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Veiled Women: Open Threats?

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> The fundamental question: If it is unacceptable for a woman to be obliged by family or co-religionists to hide her face in public, is it acceptable for the state to oblige her to reveal it even if she herself does not want to?

On 14 February 2013, the Spanish Supreme Court brought down a decision that gave constitutional protection to the burqa. This decision was in contrast to political and judicial actions in some European Union countries, as well as at the European Court of Human Rights. The decision was based on a constitutional article (16.1) guaranteeing freedom of ideology, religion, and worship. Arguing that, in conjunction with European jurisprudence, it was not legitimate for a secular court to judge any religious matter, it granted the protection as a question of "ideology:" in other words, part of a framework of values and practices determining how a person lives her life. The argument of the court is revealing and deals with issues closely related to what in Canada are termed "reasonable accommodations," i.e. a manner of living together with religions, cultures, and practices distinct from those of the majority. But whereas the Canadian situation means making adaptations to accepted practices in specific cases, providing the changes do not impose undue

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hardship, the Spanish judgement makes a fundamental constitutional point. This point is one of freedom of choice in a democratic society: the choice to live outside the norms of local cultural practices, to deny oneself ease of social interaction with fellow-citizens, and even outside the constitutional right of free development of the personality (Article 10.1), providing the constitutional rights of others are not breached. The Court concluded that women wearing burqas did not breach the rights of others and indicated also that others do NOT have any legal or constitutional claim to be protected from the sight of a woman in a garment that covers her entirely, including her face.

The matter was appealed to the Court because in 2010, the city of Lleida in Catalonia had passed and promulgated a bylaw prohibiting the wearing of a face veil in any municipal building or space, and also on public transport. Although Lleida was the first municipality in Spain to pass such a measure, it was not alone. Reportedly, up to August 2014, thirty towns and cities have debated it, and seventeen have passed such a measure, though only seven have promulgated the bylaw.[3]

Similarly, on 23 June 2010, the Spanish Senate debated a motion introduced by the opposition. The motion (not a bill) urged the government to bring in legislation to ban the burqa nationwide. The motion was passed, but the government took no action. Since 2010, and even since the decision of the Supreme Court, various motions and bills have been introduced in the Catalan Parliament to ban the burqa within Catalonia. Parties there agree that the burqa should disappear from public places and that it is offensive to any vision of gender equality. But there is disagreement on how the garment, and what it is stated to represent, should be made to disappear.

There is thus a significant conflict between legislators who repeatedly state that they are reacting to voter pressure, and the judges of the Supreme Court who are reacting to constitutional imperatives. It is also a conflict between two visions of Catalan and national identity, and additionally, between the individual right to choose a lifestyle and the collective right of equality for women.

These are conflicts taking place and fundamental questions being asked elsewhere within the EU, and also in Canada. Because they are fundamental questions in any liberal democratic state, these questions will doubtless continue to be raised on either side of the Atlantic, and these conflicts will continue to occur. And the issue will be addressed more sharply with specific reference to Islam,

[3] Camilo S. Baquero, "El 'no' al burka un brindis al sol", *El País*, 19 July, 2014. José Procedo, "Interior sugiere a los partidos regular el uso del 'burka' en la ley de seguridad", *El País*, 3 September, 2014.

because, as Associate Chief Justice Hassemer of the Second Chamber of the Federal Constitutional Court in Germany said on 2 June 2003, "Wieviel fremde Religiosität verträgt unsere Gesellschaft?"[4] He put this question of how much foreign or alien [the word carries both meanings] religiosity German society could bear when opening the proceedings to decide whether a civil servant could wear a headscarf (often deliberately and misleadingly referred to as a "veil") while performing her duties. But he was quite wrong in the important sense that, with millions of adherents, in 2003, Islam could no longer be considered as "foreign" in Germany or Europe. On the other hand, one might perhaps agree with him that it is "alien," though only in a limited sense, since, even in secular European countries and societies, Islam exists within traditions, views of national identity, values, and practices profoundly influenced by Christianity.

