ISLAM RETURNS TO SPAIN: THE SPANISH SUPREME COURT ACCEPTS THE BURQA

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INTRODUCTION

In connection with the debates around Muslims in Europe, in 2010 Triandafyllidou summarised one position in the following way:

> ... Others have argued that Muslims can be accommodated in the socio-political order of European societies provided they adhere to a set of civic values that lie at the heart of European democratic traditions and that reflect the secular nature of society and politics in Europe. Others still have questioned the kind of secularism that underpins state institutions in Europe.[1]

Later in the same introduction she remarks that "a notion of religious pluralism is probably more helpful, both theoretically and empirically, to make sense of what is going on in European societies". The recent decision of the Spanish Supreme Court to accept the burqa and give it constitutional protection in the face of an attempt to ban it at the municipal level reveals aspects of these positions worth considering in more detail with respect to the particular circumstances

[1] Anna Triandafyllidou, "Muslims in 21st Century Europe: Conceptual and empirical issues" in ed. Triandafyllidou, *Muslims in 21st Century Europe: Structural and cultural perspectives* Routledge: London and New York City 2010, pp 1-26.

of Spain, of Spanish society as viewed by the court, and of European jurisprudence. At the same time it is clear that, viewed within the framework of academic discourse, we are dealing with, among other things, questions of constitutional patriotism, and what Ponzanesi and Blaagaard have called "managing hierarchies of acceptable and unacceptable difference".[2] I shall come back later to these concepts.

Within the broader framework set by the topic of the conference, this paper will focus on the rights arguments used by the Court to arrive at its decision. But at the same time, it will also examine briefly the interplay of European and national jurisdictions; the question of "cosmopolitisation" from below (Beck) and cosmopolitanism from above imposed by European norms; "constitutional patriotism" in Spain; and political discourses on the burqa in Spain and elsewhere preceding and surrounding the decision.

In all these European debates the fundamental question turns around what in the French and Belgian face-veil debates of 2010 and 2011 was called "le vivre ensemble" and what in Spain is termed *convivencia*, sometimes translated as "peaceful coexistence", but within states. In Spain this term has a particular importance as it is also a constitutional term (Preamble, and Article 27). It is central to the political debates concerning the burqa / *velo integral* since at least 2010, has colonised media and public perceptions, and is central to the decision I shall be talking about.

BACKGROUND I

On May 28th 2010 the city council of Lleida in Catalonia gave notice that it was going to introduce a motion to ban the burqa and niqab in all public places and in primary and secondary schools. The draft by-law that was introduced by the three major parties present in Catalonia,

[2] Sandra Ponzanesi and Colette B. Blaagaard, *In the name of Europe, Social Identities* 17: 1, January 2011, 1-10, page 5.

CiU, PSC and PP, and then finally passed on 8 October 2010 restricted the ban to municipal buildings, properties, markets, schools and public transport.[3]

In fact, although the first city to enact such a ban, Lleida was not alone. Reportedly, between six and thirteen cities did the same (mainly in Catalonia), with at least one in Andalucia.[4] But the appeal which went through the court system and finally to the Supreme Court, which is the centre of my presentation, concerned only Lleida. The jurisprudence, however, has general application. In a judgement dated 14 February 2013 the court ruled that the action by the municipality in relation to its buildings was *ultra vires*. Only the national government has the power to take action in the area of religious freedoms.[5] If the court had restricted itself to that statement, its judgement would be irrelevant for this conference. But its arguments go far beyond a statement of the limitation of municipal powers and embrace broad perspectives of religion and the democratic state.

BACKGROUND II

it has to be noted that in 2010 and 2011 resolutions were introduced by the then opposition party PP in the Senate of Spain (debated 21 June 2010) and the Parliament of Catalonia, where it was also in opposition (20 April 2011) urging the respective governments to introduce anti-burqa legislation. Both were passed, but no action was taken by the governments. On 24 April 2013 the Parliament of Catalonia rejected a resolution, again by an opposition party, *Ciutadans*, to urge the Government of Catalonia to request the Government of Spain to modify the

[3] http://www.paeria.es/arxius/actes/Document_cat_1090.pdf .
[4] *El País*, 28 February 2013, http://sociedad.elpais.com/sociedad/2013/02/28/actualidad/1362051859_884570.html and also http://elpais.com/elpais/2013/02/28/opinion/1362080324_815143.html .
[5] Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección: Septima, *Recurso Casacion Num.:* 4118/2011, 14 February 2013.

Fundamental Law on Religious Freedom[6] in such a way as to prohibit wearing the burqa in all public places.

With the exception of the topic of *laïcité* in France where part of the argument was that the very foundations of the state were threatened by wearing the burqa in public, very many of the arguments made by the proposing parties in Spain in favour of the various resolutions reflect those heard in the French and Belgian debates.[7] The difference in Spain from the situation in those countries, however, was the clear and outright tactical opposition by the other parties to the wording of the resolutions. The stated reasons for doing so were a) that existing legislation other than the Fundamental Law on Religious Freedom already covered the concerns voiced by the proposers, and b) that the numbers of women wearing face-veils in Spain was minimal. In other words, there was division along standard lines of party-political advantage, but there was no division along the line of fundamental opposition to the garment. Clearly there is an elite consensus (i.e. in the political class) that the burqa has to be banned. However, it is also quite clear that the Court does NOT share this point of view.

