

# Pertinence of a General Prohibition of the *Burqa* and *Niqab* in Spain: A Human Rights Perspective

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**Resumen:** El debate sobre la prohibición del *burka* y el *nikab* se ha reabierto en España tras la publicación de la sentencia del Tribunal Supremo de 14 de febrero de 2013, donde se apunta que un municipio no puede restringir un derecho fundamental como la libertad religiosa. Este artículo introduce un marco teórico que establece que el velo integral constituye una manifestación externa del derecho a la libertad religiosa. Asimismo, se analiza la pertinencia de una prohibición general del *burka* y el *nikab* y se concluye que tal prohibición no constituye una medida adecuada, necesaria y proporcionada para alcanzar fines tales como la igualdad de género, el orden público o el respeto de los requisitos mínimos para vivir en sociedad.

**Palabras claves:** burka, nikab, prohibición general, igualdad de género, orden público, vivir en sociedad, España, proporcionalidad, margen de apreciación.

**Abstract:** The debate on whether to prohibit the *burqa* and *niqab* in Spain has been reopened after the recent decision of the Spanish Supreme Court on 14 February 2013. The Spanish Supreme Court held that a municipality could not pass a local law prohibiting the right to wear the full-face veil in public spaces. This article analyzes a conceptual and theoretical framework to establish that the full-face veil qualifies as an external manifestation of the right to religious freedom. Moreover, the pertinence of a *burqa*-ban in all Spanish public spaces is analyzed and a general prohibition is not found to be a suitable, necessary, and proportional measure to achieve gender equality, public order or «respect for the minimum requirements of life in society».

**Keywords:** burqa, niqab, general prohibition, gender equality, public order, «living together», Spain, proportionality, margin of appreciation.

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## 1. Introduction

Lleida (Catalonia) was the first Spanish city to pass a law in 2010 banning women from wearing any garment impeding their identification in public spaces. However, on 14 February 2013, the Spanish Supreme Court (SSC) rejected that a municipality could ban the use of the full-face veil,<sup>1</sup> ruling that such a ban interferes with article 16 of the Spanish Constitution (SC), which guarantees the right to freedom of religion. While the SSC has the jurisdiction to assess whether a municipality has overreached its powers passing a local *burqa*-ban, it does not have the authority to rule if a general prohibition of the *burqa* and *niqab* in all public spaces is constitutional.<sup>2</sup> The latter falls under the jurisdiction of the Spanish Constitutional Court (SCC), which has not yet ruled on the matter.<sup>3</sup>

Consequently, this paper aims to answer the question of whether prohibiting the *burqa* and *niqab* in all Spanish public spaces is pertinent under the SC and the European Convention of Human Rights (ECHR) framework. Since the legislature and the SCC have not ruled on this matter, finding a solution is crucial in order to develop a consistent ruling for the women who practice this religious tradition. In other words, this article adopts a human rights perspective to the question of whether a ban on the integral veil in all public spaces throughout Spain is justifiable, proportional, and ultimately necessary.

The following sections will examine the previous research question in more detail to determine the pertinence of prohibiting the full-face veil. The first section conceptually and theoretically describes the implications of the right to religious freedom and the restrictions to its external manifestation according to the ECHR. The following section discusses whether, according to the SC framework and the ECHR, a general *burqa*-ban in all Spanish public spaces may be suitable, proportional, and necessary to achieve gender equality, public order and «living together». In this regard, special attention will be paid to the case, «S.A.S. v. France», pub-

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<sup>1</sup> SSC 4118/2011, 14 February 2013, ground 14.º.

<sup>2</sup> *Ibid.*, ground 2.º.

<sup>3</sup> The SSC is the highest court in civil, criminal, administrative and social matters, except in the area of constitutional rights and guarantees, which falls under the jurisdiction of the SCC. Specifically, the SCC is the highest interpreter of the SC, and is also responsible for balancing the extent and limits of the highest constitutional values. Regarding the local bans enacted by certain Spanish municipalities, competence fell under the Administrative Chamber of the SSC, rather than the SCC, for the matter at hand concerned the administrative competence of a municipality.

lished 1 July 2014. This is the first case at the European Court of Human Rights (ECtHR) to concern the full-face veil, in which a Muslim woman who voluntarily wore the *niqab*, alleged that the *burqa*-ban passed in France breached her right to manifest her Islamic faith according to article 9 ECHR.<sup>4</sup>

## 2. Conceptual framework

This section aims to set the theoretical framework, which the rest of the paper will be based on. Firstly, the right to freedom of religion will be analyzed and the full-face veil will be considered as an external manifestation. Secondly, a brief religious and sociological approach will be implemented. The significance of the *burqa* and *niqab* under the Islamic faith and the reasons that lead women to wear these garments in Europe will be explored respectively. Lastly, while freedom of religion protects women who wear the full-face veil, it will be discussed that this right is not absolute and may be limited to guarantee other legitimate aims.

### a. *Freedom of Religion*

According to article 9(1) ECHR, one may manifest his or her religion in four ways: worship, teaching, practice, and observance. Wearing the *burqa* or *niqab* may be assumed to qualify as practice, however, in the case, «*Arrowsmith v. United Kingdom*», the term practice was interpreted narrowly.<sup>5</sup> Essentially, regarding this case, M. Evans explained that: «not all activities undertaken which are motivated or inspired by a belief are necessarily protected since not only might they not be related to the *forum internum* [...] but they may also be considered not to amount to a manifestation of that belief [...]».<sup>6</sup>

Nonetheless, the ECtHR changed its view on this matter, concretely in cases related to the Islamic veil, namely «*Leyla Sahin v. Turkey*» and «*Kervanci and Dogru v. France*».<sup>7</sup> In these cases, the ECtHR preserved

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<sup>4</sup> ECtHR: *S.A.S. v. France*, Application n.º 43835/11, judgment of 1 July 2014.

<sup>5</sup> ECtHR: *Arrowsmith v. United Kingdom*, Application n.º 7050/75, judgment of 16 May 1975, §71.

<sup>6</sup> Evans, Malcolm David (2009). *Manual on the Wearing of Religious Symbols in the Public Areas*, Council of Europe Publishing, p. 14.

<sup>7</sup> ECtHR: *Kervanci and Dogru v. France*, Application n.º 27058/05, judgment of 4 December 2008, §47-48.

some solely motivated religious behaviors as demonstrations.<sup>8</sup> Specifically, in «Leyla Sahin v. Turkey», it was established that the choice made by Leyla Sahin to «wear the headscarf may be regarded as motivated or inspired by a religion or belief and [...] the Court proceeds on the assumption that the regulations in issue [...] constituted an interference with the applicant's right to manifest her religion»<sup>9</sup>. In this case, the shift is evident, for the veil was assumed to represent the Islamic faith regardless of whether or not the veil was in fact worn for religious purposes.<sup>10</sup> This shift has been confirmed by the ECtHR in its latest rulings. In «Eweida and Others v. the United Kingdom» and «S.A.S. v. France», the ECtHR established that «applicants claiming that an act falls within their freedom to manifest their religion or beliefs are not required to establish that they acted in fulfillment of a duty mandated by the religion in question».<sup>11</sup>

While it was originally considered necessary to demonstrate that one's Islamic beliefs led Muslim woman to wear the veil, the ECtHR currently assumes that in wearing the Islamic veil, the Muslim woman is manifesting her right to religious liberty. Hence, wearing the veil is interpreted as a manifestation of the right to religious freedom covered by article 9(1) ECHR.<sup>12</sup> In recognizing the Islamic veil as an external manifestation of the right to freedom of religion, the ECtHR essentially establishes that restricting one's freedom of religion amounts to an interference with article 9 ECHR. Whether such a restriction is in fact justified is a separate matter that will be studied below.

