

**EUROPEAN COURT OF HUMAN RIGHTS**  
**Fouzia Dakir v. Belgium, Application No. 4619/12**  
**Written submission by the Human Rights Centre of Ghent University**

**EXECUTIVE SUMMARY**

*These comments cover two themes.*

*First, they address the specificities of the (adoption of the) face covering ban in Belgium, as compared to France, with a particular emphasis on the process leading to the adoption of the ban.*

*Next, they focus on ‘living together’ in the context of the face veil discussion. We analyse the mobilization of the ‘living together’ argument in the Belgian context, and we present the results of our empirical research among face veil wearers in Belgium as they pertain to this topic. Finally we suggest a way to address some of the critiques of the Court’s ‘living together’ reasoning, i.e. by injecting it with requirements of evidence and procedural quality control.*

**1. INTRODUCTION**

These written comments are prepared and submitted by a team of researchers at the Human Rights Centre of Ghent University (Belgium). The Human Rights Centre of Ghent University is one of Belgium’s leading expert academic centres on European human rights law and the ECHR in particular. The Human Rights Centre has conducted extensive research on the face covering ban in Belgium. This includes both detailed analysis of the municipal bans and of the federal ban, and empirical research into the experiences of women wearing a face veil in Belgium, as confronted with such bans. This has resulted in numerous scholarly publications.<sup>1</sup> The comments are submitted pursuant to leave granted by the President of the Second Section of the European Court of Human Rights on 13 October 2015 and concern the case of *Dakir v. Belgium*. They may also provide useful background information for the case of *Belkacemi and Oussar v. Belgium* (Application No.

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<sup>1</sup> Eva Brems (ed.), *The Experiences of Face Veil Wearers in Europe and the Law*, Cambridge University Press, 2014, 307 p; Jogchum Vrieling, Saïla Ouald Chaib and Eva Brems, “Het ‘Boerkaverbod’ in België”, *NJCM-bull*, 2011, 623-638; Jogchum Vrieling, Saïla Ouald Chaib and Eva Brems, “Boerkaverbod : juridische aspecten van lokale en algemene verboden op gezichtsverhulling in België”, *NJW*, 2011, 398-414; Jogchum Vrieling, Eva Brems en Saïla Ouald Chaib, “Il divieto del ‘burqa’ nel sistema giuridico belga”, *Quaderni di diritto e politica ecclesiastica*, 2012, 161-191; Jogchum Vrieling, Saïla Ouald Chaib and Eva Brems, “The Belgian ‘burqa ban’. Legal Aspects of Local and General Prohibitions on Covering and Concealing One’s Face in Belgium”, in Alessandro Ferrari and Sabrina Pastorelli (eds.), *The Burqa Affair Across Europe; Between Public and Private Space*, Ashgate, 2013, 143-170; Jogchum Vrieling en Eva Brems, “Instrumentaliteit en onherkenbaarheid. Het ‘boerkaverbod’ en de rechtsbeschermende werking van het strafrecht”, *Liber Amicorum René Foqué*, Brussel, Larcier, 2012, 285-297; Eva Brems, Saïla Ouald Chaib and Jogchum Vrieling, “Uncovering French and Belgian Face Covering Bans”, *Journal of Law, Religion and State* 2 (2013), 69-99; Saïla Ouald Chaib and Eva Brems, “Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe”, *Journal of Muslims in Europe*, 2013, 1-26; Eva Brems and Laurens Lavrysen, “Redding boerkaverbod leidt tot rare kronkels”, (2013) *Recht, Religie en Samenleving*, p. 131-145; Eva Brems, “Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings”, *Journal of Law and Policy*, Volume 22, Issue 2, 2014, 517-551; Eva Brems, Lourdes Peroni and Saïla Ouald Chaib “Improving Justice in the ‘Burqa Ban’ Debates: Group Vulnerability and Procedural Justice”, in Marie-Claire Foblets, Katayoun Alidadi, Jorgen S. Nielsen and Zeynep Yanasmayan (eds), *Belief, Law and Politics; What Future for a Secular Europe?*, Ashgate, 2014, 265-273; Eva Brems, “Equality Trouble in Multicultural Human Rights Claims: The Example of the Belgian ‘Burqa Ban’”, in Marjolein van den Brink, Susanne Burri and Jenny Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble?*, *Liber amicorum Titia Loenen*, SIM Special no. 38, SIM; Utrecht, 2015, 67-85.

