

# ***Covernance* or Women's Rights. How Much Room for the Gender Equality Argument In The Swiss Headscarf Debate?**

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**Abstract:** *Covernance* o diritti delle donne. Quanto spazio per la parità di genere nel dibattito svizzero sul velo Islamico? – With the popular initiative “Sì al divieto di dissimulare il proprio viso”, in March 2021 a national ban on full-face coverings has been adopted in Switzerland. Prior to this, similar bans already existed in Ticino and San Gallo Cantons. Among the many arguments in their support, stands gender equality. The article explores if and how this argument has been employed in the Swiss headscarf legislative and jurisprudential debate. By considering both the relevant parliamentary debates and the case-law of the Swiss Federal Tribunal, it concludes that, so far, gender equality has never played a truly diriment role in the appreciation of the ban. Thus, the article finally suggests that, if challenged with a proper complaint, there is room for the Swiss judge, in a given case, to declare the ban contrary to the gender equality principle, and this under a harmonised interpretation of the Constitution and/or an interpretation consistent with the CEDAW.

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*Women who have made a conscious choice to wear the Islamic veil need governmental and judicial protection of their religious freedom and of the ability to embrace the dynamic aspects of their gender, religion, identity, and autonomy in a secular Western society.*

*Without this protection, veiled women will continue to live under a restrictive form of *covernance* – a discriminatory system of governance that restricts the way they manifest their religious belief by covering their bodies in the public sphere*

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## **1. Introduction**

By 2010, the so-called burqa-ban has been mushrooming in several European States. In the wake of the strong French precedent (especially after *S.A.S v. France*),<sup>1</sup> countries such as Austria, Belgium, Bulgaria, Denmark, Germany, Italy, the Netherlands and Spain, have by now finally introduced a national or local ban for women to wear their full-face veil (such

<sup>1</sup> *S.A.S v. France*, App. no. 43835/11.

as burqas or niqabs) in public places.<sup>2</sup> Thus, despite being national in origin, this ban has been usually implemented by other countries.<sup>3</sup> This applies also to the case study of this article, Switzerland, where the European anti-burqa tendency has been recently embraced.<sup>4</sup> Indeed, shortly after having been adopted at the local level in Ticino<sup>5</sup> and San Gallo<sup>6</sup> Cantons, the so-called burqa ban now exists also at the federal level following the acceptance of the popular initiative “*Sì al divieto di dissimulare il proprio viso*”.<sup>7</sup>

There are various arguments that have been often times put forward to support this ban: among others, the safeguarding of national security, the need to avoid ghettoization, the fostering of integration, the preservation of secularism and, finally, the promotion of gender equality between men and women are worthy of mention.<sup>8</sup> The latter has probably been the most used in support of the ban<sup>9</sup> and the one that has catalysed the most heated debates in the scholarship and within the feminist movement: is a ban on full-face coverings a proper way to foster women emancipation or is it rather a Western mean that simply endorses a stereotypical view of Muslim women and fails to consider the real meaning behind these clothing?

This article aims at analysing if and how the gender equality argument has been employed in the Swiss debate.

<sup>2</sup> An updated overview of most European legislative interventions imposing a restriction on Muslim women's dress is available at: [www.justiceinitiative.org/uploads/dfdb416-5d63-4001-911b-d3f46e159acc/restrictions-on-muslim-womens-dress-in-28-eu-member-states-20180709.pdf](http://www.justiceinitiative.org/uploads/dfdb416-5d63-4001-911b-d3f46e159acc/restrictions-on-muslim-womens-dress-in-28-eu-member-states-20180709.pdf).

<sup>3</sup> R. Grillo and P. Shah, *Reasons to Ban? The Anti-Burqa Movement in Western Europe*, in *MMG WP* 5, 2012, 15: the authors portray this diffusion as a sort of “me-too” movement.

<sup>4</sup> See generally A. Tunger-Zanetti, C. Niggli, A. Petrino and N. Marchon (eds.), *Verhüllung. Die Burka-Debatte in der Schweiz*, Zurich, 2021.

<sup>5</sup> Popular initiative “Vietare la dissimulazione del viso nei luoghi pubblici e aperti al pubblico” of 3 June 2011, FU 2011 44; the acceptance of this initiative in 2013 resulted in the amendment of the Ticino's Constitution with art. 9a, which establishes that: “<sup>1</sup>Nessuno può dissimulare o nascondere il proprio viso nelle vie pubbliche e nei luoghi aperti al pubblico (ad eccezione dei luoghi di culto) o destinati ad offrire un servizio pubblico. <sup>2</sup>Nessuno può obbligare una persona a dissimulare il viso in ragione del suo sesso. <sup>3</sup>Le eccezioni al primo capoverso e le sanzioni sono stabilite dalla legge”.

<sup>6</sup> In San Gallo Canton the ban was introduced in 2018 (but entered into force only in 2019) through the acceptance of the referendum (Nachtrag zum Übertretungsstrafgesetz of 23 September 2018) concerning the modification of the Cantonal law related to criminal offences (Übertretungsstrafgesetz of 13 December 1984, RS/SG 921.1) with art. 12<sup>ter</sup>: “Wer sich im öffentlichen Raum sowie an Orten, die öffentlich zugänglich sind, durch Verhüllung des Gesichts unkenntlich macht und dadurch die öffentliche Sicherheit oder den religiösen oder gesellschaftlichen Frieden bedroht oder gefährdet, wird mit Busse bestraft”.

<sup>7</sup> Popular initiative “Sì al divieto di dissimulare il proprio viso” of 15 March 2019, FF 2019 2519.

<sup>8</sup> See generally E. Howard, *Law and the Wearing of Religious Symbols in Europe*, London, 2020.

<sup>9</sup> E. Howard, *Banning Islamic Veils: Is Gender Equality a Valid Argument?*, in 12 *International Journal of Discrimination and the Law* 3, 2012, 148.

Thus, in part II, an analysis of the gender equality argument will be drawn up; to this end, the main arguments put forward both to validate or to confute it will be reviewed. Part III and IV will be instead focused on whether and how this argument has been employed by the cantonal and the federal legislator, as well as by the judges of the Swiss Federal Tribunal. At the end, in part V, some critical reflections will be put forward.

## 2. The Promotion of Gender Equality: Full-Face Ban Under Scrutiny

The practice of wearing the veil in the Islamic world mostly derives from a certain interpretation of the Qu’ran, which indeed does not expressively prescribe it. Some verses of the Islamic holy text simply invite women to “guard their modesty”,<sup>10</sup> a vague expression that has led Muslim societies to develop the custom of women veiling under several forms, ranging from the simple hijab to the burqa or the niqab.<sup>11</sup> Despite originally conceived as a way to safeguard women “modesty, privacy and morality”,<sup>12</sup> out of the Muslim world the veiling practice has been often portrayed as a tool to confine Muslim women to a second-class status and thus to undermine their fundamental rights,<sup>13</sup> and especially their right not to be discriminated.

Once the debate concerning as to whether or not banning full-face veils in public places arose in the European panorama, the consistency of Islamic clothing with gender equality readily started to be pondered.

