by now aware of the problem of internal minorities.²² In addition, and a bit more complicated, feminist and antiracist and gay studies of and in law have espoused the problem that even equality law suffers from groupism, although it is meant to undo its harmful effects. Groupism reigns when inequalities are constructed as problems of groups, as in most talk of affirmative action. Law protects us against groupism only when inequalities are seen as problems of attributing group characteristics, what may be called stereotyping or stigmatizing. Doctrinally, groupism is another problematic effect of symmetrical, Aristotelian equality analysis, in that this needs fixed units to compare, to similarly situate. Instead, equality is a right against groupism if it is understood as asymmetrical and substantive, a difference I return to below.

Regarding religion, the difference is one between a concept of religious freedom tied to a collective and religious freedom as an individual right which may eventually be turned against hegemonic claims within a religious community. To be sure, an individual right is a right of

20 See more generally, J. De Groof & J. Fiers (eds.) *The Legal Status of Minorities in Education*, 2002; Ch. Glenn & J. De Groof, *Finding the Right Balance: Freedom, Autonomy and Accountability in Education*, 2002; W. Kymlicka, ‘The Evolving Basis of European Norms of Minority Rights: Rights to Culture, Participation and Autonomy’, in M. Weller et al. (eds.), *The Protection of Minorities in the Wider Europe*, 2008, pp. 11–41.

21 S. Moller Okin, ‘Is Multiculturalism Bad for Women?’, and a ‘Reply’ in J. Cohen et al. (eds.), *Is Multiculturalism Bad for Women?*, 1999. See also Phillipps, *supra* note 16.

22 L. Green, ‘Internal Minorities and their Rights’, in J. Baker (ed.) *Group Rights*, 1994, pp. 101–117; see also A. Eisenberg & J. Spinner-Halev (eds.), *Minorities within Minorities: Equality, Rights and Diversity*, 2005.

individuals in communities, but not a right of the community which can be turned against the individual. Then, conflicts around religious freedom are not some broader clash, but cases centre on whether individuals are hurt, and whether every believer has to follow a group's version of that belief. It is the right of a Muslim girl to learn to swim and dress the way she wants (not drowning in the water), and not the right of a Muslim community or the parents, as the mini-community, to decide for her. It is a right which the international community decided to protect, by way of human rights in education and sex equality. Therefore, it is the nation state with its public schools which delivers. In other conflicts, a right to religious freedom is a right of women who marry outside a group not to lose their property or home,²³ and it is a right to wear religious clothing.²⁴ It is also a right against genital mutilation, a form of sexual violence which may be endorsed by a group, but which is not endorsed by fundamental human rights.²⁵ In all these conflicts, groups are often positioned against individuals and groupism is a danger to (as well as a danger in most concepts of) equality. More broadly, when religion is a short cut to culture, and vice versa, it constructs a specific type of a collective claim which invites problems of groupism. Yet this is not the only problematic frame in discussions of religion and human rights.

2.2. Othering sex inequality

The return of religion to the political and legal agenda has been accompanied, and has in some way invited, another item of public interest. It is also an item with a history and an item which does not surface unchanged: sex equality, or to use its political name despite all attempts to discredit or replace it, feminism. Sex equality has been, to be sure, a marginalized concern for centuries. More precisely, women have largely been absent from concepts of justice, legal subjectivity, or human rights.²⁶ Then, sex equality became a concern located with women only, which is not silence but marginalization, and it has been labelled private, thus not political and of public concern, not part of the common good. These days, sex equality is a recognised human right, but is watered down by those not interested in change, to sort women into good and bad ones, the good ones to be considered different, as in difference-feminism which informs a symmetrical interpretation of equality, and the bad ones to be considered dominant and imposturous, as in radical feminism which informs a concept of substantive equality. Sex equality did always come in such varieties, some easily mainstream-compatible, and others transformative, opting for radical change. What we see on the agenda today is mostly the mainstream version. So when sex equality and feminism are back, it is mostly a particular brand of feminism, or equality as a right.

Yet this is not all there is. In addition to the problem of symmetrical equality, there is a more specific problem when sex equality is on the agenda next to religion. When sex equality is put on the political mainstream agenda and when the mainstream is concerned with conflicts around religion, equality is *orientalised*, sex equality is *the other*. *Othering* is a strategy to locate a problem elsewhere and to remain categorically clean, untouched; and *orientalising* is othering in a particular mode, establishing the occident as the unlabelled standard and the orient as

23 C. MacKinnon, 'Whose Culture? A Case Note on *Martinez v. Santa Clara Pueblo* (1983)', in *Feminism Unmodified: Discourses on Life and Law*, 1987, pp. 63-69.

24 Such conflicts reach the courts in very different ways. Some arise out of employment settings, others as refugee law or asylum cases; B. Ankenbrand, 'Refugee Women Under German Asylum Law', 2002 *International J. of Refugee Law*, pp. 45-56.

25 See N. Toubia, 'Female Genital Mutilation', in J. Peters & A. Wolpe (eds.) *Women's Rights, Human Rights: International Feminist Perspectives*, 1995, pp. 224-237, at 226. In Germany, legislation has been introduced to strengthen criminal law against genital mutilation in 2009.

26 On concepts of justice, see S. Moller Okin, *Justice, Gender and the Family*, 1989; for human rights, see C. MacKinnon, *Are Women Human?*, 2006.

different, dark, elsewhere, the problem.²⁷ Political developments in the Netherlands, in Germany, in the UK or in Switzerland illustrate the point: These multicultural politics, which by now encompass politics of citizenship in all dimensions,²⁸ focus on gendered violence, a topic formerly reserved for radical feminists, and new to the mainstream political agenda. But, at the same time, this is a focus on gendered violence in Muslim or other ‘immigrant’ families only, a reference which is intended to have gendered violence and other substantive inequalities in mainstream society fade away. By *othering* sex inequality, a majority pretends to finally become feminist but does so with a watered-down version of feminism, and instead engages in, ultimately, racist politics.

This is a move to protect majorities from challenges to the normalcy of privilege. They are not unknown. Regarding gendered and sexualized violence, many societies have labelled child abuse or the rape of married women by their husbands or domestic violence generally as a problem of the lower classes, effects of little education, bad habits, alcohol and other drugs, unemployment, poverty. Then, class is used to *other* inequality. And nowadays, it is often religion, sometimes coupled with class, which codes similar classifications. ‘Those’ immigrants, the mainstream story goes, do not yet know about modernity, have traditional problematic habits, are often unemployed and generally less economically successful than the rest of ‘us’. This is classism and orientaling culturalism at work, more specifically islamophobia and racism and sexism mostly in the form of heteronormativity. This operation marks differences as natural, collective and homogenous; it produces a stigma relating to sex, sexuality, ethnicity or race and religion. It focuses on a ‘backward’ minority ‘group’ and has mainstream society shine as enlightened and free from sexist or violent cultures or practices. Then, equality politics is depicted as outdated, given its achievements in mainstream society, and resources shift to the *other*, either as perpetrators or to help the, stereotypes at hand, poor and female victims. In the Netherlands or Great Britain, attention and resources have shifted from inequalities in mainstream society to inequalities in migrant communities,²⁹ and the German conservative Government now dedicates the ‘Islamkonferenz’, its most prominent effort to discuss Islam with Muslims living in Germany, to the topic of ‘gender justice’ entirely. This is a return of feminism to the agenda which comes at a price of watering down the concept and of othering. It is also this discursive turn to *other* sex inequality which was a key element in the right-wing campaign to prohibit minarets in Switzerland by way of referendum.