## b. *The Islamic Veil and Muslim Women*

This section aims to discuss how the *Quran* regards Muslim veils, and the various types of them, under the Islamic faith. It also will examine the reasons why Muslim women decide to wear the integral veil. In this regard,

<sup>8</sup> Hill, Daniel and Whistler, Daniel (2013). *The Right to Wear Religious Symbols*, Palgrave Connect, is an in-depth study of the shift introduced by the ECtHR case law.

<sup>9</sup> ECtHR: *Leyla Sahin v. Turkey*, Application n.º 44774/98, judgment of 10 November 2005, §78.

<sup>10</sup> See *Dahlab v. Switzerland*, Application n.º 42393/98, judgment of 15 February 2001, §13.

<sup>11</sup> ECtHR: *Eweida and Others v. United Kingdom*, Application n.º 48420/10, 36516/10, 51671/10, 36516/10, judgment of 15 January 2013, §81. See also, *S.A.S. v. France*, §55.

<sup>12</sup> See also, SCC 19/1985, 13 February 1985, ground 2.º; SCC 120/1990, 27 June 1990, ground 10.º, and SCC 137/1990, 19 July 1990, ground 8.º.

a sociological study, which highlights that women who wear the *burqa* or *niqab* have decided to do so voluntarily, will be studied.

## 1. THE VEIL AND ISLAM

This section aims to analyze whether wearing a full-face veil constitutes a religious practice under the Islamic faith.<sup>13</sup> While the *Quran* itself does not oblige women to cover themselves with a veil, the interpretations thereof have led to the practice of wearing the veil.<sup>14</sup> Depending on an orthodox or heterodox interpretation of the *Quran*, the Islamic veil is worn in different ways. The *hijab* is a scarf that covers the head but not the face. The *niqab* is a variation of the *hijab* that only leaves the eyes uncovered. The *chador* covers the whole body except the face and the hands. Finally, the *burqa* completely covers the woman, leaving only a small grid for the eyes.<sup>15</sup>

From a legal perspective, the religious controversy surrounding the manner in which a Muslim woman wears the veil is irrelevant. In other words, states and tribunals should not assess whether certain religious manifestations are legitimate.<sup>16</sup> Particularly, the ECtHR has stressed, in the recent case of «Eweida and Others v. UK», that «religious freedom is primarily a matter of individual thought and conscience»<sup>17</sup> and that «the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess [...] the ways in which those beliefs are expressed».<sup>18</sup> The SCC also stated that the principle of religious neutrality recognized in article 16(1) SC does not permit the state to assess whether a symbol represents a religious belief.<sup>19</sup> Rather, it is the individual who determines what constitutes a religious practice according to one's faith.<sup>20</sup>

<sup>13</sup> The scope of this article does not include a detailed religious analysis. In this regard, the following literature can be consulted for a greater analysis in this area: Galadari, Abdulla (2012). «Behind the Veil: Inner Meanings of Women's Islamic Dress Code», *The International Journal of Interdisciplinary Social Sciences*, 6, pp. 115-124 and Catalá, Santiago, «Libertad religiosa de la mujer musulmana en el Islam y uso del velo» in Montilla, Agustín (ed.) (2009). *El pañuelo islámico en Europa*, Marcial Pons, pp. 19-39.

<sup>14</sup> The parts of the *Quran* that refer to the veil are XXIV, 30; XXIV, 31; XXXIII, 33; XXXIII, 53 and XXXIII, 59. See also Aluffi Beck-Peccoz, Roberta, «Burqa and Islam» in Ferrari, Alessandro and Pastorelli Sabrina (2013). *The Burqa Affaire Across Europe*, Ashgate, p. 16.

<sup>15</sup> Vázquez Gómez, Rebeca (2007). «Aproximación al Derecho Islámico y su regulación del velo», *Ius Canonicum*, 94, see also Ferrari, Alessandro and Pastorelli, Sabrina, *op.cit.*, p. 611.

<sup>16</sup> See, *Leyla Sahin v. Turkey*, §107; *Jakobski v. Poland*, §44; *Refaht Partisi v. Turkey*, §91.

<sup>17</sup> *Eweida and Others v. United Kingdom*, §80.

<sup>18</sup> *Ibid.*, §81. See also, *S.A.S. v. France*, §127.

<sup>19</sup> SCC 46/2001, 15 February 2001, ground 4.º.

<sup>20</sup> SCC 34/2011, 28 March 2011, ground 6.º.

## 2. THE FULL-FACE VEIL AND MUSLIM WOMEN

One of the most controversial aspects surrounding the integral veil is whether it is compatible or not with gender equality.<sup>21</sup> There are varying opinions as to whether the full-face veil symbolizes a woman's religious freedom, or rather, threatens gender equality. This has been stressed at the Resolution of «Islam, Islamism and Islamophobia in Europe» by the Council of Europe, stating: «the veiling of women [...] is often perceived as a symbol of the subjugation of women to men, restricting the role of women within society [...]. However, a general prohibition [...] would deny women who freely desire to do so their right to cover their face [...]».<sup>22</sup>

Due to the complexity behind women's reasons to wear full-face veils, it is necessary to value the women's opinions themselves on the matter, with the aim of finding possible solutions for effective integration in Western cultures. In the case, «Leyla Sahin v. Turkey», Judge Tulkens opposed the Grand Chamber's assumption that the Islamic veil is imposed upon women and therefore violates gender equality. In this respect, Judge Tulkens stated: «what is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to».<sup>23</sup> This article supports Judge Tulkens stance on this matter. Therefore, sociological research will be studied below in order to understand whether Muslim women feel forced to wear the integral veil, or personally decide to do so without external pressure.<sup>24</sup>

Before France prohibited the full-face veil in public spaces in 2011, one such sociological study, «Unveiling the Truth», was conducted to determine the opinions of Muslim women on wearing full-face veils.<sup>25</sup> The findings demonstrated that these women did not feel forced to wear the full-face veil, but rather, personally chose to do so for religious reasons.<sup>26</sup> Additionally,

<sup>21</sup> For a gender perspective approach, see Rosenberger, Sieglinde and Sauer, Birgit (2012). *Politics, Religion and Gender – Framing and Regulating the Veil*, Routledge. Salzbrunn, Monika (2012). «Performing Gender and Religion: The Veil's Impact on Boundary-Making Processes in France», *Women's Studies*, 41, pp. 682-705.

<sup>22</sup> Parliamentary Assembly of the Council of Europe, «Islam, Islamism and Islamophobia in Europe» Resolution 1743 (2010), §15-17.

<sup>23</sup> *Leyla Sahin v. Turkey*, dissenting opinion of Judge Tulkens, §11.

<sup>24</sup> Three reports with similar findings, which are not studied in this paper, were published in Denmark, The Netherlands, and Belgium, see Moors, Annelies (2009). «Gezichtsliuiers Draagsters en Debatten», *International Institute for the Study of Islam in the Modern World*. Warburg, Margit (2009). «Rapport om brugen af niqab og burka», *Institut for Tvaerkulturelle og Regionale Studier*. Brems, Eva, et. al., (2013). «Wearing the Face Veil in Belgium», *Human Rights Center*, pp. 1-36.

<sup>25</sup> Open Society Foundations, «Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France», April 2011, pp. 1-77.

<sup>26</sup> *Unveiling the Truth*, op. cit., pp. 40-41.

the study found that many of these women decided to use the full-face veil against the will of their family members.<sup>27</sup> After the *burqa*-ban was passed in France, another sociological study examined the opinions of Muslim women concerning the law.<sup>28</sup> The study found that while only a minority of the women interviewed stopped wearing the integral veil, the majority continued to do so, viewing adherence to this law to mean abandoning their Islamic beliefs.<sup>29</sup> Not only did these women disapprove of the *burqa*-ban as a mechanism to encourage freedom,<sup>30</sup> in fact, they believed that the law caused negative effects for them, such as social isolation and public harassment.<sup>31</sup>

Therefore, as evidenced from the findings in these sociological studies, outlawing full-face veils in public spaces does little to promote gender equality, and in fact, according to the women interviewed, greatly restrains their freedom.

