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Introduction

Human rights law as a site of struggle over multicultural conflicts Comparative and multidisciplinary perspectives

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1. Background

This special issue of the Utrecht Law Review contains the reworked and extended versions of the papers which were presented at an expert seminar held at Utrecht University in November 2009. Utrecht University has recently chosen to focus its research on a number of themes in which it has built widely recognized expertise over the past decades. Faculty from various disciplines and schools collaborate in multidisciplinary research into fifteen themes, ranging from drug innovation, the foundations of the natural sciences and infection and immunity to coordinating social change and the origin and impact of institutions.[1] One of the fifteen research clusters is called *Conflicts and Human Rights*. Under this umbrella, faculty from the disciplines of philosophy, law, anthropology, history and conflict studies work together on a series of important issues which deeply impact peace, stability and human rights in Western and non-Western societies.

One of these issues is multiculturalism. A small team of scholars, mainly from the law school, with expertise in human rights law, gender studies, legal anthropology, the sociology of law, legal theory and philosophy, examines a set of multicultural issues which have recently provoked controversy and debate inside and outside the legal community in Western societies. By studying these issues from a multidisciplinary and comparative perspective, the team aims to contribute to a better understanding of these issues and to point to possible solutions.

The November 2009 conference aimed to firmly establish and expand the research group, to intensify national and international collaboration with other experts in this field and to explore the value of a combination of multidisciplinary and comparative perspectives on multicultural issues. The focus of the research group provided the central theme of the conference: 'Human rights law as a site of struggle over multicultural conflicts'. Though the research ambitions of the research group are much broader and include more overarching themes and perspectives, the subject of the conference was narrowed down to two types of issues which have provoked

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1 For more information see <http://www.uu.nl/EN/research/focusareas/Pages/default.aspx>.

considerable controversy in various Western countries over the past two decades: sex segregation and the multicultural family.

After giving a brief overview of the contributions in this special issue (Section 2) we will reflect on two topics that seem highly relevant to understand the way in which human rights law can(not) play a role in struggles over multicultural conflicts, and that struck us as cutting right across many if not all of the contributions (Section 3). Firstly, we will discuss the importance of framing a multicultural conflict as a human rights issue (or, conversely, of not framing it as such). In this respect, both the role played by human rights norms as such and by the actors involved merit attention. Secondly, we will reflect on the ways in which human rights law can or could play a role once a multicultural issue has been framed in its terms.

2. Overview of the contributions

One way or another, almost all contributions deal with a specific set of multicultural issues: issues involving religious pluralism. (Potential) conflicts between norms, values and practices endorsed by majority groups and those cherished by minority religious ones such as Islamic, orthodox-Jewish or orthodox-Christian groups play a central role. The family and family law seem to be a particular bone of contention. Human rights such as the freedom of religion, the right to respect for family life and the right to sex equality often figure prominently in the ensuing debates.

2.1. Cultural bias in legal interpretation

A first set of contributions explores potential cultural bias in the interpretation of legal concepts that may play a crucial role in human rights law.

Prakash Shah investigates the way in which immigration officials and judges assess the validity of transjurisdictional marriages that do not fit European assumptions about legitimate marriage relationships. Among members of the diverse ethnic minority communities now settled in Britain, the practice of marrying among the same kin group in other parts of the world is an accepted pattern of behaviour. However, they may run into difficulties when their new marriage partner wants to enter Britain. Immigration officials and judges then have to assess whether there 'really' is a marriage. Shah uses four cases in which he was personally involved as an expert witness to demonstrate the underlying assumptions and cultural bias of the concept of 'marriage'. His research shows the UK legal order to be reluctant to recognize certain Islamic marriages, which has a major impact on the possibility of members of ethnic minority groups to fully enjoy their right to respect for family life, for instance by being able to live with their spouse in the UK. Because the European Court of Human Rights (ECtHR) leaves states considerable leeway in determining immigration law and policy, human rights law is effectively left toothless. Shah suggests that the assumptions and cultural bias in relation to marriage are part and parcel of a form of Eurocentrism that functions to protect the cultural integrity of Europe.

Wibo van Rossum investigates the clash of cultures in the specific instance of international child abduction cases in which Islamic legal cultures are involved. He focuses on the behaviour of Dutch legal professionals like lawyers and judges in dealing with these cases, and on developments in the Dutch legal profession like how they keep their 'cultural knowledge' up to date, and whether they develop alternative ways to deal with culture clashes. The central human (child) rights concept, around which cases of international child abduction revolve, is the standard of 'the best interests of the child'. His empirical research into several cases of child abduction shows how Dutch lawyers and judges, but also child welfare agencies, unreflectively apply the dominant

Dutch values concerning children. Other possible perspectives are implicitly set aside as not based on scientific knowledge, are not actively addressed as possibly relevant in the views of ethnic minority parties, and sometimes are deliberately ignored. The extensively described case of *Rachida,* who was confronted with the abduction of her son, shows several of these cultural biases and assumptions at work. According to Van Rossum Dutch legal professionals do address the problem of a clash of legal cultures in international child abduction cases, but not in a very organized way. Specialist courses, for example, are not offered systematically and at several different institutions. There is some recent attention to alternative dispute resolution (also 'court annexed') in cases of child abduction, and furthermore the institution of an office of liaison judges who regularly meet with judges from Islamic countries. Overall, the effect of these developments is that Dutch legal professionals broaden their horizons, but at the same time their cultural assumptions are being confirmed and reinforced.

2.2. Conflicting rights

A second set of contributions focuses on (potential) conflicts between religious norms and practices and women's (and sometimes children's) rights. They cover various crucially important questions concerning this topic.

