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Speaking Law: Towards a Nuanced Analysis of “Cases”

By *Susanne Baer**

Abstract

“The headscarf case” is more than just a case. Talking law is often talking cases, but we need to understand law more specifically as a powerful practice of regulation. Law is also not only another discourse, or just text, or politics, with fundamental rights as “an issue,” or a promise, or just an idea. Instead, to protect fundamental rights, it is necessary to understand how in reacting to a conflict, we in fact speak rights today—*Rechtsprechung*—as a form of practice. The German Federal Constitutional Court’s decision in the conflict about female teachers wearing headscarves in German public schools may be used to illustrate the pluralities of law—understood here as legal pluralism. This pluralism includes actors and legal arguments as frames to the speaking of law. In addition, it becomes clear that any analytical focus on gender, based on the current state of the art, further illuminates these issues. As such, interdisciplinary legal studies become inherently critical to the protection of fundamental rights.

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Law is interesting to many. In fact, law is, today, a dominant focus of political discussions. Although politics is multifaceted and much more open to a larger variety of arguments than law, political questions are often discussed as controversies surrounding legal questions. This turns complex problems into a call to decide between right or wrong. And this is more than a game of changing codes. Turning things legal may very well obscure the different politics of each practice. Thus, we need the ability to understand law as a very specific type of practice. My plea in this Article is for the importance of understanding of law as a specific practice of regulation. This calls on us to not merely talk about “the case,” “the law,” or “legal discourse,” but to very precisely identify which practice of law we want to talk about. It is also a call to avoid treating fundamental rights as just another issue, a mere promise, a grand idea, or another version of politics.¹ Rather, this Article proposes that to indeed protect fundamental rights, it is necessary to understand how, specifically, courts speak of law today as a form of practice.

In German, *Recht sprechen* captures the meaning of jurisprudence literally as a practice of speaking both the law and justice—as *Recht* has both meanings in German. Certainly, one must also consider other forms of “speaking” law, like legislative debate or academic reflection. To the contrary, the focus here is on the way we discuss “cases,” which are usually court rulings. It is motivated both by a commitment to interdisciplinary legal studies and by my practice as a sitting Justice with the mandate to ensure fundamental rights at the German Federal Constitutional Court. As to the latter, there is a need for nuanced critique, because this is what judges need to live up to their task.

More generally, I believe that in engaging with the pluralities of law, we need to be very precise concerning what we are talking about. This is not only because law is different from politics. It is also because the practices of law vary, and the force of law depends on the specific practice at hand. What precisely do we mean when we talk about “law”? And when we address “a case,” do we mean a ruling in the form of the authoritative text that judges sign, or are we talking about the social event of bringing a claim with an argument in court and with deliberation, decision, and reactions to it? And does the ruling constitute the written decision, or are we also referring to the reasons for it—which are sub-headed as *Gründe* in our court decisions and are listed in those decisions? Does this narration of facts matter? Or, changing positions, should “a case” be described from the perspective of the individual as a right to something or from the seemingly objective perspective of a court or an outside observer? Is law, then, the litigant’s notion of it—as in legal consciousness—or a lawyer’s idea? Or has “our” notion of law, as influenced by the continental European tradition, been generated through intense interaction between academia and courts, where it has developed in the courts and therefore, has been much more driven by lawyers in common law contexts? These questions arise from close readings of court decisions alone.

¹ See Mark Goodale, *Toward a Critical Anthropology of Human Rights*, 47 *CURRENT ANTHROPOLOGY* 485 (2006); Susanne Baer, *Privatizing Religion*, 20 *HUMAN RIGHTS POLITICS, CONSTELLATIONS* 68 (2013).

In addition, theory matters. To name two sides of a much more complicated discussion: If we talk about fundamental rights, are we then discussing doctrine as the agreed-upon meaning of the legal text? Or should we instead understand law as a political claim that is couched in legal terms? As will be explained in this Article, an understanding of law as a practice of regulation and of court decisions as one particular form of practice allows us to catch these variations. Eventually, this informs more nuanced critique.

A. What is a Case, Really?

As a judge with the mandate to speak the law—*Rechtsprechung*—, I am used to starting discussions of fundamental rights in the form of individual cases. So, let us begin with such a case.

Looked at from the bench, “my” case is a constitutional complaint lodged by two women from North Rhine-Westphalia against a statute that was admitted by the Court and accepted as valid, and the state law banning teachers from wearing headscarves was ruled to be unconstitutional. But “the case” can be told very differently: On March 13, 2015, the news spread that from now on German teachers would be allowed to wear a headscarf in public schools—something which had been previously prohibited.

Or, the German Federal Constitutional Court decided, and in fact, the Justices of the Court signed a ruling on January 27, 2015, that a general prohibition on public school teachers from wearing a headscarf or veil is a violation of the Basic Law’s fundamental rights.

Or, put differently once again, the constitutional court in Karlsruhe made a plea for greater religious tolerance. Some critics would say the court paved the way for an “Islamization” of Germany, while others may tell you that the court protected individual liberty, and still others caution that the court delegated the problem of social integration in an increasingly heterogeneous society to schools. Some describe “the case” as a sellout on the fundamental right to gender equality, while others see it as an effort to manage and counter Islamophobia after the Charlie Hebdo attacks in Paris and to take a stand against *Pegida*, short for *Patriotic Europeans Against the Islamization of the West*, a noisy, racist, and particularly Islamophobic, sexist, and patriarchal political movement in Germany. Rather differently, some constitutional law specialists describe “the case” as an instance, in which the First Senate of the Court took issue with a decision that had been made by the Second Senate in 2008. The Second Senate prescribed specific legislation to prohibit religious clothes being worn in public schools and thereby, emphasized the interest of undisturbed schooling, the “peace in school or *Schulfrieden*, while the First Senate was now emphasizing religious freedom as an individual right. Or law took the stage in Karlsruhe for a moment in the ongoing struggles for sexual and gender equality, religious tolerance, and in the fundamental right to a liberal, humanist education.

What then happened? There are many ways to narrate the story of a case, but what *is* a case, really?