### c. *Limitations to Religious Freedom*

Previous sections have concluded that the integral veil is a religious symbol subjected to different interpretations according to the *Quran*, and that it may be assumed that Muslim women decide to wear it voluntarily in Western countries. This religious manifestation in public spaces is warranted under article 9(1) ECHR. However, it is still necessary to analyze the criteria presented in article 9(2) ECHR for a limitation on freedom of religion to be justified.<sup>32</sup> Consequently, this section examines the three requirements that must be fulfilled: the limitation must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society.

#### 1. PRESCRIBED BY LAW

For a limitation to be prescribed by law, the ECHR stated, in «Sunday Times v. the United Kingdom», that two requirements must be met.<sup>33</sup> Firstly, it should be accessible, meaning that a law must provide an individ-

<sup>27</sup> *Ibid.*, pp. 47-54.

<sup>28</sup> Open Society Foundations, «After the Ban: The Experiences of 35 Women of the Full-Face Veil in France», September 2013, pp. 1-18.

<sup>29</sup> After the Ban, *op. cit.*, p. 7.

<sup>30</sup> *Ibid.*, pp. 8-10.

<sup>31</sup> *Ibid.*, pp. 14-16.

<sup>32</sup> Kamal, Jillan (2008). «Justified Interference with Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine Under Article 9(2)», *Columbia Journal of Transnational Law*, 46, pp. 667-708.

<sup>33</sup> See Evans, Malcolm David (2009), *op. cit.*, p. 18.

ual with certainty, so as to understand its application under various circumstances.<sup>34</sup> The second requirement states that it must be foreseeable, implying that a law should be precise enough for a citizen to adapt his or her conduct to that law.<sup>35</sup>

## 2. PURSUE A LEGITIMATE AIM

The second condition establishes that the restriction must pursue a legitimate aim. Particularly, this paper focuses on the limitations of gender equality, public safety and order, and «living together», due to their relevance and because the SSC explicitly refers to them in its ruling.<sup>36</sup> Since these limitations will be discussed in greater depth later on in the paper, it is important to highlight the approach taken by the ECtHR.

Firstly, the ECtHR stated that gender equality could be a justified objective to limit freedom of religion.<sup>37</sup> In «Leyla Sahin v. Turkey,» gender equality was found to be «one of the key principles underlying the European Convention and a legitimate goal to be achieved by Member States».<sup>38</sup> Furthermore, in «Dahlab v. Switzerland», the Court established the headscarf to be «difficult to reconcile [...] with the message of tolerance, respect for others and, above all, equality and non-discrimination».<sup>39</sup> However, the ECtHR has departed from this discriminatory interpretation of the full-face veil in the case of «S.A.S. v. France». Specifically, the Court stated that «a State Party cannot invoke gender equality in order to ban a practice that is defended by women, [...] unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms».<sup>40</sup> Secondly, safeguarding public order was found to be one justified objective in the case of «Leyla Sahin v. Turkey».<sup>41</sup> Regarding the

<sup>34</sup> ECtHR: *Sunday Times v. the United Kingdom*, Application n.º 6538/74, judgment 26 April 1979, §49-50.

<sup>35</sup> *Ibid.*, §49.

<sup>36</sup> SSC 14 February 2013, ground 10.º.

<sup>37</sup> The interpretation by the ECtHR of «gender equality» as a legitimate aim, despite the fact that it is not explicitly stated under article 9(2) ECHR, raised criticism; see Vakulenko, Anastasia (2007). «Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends», *Human Rights Law Review*, 7, pp. 717-739. Stuart, Alison (2010). «Freedom of Religion and Gender Equality: Inclusive or Exclusive?», *Human Rights Law Review*, 10, pp. 429-459.

<sup>38</sup> *Leyla Şahin v. Turkey*, §115.

<sup>39</sup> *Dahlab v. Switzerland*, §25.

<sup>40</sup> *S.A.S. v. France*, §119.

<sup>41</sup> *Leyla Şahin v. Turkey*, §115. Public order has also been recognized as a justified objective in *Kervanci and Dogru v. France*, §63.

full-face veil, the ECtHR recognized public safety as a legitimate aim, stating that «a State may find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud». <sup>42</sup> Lastly, the Court, in «S.A.S. v. France», introduced the concept of «respect for the minimum requirements of life in society», or «living together», as a legitimate aim. <sup>43</sup> Particularly, the Court stated that «the face plays an important role in social interaction [and] forms an indispensable element of community life within the society in question». <sup>44</sup>

### 3. NECESSARY IN A DEMOCRATIC SOCIETY

The third criterion that must be met in order for a restriction to be justified, according to article 9(2) ECHR, is its necessity in a democratic society. This «necessity test» studies whether the restrictions are proportionate. In this regard, in the case of «Dahlab v. Switzerland», the ECtHR established that its role is «to determine whether the measures taken at national level were justified in principle —that is, whether the reasons adduced to justify them appear relevant and sufficient and are proportionate to the legitimate aim pursued—». <sup>45</sup>

Nevertheless, despite what was stated in the previous case, the way to apply the proportionality requirement is obscured. Therefore, this paper will use a tripartite criteria to conclude whether a general prohibition of the *burqa* and *niqab* is pertinent. <sup>46</sup> The tripartite criteria are comprised of the following tests mentioned below. Firstly, the suitability test examines whether the restriction enacted is pertinent to achieve its aim. Secondly, the necessity test analyzes whether there are less burdensome measures to gain the same goal. Thirdly, the proportionality in *stricto sensu* test studies whether the burden of the *burqa*-ban outweighs the objectives to be achieved. <sup>47</sup> In fact, the SCC also uses similar tripartite criteria in order to assess whether the restriction of a fundamental right is excessive or not. <sup>48</sup>

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<sup>42</sup> S.A.S. v. France, §139.

<sup>43</sup> *Ibid.*, §121-122.

<sup>44</sup> *Ibid.*, §122.

<sup>45</sup> Dahlab v. Switzerland, §21.

<sup>46</sup> Gunn, Jeremy (2005). «Deconstructing Proportionality in Limitations Analysis», *Emory International Law Review*, 19, pp. 465-498.

<sup>47</sup> Gunn, Jeremy, *op. cit.*, p. 474.

<sup>48</sup> SCC rulings 270/1996, 16 December 1996; SCC 66/1995, 8 May 1995; and SCC 55/1996, 28 March 1996.

### 3. Municipal bans and the supreme court judgment on the *burqa* and *niqab* in Spain

the legislative power in Spain has not enacted any law that prohibits wearing the full-face veil in public spaces. In fact, only municipalities have limited this external manifestation of religious freedom, regarding public order, gender equality, and «living together» as legitimate aims for such a ban.<sup>49</sup> This chapter of the paper examines the local bans that took place in certain municipalities, the proposals enacted by the Spanish Government and Senate, and the recent judgment of the SSC.

#### a. *Burqa and Niqab Bans in Municipal Councils in Spain*

This section aims to describe the legal debate and events that took place in 2010 regarding the integral veil. In Spain, the issue of the *burqa*-ban has been mainly confined to Catalonia. Specifically, in May 2010, the City Council of Lleida approved the first local bill, in which the ban on wearing the *burqa* and *niqab* in municipal buildings was established to protect gender equality, public order and safety. Subsequently, other municipalities<sup>50</sup> adopted a set of similar local bans like the one passed in Lleida.<sup>51</sup> Due to the extensive list of municipalities banning the full-face veil, Spain's Minister of Justice stated in June 2010, that the government was considering enacting a law that would prohibit the integral veil throughout Spain, because it was believed to violate gender equality and public safety and order.<sup>52</sup> However, this remained a mere proposal, and it never went into force.<sup>53</sup>

In June 2010, the Popular Party presented a not-for-law proposition in the Spanish Senate, which aimed to prohibit the full-face veil in all public spaces in order to guarantee gender equality and public safety and order.<sup>54</sup> However, other political parties disagreed with this proposition, stating that

<sup>49</sup> STSJ Cataluña, 489/2011, 7 June 2011, ground 2.º.