In this respect, two main polarised perspectives have emerged: the one of the supporters of the ban who argue that this prohibition could undoubtedly promote Muslim women emancipation, and that of the opponents who conversely advocate that such an interdiction envisages a stiff setback in their path towards parity. This contraposition has resulted in a multifaceted debate, in which the full-face veil matter was respectively invoked to claim a different version of equality.<sup>14</sup>

The core of the supporters’ rationale was that the full-face veil is inherently inimical to women and represents a banner of oppression and male-subjugation, a sort of a “walking prison”<sup>15</sup> which denotes a horrific “psychological, sexual and social mutilation”.<sup>16</sup> On this basic premise, it was

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<sup>10</sup> See, for instance, Surah 24, verse 31: “And tell the believing women to lower their gaze and *guard their modesty*, and not to reveal their adornments except what normally appears [...]”.

<sup>11</sup> S. Nanwani, *The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction*, in 25 *Emory International Law Review* 3, 2011, 1436.

<sup>12</sup> E. Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, in 41 *Law & Society Review* 3, 2007, 717.

<sup>13</sup> See generally P. Chesler, *Ban the Burqa? The Arguments in Favor*, in 17 *Middle East Quarterly* 4, 2010, 33–45.

<sup>14</sup> E. Wiles, *Headscarves*, op. cit., n. 12, 700.

<sup>15</sup> This expression was coined and utilized in the parliamentary Belgian debates concerning the veils’ ban in public places: [www.reuters.com/article/us-belgium-veil-idUSTRE63S4VU20100429](http://www.reuters.com/article/us-belgium-veil-idUSTRE63S4VU20100429).

<sup>16</sup> This expression belongs indeed to the Iranian French writer Chahdortt Djavann,

alleged that a ban on integral veil could engender several emancipatory effects,<sup>17</sup> in at least three ways: firstly, for Muslim women themselves; secondly, for Muslim women with men; and, finally, for Muslim women with (and within) the society (and vice versa).

In the supporters' opinion, since the integral veil is the emblem of women's oppression,<sup>18</sup> its outlawing would firstly implement their rights, as well as ensure their dignity and prevent their dehumanisation.<sup>19</sup> As also being a patriarchy distinctive, an intervention for prohibiting the wearing of integral Islamic veils would weaken the domination that Muslim men are supposed to exercise on "their" women.<sup>20</sup> Indeed, from the anti-veil advocates' standpoint, full-face coverings are a kind of masculine permanent monitoring system,<sup>21</sup> as far as they are imposed on women (who therefore wear it unwillingly) to enable men to exercise a continuous control on their sexuality.<sup>22</sup> In their opinion, what was most striking is that Muslim men talk of the integral veil as a modest garment that can protect women from other men gaze or even violent assaults.<sup>23</sup> Thus, it has been argued that, thanks to this narrative, Muslim women feel finally safe and do not therefore understand that this garment is a symbol of possession and a constant warning of their place in the world, the home.<sup>24</sup> The last category of reasons put forward to sustain the ban concerns the impact that Muslim garments have on and within the public sphere. In this regard, it has been firstly contended that integral veils are religious symbols capable of exercising a certain degree of pressure on others.<sup>25</sup> This is firstly true for unveiled Muslim women, who widely reported the embarrassment and the shame they felt when crossing veiled Muslim women:<sup>26</sup> in this respect, the ban

who always manifestly stood for the veils' ban.

<sup>17</sup> J. Freedman, *Women, Islam and Rights in Europe: Beyond a Universalist/Culturalist Dichotomy*, in 33 *Review of International Studies* 1, 2007, 39.

<sup>18</sup> A.K. Wing and M. Smith, *Critical Race Feminism Lifts the Veil: Muslim Women, France, and the Headscarf Ban*, in 39 *U.C. Davis Law Review* 3, 2006, 767.

<sup>19</sup> E. Howard, *Banning*, op. cit., n. 9, 149.

<sup>20</sup> D. Lyon and D. Spini, *Unveiling the Headscarf Debate*, in 12 *Feminist Legal Studies* 3, 2004, 24.

<sup>21</sup> Fedela Amara, the President of the association *ni putes, ni soumise*, stressed the fact that Muslim women's life is constantly marked by the surveillance exercised by a "big brother": [www.letemps.ch/societe/fadela-amara-voile-nest-un-symbole-religieux](http://www.letemps.ch/societe/fadela-amara-voile-nest-un-symbole-religieux).

<sup>22</sup> G. Jasser, *Voile qui dévoile intégrisme, sexisme et racisme*, in 25 *Nouvelles Questions Féministes* 3, 2006, 79.

<sup>23</sup> Conversely, as stressed by the scholarship, being visibly Muslim in Europe rather exposes Muslim women to street violence: see, among others, B. Perry, *Gendered Islamophobia: Hate Crime against Muslim Women*, in 20 *Social Identities Journal for the Study of Race, Nation and Culture* 1, 2014, 74–89.

<sup>24</sup> E. Badinter, *Interview with L. Joffin*, in *Le Nouvel Observateur*, 1989, cited in M. Mookherjee, *Women's Rights as Multicultural Claims. Reconfiguring Gender and Diversity in Political Philosophy*, Edinburgh, 2009, 132.

<sup>25</sup> E. Howard, *Banning*, op. cit., n. 9, 151.

<sup>26</sup> K. Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality under International Law*, in 45 *Columbia Journal of Transnational Law* 2, 2007, 369.

would bridge the divide between them.<sup>27</sup> When referring to the school environment, it has been instead emphasised that authorizing Muslim students or teachers to wear the integral veil might have pressuring effects on both other Muslim girls or on pupils: in the first case, because other Muslim girls would probably be obliged to do the same, whilst in the second because it can even have proselytising effects.<sup>28</sup> Therefore, within this framework, the ban would both avoid these constraints and contribute to protect the best interest of the child. More in general, the supporters of the ban have stressed the fact that full-face veils also deny the so-called *mixité* between sexes<sup>29</sup> and must therefore be outlawed to re-establish “the equality between men and women on which our society rests”.<sup>30</sup>

Even if the Islamic veil can be seen as the manifesto of gender inequality, it is indeed not only that.

In the opponents’ view, the previous narrative suffers from a cultural bias<sup>31</sup> and thus offers a one-sided image of the reality, which primarily fails to consider the plethora of meanings that women invest on their veil and its enabling potential. Indeed, the narrative according to which veils are mere symbols of oppression and thus Muslim women must be liberated by their Western sisters,<sup>32</sup> is arguably a Eurocentric and misinterpreting one. Among others, it has been maintained that Muslim women independently decide<sup>33</sup> to wear the veil as to manifest their religion or, again, to show their belonging to the Arabic community or, finally, as a symbol of solidarity with other women.<sup>34</sup> As emphasized by the opponents to the ban, wearing the integral veil means also for some Muslim women to be enabled to interact in the public society<sup>35</sup> or, again, to go to school or getting a job.<sup>36</sup> For all these reasons, the interdiction to wear the integral veil in public places would rather undermine gender equality since, on the one side, it diminishes women freedom to choose and, on the other, it excludes them from the

<sup>27</sup> A.K. Wing and M. Smith, *Critical Race Feminism*, op. cit. n. 18, 771.

