

RELIGION AND THE DE-CONSTRUCTION OF THE PUBLIC SPACE

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Abstract:

In first place, the distinction between public and private space is culturally biased and far from being universal. Secondly, the definition of public space and of public sphere is also complex. Thirdly, the notion of deconstruction of the public space can provide some recommendations to the problem raised by pluralization and public role of religion. Moreover, a better understanding of the word "public space" can clarify in first place, the notion of separation between state and religion, and can be more easily upheld in relation to the institutional space. On the other hand, which is more important, separation of State and religion does not have the same meaning in a religiously homogeneous as it does in a plural society.

Key words:

Public space, private space, public sphere, deconstruction of the public space, pluralization, public role, religion.

Resumen:

En primer lugar, la distinción entre espacio público y privado es culturalmente sesgada y lejos de ser universal. En segundo lugar, la definición del espacio público y de la esfera pública también es compleja. En tercer lugar, la noción de deconstrucción del espacio público, puede proporcionar algunas recomendaciones al problema planteado por la pluralización y el papel público de la religión. Por otra parte, una mejor comprensión de la palabra "espacio público" puede aclarar en primer lugar, la noción de separación entre Estado y religión, y puede ser más fácilmente mantenido en relación con el espacio institucional. Por otro lado, y más importante, la separación de Estado y religión no tiene el mismo significado en una sociedad religiosamente homogénea, como si lo hace en una sociedad plural.

Palabras claves:

Espacio público, espacio privado, lo público, la deconstrucción del espacio público, la pluralización, función pública, la religión.

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1. PUBLIC AND PRIVATE

Many would agree with TalalAsad that “the terms “public” and “private” form a basic pair of categories in modern liberal society. It is central to the law, and crucial to the ways in which our liberties are protected. Our approval of other societies depends on the measure to which they reflect the categories as we do”¹. However the content of these notions and their distinction has never been so controversial as in our days. First, the distinction between public and private has been criticized from many quarters as ideologically tainted, in the sense that “the classic liberal public/private dichotomy hides lots of publics and tries to keep lots of political or public issues (e.g. structural power-asymmetries) “private”, i.e. off the public/political agenda”². Second, the same distinction has been criticized as “culture-specific”. Hanne Petersen believes that the private/public dichotomy is connected to the monotheistic way to conceive religion, “inherited by secular state organizations and regulations. The “Atlantic-European” inspired secular normative culture introduces a division in public and private spheres, which continues a tradition of gender division and class privilege”³. Others go further and identify a direct link between the public/private divide and Christianity (in particular Protestant Christianity), where religion is seen as something that primarily affects the spiritual (versus the material) side of human existence, the *forum internum* as opposed to the *forum externum*: according to Judith Butler “we could not have the distinction between public and private were it not for the Protestant injunction to privatize religion”⁴. In all these cases it is highlighted that the private/public distinction is culturally biased and far from being universal. Finally, others underline that it is also a crude and imprecise distinction: a sharp line neatly dividing these two dimensions of human life cannot be drawn and, whatever definition of public and private is adopted, it is impossible to remove a large grey area in which public and private overlap and mingle⁵.

¹TalalAsad, *Boundaries and rights in Islamic law: introduction (Part II: Islamic law: Boundaries and rights)*, in *Social Research*, 70(2) 2003, p.683.

²Veit Bader, *Eurospheres? Fragmented and Stratified or Integrated and Fair? A Conceptual and Pre-Theoretical Mapping Exercise*, 2008, *Eurospheres working papers series*, no. 9, paper available at: <http://dare.uva.nl/document/115557> (all the website were accessed on November 30, 2012).

³Hanne Petersen, *Contested Normative Cultures: Gendered Perspectives on Religions and the Public/Private Divide*, in Silvio Ferrari and Sabrina Pastorelli (eds.), *Religion in Public Spaces. A European Perspective*, Farnham, Ashgate, 2102, p. 121.

⁴*Is Judaism Zionism?*, in Eduardo Mendieta and Jonathan Vanantwerpen (eds.), *The Power of Religion in the Public Sphere*, New York, Columbia Univ. Press, 2011, p.71.

⁵ See M. Hénaff and T.B. Strong (eds.), *Public Space and Democracy*, Minneapolis, Univ. of Minnesota Press, 2001, p. 23.

These criticisms cannot be overlooked but, on the other hand, the public/private distinction is deeply ingrained in our way of understanding the social fabric and plays a positive role in building and maintaining a democratic society. “The public/private split is normatively valuable” –Parkinson writes–because “it creates normative room for citizens to exercise individual autonomy, and a public sphere in which conflicts between the results of those autonomous decisions can be resolved, or at least discussed”⁶: A world where private is public and vice versa would probably be a totalitarian or a theocratic world. As underlined by Gaudreault-DesBiens and Karazivan, “the division between the public and private spheres still matters today [...] whether we like it or not, this divide continues to inspire the state’s regulatory endeavors, as well as the behaviour of many citizens”⁷. For these reasons, a careful and prudent use of these two categories can still provide useful hints to reflect on the place to be assigned to religion and on the role it can play in either area.