37798/13), for which the Human Rights Centre was not able to introduce a timely request for leave to intervene.

## 2. FACE COVERING BANS: DIFFERENCES BETWEEN BELGIUM AND FRANCE

Although local or regional bans on face covering in public exist in several European countries,<sup>2</sup> France and Belgium are the only two countries so far to have adopted a nation-wide ban through specific legislation. There are a number of parallels between the bans in both countries, most notably the fact that the bans were adopted around the same time in both countries, and that in both countries the bans are explicitly intended to ban the Islamic face veil from public space and appear to be exclusively applied to Islamic face veils. Moreover, the texts of the legal provisions are quite similar in both countries, and the Belgian Constitutional Court added the same reservation as the French Constitutional Council concerning places of worship. Yet there are also a number of differences between the two cases. Most notable are the following 3 specificities of the Belgian face covering ban:

- Absence of a provision that penalizes a person who forces another to cover her face
- Federal ban preceded by municipal bans, which are kept in place
- Much less elaborate process toward adoption of the ban compared to France

1. The Belgian ban, as opposed to the French ban, does not include a provision that penalizes a person who forces another to cover her face; it only penalizes the person herself who covers her face.

This difference is particularly relevant with respect to the argument that would justify the ban as a measure intended to protect women against patriarchal cultural oppression. This motive was very prominent in the *travaux préparatoires* of the Belgian ban, and was accepted by the Belgian Constitutional Court. In its Grand Chamber judgment in *SAS v. France*, the European Court of Human Rights has however ruled out the relevance of this argument, stating in para. 119 that ‘a State Party which, in the name of gender equality, prohibits anyone from forcing women to conceal their face pursues an aim which corresponds to the “protection of the rights and freedoms of others” within the meaning of the second paragraphs of Articles 8 and 9 of the Convention (....). The Court takes the view, however, that a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms’. The Belgian context puts this matter even more sharply into relief. The Belgian legislator strongly relied on the (erroneous) hypothesis that women who wear a face veil are generally forced or pressured into doing so. This was confirmed by the Belgian Constitutional Court, which stated that: ‘Concerning the dignity of women, the legislator was entitled to assume that the fundamental values of a democratic societies oppose women being

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<sup>2</sup> Municipal (general or partial) face covering bans are in place today in Belgium, the Netherlands, Italy and Spain. In Belgium the ‘geographical coverage’ of these local prohibitions appears to be the widest. In the Netherlands such local bans are quite rare. As their legality and constitutionality is widely considered controversial, they hardly seem to be enforced in practice. In Italy, local bans can be found particularly in the north and northeast of the country. In Spain, a relatively small number of towns and cities in Catalonia (including, most notably, Barcelona), started as of 2010 to pass regulation banning face covering in municipal buildings. In addition, a regional ban was voted in by referendum in the Swiss canton of Ticino.

obliged to hide their face under pressure of members of their family or their community, and thus, against their will, are deprived of the liberty to decide about this themselves'.<sup>3</sup>

Nevertheless the legislator only provided for penalization of the women themselves, who in this hypothesis would in fact be the victims. It is respectfully submitted that the Court may wish to add some language to that of par. 119 in *SAS* concerning its views on the penalization of victims in this and other contexts.

2. In Belgium, face covering was banned by municipal bans, imposing administrative fines, prior to the adoption of a federal criminal ban. The federal ban leaves these municipal bans in place. When women are fined in Belgium for violating the face covering ban, this is often still on the basis of a municipal ban.

