A Quest for Open Helmets

On the Danish Burqa Affair

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The Burqa Affair Across Europe

Between Public and Private Space

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Introduction

Alessandro Ferrari and Sabrina Pastorelli

Burqa and niqab represent the paradigm of an important passage of the European history.

At the centre of the European debates, burqa and niqab allow covering – and *hiding* – the deep transformations of the old continent while emphasizing the fear of a European identity ever more uncertain.

The *cases* represent, at the same time, the peak of a securitarian approach of the fundamental liberties post September 11th but also the passage towards another epoch marked by uncertainty, suffering and complexity. This new era is characterized by the research by all social actors – public authorities and religious groups – of the necessary accommodations for a social cohesion respectful of the public role of religions and fundamental rights for all.

Burqa and niqab 'cases got through Europe as an Arabic spring storm. The burqa *affair* confirmed the delicate situation of the Muslim taking root in Europe while showing – as never before – its transformation in a *European religion*. During the debates over these religious dress codes, women convert, second generation Muslims, the issue of religion as a personal choice represented the main opponents of those who asked for a total burqa-niqab ban on the basis of a securitarian and state centered approach.

The burqa-niqab affairs also showed the difficulties of applying to a personal interpretation of the right to freedom of religion as a protection of the fundamental choices of individual consciousness. They also demonstrated how easy could be to convert the right to freedom of religion in a cultural right – protecting the identitarian expressions of majority groups – and thus easily subjected to limitations once the majority feel threatened.

The theme of this book constitute a sort of *gymnasium* that allows dealing with delicate and intriguing questions inherent to the exercise of religious liberties from the point of view of the definition of religious freedom and the real concrete manifestation of it.

This book draws a picture of different national burqa affairs, from countries formally banning the burqa to countries where the debate did not lead to a peculiar legislation on the subject. This volume focuses not only on the banning measures of the burqa-niqab but also on the reasons and topics of the debate in the different European contexts. It contributes to the understanding of why some countries chose to ban while others did not. Several contributors show the similarities and the differences of the approach to the same subject in different cultural and political European contexts.

The articles in this volume are the product of a two days' conference[1] which took place within the RELIGARE project: Religious Diversity and Secular Models in Europe (2010–2013).[2]

The conference held under the initiative of one of the sub-projects of the RELIGARE EU Commission funded program, dealing with the issues of religion in the public space. This sub-project, coordinated by Silvio Ferrari (Institute of Ecclesiastical and Canon Law at the University of Milan), aimed at providing some inputs to restructure public spaces in a way that can cope with the increasing religious and cultural backgrounds of the European societies. Dress codes issues represented, in this framework, one of the main topics of research of the team.

The chapters of the book are a revised and updated version of the panelist papers as well as of other experts in the field.

The methodological tension between conceptual debates and concrete national cases is at the basis of the book structure. The first three chapters – dealing with key concepts – are approached from a socio-legal perspective.

Silvio Ferrari analyses the different strategies adopted by the European countries showing that they replicate – with few variations – the one used to deal with the question of the 'sects' or 'new' religious movements. He shows how a pragmatic approach – and not an ideological debate about the burqa – could be preferable compared to a law banning the full veil from all the public space.

Roberta Aluffi offers an explication of the different used terms such as burqa, *niqāb, hiğāb* in the Islamic legal literature. She then addresses the issue in non-western countries showing that *hiğāb* does not bear a single significance, but various changeable, culture-bound meanings.

Letizia Mancini studies the composite relation between women's rights and the use of the burqa and the niqab in the *common* and *public spaces* of European countries. She analyses, in a critical perspective, the main arguments in favor of a total ban of those garments in the name of protecting women's rights.

National cases are the theme of the further chapters.

Alessandro Ferrari's contribution focuses on the Italian case. The author shows how the proposals of different Italian parties for a complete burqa ban represent a regression from the ordinary standard of the right to religion freedom in Italy. Through a deconstruction of the responses to the debate on the full-face veil, he then analyses the unified final text of the law proposals to ban the veil, yet to be discussed at the Italian Parliament.

The French 2010 law, banning the concealment of the face in public spaces is analysed by the chapter written by **Anne Fornerod**. Underlying the gap between the growing importance of this issue in the public debate and the reality of the small number of women wearing a full veil, she analysed the legislative process leading

1 *The* Burqa *Affair across Europe: between Private and Public*, University of Insubria, Como, 4–5 April 2011.

2 http://www.religareproject.eu/, 7th Framework Programme for Research and Technological Development (FP7).

to the law: from the difficulties of translating the bill into legal rules linked to the principle of laïcité. She then focuses on the administrative regulations enacted after the 2010 law allowing to better understand the reference to new substantial legal concepts, such as 'public space' and the 'requirements of living together'.

Mark Hill provides an overview of English law and its minimal engagement with the wearing of Islamic dress. He analyses in depth the position of the Muslim British community, the media treatment and the debate in the British society at larger where there is no official policy on headscarves or veils.

Adriaan Overbeeke focuses on the situation of the full-face veil in The Netherlands. He underlines that even if restriction on individual manifestations of religious freedom in the public sphere appears as unusual in the Dutch context, the rapid change in Parliament's composition, the relations between State and religions, with particular reference to issues related to the Muslim minority, are the focus of a growing debate.

Jogchum Vrielink, Eva Brems and **Saila Ouald-Chaib** focus on the legal aspects of *local* and *general* prohibitions of the burqa in Belgium. They show that while a ban on face-veils in public places can affect few women, it nevertheless raises fundamental legal questions. They also consider that 'it seems conceivable that the Belgian 'burqa ban' may not pass constitutional challenges or scrutiny by the ECtHR'.

Lisbet Christoffersen analyses the issue of the full-face veil in the Northern European Countries by focusing in detail on the Danish case. She focuses on the prohibition of wearing religious and political symbols in court but also on the re-interpretation of existing legislation in order to consider whether it is possible to make prohibitions towards the use of the burqa. In so doing, Christoffersen focuses on the central values of the Danish society such as open-mindedness and equality combined with respect for freedom of religion also in public institutions, understood as representing 'the people' as common good more than representing 'the state' in any republican way.

Jörn Thielmann and **Kathrin Vorholzer** analyse the burqa affair in Germany. They explained that despite the growing visibility of Islam in this context – through the building of mosques and the wearing of the Islamic headscarf (hijab) – and the heated debates over this issue, very few conflicts raised around the burqa affair. Unlike other European countries, in Germany, the full-face veil burqa remains a 'minor problem' in case law.

Ralph Grillo and **Prakash Shah** draw a picture of the European context of the burqa debate, and examine the rise of the anti-face-veiling movement. They in depth analyse the arguments against face-veiling and in favor of a ban in the European countries and focus on the notion of *criminalization* wondering whether it could really be an appropriate response. They explain the reasons and the implications of the burqa debate in diverse societies giving inputs for further research on this topic. In their appendix, in a very useful table, they describe the timeline of the events relating to the criminalisation of face-veiling in Europe.

Methodological issues are finally the focus of the chapter written by **Daniele Ferrari** and **Sabrina Pastorelli**. Showing how comparative and interdisciplinary research is of great interest in the study of religious diversity – and so in the burqa issue in Europe – the authors focus on the European institutions' political actions and reactions to the debate on full-face veil. Looking at the Council of Europe and the European Union, they describe the sources of positive law with reference to the practice of wearing the burqa and investigate on how these sources could be processed by the jurisprudence of the EU courts.

Finally, the book submits a reflexive and operative proposal: the **Como charter**.

The Como charter constitutes an example of pragmatism as well as an invitation to humbleness and moderation in the exercise of public policies taking into account the reality of problems instead of concealing them. Once *lift off* the full-face veil issues, Europe could thus draw and build from its diversity new reasons of unity that represent its hope for the future.

Chapter 1
In Praise of Pragmatism

Silvio Ferrari

For a Pragmatic Approach to the Burqa Question

I should like to begin on a personal note: I wish to point out straight away that I do not appreciate the use of the burqa, niqab or of other garments that conceal a person's face. That said, however, I do not think that it is possible to forbid them without violating principles which are at the basis of liberal constitutionalism.