Religion was never an exclusively private or public matter. In the Christian tradition (Judaism and Islam may have a different approach) faith is a personal matter that concerns the most private part of human life, the *forum internum*, the conscience. “My kingdom is not of this world” said Jesus and, as correctly underlined by Modéer⁸, this persuasion supported the idea that State and Church have distinct spheres of influence. But the evangelical dictum ‘Render unto Caesar the things that are Caesar’s, and unto God the things that are God’s’, which translates the previous principle into operative terms, was never interpreted by the Church authorities in the sense that Caesar is public and God is private. The public dimension of religion was always upheld by the Christian Churches and they strongly opposed the attempt to privatize religion that was pursued in particular throughout the nineteenth century: this opposition explains why such privatization was not thoroughly carried out in Europe so that, even in the most ‘separatist’ countries like France, religion never lost its public role (as shown by the persistence of religious chaplaincies in the Army, the legal status of the Catholic places of worship, etc.).

Now the public/private divide seems to be again on the move, at least as far as religion is concerned. The privatization process has lost much of its impetus and re-publicization of religion has become the new catch phrase in many academic circles. But this re-

⁶ John Parkinson, *Holistic Democracy and Public Space*, in Mark Kingwell and Patrick Turmel (eds.), *Rites of Way: The Politics and Poetics of Public Space*, Waterloo, Wilfrid Laurier University Press, 2009, p. 71–84.

⁷ Jean-François Gaudreault-DesBiens and Noura Karazivan, *The “Public” and “Private” in the Common Law and Civil Law Traditions and the Regulation of Religion*, in Silvio Ferrari and Sabrina Pastorelli (eds.), *Religion in Public Spaces*, p. 94.

⁸ Kjell Å Modéer, *Public and Private, a Moving Border: A Legal-Historical Perspective*, in Silvio Ferrari and Sabrina Pastorelli (eds.), *Religion in Public Spaces*, pp. 25-34.

publicization cannot simply be a repetition of the past because something new has been happening in Europe: religion has become plural and, differently from the past, this plurality involves many followers of non-Christian religions and a growing number of Europeans who have no religion. Categories and language are inevitably more diversified and this difference has an impact also on the definition of public and private: how these two notions can be reformulated to fit this plurality is the subject of many discussions.

2. DEFINING PUBLIC SPACE AND PUBLIC SPHERE.

The definition of public space and of public sphere is a particularly complex argument which has attracted the attention of urban planners, sociologists, political analysts, theologians, legal experts and economists. We should not therefore be surprised that many different notions have been proposed, even though they are not without points in common. In the first acceptation the expression “public space” is understood as an open physical space that is accessible to a multitude of people: the square, the park, the market. This conception is widespread above all among urban planners who are engaged in building a public space that – for its characteristics - is easily accessible and pleasant to use, thus encouraging the mobility and daily interaction of citizens and opposing segregation. These features and objectives are close to those that are assigned to the public space by many sociologists for whom it is first and foremost the place of integration, where individuals can meet and establish relationships of acquaintanceship that favour social inclusion. In this perspective it is important that the public space is well designed, welcoming and easy to use so as to foster the development of the citizens’ sense of belonging to an environment and to a community, increasing the social well-being and the quality of life: “When public spaces are successful [...] they will increase opportunities to participate in communal activity. This fellowship in the open nurtures the growth of public life, which is stunted by the social isolation of ghettos and suburbs. In the parks, plazas, markets, waterfronts, and natural areas of our cities, people from different cultural groups can come together in a supportive context of mutual enjoyment. As these experiences are repeated, public spaces become vessels to carry positive communal meanings”⁹.

Urban planners and sociologists, however, are the first to recognize that today the meaning of the public space has changed. “We are far removed – writes Ash Amin- from the times when a city's central public spaces were a prime cultural and political site. In classical

⁹Stephen Carr, Mark Francis, Leanne G. Rivlin, Andrew M. Stone, *Public space*, Cambridge, Cambridge Univ. Press, 1992, p. 344.

Rome, Renaissance Florence, or mercantile Venice, the public spaces of a city (for the minorities that counted as citizens and political actors) were key sites of cultural formation and popular political practice. What went on in them -and how they were structured - shaped civic conduct and politics in general [...]. Today, however, the sites of civic and political formation are plural and distributed. Civic practices - and public culture in general - are shaped in circuits of flow and association that are not reducible to the urban (e.g. books, magazines, television, music, national curricula, transnational associations), let alone to particular places of encounter within the city”¹⁰.