In our research into municipal bans, we distinguished roughly two basic categories of local bans. The first category prohibits “disguises”, “masks” and “costumes” that cover one’s face, and the second category targets “appearing in public unidentifiably” or “with concealed or covered face, by whatever means”. The first type dates back to the 19<sup>th</sup> century, with festivities and Carnival in particular in mind, and was (re)interpreted to include face veils as of 2004 and 2005.<sup>4</sup> The second category was introduced around the latter time, and was especially drafted in order to enable the prohibition of face-veils. Municipalities being confronted with women wearing face veils, had requested the assistance of superior regional authorities in dealing with the issue. In response, the latter proffered model provisions enabling municipalities to prohibit face veils should they wish to do so.<sup>5</sup> Generally, a number of exceptions apply to both types of provisions. These include temporary authorisations by the Mayor, as well as exceptions for certain periods, holidays or situations (e.g. Carnival and Halloween). Some local bans apply “subject to legal or regulatory provisions to the contrary”. The application of these local prohibitions, on women wearing face-veils, has led to contradictory case law at the level of police courts. Whereas the police court of Maaseik upheld a ban in 2006<sup>6</sup>, the police court of Brussels ruled on 26 January 2011 that the municipality of Etterbeek was not allowed to impose a fine on a woman who had worn a niqab, as this would violate her fundamental rights<sup>7</sup>. The latter judgment appears to have stimulated the impetus toward a federal ban.

The federal ban, enacted in article 563bis of the Criminal Code, includes a contingency arrangement vis-à-vis municipal administrative sanctions. The arrangement enables continued application of local face covering bans if the public prosecutor decides not to prosecute on the grounds of the general prohibition, and with a strict double jeopardy prohibition.

Hence it is important to note that *the municipal bans and the federal ban are strongly linked together*. While many face veil wearers are in practice confronted with administrative fines on the basis of municipal bans, the federal criminal ban (the latter being ‘cleared’ by the Constitutional Court) serves as both a political and a legal ‘cover’ for local authorities, i.e. it shelters these local bans against political or legal challenges.

<sup>3</sup> Belgian Constitutional Court, judgment 145/2012 of 6 December 2012, para. B 22.

<sup>4</sup> At least, in *some* towns and municipalities. A small-scale random telephone survey we performed among some 30 municipalities suggests that in almost half of the municipalities where a first category prohibition applies, wearing a face-veil is *not* considered to be prohibited under this ban. See extensively Jogchum Vrielink, Saïla Ouald Chaib and Eva Brems, “The Belgian ‘burqa ban’. Legal Aspects of Local and General Prohibitions on Covering and Concealing One’s Face in Belgium”, in Alessandro Ferrari and Sabrina Pastorelli (eds.), *The Burqa Affair Across Europe; Between Public and Private Space*, Ashgate, 2013, 143-170.

<sup>5</sup> Such a model provision was drafted in Flanders in 2004, by the administrative services of Home Affairs. To the same end, a somewhat different model was proffered by the Association of the City and the Municipalities of the Brussels-Capital Region, for the region of Brussels. In Wallonia, similar model regulations are non-existent to our knowledge.

<sup>6</sup> Police Court Tongeren (Maaseik department), 12 June 2006.

<sup>7</sup> Police Court Brussels, 26 January 2011, [www.legalworld.be](http://www.legalworld.be).

3. In Belgium, the process leading toward the adoption of the ban was much less elaborate than in France

The adoption of the nationwide face covering ban in France was preceded by the work of a parliamentary commission of inquiry (commission Gérin). This commission heard numerous witnesses and experts, and it sent out questionnaires to several French Embassies. It produced a 658 page report. The French bill was moreover discussed in both houses of Parliament, and in the course of the legislative process, the Conseil d'Etat issued an advice, which impacted on the debates (shifting the stated motivation for the ban more toward the 'living together' argument as a matter of 'public order') even if its advice against the adoption of a ban was not followed. In these proceedings, partly as a result of the advice of the Conseil d'Etat, the human rights implications of the ban were discussed. In the lower house the bill received 335 ayes, 1 nay, and 221 abstentions (13 July 2010). In the Senate there were 246 ayes, 1 nay, and 100 abstentions (14 September 2010).