I do not appreciate the burqa or the niqab because they hinder communication between people. This is not only a question of words or gestures, it is also about expressions. A word or a gesture is normally accompanied by facial expression: a twitch of the lips, a frown, wrinkling of the brow. It is no coincidence that when we wish to stress the importance of something we wish to communicate we say: let's talk about it face to face. A word or a gesture without a face is a poorer form of communication which more easily lends itself to ambiguity and misunderstandings. It is also asymmetrical communication that places the unmasked person in a position of disadvantage: any poker player can tell you that he would never sit at the same card table with a person whose facial expression is inscrutable.

It is true that similar difficulties are encountered when we speak to a person who is wearing, for instance, a pair of large dark glasses. For this reason when I was a child my mother taught me that it is good manners to remove one's sunglasses whenever one starts a conversation. Those who do not respect this rule violate a rule of good behaviour, but they do not commit a crime. This is why I believe that hindrance to open and direct communication is not sufficient grounds for forbidding the use of the full veil except in circumstances where it is essential for the person's face to be seen. Indeed no country in the world has laws requiring a person to remove his sunglasses when entering the public space; but in some of them there are laws which impose the removal of the burqa or the niqab in such a situation. It is therefore legitimate to suppose that there must be other reasons behind these laws.

The justifications for supporting a legal prohibition extending to any public space have never persuaded me. I do not subscribe to the view that the burqa or the niqab is always imposed on women by men, by religion, or by social convention – although it can happen[1] – because this argument neglects the fact that there are women who do choose freely and wittingly to wear this garment. I remain unconvinced by the

1 And in that case the public powers are obliged to protect the woman's freedom not to wear these garments.

reasoning that covering one's face with a veil is not an obligation according to the Muslim religion and so it can be forbidden without prejudicing religious freedom: also wearing a cross is not an obligation for the Christian religion, but we would consider any law prohibiting one to do so to be illiberal. And I am sceptical that the general ban on the burqa and the niqab is necessary for reasons of public security or public order. This may be true in particular circumstances but not as a general rule. Indeed wearing these garments is not the best way to pass unobserved: quite the contrary, in Europe it attracts attention.

The weakness of these arguments leads me to suspect that the ban on wearing the burqa and the niqab in the streets and in other public places is not aimed at solving the concrete problems that these garments can give rise to. Such a ban is intended to communicate a message of condemnation of a religion and of a culture that are considered backward compared to others which are viewed as more respectful of the dignity of the human being, women's rights and gender equality. This feeling is reinforced by the ideological nature that the debate has rapidly assumed in Europe. It is almost as though this way of dressing were – always and in every case – a sign of submission of the female sex, a danger to public safety, an offence to gender equality which should be condemned outright. Or, on the contrary, as though it was an expression of religious faith, a sign of personal autonomy, a display of freedom of expression which should be safeguarded without exception.

In reality the full veil can be many of these things together and so it is necessary to conduct a lengthy and demanding study of distinctions. This can enable us to adopt only those restrictions that are indispensable in a democratic society so that all citizens may have open and orderly access to the public sphere. It goes without saying that there are situations when it is necessary to see a person's face (such as when checking identity cards or passports); there are activities which it would be dangerous to carry out with one's face covered (such as driving a car); there are cases when appearing in public wearing a burqa or niqab may cause social alarm. In these circumstances the question at issue is not the full veil per se, but the problems that may arise from a person's appearing in public with his or her face concealed. It is necessary to carry out a pragmatic assessment case by case in order to adopt measures proportionate to the practical problems arising from the use of the burqa or of the niqab while respecting as far as possible the freedom of religion and expression of the women who intend to wear them.

This is by no means an easy task because it requires a careful analysis of the various components of the public sphere. Such an analysis has already been carried out elsewhere (S. Ferrari and Pastorelli 2012) so I will not repeat it here. I would just like to stress that the deconstruction of the notion of public sphere according to its spatial and personal elements makes it more difficult to adopt general and uniform solutions which do not take into account the coexistence of many, different and overlapping public spaces and which neglect the specific role that each of them plays in the promotion of a democratic society. One issue is the common space (the street, the square) which is a space each of us is obliged to enter to satisfy the fundamental necessities of our lives (to buy food, to go to work);

another issue is the political space, where we discuss questions of common interest (TV *talk shows*; a street protest by the *indignados* or by *Occupy*); yet another issue is the institutional space (the courtroom; parliament) where binding decisions are taken for all citizens. The rules that apply to these different spaces, which together make up the public sphere, are not the same. Nor are the same rules applied to a person who enters these spaces as a private subject or as the representative of a public institution: teachers and students share the same physical space – school – but their behaviour (and clothing) is regulated by different criteria. It is not possible here to go beyond this extremely brief overview (for a more detailed analysis see the work cited at the previous note in this paragraph). But this spatial and personal deconstruction of the notion of public sphere can be a helpful starting point for a pragmatic orientation, focused on a practical evaluation and case by case examination of the problems arising from a person's manifestation of religious convictions in the public sphere.

A general ban on the full veil extended to all the common space seems hard to justify not only because it limits freedom of religion and expression but above all because it touches the everyday and in a certain sense 'pre-political' life of individuals. The freedom to wear garments ascribable to a religious or cultural conviction should not be limited in this common space unless it can be demonstrated that their wearing causes concrete damage to other people's enjoyment of it. A similar reasoning regards the political space. By definition the political space must be free and plural: in it the visible manifestation of different religious and cultural convictions is indispensable for guaranteeing the pluralism on which a democratic society is founded and so this works in favour of the freedom to wear the burqa or niqab. In the institutional space things may be different: a judge who wears such garments could raise issues that are not so very different from those arising from the presence of the crucifix in courtrooms. The guarantee, not only in substance but also in appearance, of the impartiality of the institutional space can prevail over the freedom of the subjects who work there in the name of the public powers.

In the grey areas where the common, political and institutional space overlaps a little healthy pragmatism will do no harm: the patient who asks to be admitted to hospital while her face is covered is one thing; the teacher who wants to teach behind the screen of a burqa or niqab is another.

In conclusion, apart from in specific and well-defined cases I think that criminal law is not the best instrument for dealing with the problems raised by women who want to wear the burqa or niqab. Criminal law is the *extrema ratio*, the last resort for when it is not possible to protect a fundamental individual or community good in another way. Even though the full veil makes inter-personal communication less open and transparent, I do not think that there are sufficient grounds for invoking the force of law. In this situation a genuinely liberal society uses other instruments – education, debate, persuasion – aimed at encouraging an open discussion within the Muslim community on the opportuneness of women covering their faces when they enter the public space.

The Legislative Panorama in Europe

This pragmatic approach which is attentive to the different character of each particular case has not been adopted by all European countries. The contributions collected in this volume show that each country has followed a different route to regulate the question of the full veil.[2]

The first and best known is the prohibition to circulate in public with one's face covered. This is the route France took with the law of 11 October 2010.[3] In this case the prohibition is contained in a state provision which is extended to all public space. The breadth of the ban marks a significant escalation in the application of the principle of *laïcité* in France. Previously the ban was applied within the institutional space: *laïcité* forbade exhibiting religious symbols in public institutions and barred public officials from manifesting religious convictions when carrying out their duties. More recently the ban was extended also to state school students, who were forbidden to wear religious symbols considered too visible:[4] but also in this latter case the space covered by the ban was that of a public institution. With the law on the full veil the ban has been extended beyond these limits and it covers all public places (squares, streets), places open to the public (a shop, a supermarket; although not a place of worship) and places providing a public service (such as a post office). According to a speech by the French Minister of Justice in the parliamentary debate, the justification for such a broad provision is that the full veil respects neither liberty, nor dignity, nor equality:[5] it therefore has to be outlawed in all of the public space. But this explanation seems to go over the mark (if the burqa and niqab do not respect these fundamental rights they should be banned also in places of worship and in the private space) and it betrays the intention to extend the principle of *laïcité* from the state sphere to the social and political spheres: in this perspective *laïcité* pervades not only the institutional space but also the common and political spaces. The same route of legislative bans was followed by Belgium, which outlawed the full veil with a law of 2011. However, the provision is formulated in a different way from the French law:

2 In recent years some states have approved laws and administrative measures which specifically regard the burqa and the niqab, while in others the prohibition falls on any garment that fully conceals the face, leaving only the eyes uncovered. This difference is significant for many aspects. However, the debates that have accompanied the laws of the latter type clearly show that also these measures were aimed especially at the burqa/niqab and that the formulation of the legal provisions in more general terms is mainly due to the need to avoid criticisms of constitutional legitimacy on the grounds of gender or religion. For this reason in the following pages I shall not insist further on this distinction.

