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Multiculturalism by Liberal Law

The Empowerment of Gays and Muslims

Abstract

There has been much talk about the retreat or even death of multiculturalism. Much of this discussion confounds multiculturalism with explicit policy under that name. I argue in this paper that liberal law itself, in particular majority-constraining constitutional law, requires multiculturalism, understood as multiple ways of life that cannot and should not be contained by a state that is to be neutral about individuals' ultimate values and commitments. The workings of legal multiculturalism are demonstrated through a comparison of benchmark jurisprudence on gays in America and Muslims in Europe. An interesting difference is that for Muslims, liberal law has also functioned as constraint, not only as resource, especially in the post-2001 period of heightened integration concerns.

Keywords: Multiculturalism; Liberalism; Constitutionalism; Gay rights; Religious rights; Muslims; United States; Western Europe.

THERE HAS BEEN MUCH talk about a retreat or even death of multiculturalism, more often by way of a rebuttal [Kymlicka 2010]. Much of this discussion confounds multiculturalism with explicit policy under that name. Conversely, it overlooks the fact that liberal law itself requires multiculturalism, understood as multiple ways of life that cannot and should not be contained by a state that is to be neutral about people's ultimate values and commitments. I dub this phenomenon "legal multiculturalism." In particular, constitutionalism, a higher law that protects individual rights from democratic majority preferences, assures that we live in societies that are set to become more and more multicultural. A case in point, to be explored in this paper, is the empowerment of gays and Muslims. This pairing may appear unusual, even odd, because the real world has seen both groups in conflict with one another, to put it mildly. But the dynamic of their respective empowerment is similar.

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Constitutions constrain majority power; in turn, they protect structural minorities that have fewer opportunities to use the political process in their favor. But constitutions do so mostly not through group protections but through individual rights clauses, especially liberty clauses, which posit the individual as the unit of integration in liberal societies. The only difference between our two cases, as we shall see, is that liberal law is more complexly involved in the Muslim case, where it may *also* function as a constraint on certain "illiberal" claims—there is interestingly no equivalent to the constraining function of liberal law on the gay side.

The first part of this paper briefly maps the contours of liberal constitutionalism. The second part elaborates in more detail the workings of liberal constitutionalism in the case of gay empowerment in America. Part three extends this analysis to Muslims in Europe. A brief conclusion summarizes the main similarities and differences of both instances of legal multiculturalism.

Liberal Constitutionalism

Will Kymlicka [2007: 93] realizes that multiculturalism operates "within the larger framework of liberal constitutionalism". But he draws too sharp a line between the latter and "multiculturalism" proper that requires going "beyond [...] rights guaranteed to all individuals" [*ibid.*: 16]. Rights not guaranteed to all individuals will always be rare and contested in a liberal state, granted more for prudential than principled reasons, dependent on context. In turn, Kymlicka underestimates the elasticity of liberal constitutionalism to do much of the work that his "liberal multiculturalism" is burdened with. At least this is the case with respect to immigrant-based minorities (like Muslims in Western Europe), who in Kymlicka's scheme [1995: 30-1] are entitled only to a lesser kind of "polyethnic rights", short of stronger "self-government rights" that are reserved for longer-settled and territory-fixed national and indigenous minorities (and that, indeed, *do* go beyond liberal constitutionalism in establishing group-level "multicultural jurisdictions," to quote Shachar [2001]).

The prototypical case of polyethnic rights involves exemptions from generally applicable laws that conflict with minorities' cultural or religious norms. But in reality, these are not group-specific rights but higher-order individual rights, especially religious liberty

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rights, which trump lower-order statutory laws or public order considerations. As Habermas argued forcefully, whether it is Sikhs riding motorcycles in turbans; the wearing of ritual daggers in public; halal butchering; or headscarves worn in the workplace or school, each is "a trivial case of a basic right taking priority over an ordinary law or public-safety regulation" [2005: 15]. Importantly, even by Kymlicka's own reckoning, such polyethnic rights (aka higher-level individual rights) are not absolute but constrained by an "integration" proviso: their point is to "promote integration into the larger society, not self-government" [Kymlicka 1995: 30]. Qua having voluntarily left their homeland, Kymlicka realistically argues, immigrants have "waived" any claim for group autonomy [96]. As I shall argue, liberal law itself, short of any explicit multicultural commitment, provides the resources for polyethnic accommodation—though constrained by an "integration" proviso that is conceded by Kymlicka himself, and which in the case of Muslims in Europe lends to liberal law the ambiguous quality of resource *and* constraint.

In mapping out liberal law's resourcefulness, one should start with the fact that liberalism itself is "respect for people whatever they think and whoever they are" [Fawcett 2014: XIII]. The "ethical standard of individualism", which stipulates that each person has the right to conduct her life according to her own preferences, is one of two "normative intuition(s)" of liberalism (the other being the "moral standard of egalitarian universalism") [Habermas 2005: 1]. Elementary respect for the individual is the reason why a liberal society cannot but be multicultural, because it is left to individuals and not the state to decide what kinds of life they want to live, as individuals as much as in groups. There is a public morality in a liberal society, but the entity to be protected under its laws is not corporate, like religion, nation, or family, but the individual herself. "Individualism", argued Durkheim in one of the most passionate and political of his writings, is "the only system of beliefs which can ensure the moral unity of the country" [1898: 50]. The liberal state is "neutral" in the precise sense of making the integrity of the individual the lynchpin of public morality and order—"neutrality" is the "best term to describe the minimal moral conception of liberalism" [Larmore 1990: 342].

Liberalism thus understood is devoid of a positive view about how people should live their lives and make their choices. It is a "liberalism of fear" [Shklar 1989] that protects the individual from the *summum*

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malum of arbitrary state and group power.[1] Liberalism is thus closer, not to the idea of democracy, but to the idea of constitutionalism and "rule of law", which is liberalism's "original first principle" [37]. A classic paper by Sartori [1962: 854f] aptly qualified as "constitutional" a "system of protected freedom for the individual" and of "restrict (ing) arbitrary power". In a democratic context, constitutions constrain majority power. Hence there is tension between the two.[2] While we are used to the notion of "liberal democracy", as if its two elements go naturally together, they are in reality not of the same cloth. Therefore, the continued attraction of "dark" thinker Carl Schmitt, who resolved the tension in favor of a *völkisch* (a contemporary update would be *populist*) conception of democracy. Of course, liberalism requires democracy because its promise of freedom is *equally* bestowed on *all* individuals. A classic formulation of this point can be found in Tocqueville: "[M]en cannot be absolutely equal without being entirely free, and consequently equality, in its most extreme form, must merge with freedom" [1969: 504]. But then he famously continued that both "tastes" were nevertheless "distinct", and that in a democracy the one for equality would trump the one for freedom. The least to say is that liberalism's preference for the individual may clash with the whims of the collective, the *demos*. Judith Shklar has put it well: "[L]iberalism is monogamously, faithfully, and permanently married to democracy—but it is a marriage of convenience" [1989: 37]. No one would have ever thought to describe the relationship between liberalism and constitutionalism as a "marriage of convenience", simply because there is no tension between the two.

To the degree that certain individuals can never hope to attain a democratic majority, we arrive at the concept of "minority" and a special protective attention to them under constitutionalism. That constitutional law is structurally geared to the protection of "minorities," the standard-bearers of multiculturalism, has been canonized in the American context by legal scholar John Hart Ely (1980).

[1] This is of course not the only understanding of liberalism, as it competes with a thicker, ethical understanding [see Galston 1995]. Particularly from a thin understanding the precepts of liberal constitutionalism can be derived, which supports multicultural claims. From a thicker understanding one can, in turn, derive certain limits to multiculturalism, which Kymlicka [1995: 30-31] himself seems to endorse in the case of immigrants in that he puts them on a track of "integration," not "self-government."

[2] This is overlooked by Habermas [1994], who stipulates an "internal connection between democracy and the constitutional state" [113] [see also Habermas 2001]. However, his general point that the "system of rights," while being "individualistic," is not "blind" to "cultural differences" [1994: 113], is valid and very close to the position defended here.