This argument of Christian influence on traditions and identity played a role in Germany following the decision of the Federal Constitutional Court in the case mentioned above. In the majority decision, the justices said that the headscarf did not represent values in conflict with those of the Constitution (§ 52) and that it would not prevent the wearer from fulfilling her obligations to work for the public good under the Public Service Act of Baden-Wurtemberg, the state where the case had begun (§59).[5] It then stated that there may be good reasons for incorporating increasing religious diversity into schools as part of an effort to promote acceptance by all parties, and thus contribute to integration (§65). However, if state parliaments did legislate, then there had to be equal treatment for the members of different religious groups (§71). Only Berlin complied fully with this directive. A number of state parliaments have legislated against the headscarf, and some included explicit provisions to maintain Christian symbols. In Hesse, for example, symbols that indicate "the tradition, strongly influenced by Christianity and humanism of the State of Hesse" are permitted.[6]

The extent to which Islam is felt to be "foreign" or "alien" in Germany became evident in the public reaction to President Wulf's speech on 3 October 2010, the 20th anniversary of reunification. He acknowledged the changes brought about in German society by immigration. He acknowledged also the Christian and Jewish foundations of the country, and then added a statement of what some people consider a self-evident truth due to the massive Turkish immigration to Germany: "Islam,

[4] See the *Frankfurter Allgemeine Zeitung*, 3 June 2003. "How much foreign/alien religiosity can our society bear?"
[5] The Court's decision is available at http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602.html.
[6] Hessicher Landtag, Drucksache 16/1897 neu, 18 February 2004.

too, has now become a part of Germany."[7] Reliable reports state that he had been advised against incorporating such a statement into his speech because of the controversy it would create, but he insisted on including it in the ceremony, which commemorated a turning point in German national identity.[8] The rejection of the statement was massive, and came from all quarters of the political spectrum and the population -- except from German Muslims.

A phenomenon of rejection was equally visceral in France and took a particular form: rejection of the "burqa" (meaning any face veils). On 22 June 2009, President Sarkozy announced that "[l]a burqa ne sera pas la bienvenue sur le territoire la République. Le problème de la burqa n'est pas un problème religieux, c'est un problème de liberté, de dignité de la femme."[9] This immediately set the tone for the subsequent public and parliamentary debates, including the 500-page report to the National Assembly by a Commission of Enquiry set up to examine the phenomenon of the burqa in France.[10] The report was completed in just over six months, and a reasonable person might conclude that it was written in order to justify the decision, already taken, to ban the burqa. Legislation to this end was concluded in 2010; Belgium followed suit with national legislation the following year. The arguments were those outlined by President Sarkozy, plus, in the French case, the view that the garment was totally contrary to the "Republican triptych" of Liberty, Equality, and Fraternity, and consequently undermined fundamental principles of the Republic. In the political debates of neither country was it really countenanced that a woman might voluntarily cover her face: virtually all contributors to the Report and to the debates considered it to be imposed by male relatives or extremist elements.

The French legislation, which had been only grudgingly approved by the *Conseil d'Etat*, the body charged with reviewing bills for their conformity with legal principles, was appealed to the European Court of Human Rights by a French woman who believed that her rights had been

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[7] "Aber der Islam gehört inzwischen auch zu Deutschland." The full speech is available in German, English, French, and Spanish at http://www.bundespraesident.de/SharedDocs/Reden/DE/Christian-Wulff/Reden/2010/10/20101003_Rede.html.

[8] *Frankfurter Allgemeine Zeitung*, 26 April, 2014: http://www.faz.net/aktuell/politik/welcher-satz-mit-christian-wulff-verbunden-bleibt-12911532.html?printPagedArticle=true#pageIndex_2

[9] For example, *Le Nouvel observateur*, 28 June 2009, "The burqa will not be made welcome on the territory of the Republic. The problem of the burqa is not a religious problem; it is a problem of freedom, of the dignity of women." http://tempsreel.nouvelobs.com/politique/20090622.OBS1470/sarkozy-la-burqa-n-est-pas-la-bienvenue-sur-le-territoire-de-la-republique.html.