BACKGROUND III

Spanish Constitution, Article 16

> 1. Freedom of ideology, religion and worship of persons and of collectivities is guaranteed without any restriction in their manifestations beyond what is necessary for the maintenance of public order as protected by law.
>
> 2. XXX

[6] An **absolute majority** of the *Congreso de los Diputados* [lower house of the national parliament] is required to pass or modify a *ley orgánica*, for which I shall use the term "fundamental law".
[7] For further information on these debates, see Robert Gould "'Alien Religionsity' in Three Liberal States", *Politics, Religion & Ideology* 14:2 (2013), pp. 173-192.

> 3. No creed has the position of a state religion. Public authorities must take into account the religious beliefs of Spanish society and maintain the resulting co-operative relations with the Catholic Church and the other creeds.

There is no doctrine of *laïcité l laicismo* or secularism, and Spain has moved away from the previous view of itself as a mono-confessional Catholic state.[8] On the other hand, the Catholic Church is *de facto* first among unequals. It needs to be pointed out, also that the word I have rendered as "ideology" can include the idea of a set of **religious** values.[9]

BACKGROUND IV

Spanish Society was traditionally defined as Catholic and moorophobic (hostile to, and fearful of, North Africans).[10] However, in the Supreme Court decision I am going to be talking about, referring to life in Spain, the Attorney-General, as quoted in the Supreme Court Decision wrote:

> ... in ... [Spain's] globalised and multicultural society in which images and information make it possible to share - by audiovisual means and the internet – day-to-day life of other countries and cultures which are now present, moreover, in daily life due to the intensity of migratory flows.

As I read the legislative debates of 2010, 2011, and 2013, the political parties in question largely share this view of Spanish society. This represents an evolution since the PP and PSOE party

[8] But it is quite clear that public authorities, in the form of municipalities which are responsible for providing permits for religious buildings (mosques or prayer rooms) are frequently uncooperative: R. Zapata-Barrero and Nynke de Witte, "Muslims in Spain: Blurring past and present Moors" in Anna Triadafyllidou *Muslims in 21st Century Europe: Structural and cultural perspectives*, Routledge: London and New York City, 2010, 181-198. See also below: Observatorio andalusí.

[9] Real Academía Española, *Diccionario de la lengua española*, 22nd edition, 2001: **ideología.** (Del gr. ἰδέα, idea, y *-logía*).
1. f. Doctrina filosófica centrada en el estudio del origen de las ideas.
2. f. Conjunto de ideas fundamentales que caracteriza el pensamiento de una persona, colectividad o época, de un movimiento cultural, religioso o político, etc.

[10] Ricard Zapata-Barrero, "The Muslim Community and Spanish Tradition: Maurophobia as a fact, and impartiality as a desideratum", eds. Tariq Modood, Anna Triandefyllidou, and Ricard Zapata-Barrero, *Multiculturalism, Muslims and Citizenship*, Routledge: London and New York City 2006, pp. 143-161,

platforms for the elections of 2004.[11] On the other hand, it is not surprising that the political and legal processes which eventually gave rise to the judgement under discussion today began in Catalonia. This region is striving to assert the validity of its language and identity within the larger context of a "globalised and multicultural" Spain,[12] has recently (2006) obtained the power to manage immigration as an exclusive competence,[13] and also has the largest population of Muslims of any autonomous region (in 2012 448,879, out of a total of 1.67 million in the country as a whole).[14]

BACKGROUND V

It is important to note that, with the exception of just one statement by the PP, the arguments used in the **discourses** of the major parties (municipal – as far as the material is available on line, but certainly in Lleida - , in Catalonia, and nationally), including and since the Senate debate in 2010, and possibly earlier, do **NOT** include that of Catalonia, Spain or Europe as Christian entities.[15] Nor, again with the exception of one statement also by the PP in a committee of the Catalan Parliament on 5th April 2011, is the "Occidental" argument employed.[16] Rather, for the parties they are a region, country and a continent characterised by RIGHTS. They focus in the first place on GENDER EQUALITY RIGHTS, and secondly on safety and