In Belgium, the face veil issue had been on the political agenda longer than in France. The first proposal dates back to the beginning of 2004, and was submitted by the right-wing extremist Vlaams Blok party<sup>8</sup>. At the time, it did not lead to parliamentary discussion. During the 2007-2010 legislature various bills were submitted with the purpose of introducing a general ban. One of these was approved by the plenary Chamber at that time with 136 ayes, 0 nays and 2 abstentions. The bill was then 'evoked'<sup>9</sup> by the Senate. Yet its discussion and approval by the Senate were precluded by early dissolution of the chambers on 7 May 2010. This was before the adoption of the French ban. After the elections, various legislative proposals for face covering bans were again submitted. Three of these proposals were combined and discussed.<sup>10</sup> The process toward approval was fast. A request for the Chamber committee to organize expert hearings on the matter was dismissed. A request to ask for the advice of the Legislative Section of the Council of State (which is optional for bills initiated by members of parliament) was also dismissed. The bill was discussed only by the Chamber of Representatives: the Senate opted against evoking it. It was approved in the Chamber with 129 ayes, 1 nay and 2 abstentions. Arguments concerning the impact of the ban on human rights were advanced only by one opposition MP, yet they were not substantially engaged with.

While there has been criticism of the procedure leading toward the adoption of the French face covering ban, in particular on the lack of attention for the perspectives of the women involved, this procedure was at the same time significantly more elaborate than the Belgian procedure, in several respects:

- The collection of expert opinions
- The inclusion of advice (Council of State) on legality and conformity with human rights
- The discussion in both chambers of Parliament

Each of these aspects is a common feature of parliamentary procedure in Belgium as well, but they were however not opted for in this case. In addition, and partly as a consequence of these choices, the Belgian Parliament did not engage, or hardly did so, with the implications of a ban on the human rights of the women concerned. A prominent commentator, who analysed this parliamentary process in detail, stated that it was

<sup>8</sup> *Parliamentary documents*, Senate 2003-04, no. 3-463/1 (Van dermeersch). Shortly thereafter, delegates of the (then) Vlaams Blok also submitted a proposal to the Chamber: *Parliamentary documents*, Chamber 2003-04, no. 51-880/1 (Van Steenberge, De Man and Laeremans).

<sup>9</sup> At that time (before the recent change of bicameralism in Belgium), the majority of legislative proposals in Belgium were 'optionally bicameral'. Regarding such proposals, the governing principle was that the Chamber of Representatives had the authority to approve a bill autonomously but the Senate had the right to 'evoke' the approved bill and discuss it.

<sup>10</sup> I.e.: *Parliamentary documents*, Chamber BZ 2010, no. 53-85/1; *Parliamentary documents*, Chamber 2010-11, no. 53-754/1; *Parliamentary documents*, Chamber BZ 2010, no. 53-219/1-2.

‘a merely formal respect of the requirement of democratic debate’ (le respect purement formel de l’exigence de débat démocratique) and a ‘refusal of all debate’ (le refus de toute discussion).<sup>11</sup>

As for procedures leading toward the adoption of municipal bans: our analysis reveals that where new provisions were adopted or existing provisions adapted, this was often a reaction to the fact that one or more persons wearing an Islamic face veil had been spotted on the territory of the municipality, and that some citizens had expressed their dismay at this. The quality of the democratic procedure and of the consideration of the human rights implications of the measure would have to be examined in each individual case.

### *Relevance for the European Court of Human Rights*

One of the prominent recent developments in the case law of the Court is a ‘procedural turn’. That is to say that it seems that in its assessment of the compatibility of a particular measure or situation with the European Convention on Human Rights the Court increasingly includes an appreciation of the quality of the domestic process that lead to this measure or situation. This concerns administrative and legislative processes, as well as procedures before domestic courts. Procedural control is often linked to a wide margin of appreciation, in the sense that either evidence of good domestic procedural practice is a precondition for the granting of a wide margin of appreciation, or the requirement of good domestic procedural practice is part of the residual control performed by the Court despite the wide margin of appreciation.<sup>12</sup> In both cases, the trust in the domestic authorities that is required for the Court to grant a wide margin of appreciation is partly motivated by the finding of good procedural practice. When a contested measure is of a legislative nature, the domestic procedure to be reviewed concerns parliamentary procedure. Scholars<sup>13</sup> as well as ECtHR judges speaking in an academic context<sup>14</sup> have ranked the Grand Chamber judgment of *SAS v. France* among the judgments that

<sup>11</sup> Xavier Delgrange, “La loi “anti-burqa” comme symptôme”, *Politique - revue des débats*, 74, 42-50. Xavier Delgrange is First Auditor Head of Section at the Belgian Council of State and Reader in Law at the Faculté Universitaires Saint Louis and the Université Libre de Bruxelles.

