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THE STRUGGLE OVER CULTURE: EQUALITY AND DIVERSITY IN THE EUROPEAN PUBLIC SPHERE.

In this lecture I would like to examine the role of discourses of cultural and religious difference and of the fluid boundaries between culture and religion, as they mark contemporary political conflicts. In particular, I want to investigate how the integration of so-called “Islamic” cultural and religious differences is defining the dialectic of inclusion and exclusion within the European public sphere. While the actuality of these concerns can hardly be debated – they confront us everyday as news about bombings in Madrid or London, car burnings and violent confrontations with the police on the streets of Paris – their philosophical import have not been properly examined¹.

Increasingly in today’s world, we are experiencing the growing antagonism between religious and ethno-cultural differences and the sphere of the political in ways that are painfully reminiscent of Europe’s “Wars of Religion”. The representation of cultural and religious difference in the public sphere has become a central political struggle in all western democracies. The «clash of civilizations», a term which Samuel Huntington has made so popular, is not only outside state boundaries; it is within them as well. In particular, women’s bodies have become the site of symbolic confrontations between a re-essentialized understanding of religious and cultural difference

¹ This lecture draws on my work from recent years, during which I have examined citizenship, multiculturalism, migration, and women’s issues within the context of the global developments and with specific reference to the European Union. See my *Transformation of Citizenship. Dilemmas of the Nation-State in an Era of Globalization. The Spinoza Lectures*, Van Gorcum, Amsterdam 2001; Ead., *The Claims of Culture. Equality and Diversity in the Global Era*, Princeton University Press, Princeton 2002; Ead., *The Rights of Others. Aliens, Citizens and Residents. The John Seeley Memorial Lectures*, Cambridge University Press, Cambridge 2004.

and the forces of state power – whether in its civic-republican, liberal-democratic or multicultural-communitarian form. “The scarf affair”, or “l’affaire du foulard”, or sometimes as it is referred to as “la voile”, in France, Germany and Turkey, will constitute my reference point here.

I begin by examining the new discourse concerning religion in the public square in the context of the *secularization hypothesis*. Then I turn to contemporary ideologies of cultural difference, and examine, as a next step, the position of discourses about women and their prominence in intercultural evaluations. The “scarf affair” in France and the case of the German-Afghani teacher, Farashda Ludin, constitute my concrete reference points. I conclude with a theoretical political framework, which I call *democratic iterations*, to conceptualize the new forms of contestation around equality and diversity.

1. *The End of the Secularization Hypothesis*

Since Max Weber’s essay *Wissenschaft als Beruf* (1919), it has been axiomatic that modernity is characterized by *Entzauberung*, by the loss of magic in everyday world and the rationalized differentiation (*Ausdifferenzierung*) from one another of the spheres of science, religion, law, aesthetics and philosophy. Max Weber was giving expression thereby to a widely held view since the Enlightenment, that the spread of knowledge and science would mean not only «holding religion within the bounds of reason», as Kant thought, but dispensing with religion altogether in the name of modern reason, as Feuerbach, Marx and Nietzsche postulated. Modernization would mean secularization, whether in the form of an ideology critique which began with the critique of religion as the chief hindrance on the way to an emancipated society, or as secularization in the form of “loss of magic” in a scientific-technological rationalized everyday world.

Karl Löwith and Hans Blumenberg have already reminded us of the theological sources of Enlightenment’s own belief in the secularization hypothesis: the idea of a united mankind, capable of cumulative learning and progressing toward a common Enlightenment, has its sources in religiously inspired salvation myths². The Enlightenment was not beyond theology but based on theological premises

² K. Löwith, *Meaning in History: The Theological Implications of the Philosophy of History*, The University of Chicago Press, Chicago 1949; H. Blumenberg, *The Legitimacy of the Modern Age. Studies in Contemporary German Social Thought*, trans. by R. M. Wallace, MIT Press, Boston 1983.

of a *Heilsgeschichte*. And even early sociological students of modern societies, such as Alexis de Tocqueville, pointed out in mid-nineteenth-century that the great modern experiment with democracy required religious foundations. Tocqueville noted that the most egalitarian of modern societies of his time, the United States, remained deeply religious. The secularization hypothesis always had its detractors.

Today we are experiencing the world-wide growth of religious fundamentalisms and the intense challenge to one crucial aspect of the modernization process, in particular the separation between religion and politics; or between theological truths and political certitudes. The ever fragile walls of separation between religion and the public square have become increasingly porous. Certainly, this phenomenon is most strikingly observed with the rise of political Islam, which challenges not only the separation of religion and politics but threatens the very boundaries of Islamic nation-states altogether in the name of “*Dar-ul-Islam*” (the domain of Islam) to prevail over “*Dar-ul-Harb*” (the domain of the infidels); however, since the Nineteen-seventies Jewish and Christian fundamentalisms have gained more and more adherents as well. What is remarkable about these movements is their poverty in terms of doctrinal and theological innovations when contrasted to their attractiveness for their followers in terms of securing collective identities. I would dare say that, since the Liberation Theology movements of Latin America, half a century ago, we have not seen an authentic theological renovation of core religious doctrines; instead, what we see are the manifestations of religiosity as an identity project and the increasingly blurred lines between religious concerns of faith and ethno-cultural preoccupations with identity. It is this blurring of the line between religion and culture, and the difficulty of differentiating among them, which concerns me in this lecture.

