Tensions and Synergies panel
Comments of Renata Uitz

Most often when people speak of tensions between freedom of religion and other rights we do not face a real conflict, but get caught in **false dichotomies** – produced by our fascination of spectacles.

The usual phenomenon is well familiar to all of us in this room: due to an unfortunate incident an issue which has been a matter of concern for a political community becomes an intellectual and political **lightening rod**. In a matter of months participants of the ensuing debates clarify and then essentialise their positions, competing positions crystallize with each debate, and finally the contenders reach their respective extremes and clash with each other.

The issue of the first decade of the new century was undoubtedly the clash between freedom of religion and women's rights, which got captured in the headscarf debate. The second decade appears to be marked by the clash of religious freedom and gay rights, as expressed in the bitter contestation over **same-sex marriage**.

While politically it might be sensible to speak of the clash of gay rights and religious liberty, and promise victory in a zero-sum game, a second look at the landscape offers a more nuanced picture, in which the spectacular clash fades away rather quickly.

Taking the same sex marriage example, I would like to introduce three points for further consideration:

1 – claims for same sex marriage are made at a time when family law (and the concept of civil marriage with it) is undergoing profound transformation.

The transformation clearly results in family law's detachment from its religious origins, as far as the consequences of marriage (or the lack thereof) for the purposes of public administration is concerned. Consider the institutionalization of no-fault divorce or the equalization (normalization) of the legal status of children born out of wedlock.

These developments in family affect the concept of marriage: the sacrament of marriage has gradually been replaced by an agreement which is a matter of free will, with consequences in property law and inheritance. At the same time, legal systems started to offer meaningful alternatives substituting to the consequences of marriage, in order to protect the rights and interests of those who lived their lives outside wedlock – irrespective of whether this was a matter of their choice or an unfortunate reality in their lives.

This transformation has been assisted by human rights law, and took place at the very same time when similar important developments strengthened the protection of freedom of religion as a human right. The transformation of family law may be read not only as a secularization story, but also as a story of

empowering those who were vulnerable for centuries (the bastards and the divorcees).

2 – as much as religious communities are not homogeneous about their takes on gay rights and same sex marriage, **the LGBT community is divided on the question of marriage**. Many in the LGBT community find that the fight for same sex marriage is not more than the reproduction of the hetero-normative ordering of the world within the LGBT community. As a result, committed gay rights advocates prefer civil partnership or civil union to the recognition of same sex marriage. Even when same sex marriage is opened up many committed gay couples do not get married – similarly to many committed heterosexual couples.

Furthermore, the recognition of same sex marriage is not the sole or most important issue for the LGBT community – it is one of many agenda items. And indeed most issues of common concern for the LGBT community are much more mundane and do not involve a clash with religious liberty – consider succession in tenancy or access to health insurance.

3 – it is a grave mistake to juxtapose believers and gays to each other in the narrative of the great clash of religious liberty and gay rights. In reality, all religious communities have members who are gay. Religious communities may attempt to shun them, drive them away or compel them to suppress their 'tendencies.' In reality, any response which is short of the complete acceptance of gay believers is fated to generate tension within a religious community, with lasting consequences.

By now it should be obvious that the false dichotomies mentioned in the beginning of this presentation are false not only because they are artificially generated, but because they are manufactured to **hide commonalities** between competing claims.

In maintaining the image of clashes the legal process is as much responsible, as the political process. When lawyers get involved in such cases, they will find a way to bring a **naked claim** to court. This means translating a complex situation to technical legal terms – and accepting that most of the nuances get lost in the way in the legal distillation process. A simple and clearcut claim makes a good case and increases the chances of success in court – and also contributes to cultivating the impression of deep clash which needs to be resolved to the benefit of one or the client, with no middle ground.

The foregoing is not to deny that freedom of religion as a fundamental human right might be in conflict with other rights, it only hopes to remind that we need to look at the conflicts more closely before we start essentalize them.