3 On this law cf. the chapter by Anne Fornerod in this volume. See also Bui-Xuan 2011: 551–559.

4 Loi 2004-228 du 15 mars 2004, encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, in *Journal Officiel* n°65 du 17 mars 2004, 5190.

5 This passage is cited by Olivia Bui-Xuan 2011: 555.

it forbids appearing with one's face covered or concealed 'in places accessible to the public'.[6] This formulation is juridically more correct and ideologically less demanding than the one adopted by the French law. The expression 'places accessible to the public' has a precise legal content and it does not evoke the political desire to confine religious symbols to the area of private life in the way that the French provision does with the expression 'public space'.

At the opposite end there is Great Britain, where the minister for immigration has qualified any provision aimed at banning the burqa or niqab as 'unBritish'.[7] As Mark Hill writes in the essay contained in this volume, 'Britain has no official policy on headscarves or veils'. In this country not only are there no legislative or administrative provisions forbidding the burqa and the niqab at the national or local level, but there are no directives by professional organisations on this matter. When the question was raised about jury members, lawyers and witnesses wishing to appear in court with their faces covered, the Judicial Studies Board (a body that works as a 'training academy' for judges) did not take a position, leaving the decision up to the discretionary power of each judge.[8] Even the jurisprudence is very meagre and in substance it boils down to a sentence by the Employment Tribunal which states that it is legitimate to dismiss a teacher who wants to wear a niqab when another male teacher is in the classroom. One element (though certainly not the only one) which goes towards explaining such a radical difference between this legislation and that of France is the different importance of the principle of state *laïcité*. As Hill concludes, 'the United Kingdom does not have a tradition of *laïcité* and enforced secularism. On the contrary, its patrimony lies in an established state church which affords liberal tolerance to those of all religious persuasions and none'.

A third route hinges on local law. In this case the state abstains from outlawing the use of the full veil throughout its territory but the ban is introduced by the mayors or by other local authorities through administrative provisions. This is what has happened in Spain, where it is forbidden to enter public buildings in Lerida, Barcelona and other municipalities with one's face covered.[9] The justification for this strategy is that the burqa/niqab has to be forbidden only where it creates real social alarm. But it is doubtful whether this objective has in fact been achieved. An examination of the individual cases shows that the prohibition does not depend on the occurrence of episodes that actually did disturb the peace and

6 On this law see the chapter by Vrielink, Ouald Chaib and Brems in this volume.

7 This statement is cited by Grillo and Shah 2012:14.

8 In Holland the Zwolle court refused to accept the testimony of a woman who was wearing a niqab with the motivation that this garment prevents adequate communication (the decision, dated 10 October 2010, can be read at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=AL8382, accessed on 13 May 2012).

9 See the chapter by Motilla in this volume. Also in Italy some mayors have tried (without much success) to ban the burqa or the niqab with administrative provisions: cf. the chapter by A. Ferrari in this volume.

public order of a particular community, but rather on the existence of a political majority convinced that the full veil was against the safety or dignity and equality of citizens, irrespective of the local situation.

A strategy that I find more convincing has been followed in Denmark.[10] Also in Denmark there is no law that forbids the wearing of the full veil and, unlike in Spain, there are no local administrative provisions outlawing its use. There are instead court sentences, documents by professional bodies and government directives which supply guidelines for dealing with the most controversial cases. In this way it has been established that all those who work in Danish courts have to have their faces visible so as to be recognisable to the public;[11] that women wearing the burqa or niqab can ride public transport but they cannot use season tickets which require the identification of the bearer; that schools and universities may (but are not obliged to) prohibit the full veil because this hinders non-verbal communication between students and teachers. In these and in other cases a pragmatic and functional approach has been adopted. The full veil as such has not been judged as a garment that violates fundamental human rights, but it is clothing that in some concrete situations can create problems for the correct functioning of the public institutions and public services. In these cases the attempt has been made to find a solution that guarantees, as far as possible, the women's right to wear the burqa or the niqab: only when this objective has turned out to be impossible or too complicated to achieve has the wearing of this garment been forbidden.

The Burqa and 'Sects'

These different strategies by the European countries follow a model which is not new. It replicates, with few variations, the one used to deal with the question of the 'sects' or 'new' religious movements ('new' in the sense that they had never had a significant presence in Europe).

The terms of the question are known. Since the 1970s 'new' religious movements have multiplied in the Old Continent. Some came from Asia, where in some cases they had quite a long history (for instance some groups which drew their inspiration from Buddhism or Hinduism). Some were born in the United States and they linked up with the movement of religious awakening that had been developing in that country since the beginning of the nineteenth century (such as the Mormons). And some were more recently created movements, like the Church of Scientology founded by Ron Hubbard in the 1950s.

10 See the chapter by Christoffersen in this volume.

11 A similar provision, but which was extended to all public offices, has been in force since 2 February 2011 in the German Land of Hessen (this provision is signalled in response to the Thematic Template Issue 5 WP5: Religious symbols in the common space, RELIGARE).

For various reasons these movements sparked off considerable social alarm. They were accused of psychologically conditioning their followers with techniques likened to 'brainwashing'; of isolating them from the family and social environment in which they lived; of exploiting them economically; and of leading them to extreme acts of self-destruction (Europe reverberated with the collective suicide of some members of the Order of the Solar Temple in 1994). Although these accusations referred to an exiguous minority of members of such movements, the mass media and a substantial part of public opinion and the political powers clamoured for provisions that would outlaw them. In some countries laws were therefore issued against the 'new' religious movements; in others no laws were made; in yet others a middle way was followed, with the publication of reports, instructions and guidelines by the various public institutions to caution people about the dangers of these organisations.[12]

It is interesting to note how the states which at that time decided to legislate against the 'new' religious movements are the same ones to have now legislated against the full veil and the states which had avoided doing so are the same ones that today refuse to ban the burqa and the niqab. In 2001 France enacted a law whose aim was to 'renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l'homme et aux libertés fondamentales';[13] some years earlier Belgium had used a specific law to set up a 'cellule administrative de coordination de la lutte contre les organisations sectaires nuisibles',[14] at the same time publishing a list of nearly 200 sectarian organisations. On the other hand, the British government did nothing of the kind and limited its action to supporting the creation of an independent agency, INFORM (Information Network Focus on Religious Movements) with the duty to 'help people by providing them with information that is as accurate, balanced, and up-to-date as possible about alternative religious, spiritual and esoteric movements'.[15]

The analogy between what happened over the 'sects' and what is going on about the full veil is interesting because some elements which are central to the second issue – Islam and women's rights, in particular – were totally absent in the first one. Nevertheless, the European states have reacted against the burqa and the niqab, where the Islamic and gender issues are crucial, using instruments and modalities that are surprisingly similar to those adopted against the 'new' religious

12 For a concise picture of these events cf. S. Ferrari 2006; for a more analytical examination see Richardson 2004.

13 Loi n. 2001-504, 12 juin 2001, in *Journal Officiel*, n. 135, 13 juin 2001.

14 Loi 2 juin 1998, in *Moniteur belge*, 25 novembre 1998. The list with the indication of the 'sects' is annexed to the report which collects the results of the 'Enquête parlementaire visant à élaborer une politique en vue de lutter contre les pratiques illégales des sectes et le danger qu'elles représentent pour la société et pour les personnes, particulièrement les mineurs d'âge. Rapport fait au nom de la commission d'enquête par MM. Duquesne et Willelm', *Documents parlementaires*, 1996–97, no. 313/7 and 313/8.

