



*MMG Working Paper 17-10* • ISSN 2192-2357

MARIAN BURCHARDT (MPI-MMG)

ZEYNEP YANASMAYAN (MPI for Social Anthropology)

MATTHIAS KOENIG (University of Goettingen)

The judicial politics of ‘burqa bans’ in Belgium  
and Spain – Socio-legal field dynamics and the  
standardization of justificatory repertoires

Marian Burchardt (Max Planck Institute for the Study of Religious and Ethnic Diversity)  
Zeynep Yanasmayan (Max Planck Institute for Social Anthropology)  
Matthias Koenig (University of Goettingen)  
*The judicial politics of 'burqa bans' in Belgium and Spain –  
Socio-legal field dynamics and the standardization of justificatory repertoires*

---

MMG Working Paper 17-10

Max-Planck-Institut zur Erforschung multireligiöser und multiethnischer Gesellschaften,  
*Max Planck Institute for the Study of Religious and Ethnic Diversity*  
Göttingen

© 2017 by the authors

ISSN 2192-2357 (MMG Working Papers Print)

Working Papers are the work of staff members as well as visitors to the Institute's events. The analyses and opinions presented in the papers do not reflect those of the Institute but are those of the author alone.

Download: [www.mmg.mpg.de/workingpapers](http://www.mmg.mpg.de/workingpapers)

MPI zur Erforschung multireligiöser und multiethnischer Gesellschaften  
MPI for the Study of Religious and Ethnic Diversity, Göttingen  
Hermann-Föge-Weg 11, 37073 Göttingen, Germany  
Tel.: +49 (551) 4956 - 0  
Fax: +49 (551) 4956 - 170

[www.mmg.mpg.de](http://www.mmg.mpg.de)

[info@mmg.mpg.de](mailto:info@mmg.mpg.de)

## Abstract

Over the past decade, controversies over Islamic face veiling have become increasingly widespread in societies across Europe. This article comparatively explores the socio-legal dynamics of claims-making by proponents and opponents of prohibiting full-face coverings in Belgium and Spain. In Belgium, a federal ban of full-face coverings was adopted in July 2011 and, after intensive judicial struggles, received judicial validation by the Constitutional Court in 2012. In Spain, local *burqa* controversies led to municipal bans in the region of Catalonia in 2010, which were annulled by the Supreme Court in 2013 after effective legal counter-mobilizations. Our key argument is that, the diverging legal outcomes notwithstanding, as *burqa* controversies are transposed from locally embedded political fields to transnationally situated judicial fields the justificatory repertoires employed are increasingly standardized. It is this standardization of justificatory repertoires that, in the long run, has facilitated the rapid spread of ‘*burqa* bans’.

**Keywords:** Religion, diversity, law, judicialization, Spain, Belgium, face veil, burqa.

## Author

MARIAN BURCHARDT is a cultural sociologist and senior research fellow at the Humanities Center of Advanced Study “Multiple Secularities” at the University of Leipzig. Before joining the Center, he was a researcher at the Max Planck Institute for the Study of Religious and Ethnic Diversity in Göttingen and the University of Bayreuth. His research is mainly about how cultural diversity affects public life, institutions and everyday life. He is the author of *Faith in the Time of AIDS: Religion, Biopolitics and Modernity in South Africa* (Palgrave Macmillan 2015) and co-editor of *Topographies of Faith: Religion in Urban Spaces* (Brill 2013), *Multiple Secularities Beyond the West: Religion and Modernity in the Global Age* (De Gruyter 2015) and *After Integration: Islam, Conviviality and Contentious Politics* (Springer 2015). His recent publications include “Narrating liberal rights and culture: Muslim face veiling, urban coexistence and contention in Spain” *Journal of Ethnic and Migration Studies*, 41(7), 1068-1087 (2015, with M. Griera and G. Garcia-Romeral) and “Diversity as neoliberal governmentality: Towards a new sociological genealogy of religion”, *Social Compass*, 64(2): 80-93.

ZEYNEP YANASMAYAN is a Senior Research Fellow and the Coordinator of the project 'The Challenges of Migration, Integration and Exclusion' the Department of Law and Anthropology of the Max Planck Institute for Social Anthropology. She holds a PhD in Social Sciences from KU Leuven, Belgium. She worked as a research fellow at various institutions, including Humboldt University in Berlin, European University Viadrina in Frankfurt/Oder and the Max Planck Institute for the Study of Religious and Ethnic Diversity in Göttingen. Her research focuses on topics relating to migration and citizenship studies, religion and politics, Turkish politics and law and society. Her recent publications include; "Oppositional usages of Europeanization in Turkish constitution-making: discussions on religious freedom." *Turkish Studies* (2017); "Does Education 'Trump' Nationality? Boundary-Drawing Practices among Highly Educated Migrants from Turkey." *Ethnic and Racial Studies* 39(11) (2016): 2041-2059; "Citizenship on Paper or at Heart? Closer Look into the Dual Citizenship Practices in Europe." *Citizenship Studies* 19(6-7) (2015): 785-801.

MATTHIAS KOENIG is full professor of sociology at the University of Göttingen and Max Planck Fellow at the Max Planck Institute for the Study of Religious and Ethnic Diversity. He held visiting positions at the École Pratique des Hautes Etudes in Paris, at the University of Toronto and at the University of Michigan. He has published widely on sociological theory, human rights, religion and immigrant integration in journals such as *Ethnic and Racial Studies*, *International Migration Review*, *Journal of Ethnic and Migration Studies* and *International Sociology*. His recent publications include *Religion and National Identities in an Enlarging Europe* (co-edited with W. Knöbl & W. Spohn, Palgrave 2015), "Governance of religious diversity at the European Court of Human Rights" (in: J. Boulden & W. Kymlicka, eds., *International Approaches to Governing Ethnic Diversity*, Oxford University Press 2015), and "Religion and new immigrants' labor market entry in Western Europe", *Ethnicities* 16(2): 213-235 (with M. Malipaard and A. Güveli). His current research focuses on constitutional models of majority/minority relations in global comparative perspective and on religious mobilization in transnational legal arenas.

## Contents

1.	Introduction .....	7
2.	Theorizing Judicial Politics of Religious Difference .....	10
3.	Contesting the <i>Burqa</i> Ban in Belgium.....	12
3.1	Local Actor Constellations and the Early Judicialization of ‘Burqa Bans’ .....	14
3.2	Political Actor Constellations and Parliamentary Burqa Controversies.....	15
3.3	Changing Justificatory Repertoires.....	17
4.	Contesting the <i>Burqa</i> Ban in Spain.....	21
4.1	Political Actor Constellations I: National Electoral Politics .....	22
4.2	Political Actor Constellations II: Contentious Urban Politics of Religious Diversity .....	23
4.3	Changing Justificatory Repertoires.....	25
5.	Conclusion .....	27
	Laws Cited.....	31
	Cases Cited.....	31
	References.....	32



## 1. Introduction

Over the past decade, national governments and subnational administrations have become embroiled in heated debates about Islamic face coverings (*niqab* and *burqa*)<sup>1</sup> throughout Europe. It is striking how rapidly legal restrictions on their use in public spaces have spread across the continent (see Grillo and Shah 2012; Ferrari/Pastorelli 2013). France was the first country to adopt a nation-wide restriction of face coverings in a widely publicized law in 2008, and Belgium followed suit in 2011. In its famous decision *S.A.S. v France* (2013), the European Court of Human Rights (ECtHR) in Strasbourg upheld the legitimacy of such ‘burqa bans’. While potentially limiting the individual’s freedom of religion, banning full-face coverings was deemed compatible with human rights requirements as long as it was based in law and served a legitimate aim, such as the maintenance of public order and its underlying value of ‘living together’. Today, local bans exist in Italy (since 2016), Switzerland (since 2013) and Russia (since 2013). In Bulgaria (since 2016), Islamic face-coverings are prohibited on public transport, while the Netherlands approved plans to ban face-coverings in government buildings, schools, hospitals, and on public transport. Similarly, at the beginning of the year 2017, the Austrian ruling coalition agreed to prohibit full-face veils in public spaces. In Chad as well as in parts of Niger, Cameroon, Gabon and Congo-Brazzaville face veil bans were passed in response to Islamist suicide attacks.