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According to Ely, the function of "judicial review"—the controlling of the political process by constitutional law—is the "protecting (of) minorities from majority tyranny". His point of departure is the famous Footnote 4 in an old and otherwise unspectacular Supreme Court decision, *United States v. Carolene Products* (1938). There the court argued that a more "searching inquiry" was warranted for laws that were directed at "particular religious [...] or national [...] or racial minorities," and where "prejudice against discrete and insular minorities tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." Footnote 4 pioneered the idea of "more exacting judicial scrutiny" for laws that impinge on certain individual qua minority interests, which would legally empower the civil and minority rights revolution of the 1960s.

A minority-protecting Supreme Court naturally did not champion group rights. Rather, it championed the individual liberty ("due process") and equality ("equal protection") rights of members of minority groups. It nevertheless brought into existence a strong legal multiculturalism, American-style. Weaker variants of it can be found in all Western constitutional states, because minority protection (or, conversely, the curtailing of majority power) is within the logic of constitutionalism. The one difference is the protective attention to explicit "minorities" in the American constitutional process, which is due to the uniquely serious race problem in America. There is no equivalent in other legal systems to the "suspect classification" and "tiers of scrutiny" doctrine that the US Supreme Court developed in its equal protection clause jurisprudence. In Europe, it was from the start more the general individual rights provisions in the constitutions, above all religious rights, which have been central to a de facto minority empowerment. In Europe also, a kind of legal multiculturalism has evolved, with the accommodation of Islam as prime example.

Ironically, gays have never been formally recognized as a Footnote 4 minority under US constitutional law. This makes their legal empowerment a hard or "least-likely" case [Eckstein 1975]. Gays and Muslims still have this much in common to be "vulnerable minorities whose identities are often denigrated by members of the majority" [Carens 2013: 77], thus inviting a comparison. It will show how both groups, despite their frequent clashes on the political front (see Puar 2007 or Mepschen *et al*. 2010), have seen many of their claims recognized through the same source, which is liberal law, in particular, constitutional law.

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Gay Rights in America and the Thinning of Public Morality

Will Kymlicka [1998: ch.6] famously denied gays the status of multicultural claimant, because they partake in majority culture and are not "institutionally complete". Other scholars have shared this view [e.g., Ford 2010]. By contrast, Nancy Fraser, when distinguishing between a "politics of recognition" and a "politics of redistribution", lists "despised sexuality" as the purest case of an injustice calling for remedial "recognition" only, without any element of "redistribution," on the plausible assumption that homosexuals are "distributed throughout the entire class structure of capitalist society" [1995: 77]. Gays themselves tend to see themselves as multicultural claimant. One of the earliest analyses of an emergent "gay identity" in late 1980s America depicted mobilized gays as inspired by the civil rights movement, as "a legitimate minority group having a certain quasi-'ethnic' status, and deserving the same protection against discrimination" [Epstein 1987: 12].

There is, in fact, a tension within the gay movement between a quasi-ethnic, essentialist understanding of gayness and "constructivist" queer theory, according to which sexual orientation is malleable in any direction one chooses [for the latter, see Butler 1990]. Both understandings, and changes in their relative preponderance, are deeply implicated with a legal context in which gays have desperately tried to move from illegality to legality, if not public recognition. In the next two sections, I first address the gay movement's "uncertain identity" and, secondly, its conditioning by a changing legal context.

An uncertain identity

Janet Halley [1998: 115] noted that "sexual orientation movements" do have the "look and feel" of "identity politics," but that they "lack the substance" of it. She finds these movements "unique" in "harboring an unforgiving, corrosive critique of identity itself", constituting rather a "post-identity politics." This is emblemized in the notion of "queer," which is precisely to "frustrate identity formation around dissident sexualities". From the queer angle, identity appears as "script" that restricts group members and "begins to look like power" itself [117]. Halley uses Althusser's notion of "interpellation" to make the point: "identity" is like the police calling you from the back in a dark street, "Hey, you there" [118]. In fact, we

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know from Michel Foucault that only in the 1870s, as a result of the modern state's invention of "bio-politics" and "sexuality," previously "forbidden acts" transmuted into a "homosexual… personage," with a "past, a case history, and a childhood… The sodomite had been a temporary aberration, the homosexual was now a species" [Foucault 1980: 43].

Radical "gay liberation" paralleled the deconstruction of sexual identity in the realm of scholarship. The claim was no longer just to be put on a par with heterosexuals, but to tear down the entire ontology of fixed identities. One activist expresses it well: "I tell you what we want, we radical homosexuals: not for you to tolerate us, to accept us, but to understand us. And this you can do only by becoming one of us. We want to reach the homosexuals entombed in you, to liberate our brothers and sisters, locked in the prisons of your skulls… We will never go straight until you go gay" [quoted in Cain 1993: 1640, fn.462]. Radical "queerness" simultaneously moves multiculturalism to the extreme, as this is surely difference to the max, at least an eccentric position not shared by many; and it pulls the rug from under multiculturalism, because difference is at the same time repudiated.

The problem of queerness is its political impracticality, its non-fit with a civil rights frame that requires the carving out of clearly demarcated "groups" or "minorities." As gay sociologist Joshua Gamson stated, the social constructionist movement "shakes the ground on which gay and lesbian politics have been built" [quoted in Katyal 2002: 116]. Accordingly, the "universalizing" understanding of sexual orientation, especially in the world of activism, never matched a "minoritizing" understanding, according to which "sexual orientation" looks "like race" [Halley 1998: 121]. In the latter optic, sexual orientation is an "immutable" characteristic, like skin color, with the corresponding call, accepted and established by race-focused civil rights law, not to be discriminated against on this ground.[3] This, finally, is multicultural identity politics as we know it. Joshua Gamson again expressed it well: "Gay and lesbian social movements have built a quasi-ethnicity, complete with its own political and cultural institutions, festivals, neighborhoods, even its own flag" [quoted in Katyal 2002: 110]. However much the ethnic track was in sync with civil rights law, there still lurked "crosscutting vulnerabilities"

[3] For a critique of race-like "immutability" to ground gay identity, see Richards [1999]. Instead, he argues for a "religious analogy," according to which gay identity is "both a moral *choice* and *demand*" [5] and thus a matter of the "liberty of conscience" [94].

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[Halley 1998: 126f] on *both* paths of gay emancipation, the universal *and* the ethnic. From a "universalism" angle, to be gay is choice, and thus confronted with the anti-gay call to be converted or, at least, prevented from spreading further; from a "minoritism" angle, gay is a pathology, to be cured, excised, or excluded.

The legal drama

The American gay and lesbian movement eventually moved on a group-level, quasi-ethnic track, a "conception of gay men and lesbians as a clearly demarcated social group with a fixed, ethnic-like identity" [Katyal 2006: 1437]. It was thus traditionally multicultural. This intimates the movement's close conditioning by civil rights law in general, and by the evolving constitutional jurisdiction on homosexuality in particular.

The American legal drama of gay emancipation started with an anachronistic blow. In 1986, the Supreme Court flatly declared, in its infamous *Bowers v. Hardwick* decision, that the Federal Constitution did not "confer [...] a fundamental right upon homosexuals to engage in sodomy."[4] This was the case of a man, "Hardwick" (never mentioned by his first name, Michael, in the court's caustic 2.5 page opinion), who had been arrested in his own apartment for the "offense of sodomy" with another man, punishable in the state of Georgia with "not less than one nor more than 20 years" of prison. At the time, sodomy in private between consenting adults was punishable in 24 American states and in the District of Columbia. Most of these sodomy laws, like the one in Georgia, were indifferent to the sex of the offender, punishing also heterosexual sodomy. This points to the religious origins of the sodomy prohibition, that "infamous crime against nature" as Blackstone had called it, in which not the homosexual element but "non-procreation" was the "central offence" [Hunter 1992: 533]. As late as 1960, general sodomy laws were in place in *all* American states. They were rarely enforced but used as a pretext for discriminating specifically against homosexuals in other branches of the law, those dealing with employment, social services, and child custody, on the presumption that homosexuals were regularly practicing sodomy and thus committing crimes [Katyal 2002: 103]. In 1961, Illinois became the first state to decriminalize sodomy, and nearly half of the other states followed suit. Their inspiration was the

[4] *Bowers v. Hardwick*, 478 U.S. 186 [1986], at 190.

