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# Who Is the "Human" in Human Rights? The Claims of Culture and Religion

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## Who Is the “Human” in Human Rights? The Claims of Culture and Religion

PETER G. DANCHIN\*

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*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

—Article 1 of the Universal Declaration of Human Rights (1948)

Let me begin with a familiar line of critique in human rights discourse which proceeds broadly as follows. Human rights, at least in the specific form they have assumed in modern international law, have tainted Western liberal origins; the West embodies a particular legal tradition premised on a stridently individualistic account of moral personality; and the “universal” rights asserted by powerful states such as the United States are thus merely another form of Western imperialism—universalizing the tenets of a distinct tradition or “being illiberal about being liberal, forcing people to be free.”<sup>1</sup>

Such arguments challenging the claims to universality of international human rights law raise difficult questions. They are questions, however, that urgently demand our intellectual and

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1. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 266 (3d ed. 2007). See also Bhikhu Parekh, *The Cultural Particularity of Liberal Democracy*, 40 POL. STUD. (SPECIAL ISSUE) 160 (1992).

practical engagement rather than arrogant dismissal. David Kennedy, for example, points to the fact that the idea of human rights has a particular time and place of origin—“[p]ost-enlightenment, rationalist, secular, Western, modern, capitalist”—and has therefore argued that, to the extent the international human rights project is linked to liberal Western ideas about the relationship among law, politics, and economics, it is itself “part of the problem.”<sup>2</sup>

For Kennedy, the main difficulty is the way that human rights positions itself, in accordance with its rationalistic underpinnings, as an “emancipatory political project” that operates *outside politics*. The implicit logic is that:

emancipation *means* progress forward from the natural passions of politics into the civilized reason of law. The urgent need to develop a more vigorous human politics is sidelined . . . [and w]ork to develop law comes to be seen as an emancipatory end in itself, leaving the human rights movement too ready to articulate problems in political terms and solutions in legal terms. Precisely the reverse would be more useful.<sup>3</sup>

Similarly, for Martti Koskenniemi the paradox of international human rights law is that it “aims to create space for a non-political normativity in the form of human rights that would be opposable to the politics of states but is undermined by the experience that what rights mean . . . and how they are applied, can only be determined by the politics of states.”<sup>4</sup> This is the basis for Koskenniemi’s thesis of the interminable dialectic between the universal and the particular in international legal argument.

I have titled my reflective essay “Who is the ‘Human’ in Human Rights?” By doing so, I wish to suggest that modern critiques, like those of Kennedy and Koskenniemi, force us to confront at least two conceptual puzzles in the field of human rights which go to the heart of issues so pressing and controversial today: the claims of culture and religion.

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2. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 114–15 (2002).

3. *Id.* at 115.

4. Martti Koskenniemi, *Human Rights, Politics, and Love*, 13 FINNISH Y.B. INT’L L. 79, 79 (2002).

## SECULAR FREEDOM AND THE CLAIMS OF RELIGION

The first puzzle concerns the two concepts, often run together, of the secular (or secularism)<sup>5</sup> and freedom, and the related question of how rights—e.g. the right to freedom of thought, conscience, and religion—mediate between these purportedly universal or objective positions and the imagined subjective claims of particular religious or cultural norms.

Let me provide two contemporary examples.

The wearing of the Islamic headscarf in public schools, and the rights of Muslim minorities in European nation-states more generally,<sup>6</sup> have been subjects of acute and often angry debate in recent years. In particular France, with its own unique conceptions of *laïcité* and individual rights, has sought to restrict the wearing of religious symbols in parts of the public sphere on various grounds including those of public order, the rights and freedoms of others, and gender equality or the protection of women, especially girls, against discrimination.

The other striking example of contestation and conflict within rights discourse has occurred in the context of the so-called Muhammad cartoons affair. In September 2005, the Danish newspaper *Jyllands-Posten* published twelve editorial cartoons depicting the Islamic prophet Muhammad, leading to widespread and violent protests both in Denmark and across the Islamic world.

In the United States, the weight of legal opinion has favored free speech as against any countervailing right to freedom of religion, and has favored the individual right to expression as against any countervailing group or minority rights to be free from discrimination, hostility or violence. In Europe, however, there has generally

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5. The notion of “the secular” as an epistemic category and “secularism” as a political doctrine is discussed in TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* 1 (2003). Scholars such as T. N. Madan similarly distinguish between “secularization” as a socio-cultural process that enlarges the “areas of life—material, institutional and intellectual—in which the role of the sacred is progressively limited,” “secularity” as the “resultant state of social being,” and “secularism” as an ideology that argues the “historical inevitability and progressive nature of secularization everywhere.” T. N. MADAN, *MODERN MYTHS, LOCKED MINDS: SECULARISM AND FUNDAMENTALISM IN INDIA* 5–6 (1997).

6. See, e.g., Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women’s Equality Under International Law*, 45 COLUM. J. TRANSNAT’L L. 367 (2007); Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT’L L. 1 (2008).

been a greater sensitivity shown to these countervailing factors. European states have made a genuine (albeit inconclusive) attempt to reconcile the competing claims of right at issue in terms of both the historical context of European inter-group relations and the relevant international human rights instruments.

By contrast, in the vast majority of Islamic states there has been a consensus that the cartoons are part of a wider pattern of discrimination and hostility towards Muslims in Europe in particular and are defamatory of Islam in general. On the basis that defamation of religions is inconsistent with the right to freedom of expression, the Organization of the Islamic Conference has called for “legally-binding” U.N. resolutions to “prevent defamation of religion and prophets” and to “render all acts whatsoever defaming Islam as ‘offensive acts’ and subject to punishment.”<sup>7</sup>

I should make clear that the eclectic, value-pluralist nature of the European position is the approach I favor. By considering both the individual *and* collective interests protected by the right to freedom of religion, we begin to see both the unarticulated major premises and particulars masquerading as universals in much Western rights discourse.

But irrespective of how such a case is resolved in particular domestic legal systems, how should it be addressed as a matter of international human rights law? Does the communicative act at issue here—or perhaps the failure of a state to prevent or punish such an act—violate human rights norms regarding freedom of religion and belief, or is it rather an act protected by rights such as freedom of expression and opinion? Similarly, in the case of the wearing of the Islamic headscarf, on what possible grounds may states limit the freedom to manifest one’s religion or belief? What, in particular, would we need to know in order to make such determinations, and why has there been such a wide divergence of views on these issues across the world?

