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### Gendered Normativities: The Role and Rule of Law

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# Gendered Normativities: The Role and Rule of Law

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*Susanne Baer*

## 1. Introduction

In the 21st century, human rights are as present as they are endangered. Specifically, sex/gender equality rights are contested, or actively abridged, which is to be understood as an attack on women and on people who do not fit a 'normal' pattern of gender relations. Yet in addition, these are attacks on democratic constitutionalism itself. The article argues that to properly understand the recent contestations of human rights, one must distinguish between critique and attack, and revisit the very form and content of human rights, to deal with law's ambivalence, such as 'legal colonialism', and also take into account critical understandings such as feminist jurisprudence, including an intersectional account of gendered inequalities, with a focus on the gendered ontology of law. We need to defend human rights against attacks, but make sure to defend the right version, namely a substantive notion of equality, in conjunction with dignity and liberty, in a triangle of fundamental human rights as prerequisite for democracy.

"Ours is the age of rights. Human right is the idea of our time, the only political-moral idea that has received universal acceptance" (Henkin 1990: 1). This is the beginning of eminent international lawyer Louis Henkin's description of the world past 1945. Then, in 1946, Eleanor Roosevelt (1948/1999: 156) proudly held up a large roll of paper featuring the Universal Declaration of Human Rights: "Many of us thought that lack of standards for human rights the world over was one of the greatest causes of friction among the nations", she told readers of *Foreign Affairs*, "and that recognition of human rights might become one of the cornerstones on which peace could eventually be based".

In 2021, it seems as if they were both wrong. Human rights are contested – and under attack.

Indeed, over the last few years, there were quite a few big conferences on ‘contestations of human rights’. We have witnessed one report after another on the destruction of the rule of law in Eastern and Central Europe, which follows a Hungarian script, and seems most striking in Poland, but is not limited to these two countries. We see “constitutional regression” (Huq/Ginsburg 2018). There is grave concern, again, regarding human rights of minorities in China, and regarding human rights generally in Hongkong. We witnessed four years of utter disregard of human rights from the US government. And there are ethno-nationalist political parties throughout Europe, as well as in many countries on other continents, that disregard human rights in order to maximize their profit through political power. They first target dissent, i.e. censor and eventually destroy independent media as well as research, and take over the judiciary, to then, now unhindered, target the racialized other, often also coded in religious terms, and the poor, often coded in cultural terms, and sexual minorities, coded as ‘gender’.

As one example, the Hungarian government has declared that it legislates to respond to demographic change, to strengthen the Hungarian family, to support the Hungarian people, nation, values, by implementing ethnocentric pronatalist policies, including a ban on education that follows anything but a heteronormative patriarchal frame. This is no commitment to human rights, but a commitment to a rather narrowly defined ‘us’. But note that Hungary also legally recognizes, at least to date, same-sex relationships, and frames its policies as protection of children and stopping what is denounced as ‘gender ideology’, thus plucking the chicken feather by feather, strategically, to enlist widespread resentment, then eventually kill the bird (cf. Albright 2018).

In Mali, the struggle for gender equality was confronted with the argument that no law may ever impose, and certainly no Western human rights law may ever colonize, the local ways, resulting in sex inequality to the detriment of women and further ‘others’.

In Europe, a president of a member state of the Council of Europe eventually declared, in March 2021, his wish to leave the Istanbul Convention. The claim is that the Convention advocates LGBTQI\* rights or normalizes ‘homosexuality’, and that it degrades or undermines ‘family values’. And this state leader is not alone. While 45 states sent delegates to draft the Convention, two states – Russia and Azerbaijan – did not participate at all, ever. In addition, the member state whose president intends to leave has never really implemented the obligations that come with the commitment. Also, several countries are known not to apply the Convention. Currently, the government

of another state, now also a member of the European Union, namely Poland, openly considers opting out of the convention, as well.

How could this happen? What exactly is happening there? And what should we do about it?