15 Cf. http://www.inform.ac/infmain.html, accessed on 3 May 2012.

movements. The importance of these elements is thus put back into perspective: the aggressive policy of France and the tolerant policy of Great Britain cannot be explained only through reference to religious, ethnical or gender motivations.

On this point it is necessary to be more precise. It is evident to any observer that ethnicity, religion and gender are central components in the full veil affair, just as themes of psychological subjugation and economic exploitation were in the 'new' religious movements question. But these elements are involved at a relatively superficial level and serve the purpose of identifying the specific scapegoat that is evoked each time to exorcise the fears of a frustrated and concerned European society. The link between 'sects' and full veil, which is able to explain the resemblance between the mechanisms of reaction sparked off in both cases, is to be found at a deeper level, in the fear of the 'other' which has spread through European countries. The history of Europe has shown on several occasions – especially in difficult moments like the one we are going through now – that it is easy to construct a stereotype according to which the 'other' is not perceived for what it is in reality but is seen only through the lens of fears and desires which otherness arouses. In other words, people see the 'other' in terms of how they fear that the 'other' is or how they would like the 'other' to be. The woman covered by a veil embodies this stereotype perfectly, evoking at the same time the ghosts of religious obscurantism, cultural backwardness and political fanaticism. Likewise the follower of the 'sect' evoked the spectres of the irrationality of religion, the absolute power of the charismatic leader and the annihilation of its followers' capacity of self-determination. In different ways the veiled woman and the member of the 'sect' are perceived as a threat to modernity and to the models of understanding the roles of religion, women, politics and individual freedom that had hitherto been considered consolidated in European society.

Faced with this threat each state acts with the legislative arsenal it is familiar with. Invoking the principle of *laïcité* justifies the resort to criminal law in France, while the appeal to the rule of tolerance explains the legislative inactivity in Great Britain. Most scholars think that this difference has its roots in the different political[16] and legal[17] traditions of the two countries, with the paradoxical result that

16 Cf. Tourkochoriti 2012: 850, according to whom 'in France, a paternalistic vision of the state, together with a conception of a secularism imposed from top-bottom legitimizes state intervention for banning religious symbols' while in the United States (which is close to Great Britain on the issue, and likewise on the question of 'sects') 'a conception of secularism founded upon the need to accommodate religious differences leads to a more tolerant attitude towards religious symbols even if they seem incomprehensible to the majority of the population'.

17 Cf. Gaudreault-Des Biens and Karazivan 2012. The authors put forward the hypothesis that 'the civil law tradition seems more prone to accept intrinsic limitations to fundamental rights, with a conception of these rights that is more objectivist than the more subjectivist one adopted in common law jurisdictions' and note that 'the relatively easy acceptance in some civil law countries of a legal distinction between (legitimate) religions and (illegitimate) cults, or of bans on signs that are seen by some as having a religious dimension, and the reluctance in common law ones to adopt a similar path, seem to support that thesis'.

religious freedom is better guaranteed where there is an official church (*established by law*) than where all religions are equal before the law. Although there may be some reservations about this conclusion (above all when it is presented as a rule of general application), it is undeniable that in the two cases just mentioned here the strategy adopted in Great Britain appears to be more coherent with the laws on religious freedom than the strategy chosen in France.

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Twenty years or so ago Europe seemed on the verge of being invaded by the followers of 'new' religious movements; today it fears an invasion of women wearing the burqa or niqab. The first invasion did not take place and everything points to the likelihood that there will not be the second invasion either. The experience of the 'new' religious movements has shown that an intelligent policy of tolerance is effective: Great Britain, without adopting any legislative provision, had fewer problems than France or Belgium, where the laws against 'sects' exacerbated internal tensions and also created foreign policy problems. The past therefore teaches us that prohibitions of a general nature are not very useful and may sometimes even be counterproductive: a pragmatic approach, hostile to a law that bans the full veil from all the public space but open to the possibility of prohibitions in well-defined specific situations seems to be preferable both from the point of view of political opportuneness and out of respect for the principles of freedom of religion and expression.

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Chapter 10

A Quest for Open Helmets: On the Danish Burqa Affair

Lisbet Christoffersen

This article shows how the presence of the burqa in the common public space has contributed to reopening one of the oldest known value debates in Danish-Nordic society, namely the quest to be open not only in mind but also in appearance. The first part of the article explains how this debate was opened in relation to the *black block* in public demonstrations already years before the first burqa was seen in Copenhagen. An attempt by the Danish Courts to be tolerant and *mainstreaming* also in relation to religious values, however, reopened the question and placed the burqa on the side with the masks in public understanding. The Danish burqa affair thus contains a prohibition of wearing religious and political symbols in court as well as a re-interpretation of existing legislation in order to identify where within the limits of freedom of religion it is possible to make prohibitions of the use of the burqa. In this article the reactions are interpreted as concerning central values such as open-mindedness and equality combined with respect for freedom of religion also in public institutions, which are understood as representing 'the people' as common good more than representing 'the state' in any republican way. The final solution appeared as functional and pragmatic, however based on the values of openness.

Contextualising – the Danish Context on Head Covering before the Danish Burqa Debate

The Danish criminal code was changed in 2000 in order to make it illegal to cover one's face when taking part in a public demonstration. Seen from a politico-legal point of view, this legislation was invented by the police because of a new trend among young political activists in public demonstrations: they covered their faces, very often with a black cowl or a mask, and thus could not be identified through photos, etc., after a fight with the police. Even though there had been huge demonstrations in Copenhagen in spring 1968 (against the war in Vietnam) and spring 1970 (against the World Bank Summit in Copenhagen) and even though there had been fights between the police and demonstrators over housing possibilities throughout the 1970s and 1980s, one demonstration during the night between 18 and 19 May 1993 changed the public picture. A majority of Danes had voted *no* to the Maastricht Treaty on 2 June 1992. Negotiations between the

government, parliament and the EU led to the Edinburgh agreement with four significant opt-outs and a new public referendum was established on 18 May 1993. Here a small majority voted for the treaty, and riots broke out in the streets of Copenhagen, especially in areas where there was a vast majority against the EU. Demonstrators at these demonstrations were using the model from other European and Middle Eastern countries, covering their faces, and consequently they could only with difficulty be singled out and identified for subsequent prosecution. The demonstrations went totally out of control with demonstrators sending fire bombs against the police and in the end the demonstration was stopped after the police had fired live rounds and hit demonstrators. *Shoot after the Legs* in the Danish language [*'Skyd efter benene'*] has become a synonym for this situation, with the first shooting by the police in the streets of Copenhagen since World War II.

The prohibition against masks (as it is commonly called) in the criminal code § 134b is formulated as follows: a person, who in relation to meetings, assemblies, processions, and the like goes about in public with the face covered partly or fully with a hood, a mask, painting or in other ways suitable for lack of identification, is to be punished with fine or up to 6 months of imprisonment. This prohibition, however, does not count for a covering of the face with regard to protection against bad weather or which suits *other purposes, worthy of recognition* (my italics and my translation).

This new ruling was largely backed by public opinion, among other reasons because it drew on a common cultural understanding in Danish society: if you want to use your rights and freedoms to expression and association, which everyone certainly should, then you need to stand up for them also in a public debate and be responsible for who you are and what you do. Be open-minded, not only in a theoretical way, but also very concretely:

> Vil dansken i verden fægte, men dølger åsyn og navn, jeg ved at hans ånd er ej ægte, jeg tager ham ej i favn.[1]

These words from a popular song written in 1837 became part of the public debate. The song is still included in some of the most common collections of songs for children. It was written by B.S. Ingemann (1789-1862)[2] and it is part of a national-romantic song-cycle on *Holger Danske*, a Danish legendary figure. *Holger Danske* was the son of a Danish king and originally a prisoner of war, who was said to have been the saviour of *Karl der Grosse* in the battle against the Saracens (the Moors) in 778. This song reminds the Danes of legends of identity. *Holger Danske* is mentioned in various European medieval songs and plays, such as *Rolandkvadet* (*Le Chanson de Roland: Oger le Danois*) and in

1 'A person who fights his case in the world with a hidden face is not a true Dane. His spirit is muddled and I don't want to embrace him in loyalty' (my translation).