<sup>50</sup> Tarragona, El Vendrell, Barcelona, Manresa, L'Hospitalet de Llobregat, Martorell, Mollet del Vallès, Galapagar (in Madrid), and Coin (in Málaga).

<sup>51</sup> Cañamares Arribas, Santiago (2010). «Nuevos desarrollos en materia de simbología religiosa». *Revista General de Derecho Canónico y Eclesiástico del Estado*, 24, p. 4.

<sup>52</sup> Cembrero, Ignacio and Ceberio Belaza, Mónica (2010). «El Gobierno se abre a una regulación nacional del uso del burka», *El País*, 16 June.

<sup>53</sup> Montilla, Agustín (2013), «The Burqa Affaire in Spain: Legal Perspectives» in Ferrari, Alessandro and Pastorelli, Sabrina, *op.cit.*, pp. 133-134.

<sup>54</sup> Cañamares Arribas, Santiago, *op.cit.*, p. 5.

prohibiting the full-face veil was not the answer, but rather fostering education, constitutional values, and respect for the woman, was of greater importance. Finally, the proposition was rejected in the Spanish Congress on 20 July 2010 and new legislative measures at the state level have not been established since.<sup>55</sup>

#### b. *Spanish Supreme Court Judgment, 14 February 2013*

This section studies the recent judgment of the SSC, which concluded that it is not legitimate for a municipality to ban a fundamental right like freedom of religion.<sup>56</sup> In other words, the SSC ruled that the municipality of Lleida overreached its powers for the following reasons. Firstly, the city council of Lleida enacted a local ordinance exercising its powers to impose sanctions (recognized in the principle of local autonomy and in the «Ley de Bases de Régimen Local»). Secondly, the local ordinance enacted by Lleida caused an interference in the religious practice of some women who wore the *burqa* or *niqab*. Thirdly, the limitation of a fundamental right can only be determined by a law passed by the Spanish Congress and Senate. Particularly, the SSC held that both article 9(2) ECHR and article 53 and 16 SC establish that such a limitation to a fundamental right must be prescribed by law, not through a municipal ordinance.<sup>57</sup> In this respect, article 81 SC states that restricting a fundamental right like religious freedom must be enacted by an Organic Act, which requires the vote of the overall majority of the Members of the Spanish Congress. Therefore, the municipality of Lleida did not pass a municipal ordinance with the aim of regulating a fundamental right, but the effects of its ordinance caused an interference with a religious practice.<sup>58</sup>

The SSC also examined whether gender equality, public order, and the «disturbance of public tranquility and peace»<sup>59</sup> were legitimate aims to prohibit wearing the integral veil in public spaces. The SSC claimed it did not find the full-face veil to be an interference with public order, specifically noting that public order could not be interpreted as a preven-

<sup>55</sup> Montilla, Agustín, *op.cit.*, pp. 134-135.

<sup>56</sup> The case, *S.A.S. v. France*, analyzes the SSC ruling of 14 February 2013, §43-48.

<sup>57</sup> SSC 14 February 2013, ground 10.º.

<sup>58</sup> *Ibid.*, ground 8.º.

<sup>59</sup> The SSC does not specifically refer to «living together», a concept that was used by the French government and found in the ruling of «*SAS v. France*», but mentions the «disturbance of public tranquility and peace». Both concepts are analyzed in this paper under the framework of «the protection of the rights and freedoms of others» and can be compared due to their similar nature.

tive clause.<sup>60</sup> In other words, it must be established that there is a certain, rather than potential, danger that threatens public order. Regarding women's rights, the SSC assumed that adult Muslim women who wear the integral veil in Spain do so voluntarily.<sup>61</sup> In this respect, the SSC referred to the recommendation of the Council of Europe on «Islam, Islamism, and Islamophobia», which encourages avoiding a general ban of the full-face veil, stating that it may hinder the integration of women in host societies.<sup>62</sup> Finally, the SSC considered that the «disturbance of public tranquility and peace» was difficult to justify, for if it is assumed that everyone has the right to see the face of another, that would imply denying the right of each person to show it. The SSC ruled that it was not sufficiently demonstrated that the full-face veil provoked a «disturbance of public tranquility and peace».<sup>63</sup> Particularly, the SSC cited the case of «Leyla Sahin v. Turkey», where the ECtHR established that «democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position».<sup>64</sup>

Lastly, the SSC held that the objectives of public order, gender equality, and the «disturbance of public tranquility and peace» must be necessary, proportional, and respect the essence of religious freedom.<sup>65</sup> While the SSC referred to the principle of proportionality, it fell short of actually applying this, for it did not analyze whether gender equality, public order, and «living together» were legitimate aims to restrict the fundamental right of freedom of religion. Therefore, the following section of this paper will examine whether such goals are necessary and proportionate, under the SC and the ECHR, to limit wearing the full-face veil in public.

#### 4. Pertinence of a general ban of the *burqa* and *niqab* in Spain

as discussed in the previous chapter, the debate surrounding the prohibition of the integral veil in all public spaces is far from settled in Spain. Due to the controversial nature of this issue, this chapter aims to question the pertinence of prohibiting the *burqa* and *niqab* in all public spaces in Spain. Specifically, the notion of whether a *burqa*-ban is suitable, neces-

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<sup>60</sup> SSC 14 February 2013, ground 10.º.

<sup>61</sup> *Ibid.*, ground 10.º.

<sup>62</sup> *Ibid.*, ground 10.º.

<sup>63</sup> *Ibid.*, ground 10.º.

<sup>64</sup> *Leyla Sahin v. Turkey*, §108.

<sup>65</sup> SSC 14 February 2013, ground 9.º.

sary and proportional to achieve gender equality, public order and safety, and «living together» is analyzed. Furthermore, the ECtHR's margin of appreciation doctrine is discussed in order to examine whether Spain may be granted a wide margin of appreciation by the ECtHR to prohibit the wearing of the full-face veil in all public spaces.

### a. *An Analysis of the Proportionality and Necessity of Prohibiting the Burqa and Niqab in all Public Spaces*

Article 9(1) ECHR and 16 SC recognize the right to manifest religious beliefs through the use of religious symbols. However, this right is not absolute, and may therefore be restricted. For the right of religious freedom to be limited, article 9(2) ECHR stipulates three conditions: the restriction must be established by law, pursue a legitimate aim, and be necessary in a democratic society.<sup>66</sup>

This paper has already examined that any limitation to freedom of religion must be established by a law that is both accessible and foreseeable.<sup>67</sup> Since the paper has already studied this requirement, examining whether a general prohibition of the full-face veil is a «necessary measure in a democratic society» will be examined below. Particularly, gender equality, public order and safety, and «living together» will be analyzed to assess whether they are legitimate aims to restrict the integral veil in public spaces in Spain.

#### 1. GENDER EQUALITY

Gender equality is established in article 1(1) of the SC as one of the highest values of the Spanish legal system. The importance of gender equality is also reflected in the constitutional provisions of article 14 SC and article 9(2) SC, which require public authorities to promote gender equality. Gender equality is therefore a core value under the Spanish legal system and has thus been alleged as a legitimate aim for restricting the use of the integral veil.

This section will examine whether prohibiting the full-face veil can be regarded as «necessary in a democratic society» to achieve gender equality. Specifically, this section will apply a tripartite criteria that examines

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<sup>66</sup> See SCC 292/2000, 30 November 2000, ground 11.º; SCC 20/1990, 15 February 1990, ground 4.º.