Differentiating the religious from the cultural is significant because of the commitment of liberal democracies to uphold the fundamental rights of freedom of conscience, expression and association. Recall some contemporary controversies was Salman Rushdie’s *Satanic Verses* an expression of religious apostasy, as devout Muslim communities claimed, or was it an expression of artistic freedom and cultural irony, as many liberals and democrats argued? Could it have been both? Is wearing the “*hijab*” by observant Muslim women a religiously mandated duty or a cultural dress code which shows great variation in different Islamic traditions? Is polygamy religiously

sanctified by the Koran? And what about female genital mutilation? What religious basis, if any, is there for this practice?

A principal reason for this blurring of the lines is a sociological one which I have characterized in other works as “reverse globalization”³. The distinction between the cultural and the religious as well as the identification of actions and customs as being one or the other is occurring against the background of the history and experience of colonialism and of the West’s encounter with the rest. Whereas at one time it was the historical experience of western colonialism in facing its cultural and religious “others” that forced European political thought to clarify and solidify the line between the religious and the cultural, today it is mass migration from Africa, Asia, and the Middle East to the shores of resource-rich liberal democracies such as the EU, the USA, Canada and Australia that is leading to the reframing of the distinction between the cultural and the religious. Under conditions of immigration, a destabilization of identities and traditions is taking place and tradition is being “reinvented”.

A historical example may illustrate for us what Eric Hobsbawm has presciently named «the invention of tradition». The history of the Indian custom of “widow burning” – *sati* – is instructive here. According to *sati*, a widowed wife emulates herself by ascending the burning funeral pyre of her husband. In her analysis of the politics of tradition formation, the Indian feminist philosopher, Uma Narayan, puzzles over «how and why this particular practice, marginal to many Hindu communities let alone Indian ones, came to be regarded as a central Indian tradition»⁴. Her answer, based on recent historiography of colonial India, is that the meaning as well as status of *sati* as a tradition, emerged out of negotiations between British colonials and local Indian elites. British colonial administrators who were driven, on the one hand, by their own moral and civilizational revulsion when confronted with this practice, were, on the other hand, equally concerned that their intervention in outlawing this practice should not lead to political unrest. British colonial officials investigated the status of *sati* as a «religious practice», assuming that if it had religious sanction, it would be unwise to abolish it; if it did not, then the abolition could be approved of by the local elites themselves⁵. To determine whether a practice had a religious basis, in turn, meant finding

³ Cfr. S. Benhabib, *The Claims of Culture. Equality and Diversity in the Global Era*, chap. 1.

⁴ U. Narayan, *Dislocating Cultures: Identities, Traditions, and Third-World Feminism*, Routledge, New York 1997, p. 61.

⁵ Ivi, p. 62.

a justification for it in religious scripture. Reasoning analogically that in Hinduism the relationship of scripture to practice was like that in Christianity, British colonial powers then trusted accounts of documents produced by Indian *pundits* (religious scholars) codifying in effect the interpretation of tradition. Given that Hinduism, unlike Christianity, does not have a core spiritual text, «[...] the question of where to look for such scriptural evidence was hardly self-evident. The interpretative task was not made any easier by the fact that there seemed to be few, if any, clear and unambiguous textual endorsement of *sati*»⁶. What emerged at the end of a long historical process of cultural interventions and negotiations was the ironing out of inconsistencies in the account of local elites about the various myths surrounding the figure of *sati*, the quasi-codification of religious stories in relation to existing practices, and above all the homogenization of discrepancies in local Hindu traditions which varied not only from region to region but among the various castes as well.

Cooked in the cauldron of the religious wars in Europe, which pitted Protestants against Catholics, Anglicans against both, sectarian and millenarian movements against all for several centuries, members of the British colonial administration sought to apply the lessons of religious tolerance as practiced in the modern secular state to the Indian case. As long as a practice was considered central to one's religion, a certain amount of tolerance was to be shown toward it. But what if the practice at hand was not *religious* but merely *cultural*, in the sense that members of the same religion felt free to engage in it or not, depending on other factors? The presumption of the colonial administrators was that *culture* as opposed to *religion* needed to be protected less against intervention and legislation, particularly if the practices at hand were considered odious and offensive to human dignity, in accordance with the self-understanding of the majority.