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7. Islamic Conference of Foreign Ministers, 33d Sess., *On Eliminating Hatred and Prejudice Against Islam*, Res. No. 26/33-DW (June 19–21, 2006). Note that fifty-seven member states of the Organization of the Islamic Conference have had longstanding concerns regarding “defamation of religions.” The U.N. Commission on Human Rights has passed resolutions annually since 1999 on combating defamation of religions. See U.N. Comm’n on Hum. Rts., *Combating Defamation of Religions*, pmbL., U.N. Doc. E/CN.4/RES/2005/3 (Apr. 12, 2005).

In the language of Article 1 of the Universal Declaration, how should human beings “born free and equal in dignity and rights. . . . endowed with the faculties of reason and conscience” and seeking to “act towards one another in a spirit of brotherhood” resolve such seemingly intractable and historically and culturally situated conflicts? How do we understand the relationship in Article 1 between the human as subject and the concepts of reason, conscience, and freedom? Are “conscience” and “reason” perhaps the two ascending and descending argumentative positions<sup>8</sup> captured in our singular notion of “right”—a notion which itself straddles between the Human and a transcendent or metaphysical notion of (universal) Liberty? If so, how does this argumentative structure differ in fundamental terms from pre-classical international legal thought which was premised on similar notions of God or Nature?

If the drafters of the Declaration—whether René Cassin, John Humphrey or the Harvard-educated Peng-chun Chang<sup>9</sup>—had an Enlightenment view of human rights as “somehow located in human beings simply by virtue of their own humanity, and for no other extraneous reason, such as social conventions [whether religion, tradition, or custom], acts of governments, or decisions of parliaments or courts,”<sup>10</sup> what does this tell us today, sixty years later?

Here I am alluding to Koskenniemi’s point that, unlike lawyers such as Hersch Lauterpacht who wrote his 1950 monograph

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8. For the notion of “ascending” and “descending” strands of argument, see MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 45 (1989).

9. JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 281 (1999). Note that there was great disagreement during the drafting of Article 1 between the delegates of different States over what Morsink terms the question of “a single, transcendent source of value” leading to “A Bargain about God and Nature,” *id.* at 283, which, according to Cassin, “allowed the Committee to take no position on the nature of man and of society and to avoid metaphysical controversies, notably the conflicting doctrines of spiritualists, rationalists, and materialists regarding the origin of the rights of man,” *id.* at 287 (quoting René Cassin, *Historique de la Déclaration Universelle de 1948*, in *LA PENSÉE ET L’ACTION* 108 (1981)). Lindholm has also observed that Article 1 in no way explains the source of these universal characteristics of human beings. By omitting any reference to a Supreme Being or Nature as a source of inherent rights, and thus leaving open enough the space to allow for a multitude of interpretations, the drafters were able to create a document which could be accepted by the broad majority of peoples. This, in turn, supports the view that Article 1 is not a mere reiteration of Western Natural Rights Philosophy. Tore Lindholm, *Article 1*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 31 (Asbjørn Eide et al. eds., 1992).

10. MORSINK, *supra* note 9, at 281.

*International Law and Human Rights* in an effort to “recapture the Western canon of individual rights as derived not only from Enlightenment thinkers but also from sixteenth-century religious humanism and even Stoic dogma,”

we no longer take seriously the tradition within which human rights grew up but ‘have fragmented an older tradition by appropriating parts of it while leaving behind crucial premises that gave these parts their underlying coherence.’ As a result, rights have become at best a sentimental memory of political faith that we no longer have—a love that we have lost—but cannot fit within the rituals of modern politics. At worst, they have become a façade for cynicism, and an instrument of hegemony.<sup>11</sup>

Without a universal foundation in “human nature” or “autonomous human reason,” the quest for an ultimate foundation for human rights is itself misconceived. On this, many today agree.<sup>12</sup> If rights cannot in fact be *outside* politics or ideology—if we now see them not as a *condition* or *limit* on politics in an objectively-ascertainable moral order but in fact as an *effect* or *outcome* of politics—what implications follow for our understanding of the legal content and institutional politics of human rights?

For Koskenniemi, the answer is to realize that rights *defer to* politics in their practice and application in at least four ways: “field

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11. Koskenniemi, *supra* note 4, at 80–81 (footnotes omitted). Koskenniemi suggests that the tradition Lauterpacht was seeking to invoke and revive in the aftermath of World War II and the Holocaust

received the meaning of human rights sometimes from scripture, sometimes from a concept of uniform human nature, from a progressive philosophy of history or an autonomous concept of reason. But today, naturalism, rationalism and religion have each become vulnerable to the hermeneutics of suspicion embedded in the same Enlightenment that gave us the notion of rights in the first place. The moral grounding of rights that was central to Vitoria, Grotius or Locke is not available in a world where morality has turned into subjective, historically conditioned ‘value-systems’ and where anthropologies of humanity have produced both liberal and racist conclusions.

*Id.* at 81.

12. See, e.g., Joseph Raz, *Human Rights Without Foundations* (Univ. of Oxford Faculty of Law, Working Paper No. 14/2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=999874](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999874) (advancing an antifoundational or “political conception” of human rights); JOHN GRAY, ENLIGHTENMENT’S WAKE: POLITICS AND CULTURE AT THE CLOSE OF THE MODERN AGE 72 (1995) (arguing that rights claims are never foundational because “human rights have neither substantive content nor moral weight until their impact on human interests, their contribution to human well-being, has been specified”).

constitution” (the process by which different areas of social life come to be characterized in terms of rights); “indeterminacy” (rights have no meaning independent of how they are interpreted by a relevant authority in a relevant context); “right-exception” (rights always come with exceptions and the scope of the exceptions are determined by choices which ultimately rely on alternative conceptions of good society); and “conflicts of rights” (in any conflict, the opposing sides will describe their claims in terms of rights).<sup>13</sup>

None of this would have much surprised Max Horkheimer or Theodor Adorno writing their *Dialectic of Enlightenment* in 1947 at the exact moment the Declaration was being drafted and international lawyers such as Lauterpacht were decrying the sovereignty of the nation-state in the name of the “sovereignty of man.” For Horkheimer and Adorno, the scientific method of the Enlightenment

may have originally intended to serve the ideals of human liberation in an assault upon religious dogma. Yet the power of scientific reason ultimately wound up being directed not merely against the gods, but all metaphysical ideas—including conscience and freedom—as well. ‘Knowledge’ became divorced from ‘information,’ norms from facts, and the scientific method, increasingly freed from any commitment to liberation, transformed nature into an object of domination, and itself into a whole employed by the highest bidder.<sup>14</sup>

In similarly controversial terms, Alasdair MacIntyre argues that the Enlightenment project has failed in its objective to find a free-standing rational justification of liberal political morality.