<sup>67</sup> See *Sunday Times v. UK*, §49-50.

whether a *burqa*-ban is suitable, necessary, and proportional *in stricto sensu* to achieve gender equality and women's rights.<sup>68</sup>

### *Suitability Test*

The local bans enacted by the Spanish municipalities and the national proposal sent to the Spanish Senate assumed the integral veil to symbolize a lack of equality between men and women, with the former forcing the latter to wear it. However, the municipal governments involved did not investigate as to whether or not those women were obliged to wear the *burqa* or *niqab*, or if they chose to do so freely. Without this key piece of research, prohibiting women from wearing the full-face veil cannot be equated with increased gender equality.<sup>69</sup> The Spanish Government should therefore create a governmental commission dedicated to distinguishing how many women wear the full-face veil due to personal choice and how many of them feel obliged to do so.

In terms of those women who have voluntarily decided to wear the integral veil, prohibiting this would not encourage gender equality, but in fact, would further limit their freedom of choice.<sup>70</sup> In this regard, the ECtHR has established that freedom of choice requires others to support ideas, opinions, beliefs, and lifestyles that are not necessarily shared and which may occasionally be seen as offensive.<sup>71</sup> Specifically, the ECtHR has denied that even a common, popularly shared sentiment in society regarding a symbol is not sufficient so as to restrict it.<sup>72</sup> Therefore, a ban can be seen as a paternalistic provision of the state with the intention of promoting gender equality, but actually may diminish it.<sup>73</sup>

Regarding those women who are obliged to wear the integral veil in public, punishing their actions, as opposed to those who forced them to wear it, is not a suitable provision. In fact, making these women unveil will not eradicate the issue of oppression.<sup>74</sup> In this respect, Spanish legislation already has mechanisms to penalize those who force a woman to wear the integral veil. Particularly, such behavior constitutes a coercion offence, as

<sup>68</sup> Gunn, Jeremy, *op.cit.*, p. 474.

<sup>69</sup> Nanwani, Shaira (2011). «The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?», *Emory International Law Review*, 25, p. 1459.

<sup>70</sup> Brems, Eva, *op.cit.*, p. 92.

<sup>71</sup> ECtHR: *Tatár and Fáber v. Hungary*, Applications n.º 26005/08 26160/08, judgment 12 June 2012, §35.

<sup>72</sup> ECtHR: *Vajnai v. Hungary*, Application n.º 33629/06, judgment 8 July 2008, §57.

<sup>73</sup> Nanwani, Shaira, *op. cit.*, p. 1459.

<sup>74</sup> Brems, Eva, *op. cit.*, pp. 85-86.

seen in article 172 of the Spanish Penal Code. Therefore, it is completely unnecessary to penalize the woman who is forced to wear the full-face veil because doing so would imply punishing the victim, rather than the offender.

The suitability test demonstrates that banning the full-face veil in all public spaces is not an adequate measure to guarantee women's rights. In fact, both Judge Tulkens, in her dissenting opinion in «Leyla Sahin v. Turkey», and the Council of Europe, in its Resolution «Islam, Islamism and Islamophobia in Europe», denied the suitability of a general prohibition of the integral veil in all public spaces. Judge Tulkens pointed out that it is not the ECtHR's task to assume that the Islamic veil is a religious symbol, which violates gender equality because it is imposed on women. Judge Tulkens believes that unless the contrary is proven, women who wear the veil do so voluntarily. In fact, «equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them».<sup>75</sup> Furthermore, the Council of Europe<sup>76</sup> denied the suitability of a general prohibition of the integral veil in all public spaces for two reasons.<sup>77</sup> Firstly, a general *burqa*-ban would generate more familial pressure for Muslim women to remain out of public spaces and spend more time in the home. Consequently, these women would be progressively forced to abandon educational institutions and work.<sup>78</sup>

### *Necessity Test*

For a general prohibition of the integral veil to pass the necessity test, it must be proven that such a measure is the least interfering means available to achieve the aim at hand.<sup>79</sup> In fact, less interfering means could be implemented, rather than imposing a general *burqa*-ban, to achieve gender equality.<sup>80</sup> Specifically, initiatives could be established to discuss the full-face veil with Muslim women and their family members, in an effort to increase understanding and awareness as to why they wear the *burqa* or *niqab*. Additionally, education could be used as a tool to foster gender equality and the integration of all religions into society. Finally, encouraging and promoting support for Muslim women to turn in anyone that forces

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<sup>75</sup> *Leyla Sahin v. Turkey*, dissenting opinion of Judge Tulkens, §12.

<sup>76</sup> Resolution 1743 (2010), *op.cit.*, §15.

<sup>77</sup> *Ibid.*, §16.

<sup>78</sup> *Ibid.*, §17.

<sup>79</sup> Gunn, Jeremy, *op.cit.*, p. 474.

<sup>80</sup> Plenary General Assembly of the Conseil d'État, «Study of possible legal grounds for banning the full veil», 25 March 2010.

them to wear the integral veil could also be introduced.<sup>81</sup> As can be seen, these means represent less interfering measures to achieve gender equality, rather than banning the full-face veil in all public spaces.

### *Proportionality in Stricto Sensu Test*

The test of proportionality *in stricto sensu* entails «the actual process of weighing and balancing the comparative interests of the state and the infringements of the rights».<sup>82</sup> One may then claim, applying the proportionality *in stricto sensu* test, that a *burqa*-ban does not greatly hinder religious freedom, for it only affects a very slim percentage of Muslim women in Spain, and does not prohibit them from wearing other types of headscarves. Nevertheless, banning the integral veil in all public spaces is an extreme measure to achieve the aim at hand, gender equality.<sup>83</sup> In fact, the sociological studies carried out in France and Belgium after the *burqa*-ban was passed, showed that women experienced restraint in their freedom of choice and continue to suffer from public harassment.<sup>84</sup> Therefore, in applying the proportionality *in stricto sensu* test, it can be concluded that a general *burqa*-ban is a disproportional measure. It seems clear that after balancing the gain, in this case gender equality, with the harm done to the fundamental right at stake, the harm to freedom of religion is overwhelmingly negative compared to how the gain is fostered.

To conclude, in the recent ruling of «S.A.S. v. France», the ECtHR held that gender equality was not a legitimate aim to prohibit wearing the *burqa* and *niqab*. Specifically, the Court stated that «a State Party cannot invoke gender equality in order to ban a practice that is defended by women»,<sup>85</sup> regarding the full-face veil as an «expression of a cultural identity which contributes to the pluralism that is inherent in democracy».<sup>86</sup> Hence, prohibiting the *burqa* and *niqab* in all Spanish public spaces is not a legitimate mean to achieve the objective of gender equality. If an individual personally decides to wear the full-face veil, then this must be considered a lawful act, for such an action is the result of a woman's freedom of choice. In the case of force, legal mechanisms are already in place to punish those that obligate a woman to wear the integral veil. Therefore, instead of im-

<sup>81</sup> *Ibid.*, pp. 44-45.

<sup>82</sup> Gunn, Jeremy, *op.cit.*, p. 474.

<sup>83</sup> Nanwani, Shaira., *op.cit.*, pp. 1463-1464.

<sup>84</sup> «Wearing the Face Veil in Belgium», *op.cit.*, pp. 17-21 and «After the Ban», *op.cit.*, pp. 14-16.

<sup>85</sup> *S.A.S. v. France*, §119.

<sup>86</sup> *Ibid.*, §120.

plementing a general prohibition, Spain should not only guarantee that women who choose to wear the *burqa* and *niqab* may do so freely, but also improve the mechanisms available to protect those women who are forced to wear these garments. Failure to uphold these measures and implement a *burqa*-ban in public places may result in increased isolation and will further prevent the integration of these women into society.