Most liberal democracies down to our own days operate with some version of this distinction between cultural and religious practices, and between central and subsidiary practices of a religion. My point is not to challenge these distinctions; what I want to stress is an insights which derives from Ludwig Wittgenstein's epistemology but which I want to use in the current context: very often we do not know what *type of a practice the practice at hand is for we do not share a common meaning of the disputed practice itself*. Is it religion, is it culture, or is it morality? What if it is all of these and may be

⁶ Ivi, p. 200.

none and what if its meaning shifts and changes as a result of social and cultural interactions across time and within shared space? I will argue that this is precisely what is taking place around the practice of “veiling” in different communities of Muslim women who engage in this practice in countries of immigration as well as in their own societies. In other words, the practice itself is being resignified.

2. *Contemporary Ideologies of Cultural Difference*

Contemporary ideologies of cultural difference ignore both the contested boundaries between religious and cultural practices, as well as the fluid resignifications currently taking place among migrant, third-world communities in Europe and elsewhere. Instead, a re-essentialized discourse of the cultural *cum* religious *cum* anthropological difference is dominating the public-political vocabulary: thus, it is not contemporary Turkey’s failure to live up to the Copenhagen criteria in its search for candidacy to enter the EU that is lamented but whether the EU can accommodate a majority Muslim country with 70 million inhabitants. Thus, it is not the deplorable marginalization, degradation and social exclusion of immigrant youth of Islamic and African origin by French society that is lamented but the fact that these youths come from families which are supposed to “practice polygamy”, and are therefore not “normal” in the sense that the French bourgeoisie recognizes. As the *banlieues* of Paris were burning, the question of Islamic polygamy, certainly which should be of concern to all of us, was paraded as the proximate cause of events which could have been explained much more simply and truthfully by examining inner city riots in the USA in the late Nineteen-sixties among urban, marginalized, mostly African-American youth. The suggestion that polygamic family practices of these youth accounted for their actions pointed the finger not at socio-economic factors but rather at *cultural difference* as the explainans for all social conflict. What was once the romantic multicultural discourse of “difference”, common to the western Left, is now deployed by the European right. I want to briefly analyze the philosophical as well as social-scientific presuppositions of this language of cultural difference.

Whether conservative or progressive, such attempts share a number of faulty epistemic premises: 1) that cultures are clearly delineable wholes; 2) that there are smooth overlaps between cultures and groups, in the sense that a non-controversial description of the culture of a human group is possible; and 3) even if cultures and groups do not stand in a one-to-one correspondence with one another, and

even if there is more than one culture within a human group, and more than one human group which may possess the same cultural traits, this does not pose problems for politics or policy. Taken together these assumptions form what I will call the “reductionist sociology of culture”. In the words of Terence Turner, this view «risks essentializing the idea of culture as the property of an ethnic group or race; it risks reifying cultures as separate entities by overemphasizing their boundedness and distinctness; it risks overemphasizing the internal homogeneity of cultures in terms that potentially legitimize repressive demands for communal conformity; and by treating cultures as badges of group identity, it tends to fetishize them in ways that put them beyond the reach of critical analysis»⁷.

For the participants of the culture, by contrast, their traditions and stories, rituals as well as tools, material living conditions as well as symbols, are experienced through contested and contestable narrative accounts. From within the culture itself, a culture does not and need not appear as a whole; rather it forms a horizon, which recedes further and further each time one approaches it.

Why does culture present itself through narratively contested accounts? For two principal reasons. First, human actions and relations are formed through a double hermeneutic. We identify *what* we do through an *account* of what we do; words and deeds are equiprimordial, in the sense that almost all socially significant human action – beyond scratching one’s nose – is identified as a certain *type of doing* through the accounts which agents as well as others give of that doing. This is true even when, and especially when, there is disagreement between the doer and the observer. Second, human actions and interactions are not only constituted through narratives which together form a «web of narratives» (Hannah Arendt), but human beings always also have an evaluative stance toward their doings. There are second-order narratives that entail a certain normative attitude toward the first-order narrative accounts of human deeds. Human beings live in an evaluative universe. What we call culture is the horizon formed by these evaluative stances through which the infinite chain of space-time sequences is demarcated into “good” and “bad”, “holy” and “profane”, “pure” and “impure”. Cultures are formed through binarisms.

⁷ T. Turner, *Anthropology and Multiculturalism: What is Anthropology that Multiculturalism should be Mindful of it?*, «Cultural Anthropology», vol. 8, n. 4, 1993, A. S. Anagnost (ed.), Published for “The Society for Cultural Anthropology”, University of California Press, Oakland (CA), p. 412.

We should view human cultures as the constant creation, recreation, and negotiation of imaginary boundaries between “us” and “them”, “we” and the “other(s)”. The *other* is always also within us and is one of us. The *self* is a self only because it distinguishes itself from an imaginary “other”. Struggles for recognition, among individuals and groups, are struggles to negate this status of “otherness”, insofar as otherness is taken to involve disrespect, contempt, domination and inequality. Individuals and groups struggle to attain respect and self-worth, freedom and equality while also retaining some sense of selfhood. Whether in the psyche of the individual or in the life of nations, to let the other be in his or her difference while recognizing his/her fundamental human equality and dignity, is one of the most difficult achievements of human interaction – a task at which, more often than not, one fails.