2.3. Tolerance frame

Othering paves the way towards yet another discursive item which is important to consider in the conflicts in human rights around religion and equality. To illustrate, we may again take a look at Germany, where Maria Böhmer, the conservative Federal Government Commissioner for Integration, stated in her speech on Women’s Day in 2008 that ‘Tolerance is no one-way street’.³⁰ What does that mean? Tolerance is the very essence not only of German im/migration and

27 F. Coronil, ‘Jenseits des Okzidentalismus. Unterwegs zu nichtimperialen geohistorischen Kategorien’, in S. Conrad & S. Randeria (eds.), *Jenseits des Eurozentrismus. Postkoloniale Perspektiven in den Geschichts- und Kulturwissenschaften*, 2002, pp. 176-219; G. Dietze, ‘Critical Whiteness Theory und Kritischer Okzidentalismus. Zwei Figurationen hegemonialer Selbstreflexion’, in: M. Tißberger et al. (eds.), *Weiß – Weißsein – Whiteness. Studien zu Rassismus und Geschlecht*, 2006, pp. 219-249.

28 See S. Baer, ‘Citizenship in Europe and the Construction of Gender by Law in the European Charter of Fundamental Rights’, in K. Knop (ed.) *Gender and Human Rights*, 2004, pp. 83-112.

29 *Supra* note 15.

30 For an analysis, see Sch. Amir-Moazami, ‘Muslim Challenges to the Secular Consensus. A German Case Study’, 2005 *J. of Contemporary European Studies*, pp. 267-286, and, with sources for Böhmer, ‘Islam und Geschlecht unter liberal-säkularer Regierungsführung – Die Deutsche Islam Konferenz’, in J. Brunner & S. Lavi (eds.), *Tel Aviver Jahrbuch für deutsche Geschichte 37, Juden und Muslime in Deutschland. Recht Religion, Identität*, 2009, pp. 185-205.

culturalist politics and the mainstream approach to multiculturalism. But it is also contested, since it may imply a graceful act to live with something or someone, thus privilege, or it may call for recognition. It is this ambivalence in tolerance why many are worried,³¹ while I am particularly concerned with its regulatory side.

More specifically, nation states have developed elaborate techniques to administer tolerance as control, or in Foucauldian terms, to discipline by way of regulation. For example, the state may 'tolerate' individual life decisions but turn social services into a system of 'demand and support', thus control people rather than just support them. As another example, the state may grant tax benefits to marriage and in fact support the patriarchal middle and upper-class heterosexual family because such benefits only pay for those with higher earnings, i.e. in light of the global gender pay gap, men. The state may also 'tolerate' cultural diversity but pass an immigration law which requires active support for and belief in features defined as basic to 'us', like a Christian type of marriage deemed different from marriages convened according to Jewish or Muslim rules. Finally, the state may 'tolerate' different religions, but privilege only those that conform to specific notions thereof, as in the German example communities which are organized like a Christian church. Here, tolerance hides and frames aversion. 'Tolerant' law is not outright repressive and punishing, as in a general prohibition on teachers wearing a headscarf, but it is 'activating', as political pedagogy, which also happens when politicians call for an obligation for migrant children to visit day-care centres. Law may then be 'caring', enforced liberation by law, when politicians discuss a prohibition on headscarves for all girls below the age of 14. Such policies are certainly always also embedded in specific regulatory schemes of state-church relations. But the tolerance frame gives them a specific twist.

2.4. Law as a fetish

Finally, there is a tendency in discussions of conflicts around religion/cultures and equality to fetishise law. Then, discussions of conflicts in human rights focus on court decisions which react to insular claims, again reduced to an abstract narrative of 'key' facts and 'the' law applicable thereto. There is 'the' case of 'the' headscarf, not even expanding it to a claim of a Muslim woman to have a right to work, or 'the' case of forced marriage, not even acknowledging the claim of a woman who wants to be protected from violence, or 'the' case of the bride price, mostly not even told as a claim of a woman who does not want to be sold, or 'the' case of divorce, but not even expanded to also see a claim of a woman who wants to define her intimate life. The court decisions which inform these stories are specific incidents in the world of legal utterances which respond to a wide variety of social interaction. As such, court decisions are indeed as complex as regulation, but they are told as stories, and thus become more easily fetishised as 'the case'. All kinds of actors and academics love these 'cases' and those 'rights', and that is no coincidence.

Then, it is 'cases' which are discussed, rather than experience, and 'cases' seem to be clear while experience is personal, ambivalent, shifting, contextual, where details matter. In cases, it is 'rights' which are invoked, while experience calls for interests, positions, needs, all grounded in a plurality of legitimate perspectives. And in cases, it is 'the law' which is treated as consistent rather than as a set of contested norms. Cases are reductions to a seemingly clear statement of a moral problem, with a tendency to ignore both the complexities on the side of the facts and on

31 Deveaux criticises solutions to conflicts in human rights which emphasize tolerance as ignorant of inequalities within groups; see Deveaux, *supra* note 16, Chapter 2 (discusses Ch. Kukathas and J. Spinner-Halev). See also W. Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire*, 2008.

the side of the law in question. On the side of the facts, it is important to understand which conflicts become legal cases, different from political controversy or moral debate, and it is important to understand what exactly happens to a conflict when it is turned into a case. Otherwise, many aspects are lost in translation. So although cases look like a little story one can tell, the facts of a case are already the filtered version which lawyers and judges construct from a communication about experience, which is shaped by additional rules of evidence and procedure, by presuppositions, by taboo, by silencing and a hierarchy of voices and meaning.³² In addition, the larger context, i.e. varieties of secularism or intersecting patterns of inequality or minorities within minorities can easily be forgotten when it is so very fascinating to really discuss a case.

On the side of the law, conflicts in human or fundamental constitutional rights are always also sites of struggle, not just a statement of conflicting principles or rights. Even cases are not the easy way to understand conflicts in human rights, despite the fact that legal language lives by the illusion of encyclopedic clarity.³³ The law is in fact somewhat(!) indeterminate,³⁴ or more precisely: laws open a semantic space which is constantly filled, again and again, with specific rhetoric, anchored in politics and moral belief, and organized as doctrine. Any given law and any given set of rights, including human rights, are contested and, if taken seriously as sites of diverse interpretation, are not very useful to mark clear collisions, i.e. of religious freedom and equality. In particular, we have to acknowledge the multi-level legal environments we live in today. Law appears in many forms and variations in several regulatory regimes. A 'case' which is subject to a court decision is not the same as the 'case' of the minaret prohibition in the Swiss constitutional amendment referendum. In fact, instances of regulation are rarely used to illustrate a moral conflict 'in human rights', and if so, they are also reduced to a 'case', i.e. of the Swiss minaret prohibition, as if it were an adversarial conflict between two parties, which ignores the multitude of facets of what happened, and what people make of it. To understand conflicts in human rights, we however need to understand the specific political, regulatory, or judicial procedures, the politics therein, the regulatory schemes around it, the actors involved, the discourses and the governance arrangements.