Susanne Baer discusses several overarching theoretical aspects to be addressed when reflecting on this type of issue in a legal setting. She urges the reader to resist the temptation to reduce such issues to cases or clashes between a determinate set of rights if we really want to understand them better. Rather, we need to understand the political agendas set, including the culturalization of religion and the othering of sex equality. The latter refers to the phenomenon of sex inequality and gendered violence being increasingly represented as being typical of ethnic minorities, presuming such problems have been left behind by majority groups. Besides, we need to realize that such conflicts are taking place in the context of contested secularism and as part of a complicated world of multi-level (and thus also contested) regulation. In this context we cannot expect to find easy answers and we need to carefully analyse all the different, interacting levels involved. The multiple inequalities at stake further add to this complexity. To solve the issues Baer suggests relying on what she calls a 'triangle of fundamental human rights, with substantive equality and interrelated liberty as well as dignity'. To highlight the challenges we face she takes two concrete cases which figure prominently in today's public discussions in Germany as a starting point: religion-based demands to be exempted from mixed swimming classes and claims to be provided with a separate room for prayer, both in a public school setting. The way they are approached differs tremendously, depending on the conception of secularism that is taken as a starting point. Looking for solutions is greatly complicated by the simultaneous applicability of multi-level equality and other human rights provisions. If anything, her contribution shows law to be a very complex site of struggle over multicultural conflicts.

On a more detailed legal level, several papers explore the role of (human rights) law in deciding topical conflicts between religious norms and practices and women's and children's rights. Both Rutten and De Blois address religious marriage laws which provide unequal rights for men and women.

Susan Rutten addresses the question whether it is feasible and desirable that human rights protect spouses in informal marriages. These cultural or religious marriages do not have legal force under formal state law. Rutten discusses two types of problems that spouses in informal marriages could meet.

The first problem occurs when the beneficiaries of economic rights, like pension claims, are exclusively spouses in civil marriages. It appears that spouses in informal marriages who

claim equality with formally valid marriages for specific (financial) purposes will almost never succeed. Neither will an appeal to the right to family life be successful. The European Court of Human Rights gives the state quite some margin to exclude informal marriage relations from recognition.

The second problem is faced by the so-called 'chained wife'. A 'chained wife' is a woman who is divorced under formal state law yet remains married under religious – Jewish or Islamic – law, because she cannot divorce according to the latter without the cooperation of her husband (the husband turning out to be unwilling to do so). This problem provides a clear example of the tension that may exist between religious law and the human rights of women. Rutten explores the ways in which human rights such as the right to equal treatment of men and women, the right to (re)marry and the right to family life as guaranteed in international and European human rights conventions could provide protection to women who are imprisoned in a religious marriage.

She concludes that, although there are dilemmas concerning state interference in the private and religious sphere, it is desirable that states will protect the human rights of spouses in informal marriages.

Taking a comparative approach, *Matthijs de Blois* discusses the Jewish version of the 'chained divorced wife' case, the so-called *get* refusal, in more detail. Under Jewish law divorce is a male prerogative, which means that the wife depends entirely on her husband's consent or refusal to provide the *get*, the formal divorce document.

De Blois compares the different ways in which Dutch, UK and Israeli law have responded to the problems which this unilateral right of the husband creates for women. The Dutch family law is the most secular of the three countries: it does not recognize (the consequences of) religious marriages in its legislation and court decisions seem to be the most indifferent to religious law; there have been court orders for the husband to cooperate in the Jewish divorce procedure, although this could be considered to be against Jewish law. English family law has an intermediate position: religious marriages have consequences in civil law and the enforcement provision in case of a *get* refusal is less intervening in Jewish law: it could only bar a civil divorce. In Israeli family law marriage and divorce are governed by religious law. Rabbinical courts have dealt with the *get* refusal with different degrees of coercion. However, also secular courts in Israel have stepped into the problem when they have considered a husband's non-compliance with rabbinical court decisions concerning the *get* refusal to be sufficient to impose (punitive) damages. This has resulted in a jurisdictional conflict between religious and secular courts in Israel.

These three approaches illustrate the inevitable clash between religious and secular law. This clash can easily be translated into competing approaches to human rights, according to De Blois. He confronts two perspectives of human rights and explores the meaning and value of several human rights from both perspectives. The first perspective that has a religious inspiration, could, in principle, lead to a positive evaluation of the role of religious law (in family matters). The freedom of religion includes the application of religious law, leaving the fundamental right to equal treatment of men and women to the discretion of the religious community (and the 'chained wife' to stay or leave). The second perspective, that has a secular inspiration and is endorsed by several international supervisory organs, considers the application of religious law as problematic. The freedom of religion does not protect religious law that infringes the fundamental right of women to equal treatment.

Whereas Rutten's contribution suggests giving priority to the equal rights of women over freedom of religion, De Blois cannot find an easy solution, but advocates some modesty because of the religious perspective.

A different kind of potential conflict between sex equality and religious norms and practices enters the picture in what appears to be increasing demands by some religious groups for sex segregated facilities, e.g. in public education or the provision of welfare services. Under what conditions, if any, is sex segregation legally acceptable? *Marjolein van den Brink*, *Titia Loenen* and *Jet Tigchelaar* explore this issue by comparing several practices of sex segregation, ranging from highly controversial (separate integration courses for Muslim men and women in the Netherlands), to somewhat less controversial (separate education for girls and boys) to rather uncontested (segregation in amateur football).

Drawing on equality and non-discrimination case law in several jurisdictions as well as critical legal theory they formulate a two-pronged test which would seem to be appropriate to assess the legal acceptability of state-supported sex segregation: 1. are the segregated practices genuinely equal in terms of all relevant tangible factors?, and 2. do the segregated practices create or perpetuate the social and/or economic inferiority of women or not? Applying this 'inferiority test' to the three selected sex segregated practices, it turns out that each practice is problematic. For example, the differences between female and male football teams as regards tangible factors such as the quality of the pitches, referees and coaches do not meet the first part of the test. All-girls' classes can easily confirm traditional gender roles and as a result also perpetuate the subordinate position of women on the labour market. Segregated integration courses could be questioned when women do not have the choice to attend mixed-sex facilities.