Often, and especially in interdisciplinary settings, a “case” is the name of an argument used in order to not frighten the non-lawyers in the room, instead of the First Senate of the German Federal Constitutional Court’s Decision 1 BvR 471/10. But watch out for how references to “the case” actually function. If “case” is used to name the so-called headscarf ruling—or *Kopftuchurteil*—after two women sued the government for the right to teach while wearing headscarves, this particular frame emphasizes conflict. As a reference to constitutional law, it pitches individuals against the state and often frames one right as in conflict with another. It reduces a highly complex issue to a fight with winners and losers. As a plot form, this conflict is interesting and promises to be quite easy to understand and follow. “The case” is in the news, and such a case is regularly used to start a discussion and illustrate a point.

In addition, the manner in which a complicated issue is framed as “a case” tends to stabilize the law as the prime or even sole carrier of justice. To discuss “a case” as a court decision functions to attribute wisdom to the bench. Even when a given decision is criticized, the court ruling is nonetheless portrayed as the potential solution to the problem. Thus, a court is presented as the site of authority, if in a more personalized fashion in common law contexts where the bench is referred to as the seat of judges, and less so in continental legal ones where the court is referred to as an institution. Without a more nuanced understanding of the conflict at hand, talking about “the case” and, in fact, discussing any version of a court decision, may suggest in not so secular cultures that salvation is out there and a good ending will inevitably occur. In political terms, this framing portrays law as an authority rather than as a constant struggle, a discursive practice and an iterative development. Is this the idea, then, behind portraying related phenomena as “a case,” to *hide* the actual practices of law?

To better grasp the power of law in its different practices, we should understand “the case” as the dominant and problematic frame for a complicated plurality of stories. Then, a different set of questions comes to mind. What is it that happens out there, really? How does a conflict enter the various arenas of law? What is litigated and by whom and in what manner? And who decides in what kind of institutional context the case shall be adjudged? Asking these questions means pursuing an understanding of law as a practice, and this opens up the space for more refined critique.

B. Methodological Challenges

Law is a genre of its own kind, and its practices are specific to itself. Yet, understanding law as regulation is not to refute the theme of the conversation to which this Article was asked to contribute: To understand “law as cultures, narratives, images, and genders.” Indeed, my argument is an attempt to support an interdisciplinary approach to law that includes using analytical tools to understand law’s cultural and narrative dimensions. But my point is to

take law seriously as a practice. Lawyers may tend to take law for granted and even perpetuate some myths about it, and critical interdisciplinary scholarship may allow us to move beyond this facile position, but it should not disregard the specific workings of law itself.

Understanding law as practices of regulation is, then, the starting point for empirical legal studies, including discourse analysis. Here, law is viewed as a practical phenomenon in this world, and not simply as either an idea or a system of rules, or as either a technique of governance, another expression of empire, of hegemony, or of the state; it is not simply only narrative or culture. Law as a practice of regulation may involve all of these aspects, but it is also something more complicated and specific.² But understanding law in this manner creates a methodological problem for empirical legal studies.

If we take the headscarf “case” as an example, we would want to know what “really” happened in this practical instance of a court speaking law. In particular, an interdisciplinary analysis might be interested in discovering how the ruling was arrived at. There is the wish to understand how the decision was made, which matters were considered significant, and which not. Yet the text of the decision offers limited information about these matters, and this represents a methodological challenge. The type and amount of information given in a decision is also not only limited, it also differs in relation to the legal culture in which it is written. In fact, there is a localized tradition of judging, notwithstanding the transnational conversation that occurs between courts.³ Narrative structure, type and scope of argument as well as style vary greatly both between legal systems as well as within legal systems, depending on the institutional traditions at hand. To stay with my example, a German Constitutional Court Senate ruling differs from that of many other courts. Unlike a short Chamber decision, the German Constitutional Court Senate ruling gives a full account of the case’s history and summarizes the expert and third-party statements that were collected before the decision was rendered, whereas other courts present “the case” differently. Additionally, German courts speak in one voice and not as individual justices, with the sole and rare exception of dissents to rulings of the Federal Constitutional Court. Even in this case, the delivery is far less personal than that of common law colleagues.

Public proceedings cannot compensate for the limitations of the text. The German Federal Constitutional Court takes most decisions without public hearings. Thus, a “sitting judge in session” in my case, is primarily a Justice who sits in the deliberation room with her colleagues. This is quite different from courts that stage oral hearings regularly. To the contrary, if a decision does not tell you all there is to know about a case, it would seem to

² “Regulation” is often used to describe a specific set of norms that are directed at infrastructure. In contrast, I use the term to mark the nature of law as a process of intervention. See generally SUSANNE BAER, RECHTSSOZIOLOGIE (2d ed. 2013); see also Nicola Lacey, *Criminalisation as Regulation*, in REGULATING LAW 144 (C. Parker et al. eds., 2004).

³ See Susanne Baer, *Praxen des Verfassungsrechts*, in DEMOKRATIE-PERSPEKTIVEN 3 (Michael Bäuerle et al. eds., 2013).

be an obvious choice to ask the Justices of the Court about these matters. But then another methodological challenge arises. Generally, a judge is not free from the effects of the actor-observer bias. She is more likely to portray actions in the most positive light possible, to be defensive, and to perpetuate an image that works to sustain her own and the court's standing. More importantly, a German judge is simply bound by law. As in other legal systems, no judge is allowed to tell the public about the actual practice of judging. As a sitting Justice at that Federal Constitutional Court that decided the headscarf case, I am thus not permitted to tell you what really happened in deliberations. Formally, I am under a legal obligation to not reveal the details of rulings that have been deliberated on. Clerks are not present at final deliberations and stand under the same obligation to not reveal details. And no member of the institution has, to date, torn down the veil from what happens in the Federal Constitutional Court's deliberation rooms.

Indeed, this veil of secrecy over deliberations protects judges and the institution itself. It is highly functional. It also, however, presents a barrier against research. But this barrier can be turned into an advantage. Because there is no authoritative voice on how a collegial court arrives at a judgment, there is an opportunity for scholarly analysis, which is also always an opportunity for a new understanding of the law. Because you do not *really* know and because there is no one biased authority, there may be many voices to inform our understanding of a given case. Yet there is no way to really see the practices of deliberation.

With the caveat of my obligation of secrecy in mind, I want to shed some light on what you are indeed allowed to know about the deliberation process in the Federal Constitutional Court. Also, I would like to point out some aspects at risk to remain hidden in much debate about the headscarf "case." Understanding the set of issues underlying the ruling will allow us to better understand the filters that were at work. Namely, this specific instance of speaking the law involves questions of legal pluralism, regarding the actors who were involved, the way legal arguments work as frames of an issue, and the nature of compromise.