My remarks are born out of concern about the rule of law and democracy. I insist that no country deserves these labels without guaranteeing fundamental rights: dignity, liberty and equality for all. The point is that there is no democracy without constitutionalism, because fundamental rights need protection for democracy to work. The contestation of human rights is, then, not only a threat to gender/sex equality, but as such, also an attack on constitutional democracy itself (Baer 2018, 2020).

In addition, this article is based on interdisciplinary work on law as a reality (Baer 2021, #rechtreal). Here, the point is to discuss law as a multifaceted way of negotiating the world, with its legal-judicial component (doctrine), its political – and discursive – component (sometimes ‘rights talk’, sometimes window dressing, and more), its economics (to distribute wealth and resources), its social reality (as in juridification, or legalism), as well as its cultural ontology performing not only justice, but also gender, sex, etc. As such, these remarks are necessarily grounded in critical understandings of the legal, namely: feminist jurisprudence, including an intersectional account of gendered inequalities, with a focus on the gendered ontology of law.

And certainly, there is comparative constitutionalism, a concept I define as the national, transnational and international practice of a fundamental rights commitment of democratic forms of government, thus bound by law (cf. Dorsen et al. 2016). In such a normative setting, human rights are more than formal international law treaty rights, and more than political promises or normative ideas. They are, as fundamental rights of human beings, legal promises to people as people, to be implemented by independent institutions usually called the courts.

To think about human rights in the 21st century is thinking about, at least, four aspects. *First*, I will address the significance: What exactly are these ‘human rights’? *Second*, I suggest distinguishing between critique and attack to allow a proper understanding of the recent contestations of human rights. *Third*, it may be tempting to then denounce the attackers, call for action and an end to the attacks, thus revitalizing human rights. Yet, I suggest not to forget that the very notion of law, human rights included, is ambivalent. What exactly are the challenges, if one takes this ambivalence seriously? *Fourth*, and finally, with all that in mind, there remains the question of what are we to do?

My argument is neither to denounce human rights nor to forget about them. Instead, we need to defend human rights against attacks, but make sure we defend the right version of them. In essence, human rights are important as a *conditio sine qua non* of a morally defensible way of being, but in light of their ambivalence and abuse, there is a need to very clearly define what exactly should matter, needs our support, must be defended today. My contribution will focus on a necessarily substantive notion of equality, in conjunction with dignity and liberty, in a triangle of fundamental human rights (Baer 2009).

## 2. Significance of human rights

What exactly are we talking about when we talk about human rights? Basically, it is helpful to distinguish between the idea, the politics and the law of human rights (Baxi 2002). The idea of human rights dates back to references to humankind in the 18th century, rhetorically inclusive, but predominantly taken as male and white only. Yet still, this idea presents a vision, a hope, a belief, a moral foundation, and often focuses on human dignity, rather than merely a black box (McCrudden 2013).

Another option is to refer to human rights as politics. This notion dates back to the 19th century (Ignatieff 2011) and is an important device of liberation movements until today, using human rights as a tool to achieve political goals. As such, they are a component of power, a specific argument – and may be used in various ways. Where human rights become “weapons” (Bob 2019) – as rallying cries, as denial/reversal/repudiation, as camouflage/spears/dynamite or as wedges/blockades, they are also up for grabs for a variety of causes. However, the starting point is to believe that human rights exist and are applied, regardless of the legal practice.

But then, there is also the notion of human rights as law. This is a reference to the codifications post WW II, since 1945, because these are human rights catalogues signed and ratified and meant to be implemented by states, albeit often with reservations, thus partially.<sup>1</sup> Yet as law, human rights are not just an idea or argument, but a specific type of norm, in a specific form,

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1 On the distinction see Baxi (2002) referring to the post-1945 argument by Louis Henkin. Samuel Moyn (2014) claims that the rise of human rights is not based on the mantra of ‘never again’, but serves national and other causes. He points to the 1970s as the decade of upheaval.

with distinct modes of implementation, via special proceedings in institutions, namely courts and tribunals, and with specific effects, as sanctions, both repressive and productive.<sup>2</sup>

In real life, these three notions of human rights as idea, politics and law are certainly entangled. But for analysis as well as for activism, it is crucial to distinguish between the idea, the politics, and the law in the narrow legal sense of human rights. The latter, then, has several dimensions, as well.