The inferiority test is able to deal with multicultural complexity. This is highly relevant, as many of the new claims for sex segregation may involve not just gender hierarchy but also ethnic, cultural and/or religious hierarchies.

Van den Brink et al. conclude, however, that the inferiority test should be modified slightly, in case the detrimental effects are limited and the gains rather substantial. This could leave space for the limited and incidental use of sex segregation, like separate maths classes that empower girls.

2.3. Empirical realities

The crucial importance of empirical research for understanding the way in which human rights law functions or can(not) function as a site of struggle over multicultural conflicts is born out by a third set of contributions.

Firstly, *Ali Çarkoğlu* presents the results of an extensive survey on the controversy in Turkey about the ban on the religious headscarf, called the *türban*, in public employment and universities. Çarkoğlu depicts the behaviour and attitudes related to this highly polarized *türban* ban against the political background of the division between less religiously conservative centralist elites upholding a secular public lifestyle and the rise of the more religiously conservative political Islam, becoming visible in the *türban* and expressed by the conservative Islamic party AKP coming to power in 2002.

National surveys covering the last decade show that the proponents and antagonists of the *türban* ban have not changed much and that the majority (about 70% of the Turkish population of voting age) are in favour of lifting the ban. Men and women do not differ in this attitude. The *türban* ban is also mentioned by most of the respondents as the prime example of the oppression of religious people in Turkey. Interestingly, the pressure on women to cover their head is also mentioned as an example of the oppression of people of secular conviction, although this is mentioned by a minority.

Çarkoğlu's account raises the question of how these empirical data on the meaning of wearing a headscarf in Turkey relate to several decisions by the European Court of Human Rights

on the Turkish *türban* ban. In these decisions the way in which the Court perceives the wearing of a headscarf as a manifestation of religion that is 'hard to square with the principle of gender equality' and even 'difficult to reconcile (…) with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils (...)' plays an important role in its assessment that the ban does not infringe the European Convention on Human Rights (ECHR). Ali Çarkoğlu's research suggests a much more complex reality behind wearing a headscarf in Turkey, which seriously questions this part of the European Court's argumentation in upholding the Turkish ban in the cases at hand.

The empirical work by *Barbara Oomen*, *Joost Guijt* and *Matthias Ploeg* provides unique information on the actual effects of human rights litigation regarding conflicting norms and practices. They delved into a highly controversial Dutch case regarding a political party which bars women from standing for election (and from public office in general) on religious grounds. This orthodox-Christian party, the *Staatkundig Gereformeerde Partij* (SGP) takes the Bible as its primary frame of reference. According to its belief men and women have been given different roles in life by God. Women are assigned the nurturing role, men the role of earning the family income. More importantly, men are to rule in public functions, from which women are excluded. Several women's NGOs and other general human rights organisations brought proceedings against the Dutch State for condoning and even supporting the SGP by subsidizing it on an equal footing with other political parties. In their contribution Oomen et al. assess how 'rights talk', in particular 'rights talk' in terms of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), became the language in which the discussion over orthodox women's political rights came to be framed in the Netherlands. In addition, they report on the extensive quantitative and qualitative data they assembled to assess the social effects of this particular form of rights realisation by way of court cases lodged by outside NGOs. They explored the way in which the (minority) orthodox reformed communities involved responded to those legal procedures. Their research suggests that human rights litigation may have adverse effects by reinforcing the adherence of the challenged communities to contested norms and practices.

To conclude this set of empirical contributions, *Adriaan Bedner*'s and *Stijn van Huis*' research in Indonesia suggests that human rights strategies for improving the situation of vulnerable groups such as women and children are hardly self-evident to start with. They state that Indonesia wants to be a modern state with full protection for women's rights. Indonesia, however, hosts diverse religious and ethnic groups, among which the Islamic communities are the largest. The article starts with a discussion of marriage as a bone of contention between the state, religious authorities and social groups. Marriage practice, according to the authors, can be understood as a result of the tensions between the rules which each of these institutions imposes upon marriage. Marriage registration is mandatory in Indonesia, but many couples do not register and evade the control of the state. The reasons for non-registration are often a mixture of practical and religious ones. Focusing on solutions found locally and with actors from the lowest levels of the administration involved, Bedner et al. argue that the legally pluralistic and relatively 'open' informal system does offer women the opportunity to receive protection from the state when they need it. They therefore argue that much can be said for a pragmatic, but not a principled approach.

3. Some reflections on human rights law as a site of struggle over multicultural conflicts

As we wrote above, reflecting on the many themes and strands that connect the contributions in this volume we selected two topics that seem to stand out and are crucial for understanding the way in which human rights law can(not) play a role in struggles over multicultural conflicts: the role of human rights norms and of the actors involved in (not) framing a multicultural conflict as a human rights issue (Section 3.1) and the ways in which human rights law can or could play a role once a multicultural issue has been framed in its terms (Section 3.2).

3.1. Framing multicultural conflicts as a human rights law issue

Multicultural conflicts are not necessarily framed in terms of human rights law.[2] Multicultural conflicts can be approached historically, psychologically, sociologically, economically etcetera. Starting from such approaches, other terms and perspectives than human rights may prevail, like migration dynamics, labour market tensions, collectivism versus individualism, traditional and modern ways of life, criminal statistics and so on and so forth. Multicultural conflicts could also be approached as human rights issues in a political and moral sense, for example when different cultural and moral perspectives are conceived as a conflict between universalism and cultural relativism.