C. Multiple Norms: Legal Pluralism, Embedded Constitutionalism

Practices of regulation do not deal with any one set of rules. Speaking law constitutes more than applying one legal formula or one single principle to the matter at hand. As the German term, *Rechtsprechung*, suggests, speaking laws, like interpreting statutes, is always a broader claim to justice. Yet even on the level of application, there are, from an interdisciplinary point of view, always multiple norms at work. If we seek to understand law as practice, legal pluralism matters.

Conflicts surrounding "the case" illustrate this point. There is a state law set of formal rules that address the employment of teachers in public schools. There are also rules that govern the organization of school itself. Those norms have been created by democratically elected parliaments and are often driven by the executive and by a specific conglomeration of

interests. In addition to national or state laws, constitutional law and international law guarantee human rights. Then, there are the formal rules of religious authorities—in this case, Islam—as classic phrases interpreted again and again by different groups of scholars are bundled into schools, including critical scholars who provide re-readings of Islamic texts. As such, the issue of veiling or wearing a headscarf provides a case in point for understanding legal pluralism as the multiplicity of norms that inform and influence any social conflict, ranging from personal habits and informal cultural norms to religious rules and, in some cases, also to state-made or state-endorsed statutes. We need to locate the law within such settings.⁴ There is a specific normativity, colliding with secular state norms, that is imposed by religious leaders on a larger or local scale or by members of a given family. Furthermore, there are informal rules, yet rules nonetheless, such as habits and norms of conduct, which are highly contextual, but are driven by majority practices that define what is considered normal. What, then, is “the law” to inform “the case”?

All of these rules and types of prescription differ in their reach, scope, and content; they also overlap and are contingent. To decide, or in fact: to agree on a decision, is to intervene in a complex set of relations. As one example, in Germany at this precise moment, the dominant informal norm concerning headwear is to not cover one’s head in a building or when the weather outside permits, except as a distinct form of fashionable practice. This is quite different from the past and thus, also differs from those norms still followed by older women in Germany and in rural communities, where covering one’s head is still a common practice. But the hegemonic norm that suits the majority of non-head-covering individuals follows a non-praxeological set of religious beliefs—namely, versions of Christianity, in which you cannot judge a non-head-covering person on the basis of this practice. Does this matter considered in light of a constitutional or human rights guarantee of religious freedom, and in light of a prohibition of the state’s privileging one religious belief over another?

Specifically, decisions on fundamental rights need to address legal pluralism. Different from regular courts, constitutional courts and international courts are called upon to find ways to deal with the issue of competing forms of regulation and normativity because they have the power to invalidate law, to reject international obligations or national exceptionalism, and to pave ways through the new obscurity⁵ in which we live. Therefore, the German Federal Constitutional Court discusses the European Convention of Human Rights, as interpreted by the Strasbourg Court. This is what I call “embedded constitutionalism”: A national application of constitutional law taking the surrounding varieties of law and international obligations into account. The headscarf case is located in Germany, and thus, constitutionally speaking, situated within a specific set of relations between the German state and “the church,” which encompasses all religious organizations recognized by the

⁴ See *LOCATING LAW* (Elizabeth Comack, 2d ed. 2006) (discussing Canadian cases in the context of race, class, and gender to understand the role played by law in maintaining or undoing inequalities).

⁵ Jürgen Habermas, *The New Obscurity*, 11 *PHILOSOPHY & SOCIAL CRITICISM* 1 (Phillip Jacobs trans., 1986).

government—primarily the Catholic, Protestant, and Jewish faiths. This differs significantly from the French system of *laïcité* or the British and Danish system of state-churches. To make sense in Europe, this must at least be recognized. In addition, France and Germany and many more nations are bound together in the European Council, governing the European Convention of Human Rights, and in the European Union, as a space of shared values, which is now articulated in the European Charter of Fundamental Rights. When the German Constitutional Court decides a case, it is embedded in these transnational configurations. Thus, a German decision has to take those other perspectives into account. Here, legal pluralism matters.

In addition to the plurality of norms in a stricter legal sense, to do justice—in a broader sense—to the conflict at hand, courts also need to address other norms. Regarding wearing a headscarf or a veil, the praxeological nature of religious rules in Islam matters. The Q`ran is mentioned in the Federal Constitutional Court judgment, which refrained from privileging one interpretation over the other, but accepts a plausible interpretation of the religious belief to which one adheres. Because it is not for the state to define the rules of a religion and because a state governed by a commitment to protect fundamental rights has to recognize and respect the rules that believers deem to be mandatory, those women who feel obliged to wear a headscarf for religious reasons have the right to hold this belief and to shape their behavior accordingly. Notably, it is not the prerogative of the state to adjudicate whether wearing a headscarf or a dress code for head coverings for Jewish or Sikh men, for that matter, constitute proper religious beliefs, or are a good idea given other considerations such as a commitment to gender equality. What the Court states is that different religious norms may call for different sets of behaviors, and human rights should protect these behaviors. This paves a way through the multitude of norms that govern the case, in that normative pluralism matters but some norms nonetheless take precedence.

Returning to the non-legal norms, one may discuss the rules that govern gendered behavior, both in religious contexts as well as in organizations like schools and settings such as the education system, which are themselves highly gendered. Similarly, to understand “the case,” one would need to understand the rules that govern integration, and othering, to take the role of migration and racism into account. The headscarf case thus illustrates that legal pluralism matters, in its discussion of transnational law as well as in its recognition of non-state made forms of obligation.

D. Multiple Actors: Courts and Judges

In addition to legal pluralism understood as the multiplicity of norms, to consider law as a set of regulatory practices, it is also necessary to highlight the multiplicity of actors affecting the practice of regulation. Because we are considering “a case,” I shall start with the courts, particularly the role of judges.

In any given legal case, the judges are important actors in the performance of regulation. The naïve understanding of judges as agents who simply apply the law has long since disappeared, yet their authority remains. The term *Rechtsprechung* in fact reminds us that the judge has traditionally been considered the “mouth of the law”—*la bouche de la loi*; this again points to the meaning of law as the stating of norms and justice. Yet we also recognize that courts in general—particularly constitutional courts, human rights courts, and supreme courts—do not simply apply the law. Today, most people will not see legal interpretation as a simple mathematical computation of formulas. But what is it, then, that judges do?