[10] *Rapport d'information fait en application de l'article 145 du Règlement au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national, 26 janvier 2010.*

violated.[11] On 1 July 2014, the Court published its decision and, while rejecting some of the familiar arguments of the French government, upheld the law. It observed that "… in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight" (§ 154), which meant that "France [as also other states] has a wide margin of appreciation" (§ 155). Consequently, the Court held that the prohibition of the burqa under the appealed law was proportionate to "the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others'" (§ 157), and so found that Article 8 and Article 9 of the European Convention on Human Rights had not been breached. It is to be noted that, because of the wide degree of latitude ("margin of appreciation") enjoyed by states in the matter of achieving "living together" (i.e. what the Spanish court calls "convivencia"), the ECtHR accepts the French position that "the barrier raised against others by a veil concealing the face is perceived . . . as breaching the right of others to live in a space of socialisation which makes living together easier" (§ 122). The Spanish Supreme Court, on the other hand, held a view totally in contradiction to the French position. It accepted the view of the *Ministerio Fiscal* (approximately: Attorney General's Office) that the burqa did not disturb "the peace and tranquility of citizens" (Fundamento de Derecho Quinto) and so decided that, however extreme the "cultural friction" and the "clash . . . with views held in our country" brought about by the burqa might be (Fundamento de Derecho Décimo), a woman's right to manifest her beliefs in public in a free society overrode any and all other considerations. However, the view of the Spanish judiciary is one thing, but, as was indicated above, and as will be discussed further below, that of Spanish politicians is another.

It is quite clear that the Spanish senators and Catalan legislators who debated the various anti-burqa measures before them were fully cognizant of the debates that had taken place in Belgium and France. Some of the arguments and emotive metaphors they used are present in the records of these debates in the French-speaking countries. Although so far only Belgium and France have legislated nationwide face veil bans, between 2007 and 2011, there were four such bills in the Netherlands, all rejected by that country's Council of State (a body responsible for reviewing proposed legislation) as being contrary to legal or constitutional principles. The Swiss cantons of Aargau and Ticino have attempted to introduce a ban, and, as reported by the ECtHR, a bill to that end has been introduced in Italy. Clearly, across Europe there is considerable popular and political feeling

[11] Case of S.A.S. v. France (Application no. 43835/11).

against the burqa and what it is deemed to represent: an alien presence, an affront to women's rights, and an association with Islamic extremism.

It is clear that a similar feeling is present in Canada. In 2013, the then-Government of Quebec introduced a bill to establish what became known as the *Charte des valeurs québécoises*.[12] For constitutional and legal reasons, it could not include an outright ban on the burqa, but it did provide that persons receiving any service from a provincial agency must do so with their face uncovered (Section III). Because of an intervening election and the subsequent defeat of the government, the bill never came to a vote. While not certain, it has been argued that the bill contributed to the electoral defeat.

Efforts to ban the burqa continue in Spain. The Government of Catalonia and the Government of Spain, on 2 and 3 September 2014 respectively, announced that they were about to proceed with legislation to that end. In view of the decision of the Supreme Court, this at first appears paradoxical and counterproductive. But one can suggest three motivations for the two governments' doing so: first, in view of what appears to be widespread resistance to the garment, it is certainly politically advantageous. The public political argument of rights and gender equality is particularly potent in a society in which, well within living memory, women were subject to their husbands and all lived under an authoritarian and repressive regime. The legislators consistently refer to the liberal society that they are in the process of creating.

The second motivation for these governments to continue to try to ban the burqa is that the Supreme Court appears to have left one possibility open for legislation. The appeal that came to it contained an argument that public safety was threatened. The Supreme Court rejected this, saying that, in the case before it, no evidence of a concrete threat had been presented, and thus no case had been made. Article 16.1 of the Spanish Constitution (mentioned above) does contain a provision that manifestations of religion may be restricted by law for the "maintenance of public order." The Court cites Spanish jurisprudence, which defines "public order" as "social peace," "public peace," and "peace and tranquility of citizens." Consequently, carefully-worded bills may be able to use this avenue, linking it with the notion of public safety.