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1955 Model Penal Code of the American Law Institute, which rejected "criminal penalties for consensual sexual relations conducted in private."[5] In 1973, the American Psychiatric Association removed homosexuality from its list of mental diseases, and by 1975 gay-specific anti-discrimination laws were passed in the District of Columbia, San Francisco, Los Angeles, Minneapolis, Philadelphia, and several other cities [Hunter 1992: 539].

However, these successes triggered a counter-trend toward revised sodomy statutes that targeted homosexuals only; such explicitly anti-gay laws were passed after 1973 in eight states, including Texas. The Supreme Court's *Hardwick* decision was part of this counter-trend toward "specification" [Katyal 2002: 104], because it denied constitutional protection only to "*homosexual* sodomy," even though the state law that was affirmed in this decision, to repeat, was sex-indifferent.

The *Hardwick* notion of "homosexual sodomy" is revealing for its systematic conflation between "act" and "identity." This conflation, argues Janet Halley, functions as "rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity" [1993: 1722]. Note that it was never "illegal to be gay" [Cain 1993: 1564]. Not the identity or the status, but only certain conduct, most centrally sodomy, was criminalized. But the latter—as shown—had originally been a sex-indifferent offense. *Hardwick* helped cement the equation of "homosexual" and "sodomy". This caught gays in a double-bind. They were defined by the act without escape, while heterosexuals, strangely absent in a case that potentially affected them too, were implicitly cast in a more "mobile and fluid position," as people for whom sodomy is option and not destiny [Halley 1993: 1726]. One can hardly resist the dark conclusion that this way of setting up the matter is an "exercise of homophobic power" [*ibid.*: 1770]. In less drastic terms but to the same effect, Justice Stevens, who dissented in *Hardwick*, saw method in this case's "selective application of … generally applicable law," because maintaining the same prohibition for heterosexuals would be "concededly unconstitutional."[6]

In particular, the *Hardwick* court denied the application to "homosexuals" of the "right to privacy." This right could not be found anywhere in the Constitution, but it had been construed in the court's recent jurisdiction on so-called "substantive due process."

[5] Quoted in *Lawrence v. Texas,* 539 US 558 (2003), at 572.

[6] *Bowers v. Hardwick*, Justice Stevens (dissenting, joined by Justices Brennan and Marshall), at 220.

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These were all cases concerning family matters, from the use of contraceptives to abortion. The cautious beginning was *Griswold v. Connecticut* (1965), which was the first decision to recognize a constitutional "right of privacy" in allowing the use of contraceptives by married couples. And the controversial high point was the seminal *Roe v. Wade* (1973), which legalized abortion in the first two trimesters on the same grounds. Michael Sandel [1989] subtly noted that initially, in *Griswold*, it had been more "intrusion" rejected than "choice" protected, thus "affirming and protecting the social institution of marriage" [527], whereas later it was the individual who moved to the fore. As Justice Douglas put it in *Griswold*, "the sacred precincts of marital bedrooms", and the "privacy surrounding the marital relationship" enjoyed constitutional protection.[7] In a nutshell, initially it was more the institution of marriage than individual choice that was protected. By contrast, seven years later, in *Eisenstadt v. Baird*, a case that concerned the distribution of contraceptives to unmarried couples, the "right to privacy," if "it means anything [...] is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion..."[8] Finally, in *Roe*, the right of privacy protected "a woman's *decision* whether or not to terminate her pregnancy."[9]

The legal evolution from *Griswold* to *Eisenstadt* and *Roe* shows the workings of "individualization," whereby law no longer protected corporate entities like family or nation but the individual [Franck *et al.* 2010]. However, the *Hardwick* court mischievously refused to extend this line of cases to "homosexual sodomy." In the court's brusque words, there was "no connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other."[10]

In justifying the refusal to extend privacy protection to homosexual sodomy, the Supreme Court fathomed that "[p]roscriptions against that conduct have ancient roots,"[11] and that "[c]ondemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."[12] Considering the construction of the "homosexual personage" not before the late 19th century, according to the scholarship not only of Foucault but also of other historians,[13] this was a contestable statement, to say the least. But the *Hardwick* court's condemnation of homosexuality was not undertaken in a "naïve" but "sophisticated"

[7] *Griswold v. Connecticut*, 381 US 475 (1965), at 485.
[8] *Eisenstadt v. Baird*, 405 US 438 (1972), at 453.
[9] *Roe v. Wade*, 410 US 113 (1973), at 153.
[10] *Bowers v. Hardwick*, at 191.
[11] *Bowers v. Hardwick*, at 192.
[12] *Bowers v. Hardwick*, concurring opinion by Justice Burger.
[13] Some of whom are cited in *Lawrence v. Texas*, at 568.

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way, to use Sandel's terms [1989]. That is, the court did not directly attack homosexuality as morally reprehensible. Instead, it defended the right of democratic majorities to embody in law their moral convictions. Accordingly, the court claimed no "judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable."[14]

This was a concession to liberal proceduralism, because it kept state institutions, including this very court, out of the business of defining the good life. But it did not produce liberal results. In fact, the result exactly mirrored English High Court justice Patrick Devlin's position, in the famous Hart-Devlin debate fought out more than two decades earlier, also over the legalization of homosexuality. There it was argued that there was "such a thing as public morality" [1963: 10]; that the contents of that morality were set by the majority in society ("the man in the Clapham omnibus," in Devlin's metaphor: 15); and that it was the function of "the law to enforce (society's) judgments" [12]. In almost the same terms, the *Hardwick* court rejected the plaintiff's proposition that the "majority sentiments about the morality of homosexuality" was an "inadequate" basis for Georgia's anti-sodomy statute: "We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated."[15] As the court further opined, "The law [...] is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[16]

The Supreme Court's *Bowers v. Hardwick* decision had momentous impact on the direction of the American gay and lesbian movement. It turned the movement away from conduct-focused and individualist "gay liberation" toward status-focused and group-level "gay rights" [see Cain 1993]. It thus helped into existence the multicultural identity movement as the gay and lesbian movement is known today. Activist lawyer Nan Hunter describes it well: "Law has contributed massively to the construction of the idea of homosexuality as a significant marker of human identity, never more dramatically than in *Bowers v. Hardwick*, when the Supreme Court's will to distinguish and specify homosexual from heterosexual acts overrode the statutory text before it" [1992: 552]. Paradoxically, the radical "queer" project of

[14] *Bowers v. Hardwick*, at 190.

[15] *Bowers v. Hardwick*, at 196. As Justice Stevens pointed out in dissent, strictly speaking the court could not know what the people of Georgia thought about homosexuality, because the sodomy prohibition passed in the state legislature applied also to heterosexual sodomy (*Bowers v. Hardwick*, at 220).

[16] *Bowers v. Hardwick*, at 196.

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liberating sexuality, for everyone, is dependent on notionally unspectacular individual privacy protection. Yet this is what was blatantly refused in *Hardwick*. Post-*Hardwick*, the privacy or sexual liberty venue was foreclosed to litigators. Instead, litigators came to focus on "status, as distinct from conduct," arguing that "discrimination against lesbians and gay men should be subjected to the same strict liability scrutiny accorded racial discrimination" [Cain 1993: 1618]. In legal terms, the focus shifted from constitutional liberty to equality rights, under the umbrella of antidiscrimination, thus trying to take advantage of the Footnote 4 "minority" jurisprudence that had so far not included gays. This was the moment of "coming out", and of seeking "protection based on sexual orientation and identity" [Katyal 2002: 108]. One activist well expressed the post-*Hardwick* mood: "What can you do—alone? The answer is obvious. You're not alone, and you can't afford to try to be. That closed door—never very secure as protection—is even more dangerous now. You must come out, for your own sake and for the sake of all of us" [*ibid.*].

