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# TWO INTERPRETATIONS OF ‘LIVING TOGETHER’ IN EUROPEAN HUMAN RIGHTS LAW

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**ABSTRACT.** The European Court of Human Rights and the Council of Europe have recently recognised ‘living together’ as a legitimate dimension of the rights of others that could justify limitations on various ECHR rights, including the rights to freedom of religion and respect for private life. This article argues that the important, yet still unexplored in human rights law, idea of ‘living together’ stems from the republican ideal of fraternity and supplements the distinctive links between democratic principles and rigorous human rights protection. Even so, its justifiability as a limitation ground depends on which conception of the idea is compatible with core values and functions served by human rights under the Convention. This article distinguishes between two main interpretations of ‘living together’, grounded on responsibility and conformity. It is argued that in cases touching on our expressive conduct in public, including cases on the wearing of full-face veils, a conformity conception of ‘living together’ sits uneasily both with firmly established case-law of the ECtHR and with certain key functions of rights, such as the exclusion of moralistic majoritarian preferences as grounds for coercive prohibitions.

**KEYWORDS:** *‘Living together’*, *freedom of religion*, *S.A.S. v France*, ECHR, conformity, privacy, secularism, fraternity.

## I. INTRODUCTION

‘Living together’, an enigmatic term absent both from the text of the European Convention on Human Rights (‘ECHR’) and from the legal doctrine and case law of continental European legal systems,<sup>1</sup> is decisively edging its way into mainstream human rights discourse in Europe. The idea of ‘living together’ – and its justifiability as a legitimate reason for state limitations on specific human rights – first emerged in *S.A.S. v France*,<sup>2</sup> a landmark case on the French criminal prohibition on the wearing of full-face covers in public. In *S.A.S.*, the European Court of Human Rights

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<sup>1</sup> See Conseil d’Etat, *Etude Relative Aux Possibilites Juridiques D’Interdiction Du Port Du Voile Integral*, 30 March 2010; E. Brems, “Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings” (2014) 22 *Journal of Law and Policy* 517, 535.

<sup>2</sup> Application no. 43835/11, 1 July 2014 (Grand Chamber).

(‘ECtHR’) held that ‘living together’ was a legitimate aim, associated with the rights of others to live in a space of socialisation that makes life in a community easier.<sup>3</sup> As such, ‘living together’ was held capable of justifying limitations on respect for private life and freedom to manifest religion, provided that those are also necessary in a democratic society.<sup>4</sup> In late 2015, a year after the Grand Chamber’s judgment on *S.A.S.*, the Council of Europe attempted to explicate the normative underpinnings of ‘living together’ in Recommendation 2076 on ‘freedom of religion and living together in a democratic society’.<sup>5</sup> However, the scope of ‘living together’, along with its grounds and status under the ECHR, remain startlingly obscure.

The emergence of ‘living together’ as a legitimate dimension of the ‘rights of others’ under Articles 8(2), 9(2) and 10(2) ECHR that is capable of justifying state limitations has already attracted vehement criticism in human rights scholarship. More specifically, the ECtHR has been criticised for prioritising illicit majoritarian preferences over the individual right to religious manifestation,<sup>6</sup> for yielding to cultural bias,<sup>7</sup> and for effectively ‘bulldozing’ a right to personal identity ‘unless that identity is acceptable and permissible in the eyes of the majority’.<sup>8</sup> However, contrary to the prevailing view in human rights literature, this article argues that ‘living together’ – along with its potential problems – has to be examined not exclusively with reference to questions of identity such as, for instance, questions about wearing religious symbols in public. Rather, any plausible interpretation of ‘living together’ clings on our answers to more general questions of human rights theory, such as whether ‘living together’ constitutes a collective good that may be balanced against rights, the circumstances under which it might justify limitations on them, and how far-reaching those limitations could be.

This article will pursue two main claims. First, I will argue that ‘living together’ constitutes another link between certain minimum social values, already established in the jurisprudence of the ECtHR, and democracy; as a result, the judicial recognition of its role in securing equal protection of our rights is far from surprising. By contrast with the prevailing analysis in human rights scholarship, this article claims that ‘living together’ is neither a novel addition to the jurisprudence of the ECtHR, nor in conflict with pluralism, tolerance and broadmindedness.<sup>9</sup> Rather, the ECtHR has repeatedly upheld limitations on various rights, including freedom of religion, respect for private

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<sup>3</sup> *Ibid.* at para. [122].

<sup>4</sup> The term ‘necessary in a democratic society’ reflects the familiar terminology of the Convention for the third stage of the proportionality test; see e.g. Articles 8(2), 9(2) and 10(2) ECHR.

<sup>5</sup> Parliamentary Assembly Council of Europe, Resolution 2076: Freedom of Religion and Living Together in a Democratic Society, 30 September 2015 (33<sup>rd</sup> Sitting).

<sup>6</sup> M. Adrian, *Religious Freedom at Risk: The EU, French Schools, and Why the Veil was Banned* (Heidelberg 2016), 71-75; H. Yusuf, “Supporting ‘Living Together’ or Forced Assimilation?” (2014) 3 *International Human Rights Law Review* 277-302; S. Berry, “*S.A.S. v France*: Does Anything Remain of the Right to Manifest Religion?”, *EJIL: Talk!*, 2 July 2014; E. Howard, “*S.A.S. v France*: Living Together or Increased Social Division?”, *EJIL: Talk!*, 7 July 2014.

<sup>7</sup> Brems, “Face Veil Bans in the European Court of Human Rights”, pp. 534-538.

<sup>8</sup> J. Marshall, “*S.A.S. v France*: Burqa Bans and the Control or Empowerment of Identities” (2015) 15 *H.R.L.R.* 377, 385.

<sup>9</sup> *S.A.S. v France*, Joint partly dissenting opinion of Judges Nussberger and Jäderblom, [13]–[14].

life and freedom of expression, for reasons of solidarity and mutual respect.<sup>10</sup> Although those values also fall outside the text of the Convention – as much as ‘living together’ does – the ECtHR recurrently appeals to them in order to highlight and reinforce the connections between rigorous human rights protection and core principles underlying liberal democracy. Moreover, although both the ECtHR and the Council of Europe employ ‘living together’ as a portmanteau concept covering a plurality of values, the concept does have distinctive meaning. Its distinctiveness stems from its intricate socio-historical and constitutional connections with the republican ideal of fraternity, which are further discussed in Section 3. All in all, the justifiability of ‘living together’ as a limitation ground for our rights to freedom of religion and respect for private life does not depend on whether it is a new addition to the ECHR. Rather, it depends on which conception of ‘living together’ (if any) is compatible with certain fundamental moral values served by human rights, which inform, in turn, the interpretation of the Convention.

Exploring the close relationship between ‘living together’ and the constitutional virtue of fraternity is crucial, but there is another important distinction that helps us decipher the precise meaning of the idea in human rights law. More specifically, the second claim of the article is that securing ‘living together’ is ambiguous because it alludes to two different and antagonistic goals, which I call responsibility and conformity. Under a responsibility conception, ‘living together’ requires citizens to recognise certain minimum social values and decide reflectively, as a matter of moral importance, about whether particular forms of their public conduct are respectful towards others. A responsibility conception of ‘living together’ is compatible with various ‘soft’ measures such as, for instance, strengthening civic and human rights education for both sexes, combating obscurantism and promoting a culture of openness and inter-cultural dialogue. By contrast, under a conformity conception, a state can compel its citizens to embrace only the forms of interaction that the majority believes best capture the ideals of fraternity and civility. The disagreement – crucially, among others, before the French National Assembly itself<sup>11</sup> – between those who support ‘soft’ measures and those who favour criminalisation of the wearing of the full-face veil in public mirrors the antagonism between those two very senses of responsibility and conformity. In fact, blanket criminal prohibitions on full-face covers from the general public space, such as those currently enacted in Belgium and France, make good sense under a conformity conception of ‘living together’.

However, this article claims that at least in the specific case of the blanket ban on full-face covers a conformity conception of ‘living together’ faces insurmountable difficulties. As Section 4 discusses in greater detail, conformity is at variance with elemental functions of human rights, such as their role as limits on the kinds of reason that states can legitimately invoke to justify their action. Moreover, under its most convincing reconstruction, the conformity version of ‘living together’ sits uneasily

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<sup>10</sup> In accordance with the historical emphasis on peaceful coexistence that underlies how European states are dealing with religion in political life. See M. Lilla, *The Stillborn God: Religion, Politics, and the Modern West* (New York 2008), 296-310.

<sup>11</sup> *S.A.S. v France*, at para. [11].

with the republican ideal of fraternity, as well as with the constitutional principle of laïcité, both of which inform its normative bedrock in varying degrees. Those are important reasons to prefer a responsibility version of ‘living together’ – at least in cases touching on the expressive dimensions of our rights to freedom of religion, respect for private life and freedom of expression.