This profile of associative life is at the centre of political analysts’ reflections: it is no coincidence that they prefer to speak of public sphere rather than of public space. They introduce a new dimension into the debate, underlining that the public sphere is not only a physical place but more often than not it is an immaterial and metaphorical one: the mass media or internet are places where a process of communication develops around subjects and choices that interest the whole society. In other words “the Public Sphere is a symbolic place where the various political, social, religious, cultural and intellectual discourses of people making up a society are exchanged”¹¹. A variant of this conception is proposed by some theologians, according to whom the public space is the place where the community is engaged in seeking the common good¹².

Economists and law scholars bring to this debate a point of view that is more closely connected to practical interests. For the former the public space is "a type of public good, a resource that individuals cannot be prevented from consuming and for which one individual's consumption does not diminish its potential consumption by others”¹³. This does not mean that the public space does not have a measurable economic value: an attractive public space has a value in terms of tourism appeal, impact on nearby residential property values, recreation facilities and, not least, as an element of stimulus of

¹⁰ Ash Amin, *Collective culture and urban public space* (2006) available at <http://www.publicspace.org/es/texto-biblioteca/eng/b003-collective-culture-and-urban-public-space>

¹¹ Patrick Wolton, *Public Sphere*, http://www.wolton.cnrs.fr/EN/dwcompil/glossaire/esp_public.html

¹² T.J. Gorringer, *The common good and the global emergency*, Cambridge, Cambridge Univ. Press, 2011, p. 126.

¹³ Zachary Neals, *Seeking common ground: three perspectives on public space*, Proceedings of the Institution of Civil Engineers udp900031.3d 01/15/10, available at <https://www.msu.edu/~zpneal/publications/neal-seekingcommon.pdf>.

“community cohesion”¹⁴. Finally, law scholars are reluctant to adopt a single notion of public space and they make a series of distinctions between public space, space open to the public, space visible to the public, space destined for public use and so on¹⁵. Underlying these cases there is an important intuition: that the notion of public space contains different realities to which it is not opportune to apply the same rules.

At first sight this plurality of definitions can be disconcerting but a closer examination reveals that they present a point in common. All of these definitions consider that a “good” public space and a “good” public sphere can generate social capital as the meeting and dialogue among different people, different experiences of life, alternative conceptions of the world constitute a factor of individual and collective growth¹⁶. This conviction represents the meeting point between public space and public sphere: not only the park or the square, but also internet or the mass media play an important role in building a vital and vibrant civil society that, in turn, constitutes the premise for building a democratic State. Nevertheless there remains a difference which should not be overlooked: in speaking of the public sphere, political analysts above all highlight “the possibility for a debate or a discourse” while – when they discuss the public space – urban planners focus on the “physical venues of the city and the daily interactions of the citizenry”. The first conception “can be summed up by the concept of the conversation and debate whereas the second one is best said as a question of mobility. The first one raises the important and ever pressing question of participative democracy, whereas the second one lends more attention to the idea of individual liberties, notably under the form of a “right to the city”¹⁷. It is therefore opportune to re-examine the point of view of the legal scholars and develop their intuition, according to which it is necessary to differentiate between different

¹⁴Cf. Peter Harnik and Ben Welle, *Measuring the Economic Value of a City Park System*, The Trust for Public Land, 2009, available at <http://cloud.tpl.org/pubs/ccpe-econvalueparks-rpt.pdf>

¹⁵ Cf. Olivia Bui-Xuan, *L'espace public. L'émergence d'une nouvelle catégorie juridique?*, in *Droits et libertés*, mai-juin 2011, pp. 551-559.

¹⁶ Cf. Charles Landry, *The Art of City-Making*, Abingdon, Routledge 2006, p. 245.

¹⁷Stéphane Tonnelat, *The sociology of urban public spaces*, in Hongyang Wang, Michel Savy and Guofang Zhai (eds.), *Territorial Evolution and Planning Solution: Experiences from China and France*, Paris, Atlantis Press, 2010, p. 2 (available at http://www.academia.edu/313641/The_Sociology_of_Urban_Public_Spaces).

types of public space and to avoid applying the same rules to each of them¹⁸. The square, the TV talk show and the courtroom are three public spaces but their different characteristics and functions require a diversified legal discipline. This is also true for the rules regarding the manifestation of religious convictions in these spaces.

3. DECONSTRUCTING PUBLIC SPACE AND PUBLIC SPHERE.

It is impossible to re-organize the public space in terms that are more adequate to the cultural and religious changes that are taking place in Europe without acknowledging that there are many public spaces that have different characteristics. For the purposes of this investigation, it is helpful to make a distinction, within the public space, between common space, political space and institutional space. Two elements that are relevant to all these spaces should also be taken into account: in which capacity individuals are acting and which type of services (public or private) they provide.