3. *Sexual Difference and Cultural Diversity*

Why is it then that *sexual difference* plays such an important role in the demarcation of cultural differences? Why is it that cultural diversity is often inscribed within the language of sexual difference?

The sphere of sexual and reproductive lives is a central focus of most human cultures⁸. The regulation of these functions forms the dividing line between nature and culture: all animal species need to mate and reproduce in order to survive, but the regulation of mating, sexuality, and reproduction in accordance with «kinship patterns» is, as Claude Levi-Strauss argued in *The Elementary Structures of Kinship*, the line that separates *fusis* from *nomos*. Women and their bodies are the symbolic-cultural site upon which human societies inscript their moral order. In virtue of their capacity for sexual reproduction, women mediate between nature and culture, between the animal species to whom we all belong and the symbolic orders which make us into cultured beings.

Since Simone de Beauvoir’s *The Second Sex* feminist theory has dissected why this function of women as mediators between nature and culture also makes them the object of longing and fear, desire and flight. The passages in and out of human life are usually marked by the presence of the female: always and inevitably in the case of birth, usually, but not necessarily in the case of death, since male

⁸ S. Okin, “Is Multiculturalism Bad for Women?”, in J. Cohen-M. Howard-M. C. Nussbaum (eds.), *Is multiculturalism Bad for Women?*, Princeton University Press, Princeton (NJ) 1999, pp. 12-13. Si veda la trad. it. di questo saggio in questo numero di «Post-filosofie», pp. 97-113.

magicians, priests and shamans can also play a significant role in the death ceremony. The female of the species who presides over these functions thereby controls moments of greatest vulnerability in human life: when we enter life we are helpless as infants and when we leave it, we are equally helpless in the face of death. Intercultural conflicts, which challenge the symbolic order of these spheres, because they delve into the earliest and deepest recesses of the psyche, are likely to generate the most intense emotional responses. Thus the loss of one's culture, cultural uprooting and the mixture of cultures are often presented in sexualized terms: one's culture has been «raped», say primordialists, by the new and foreign customs and habits which have been imposed upon one; cultural intermixture is very often described as *mongrolization* or *mestizaje*. The use of these metaphors is not accidental: fundamentalist movements know very well the deep recesses of psychic vulnerability into which they tap in doing so.

These interconnections between psychic identity, the practices of the private sphere and cultural difference, assume a new configuration in modern liberal-democracies. These societies demarcate the private from the public along the following lines. In the genealogy of liberal political thought the distinction between the “public” and “private” spheres has referred to at least four domains. Down to our own days, the status of cultural and religious differences and the articulation of sexual difference in the public sphere of liberal democracies take place within this conceptual horizon.

In its most prominent sense, “the private” refers to the domain of the *household and family life*. The autonomy of the liberal subject is deciding upon whom to marry; the inner psychic life of the family; the regulation of sexuality within it are considered “private” matters. Of course, matters are never that simple, and the line between the public and the private is always contested. From the standpoint of the liberal state, the family is a public institution in which practices governing marriage and divorce are defined and regulated by political as well as legal norms. The state confers fiscal and economic status upon the family in that it defines the tax status of those who are considered family members; in not recognizing same sex unions as marriages, the state also upholds a specific conception of the family. Viewed as an institution within the modern state then, there is nothing “private” about the family.

The second most important sense of the “private” sphere is the right of citizens to *their liberty of conscience*. In the words of John

Rawls, the liberal state is based on the assumption that citizens are moral persons who can form their own sense of *the good* and also engage in cooperative public activities of *justice* in pursuing their various life-projects, whether these are characterized by religion, aesthetics, science, or culture. In this domain as well lines separating religion from the state; aesthetics from politics have always hotly contested.

The third sense of the “private” refers to the “*civil space*”: certain forms of association, such as clubs, religious institutions, educational facilities, cultural and scientific organizations are considered “private”, in the sense that they pursue shared goals of citizens, understood as individuals with diverse conflicting interests in an active civil society. The state ought not dictate the content of these activities nor regulate the internal constitutions of these organizations. Here as well, the line between the “civil” and “the political”, the “private organizations” and “public interests” is subject to constant negotiation and rearticulation.

The fourth meaning of the private is that of the *economic sphere*, or to use Hegelian language, of «the system of needs». The modern capitalist commodity economy is based upon the so-called free exchange of goods among legally equal property owners in the market place. Since the Nineteenth-century most social movements for justice have contested, in this domain as well, the “privacy” of market relations and of the consequences of economic laws.

The “public/private” distinction is both pivotal yet highly controversial in all liberal-democracies. Many political disagreements among citizens are about the limits of state interference in all these private spheres or again, about the desirability of state interference and state regulation within them.