There is an additional point that requires clarification. Should an interpretation of ‘living together’ fall exclusively within a state’s margin of appreciation? It is noteworthy that in *S.A.S.* the majority of the ECtHR did not directly validate the French ban on full-face veils and did not expressly answer whether the criminalisation of full-face veils was proportionate to the legitimate aim of protecting the rights of others to ‘living together’. Rather, despite having significant reservations about the concept,<sup>12</sup> the ECtHR held that in ‘general policy’ questions – which seemingly do include questions about which forms of our public conduct may be compatible with the majority’s interpretation of tolerance and broadmindedness<sup>13</sup> – states enjoy a wide margin of appreciation that constrains the ECtHR in its review of Convention compliance.<sup>14</sup> Crucially, here the ECtHR uses margin of appreciation in a structural, rather than a substantive, form.<sup>15</sup> More precisely, the majority of the ECtHR did not use the margin of appreciation in a substantive form that means that state authorities did struck a ‘fair balance’ between individual rights and collective goals, and that the limitation in question was proportionate and therefore within the state’s discretion.<sup>16</sup> Rather, this is a typical case where the ECtHR allows wide margin of appreciation based on arguments from institutional competence and subsidiarity; and from the more specific idea that ‘better placed’<sup>17</sup> national authorities should enjoy normative priority over international courts whenever there is lack of consensus among the Contracting States of the Council of Europe. This is a typical case where the ECtHR simply refrains from making a substantive judgment as to whether a right has been violated.<sup>18</sup>

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<sup>12</sup> *Ibid.*, at para. [122].

<sup>13</sup> C. Ruet, “L’Interdiction Du Voile Intégral Dans L’Espace Public Devant La Cour Européenne: La Voie Étroite D’Un Équilibre”, *Revue Des Droits De L’Homme*, 12 August 2014. Also J. Maher, “*S.A.S. v France* in Context: the Margin of Appreciation Doctrine and Protection of Minorities”, 18 July 2014, Oxford Human Rights Hub Blog.

<sup>14</sup> *S.A.S. v France*, at para. [154].

<sup>15</sup> E. Bjorge, *Domestic Application of the ECHR: The Courts as Faithful Trustees* (Oxford 2015), 180-81; M. Saul, “The European Court of Human Rights’ Margin of Appreciation and the Processes of National Parliaments” (2015) 15 *H.R.L.R.* 745; A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford 2012), pp. 69-144; G. Letsas, “Two Concepts of the Margin of Appreciation” (2006) 26 *O.J.L.S.* 705.

<sup>16</sup> In a substantive form the margin of appreciation is the other side of the principle of proportionality. See Bjorge, *Domestic Application of the ECHR*, p. 180.

<sup>17</sup> On the various different meanings of ‘better placed’ see Legg, *The Margin of Appreciation in International Human Rights Law*, pp. 75-79; Lewis, “The European Ceiling on Human Rights” (2007) *P.L.* 720, 737-38.

<sup>18</sup> Letsas, ‘Two Concepts of the Margin of Appreciation’, p. 721. This structural use of the margin of appreciation is also called ‘deferential review’. See J. Gerards, “How to Improve the Necessity Test of the European Court of Human Rights” (2013) 11 *I•CON* 466.

This structural use of the margin of appreciation is all-too-common in cases touching on morals, such as, for instance, cases involving blasphemous art,<sup>19</sup> and has been repeatedly criticised for its association with moral relativism and for compromising the universality of human rights.<sup>20</sup> Although a detailed analysis of the margin of appreciation falls outside the scope of this article, its structural use is deeply problematic here for two specific reasons. First, as Section 4 discusses, the danger that majoritarian arguments might have been corrupted by the wrong sort of reasons whenever states use concepts as fluid and abstract as ‘living together’ in order to justify limitations on human rights is particularly acute. Close judicial scrutiny is crucial as a result. Second, the structural use of the margin of appreciation creates significant inconsistencies within the jurisprudence of the ECtHR. As Section 3 notes, the ECtHR habitually resolves questions on the proportionality of state limitations on human rights through imposing its own interpretation of concepts such as pluralism, solidarity and toleration, and it is unclear why ‘living together’ has to be treated differently. So, reasons from both the counter-majoritarian nature of rights and from legal coherence require the ECtHR to reach a substantive judgment, rather than defer to state authorities, not only as to whether ‘living together’ is a legitimate aim, but also as to whether, amongst various policy options, the limitations it justifies in specific cases are proportionate all things considered. Moreover, such a substantive judgment cannot be solely contingent on theories of proportionality and deference since their content depends on which moral theory underlies human rights.<sup>21</sup> In fact, the ECtHR has to resolve the legitimacy and proportionality questions surrounding ‘living together’ exactly the way it usually does; it has to specify the normative conditions on the legitimate use of state coercion through the interpretation of legal principles and autonomous concepts,<sup>22</sup> such as individual autonomy<sup>23</sup> and equal respect.<sup>24</sup> Of course the most attractive interpretation of ‘living together’ is one that defines the concept not only as compatible but as intertwined with equal respect, ethical independence, pluralism and fraternity. The responsibility interpretation that

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<sup>19</sup> *Otto-Preminger v Austria*, Application no. 13470/97, 20 September 1994; *Wingrove v United Kingdom*, Application no. 17419/90, 25 November 1996; *I.A. v Turkey*, Application no. 42571/98, 13 September 2005. Also I. Trispiotis, “The Duty to Respect Religious Feelings: Insights from European Human Rights Law” (2013) 19 C.J.E.L. 499.

<sup>20</sup> E. Benvenisti, “Margin of Appreciation, Consensus and Universal Standards” (1999) 31 *New York University Journal of International Law and Politics* 843.

<sup>21</sup> Letsas, “Two Concepts of the Margin of Appreciation”, p. 731; D. Kyritsis, “Whatever Works: Proportionality as a Constitutional Doctrine” (2014) 34 *O.J.L.S.* 395; K. Möller, “Balancing and the Structure of Constitutional Rights” (2007) 5 *I•CON* 453. The content of different theories of deference or proportionality could also turn on the purpose of judicial review more generally. See J. Waldron, *Law and Disagreement* (New York 1999), 211-31; K. Möller, *The Global Model of Constitutional Rights* (Oxford 2012), 99-134. But note that the relationship between proportionality and the margin of appreciation is not directly relevant to the present discussion because the ECtHR is using the margin of appreciation in a structural sense.

<sup>22</sup> S. Greer, “Constitutionalizing Adjudication under the European Convention on Human Rights” (2003) 23 *O.J.L.S.* 405, 408-15; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford 2007), 37-57.

<sup>23</sup> K. Möller, “Two Conceptions of Positive Liberty: Towards an Autonomy-based Theory of Constitutional Rights” (2009) 29 *O.J.L.S.* 757.

<sup>24</sup> R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA 2011), 332-39.

this article develops and defends, at least in cases touching on our expressive conduct in public, is an example of such an interpretation.

Parts of the following discussion will focus on the French ban on full-face covers and the French interpretation of fraternity, not least because they add context to the emergence of ‘living together’ both in the policy work of the Council of Europe and in the jurisprudence of the ECtHR. Despite those references the main question of this article does not concern the deployment of the concept in the French constitutional context. Exploring the notion of ‘living together’ in European human rights law is crucial and timely because the idea is so flexible that it could be used to justify future state limitations on countless other forms of expressive conduct in public protected by various human rights, including our rights to privacy and freedom of thought, conscience and religion. In fact, the emergence of ‘living together’ coincides with a shocking number of horrific terrorist attacks across Europe which fuel European-wide calls for decisive reforms of our national and international human rights agendas in order to prevent extremism and radicalisation. However reasonable, those calls require vigilance in order to filter out far-reaching limitations on our rights grounded on the pretext of securing common values. This article therefore also joins wider theoretical efforts to imbue European human rights law with an accurate account of the common values that may be legitimately protected and balanced against our rights under the ECHR, and of the type and level of state coercion that they should be able to justify.

## II. ‘LIVING TOGETHER’ IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

In July 2014 the Grand Chamber of the ECtHR published its much-awaited judgment on *S.A.S. v France*. Notably, this was the first time that an individual complaint about a national ban on the wearing of full-face covers reached the ECtHR. The applicant in *S.A.S.*, a young French lady, is a devout practicing Muslim. According to her submission to the ECtHR, she wears the burqa or the niqab in virtue of her religious and cultural convictions. Before the ECtHR the applicant stressed that neither her husband nor any other members of her family have pressurised her to wear the face veil.<sup>25</sup> She further noted that she wears her niqab ‘non-systematically’, namely that she does not wear it when she visits a doctor, when meeting friends in public, when she wants to socialise, or when she has to pass security checks in banks, airports or other public places where those are required.<sup>26</sup> Despite accepting those limitations, she wishes to have the choice to publicly manifest her religion through wearing the niqab depending ‘on her spiritual feelings’<sup>27</sup> and especially during religious events

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<sup>25</sup> *S.A.S. v France*, at para. [11].

<sup>26</sup> *Ibid.* at paras. [12]–[13].

<sup>27</sup> *Ibid.*

such as the Ramadan. She argued that she does not want to divide, but to ‘feel at inner peace with herself.’<sup>28</sup>

The applicant complained that the Law no. 2010-1192 (hereinafter ‘the Law’), which prohibits individuals from wearing clothing that is designed to conceal the face in public places,<sup>29</sup> violates, among others, her right to respect for private life, freedom of religion and freedom of expression taken separately and together with freedom from religious discrimination.<sup>30</sup> Amnesty International, Article 19, the Human Rights Centre of Ghent University, Liberty, and the Open Society Justice Initiative<sup>31</sup> intervened with supportive of the applicant’s complaint statements.