<sup>28</sup> C. Laborde, *State Paternalism and Religious Dress Code*, in 10 *International Journal of Constitutional Law* 2, 2012, 408.

<sup>29</sup> J.W. Scott, *The Politics of the Veil*, Princeton, 2007, 157.

<sup>30</sup> E. Roudinesco, *Libération*, 2003, cited in *ibidem*.

<sup>31</sup> J. Freedman, *Women, Islam and Rights*, op. cit., n. 17, 32 ff.

<sup>32</sup> See, in general, L. Abu Lughod, *Do Muslim Women Need Saving?*, Cambridge, 2013.

<sup>33</sup> This assumption has been indeed corroborated by interviews conducted with Muslim women: see, among others, E. Brems et al., *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*, 2012, available at: [www.hrc.ugent.be/wp-content/uploads/2015/10/face-veil-report-hrc.pdf](http://www.hrc.ugent.be/wp-content/uploads/2015/10/face-veil-report-hrc.pdf). See also I. Zempi, *Veiled Muslim Women’s Views on Law Banning the Wearing of the Niqab (Face Veil) in Public*, in 42 *Ethnic and Racial Studies* 15, 2019, 2585–2602.

<sup>34</sup> On the several meaning that can be invested on the veil see A. D’souza-Lodhi, *Hijabi (R)evolution*, in M. Khan (ed.), *It’s Not About the Burqa. Muslim Women on Faith, Feminism, Sexuality and Race*, London, 2019, 115–125.

<sup>35</sup> E. Wiles, *Headscarves*, op. cit., n. 12, 720 ff.

<sup>36</sup> C. Evans, *The ‘Islamic Scarf’ in the European Court of Human Rights*, in 7 *Melbourne Journal of International Law* 1, 2006, 68–69.

society.<sup>37</sup> What makes even harder to trust in its genuine emancipatory effects is that this ban would simply replace a supposed constraint with another one, as far as Muslim women would anyhow be subjected to an external control, those of the State,<sup>38</sup> which as Muslim men would prescribe them how to behave in society. Consequently, Muslim women would be put in a no-win situation, since they would be forced to decide whether to go out veiled and be punished or to necessarily stay home.<sup>39</sup>

Overall, what consumed the opponents to the ban is that the supporters depicted Muslim women as mere passive victims<sup>40</sup> and carried out a sort of a “civilizing mission”<sup>41</sup> by completely losing sight of Muslim women’s will and of the fact that, in this controversy, they became the target of a wider political tension.<sup>42</sup>

### 3. The Gender Equality Argument’s Value in the Swiss Headscarf Debate: The Legislative Approach

In Switzerland, a ban on full-face coverings in public places was initially adopted in the Ticino and San Gallo Cantons,<sup>43</sup> in 2013 and 2018 respectively.

In Ticino, the interdiction was established following the acceptance of the constitutional popular initiative “*Vietare la dissimulazione del viso nei luoghi pubblici e aperti al pubblico*”, which integrated the Cantonal Constitution with art. 9a. On that occasion, alongside with the initiative, the Grand Council of Ticino launched a counterproposal, aimed instead at modifying with the same interdiction the Cantonal law on public order:<sup>44</sup> with a percentage of 64.5 versus 60, the initiative was accepted and the counterproposal rejected. On 1 July 2016, pursuant to the Confederation’s guarantee,<sup>45</sup> the interdiction to wear full-face coverings in Ticino Canton

<sup>37</sup> C. Elkayam-Levy, *Women’s Rights and Religion the Missing Element in the Jurisprudence of the European Court of Human Rights*, in 35 *University of Pennsylvania Journal of International Law* 4, 2014, 1202.

<sup>38</sup> J. Freedman, *Women, Islam and Rights*, op. cit., n. 17, 31.

<sup>39</sup> J. Heider, *Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights*, in 22 *Indiana International and Comparative Law Review* 1, 2012, 117.

<sup>40</sup> See generally T. Saed, *Islamophobia and Securitization. Religion, Ethnicity and the Female Voice*, Switzerland, 2016, 58 ff.

<sup>41</sup> J.W. Scott, *The Politics*, op. cit., n. 29, 162.

<sup>42</sup> R. Grillo and P. Shah, *Reasons to Ban?*, op. cit., n. 3, 9.

<sup>43</sup> Similar parliamentary and popular initiatives were refused in Basel-Stadt (2013), Zurich (2016) and Glarus (2017) Cantons.

<sup>44</sup> Law on public order of 23 November 2015 (LORP, 550).

<sup>45</sup> Pursuant to art. 51, par. 2 Const. fed., when a Cantonal Constitution is modified, the Confederation (on behalf of the Federal Assembly) shall give its guarantee, namely must certify that the modification at issue is compliant with the Federal Constitution for entering into force: “Each Cantonal Constitution shall require the guarantee of the Confederation. The Confederation shall guarantee a constitution provided it is not contrary to federal law”. Anyway, it should be noted that in the related Message, the

entered into force. Contextually, the modification of its implementing regulations came into effect.<sup>46</sup>

This ballot was preceded by a lively multi-lateral debate within the Grand Council between the proponents and the advocates of the initiative, the supporters of the counterproposal and those who opposed both: in that context, the argument of gender equality was often invoked.

Overall, the discussion took shape as follows.

The initiative committee, who openly said to have drawn inspiration from the French law on face concealment,<sup>47</sup> aimed at modifying the Constitution not only for bringing this issue at the Federal level, but also because they were persuaded that wearing full-face coverings runs counter human dignity, and as such was to be banned in the fundamental text.<sup>48</sup> In this vein, and unlike the counterproposal, the initiative text also suggested sanctioning anyone who forced a person to wear it because of her sex (art. 9a, par. 2): as they argued, this prohibition would have protected women from discriminatory practices, which are incompatible with both the Western culture and, clearly, with human dignity.<sup>49</sup> Moreover, modifying the Constitution would have ensured its “durability”: indeed, in order to amend or repeal it, another popular vote would have been necessary. Conversely, the supporters of the counterproposal interpreted the norm on face concealment as one seeking at safeguarding national security, and thus called for a revision of the Cantonal Law on public order.<sup>50</sup> This way, any amendments’ implementation would have been easier. Eventually, a third group of people invited to refuse both, because such an interdiction was unnecessary in Ticino.<sup>51</sup>

These initial findings thus suggest that the issue of gender equality was exclusively brought forward by the initiative committee that agrees with and disseminates the idea that a ban on full-face coverings would have

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Federal Council defined this ban inopportune: Message concerning the conferral of the guarantee to the revised Constitution of Bern, Uri, Soletta, Basel-Stadt, Basel-Country, Appenzell Outer Rhodes, Appenzell Interhoden, Ticino, Vaud and Jura Cantons of 12 November 2014, FF 2014 7845, 7864.