The rapidity with which ‘burqa bans’ have spread across Europe is matched by the intense normative controversies which they stirred in public discourse. Beyond the specter of Islamophobia and populism which undeniably haunts the politics of ‘burqa bans’, they also raise deeper normative and legal questions of how liberal democracies accommodate religious difference – questions which have come to be intensely debated by political and legal theorists. It has even been suggested that French political theorists have influenced laws against the full-face veil by introducing conceptions of reciprocity and visibility – the *vivre ensemble* – into public justificatory repertoires (Baehr and Gordon 2013). But whereas some theorists have defended ‘burqa bans’ on liberal grounds (e.g. Bruckner 2010), many others have criticized them as mani-

---

1 We are fully aware of the differences between the diverse forms of face-covering used by Muslim women. In this article, we employ the vernacular term ‘burqa’ as used, or rather misused, in political and legal discourses. As Moors (2009) suggests, the preference in much political discourse for *burqa*, as opposed to *niqab*, has to do with the intention to conjure up images of the Taliban regime and its barbarism as the real opponent in the controversy.

festations of religious intolerance and state paternalism (e.g. Hunter-Henin 2012; Laborde 2012; Nussbaum 2012; Ouald Chaib and Brems 2013). However, if 'burqa bans' are normatively so contested, the question arises what accounts for their rapid spread across Europe.

Social science scholarship has only begun to explore the socio-legal dynamics of 'burqa bans' systematically, pursuing mainly two different agendas. On the one hand, micro-level approaches, based on thick ethnographic descriptions and in-depth interviews with face-veiling women, have explored the variable subjective meaning of face-coverings as religious symbols, expressions of piety, or forms of spirituality (e.g. Parvez 2011, Selby 2014; Brems 2014). This research has largely found that – contrary to public stereotypes – the use of the *niqab* was often self-chosen, an outcome of spiritual journeys tellingly pursued not only by Muslims with migration background but also by native converts. On the other hand, macro-level approaches as advanced by comparative political scientists and institutional sociologists have attempted to explain the adoption of restrictive regulations as resulting from historically path-dependent state policies towards religion, citizenship regimes, idioms of nationhood, or political party politics. For instance, the restriction of full-face coverings in France has been regarded as reflecting a political culture of militant or assertive secularism (e.g. Fournier and See 2012).<sup>2</sup> Some authors have regarded these restrictions as characteristic for a general secularist onslaught on publicly visible religion (e.g. Amiraux 2013), or have drawn attention to the fact that 'burqa bans' serve to distinguish desirable from undesirable religions (Mahmood 2006) and to target versions of Islam deemed incompatible with Western liberal democracy (Griera and Burchardt 2016; Burchardt, Griera and Garcia-Romeral 2015; Joppke 2013).

Neither micro- nor macro-level approaches, however, have fully captured the socio-legal dynamics that undergird the phenomenal spread of 'burqa bans' across rather different political settings in Europe. In this article, we therefore advance a meso-level analysis of contestations over full-face coverings that sheds light on the socio-legal dynamics through which justificatory repertoires employed in public discourse have become increasingly standardized. Our analytical focus is on judicial battles over 'burqa bans'. While largely approved by public opinion, political banning initiatives have faced considerable resistance – from Muslims, human rights associations and activist lawyers who have challenged what they perceived as infringement

---

2 On France, see also Joppke and Torpey (2013) and de Galement (2014); on Belgium, see Brems, Vrielink and Ouald Chaid (2013) and Delgrange (2014); on Canada, see Beaman (2013).



of constitutional and human rights to religious freedom. As a consequence, constitutional and international courts have become key arbiters over the legitimacy of 'burqa bans'. Indeed, controversies over full-face coverings attest to the 'judicialization' of mega-politics, which has affected politics of religious difference across the globe (Hirschl 2008; de Galembert and Koenig 2014). Our key argument is that as *burqa* controversies are transposed from locally embedded political fields to transnationally situated judicial fields the justificatory repertoires employed are increasingly standardized. It is this standardization of justificatory repertoires that, in the long run, has facilitated the rapid spread of 'burqa bans'.

We develop our argument by comparing socio-legal dynamics of claims-making by proponents and opponents of prohibiting full-face coverings in Belgium and Spain. Previous studies have mostly focused on France as an early adopter of such prohibitions. The French law against full-face coverings (2008) is indeed a textbook example of judicial politics in which government and parliament entered into sustained dialogue with the *Court Constitutionnel* to design a legally defensible prohibition (de Galembert 2014), which even passed muster by the ECtHR in the aforementioned case *S.A.S. v France*. Compared to the often told French *burqa* saga, the cases of Belgium and Spain have received less attention in the literature. In Belgium, where local initiatives date back as early as 2002, a federal ban of full-face coverings was adopted in July 2011 and, after intensive judicial struggles, received judicial validation by the Constitutional Court in 2012. In Spain, local *burqa* controversies led to municipal bans in the region of Catalonia in 2010 which, however, were annulled by the Supreme Court in 2013 after effective legal counter-mobilizations. Our selection of these two cases of *burqa* controversies is motivated by two analytical considerations. First, both cases differ starkly in terms of their historical and macro-political configurations and with respect to the specific outcomes of apex court rulings concerning full-face coverings. Thus, they provide fertile ground to explore our argument that judicial field effects have standardized justificatory repertoires. Second, both *burqa* controversies occurred prior to *S.A.S.* Hence, they shed light on socio-legal dynamics occurring in a situation of uncertainty concerning transnational institutional frameworks. In short, a comparative analysis of Belgium and Spain promises strong analytical leverage in assessing whether judicial politics of 'burqa bans' follow similar meso-level dynamics. Empirically, our comparative analysis of Belgian and Spanish *burqa* controversies is based on archival material, including complaints, decisions and third-party interventions in courts, as well as on 20 semi-structured expert interviews conducted with judges, lawyers, politicians and human rights activ-

ists between 2014 and 2015. All interviews were fully transcribed and coded with a focus on conflict evolution, types of arguments and conflict outcomes.

We start by situating our approach in the wider law and society literature, highlighting the need for a more rigorous analysis of socio-legal field dynamics that account for shifting justificatory repertoires (2.). We then present the findings of our two case studies, starting with Belgium (3.) and then turning to Spain (4.). In both cases, we follow *burqa* controversies as they move from local to national arenas, from political to judicial fields, and we identify the distinctive actor constellations and justificatory repertoires that characterize each stage of these controversies. We conclude by highlighting the standardizing effects of judicial fields and by spelling out some implication for future research (5.).

## 2. Theorizing Judicial Politics of Religious Difference

We situate our analysis of *burqa* controversies in Belgium and Spain in debates over the judicialization of politics. Accompanying the world-wide proliferation of constitutional and international bills of rights, judicialization is typically conceived as large-scale transformation in which supreme courts are invested with increased authority over crucial political questions (Ferejohn 2002; Hirschl 2008). A sophisticated literature in law and society research, comparative politics and sociology has sought to understand the causes and consequences of judicialization. Focusing on causes, scholars have asked why courts have become empowered in the first place and why politicians delegate certain issues to the judiciary (Ginsburg 2003). In terms of consequences, scholars have identified various ways in which judicialization affects political action. These include direct effects where empowered supreme courts, through judicial review or case law, can require laws to be amended or annulled. They also include indirect effects, notably what Stone Sweet (2010) has called the 'pedagogical authority' of constitutional courts; their existing and anticipated jurisprudence sets the framework within which bills are discussed, at times leading to auto-limitation on the part of lawmakers to avoid rebuttal in court. Finally, judicialization affects political action by means of shaping rights consciousness and creating legal opportunity structures for citizens' participation and social movement mobilization. As a consequence, citizens, interest groups, and movement activists routinely use strategic litigation to contest public policies they oppose (McCann 1994). A key concern

underlying the entire literature is, of course, to assess whether and how the judicialization of politics advances or undermines the claims-making of politically subordinate minority groups (see notably Rosenberg 1991; Epp 1998; for review Roesler 2007). It is this concern that also undergirds recent attempts to explore the judicial politics of religious difference (for review see authors 2014).

But despite recent advances in exploring the judicial politics of religious difference, the literature has paid less attention to the meso-level dynamics through which political claims and their justifications are fundamentally altered under conditions of judicialization. While it is often assumed that judicialization has broadly affected the very terms of political discourse, only few studies have scrutinized how exactly claims, frames and arguments are modified, expanded or reduced as political conflicts are brought into the judicial arena (on this point see Pedriana 2006 and Roesler 2007: 575). In what follows, we propose that such meso-level dynamics are best captured by analytical tools developed in sociological neo-institutionalism and field theory.