So although it seems tempting to refer to 'a case' when it comes to very complicated issues, to look at 'a right' as if it had clear meaning and as if it would be guaranteed on one level, as if there were no competing claims of interpretation and on different levels of regulation, that does not do justice to the conflict nor to the law.

3. Cases? Court decisions on headscarves and swimming lessons

Law is a site of struggle and since the rise of democratic constitutionalism, most struggles eventually make it into the law.³⁵ Therefore, I will now turn to court decisions as instances of such struggles, but I will add some complicating ingredient to resist the temptation to tell a story as if things were clear.

32 S. Baer, 'Thematisierungen. Körper, Sprache und Bild im Prozeß', in K. Scherpe & Th. Weitin (eds.), *Eskalationen. Die Gewalt von Kultur, Recht und Politik*, 2003, pp. 109-117.

33 M. Edelman, *The Symbolic Uses of Politics*, 1976.

34 This claim is associated with Critical Legal Studies, a version of legal realism in the US, prominently articulated by R. Unger, see with references M. Tushnet, 'Critical Legal Theory (without Modifiers) in the United States', 2005 *J. of Political Philosophy*, pp. 99-112. However, there are more or less radical versions of the claim (law as ultimately indeterminate vs. law as open to certain varieties of interpretation). In German legal science, the problem of legality and meaning applied to cases is treated as a question of method (in fact: methodology of hermeneutics), and critically so by J. Esser, *Vorverständnis und Methodenwahl*, 1970.

35 Before that, nature or some higher power were alternative sites, but in many environments, since the mid 19th century, regulation and thus people-made (then: man-made) law privileges law.

In the 21st century, there is a large sample of cases decided by courts on religion and equality to choose from. Some surface when religious collectives seek public visibility and collide with what is considered normal in a given setting. Examples include conflicts around claims to a right to build a mosque and the call to prayer,³⁶ decisions on the right of butchers to slaughter according to Jewish or Muslim rules, which contravene German, Christianity-compatible food regulations.³⁷ Furthermore, there are several conflicts in settings of public formal education.³⁸ Mostly, ‘cases’ about religion in schools have been discussed as such, but should also be understood as issues of sex segregation.³⁹ For example, a prohibition on wearing a headscarf for teachers does in fact exclude women, and not men, from specific spheres of employment, and it illustrates the othering of sex equality when seemingly feminist arguments are used to justify a measure against Islam. In the German Federal Constitutional Court decision, there is a strong (in this case: dissenting) opinion by known conservative hard-liners who argue that sex equality legitimizes a headscarf prohibition.⁴⁰ This also illustrates the problems of groupism, when the same argument is made by ‘leaders’ of the women’s movement and ‘representatives’ of Muslim women:⁴¹ since the headscarf is the symbol of sex inequality, and the oppression of women, it should be kept out of schools. Often, the story told about ‘the case’ ends here. But note that the German Federal Administrative Court has held that a woman may wear a headscarf during her legal internship training, since it is part of the required education.⁴² Also note that German labour courts are ambivalent concerning the issue, and create space for headscarves in private employment, but that some lower courts have stated that there may be little tolerance for headscarves if an employer, or customers, do not appreciate them.⁴³ Regulating this, states have also endorsed a variety of schemes, with some more explicitly religious Southern German states targeting Islam, rather than all religions, and an explicitly secular state like Berlin prohibiting any type of religious dress in all public professions, including child-care facilities, in a ‘Neutrality Law’, which, however, has de facto prohibitive effects on women with headscarves in private employment, too. In light of all of the above, rather than based on a limited

36 Decisions were based on construction and planning regulations, which treat all religious buildings the same, and limit the noise levels of bells and muezzin calls alike but allow for interpretation regarding a requirement of ‘fitting into the neighbourhood’ (‘Einfügen’). Conflicts are mostly solved outside the courts, where additional concerns are legitimate. See J.-B. Oebbecke, ‘Moscheebaukonflikte und der Beitrag des Rechts’, in R. Robert & N. Konegen (eds.): *Globalisierung und Lokalisierung. Zur Neubestimmung des Kommunalen in Deutschland*, 2006, pp. 273 – 283.

37 The leading decision is Bundesverfassungsgericht (Federal Constitutional Court, FCC) 2002, Az: 1 BvR 1783/99, BVerfGE 104, 337 (Muslim butcher).

38 Such conflicts are particularly interesting because schools are a site of controversies surrounding secular aspects, since schools breed citizens. This is why the German FCC decision, which prohibited Bavaria, a predominantly Catholic federal German state, from having Christian crosses put up in public school rooms (Bundesverfassungsgericht 1995, Az. 1 BvR 1087/91, BVerfGE 93, 1 (crucifix)), may have been the first case in which politicians called for resistance against the Court, otherwise an institution of the highest esteem and always respected. To decide that there is a right for children not to study under the Christian cross simply went, for many, too far. Bavaria in fact transposed the FCC decision into a state law which allows individual children to protest against a cross on the wall, thus placing the burden of dissent on the minority. And it is the pivotal role of public schools to ensure the majoritarian tradition which also led many to see the analogous Strasbourg judgment on Italian public schools with a cross (ECtHR 2009, *Lautsi v. Italy*, application no. 30814/06) as an aberration which is detrimental to respect for the court. For data from the UK, but also as an example of an intersectional analysis, see Y. Li et al., *Equality Group Inequalities In Education, Employment and Earnings: A research review and analysis of trends over time*, Equality and Human Rights Commission 2008.

39 To date, there is no documented German court decision on medical facilities and no decision on religious sex segregation pertaining to religions other than Islam.

40 Di Fabio et al., dissenting, FCC 2003, Az. 2 BvR 1436/02, BVerfGE 108, 282.

41 In Germany, the most prominent feminist is Alice Schwarzer, the most prominent anti-Islamic Muslim is Necla Kelek. For a critical analysis of additional dimensions see G. Klauda, *Die Vertreibung aus dem Serail*, 2008.

42 Bundesverwaltungsgericht (Federal Administrative Court) 2008, Az: 2 C 22.07, BVerwGE 131, 242.

43 The leading decision does protect women who wear a headscarf, see Bundesarbeitsgericht (Federal Labour Court) 2002, Az: 2 AZR 472/01.

account of ‘the case’, the headscarf controversies illuminate the different arguments used, the frames invoked, the concepts of human rights applied.⁴⁴

The headscarf ‘case’ has been a hot topic for several years by now. However, there are less often told, but equally inspiring decisions which one may want to look at to address conflicts in human rights. One such ‘case’ is the swimming lesson case. In Germany, this is in fact a line of court decisions dating back to the early 1990s. There, the courts have dealt with claims brought by parents, all Muslims, to exclude their children, mostly girls,⁴⁵ but more recently, also boys,⁴⁶ from swimming lessons, physical education classes in general, or school trips with overnight stays at public schools. The conflict is, in some ways, whether there should be sex segregation in education. Initially, the German courts were mostly willing to accommodate this and, in fact, the parents.⁴⁷ However, over time and similar to the Swiss High Court,⁴⁸ the German courts started to defend the principle of co-education and less easily to allow parents to opt out, thus excluding girls from swimming, sports, or field trips.⁴⁹ This shift also informs a 2009 decision by the Federal Constitutional Court against Baptist parents who wanted their children to be removed from a school project involving a theatre play to educate children about and prevent them from becoming victims of sexual abuse.⁵⁰ Then, a lower German court held that a girl whose parents had signed an agreement to have her participate in sports lessons, with what the school and many Muslims consider to be adequate dress (the trade name is ‘burkini’ which is a headscarf, tunic and trouser outfit designed for swimming), is bound by that agreement, and cannot opt out of the general curriculum.⁵¹ The shift does not only indicate a change of views on sex segregation or integration, but it also indicates a change of views on religion and public secular space.