Even legally, 'human rights' as law does not always mean the same thing. First, there is a formal existence – law 'on the books'. Then, there is the mobilized version – law 'in action' (Baer 2021). In addition, there is the implementation of human rights – a promise delivered in real life. I suggest to take all three dimensions of law seriously. This deviates from a widely shared sense among lawyers that law that is not implemented is worth nothing, and also departs from a widespread attitude among theorists to not consider implementation, and it does not reduce law to only those laws that work in action.

On all three counts, my argument is that there is more to the law than usually considered. For one, law on the books is certainly much less of a tool for change than law in action. Yet, law on the books still does something. It has symbolic value, in that it signals a rule, and in addition, it is proof of the fact that competent actors have agreed on something which they can be held accountable for – which informs the politics of 'naming and shaming' in international relations (Hafner-Burton 2008). Also, law matters significantly when and because it is mobilized, in references to law in politics, or in taking a human rights case to a court, or by lodging a complaint with an agency, although this might not change matters on the ground as such. Eventually, then, an administrative decision or a court ruling on a case will deliver law's promise, if, and only if it is also properly implemented, which cannot be taken for granted.

There are many examples to illustrate the difference in dimensions. In Turkey, the Istanbul Convention against Violence against Women was agreed upon ('written'), passed, and ratified, but has not been implemented by that state. And despite this lack of implementation, leaving the convention still

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2 Often, rights/law has been or is reduced to paradigmatic criminal and administrative law as a repressive sanction, while law always has a productive side as well, as a specific ontology (regarding sexism cf. MacKinnon 1989), and an element of a discursive regime, often associated with Michel Foucault, who himself never developed a clear concept of law.

does matter. Louis Henkin knew about the challenge: “Even hypocrisy may sometimes deserve one cheer for it confirms the value of the idea, and limits the scope and blatancy of violations” (Henkin 1990: 28-29).

Similarly, LGBTQI\* rights have not yet been explicitly recognized by the United Nations. A group of activist scholars drafted the Yogyakarta principles to address such discrimination, but they have not been passed by any formally empowered actor, or consented upon, or ratified as law. However, they also and already do matter, sometimes as a normative reference, or as backup for a political agenda (O’Flaherty 2015; Brown 2009; Holzer 2020). As such, many ‘social’ movements around the globe used and still use references to human rights to mobilize, anchor and legitimize their demands. Therefore, even law that is not formally passed or ratified matters.

Human rights law may exist only as law on the books – but it is also different from a statute or some other piece of regulation. Usually, it is written by authors from many nations, and is thus an important anchor for politics in trans- and international frames. As such, human rights are a normative commitment governments and other actors on the global scene may be reminded of. Again, they allow for a politics of naming and shaming in a globalized world in which states and companies compete for reputation, and also for funding, which is sometimes even formally bound to a commitment to human rights. In addition, human rights are a powerful idea with a name and words to it, to be invoked, and it may be law, to be administered and adjudicated, with norms and sanctions. As such, law also has a multifaceted as well as specific function in the production of knowledge, with an ontology of its own (MacKinnon 1991). Thus, human rights, as law, matter in various dimensions.

## 2.1. Gender and human rights today

Now, what are we talking about when we talk about gender and human rights? While the French and US constitutions are important predecessors for mainstream constitutionalism, as is the English Bill of Rights, the French women’s rights activist Olympe de Gouges, who co-drafted a Declaration of the Rights of the Citoyenne, as well as the women at Seneca Falls<sup>3</sup> had to intervene early