<sup>12</sup> Eva Brems, “Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights”, in Eva Brems en Janneke Gerards (eds.), *Shaping Rights in the ECHR; The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, 2013, 137-161.

<sup>13</sup> Matthew Saul, “The ECtHR’s Margin of Appreciation and the Processes of National Parliaments”, Working Paper for Conference on Parliaments in the Open Government Era in Oslo, 14 - 15 January 2015.

<sup>14</sup> We found statements in this sense by Judge Spano en Judge Nussberger:

- ‘Some recent Grand Chamber judgments of my Court, for example *SAS v. France*, the French Burqa case, that I will talk about in a moment, thus stand for the important proposition that when examining whether and to what extent the Court should grant a Member State a margin of appreciation, as to the latter’s assessment of the necessity and proportionality of a restriction on human rights, the quality of decision-making, both at the legislative stage and before the courts, is crucial and may ultimately be decisive in border-line cases. With this qualitative, democracy-enhancing approach, as I have previously termed this phenomenon, the Court’s refinement of the principle of subsidiarity, and the margin of appreciation, introduces a clear procedural dimension that can be examined on the basis of objective factors informed by the defendant government in its pleadings.’ (Robert Spano, “The European Court of Human Rights And National Courts: A Constructive Conversation or A Dialogue of Disrespect?”, The Torkel Opsahl Memorial Lecture 2014, 28 November 2014, para. 20).
- ‘... the message of the judgment is that the blanket ban of wearing a burka in public is justifiable as a “choice of society”. It can be understood that the Court is satisfied that this choice had been made consciously and deliberately and that the democratic process lived up to what might be called “European standards”. This has been spelt out clearly, even if the Court has not focused on the procedural aspects of the legislative process.... (quote from para 154). Thus, (legislative) procedure which was extensively described in the first parts of the judgment did not only matter, but was a dominant aspect of the case. In this sense it may be argued that there is not only an explicit, but also an implicit procedural review. Whenever the Court accepts the “choice of society” based on a democratic decision-making process it can be assumed that in the Court’s view the procedure which led to this decision fulfilled

show evidence of the Court's trust in the outcome of parliamentary procedures that comply with certain quality standards. This is based on the reference in the *SAS* judgment (para 154) to the need for judicial restraint in face of a 'societal choice' 'by means of a democratic process', against the background of the knowledge that the face covering ban in France was the result of a long process of deliberation and consultation (cf. *supra*).

The Grand Chamber judgment of *SAS v France* thus appears to be an important reference point in the Court's emerging new approach toward subsidiarity vis-à-vis national parliaments, in which a wide margin of appreciation is linked to an assessment of the quality of the parliamentary process.

Given the important differences between the French and Belgian procedures leading to similar legislation, a judgment of the European Court of Human Rights on the Belgian face covering ban is an opportunity to clarify what the Court expects of a qualitative parliamentary process. For example:

- is widespread agreement across parliamentary groups about the desirability of a certain rights-restrictive measure a reason to dispense with expert advice and with advice on, and discussion of the conformity of the measure with human rights? Or does near-unanimity among parliamentarians, and its impact on the range of viewpoints expressed in the debate, instead strengthen the need for expert advice and opinions from persons or bodies outside Parliament?
- Is it relevant in this context whether the rights-restrictive measure specifically targets a marginalized minority group?
- Is it relevant whether or not the viewpoints of members of this group have been heard? Is it relevant whether the legislative process takes place in a context of widespread hostility toward the targeted group?
- Can the quality of a parliamentary process be linked to the number or nature of different bodies (committees, chambers) and formats for discussion and input (hearings, requests for information...) that are involved?
- What is the degree and the nature of parliamentary engagement with human rights arguments that inspires sufficient trust for the Court to grant a wide margin of appreciation?

These are some of the questions that will be in the minds of scholars and policy makers when analyzing a judgment on the Belgian face veil ban in the light of *SAS v. France* and discussions about procedural quality control in a context of subsidiarity. It is respectfully submitted that the Court may elect to take advantage of the opportunity to clarify its views on some of these matters.