<sup>46</sup> The interdiction to wear full-face coverings in Ticino Canton has been concretized by two Cantonal laws: the first one is the Law on public order (supra, n. 44) and the second is the Law on face concealment in public places of 23 November 2016 (LDiss, 550.200).

<sup>47</sup> French law “*Interdisant la dissimulation du visage dans l’espace public*” of 11 October 2010, no. 2010-1192.

<sup>48</sup> [www4.ti.ch/fileadmin/GENERALE/DIRITTIPOLITICI/votazioni/pdf/2013/22-09-2013\\_Opuscolo-C.pdf](http://www4.ti.ch/fileadmin/GENERALE/DIRITTIPOLITICI/votazioni/pdf/2013/22-09-2013_Opuscolo-C.pdf).

<sup>49</sup> Council of the State, Report of minority of 25 March 2013 (6732 R2), 2, available (in Italian) at: [www4.ti.ch/fileadmin/POTERI/GC/allegati/rapporti/10207\\_6732R-min.pdf](http://www4.ti.ch/fileadmin/POTERI/GC/allegati/rapporti/10207_6732R-min.pdf).

<sup>50</sup> Council of the State, Report of majority of 25 March 2013 (6732 R1), 5, available (in Italian) at: [www4.ti.ch/fileadmin/POTERI/GC/allegati/rapporti/10652\\_6732R-magg.pdf](http://www4.ti.ch/fileadmin/POTERI/GC/allegati/rapporti/10652_6732R-magg.pdf).

<sup>51</sup> [www4.ti.ch/fileadmin/GENERALE/DIRITTIPOLITICI/votazioni/pdf/2013/22-09-2013\\_Opuscolo-C.pdf](http://www4.ti.ch/fileadmin/GENERALE/DIRITTIPOLITICI/votazioni/pdf/2013/22-09-2013_Opuscolo-C.pdf).

emancipated women. Vice versa, the supporters of the counterproposal seemed to be solely concerned with those of national security.

However, during the parliamentary debate a more nuanced and differentiated approach arose.<sup>52</sup> Besides those who resumed the topic of gender equality under the previous profile (even by emphasizing that “if only one woman is forced to wear the burqa [...] than she must be protected”),<sup>53</sup> there were some deputies supporting the counterproposal who warned that this interdiction could produce a side effect. In short, it has been argued that this ban “represents an additional barrier to [...] Muslim women’s] integration”<sup>54</sup> that could lead to their “exclusion [...] from the public arena”.<sup>55</sup>

For what it instead concerns the San Gallo Canton, the interdiction to wear full-face coverings in public places followed to the acceptance of the referendum “*Nachtrag zum Übertretungsstrafgesetz*”, adding art. 12ter to the Cantonal law related to criminal offences. The text submitted to the popular vote endorsed a “burqa ban light”,<sup>56</sup> since faces’ concealment can be sanctioned only if it jeopardizes national security or the religious and social peace. This text was the result of a compromise between those who required a general ban and those who conversely supported the Government’s proposal<sup>57</sup> that, mainly for avoiding the exclusion of Muslim women from the public arena,<sup>58</sup> suggested a ban only before public authorities or in administrative offices. Since the amendment passed with only 57 votes against 55, its submission to the popular vote was immediately requested.<sup>59</sup>

The parliamentary debate was a multifaceted one and slightly involved the topic of gender equality. The advocates of the ban widely stressed the fact that it could promote women’s emancipation. Indeed, in their point of view, this intervention represented an act of *Gute Politik*, which fought against the spread of a medieval, misogynistic and radical practice.<sup>60</sup> In this

<sup>52</sup> A transcript of the debate is available at: [www4.ti.ch/index.php?id=86542&user\\_gcparlamento\\_pi9%5Banno%5D=2013](http://www4.ti.ch/index.php?id=86542&user_gcparlamento_pi9%5Banno%5D=2013) (15.04.2013, VGC 57p.), 5318 ff.

<sup>53</sup> Ibid., 5329–5330 (our translation).

<sup>54</sup> Ibid., 5325 (our translation).

<sup>55</sup> Ibid., 5328 (our translation).

<sup>56</sup> A. Tunger-Zanetti, C. Niggli, A. Petrino and N. Marchon (ed.), *Verhüllung*, op. cit., n. 4, 159.

<sup>57</sup> With the motion 42.13.20 “Vermummungsverbot” the Cantonal Government was mandate to elaborate a ban on faces’ concealment which, as far as it only foresaw an interdiction to wear a burqa or a niqab before public authorities, did not satisfy the will of those who launched the motion, but received nonetheless the support of those who countered it: see, for this recap, the intervention of deputy Thalmann-Kirchberg in September 2017 at [www.ratsinfo.sg.ch/geschaefte/4551#statements](http://www.ratsinfo.sg.ch/geschaefte/4551#statements).

<sup>58</sup> Kantonsrat des Kantons St.Gallen Parlamentsdienste, Parlamentarischer Kommissionsdienst, 23 August 2017, 47.

<sup>59</sup> This amendment was then accepted with a stronger percentage than Ticino up to 66.65%.

<sup>60</sup> As stated by deputy Egger-Berneck in its intervention during the parliamentary session of September 2017: [www.ratsinfo.sg.ch/geschaefte/4551#statements](http://www.ratsinfo.sg.ch/geschaefte/4551#statements).

sense, they uphold that prohibiting the burqa and the niqab in public places would, on the one side, promote women's personal freedom and equality to men and, on the other, improve their integration in the society.<sup>61</sup> Conversely, the opponents considered this intervention to be unnecessary since, unlike Ticino, the Cantonal criminal law of San Gallo already punished those who voluntarily concealed their faces during gatherings (that required a permit) or sporting (and similar) events<sup>62</sup> and the federal criminal law already foresaw the crime of coercion.<sup>63</sup> Moreover, the fact of endorsing this prohibition in the criminal law was considered as disproportionate and inconsistent since, on the one side, criminal law is for preventing and punishing dangerous behaviors rather than for promoting the most desirable ones<sup>64</sup> and, on the other, it was hard to believe that it could truly promote the integration of women.<sup>65</sup> Besides, it was also argued that, because of its wording, the ban risked being inapplicable since it demanded public officials to understand whether a woman wearing a full-face covering could represent a concrete menace.<sup>66</sup> In the end, the opponents interpreted the amendment as a mere act of *Symbolpolitik*,<sup>67</sup> that targeted women as dangerous simply because of their clothing<sup>68</sup> and could even result in their exclusion from the public arena.

By the time the Ticino and San Gallo Cantons implemented their local bans, the possibility to introduce a similar interdiction at the federal level started to be widely discussed and, over the years, several actions to this end were taken. Lastly, in 2017, the popular initiative "*Sì al divieto di dissimulare il proprio viso*" was launched. This latter aimed at integrating the Federal Constitution with art. 10a, under which no one can in Swiss public places conceal her face (§ 1) as well as force someone to do so because of her sex

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<sup>61</sup> As supported by Widmer-Mosnang in its intervention during the parliamentary session of November 2017: [www.ratsinfo.sg.ch/geschaefte/3390#statements](http://www.ratsinfo.sg.ch/geschaefte/3390#statements).