Sociological neo-institutionalism regards social action as embedded in broader institutional environments that contain cognitive and normative templates, which actors typically employ in situations of uncertainty (see notably DiMaggio and Powell 1983). As neo-institutionalists emphasize, the availability of legitimate templates, scripts or models promoted by international organizations, transnational epistemic communities and professionals, who are dis-embedded from local contexts, generates a strong institutional drift towards convergence or 'isomorphism' across otherwise different contexts of action. Transnational law is a case in point, as it shapes collective identities as well as mobilization strategies of social activists (Kay 2011). Neo-institutional insights have been fruitfully employed to account for converging trends in the politics of religious difference in Europe in light of an expansive jurisprudence of the ECtHR (e.g. Koenig 2015). In our two case studies on Belgium and Spain, we add further nuance to these insights by exploring how *burqa* controversies that originate in distinctive local and national settings are embedded in broader transnational processes. To understand when and how actors draw upon transnational templates, however, requires greater attention to the socio-legal field dynamics.

Field theory regards the social world as composed of multiple sites, arenas, or fields characterized by distinctive power relations and symbolic logics, which enable and constrain actors' strategies (see Fligstein/McAdam 2012). The legal field can thus be conceptualized, drawing on Bourdieu, as a 'symbolic terrain with its own networks, hierarchical relationships, and expertise, and more generally its own rules of

the game' (Dezalay and Garth 1996: 16-17). Crucially, power relations and symbolic logics characteristic for the legal and, more specifically, judicial fields differ from those that characterize the political field. Understanding the meso-level dynamics that undergird judicial battles over religious difference therefore requires exploring how claims-making is transformed when being transposed from political to judicial fields. Such transposition requires strategic actors, or so we argue, to engage in practices of translation that align their claims with field-specific symbolic logics or rationalities. That entry into the judicial field alters the range of legitimate arguments available to actors is, in fact, suggested by previous research on judicial politics of religious difference in France. Thus, the extension of headscarf prohibition from the public to the private domain, ultimately sanctioned by French courts in what is known as the 'Baby Loup affair', has required actors to constantly refashion their interpretations of legal concepts such as 'laïcité', neutrality or public order (Henette-Vauchez and Valentin 2014). Likewise, contestations over the French 'burqa ban' have been accompanied by complex negotiations between activists, legal experts, politicians and high-court judges which ultimately resulted in judicial justification of the ban (Fredette 2015). In our two cases studies on *burqa* controversies in Belgium and Spain, we show that judicial field effects generally standardize the justificatory repertoires available to both proponents and opponents of 'burqa bans' requiring them to frame their claims in terms of individual rights or public order consideration. Judicial field dynamics thus produce a standardization of normative arguments that is, in the long run, more consequential for public discourse over religious difference than the outcome of a given court ruling on a given particular case; it is this standardization that prepares the ground for the rapid spread of 'burqa bans'.

### 3. Contesting the *Burqa* Ban in Belgium

Belgium is one of the few countries in Europe where a nation-wide ban on face veiling is currently in force. Unlike in France, however, this ban does not form part of general public policy of 'assertive secularism'. In fact, as the historical battle between state and church occurred under conditions of deep denominational cleavage, the secular settlement in Belgium consisted 'consociational' agreements that successively granted public recognition to Catholicism, Protestantism, Judaism, Anglicanism, Orthodoxy as well as secular humanism. A core element of the Belgian 'consociational' pacts for

the recognition of religious or philosophical communities is the imperative condition that they are represented through a stable organization (Laurence 2012: 182). Even though Islam relatively quickly benefited from this conditional pluralism, receiving official recognition as early as in 1974, problems of establishing a representative body have hindered full-fledged institutionalization of Islam till today (see Kanmaz 2002; author 2010). As we shall see, this context has left an impact on judicial controversies over full-face veiling, notably on the reluctance of the Islamic representative body, the so-called Muslim Executive in Belgium, to engage in the advocacy against the ban.

Overall, the genealogy of the Belgian ban on the face veil offers a mixed picture entwining local security practices with national identity discourses. While there was no concrete case of radicalization that stimulated the ban, a diffuse fear of fundamentalism was evident in parliamentary debates. More precisely, the initial repertoire of arguments in favor of a ban encompassed (1) the fight against the perceived growth of Islamism; (2) the promotion of Western values such as gender equality; (3) support for the emancipation of Muslim communities in order to foster a harmonious *vivre ensemble*; (4) safety concerns; and (5) the legal unity of the Kingdom that was putatively undermined by existing local bans. By contrast, the arguments of anti-ban activists were from the very beginning framed in legalistic language. In parliament the ban was little contested, the only worry being the potential clash of a blanket ban with fundamental freedoms.<sup>3</sup> Similarly, the activists and NGOs that appealed to the Constitutional Court have used a variety of fundamental freedoms as arguments. Apart from pointing out (1) the interference of the ban with the religious practices of a specific group of Muslims, they criticized (2) the principle of the permanent identifiability required from everyone in the public space. Moreover, while some opponents maintained that (3) the law discriminated against and stigmatized Muslim communities, others had a more modest attitude, objecting to (4) the criminalization but not to the restriction on burka-wearing as a practice. The court mainly picked up on the arguments relating to the violation of religious freedom, thus focusing the debate strictly on the appropriate reasons for limiting this freedom, which granted priority to concerns of public safety and *vivre ensemble*. As the following analysis demonstrates, the justificatory repertoires employed by the proponents of the ban have thus become highly standardized in the course of judicial field

---

3 This is perhaps not surprising in light of the fact that the MP who openly opposed the ban has a legal background herself.

dynamics. Arguments focusing on threats of radicalism almost entirely disappeared from public discourse, while issues of public security and *vivre ensemble*, which had greater chances of surviving constitutional scrutiny, gained considerable prominence.

### *3.1 Local Actor Constellations and the Early Judicialization of 'Burqa Bans'*

A number of Belgian municipalities have long had provisions prohibiting the wearing of masks or other forms of disguise in the public space, except for specific festivities such as the period of Carnival. From 2004 onwards, not only were these provisions reinterpreted so as to include Islamic face veils, but also a new set of regulations prohibiting appearing in public in an unidentifiable manner or with a covered face were promulgated (Vrieling, Ouald Chaid and Brems 2013). These latter regulations, as opposed to the historical ones, were specifically geared to addressing issues with women wearing face veils. In order to facilitate the task of the municipalities, the governments of the Flemish and Brussels-Capital regions have provided them with sample regulations that could serve as a model. Before the federal ban was enacted, a number of municipalities, including major cities such as Antwerp, Brussels and Gent, had instituted such a ban. However, these regulations did not go uncontested at the local level. Two contradictory court decisions, which were later on used by the federal legislators as evidence of legal uncertainty in the territories of the Kingdom, are worth mentioning.

With the first decision in June 2006 issued by the local Police Court, the small town of Maaseik in Flanders became one of the first municipalities to inquire for and apply the standard regulation model provided by the Flemish government. The case involved a face veil-wearing woman who objected to being fined and whose appeal was rejected by the Police Court, which did not find violations of the freedom of religion, nor of the principle of equality (Vrieling, Ouald Chaid and Brems 2013). Almost five years later, another local court decision rejected the judgment of the Maaseik Police Court. The Police Court of Brussels ruled in January 2011 in favor of a woman who had been fined twice with an interval of two months in 2009 for wearing a face veil. It is important to note here that this is the very same woman who brought the case first to the Belgian constitutional court and then to the ECtHR. This early judicialization of the conflict therefore had an impact on the unfolding of later episodes, as well as on the repertoires of argumentation, which prioritized the 'language' of the judicial field. The judgment makes extensive reference to Article 9 of the European Convention of Human Rights and to the pre-*S.A.S.* case law of the

ECtHR and concludes that the municipal regulation is incompatible with religious freedom, since, despite serving a legitimate aim, which in this case is public security, it offers a disproportionate response.