We will focus, however, on a more narrowly conceived human rights conception, namely human rights *law*. This is not to say that a clear dividing line exists between the use of a legal conception of human rights and a political appeal to and the use of human rights. An illustration of the politicized framing of a multicultural conflict in terms of legal human rights is to be found in the contribution by Çarkoğlu about the *türban* controversy in Turkey. Proponents and opponents in Turkey perceive the ECtHR decision in the *Leyla Şahin* case in political terms. The Court's legal argumentation about the justification of the restriction of religious freedom became part of and even contributed to the polarization in Turkish politics.

Nonetheless, we will consider at least two aspects that contribute to the framing of multicultural issues as legal human rights and influence the way in which this comes about. Framing starts firstly with actors who start addressing a multicultural issue as a human rights law issue; if there is no one who uses the human rights language there will be no framing as such. Secondly, human rights law should be open to this naming and framing. We will pay attention to both aspects, but will start with last one: the role of human rights law itself. How does human rights law itself contribute to the way in which multicultural conflicts are framed?

The role of human rights norms and standards

Human rights law has it own reality and dynamics and as such may exert considerable influence on how multicultural issues are or can be framed in human rights law terms and subsequently be used in litigation. The contributions in this volume point to several examples.

The first issue to realize is that human rights law can block the framing of a multicultural conflict in its terms, by upholding a *formal* barrier. Human rights law can block it for reasons that deny that human rights norms are legally binding or enforceable. Not all human rights law is legally binding. Quite some human rights law instruments that are interesting as a framework for

2 The concept of 'framing' is usually attributed to Erving Goffman's 1974 book *Frame analysis: An essay on the organization of experience*. He used 'frame' and 'framing' in the sense of 'scheme of interpretation' or, in other words, the 'social construction of a social phenomenon'. The basic idea of our use here is that the way a social conflict is perceived, structures its possible solutions.

some multicultural issues are not, such as the UN Declaration on the Rights of persons belonging to national or ethnic, religious and linguistic minorities.[3] Next to this, the absence of the ratification of a treaty or the presence of a reservation to a human rights norm can render a human rights norm not binding for a specific state. De Blois mentions several reservations to human right norms made by the State of Israel, like the following three reservations: 1. to the right to marry (Article 23 ICCPR), 2. to the right of women to participate on equal terms as men in political and public life (Article 7 CEDAW) in order to prevent women from becoming judges in religious courts and 3. to the prohibition of discrimination of women in marriage (including equal rights at its dissolution) and family relations (Article 16 CEDAW).[4] It is obvious that these reservations will facilitate Israeli religious courts to uphold the discriminatory privilege of a Jewish husband to refuse his wife a letter of divorce.

The lack of enforceability or justiciability of a human right means that even if it may be possible to refer to a problem as a human rights issue – because a legally binding human rights norm fitting the problem exists – it is not possible to claim the human right in litigation. The most prevailing reason for the non-justiciability of a human rights norm is that the norm is primarily meant to impose an obligation on the state, without clearly defining what the state is obliged to do, thus leaving political discretion to the state as the addressee. A claim framed in terms of such a human rights norm will not succeed in a court procedure. So, it appears that such a framing before a judge, if it happens to start with, is a rhetorical rather than a legal framing pointing to a moral or political claim. Anyway, it will be much more attractive to invoke legally binding and justiciable human rights than rights which are not, such as cultural rights. One could, for example, consider the vague wording of Article 27 ICCPR as an indication of a weak or non-justiciable human rights standard: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. This could explain why this provision hardly plays a role in framing multicultural conflicts in human rights law terms.

Similarly, social and economic rights tend to play a minor role only. Many multicultural conflicts concern very pressing issues such as a fair distribution of social and economic goods and opportunities. On a global scale attention is being given to poverty and lip service is being paid to economic and social human rights, but in legal practice it appears to be difficult, if not impossible, to frame such multicultural conflicts in justiciable human rights standards. Though rhetorically social, economic and cultural rights are claimed to be equally important as civil and political rights, in practice the former are hardly enforceable in any significant way.

So it turns out that human rights standards that would seem to provide a quite obvious point of departure for framing multicultural conflicts as a human rights law issue are formally blocked from being framed as such, while the relevant human rights are either not legally binding on states (see the previously mentioned Declaration) or not enforceable by rights holders (Article 27 ICCPR, social and economic rights).

A second (material) way in which the internal dynamics of human rights law may influence the way in which framing a multicultural conflict as a human rights law issue takes place is with regard to the specific formulation of human rights norms. Specific human rights provisions may

3 Adopted by General Assembly resolution 47/135 of 18 December 1992.

4 Interestingly the Netherlands did not make a reservation to Art. 7 CEDAW, although this was advised by the party leader of the political party SGP that excluded women from participating in political bodies. The passive attitude of the state became increasingly problematic in the light of the human rights norm of Art. 7 CEDAW.

determine in which ways multicultural conflicts can be transformed into legal human rights terms. Thus it can occur that an obvious multicultural issue, like the example highlighted by Rutten of the protection of informal marriages, is difficult to frame in terms of human rights law. The dominant interpretation namely restricts the scope of the right to marry and the right to equal treatment on the basis of marriage to the protection of *civil* marriages. A desire to protect informal marriages thus has to be transformed to fit human rights that do offer protection to informal relations, like the right to family life (Article 8 ECHR).

Along the same lines it seems that quite some conflicts regarding traditional, cultural norms and values are transformed into religious ones when they are framed in human rights law terms, just because the freedom of religion is guaranteed in many (binding) human rights documents, whereas rights to the protection of tradition or cultural identity are not. So actors interested in using human rights law to protect their tradition or cultural identity may be much more successful in doing so if they can frame this as an issue of religious freedom.