The Grand Chamber of the ECtHR accepted that the ban on the full-face veil constitutes a form of interference with the applicant’s rights and embarked on an ‘in-depth’ examination of the legitimacy of its aim.<sup>32</sup> The French government argued that the Law pursued two aims: public safety and protection of the rights and freedoms of others through securing the ‘minimum set of values of an open and democratic society.’<sup>33</sup> The ECtHR held that the public safety justification was disproportionate, but accepted the second legitimate aim behind the ban, namely the French argument that protection of the rights and freedoms of others entails securing a minimum set of values that are fundamental in a democratic society. Those included respect for equality between men and women, respect for human dignity, and respect for the minimum requirements of life in society.

Although the French government has been adamant about the gender equality justification of the ban, the majority of the ECtHR dismissed that argument because states cannot ‘invoke gender equality in order to ban a practice that is defended by women, such as the applicant’.<sup>34</sup> This part of the judgment is noteworthy both because it highlights how important ‘living together’ proved for the justification of the ban and because it marks a significant shift in the Court’s approach to gender equality,<sup>35</sup> compared to previous cases such as *Dahlab v Switzerland*<sup>36</sup> and *Leyla Sahin v Turkey*,<sup>37</sup> where the ECtHR found the Islamic headscarf hard to square with tolerance, respect for others, and equality and non-discrimination. Contrary to those much-criticised judgments,<sup>38</sup> where the focal point was the practice of wearing symbols in public, in *S.A.S.* the ECtHR placed more emphasis on the applicant’s views, without associating her chosen way of religious manifestation with negative stereotypes about

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<sup>28</sup> *Ibid.* at para. [12].

<sup>29</sup> Law no 2010-1192 of 11 October 2010, s. 1.

<sup>30</sup> *S.A.S. v France*, at paras. [69]–[74].

<sup>31</sup> *Ibid.* at paras. [102]–[105].

<sup>32</sup> *Ibid.* at para. [114].

<sup>33</sup> *Ibid.* at para. [116].

<sup>34</sup> *Ibid.* at para. [119].

<sup>35</sup> S. O. Chaib and L. Peroni, “*S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil*”, *Strasbourg Observers*, 3 July 2014. Also M. Foblets and K. Alidadi (eds.), *Summary Report on the Religare Project* (European Commission 2013), 24.

<sup>36</sup> Application no. 42393/98, 15 February 2001 (inadmissible).

<sup>37</sup> Application no. 44774/98, 10 November 2005 (Grand Chamber).

<sup>38</sup> J. Marshall, “Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate” (2008) 30 *H.R.Q.* 631; C. Evans, “The ‘Islamic Scarf’ in the European Court of Human Rights” (2006) 7 *Melbourne Journal of International Law* 52, 71-73.



gender relations between Muslim women and men.<sup>39</sup> This approach also aligns the ECtHR with Resolution 1743 of the Council of Europe, where the Parliamentary Assembly doubted the compatibility of a general prohibition on the wearing of the burqa and the niqab with Article 9 ECHR, given that it ‘would deny women who freely desire to do so their right to cover their face’.<sup>40</sup>

Similarly to the argument about gender equality, the ECtHR swiftly dismissed the French argument from human dignity because, as the majority held, respect for human dignity could not justify the general ban in question. The full-face veil expresses a cultural identity relating to a different notion of decency about the human body<sup>41</sup> and, moreover, there is no evidence that women who wear it show contempt for others.<sup>42</sup> With regard to respect for the minimum requirements of life in a democratic society, the French government argued that the ban responded to an incompatible practice ‘with the ground rules of social communication and more broadly the requirements of “living together”’.<sup>43</sup> The ban aimed to protect social interaction, which is essential to pluralism, tolerance and broadmindedness.<sup>44</sup> The ECtHR conceded that the face is important to engage in open interpersonal relationships, and noted that the explanatory memorandum accompanying the Law recognised that voluntary concealment of the face contravenes the ideal of fraternity and the minimum requirements of civility that are necessary for social interaction.<sup>45</sup> On that account, the ECtHR accepted that the full-face veil raises a barrier in breach of ‘the right of others to live in a space of socialisation which makes living together easier’.<sup>46</sup> Although the majority expressed its concerns about the ‘flexibility’ and ‘the resulting risk of abuse’ of securing ‘living together’, it accepted that in principle ‘it falls within the power of the State to secure the conditions whereby individuals can live together in their diversity’.<sup>47</sup>

Apparently one of the arguments that led the majority of the ECtHR to find the blanket ban within the state’s (wide) margin of appreciation was the lack of European consensus ‘against a ban’.<sup>48</sup> It is notable that various human rights scholars have repeatedly argued that seeking consensus among states, as part of the reasoning of the ECtHR in determining the protective scope of our human rights, is incoherent and morally controversial.<sup>49</sup> But there is an additional problem here. The argument about

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<sup>39</sup>L. Peroni, “Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising” (2014) 10 *International Journal of Law in Context* 195, 201-06.

<sup>40</sup> Parliamentary Assembly Council of Europe, Resolution 1743: Islam, Islamism and Islamophobia in Europe, 23 June 2010 (23<sup>rd</sup> Sitting), at [16].

<sup>41</sup> S.A.S. v France, at para. [120].

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* at para. [153].

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.* at paras. [25] and [141].

<sup>46</sup> *Ibid.* at paras. [121]–[122].

<sup>47</sup> *Ibid.* at para. [141].

<sup>48</sup> *Ibid.* at para. [156].

<sup>49</sup> I. Trispiotis, “Discrimination and Civil Partnerships: Taking ‘Legal’ out of Legal Recognition” (2014) 14 *H.R.L.R.* 343, 348-51; G. Letsas, “Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer” (2010) 21 *E.J.I.L.* 509, 527-28; L. R. Helfer, “Consensus, Coherence and the European Convention on Human Rights” (1993) 26 *Cornell International Law Journal* 133.

lack of European consensus regarding the regulation of full-face covers in public is of doubtful validity. More specifically, according to the recent Religare report<sup>50</sup> we could distinguish between three different forms of regulation of full-face covers in Europe. The first includes national laws prohibiting any form of clothing designed to conceal the face in public.<sup>51</sup> The moment I am writing these lines such laws exist at national level only in France and Belgium.<sup>52</sup> Various human rights organisations, among others, have questioned the necessity of such legislation given that in Belgium, for instance, it is estimated that only ‘several dozen out of the country’s 375,000 Muslims wear the burqa’.<sup>53</sup> Even so, some have defended a European-wide ban on full-face covers in public.<sup>54</sup> That area of law continues to stir heated political debates and to be susceptible to manipulation by populist, xenophobic parties across Europe.<sup>55</sup>

A second form of regulation of full-face covers does not involve state-wide bans, but limitations ‘introduced by mayor or other local authorities by means of administrative provisions’.<sup>56</sup> At the moment, Italy<sup>57</sup> and Spain<sup>58</sup> follow that form of regulation. Perhaps unsurprisingly, local bans have steered constitutional controversy. For instance, in February 2013 the Spanish Supreme Court held that the ban on full-face covers in the municipality of Lleida,<sup>59</sup> which was introduced in 2010 to protect public order, social peace and women’s rights, violated the right to freedom of religion because it was not shown to be necessary to protect women from discrimination and violence.<sup>60</sup> According to the Spanish Supreme Court the most important factor is whether a woman ‘freely chooses to wear a full face veil’.<sup>61</sup>

Finally, in most of the remaining members of the Council of Europe, including the United Kingdom, there are no general (legislative or administrative) prohibitions on the wearing of full-face covers at national or local level. For instance, Danish law prohibits the wearing of religious and political symbols in court, without other general

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<sup>50</sup> Foblets and Alidadi, Summary Report on the Religare Project, p. 24.

<sup>51</sup> On the Belgian ban see L. Peroni, S. O. Ouald-Chaib and S. Smet, “Would a Niqab and Burqa Ban Pass the Strasbourg Test?”, Strasbourg Observers blog, 4 May 2010.

<sup>52</sup> At the moment these lines are written, a complaint about the Belgian ban on full-face veils in public is under consideration by the ECtHR. See *Belkacemi and Oussar v Belgium*, Application no. 37798/13 (communicated to the Belgian Government on 9 June 2015).

<sup>53</sup> Amnesty International, *Choice and Prejudice; Discrimination against Muslims in Europe* (London 2012), 92-94. Also E. Brems, “Equality Problems in Multicultural Human Rights Claims: The Example of the Belgian ‘Burqa Ban’” in M. Van den Brink, S. Burri and J. Goldschmidt (eds.), *Equality and Human Rights: Nothing but Trouble? Liber Amicorum Titia Loenen* (Utrecht 2015), 67-85.

<sup>54</sup> L. Phillips, “Top German Liberal in EU Parliament Wants Europe-wide Burqa Ban”, *EU Observer*, 3 May 2010.

<sup>55</sup> H. Elver, *The Headscarf Controversy: Secularism and Freedom of Religion* (Oxford 2014), 41-72.

<sup>56</sup> Foblets and Alidadi, Summary Report on the Religare Project, p. 24.