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3 The 1848 Seneca Falls Women’s Rights Convention worked in an atmosphere of idealistic reform, as a first meeting to discuss the “social, civil, and religious conditions and

on, to make sex equality matter as well. And even more absent from mainstream constitutional history is Haiti, with the revolution led by freed slaves in 1791 to found a postcolonial independent nation, which was based on a constitution that abolishes slavery, yet seemed rather patriarchal and autocratic.<sup>4</sup> Similarly, we know very little about the transnational courts that were set up against slave trafficking as early as the 18th century (Martinez 2012). The Universal Declaration of Human Rights (UDHR) starts with “all humans” (and not all men, in Art. 1) and lists an explicit guarantee of gender equality (with no distinction of any kind, such as sex, in Art. 2), and adds a right to marriage and family, with equal rights in it (Art. 16). In addition, the UDHR features rights to social security (Art. 22), to work (Art. 23) and to rest and leisure (Art. 24) – and offers us an early normative commitment. It is, legally speaking, non-binding, yet of eminent political force. Regarding enforceable rights, the UN then eventually agreed on Conventions, protecting political liberties first and social and cultural rights second, while both come with equality guarantors, to be followed by specific Conventions to fight racism in 1965<sup>5</sup>, sexism in 1979<sup>6</sup>, and ableism in the year 2000<sup>7</sup>.

There are regional human rights treaties such as the European Convention of Human Rights – ECHR – from 1950, covering countries from Malta to Russia to Turkey and more. In 2000, EU member states agreed on a Charter of Fundamental Rights featuring fundamental freedoms as well as a prohibition of gender-based pay inequality, which had already formed part of the EU treaties. There is also the American Convention on Human Rights called the Pact of San José from 1969, which entered into force in 1978, as well as a Social Charter, a Convention against Discrimination and one specifically against racism plus four conventions on women’s rights, four regarding children, one for people with disabilities, and a draft resolution on sexual orientation and gender identity and expression, all garnished with a strong and often courageous court. Also, the African System features a plethora of legal texts, most

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the rights of woman”, one founding moment of the women’s rights movement in the US. For a critical account (cf. Jones 2020).

- 4 The first Constitution dates from 1801, the second from 1805. France abolished slavery in 1799 but nonetheless sent troops to crush the Haitian revolution.
- 5 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), of 21 December 1965, entry into force 4 January 1969.
- 6 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979.
- 7 Convention on the Rights of Persons with Disabilities (CRPD).



prominently the African (Banjul) Charter on Human and Peoples Rights from 1986, with the Maputo protocol on the Rights of Women in Africa, as well as a Protocol of Rights of Persons with Disabilities.

In fact, however, Strasbourg and San José, Geneva and New York are often far away from the scene of injustice, and often not easily accessible for those hurt, as well as ignored by those responsible. Therefore, many recent transnational movements tend to at least also address international human rights in national contexts, in strategic litigation. Thus, it is helpful to understand national bills of rights, usually in constitutions, as human rights as well, to even more forcefully address injustice on site.

Taken together, this is a wonderful world of human rights commitments. Most countries in the world are proud of their written documents that often formed the nation, or constitute a *we, the people*, young and old (dating back to the year 1600 in San Marino), some very long, as in India, some very short, as in Monaco. Revolutions and other transitions to new forms of government often end in constitutions, and constitutions thus often mark regime change, sometimes explicitly, as in South Africa, sometimes implied. And all this law and all these rights on paper matter. They have been fought for, specifically to guarantee human dignity as equal liberty for all, and they indicate modified normalities.

In many cases, these human rights are also mobilized by individuals that bring cases to courts, with or without lawyers and with or without social, political and economic support. However, access to a court cannot be taken for granted although it is a human right in itself. Law may also be mobilized in politics, specifically to back up or to counter legislation. Here, rights may serve as ‘weapons’, in that they are used in specifically scandalizing ways. As such, human rights law may address the loss of law, when applied in warzones, as in ECHR *Isayeva et al./RUS, 57947/00*, abuses of law, or illiberal democracy, as in ECtHR rulings on Russia, Hungary, Turkey, based on Art. 18 ECHR, with as many as 18 rulings in 2020 (Nußberger 2020: 393).