It is possible to distinguish broadly between a “civic republican”, a “liberal-democratic” and “multicultural-communitarian” manner of conceptualizing the relationship between religious difference and the political community and the further articulations of the public and private spheres. With the “civic republican” model I mean the French principle of “*laïcité*” and the Turkish principle of “*laiklik*”, which was modeled on the French one. In this model the public sphere is to maintain a strict removal from all religious and ethnic symbols, relegating them to the private sphere. With the “liberal-democratic” model I have in mind a plethora of institutional arrangements, principally characteristic of Anglo-American and Protestant countries, in which the boundaries between the public and the private articulation

of difference, as well as that between religion and politics is porous, pragmatically defined and always contested. With the “multi-cultural and communitarian” model, I mean in the first place countries such as Israel and India, in which civil-personal rights, such as marriage, divorce, alimony, and inheritance, are distinct for each religious *cum* ethno-cultural group and in which the public sphere is segmented for each group and reflects the core differences without absorbing them in a common public political identity.

The “struggle over cultural identities” and the position of women within different religious and cultural communities are pushing the limits of established legal, political, cultural and discursive lines separating the public from the private and signaling new rearticulations. I want to look at the ongoing controversy in France, Turkey and Germany about “l’affaire du foulard” – the so-called “scarf affair” – in this context.

4. “L’Affaire du Foulard”

“L’affaire du foulard” refers to a long and drawn out set of public confrontations which began in France in 1989 with the expulsion from their school in Creil (Oise) of three scarf-wearing Muslim girls and continued to the mass exclusion of 23 Muslim girls from their schools in November 1996 upon the decision of the Conseil d’Etat⁹. Finally, after nearly a decade of confrontations, the French National Assembly passed a law in March 2004 with a great majority banning not only the wearing of the “scarf”, now interestingly referred to no longer as “le foulard”, but instead as “*la voile*”, but the bearing of all «ostentation signs of religious belonging in the public sphere». The Commission headed by Bernard Stasi and presented to the President of the Republic, considers the wearing of the scarf as part of a growing political threat of Islam to the values of “*laïcité*”.

Let me introduce another note of terminological clarification first: the practice of veiling among Muslim women is a complex institution that exhibits great variety across many Muslim countries. The terms *chador*, *hijab*, *niqab*, *foulard* refer to distinct items of clothing which are worn by Muslim women coming from different Muslim communities: for example, the *chador* is essentially Iranian and re-

⁹ My discussion of these incidents relies primarily upon two sources: F. Gaspard-F. Khosrokhavar, *Le Foulard et la République*, Decouverte, Paris 1995, and an excellent seminar paper by M. Brun-Rovet, *A perspective on the multiculturalism debate: «l’affaire foulard» and laïcité in France, 1989-1999*, submitted to Benhabib’s seminar on “Nations, States and Citizens”, Harvard University, Department of Government 2000.

fers to the long black robe and head scarf worn in a rectangular manner around the face; the *niqab* is a veil that covers the eyes and the mouth and only leaves the nose exposed; it may or may not be worn in conjunction with the *chador*. Most Muslim women from Turkey are likely to wear either long overcoats and a *foulard* (a head scarf) or a *carsaf* (a black garment which most resembles the *chador*). These items of clothing have a symbolic function within the Muslim community itself: women coming from different countries signal to one another their ethnic and national origins through their clothing, as well as signifying their distance or proximity to tradition in doing so. The brighter the colors of their overcoats and scarves – bright blue, green, beige, lilac as opposed to brown, grey, navy and of course, black – and the more fashionable their cuts and material by western standards, all the more can we assume the distance from Islamic orthodoxy of the women who wear them. Seen from the outside, however, this complex semiotic of dress codes gets reduced to one or two items of clothing which then assume the function of crucial symbols of complex negotiations among Muslim religious and cultural identities and western cultures.

The French sociologists Gaspard and Khosrokhavar capture these set of complex symbolic negotiations as follows: «[The veil] mirrors in the eyes of the parents and the grandparents the illusions of continuity whereas it is a factor of discontinuity; it makes possible the transition to otherness (modernity), under the pretext of identity (tradition); it creates the sentiment of identity with the society of origin whereas its meaning is inscribed within the dynamic of relations with the receiving society, [...] it is the vehicle of the passage to modernity within a promiscuity which confounds traditional distinctions, of an access to the public sphere which was forbidden to traditional women as a space of action and the constitution of individual autonomy»¹⁰.

“L’affaire du foulard” eventually came to stand for all dilemmas of French national identity in the age of globalization and multiculturalism: how to retain French traditions of *laïcité*, republican equality and democratic citizenship in view of France’s integration into the European Union on the one hand and the pressures of multiculturalism generated through the presence of second and third generation immigrants from Muslim countries on French soil on the other hand? Would the practices and institutions of French citizenship be flexible and generous enough to encompass multicultural differences within an ideal of

¹⁰ Cfr. F. Gaspard-F. Khosrokhavar, *Le Foulard et la République*, pp. 44-45. My translation.

republican equality? Among the organizations opposing the 2004 legislation to ban the wearing of the head scarf in public schools were the League for Human Rights, the Movement against Racism and for Friendship Among Peoples (MRAP), as well as the United Syndical Federation (FSU) and the Federation of Parents Councils (FCPE).