As said before, we selected two types of multicultural conflicts to be discussed at the conference and in this special issue of the Utrecht Law Review: the multicultural family and sex segregation. These kinds of conflicts often have serious identity aspects: whether a person is free to enter into or dissolve a marriage, whether or not a religious marriage is formally acknowledged and protected, whether a person is able to raise and visit his child, whether one is considered primarily as a woman or man with differing opportunities, or whether a person is able to live one's life according to one's religious convictions, all are identity related.

When these two types of multicultural conflicts are framed in terms of human rights, the human rights provisions referred to will be those that best fit these two types of multicultural conflicts and that are estimated to be the most successful. The contributions in this special issue show that human rights law is quite capable of dealing with these kinds of conflicts and to transform them into human rights law issues by linking them to rights that refer to identity aspects. We will highlight some interesting aspects of this framing into identity rights.

Starting with the case of *sex segregation* it is obvious that the right to equal treatment of men and women or the right to non-discrimination on the basis of the sex identity marker will certainly play a central role. Depending on the context of the contested practice of sex segregation and depending on available human rights law, more specific equality standards can be invoked.

This happened in the case discussed by Oomen et al. regarding the Dutch State subsidizing a political party (SGP) that bars women from being eligible as a Member of Parliament. In that case the state-tolerated sex segregation by the orthodox-Christian political party was contested by women's and human rights NGOs with reference to the specific equality standard in political life as contained in Article 7 CEDAW. This specific right on an international level offered a more detailed weapon in this conflict than the general non-discrimination standard on the national and international level. Yet, CEDAW is for quite a few (mostly conservative) people a very controversial human rights convention and does not play such a prominent and esteemed role as, for instance, the European Convention on Human rights. CEDAW providing the more specific legal human rights standard to challenge the exclusion of women resulted in it becoming the focus of the legal procedures. Thus the conflict became predominantly framed as a conflict between (controversial) CEDAW norms and other human rights conventions such as the European Convention on Human Rights protecting religious freedom, even if the latter also prohibits sex discrimination.

In the case of *the multicultural family* one can expect multicultural conflicts being linked to human rights that aim to protect family life (like the right to private and family life and the

right to marry and to establish a family) and human rights that aim to protect vulnerable members of the family and/or marriage, like the rights of children (see the contribution by Van Rossum) and women (see the contributions by Rutten and De Blois).

Still: Shah, but also Rutten show that the right to family life and the right not to be discriminated against on the basis of (the type of) marriage both seem to be weak human rights for individuals in deviating marriages. If the deviating (informal) marriage can be framed as those human rights, it is left to the state to acknowledge the validity of a marriage according to its national laws. Thus, although being framed as a human right could be feasible, the site of struggle then turns to the justification for restricting the human right and, along the same lines, restricting the cultural practice.

While family norms and norms concerning sex segregation are often influenced by culture and/or religion, rights in those spheres could also be expected to mark the site of struggle. As we pointed out earlier, the right to culture is legally weak and cannot be easily invoked, so disputes about cultural norms will often be framed in other terms, such as the right to the freedom of religion. This comes as no surprise when it concerns a religious marriage and when the struggle involves competing or even conflicting state norms and established religious rules. In that case the human right to freedom of religion can be used as a shield against state interference in religious and private life. De Blois gives a comparative overview of how this shield of freedom of religion functions when the state is requested by a Jewish woman to overrule religious rules that privilege Jewish men. This shield of freedom of religion seems to be quite strong when the struggle over applicable rules is primarily assessed as a religious issue, but the shield shows cracks when the struggle is framed as a conflict between the equality of men and women and the freedom of religion.

It is through this framework of a conflict between the identity rights of gender equality and freedom of religion that multicultural issues often enter the legal domain, as also Baer stresses and is illustrated in the contribution of Çarkoğlu about the *türban* debate in Turkey. Sometimes one could ask whether religion is really at stake, as is the case with social norms: are sex-segregated swimming lessons and integration classes issues of religion, tradition or culture? Are the proponents of lifting the headscarf ban in political service and higher education solely religiously inspired or are conservatism, opposition against strict secularist elites and political affiliation also involved? As a claim to respect for tradition and culture as such does not offer legal protection to human rights, such issues will be transformed into freedom of religion. In other words: the translation of multicultural conflicts into legal terms depends on whether and to what extent the legal concepts are applicable to these conflicts.

All in all, human rights law may provide a site of struggle over multicultural conflicts in different ways, but selects and transforms those conflicts. Especially the transformation into the identity human rights is notable. Particularly sex equality and freedom of religion seem to be 'strong' human rights to frame multicultural issues. Equality serves to ask for the inclusiveness of the state recognition of minority practices on the same footing as majority practices. Equality also serves to ask for the inclusiveness of the state protection against other citizens (often of a religious minority). Freedom of religion is suitable for demanding that the identity of one's religious group is respected. Multicultural conflicts often concern a demand for the inclusiveness of one's identity and respecting one's (group) identity. However, multicultural conflicts are often also about the distribution of social and economic goods and positions. As these positions are not easily framed as (social and economic) human rights, one could question to what extent human rights law affirms and reinforces the one-sided framing of multicultural conflicts as identity conflicts.