2 http://en.wikipedia.org/wiki/Bernhard_Severin_Ingemann (attended 28 March 2013)

Le Chevalierie d'Ogier de Danemarche, 1215.[3] Italian sources mention the same figure as *Uggiero il Danese* in the Sicilian *Opera dei pupi*. *Holger Danske* rests (in stone) in the cellars of one of the most famous Danish castles, *Kronborg*,[4] but the mythological promise is that if there ever comes a situation where he is needed, he will rise from his stone and stand for Denmark. Therefore one of the most famous Resistance groups during World War II was named *Holger Danske* as was the first Danish opera, written about this figure in 1789 and now elected as part of the Danish Canon of Culture.[5]

The icon *Holger Danske* and the link to the idea of fighting with an open, uncovered face thus forms part of the cultural background as to why the idea of covering the face at public demonstrations was simply seen by the general public as *un-Danish* and was thus forbidden by law.

A Changed Public Picture

The Muslim part of the Danish population has changed rapidly from only a few hundred in the late 1950s (when Muslim groups for the first time applied for public recognition according to the administrative standards of the time) to now, 50 years later, when they number about 250,000 (that is 4–5 per cent of the population). Muslims are therefore by far the largest religious minority community in the country (the Catholics, who for a long time were the biggest minority community are now about 1 per cent = 50,000 people).

The different Muslim traditions in the country have also meant the re-introduction of the habit for some of the women to cover their heads/hair with a *hijab*. This habit was largely seen as the practising of a religious norm, covered by freedom of religion. Several references were made in the public debate to Danish traditional norms for women as late as 50 years ago, when in different parts of society it was a habit for women to cover their hair with a hat or a headscarf when appearing in public. It was a way of showing modesty or, in the popular clothing from the Western part of the society or in the countryside in general, it was a practical way of keeping sand and sun from one's hair and face. In Danish society by and large it was therefore seen as ridiculous to react to Muslim traditions of the same kind. For a long time the general understanding was: let them decide that themselves, why interfere?

The burqa is understood as a veiling, which covers also (parts of) the face and the whole body. There is also the niqab, which covers the face and sometimes

3 These texts were translated into Danish by Christiern Pedersen, who also translated the Bible into Danish as part of the Lutheran reformation, in 1534. His translation became a popular book until the nineteenth century.

4 It is in the yards of this castle that Shakespeare's Hamlet formulates the famous sentence: 'To be or not to be, that is the question.'

5 Invented by the Minister of Culture in 2006.

leaves only the eyes free. The burqa even covers the eyes with light cloth or with an embroidered grille, only allowing the wearer to see a little from within but with no possibility to gain contact with other people's eyes from outside. The burqa was first seen in Danish society in the late 1990s in parts of the Somali population who had come as refugees. Researchers estimated in 2010 that between 100 and 200 women in Denmark wear a burqa (Burqa Report 2009, see also Warburg et al 2013). The maybe surprising information is that next to the Somali groups most of the wearers of the burqa are citizens of original Danish birth who have converted to Islam and see the wearing of the burqa in public as part of their new religious identity. Most of the wearers of burqa are young, up to 40 years old. They are theologically speaking part of *wahhabi/salafi* circles, but the interviewees in the report mentioned that they did not want themselves to be identified theologically – they underlined that this was a decision of their own, understood as part of an individual spiritual journey. The motivation is based on an ideal of hiding female beauty from the outer world, escaping gendered attention, even though the veiling itself is a basis for other forms of attention.

The reaction to the burqa among broader Muslim groups in Denmark is indifferent or negative. Many Muslim observers or leaders fear the reaction from other parts of the society or represent more neutral or secularised understandings of Islam, not in favour of the total covering of the face. Of course minor and more religiously strong Muslim groups support the idea. However, in Denmark the burqa is mostly seen as part of female religious practice more than as part of a male or a leadership based organisation of Muslim practice.

The reactions towards the total burqa and the niqab have been strong in the broader Danish society. There is not much support to be found, indeed quite the contrary. The interviewees in the aforementioned report have experiences with limitations of possibilities in society as such, combined with popular reactions against them on the street. The common scientifically based understanding in Danish society is also that the wearing of niqab or burqa (as an alternative to *hijab*) is a relatively new development, based partly on a new revelation in the Middle East (from the 1970s onwards) and partly on politically based violence in Afghanistan, Pakistan, Iran, Syria, Somalia, etc. The niqab/burqa in these countries is thus seen as some sort of protection for/of the women – however, it is a protection which has become necessary because of religiously legitimated violence (ibid., 55 ff.).

Politico-Legal Reactions to the Changed Picture

Already the introduction of the *hijab* in Danish society, and this time caused by religious ideas, has given rise to general discussions and a couple of court cases

around 2000.[6] The general line from the court is that a private employer can decide a general regulation on how he wants his employees to be dressed (of course within the limits of public order) and that on the basis of such a general clothing policy he can deny his employees the option to wear religious clothing (or clothes or symbols with political or other normative references). However, many have argued that society should not change into an intolerant one, stripping people of central dimensions of their identity and acting also in contrast to the freedom of religion. Among the latter were especially remarkable leading politicians (members of the government and of parliament) from the centre-right parties in government; and even though that government in general was rather critical towards the role of Muslims in society, those politicians still underlined freedom of religion and mutual respect and tolerance as central values, also in the workplace. The general impression is thus that as soon as the cases were solved with no *legal* obligation for the employers, wearing of the *hijab* in Danish workplaces rose. Interest was now more concentrated on how well young women from immigration populations did in their studies at high school as well as on the labour market instead of focusing on their head gear.

The public labour market is, however, seen as different from the private labour market. On the one hand, the public labour market must be bound by general rules, prohibiting against religious discrimination. These rules have been in force in Denmark since the constitution of 1849, which in § 70 states that denial of a public job or function due to the religion of the employee is prohibited.[7] On the other hand, the public labour market is precisely public or common, that is, representing common goods, not individual norms. The question is then to what extent are employees in the public institutions representing 'state values'; to what extent are they simply Danes with their own values and a common *bildung*, professionalism established through education, working in the public institutions; and, even more, to what extent are the public institutions required to show inclusiveness towards minority – and maybe also majority – perspectives of different kinds.

A couple of cases reported in the public debate are considered here.[8]

6 The Magasin Case and the Føtex Case: see for detailed information Christoffersen 2012 and Christoffersen & Vinding forthcoming.

7 The consequences in relation to the most public of all public legal institutions, the court system, was discussed in the committee, which decided the constitution of 1849. The leading jurist of the time, A.S. Ørsted, argued that such a rule would open the Supreme Court for members of the Jewish faith. That was also exactly the idea, was the answer from the then and later very influential Danish pastor, hymn writer and founder of the folk high school movement as well as the ideas on adult education, N.F.S. Grundtvig, the argument being that in the Supreme Court members are not basing decisions on religious rules, but on the law of the land – and so be it, many of the members of the current Supreme Court have names showing their roots in old Danish Jewish families.

8 The cases reported here are just the most well known, representing relevant dimensions of the discussion. I have no intention of covering the field as such here.

In early May 2007 a person, who ran a home care for children (private kindergarten) was denied authorisation by the municipality because she wore a burqa. The argument was that the children, who are very small and just learning an oral language themselves, need access to the carer's face in order to learn different dimensions of communication.

From 2008 onwards members of the nurses' organisation have conducted intense internal discussions on whether or not it should be possible to work as a nurse in a public hospital wearing religious clothing and especially, but not only, burqas.[9] The discussion was started by a nurse of a non-Muslim faith, thinking that nurses should not throw their own (religious) identity in the face of sick people. Later, in November 2010, the minister (from the centre-right party) responsible for health care institutions[10] argued in parliament that people who did not want to be taken care of by nurses and doctors with religious identity markers had the right to change to another hospital (which is not an automatic right in the Danish system for care, paid for by the public). His argumentation was based on tolerance. Representatives from the then centre-left opposition (in government since October 2011) on the contrary argued that patients should not risk being put in a position to have to choose, since publicly hired nurses and doctors ought to follow a more secular norm at work.