The cases are, however, not just interesting decisions on conflicts. They always illustrate procedures and instances of a debate on the meaning of equality and of religious belief, of secularism and of law. To use another example, meanings also shift in contexts which do not immediately invoke sex equality claims, but do in fact imply them, too. In 2009, a Berlin administrative court decided that a public school has to offer space to pray to accommodate a Muslim male student.⁵² The public – i.e. newspapers and politicians – were outraged – too much accommodation!, the loss of our identity!, ‘them’ taking ‘it’ too far! – and the State Government

44 For a more nuanced analysis of the conflicts, see T. Loenen, ‘The Headscarf Debate: Approaching the Intersection of Sex, Religion, and Race under the ECHR and EC Equality Law’, in D. Schiek & V. Chege (eds.), *European Union Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, 2008; S. Berghahn & P. Rostock (eds.), *Der Stoff, aus dem Konflikte sind*, 2009; S. Baer & M. Wrase, ‘Zwischen Integration und “westlicher” Emanzipation: Verfassungsrechtliche Perspektiven zum Kopftuch(-verbot) und der Gleichberechtigung’, 2006 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, pp. 401-416.

45 The German leading decision is Bundesverwaltungsgericht 1993, Az: 6 C 8.91, BVerwGE 94, 82 (school needs to accommodate claims of parents not to have daughter exposed during swimming classes). Later cases by the lower courts are Verwaltungsgericht (Administrative Court) Hamburg, April 2005 (rejected claim of Pakistani parents to have their 9-year old daughter removed from swimming lessons).

46 Verwaltungsgericht Düsseldorf, Az: 18 K 74/05, May 2009 (parents argued that 11-year old son should not be exposed to girls in an immodest state of dress).

47 Amtsgericht (Local Court) Tiergarten 1986, Az: 286 OWi 17/86; Bundesverwaltungsgericht 1993, Az: 6 C 8/91, BVerwGE 94, 82-94, reversing Oberverwaltungsgericht (Superior Administrative Court) North-Rhine Westphalia 1991, Az: 19 A 2198/91.

48 The Swiss Highest Court overturned an earlier decision from 1993 (BGE 119 Ia 178) and ordered two boys to attend swimming lessons, based on a reasoning which largely focuses on immigration and the need for integration. See Bundesgericht 2 C_149/2008, BGE 135 I 79 (24 October 2008).

49 Verwaltungsgericht Hamburg 2005, Az: 11 E 1044/05; Verwaltungsgericht Düsseldorf 2005, Az: 18 K 74/05 (Muslim boy), 2008, Az: 18 K 301/08; Oberverwaltungsgericht North-Rhine Westphalia 2009, Az: 19 B 1362/08, 19 E 1161/08, affirming Verwaltungsgericht Gelsenkirchen 2008, Az: 4 L 526/08; 2009, Az: 18 L 695/09; id. 2009, Az: 19 B 801/09, affirming Verwaltungsgericht Düsseldorf 2009, Az: 18 L 695/09.

50 Bundesverfassungsgericht Az: 1 BvR 1358/09, 21 July 2009. Also, a Hamburg Administrative Court rejected a claim by a Turkish mother to withdraw her daughters, age 14 and 15, from sex education in biology classes, Verwaltungsgericht Hamburg 2004, Az: 15 VG 5827/2003.

51 Verwaltungsgericht Düsseldorf 2009, Az: 18 L 695/09; affirmed on appeal: Oberverwaltungsgericht North-Rhine Westphalia 2009, Az: 19 B s801/09.

52 Verwaltungsgericht Berlin 2009, Az: VG 3 A 984.07.

has not challenged the decision on appeal. However, as in all other debates in the area, there are also voices across the political spectrum which endorse the decision as long as children do not miss classes, which ask questions about sex segregation during prayer and whether schools should accommodate that, about Muslim prayer requirements and modifications thereto, etc. So what is the case all about? The dominant story is the clash of cultures and the defence of a particular type of school, the privatization of belief and neutrality in education pitted against space for Muslim rituals, and for some, space for a Christian way of life. Just like the headscarf case or the swimming lessons, there are thus larger issues which inform such conflicts. Beyond the critique which should be attentive to groupism, othering equality or law as a fetish, I will now turn to reconsider secularism and the human rights at issue, to pave the way not only for critique but also for solutions.

3.1. Secularism – an institutionalized ideology

Context matters when we seek to understand court decisions in the field of religion and equality, as conflicts in human rights. Regarding legal reactions to such conflicts, it is the context of the regulation of the religious, usually abbreviated as church-state relations,⁵³ which is particularly relevant here. For many, secularism, in its regulated varieties, is at stake, when confronted with claims to sex-segregation on religious grounds in educational settings or employment and politics.

Most legal systems endorse one version of secularism or another, be it nation states or transnational and international legal systems. For some, constitutionalism, the adherence to a rule of law, is a secular concept as such, in that its core ingredient is the superiority of people-made norms, in deliberative processes of democracy.⁵⁴ Then, states which establish, in their constitutions, religious law as being superior, like Muslim states ranging from Egypt to Iran, or a Jewish state like Israel, or the Catholic state of the Vatican, may not count as varieties of constitutionalism at all. For others, constitutionalism is a more flexible concept which can accommodate strong religious norms, and thus allow, i.e., for ‘Islamic constitutionalism’, or which can accommodate other specificities and thus allow, i.e., for ‘African constitutionalism’.⁵⁵ But what is the meaning of secular in such debates?

There is, as sociologists of religion tell us, not one secularism but many variations thereof.⁵⁶ In particular, regulatory regimes do differ, as the comparative study of the headscarf controversy in the European research project VEIL has pointed out.⁵⁷ Some states like France or Turkey

53 Note that the relevant clause in US constitutional law (‘The separation of church and state’) was codified in the First Amendment to protect religious sects from the state and the Church establishment and to protect the federal secular state from religion.

54 Classic: L. Henkin et al., *Human Rights*, 2009; for a different view see Casanova 2008, *supra* note 7, p. 16, (regarding the varieties of church-state relations in Europe, ‘one can therefore safely conclude that the strict secular separation of church and state is neither a sufficient nor a necessary condition for democracy.’). For a critique of constitutionalism as an ideology, see D. Lev, ‘Social Movements, Constitutionalism, and Human Rights: Comments from the Malaysian and Indonesian Experience’, in D. Greenberg et al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World*, 1993, pp. 139–141, and others. Often, law is treated as monolithic, with no due regard to the varieties of regulation and enforcement mechanisms as well as effects. In some discussions, law is referred to as human rights when it is in fact individual constitutional rights, more or less informed by interpretations of international law, which govern the case. In other instances, law is referred to as principles, when it is in fact rights in a very specific interpretation which governs a conflict, etc. It is my impression that our understanding of the issues is in a rather desperate need to be better informed, legally speaking.