But what exactly was the meaning of the girls' actions? Was theirs an act of religious observance and subversion, or one of cultural defiance, or of adolescent acting out to gain attention and prominence? Were the girls acting out of fear, out of conviction or out of narcissism? It is not hard to imagine that their actions may involve all these elements and motives. The girls' voices were not heard in this heated debate; although there was a genuine public discourse in the French public sphere and a soul-searching on the questions of democracy and difference in a multicultural society, as the sociologists Gaspard and Khosrokhavar pointed out, until they carried out their interviews and until the publication of *Des Filles comme les Autres: Entretiens avec Alma et Lila Levy*¹¹ in 2004, the girls' own perspectives were hardly listened to. Even if the girls involved were not adults and in the eyes of the law and were still under the tutelage of their families, it is reasonable to assume that at the ages of 15 and 16, they could account for themselves and their actions. Had their voices been heard and listened to, it would have become clear that the meaning of wearing the scarf itself was changing from being a religious act to one of cultural defiance, increasing politicization and a vindication of cultural otherness in a monochrome public space which wanted to ban difference to the private sphere.

There is growing evidence in the sociological literature that in many other parts of the world as well Muslim women are using the veil as well as the *chador* to cover up the paradoxes of their own emancipation from tradition¹². Turkish law likewise forbids female students to attend universities and other institutions of higher learning with the scarf; but not only schools, other public spaces such as the National Assembly, must respect the principles of *laiklik*. Yet the observance of these principles can be taken to such an extreme, that some civil servants and municipal doctors in neighborhood clinics – called “dispensers” – have refused to serve women with headscarves. Thus, making them into the “others” of the republic in all senses of

¹¹ V. Giraud-Y. Sintomer, *Alma et Lila Levy: Des Filles Comme les Autres*, La Decouverte, Paris 2004. Also, A. Renaut-A. Touraine, *Un Débat sur la Laïcité*, Editions Stock, Paris 2005.

¹² N. Gole, *The Forbidden Modern: Civilization and Veiling*, University of Michigan Press, Ann Arbor 1996.

the term. Yet sociologists report that among girls and young women wearing the “*foulard*” in Turkey, there is conscious opposition to the *Shari’a* in regulating private-family matters. A majority of those interviewed refuse to have marriage, divorce and inheritance matters to be regulated by religious Islamic law and wish to preserve the Turkish civil code instead. To assume, therefore, that the meaning of these girls’ actions is purely one of religious defiance of the secular state, constrains these women’s own capacity to write the meaning of their own actions, and ironically, reimprisons them within the walls of patriarchal meaning from which they are trying to escape.

Learning processes would have to take place and are taking place on the part of the Muslim girls as well: while French and Turkish societies would have to learn not to stigmatize and stereotype as “backward and oppressed creatures” all those who accept to wear what appears at first glance to be a religiously mandated piece of clothing, the girls themselves and their supporters, in the Muslim community and elsewhere, have to learn to give a justification of their actions with “good reasons in the public sphere”. In claiming respect and equal treatment for their religious beliefs, they have to clarify how they intend to treat the beliefs of *others* from different religions, and how, in effect, they would institutionalize the separation of religion and the state within Islamic tradition.

In today’s Europe, the “scarf affair” is being debated within the context of two fundamental principles: the equal right to freedom of expression, guaranteed equally to all citizens and residents on the one hand, and the “interests of the state” in maintaining peace, security, public order, etc., on the other. The clause of the separation of religion and state, while being a cornerstone of liberal democracies, also permits significant democratic variations. Thus the United Kingdom has a Church of England, while Germany subsidizes the three officially recognized denominations – Protestant, Catholic and Jewish – through an indirect “church tax” known as “*Kirchensteuer*”.

The case of the German-Afghani teacher, Fereshta Ludin, also illustrates some of these dilemmas. An elementary school teacher in Baden-Württemberg, Fereshta Ludin, of Afghani origin and German citizenship, insisted on being able to teach her classes with her head covered¹³. The school authorities refused to permit her to do so. The case ascended all the way to the German Supreme Court (*BVerfGe*)

¹³ C. Emcke, *Kollektive Identitäten. Sozialphilosophische Grundlagen*, Campus, Frankfurt-New York 2000, pp. 280-85.

and on September 30, 2003 the Court decided as follows. «Wearing a headscarf, in the context presented to the Court, expresses that the claimant belongs to the “Muslim community of faith” (*die islamische Religionsgemeinschaft*)». The court concluded that to «describe such behavior as lack of qualification (*Eignungsmangel*) for the position of a teacher in elementary and middle schools, clashed with the right of the claimant to equal access to all public offices in accordance with article 33, paragraph 2 of the Basic Law (*Grundgesetz*), and also clashed with her right to freedom of conscience, as protected by article 4, paragraphs 1 and 2 of the Basic Law, without, however, providing the required and sufficient lawful reasons for doing so»¹⁴. While acknowledging the fundamental rights of Ms. Fereshta Ludin, the Court nevertheless ruled against the claimant and transferred the final say on the matter to the democratic legislatures. «The responsible provincial legislature is nevertheless free to create the legal basis [to refuse to permit her to teach with her head covered], by determining anew within the framework set by the constitution, the extent of religious articles to be permitted in the schools. In this process, the provincial legislature must take into consideration the freedom of conscience of the teacher as well as of the students involved, and also the right to educate their children on the part of parents as well as the obligation of the state to retain neutrality in matters of world-view and religion»¹⁵.