The role of the actors involved

That human rights are available to frame certain social conflicts or problems as conflicts in terms of human rights, does not always mean that they will be framed in that way. From the contributions it becomes clear that different types of actors are involved in multicultural conflicts, each with their general and specific set of knowledge and experience. The most obvious distinction between types of actors is between lay actors and legal professional actors. One might theorize that lay actors will probably not have a 'natural tendency' toward framing their problem in terms of law and specifically human rights law. This is not always the case, however. The other hypothesis one might suggest is that legal professionals will primarily frame a conflict in terms of law and human rights violations. This is also not always the case. There may be advantages in not framing a conflict in terms of human rights. In looking at the contributions especially with an eye on which actors frame or evade framing a conflict in terms of a violation of human rights and why, we hope to gain a further insight into how human rights law functions as a site of struggle. We distinguish two situations. The first is the one in which actors do not naturally frame a case in human rights terms, while the second situation is one in which the decision to frame a case in human rights law or to avoid doing that is a strategic consideration of the actors in question.

The first situation is when the language of human rights law does not naturally and immediately come to mind as far as the actors are concerned. Shah for example suggests that immigration officers simply apply the law in a way that gives them the least trouble. The immigrants then need to protest to set the legal machinery in motion and they need a legal professional like a lawyer to see if it is helpful to frame their problem in human rights terms. Shah argues that lawyers will often not do that because they know that the ECtHR leaves ample room for states to regulate immigration, resulting in Shah's sigh that the ECHR is 'marginally relevant' in immigration cases. Van den Brink et al. describe the case of a young female footballer who sued the Royal Netherlands Football Association (KNVB) for tort because she was not allowed to play in the boys' team. The argument was not based on the equality principle, but that the KNVB 'prevented her from developing her footballing skills'. The same holds true for the ECtHR case of *Şerife Yeğit v. Turkey*, as discussed by Rutten. Yeğit apparently simply asked the Turkish authorities to register her religious marriage, for the registration of her children, and for pension rights and health benefits. In the article by Bedner et al. on family law in Indonesia, it becomes clear that local lay actors apparently do not frame their case in terms of international human rights, but argue in terms of their local (Christian, Adat, or Islamic) law. In the contribution by Oomen et al. on the case of the political party SGP it is clear that the lay actors (party members) who are closest to the contested issue of the political participation of women frame their argument firstly in terms of their interpretation of the Bible. Only in the second instance do these actors use the human rights frame of freedom of religion.

The second situation concerns the question whether it is strategically 'wise' to frame a multicultural conflict in human rights terms. In some articles it becomes clear that the *evasion* of human rights terms is done for strategic reasons, for example to avoid increasing tensions in social relations. Van Rossum describes how lawyers in the case of a (possible) child abduction first make an effort to solve the case informally, because they know that stating the case in terms of 'the best interests of the child' and calling on law enforcement agencies to return the child will increase tensions between the (ex) partners. In court cases like that of *Rachida* (who as a lay person mainly talked in terms of 'I want my boy back'), judges probably prefer the application of rather straightforward private international law and Dutch legal rules as long as the lawyers do not problematize the situation of Rachida's son in terms of 'his best interests'. There may be

other reasons to evade the language of human rights. In the background of the article by Bedner et al. lingers the notion that the Indonesian Government evades formulating social problems in human rights terms because it fears that it will diminish the social acceptance of legal measures among a population that is not very 'pro-West'. Since, when it comes to family law, Indonesia is legally pluralistic in terms of Christian, local Adat, Hindu, Buddhist, and Islamic law, they argue that it is best for the Indonesian State not to be very principled, but on the contrary to be pragmatic. In a legally pluralistic situation and especially when – like in Indonesia – the state is not that powerful, the principled language of human rights law is best evaded. However, there may also be quite simply strategic reasons to avoid the language of human rights law, for example because a lawyer estimates that he can win a case by arguing it in tort law terms. This is probably the lawyer's strategy behind the female footballer in the article by Van den Brink et al. who sued the Royal Netherlands Football Association in tort, and we may also expect this with the Dutch '*get* case' which De Blois describes. The Jewish woman who wanted the *get* sued her ex-husband in tort and the court granted it because the ex-husband had violated an unwritten rule of proper social conduct toward his divorced wife. A lawyer will probably only in the second instance and 'as a last resort' use the more vague and insecure human rights law. This was probably the case of *Yeğit* before the ECtHR in Rutten's article. Only when the registration of her marriage was refused did her lawyer argue in legal terms that this constituted a violation of family life.

The flip side of the strategic evasion of interpreting conflicts in human rights terms is an *explicit argumentation in those terms*. In two cases which Van den Brink et al. describe (sex-segregated education and sex-segregated welfare services) legal professionals were not (yet) involved, but politicians and other public figures did frame the issues in the human rights terms of (gender) equality and religious freedom, probably because this scheme of interpretation is readily available and appeals to the wider lay public. The debate in the media is sometimes high-pitched because of the fundamental values at stake. The authors show, however, that actors may also find arguments in empirical terms by looking at the most effective outcome in the long run. Actors who argue empirically can balance these with a principled discussion in human rights terms. Oomen et al. describe how actors outside the direct circle of people involved, mostly legal professionals, initiated court proceedings in the SGP case on the political participation of women and based their arguments on human rights, especially CEDAW. The interest they claimed to defend was 'the interest of all Dutch women' and the question was what exactly the obligations of a state that has adopted CEDAW are. We can thus say that the adoption of CEDAW has changed the interpretive context of Dutch society in which we will probably see a bigger 'women's rights consciousness' in the future. The cases on wearing a headscarf in public institutions in Turkey also show how context matters. Contrary to Indonesia where local actors mainly seem to argue in local legal terms, medical student Leyla Şahin explicitly raised the issue of the freedom of religion as a human right (the article by Çarkoğlu). Turkey's context apparently makes lay people much more 'human rights conscious' when it comes to headscarves.[5] The same holds true for the cases mentioned by Baer: parents who did not want their children to partake in mixed swimming lessons and especially the fifteen-year old German boy who went to court because he felt he had a right to pray in high school come across as extremely human rights

5 This consciousness probably also contributes to the headscarf debate in Turkey becoming increasingly politicized.

conscious.[6] These actors framed their conflict strategically in terms of religious freedom in order to further their interests. In most cases that interest is personal and based on a particular world-view or religion. Interests may also be 'general' as with the NGOs in the SGP cases, and may just as well be political or ideological as is well illustrated in the article by De Blois. When we look at the State of Israel as an actor, that actor argues that the weight of religious freedom is much greater than the equality principle, and therefore that actor will not interfere in religious family law that provides for legal distinctions between men and women. The ideology and religion behind that argument is the historical relation of the territory of the State of Israel to the Jewish religion and culture.