To consider the very authority and power of judging, again, jurisprudence should be thought of as a form of regulation, as an ongoing practice “doing” law. To understand how this practice of regulation functions, one must drop mere references to such and such a court and such and such a judge or Justice, and develop an understanding of courts as institutions with a set of actors that perform different tasks in a variety of contexts.

To understand how courts function, one may look at courts as the organizational context in which a specific type of regulatory practice takes place, one with a specific set of actors. In doing so, organizational design and organizational culture come to matter. To understand adjudication as a regulatory practice, one would need to know how it is performed not only with its own history,⁶ but also with its own set of rituals, rhetoric, and forms. Here, sociological and ethnographic studies may help us to understand how organizations work; micro-sociology and psychology can be harnessed to analyze social interactions within law; and finally, insights from political science can be used to understand how structures of governance and power relations intersect with law, for example.⁷ With the use of these analytical tools, “the case” might be seen not only as the effect of a regulatory practice, but also as the effect of a specific institutional design produced in a specific organization’s culture, with its own norms and rituals.

Subsequently, we may ask in what ways the courts are, for example, gendered. Based on the history of legal institutions and in light of the nature of political power, it is highly likely that courts of law must be considered heteronormatively male. If this is correct, one might ask what happens when women enter the court, when people—litigants, lawyers, staff, justices—start to queer or change formally male courts, or displace other normalities. Yet before we address these additional issues, a closer look at the judges seems worthwhile. Who are the individuals who decide “the case,” in the organizational context of courts? Who are, in the case of the German Federal Constitutional Court, we Justices? What exactly do

⁶ See generally JUSTIN COLLINGS, *DEMOCRACY’S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT, 1951–2001* (2015).

⁷ For a summary of these perspectives with further references, see generally BAER, *supra* note 3.

we do? How did we get there, what has “made” us who we are, and who or what do we become, as Justices?⁸

Legal systems differ tremendously in these respects. When it comes to appointing judges, their length of terms, their status, pay and position, qualifications and biographies, the degree of visibility they have to the public, and the amount of room allowed for their personal visions and professional and personal identities, there are many interesting variations in this world. To stick with my own example, the German Federal Constitutional Court is neither a regular court, nor is it a supreme court. Rather, this court is an institution with the sole and special mandate to adjudicate constitutional law. It is composed of two Senates with eight Justices each, who are elected by either the *Bundestag* as the federal parliament or the *Bundesrat* as the assembly of the states. Because political make-up varies, this already allows for changing preferences in ideological assumptions concerning Justices. Additionally, the Justices are proposed by various political parties based on their success in elections, thereby allowing for visible preferences across the spectrum. Yet the election of a Justice also requires a two-thirds majority agreement, which is based on the idea of finding a candidate the opposition can also agree to. Thus, institutional design fosters a certain scope of, yet no unlimited plurality regarding a Justice’s politics.

Yet we know from sociology that there may be much more that distinguishes judges from one another than their political party allegiances. In socio-legal studies of courts, the individual factors of judges’ biographies, including their training and professional identities as well as their specific experiences in specific institutional contexts and cultures, have all been identified as important. All of these factors seem to contribute to how judges decide. Again, the challenge is that we do not really know how deliberation works, because of their secrecy. Neither do we very well know how decision-making works in general, and how one’s biography affects it. To inform nuanced critique, one must know more.

Within German legal sociology, there is a long tradition of *Justizforschung*—research on judges—which began as a critique of what was perceived as the elitism of the bench.⁹ For a long time, and in no small part under the influence of Marxism and Neo-Marxism, such elitism was seen as solely class-based. Today, however, more nuanced studies indicate that there is a problematic shortcut from family background to decision making. In addition, based on the subsequent insights offered by gender and critical race studies, we now know that other hierarchies besides class operate in all social settings, including institutions such

⁸ See Sebastian Jäckle, *Pathways to Karlsruhe*, 25 GERMAN POLITICS 25 (2016) (providing commentary on some of these existential questions that Justices face).

⁹ See Hubert Rottleuthner, *Perspektiven der Justizforschung*, in 21 DEUTSCHER SOZIOLOGENTAG 212 (Friedrich Heckmann ed., 1983) (providing a classic summary of the tradition of judicial research and noting that socio-legal studies and legal realism in the U.S. drew significantly on this German tradition); see also Hermann Kantorowicz, *Some Rationalism About Realism*, 43 YALE L. J. 1240 (1934); see also James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399 (1987).

as the courts, and that class is often sexualized and racialized as well. May this inform our understanding of “the case” as well?

As always, and similarly to the class-elitism-shortcut, one needs to beware of the essentialism fallacy. Early twentieth-century critics of the courts already noted that the point is not just who Judges “are.” Certainly, it matters who makes a decision in a given case. Yet the question may be more properly posed as to how deliberation is framed and shaped by class, or gender, as socially meaningful markers of inequality. It is not that men and women judge differently per se. The question is when and how being a woman on the bench—or a man—matters, in what ways does this matter, and how do these differences play out. Alternatively, essentialism has not gone out of fashion. In fact, it remains depressingly common. In the headscarf ruling, some have indeed assumed that there must have been a sex-based difference in how the Justices regarded the conflict, and that the women would assume a particular position on the issue. Notably, it is less often supposed that particular positions are expected of men, as men. Others may have attributed a particular argument to being German or being brought up a Christian. Here, the way judging is attributed to biological sex or the way nationality is cited as a coded way to talk about race or religion still proves highly attractive because it relies on easy stereotypes and bias.

Gender studies have shown again and again that sex is relevant, yet not determinant, of behavior. Gender matters as a much more elaborate concept of the construction and meaning of sex. Indeed, gender studies have taught us that one makes essential sexual differences as a heterosexist dichotomy by looking for the sex or gender difference in judges’ deliberations. Instead, to understand ways of judging, we need to think more carefully about all of the ways in which perspectives on the headscarf issue are gendered and marked by other factors as well.

If gender inequality is understood to be the effect of the allocation of privilege as a normalization process, this form of inequality can be theorized as a bias that people retain, particularly when their sense of normality goes undisturbed. The point—to be clear—is that social divisions are multidimensional, complicated, and affected by intersectional identities. They are not only complex, but complex in highly specific ways, because complexity is itself political.