While acknowledging the fundamental nature of the rights involved – that of freedom of conscience and equal access of all to public offices – the German Supreme Court, much like the French Conseil d’Etat – refused to protect these against the will of the democratic legislatures. Yet by not delegating the case to the exclusive jurisdiction of the school authorities, and by stressing the necessity for the State to maintain religious and world – view neutrality in the matter, it signaled to democratic law-makers the importance of respecting the legitimate pluralism of world-views in a liberal democracy. Nevertheless, the Court did not see itself justified in positively intervening to shield such pluralism, but considered this to be the domain of provincial legislation¹⁶. Such reticence may surprise some; undoubtedly, the fact that teachers in Germany are also “*Beamten*”,

¹⁴ Cfr. German Supreme Court (*BVerfGe*), 2BvR, 1436/02, IVB 1 and 2. My translation.

¹⁵ Cfr. German Supreme Court (*BVerfGe*), 2BvR, 1436/02, 6. My translation.

¹⁶ The German legislators responded to the mandate of the Court rather speedily and after Baden-Württemberg (Bavaria), as well passed a bill banning the wearing of headscarves in the schools. Christian and Jewish symbols were not included in this ban. Civil rights organizations and groups representing Muslims living in Germany (estimates at 3.2 million) have criticized the proposed ban.

i.e. civil servants of the state who stand under the special jurisdiction of various civil service acts, may have played a role in the German Supreme Court's not wanting to intervene in the regulatory jurisdictional domain of legislators. Nevertheless, it is hard to avoid the impression that the real worry of the Court was more the substantive rather than the procedural question, as to whether a woman who ostensibly wore an object representing her belonging to «the traditions of her community of origin» could carry out the duties and tasks of a functionary of the German state.

Despite the fact that Ms. Ludin was a German citizen of Afghani origin who had successfully completed the requisite qualifications to become a teacher according to German law, the cultural and religious significance of her wearing the scarf clashed with widely held beliefs about the public face of a teacher in German society. The two dimensions of her citizenship rights – the entitlement to the full protection of the law and her cultural identity as an observant Muslim woman – clashed with one another. By leaving it up to the provincial legislatures to decide the extent to which articles of religious clothing and other items could be worn or brought into the schools, the German Supreme Court underlined the cultural and moral expectations of the parents as well as children involved. The right to freedom of conscience, despite all acknowledgment of the state's neutrality toward religious and other world-views, was thereby subordinated to the interests of the democratic people in maintaining their specific cultural identities and traditions. The Court failed to present a robust constitutional defense of pluralism. This would have involved differentiating more sharply between the status of German citizenship versus the cultural, ethnic and religious identity of individuals involved. Of course, insofar as in Germany as well as in many other liberal democracies discrimination on the basis of race, gender, ethnicity, and religion, is unconstitutional, this formal separation is to some extent encoded in the law. Nevertheless, in the context of being a civil servant of the German state, a thicker and more substantive understanding of citizenship-identity was invoked, and this apparently precluded the teacher's public manifestation of her belonging, not just to any religion, but to Islam¹⁷.

¹⁷ Emcke points out that in an earlier decision concerning the presence of crucifixes in the classroom, what the German Supreme Court declared to be unconstitutional was not the existence of religious symbols in public spaces or public schools, but rather the *obligation* to display the crucifix regularly. «In this sense – she concludes – there are no constitutional grounds against religious symbols as such» (cfr. C. Emcke, *Kollektive Identitäten. Sozialphilosophische Grundlagen*, p. 284).

In clear recognition of protections provided by the European Charter of Human Rights as well as the European Convention on Human Rights and Fundamental Freedoms, many women from European countries as well as Turkey have taken this matter to the European Court of Human Rights. Repeatedly, the Court so far has not seen fit to see the wearing of the scarf as a matter of liberty of conscience and has accepted that states and political bodies may have other considerations in mind, such as security, in banning the wearing of the foulard. This is truly unfortunate.

I think the worst political mistake which can be made today in Europe and in many other parts of the globe is to freeze the process of the profound resignification occurring in the lives of Muslim girls and women and instead to force a criminalization of their actions, also thereby freezing the dialectic of rights and identities which must be constitutive of liberal political and constitutional traditions everywhere. In conclusion, I want to return to theoretical questions again and introduce a framework for considering the interaction between rights and identities, law and democratic politics.