Post-*Hardwick*, the activist focus on homosexuality as a public identity led to the paradox of proliferating local anti-discrimination measures, particularly in cities friendly to gay concerns, elevating (minoritarian) "sexual orientation" to a race-like marker of identity and protection, while the act of "homosexual sodomy," to use the wording of *Hardwick*, continued to be a crime. Moreover, at the legal level the group identity strategy caught the movement in the double-bind of status-conduct conflation that had always hindered gay emancipation. Let me explain. Judges responded to the movement strategy shift from conduct to status, or from freedom to equality, that no equal protection claim, under the 14th Amendment, could be recognized until *Hardwick* was reversed [Cain 1993: 1618]. These judges refuted the status claim by means of a syllogism: first, *Hardwick* had held that there was no constitutional protection for "homosexual conduct"; secondly, "homosexual" is precisely defined by engagement in homosexual conduct (whereby status *is* conduct); therefore, thirdly, there can be no protection for persons who fall within this category. As one district court put it, "[I]t would be quite anomalous… to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause" [*ibid.*, fn.361].

Not by accident, the one Supreme Court decision that first acknowledged a gay claim under the minoritarian equal protection clause, *Romer v. Evans* (1996), did not mention *Hardwick* with a single

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word. In this surprise decision, the court rejected a constitutional anti-gay amendment in Colorado, which had been passed to override local anti-discrimination ordinances, protecting "sexual orientation," in the progressive cities of Aspen, Boulder and Denver. The corrective Colorado state amendment, argued the court, was born of "animus toward the class that it affects"[17] and "lack(ing) a rational relationship to legitimate state interests."[18] Justice Scalia attacked the court majority in a sarcastic and bitter dissent for taking "sides in the culture wars," elevating homosexuality into "an optional and fully acceptable 'alternate life style,'" while frustrating the good people of Colorado's "reasonable effort to preserve traditional American moral values."[19] His furious defense of the "sexual morality favored by a majority of Coloradans" against "the elite class" had one valid point: as long as *Hardwick* was good law, that is, as long as it was "constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct."[20]

When *Lawrence v. Texas* (2003) finally overruled *Hardwick*, it was hailed as "the *Brown v. Board* of gay and lesbian America."[21] The case was strikingly similar to *Hardwick*: John Geddes Lawrence (now acknowledged by the court with his full name) had been arrested in his own home for engaging in anal sex with another man, Tyron Garner. Both were charged and indicted for violating the Texan anti-sodomy statute, which was a second-generation anti-sodomy statute that singled out the same-sex variant for persecution. The petitioners challenged the statute as violation of the Equal Protection Clause of the 14th Amendment. This was an obvious charge as the statute discriminated against homosexuals. But it also reflected the larger post-*Hardwick* turn of gay rights toward defending the equality of a race-like identity group.

The court, however, would not take this turn (as this would leave the state of Texas with the escape route of levelling-down, namely, extending the sodomy prohibition to straight people). Instead, the court squarely restored what had been denied to gays in *Hardwick*, the right of privacy, now elevated into the "liberty of the person both in its

[17] The "class" was defined in the Colorado state constitution amendment as "status based on homosexual, lesbian, or bisexual orientation."

[18] *Romer v. Evans*, 517 US 620 (1996), at 629; quote at 622.

[19] *Romer v. Evans*, Justice Scalia (dissenting, joined by Chief Justice Rehnquist and Justice Thomas), at 637, 630, and 636, respectively.

[20] *Romer v. Evans*, Justice Scalia, at 638, 622, and 626, respectively.

[21] Tribe (2004: 1898). *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), is the Supreme Court's single most important 20th century decision, which started the legal emancipation of American blacks.

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spatial and its more transcendent dimensions."[22] At the same time, the *Hardwick* court's reduction of the plaintiff's claim to whether there is a right to homosexual sodomy was rebuked for "demean[ing] the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[23] To bring a gay claim in close proximity to marriage and the family underlines the dramatic full-turn the court had taken from *Hardwick* to *Lawrence*, as well as intimating further possibilities: the recognition of same-sex marriage. Importantly, what came to be protected in *Lawrence* was not the sexual act but the "relationship" in which it is embedded: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[24] This was rather lyrical language for the case at hand, which had apparently been a fleeting encounter, a "one-night stand" in colloquial language. As Laurence Tribe, a Harvard law professor who had litigated in *Hardwick*, put it, not "specific acts" were protected in *Lawrence* but rather "the relationships and self-governing commitments out of which those acts arise—the network of human connection over time that makes genuine freedom possible" [2004: 1955].

The protection of "relationships" not "acts" provided a floor for restoring the "personal dignity and autonomy" that had been denied to gays under the sodomy statutes and their legal affirmation in *Hardwick*. This restoring was a matter of "respect," thus invoking the *leitmotiv* of liberalism-cum-multiculturalism: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[25] Accordingly, while *Lawrence* was decided as defense of liberty on substantive due process grounds, it included a "powerful minor chord of equality" [Hunter 2003-2004: 1123]. The court even used the word "stigma" to describe the "demean[ing]" impact of sodomy statutes on "the lives of homosexual persons."[26] As one activist lawyer put it, the court's "soaring language recognizes the dignity and respect that gay men and lesbians are due" [Franke 2004: 1401]. *Lawrence* was, indeed, an instance of Charles Taylor's "politics of recognition" [1994]. However, it was achieved on the basis of the individual-rights-focused and neutralist mainstream liberalism that Taylor repudiated

[22] *Lawrence v. Texas*, at 562.
[23] *Lawrence v. Texas*, at 567.
[24] *Lawrence v. Texas*, at 567.
[25] *Lawrence v. Texas*, at 578.
[26] *Lawrence v. Texas*, at 575.

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("Liberalism 1," as Walzer [1994] called it), and *not* through the explicitly group-recognizing liberalism that he favored ("Liberalism 2", *ibid*.).

Lawrence cut down to liberal size public morality by means of constitutional law, thus naturally allowing multicultural possibilities. An (even by his own standards) furious dissent by conservative Justice Scalia confirms it. This was the "end of all morals legislation,"[27] thundered Scalia, including "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."[28] Of course, there was no state law prohibiting masturbation. But the thrust of Scalia's fit of rage is on target. Indeed, if "the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational basis review."[29] Over a decade later, as anticipated by Scalia, the federal recognition of gay marriage, long-established by then in many states, including in traditionally conservative states, has occurred, with the Supreme Court's 2015 *Obergefell v. Hodges* decision.[30] Only, no "massive disruption of the current social order"[31] has as yet materialized—at least, if one associates "disruption" with less agreeable things than gays or lesbians exchanging rings in Las Vegas Elvis Presley chapels. *Lawrence* still endorses "alternate life style(s)," as Justice Scalia already feared in a previous case[32], cementing a legal multiculturalism that is necessary in a liberal society.

Muslims in Liberal Europe

A liberal law no longer subordinating the claims of the individual to a hypostasized public morality has been an unambiguous source of gay empowerment. The situation is more ambiguous with respect to Muslims. Here liberal law has functioned both as resource *and* constraint. On the resource side, constitutional rights, above all the freedom of

[27] *Lawrence v. Texas*, Justice Scalia (dissenting, joined by Chief Justice Rehnquist and Justice Thomas), at 599.

[28] *Lawrence v. Texas*, Justice Scalia, at 590.

[29] *Lawrence v. Texas*, Justice Scalia, at 599.

[30] *Obergefell v. Hodges*, 576 US (2015). This narrow 5:4 decision, written like *Lawrence* by Justice Kennedy, predictably follows the doctrinal lines of *Lawrence*, that is, combining substantive due process and equal protection arguments, only more explicitly: "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty" (*Obergefell v. Hodges*, at p.22). Justice Kennedy speaks of a "synergy between the two protections" (*ibid*., at p.20).

[31] *Lawrence v. Texas*, Justice Scalia, at 591.

[32] *Romer v. Evans*, Justice Scalia, at 630.

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religion, which is guaranteed by Western state constitutions and international conventions, are the premier force of Muslim empowerment. They allow Muslims (and other minority religions) to practice their religion on free and equal terms, yielding a "growing multiculturalism of European societies" [Grimm 2009: 2370] that is not only demographic but required by law. This is yet another case where the "equal treatment of cultures" is "implement[ed] [...] through the normal route of applying the law" [Habermas 2005: 15]. On the constraint side, however, the religious claims of Muslims often conflict with the individualistic and egalitarian underpinnings of liberal law itself, such as the freedom of expression and the equality of the sexes. There is no equivalent to this on the side of gay emancipation, which has even clashed occasionally with an "illiberal" and "homophobic" Islam—hence the polemic notion of "homonationalism" [Puar 2007], meant to denounce the instrumentalizing of gay rights for Islam bashing.