55 A. An-Na’im, *African Constitutionalism and the Role of Islam*, 2006. It is important to differentiate between a descriptive use of African, pertaining to a region, and a normative use, which invokes some sort of ‘African’ values, thus a culturalized and groupist (on groupism, see above) narrative, similar to ‘Western’, ‘European’, ‘American’ etc.

56 However, secularism is a contested concept also in sociology. For an overview, see P. Gorski & A. Altinordu, ‘After Secularization?’, 2008 *Annual Review of Sociology*, pp. 55-85.

57 Materials and research results at <<http://www.univie.ac.at/veil/Home3/index.htm>>, in particular S. Berghahn, ‘Judicial expertise on current regulations as well as on explanations for varieties in regulations and in the framing of European headscarf debates’, 2008, download at <<http://www.univie.ac.at/veil/Home3/download.php?ea1c1ba9e1dd6ceb773fb1d151c2a2b3>>.

regulate state abstinence from religion (and Joan Scott has made the point that this is not totally ‘French’⁵⁸), others like the Netherlands, Austria, Switzerland or Germany are religion-friendly (often called ‘neutral’), and still others like Great Britain, Denmark or Greece endorse state churches.⁵⁹ Comparative studies in constitutionalism also show that the doctrinal answers to conflicts around religious freedom differ less on the level of law and more on the level of whether and what kind of socio-cultural aspects are employed in a legal decision.⁶⁰ In Germany, one may very well observe how religious belief becomes part of the script of officially secular legal systems, a hidden agenda of religious freedom as long as Christian churches were the only ones to profit from it, moving to the forefront at the very moment at which other religions claimed equal standing.⁶¹ German law illustrates the tensions: Muslim communities gain the right to build mosques, and have a Muezzin call on the terms set for church bells, but states also lost the right to hang a Christian cross in public school rooms, or in the courts. There are nuns teaching in public schools, but there shall be no women with headscarves in the same facility in some Länder, while others prohibit any religious sign in public educational settings. Religions enjoy tremendous freedom to discriminate against all they define not to belong, and women are thus excluded from several positions in Catholic churches as well as Jewish communities. Now that Muslims claim such rights, conservatives call for equality, to not extend the privileges (to discriminate!) that they enjoy. And, as mentioned, the headscarf controversy has motivated some Länder to explicitly privilege Christianity, yet keeping the taboo of the yarmulke (which would have certainly shattered the Christian privilege in Germany), and never touching upon a Sikh turban, which seems not to appear in Germany on a relevant stage.

Regarding law, there is thus a powerful argument that secularism is, at its core, a commitment to deliberation, and not to metaphysics.⁶² Sajó recently concluded that most states have not consistently followed that commitment, to date, but that they employ a ‘fuzzy’ and ‘half-hearted’ version of secularism.⁶³ Also consider that different conflicts appear on different stages, so that the issues discussed, and the solutions proposed, vary considerably, are case-driven and inconsistent. And consider that conflicts around religion often expose the unsolved conflicts around sex equality. Overall, simple invocations of ‘secularism’ must be called ideological since they actually hide the fact that existing regulatory schemes in fact privilege some and disadvantage others. It is the controversies around religious rights to sex segregation or marriage and family matters which bring that to the fore. There, religious minorities claim rights which religious majorities enjoy, and there, religious minorities also confront religious majorities with the sex equality issues they fail to address. Thus, secularism is not only at stake, but it is challenged in a very specific way.

3.2. Equality and religion – a refined understanding of individual rights

The challenge to secularism is specific because religion and equality are on the political agenda. As mentioned, religious freedom often appears in the guise of culture, and then becomes a

58 J. Scott, *The Politics of the Veil*, 2007.

59 A striking fact: Germany is the only religion-friendly state which reacts with a harsh prohibition on the headscarf, similar to Turkey and France. See Berghahn & Rostock 2009, *supra* note 44, pp. 11 *et seq.*

60 N. Dorsen et al., *Comparative Constitutionalism*, 2003, Chapter 7.

61 A critical and comprehensive study of the law of church-state relations is C. Classen, *Religionsrecht*, 2007; M. Heckel, ‘Zur Zukunftsfähigkeit des deutschen “Staatskirchenrechts” oder “Religionsverfassungsrechts”’, 2009 *Archiv des öffentlichen Rechts*, pp. 309-390.

62 Sajó, *supra* note 9.

63 One could define the secular neutral state as one which offers equal access, equal distance, equal respect or equal support to all the religions within its territory – all of which is not a reality in Europe, or elsewhere. For further discussions, see M. Galenkamp, ‘Towards a Socialization of Fundamental Rights’, in E. Brems (ed.), *Conflicts Between Fundamental Rights*, 2008, pp. 149-165; O. Roy, *Secularism Confronts Islam*, 2007.

collective interest of a group, invoking the danger of groupism even when a claim is brought by an individual. Equality often appears as a principle of symmetrically equivalent treatment, and of a concern for groups, too, which are treated poorly by others, to immunize oneself from criticism. Thus, in the headscarf, swimming and prayer-room controversies, we need to pay attention to interpretive detail to better understand which version of which human right is exactly invoked.

If parents want their daughters to be removed from physical education, like swimming lessons, they do claim an individual right to religious freedom but refer to a collective religious norm, i.e. of modest dress for females, thus a sexualized and gendered code of behaviour which is meant to control men and protect women against sexual advances. School administrators, state governments and more and more judges do insist, countering that claim, on sex equality, interpreted as a call to treat likes alike, thus all pupils the same. But clearly, that is not convincing. Such a symmetrical similarity doctrine of equality invites claims of difference.⁶⁴ And this is a tempting invitation, since it is in tune with deeply-held everyday convictions, as 'knowledge' on 'the' difference between 'the' sexes, which is exactly one aspect of religious belief which renders the multicultural conflicts around education, clothing and the like so problematic. If one can thus argue that pupils are indeed not alike, in relation to physical education, one has a claim to differ. The more parents can argue convincingly that their daughters differ from Christian or atheist girls, and from all boys, the more they have to be accommodated in that difference, thus: they eventually do not learn to swim. If we follow this strong tradition of symmetrical equality, we need to eventually accommodate, thus to allow inequality, but in fact perpetuate disadvantage and exclusion. Then, equality serves as the principle (and sometimes, the individual right) of equal treatment regardless of hierarchy and discrimination, and accepts the differences which are made because of sex, of race, of religion, of disabilities, etc. So if there is really a difference, the story goes, there is a dilemma, since equality presupposes the difference it is called to undo, and a dilemma is a conflict which cannot be resolved.⁶⁵ And even if we acknowledge the disadvantage, as a substantive inequality, but reduce it to but one group's problem, we endorse categorisation and overlook the intersectionality of inequalities. And then, if we allow another group (a religion) to solve that problem (whether children should learn to swim, when to pray, what to wear) we silence dissent within the group and perpetuate elitism. So there must be another way.