[12] Officially: *Charte affirmant les valeurs de laïcité et de neutralité religieuse de l'État ainsi que d'égalité entre les femmes et les hommes et encadrant les demandes d'accommodement.*

The third and final motivation behind these efforts to ban the burqa is that, in its decision of 1 July 2014, the European Court of Human Rights found that the French legislation was not in conflict with Article 9 of the European Convention on Human Rights (visibly the model for Article 16.1 of the Spanish Constitution). This article of the Convention admits such limitations on the manifestation of religion or beliefs "as are prescribed by law [...] in the interests of public safety [and] for the protection of public order." In the Spanish case, the initial prohibition was not on the basis of a law, but by means of a municipal bylaw. The Supreme Court quickly ruled this as being *ultra vires*, as only a duly passed law could restrict any constitutional liberties. Similarly, in the German case mentioned above, the original restriction prohibiting a headscarf had been made by administrative decision of the Stuttgart Education Authority, and the Federal Constitutional Court ruled that it was insufficient, as only a state parliament could legitimately take such a significant step.

Thus, the two aforementioned pieces of legislation announced in Spain at the beginning of September appear designed to withstand constitutional and European challenges. Neither of them would ban the burqa as such, but, for the sake of public safety, they would prohibit all face coverings.[13] The Catalan spokesman clarified, just as President Sarkozy had done in 2009, that it was not a proposal to restrict religious freedom, and emphasised that the Government of Catalonia has full legal authority to act to protect public safety. The Spanish Minister of the Interior stated that the Madrid government would include the measure in the Public Safety Act (*Ley Orgánica de Protección Ciudadanía*) as the burqa "makes it difficult to identify a person committing a crime," adding his personal conviction that the burqa was an affront to the dignity of the wearer.

In granting constitutional protection to the face veil, the Spanish Supreme Court clearly thought that the principle of free personal choice nullifies any such affront. That the Minister of the Interior has a personal conviction to the contrary is a normal phenomenon in a democratic society. But the fact that the Government of Spain and the Government of Catalonia are choosing to bring about prohibition of the burqa via the path of public safety and security is a clear admission that a) they have no argument to counter the court's position on free choice, and b) if they legislated under any other principle, for example the protection of dignity or the right of participation in public affairs (Article 23 of the Constitution), and it were challenged, the Supreme Court or even the

[13] See Juan Procedo above, and *La Vanguardia*, "El Govern tramita la prohibición de ocultar la cara en la calle", 2nd September 2014.

Constitutional Court would either refuse to hear the challenge, or, if it did admit it, would in all probability not uphold the law. They may even tacitly be admitting that some women do voluntarily choose to cover their faces in public. But they still persist in their desire to ban the burqa. Thus, two closely interrelated questions remain. First, why is there such pressure to prohibit clearly Muslim garments in European countries ranging from the Netherlands in the north to Italy and Spain in the south? They are all very distinct and different societies, though all have Christian traditions in common. And certainly, in countries as distinct as Germany and Spain, some politicians have explicitly used this fact as part of an argument to prohibit a Muslim garment, even in cases where courts have given them no foundation for doing so. One must then conclude that, in part, the opposition is rooted in a concept of national identity still inseparable from the traditional religion of Europe; any very visible cultural practice, such as a headscarf or burqa, based on another religion is to be rejected. On this matter, it is also clear that there is massive popular pressure pushing the governments and elected representatives, sometimes it seems reluctantly and sometimes less so, into actions that they all know to be legally problematic.

In the countries in question, politicians have concluded that they cannot be seen to be doing nothing. However, the really fundamental question remains the one asked at the start of this discussion paper: if it is unacceptable for a woman to be obliged by family or co-religionists to hide her face in public, is it acceptable for the state to oblige her to reveal it even if she herself does not want to? The European Court of Human Rights decided that it was acceptable, but the Spanish Supreme Court decided it was not. Spanish politicians and a number of other European politicians have decided that it is acceptable. To a greater or lesser degree, all of them used arguments of safety and security, though in most cases they also meant protection of gender equality against what they presented as a harmful alien influence. Politically, this is a potent and unassailable combination. In Spain, it appears more than likely that the politico-legal argument of public safety will prevail and impose a certain vision of national identity, human rights, and gender equality. In the way in which it is proposed, the measure is eminently political, but it begs difficult questions that are valid in countries on both sides of the Atlantic: questions of collective rights – safety, security, gender equality – against the individual right of free choice in democratic societies that are becoming more and more diverse.