On the one hand the individual moral agent, freed from hierarchy and teleology, conceives of himself and is conceived of by moral philosophers as sovereign in his moral authority. On the other hand the inherited, if partially transformed rules of morality have to be found some new status, deprived as they have been of their older teleological character and their even more ancient categorical character as expressions of an

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13. Koskenniemi, *supra* note 4, at 82–85.

14. Stephen Eric Bronner, *Interpreting the Enlightenment: Metaphysics, Critique, and Politics*, 3 LOGOS (2004), [http://www.logosjournal.com/issue\\_3.3/bronner.htm](http://www.logosjournal.com/issue_3.3/bronner.htm). Note also Gray’s argument that the core of the Enlightenment was the “displacement of local, customary or traditional moralities, and of all forms of transcendental faith, by a critical or rational morality, which was projected as the basis of a universal civilization.” GRAY, *supra* note 12, at 123.



ultimately divine law.<sup>15</sup>

But did the drafters really hold to an essentialist view of the foundations of human rights? Or rather, as Morsink has suggested, did they hold to non-essentialist, non-rationalist views of both the secular and freedom such that “any criticism of the Enlightenment project, as then conceived, does not automatically doom the Universal Declaration”?<sup>16</sup>

Here it is helpful to recall Charles Taylor’s distinction between the “common ground” and “independent political ethic” strategies of seeking to justify a universal norm of religious freedom, and, in turn, the methodological implications of seeking to reconcile these two modes of justification.

Each strategy offers different ways of conceptualizing the bases upon which people of different religious and fundamental commitments seek to live together in a political community. On the one hand, the common ground approach seeks convergence on certain norms by appealing to different comprehensive (religious or other) commitments. On the other hand, the independent political ethic approach “asks us to abstract from these deeper or higher beliefs altogether for purposes of political morality” in search of a common basis for peaceful and equitable coexistence.

The important point to note is that neither strategy on its own can be successful because neither rests upon a firm foundation. As Taylor notes, the main problem with the common ground approach is that in diverse societies with expanding religious and fundamental commitments, “the ground originally defined as common becomes that of one party among others.”<sup>17</sup> Given that competing conceptions

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15. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 60 (3d ed. 2007). For Gray, this collapse gives “contemporary moral discourse its distinctive character of emotivism or subjectivism, in which moral judgments are in the end assimilated to preferences, and of deep incoherence.” GRAY, *supra* note 12, at 148. It is merely the “long shadow cast in the slow eclipse of Christian transcendental faith” with the result that we today live “among the fragments of archaic moral vocabularies, whose undergirding structure of metaphysical and religious beliefs has long since collapsed.” *Id.*

16. MORSINK, *supra* note 9, at 283. Morsink suggests that they saw the two human capacities of reason and conscience as “epistemic” vehicles by which we can come to know that people have human rights. *Id.*

17. Charles Taylor, *Modes of Secularism*, in *SECULARISM AND ITS CRITICS* 35–36 (Rajeev Bhargava ed., 1998) (noting that while the Founders of the U.S. Constitution agreed on “some kind of Christian outlook” that could be “pushed laterally into a vaguer biblical theism to accommodate Jews,” the U.S. “now contains substantial numbers of non-believers, as well as Muslims, Hindus, Buddhists, and adherents of many other views”).

of the good themselves generate the Rawlsian overlapping consensus, that consensus is dynamic, intersubjective, and constantly shifting, and can thus have no single, stable foundation.

Likewise, the “very diversification that has undercut the common ground approach also challenges the independent ethic,” a process that becomes especially difficult as between believers of all faiths on the one hand and atheists on the other—who seek to “police the boundary between independent and religious ethic more closely, and to . . . push further the process of making religion irrelevant in the public sphere.”<sup>18</sup>

Not only is the meaning of the right to religious freedom itself essentially contested between the religious and secular spheres, but also its relationship to other conceptions of rights (such as minority and self-determination norms) is equally contested. For these and related reasons, the problem of rights foundationalism is irresolvable when both strategies are considered separately.

Taylor suggests that these shortcomings become even more problematic when religious freedom is asserted as a right under international law. Viewed from a non-Western perspective, both approaches appear inextricably linked to their Christian origins: the common ground to a form of post-Enlightenment Deism and the independent ethic to the rise of Western unbelief and secularism. To the extent, then, that international human rights law is perceived as being grounded in either (or both) of these approaches, the dual charges of foreign and imperial imposition are likely to arise. Indeed, perhaps somewhat ironically, this problem is likely to be more acute in the case of the independent ethic which, once unmoored from Western secularism and imported into comprehensively religious societies, “understandably comes across as the imposition of one metaphysical view over others, and an alien one at that.”<sup>19</sup>

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18. *Id.* at 36. Taylor sees this as leading to a “*Kulturkampf*, in which ‘secularists’ slug it out with believers on issues about the fundamentals of their society.” *Id.* To believers this may soon be perceived as the exclusion of religion in the name of a “rival metaphysical belief.” *Id.* The problem becomes further compounded when “the society diversifies to contain substantial numbers of adherents of non-Judeo-Christian religions. If even some Christians find the ‘post-Christian’ independent ethic partisan, how much harder will Muslims find it to swallow it.” *Id.* at 36–37.

19. *Id.* at 37. Taylor suggests that in this form, “Western secularism may not ‘travel’ very well outside its heartland; or only in the form of an authoritarian programme designed to diminish the hold of religion on the masses, as in Turkey under Atatürk, or China under Mao.” *Id.*

Conversely, the common ground approach is only vulnerable to one of these charges—that of its historically Christian lineage. For Taylor, there is no reason, at the level of theory, why the logic of this approach could not be applied and readapted in other non-Christian, non-Western contexts. Of course, such a project would still face major difficulties on account of the diversification of religious and metaphysical beliefs in increasingly pluralistic societies. But it is this possibility, all the same, that has led contemporary rights theorists to seek to define a third approach, one that avoids both the historical and conceptual shortcomings of the former two strategies.