### 3. FACE VEILS AND 'LIVING TOGETHER' IN BELGIUM

Analysing the *travaux préparatoires* of the Belgian face covering ban, we identified the Belgian legislator's most important motives for banning the face veil. These consist of three clusters of arguments: improving (subjective and objective) safety, protecting women's rights, and guaranteeing communication and social cohesion. In its Grand Chamber judgment in *SAS v. France*, the Court has accepted only the last motive as a potential justification for a general ban. Hence this is the argument that will be developed here.

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all the requirements of a well-functioning democracy.' (Angelika Nussberger, "Procedural review by the ECHR: View from the Court", draft paper presented at seminar on 'Procedural review and the European Court of Human Rights', organized at Ghent University on 21-22 May 2015).

### 3.1. 'Living together' as an argument supporting the Belgian ban

Some arguments in the Belgian parliamentary debate concern the alleged antisocial character of wearing a face veil. Several Members of Parliament characterized face veils as a 'break from 'living in a community' (*le vivre-ensemble*), from public responsibility and citizenship, and from communal ties'.<sup>15</sup> The face veil would disrupt the social environment, since members of the general population indicate 'that they do not wish to encounter something like that in the street'. It is stated that 'Everyone has his own reasons for this, but it concerns a permanent value in any event'.<sup>16</sup> In this respect, one of the legislative proposals refers to work done by the French sociologist Elisabeth Badinter, who states that women who wear face-veils breach soci(et)al norms in an unacceptable way, since they can look at others without being seen themselves; a situation from which these women – according to Badinter – can derive pleasure and a sense of superiority. Badinter argues that this is at odds with our social model, which is based on reciprocity and equality. On a less philosophical level, it is presumed throughout the *travaux préparatoires* that covering the face hinders communication, and that a person who covers her face isolates herself from others and from the community. This is considered to be intolerable: the possibility of having interaction between individuals in public life in order to bring about and reinforce social ties in the community is deemed essential. Members of Parliament argued that it would be impossible for a person, of whom only the eyes are visible, to participate in these dynamics of 'living in a community' because wearing 'face-covering garments largely precludes verbal and non-verbal communication'.<sup>17</sup> The interference with communication arising in this regard would 'consequently be liable to prejudice public order, and lead to social disruption'.<sup>18</sup>

Some Members of Parliament also identify face-veils with a rejection of 'Western civilisation' or 'our way of living' by fundamentalist Islam. The ban, as such, is allegedly a step to combat Islamism or Islamisation in general, and so safeguard Western society and its modes of coexistence.

### 3.2. 'Living together' in the experiences of face veil wearers in Belgium

A team at the Human Rights Centre of Ghent University interviewed 27 women who wore (at least occasionally) a face veil in Belgium between September 2010 and September 2011.<sup>19</sup>

The argument based on social cohesion and 'living together' merges practical concerns about the ability to communicate of/with a person covering her face, and normative statements about the need for all members of a society to socially interact with others in public. In the analysis of the interviews, we consider first what they reveal about the degree of social integration of the interviewees through activities in the public sphere in the broad sense, i.e. social interaction in functional settings and contacts with anonymous others as well as neighbours and the like (not including their family and friends). Next we focus on the more specific issue of communication.

<sup>15</sup> *Parliamentary report*, Chamber 2010-11, no. 53-219/4, 6.

<sup>16</sup> *Parliamentary proceedings*, Chamber 2010-11, 28 April 2011, no. 53-30, 35.

<sup>17</sup> *Parliamentary documents*, Chamber 2010-11, no. 53-85/1, 3.

<sup>18</sup> *Ibid.*, 4. Elsewhere there was mention of a 'social bomb at the foundations of shared values' (*Parliamentary report*, Chamber 2010-11, no. 53-219/4, 22).