[11] Robert Gould and Antonia Maria Ruiz Jiménez**, "**Immigrants and the Nation: Political Discourses in Germany and Spain, 2002-2004", unpublished paper, 2006.
[12] Ricard Zapata-Barrero, "Policies and public opinion towards immigrants: the Spanish Case", *Ethnic and Racial Studies* 32, 7 (2009) 1101-1120", and other publications of ZB.
[13] Ricard Zapata-Barrero, *Una ética política mínima de la immigració a Catalunya: Cohesió, autogovern, llengua i frontera*, Cànoves i Samalús: Proteus, 2012, p. 73.
[14] Observatorio Andalusí, *Estudio demográfico de la población musulmana: Explotación estadística del censo de ciudadanos musulmanes en España referido a fecha 31/12/2012*, Unión de Communidades Islamicas de España, 2013; http://oban.multiplexor.es/estademograf.pdf .
[15] This sets the debates clearly apart from the political discourse in Germany with its constant emphasis of „christlich-abendländisch". The exception is Senator Alicia Sánchez-Camacho Pérez (PP) who in the Senate debate on 23 June 2010 did not wish to give the socialist government the chance to use "esta cuestión para después negar los símbolos católicos y cristianos que forman parte de la tradición cultural de este país" (p. 4551).
[16] Diari de Sesions del Parlament de Catalunya, IX legislatura Sèrie C - Número 50, Segon període 5 d'abril de 2011: Comissió de Benestar, Família i Immigració, page 8 ff.

"public order".[17] The judgement shares this focus. But whereas the politicians use the gender equality and human dignity rights arguments in their efforts to ban the burqa, the court uses a different rights argument to accept it.

BACKGROUND VI

The Supreme Court judgement constitutes currently valid jurisprudence. However, a press report has appeared which states that the Mayor of Lleida is appealing its judgement to the Constitutional Court. Whether the Court will hear the case, and what it might decide, are different questions.[18] However, developments in very early July 2013, noted in the coda at the end of the paper, indicate that Catalonia has decided to attempt a different approach to regulate the wearing of the burqa in public.

But however interesting the political debates alluded to are in the wider European context, and whatever might happen judicially, I want to look principally at the Supreme Court judgement and its implications particularly relevant for the themes of this conference.

The court states that it is the first time that such a case has come to its attention and "in its most extreme form", the "*velo integral"*. Furthermore, this judgement is the first in Europe upholding the right to wear the burqa.[19] And what is meant by "burqa" is really the face veil, prohibited, as the Court points out, in Belgium and France (though the Belgian act is being contested before ECtHR (Cour constitutionelle, arrêt n8 148/2011 du 5 octobre 2011).

The Position of Religion in Society

[17] Jurisprudence of the *Tribunal Supremo* equates "*orden público*" with *"paz social", "paz pública", "convivencia social"*, and *"paz y sosiego de los ciudadanos",* Fundamento de Derecho Primero.
[18] El País, 25 April 2013, http://www.lavanguardia.com/local/lleida/20130425/54371548673/la-fiscalia-del-supremo-se-opone-a-que-el-ayuntamiento-de-lleida-pueda-prohibir-el-burka.html descargado el 3 de mayo 2013.
[19] El País, 28 February, 2013, http://ccaa.elpais.com/ccaa/2013/02/28/catalunya/1362059787_966849.html?rel=rosEP . Also the court indicates there is no precedent in European jurisprudence (Fundamento de Derecho Segundo).

The Court gave protection to the burqa based on Article 16 of the Constitution, which I have already shown. But the protection was not given under the question of freedom of religion, rather under "freedom of **ideology**". It said that in conjunction with European jurisprudence ranging from 1996 to ECtHR *Eweida at al. v. UK* of 15 January 2013, it was not up to the court to decide whether any practice, such as wearing the burqa, is fundamentally required by a religion, but:

> ... from the point of view of Article 16.1 of the Constitution ... the garment's character as the expression of a given ideology cannot be denied, which as a constitutional freedom has the same rank as religious freedom. (Fundamento de Derecho Octavo)

In various sections the court quotes or refers to European jurisprudence and statements of rights and acknowledges it is subject to them EXCEPT in questions where the Spanish Constitution provides greater rights or protection than European rulings. Consequently and, importantly, it explicitly argues that European jurisprudence cannot be used to restrict Spanish rights. Thus if a European court had ruled against the burqa, that decision could NOT prevent a Spanish court from ruling in its favour. Or, if in the future a European-level court should rule against the burqa, the judgement could not be binding in Spain.

On the other hand, the Court is aware that it is on its own. It argues that any parallels with Turkish cases and French cases decided by European courts, or any parallels with French legislation prohibiting face-veils are irrelevant because of the doctrines of secularism "laicismo" in those countries. The court points out, also, that there is no European jurisprudence from ECtHR concerning face veils; what exists concerns headscarves, and those cases are principally in the area of teaching. They are not generalised prohibitions as was the case before the Court (Fundamento de Derecho Segundo). Similarly, cases brought elsewhere under the UN's *International Covenant of Civil and Political Rights* do not provide applicable guides.