In the prayer-room case, the situation is in many ways different, but the problems are similar. The German court argued that a Muslim boy who considers prayer during school-time to be part of his individual religious needs to be accommodated if possible, thus given room to pray. So who defines when that boy needs to pray: the boy, or his parents, or the religious community, in fact then: its leaders with whom he or she is associated? Also, assume that the school, different from the administration which went on appeal, follows suit and makes a room available for Muslim prayer. Will girls be allowed to enter that room? Should the room feature a wall to separate boys and girls, or in some way force them on the same floor? What about people who do not want to be classified as male or female? It is no coincidence that this aspect of the case has not yet made it to the agenda of fundamental rights issues. But it suggests that

64 In Germany, the General Equality Statute AGG prohibits disadvantages based on structural inequalities, but then oscillates between a formal and a substantive understanding of equality, an essentialist and a constructivist understanding of gender, race, or religion, and offers ways out of an equality regime, in particular, for religious communities.

65 In Germany, there is a known problem to list race here, which is replaced with ethnicity, while sex/gender are easily established as a difference. D. Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law*, 1991, elaborated on the dilemma in feminist terms, while M. Minow, *Making all the Difference: Inclusion, Exclusion, and American Law*, 1990, p. 20, has framed it as a more general problem. Very clearly in U. Gerhard et al. (eds.), *Menschenrechte haben (k)ein Geschlecht*, 1990. The core idea has most clearly been articulated by C. MacKinnon, 'Reflections on Sex Equality Under Law', 1991 *Yale L. J.*, pp. 1281-1328.

there may be no conflict around religion and human rights which does not invoke additional inequalities, like gender, at least when we deal with religions that endorse heavily gendered norms of behaviour. Then, every human rights discussion around religion must also be a human rights discussion around sex equality, and not just a subtle move to mark the problem as the *other*. To take that further, I propose to think of conflicts in human rights in a way that always already relates fundamental rights to each other, which allows us to see where they conflict, but be prepared to address that. Yet what does that mean?

There are good reasons, as I have demonstrated elsewhere, to ground human rights analysis in a fundamental rights triangle of liberty, equality, and dignity.⁶⁶ This is not just some call to some human right, but a very specific call to specific concepts of equality and liberty, in this case: religious freedom. And the conflicts around religious freedom and equality are particularly illuminating to consider how we should refine our understanding of human rights.

Regarding equality, the alternative version of that human right which could be applied in both cases is substantive equality, well known to those working in feminist legal theory, anti-racist legal theory⁶⁷ and, more generally, law against substantive discrimination. Here, equality is interpreted as an asymmetrical claim against *hierarchisation*, a claim against substantive, socially entrenched disadvantage.⁶⁸ Equality, thus reconstructed, is a right against discrimination not as a difference, but as oppression and dominance, disadvantage and exclusion embedded in a pattern which turns one aspect of a person into a group marker. Difference, here, is either an infinite fact of life, i.e. a multitude of differences, or, as *a* or *the* difference, it is the problem, the ideological construct which serves to legitimate discrimination, mark and effectuate disadvantage. In the case of sex, *the* difference is heteronormative biologism, which privileges a specific masculinity and adequate femininity alongside it. It is an ingredient of most religions, but also of most other configurations of ‘culture’, and something human rights have addressed as a problem since CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) at least. In the case of religion, *the* difference is a culturalist essentialism, which privileges limited readings of canonical texts, and a limited understanding of the physics and metaphysics of a belief, to the detriment of non-mainstream believers and the rich diversity in religious communities.

If we start from there, from human rights directed against categorizing people in groups and privileging some while disadvantaging others, conflicts around religion and equality appear in a different light. The most radical development is the turn from a collective claim to individual rights grounded in collective contexts. If equality informs liberty, individual freedom is a right of people within communities. This, I suggest, is an individualistic concept of human rights without group rights, but with minority protection. It positions equality as an individual right against boxing identities, against a reduction of people to biological or elitist defined categories, against enforced groupism. It relies on meaningful, relational self-determination and ensures dignity, as a third corner of the triangle, as mutual respect. Then, individual needs to pray in schools or wherever may be accommodated just like individual clothing needs. But prayer or clothing which violates a principle of mutual respect is not an emanation of this individual right. Therefore, it is at least a tenable argument to prohibit a face-covering veil because it seriously

66 S. Baer, ‘Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism’, 2009 *U. of Toronto L. J.*, pp. 417-468.

67 Mostly, this is labelled critical race theory, just as in gender studies, which are in fact critical sex studies, because gender has been developed as a concept to challenge notions of sex. I prefer to label both with terms taken from political struggles to end the problem they address, thus feminism and anti-racism.

68 The more this version of equality gains recognition, the less one finds references to path-breaking work, often hiding the feminist genealogy, or simply stealing ideas.

inhibits communication, yet it is a violation of fundamental human rights to prohibit a headscarf, a turban or a yarmulke since there is no violation of additional concern. Therefore, children should be allowed to wear any bathing suit they like for swimming lessons as long as they can move safely and talk face to face, but they should learn how to swim. In the Swiss High Court case, the parents promised to send their child to private swimming lessons. But if we remember the arguments which convinced the US Supreme Court to end formal racist school segregation, in *Brown v. Board of Education* in 1954⁶⁹, then educational segregation does violate, as a default starting point, individual rights to equality and dignity, since it is not based on equal concern and recognition. This is also why a prayer room is fine, but why enforced sex segregation in prayer must not be endorsed by a state. So there are then, I suggest, ways to address the conflicts which trouble us around religion and equality in more nuanced ways.

3.3. Multi-level regulation – against the return of the public-private ideology

Finally, conflicts around religion and equality feature additional characteristics which make them rather complicated, specifically when they are discussed as problems of human rights, but increasingly so in national legislation as well. It is the problem of multi-level regulation and the problem of the public-private distinction, the latter which is well known as a pitfall regarding human rights yet back in rather problematic ways. Currently, there is a trend to treat the local, the cultural and the religious as the private and the global, the national and the secular as the public, and this creates unequal standards, in violation of the very rights we seek to protect.

Today, the concept of multi-level regulation is often used to explain the interplay between the EU and nation states.⁷⁰ However, it can very well be expanded and employed as a general approach to conflicts in human rights.⁷¹ Then, multi-level regulation names the phenomenon of a diverse set of rules which are applicable to any case. One set of rules is legal in the sense of being institutionally bound to a public democratic process and institutionalized enforcement, and that set consists of rules on various levels, such as international, transnational, national, and local rules, with the local consisting of state law, municipal law, and laws of organizations. Another set of rules, known from studies in legal pluralism,⁷² is social, and consists of traditional, religious and moral rules, which are often specific to communities or activities, like the rules of a game of sports, or, say, the rules of flirtation or ‘dates’ of heterosexuals somewhere, or the rules of a Protestant community, maybe different from the rules of a national Protestant church. Multi-level regulation, so defined, thus consists of varieties of rules, subject to regulatory choice, some of which are procedural and some substantive, some of which do state rights, some principles, and some come with and some without sanctions. With this in mind, law resists being fetishised. Rather, law looks like an onion, and, to stay with the metaphor, the more competently one peels it the less one may cry. But why would one have to cry?