### *3.2 Political Actor Constellations and Parliamentary Burqa Controversies*

While the conflict had started in the local arena, the federal parliament did not lag behind. Legislative attempts were initiated by the extreme right-wing party *Vlaams Blok* as early as in 2004. Even though this initiative did not find much support in either chamber of parliament at the time, in the long term the legislative desire to ban the Islamic face veil has been extended to the center of the political spectrum. Different political parties, such as the Christian Democrats, Liberals and again *Vlaams Belang*, a reincarnation of *Vlaams Blok* following the latter's conviction using racist language, submitted proposals during the 2007-2010 legislative term, which led to the eventual adoption of the 29 April 2010 law by the House of Parliamentarians, the lower house of the bicameral Belgian system. Before the Senate had a chance to review the bill the government fell, and both houses were dissolved. Nearly one year after the subsequent elections in 2010, the Belgian parliament re-visited the earlier proposals and adopted the law criminalizing the face veil and all other garments that cover the face either fully or partially. The 'Act of 1 June 2011 instituting a prohibition on wearing clothing that covers the face in whole or in part', which adds an Article 563bis to the Belgian Criminal Code, received near-unanimity (one nay, two abstentions) from members of parliament. With the Senate opting out of a review this time round, the federal ban on the face veil saw the light of day amidst the most serious political deadlock in the Kingdom, with 445 days without a government. The majority of other legislation adopted in this limbo period, already considerably reduced in amount, was geared to fulfilling Belgium's international obligations or to managing the economic situation (Delgrange 2014). The law on the banning of face veil, a significant exception, makes one wonder as to the reasons for the rush to legislate. Despite being passed twice, a sense of urgency dominated the parliamentary debates, leading to the omission of a few stages of the sort taken in France prior to the adoption of the law, such as holding hearings with civil-society representatives and requesting the Council of State for an opinion. As our interviewee at the Centre for Equal Opportunities and Opposition to Racism, a Belgian government agency that predominantly deals with discrimination cases, put it, 'There was a kind of competition to be the first state to ban the face veil in Europe.' Even though that race

was lost due to the unexpected fall of the government, which put Belgium behind France in this respect, the interest in legislating did not fade away. On the contrary, the April 2010 attempt had shown the uncontested nature of this law and gave the politicians a golden opportunity to reaffirm national unity at a time when it was to be found nowhere else. Therefore, Fadil (2014) is right in suggesting that the Belgium ban was in the first place an expression of sovereign state power at a moment of deep institutional crisis.

As we explain below, some urban administrations in Spain such as Lleida pursued burka bans to promote a political agenda regardless of the legal outcome. Similarly, Belgian parliamentarians were more interested in 'sending a message,' and they did not want take the risk of it being undermined through its possible rejection by the Council of State, as was the case in France. In the words of one deputy from the Francophone liberal party (*Mouvement Réformateur*):

A clear message should be conveyed to some representatives of the judiciary on our values and public safety: the political world will maintain its position. Aside from public safety, our core values are at stake here. These are also shared by a number of Muslims, but this is a first step against Islamism, which is currently growing in our country. Just like France, which has taken steps in the matter, the adoption of this bill is an outstanding message to the world about owning up to our values of women's dignity and liberty and Enlightenment.' (Parliamentary Document DOC 53 0219/004, p.11, 18 April 2011, authors' translation)

As these words show, central to this initiative was the desire to disseminate an image of a cohesive society to which certain values such as gender equality are a *sine qua non* for membership. The interventions in parliament were different shades of the same color, with strong agreement on how burkas dehumanized women. For an overwhelming majority, the oppression of women that is incarnated in the burka touches the very heart of the principle of *vivre-ensemble*. While some political actors perceive wearing a face veil as an act of the rejection of Western and Enlightenment values, others see it at best as a huge impediment to further integration and emancipation. Therefore, the ban is conceived as a first step in an 'emancipatory mission' that needs to be continued through other measures at the community level. Yet, for a minority of deputies, it is not so much what the burka symbolizes for gender equality that damages *vivre ensemble*, but the very act of hiding one's face. The lack of identifiability that comes with it is thought to hinder dialogue, sociability and civility, which are essential values of an open society. It will be seen later that it is in fact this particular



conceptualization of *vivre ensemble* that has gained ground in the judicial debate in both Belgium and Spain, as well as in the ECtHR.

The debate in the Belgian parliament was almost solely focused on the face veil, with only the Francophone socialist party (*Parti Socialiste*) representative claiming that burkas were included within the scope of the law but were not being targeted exclusively. On the other hand, one of the Flemish liberal parties (*Libertair, Direct, Democratisch*) proposed to ignore political correctness by tabling two amendments explicitly citing Islamic clothing, which were both rejected. To be clear, public security was one of the main arguments made in favor of the ban during the parliamentary debates, though it was certainly considered less significant compared with *vivre ensemble* and gender equality.

### 3.3 *Changing Justificatory Repertoires*

Once the law had been adopted and the conflict subsequently transposed to the judicial level, this priority ranking was modified due to the judicial field effects. In its written defense submitted to the Constitutional Court, the Council of Ministers held that public security was one of the legitimate objectives of the law, along with *vivre ensemble*. Taking off one's face veil during an identity check was not deemed sufficient, as it would prevent other forms of identification, such as witness accounts and video-surveillance. Therefore, the debate on the general ban on the burka in public was tied to the increasing presence of surveillance cameras and the notion that personal identification is less and less a matter of policing and increasingly one of permanent identifiability.

Evidently, this way of conceptualizing the ban had not appeared credible to all the actors involved in the conflict that have noted the discrepancy between the preparatory works and the language of the law. However, the head of the Muslim Executive in Belgium, as stated above, the official interlocutor between Islam and the Belgian state, told us in an interview that he believes identifiability to be 'the principle motive of the law, which is sufficient to persuade everyone.' His conviction should be read against the background of the disparaged status of the Muslims Executive and therefore their non-involvement in the court case can be seen as an attempt to protect what is left of the legitimacy of his institution. In the same vein, he also underlined that the law was not an attack on the core of Islam:

We should make the distinction between hijab and burka. The latter is not an uncontested practice among Muslims and is clearly not a requisite. It is more of a regional interpretation. So the current law does not concern us a great deal, but it should not be used as a first step to ban hijab or halal meat. (Interview, 25 July 2013, authors' translation).

He thus reinforced the hierarchization of religious practices, already implicitly established by the federal legislators, which treated burka wearing not as a Muslim religious practice, but rather as a withdrawal from Western society, the values of which are shared by Muslims and non-Muslims alike. This is why, even though the parliamentary debate focused almost exclusively on Islamic clothing, political parties expressed their surprise that the discussions took a 'religious turn'. Since the face veil was not perceived as a religious practice to start with, they reasoned that the law had no intention to limit religious freedom. Therefore, with the exception of the Ecolo/Groen! Bloc, the implications of the law for religious freedom did not constitute a major worry for the deputies. On the other hand, the Ecolo/Groen! Bloc raised concerns about the potential conflict with fundamental freedoms, relying on the recent reports of human rights organizations such as Amnesty International and Council of Europe recommendations that such general bans should not be introduced. They also warned the deputies that the ban could be perceived as indicating increasing Islamophobia. However, along with the group's request to consult the opinion of the Council of State, these recommendations were quickly dismissed, as they were deemed to be delaying the process.

The reluctance to engage with the implications of the law for religious freedom also needed to be altered once the conflict was moved to the judicial arena. When the law was challenged in the Belgian constitutional court, with a speed comparable to that of its adoption, exactly one day after its publication in the official gazette, the violation of religious freedom was one of the main arguments of the counter-mobilizers. This first application in late July 2011, which over the year was followed by three more applications, entailed pleas for both the annulment and the suspension of the law. It should be noted that not all the applicants were in agreement with each other, and not all of them prioritized religious freedom as a ground on which to appeal against the ban. In fact, a variety of legal principles were cited by the applicants and the NGOs that offered third-party interventions: freedom of expression, right to a private life, freedom of circulation, right to liberty and security, right to the dignity of life, freedom of association and the principle of non-discrimination. Evidently not all of these pleas carried equal weight in the appeal process. However, our interview with the principal lawyer for the applicants reveals that this prolifera-

tion of principles was intentional in order to make the point that the law does not only target Muslims:

It was good to have applicants from different backgrounds. We had two persons who did not raise religious freedom, they were also not at all Muslims. It is not only Muslims who are affected (...) All the pleas introduced were important to me. They are ultimately related to each other, but indeed freedom of religion and the right to a private life took precedence. This latter was particularly important for non-Muslims, but the Court did not follow that argument, which I find almost more important, as it applies to everyone. (Interview, 12 September 2013, authors' translation)

The NGO Justice and Democracy, which was cooperating closely with the principal lawyer in the case, also confirmed that its application took the form of a comprehensive strategy that sought to cover all the possible grounds by mobilizing the right people in order to increase their chances of success. On the other hand, Justice and Democracy itself focused more on the freedom of religion in appealing against law, which they thought was 'aimed exclusively to stigmatize and attack Islam'.