<sup>57</sup> S. Pastorelli, “Religious Dress Codes: the Italian Case” in A. Ferrari and S. Pastorelli (eds.), *Religion in Public Spaces* (Surrey 2012), 235-54.

<sup>58</sup> One of those local bans, issued in the municipality of Lleida, was declared unconstitutional by the Spanish Supreme Court on 28 February 2013. See Foblets and Alidadi, Summary Report on the Religare Project, p. 24.

<sup>59</sup> Amnesty International, “Spain: Supreme Court Overturns Ban on Full-Face Veils; AI Concerns Remain About Restrictions on Headscarves in Schools”, *EUR 41/001/2013*, 8 April 2013.

<sup>60</sup> *Ibid.*, at p. 1. The Supreme Court held that ‘the ban may have the effect of confining women wearing such a dress to the home.’

<sup>61</sup> *Ibid.*

prohibitions enacted on state or local level. Rather, court judgments, guidelines issued by professional bodies, as well as government directives constitute the main points of guidance on how to deal with hard cases such as, for instance, the wearing of full-face covers on means of public transport.<sup>62</sup>

Notwithstanding the diversity of regulatory possibilities, it is noteworthy that at the moment only France and Belgium have opted for a blanket criminal prohibition on the wearing of full-face covers in public. Thus, even if the ECtHR did have to take into consideration the level of consensus among the members of the Council of Europe in its substantive decision, that consensus (at least at the moment these lines are written) could only be against blanket prohibitions on full-face covers from public places. Of course the ECtHR connected the lack-of-consensus point with another, distinct claim which will be further discussed below, namely that the question of whether wearing full-face veils in public should be allowed constitutes a choice of the society. Both those arguments led the majority of the ECtHR to the conclusion that, especially given France's wide margin of appreciation in the case, the blanket ban is proportionate to the legitimate aim of preserving the conditions of 'living together' as an 'element' of the rights and freedoms of others.<sup>63</sup>

### III. 'LIVING TOGETHER' AND THE ECHR AS A 'LIVING INSTRUMENT'

The role of 'living together' as a justifiable ground for limitations on human rights was revisited in the recent Resolution 2076, which the Parliamentary Assembly of the Council of Europe adopted in October 2015. The Resolution 2076 stresses the renewed importance of the role of religion in Europe. Moreover, the Parliamentary Assembly emphasises that certain beliefs and churches that are currently developing in Europe give rise to 'tensions, lack of understanding and suspicion, and even to xenophobic attitudes, extremism, hate speech and the most despicable violence'.<sup>64</sup> Although the right to freedom of religion is non-negotiable, Resolution 2076 adds that religious authorities have a fundamental duty 'to promote the shared values and principles which underpin "living together" in our democratic societies'.<sup>65</sup> Those values include mutual recognition and solidarity,<sup>66</sup> as well as respect for dignity and human rights, the rule of law and non-discrimination.<sup>67</sup> More specifically, the right to freedom of religion coexists not only with 'the fundamental rights of others', but also with 'the right of everyone to live in a space of socialisation which facilitates living together.'<sup>68</sup> All in all, notwithstanding its advisory and non-binding legal nature, Resolution 2076 confirms that protection of 'living together' should now be regarded

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<sup>62</sup> Foblets and Alidadi, Summary Report on the Religare Project, p. 24. On the wearing of headscarves in courtrooms see *Barik Edidi v Spain*, Application no. 21780/13, 26 April 2016 (only in French).

<sup>63</sup> *S.A.S. v France*, at para. [157].

<sup>64</sup> Parliamentary Assembly Council of Europe, Resolution 2076: Freedom of religion and living together in a democratic society, 30 September 2015 (33<sup>rd</sup> Sitting), [1].

<sup>65</sup> *Ibid.* at para. [3].

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.* at para. [4].

<sup>68</sup> *Ibid.* at para. [5].

as a legitimate dimension of the rights of others capable of justifying restrictions on freedom of religious manifestation under Article 9(2) ECHR, among other rights.

That position is not uncontroversial though. In their joint dissenting opinion in *S.A.S.*, Judges Nussberger and Jäderblom heavily criticised the legitimacy of ‘living together’. They argued that the idea is ‘very general’, ‘far-fetched and vague’<sup>69</sup> and that it is unclear which rights it aims to protect.<sup>70</sup> The dissenting judges were also concerned about the interpretation of certain Contracting States, which have conceptually relied on ‘living together’ in order to justify limitations on rights because of fear and feelings of uneasiness associated with the presumed philosophy behind the full-face veil.<sup>71</sup> But even if those interpretations of the full-face veil were correct, the dissenting judges argued that ‘living together’ should still not be able to justify the blanket ban under scrutiny both because ‘there is no right not to be shocked or provoked by different modes of cultural or religious identity’<sup>72</sup> and because, in any event, interpersonal exchange can take place ‘without necessarily looking into each other’s eyes’.<sup>73</sup>

Notably, the reaction of the human rights legal scholarship to the justification of ‘living together’ by the ECtHR and the Council of Europe seems congenial to the concerns expressed by the dissenting judges in *S.A.S.* For instance, Berry argues that “‘living together’ pursues a distinctly assimilationist agenda’, which risks that the majority will be permitted to dictate that minorities assimilate ‘instead of pursuing the more integrationist aims of “pluralism, tolerance and broadmindedness”’.<sup>74</sup> Vickers argues that ‘living together’ is ‘one of the weakest legitimate aims’ identified under the ECHR and that it sits uneasily with the fact that the majority in *S.A.S.* engaged in ‘a careful and well evidenced demolition of the standard arguments in favour of banning the veil’.<sup>75</sup> Chaib and Peroni note that the vagueness of ‘living together’, coupled with the vulnerability of Muslim women, require ‘careful examination’ by the ECtHR instead of allowing wide margin of appreciation to France.<sup>76</sup> Brems argues that ‘living together’ reflects ‘the fundamental unease of a large majority of people with the idea of an Islamic face veil, and the widespread feeling that this garment is undesirable in “our society”’.<sup>77</sup> She also contends that the ‘right of others to live in a space of socialisation which makes living together easier’ could open the door to the coercive imposition of majoritarian preferences about how others should live.<sup>78</sup>

I think that the compatibility of certain interpretations of ‘living together’ with the very considerations that rights protect us from is questionable, and deserves separate examination. But before entering that discussion, it would be useful to

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<sup>69</sup> *S.A.S. v France*, Joint partly dissenting opinion of Judges Nussberger and Jäderblom, [5].

<sup>70</sup> *Ibid.* See also, *mutatis mutandis*, the Partly concurring and partly dissenting opinion of Judge O’Leary in *Affaire Ebrahimian c. France*, Application no. 64846/11, 26 November 2015 (in French).

<sup>71</sup> *Ibid.* at para. [6].

<sup>72</sup> *Ibid.* at para. [7].

<sup>73</sup> *Ibid.* at para. [9].

<sup>74</sup> Berry, “*S.A.S. v France*: Does Anything Remain of the Right to Manifest Religion?”.

<sup>75</sup> L. Vickers, “Conform or Be Confined: *S.A.S. v France*”, Oxford Human Rights Hub, 8 July 2014.

<sup>76</sup> Chaib and Peroni, “*S.A.S. v France*: Missed Opportunity to Do Full Justice”.

<sup>77</sup> E. Brems, “*S.A.S. v France* as a Problematic Precedent”, Strasbourg Observers, 9 July 2014.

<sup>78</sup> *Ibid.*

examine the argument that ‘living together’ is unjustifiable because it ‘does not find expression’ in the Convention.<sup>79</sup> Likewise, in their joint dissenting opinion Judges Nussberger and Jäderblom argued that protecting ‘living together’ cannot ‘readily be reconciled with the Convention’s restrictive catalogue of grounds of interference with basic human rights’.<sup>80</sup> That is a familiar textualist argument that has been commonly employed in constitutional and legal theory to criticise judicial decisions reading principles outside the text of the Convention. Fidelity to the text and to the intentions of the drafters of the Convention is deemed important both for reasons of legal certainty and for more specific reasons of international law, including the seminal principle that states should be cognisant of the obligations they undertake by signing a treaty like the ECHR.<sup>81</sup>

However, it is noteworthy that pluralism, tolerance and broadmindedness – which the dissenting Judges Nussberger and Jäderblom juxtaposed to ‘living together’ in order to justify stronger protection for the right to private life and freedom of religion of Muslim women<sup>82</sup> – are not amongst the legitimate grounds of interference with human rights included in the Convention, either. Thus, a textualist argument for the interpretation of the Convention would be inadequate to explain why some extra-textual principles should be taken into consideration in the examination of the scope of our rights, whereas others should not. This is not to suggest that the rights of the applicant in *S.A.S.* have been sufficiently protected under the doctrine developed by the ECtHR. But it is a matter of principle that if ‘living together’ has to be treated differently compared to other extra-textual moral principles, such as solidarity and tolerance, then the argument cannot be solely based on the text of the ECHR without contradiction.