In September 2009 a bus driver in Odense, the third biggest city in the country, was dismissed for having denied access to the public transport for women wearing the burqa. His argument was that they could not identify themselves according to their licence card and he was of course supported in the argument that relevant identification should be possible. The denial of access to the bus was, however, seen as unlawful discrimination. An alternative solution was found: if you want to wear a burqa and use the public transport system, then you cannot take part in refund systems, based on face-identification with a picture, but you have to pay for the full ticket.

Legislative Initiatives

Courts of Denmark is an established hierarchical organisation of the Danish courts with common policies regarding, e.g., human resources. In April 2008 this organisation formulated and published policies regarding *conduct and personal behaviour at Courts of Denmark*.[11] The norms were based on a general understanding that due to the special role of the courts and the special character

9 See e.g. Rachel Adelberg Johansen: 'Religiøs Kønsuniform' ['Religiously Gendered Uniform?'] in *Sygeplejersken* [*The Nurse*], 5/2008, 4 March 2008, http://www2.dsr.dk/sygeplejersken/?intArticleID=16563, accessed on June 23 2012.

10 Bertel Haarder (V). The answer can be found in the Danish parliamentary document system as *svar på spm S 261* [*Answer to Question nr 261*], 2010-2011.

11 Notat om adfærd og personlig fremtræden ved Danmarks Domstole [Note on Behaviour and Personal Appearance at the Danish Courts], 22 April 2008, j.nr. 7199-2006-8.

of the work done by the people there, working in the courts required particular rules. Among other aspects regulated, it was seen as relevant also to regulate the clothing of employees having direct contact with the public, among which of course especially the judges in court. The regulations should signal respect for the legal system and the general values related to the court system.

The first more concrete norm regulated in the paper was that nothing hinders an employee at the Danish Courts from wearing a *hijab*, turban or other head covering of religious or cultural grounds, as long as the face is not covered. The argument for not allowing face-covering headscarves was that the public should be able to identify the person in court. A second, more concrete norm was that all employees had to make sure that the authority of the court was used with dignity and, in consequence, that judges are obliged to ensure that the court appears with dignity, independent and impartial.[12]

The background for this proposed regulation seemed to be manifold. The courts wanted to adjust to the general legal understanding of antidiscrimination legislation (also back from the constitution) and tried consequently to formulate a solution with as few limits on the personal observance of religious norms as possible. The majority of the judges, at least in the lower courts, are women and so are the majority of the students of law, among whom are many students from immigrant families (third-generation immigrants) where the family is still upholding certain moral norms as regards clothing, veiling, etc., but at the same time seeks to have their youngsters, including the females, study and get good jobs in society. This is supported also officially in the society as such and so in the court system. Therefore the Danish Courts wanted to underline that some types of religious identification could be acceptable when at the same time supporting the Danish legal system, whereas the wearing of a burqa was seen as unacceptable for functional reasons: it must be possible for you to see the judge who is judging you. The Danish Courts thus saw themselves as supporting a general open-minded line of argumentation when formulating these norms.

The proposed guidelines caused major political outrage. The Danish People's Party, which was supporting the centre-right government, reacted promptly with huge advertising campaigns showing a judge in a burqa – meaning that the person put on trial could not identify her while she was administering high punishments. The advertisements thus combined the Danish norm that you must show yourself and stand up for who you are with the (Western) fear of blindness in court, strongly supported by a general fear of *Shari'a*.

Consequently, the Conservative minister of justice proposed a new piece of legislation in parliament, forcing judges in all courts to wear a gown and prohibiting them from appearing in court in ways which could display any religious or political attitude, belonging or position. It *can* be allowed to wear a small Christian cross as jewellery, but all sorts of very obvious identifications – such as Muslim veiling,

12 My translations of first to fourth passage of the abstract under section 1 from the normpaper from the Danish Courts (see the previous footnote).

Jewish *kippah* and any party emblems – are prohibited. The prohibitions are only when the judge is in court. It is clearly underlined that judges are allowed not only to have – but also to identify themselves with – a personal faith also at work. That is, if you wear a turban on religious grounds, then wear it on the bike to and from the court room, in your own office and in the canteen. But when on your way to the courtroom, you have to leave it behind. The legislation was decided by a majority of parliament,[13] against protests from the Danish Courts, also based on the independence of the court system.

Political Initiatives

In the aftermath of the 2009 legislation the Conservative Party (which was a member of the government, responsible for the Ministry of Justice) at its summer meeting in August 2009 suggested a general prohibition on wearing the burqa in public (not only in public institutions, but in general on streets, on public transport, etc.). This was rather an unusual proposal in the Danish political debate, caused of course by support for the prohibition not only of the burqa, and of all sorts of religious clothes in the courts, but also by a general change in this party from a *God-monarchy-homeland*-party to a more modern secular(ist), French style republican party. Part of this change was caused by a single politician of Palestinian origin who argued that he knew what he was talking about and who was responsible for precisely this proposal. His argument was that the burqa is against the freedom of individual women no matter whether she claims that she has decided to wear it herself; and that the religious idea of segregating women in public should be seen as dangerous in open-minded Danish society (see also Andreassen and Lettinga 2012 for a more detailed analysis and discussion of the gendered dimensions of these cases. Andreassen 2011 discusses the case as an example of formulating gender equality and concludes that the struggle is less about inclusive feminism and more about exclusive hostility towards otherness).

Consequently, the government asked the University of Copenhagen to provide a scientific analysis on the number of burqa*s* and niqab*s* in Denmark, the result of which was published in January 2010: it has been referred to earlier in this chapter.

Another immediate consequence of the proposal from the Conservative wing was a working group under the government organised in August 2009 to analyse the use of the burqa in the public space in 'a society marked by freedom, open-mindedness and participatory democracy where all citizens have equal rights and obligations without any reference to their religious identity or norms', as it was formulated in the terms of reference for the working group.

A report from this intergovernmental committee was published in January 2010 (Afrapportering fra Arbejdsgruppen om Burka, Niqab og lignende beklædning, Januar 2010, Sekretariatet for Arbejdsgruppen, Indenrigs- og Socialministeriet [Report from the Working Group on Burqa, Niqab and similar Dress. January 2010. Delivered by the Secretariat for the Working Group. Ministry of Interior and Ministry of Social Affairs]). The report included an overview over parallel discussions in other (relevant) countries in Europe and presented existing rulings concerning religious elements in clothing on the labour market, consequences in relation to welfare benefits and unemployment insurance. It also presented pedagogical and other arguments in relation to both teachers' and students' (possible) wearing of the burqa in public education and finally discussed how public authorities in the executive branches should react to customers using the burqa.

13 Lov nr 495 af 12 June 2009 [Act Number 495, dated 12 June 2009].

This report formed the background for a so-called *note*, signed by the government in January 2010 and published on the government homepage. That is a form of communication we have seen very seldom in Danish society. It does not of course have any legal consequences, but on the other hand it is also not a simple policy statement. It is a paper of two pages, containing the current interpretation of legal norms and thus the current understanding of how to deal with the burqa and niqab in Danish society. And the headline is even more unusual: 'Burqa and niqab do not belong to Danish society', it states.

This is further argued in the statement:

> The burqa and the niqab, which camouflage the identity of the individual, are symbols of views on human nature and especially on female nature, which according to the government under no conditions belong to Danish society. The government thus calls on the full use of existing rules and possibilities for limiting the appearance of the burqa and the niqab in practice.
>
> The government works for a society marked by freedom, tolerance and respect for the individual human being. We have through generations developed a community of inclusiveness, but also with obligations and responsibilities towards the common goods.
>
> The burqa and the niqab are diametrically opposite to the basic values for our society. And the burqa and the niqab are a degradation of and an insult to humanity and the possibility of openly meeting the world as an independent individual. The use of the burqa or the niqab reduces humanity to sexuality and robs women of the right of behaving in Danish society on an equal footing with men and with women not wearing the burqa or the niqab. Therefore, according to the government, the burqa and the niqab are both a factual as well as symbolic suppression of women.
>
> A coherent society presupposes an open and equal dialogue between the citizens. And confident and reliable dialogue presupposes that we can see the person we are communicating with and that we have the possibility of seeing and reading each other's facial expressions and non-verbal communication. Openness is at the same time a condition for the ability to secure that we are the persons we are appearing as being, which again is a prerequisite for safety and security in society.