Public security is the only legitimate aim for this law, but other illegitimate discussions have also been held. Is this part of Islam? This is not the state's business to decide. The dignity of the person? If the person is wearing it out of her free will, it is up to her to decide the level of dignity. As for security, there is already a law regarding the police. There is no need for a new law: further clarification could be brought about with a ministerial circular, which could stipulate the unveiling of the face in course of an offense or in suspicion of an offense. We are therefore of the opinion that there is a violation of the principle of proportionality in the current law.' (Interview, 24 July 2013, authors' translation).

Other actors involved in the case also tried to broaden the debate beyond the burka. For instance, the francophone branch of the Human Rights League chose to introduce an appeal strictly on the principle of subsidiarity, that is, it objected to the use of penal code as a sanctioning mechanism. However, the introduction of a different basis for contesting the law was not so much geared to increasing the support base for countering the ban, but rather stemmed from a cautious stance adopted to distinguish the League's position from those of the other applicants:

We did not want to take a pro position on wearing the full veil. It was not that at all, and I think for some it was pretty sensitive – they did not want the League to appear as an association that supports it. But it seemed important to us to raise this argument. We wanted to intervene *only* on that point. And since no other organization has raised this

argument in their appeals, we suspected that the other pleas would be developed on the basis of Article 9.' (Interview, 10 September 2013, authors' translation)

Similar concerns about appearing to support the face veil were voiced by the Flemish League of Human Rights, which also made a third-party intervention, and the Centre for Equal Opportunities and Opposition against Racism, whose intervention to the debate remained limited to the press releases issued prior to the adoption of the ban. Even though ultimately the Flemish League went to the Constitutional Court to contest the law, mainly on the basis of the disproportionality of its implications for freedom of religion and of speech, the lawyer we interviewed admitted that this was a divisive issue within the board, as some members felt uncomfortable attacking a law that 'tried to protect gender equality'. That is also why there was a decision to wait for initiatives from other parties first and then join in as a third party, rather than appeal against the law directly.

Yet, the decision of the Court, which rejected both requests to annul or suspend the law, concentrated more on the issue of the violation of religious freedom. It is also in this context that the Court assessed the legitimacy, necessity and proportionality of the three objectives it had identified on the basis of parliamentary debates, namely public security, equality between men and women, and *vivre ensemble*. In its own reasoning, the Court connected the latter two aspects to the issue of individuality. Since the burka allegedly takes away the capacity of being an individual, even if it is worn of one's free will, it hampers not only membership in a democratic society, which is the very core of *vivre ensemble*, but also equality between men and women. The conceptualization of *vivre ensemble* that builds on an understanding of social interaction that is inevitably interrupted by the concealing of the face has also gained ground in the *S.A.S v. France* decision of the ECtHR. Therefore, in being transposed from the political field to the judicial one, the argument of *vivre ensemble* had to shed some of its layers and adapt to the logics of this new field. This refashioning of the argument of *vivre ensemble* due to the effects of the judicial field has not only standardized justificatory repertoires for the ban but also facilitated its spread across different settings.

We now turn to the Spanish case, where we discern a similar standardization of justificatory repertoires in the judicialization of the conflict – despite stark difference in the origins and judicial outcomes of controversies over full-face veils.

#### 4. Contesting the *Burqa* Ban in Spain

As in Belgium, these judicial controversies are situated in broader trajectories of state policies towards religion. Spain's constitution of 1978 declares the state to be non-confessional (in Spanish original: "*a-confesional*") and neutral towards religion, recognizing the separation of church and state and the liberty of conscience. At the same time, the constitution stipulates that the state established cooperative relationships with the Catholic Church and other confessions while a separate law on religious freedom was passed in 1980. In 1989, the Spanish state officially recognized Islam as a "deeply rooted" religious tradition, and in 1992 signed agreements with the Islamic Commission of Spain that established a series of privileges, including the right to religious accommodation in public institutions, Islamic religious education in public schools and the right to take time off from work to celebrate Islamic holidays (Astor 2015: 252-253). Up until now, most high-level court cases around religion concerned institutional privileges of Catholicism rather than the rights of religious minorities. It is against this backdrop that judicial battles over full-face veils have emerged in two separate developments. On the one hand, there were several attempts to discuss burka regulations in the national parliament in Madrid and the Catalan regional parliament in Barcelona. However, while failing we also explore these attempts in order to appreciate subsequent changes in political argumentation. On the other hand, there were local-level debates in Catalan cities, which are more important as they effectively led to bans, albeit short-lived, and triggered subsequent legal counter-mobilizations.

While between 2010 and 2014 Catalonia saw a whole series of municipal regulations on face-veiling, we see dynamic changes in the argumentation and legal repertoires that are mobilized in these debates and regulations resulting to an important degree from the parallel counter-mobilization. The political discourses in favor construed the ban as (1) an instrument in the fight against radicalism and necessary (2) for public safety and security (the ability to identify individuals), (3) the defense of Western culture, (4) gender equality and (5) the preservation of people's tranquility. Arguments against the ban included the notion (1) that whether to cover one's face or not was a private matter, (2) that it was prompted by populist politics and increasing islamophobia, (3) that city governments had no competence to rule on such freedoms, and (4) that there was no proof that people's tranquility was being disturbed. As we shall see, in the judicial arena the question of Muslim radicalism only played a minor role, while concerns over freedom of religion, which were periph-

eral to political pro-ban discourses, became central, as did concerns over gender and safety. Simultaneously, the argument regarding the defense of Western culture was linked to and reinterpreted in light of the idea of 'tranquility'. Arguments against the ban remained remarkably stable across the different arenas of contestation. We now consider these changes in terms of judicial field effects step by step.

#### *4.1 Political Actor Constellations I: National Electoral Politics*

On 23 June 2010, Spain's second chamber, the Senate in Madrid, approved a motion presented by the main conservative party, the *Partido Popular* (then in parliamentary opposition), to ban face-veiling with the support of the Catalan center-right party *Convergencia i Unio* (CiU). The motion suggested banning wearing the burka in public buildings and justified it with reference to the ability to identify individuals, allow visual communication and ensure gender equality. Most observers concluded that these parliamentary maneuvers were driven by the dynamics of Catalan regional elections suggesting the CiU sought to mobilize its electorate with a tough stance on the burka. Just one month later, the national parliament rejected the motion by majority vote of the socialists.

In the Catalan parliament as well, there were three separate attempts to submit face-veiling to parliamentary debate and regulation, which were put forward and rejected by different party coalitions. Thus, in 2010 the *Partido Popular* presented a motion in the Catalan parliament, only for the center-left government parties (PSC/ERC/IVC) to reject it by simple majority. Three years later, on 24 April 2013, the Catalan parliament rejected another motion to debate burka regulations, this time presented by the new center party, *Ciutadans*, which demanded a change in the law on religious freedom that would recognize wearing the burka as discriminatory against women and a security threat. Parties that were pushing the issue at one point stopped it at another point, depending on whether they were in government or opposition, and accusing the opposing parties of using the issue for electoral purposes. We argue that the lack of political majorities in favor of face-veiling regulations ceded these regulations as a contested terrain to local controversies. This lack is partly explained by the absence of significant right-wing populist parties<sup>4</sup> and related tendencies to push parties of the center into anti-Muslim symbolic politics. Interestingly, municipi-

---

4 For a similar impact by right-wing parties on restrictive citizenship policies, see Howard (2009).

pal bans occurred in Catalonia as the only Spanish region with a moderately successful right-wing populist party, the *Plataforma per Catalunya* (Catalonian Platform, but its electoral influence was restricted to the municipal level. As we show below, local pro-ban politicians and activists drew on local discourses to gain popular support that worked against their institutional dis-embedding and eventually weakened their legal value.