## 2. PUBLIC ORDER AND SAFETY

The protection of public order and safety is mentioned in article 16 SC and article 9(2) ECHR as a legitimate aim that may limit the right to religious freedom. Specifically, the SCC recognized that safeguarding security and public order should be understood as one of the essential functions of the State, for it is crucial for the coexistence of its citizens and the functioning of its institutions.<sup>87</sup> In this respect, the SCC defined public order as an activity that aims to protect the people and their property, as well as peace and civil order in Spanish society.<sup>88</sup>

While the protection of public order and safety throughout the state is a legitimate aim, it must be analyzed whether prohibiting the *burqa* and *niqab* in all public spaces is a proportional measure to achieve such an objective. This section therefore applies the tripartite criteria again to examine whether a *burqa*-ban is a suitable, necessary and proportional *in stricto sensu* measure to achieve public order and safety.

### *Suitability test*

Prohibiting the full-face veil in public spaces would undoubtedly identify those women that were previously covered, thus promoting public safety and order.<sup>89</sup> While this measure passes the suitability test, the following sections will demonstrate that it does not comply with the necessity and proportionality tests.

### *Necessity Test*

Prohibiting the full-face veil in all public spaces shows little consistency with previous ECtHR case law, which considered restricting the right

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<sup>87</sup> SCC 33/1982, 8 June 1982; SCC 117/1984, 5 December 1984.

<sup>88</sup> SCC 123/1984, 18 December 1984; SCC 104/1989, 8 June 1989; SCC 55/1990, 28 March 1990.

<sup>89</sup> Nanwani, Shaira., *op.cit.*, p. 1465.

to religious freedom, by only momentarily identifying the individual in certain public spaces, as justified to achieve the protection of public safety and order. For instance, the ECtHR rejected a claim from a Muslim woman who was asked to remove her veil momentarily to verify her identity at the French Consulate in Marrakech when applying for a visa.<sup>90</sup> Similarly, the ECtHR found that requiring a man to remove his turban to pass through security at an airport was a legitimate measure, with his right to religious freedom justified by public safety.<sup>91</sup> The restrictions imposed in these two cases were found to comply with article 9(2) ECHR because the individuals were requested to take off their religious garments for a limited amount of time in particular public spaces to ensure public order and safety. In the recent case of «S.A.S. v. France», the ECtHR confirmed this, stating that freedom of religion could be legitimately limited when passing through security checks and taking official identity photos.<sup>92</sup> However, the Court held that regarding the full-face veil in all public spaces, a general prohibition «can be regarded as proportionate only in a context where there is a general threat to public safety».<sup>93</sup> Therefore, the ECtHR concluded that France did not prove that its prohibition qualified as a general threat to public order.

Regarding previous ECtHR case law, it is questionable whether a general *burqa*-ban in Spain may be pertinent to achieve public order and safety, when there are less interfering means already in effect that promote and ensure this aim is met. Namely, article 20 of the Organic Act 1/1992, entered into force on 21 February 1992, recognizing the right of police officers to identify an individual in a public space in order to investigate or prevent a crime. Therefore, this law does not imply a general ban in all public spaces, which would amount to an interference with religious freedom and would not be necessary, but rather partially prohibits the full-face veil while maintaining public safety and order. Additionally, the Royal Legislative Decree 896/2003, which went into effect on 11 July 2003, requires that the photograph in one's ID card and passport show the individual's full face. This implies a partial ban, rather than a general one, for those wearing the *burqa* and *niqab* in Spain. Lastly, regarding road safety, article 11 of the Royal Legislative Decree 339/1990, from 2 March 1990, states that drivers must have clear visibility at all times in order to have control over their automobiles. Therefore, this provision can be interpreted as a partial

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<sup>90</sup> ECtHR: *El Morsli v. France*, Application n.º 15585/06, judgment 4 March 2008.

<sup>91</sup> ECtHR: *Phull v. France*, Application n.º 35753/03, judgment 11 January 2005.

<sup>92</sup> *S.A.S. v. France*, §139.

<sup>93</sup> *Ibid.*, §139.

ban on the full-face veil, which is necessary to guarantee the safety of all drivers.

To conclude, the necessity test shows that less interfering measures exist in order to achieve public order and safety in Spain, and therefore implementing a general ban with the same objective would be unnecessary. In «S.A.S. v. France», the Court denied that public order and safety qualifies as a legitimate aim to enact a general prohibition of the *burqa* and *niqab* in all public spaces. Particularly, the Court established that in regards to Muslim women who wear the full-face veil, public safety and order «could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established, or where particular circumstances entail a suspicion of identity fraud». <sup>94</sup>

### *Proportionality in Stricto Sensu Test*

Though a woman may need to verify her identity for security reasons, prohibiting the integral veil in all public spaces is a disproportionate burden in order to achieve public order and safety. In fact, in the case of «Ahmet Arslan v. Turkey», the ECtHR found banning the use of a religious garment in all public spaces to be a disproportional measure to achieve public order. Particularly, the ECtHR stated that wearing religious symbols in public spaces must be differentiated from their use in public establishments. <sup>95</sup> While freedom of religion outweighs neutrality in public spaces, neutrality takes precedence in public establishments. Moreover, in the same case of «Ahmet Arslan v. Turkey», the ECtHR ruled that wearing the *burqa* and *niqab* must constitute an actual, not merely potential, risk to public order. <sup>96</sup> It found banning a religious garment in all public spaces to be disproportionate. <sup>97</sup> The SSC also expressly referred to these findings of the ECtHR, stating that public order cannot be interpreted as a preventive provision against potential risks. Therefore, according to the SSC, it is necessary to establish proof of danger to public order and safety before limiting the manifestation of one's religion. <sup>98</sup>

Therefore, applying the proportionality *in stricto sensu* test, it can be concluded that a general *burqa*-ban is a disproportional measure. It seems

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<sup>94</sup> *Ibid.*, §139.

<sup>95</sup> *Ahmet Arslan v. Turkey, op.cit.*, §49.

<sup>96</sup> *Ibid.*, §50-51.

<sup>97</sup> *Ibid.*, §52.

<sup>98</sup> SSC 14 February 2013, ground 10.º.

clear that after balancing the gain, in this case public order and safety, with the harm done to the fundamental right at stake, the harm to freedom of religion is overwhelmingly negative compared to how the gain is fostered.<sup>99</sup>

### 3. «LIVING TOGETHER»

This section firstly describes the reasons why the ECtHR considered «living together» as a legitimate aim to prohibit the full-face veil in all French public spaces. The second part of this section adopts a critical stance to the decision made by the ECtHR in «S.A.S. v. France».

#### *The ECtHR's Introduction of «Living Together» as a Legitimate Aim*

In «S.A.S. v. France», the ECtHR held that «respect for the minimum requirements of life in society», or «living together», may limit the right to religious freedom.<sup>100</sup> While article 9(2) ECHR does not establish «living together» as a legitimate aim to limit the right to religious freedom, the Court linked it to the «protection of the rights and freedoms of others», a legitimate aim actually found in article 9(2) ECHR.<sup>101</sup> In «S.A.S. v. France», the Court introduced «living together» as a legitimate aim to ban the *burqa* and *niqab*, on the basis that wearing the full-face veil hinders communication among individuals. Specifically, the Court pointed out that the «principle of interaction between individuals [...] is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society».<sup>102</sup>

The Court recognized that the legitimate aim of «living together» could be interpreted in a flexible manner, which consequently may lead to the abuse of this provision.<sup>103</sup> Therefore, the Court conducted a detailed analysis to determine whether «living together» was a legitimate aim. Firstly, the Court established that since very few women actually wear the *burqa* and *niqab* in France, a general prohibition may be excessive.<sup>104</sup> Secondly, the Court recognized the negative effects of such a prohibition, such as social isolation and the restriction of autonomy for women who

<sup>99</sup> See SCC 46/2001, 15 October 2001, ground 11.º.