As mentioned above, if discussions of conflicts in human rights are reduced to a case or to a clash between two rights, if not cultures, one simply misses the richness of legally-based arguments which are available. In addition, one risks losing the case in another court system or in a controversy brought in a different framework. Therefore, it is rather productive to think along

69 United States Supreme Court, 347 U.S. 483 (1954).

70 An example is A Follesdal et al. (eds.), *Multilevel Regulation and the EU. The Interplay between Global, European and National Normative Processes*, 2008

71 One may think of regulatory choice, meta regulation etc., which may be part of the underdeveloped understanding of law in discussions dominated by economics and some sociology and political science. Inspiring approaches can be found in work on norm diffusion, attentive to governance structures and knowledge politics.

72 Meaning the newer concept, as discussed by S. Engle Merry, ‘Legal Pluralism’, 1988 *Law & Society Review*, pp. 869-896. However, legal pluralism tends to stay within legal ethnology, and comparative legal studies. Therefore, multi-rule governance.

multi-level lines, even in tiny local cases. Swimming lessons in public schools are not just conflicts between two fundamental rights, but are governed by safety as well as insurance regulations, by administrative rules as well as laws governing curricula, by parental rights as well as children's rights, by labour law for teachers as well as rules of pedagogy, and more. Similarly, a prayer room is governed by human rights, but also by building or safety regulations, insurance rules and employment law. So every time there is already a local onion which needs to be carefully peeled.

In addition, the German swimming lesson case has, for example, been decided based on state school law and the national constitution. Had it gone up to the human rights system guarded by the European Court of Human Rights, regional human rights would have been added.⁷³ Had it gone up in the EU system, we would have seen the need to consider the now binding European Charter of Fundamental Rights, which covers education in Article 14, which the EU Directives against discrimination based on Article 13 EC and the national and local laws which transpose them do to a certain extent as well. But under the heading of human rights and committed to finding global standards particularly in conflicts which result in part from global migration, one needs to go even further, indeed to global human rights. Specifically, the United Nations addressed education in the Convention against Discrimination in Education in 1960⁷⁴ and education is subject to the Social and Cultural Rights Convention (ICESCR, Article 13) as well as being a matter for the Convention on the Rights of the Child (CRC, Articles 28 and 29)⁷⁵ and the Convention for Rights of People with Disabilities (CRPD, Article 24). Article 10 of the Convention on sex equality (CEDAW) addresses sex discrimination in education and Article 7 of the Convention against racism (CERD) targets racism there, too. With all of this at hand, a competent analysis of such conflicts, considering multi-level regulation, would be enriched by a larger pool of arguments.

Large is certainly not simply or necessarily better. But the multiple levels of and the varieties in regulation which ensure human rights would allow us to reveal the inconsistencies of 'law', of claims of 'secularism', of 'the right to religious freedom' or 'the right to equality'. Then, one may wonder whether it is particularly the law, or the multitude of regulations, in the area of religion and equality that does not allow for consistent answers, neither on one level nor across levels of law. Is it because they invoke deep moral concerns, deeper than others? Or does the inconsistency result from the entrenchment of inequality in the very fabric of our legal systems?⁷⁶ There are very strong arguments that sex inequality is indeed a building block of liberal democracies,⁷⁷ which would explain why such democracies have trouble in addressing the conflicts at hand. Or are the conflicts we discuss here just another instance of contested post-

73 E.g., on the headscarf, ECtHR 2001, *Dahlab v. Switzerland*, application no. 42393/98; 2005, *Leyla Şahin v. Turkey*, application no. 44774/98.

74 Online at <http://www.unesco.org/education/information/nfsunesco/pdf/DISCRI_E.PDF>. The Universal Declaration of Human Rights covers education in Art. 26.

75 Art. 29 states that education shall pursue 'b. the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations', but also 'c. the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own', which may collide with 'd. the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin'.

76 In family law, some observe a pragmatist chaos, which may have the same cause.

77 In European political studies, namely B. Sauer, *Die Asche des Soveräns. Staat und Demokratie in der Geschlechterdebatte*, 2001 and E. Kreisky, 'Der Staat als "Männerbund": Der Versuch einer feministischen Staatssicht', in E. Biester et al. (eds.), *Staat aus feministischer Sicht*, 1992, pp. 53-62. In Anglo-American contexts, Moller Okin, *supra* note 26; C. Pateman, *The Sexual Contract*, 1988.

national law?⁷⁸ We will only come to understand that if we allow multi-level regulation to be considered in our analysis.

This task is a difficult one. Mostly, lawyers are neither educated in all relevant fields of the law nor on all levels of the law, nor are courts trained or have jurisdiction to adjudicate them all together. This is one of the effects of what has been seen as differentiation and modernity, but is also a problem of national legacies and intradisciplinary compartmentalization. The architecture of law itself implicitly states what is relevant in the world, and what is not. It effectuates specific assumptions, attributes meaning, constructs lives, and these may already conflict, be inconsistent.⁷⁹ If swimming is part of a school curriculum because surviving in the water is considered to be a basic necessity, it may very well collide with insurance policies, or, in our case, with religious clothing rules, with gendered clothing rules, etc. What matters? If a school is regulated as a space with little caveats for religious instruction, then rooms for prayer during breaks collide with the principle of secularism, with building regulations, with safety regulations etc. Which matter most? We may need additional guidance in how to deal with conflicting norms, and we may need refined analytical concepts to interpret them. It may help to refer to a basic triangle of fundamental rights. It may in fact inspire what has been operationalised in appeals to the 'Einheit der Rechtsordnung', the doctrine of the unity of the legal order. But if that shall not be a myth, an ideology, we need tools to build it.

If we understand multi-level regulation, we may also be better equipped to handle the other challenge which comes with the existence of multiple rules, the challenge of the public-private distinction in international law. It occurs when problems are delegated from the top to the bottom, from the grand to the small. This is not just subsidiarity at work. Rather, such delegation is particularly well known and has been thoroughly criticised in international law, because it disregards, specifically, sex inequality.⁸⁰ For example, in EU law and all transposition rules in EU member states sex discrimination is allowed for religious entities if this is part of what they believe in.⁸¹ Therefore, a claim to sex segregation in a public facility by a religious entity or by believers is confronted with the fact that religion counts, but sex equality does, too. EU law and member states that transposed it have given way to religious bodies when it comes to the discrimination of, in particular, sexuality, albeit not racism.⁸² Thus, much of the current law does 'solve' the conflict in human rights by establishing a church privilege to allow for discrimination,

78 For a larger claim of transnational sites as arenas of contestation, see A. Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters*, 2008.

79 The feminist legal theorist T. Stang Dahl once analyzed this as a male construction of the world; see her *Women's Law*, 1987.

80 Seminal works include F. Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform', 1983 *Harvard Law Review*, pp. 1497-1578; Moller Okin, *supra* note 26; B. Rössler, *Der Wert des Privaten*, 2001; C. Chinkin et al., 'Feminist approaches to international law: reflections from another century', in D. Buss & A. Manji (eds.), *International law: modern feminist approaches*, 2005, pp. 17-47 (discussing their seminal critique from 1991).

81 Art. 4 of Directive 2000/78/EC (see note 82, *infra*). Regarding intersectional discrimination, see generally European Commission (Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G4), *Tackling Multiple Discrimination. Practices, policies and laws*, 2007.