### 3. Attacks on human rights

Human rights are contested, and there are already claims of the “dawn” (Posner 2014) and the “endtimes” (Hopgood 2013) of human rights, or a “post human rights era” (Wuerth 2017). There is much utter disrespect for human rights, by dictators, military, militia, business, etc., who simply do not care,

and exploit the violation. There is less commitment to multilateral guarantees of universal human rights (Gosewinkel 2019). In addition, and more troubling, there is disappointment in countries that did establish democratic constitutionalism and joined the club of modernity, but saw their safety, trust and values go down the drain in very real ways. This happens in transitional times when countries are basically sold to business, it happened during and after the financial crises (cf. Pető in this volume), it is now happening during the COVID-19 pandemic, and will soon become more clearly a disappointment in human rights regarding climate change. To many people, the promise of equal liberty and a dignified life is an empty one. They are, and they have reason to be, disappointed.

Then, there are the critics of human rights – politically speaking – from the left and the right and from the Global North and South, when published voices must be in English to be heard and when many ‘Third World-scholars’ primarily work from or in the U.S. Also, the critics of human rights pursue radically different goals: While some want to further, to better, to upgrade human rights, others want to attack and destroy the very idea of them.

Regarding contestations of human rights, this difference between critique and attack matters for two reasons: *First*, those who attack fundamental rights try to enlist those who criticize them. Today, there is at least a risk that authoritarian legalists, who attack and destroy human rights, capture the theories and terminology of those committed to inclusive participation, substantive equality, dignified liberty for all. Namely, critical legal studies in North America have long targeted the law for its indeterminacy, and so do radical conservatives, yet with the objective to get rid of rights. Also, many critics, including some feminists, reject a law that interferes with what is considered a private or intimate affair – i.e. sex, pornography, prostitution – or that sanctions harassment or hate speech, as unjustified restrictions on speech. Rigid conservatives join that call, and patriarchy applauds. Most certainly, applause from the wrong side is no sufficient reason to change. But at least, such unfriendly takeovers must be taken seriously, and they must be dealt with.

*Second*, the difference between critique and attack matters because criticism may be interesting, with some effect, but attacks are dangerous, as an immediate threat today. The destructive version of a contestation of human rights thus must be understood in order to be able to counter it and to be sure not to feed these trends, not to be enlisted. Today, the attacks as aggressive contestations of human rights come with a distinct set of arguments. Often, human rights are portrayed as a destruction of liberty, which should

at least stop equality demands (Benoist 2004). This targets an “inflation” of social rights (Scruton 2014) and of equality claims (with a slippery slope twist that “now anyone could ask for anything”). And conservative philosophers argue that the whole concept is morally false (MacIntyre 1995). Even more dangerous are attacks on human rights adjudicated by courts. If mobilized and implemented in court decisions, this is denounced as ‘judicial activism’ to call the authority of courts into question and portray courts as acting beyond their competencies (Baer 2017a, 2017b, 2020). Similarly, international agreements human rights are based on and applied with, are labelled as undemocratic, and even as a destruction of politics. When critics ask, “how do they get away with it?” (Shapiro 1986), and talk about human rights and constitutional courts, it might just be a provocation, but these days, it is a dangerous move as well. In addition, human rights, and specifically equality claims against discrimination, are denounced as ‘minority issues’ in the form of ‘identity politics’, described as an elitist project targeting activists and lawmakers as well as, again, judges that are then depicted as being ‘out of touch with society’.

*Finally*, and extremely relevantly to struggles for sex/gender equality, human rights are portrayed as tools to undermine tradition/culture/value/nation, centrally featuring the family, of which women are the ‘foundation’ (Erdogan). This is another classic according to which the female body and soul stand for the nation, to be protected and locked away, and equal human rights disturb that precious setup. In Turkey, human fundamental rights are portrayed as an unnecessary intrusion, first of all, into marriage and the family, then as a disturbance of patriarchy, which is trouble for the nation as such. Also, human rights are perceived as an intrusion into church matters, thus disturbing religion per se. Overall, we see a portrait of human rights as hindering ‘our ways’, which are patriarchal and privileged ways defended by a global network of fundamentalists.