An important part of the Court's judgement, and one which places it quite apart from the political argumentation, including that of other countries, is the paramount nature of individual choice. The Court decided that a woman may make a choice which effectively renounces the exercise of the rights of individual development, gender equality, and participation in public life central to the public and political discourse. The politicians in Spain, as also in Belgium and France, have argued and continue to argue that the burqa isolates the wearer, cutting her off from most social interaction and interaction as a citizen. In countries which have banned the burqa the state has enforced a particular view of gender equality. In Belgium and France the argument of gender equality, women's rights and protection of state or society trumped that of personal autonomy and free choice. In other words, as scholars have pointed out, in those countries the legal principle that no impediment should be placed in the way of women has been reinterpreted and solidified in a statutory form whereby the state *enforces* a particular view of equality.[20] Coming down on the side of individual autonomy, the Spanish court has chosen a different path. It decided that, at least in the present circumstances, the individual's right to choose a way of life which leads her to cover her face in public falls within the protection of "ideology". Secondly, an important, adjunct, part of the argument is that the individual also possesses the **right to choose**. Through the Supreme Court democratic Spain defends the right of individuals to deny themselves what others see as essential rights of self-development, participation and communication considered of such importance that they are imposed on women in certain states within the European framework in which Spain now exists. Individual self-determination, the polar opposite of state power, is paramount. The court argues that the wearer covers herself as an act of free choice. And as such, it is what Assad in an essay on trying to understand

[20] Bahners, P. *D*ie *Panikmacher: Die deutsche Angst vor dem Islam: Eine Streitschrift*. Beck: Munich, 2004 p.116. A similar view is expressed by Cesari in connection with the French prohibition of headscarves in publicly-financed schools: 'Islam, Immigration and France', Bramadat and Koenig, op.cit., pp.195-224; also Joan Wallach Scott, *The Politics of the Veil*, Princeton UP 2007.

French secularism calls "*part of an orientation, of a way of being*".[21] And it is also precisely an orientation or a way of being which the Constitution protects under the terms "ideology" and "creed", or alternatively under "the free development of the personality" (Article 10.1) to which the Court also refers. In permitting women to remain covered, one can argue with Bikhu Parekh that the Court is fundamentally arguing that compulsion is incompatible with human dignity and that a free and democratic society must insist on this.[22]

It cannot be pure chance that, starting in that watershed anti-burqa year of 2010, in the Spanish political debates alluded to, right up to the debate in the Catalan Parliament just two months ago,[23] the arguments are those of rights, above all gender equality rights, plus that of individual development, and the theme of human dignity. These are arguments powerfully and successfully used by all parties in the political debates in Belgium and France and which were explicitly presented in a totally black-and-white manner as being in conflict with Islamic practices; this **political** practice was decried by Farhad Khoskrokhavar in his statement to the *Mission d'information* of the *Assemblée nationale*.[24] The arguments trump all and any claims of religion and individual choice. Admittedly, the parties are starting from Europe-wide notions of rights, but the situation also suggests direct trans-frontier communication between parties to deal with what is perceived as a common wrong or even a common threat. But the difference in Spain is that, in contrast to Belgium and France (and even Germany a little earlier – in connection with headscarves) the parties directly and harshly attack each other on the matter of the tactics to be employed. However, the fundamental point is that the Court does not follow the established rights arguments as expressed in the political sphere. There is a clear division

[21] Talal Assad "Trying to understand French Secularism", in Hent de Vries and Lawrence E. Sullivan (eds.), *Political Theologies: Public Religions in a Post-Secular World*, New York City: Fordham UP, 2006, page 501, emphasis in the original.
[22] Bhikhu Parekh, "Europe, Liberalism, and the 'Muslim question'", in Modood, Triandafyllidou, Zapata-Barrero, pp. 179-203.
[23] 24 April, 2013.
[24] *Mission d'information sur la pratique du port du voile intégral sur le territoire de la République* of 26 January, 2010, pp. 438-439..

and clear tensions within these different representatives of the democratic Spanish state, democratic Catalonia and democratic municipalities.

In connection with rights in Spain, it is worth considering a point made in Natalie Doyle's paper "Islam and the European Crisis of Democratic Legitimacy" arising from her presentation at this conference two years ago. In it, and referring to Jan-Werner Müller's book *Constitutional Patriotism*,[25] she points to the concept and conception of the European Union as a post-totalitarian project. In the first instance it was a post Italian-fascist and, above all, a post-nazi project. Using this point of view, one has to consider the totalitarianism of Franco fascism. The latter lasted in Spain at least up to the proclamation of the current Constitution at the end of December 1978. It is this memory of *franquismo* and all its works which perhaps explains a number of things in the current discourses around the burqa. One of these is the 66 references to the Constitution in the decision – and one has to remember that the *Tribunal Supremo* is the highest level of appeal court, not the Constitutional Court. Jorge Benedicto expressed the view in 2004 that references to the Constitution can be understood as forming part of the 'foundation myth' of modern democratic Spain, restricting the influence of state power over the practices of individuals.[26] The political discourse around the burqa, particularly in Catalonia, repeatedly uses the Constitution as the benchmark for the sort of society to be created. Müller does point out that the concept of constitutional patriotism was exported to Spain (page 44). He indicates also that in the German context it contained strong doses of "memory" and "militancy". I think this applies to Spain, too. "Memory" here refers primarily to a self-critical remembering of the totalitarian past; and "militancy" to anything seen as undermining the sort of rights society did not possess under Franco. The Senate debate on 23 June 2010, and the debate in the Catalan Parliament on 24 April this year, for example, were introduced by references to the rights which