<sup>19</sup> For more results of this study and information on the methodology, see Eva Brems, Yaiza Janssens, Kim Lecoyer, Saïla Ouald Chaïb, Victoria Vandersteen and Jogchum Vrieling, "The Belgian 'burqa ban' Confronted with Insider Realities", in Eva Brems (ed.), *The Experiences of Face Veil Wearers in Europe and the Law*, Cambridge University Press, 2014, 77-114; and Eva Brems, Yaiza Janssens, Kim Lecoyer, Saïla Ouald Chaïb and Victoria Vandersteen, *Wearing the Face Veil in Belgium; Views and Experiences of 27 Women Living in Belgium concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering*, Research Report, 2012, available online: <http://www.hrc.ugent.be/wp-content/uploads/2015/10/face-veil-report-hrc.pdf> (hereafter 'Research Report').

## SOCIAL INTERACTION

Some women indicate that their choice to wear the niqab implied a choice to withdraw from a number of activities that they did not consider suitable for a veiled woman (such as 'unnecessary' shopping at a curio market).

Yet many state that they do not experience any inhibitions to engage socially in the public sphere, with some women saying that they would in fact live a *less* social life if they could not wear the face veil, because they would not feel at ease in a number of circumstances.<sup>20</sup>

The types of social activities the interviewees mention mostly relate to their roles as mothers and housewives: accompanying the children to and from school, taking the children to the park, shopping and errands, talking to neighbours, going to the market, going to the post office or other administrative offices... Several women mention the use of public transport, driving a car, day trips and foreign travel. Some quotes from the interviews illustrate this:

*I am outside a lot because I have activities outside. I take the kids to their diverse activities they have in the week, they have several. (quote from interview 1)*

*Yes, some people were laughing then, 'hey a woman in niqab on a motorcycle', but I do not think it stops you, the other people in fact stop you from doing certain things, but not yourself, ... so I think you can integrate completely in society and you can do everything when you wear that (quote from interview 14)*

*At the time I lived in a neighborhood of old people [...] And these people recognized me without any problem and they acted toward me as if they saw whoever else in the street [...] We were good neighbors, and I remember that when we moved, the old people were even sad because they told us: 'Oh, we knew you so well and we knew that we could count on you, that we could ask you something'. There was even an old lady, who lived upstairs where I lived, and whose children did not visit her. And she told me, 'it is so good of you, that you come and visit the elderly', because I visited her from time to time with my children. So it does not stand in the way of anything at all. It is enough to want to accept the difference and to understand that behind that face veil, there is a person who is completely normal. (quote from interview 25)*

As these stories illustrate, these individuals wish to engage with society and participate as regular citizens. There is no desire to withdraw from society.

However, especially where a face covering ban is in place, many women also report avoiding certain activities outside the house or avoiding as much as possible to go out on their own, because of fear for aggressive reactions of others, or of confrontation with the police. While some women's reaction to the ban has been to reluctantly stop wearing the face veil, others have rather chosen to avoid going out, except by car. Some quotes illustrate the effect of face covering bans on the social integration of these women:

*And it is from that moment that the life of those women wearing the face veil was disturbed because they were so frightened [...] of being arrested, they were watching every movement, we did not go out to the park anymore, we did not go out shopping. When I needed to go anywhere, it was mandatorily by car. I had a dentist at 200 meters from my home, I had a friend who came from Laken to pick me up by car to drive me to the dentist who was at 200 meters ...(quote from interview 25)*

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<sup>20</sup> Research Report, p 12.



*Gradually as the law was voted [later corrected in the sense that it was a local ban that was adopted, EB] I was arrested several times by the police, I had no life anymore, because my husband [...] worked a lot at the time, he left at 7 am and came home at 10 pm, I did not go out, I had no life, my children were at home all the time, to do my shopping I needed to wait until someone could drive me in a car, same thing to see a doctor, it was hell. [...] It was not feasible. (quote from focus group discussion)*

#### COMMUNICATION

Several interviewees expressed a self-image as very open or sociable persons. Many women state that from their perspective, communication is perfectly possible.

Yet several interviewees also indicated that there appears to be a communication barrier on the side of others. Several women relate stories of situations in which people addressed an accompanying man, rather than talking to them. They express frustration at being ignored.

Some interviewees have experienced that they engender a sense of fear in some other people. Several women state that this fear disappears when they can establish contact. Also, several women told stories of how a conversation with an initially suspicious stranger turned into a positive exchange, an actual encounter.