To use the example of the headscarf ruling, one might then ask whether it matters that three of the eight court Justices were women and five were men. Was the deliberation really affected by whether or not the Justices are parents, whether or not they enjoyed school? What is the impact of having been raised a Christian, or of being an active believer or an atheist? Does sexual identity matter? If so, how? My personal experience certainly matters to me and to how I see the world. To know exclusion matters, as does pride, and to enjoy success matters, as does the experience of being different, or experiencing oneself as part of a community. Moreover, to be viewed with a mixture of voyeurism, curiosity, and skepticism, and sometimes even hostility or disgust, also has an effect on you, both in private

and in your judicial role. It affects the manner in which you “speak” law/justice concerning fundamental rights. Yet this only says so much. It is still mostly unclear as to what exactly these differences may entail.

Essentialist assumptions are widespread regarding the practice of wearing headscarves as Muslim, yet pluralism reigns. In fact, a range of positions can be found on this issue amongst women, men, liberals, conservatives, the general public, Muslim scholars, scholars of Islam and religious diversity, representatives of a secular state, Christian denominations, or Jewish communities. Why does anyone think and argue the way they do? There are not only many voices, but also a plurality of positions within the pluralistic paradigm. This fact, as well as our own lives and actions, must caution us not to fall for the essentialist fallacy.

Although some specific aspects of judges’ biographies matter when it comes to deliberating over a given case, because they inform patterns that make sense of legal arguments, there are also positions and situations that inform individual activity. Therefore, to understand judges as actors behind a case, additional factors matter. To name but one, it may matter greatly whether a judge has always adhered to the mainstream in her or his decisions, or is used to being an outsider. Similarly, judges’ current ways of existing in the world matter because they inform her or his behavioral and epistemological presuppositions.

Thus, gender and equivalent factors matter but in ways far more complex than the stereotypical replication of the man/woman division, the upper/lower class scheme, or the German/migration background allows for. Judges are always gendered, marked by class, and racialized, but their actions are not in any sense fully determined on the basis of their biological sex, their class, or race. Indeed, studies of judicial deliberation that place an analytical focus on gender, always discussed in conjunction with class and race, support the call for more diversity on the bench.¹⁰ But this call is not based on the essentialism fallacy; it relates to a much broader argument about the need for change in the judiciary that includes an awareness of processes of legitimation, representation, and inclusion, while taking account of the practices of deliberation as such.

E. The Form of the Case: Access and the Politics of Knowledge

The headscarf case can be seen as an intervention into legal pluralism that was made by a legal organization, a court, and was co-written by the eight different individuals who were appointed as Justices there. Yet the ruling was produced by far more people. As such, the actual ruling is just one instance in a process that involves many different actors. How then can this process be better understood?

¹⁰ See generally WOMEN IN THE WORLD’S LEGAL PROFESSIONS (Ulrike Schultz & Gisela Shaw eds., 2003); GENDER AND JUDGING (Schultz & Shaw eds., 2013); ERICA RACKLEY, WOMEN, JUDGING AND THE JUDICIARY (2013).

The headscarf ruling had a beginning. If we discuss the overall conflict of which the court decision is a part, the beginning is constituted by the plurality of norms mentioned above. Yet if we focus on the regulatory practices that are involved in the court decision at hand, the beginning of the case is the litigants' action. In "the case," two women went to court. This is important because it often goes unmentioned. Yet if there is no such activity, no mobilization of law, then there is no case. Legal tribunals do not freely choose to deliberate over cases or the issues at hand. Courts are responsive actors, who speak when they are called upon, with some choice on whether, and more choice on how, to respond to a given issue.

Regarding litigation, neither the subjective nor the objective conditions by which individuals gain access to the court's regulatory processes should be taken for granted. Not everyone thinks of themselves as having the subjective right to seek redress in court; as has been shown in work on legal consciousness informed by feminist and critical race theory, those who are not privileged are particularly reluctant to access what they perceive to be a legal privilege. Even those who do think they have the right to gain access to the legal system do not all exercise this right. Many lack the necessary—financial and educational—resources to seek legal redress. So, what is it that allows for the headscarf decision, in which a court responded to a challenge brought by those who, in the past, had not always taken this route?

In the conflict surrounding the wearing of headscarves on which the German court had to decide, a Turkish-born, now German, public school teacher of elective Turkish language classes refused to obey the school administration that had ordered her not to wear her headscarf while teaching. She wished to adhere to the rules of her religion. Within the same case, the Federal Constitutional Court addressed the complaint of another Turkish-born, now German, public school employee, who had been trained as a social worker to resolve religious and cultural conflicts in schools. She also refused to remove her headscarf in school. In an effort to reach a compromise with the school, she offered to cover her head and neck with a pink woolen beret rather than a headscarf, yet the administration insisted. She fought back and then went to court. Both went to the court not just once, but three times, from the Labor Court to the Federal Labor Court. After these lawsuits were unsuccessful, they then lodged a fundamental rights complaint to the Federal Constitutional Court—as Germans refer to the court synecdochically, *Karlsruhe*. Had they been unsuccessful, they might have continued their efforts to have their rights redressed in Strasbourg, a U.N. committee, or even Luxembourg—one of the many legal forums for addressing rights in Europe today. But any analysis of the case must take this itinerary into account. One should consider how "the case" was brought to and handled in the various courts, not just in final court. How did the narrative of the case change? Does narrative depend on the type and level of court in which it was tried?

There is a specific way in which courts tell the story of the case, in terms of the so-called facts. Yet it is well known that there is a great deal more that was and is involved. In the headscarf case, the complainants were women as well as members of a religious minority

within Germany. On two counts, their complaint is thus an exception to the general rule of avoidance and silence that pertains to outsiders in law. Insisting on having fundamental rights and speaking for oneself first entails a person considering herself to be a legal person who holds such rights. It also means claiming a normality that was not originally designed for you and which has traditionally been assigned to those in positions of privilege. This is particularly evident in conflicts concerning “another” religion—for example, Islam—as it is clear in relation to the rule of patriarchy. Hence, the presence of a Muslim woman in court, outside of legal conflicts surrounding marital and family issues, is anything but paradigmatic. Furthermore, Germany has a predominantly public school system, in which teachers traditionally work as civil servants. For a long time, civil servants were considered state actors, and could not be seen as individual bearers of rights like other citizens. Therefore, what we see when two Muslim women teachers gain access to the court is a disruption of our horizon of expectation.