Yet the argument that ‘living together’ is unjustifiable because it does not find expression in the Convention could be broader than textualism. It could be argued, for instance, that ‘living together’ should not be able to justify limitations on rights because the drafters of the Convention did not intend to protect it as a legitimate aim capable of justifying limitations on rights. But that would be another difficult argument to pursue. Intentionalist theories of interpretation have trouble explaining which intentions of the drafters of the Convention count and to what extent. For instance do abstract intentions, such as that fundamental interests must be equally protected, count as much as concrete ones, such as that specific acts that treat people differently, such as a ban affecting the public wearing of specific religious symbols, must be prohibited?<sup>83</sup> Within different levels of abstraction the choice of the relevant intention cannot but depend on a controversial political theory, such as a theory of human rights or representative democracy that would, for instance, make concrete,

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<sup>79</sup> Berry, “*S.A.S. v France: Does Anything Remain of the Right to Manifest Religion?*”. Also C. Evans and T. Baker, “Religion and Human Rights: Principles and Practice” in F. Cranmer, M. Hill, C. Kenny and R. Sandberg (eds.), *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe* (Cambridge 2016), ch. 13, 199.

<sup>80</sup> *S.A.S. v France*, Joint partly dissenting opinion of Judges Nussberger and Jäderblom, at [25].

<sup>81</sup> M. Shaw, *International Law* (7<sup>th</sup> Ed., Cambridge 2014) 66-69.

<sup>82</sup> *S.A.S. v France*, at paras. [13]–[14].

<sup>83</sup> R. Dworkin, *A Matter of Principle* (Oxford 1985), 48-49.

rather than abstract, intentions decisive for the interpretation of the Convention. So, choosing which drafters' intentions count requires that some part of our argument stands 'on its own in political or moral theory' about the object and purpose of the Convention.<sup>84</sup> Of course this is not to suggest that the text of the ECHR or the intentions of its drafters are irrelevant in resolving interpretative challenges. It just shows that intentionalism, just like non-intentionalist theories of interpretation, requires independent normative foundation.<sup>85</sup>

It is no coincidence that textualist and intentionalist theories have been overshadowed in the context of the Convention by an evolutive or 'living instrument' interpretation that the ECtHR has been famously developing for decades.<sup>86</sup> The 'living instrument' interpretation has helped the ECtHR recognise and protect various rights outside the text of the Convention, including among others the right to work,<sup>87</sup> equal rights to legal recognition of same-sex civil partnerships,<sup>88</sup> and equal rights for children born out of wedlock.<sup>89</sup> Moreover, it has been argued that rather than an endorsement of moral relativism through giving prominence to the current consensus between states, the 'living instrument' approach has actually been used to improve the ECtHR's understanding of the principles underlying our rights under the Convention, 'regardless of how states themselves apply these principles'.<sup>90</sup> Although it is impossible to examine the evolution and implications of the 'living instrument' interpretation in more detail here, the point that mainly concerns our analysis should be clear. Even if textualism and intentionalism, as theories of interpretation, fail to fit morally important parts of our shared legal practice under the Convention, that does not say anything by itself about the justifiability of 'living together' as a legitimate ground of state limitations on human rights. Rather, its justifiability depends on substantive considerations about our protected rights and their moral truth, not on the text of the Convention, or on aggregating what most states do or prefer.

Critics of 'living together' are right to emphasise the lack of meaningful guidance with regard to the scope and implications of 'living together'. Both the majority of the ECtHR in *S.A.S.* and the Resolution 2076 of the Council of Europe employ 'living together' as a portmanteau concept covering various different principles, including solidarity, fraternity, civility and mutual respect. Many of those extra-textual principles are familiar from the jurisprudence of the ECtHR. In fact, mutual respect, toleration and solidarity have been repeatedly employed to outline the scope of various rights, including freedom of religion and freedom of assembly and association.<sup>91</sup> In *Karaduman*, the ECtHR found that limitations on the wearing of

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<sup>84</sup> *Ibid.* at p. 54.

<sup>85</sup> Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, p. 68.

<sup>86</sup> Bjorge, *Domestic Application of the ECHR*, pp. 131-54.

<sup>87</sup> *Sidabras and Džiautas v Lithuania*, Application nos. 55480/00 and 59330/00, 27 July 2004, [48].

<sup>88</sup> *Vallianatos and Others v Greece*, Application nos. 29381/09 and 32684/09, 7 November 2013 (Grand Chamber). Also Trispiotis, "Discrimination and Civil Partnerships", pp. 351-57.

<sup>89</sup> *Genovese v Malta*, Application no. 53124/09, 11 October 2011.

<sup>90</sup> Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, p. 75.

<sup>91</sup> N. Bratza, "The 'Precious Asset': Freedom of Religion Under the European Convention on Human Rights" (2012) 14 *Ecclesiastical Law Journal* 256; C. McCrudden, "Religion, Human Rights, Equality and the Public Sphere" (2011) 13 *Ecclesiastical Law Journal* 26.

religious symbols in universities are justified provided that they aim to ensure ‘harmonious coexistence’ between students of various faiths.<sup>92</sup> In *Refah Partisi*, Turkey’s restrictions on the activities of an Islamist political party were found compatible with the Convention for reasons of democratic pluralism<sup>93</sup> and ‘mutual tolerance between opposing groups.’<sup>94</sup> In *Supreme Holy Council*<sup>95</sup> and in *Holy Synod of the Bulgarian Orthodox*,<sup>96</sup> the ECtHR found that compelling a divided religious community to a single leadership violated the rights to freedom of association and freedom of religion because pluralism requires resolving problems through dialogue, rather than violence.<sup>97</sup> In *I.A.*, it was held that ‘pluralism, tolerance and broadmindedness’<sup>98</sup> could justify state restrictions on ‘unwarranted and offensive’ attacks on matters regarded as sacred by Muslims.<sup>99</sup> In *Perinçek*, which examined the conviction of a Turkish politician for denying the Armenian genocide, in his dissenting opinion Judge Nussberger argued that the Swiss criminal ban on denial of the genocide constitutes a justifiable ‘choice of society’ whose aim is to express ‘solidarity with victims of genocide and crimes against humanity’.<sup>100</sup>

Their factual differences notwithstanding, those cases flesh out the connections that the ECtHR draws between principles such as ‘pluralism, tolerance and broadmindedness’<sup>101</sup> and the role of the Convention as ‘an instrument designed to maintain and promote the ideals and values of a democratic society’.<sup>102</sup> Time and again the ECtHR has held that the underlying values of the Convention are interlaced with a European ‘common heritage of political tradition, ideals, freedom and the rule of law’.<sup>103</sup> According to the jurisprudence of the ECtHR, a ‘constant search for a balance’ between individual fundamental rights constitutes the foundation of a democratic society.<sup>104</sup> Those interconnections between human rights and fundamental moral principles underlying liberal democracy are characteristic of the gradual move

<sup>92</sup> *Karaduman v Turkey*, Application no. 16278/90, 3 May 1993, p. 108.

<sup>93</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, Application nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 (Grand Chamber), [91].

<sup>94</sup> *Ibid.*

<sup>95</sup> *Supreme Holy Council of the Muslim Community v Bulgaria*, Application no. 39023/97, 13 December 2004.

<sup>96</sup> *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v Bulgaria*, Application nos. 412/03 and 35677/04, 22 January 2009.

<sup>97</sup> *United Communist Part of Turkey and Others v Turkey*, Application no. 133/1996/752/951, 30 January 1998 (Grand Chamber), [42]–[43]; *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania*, Application no. 46626/99, 3 February 2005, [27]; *Tsonev v Bulgaria*, Application no. 45963/99, 13 April 2006, [48]; *Christian Democratic People’s Party v Moldova (No. 2)*, Application no. 25196/04, 2 February 2010, [24]. Exceptions to the rule include safeguarding democracy and protecting the country’s electoral system. See *Refah Partisi v Turkey*, *op. cit.* at para. [100]; *Gorzelik v Poland*, Application no. 44158/98 17 February 2004 (Grand Chamber), [88]–[106].

<sup>98</sup> *Handyside v United Kingdom*, Application no. 5493/72, 7 December 1976, [49].

<sup>99</sup> *I.A. v Turkey*, Application no. 42571/98, 13 September 2005, [28]–[30].

<sup>100</sup> *Perinçek v Switzerland*, Application no. 27510/08, 15 October 2015 (Grand Chamber), Partly concurring and partly dissenting opinion of Judge Nussberger, p. 119.

<sup>101</sup> *Şahin v Turkey*, at para. [108].

<sup>102</sup> *Soering v United Kingdom*, Application no. 14038/88, 7 July 1989, [87]; *Kjeldsen, Busk Madsen and Pedersen*, Application nos. 5095/71, 5920/72 and 5926/72, 7 December 1976, [53].

<sup>103</sup> *United Communist Party of Turkey v Turkey*, at para. [45].