A conflict of rights which receives much less attention than some of the 'spectacular' examples is easily presented as a clash of freedom of religion and the right to private and family life. The most trivial example of such a clash is a **custody dispute** when a family breaks apart along religious lines. The all-too-usual scenario involves parents who decide to separate after one of them

converts to a non-traditional religion or one of them leaves a tight-knit religious community while the other stays. **(i)** The parent who stays with the non-traditional community and continues to live a life by stricter rules will often see his/ her custody of children challenged by the other parent or relative who lives the life with fewer constraints. **(ii)** The alternative scenario involves the parent belonging to the non-traditional religious community desperately challenging the custody of his / her former spouse, seeking access to the child who was left behind (visitation rights). The legal distillation process would then pitch one parent's freedom of religion with the other's right to family life or private life (to reunite with their biological child).

These custody cases (at least the ones in the European Court of Human Rights) have some common elements:

- Domestic courts do not look into the faith-based motivations of the competing parents for leading their life in a particular way, instead, dietary rules or the child's daily routine is translated as a 'lifestyle choice',
- in turn, the lifestyle choice gets analyzed in terms of its 'normalcy' (taking into account the best interest of the child). 'Normalcy' as a base-line refers to what is customary for children of the same age in the majority community – according to the challengers of custody and / or the national court.
- The parent who diverges from 'normalcy' may receive not only repeated by child protection services, but may also be subjected to psychological assessment and other fitness tests, to assess their fitness, despite their 'unusual' way of life.

In the Hungarian case, mentioned in Judge Tulkens' opening address (Vojnity v Hungary) the European Court of Human Rights decided to set the standard higher in order to offer more robust protection to the rights of the parent who sought custody of his biological child despite his 'unusual' (meaning, faith-drive lifestyle).

Reading the custody dispute in a slightly broader context, it tells not only a story of a conflict of rights as abstract legal claims: the underlying conflict fueling the clash of rights is informed by **a clash between communities, typically between a traditional religious majority and a non-traditional minority**.

The assessment of 'normalcy' of a lifestyle will be based on proxies which are often informed by the majority's cultural and traditional values and routines. Where religiosity means going to church on Sundays, daily religious observance is out of the ordinary. In traditions where fear of hell is 'normal' children may have legitimate nightmares, but children who are afraid of 'flood' are having irrational fears – at least from the perspective of a non-Jehovah's Witness majority.

Following the above pattern, it would be an interesting thought experiment to put the headscarf debate, or the crucifix debate in a majority-minority matrix. Such an analysis is likely to reposition the narrative of clashes along a framework which highlights the **second nature of religious liberty claims: their deep connection with the prohibition of discrimination** – an angle

which often gets overlooked when questions are asked from the perspective of a dominant / traditional majority. This perspective introduces an emphasis on identifying the **vulnerability of the rights' claimant** – even in the face of the preferences of the majority.

The consequences of the though experiment, which introduces a religious majority vs minority angle to the base-line clash of rights analysis reintroduces those components of context into the analysis which are routinely screened out by standard legal analysis.

As a result, **courts** and **lawyers bringing cases before them have a special responsibility** in looking beyond the narratives of clashes and conflicts.

The special responsibility has at least two angles to consider, and explore further:

- the first one is the important of becoming aware of majoritarian biases in legal analysis which undercut (and sometimes demean) the claims of religious minority clients. Being lead by the routines and standards, conforming to the teachings of the majority / traditional religion of a country, results in de facto establishment of religion – after all, this means that the teachings of faith become the standard for all through judicial enforcement.

- the second angle is equally important, otherwise litigation of competing rights claims cannot offer a meaningful resolution of underlying conflict. This perspective requires considering multiple possible readings of legal claims, making sense of them in their broader real-life context.

Consider the following (not entirely hypothetical) scenario. The divorced employee dismissed by a religious employer who is suing to get reinstated can be seen as a revolutionary seeking to uproot church doctrine and even religious legal rules. But the same employee can also be seen as a desperate believer seeking inclusion or re-entry in a religious community where she strongly wishes to belong – if on slightly altered terms. (Otherwise the former employee would not sue, but would walk away.)

The role of the courts, and the role of governmental intervention in cases which involve not only clashes of rights, but also clashes between religious communities and communities of conscience and shared values is to provide a framework for peaceful coexistence and continuing dialogue. Courts siding with either the majority or the minority due to a preference for their teaching about the good life is likely to antagonize the parties and suppress the loser to second-class citizenship. As much as the state cannot force religious communities to adopt their doctrine according to judicial dictate or statutory requirements, in cases involving clashing rights claims **courts have to be mindful of biases and routines which may result in them making the teachings or practices of a religious community a standard for all in their jurisdiction**.