That there is a constraint side of liberal law might be taken as confirming the whole point of an orthodox multiculturalism that criticizes and goes beyond mere liberalism [e.g., Modood 2007], while disproving the legal multiculturalism argument proffered in these pages. But note that no multiculturalist, not even the most radical, would condone genital mutilation or honor killings in the name of minority religion or culture. But then there are limits to multiculturalism and one arrives at the same conclusion, which is that liberal law constrains extreme forms of multicultural claims-making. Kymlicka, again, has conceded that much, not only with his integration proviso for the case of immigrants [1995: 30] referred to above. He also argued that a liberal-democratic consensus shared by minorities is the presupposition of the exceptional fortune of multiculturalism in Canada (while, conversely, suggesting that the lack of such consensus explains the rougher goings of multiculturalism in Europe) [Kymlicka 2010: 108].

On the other hand, Muslims themselves have recognized liberal law's resourcefulness. Europe's most prominent Muslim, Tariq Ramadan, writes: "The fact that after more than 40 years of presence in Europe the Muslims are generally allowed to practise their Religion in peace, to build mosques [...] and to found Islamic organisations is clear evidence that the various European constitutions and laws respect Islam as a Religion and Muslims as Believers who have the right, as others, to enjoy freedom of worship. This is an indisputable fact and the increasing number of mosques and Islamic centers or institutions supports this assertion" [2002: 121]. Socioeconomic and other integration failures, as well as "racism," Ramadan continues, are not

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to be "confused" with failing religious integration, for which he finds no evidence. On the contrary, Muslims in Europe "live in an atmosphere of security and peace regarding religious matters." Indeed, Europe's "legislation, laws or rules" are all fine; the main problem is "spiritual life in a modern society," which, however, squarely falls within Muslims' own "responsibility" [138].

In the following, I map two ways in which liberal law has empowered Muslims[33], with a special (but not exclusive) focus on Germany. This is a particularly interesting case, because Germany is a country that cannot be called "multicultural" at political level—Muslims in Germany, like gays in the US, are a "least likely" case in Eckstein's sense (1975). But Germany indisputably is multicultural at the legal level, despite a lack of political support for such a stance. First and foremost, there is constitutional law, with its principle of religious freedom, which in a secular state protects all believers irrespective of majority or minority status. An additional inroad for legal multiculturalism is, secondly, a modicum of legal pluralism that results from two sources: private international law and civil law. However, as I shall argue in a third step, there is a shadow side of liberal law in the context of Muslim or Islam integration, which is to function also as constraint and not only as resource. This shadow side looms large in the post-2001 period.

Constitutional law and religious freedom

Article 4 of the German Basic Law guarantees the "inviolability" of the "freedom of belief", as well as the "undisturbed practice of religion." It applies to the private and public exercise of religion, by individuals and by groups. It is a right of all persons residing in Germany, irrespective of their citizenship status. And it is granted universally, without a "Christian cultural reservation" [Rohe 2010: 173]. It even protects the freedom *not* to believe. Its universal scope, including negative religious freedom, is due to the logic of secularism, according to which the "common good" is not religious but the "security and welfare of (the state's) inhabitants", with religious truth being privatized [Grimm 2009: 2372]. Finally, the right to religious freedom under the German Basic Law is granted without a statutory provisory. This means that it can be limited only at the level of the constitution itself, by other constitutional rights or principles.

[33] "Muslims" are considered here and in the following only as a religious, not a socioeconomic, minority group.

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Basic Law Article 4, parallels to which can be found in all Western state constitutions, but also in the European Convention of Human Rights,[34] explains why mosque building permits are privileged under German construction law (outweighing their neighbors' interest in nocturnal tranquility); why the Muezzin call for prayer is in principle allowed (though rarely practiced, for prudential reasons); why halal meat can be produced against the odds of tough animal protection laws; why social security has to reimburse the costs of religious circumcision or the ritual washing of deceased Muslims; why, until recently, Muslim girls were easily exempted from co-educational sports lessons; and why the Islamic headscarf is generally allowed in the private and public sectors, lately even among public school and Kindergarten teachers [see the overviews by Obbecke 2000 and Rohe 2004 and 2010]. Acknowledging the extensive religious freedoms that Muslims enjoy in Germany, a prominent Muslim organizer even deemed Germany to be "more Muslim than Saudi-Arabia" [Rohe 2004: 334].

But, as in other European countries, there has been a drama about the Islamic headscarf, whose restriction is often taken as an exception to a general rule of accommodation. Indeed, at the European level, every single headscarf decision by the European Court of Human Rights has left the restriction by a convention state in place, mostly arguing that a remote court is ill-suited to decree on a sensitive religious-cultural matter.[35] But at state level the situation is often much less grim. In Germany, as in all European countries (except France[36] and Turkey), the wearing of headscarves by pupils has always been tolerated, in line with the German regime of "open neutrality" that does not expel but equally includes religion in the public space. The issue in Germany was rather whether the headscarf was to be allowed in private and public employment, above all for public school teachers. With respect to the private sector, the Federal Labor Court, in a decision of October 2002, later confirmed by the Federal Constitutional Court,[37] found the firing of a headscarf-wearing employee in the perfume section

[34] Article 9 of the European Convention on Human Rights (ECHR) guarantees "the right to freedom of thought, conscience and religion."

[35] See Joppke (2013). To the classical headscarf cases discussed there has to be added the European Court of Human Rights' more recent *S.A.S. v. France* (2014), which held the French law against face veiling (the so-called "Burka Law" of 2010) conformant with the European Convention of Human Rights.

[36] In France, headscarf and veiling laws passed in 2004 and 2010, respectively, may be interpreted as political backlash against the legal permissiveness of the Conseil d'Etat, France's highest administrative court [see Joppke 2009: ch.2; Joppke and Torpey 2013: ch.2].

[37] *BVerfGE*, 1 BvR 792/03, decision of 30 July 2003.

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of a department store "socially unjustified," ranking her "basic right of religious freedom" higher than the employer's professional or profit-making interest.[38]

The court-ordered headscarf permissiveness of Germany's private sector is less well-known than its public-sector restriction of the teacher's headscarf. The well-known *Ludin* decision of the Federal Constitutional Court in 2003 was double-headed [see Joppke 2009: ch.3]. It held that a deep restriction of a religious freedom required a statutory basis, which in this particular case did not exist. Yet it also threw the switches for the swift passing of such restrictive laws in *Land* after *Land*, in its immediate wake. However, in a second headscarf decision in January 2015, the court surprisingly reversed course, now plainly declaring that "teachers are allowed to wear a headscarf."[39] In particular, the court held that the *Land*-level prohibitions of religious expressions, which had been justified in reference to their "abstract threat" to school peace, were "disproportionate," considering their "considerable compromising of the constitutional right of religious freedom on the part of teachers."[40] Instead, a "concrete threat" had to be demonstrated, to be evaluated case-by-case. A "general prohibition" was only possible if a "considerable number of cases" had been reached, but such prohibition still had to be limited to specific schools or school districts. Not the least important aspect of the Federal Court's 2015 headscarf decision was to declare unconstitutional the state-level exemptions for Catholic nun teachers. Never convincing many, the nun's veil had previously been declared not religious but cultural, that is, "representative" of "Christian and occidental values" that the state was entitled, even mandated, to instill in young minds. In its 2015 headscarf decision, the Constitutional Court refuted the arcane distinction between religious "confession" and cultural "representation" proffered for the Christian exemption, and it found the respective clause in North-Rhine Westphalia's education law a "discriminatory disadvantaging (*gleichheitswidrige Benachteiligung*) on the basis of faith and religious beliefs."[41]

Already the *Ludin* court had held a differentiated view of the Islamic veil, which could not be reduced to the suppression of women. The 2015 decision, which was even more unambiguously pro-headscarf, naturally continued this line. In contrast to the crucifix in the classroom,

[38] BAG, 2. Senate, 2 AZR 472//01, decision of 10 October 2002; at para. 31.

[39] 1 BvR 471/10 and 1 BvR 1181/10, decision of 27 January 2015 (Teachers' Headscarves).

[40] *Ibid.*, para. 82.