#### 4.2 *Political Actor Constellations II: Contentious Urban Politics of Religious Diversity*

As the first municipality in Spain, on 8 October 2010 the city government of Lleida in the region of Catalonia passed a ban on full face-coverings in spaces belonging to the municipality (public transport, municipal archives, community halls and social service centers) by introducing an amendment to its by-law on public participation and coexistence (*civismo y convivencia*). The analysis of the origins of the conflict reveals that a variety of actors had diverse stakes in it. As a local policy, Lleida's burka ban is closely tied to long-lasting conflicts between the city government and one of the two big mosque communities, one with clear Salafist tendencies. This conflict played itself out in disagreements over an adequate place of worship for this group and about a number of other places the community rented for different purposes. In the midst of these controversies, a small number of women wearing the full-face veil were seen in the streets of Lleida, which was interpreted as a clear sign of the increasing radicalization of local Muslims. The burka regulation was therefore in the first place a political response to this supposed radicalization and framed as 'message' that needed to be sent to Salafist leaderships.

Significantly, there was second mosque community with which the city government maintained good relationships and which was continuously hailed as well integrated and as an example of successful religious coexistence. If the city government framed the ban as a policy instrument in the fight against radicalism and a 'message' to Salafists that their interpretation of religion and their vision of coexistence was undesirable, it was also meant establishing and validating criteria for legitimate religions.

Simultaneously, in all municipalities local burka politics clearly followed an electoral logic, that is, they were instrumentally linked to nativist populist mobilizations and prompted by potential electoral gains. Invariably, burka debates took place in the context of municipal electoral campaigns, and several politicians from center and

center-right parties conceded in interviews with us that the elections played a big role. The mayor of a medium-sized town told us: 'The people were really asking for it, and I knew it would work because public support for the ban was a hundred percent.'

The larger point about burka controversies in the *political field* is thus that electoral logics typically stimulate ban initiatives. However, they also force political actors aiming to create 'democratic majorities' in favor of banning to foreground arguments that are politically the most expedient but might be shaky legally. One example is the reference to gender in Lleida's bylaw. A legal adviser to the city government told us in an interview that he had deleted gender equality from the draft bill as an argument in favor of the ban since, in the light of evidence produced in France on women having freely chosen to cover their faces, legal experts increasingly saw gender equality as an argument *against* the ban. However, as the pro-ban campaign had so deeply invested in the idea of the right to gender equality as an aspect of 'our culture', the mayor insisted on this reference.

This initial constellation of actors consisting of the city government versus the Salafist mosque community quickly gave way to one that pitted the city government against sections of civil society, especially the Watani Association for Justice and Liberty, which appealed against the ban in the Catalan Court of Justice (CCJ). Generally, Catalan civil society was divided over the issue. There were internal discrepancies revealing tensions between feminist and pro-immigrant rights agendas amongst the political left, as well tensions within feminism, with a major Catalan grouping called the Women's Network (Dones en Xarxa) and Lleida-based women's association with a president of Algerian origin vigorously supporting the ban. This, together with the ambivalent stances of Muslim-dominated migrant associations, made it difficult to present a unified discourse. Other Muslim-dominated migrant associations also emphasized their disagreement with the mosque leadership, oscillating in their stance between moral disapproval of burka wearing and doubt about the legal ban as an appropriate response. Thus, the president of a migrant association remarked:

The issue of burka wearing has to do with someone's mentality or that of the family. I think this is a personal decision or a family decision. But the burka has nothing to do with the Muslim religion. The Quran says that women should hide their beautiful parts of their body. But this way, that you can only see the eyes and nothing else, is really a bit exaggerated. But as long as there's no trouble, let everybody wear what they want. (Interview 13 June 2013)



### *4.3 Changing Justificatory Repertoires*

Importantly, an initial shift in discourse related to the very definition of face-covering had already occurred. While both socialist politicians in Lleida and conservative politicians in Reus, who dominated their respective city councils, made no secret of the fact that the prohibition of face-coverings mainly targeted Islamic full face-veils such as burkas and niqabs, eventually the municipal by-laws regulating the prohibition on face covering also included balaclavas and motorcycle helmets. This move was necessitated by the emphasis on security and identification. If full-face veiling was problematic because it hinders the security forces from identifying certain persons as potential perpetrators of crime, or even terrorist acts, this was also true for other kinds of face-covering. As a result, the religious aspects of Islamic face-veiling were removed from the frame and subordinated to issues of security whereby the burka was now classified through taxonomies geared towards policing. This also prompted protest by some sectors of the left, who saw the prohibition as a new level of the surveillance of public space intent on creating transparent citizens. Our interviews show that, while sympathetic to migrant concerns, these groups were generally hostile to religion, described themselves as atheist and rejected any possible coalition-building with Muslim communities.

In July 2010, the Watani Association for Justice and Liberty, led by a young Moroccan with no links to the city's Islamic communities, initiated the counter-mobilization by announcing that he would appeal against the ban with the help of a Barcelona-based lawyer who had accepted the case pro bono. Since neither Watani nor the lawyer had any prior contacts with the field of religion or legal mobilization, they must be construed as individual entrepreneurs, dis-embedded from the local context. After suffering defeat in the Catalan Court of Justice in Barcelona, they took the case to the Supreme Court in Madrid, which eventually ruled in their favor in February 2013.

In its defense, the municipality in Lleida based itself on an article of the Law on Local Governance (*Ley de Bases de Régimen Local*), according to which local entities had the right to establish a regime that adequately regulated relations of community of local interest and the use of its services, facilities, infrastructure and public spaces. The CCJ recognized that, although such attempts may indeed infringe basic rights, the municipality may regulate 'matters of access to basic rights, especially with regard to manifestations of community and collective life' (TSJC 2011: 10). The disturbance of tranquility is also seen as a matter of the security of public places and is expressly viewed as a matter of the permanent identification of people, not

occasional as required by security forces. The judges further declared that constitutionally the only limitation on freedom of religion is the maintenance of public order (different from civil security and public security), which – albeit legally underspecified – refers to externally perceivable actual conduct. In conclusion, they argued that freedom of religion never means that citizens can always behave according to their beliefs and that the key limitation is indeed public order. The argument came full circle when the judges drew on prior judgments in which the notions of ‘social peace’, ‘public peace’ and ‘social harmony’ were fashioned as semantically equivalent.

While the CCJ essentially framed the issue of face-covering in terms of the ‘necessary’ conditions of public spaces, in its judgment the Superior Court in Madrid followed the plaintiffs in their understanding by foregrounding the right to freedom of religion. The judges stated that municipalities had no competence over regulations concerning fundamental rights and that the only constitutional tools able to do so were national laws. ‘A municipality cannot, of itself, establish limitations to the exercise of fundamental rights in municipal spaces’ (TS 2013: 38). In addition, they denied that this was a matter of ‘local interest’ and stated that there were no sociological grounds justifying the ban. Simultaneously, however, the judges also declared that their verdict was not an answer to the question of whether the Spanish constitution allows a general burka ban of the sort implemented in Belgium and France, and it left open the possibility of a state law regulating the wearing of burkas.

Both judgments recognize that regulating full-face veiling touches on questions of fundamental rights, as they recognize that some Muslim women see wearing a burka as a religious practice and thus as an issue of the freedom of religion. However, they are deeply divided over whether the municipality has regulatory competences based on different interpretations of the notion of ‘local interest’ and on the existence of evidence for the disturbance of tranquility. Importantly, in the CCJ judgment the notion of tranquility that face-veiling presumably disturbs acquires the status of a property of ‘Western culture’:

In our – Occidental – culture, hiding one’s face in quotidian activities disturbs the tranquility of others because it implies the lack of visibility of an element that is essential in terms of identification, which is the face of the person who is hiding it. For various reasons, the same effect of disturbance is not produced in other situations, as in the exercise of certain professions, hygiene and security at the workplace, public festivities or climate-related practices. (TSJC 2011)

While the framing of the visible face as a marker of Western culture predates the judgment, it also seems that the framing's judicial consecration imbues it with a higher status and makes it more authoritative. Thus, in an interview conducted after the CCJ decision, the mayor of Reus and pro-ban activists drew on it:

At least, in our culture the visage shows the face, and the face is the mirror of the soul. If you are happy, one can see it in your face. If you feel hate, it is reflected in the face. In conversations, through the eyes and the expressions you show what you think and whether what you say is true or whether you are lying (interview 30 January 2015).