<sup>104</sup> *Chassagnou and Others v France*, Application nos. 25088/94, 28331/95 and 28443/95, 24 April 1999 (Grand Chamber), [113].

in European political and legal discourse from an anachronistic conception of toleration as *modus vivendi* to a balance between what Habermas calls shared citizenship and cultural difference.<sup>105</sup> In the context of the Convention that move has been associated with the decisive emergence, if not consolidation, of concepts such as respectful coexistence of different faiths, social inclusion, as well as mutual respect,<sup>106</sup> in the phraseology and interpretive tests of the ECtHR.<sup>107</sup>

But is ‘living together’ just another hue of the emphasis of the Convention on the relationship between human rights and democracy? Does ‘living together’ possess distinctive meaning and value? Recall that in *S.A.S.* the French government entwined ‘living together’ with the liberal democratic ideals of mutual respect and solidarity. However, it also stressed its connections with open communication and socialisation, or with what the French *Conseil d’État* calls ‘non-material dimensions of public order’.<sup>108</sup> Those links of ‘living together’ with the fundamentals of social interaction – with our minimum social duties – can be usefully traced to the socio-historical pedigree of the republican ideal of fraternity in France.<sup>109</sup>

In the French context, fraternity has been historically connected with the relationship between citizenship and national culture, and more specifically with the consolidation and protraction of a cohesive and self-governing democratic polity. For republican theorists socialisation into national culture is one of the basic determinants of Frenchness,<sup>110</sup> not least because mutual identification and solidarity are essential for a polity that wishes to remain ‘truly democratic’.<sup>111</sup> The gist of the idea is that democratic self-government requires commitment to political citizenship and popular sovereignty; that commitment depends on social structures capable of systematically fostering trust, solidarity, and civility amongst citizens.<sup>112</sup> As Habermas argues, all we can do is ‘suggest to the citizens of a liberal society that they should be willing to get involved on behalf of fellow citizens whom they do not know and who remain anonymous to them and that they should accept sacrifices that promote common interests.’<sup>113</sup> The springs of the political virtues of solidarity and fraternity are therefore pre-political: they are the fruits of socialisation, which entails a sense of being accustomed ‘to the practices and modes of thought of a free political culture.’<sup>114</sup>

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<sup>105</sup> J. Habermas, *Europe: The Faltering Project* (Cambridge 2009), 66-70.

<sup>106</sup> That sense of mutual respect is not equivalent to appraising beliefs or qualities we dislike. Rather, it is closer to what Stephen Darwall calls ‘recognition’ respect, namely that we should recognise and be willing to be constrained by the moral requirements placed on our behaviour by the existence of other persons. See S. Darwall, “Two Kinds of Respect” (1977) 88 *Ethics* 38. Also J. Raz, *Value, Respect and Attachment* (Cambridge 2001), 158-64. On how social constructions influence the development of our sense of disrespect see L. Green, “Two Worries About Respect for Persons” (2010) 120 *Ethics* 212.

<sup>107</sup> L. Zucca, “Freedom of Religion in a Secular World” in R. Cruft, S. M. Liao and M. Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford 2015), ch. 21, 399-401.

<sup>108</sup> *S.A.S. v France*, at para. [25].

<sup>109</sup> *Conseil d’Etat*, Report (n 23) 95-122.

<sup>110</sup> C. Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford 2008), 177.

<sup>111</sup> *Ibid.*, at p. 181.

<sup>112</sup> *Ibid.*, at p. 178.

<sup>113</sup> J. Habermas, “Pre-political Foundations of the Democratic Constitutional State?” in F. Schuller (ed.), *The Dialectics of Secularization* (San Francisco 2006), 30.

<sup>114</sup> *Ibid.*



For revolutionaries cultural membership was not an end in itself, but played an important instrumental role in forging political citizenship. National culture functions primarily as ‘a civic and democratic bond, the foundation for the affective solidarity binding together the “community of citizens”’.<sup>115</sup> According to Laborde, even the very idea of the nation ‘was primarily a call for social unity and the abolition of socially divisive differences’.<sup>116</sup> The republican conception distinguishes therefore fraternity from nationalism and nationhood.<sup>117</sup> Rather, the ideal makes better sense in connection with other fundamental values of political morality such as, primarily, equality.<sup>118</sup> For, whereas factionalism and corruption lead to inequality, the indivisibility of the French republic could safeguard equal citizenship. At least in the French republican constitutional tradition, fraternity functions as, and reflects, a distinctive social bond; a non-instrumental value central to a philosophy of society whose aim is to tie cultural association with democratic citizenship.

Fraternity, however, seems to be at risk now. Various reasons have been offered to explain the rise of critical approaches to national identity and the increasing difficulty of civic virtue and loyalty to the state to mobilise citizens. Those range from socio-economic inequalities and globalisation to the fact that ‘markets’ and the ‘power of bureaucracy’ are purging solidarity of many spheres of our common life.<sup>119</sup> Although it is not possible to further discuss those reasons here, a combination of those factors probably does fuel the increasingly worrying phenomenon of religious radicalisation. Importantly though, those reasons also explain why post-secular societies have to be careful of the plurality of cultural sources that furnish the conscience of their citizens, as well as their conception of solidarity.<sup>120</sup> Meanwhile, given that social insecurity disproportionately affects the worst-off, the progressive and pro-egalitarian parts of French politics, fearful of the exclusive nationalism of the increasingly more successful far-right rhetoric, have placed significant emphasis on fraternity and successful integration. It is within that very context that the full-face veil was seen as a defiant assertion of a separate identity – one of the symptoms, rather than causes, of the ongoing erosion of the French model of social integration and ‘the discredit of universalist state institutions’.<sup>121</sup> The state ban on the wearing of headscarves – which started from schools as the paradigm labs of integration – cannot be fully understood outside the context of a society anxious about the disintegration of

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<sup>115</sup> Laborde, *Critical Republicanism*, p. 178.

<sup>116</sup> *Ibid.*, at p. 179.

<sup>117</sup> On the distinction between nationality, national identity and citizenship see B. Barry, *Culture and Equality* (Cambridge 2001), 77-81.

<sup>118</sup> Commission de Réflexion sur L'Application du Principe de Laïcité dans la République, *Rapport au Président de la République*, translated in R. O'Brien, *The Stasi Report: The Report of the Committee of Reflection on the Application of the Principle of Secularity in the Republic* (Buffalo, NY 2005), 36-46. Specifically on the relationship between republicanism and equality see also S. Hazareesingh, *Political Traditions in Modern France* (Oxford 1994), 65-98.

<sup>119</sup> Habermas, “Pre-political Foundations of the Democratic Constitutional State?”, pp. 45-46.

<sup>120</sup> O. Roy, *Secularism Confronts Islam* (New York 2007), 65-90.

<sup>121</sup> Laborde, *Critical Republicanism*, p. 193.

its model of integration; outside the diffusion of the fear that traditional authorities, patriotism and civic virtue are being discredited.<sup>122</sup>

Of course, that model of social integration has been repeatedly criticised for relying on a contestable interpretation of the French common culture,<sup>123</sup> for placing too much emphasis on majoritarian preferences, if not stereotypes;<sup>124</sup> and for obscuring the fact that patriotism and solidarity can undertake many different forms of expression.<sup>125</sup> Despite those worries, the French response to the risks of social disintegration has been repeatedly criticised for being reactive, and for focusing on ‘revalorization’ of citizenship and the ‘reassertion of the validity and authority of the republican order’.<sup>126</sup> Efforts to re-establish institutional structures tailored to bolster solidarity, integration, civility and common culture have been central to that response, given the potential links between the discredit of fraternity and radicalisation, crime and insecurity. Nothing in this argument suggests that those efforts are opportunistic and ill-planned; on the contrary, they reflect an ongoing debate in France that started almost twenty years ago.<sup>127</sup> But despite their importance and socio-historical pedigree, state efforts to strengthen solidarity and political citizenship should responsively recognise that some forms of expression and public conduct that may look alien to republican values, including full-face covers, often seek to redefine integration into, rather than challenge, liberal democracy.

The next section will revisit that last point, but it must be clear by now that in the French constitutional theory and tradition the virtue of fraternity and the aim of a self-governing democratic polity are intricately entwined. The moral distinctiveness of ‘living together’ – as an inelegant restatement of the virtue of fraternity – lies into the connections of the concept with civic equality and the socio-historical challenges of social inclusion. Thus, precisely because of the well-established relationship between democracy and human rights under the Convention, the incorporation of ‘living together’ amongst the legitimate aims that state limitations on freedom of religion and respect for private life should pursue is neither novel nor surprising. But does that conclusion also entail that ‘living together’ should be able to justify wide-ranging coercive measures, such as blanket criminal prohibitions on the wearing of the full-face veil in public places? Or else, which interpretations of ‘living together’, as a legitimate way of strengthening a democratic self-governing polity, are compatible with the moral principles justifying the ECHR as a whole?

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<sup>122</sup> *Ibid.*, at p. 195.

<sup>123</sup> M. Hunter-Heinin, “Why the French Don’t Like the Burqa: Laïcité, National Identity and Religious Freedom” (2012) 61 *I.C.L.Q.* 613, 628-34.

<sup>124</sup> E. Brems, S. O. Chaib and L. Peroni, “Improving Justice in the ‘Burqa Ban’ Debates: Group Vulnerability and Procedural Justice” in M. Foblets, K. Alidadi, J. Nielsen and Z. Yanasmayan (eds.), *Belief, Law and Politics: What Future for a Secular Europe?* (Surrey 2014), 265-73.

<sup>125</sup> C. Taylor, “The Politics of Recognition” in A. Gutman (ed.), *Multiculturalism* (Princeton, NJ 1994), 25-75.

<sup>126</sup> Laborde, *Critical Republicanism*, pp. 195-96.