5. Democratic Iterations

I want to name “democratic iterations” processes in which meanings, religious as well as cultural, legal as well as political, are renegotiated in the public sphere of liberal democracies. These renegotiations are also learning processes. “Iteration” is a term which was introduced into the philosophy of language through Jacques Derrida’s work. In the process of repeating a term or a concept, we never simply produce a replica of the original usage and its intended meaning: rather, every repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever-so-subtle ways. In fact, there really is no “originary” source of meaning, or an “original” to which all subsequent forms must conform. It is obvious in the case of language that an act of original meaning-giving makes no sense, since, as Wittgenstein famously reminded us, to recognize an act of meaning-giving as precisely this act, we would need to possess language itself. A patently circular notion!

Nevertheless, even if the concept of “original meaning” makes no sense when applied to language as such, it may not be so ill-placed in conjunction with documents such as laws and other institutional norms. Thus, every act of iteration might be assumed to refer to an antecedent which is taken to be authoritative. The iteration and interpretation of norms, and of every aspect of the universe of value,

however, is never merely an act of repetition. Every iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is repositioned and resignified *via* subsequent usages and references. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority upon us as well. Iteration is the reappropriation of the “origin”; it is at the same time its dissolution as the original and its preservation through its continuous deployment.

Democratic iterations are linguistic, legal, cultural and political repetitions-in-transformation, invocations which are also revocations. They not only change established understandings but also transform what passes as the valid or established view of an authoritative precedent.

Robert Cover and following him Frank Michelman have made these observations fruitful in the domain of legal interpretation. In *Nomos and Narrative* Robert Cover writes:

[...] there is a radical dichotomy between the social organization of law as power and the organization of law as meaning. This dichotomy, manifest in folk and underground cultures in even the most authoritarian societies, is particularly open to view in a liberal society that disclaims control over narrative. *The uncontrolled character of meaning exercises a destabilizing influence upon power. Precepts must “have meaning”, but they necessarily borrow it from materials created by social activity that is not subject to the structures of provenance that characterize what we call formal lawmaking.* Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion¹⁸.

The disjunction between law as power and law as meaning can be rendered fruitful and creative in politics through “jurisgenerative processes”. In such processes a democratic people, who considers itself bound by certain guiding norms and principles, engages in iterative acts by reappropriating and reinterpreting these, thereby showing itself to be not only the *subject* but also the *author of the laws* (Michelman). Natural right philosophies assume that the principles which undergird democratic politics are impervious to transformative acts of popular collective will. Legal positivism identifies democratic legitimacy with the correctly generated legal norms of a sovereign

¹⁸ R. M. Cover, *Nomos and Narrative*, «Harvard Law Review», 1, 1983, pp. 4-68. See F. Michelman, *Law's Republic*, «Yale Law Journal», 8, July 1988, p. 18. Emphasis added.

legislature; by contrast, jurisgenerative politics is a model that permits us to think of creative interventions that mediate between universal norms and the will of democratic majorities. The rights claims which frame democratic politics, on the one hand must be viewed as transcending the specific enactments of democratic majorities under specific circumstances; on the other hand, such democratic majorities *re-iterate* these principles and incorporate them into democratic will-formation processes through argument, contestation, revision and rejection.

The dialectic of rights and identities are mobilized in such processes of democratic iteration. Rights, and other principles of the liberal democratic state, need to be periodically challenged and rearticulated in the public sphere in order to retain and enrich their original meaning. It is only when new groups claim that they belong within the circles of addressees of a right from which they have been excluded in its initial articulation that we come to understand the fundamental limitedness of every right claim within a constitutional tradition as well as its context-transcending validity. The democratic dialogue, and also the legal hermeneutic one, are enhanced through the repositioning and rearticulation of rights in the public spheres of liberal democracies. The law sometimes can guide this process, in that legal reform may run ahead of popular consciousness and may raise popular consciousness to the level of the constitution; the law may also lag behind popular consciousness and may need to be prodded along to adjust itself to it. In a vibrant liberal multicultural democracy, cultural-political conflict and learning through conflict should not be stifled through legal maneuvers. The democratic citizens themselves have to learn the art of separation by testing the limits of their overlapping consensus.

Sterile, legalistic or populist jurisgenerative processes are conceivable. We may use Robert Cover's term «jurispathic» to refer to such processes. In some cases, no normative learning may take place at all, but only a strategic bargaining among the parties may result; in other cases, the political process may simply run into the sandbanks of legalism or the majority of the demos may trample upon the rights of the minority in the name of some totalizing discourse of fear and war. Violence may ensue. Jurisgenerative politics is not a politics of teleology or theodicy. Rather, it permits us to conceptualize those moments when a space emerges in the public sphere, when principles and norms which undergird democratic will formation become permeable and fluid to receive new semantic contexts; and this enables

the augmentation of the meaning of rights. I have suggested that we are traversing such a moment in history when “jurisgenerative” and “jurispathic” politics face each other around controversies over cultural difference.