This third and more recent strategy seeks to apply the insights of philosophical hermeneutics to Rawl's idea of overlapping consensus. In asking what it would mean to come to a "genuine, unforced international consensus on human rights," Taylor has suggested this would require that

different groups, countries, religious communities, and civilizations, although holding incompatible fundamental views on theology, metaphysics, human nature, and so on, would come to an agreement on certain norms that ought to govern human behavior. Each would have its own way of justifying this from out of its profound background conception. We would agree on the norms while disagreeing on why they were the right norms, and we would be content to live in this consensus, undisturbed by the differences of profound underlying belief.<sup>20</sup>

The strength of this approach is that it avoids the need for agreement on a commonly held "foundation." As we have seen, the common ground approach founders in its search for shared religious bases for norms regulating the public sphere in a world of diverse states and societies. Once beyond the relatively homogenous discourse of Judeo-Christian constitutionalism, even some form of post-Enlightenment Deism is unlikely to be accepted in societies based on Hinduism, Islam, Buddhism, or Confucianism (or indeed certain nonreligious comprehensive ideologies such as Communism).

It is for this reason that the independent political ethic appears to offer the only viable alternative. The problem is that universal acceptance of *any* independent ethic—conceived in purely secular,

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20. Charles Taylor, *Conditions of an Unforced Consensus on Human Rights*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 124, 124 (Joanne R. Bauer & Daniel A. Bell eds., 1999).

“political” terms—must also involve the acceptance by diverse societies of its conceptual foundations. But as we have seen, from any comprehensive perspective such deontological assertions of objectivity and universality are likely to be contested as deriving from competing, “secular” metaphysical philosophies.

The hermeneutic approach is able to overcome these various difficulties by accepting from the outset the impossibility of any universally agreed foundation—whether as a product of religiously-inspired convergence or deontological deduction—for those principles or norms sought to govern the political sphere. It accepts that those who adhere to such a norm “will have some broader and deeper understanding of the good in which it is embedded” and it thus aims to “respect the diversity of such understandings, while building consensus on the ethic.”<sup>21</sup>

Such a paradigm shift, if genuinely and inclusively pursued, has significant implications not only for the scope and content of human rights norms but also for their philosophical background justifications and the legal forms in which they are expressed and given force. As Taylor states:

To be accepted in any given society, these would in each case have to repose on some widely acknowledged philosophical justification, and to be enforced, they would have to find expression in legal mechanisms. One way of putting our central question might be this: What variations can we imagine in philosophical justifications or in legal forms that would still be compatible with a meaningful universal consensus on what really matters to us, the enforceable norms?<sup>22</sup>

On this basis, Taylor posits a threefold distinction between norms, legal forms, and background justifications, and argues that such norms have to be “distinguished and analytically separated not just from the background justifications, but also from the legal forms that give them force.”<sup>23</sup>

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21. Taylor, *supra* note 17, at 38.

22. Taylor, *supra* note 20, at 129.

23. *Id.* at 143.

## EQUALITY AND THE CLAIMS OF CULTURE

Let me turn now to the second puzzle in human rights theory: the question of what we mean by “human equality” and how this idea relates to deeply-situated issues of collective identity and culture.

Consider again laws proscribing the wearing of religious symbols in certain parts of the public sphere. Under traditional liberal rights approaches, the controversy over the wearing of the Islamic headscarf appears inexplicable. As Anna Galeotti states:

The naive liberal view conceives of toleration as the principle according to which everyone should be free to follow his or her ideals and style of life as long as no harm is done to anyone else. Headscarves do no harm to any third party, and the choice to wear one for whatever reason rests in the proper domain of personal freedom. This simplistic approach to the case suggests that toleration is the obvious solution, but, in doing so, it disguises the *raison d'être* of the controversy.<sup>24</sup>

But viewing this issue solely in terms of individual rights (i.e., individuals are free to practice their religion provided the practice does not cause harm to others) obscures the collective religious and cultural implications of symbols such as the Islamic headscarf. Members of different national, cultural, and religious groups have differing national, cultural, and religious identities—that is to say, *collective* identities—which must be carefully factored into interpreting or analyzing rights claims of this kind. Indeed, what gives rise to conflicts between differently-situated subjects are not primarily differences between individuals, but differences—and unequal treatment—between groups.

Before proceeding, it is important to note that the Universal Declaration says very little about so-called “collective rights.” Emerging from the ashes of the Second World War was a general consensus amongst the main powers in the early 1940s to replace the minority protection treaties of the inter-war period with a human rights regime more directly centered on individual rights. The prevailing sentiment in 1943 was captured by Under Secretary of State Sumner Welles, when he stated that:

in the kind of world for which we fight, there must cease to

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24. ANNA ELISABETTA GALEOTTI, TOLERATION AS RECOGNITION 118 (2002).

exist any need for the use of that accursed term “racial or religious minority” . . . [I]s it conceivable that the peoples of the United Nations can consent to the reestablishment of any system where human beings will still be regarded as belonging to such “minorities”?<sup>25</sup>

Accordingly, neither the U.N. Charter nor the Universal Declaration contains any group or minority rights provisions, and both are premised instead on the nondiscrimination principle.<sup>26</sup> Part of the reason for this was the decisive influence of the Western powers in drafting the Declaration, especially the United States. In the Third Session of the Human Rights Commission, for example, Eleanor Roosevelt argued that “provisions relating to rights of minorities had no place in a declaration of human rights,” largely on the basis that “minority questions did not exist on the American continent.”<sup>27</sup> It was only later, when the process began of transforming the Declaration into the legally binding International Covenant on Civil and Political Rights (ICCPR), that certain collective rights were (re)introduced into international human rights law. In particular, Article 1, protecting a people’s right to self-determination, and Article 27, protecting the rights of ethnic, religious, and linguistic minorities, are today accepted international legal norms. The inclusion of self-determination in both covenants,<sup>28</sup> coupled with Article 27 in the ICCPR, thus reflect recognition of the limitations of

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25. Joel E. Oestreich, *Liberal Theory and Minority Group Rights*, 21 HUM. RTS. Q. 108, 113 (1999) (quoting Sumner Welles, Address by the Under Secretary of State (June 5, 1943), in 8 DEPT. ST. BULL. 479, 482) (alteration in original).

26. See U.N. Charter art. 1, para. 3; Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 2(1), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; see also International Covenant on Civil and Political Rights art. 2(1), (26), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

27. U.N. Econ. & Soc. Council [ECOSOC], Hum. Rts. Comm’n, 3d Sess., 73d plen. mtg. at 5, U.N. Doc. E/CN.4/SR.73 (June 24, 1948). In the previous year, Eleanor Roosevelt made the point that while there were different ethnic and linguistic groups in the U.S., their rights were adequately secured on the basis of individual rights and the nondiscrimination principle. See also U.N. ECOSOC, Hum. Rts. Comm’n, *Report of the Working Group on the Declaration on Human Rights*, U.N. Doc. E/CN.4/57 (Dec. 10, 1947). For a striking account of this period in American foreign policy, see CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955* (2003) (pointing to the “exigencies of the Cold War” and the need to camouflage the “the reality of Jim Crow democracy” and the “Colored question” as shaping the U.S. drafting positions).