Understanding from the outset that these three spaces are not physically or temporally separated is of fundamental importance: they coexist and overlap. The square is a space that can be common, political or institutional depending on the use made of it; the school is a space that is common, political and institutional at the same time. However, the fact that these spaces are overlapping does not exclude the possibility to identify which of them is prevailing in a specific case. The crucifix displayed on the wall of a classroom has an institutional dimension that is absent in the crucifix worn by a student in the same classroom; a burqa worn by a woman during a political rally in a square may have a different significance than the burqa worn in the same square by a woman who is going to buy bread and butter. With this caveat, it is possible to identify some characteristics of these three dimensions of the public space that can help to approach the issue of the place and role of religion in a more adequate way.

- a) The common space is the physical space that people have to enter to meet their basic needs: in this sense it is inescapable. This space is not accessed with the intent to participate in a political debate but simply to get to work or to buy what is needed for daily life¹⁹. The communication process that takes place in this space is

¹⁸ See Veit Bader, *The "Public-Private" Divide on Drift: What, if Any, is its Importance for Analysing Limits of Associational Religious Freedoms?*, in Silvio Ferrari and Sabrina Pastorelli (eds.), *Religion in Public Spaces*, pp. 47-70.

¹⁹ See John Parkinson (*Holistic Democracy and Public Space*, in Patrick Turmel and Mark Kingwell (eds.), *Rites of Way: The Politics and Poetics of Public Space*, Waterloo, Wilfrid Laurier University Press, 2009, p. 1, about the accessibility and inescapability of this space; see also Marcel Hénaff and Tracy Burr Strong (eds.), *Public*

not primarily political. Of course, wearing a cross, a *kippa*, a turban may convey a message concerning the belief of an individual even when that individual is going to buy bread and butter: but the same message can be conveyed by his/her haircut, or earring, or tattoo and there is no reason why religious symbols should be regulated more restrictively than other symbols. From a normative point of view this common space must be kept as accessible as possible to avoid segregating in their homes people who do not feel able to enter it without manifesting their religion or belief. This is the problem raised recently by the French and Belgian laws that banned the full-face veil in the streets²⁰. General prohibitions of this type can be problematic not only because they limit the freedom of religion and expression of individuals but primarily because they affect their daily and, in a sense, 'pre-political' life. No doubt, public authorities have the duty to ensure that the decision to wear the *burqa* or the *niqab* is a matter of free choice and not imposed by the family or the religious community; moreover the wearing of the full-face veil can be prohibited when it creates real and actual difficulties to an orderly enjoyment of the common space. But once individual freedom and common interest are safeguarded, wearing clothes that manifest the religious and cultural convictions of a person cannot be limited in the common space if the actual damage caused to the 'usability' of that space by other people is not proven²¹.

- b) The political space is the space of debate where the public discourse takes shape. It should not be understood only as a space of intellectual "argumentation about the truth value of propositions", but more broadly as "a realm of creativity and social imaginaries in which citizens give shared form to their lives together, a realm of exploration, experiment, and partial agreement"²²: in Robert Cover's words, it is the space where new 'normative worlds' take shape.²³ It is a metaphorical space,

Space and Democracy, Minneapolis, University of Minnesota Press, 2001, p. 4, who underline that it "is not a space where one goes to speak with others" and "is not a human construct" (differently from the political space).

²⁰Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, in *Journal Officiel*, 12 October 2010 ;Loi du 1er juin 2011 visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage, in *Moniteur belge* du 13 juillet 2011.

²¹ On the issue of the *burqa* see Alessandro Ferrari – Sabrina Pastorelli (eds.), *The Burqa Affair Across Europe: between Public and Private Space*, Farnham, Ashgate 2013.

²²Craig Calhoun, *Afterword: Religion's Many Powers*, in Eduardo Mendieta and Johan Vanantwerpen (eds), *The Power of Religion in the Public Sphere*, New York, Columbia University Press, 2011, p. 129.

²³ According to Robert Cover (*Nomos and Narrative*, in *Harvard Law Review*, 97, 1983, pp. 4–9), any person lives in a normative universe that is defined as "a world of right and wrong, of lawful and unlawful, of valid

although it can have physical materializations (Hyde Park Corner, or a political rally in a square, for example).²⁴ In order to perform its creative function, the political space should be free and plural: the visible presence of different religions and beliefs in this area is indispensable for the pluralism on which a democratic society is based.²⁵ Much attention has been devoted to the conditions required to participate in the political debate that takes place in this space: while there is significant agreement on the opportunity to accept different types of discourses (including those based on comprehensive doctrines),²⁶ a call to responsibility is also present. Differently expressed²⁷, it underlines the need that a public discourse – even when it manifests a particular experience and vision of life – takes into account social complexity and plurality. This point has recently been made by Ino Augsberg who, building on the works of Luhmann and Teubner, highlights that “every social system forms part of the social environment of the other social subsystems”, so that “its task is also to establish a sensible relationship of compatibility towards the specific functions and characteristics of the other systems”²⁸. Therefore not only freedom (as in the case of the common space) but also responsibility are the principles that should be borne in mind, from a normative point of view, when giving a legal configuration to this space.