Taking the analysis of the two situations together we may observe that apparently actors in some cases have an interest in not framing a multicultural conflict in terms of law and human rights, while in others the strategy is to make human rights as important as possible. Sometimes the actor who strategically uses human rights law is a person or institution who belongs to the inner circle of people who are directly involved, while in others that actor is a person or institution who defends 'the general interest'. We must not forget, by the way, that it is often unknown who is the actor that initially framed an issue in legal and particularly in human rights terms: The lay actor involved in a conflict? The media? Politicians who want to court the spotlight? The lawyer who is prepared to walk the long and winding legal route to the European Court of Human Rights? We must also be careful with the assumption that lay people 'just want to have their problem solved' and do not think in legal terms. In most cases it may be legal professionals who decide whether it furthers the solution of a conflict by framing it as a violation of a particular human right, but in some contexts and countries lay people may have a strong human rights consciousness. This insight puts the spotlight on the fact that actors need to 'learn' to perceive a conflict in terms of human rights *at all* for there to be a site of struggle. Just like social problems and conflicts are only under certain conditions transformed into legal problems and conflicts (the well known social process of 'naming, blaming, and claiming'), the language of human rights needs to settle in people's minds in order for it to be used to reframe social problems and conflicts.[7]

By looking at the contributions from the point of view of the question 'which actor frames in terms of human rights law?', it is clear that the site of struggle over human rights is not neutral ground, but is used instrumentally and strategically by different actors with a different knowledge base, with different experiences, having different interests, and living in different societal and legal contexts. And as far as this remark is 'kicking in an already open door', of course *some actors* in *some cases* will downplay the importance of rights, while strategic acting in other cases requires the conflict to be framed as a gross violation of a particular right. It all depends on the interests at stake and on the assessment (mostly by legal professionals) whether a particular

6 See <http://www.berlin.de/imperia/md/content/senatsverwaltungen/justiz/gerichte/vg2/entscheidungen/03_a_0984_07___090929___anonymisiert___anonymisiert.pdf?start&ts=1255675977&file=03_a_0984_07___090929___anonymisiert___anonymisiert.pdf> for the verdict.

7 W. Felstiner et al., 'The emergence and transformation of disputes: naming, blaming, claiming...', 1980-1981 *Law and Society Review* 15, no. 3-4, pp 631-654. We do not mean to say, however, that (multicultural) conflicts always need to be addressed in a principled way and framed in terms of human rights law. As some of the contributions make clear, a pragmatic approach may be more effective, while strategic acting also always needs to take the social effects and consequences of a certain framing into account.

'framing' will increase or diminish the chances of winning a case or furthering a particular development of a multicultural conflict.[8]

3.2. The way in which human rights law plays a role

Once a multicultural conflict is framed as a human rights issue it is interesting to see *how* human rights law acts or could act as a site of struggle in multicultural conflicts. *In which way* does it play such a role? A striking and, at first sight, typically legal way that seems to stand out in several of the contributions concerns legal interpretation. More specifically, the contributions show that (human rights) law operates as a site of struggle over the meaning of important legal concepts such as the best interests of the child (Van Rossum), marriage (Shah and Rutten), secularism or state neutrality (Baer), equality (Van den Brink et al.) or what constitutes an unlawful act under tort law (De Blois).

As different interpretations generate different kinds of specific and (generally) enforceable rights and obligations, interpretation is crucially important. Especially for (members) of cultural and religious minority groups it can make the difference between inclusion or exclusion. This is literally so for the potential migrants which Shah describes as trying to enter the UK: if their telephonic marriage or marriage by proxy is recognized as a marriage in the legal sense they can no longer be refused entry to the UK to realize their right to family life (presuming that other requirements have been met). In the case of the German pupils as described by Baer, who successfully claimed a room for prayer in a public school, their inclusion depended on the way the concept of state neutrality is interpreted in Germany. As the German court dealing with this claim regarded the concept of state neutrality to imply an open attitude towards religious expression, the school was indeed deemed to provide such a space.

Similarly, the way in which equality and non-discrimination are conceptualized legally can make a tremendous difference for women and other disadvantaged groups. If it is conceived as a formal symmetrical concept only, that is, as a requirement of just treating likes alike, it may not provide much protection. If, however, it is approached in an asymmetrical and substantive way, as a legal obligation to end the inferiority and subordination of (members of) one group over another, it holds much greater promise to do so (see Van den Brink et al.).

Other examples of the importance of the way in which legal concepts are interpreted for the protection of human rights can be found in the contributions by Van Rossum and Rutten. For Rachida and her former husband the specific interpretation given to 'the best interests of the child' decides their future family life with their son after their divorce (Van Rossum). Rutten gives several other examples of the impact of specific interpretations of important legal concepts in the area of marriage and divorce when she explores the way in which the right to family life, freedom of religion and non-discrimination are interpreted in various jurisdictions and under the European Convention on Human Rights. Again, interpreting such concepts in one way or another translates into very specific rights and obligations resulting in broad or narrow human rights protection.