28. The right to self-determination is articulated in Article 1 common to both the ICCPR, *supra* note 26, and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

the nondiscrimination principle and the need to protect the rights of minority groups and indigenous peoples—not just their physical existence but also their right to a distinct collective identity.<sup>29</sup>

Scholars of international human rights law are beginning to recognize how the divergent claims and interests of majorities and minorities, and the different conceptions of individual and collective goods from which they arise, are inseparably related to individual claims of right. Correspondingly, it is becoming apparent that the “liberal algebra”<sup>30</sup> of rights regimes is unable to resolve such conflicts without considering, at least at some point in the analysis, different conceptions of collective goods in the historical context of particular political communities.

In order to illustrate the importance of the collective aspects of claims to religious freedom, we need to squarely confront a generally under-theorized and contested area of international human rights law known broadly as “group rights.” In particular, we need to consider two types of communal claims—the first of so-called “peoples” or “nations,” and the second of so-called “religious, cultural or linguistic minorities.”

Together these group claims point toward the need for a theory of value pluralism in international law (whether “liberal” or otherwise) and away from classical liberal theories premised exclusively on the

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29. Given these post-1948 developments, Morsink has asked whether an additional provision modeled on Article 27 of the ICCPR should be added to the Declaration today. MORSINK, *supra* note 9. This would, in his view, correct the “greatest defect of this pivotal document,” i.e., the blindness it shares with the U.N. Charter about the connection that exists between the prevention of discrimination and the protection of minorities. *See id.* at 286–287. *See also* PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 141–143 (1991) (suggesting that Article 27 is the “only expression of the right to an identity in modern human rights conventions intended for universal application”).

30. For Waldron, the liberal algebra of rights seeks to secure public order in a way that is fair to the aims and activities of all. The aim is Kantian in inspiration: “Act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law.” Jeremy Waldron, *Toleration and Reasonableness*, in *THE CULTURE OF TOLERATION IN DIVERSE SOCIETIES: REASONABLE TOLERANCE* 13 (Catriona McKinnon & Dario Castiglione eds., 2003). On this basis

the liberal claim “may be described as the task of specifying a set of constraints on conduct (call it set C), satisfying two conditions: (1) no two actions permitted by C conflict with one another; and (2) for each individual who is subject to C, the range of actions permitted by C is adequate for the pursuit of his ends. I shall call these the requirements of compossibility and adequacy. Together they amount to something like algebraic specifications for the formal structure of a liberal society.

*Id.* at 14–15.

idea of individual rights. Indeed, it is only by including in the analysis these two sets of group rights (self-determination and minority rights) and considering their conceptual interrelationship to individual rights that the issue of the wearing of religious symbols or attire becomes comprehensible, and the need to move beyond traditional liberal accounts of human rights becomes apparent. On this basis, the need to accord public recognition of group differences and identities requires us to reconsider two central tenets of the liberal rights tradition: first, the idea that comprehensive conceptions of religious and moral value are “private” matters to be excluded from the public sphere; and second, the idea that religious freedom requires no more than noninterference with the individual’s imagined sphere of liberty, as opposed to public recognition of a plurality of different religious and cultural groups and ways of life.

Taylor refers to the Western concern for equality in the form of nondiscrimination—which he notes is a relatively recent addition to the Western philosophical tradition of rights and judicial review—to illustrate these points. This norm can be traced to the rise of the idea of Natural Right, its supplanting of subjective rights in medieval systems of law, and the decline of the view that human beings are embedded in a meaningful cosmic order against which “various forms of human differentiation could appear natural, unchallengeable—be they social, racial, or sexual.”<sup>31</sup> Taylor thus argues that:

The destruction of this order has allowed for a process of unmasking existing social and gender differences as merely socially constructed, as without basis in the nature of things, as revocable and hence ultimately without justification. The process of working this out has been long, and we are not yet at the end, but it has been hard to resist in Western civilization in the last two centuries.

This aspect of Western rights talk is often very hard to export because it encounters societies in which certain social differences are still considered very meaningful, and they are seen in turn as intrinsically linked to certain practices that in Western societies are now regarded as discriminatory.<sup>32</sup>

What this suggests is not that equality and nondiscrimination norms should be rejected under the banner of cultural relativism, but

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31. Taylor, *supra* note 20, at 139.

32. *Id.*



rather than uniquely Western conceptions of these norms, including the extent to which such conceptions have become entrenched in international law, need constantly to be open to challenge and reformation in such a way as to allow for the contribution of non-Western conceptions of the same ideas.

Questions of gender equality raised in cases such as *Shah Bano*<sup>33</sup> in India or the issue of recognition of Muslim marriages in South Africa,<sup>34</sup> for example, give rise to conflicts between contested ideas of equality and difference. The demand of the Muslim community in India for an autonomy regime and legal recognition of religious and other “personal” laws is a demand against the Indian state for *substantive equality* on the basis of religion or belief. In *Shah Bano*, a conflict arose between a Muslim personal law requiring the return of the marriage settlement upon divorce and the payment of maintenance only for the period of *iddat*, and the Indian Code of Criminal Procedure requiring monthly maintenance in specified situations of need. In this case, we face a genuine conflict *not* between a liberty claim on the one hand and an equality claim on the other, but between two competing conceptions of equality. One conception of equality protects India’s Muslim minority against other majority and minority groups and the other protects the equal rights of women in India regardless of religion. We should be careful not to recognize automatically or privilege only the second substantive equality claim and not the first. And if both claims are to be given their due, how are the conflicts between them to be resolved?<sup>35</sup>

One possibility is for the State to exercise its overriding legislative power, what Robert Cover once called the state’s “jurispathic” mode of coercively suppressing the “fecundity of the jurisgenerative principle” through the domination of autonomous communities under a unitary law.<sup>36</sup> But if so, what principle should the state employ? Most human rights proponents will argue that the state ought to privilege whatever is best for women according to some conception of liberal substantive rights. But what is this conception of equality exactly, and who is to decide both its substantive meaning and its scope of application? Does it entail the version of maintenance upon

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33. Mohammed Ahmed Khan vs. Shah Bano Begum, (1985) 3 S.C.R. 844 (India).

34. See *infra*, note 40 and accompanying text.

35. See Danchin, *supra* note 6, at 58.

36. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 15–16 (1983).

divorce currently seen as meeting the demands of substantive gender equality in, say, France, or Australia, or perhaps Brazil? Or is it rather the latest account advanced by Catherine MacKinnon or Abdullahi An-Na'im? And how exactly is any such account to be squared with the Indian Constitution's commitment in Articles 26 through 28 to guarantee the communal autonomy of India's religious minorities?