This disruption, despite portrayals in the media, is most often not an individual heroic act. In fact, and in most cases that receive attention beyond the actual parties involved, it is not only the complainants who gain access to fundamental rights. Lawyers are also involved in strategic litigation and in the struggle for fundamental rights. It is often a segment of civil society that provides backup for litigation and in publicizing the case. Thus, in point of fact, the regulatory process began when the two teachers decided they had a recognized legal right and went to see a lawyer. Within interdisciplinary legal studies, research has shown that stories change when people speak to lawyers and judges or members of law enforcement. The issue here is the translation of life events into legal proceedings, and we must understand this translation as a significant activity in its own right.

In Karlsruhe, it is not necessary to have a lawyer to lodge a case; a case can be brought by an individual citizen. The Federal Constitutional Court was founded as a citizens’ institution after the collapse of the Nazi regime in response to the regime’s corruption of the justice system. It was intended to counter the danger of majoritarian rule and never to rely on legal elites. Yet, in fact, and this is an important part of the narrative, the citizens’ court is more a myth than a reality, because most if not all of the larger and more important cases are driven forward by lawyers. One has to exhaust all other legal remedies before one may lodge a complaint with the court. In addition, the Federal Constitutional Court expects litigants to produce a highly refined set of arguments before the case will be admitted for decision.

For the most part, then, lawyers are involved. What do we know about them? How do they filter the story of a case and how? What about the performative quality of a written application? You do not need experience as a judge to know that this written text is highly relevant, and beyond the legal quality, this includes how the application appears, whether it contains typos, the typeset it uses, its formatting, and the text’s narrative quality. On the basis of what we know from gender studies, there will also be naturalized assumptions about sex. Overall, understanding that lawyers have a voice of their own adds to the recognition of law’s pluralities.

In addition to complainants and their lawyers, another group of people also has access to the regulatory process of claiming fundamental rights. In the first German Federal Constitutional Court headscarf decision from 2008, the Senate staged an oral hearing. There is no obligation to do so in this type of proceeding, which is why the First Senate did not decide to do this in a later case, where it relied instead on written expertise and documented evidence. But in 2003, the court invited scholars, mostly from the field of sociology, and school administrators to discuss issues deemed relevant to the decision. Here, non-legal knowledge entered the scene in person, while in all other instances it does so only in writing. How is such knowledge translated into law and what gets lost in translation?

In a decision of the Federal Constitutional Court, a list of authority figures who were asked for their opinions is offered, as well as citations from scholarly works and references to other relevant cases and statutes. Who gains a voice in the decision, and who else gains access to the court and its regulatory speaking of rights by way of being cited? The question of whom or what is cited as relevant is subject to the Justices' deliberations in court, and practices differ. But the issue is to no small degree political because the choice of citations attributes authority to some sources and silences others.

To focus further on the topic of scholarly work in court rulings, it may be important to recall that there are many supreme or constitutional courts in the world that never cite an article or a book. The Federal Constitutional Court does so occasionally. What remains hidden in this process is that Justices read all that can be found, based on systematic research by the clerks who prepare a first treatise that is of relevance to the deliberations—namely, every legal article and book published on the issue at hand. In a legal culture such as Germany's, scholars constitute an important epistemic community that contributes to the speaking of fundamental rights in a rather loud voice. Scholars, moreover, have their own agenda. Let us consider, for instance, the scholarly community that teaches *Staatsrechtslehre*—the law of the state, both constitutional and administrative, now increasingly called constitutional law. This community is still predominantly and hegemonically male, heterosexual, and mostly autochthonous, to mention just some of the characteristics at work. As an epistemic community, which may be more important, it is deeply invested in specific assumptions about law, the state, or justice, which results in a specific path dependency, all of which may inform a particular stance in a given case.

What then happens when non-legal scholarship is introduced? In the Federal Constitutional Court's preparations for deliberation, lots of sociological studies and data are dealt with, and all of the Justices are given this information to read. To the scholars out there, this means: Keep on publishing. Even if your voice does not figure explicitly in legal arguments and written decisions, a plurality of voices is taken into account, and this certainly contributes to the laws applied to fundamental rights, at least in the background.

In the second headscarf ruling of the German Federal Constitutional Court, as always, the politics of knowledge were also at work. One must take note of who is seen as an expert and on what issue and what kind of knowledge is adjudged insufficiently expert. For instance, it is important to understand the religious norms of Islam when you discuss the wearing of headscarves. Yet expertise on this matter is complicated by the variety of interpretations that exist, and by the claims to authentic authority involved in all quests around religion. Also, to discuss the conflict surrounding the wearing of the headscarf, one definitely needs knowledge about gender. Thus, it is important to pay attention to data that is delineated on the basis of sex'. Yet in addition, one needs an understanding of gender, to take intersections with other inequalities into account where possible.

Besides complainants, lawyers and scholars, both legal and non-legal, other voices that contribute to the speaking of law are provided by the media, at least in prominent cases held in the highest or constitutional courts. In fact, what most individuals know—or do not know—about the law, and about the headscarf ruling, indeed about any legal conflict and its implications, is brought to them via the news. News is created by reporters and journalists. Just like the judges, the lawyers, or the academicians, journalists have their own identity characteristics, their path dependencies, and their work is also shaped by specific conditions. Today, the media is under severe pressure to produce copy as rapidly as possible. Media sources thus often rely solely on the press release issued by the court to report on the case. These press releases are textual creations in their own right. In Karlsruhe, they are produced in cooperation with Justices, but nonetheless involve a short interpretation of the ruling itself. In media reporting, the conflicts dealt with by courts are inevitably much more abbreviated, and they are often sensationalized, as well as individualized, despite the collegial nature of decision-making. The way they are constructed needs to be studied to enable us to understand their potential shortcomings. Many politicians who then proceed to make statements about court decisions also rely on the news or press releases. Who, then, speaks of fundamental rights here? It is definitely worth investigating those who report on the law and legal proceedings as a very particular type of speaker.

Thus, to understand the practice of speaking of fundamental rights today, there is a need to analyze who gains access to the process of speaking. In a discussion of access, the demographics of the litigants who are involved matter, as do the lawyers, academics, or experts who are allowed to speak, and, by contrast, to those who are silenced or excluded from the process. The speaking of fundamental rights involves knowledge production, and an understanding of the deliberative process in context¹¹ helps us to grasp this process. The story of the wearing of the headscarf in a public school is but one of many.