<sup>62</sup> Übertretungsstrafgesetz, cit. n. 5, art. 12bis: "1 Wer sich bei bewilligungspflichtigen Versammlungen oder Kundgebungen oder im Umfeld von Sport- und sonstigen Veranstaltungen unkenntlich macht, wird mit Busse bestraft. 2 Die zuständige Behörde kann Ausnahmen bewilligen, wenn achtenswerte Gründe rechtfertigen, sich unkenntlich zu machen. Fasnacht und andere traditionelle, folkloristische Veranstaltungen fallen nicht unter das Verbot. 3 Die Einsatzleitung der Polizei kann im Einzelfall von einer Durchsetzung des Verbots absehen, wenn dies zur Verhinderung einer Eskalation geboten erscheint".

<sup>63</sup> Art. 181 Swiss Criminal Code: "Any person who, by the use of force or the threat of serious detriment or other restriction of another's freedom to act compels another to carry out an act, to fail to carry out an act or to tolerate an act, is liable to a custodial sentence not exceeding three years or to a monetary penalty".

<sup>64</sup> On this point see the Message of San Gallo's Cantonal Government 40.17.03, 21<sup>st</sup> March 2017, 43.

<sup>65</sup> See, among others, the intervention of Dr. Lüthi during the parliamentary session of September 2017: [www.ratsinfo.sg.ch/geschaefte/4551#statements](http://www.ratsinfo.sg.ch/geschaefte/4551#statements).

<sup>66</sup> As argued by Tinner in its intervention during the parliamentary session of November 2017: [www.ratsinfo.sg.ch/geschaefte/3390#statements](http://www.ratsinfo.sg.ch/geschaefte/3390#statements).

<sup>67</sup> Ibid., intervention of deputy Schorer.

<sup>68</sup> This point was indeed already raised during the session of September by deputy Bucher: [www.ratsinfo.sg.ch/geschaefte/4551#statements](http://www.ratsinfo.sg.ch/geschaefte/4551#statements).

(§2), provided that some exceptions for reasons of health, national security, climatic conditions and local custom could be introduced. Contextually to this initiative, in March 2021, it was submitted to the popular vote also the parliamentary indirect counterproposal,<sup>69</sup> which conversely suggested implementing a duty to show the face only if the representant of an authority (as, for instance, in administrative offices or in public transportations) asked to do so.

With a narrow majority of the voters (51.21%) and a solid one of the Cantons (16 4/2), the popular initiative was accepted, and the Constitution thereby modified.

In the debate that preceded the vote, the argument of gender equality was invoked in its broadest sense. Besides arguments such as the preservation of the *vivre ensemble* and the defence of national security,<sup>70</sup> the proponents of the initiative supported this interdiction by claiming that full-face veil represents the emblem of women's oppression. Accordingly, they argued that a ban could undoubtedly improve women's position in the society, as well as granting them more parity towards men and a higher level of personal freedom.<sup>71</sup> Conversely, in the Federal Assembly's opinion, this ban was both excessive and inadequate: the number of women who constantly wore the full-face veil in Switzerland was marginal<sup>72</sup> and its interdiction could produce the counter-effect of permanently excluding them from the public arena.<sup>73</sup> Moreover, since the majority of women who wear the burqa or the niqab autonomously decided to do so,<sup>74</sup> banning it would also be contrary to the liberal nature of Switzerland, that should not impose on a person what to wear.<sup>75</sup> In its view, the irrelevance of this prohibition also stemmed from the fact that, besides art. 181 of the Swiss Criminal Code, some provisions in the fields of foreigners and naturalization already authorized public authorities to refuse a residence permit if wearing the burqa or the niqab symbolizes an insufficient integration: in this sense, the legislation already provided for the potential incompatibility of radical Islam

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<sup>69</sup> It is worth noting that the counterproposal was also supported by the Federal Commission for Women's Issues (FCWI): see, on this point, Opinion of 18<sup>th</sup> January 2021, available at: [www.ekf.admin.ch/ekf/it/home/documentazione/pareri.html](http://www.ekf.admin.ch/ekf/it/home/documentazione/pareri.html).

<sup>70</sup> Message on the Popular Initiative "*Sì al divieto di dissimulare il proprio viso*" and its Indirect Counterproposal (Federal Law on Faces' Dissimulation), FF 2019 2519, 2537.

<sup>71</sup> *Ibid.*, 2538.

<sup>72</sup> Indeed, according to the study carried out by Tunger-Zanetti et al., the number of women (tourists excluded) who constantly wear full-face coverings in Switzerland ranges from 20 to 30, maximum 37: A. Tunger-Zanetti, C. Niggli, A. Petrino and N. Marchon (ed.), *Verhüllung*, op. cit., n. 4, 101. As the Federal Assembly argued, the majority of women wearing it in Switzerland are therefore tourists who, in the end, do not really contribute at safeguarding the conditions of a pacific coexistence: Message, cit., n. 70, 2540.

<sup>73</sup> Message, cit., n. 70, 2521.

<sup>74</sup> There are indeed also Swiss citizens converted to Islam who thus autonomously decide to wear it: *ibid.*, 2542.

<sup>75</sup> *Ibid.*, 2545.

with Swiss values.<sup>76</sup> In the end, as pointed out in the Message, the initiative seemed to have a merely symbolic significance and, for what specifically concerns women, it appeared that it did not really aimed at empowering them: indeed, if the real objective was to improve gender equality, so an action should have been taken in one of the other many Swiss sectors in which women's discrimination is definitely more evident.<sup>77</sup> Conversely, the straightforward intention of promoting gender equality clearly stemmed from the counterproposal,<sup>78</sup> that instead suggested to modify a series of existing Federal laws that could have been truly capable of "fostering the equality between men and women, as well as the women's social and economic integration".<sup>79</sup> More specifically, art. 4 of the counterproposal firstly propounded to integrate the Federal Act on Foreign Nationals and Integration<sup>80</sup> with a provision that binds Cantons to specifically take into account also women's needs when implementing the integration programs financed by the Confederation. Secondly, it proposed to modify the Federal Act on Gender Equality<sup>81</sup> so as to allow the Confederation to support the programs specifically conceived for improving the parity between men and women in society. Lastly, it aimed at including among the main purposes of the Federal Act on International Development Cooperation and Humanitarian Aid<sup>82</sup> the improvement of women position.

By way of conclusion, it can be said that the argument of gender equality has been frequently and multifariously put forward in the legislative headscarf debate, wherein women's possible empowerment, respectively their downgrading, has been in the end pondered.

#### **4. The Gender Equality Argument's Value in the Swiss Headscarf Debate: The Jurisprudential Approach**

Besides the bans specifically addressed to burqas and niqabs, there have been several attempts to limit also the possibility to wear the hijab (that only covers the hair, head and chest of women) both at the communal and cantonal level. These restrictions were then occasionally challenged before the Swiss Federal Tribunal. However, and differently from the legislative debate, we will see that in the case-law of the Swiss Federal Tribunal the

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<sup>76</sup> Ibid., 2541.