[25] Jan-Werner Müller, *Constitutional Patriotism* Princeton University Press, Princeton and Oxford: 2007.
[26] Benedicto, Jorge, 2004, "Cultural structures and political life: the cultural matrix of democracy in Spain", *European Journal of Political Research* 43:3 287-307.

women did NOT possess under Franco and to the moral necessity of protecting constitutional rights.[27]

But beyond that there is the emphasis on rights in both the political discourse on the burqa and also in the Court's decision (although the former wishes to ban it and the latter to protect it). And the emphasis on rights, guaranteed by supranational institutions (European charters, courts, treaties and directives), is one of the ways particularly within the EU of curbing the sovereign state's power to do what it wants with persons subject to its jurisdiction, just as it also forms a legitimation of the democratic state.[28]

I think the Court's acceptance of the burqa, which it explicitly acknowledges to be the object of hostility and tension, is also facilitated in a state which explicitly recognizes the legitimacy of religion in both the private and the public spheres and does not insist in any way on isolating religion. The current European understanding of religion on the one hand and of human development through knowledge on the other leads in many cases to a denial of the legitimacy of religion, and hence to a certain hostility towards it.[29] (The understanding which many French people have of *laïcité* would be an example of this, as was manifest in the French headscarf debates both inside and outside the Assembly and Senate, and in connection with the Stasi Commission.[30]) Part of this opposition is also due to a view that religion impedes individual development.[31] In Article 16 of the Spanish Constitution, as I showed earlier, the legitimacy and importance of religion for the people and the state is not denied; that much IS a continuity from

[27] Alicia Sánchez-Camacho Pérez: *Diario de Sesiones del Senado*, IX Legislatura, núm. 85, 23 June 2010, p. 4540)
[28] Jürgen Habermas, "Remarks on Legitimation through Human Rights" in Habermas *The Postnational Constellation: Political Essays*, translated, edited and with an introduction by Max Pensky, MIT Press, Cambridge MA: 2001, pp. 113-129.
[29] Paul Bramadat, 'Religious Diversity and International Migration: National and Global Dimensions' in Paul Bramadat and Matthias Koenig (eds.) *International Migration and the Governance of Religious Diversity* (Montreal: McGill-Queen's UP, 2009), pp. 1-26. From a different point of view Luca Mavelli, *Europe's Encounter with Islam: The secular and the postsecular,* Routledge: London and New York City, 2012, p. 144.
[30] Olivier Roy, *La laïcité face à l'Islam*, Paris: Stock, 2005, passim.
[31] Bramadat, op.cit.

the previous regime. But in contradiction to the previous situation of the extreme intermingling of the Franco state and the Roman Catholic Church in the concept of "National Catholicism", "public authorities" are now under a constitutional obligation not just "to take into account the religious beliefs – PLURAL -- of Spanish society" but also to maintain co-operative relations with religions [ALSO PLURAL]. In Spain there is thus nothing of what Mavelli recently called the "idealised secular unity" existing in France and dominating the debate there.[32]

Immigration and Rights: the nature of society

As Zapata-Barrero and others have shown, in the area of immigration and access to citizenship Spain has favoured, and even encouraged, European and Hispanic immigration, indicating that for reasons of culture, language, and religion the "integration" of such newcomers would be easier.[33] Added to this inflow is the very large number of documented Moroccans plus undocumented North Africans, principally Moroccans, very many of whom were regularised in the two amnesties at the beginning of the century.[34] As in Germany, Switzerland and elsewhere, as Max Frisch the Swiss writer and social critic famously wrote, the country "sought

[32] Luca Mavelli, *Europe's Encounter with Islam: The secular and the postsecular,* Routledge: London and New York City, 2012, p. 68.

[33] More information on immigration patterns is to be found in, for example, "The Politics of Immigration: Why Spain Is Different 1962-", Omar Guillermo Encarnación *Mediterranean Quarterly*, Volume 15, Number 4, Fall 2004, pp. 167-185, which provides a broader view of immigration patterns in Spain since the mid-1980s see Joaquín Arango, "Becoming a Country of Immigration at the End of the Twentieth Century: The Case of Spain," in *El Dorado or Fortress? Migration in Southern Europe* (New York: St. Martin's, 2000), ed. Russell King, Gabriella Lazaridis, and Charalampos Tsardanidis; Wayne A. Cornelius, "Spain: The Uneasy Transition from Labor Exporter to Labor Importer," in *Controlling Immigration: A Global Perspective*, ed. Wayne A. Cornelius, P. L. Martin, and J. F. Hollifield (Stanford, Calif.: Stanford University Press, 1994); and Antonio Izquierdo, *La inmigración inesperada* (Madrid: Trotta, 1996). See also Article 11.3 of the Constitution on the favoured status of Ibero-American countries with respect to citizenship.