While the Supreme Court decried the lack of 'sociological' evidence for the cultural argument, it was taken up prominently in *S.A.S. v France* and expressed through the concept of 'living together' that was central to the ECtHR decision. Furthermore, the judgment ties the notion of the 'tranquility of others' to ideas about the face in Western culture in legally novel ways. In the Spanish context, 'tranquility of others' has hitherto been used in the context of noise disturbances caused by, for example, construction activities. Since the burka, like any other element used for face-covering, is not noisy in the same sense, a semantic shift has obviously taken place whereby 'disturbance of tranquility' now seems more closely related to French or Belgian and ECtHR understandings of 'living together'. And while the Spanish concept of *convivencia* encapsulates very similar meanings of 'living together,' its official use is typically limited to the realm of policy.<sup>5</sup>

## 5. Conclusion

In this article, we have explored the transformation and standardization of the justificatory repertoires when the claims they are meant to authorize and legitimate are no longer directed to imagined political constituencies but to courts, and when the criteria by which these claims are adjudicated shift from political expediency to legality and constitutionality. The focus on 'burqa bans' is particularly apt for analyzing

---

5 Referring to the experience of peaceful interreligious coexistence between Muslims, Jews and Christians in Muslim-dominated medieval Al-Andalus, and more generally to the practice of active engagement in shared public spheres, the notion has been intellectually influential and is culturally resonant. However, it must be distinguished from the Catalan *Convivència*, which was coined and taken up as a general policy guideline to promote tolerance between Catalans and Spaniards after the end of the civil war (e.g. government and administrative units concerned with civil rights, integration and social cohesion are often called 'civismo y convivencia' (public spiritedness and coexistence)).

these processes, since the judicial politics of religious diversity has emerged as one of the most highly contested areas of human rights-related jurisprudence. Adding to the existing literature on full-face veiling, we have compared two hitherto understudied cases of *burqa* prohibitions that give us a great opportunity to test our argument about the standardizing effects of the judicial field – even prior to the obviously standardizing effects of transnational court rulings such as *S.A.S. v France*. Belgium and Spain differ strongly from each other in terms of the institutional framework, local conflict histories and judicial outcomes (one in which the courts upheld an existing ban, and one in which legal counter-mobilization succeeded) – and yet in both cases similar changes in justificatory repertoires can be observed over time. Indeed at first sight, the diverging court outcomes might give the impression to contradict neo-institutionalist assumptions about legal convergence occurring in transnational institutional environments. However, as we have shown, these divergent judicial outcomes, which are to great extent due to different conflict trajectories, camouflage the standardization of justificatory repertoires that has taken place. Both cases show how, with increasing detachment from local constellations of conflict, the judicial repertoires of justification that are used by competing parties as well as the courts tend to become standardized and reduced to specific ways of legal reasoning.

Based on these empirical findings we want to highlight three conclusions, which have broader implications for the law and society literature concerned with processes of judicialization (see Roesler 2007). First, the judicialization of politics obviously exerts pressures on actors to articulate their claims in legal vocabularies, thus altering their repertoires of justification once they enter legal fields. In our two empirical cases, local mobilizations involved a variety of actors with different claims, and yet judicial battles zoomed in on the right to religious freedom and its limitations. This was so despite the fact that the laws under scrutiny actually refrained from explicitly banning Islamic clothing and could have been interpreted from other perspectives as well. What this suggests is that judicial fields have today become relatively autonomous, forcing political actors to invest in struggles over forms of symbolic capital that are specific to these fields (see Dezalay / Garth 1996).

That said, our analysis also suggests, secondly, that judicial fields are not fully independent from neighboring political fields. The concept of 'living together' indeed pinpoints the major point of convergence between both political and legal fields and illustrates what we have called practices of translation that interlock political with legal languages. In political discourses, political actors have often mobilized, *inter alia*, around the notion that face veiling hindered people's identifiability, which sup-

posedly undermined social interaction and people's tranquility, as well as increasing security threats. The courts took up these ideas and rearticulated them in the language of 'public order' and 'the rights of others'. The courts' authority in defining the contours of plausible justifications thus engendered a standardization of justificatory repertoires and discursive practices across contexts.

Thirdly, our field-theoretical analysis adds further nuance to the study of legal transnationalism and the impact of the European human rights field. The latter turns out to be interdependent with national and local judicial fields, with influences running in *both* directions. French and Belgian politicians had reason to expect that the ECtHR would concede the state a wide margin of appreciation since it had prominently emphasized this doctrine as being central to its approach to religion-state relationships in earlier decisions, most remarkably in *Lautsi v. Italy*. Moreover, actors in Catalonia were aware of French efforts to justify the ban with reference to public order and took inspirations from them when framing their notion of disturbed tranquility. Actors situated in national and local settings strategically articulated their claims 'in the shadow' of Strasburg – thereby contributing to the emergence of shared understandings which the ECtHR could later draw upon when called to adjudicate on the French (and Belgian) 'burqa bans'. The justificatory repertoire used in *S.A.S.* sound strikingly familiar in light of the discursive practices we encountered in the pre-*S.A.S.* case studies:

The Court (...) can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. (*S.A.S. v France*, p. 49 § 122)

The concept of 'living together', having thus receiving judicial sanction as legitimate ground for governmental limitations of religious freedom, has now acquired even more leverage as a winning argument in political debates – unlike arguments of gender equality or humanity which originally were also articulated in the political field. Therefore it is this standardization of justificatory repertoires that ultimately has facilitated the rapid spread of 'burqa bans' throughout Europe. Spanish politicians responded to the ECtHR judgment by publicly declaring that they would now renew

their efforts to regulate face veiling. The mayor of Lleida declared<sup>6</sup> that the city government's views were fully in line with the judgment. Similarly, the mayor of Reus stated that 'The judgment supports our intention to prioritize security and *convivencia* [living together] over the freedom of religion,'<sup>7</sup> and the city even immediately reinstated a changed version of its ban. Yet, this time round the Catalan Court of Justice found that the regulation violated Muslim women's right to religious freedom and annulled it, at which the municipality announced its plans for a legal appeal. Usage of this term 'living together' can also be found for instance in the statements of the Dutch Prime Minister declaring the recent law banning the face veil in public as reflecting 'a balance between people's freedom to wear the clothes they want and the importance of mutual and recognizable communication.'<sup>8</sup>

In sum, our comparative case study demonstrates not only that actors' repertoires of justification are shaped by field-specific symbolic logics, but also that their practices of translation and retranslation allow them to navigate political and judicial fields, respectively. Clearly, more research is needed to fully understand how variable patterns of field interdependence shape dynamics of socio-legal mobilization and counter-mobilization and how they thus generate distinctive configurations of judicial politics. Moreover, it is an intriguing and open question whether similar processes of the standardization of justificatory repertoires can be observed in other contestations around religious diversity such as those linked to references to national identity and heritage. We may conjecture that processes of diffusions are rapid when contested issues can be easily framed in abstract legal categories and less rapid (or even absent) when contested issues (e.g. religious instruction in public schools) are highly specific to national church-state-arrangements. Further comparative research is required to determine the precise conditions that shape such processes.

---

6 See [http://ccaa.elpais.com/ccaa/2014/07/02/catalunya/1404326497\\_988633.html](http://ccaa.elpais.com/ccaa/2014/07/02/catalunya/1404326497_988633.html) and <http://www.europapress.es/catalunya/noticia-lleida-reclama-parlament-siga-tedh-prohiba-burka-espacios-publicos-20140702135331.html>, accessed 9 December 2016.

7 See <http://www.abc.es/sociedad/20140718/abci-reus-burka-prohibicion-201407181623.html>, and <http://www.lavanguardia.com/local/agencias/20140702/54411512927/reus-aplaude-la-sentencia-europea-que-avala-la-prohibicion-al-velo-integral.html>, accessed 9 December 2016.

8 See <http://www.independent.co.uk/news/world/europe/dutch-burqa-veil-ban-holland-votes-for-partial-restrictions-some-public-places-a7445656.html>, accessed 9 December 2016.

## Laws Cited

### *Belgium*

The Act instituting a prohibition on wearing clothing that covers the face in whole or in part, no. 2011-06-01/08, 1 June 2011.

### *Spain*

Ley Orgánica 7/1980, de 5 de julio, de Libertad Religiosa [Organic Law on Religious Freedom]

## Cases Cited

### *Belgium*

Police Court Tongeren (Maaseik department), 12 June 2006.

Police Court Brussels, no.12/2011, 26 January 2011.

Constitutional Court Belgium, no. 148/2011, 5 October 2011.