[41] *Ibid.*, para. 123.

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the wearing of a headscarf on the part of "some pedagogues" could impossibly entail an "identification of the state with a specific faith."[42] On the contrary, in light of Germany's tradition of open neutrality, the public school had to "mirror [...] the religiously pluralistic society," and to be open for "Christian, Islamic, and other religious and spiritual (*weltanschauliche*) contents and values."[43] The headscarf itself was not "proselytizing or missionary," and a "blanket conclusion" that it "violates human dignity and the equality of man and woman" was "impermissible."[44] The formulation is still negative, and not as emphatic as the ringing rehabilitation of gay dignity in the US Supreme Court's *Lawrence* decision. But the effect is comparable. The teacher's headscarf has moved from illegal to legal, which constitutes a milestone of legal multiculturalism in Germany and Europe.[45]

Legal pluralism

To be distinguished from the religious rights provided by constitutional law or international conventions is the limited recognition by a legal order of the facts created by other legal orders, which I shall refer to as "legal pluralism." A classic paper argued that "virtually every society is legally plural" [Merry 1988: 871], because, next to a "system of courts and judges supported by the state," one was also likely to find in it "nonlegal forms of normative ordering" [870]. Such limited legal pluralism is not to be mistaken for the existence of full-blown "parallel legal systems" [Malik 2012: 6]. For some, autonomous "jurisdiction" is the litmus test of multiculturalism proper [e.g., Shachar 2001], and "self-government rights" for national and indigenous minorities as advocated by Kymlicka [1995] come close to it. However, Kymlicka (*ibid.*) notably does not endorse this strongest form of multiculturalism for immigrants, whose trajectory is destined to be "integration" not "self-government." As Habermas clarifies, "according to the modern understanding of law, there really cannot be a 'state within the state'" [2005: 23]. In this vein, not even the most extreme case of Islam-induced legal pluralism in the West, the so-called "sharia councils" that have operated with tacit government approval in Britain for several decades now, could be described as setting up a parallel legal

[42] *Ibid.*, para. 112.
[43] *Ibid.*, para. 105 and 115.
[44] *Ibid.*, para. 116 and 118.
[45] Germany's headscarf permissiveness is confirmed in the constitutional court's most recent decision on the headscarf worn by *Kindergarten* teachers, which follows the same line as the court's 2015 decision on public school teachers (1 BvR 354/11, decision of 18 October 2016).

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system (more on this below). "Minority Legal Orders in the UK mainly accept the supremacy of the state system," argues the authoritative paper on the subject, which at the same time endorses a "progressive multiculturalism" within but not beyond these limits [Malik 2012: 6 and 12, respectively]. Similarly, a chronicler of Islamic legal pluralism in Germany states that the "legal system" itself is "not 'multicultural'" [Rohe 2010: 149]. This is because in the first there is "the rule of a uniform law" [191], which has to decide how far (or not!) to relax its reach for the sake of other, foreign sources of law.

One may distinguish in this respect between private international law and civil law as two separate sources of Islam-linked legal pluralism. To begin with the first, private international law deals with "conflicts of laws" that, in the majority of cases, result from foreign nationals' having been married or divorced in their home countries, but whose effects need to be recognized in their place of residence. This is necessary to safeguard vested private relationships and it follows the diplomatic principle of the "comity of nations." This recognition is controlled by considerations of *ordre public*, because different societies have different views of what constitutes proper family life, such as the minimum age for marrying, how many wives a man can have, or what (if anything) can dissolve a marital union. In the present era, *ordre public* equates with human rights constraints. As Paul Lagarde writes about France, "[t]he cultural differences that are rejected in the name of public order are those which are contrary to human rights as defined in the major international documents" [2010: 545f].

Different states use different connecting factors to decide which law, the domestic or the foreign, to apply in a specific case. The choice is always between nationality and domicile. Continental states, such as Germany, prefer nationality, while Britain, Canada, or the United States prefer domicile. This has led to the curious result that the application of Islamic family law "has become everyday business in German courts" [Rohe 2010: 151]. This is because under previously restrictive German nationality laws even long-settled immigrants still tend to be foreign nationals. The application of nationality-focused private international law in Germany is an instance of multiculturalism manqué, in which mother-tongue teaching and other seemingly "multicultural" measures really mean an unwillingness to integrate and to keep the "guestworkers'" return option open.

The propensity of German courts to adjudicate on the basis of immigrants' domestic laws or customs stirred a national scandal

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when a judge in the local court (*Amtsgericht*) of Frankfurt, in 2007, refused to divorce a Moroccan-origin (but naturalized German) wife who had been physically abused by her Moroccan husband. The judge (remarkably, a woman) quoted a Koran verse that attributes to husbands the right to beat their wives (*Züchtigungsrecht*). This decision was instantly shelved. But there was a public outcry about an "Islamization of German law" [see Rohe 2007]. This is exaggerated because, in principle, the public order exception provides "a powerful firewall against the conflict of laws rule" [Lagarde 2010: 525]. German courts, for instance, might recognize a unilateral Islamic *talaq* divorce, even if conducted on German territory (what a French or British court would never do), but only if the prerequisites for a divorce under German law are fulfilled, such as one year of prior separation and the proper informing of the wife [Rohe 2010: 152]. In all cases, a "balancing" has to be achieved between preserving public order, which is tantamount to applying human rights standards, and "fulfilling individual needs for legal 'difference'" on the part of transnational people [Rohe 2003: 10].

A second source of legal pluralism is civil law. Civil law is optional: it deals with the relations between autonomous private persons, who have a wide leverage in regulating their relations as they see fit. This is in contrast to public law, including penal law, which is not optional—it does not depend on the consent of involved parties but is activated even if the victim of a crime would prefer not to involve the state. As civil law deals with the private interests of the involved parties, they are "entitled to create and arrange their legal relations according to their preferences" (Rohe 2004: 337). Examples are financial transactions framed to satisfy the Islamic prohibition of paying interest (*ribā*); or matrimonial contracts about the payment of a dowry to the wife, the so-called *mahr*, which is customary in Islam. Many countries, like Britain, in addition have arbitration laws that delegate certain civil law functions, such as the regulation of business or family conflicts, to private tribunals, provided the involved parties consent to it.

An extreme case of a country undergoing Islamic legal influence through this route is Britain. Werner Menski coined the notion of *angrezi shariat* for "a new hybrid form of Shari'a" [2001: 140], which operates in a grey sphere of the British state not officially recognizing it but also not wanting to prohibit it. What "recognition" of sharia might mean is unclear to begin with, as John Bowen (2010: 413) has argued for the English case. It could equally refer to Islamic jurisprudence (*fiqh*), the laws and legal practices of Muslim countries, or the

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procedures and decisions of sharia councils operating in England. A legal scholar depicted the British situation in critical words: "[O]ften fearful of accusations of racism, and lately of Islamophobia if cultural practices are questioned, [government actors] have tended to allow communities free rein to 'police' themselves in cultural matters" [Sardar Ali 2013: 114].

As most sharia councils operate privately, it is not clear how many are in operation in Britain [see the diverging figures by Bano 2012: 85 and MacEoin 2009: 69]. There is agreement, however, that the great majority of cases before these councils are brought by women whose husbands deny them a *talaq* divorce. Their only recourse left is the *khul* divorce by an imam, which, however, forfeits the divorced wife's right to her dowry. As the sharia councils thus fulfill a positive function for British Muslim women, who would otherwise be ineligible to remarry within their community, one is inclined to hold a positive view of them. Maleiha Malik [2012: 29] argues in this vein that prohibiting the sharia councils would "only alienate minorities", and that it was preferable to make them "more 'women friendly.'"