[34] While the legal foreign-born population quadrupled in less than a decade (from 500,000 in 1995 to two million in 2004), in December 2004 illegal unauthorized immigrants represented another 1.2 million people (estimated), a number that accumulated in less than four years since the previous regularization program in 2000 to 2001 (See Arango and Jachimowicz 2005, Pérez 2004 and Rodriguez Martíenez 2003. For further information about migration see the Year Book on Migrations edited by the Spanish Ministry of Work and Social Affairs, as well as the documentation available at the State Secretary of Immigration and Emigration. Both available through www.mtas.es [all details available in Spanish joint paper] .

workers but got people".[35] This happened at the same time that there appears to have been an increase in religious practice in the Muslim world and, universally, also the explosion of virtually unimpeded and cheap electronic communication. Hence the new definition of Spanish society already referred to, which forms a pragmatic cornerstone of the Court's decision. This is the "cosmopolitisation" from below of Ulrich Beck. The Attorney-General, the Court, and the sociologist agree. And what Beck stated as a general rule is used as an assessment of a particular case – Spain – and as a foundation argument in the Court's decision.

I think something that Talal Asad wrote helps to understand the human dimension of this "cosmopolitisation" and to put it in the context of the Court's re-definition of Spanish national identity and also the extension of constitutional liberties. Asad states: "If the wearer assumes the veil as an obligation of her faith*, if her conscience impels her to wear it as an act of piety*, the veil becomes for that reason a part of herself. For her it is not a sign intended to communicate something, but *part of an orientation, of a way of being* [emphasis in the original].[36] I think this makes much clearer to sceptics how deep this religious identity in fact can go within the person. Having carefully reviewed all the European jurisprudence, including the Eweida case, decided only three weeks before the date of the decision, the Court has said this public act of Muslim self-definition is permissible in Spanish society as an ideology – as a way of being -- and has not found it to be in contradiction with European principles and the cosmopolitanism from above which they represent.

[35] Max Frisch, „Man hat Arbeitskräfte gerufen, und es kamen Menschen", from his preface to A.J. Seiler, *Siamo Italiani*, Zurich 1965. The 2004 election manifestos show both the PP and the PSOE viewing immigration as a labour-force contribution, Robert Gould and Antonia Maria Ruiz Jiménez, "Immigrants and the Nation: Political Discourses in Germany and Spain, 2002-2004", paper delivered at the Biennial Conference of the European Community Studies Association – Canada, Victoria, B.C. 19 May, 2006.

[36] Talal Asad "Trying to understand French Secularism", in Hent de Vries and Lawrence E. Sullivan (eds.), *Political Theologies: Public Religions in a Post-Secular World*, New York City: Fordham UP, 2006, page 501.

That acceptance of this visible aspect of cosmopolitisation and the realisation of the constitutional guarantee of unimpeded worship for Muslims are less than perfect is quite clear, and the latter for reasons which have nothing to do with the notion of "public order" permitted by the Constitution.[37] They do not need to be outlined here. It is clear that at both street level (as reflected by municipal politicians)[38] and at the party-political level (as represented by Catalan and national parties), they come into conflict with notions of identity associated publicly with notions of rights and citizen participation, even within the discourse of civic identity identified for Catalonia by Grad Fuchsel and Martín Rojo.[39]

The Politics of Fear

To turn now to the politics of fear, which is closely related to the question of safety / security. This concept played a large role in the argument for the prohibition of the burqa in the political debates in France and Belgium, and was also prominent in the minority decision of the Federal Constitutional Court in Germany concerning headscarves on civil servants. It did play a significant role in the subsequent political debates in state legislatures in Germany. In all three countries it was argued that society or the state itself was threatened.

In Spain the safety / security argument, eventually dismissed by the court, was central to the appeals process. But the argument being overtly made was the fear that "public order" i.e. social peace founded on recognised principles and respect for the rights of others, was significantly endangered. The Court's rejection was based on Supreme Court jurisprudence,

[37] Observatorio Andalusí, *Informe especial: Institución para la observación y seguimiento de la situación del ciudadano musulmán y la islamofóbia en España,* Unión de comunidades islámicas de España, 2011. Available at http://oban.multiplexor.es/isj11.pdf . See also, for example, Ricard Zapata-Barrero, "The Muslim Community and Spanish Tradition: Maurophobia as a fact, and impartiality as a desideratum", in eds. Tariq Madood, Anna Triandafyllidou, Ricard Zapata-Barrero, *Multiculturalism, Muslims and Citizenship: A European Approach*, Routledge, London and New York City: 2006, pp. 143-161.

[38] See, for example, the Senate debate on 23 June 2010 [page 4544], Senator Cabellero Martínez "la decisión que han adoptado algunos ayuntamientos tan próximos a la verdadera realidad social y a las exigencias de la convivencia ciudadana."

[39] Hector Grad Fuchsel and Luisa Martín Rojo, "'Civic' and 'ethnic' nationalist discourses in Spanish Parliamentary Debates", *Journal of Language and Politics* 2:1 (2003), 31–70.