Constitutional Court Belgium, no. 179/2011, 17 November 2011.

Constitutional Court Belgium, no. 145/2012, 6 December 2012.

### *Spain*

Catalan Superior Court of Justice, no. 489/2011, 7 June 2011.

Spanish Supreme Court, no. 4118/2011, 6 February 2013.

### European Court of Human Rights

*Lautsi v Italy* [Grand Chamber], no. 30814/06, 18 March 2011.

*S.A.S. v France* [Grand Chamber], no. 43835/11, 1 July 2014.

## References

- Amiriaux, Valérie. 2013. The 'Illegal covering' Saga: What's Next? *Sociological Perspectives, Social Identities* 19 (6): 794-806.
- Astor, Avi. 2015. Governing Religious Diversity amid National Redefinition: Muslim Incorporation in Spain. In *After Integration*, ed. M. Burchardt and I. Michalowski, 247-265. Wiesbaden: Springer.
- Baehr, Peter, and Daniel Gordon. 2013. From the Headscarf to the Burqa: The Role of Social Theorists in Shaping Laws Against the Veil. *Economy and Society* 42 (2): 249-280.
- Beaman, Lori G. 2013. Overdressed and underexposed or underdressed and overexposed? *Social Identities*, 19 (6): 723-742.
- Brems, Eva (ed.). 2014. *The Experiences of Face Veil Wearers in Europe and the Law*. Cambridge: Cambridge University Press.
- Brems, Eva, Jogchum Vrielink and Saïla Ouald Chaib. 2013. Uncovering French and Belgian Face Covering Bans. *Journal of Law, Religion & State*, 2 (1), 69-99.
- Bruckner, Pascal. 2010. Unveiled: A Case for France's Burqa Ban. *World Affairs* 173 (4): 61-65.
- Burchardt, Marian, Mar Griera and Gloria García-Romeral. (2015). Narrating liberal rights and culture: Muslim face veiling, urban coexistence and contention in Spain. *Journal of Ethnic and Migration Studies*, 41(7), 1068-1087.
- de Galembert, Claire. 2014. Forcer le droit à parler contre la Burqa. Une judicial politics à la Française ?. *Revue française de science politique* 64 (4) : 647-668.
- de Galembert, Claire and Matthias Koenig. 2014. Gouverner le religieux avec les juges. Introduction. *Revue française de science politique*, 64(4), 631-645.
- Delgrange, Xavier. 2014. Quand la burqa passe à l'Ouest, la Belgique perd-elle le nord?. In *Quand la burqa passe à l'Ouest: enjeux éthiques, politiques et juridiques*, ed. D. Koussens and O. Roy, 197-237. Rennes: Presses universitaires de Rennes.
- Dezalay, Yves, and Bryant G. Garth. 1996. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago: University of Chicago Press.
- DiMaggio, Paul, & Powell, Walter W. 1983. The iron cage revisited: Collective rationality and institutional isomorphism in organizational fields. *American Sociological Review*, 48 (2): 147-160.
- Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* Chicago and London: University of Chicago Press.
- Fadil, Nadia. 2014. Asserting State Sovereignty. The Face Veil Ban in Belgium. In *The Experiences of Face Veil Wearers in Europe and the Law*, ed. Eva Brems, 251-62. Cambridge: Cambridge University Press.
- Ferejohn, John. 2002. Judicializing Politics, Politicizing Law. *Law and Contemporary Problems* 65 (3): 41-68.
- Ferrari, Alessandro and Sabrina Pastorelli. 2013. *The Burqa Affair Across Europe: Between Public and Private Space*. London and New York: Routledge.
- Fligstein, Neil and McAdam, Doug. 2012. *A Theory of Fields*. Oxford: Oxford University Press.
- Fournier, Pascale, and Erica See. 2012. The 'Naked Face' of Secular Exclusion: Bill 94 and the Privatization of Belief. *Windsor Yearbook of Access to Justice* 30 (1): 63-77.



- Fredette, Jennifer. 2015. Becoming a Threat: The *Burqa* and the Contestation Over Public Morality Law in France. *Law & Social Inquiry* 40 (3): 585-610.
- Griera, Mar, and Marian Burchardt, M. 2016. Religión y Espacio público: el conflicto en torno a la regulación del velo integral islámico. *Papeles del CEIC. International Journal on Collective Identity Research*, vol. 2016/2, papel 159, CEIC (Centro de Estudios sobre la Identidad Colectiva), Universidad del País Vasco, <http://dx.doi.org/10.1387/pceic.16190>
- Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press.
- Grillo, Ralph and Prakash Shah. 2012. Reasons to Ban? The Anti-Burqa Movement in Western Europe. *MPI-MMG Working Paper* 12-05 (<http://www.mmg.mpg.de/publications/working-papers/2012/wp-12-05/>).
- Hennette-Vauchez, Stéphanie and Vincent Valentin. 2014. *L'affaire Baby Loup ou la nouvelle laïcité*. Issy-les-Moulineaux: Lextenso Editions.
- Hirschl, Ran. 2008. The Judicialization of Mega-Politics and the Rise of Political Courts. *Annual Review of Political Science* 11: 93-118.
- Howard, Marc M. 2009. *The politics of citizenship in Europe*. Cambridge: Cambridge University Press.
- Hunter-Henin, Myriam. 2012. Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom. *International & Comparative Law Quarterly* 61 (3): 613-639.
- Joppke, Christian. 2013. Double standards? Veils and crucifixes in the European legal order. *European Journal of sociology*, 54( 01): 97-123.
- Joppke, Christian and John Torpey. 2013. *Legal Integration of Islam: A Transatlantic Comparison*. Cambridge, Mass.: Harvard University Press.
- Kanmaz, Meryem. 2002. The Recognition and Institutionalisation of Islam in Belgium. *The Muslim World* 92 (1-2): 99-113.
- Kay, Tamara. 2011. Legal Transnationalism: The Relationships between Transnational Social Movement Building and International Law. *Law and Social Inquiry* 36(2):419-54.
- Koenig, Matthias. 2015. Governance of religious diversity at the European Court of Human Rights". In *International Approaches to Governing Ethnic Diversity*, ed. Jane Bolden, & Will Kymlicka, 51-78. Oxford: Oxford University Press.
- Laborde, Cécile. 2012. State Paternalism and Religious Dress Code. *ICON – International Journal of Constitutional Law* 10 (2): 398-410.
- Laurence, Jonathan. 2012. *The Emancipation of Europe's Muslims. The State's Role in Minority Integration*. Princeton: Princeton University Press.
- Mahmood, Saba. 2006. Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation. *Public Culture* 18 (2): 323-348.
- McCann, Michael W. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago and London: University of Chicago Press.
- Moors, Annelies. 2009. The Dutch and the Face-veil: The Politics of Discomfort. *Social Anthropology/Antropologie Sociale* 17 (4): 393-408.
- Nussbaum, Martha. 2012. *The New Religious Intolerance Overcoming the Politics of Fear in an Anxious Age*. Cambridge, Massachusetts: Harvard University Press.
- Ouald Chaib, Saïla and Eva Brems. 2013. Doing Minority Justice through Procedural Fairness: Face Veil Bans in Europe. *Journal of Muslims in Europe* 2 (1): 1-26.
- Parvez, Z. Fareen. 2011. Debating the Burqa in France: The Antipolitics of Islamic Revival. *Qualitative Sociology* 34 (2): 287-312.

- Pedriana, Nicholas. 2006. From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s. *American Journal of Sociology* 111 (6): 1718-61.
- Roesler, Shannon. 2007. Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority. *Law and Social Inquiry* 32(2): 545-79.
- Rosenberg, Gerald. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago and London: University of Chicago Press.
- Selby, Jennifer. 2014. Un/veiling Women's Bodies: Secularism and Sexuality in Full-Face Veil Prohibitions in France and Quebec. *Studies in Religion/Sciences Religieuses* 43 (3): 439-466.
- Stone Sweet, Alec. 2010. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press.
- Vrielink, Jogchum, Saïla Ouald Chaib and Eva Brems. 2013. The Belgian 'burqa ban': Legal Aspects of Local and General Prohibitions on Covering and Concealing One's Dace in Belgium. In *The Burqa Affair Across Europe: Between Public and Private Space*, ed. Alessandro Ferrari and Sabrina Pastorelli, 143-70. London and New York: Routledge.