We may also ask whether the ultimate goal sought under the twin banners of "secularism" (or "equal individual rights") and "gender equality" is for religious personal law to disappear altogether and to be replaced by a uniform civil code. Recall, for example, Susan Moller Okin's striking statement in her essay *Is Multiculturalism Bad for Women?*:

[It] is by no means clear, from a feminist point of view, that minority group rights are 'part of the solution' and in the case of nonliberal minority groups in liberal states, "female members of the culture . . . might be much better off if the culture into which they were born were either to become extinct (so that its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women—at least to the degree to which this value is upheld in the majority culture."<sup>37</sup>

Is this the possibility of a "final solution" of which Isaiah Berlin once spoke—the prospect that mankind could be made just and happy and creative and harmonious forever, for which "no price [could be] too high" to pay?<sup>38</sup> If so, what exactly is the price to be paid, how is it to be exacted, and what, if any, are the possible alternatives for the future?

Ironically, in order for the state to be right in its codification of the demands of substantive gender equality, it must ignore, or simply override, the nuanced and contested internal arguments within religious communities themselves. My argument is that there are strong normative reasons why the state ought to exercise considerable

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37. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7 (Martha C. Nussbaum et al. eds., 1999).

38. Isaiah Berlin, *The Pursuit of the Ideal*, in *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 15 (Henry Hardy ed., 1991), cited in STEVEN LUKES, *LIBERALS AND CANNIBALS: THE IMPLICATIONS OF DIVERSITY* 90 (2003).

deference to the arguments going on there and that the struggle over the *status quo* ought not to be decided solely by the state according to what prevailing national majorities (recall the intolerant and threatening role of the Hindu Right in the *Shah Bano* controversy) or secular liberal academics, judges or bureaucrats decide.

Of course, how such claims are to be mediated is essentially contested, but requires, at a minimum, an intersubjective and dialogic understanding of rights discourse. A helpful illustration of this dynamic is the current debate in South Africa over the recognition of Muslim personal laws.<sup>39</sup> After extensive consultations with Muslim communities, the South African Law Reform Commission proposed, in July 2003, a draft Muslim Marriages Act which *inter alia* recognizes Muslim marriages (including polygynous marriages) and deals with a myriad of issues from registration, to dissolution, to custody of and access to minor children, and to issues of maintenance (both spousal and child support). In response, the South African Commission for Gender Equality drafted an alternative bill called the Recognition of Religious Marriages Act, which is stated to be a “secular bill of general application” and provides for the recognition of all religious marriages (thus avoiding issues of codification of specific religious doctrines).<sup>40</sup>

This is precisely the type of conflict which value pluralism both anticipates and celebrates. In South Africa, we can thus see a robust constitutional dispensation which provides the normative space for contestation between what Ayelet Shachar has termed a “religious particularist” conception of pluralism, in which different religious

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39. The legal recognition of *shari'a* law is today becoming a contested issue in a number of Western states such as Canada where the Ontario Law Reform Commission is reviewing whether Islamic principles of family and inheritance law could be used to resolve disputes within the Muslim community in Canada. See Report from Marion Boyd to Michael Bryant, Attorney General of Ontario, Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion (Dec. 20, 2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd> (last visited Apr. 4, 2009). In England, the Archbishop of Canterbury has recently observed that Muslim communities seek the freedom to live under *shari'a* law and he has urged an exploration of what “might be entailed in crafting a just and constructive relationship between Islamic law and the statutory law of the United Kingdom.” Rowan Williams, Archbishop of Canterbury, Civil and Religious Law in England: a Religious Perspective, Lecture at the Royal Courts of Justice (Feb. 7, 2008), available at <http://www.archbishopofcanterbury.org/1575> (last visited Mar. 28, 2009).

40. For a recent discussion of the tensions between these two bills, see Rashida Manjoo, *The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights* (Hum. Rts. Program at Harv. L. Sch., Project Report 2005-7, 2007), available at [http://www.law.harvard.edu/programs/hrp/documents/Manjoo\\_RashidaWP.pdf](http://www.law.harvard.edu/programs/hrp/documents/Manjoo_RashidaWP.pdf).

communities have legal power over issues of personal status, and a “secular absolutist” conception, in which the state has authority over family law matters and all citizens are subject to a uniform secular family law. That this contestation will yield varying forms of legal pluralism and accommodation while at the same time seeking to maintain the existence of different majority and minority cultures should not surprise us either descriptively or normatively.

These then are the difficult questions that confront us. They involve normative conflicts which are also far from settled even in the West (as Rawls’s avoidance strategy of consigning questions of discrimination on the basis of religion to the “private sphere” in his *Political Liberalism* amply shows). Thus:

we can readily understand that a certain way of framing the difference, however oppressive it may be in practice, also serves as the reference point for deeply felt human identities. The rejection of the framework can be felt as the utter denial of the basis of identity, and this not just for the favored gender, but also for the oppressed one.<sup>41</sup>

Claims of equality and nondiscrimination—even in liberal societies—raise difficult and complex questions in their relationship to religion and culture. If the plurality of conflicting values is to be mutually respected, rather than uncritically dominated by one value, conflicts between equality norms and collective identities must be interpreted and inter-subjectively discussed in continuity with each society’s historic traditions and reference points. Indeed, it is now well recognized that “fundamentalist” resistance to the redefinition of cultural and religious forms correlates with the extent to which outside portrayals or attempts to influence a tradition are made in condemnatory or contemptuous terms.<sup>42</sup>

On this basis, scholars such as Abdullahi An-Na’im advocate the logic of the hermeneutic approach in relation to the application of human rights norms in non-Western contexts. This requires the development of a “coherent and comprehensive methodology of internal cultural discourse that is capable of challenging prevailing conceptions of indigenous culture in favor of the proposed human

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41. Taylor, *supra* note 20, at 139.