Constitutional Court jurisprudence, on the failure by the defending party to establish that the burqa constituted an actual "disturbance to the tranquility in our western culture", and refers also to the decision by ECtHR on 10th November 2005 on the role of the state in "reconciling the interests of different groups and guaranteeing respect for all beliefs" (§106). The Court's argument is that, even if a danger to "civil peace" did exist (and it phrases this whole statement in the subjunctive to indicate it does not believe there is a real danger), it is not the role of a public body such as a municipality to resolve what the Court calls the "cultural friction" by restricting fundamental constitutional rights. It acknowledges that covering the face creates "cultural friction" (p. 48), but if persons have a claim not to be disturbed by the sight of a face veil, that claim cannot be protected by restricting the constitutional rights of others; and, importantly, wearing a face-veil does not infringe on the rights of others. But also, it agreed with the Attorney General's submission that [public order] "is in our view impervious to the use of such a garment, however foreign it may be to our culture" (Fundamento de Derecho Quinto). Importantly, even if the Court is speaking only in terms of a lack of public disturbance, by extension this means that the there is no threat to the duly constituted order of the state or the accepted order of society. One is a very long way from the political rhetoric in Belgium and France, and also from the minority opinion of the German Constitutional Court and the German political debate in the headscarf case.[40]

Secondly, the court goes beyond "cultural friction" and states, "... however violent the collision (*choque*) of this garment may be with the cultural concepts of our country, and it is violent", and then continues, "it is not acceptable to fail to investigate, as the lower court did, the question of whether its use is voluntary or not". And in examining this question of free will it becomes clear

[40] The court's decision on this fundamental case: BVerfG, 2 BvR 1436/02 vom 3.6.2003, is to be found at http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602.htm. Details on the minority opinion are to be found in Robert Gould, *Identity Discourses in the German Headscarf Debate*, Working paper series 15, Canadian Centre for German and European Studies / Centre canadien d'études allemandes et européennes: York University, Toronto, 2008; http://ccges.apps01.yorku.ca/wp/wp-content/uploads/2009/01/gould.pdf.

that the court is rejecting the argument of fear so potent in Belgium and France (and present in the political discourse in Spain) – that the foreign cultural practice undermines fundamental societal values, including free choice. The argument which prevails here is that Spain is an "environment of liberty", presumes free choice, and provides the opportunity for free choice (Fundamento de Derecho Décimo). The very real "collision with the cultural concepts of our country" must not be permitted to restrict the supreme value of the free choice of wearing an alien garment given also its constitutional protection as a part of an "ideology". Once more we are back at the position of Spain reacting against its recent totalitarian past. Except indirectly when referring to Article 10.1 of the Constitution,[41] the court does not mention human dignity, but it is in fact following the line of argument that compulsion is incompatible with human dignity (see also Parekh above).

But at the same time, as I stated earlier, constitutionally, Spain explicitly recognizes the legitimacy of religion in both the private and the public spheres and does not insist on separating the two. Whatever politicians and the public might think (and there is an active debate currently running in Spain on religion, the state, and society), the Court, unrestricted by a "secularist" mindset, can recognise that religion (even under the category of "ideology"),[42] cannot be reduced to a universal category concerned with the otherworldly, but is instead what Mavelli called a "practical mode of living authorised, passed on and reformulated down the generations" – even when this applies to non-Christian traditions.[43]

The Court has acknowledged it is operating within a trans-national society – open to the world and containing elements of the world within itself. It has acknowledged Spain is a post-national state in the sense that it is working within a legal and rights framework originating outside itself.

[41] "Human dignity, the inviolable rights inherent in this concept, free development of the personality [...] are the foundation of political governance and of social peace".
[42] See the note above that, as defined by the dictionary of the Real Academía Española, "ideology" and "religion" are not mutually exclusive categories.
[43] Mavelli, p. 125.

It has looked to this framework for guidance and has found no direct case, but on the other hand, there are general principles. The only applicable **direct** guidance was the constitution PLUS the implicit but over-arching national value of the free individual in a free and open society. This underlies everything. On the basis of European values and constitutional values, and rejecting the rhetoric of harm in the appeal, the court decided that veiled women are an acceptable difference within the new reality of Spanish society as constituted in 2013.

I think it is appropriate to refer to what Ulrich Beck said in a lecture to the British Sociological Association in 2011in order to summarise the situation:

> ... The constitution of the cosmopolitanized world in and through globally filtered processes of communication cannot be seen in the simple terms of Self and Other. It is thus possible to speak of world openness in cosmopolitan terms and situation where the global public impinges upon political communication in other kinds of public discourse, creating as a result new visions of social order in which codification of both Self and Other undergo transformations.[44]

The Court recognizes the transformation of Spanish society brought about by cosmopolitisation – a largely unguided and irreversible process principally as a result of the unintended consequences of economic policies and shifts. According to the Court, in this new Spanish social order veiled women do not have to transform themselves. It is quite clear, then, that the judges of the Court refuse to view the very real clash of values currently occurring in Spain as in any sense a clash of civilisations. This is why, for them, what the scholars Ponzanesi and Blaagaard call "managing hierarchies of acceptable and unacceptable difference", earlier alluded to, does **not** apply. In the justices' view the civilisation of which they form a part is both sufficiently strong and sufficiently flexible to cope with the stresses genuinely unleashed by the

[44] Ulrich Beck, "Redefining the Sociological Project: The Cosmopolitan Challenge", *Sociology* 46:1 7-12.

presence of veiled women.[45] Moreover, they accept that Spain's "globalised and multicultural society" will inevitably have what they call "frictions" and "collisions". These are insufficient grounds to ban the burqa and, they say, unlikely to create the sort of disturbance of *convivencia* that would justify judicial intervention. Certainly, no evidence was provided to the court that they had done so.