<sup>77</sup> Message, cit., n. 70, 2543.

<sup>78</sup> C.B. Ceffa and G. Grasso, «Un velo sulla Costituzione». *Il divieto di dissimulazione del viso entra a fare parte della Costituzione federale Svizzera: una sfida inedita per il diritto costituzionale europeo?*, in 46 *DPCE Online* 1, 2021, 319.

<sup>79</sup> Opinion, cit., n. 69, 1 (our translation).

<sup>80</sup> Federal Act on Foreign Nationals and Integration of 16 December 2005 (FNIA, 142.20).

<sup>81</sup> Federal Act on Gender Equality of 24 March 1995 (GEA, 151.1).

<sup>82</sup> Federal Act on International Development Cooperation and Humanitarian Aid of 19 March 1976 (974.0).

gender equality argument did not play the same pivotal role, and this mainly because its infringement<sup>83</sup> has been only marginally raised.

In some cases, the federal judges recognized that the measures limiting or prohibiting the wearing of the Islamic veil consisted in a restriction of the fundamental freedom of religion and conscience<sup>84</sup> (art. 15 Const. fed.) which admissibility was thus to be evaluated under art. 36 Const. fed.<sup>85</sup>; however, they ultimately developed a different approach depending on the fact that these provisions were addressed towards an institutional figure or a pupil.

For what it concerns the former category, it was with the DTF 123 I 296 that the Swiss Federal Tribunal firstly clarified its stance. The applicant, a teacher at an elementary public school of the Geneva Canton who had converted to Islam, challenged the school's director decision that forbade her to wear the hijab when performing her teaching duties. Despite recognizing that such an imposition entails a restriction of the teacher's fundamental freedom of religion and conscience (art. 15 Const. fed.), the judges of the Swiss Federal Tribunal rejected her appeal by claiming that the prohibition (grounded on art. 6 of the Geneva law on public instruction)<sup>86</sup> was justified under the predominant public interest of confessional neutrality and was proportionate. More specifically, the judges upheld this prohibition by underlining that allowing a teacher to wear the hijab in an elementary school could interfere with pupils' religious belief and with those of their parents, as well as undermine the scholastic religious peace. In this respect, limiting the teacher's freedom of religion and conscience for safeguarding the confessional neutrality was deemed to be proportionate. It is worth noting that at the end of the decision, and likewise to strengthen their statement, the judges claimed that wearing the Islamic scarf seemed to be "difficult to reconcile [even] with the fundamental principle of gender equality", a constitutional principle that represents "a core value" of the Swiss society and as such is also binding on schools.<sup>87</sup> Similarly, in the recent unpublished decision 2C\_546/2018 of 11 March

<sup>83</sup> The respect of gender equality is enshrined in art. 8, par. 3 Const. fed.: "Men and women have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women have the right to equal pay for work of equal value".

<sup>84</sup> T. Tanquerel, *L'expression religieuse sur le domaine publique*, in F. Bernard, E. McGregor and D. Vallée-Grisel (eds.) *Étude en l'honneur de Tristan Zimmermann. Constitution et religion, les droits de l'homme en mémoire*, Geneva, 2017, 253.

<sup>85</sup> In the Swiss legal system fundamental rights can be restricted only if the three conditions drawn by article 36 Const. fed. are simultaneously satisfied: pursuant to it, a restriction is admissible only if it rests on a legal basis (formal, when significant), if it is justified by a public interest, if it is proportionate and if the essence of the affected right is preserved.

<sup>86</sup> Loi sur l'instruction publique of 17 September 2015 (LIP, C 1 10).

<sup>87</sup> DTF 123 I 296 par. 4.cc (our translation). On this point see also: C.B. Ceffa and G. Grasso, «Un velo sulla Costituzione», op. cit., n. 78, 317; M.P. Viviani Schlein, *Il problema delle manifestazioni di credo religioso nella vita pubblica in Svizzera*, in *Diritto Pubblico Comparato ed Europeo* I, 2005, 241.

2019, the Swiss Federal Tribunal justified under the public interest of confessional neutrality the prohibition made to Basel-Stadt's judges and tribunals' administrative staff to wear ostentatious religious symbols (such as, among others, the Islamic veil) when before the parties or during public hearings. Notably, from the federal judges' standpoint, such interdiction constitutes an admissible restriction to the freedom of religion and conscience as far as it rests on the need to safeguard Swiss secularism and is also proportionate, especially because personally and temporarily limited.<sup>88</sup> Differently from before, and probably because the decision was not specifically focused on the Islamic veil, in this case the compatibility with the gender equality principle was not raised: the fact of not considering that this prohibition could impact more on women than men has been nevertheless sharply criticized by the Swiss scholarship.<sup>89</sup>

Finally, in a nutshell, it seems so far that when the prohibition to wear a religious symbol concerns an institutional figure, the Swiss Federal Tribunal recognizes State neutrality<sup>90</sup> to prevail over the freedom of religion and conscience, respectively over gender equality (if considered). Moreover, it is worth considering that, when raised (and even if as a mere *obiter dictum*), the gender equality argument seems to have been used in order to support the prohibition of wearing the headscarf.

When concerning pupils, the approach of the Swiss Federal Tribunal heavily changed under both grounds. Firstly in 2013 with the DTF 139 I 280, the federal judges rejected the appeal lodged by the municipality of Bürglen (Uri Canton) that, by relying on the school's regulation, denied two Muslim pupils to wear the Islamic scarf. In this case, since this interdiction implied a significant restriction of the freedom of religion and conscience, the rejection was justified on the ground that the school's regulation was an insufficient legal basis. The content of the prohibition to wear the Islamic scarf in school has been then substantially assessed with the DTF 142 I 49 concerning a similar case related to the municipality of Sankt Margrethen (San Gallo Canton). *In casu*, through an impressive reasoning, the Swiss Federal Tribunal concluded that denying a girl the possibility to wear the hijab during classes was not consistent with the freedom of religion and conscience,<sup>91</sup> as far as such prohibition could not be justified by any

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<sup>88</sup> Decision 2C\_546/2018 of 11 March 2019 par. 4.6 (our translation).

<sup>89</sup> See in general E. Joller, *Darf Justitia ein Kopftuch tragen? Kopftuchverbote für Gerichtspersonen im Spannungsfeld zwischen staatlicher Neutralität, Religionsfreiheit und dem Schutz vor Diskriminierung*, in *ZBI* 3, 2019, 115–137.

<sup>90</sup> M.P. Viviani Schlein, *Laicità e neutralità religiosa in Svizzera a livello federale e cantonale*, in *Diritto Pubblico Comparato ed Europeo*, Speciale/2019, 799–820.