42. As Taylor observes, this is a “self-reinforcing dynamic, in which perceived external condemnation helps to feed extreme reaction, which calls down further condemnation, and hence further reaction, in a vicious spiral.” *Id.* at 140.

rights norm.”<sup>43</sup> This can be illustrated by considering the principle of equality in the context of the Islamic legal tradition where, from the perspective of international human rights law, *shari’a* law is regarded as discriminating against women and non-Muslim minorities. Distinctions in *shari’a* based on certain historical and cultural understandings of the natural or divine order of things run up against the uncompromising demands of human rights standards for the formal equality of all human beings. Tabandeh, for example, has argued that Islam cannot accept certain aspects of Article 2 of the Universal Declaration (prohibiting discrimination on any ground), “for it cannot deny the difference between Muslim and non-Muslim.”<sup>44</sup> Similarly, the Cairo Declaration on Human Rights in Islam provides that “[w]oman is equal to man in human dignity,” while making no reference to equality in *rights*.<sup>45</sup>

Western scholars of Islam and human rights such as Ann Elizabeth Mayer regard such *sharia*-based distinctions as clear violations of international human rights standards.<sup>46</sup> But Mayer fails to consider on what basis rights such as Article 7 of the Universal Declaration, which establishes the principle of formal equality and equal protection of the law,<sup>47</sup> should properly be regarded as universal.

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43. Abdullahi A. An-Na’im, *The Cultural Mediation of Human Rights: The Al-Arqam Case in Malasia*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS*, *supra* note 20, at 147, 156. An-Na’im suggests that “all cultures have a certain degree of ambivalence that allows for contesting prevailing perceptions and seeking to replace them with new or formerly suppressed conceptions through an internal discourse within the terms of reference of the particular culture and in accordance with its own criteria of legitimacy.” *Id.* at 159. *See also* ABDULLAHI AHMED AN-NA’IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* chs. 3, 7 (1990) (arguing for acceptance of the concept and content of a human rights regime through internal cultural legitimation in an Islamic context).

44. SULTAN HUSSEIN TABANDEH OF GUNABAD, *A MUSLIM COMMENTARY ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 20 (F. J. Goulding trans., 1970).

45. 19th Islamic Conference of Foreign Ministers, July 31–Aug. 5, 1990, *Cairo Declaration on Human Rights in Islam*, art. 6, *reprinted in* *RELIGION AND HUMAN RIGHTS BASIC DOCUMENTS* 185, 186 (Tad Stahnke & J. Paul Martin eds., 1998). *See also* UDHR, *supra* note 26, art. 1(a) (providing, in part, that “[a]ll men are equal in terms of *basic human dignity* and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations” (emphasis added)).

46. ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* 83–96 (3d ed. 1999) (examining Islamic law, especially pertaining to discrimination against women and non-Muslim minorities, in terms of international human rights standards).

47. Art. 7 of the UDHR, *supra* note 26, provides in full that: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and

Indeed, Mayer's analysis of Article 7, in terms of the equal protection clause in the Fourteenth Amendment to the U.S. Constitution, is revealing:

Although many features of U.S. equal protection jurisprudence necessarily reflect the peculiarities of U.S. history and the social environment, the basic concept has been emulated in other laws, and the idea of equal protection of the law is endorsed in international law. . . .

One sees in Article 7 of the [Universal Declaration of Human Rights] unequivocal endorsement of the idea that equal, nondiscriminatory treatment under the law is due all persons. According to Article 2 of the UDHR, it is impermissible to discriminate based on sex or religion, race, color, language, political or other opinion, national or social origin, property, or birth or other status. Any legal measures that discriminate among groups of people using these criteria violate the UDHR guarantee of equality and equal protection.

*Thus, both the U.S. constitutional principle and its UDHR counterpart envisage equal protection under a neutral law, a law that does not deny freedoms or rights to members of weaker or disfavored categories of society and that accords all people equal treatment.*<sup>48</sup>

The historical and conceptual linkages between Anglo-American and prevailing international conceptions of the nondiscrimination norm here are laid bare. While Mayer acknowledges the *particular* historical context in which the U.S. equal protection clause arose in the aftermath of the Civil War and efforts to end apartheid against blacks in the South,<sup>49</sup> she uncritically accepts its subsequent elevation to the status of international law.

The result of this elision for human rights discourse has had two interrelated distorting effects. On the one hand, to the extent that religious and cultural forms are embedded in the (public) laws and practices of non-Western states, any attempt to justify these norms

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against any incitement to such discrimination.”

48. MAYER, *supra* note 46, at 88–89 (emphasis added).

49. Mayer cites Jacobus tenBroek, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951). Note that Taylor similarly traces the rise of equal protection and nondiscrimination as central subjects of judicial review in the Anglo-American world to the Fourteenth Amendment. CHARLES TAYLOR, *MULTICULTURALISM AND “THE POLITICS OF RECOGNITION”* 54–56 (Amy Gutmann et al eds., 1992).

against the international legal norms of equality and nondiscrimination has been axiomatically viewed as constituting a disreputable form of cultural relativism justifying patriarchal and pre-modern hierarchies and power relations.

While in many instances this may well be the case, there has been a serious failure to understand that the conception of toleration used for making such judgments presumes a compromise in the form of an historically and culturally particular view of toleration which itself remains in force in virtually all liberal states. This view springs from the classic liberal idea of a public-private divide which not so much resolves questions of inequality and unequal treatment on religious and cultural grounds as avoids or suppresses them.

In failing to see universal demands of equality and nondiscrimination in the public sphere as embodying the unconscious prejudices of a particular tradition, a “single, rigid and dogmatic horizon of individual freedom,”<sup>50</sup> such an approach forecloses the possibility of any fusion of horizons with other conceptions—ones that may well contain admirable and valuable insights and other forms of accommodation.

We see this dynamic most obviously in the well-trodden debate over claims of equality and diversity in contemporary political theory. For instance, Brian Barry’s *Culture and Equality* provides a recent example of a liberal theorist clinging rigidly to interpretive method with no apparent conception of the prejudices underlying his “objective” theory of egalitarian liberalism.<sup>51</sup> In reply, James Tully has argued that there are at least three ways in which Barry’s approach forecloses any genuine dialogue on the “irreducible and interrelated problems of equality and culture,” and thus of any possible fusion of horizons.<sup>52</sup>

First, Barry employs “Enlightenment blackmail” by dismissing any opposing arguments as advancing or deriving from anti-Enlightenment essentialist conceptions of culture. In fact, however, the dialogic concept of culture at the heart of philosophical hermeneutics

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50. See Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. L.J. 249, 321 (2008).

51. BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001).

52. James Tully, *The Illiberal Liberal: Brian Barry’s Polemical Attack on Multiculturalism*, in *MULTICULTURALISM RECONSIDERED: CULTURE AND EQUALITY AND ITS CRITICS* 102, 102–13 (Paul Kelly ed., 2002).

is quite the reverse: not “separate, bounded and internally uniform,” but rather “overlapping, interactive and internally negotiated.”<sup>53</sup>

Second, Barry seeks to contrast and polarize anti-Enlightenment particularism and relativism with Enlightenment universalism and non-relativism. This is achieved in two ways:

- (i) by taking formal equality (sameness of treatment) as the standing norm against which any claim for recognition must advance compelling reasons to gain an exception rather than attempting to “work out what a liberal commitment to equality (of opportunity and respect) means in today’s conditions of cultural diversity;” and
- (ii) by mistaking universal rights and their means of recognition and accommodation with the non-universal features these rights protect.<sup>54</sup>

By contrast, contemporary theorists of difference, such as Will Kymlicka and Joseph Carens (who Barry bitterly criticizes), have sought to defend notions of community and culture from *within* the liberal tradition itself by advancing accounts of minority rights that seek to balance individual autonomy and the limits of toleration in multicultural modern societies.<sup>55</sup> In similar terms, Rawls’s shift from *A Theory of Justice* to *Political Liberalism* (also attacked by Barry) is a further example of a liberal theorist struggling to deal with the implications of religious and cultural diversity in a democratic society.

Finally, Barry ignores the “democratic dimension” of multiculturalism whereby citizens exchange (ethical) reasons over claims for public recognition and accommodation of suppressed cultural differences.<sup>56</sup> This is based on a critical distinction between

53. *Id.* at 104. Tully’s argument that these features of cultures allow for their continuous renegotiation and transformation by their members is set out more fully in JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995).

54. Tully, *supra* note 52, at 105–106.

55. See especially WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); *THE RIGHTS OF MINORITY CULTURES* (Will Kymlicka ed., 1995); *see also* JOSEPH H. CARENS, *CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS* (2000).

56. Tully, *supra* note 52, at 108. This has four features: (1) the Enlightenment ideal that laws should rest on the agreement of the people through the free exchange of public reasons; (2) the exchange of reasons over a contested rule of recognition takes place in accordance with universal principles of reciprocity; (3) while the “internal reasons” that members of a



“internal” moral reasons and “external” ethical reasons, the latter—though drawing on aspects of a person’s or group’s particular practical identity—being both “general” and “public.” By being closed and unwilling to discover and revise the unreflective partiality in his own particular interpretation of freedom and equality (which, after all, is “universal and culture-free”), Barry has no need for any *modus vivendi* ethos of toleration and peaceful coexistence.<sup>57</sup>

On the other hand, to the extent that religious traditions themselves (independent of any state laws and practices) are the source of unequal and discriminatory treatment, the public-private distinction has operated in liberal theory—under the banner of “freedom of religion”—to shield religions *in toto* from the claims of the equality norm. Scholars of women’s rights in the areas of culture and religion such as Madhavi Sunder have termed this the “new sovereignty,” the deference of human rights law to religious despotism in the private sphere through the definition of religion as a “sovereign, extralegal jurisdiction in which inequality is not only accepted, but expected.” She states: “Law views religion as natural, irrational, incontestable, and imposed—in contrast to the public sphere, the only viable space for freedom and reason. Simply put, religion is the “other” of international law.”<sup>58</sup> In all societies, however, religious communities are internally contested, heterogeneous, and constantly evolving through internal debate and interaction with outsiders. In questioning the traditional liberal construction of this category, Sunder refers to recent attempts by human rights groups (especially in non-Western contexts) to construct and realize a “new enlightenment” which seeks reason, equality, and liberty not just in the public sphere, but also in

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culture give themselves for the importance of their cultural practices may be particular, the “external reasons” they give to their fellow citizens are general and public; and (4) upholding the democratic ideal requires a mutual openness and respect towards the views and claims of others in order to discover and revise the unreflective partiality in one’s own views through dialogue. *Id.* at 108–110.

57. As Tully observes, Barry’s conception of democratic dialogue is so “constrained by the preemptory [sic] universality of his own theory that there is little room to discuss diversity under his category of exemptions to general rules. This monological stance is not only wrong in theory; it also leads to the transformation of reasonable disagreement into ideological conflict and hence to instability in practice.” *Id.* at 110 (citations omitted).

58. Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1402 (2003).

the private spheres of religion, culture, and family.<sup>59</sup> By failing to include such questions within the scope of rights discourse, the law of human rights in effect has deferred to the authoritarian claims of patriarchal, religious elites thereby buttressing their power *vis-à-vis* the claims of women's rights activists.

Of course, any such claims raise complex and difficult conflicts between equality norms on the one hand, and religious and cultural freedom norms on the other. A value pluralist approach to such questions opens the possibility of new forms of the hermeneutic circle and thus diverse forms of fusion of horizons. This, in turn, opens the way to a less dogmatic and binary account of reason and religion by viewing both as human institutions and social practices requiring modes of justification and accountability. Just as is the case with the doctrine of substantive neutrality, this requires the constant search for forms of accommodation, mutual understanding, and overlapping consensus between actual religious communities and the normative claims of rights discourse understood in value pluralist and philosophically hermeneutic terms. In order for this to occur, however, the primary obstacle, the inability of Western rights theorists to see their culture as one amongst others, must be surpassed. As Taylor concludes:

To an extent, Westerners see their human rights doctrine as arising simply out of the falling away of previous counter-vailing ideas . . . that have now been discredited to leave the field free for the preoccupations with human life, freedom, the avoidance of suffering. To this extent they will tend to think that the path to convergence requires that others too cast off their traditional ideas, that they even reject their religious heritage, and become "unmarked" moderns like us. Only if we in the West can recapture a more adequate view of our own

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59. *Id.* at 1403. Sunder notes that women in many non-Western contexts now challenge religious and cultural authorities and seek to re-imagine religious community on more egalitarian and democratic terms. These efforts are different from the women's rights movement in the West, which offers women a right to religious freedom (on patriarchal, religious leaders' terms) or a right to equality (within the public sphere and without normative community), but not a comprehensive right to both. Thus, "[e]nvisioning a third way, women human rights activists in Muslim communities are pursuing equality and freedom *within* the context of religion, not just *without* it." *Id.* at 1404. Sunder refers, in particular, to the transnational solidarity network "Women Living Under Muslim Laws." *Id.* at 1433-43.

history, can we learn to understand better the spiritual ideas that have been interwoven in our development and hence be prepared to understand sympathetically the spiritual paths of others toward the converging goal.<sup>60</sup>

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60. Taylor, *supra* note 20, at 143–44. Given the logic of philosophical hermeneutics, any overlapping consensus or *modus vivendi* that may evolve over time will not therefore be achieved through a “loss or denial of traditions all around, but rather by creative reimmersions of different groups, each with their own spiritual heritage, traveling different routes to the same goal.” *Id.* at 144.