A peculiar legal uncertainty surrounds the few Muslim Arbitration Councils (MAC) that claim to operate under the 1996 Arbitration Act—which would make their decisions binding under British state law. In September 2008, the British government was reported to have "quietly sanctioned" the powers for these councils to rule on financial disputes and family matters, from divorce to domestic violence.[46] However, the interior minister, Jack Straw, immediately denied that a delegation of legal power in family law had ever occurred: "Arbitration is not a system of dispute resolution that may be used in family cases" [quoted in Zee 2014: 8-9]. Indeed, divorce is a matter of personal status, different from a dispute between individuals that may be privately resolved—it requires state involvement, because marriage in the Western tradition is not a private contract (as it is under Islamic law) but a public institution. Accordingly, MACs cannot issue divorce certificates that are valid under civil law.[47] The dual world of *angrezi shariat* remains in place: "[V]irtually all ethnic minorities in Britain marry twice, divorce twice, and do many other things several times in order to satisfy the demands of concurrent legal systems" [Menski 2001: 152]. The very fact of having to do things twice confirms the superiority of the civil law system, which is the only one to have

[46] Abul Taher, "Revealed: UK's first official sharia courts", *The Sunday Times*, 14 September 2008.

[47] See Joshua Rozenberg, "What can sharia courts do in Britain?", *Telegraph*, 14 September 2008.

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enforcement power. By the same token, even the Muslim Arbitration Councils under the Arbitration Act have not given rise to "plural legal systems": "The legal system is still one and the same," argues Lorenzo Zucca [2012: ch.6] regarding the English case. This is because an act of the legal system, such as an arbitration law, is needed to invest (or not) authority in "a variety of adjudications." However, the case of sharia councils also proves wrong former Prime Minister David Cameron's notion that "state multiculturalism" is dead.[48] Underneath the official rhetoric, the state's "liberal multiculturalist policies" seem to persist [Sardar Ali 2013: 214], if less by way of "policy" than through the quiet workings of a legal pluralism that can also be found in other states in milder forms.

Liberal law as constraint

The one difference between gays and Muslims as claims-makers in the liberal state is that no conceivable gay claim conflicts with the tenets of liberalism, while certain Muslim claims do—thus raising the possibility of unambiguously denouncing liberal gay emancipation as "homonationalism" (Puar 2007). Whether the conflict with liberalism is a specificity of Islam or inherent in all religions need not concern us here. The prominent Islam reformist Abdullahi An-Na'im identified three principles of Islamic law that conflict with contemporary human rights norms: an unequal treatment of women and of non-Muslims, and—ironically—the denial of religious freedom [1990: 111]. Two particularly stubborn and unresolved issues have been the unequal treatment of women, which for many is symbolized by the Islamic headscarf, and the claim to suppress free speech for the protection of religion, which has been persistently raised from the burning of Rushdie's *Satanic Verses* in 1989 to the *Charlie Hebdo* killings in 2015. In both respects, extreme Islamic (or rather: Islamist) claims are testing the limits of multiculturalism by throwing into question its liberal infrastructure of freedom and equality [that has been most forcefully articulated by Kymlicka 1995: chpts. 5 and 6].

If the freedom of religion is the liberal vessel to raise illiberal claims, it is not absolute but limited by other constitutional principles, at both the individual and collective level. To the degree that the integration of Muslims and Islam has become a major political

[48] David Cameron, Speech to the Munich Security Conference, 5 February 2011 (downloadable from www.number10.gov.uk).

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concern in the post-2001 period, courts have proved to be less willing to place the freedom of religion above all other concerns. One must distinguish here between equality and exemption claims, of which the second are more vulnerable than the first [see Koenig 2010; Carol and Koopmans 2013]. Equality claims, which amount to treating Islam on a par with the Christian majority religion, are impossible to deny, irrespective of political conjuncture. The story is different with respect to exemption claims, where derogations from general norms are demanded. To the degree that these exemption claims violate an important liberal norm, such as gender equality or integration in a pluralistic society, courts have lately been less likely to grant them. It is important to see that this reticence on the part of the courts falls, in principle, within the logic of Kymlickaian liberal multiculturalism (1995), as with respect to immigrants it is guided by the imperative of integration—which is not to say, of course, that Kymlicka would condone the concrete restrictions that came to be inflicted on Muslims for the sake of their better "integration."

A good example of liberal law moving from resource to constraint is the increasing rejection of exemption requests from co-educational sports and swimming instruction in public schools.[49] The two principles that conflict with one another here are freedom of religion, in combination with parents' educational rights, on the one side; and the state's educational mandate to produce autonomous and responsible citizens, on the other. A classic decision by the German Federal Administrative Court in the mid-1990s squarely placed the freedom of religion above the state's education mandate, condoning the parents' wishes not to see their daughter "emancipated as Westerners understand that term" (Albers 1994: 987). This German high court decision became the legal inroad for increasingly extreme exemption claims by Muslims, raised also for girls in the pre-puberty phase or on behalf of boys.

In its "Burkini" decision of September 2013, the Federal Administrative Court reversed course. This was the case of a 12-year old Moroccan-origin girl in 5th grade, who had refused to swim in a "burkini", an all-body swim suit offered by the school—and widely accepted by Muslim parents—as an alternative. "This is a plastic sack that makes you ugly", said the girl.[50] The court argued that the right

[49] This has now been ratified by the European Court of Human Rights, in its *Osmanoğlu et Kocabaş c. Suisse* decision of 10 January 2017 (Requête no. 29086/12).

[50] "Muslimas müssen mit Jungen schwimmen", *Die Welt*, 28 September 2012.

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of religious freedom and the state's educational mandate (in Article 7 of the Basic Law) were "of equal rank" (*gleichrangig*) under the Basic Law, and both had to be balanced according to the principle of "practical concordance."[51] The novelty was that the balancing went to the detriment of religious liberty. The function of the school was to "contribute, under the conditions of a pluralistic and individualistic society, to the formation of responsible 'citizens.'"

If one juxtaposes the same court's stance in the mid-1990s with the one it took now, one registers its shift from a liberalism of "toleration" to a liberalism of "autonomy," as Galston [1995] would call it, which reflects a larger transformation of liberalism in the confrontation with immigrant Islam. The court now considered the school fulfilling a "necessary integration function for society (*Gemeinwesen*)".[52] Notably, the court refused to categorize "swimming" as less important than other school subjects for furthering integration. Only in "exceptional cases", in which a "religious norm exhibits in the view of the believer an imperative character,"[53] was an exemption to be granted. This proviso allowed the court to formally leave its own mid-1990s pro-exemption decision intact. But this proviso did not apply here, because the burkini offered by the school, and accepted by most other Muslim parents, constituted an "acceptable alternative" that would have allowed the required "balancing" of the conflicting constitutional principles.[54] Furthermore, on the supply side, there was no right of females to be protected from the sight of boys or men in "tight swim suits." It is particularly noteworthy that the function of the school was not just to educate but to integrate: "In the confrontation of pupils with the diversity of behavioral styles in society, to which belong different styles of dress, the integrative power of the public school is especially vindicated and realized."[55]

Interestingly, this argument was similar to the German Constitutional Court's diametrically opposed defense of the teacher's headscarf in 2015: both decisions take the school to be the mirror of a pluralistic society. This requires secular pupils to stomach the view of a teacher in headscarf, but also pious pupils to cope with the vista of boys in swimsuits. The joint diction of both judgments is to embrace diversity and pluralism—only that religious freedom does not always turn out to be the winner. But one must consider that the burkini is a commonly accepted compromise among Muslims. It is difficult to see in its legal

[51] *BVerwG* 6 C 25.12, decision of 11 September 2013 (Burkini); at para. 12.
[52] *BVerwG*, Burkini decision, para. 13.
[53] *BVerwG*, Burkini decision, para. 22.
[54] *BVerwG*, Burkini decision, para. 25.
[55] *BVerwG,* Burkini decision, para. 30.

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affirmation and subsequent refusal of a total exemption claim an undue restriction of religious freedom.

Conclusion

The nutshell of the preceding analysis is that a liberal society must be multicultural because the majority has constitutionally limited powers to impose its particular way of life on minorities. Not an explicit multiculturalism policy, but liberal constitutionalism is the true engine of multiculturalism. Legal multiculturalism thus understood is an individual- rather than group-centered multiculturalism, as advocated at the philosophical level by Amartya Sen [2006] or Anthony Appiah [2005]. The stories of gay and Muslim empowerment through liberal law fundamentally converge on being stories of legally procured multiculturalism. Kissing gays and veiled Muslims, and too many other multicultural things to tell, are and will remain common sights in a liberal society, even increasingly so. This is because the law has no powers to prohibit these practices; on the contrary, it must protect them, to a degree.