#### **4. Ambivalence of human rights**

It seems important to better understand what happens here, and why it works. One feature of these attacks is the use of political forms of protest formerly known as leftist strategies, like protest camps, grassroots activism, etc. Yet another reason for success is the smart tapping into established lines of critique in scholarship.

That means that recent attacks on human rights target ‘judicial activism’, a concept to discuss how far courts should go, now used to discard any meaningful human rights as such. Similarly, attacks employ the ambivalence of law itself, human rights included, and disregard the function and nature of these guarantees. And certainly, there are inherent contradictions in the law, which produce dangerous cracks in that building. Famously, feminist and antiracist poet and activist Audre Lorde reminded us that “the master’s tool may never dismantle the master’s house” (Lorde 1984). Some feminists took and still take this as a reason to reject the law entirely, or at least laws drafted to counter the violence of pornography and prostitution. But Lorde went on, in an argument towards empowerment beyond differences:

“They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those women who still define the master’s house as their only source of support” (Lorde 1984: 112).

Leaving the law in the master’s hand and the master’s house intact and central is not an option. Only the privileged may afford such legal nihilism (Williams 1991). More to the point, sociologist Carol Smart (1989) issued a warning of the “siren call of law”: If feminists come too close, she wrote, they might drown. Therefore, there is a need for a critical distance to legalism without rejecting it altogether. Similarly, theorists exposed the “feminist dilemma” or “dilemma of difference” in law, which seems to bother us when law emphasizes the very factors that are indeed the source of inequality, and thus tends to perpetuate the problem (Baer 1996: 242). But the dilemma dissolves if we differentiate between the different dimensions of law – idea, politics, law, on the books, mobilized, or implemented –, since a legal text is then different from social practice. Still, a law that uses naturalized categories of oppression is problematic, which is why post-categorical law against discrimination may be an option (Baer 2010). Yet, refined arguments may ensure that equality is not used against feminism as such.

Similarly, the critique of legal colonialism (i.e. Burke 2017; Dembour 2010; Lacroix/Pranchère 2018; Mutna 2001) is well founded and an important intervention into a rather ignorant mainstream, yet must not turn us away from the law. In fact, much of human rights law is more multifaceted than generally known. And indeed, it seems to be empirically biased to simply call human rights Western and thereby disregard contributions of the Eastern, Southern, Northern worlds. More specifically, in international trade law, patent rights,

etc., international law is indeed often problematic when and because it privileges and exports Western claims to impose their own interest on others (cf. Eckel 2014). Also, much of international law carries features of racist colonialism when military operations are based on an image of, as Spivak said, “White men saving brown women from the brown men” (1993: 120). Furthermore, there is the philosophical critique of the “force of law” (Derrida 1990), and of “normative violence” (Butler 2004). All of these are important reminders that law is a powerful tool which we never fully control. Yet, they are no reason to turn away.

Yet again, such critical approaches are at risk of being abused. Note that the force of law is picked up by conservatives that reject, specifically, a fundamental rights review of legislation. They call human rights control ‘totalitarian’ (Sumption 2019). Also, the critique of judicial activism is abused to fully reject human rights. In addition, human rights are portrayed as colonial by nationalists to prioritize ‘our own’ values, tradition, etc. And does the trend in progressive movements to endorse regionalism/localism/community support or risk the global promise of ‘never again’? Today, politically right-wing nationalist and authoritarian attacks on human rights employ a formerly progressive rhetoric, and progressives embrace concepts that may feed dangerous trends. At least, critics of human rights should then be careful not to feed the wrong thread. History teaches that every wonderful human right – dignity, liberty, equality, including sex/gender equality – may be turned into a sexist trap eventually. Refined arguments are needed in order not to let that happen.

Regarding the contestations of human rights, it is thus crucial to watch out for the abuse of progressive ideas, and to be careful to subscribe to human rights in the right version, in the proper dimension. There are many aspects to this argument and even more examples. Here, I highlight the multipolar nature of all conflicts, the frames that matter, and the exact content or substance we give to any human right.