> The government is thus determined to fight against the view on human nature represented by the burqa and the niqab and to utilize the available instruments best suited to limit the problem.
> [...]
> A strong community, which like the Danish one is built on freedom, presupposes that each individual feels a personal responsibility for contributing to the community. We can therefore also have legitimate expectations that basic norms about freedom, equality and open-mindedness, which all can rely on, are also respected by all.
> [...]
> The existing rules mirror the basic values which we have already built on and still want to build our society upon and they are thus also able to catch the problems which arise in the meeting between a woman in a burqa or a niqab and society as such [...] existing rules and norms are thus marked by exactly the consideration of freedom, equality and open-mindedness.
>
> A society under the rule of law is characterized by equality in front of the law, and women whose face is covered with a burqa or a niqab do not of course have any special rights in relation to the demands from the law. The government strongly suggests that the existing rules and possibilities for limiting the use of the burqa and the niqab are fully utilized, no matter whether on the labour market, within education or in relation to control of identity etc.[14]

The government initiated two concrete changes in the criminal law and in the law on procedure in court rooms on the basis of the report. It was thus prohibited covering the face with a burqa or a niqab while witnessing in court. Also this rule was based on a concrete situation where a married woman refused to testify in a serious crime in the court room if she was not allowed to cover her face. The change of the criminal law was a further criminalising of enforcement to wear the burqa.[15]

The rhetoric in the governmental note was extremely sharp and one could have expected that the result would have been precisely that prohibition on the wearing of the burqa in public (streets, busses, shops, institutions) suggested by the Conservative partner in the government. However, that was not the case. The Ministry of Justice sharply underlined that freedom of religion is an individually protected right including a right to practise one's religion not only in private but also in public, and that this right has been protected in Denmark at least since

14 So far I have presented the first page of this very unusual note from the government in my translation. The rest of the note is a re-interpretation of already existing rules.

15 Lov nr 651 af 15 June 2010 om ændring af straffeloven og retsplejeloven (skærpelse af straffen for ulovlig tvang i forbindelse med brug af ansigtsdækkende beklædning samt ansigtstildækkende beklædning under vidneforklaring) [Act Number 651, dated 15 June 2010, Changing the Criminal Code and the Law on Procedure in the Courts (Strengthening the Penalty for Illegal Enforcement Related to the use of Face-covering Clothes as well as Face-covering Clothes used as a Witness].

1849 (the Danish Constitution), where the same two gentlemen mentioned earlier (Ørsted and Grundtvig, in a previous note) precisely discussed the consequences of freedom of religion for the public space. Ørsted argued that freedom of religion directly on the basis of the constitution would result in *Catholic processions in the street*, meaning that he wanted a possibility to outlaw the public display of religious items and keep religion within walls in churches or private homes. Grundtvig, however – again – replied that freedom of expression of religion also in the public streets was exactly what he understood by freedom of religion – and this constitutional basis securing rights also backed by the European Convention of Human Rights does not really open for prohibition of religious dressing in the public streets. The Conservative Party had to accept that and hence the rhetoric: political discourse instead of a change of law.

Governmental Re-Interpretation of the Law

The government could, however, do one further thing, namely go through the relevant legislation and make an official re-interpretation of relevant dimensions of the law. This political re-interpretation is of course not binding for the judiciary, but for the governmental ministries and departments it was binding from having been published and also the municipalities received through this re-interpretation a sort of assurance that they would not be judged (administratively, at least) if they followed the line.

The general re-interpretation of the law was based on the understanding that the wearing of a burqa is seen as *functionally* hindering verbal and non-verbal communication. Thus the government underlined that private people, including private employers, could decide themselves (within the margins of equality on the labour market and equal treatment in public) what is seen as proportionate and not indirect discrimination. They were thus supported in an understanding that security matters, and that contact with customers or respect of communication, could lead, e.g., to a denial of a job.

As for public employers, it was underlined on the contrary that employees working in health care in direct contact with the citizens, or in day-care, teaching service for citizens and internal communication could not claim a right to wear a burqa.

It was also underlined that a person who declines a job because she cannot wear the burqa is seen as not accessible for the labour market and consequently she gets no welfare benefits.

Schools and universities with personal attendance can rule the burqa out also among the students due to lack of communication (but virtually no institutions have done so). At the same time it was made public that the government did not want to employ a burqa-wearing woman as a school teacher because the students need access to the teacher's non-oral communication.

The police were allowed to require identification, and security personnel can demand that the burqa be taken off *if necessary*. Originally the ruling against

masks at demonstrations was interpreted as exempting burqas (on religious grounds). This ruling was now re-interpreted so that the wearing of a burqa at demonstrations or assemblies is not allowed any more.

The re-interpretation is thus in general based on a *functional* approach based on situations where a burqa is seen as a practical, functional problem. Just beneath this functional approach is, however, a hidden reaction towards 'un-Danish values'.

Reflecting the Conflicts

The rhetoric, as well as the appearance itself, of the governmental note rejecting the presence of the burqa in society is highly unusual. Seen from a political and analytical point of view, some of the background for this unusual reaction was the political situation with a centre-right government, supported by the Danish People's Party which originally came into existence on the basis of the fight against Muslim immigration into Danish society (in combination with EU antagonism); that is, Denmark for the Danes building on traditional Danish values. However, what is surprising is that the two old parties, the Conservative Party (with the then Foreign Minister Per Stig Møller) and the Danish Liberal Party (with the then prime minister Anders Fogh Rasmussen, now secretary general of NATO) were also open to such sharp rhetoric. This is a sign of very interesting changes among elites, apparently not only within Danish society, but among elites in general in Europe, which are now supporting more traditional national and European values and distinguishing human rights as not necessarily protecting these same values. There is a rising reaction towards concepts such as multiculturalism, arguing in favour of not only integration but also assimilation, to an extent which could not have been expected in the 1990s, and this is a general, not only populist, but also elitist trend in European countries.

There is no doubt that this trend is especially seen as a reaction towards values in human rights and the concept of multiculturalism. That is, the question is now to an increasing extent being formulated about what is to be done with movements which can appear openly in our societies only because they are protected by the basic values in constitutional norms and human rights values – but which themselves already in their own appearance show not only disrespect for but also the will to change those very same values that protect them.

This reaction towards the presence of the burqa in society is combined with a general mainstream understanding of citizenship among European elites as including equality and non-discrimination towards both minorities and women. If a minority is thus suppressing its women, European elites are having problems with their argumentation.

This line of argumentation is especially strong towards what is seen as political Islam and the use of the burqa as a sign of political attempts at a takeover of Western ideology by Islamic states. There is no doubt that radical political Islam to some extent is seen as *the Turk* by the general public, meaning that some quarters are

arguing an even religiously based warfare between 'our' values and the normative structure in Islamistic approaches to state and society.[16] And in this fight, the burqa is seen as a sign or as mirroring a combination of different basic values in Western societies: equal treatment of men and women combined with the demand to play with the cards face up on the table.

There is thus also a link to the fact that Denmark and other Western countries in the same period started the war in Afghanistan, with pictures of women in blue burqa*s* and information about how women are treated in a society run by the *Taliban* as some of the normative/political/public background for being there: this is what they should be saved from; or even stronger: this is what we risk, if we don't stand up for our norms and values.

This new high presence in international politics relates to changed political normative standards and trends. Europeans are travelling; globalisation means new understandings or at least new impressions of a more global world, the opening for a new cosmopolitanism in also Danish society. And in this context an old-fashioned nationalistic path dependency seems to fit well with new republicanism in its demand that religion should not be coercing anybody, neither in the national nor in the international public.