<sup>100</sup> *S.A.S. v. France*, §121.

<sup>101</sup> *Ibid.*, §121.

<sup>102</sup> *Ibid.*, §153.

<sup>103</sup> *Ibid.*, §122.

<sup>104</sup> *Ibid.*, §145.

voluntarily wear the veil.<sup>105</sup> Thirdly, the Court raised its concern about the islamophobic manifestations that took place before the enactment of the French law of 11 October 2010.<sup>106</sup>

Despite the previous acknowledgements, the Court finally accepted «living together» as a legitimate aim, alleging that «the Law of 11 October 2010 does not affect the freedom to wear in public any garment or item of clothing [...] which does not have the effect of concealing the face.» Furthermore, the Court pointed out that the criminal consequences for not complying with the law were «among the lightest that could be envisaged».<sup>107</sup>

### *A Critical Analysis of the Introduction of «Living Together» as a Legitimate Aim*

The following paragraphs will analyze the inconsistencies in the argumentation regarding «living together» as a legitimate aim.<sup>108</sup> Furthermore, the position held by the SSC will be examined, for it denied the «disturbance of public tranquility and peace» as a legitimate aim to prohibit the full-face veil in all public spaces.<sup>109</sup> Firstly, the ECtHR referred to the exceptions listed in article 9(2) ECHR as «exhaustive and [...] restrictive».<sup>110</sup> Nevertheless, the Court did not follow its own recommendation, for it introduced «living together» as a legitimate aim to limit one's freedom of religion. Precisely, in the dissenting opinion, Judges Nussberger and Jäderblom considered the concept of «living together» to be «far fetched and vague».<sup>111</sup>

Secondly, the ECtHR held that the criminal provisions for those who violated the law of 11 October 2010 «were among the lightest».<sup>112</sup> However, Judges Nussberger and Jäderblom disagreed, pointing out that «where the wearing of the full-face veil is a recurrent practice, the multiple effect of successive penalties has to be taken into account»<sup>113</sup>. In this

<sup>105</sup> *Ibid.*, §146.

<sup>106</sup> *Ibid.*, §149.

<sup>107</sup> *Ibid.*, §151.

<sup>108</sup> Some authors have also expressed their concerns regarding the «S.A.S. v. France» ruling. See, Brems, Eva (2014). «Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings», *Journal of Law and Policy*, 22, pp. 517-551. Ouald Chaib, Saïla (2014). «S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil», *Blog of Strasbourg Observers*. Berry, Stephanie (2014). «S.A.S. v France: The French Burqa Ban and Religious Freedom», *Blog of the European Journal of International Law*.

<sup>109</sup> SSC 14 February 2013, ground 10.º.

<sup>110</sup> *S.A.S. v. France*, §113.

<sup>111</sup> *S.A.S. v. France*, dissenting opinion, §5.

<sup>112</sup> *S.A.S. v. France*, §151.

<sup>113</sup> *S.A.S. v. France*, dissenting opinion, §22.

respect, the SSC ruled that every criminal provision must be interpreted restrictively and follow the principle of proportionality.<sup>114</sup> In the dissenting opinion regarding the case of «S.A.S. v. France», the Judges indirectly referred to the principle of proportionality, stating that «the [French] Government have not explained why it would have been impossible to apply less restrictive measures, instead of criminalizing the concealment of the face in all public places».<sup>115</sup> Particularly, these Judges criticized that the ECtHR did not adequately explore alternative measures such as raising awareness and education for Muslim women.<sup>116</sup>

Thirdly, the ECtHR stated in «S.A.S. v. France» that «pluralism, tolerance, and broadmindedness are hallmarks of a democratic society».<sup>117</sup> Nonetheless, the Court recognized «living together» as a legitimate aim for a general prohibition, which in fact justifies a prohibitive law that hinders pluralism and diminishes the freedom of choice of women who voluntarily decide to wear the *burqa* or *niqab*. Similar criticism was raised in the dissenting opinion, whereby introducing the principle of «living together» as a legitimate aim was «interpreted as a sign of selective pluralism and restricted tolerance [...]»; it [the ECtHR] has not sought to ensure tolerance between the vast majority and the small minority, but had prohibited what is seen as a cause of tension».<sup>118</sup> On the contrary, the SSC in its ruling did ensure such tolerance and the protection of minorities.<sup>119</sup> To do so, the SSC cited the case of «Leyla Sahin v. Turkey», where the ECtHR established that «democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position».<sup>120</sup> Therefore, the ruling of the SSC clearly differs from the position adopted by the ECtHR in «S.A.S. v. France». The ECtHR stated that «the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society».<sup>121</sup> While the ECtHR sided with the majority, the SSC aimed to protect the interests of the minority.<sup>122</sup>

Lastly, the ECtHR implemented a *burqa*-ban on the basis that it hinders communication in society. However, as Judges Nussberger and Jäderblom

<sup>114</sup> SSC 14 February 2013, ground 5.º.

<sup>115</sup> S.A.S. v. France, dissenting opinion, §24.

<sup>116</sup> *Ibid.*, §24.

<sup>117</sup> S.A.S. v. France, §128.

<sup>118</sup> S.A.S. v. France, dissenting opinion, §14.

<sup>119</sup> SSC 14 February 2013, ground 10.º.

<sup>120</sup> Leyla Sahin v. Turkey, §108.

<sup>121</sup> S.A.S. v. France, §153.

<sup>122</sup> SSC 14 February 2013, ground 10.º.

expressed in their dissenting opinion of «S.A.S. v. France»: «while communication is admittedly essential for life in society, the right to respect for private life also comprises the right not to communicate [...] —the right to be an outsider—». <sup>123</sup> In this regard, the SSC considered that the «disturbance of public tranquility and peace» is difficult to justify, for if it is assumed that everyone has the right to see the face of another, that would imply denying the right of each person to show it. <sup>124</sup> The SSC ruled that it was not sufficiently demonstrated that the full-face veil provoked a «disturbance of public tranquility and peace».

### b. *Spain's Margin of Appreciation to Prohibit the Burqa and Niqab*

The previous sections have concluded that banning the *burqa* and *niqab* in all Spanish public spaces is not a legitimate measure to achieve gender equality and public safety and order, let alone to allege, «living together» as a legitimate aim. Furthermore, the ECtHR may still provide a wide margin of appreciation to Spain, limiting freedom of religion, according to article 9(2) ECHR. In other words, the ECtHR's decision on whether a Spanish *burqa*-ban is necessary in a democratic society will be determined by the margin of appreciation that Spain is given.

The doctrine of «margin of appreciation» is rooted in the case of «Handyside v. United Kingdom», where the ECtHR stated that «the Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines». <sup>125</sup> Essentially, when no consensus has been reached at the European level, the ECtHR tends to provide a wider margin of appreciation to the states because «the national authorities have direct democratic legitimation and are [...] better placed than an international court to evaluate local needs and conditions». <sup>126</sup>

In this regard, the ECtHR has consistently established a wide margin of appreciation in cases concerning the Islamic veil, and it has recently granted a wide margin of appreciation in «S.A.S. v. France», which concerned a general prohibition of the full-face veil. Regarding the Islamic veil, the case of «Leyla Sahin v. Turkey» held that «the meaning or impact of the public expression of a religious belief will differ according to time and context [...]. Accordingly, the choice of the extent and form such

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<sup>123</sup> *S.A.S. v. France*, dissenting opinion, §8.

<sup>124</sup> SSC 14 February 2013, ground 10.º.

<sup>125</sup> ECtHR: *Handyside v. United Kingdom*, Application n.º 5493/72, judgment 7 December 1976, §48.