82 Directive 2000/43/EC (the 'Race Directive') does not exempt religious bodies from the prohibition of discrimination, while Directive 2000/78/EC ('Framework Directive') does so in Art. 4 on occupational requirements, which says that '2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

in which some courts followed suit in the early swimming lesson cases. Put differently, such equality law delegates the task of solving the conflict between belief and discrimination to another entity, here: religious communities. It is evident that such solutions may come at the cost of dissenters (in our cases: mostly females) within that community, and at the cost of those who are unequal, here: women. It is thus also evident that this is not a solution.

As another example, in international law, sex equality concerns have been and are again very likely to remain unresolved by the courts. For example, the European Charter of Fundamental Rights expressly delegates issues in education to the national level, as well as issues of family and marriage.⁸³ Politically, the latter is a victory for conservatives who seek to keep marriage exclusively heterosexual. Whenever international law or the courts delegate issues around private life to the national level, granting a ‘margin of appreciation’,⁸⁴ human rights claims are rendered non-global, thus not subject to a human rights regime, or non-European, thus left to the nation states or to local or religious communities, thus rendered non-universal. Other examples are discussions on family and marriage law in Great Britain and elsewhere, where some contemplate vesting juridical power with religious communities instead of state institutions. Sex inequality, in all these instances, becomes national, local, community-based, specific, as cultural, religious, the other, eventually being ok. The substance of such ‘cultural’ relativism is however sexism, gendered inequality.⁸⁵ To prevent this, discussions of multi-level regulation need a thorough analysis of the gender and other inequality dimensions.

4. Solutions?

When human rights conflict and when religion collides with sex equality, or equality with religion, such collisions are more than mere ‘cases’ of ‘law’. Rather, human rights are a site of contestation. To better understand the dynamics of these and to find solutions to the conflicts at hand, several worrisome tendencies have to be carefully considered. There is the tendency to call everything *culture*, and thereby to render it positive and different, homogenous and static, and to eventually delegate it out of reach of human rights. There is a tendency to engage in groupism, in violation of claims to individual self-determination, which ignores the multiple characteristics, relating to a plurality of group identities, which form a person. There is also the tendency, in law, to interpret religious freedom as a right of such groups and the tendency to reduce sex equality to a symmetric, rather formal principle, both of which do not adequately address the experiences of people who bring the cases which give rise to conflicts in human rights. Finally, there is a tendency to fetishise the law, to frame complex problems as binary clashes, to disregard multi-level regulation and the richness of norms which may inform a solution to a problem.

83 Art. 14 on the right to education states ‘3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.’ Art. 9 on the right to marry and the right to found a family says: ‘The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.’ This allows states to discriminate against homosexuals.

84 This is a doctrine associated with the European Court of Human Rights, i.e. in decisions on obscenity or pornography like *Handyside v. the United Kingdom*, (5493/72) [1976] ECtHR 5 (7 December 1976). See A. J. Sweeney, ‘Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era’, 2005 *International Comparative L. Q.*, p. 459; J. Schokkenbroek, ‘The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation’, 1998 *Human Rights L. J.*, pp. 20-36; and contributions to ‘The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice’, 1998 *Human Rights L.J.* 1.

85 Many have provided evidence of this claim. See C. Chinkin, ‘Cultural relativism and international law’, in C. Howland, (ed.) *Religious fundamentalisms and the human rights of women*, 2001, pp. 55-66.

To counter these tendencies and to better address conflicts in human rights, we need additional finesse. How can we, I asked above, peel the onion without too much crying? In political theory, some have suggested a path of zero-tolerance regarding sex inequality.⁸⁶ In the end, that may be it, but we need to discuss the meanings of equality first. Others have argued that some smaller conflicts of religion and equality should not be subject to the crude logics of the law, but be subject to democratic deliberation, in a laissez-faire concept or based on a fine line between law and politics.⁸⁷ But who is then to decide whether harassment matters or not, whether not getting a job in a congregation is a minor or a major problem, whether praying during school hours (which observe Christian holidays) actually matters or not? Do public things in fact matter, while private issues are left outside the reach of the law, fully in line with the discriminatory history of the public-private ideology? It is in fact the subtle constellations which form the overwhelming majority of what people experience as inequality, which is why it is called systemic discrimination and why intent does not matter in EU indirect discrimination law. Therefore, that proposal is not an adequate response to protect human rights. To leave some issues to politics may be tempting to those who see the law as an adversarial case administration only, but if we consider the multiple levels of regulation and of procedures and the governance arrangements in which they work, then law looks much more like deliberation, like fair politics. One can very well argue that delegation away from the law is a good idea if more people are then empowered to deliberate, thus to equalise democracy.⁸⁸ But as long as there is no equal agency in such contexts, delegation is discrimination, and the law is still one option not to easily forego.

For now, then, courts need to be equipped with a more nuanced, a richer and a more principled approach to conflicts in human rights. We need doctrine that allows us to convincingly respond to claims of self-determination, be it religious or otherwise, and ensure equality, be it sex equality or any other. Therefore, I suggest employing an understanding of human rights based on equality and liberty and dignity, in a triangulated perspective of recognition.⁸⁹ This as a pointedly secular approach in that it presupposes human rights and allows for and requests but rational deliberation. It endorses religious pluralism, protected by religious freedom as an individual right which can be publicly expressed. Then, swimming lessons are about self-determination and, in fact, the development of agency, with cognitive, psychological and physical features. This supports a right to learn to swim, which the state may legitimately turn into an obligation. Also, there are equality concerns regarding boys and girls. In controversies around clothing, both for teachers and in swimming lessons, there are not just individual needs to express one's religion, but also equality concerns regarding majoritarian de-facto Christian norms (called 'secular') whose dress code is generally followed, thus privileged, and believers in other faiths, whose dress code should be allowed, if that does not cause a further risk, like drowning. There are also dignity concerns in that no person should be subjected to harassment, at a pool or elsewhere. This may translate into an obligation to educate teachers and pupils, and to produce intercultural tolerance and respect in interaction, rather than excluding girls. But girls will learn not to drown in the water.

86 In particular, see O. O'Neill, *Bounds of Justice*, 2000 (requiring consent based on agency because without the voices of those concerned, and hurt, there is no way to do justice as best as possible to all). See also W. Kymlicka, *Multicultural Citizenship*, 1995, and *Politics in the Vernacular*, 2001; B. Barry, *Culture and Equality*, 2001.

87 S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, 2002, Chapter 2 (arguing that 'soft patriarchy' needs to be combated in civil society); see also J. Tully, *Strange Multiplicity*, 1995; Ch. Kukathas, 'Are there any cultural rights?', 1995 *Political Theory*, pp. 105-139 (rejecting group rights but also state intervention).

88 Recently, Deveaux, *supra* note 16, Chapters 4 and 8.

89 See Baer, *supra* note 66.

The swimming lessons case is, just like the prayer-room case, but one case which has reached the courts. There are many more cases which will be and should be subject to this debate because power inequalities call for regulated proceedings and substantive rules. Then, courts and politics, citizens and scholars face very complex issues. I have tried to add to such complexity, but also suggest that some analytical clarity allows us to understand the issues somewhat better. Hopefully, this will demystify the law which often oscillates between fetish and beast in the shadow. But also, rather than treating law as the call of the sirens,⁹⁰ normative, repressive, juridical, or just bad, as happens in some proposals to handle conflicts within human rights, I propose to, simply, take a closer look.

90 C. Smart, *Feminism and the Power of Law*, 1989.