¹¹ See Johannes Fried, *Wissen als Soziales System*, in *WISSENSKULTUREN* 12, 31 (Fried & Michael Stolleis eds., 2009) (arguing that “legalese” invaded Western culture from the thirteenth century onward).

F. Legal Arguments as Framing

As has been shown, there are subjective and objective factors that inform whether or not people have access to the law, and there are many actors and voices at work in this process. Over time, one may understand “a case” as a conflict that is transformed into a process of deliberation, which results in a ruling that retells the story and presents legal arguments to support a decision.

It is these legal arguments that are first and foremost labeled as “a case.” They are a legal shorthand for life’s complexity. Others have pointed out that there is an injustice in this process because the law can never tell the entire story.¹² Yet is there an entire story of a case to be found anywhere, ever? The discursive force at work in the proceedings renders court decisions and certain voices authoritative so that some events are told and thereby, deemed relevant, and others dismissed. One way to look at this is to understand the speaking of law as a process of inclusion and exclusion. Taking this into account, the larger issue of law’s pluralities that is being pursued in this Article may be best understood if we look at legal arguments as a type of framing.

Framing means that things might be told differently and that a frame dictates the way they are told.¹³ When life meets law, life is framed in the legal manner. This does not mean that nothing exists outside the frame of the law; there is always a subtext to the legal text. Yet to understand legal procedure, an act of framing allows us to understand the ways in which something is accepted and legitimated through being retold, while other issues as well as persons are excluded from the purview of the law. They do not figure there, are rendered irrelevant, and disappear. Law frames life in that it states and dictates what matters. As parts of this frame, legal arguments may not just be seen as aspects of procedure, considerations, perspectives, points, or positions. Instead, legal arguments and court decisions constitute authority because institutional design matters. Yet they constitute authority because they are anchored in a deliberation process specifically designed to be legal, not political. This anchor is defined by what we call “method” in adjudication or legal reasoning. Yet as is well known, method also has a political dimension.¹⁴

¹² See generally Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority*, in ACTS OF RELIGION 230–98 (Gil Anidjar ed., 2002); see Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 6, 19 (1990); see Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 IOWA J. GENDER, RACE & JUST. 531 (2013).

¹³ See THE EUROPEANIZATION OF GENDER EQUALITY POLICIES (Emanuela Lombardo & Maxime Forest eds., 2012) (reviewing the critical framing analysis); see also DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2015).

¹⁴ See Dieter Grimm, *Methode als Machtfaktor*, in 1 FESTSCHRIFT FÜR HELMUT COING 470 (Norbert Horn ed., 1982); see Grimm, *Constitutional Adjudication and Constitutional Interpretation*, 4 NUJS L. REV. 15 (2011) (providing an English translation of the German classic).

Contrary to a well-known stance within critical legal studies, however, adjudication is not simply indeterminate.¹⁵ Nor is it fully determined. Court decisions are different from other types of arguments because they need to be anchored in the law in order to be legitimate. Frankly, and particularly as a Justice of a constitutional court, it would be suicidal to leave the legal terrain because the manner in which we intervene in politics and the acceptance thereof entirely depends upon the legal mode we use. Again, this does not mean that court rulings are immune to politics. But for constitutional courts in particular, it is crucial that these courts differ institutionally and otherwise from politics to allow intervention in the political field.

In the headscarf ruling, as in most fundamental rights cases, there is little, but there is, authoritative text in the constitution on which to base one's deliberation. The *Grundgesetz*, or Basic Law, as the German constitution, explicitly and more elaborately than, say, the U.S. constitution, protects the rights of liberty and the equality of religious and other beliefs, gender equality, parental rights, and freedom of occupation. Article 4 Sections 1 and 2 of the Basic Law state: "Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable." Yet the 2015 ruling had a great deal of precedent material in the 2008 decision by the other Senate of the Federal Constitutional Court.¹⁶ In times of legal pluralism, the German court does also anchor its ruling in the European Court of Human Rights' interpretation of the European Convention of Human Rights (ECHR): it practices what I call "embedded constitutionalism." Other important participants in the conversation include lawyers and government entities who are invited to offer their opinion, as well as scholars and experts of specific fields who offer arguments. In Germany, lobby groups and civil society organizations rarely intervene, because there is no tradition of *amicus curiae* briefs, but some are invited by the Court, and via public forums many voices participate in the speaking of fundamental rights. To effectively inform a ruling, however, all of these voices have to be framed as legal.

Legal frames differ significantly. In the 2015 ruling, the Federal Constitutional Court made an initial decision about how to frame the case by referencing Articles 3, 4, 6, 7, and 12 of the Basic Law. It uses precedent to secure the case's anchor and legitimacy and employs principles that are firmly established as doctrine, which consists of generally agreed upon lines of argument. Yet, it does so with a specific starting point: A frame. In fact, in 2008, the Second Senate of the German Federal Constitutional Court focused on a discussion of whether you can accept a teacher's decision to wear a headscarf in school by looking at the

¹⁵ See generally ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (2015) (providing the classic critical position on adjudicatory issues); see also Rosemary Hunter, *The Feminist Judgments Project: Legal Fiction as Critique and Praxis*, 5 *INT'L CRITICAL THOUGHT* 501 (2015) (providing an interesting attempt to rewrite judicial decisions).

¹⁶ The German Federal Constitutional Court has two sets of Justices (the First and Second Senate), consisting of eight Justices each, each serving for a twelve-year term.

character of the school, the nature of teaching, and the pupils and parents involved. In 2015, the Justices started the discussion by asking whether the teacher felt obliged to wear a headscarf according to her religion and then, eventually turned to the limits of that freedom. In this frame, the court also needs to take into account a long line of precedent specifying the meaning of religious freedom as being based on self-determination and holds that it is not for the state or the courts to decide whether religion mandates a norm or not. It also needs to discuss the line of precedent elaboration on the meaning of religious freedom in social encounters, which states that there is no right that protects one from being confronted by another citizen's expression of her religious beliefs and that the constitution endorses a society in which religious expression exists freely. Eventually, all points that inform the 2008 decision are taken up as well, but the frame has now shifted.