<sup>91</sup> Even if not directly correlated with the headscarf debate, it is worth noting that the Swiss Federal Tribunal rejected the possibility for Muslim students to be exempted from swim classes because of religious reasons. Through a shift in case-law (see DTF 119 Ia 178), with the DTF 135 I 79 Federal judges refused two Muslim boys a dispensation from the school swimming course considering that the need to be integrated prevailed over their religious beliefs, pursuant to which they couldn't be

predominant public interests and was disproportionate.<sup>92</sup> Among the different public interests raised, especially two are worthy of attention: the confessional neutrality to clear up the motifs of the diverse restrictions' extent as opposed to institutional figures, and the gender equality to start shedding light on its weight in the jurisprudential balancing of rights. With regard to the first one, the Swiss Federal Tribunal argued that, contrary to teachers,<sup>93</sup> pupils do not represent the State, hence the fact that they display a religious symbol cannot be interpreted as the identification of Switzerland with a specific religion. For this reason, the interdiction made to a pupil to wear the headscarf could not be justified under the confessional neutrality profile (par. 9.2). For what it instead concerns gender equality, the reasoning of the Swiss Federal Tribunal has been welcomed by the scholarship as a "heartening jurisprudential evolution".<sup>94</sup> To the argument that a general prohibition of the Islamic veil could improve the parity between men and women (art. 8, par. 3 Const. fed.), and clearly differently from the position adopted 19 years before,<sup>95</sup> the Swiss Federal Tribunal herein rebutted that "wearing the Islamic scarf doesn't straightaway exclude the autonomy and the equality of women in society".<sup>96</sup> Indeed, as the federal judges pointed out, if it is true that some "fundamentalist currents steadily exclude the constitutional model of parity between men and women", it is also undeniable that "for some women wearing the Islamic scarf is a form of respect of parents' tradition, of their country" or, again, represents a "symbol of their religious identity and convictions".<sup>97</sup> Accordingly, since "the reasons

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exposed to half-naked female bodies. This case-law has been further confirmed with the decision 2C\_666/2011 of 7 March 2012. To round off this overview, it should be also observed that the Swiss Federal Tribunal adjudicated as admissible the constrain made to a girl to participate to female Swiss classes with the "burkini" (decision 2C\_1079/2012 of 11 April 2013). For a further insight see also: B. Ramaj, *Vom Kruzifix bis zum Händedruck. Die neuere Rechtsprechung des schweizerischen Bundesgerichts im Bereich Religion und öffentliche Schulen*, in *Zeitschrift für Religionskunde/Revue de didactique des sciences des religions* 3, 2016, 95–101.

<sup>92</sup> This case-law has been recently confirmed with the decision 1C\_76/2018 of 20 August 2018 concerning the popular Cantonal initiative "For students with bear heads in Valais Canton's public schools": noting that the prohibition was contrary to the DTF 142 I 49, the Grand Council of Valais declared this initiative inadmissible. The decision of the Grand Council was then challenged before the Swiss Federal Tribunal, which reiterated that "any provision preventing a student of public school to wear the Islamic veil consists in a disproportionate violation of the freedom of religion and conscience" (par. 3.4). In this light, since the initiative mainly aims at forbidding to wear the Islamic veil in school, the Swiss Federal Tribunal rejected the appeal and therefore confirmed the Grand Council's decision of inadmissibility.

<sup>93</sup> Since by that time the decision 2C\_546/2018 had not yet been issued, the comparison was solely made with teachers.

<sup>94</sup> M. Hertig Randall, *Aux antipodes de juge Scalia: L'arrêt « St. Margrethen » du 11 décembre 2015 sur l'interdiction du port du voile par une élève dans une perspective comparative*, in F. Bernard, E. McGregor and D. Vallée-Grisel (eds.), op. cit., n. 84, 143.

<sup>95</sup> *Supra*, DTF 123 I 296.

<sup>96</sup> DTF 142 I 49 par. 8.2.3 (our translation).

<sup>97</sup> DTF 142 I 49 par. 8.2.3 (our translation).

that induce Muslim women to wear it are still heterogeneous” and “range from oppression in patriarchal structures where the position of women is incompatible with art. 8, par. 3 Const. fed. to the free expression of a religious identity or cultural origin”,<sup>98</sup> the federal judges claimed that wearing the headscarf is not intrinsically contrary to the Constitution. This way, the suitability to promote gender equality of such measures had to be evaluated case by case on the basis of the concrete circumstances, thus by refraining from stereotyping the visions hovering the Islamic veil. In the case at hand, since there were no elements that suggested she was forced to wear it (what was even corroborated by the pediatrician’s estimation), the federal judges concluded for the absence of a conflict between arts. 15 and 8, par. 3 Const. fed.; as a result, they adjudicated that subordinating the further education of the girl to her veil’s withdrawal was neither appropriate, nor necessary, and this both from a gender equality and an integration perspective.<sup>99</sup>

The statement that the Islamic veil doesn’t necessarily represent the subordination of women to men was indeed already put forward in the case-law of the Swiss Federal Tribunal concerning the naturalization of Muslim women. Firstly, in the DTF 134 I 49, the federal judges claimed that refusing a woman the right of citizenship exclusively because she wears the hijab entails an inadmissible discrimination (this time, however, not specifically on the basis of sex but more generally under art. 8, par. 2 Const. fed.).<sup>100</sup> Indeed, from the judges’ standpoint, building the rejection of naturalization on this sole fact prejudices “Muslim women who wear the veil with respect to men and women of another confession, to men of the same confession and women who, despite belonging to the same confession, don’t wear the veil; to their detriment, it implements a difference in treatment capable of making it impossible for them to access the right of citizenship”.<sup>101</sup> Even on this occasion, the federal judges had additionally specified that, since the Islamic veil does not *per se* symbolize the subordination and abasement of women to men, a refusal of the right of citizenship must be always justified under the concrete circumstances, namely if in the case at hand the wearing of the veil effectively contravenes the “principles

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<sup>98</sup> DTF 142 I 49 par. 9.6.1 (our translation).

<sup>99</sup> DTF 142 I 49 par. 9.6.2 (our translation).

<sup>100</sup> Indeed, whilst the second paragraph of article 8 of the Federal Constitution enshrines a general prohibition of direct and indirect discrimination “in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability”, the third one specifically safeguards gender equality. More precisely, it firstly sets that men and women have equal rights, than mandates the legislator to concretely achieve this objective and finally grants the equal pay. For a further insight, see: E. Kleber, *La discrimination multiple. Étude de droit international, suisse et européen*, Zurich, 2015, especially 149–181.

<sup>101</sup> DTF 134 I 49 par. 3.2 (our translation).

underlying the [Swiss] democratic states”,<sup>102</sup> such as the equal treatment one. However, since in this instance the refusal was justified under the general assumption that the Islamic veil constitutes an objectification of woman without therefore taking into consideration the concrete situation, such a refusal was finally deemed to be inadmissible.