In the Court's view, the majority population needs to accept that such a radical difference and the right to be different are within the definition of Spanish constitutional democracy and also within the new social identity and diversity in day-to-day life arising from the process of cosmopolitisation from below on the Beckian model. And this model includes not only the movement of people, but also, as was noted as a fundamental part of the judgement, the unrestricted movement of images and information, leading to an increasing interpenetration of customs and practices. Taken together, this indicates that, in addition to thinking in terms of European and national rights, the justices are also thinking very pragmatically: they wrote their decision not for any conservative or idealised Spanish society, and certainly not for one with the type of idealised unity, secular or otherwise, which Mavelli sees for France,[46] but for the genuinely existing Spanish society of today which many people find uncomfortable and possibly will continue to find uncomfortable.

With little European jurisprudence from above which could provide direct guidance, on the basis of national criteria and jurisprudence alone, and for a society which has become cosmopolitanised from below, the Supreme Court came to a conclusion which is in conformity

[45] The justices are aware that Spain is not an isolated example: they speak of "a more and more globalised world", see "Fundamento de Derecho Segundo".
[46] *Europe's Encounter with Islam: The secular and the postsecular,* Routledge: London and New York City, 2012, p. 68.

with human rights principles emanating also from the processes of Europeanisation from above.[47] The rights discourse of the highest appeals court has provided a very liberal outcome.

However, the other side of the coin is that in this same new social order, and with public pressure and the feeling by politicians that they have the support of the democratic electorate, the political discourse is following a different track. Politicians insist that it is the covered women who have to transform themselves in conformity with their different rights-based vision of Spanish and Catalan society.[48] As in a number of other European countries, Spanish parties are convinced that party-political capital is gained by public condemnation of the burqa and by political action against it. In Germany the electorate and politicians were mightier than the Constitutional Court's judgement which envisioned the possibility that a civil servant on duty could wear a headscarf, but insisted that states had to treat all religious signs equally. In nearly half of Germany's sixteen states the political classes subverted The Constitutional Court's very liberal judicial decision. The Belgian and French political pressures to ban the burqa were overwhelming. It is more than possible that something similar will happen in Spain, too, once some of the five current crises have been settled.[49] Here the political discourse will continue using what Müller calls "collective ethical self-clarification" referring to the Constitution (p. 50) as part of the politics of fear presented as the apprehended loss of hard-won rights in a society still re-constructing itself after a terrible civil war and a period of totalitarianism.

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[47] For example, Recommendation 1927 (2010) of the Parliamentary Assembly of the Council of Europe, "Islam, Islamism and Islamophobia in Europe" quoted in "Fundamento de Derecho Segundo".
[48] See, for example, Diario de Sesiones del Senado, IX Legislatura, núm. 85 (23 June 2010, page 4544), Senator Cabellero Martínez commenting on the decisions of some municipalities to ban the burqa: la decisión que han adoptado algunos ayuntamientos tan próximos a la verdadera realidad social y a las exigencias de la convivencia ciudadana.
Also: Ricard Zapata-Barrero, "Coherència de polítiques i immigració" in ed. Ricard Zapata-Barrero, *Una ética política mínima de la immigració a Catalunya: Cohesió, autogovern, llengua i frontera*, Cànoves i Samalús, Proteus: 2012, 141- 143, reprinted from *Públic*, 2 November 2011, p. 5.
[49] Las cinco Cs: Casa real, Cataluña, Crisis económica, Corrupción, Constitución.

Attempts to obtain legislation to ban the burqa are coming much earlier than was speculated in this paper, presented to the conference on 21st June, 2013. Although none of the crises indicated above had been resolved, Ramon Espalader i Parcerisas, Minister of the Interior of Catalonia, announced in the Catalan Parliament on 3rd July 2013 that the Government believed it had jurisdiction under the Police Act and under Article 164 of the Statute of Autonomy of 2006 to introduce legislation to prohibit deliberately covering the face [i.e. the "burqa"] in public on the grounds of safety / security. He made quite clear that he was aware of the Supreme Court decision and that any approach dealing with a restriction of religious freedom (via a modification of the Fundamental Law on Religious Freedom) would fail. He announced that the Catalan Government would introduce its bill after wide-ranging consultations with political parties, in order to obtain the "maximum consensus in the chamber".[50]

[50] Ple del Parlament / sessió núm. 14.1 / 3 de juliol de 2013, pp. 102-108: http://www.parlament.cat/activitat/dspcp/transcripcions/plec_mati_14_1PLE.pdf#page=099.