This new republicanism which as mentioned was a central part of the background for the sharp reactions to the presence of burqa*s* in Danish society does, however, have a problem regarding freedom of religion. Theoretically this approach would simply argue that religion should be kept out of politics, out of the public space, be privatised. But this is a very difficult argumentation in Danish society, with not only a majority Church with 80 per cent of the population as members, but also with the fact that this Church is organisationally and economically supported and also legally led by the government / the state. The Danish model on religion thus has a very high presence of religion in the public, in the general public streets, etc., but also in public institutions and in public life, quite simply because of the strong relations between monarchy, government (and even parliament) and the Church. In this context, an argumentation based on the exclusion of signs of minority religions from the public streets would be understood as the majority suppressing the minorities, and that is possibly why the Ministry of Justice argued that prohibiting the presence of burqa*s* from the streets would conflict with the individual right to freedom of religion. That is, even though some see the burqa as a sign of Islamist politics, the lawyers have to take into account that the individuals wearing a burqa are arguing that they do it of their own free will and that it is a religious habit.

16 It would not be fair in an article on a burqa affair to deal with the normative background for the disaster on 22 July 2011 in Norway, where a blond Scandinavian man shot more than 100 young Social Democrats, but it is relevant to mention that his main target was precisely social democracy and its open-mindedness, that is: the human rights based values which have made Norway a very high profile player in international human rights protection of also Muslim religious values.

Given these complex and mixed normative figures behind the reaction from the government, it should not be surprising that the actual legal responses to the demand of prohibiting the wearing of a burqa in public places and in public institutions was more than limited and that there is no logical relation between the harsh rhetoric and the concrete legal solutions. Thus, contrary to the rhetoric, the concrete suggestions in the paper from the governmental working group are very pragmatic responses to very concrete situations, based on a line of argumentation with a combination of acknowledging the individual's free choices and showing a general tolerance towards minorities.

The pragmatic response behind the rhetorical outburst is thus a combination of a pledge for tolerance and a pledge for – or a demand to – show one's face and stand up in public for one's convictions.

However, should the persons wearing the burqa be representing the idea of a political Islam, and especially any sort of idea of relying on *Shari'a* instead of on European/Danish legal norms, then the reaction would not be pragmatic, but instead sharp, also through a change of legislation. The legislation on prohibiting judges from appearing in court with any sign of religious identity must be understood through the lenses of a very general and distinct dissociation from any idea of following *Shari'a* in quarters of Danish cities. Information about young groups policing streets and warning against partaking in public elections has really led minds to react. Even research into the concepts of *Shari'a* is seen as problematic. The same goes for information into the extent to which people living in the country are actually following norms from *Shari'a*. Political reactions towards the concept of *Shari'a* are strong.[17]

Changing Nordicness?

Basically, clothing, also the clothing the individual wears in public and on the labour market (private or public), is seen as a private matter (both legally and socially) in the Scandinavian countries and there is a tolerance towards individual choices which even at times appears to be over the limits of good behaviour. Therefore also the question about religious clothing is seen fundamentally as a private choice, in the private space, but also in the general public and as users in the public institutions. However, from the point of view of the employee (private or public) it is seen as possible to restrict the clothing in relation to the signals sent and how they fit with the identity of the institution.

In this context it is central to understand that public institutions (schools, kindergartens, hospitals) are not necessarily seen as representing *the state* (except precisely the court rooms). There is not this sharp dichotomy between the state and the private. The state is ours; public institutions are not seen as state institutions,

17 The author here draws on personal experiences with reactions in the public towards her publication together with Professor Jørgen S. Nielsen (Nielsen and Christoffersen 2010).

but precisely as common public institutions of and for the people. That is why the general impression is that an argument in relation to whether or not *state values* are represented in a proper way does not seem to be well founded. The public institutions are precisely that – public, representing the common good. So therefore a prohibition of wearing a burqa must be representing an even stronger public good argument, a functioning in the common wealth. That is why the concrete prohibitions are rather narrow, related to relations between a person, working for the public good, and the public she must be in contact with.

Thus, apart from the functional approach, the wearing of a burqa to a very large extent is basically seen as the choice of the individual, a choice which must be respected. There is, however, a hidden dichotomy here.

A recently published book on Scandinavian women's law in the twenty-first century (Nielsen and Tvarnø 2012) includes a chapter on 'Balancing an individual and a structural approach towards gender equality, the question of the police *hijab*' (Blaker Strand 2012). Norway has for a very long period tried to be the good guy in the classroom by including human rights as a central dimension in politics not only abroad, but also internally in Norwegian administration, etc. Thus the Norwegian police decided in 2009 to develop a police uniform that could include the wearing of a *hijab* (not a burqa). The proposal was backed by the official equality bodies that saw a changed uniform as inclusiveness and a fight against the discrimination of Muslim women. Massive public criticism has, however, resulted in governmental back-tracking on the proposal, backed by the Ministry of Justice, interpreting antidiscrimination legislation differently. From the side of general strands of feminism, the idea to include a religious *hijab* in the police uniform was backed as an attempt to support women's individual choices as well as a structural approach to include women in the labour market and in public institutions in general. Thus, prohibiting veiling is seen as a sort of suppression of women, rather contrasting with the political understanding that wearing veils (and even more the burqa) is seen as suppression of women.

There is no doubt that, as Vibeke Blaker Strand puts it, from the individual's standpoint the *hijab* (and even more the burqa) can be both a garment that liberates and a garment that binds (Strand 2012, 245). Thus public authorities are facing a dilemma, arising from complex and diverse understandings among not only Muslim women, but the population in general. It is thus not easy to argue with gender equality in this regard – a line of argumentation which has been of general effect since World War II in the Nordic countries.

This leads back to a deeper set of normative conflicts in the Nordic societies. Hanne Petersen argues (Petersen 2012, 93–117) that the twenty-first century is (perhaps) more global and more diverse, more complex and more confused, and its normative cultures are (perhaps) less hierarchically organised than the androcentric, anthropocentric and Eurocentric heritage which according to her dominated Nordic legal culture in the last millennium. She understands the secular change in the twentieth century as closely connected to the post-secularist change at the beginning of the twenty-first century, as it is based on a renewed

strengthening of monotheist religious approaches, guaranteeing male superiority in gender relations but also the superiority of the human species in relation to other species. However, as she puts it:

> Male, human and verbal superiority in the formulation and interpretation of norms in a broad sense may be on a downward turn. (Petersen 2012, 99)

The challenge comes from climate change and the question raised is whether equality and sustainability can be combined into cultural metamorphoses, a new agenda, based on the Myth of the Sea Mother from the Arctic, resulting in a renewal of relations of both love and dependence. Her proposal is thus that Nordic elitist women turn to the coexistence of normative cultures which:

> may help us to find ways towards our common futures – beyond gender and species hierarchies and accepting the paradoxes that follow from these transformations and mutations. (Ibid., 99)

Bearing this hope in mind, no one should try to fight against a renewed presence of not only God, but very many different gods and goddesses in the contemporary world. But where does that lead? To an acceptance of a renewed male use of religion to suppress women? Or to an acceptance of the burqa as a female choice based on a religious understanding of life? It is this normative conflict that the combined harsh rhetoric and pragmatic legal responses try to balance with regard to the very few burqa*s* in the existing Muslim societies in the Nordic countries.

The question could be reformulated like this: what did the wife of *Ogier le Danois* do while her husband fought for the French king with his face unconcealed? Some European tapestries show the women sitting in a chair, working on embroidery. Scandinavian history tells us about Viking women building and maintaining the societies while the men were abroad. My understanding is that a woman who is responsible not only for her own life but also for the continued existence and stability of her surroundings is not very well fit for this fight in a burqa. Therefore, as I see it, no matter what changes the future will bring about, it must still be so that both males and females would need to listen to the old Danish song:

> A Dane, fighting his fight in the world,
> Has to be open-minded and fight seriously for his beliefs.
> Therefore, when I fight, I open up my helmet, so that everyone can realise who I am.
> A person, who covers face and name in the fight, distances himself from the pure Danish spirit.
> I don't support him, or trust him; nor embrace him.[18]

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18 I alle de riger og lande, hvorhen jeg i verden for, jeg kæmped med åben pande, for hvad jeg for alvor tror. Når mænd jeg kasted min handske, opslog jeg min ridderhjelm. De så, jeg var Holger Danske, og ingen formummet skælm. Vil dansken i verden kæmpe, men dølger åsyn og navn, jeg ved, at hans ånd er ej ægte. Jeg tager ham ej i favn (Ingemann 1836).

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