Interestingly, the contributions in this volume show that although the interpretation of legal concepts by the courts seems at first sight to be a typically legal exercise, in fact it often depends on all kinds of non-legal assessments. Thus the recognition of atypical marriages in Shah's case studies depends on religious interpretations of Muslim marriage. In fact, the author himself was

8 We as researchers who are interested in the functioning of human rights law are well aware of the fact that we are part and parcel of the process of framing certain multicultural conflicts in terms of human rights conflicts. Even if we only have a scientific interest, we are included among the players in the discourse on human rights in multicultural conflicts.

called upon to give expert evidence in several judicial proceedings on what may constitute a marriage under Muslim law. The content of the concept of 'the best interests of the child' in Van Rossum's example of the case of Rachida shows how this largely depends on the non-legal assessments of the Child Protection Board (and perhaps also on the personal opinion of the judge deciding on the custody arrangements). Similarly, evaluating compliance with the elements of the 'inferiority test' in the contribution by Van den Brink et al. time and again requires non-legal knowledge about the impact of segregated practices, for instance on the social and economic position of women. If anything, this shows how legal actors and legal decision making are in dire need of the expertise and knowledge obtained from the social sciences.

Several of the contributions also show what happens if such knowledge is not available or, worse, is ignored. Legal actors can and do make many mistakes. As Çarkoğlu's contribution shows, the assessment of the European Court of Human Rights in the case of *Şahin v. Turkey*[9] regarding the meaning of the *türban* as hard to square with sex equality ignores the far greater complexity of the issue of wearing it in the Turkish context. Van Rossum suggests similar problems when he discusses the lack of proper knowledge on Islamic culture and religion by legal actors in child abduction cases.

As concepts such as marriage, state neutrality and many other legal concepts more often than not are underdefined in the law, it is hardly surprising to find them becoming the object of a struggle over their 'true' legal meaning. This may be all the more so where conflicting rights are at stake. Legal human rights standards generally do not provide clear-cut solutions as to which right should prevail and thus cases involving conflicting human rights tend to be resolved on a case by case basis, leaving even more indeterminacy.

The contributions in this volume clearly demonstrate the clashes between the underlying norms and values involved. Those of De Blois and Rutten, for instance, deal extensively with competing religious and secular norms and values concerning marriage and divorce and the problems this creates when the two regimes meet or conflict in the everyday lives of individuals and they seek a legal way out. The empirical research by Oomen et al. shows how different interpretations of what constitutes sex discrimination relate to more fundamental, underlying views on Man and Society which are worlds apart. The orthodox reformed groups who bar women from standing for election do so on Biblical grounds and do not regard this exclusion as discrimination. To them different or unequal roles for women and men do not render women inferior, but reflect and respect the proper role of men and women in society as willed by God. It seems clear that this interpretation clashes with modern legal conceptions of discrimination in Dutch society. Even so, this does not answer the question whether the modern interpretation of discrimination should overrule the modern interpretation of the right to freedom of religion, which is not limited to having a religion or belief as such, but also to live by it.

The importance of interpretation in human rights law begs the question of who has the power to influence and/or attribute meaning. In this respect, lawmakers, judges, lawyers, legal counsel and the parties to a conflict may all play a role. And last but not least: we ourselves as academics often hope to play our part in arguing for 'proper' or 'more convincing' or 'better' interpretations of (human rights) law (see Baer, De Blois, Van den Brink et al., Shah, Rutten).

To socio-legal scholars it will not be surprising to conclude that at the end of the day power relations come into play. Human rights law is not immune to that whatever its lofty, idealistic image (and however much we would perhaps like it to live up to that image). The contributions

9 ECtHR (Grand Chamber) 10 November 2005, *Leila Şahin v. Turkey*, application no. 44774/98.

show the many faces that power struggles in this context may take. Thus Baer describes the process of 'othering' sex equality by dominant groups in Germany and other European countries by framing sex inequality and gendered violence as a characteristic of Muslim and other immigrant communities rather than as (also) a mainstream problem. But power is also exercised on a much more individual level as is shown by the influential position of the Child Protection Board in interpreting the 'best interests of the child' in Van Rossum's contribution or the position of immigration officials vis-à-vis potential immigrants in Shah's. In the latter case one can expect both potential immigrants and immigration officers to use the law strategically to further their own purposes. Backed by their lawyers, individual immigrants can be expected to try to use the flexibility of the concept of marriage to support their objective of gaining entry to the UK. UK officials who are supposed to keep immigration under control can be expected to use it the other way round. The contribution by De Blois shows that legal power struggles may even take place between courts within the same jurisdiction, as his example of the *get* refusals in Israel illustrates: civil family courts are making inroads into the dominance of Jewish religious law governing marriage and divorce as adjudicated by religious courts by using civil tort law to help wives to procure a *get* from their husbands who cannot be forced to do so under religious law.

The last example also illustrates a characteristic of many conflicting rights cases. In this context, power struggles may become even more complex because the groups involved are not homogenous, but are themselves multilayered and diverse, hiding internal power differences between their members (for instance, between men and women). Several of the contributions explore the question of whether and how in this context human rights law protects one or the other, or maybe both.

4. Concluding remarks

If anything, the contributions in this volume provide rich and intriguing perspectives on the myriad of ways in which human rights law functions as a site of struggle over multicultural conflicts. They also leave us with the knowledge that much more scholarly work needs to be done to get to grips with this complex subject. The November 2009 conference was a very inspiring moment in this endeavour and has refreshed and coloured our 'internal debates' at the Institute of Legal Theory in Utrecht during the winter. Especially preparing the papers for publication in this special issue made us, the editors, reconsider and reassess our own scientific positions and research. We hope the contributions in the special issue will be as fruitful to any reader interested in multicultural conflicts and human rights as they have been to us. We are confident that the work of the authors will bear fruit and will inspire them and others to pick up new topics and continue their research in this important area.