- c) Finally, the institutional public space is the place where binding deliberations, which are compulsory for all, are taken (parliament, the law courts, public administration, etc.). It is not (only) the space of debate and discussion, it is the space of decisions that, once they have been taken, have to be respected by everybody.²⁹ The law

and void”. Religious communities are a good example of these normative worlds: they are places where new legal meanings are created through the personal commitment of the community members, who apply their will to transform the “extant state of affairs” according to their “visions of alternative futures”.

²⁴ This description of the political space (and of the institutional one mentioned a few lines below) corresponds largely to Habermas’ characterization of the informal and institutional public sphere (JurgenHabermas, *Religion in the Public Sphere*, in *European Journal of Philosophy*, 14, 2006, pp. 1–25.

²⁵ See the European Court of Human Rights decision in the case *Metropolitan Church of Bessarabia v. Moldova*, 2001.

²⁶ The ‘Babel of voices in the informal flows of public communication’ evoked by Habermas, *Religion in the Public Sphere*, p. 22.

²⁷ See Christine Lafont, *Religion in the Public Sphere*, in *Constellations*, 14:2, 2007, pp. 236–256.

²⁸ Quoting Teubner’s *Reflexives Recht*, Augsberg concludes that “it is the task of reflexion structures in any social subsystem to resolve conflicts between function and performance by imposing internal restrictions on given subsystems so that they are suitable as components of the environment of other subsystems” (InoAugsberg,, *Religious Freedom as “Reflexive Law*, in René Provost (ed.), *Mapping the Legal Boundaries of Belonging. Religion and Multiculturalism from Israel to Canada*, Oxford, Oxford Univ. Press, 2014, p. 91.

²⁹ Dominique Wolton (*Espace public*, 2011, available at: www.wolton.cnrs.fr/spip.php?article67, accessed May 3, 2013) writes that in the political space (what I call institutional space) «il ne s’agit ni de discuter ni de délibérer, mais de décider et d’agir.

court is not a TV talk show: one does not go there to have a nice chat with a judge, one goes to court to obtain an enforceable sentence that decides who is right and who is wrong. In order to gain the general respect and recognition that is required for the enforcement of such binding decisions, this space must not only be, it must also be seen to be, fair and impartial. That is why some doubts are raised, for example, by the legal provisions that require a crucifix to be displayed in the courtrooms of some European States: these provisions could give the impression that the administration of justice is biased, as it is influenced by a specific religious doctrine. However, these principles of fairness and impartiality do not mean the automatic exclusion of all religious references, manifestations and symbols from the public institutions. The presence of religious symbols can be unsuitable in some of them and not in others, particularly if the principle of neutrality of the institutional space is applied in a way that includes different religions and conceptions of life: when appropriate and possible, the quest for solutions that consent the coexistence of different religious symbols in the same physical space can be the best way to educate towards responsible and accountable pluralism.³⁰

At the end of this short description of the different spaces included in the category “public space”, it is convenient to reiterate again that common, political and institutional spaces are not still separate entities. The public school provides a good testing ground for understanding the differences and the overlaps between political and institutional space. The school is primarily a space of the first type, where a process of communication and exchange between different conceptions and experiences of life takes place: from this point of view it is essential to ensure the freedom of expression and the plurality of experiences. The prohibition of wearing religious symbols at school, which is in force in some European countries, affects this political space: it limits the students’ freedom to manifest their religion and can be justified only on the ground of the protection of a legitimate and pressing social need that requires to be assessed case by case.³¹ But the

³⁰An example of good practice of “inclusive neutrality” in the institutional space is offered by the legal discipline of the oath that is in force in some countries where, when an oath is required, it is possible to take it in a secular or religious form and, in the second case, according to different religious creeds.

³¹This point has been made by the UN Human Rights Committee in the Communication n. 1852/2008 *Bikramjit Singh v. France*, *Views adopted on 1 November 2012, regarding the expulsion from a French school of a Sikh student wearing a small turban*. The Committee decided that France had “not furnished compelling evidence that by wearing his keski the author would have posed a threat to the rights and freedoms of other pupils or to order at the school” (para 8.7). This decision is in conflict with the ECtHR sentences that, in similar cases, decided that –taking into account that secularism “is a constitutional principle, and a founding principle of the Republic” and having regard to “the margin of appreciation which must be left to the

public school is at the same time an institutional space, which must be characterized by neutrality towards different religious (or non-religious) convictions of students and teachers: from this point of view the compulsory display of a religious symbol (for example a crucifix) can be problematic, as it indicates the preference of the public institution for a specific religion.