<sup>126</sup> *S.A.S. v. France*, §129.

regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context [...]»<sup>127</sup> In «S.A.S. v. France», France was granted a wide margin of appreciation because «in Europe there is no consensus as to whether or not there should be a blanket ban on the wearing of the full-face veil in public places».<sup>128</sup>

Before the ruling of «S.A.S. v. France» was published, the only case regarding a general ban of a religious garment in public spaces was «Ahmet Arslan v. Turkey».<sup>129</sup> In this case, the ECtHR was confronted with the issue of whether wearing religious clothing, specifically a turban and a tunic, in public spaces, should be deemed a criminal offense. The ECtHR found Turkey to have violated article 9(1) ECHR, because the individuals did not threaten public order. Additionally, it held that legally punishing them for wearing religious dress in public spaces was neither necessary, nor proportional to achieve public order.<sup>130</sup> Consequently, the ECtHR granted a narrow margin of appreciation to Turkey because the case dealt with ordinary citizens who wore religious garments in open public spaces. It seemed that an emerging shift could be seen in the ECtHR jurisprudence: moving from a wide margin of appreciation in cases regarding the headscarf (i.e. hijab), to a narrow margin of appreciation in cases concerning ordinary citizens who wear religious dress (i.e. turban and tunic) in public spaces such as streets, parks, etc.<sup>131</sup> However, in «S.A.S. v. France» the ECtHR pointed out that «while both cases concern a ban on wearing clothing with a religious connotation in public places, the present case differs significantly from *Ahmet Arslan and Others* in the fact that the full-face Islamic veil has the particularity of entirely concealing the face, with the possible exception of the eyes».<sup>132</sup>

In «S.A.S. v. France», the ECtHR granted France a wide margin of appreciation, arguing that France had passed the law for a general prohibition fol-

<sup>127</sup> *Leyla Sahin v Turkey*, *op. cit.*, §109. See also *Kervanci and Dogru v. France*, §63.

<sup>128</sup> *S.A.S. v. France*, §156.

<sup>129</sup> A detailed analysis of the case *Ahmet Arslan v. Turkey* can be found in Powell, Lina Ragep (2012). «The Constitutionality of France's Ban on the Burqa in Light of the European Convention's Arslan v. Turkey Decision on Religious Freedom», *Wisconsin International Law Journal*, 31, pp. 118-146.

<sup>130</sup> *Ahmet Arslan v. Turkey*, *op. cit.*, §49-52.

<sup>131</sup> A narrower margin of appreciation will be more in line with the recent Human Rights Committee jurisprudence. See, *Ranjit Singh v. France*, communication n.º 1876/2009, UN Doc. CCPR/C/102/D/1876/2009, (2011) and *Mann Singh v. France*, communication n.º 1928/2010, UN Doc. CCPR/C/108/D/1928/2010, (2013). See also, concerning the Islamic veil, *Raihon Hudoyberganova v. Uzbekistan*, communication n.º 931/2000, UN Doc. CCPR/C/82/D/931/2000 (2004). In this regard, see also *S.A.S. v. France*, dissenting opinion, §19.

<sup>132</sup> *S.A.S. v. France*, §136.

lowing «a democratic process».<sup>133</sup> However, a wide margin of appreciation does not seem to comply with previous case law. Specifically, in «*Young, James and Webster v. United Kingdom*», it was held that «democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position».<sup>134</sup> In «*Alajos Kiss v. Hungary*», it was established that «if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination [...] then the State's margin of appreciation is substantially narrower».<sup>135</sup> In this regard, in the dissenting opinion of «*S.A.S. v. France*», the judges considered that it is the duty of the ECtHR to protect «small minorities against disproportionate interferences».<sup>136</sup>

To conclude, the ECtHR may grant Spain a wide margin of appreciation regarding a general prohibition of the full-face veil. However, it should be noted that ECtHR case law cannot be used to lower the minimum threshold of the protection of fundamental rights if the Spanish national system has higher protection standards. Article 53 ECHR establishes that «nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party [...]». In fact, the SSC referred to article 53 in its ruling, stating that the ECHR can in no way diminish the rights recognized in the SC.<sup>137</sup>

## 5. Conclusión

Since Spain has not taken a stance on the issue at hand, this paper has addressed whether banning the *burqa* and *niqab* in all Spanish public spaces is pertinent to achieve gender equality, public order and safety, and «living together». It was determined that banning the full-face veil in all public spaces in Spain was not found to be necessary, suitable, or proportional *in stricto sensu* to achieve gender equality. In regards to public order and safety, less restrictive measures already exist in the Spanish legal system, which ensure public order and safety are met without resorting to

<sup>133</sup> *Ibid.*, §154.

<sup>134</sup> ECtHR: *Young, James and Webster v. United Kingdom*, Application n.º 7601/76, judgment 13 August 1981, §63.

<sup>135</sup> ECtHR: *Alajos Kiss v. Hungary*, Application n.º38832/06, judgment 20 May 2010, §42.

<sup>136</sup> *S.A.S. v. France*, dissenting opinion, §20.

<sup>137</sup> SSC 14 February 2013, ground 10.º.

more extreme measures. Additionally, while «living together» was recently introduced as a legitimate aim to prohibit the *burqa* and *niqab* in all public spaces, this paper has adopted a critical stance towards its recognition. Lastly, this article described how the ECtHR granted a wide margin of appreciation regarding the prohibition of the full-face veil. However, this paper discussed that ECtHR case law cannot lower the minimum standard of the protection of fundamental rights if the Spanish Constitutional system provides a higher threshold of protection.

While values such as gender equality, public order and safety, and «living together» seem to justify a general prohibition of the Islamic veil,<sup>138</sup> this paper argues that these types of generalized prohibitions will not eradicate a tradition with strong cultural and religious roots among Muslim women. Hidden under the disguise of a general prohibition is not only a fear of discrimination, but an apprehension to pluralism at its deepest core, which makes uncovering the veil a more comfortable option for westerners. This hesitation to what is foreign is that what must be altered, to learn to value and appreciate the beauty and uniqueness of that which is different. It is only when foreign ideas are viewed with acceptance and respect under a universal vision, that integration and mutual tolerance will thrive, steering far away from prejudice and inequality.<sup>139</sup> In fact, a general ban implies shunning that which opposes one's views, with the idea that the foreigner should adopt the traditions of the host country. Therefore, instead of restricting such a manifestation of religion, efforts should shift toward a more inclusive approach to strengthen dialogue between Spain and the Muslim organizations. Such an approach would encourage communication and understanding of wearing the full-face veil throughout Spain, promoting values of respect, acceptance, and coexistence in a social, plural, and democratic state.

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<sup>138</sup> Several authors believe that a prohibition of the *burqa* and *niqab* might be pertinent. Among others, see Areces Piñol, María Teresa (2013). «La prohibición del velo integral islámico, a propósito de la sentencia del Tribunal Supremo», *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 32, pp. 1-57. Carmona Cuenca, Encarnación, «El Velo Islámico, la libertad religiosa y la igualdad de género», in Revenga Sánchez, Miguel et. al., (2011). *Los símbolos religiosos en el espacio público*, Centro de Estudios Políticos y Constitucionales, p. 162. Chesler, Phyllis (2010). «Ban the Burqa? The Argument in Favor», *Middle East Quarterly*, pp. 33-45. Mookherjee, Monika (2012). «Women's Rights as Multicultural Claims: Reconfiguring Gender and Diversity in Political Philosophy», *Contemporary Political Theory*, 11, pp. 1-192. Ruiz-Rico Ruiz, Catalina, «Símbolos religiosos e inmigración desde la perspectiva del derecho —la igualdad—», in: Revenga Sánchez, Miguel et. al. (2011). *Los símbolos religiosos en el espacio público*, Madrid: Ed. Centro de Estudios Políticos y Constitucionales, pp. 305-307.

<sup>139</sup> See *Dogru v. France*, §62. See also *S.A.S. v. France*, §128

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