However, the comparison revealed important differences between the gay and Muslim cases. First, for gays, cultural change preceded legal change, to the point that even gay marriage, still unthinkable only 15 years ago, raises few peoples' hackles today.[56] The causality has been the reverse with respect to Muslims, whose legal empowerment contrasts sharply with persistent public hostility. Kai Hafez even described Germany, which figured prominently in my account of legal multiculturalism for Muslims, as the "reigning European champion" in "Islamophobia" [2014: ch.2.1]. This makes the institutional, as against the societal or cultural, advancement of Islam in the West all the more remarkable. But it is vulnerable to a dialectic of backlash and reactive extremism, which must temper one's optimism.

Secondly, gays have never claimed "special" but only "equal rights," which has been an additional factor in their smooth sailing. This makes the case of gays a dubious instance of "multiculturalism", if one understands the latter narrowly as "different rights for different people" (Modood 2007). Still, a different way of life, previously

[56] An interesting sociological explanation is Rosenfeld [2007], who argues that post-1960s youngsters pass through a novel "independent life stage," roughly equivalent to their years in college, which makes them tolerant and open to unconventional intimacy and family forms.

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suppressed and criminalized, is now fully accepted, even endowed with "dignity" by America's highest court—if anything, this is an instance of the multicultural "politics of recognition" [Taylor 1994]. By contrast, Muslims have claimed, in addition to equal rights that cannot be denied to them, a special treatment, in terms of exemptions from general laws that conflict with their religious norms. However, the notion of "special rights," which is often used in this context, is a misnomer because religious exemptions, to reiterate Habermas' important observation [2005: 15], are "a trivial case" of a higher-level individual right taking precedence over statutory law or administrative rules. Nevertheless, Muslims are more plausible protagonists of a difference-minded multiculturalism than gays, who want little more than what the mainstream already enjoys. But exemptions, aka "special rights," may conflict with the imperative of integration. Hence, the retreat of multiculturalism, nonsensical with respect to gays, is fought over Muslim integration only [see Bowen 2011].

Thirdly, and most importantly, the thinning of public morality, which historically has been Christian in Western lands, has constituted the unambiguous backdrop to the empowerment of gays by liberal law. Under the name of secularism, the same process did help the cause of Muslims. This is because the secular state has to treat Islam equally to the Christian majority religion, both as individually and as collectively practiced. However, Muslims also face a simultaneous thickening of public morality, under the guise of an ethicized "autonomy" liberalism [Galston 1995] that now figures as a particular way of life itself. Civic integration policies for immigrants, which predominate in Europe, are not free of this—Liav Orgad pointedly called them instances of "illiberal liberalism" [2015]. But the prescription of liberal identity is above all the cause of a new brand of anti-immigrant and anti-Islamic populist parties that play the liberal card as a cover for exclusion [see Halikiopoulou *et al*. 2013; and Brubaker 2017]. Stephen Macedo [2000], a defender of ethical autonomy liberalism, is right in saying that liberalism must mean more than procedures to ground a liberal democracy: "No liberal democracy can survive without citizens prepared to tolerate others, to act more or less responsibly, to take some part in public affairs, to stay informed, and to act for the good of the whole at least sometimes" [10]. To navigate the two extremes of liberalism as too thick or too thin, too ethicized or too procedural, crushing or being crushed by the intolerant: this is the big challenge that Europe faces today.

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The legal multiculturalism exposed in this paper is strongly individual-centered, and further protecting more her liberty than her equality interests. This is why many will doubt that one may call it "multiculturalism" at all. But it is the multiculturalism that remains after decades of attacks on it (the most intellectually ferocious still being Barry 2001). Legal multiculturalism resembles what Kenji Yoshino has called "new equal protection" [2011]. As we saw, gay rights in America, in the Supreme Court's *Lawrence v. Texas* decision (2003), were won on the basis of a constitutional individual liberty right, though with an element of "groupist" equal protection rhetoric. According to Yoshino, this was a cautiously forward-looking measure by an overall conservative Supreme Court plagued by "pluralism anxiety," in a context of ever proliferating "new" or "newly visible" groups [2011: 747]. Previously, the court had denied constitutional protection to new groups, such as the mentally disabled, the young, or the indigent; and it had curtailed rights for already covered groups, as in the narrowing-down of the possibility to claim indirect or "disparate impact" discrimination on the basis of race or sex. The way out, or rather forward, to nevertheless not deny constitutional protection to minorities whose names are not dared to be spoken was the "legal double helix" (Tribe 2004) of hybrid liberty/equality claims. This explains the frequent invocation of "dignity" in *Lawrence*, as much as in its *Obergefell* sequel in 2015. "Dignity," argues Yoshino, links liberty and equality, enabling a "new, broader sense of 'we'" [Yoshino quoting Robert Putnam, 2011: 754], thus transcending traditional group-based identity politics. (On the steep legal career of "dignity," and its inherent ambiguities, see McCrudden 2008 and Rosen 2012.)

Not incidentally, the legalization of homosexual intimacy in *Lawrence* was followed by a campaign for the "Freedom to Marry," which turned out to be victorious in *Obergefell*. There is no "group" in this claim, only a "freedom" that should be universally recognized. Traditional equal protection claims cannot but stress the distinctions between groups, even if these distinctions are to be overcome. Accordingly, they are caught in a "performative contradiction," asking "to transcend a distinction that the entity urging transcendence is unable itself to achieve" [Yoshino 2011: 794]. By contrast, a liberty claim "is more persuasive because it performs the empathy it seeks", as Yoshino put it elegantly. Just compare the different form of equal protection and liberty claims. The demand for gay marriage in a (traditionally multiculturalist) equal protection frame appears as the claim to extend to "gays" a right that "straights" already enjoy, in

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order to fend off "discrimination." This surely is not a claim for "special rights." But it has the sound of it, because distinctions between groups are highlighted. Contrarily, the same demand in a liberty (technically: substantive due process) frame appears as the claim that all adults should have the right to marry the person they love or wish to commit their lives to. This stresses the communalities instead of the differences between groups and people. To the degree that religious freedoms are the same for Christians and Muslims under liberal state constitutions, a similar stance has also helped in the empowerment of European Muslims as depicted in this paper.

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Résumé

On a beaucoup parlé du recul ou même de la mort du multiculturalisme. Une grande partie de cette discussion confond le phénomène du multiculturalisme avec la politique qui porte le même nom. Je soutiens dans cet article que le droit libéral lui-même, en particulier le droit constitutionnel contraignant majoritaire, implique le multiculturalisme, entendu comme une multiplicité de modes de vie qui ne peut et ne doit pas être refréner par un Etat conservant une neutralité vis-à-vis des valeurs et des engagements profonds des individus. Le fonctionnement du multiculturalisme légal est étudié à travers une comparaison de la jurisprudence sur les homosexuels en Amérique et les musulmans en Europe. Une différence intéressante est que, pour les musulmans, le droit libéral a fonctionné tout autant comme une contrainte que comme une ressource, en particulier dans la période post-2001 marquée par des préoccupations croissantes concernant l'intégration.

Mots-clés : Multiculturalisme ; Libéralisme ; Constitutionnalisme ; Droits des homosexuels ; Droits religieux ; Musulmans ; États-Unis ; Europe occidentale.

Zusammenfassung

Es wird viel über den Rückzug oder das Ende des Multikulturalismus geredet. Dabei wird Multikulturalismus mit expliziter Politik unter diesem Namen verwechselt. Dieses Papier zeigt, dass bereits das liberale Recht, besonders ein Mehrheitspräferenzen einschränkendes Verfassungsrecht, Multikulturalismus generiert, wenn man diesen versteht als unterschiedliche Lebensweisen, die durch den neutralen Staat zu schützen sind. Der durch liberales Recht bedingte Multikulturalismus wird erläutert an der Legalisierung der Homosexualität in den USA und der Integration des Islam in Europa. Ein interessanter Unterschied ist, dass im Fall der Islam-Integration das liberale Recht auch als Beschränkung, nicht nur als Ressource fungiert.

Schlüsselwörter : Multikulturalismus; Liberalismus; Konstitutionalismus; Homosexuelle Rechte; Religiöse Rechte; Muslime; Vereinigte Staaten; Westeuropa.

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