Besides the spatial dimension that has been considered so far, there is another dimension that regards the individuals who act in the common, political and institutional spaces. In these three public spaces there are individuals who act in a different capacity according to the task they perform in that space. A public school is attended by students and teachers. Once they have entered the school doors, students retain their private status, while teachers acquire a public status. Consequently when a student wears an Islamic scarf, she is manifesting her personal conviction/belonging; when the scarf is worn by a teacher, this private dimension cannot be dissociated from the public one. This difference explains why the courts in Europe seem to be more ready to accept the students' scarf than the scarf worn by a teacher. From a spatial point of view, we are speaking of the same space (the school); but if we adopt a point of view based on the role performed by each person, we are speaking of two different groups of people who live in the same space. Privileging the first or the second perspective can bring to different conclusions³².

Finally we can look at the public space issue from an angle that is neither spatial nor personal, but functional. In this perspective the notion of public service comes to the forefront. With a good dose of approximation human activities can be defined 'public' when responding to a general interest, 'private' when responding to a particular interest. But not all public activities are performed by public subjects: in many cases, services of general interest – that is, public services – are provided by private individuals or entities (and vice versa) and the tide direction seems to go towards the expansion of public services rendered by private institutions (even in the fields that were traditionally reserved to the State, like security, management of prisons, etc.). This issue cannot be addressed in spatial terms only. Once more, school is a good example. Education is a service of general interest that can be provided both by public and private schools. But the rules that apply to the former do not correspond to those that regulate the activity of the latter. For a State school, for example, a teacher's religious faith is irrelevant for the purpose of his/her hiring

Members States"- the students' expulsion was justified (see among others *Dogru v. France*, application 27058/05, 4 December 2008).

³² See Hana van Ooijen, *Religious Symbols in Public Functions. A Comparative Analysis of Dutch, English and French Justifications for Limiting the Freedom of Public Official to Display Religious Symbols*, Cambridge, Intersentia, 2012.

or dismissal; for a religiously-oriented private school, on the contrary, this element can legitimately be taken into account. Both schools provide the same educational service and operate within the same public space (which can be common, political or institutional depending on the circumstances), but in one school the teacher has the right to wear religious symbols, in the other he/she cannot do so.

4. A CASE-STUDY: THE FULL-FACE VEIL IN THE PUBLIC SPACE

Deconstructing the public space is far from being the solution for all problems concerning the manifestations of religion or belief in this area of human life. However, it provides a few indications that can be helpful in dealing with this issue. In particular it shows that a much more sophisticated intellectual approach is required to address properly the difficult relationship between religion and public space and place it in a framework that is politically appropriate and legally correct. The case of the full-face veil provides a good example to test this statement³³.

The full-face veil raises a particular set of problems as it affects the identification of a person. Confronted with these problems the EU countries have adopted different strategies. The first and best known is the prohibition to circulate in public with one's face covered. This is the path France took with the law of 11 October 2010³⁴. In this case the prohibition is contained in a State provision which is extended to all public spaces. The breadth of the ban marks a significant escalation in the application of the principle of *laïcité* in France. Previously the ban was applied within the institutional space: *laïcité* forbade exhibiting religious symbols in public institutions and barred public officials from manifesting religious convictions when carrying out their duties. More recently the ban was extended also to State school students, who were forbidden to wear religious symbols considered too visible³⁵: but also in this latter case the space covered by the ban was that

³³ On this issue see Alessandro Ferrari and Sabrina Pastorelli (eds.), *The Burqa Affair*.

³⁴ On this law cf. the chapter by Anne Fornerod in the book quoted in the previous footnote. See also Olivia Bui-Xuan, *L'espace public. L'émergence d'une nouvelle catégorie juridique?*, in *Droits et libertés*, mai-juin 2011, pp. 551-559 ; Id., *Espace public et libertés religieuses*, in Olivia Bui-Xuan (dir.), *Droit et espace(s) public(s)*, pp. 123-133.