The same reasoning has been then further implemented in the DTF 134 I 56 concerning the denial of citizenship to a married couple because of the fact that the wife wore the Islamic veil, was not fluent in German and had little knowledge about the Swiss political system; in particular, the municipal assembly remarked that wearing the veil represents a disavowal of the Swiss fundamental constitutional principles, especially the parity between men and women. In this case, by firstly stating that these applications should have been singularly evaluated, the federal judges dismissed the claim of the wife and admitted that of the husband. With reference to the latter, as far as the denial solely rests on his religious confession and his wife’s observance of religious customs, the judges argued that the denial amounts to a discrimination under art. 8, par. 2 Const. fed.; for what it instead concerns the wife, judges simply confirmed that the refusal decision was not arbitrary (art. 9 Const. fed.) since the absence of the basic linguistical and political knowledges effectively reflects an insufficient integration in Switzerland, and this regardless of the fact that she wore the Islamic veil.<sup>103</sup> Either way, it is important to stress that, again in this case, the judges of the Swiss Federal Tribunal confirmed that the veil does not automatically symbolize the subordination of women to men, since wearing it can also be the independent choice of a woman to follow the Qu’ran prescriptions.<sup>104</sup>

More recently, with the DTF 144 I 281, the Swiss Federal Tribunal adjudicated on the appeal brought against the implementing regulations of the Ticino constitutional ban.<sup>105</sup> On that occasion, the applicants exclusively claimed that, as formulated, the ban represents a disproportionate restriction of their freedom of expression and information (art. 16 Const. fed.), as well as of their economic freedom (art. 27 Const. fed.). The federal judges admitted their claim and adjudicated that the Grand Council has to intervene in order to complete the exceptions made to the ban as far as, being specific and not merely illustrative, they can effectively amount to a disproportionate restriction of the abovementioned rights. The applicants did not indeed challenge the constitutionality of the headscarf ban neither with respect to religious freedom,

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<sup>102</sup> *Ibidem* (our translation).

<sup>103</sup> Nevertheless, it should be noted that in this specific case the Swiss Federal Tribunal paradoxically refused the woman’s request without pondering whether her lesser integration was the consequence of a condition dictated by the husband himself. This way, the Swiss Federal Tribunal implicitly accepted that Islamic women leave in the shadows of the society and, by consequence, it reinforced a disparity of treatment between her and her husband: S. Burgat and F. Matthey, *Tribunal fédéral 27.2.2008/a, RDAF I*, 2009, 387–388.

<sup>104</sup> DTF 134 I 56 par. 5.2.

<sup>105</sup> *Supra*, n. 46.

nor to gender equality. Therefore, in an *obiter dictum*,<sup>106</sup> the federal judges deemed irrelevant for the case at stake the fact that an analogous ban implemented in France (which content was emulated by the Ticino's initiative committee) was already declared consistent with arts. 8 and 9 of the European Convention on Human Rights (ECHR) by the Court of Strasbourg.<sup>107</sup> Besides, the federal judges did not even refer to the gender equality's argument.

## 5. Conclusion

In the Swiss headscarf debate the gender equality argument has thus played a multifaceted role, but never a truly diriment one. Indeed, even if both the legislator and judges variably rebuilt on it, neither in the discussions that preceded the voting of the Cantonal and Federal popular initiatives, nor in the reasoning of the relevant decisions, the need to safeguard the parity between women and men was decisive. The same goes for the scholarship that, as previously pointed out, is still divided. Therefore, it is still not possible to detect a linear position in the Swiss legal framework.

With specific regard to the Swiss Federal Tribunal, it can be noticed that it has rather differently adjudicated the cases depending on the individual who claimed the right to wear the Islamic veil. Moreover, the cases brought before it exclusively revolved around the right to wear the hijab, and this begs the question whether the Swiss Federal Tribunal would have ruled the same if the right to wear the burqa or the niqab had been at stake.

However, one could assume that the fact that in some specific cases the Swiss Federal Tribunal assessed the legitimacy of the Islamic veil ban through the gender equality argument could now leave room for a potential appraisal of the newly introduced federal ban even in this light. Indeed, on the one hand, art. 10a Const. is not self-executing and does not attribute any new competence to the Confederation; on the other, the management of the public space is mainly the responsibility of Cantons. Thus, since Cantons themselves will be mostly competent for the ban's implementation,<sup>108</sup> the Swiss Federal Tribunal might in the future be requested to assess whether the bans or sanctions enacted through a cantonal regulation are in the end compliant with the Federal Constitution. In this context, if challenged with a proper complaint concerning an infringement of art. 8, par. 3 Const. fed., there could be room for judges also to adjudicate the case in favour of a woman if, according to an evaluation of the concrete circumstances, the ban represents a disproportionate restriction of her right to self-determination and is thus contrary to the gender equality principle. In such a case the judges of the Swiss Federal Tribunal might be required to make a so-called "harmonised interpretation" of the Constitution, aimed at ensuring a

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<sup>106</sup> DTF 144 I 281 par. 3.2.

<sup>107</sup> *Supra*, n. 1.

<sup>108</sup> What, incidentally, may in the end entail local disparities: Message, cit., n. 70, 2544.

“practical concordance” between the various relevant constitutional provisions, all of which express a fundamental value, but none of them an absolute one, and without any pre-established hierarchy between them.<sup>109</sup> Moreover, one could argue that even the necessity to ensure an interpretation consistent with international law (enshrined in art. 5, par. 4 Const. fed.) might result in the inadmissibility of the Islamic veil ban. Indeed, according to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>110</sup> - ratified by Switzerland in 1997 - State parties should take all appropriate measures to improve the parity between men and women. More precisely, the Convention establishes that State parties should “refrain from engaging in any act or practice of discrimination against women” (art. 2, lett. d) and that, in case a discrimination concretely exists, they should “take all appropriate measures, including legislation” to eliminate it.<sup>111</sup> In this respect, if the cantonal implementation of the Islamic veil ban in public places entails in a given case a discrimination only at the expenses of woman, the Swiss Federal Tribunal should declare it unlawful so as to respect the international commitments signed by Switzerland. Indeed, despite some of the CEDAW provisions are not directly justiciable, these nevertheless integrate the national legal system, and as such must be considered once national norms (whether federal, cantonal or communal) are interpreted.<sup>112</sup>

Finally, in a nutshell, one could assume that the historical conservative attitude of the Swiss Federal Tribunal towards the gender equality as well as its reluctance to interpret the cantonal legislation in conformity with international conventions such as CEDAW have so far probably not prompted the parties to raise corresponding objections.

However, the time seems nowadays to be ripe for women to claim for it.

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<sup>109</sup> See, by analogy, DTF 139 I 16 par. 4.2.2.

<sup>110</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 18 December 1979, RS 0.108.

<sup>111</sup> On this point see K. Lempfen, *Europäische Perspektiven / Travail, genre et religion: le port du hijab en Europe / I – III*, in A. Stöckli, A. Kühler, F. Hafner and K. Pärli (eds.), *Recht, Religion und Arbeitswelt*, Zurich, 2020, 41–46.

<sup>112</sup> M. Cottier, *Impulsion des instruments de protection des droits humains de l'ONU en matière d'égalité et de protection contre les discriminations pour le droit de la famille suisse*, in 140 ZSR II, 2021, 139.