<sup>127</sup> M. Akan, “Laïcité and Multiculturalism: The Stasi Report in Context” (2009) 60 *British Journal of Sociology* 237.

#### IV. TWO INTERPRETATIONS OF ‘LIVING TOGETHER’

Do the Convention and the ECtHR allow states to decide not only what rights people have, but also whether ‘living together’ is inherently valuable, why it is so, and to what extent this can be enforced? We cannot resolve that question as quickly as a libertarian approach might suggest: we cannot just contend that people should be free to engage in any kind of conduct in public, including wearing any clothing they might wish. That would be at odds with the familiar idea that collective goods such as public order can generate specific social duties on others which are often reflected in state prohibitions on various forms of individual conduct in public,<sup>128</sup> such as nudity.<sup>129</sup> As the applicant herself noted in *S.A.S.*, protection of ‘living together’ does sometimes involve coercion when, for instance, security reasons are implicated. Crucially, the applicant maintained that she is happy to remove her full-face veil whenever she has to undergo identity checks in airports or banks without arguing that those instances of state coercion violate her rights to respect for private life and freedom of religion.<sup>130</sup>

The idea of ‘living together’ may well be over-broad and unclear,<sup>131</sup> but careful reading of the arguments of the French government – whose conception of ‘living together’ influenced the majority’s opinion in *S.A.S.* – unveils an interpretation of ‘living together’ which is more dynamic than mere conservation of a given state of affairs. The idea entails that the government has an interest in protecting our common social life through requiring its members to acknowledge certain values, such as fraternity and the minimum requirements of civility facilitating social interaction, in their individual decisions.<sup>132</sup> It seems therefore that both the French government and the ECtHR and the Council of Europe embrace a broader interpretation of civility that connects the idea with broader questions of political justice and fair cooperation. Their approach often seems congenial to Rawls’s argument that civility entails that when deciding on constitutional essentials or matters of basic justice ‘reasonable citizens [should] ideally think of themselves as if they were legislators following public reason’, namely reasons that are sufficient and reasonably acceptable by other free and equal citizens.<sup>133</sup> Civility turns to mean more than how we dress in public.

But that dynamic interpretation of ‘living together’ is platitudinous in the legal context of *S.A.S.* Throughout the consultation procedure preceding the enactment of the French blanket ban there was no disagreement on the value of fraternity, or on the importance of open interpersonal relationships. Crucially, neither the applicant nor the third-party interveners argued (or implied) before the ECtHR that the ‘minimum

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<sup>128</sup> *Arrowsmith v United Kingdom*, Application no. 7050/75, 12 October 1978, [19]; *Kalaç v Turkey*, Application no. 20704/92, 1 July 1997, [27]; *Şahin v Turkey*, at paras. [105] and [121].

<sup>129</sup> *Gough v United Kingdom*, Application no. 49327/11, 28 October 2014, [171]–[176].

<sup>130</sup> *S.A.S. v France*, at paras. [12]–[13].

<sup>131</sup> *Ibid.*, Joint partly dissenting opinion of Judges Nussberger and Jäderblom, at paras. [5]–[7].

<sup>132</sup> *S.A.S. v France*, at para. [153].

<sup>133</sup> J. Rawls, ‘The Idea of Public Reason Revisited’, in J. Rawls (ed.), *The Law of Peoples* (Cambridge, MA 1999) 136–37. See also G. Webber, *The Negotiable Constitution* (Cambridge 2009), 185; J. Finnis, ‘On ‘Public Reason’’ (2007) Oxford Legal Studies Research Paper No. 1/2007, 6.

requirements of life in society' are not worthy of protection.<sup>134</sup> The disagreement did not concern therefore the values underlying 'living together'. Moreover, recall that the applicant stressed her willingness to remove her full-face veil whenever she visits a doctor, whenever she wants to socialise and whenever she has to undergo security checks in banks, airports and various other public places where such checks might be required.<sup>135</sup> But if the parties do not dispute that sometimes securing 'living together' might justify coercive measures, and do not doubt the values underlying 'living together' per se, then what was their disagreement about?

The statement that the French government has an interest in securing 'living together' is ambiguous because it alludes to two different and antagonistic goals.<sup>136</sup> The first is the goal of responsibility. A state may aim that its citizens treat social interaction as a matter of moral importance, that they recognise that a democratic state is founded on certain values, including solidarity and fraternity, and that they decide reflectively whether particular ways of conduct are respectful towards others or not. The second is the goal of conformity<sup>137</sup> or homogeneity.<sup>138</sup> A state may compel its citizens to embrace forms of social interaction that the majority believes best capture certain values, such as fraternity and civility, and that they manifest their religion in public only in ways that the majority considers appropriate in virtue of the 'right of others to live in a space of socialisation which makes living together easier.'<sup>139</sup> I think that the disagreement that the ECtHR had to resolve in *S.A.S.* concerns which of the two state goals, responsibility or conformity, is compatible with our equal entitlements to respect for private life and freedom of religion in a liberal democracy.

As Dworkin has noted, the goals of responsibility and conformity are not only different, but also antagonistic in the following way.<sup>140</sup> The state goal of responsibility entails that citizens should be left free to decide how they may behave because this is what a society committed to personal liberty must allow. Conversely, conformity may deny citizens that decision. Through the conformity conception of 'living together' a state may often demand that its citizens act in violation of their conscience. Citizens may also be discouraged from developing their own account of 'living together' in as much compliance as possible with their religious beliefs.

The legislative history of the ban on the full-face veil in France echoes those two different goals. Before the French Parliamentary Commission and the *Conseil d'État* a stark contrast emerged between 'soft' approaches (e.g. raising awareness,

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<sup>134</sup> The third-party interveners emphasised that the feelings of fear and uneasiness associated with the blanket prohibition are not targeted to the full-face veil per se, but to the philosophy associated with it, which is seen as incompatible with the values underlying 'living together'; *S.A.S.*, at paras. [89]–[105].

<sup>135</sup> *Ibid.*, at paras. [12]–[13].

<sup>136</sup> In abortion cases Dworkin draws a comparable, albeit different, distinction between responsibility and conformity in order to interpret the state interest in 'protecting human life'. See R. Dworkin, *Freedom's Law* (Oxford 1996), 95-96. Also R. Dworkin, *Is Democracy Possible Here?* (Princeton, NJ 2006), 78-79.

<sup>137</sup> Dworkin, *Freedom's Law*, p. 95.

<sup>138</sup> M. Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (Cambridge, MA 2012), 13-19.

<sup>139</sup> *S.A.S. v France*, at para. [122].

<sup>140</sup> Dworkin, *Freedom's Law*, pp. 95-96.

strengthening education for both genders, a declaration against oppression of women) and ‘hard’ ones that included criminalisation of the wearing of full-face veils in public.<sup>141</sup> That contrast mirrors the antagonism between exactly those goals of responsibility and conformity. Likewise, the applicant’s submission followed an interpretation of ‘living together’ through the lens of responsibility. Through a series of carefully framed qualifications (i.e. no systematic wearing of the full-face veil in public, willingness to remove it for security checks) the applicant attempted to convince the ECtHR that she takes social interaction as a matter of moral importance. However, according to her submission, reconciling her religious commitments with the prevailing social norms of the French society should be part of her own personal responsibility.

I have to clarify an important point here. The distinction between responsibility and conformity is not to suggest that every rule designed to secure conformity in our common social practices is ipso facto morally wrong. Demanding conformity in urban planning, environmental protection or prohibition of violence is right and expectable in a just and caring political community. However, conformity to ‘virtuous citizenship’ and civility is different because, as Laborde rightly notes, ‘the exact content’ of those elements of our common culture that ‘immigrants are expected to endorse’ is not sufficiently specified.<sup>142</sup> It is unclear and widely debated, for instance, how a religious woman, anxious to comply with a society’s secular norms about good citizenship, should behave in public.<sup>143</sup> There is no comparable disagreement in the case of the other values I mentioned above. It could not be plausibly argued that treating people as equals is at variance with equal protection against unlawful violence, or that it is unclear whether respect for future generations requires collective action to secure environmental protection and sustainable urban development.

There is an additional reason connected to that last point. A political community that requires us to pay taxes, to respect scarce environmental resources, to wear clothes in public and to drink no more than a small glass of wine if we are to drive home afterwards does not deny our personal responsibility to define ethical value for ourselves.<sup>144</sup> None of those rules aims to usurp our responsibility to define success in our lives, despite having serious consequences on how we design our lives. By contrast, conformity to virtuous citizenship reflects an ‘increasingly moralistic approach’ to the perceived failures of the national model of integration, which are worryingly attributed to the corrupt disposition of ‘ungrateful’ immigrants, without paying sufficient attention to the effects of their socio-economic exclusion.<sup>145</sup>

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<sup>141</sup> S.A.S. v France, at paras. [17] and [22]. Also S. Mancini, “The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence” (2009) 30 *Cardozo Law Review* 2629, 2643-49.

<sup>142</sup> Laborde, *Critical Republicanism*, p. 209.

<sup>143</sup> E. Brems, “Introduction” in E. Brems (ed.), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge 2014), 4-15; S. Leader, “Freedom and Futures: Personal Priorities, Institutional Demands and Freedom of Religion” (2007) 70 *M.L.R.* 713. On the relationship of different models of secularism with religious manifestation see R. Leigh and I. Ahdar, “Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away” (2012) 75 *M.L.R.* 1064, 1068-71.