³⁵ Loi 2004-228 du 15 mars 2004, encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, in *Journal Officiel* n°65 du 17 mars 2004, p. 5190.

of a public institution. With the law on the full veil the ban has been extended beyond these limits and it covers all public places (squares, streets), places open to the public (a shop, a supermarket; although not a place of worship) and places providing a public service (such as a post office). According to a speech by the French Minister of Justice in the parliamentary debate, the justification for such a broad provision is that the full veil respects neither liberty, nor dignity, nor equality³⁶: it therefore has to be outlawed in all of the public space. But this explanation seems to go over the mark (if the *burqa* and *niqab* do not respect these fundamental rights they should be banned also in places of worship and in the private space) and it betrays the intention to extend the principle of *laïcité* from the State sphere to the social and political spheres: in this perspective *laïcité* pervades not only the institutional space but also the common and political spaces. The same model of legislative bans was adopted by Belgium, which outlawed the full veil with a law of 2011³⁷. However, the provision is formulated in a different way from the French law: it forbids appearing with one's face covered or concealed "in places accessible to the public"³⁸. This formulation is juridically more correct and ideologically less demanding than the one adopted by the French law. The expression "places accessible to the public" has a precise legal content and it does not evoke the political desire to confine religious symbols to the area of private life in the way that the French provision does with the expression "public space".

At the opposite end there is Great Britain, where the minister for immigration has qualified any provision aimed at banning the *burqa* or *niqab* as "un British"³⁹. As Mark Hill writes, "Britain has no official policy on headscarves or veils"⁴⁰. In this country not only are there no legislative or administrative provisions forbidding the *burqa* and the *niqab* at the national or local level, but there are no directives by professional organizations on this

³⁶ This passage is cited by Olivia Bui-Xuan, *L'espace public*, p. 555.

³⁷ Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage, 1 juin 2011. The law has been declared constitutional by the Cour constitutionnelle on 6 decembre 2012 (see *Journal des tribunaux*, n. 6515, 2013/13, pp. 234-242), with a comment of Louis-Léon Christians, Sophie Minette, Stéphanie Wattier, *Le visage du sujet de droit : la burqa entre religion et sécurité* (pp. 242-245).

³⁸ On this law see the chapter by Jogchum Vrieling, Saï Ouald Chaib and Eva Brems in Alessandro Ferrari and Sabrina Pastorelli (eds.), *The Burqa Affair*.

³⁹ This statement is cited by Ralph Grillo – Prakash Shah, *Reasons to Ban? The Anti-Burqa Movement in Western Europe*, accessible at www.mmg.mpg.de/workingpapers, p. 14 (visited on 3 May 2013).

⁴⁰ See Mark Hill, *Legal and Social Issues Concerning the Wearing of the Burqa and Other Head Coverings in the United Kingdom*, in Alessandro Ferrari and Sabrina Pastorelli (eds.), *The Burqa Affair*.

matter. When the question was raised about jury members, lawyers and witnesses wishing to appear in court with their faces covered, the Judicial Studies Board (a body that works as a “training academy” for judges) did not take a position, leaving the decision up to the discretionary power of each judge⁴¹. Even the jurisprudence is very meagre and in substance it boils down to a sentence by the Employment Tribunal which states that it is legitimate to dismiss a teacher who wants to wear a *niqab* when another male teacher is in the classroom. One element (though certainly not the only one) which goes towards explaining such a radical difference between this legislation and that of France is the different importance of the principle of State *laïcité*. As Hill concludes, “the United Kingdom does not have a tradition of *laïcité* and enforced secularism. On the contrary, its patrimony lies in an established State church which affords liberal tolerance to those of all religious persuasions and none”.

A third approach hinges on local law. In this case the State abstains from outlawing the use of the full veil throughout its territory but the ban is introduced by the mayors or by other local authorities through administrative provisions. This is what has happened in Spain, where it is forbidden to enter public buildings in Lerida, Barcellona and other municipalities with one’s face covered⁴². The justification for this strategy is that the *burqa/niqab* has to be forbidden only where it creates real social alarm. But it is doubtful whether this objective has in fact been achieved. An examination of the individual cases shows that the prohibition does not depend on the occurrence of episodes that actually did disturb the peace and public order of a particular community, but rather on the existence of a political majority convinced that the full veil was against the safety or dignity and equality of citizens, irrespective of the local situation.

A more convincing strategy has been followed in Denmark⁴³. Also in this country there is no law that forbids the wearing of the full veil and, unlike in Spain, there are no local administrative provisions outlawing its use. There are instead court sentences, documents by professional bodies and government directives which supply guidelines for dealing with

⁴¹ In The Netherlands, the Zwolle court refused to accept the testimony of a woman who was wearing a *niqab* with the motivation that this garment prevents adequate communication (the decision, dated 10 October 2003, can be read at <http://zoeken.rechtspraak.nl/detailpage.aspx?ijn=AL8382>, visited on 3 May 2013).

⁴² See the chapter by Augustin Motilla in Alessandro Ferrari and Sabrina Pastorelli (eds.), *The Burqa Affairs*. Also in Italy some mayors have tried (without much success) to ban the *burqa* or the *niqab* with administrative provisions: cf. the chapter by Alessandro Ferrari (*ibid.*).