#### CONCLUDING COMMENTS ON THE ARGUMENT FROM SOCIAL COHESION

The empirical findings reveal the erroneous character of one of the assumptions of the Belgian legislator banning the face veil – i.e. that women who wear the face veil are not able to and do not wish to interact with others in society. Instead it appears that – at least before the ban – women wearing a face veil were in fact interacting in numerous ordinary ways with society at large.

Moreover, it appears that the ban is not achieving its stated purpose of increasing the social interactions by these women, and is instead counterproductive. This is the case because many women who choose to wear a face veil are strongly attached to it, and continue to wear it despite the ban, yet avoid going out. Hence, instead of increased social interaction, the effect for these women is a serious deterioration of their social life, their interactions with society at large, and their mobility.

### **3.3. The 'living together' argument and the matter of evidence**

Formally speaking, a ban on face covering has a broader sphere of application than the minority practice of the Islamic face veil. Yet both in conception and in practice, the ban targets only that practice. This is clearly shown both by the legislative and media debates surrounding the adoption of the ban, and by the police practice of enforcing it. Hence it is proper to situate the face covering ban in the broader societal context that is characterized by high levels of hostility against the minority Muslim population, and of outright islamophobia.<sup>21</sup>

In such a context, hostile stereotypes may infect political debates, blurring the lines between real societal issues and unfounded assumptions inspired by fear or prejudice. Hence there is a real risk that rights-restrictive measures which in principle might be justifiable, are in fact hugely disproportionate or ill-targeted, as the risks they are intended to address are not verified before leading to remedial action. While it may not

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<sup>21</sup> See for example the findings of the Belgian Interfederal Centre on Equal Opportunities about rising Islamophobia: <http://www.diversite.be/lislamophobie-fait-des-victimes-de-la-toile-vers-lespace-public> .

always be possible in political debates to avoid crossing the lines between *bona fide* measures in the general interest and harassment of unpopular minorities to please intolerant majority sentiments, the drawing of this line is definitely within the capacities of judicial control of human rights compliance. Many would argue that it is even among the chief reasons of the existence of such control. The classical way for the judiciary to dispense with this task is by evidence requirements.

The Court's inclusion of 'living together' among the legitimate aims that may justify a human rights restriction in *SAS v. France* has met with a lot of criticism. Read from a constructive angle, these criticisms express doubts about whether the concept can do the job sketched above of drawing the line between justifiable measures in the general interest and unjustifiable harassment of minorities.

Should the Court wish to continue to rely on the argument of 'living together' in the face covering context or other contexts, it might address this concern by emphasizing that the invocation of a legitimate aim as such is not sufficient. It should also be shown that this aim is at stake in the concrete context.

This is exactly what the Court does in *SAS v. France* when dismissing the pursuit of gender equality as a legitimate aim supporting a general face covering ban (para. 119). The Court reasoned that it is not sufficient that, according to majority opinion, a minority practice touches upon an important general interest<sup>22</sup> (in this case gender equality), but that it should be shown concretely that this interest is in fact at stake. This reasoning can be applied also to other 'legitimate aims', and *in casu* to the invoked 'legitimate aim' of 'living together'. Without such a requirement of establishing the need for a rights-restrictive measure there is no guarantee against the risk that what is presented as a 'choice of society' might be a cover-up for minority harassment. *In casu* this would require providing evidence that 'living together' is under threat in the municipality or the country by the practice of covering one's face.

In addition, the Court might, in the context of its procedural quality control, check whether it has been convincingly shown in the course of the domestic procedures that the specific measure that has been taken (*in casu* a general ban on face covering) is adequate to address the problem that has been identified, and whether due consideration has been given to alternative measures that might be less rights-restrictive.

Evidence requirements are a key component for protecting individuals against the risk of government arbitrariness. It is submitted that they are even more vital when restrictive measures target unpopular minorities in a context that is characterized by hostility and negative stereotypes.

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<sup>22</sup> Cf. restatement of para. 119 of *SAS v. France* by the Belgian Council of State in its recent breakthrough judgment on headscarves at school: Council of State, department of administrative jurisprudence, judgment nr 228.752 of 14 October 2014, Gadghadhi a.o. v Gemeenschapsonderwijs, para. 37.2.