Certainly, this is the legal perspective and form of argumentation. The analytical tools provided by literary studies and linguistics may indeed help us to further understand how courts speak towards fundamental rights. Law profits from understanding that structure and style possess a material efficacy in legal texts and rulings. In addition, there are fascinating ethnographic, sociological, and historical analyses that help to understand the meaning of veils and veiling in various societies, religious settings, and to understand the informal rules that govern the regulation of this practice, which should also inform our understanding of "the case." We need close readings to inform nuanced critique. Again, this demonstrates that there is nothing indeterminate in the law, and that legal processes are not just ideology, but informed by a variety of factors. Courts, as a specific actor doing law, are not immune or isolated from non-legal impact. Yet there is a specificity of legal arguments, different from others, to be understood from an interdisciplinary perspective.

One needs to inquire into the effects of the rhetorical quality of legal texts, into the metaphors they employ, and the images figured forth by their words. Close readings of legal texts and rulings brings to the fore a plurality of visions. One example is the politics of naming. If you read the German Federal Constitutional Court headscarf decision, you may note that it is written in gender-specific language and does not use the generic masculine form that is still mostly authorized in German to represent everyone. Does this matter, and if it does, how so, and to whom? Whom does a court explicitly address with its words? Are fundamental rights spoken differently when they are, literally, spoken for men or for women only? Is this merely a cosmetic issue, or is it worth fighting for words? You may also notice that the Court attempts to characterize Muslim women carefully and to be specific about the type of headscarf worn by them. Similarly, if you read the many Senate rulings of the German Federal Constitutional Court on cases that have been brought successfully by transsexuals, you shall notice the politics of the way in which sex is referred to. Once again, then, is it worth fighting for words?

In addition, to understand "a case," one must see the nature of court rulings as a compromise. To some, compromise is anathema to fundamental rights. They hold that the foundational legal principle is not to compromise on the very basics—the very meaning of

being human, and as such, a legal subject of fundamental rights. Yet at the same time, if fundamental rights are understood as rights that protect people in terms of their living with others, then they are always already in some sense compromised. Nonetheless, compromise is often seen as typical of politics but not of law. In fact, compromise does not signal the clarity of a decision, the sword of Lady Justice, and may even endanger the authority of a court. In particular, a constitutional court must function differently from the realm of politics, which thrives on compromise. It needs to be clear and right. Compromise appears shallow, while a unanimous decision by the court signals strength. Yet in our regulatory practice, as a collegial court, compromise is as central as it is in every collective.

In Karlsruhe, we do not only discuss a draft treatise of the decision, the key points that are to be made, the road to be taken, and the arguments we consider to be convincing. Following that, a draft of the decision is circulated, which has been written by the reporting Justice, and all of the Justices submit suggestions for revision. In the last session, we then discuss suggestions for every word, sentence, comma, citation, precedent, and comparative note. To reach consent on a final version, a compromise must be made. In the headscarf decision, as in any other decision, there will have been many convincing arguments for framing things differently. There is also dissent. Certainly, there was discussion as to whether to declare any prohibition of wearing the headscarf in schools unconstitutional as a violation of individual rights. After all, it is established doctrine that the individual does not have to be accepted by the majority in order to remain in the collective; rather, the state carries the obligation to allow the individual to stay, or here, the teacher to wear the veil. Instead, we reached a compromise in holding that in general the headscarf may not be prohibited, in order to protect religious liberty and to ensure gender equality for women who wish to retain their positions as public school teachers. Yet in order to deal with extreme conflicts that surround the wearing of headscarves, states may nonetheless prohibit teachers from wearing them in a school district for a limited period of time to ensure that schools can indeed function. This does not necessarily result in terminating employment but calls for a proportionate reaction, such as relocating the teacher to another school.

G. Understanding Practices of Regulation

Up to this point I have tried to list a number of helpful approaches to understanding “a case” such as that of the headscarf ruling. The key appeal is in its not discussing court decisions as yet another type of text or as a single emanation of a legal culture; rather, the effort is to understand the specificities of certain practices of regulation. But it is impossible to encapsulate all facets of this practice. I can only tell you so much. As I have mentioned, I have an obligation to keep deliberations secret; the Justices are called upon not to lift the veil. I am under a legal obligation, and bound by a sense of professional ethics, as well as institutional loyalty, not to tell you how we really reached the headscarf ruling. Perhaps more importantly, I am protecting myself by not telling you. Generally, the more united we Justices stand, the harder it is to attack us and the stronger we are. But also, on a personal level, the less you know about where I stood in relation to this case, the more freedom I shall

have in the next deliberation. In collective decision making, it is extremely important to stand your ground as firmly as possible, but also to be open to reasonable change. A foreseeably stubborn colleague cannot be part of the process of finding common ground, which is what we need because every decision we reach as a Senate, and thus as a collegial institution, is a compromise.

Insofar as jurisprudence is prudence concerning speaking the law—*Rechtsprechung*—court decisions may be seen as a form of speech. This helps to shed light on the speaker, the audience, the tone, and the rhetoric involved in what is said as well as the site of the saying and its technological and medial setting. A focus on a given ruling, “the case,” often sheds light only on one dimension of it, yet there is much more to law. The case focus is a focus on the court’s version of one moment in time, translated into law and specifically framed, within a legal perspective. But a case is also an experience that was brought to a court’s attention, and as such already a framed version of a conflict. Eventually, this becomes a legal argument, rendered as a written text to document the deliberative compromise that was reached by a collegium—a ruling comprises a set of answers to a specifically filtered set of questions. If we wish to comprehend the multiple dimensions of law, we need to scrutinize these instances as specific practices of regulation. In the headscarf controversy, as in others, many different types of norms are at work. If we understand law as a practice, we also allow ourselves to hear all of the voices that enter into a given case, to ponder who has been rendered silent, and understand the politics of knowledge at work in the law. To seek the beginning of a case brings attention to the conditions of gaining access to the law; this attention would profit from critical analyses of gender and other social inequalities. Like all social practices, legal decision-making is marked by multidimensional inequalities in various ways. As a starting point, it is gendered, and we know a lot about this process, but still need to learn more and keep studying them.

The issues raised in this Article are suggestions for further research in interdisciplinary legal studies, and for empirical studies of law as a social, economic, cultural, and first and foremost a political phenomenon. Here, fundamental rights are neither only an idea nor ideal. Because I keep trying to deliver the promise of fundamental rights, as a Justice, I would certainly appreciate knowing more about what we do when we practice law. More generally, constitutionalism, with its promise of guarding fundamental rights, shall certainly profit from an understanding of its practice as grounded in that plurality that is the law.