*First*, rights are always up for grabs. Since there are rights on all sides of any given conflict or controversy, no right, no inequality claim applies to one side only. Beyond a bipolar idea of rights, an inequality must be understood as a multipolar conflict, with competing claims. This does not only mean that some demand a liberty to impose an equality on others, but that there are always more interests at stake.

*Second*, when it comes to human rights, framing matters. Take domestic violence – is there a violation of human rights? In what ways, exactly? Luckily,

the Istanbul Convention provides a detailed answer to the question. But it is not the only one. According to the Convention, domestic violence is a regular abuse, not an exception, it is very harmful, with many women killed, it is supported by and embedded in socio-economic structures and cultural norms, and domestic violence is gendered, a manifestation of patriarchy. Therefore, a human right against domestic violence is a right to preventive measures, victim support, serious sanctions, thus a positive right to state action, as in legislation, administration, social services and education. But according to its opponents, and to many liberal lawyers and politicians, domestic violence is a 'family conflict', an exception to the normal proper harmony, and harm and numbers exaggerated, which is why important rights to the home, marriage and the family must be shielded from intrusion.

Another example are trans\* rights: Very often, and very successfully, trans\* people claim rights to change their biological sex, to adapt to their social gender, and to then modify their bodies to fully conform to what is predominantly defined as male or female, including the proper voice. But if such human rights claims are framed as a right to cure an illness, or based on the right to choose one option in a binary norm of sex, they risk to backfire. In fact, trans\* rights then perpetuate the very problem: an essentialized and naturalized binary order as the norm. So which frame should we use?

In all of these 'cases', framing matters. If we apply human rights, as activists in calling for them, as politicians to implement them, or as lawyers and judges to apply them, they must be properly defined.

## 5. Substance and importance of human rights

In addition to paying attention to the ambivalence of human rights and to the different frames used in these contexts, it is important to understand, and to conceptualize, a substantive content of human rights. So today, in litigation and adjudication as well as in human rights politics, how should key human rights be properly defined?

Most prominently, this is the challenge of equality. This human right has been agreed upon in short formulae, which are already different from each other. Overall, there is a dominant tradition to interpret these as a formal guarantee of equal treatment of the same. As such, it does not help against sexism, racism and other such systemic inequalities. If subordination works, you are different enough to not have that right apply to you. Even worse, a

call for formal and symmetrical equality is detrimental to efforts of emancipation, in that it hinders affirmative action. Instead, one needs to understand equality as a substantive right (cf. MacKinnon/Baer 2019).

Instead, a substantive notion of equality as a human right takes account of unequal realities (foundational: MacKinnon 2016; cf. Sacksosfsky 1996; Baer 1995). It starts from realities and acknowledges law to address its asymmetries. Then, affirmative action is a means to implement substantive equality at work, to end inequality, thus not an exception, but the rule, an idea that informs EU treaty law by now, in Article 157 TFEU. Also, a substantive notion of equality allows law to address the inequalities of reproduction. Certainly, there is the call for ‘reproductive freedom’, predominantly based on liberty, as autonomy regarding ‘my body my choice’, countered by ‘pro-life’ movements. Instead, one may frame access to abortion as an equality issue (cf. MacKinnon 1991), to take into account the conditions under which women get pregnant, and of motherhood. This is a more complicated argument, but it may be more promising. If defined substantively, it may be harder to deny an equal right to define oneself as parent, and more.

## 6. Importance of human rights

What are we to do? I argue against nihilism, because the vulnerable cannot afford it, and law is too powerful to be left in other hands. Instead, there is an urgent need to defend human rights against attacks, a need to insist on and call for human rights, and to carefully frame its content: substantive equality, liberty in context, dignity as equal respect.

Human rights are not all there is to politics, but they are an important, indeed a *conditio sine qua non* of a morally defensible way of being, because they are a “tempering power” (Krygier 2017). In light of the ambivalence of rights and law, but even more so to prevent intentional abuse, there is a renewed need for clarity in framing demands, to properly assess conflicting claims, to define what exactly should matter, needs support, must be defended, can be claimed. Recent contestations make this harder. But there are concepts to make it work.

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