⁴³ See the chapter by Lisbet Christoffersen in the volume quoted in the previous footnote.

the most controversial cases. In this way it has been established that all those who work in Danish courts have to have their faces visible so as to be recognisable to the public; that women wearing the *burqa* or *niqab* can ride public transport but they cannot use season tickets which require the identification of the bearer; that schools and universities may (but are not obliged to) prohibit the full veil because this hinders non-verbal communication between students and teachers. In these and in other cases a pragmatic and functional approach has been adopted. The full veil as such has not been judged as a garment that violates fundamental human rights, but it is clothing that in some concrete situations can create problems for the correct functioning of the public institutions and public services. In these cases the attempt has been made to find a solution that guarantees, as far as possible, the women's right to wear the *burqa* or the *niqab*: only when this objective has turned out to be impossible or too complicated to achieve has the wearing of this garment been forbidden.

What conclusions can be drawn at the end of this short review of the legal discipline of the full-face veil in some EU countries? First of all, the different approaches that have been described are to be considered an expression of the different cultural and legal traditions of the countries that are members of the EU. This diversity is perfectly legitimate provided it remains within the borders of the rights of non-discrimination and freedom of religion or belief that all EU countries are bound to respect.

Once this point is made clear, the deconstruction of the notion of public space upheld in this paper leads to consider with some perplexity the legal discipline in force in France as the prohibition to wear a full-face veil does not only concern institutional spaces but extends to all public spaces. As a consequence, the ban on wearing the full-face veil affects the common space, that is the space where the fundamental freedoms granted to all citizens and persons residing on the territory of the EU are directly guaranteed and the scope for limitations is restricted. According to Art. 9 ECHR, the general rule governing this space is that wearing clothes that are part of a religious practice or manifest the religious and philosophical convictions of a person should not be limited unless the actual damage caused to the "usability" of that space by other people is proven, or there is a clear and present danger to public order or safety. A general ban on wearing the full-face veil in the public space does not comply with these criteria as it prohibits wearing this cloth independently from the existence of an actual damage or a clear and present danger. However, there are situations where wearing the full-face veil can cause some difficulties to an orderly enjoyment of the common space. There are situations where seeing the face of a person is necessary (in the case of checking identity documents, for example), activities that can be hindered by a veil covering the whole face (when driving a car), occasions when a person appearing with his or her face covered can create social alarm. In these

circumstances the question at issue is not the full veil *per se*, but the problems that may arise from a person's appearing in public with his or her face concealed. In these and in other instances it may be legitimate to prohibit the wearing of the full-face veil in the common space on the basis of a concrete assessment of the damage that the use of such a garment can cause to the enjoyment (by all) of this space. This approach has been followed in Denmark, where a general ban on the full-face veil has not been adopted but where provisions forbid wearing it in specific places or when performing specific activities⁴⁴. Such an approach makes it possible to adopt measures that are proportionate to the characteristics of each situation individually, and to respect the individual's freedom of religion and expression.

In conclusion a pragmatic approach, that avoids the enactment of general laws banning the full veil from the whole public space but is open to the possibility of prohibitions in well-defined specific situations, seems to be preferable both from the point of view of political opportuneness and out of respect for the principles of freedom of religion and expression. Critics of a pragmatic approach underline the danger to give different solutions to similar cases, increasing the risk of unequal treatment. The guidelines deriving from the deconstruction of the public space proposed in this paper answer this objection. They provide a framework for the case by case assessments required to adopt measures that are proportionate to the practical problems arising from the use of the *burqa* or of the *niqab* while respecting as far as possible the freedom of religion and expression of the women who intend to wear them.

5. CONCLUSION.

De-constructing the notion of public sphere is by no means a panacea for the difficulties that a secular State has to face, but can provide some guidelines for dealing with the problems raised by the pluralization and public role of religion that I mentioned at the beginning of this lecture. In particular, a better understanding of what is meant by public space can clarify two points that concern the central feature of the secular State, its separation from religion.

First, the notion of separation of State and religion is most easily upheld in relation to the institutional space. Separation cannot safely be extended to the common or political spaces

⁴⁴ See Niels Valdemar Vinding and Lisbet Christoffersen, *Danish Regulation of Religion, State of Affairs and Qualitative Reflections*, Copenhagen, University of Copenhagen, 2012, pp. 88-93.

without adversely affecting individual freedom and social pluralism. Second, and more important, separation of State and religion does not have the same meaning in a religiously homogeneous as it does in a pluralist society. In the first case, the main value of separation resides in the protection of the religious freedom of minorities. In the second, separation has the function of providing a space where individuals and groups characterized by different conceptions of life -religious and non-religious- can coexist, interact and cooperate wherever possible.