<sup>144</sup> On personal and political morality, see Dworkin, *Justice for Hedgehogs*, pp. 327-31.

<sup>145</sup> Laborde, *Critical Republicanism*, pp. 208-09.

Human rights protect us from exactly those kinds of majoritarian moralistic preferences, that is, preferences that some people should suffer disadvantage in the distribution of goods or opportunities just because of who they are or what they believe, or because others care less for them.<sup>146</sup> So, to return to our question, does a policy that aims to secure our common social life through demanding conformity to the majority's interpretation of the values underlying 'living together' violate our rights to freedom of religion, respect for private life, and freedom from discrimination under the Convention? In the specific case where a government imposes a blanket ban on full-face veils in public, the answer has to be affirmative. Without questioning the importance of fraternity and civility, demanding conformity in order to secure those virtues suffers from significant problems. Firstly, despite its neutral formulation, the blanket ban on full-face covers is suspect, to use a familiar term from discrimination theory,<sup>147</sup> because of its disparate impact on Muslim women<sup>148</sup> who have to choose between their faith and facing criminal sanctions. Secondly, and perhaps more importantly, the argument that concealing our face in public is so inescapably incompatible with civility that its criminal prohibition is imperative is questionable. As the dissenting judges argued, it is a mystery how we can distinguish between 'other accepted practices of concealing the face, such as excessive hairstyles or the wearing of dark glasses or hats' and the wearing of the full-face veil.<sup>149</sup> In fact, familiar activities such as skiing, driving a motorcycle with a helmet, or wearing costumes in carnivals pose no problems for social interaction. As Nussbaum notes, during the freezing Chicago winters people are used to cover their faces with scarves and hats but that is not considered troubling for transparency, solidarity or security.<sup>150</sup> But if the notion of civility cannot be extended to cover those practices, then why is wearing the full-face veil different?

Those difficulties are complemented by the fact that commitment to pluralism and tolerance is compatible with a plurality of forms of public conduct; it is, in other words, at variance with conformity. More specifically, as the ECtHR has recognised in cases under the right to respect for private life, although there is 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life"',<sup>151</sup> respect for the right to private life entails a right not to

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<sup>146</sup> Dworkin, "Rights as Trumps" in J. Waldron (ed.), *Theories of Rights* (New York 1984), ch. 7, at 158; D. Hellman, "Equal Protection in the Key of Respect" (2014) 123 *Yale Law Journal* 3036; Letsas, "Strasbourg's Interpretive Ethic", pp. 538-41; J. Waldron, "Pildes on Dworkin's Theory of Rights" (2000) 29 *J.L.S.* 301.

<sup>147</sup> K. Lippert-Rasmussen, *Born Free and Equal? A Philosophical Enquiry Into the Nature of Discrimination* (Oxford 2014), 65-68; O. De Schutter, *The Prohibition of Discrimination under European Human Rights Law* (European Commission 2011), 17; D. Schiek, L. Waddington and M. Bell, *National, Supranational and International Non-Discrimination Law* (Oxford 2007), 124.

<sup>148</sup> S. R. Bagenstos, "Rational Discrimination and the Politics of (Disability) Civil Rights" (2003) 89 *Valparaiso Law Review* 825; "Anti-Discrimination and Accommodation" (2002) 115 *Harvard Law Review* 642; C. Jolls, "Accommodation Mandates" (2000) 53 *Stanford Law Review* 223.

<sup>149</sup> *S.A.S. v France*, Joint partly dissenting opinion, at para. [13].

<sup>150</sup> Nussbaum, *The New Religious Intolerance*, p. 106.

<sup>151</sup> *Peck v United Kingdom*, Application no. 44647/98, 28 January 2003, [57]. See also *Bigaeva v Greece*, Application no. 26713/05, 28 May 2009, [23]; *Niemietz v Germany*, Application no. 13710/88, 16 December 1992, [29].

interact with others in public<sup>152</sup> – a ‘right to be an outsider’.<sup>153</sup> Moreover, in cases involving registration rights of religious groups the ECtHR has held that treatment with equal respect commands an integrationist approach that does not restrict pluralism by eliminating the cause of the tension<sup>154</sup> but ensures tolerance ‘between the vast majority and the small minority.’<sup>155</sup> In cases on public expression of disturbing views, such as *Mouvement Raëlien Suisse v Switzerland*<sup>156</sup> (involving advocacy of ‘geniocracy’ and sensual meditation) and *Stoll v Switzerland*<sup>157</sup> (involving dissemination of confidential information about compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts) the ECtHR consistently holds that the Convention protects offensive, shocking or disturbing opinions because ‘such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”’.<sup>158</sup> In the recent *Perinçek v Switzerland* the ECtHR held that the applicant’s criminal conviction for denying the Armenian genocide was disproportionate – and therefore in violation of his right to freedom of expression – because his statements ‘cannot be regarded as affecting the dignity of the Armenian community’ and, most notably, because he was censured ‘for voicing an opinion that diverged from the established ones in Switzerland’.<sup>159</sup> Despite their factual differences all those cases demonstrate a well-established commitment to reasonable pluralism not as a value per se,<sup>160</sup> but as prophylaxis against illegitimate coercion, that is, against coercion grounded on impermissible kinds of reason such as majoritarian preferences that some people should enjoy less because of their beliefs or religious affiliation.

To be clear, a political community must somehow decide collectively, through courts or legislatures, whether wearing the full-face veil violates the personal responsibility of women to make their choice of ethical values independently and authentically. If the full-face veil does upset women’s dignity by denying them independence and authenticity, its ban does not violate respect for private life or religious freedom because no plausible interpretation of those rights could justify protection of practices that destroy their very point.<sup>161</sup> But that was not the case in *S.A.S.* Recall that the ECtHR accepted that the interpretations of the niqab and the burqa as symbols of hostility<sup>162</sup> and subservience<sup>163</sup> were not the only available,<sup>164</sup>

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<sup>152</sup> See, *mutatis mutandis*, *Chassagnou v France*, at para. [117], where the ECtHR held that freedom of association under Article 11 ECHR includes the right not to join an association.

<sup>153</sup> *S.A.S. v France*, Joint partly dissenting opinion, at para. [8].

<sup>154</sup> *Serif v Greece*, Application no. 38178/97, [53].

<sup>155</sup> *S.A.S. v France*, Joint partly dissenting opinion, at para. [14].

<sup>156</sup> Application no. 16354/06, 13 July 2012 (Grand Chamber), [48].

<sup>157</sup> Application no. 69698/01, 10 December 2007 (Grand Chamber), [101].

<sup>158</sup> *Mouvement Raëlien v Switzerland*, at para. [48]; *Stoll v Switzerland*, at para. [101].

<sup>159</sup> *Perinçek v Switzerland*, Application no. 27510/08, 15 October 2015 (Grand Chamber), [280].

<sup>160</sup> Rawls has argued that a plurality of conflicting comprehensive doctrines, including religious, philosophical, and moral, is a ‘fact’ of well-ordered constitutional democracies. See Rawls, “The Idea of Public Reason Revisited”, pp. 131-32.

<sup>161</sup> Art. 17 ECHR prohibits abuse of rights.

<sup>162</sup> *S.A.S. v France*, at para. [25].

<sup>163</sup> *Ibid.* at [17].

and rejected the argument that the full-face veil flouts gender equality and human dignity.<sup>165</sup> However, banning the full-face veil because that would satisfy the majority's conception of what constitutes a good and respectful life is at odds with respect for our ethical independence. It contradicts seminal principles underlying the rights to freedom of expression and freedom of religion, such as that beliefs that offend, shock or disturb ought to be protected because pluralism, tolerance and broadmindedness would be meaningless otherwise.<sup>166</sup>

But there is an additional problem. The interpretation of 'living together' pursued by the French government in order to justify the blanket ban sits uneasily with core principles of secularism. This is a significant challenge to a conformity interpretation of 'living together', not least because parts of the reasoning underlying the French ban,<sup>167</sup> along with arguments put forward by intervening human rights organisations<sup>168</sup> and the ECtHR itself,<sup>169</sup> seem to conceptually associate it with the constitutional implications of *laïcité*. Notwithstanding the plurality of 'ideal types' of *laïcité*,<sup>170</sup> according to its best interpretation in political theory and constitutional history it aims to reinforce civic equality and social inclusion,<sup>171</sup> rather than exclude certain people (e.g. Muslim women) from the public sphere on grounds of their religious conduct.<sup>172</sup> More than just an institutional principle of church-state separation, *laïcité* thus understood encompasses the state duty to treat religious and nonreligious people with equal respect<sup>173</sup> including a strong anti-discrimination principle that covers believers of all faiths.<sup>174</sup> As the General Assembly of the Council of Europe recognises in Resolution 2076 'secularity... properly interpreted and implemented, protects the possibility for the different beliefs, religious and non-religious, to coexist peacefully while all parties respect shared principles and values.'<sup>175</sup> Inclusive state neutrality and even-handed justice require seeking non-confrontational ways to tackle those issues by carefully assessing the different

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<sup>164</sup> The full-face veil carries a plurality of meanings for women, as research from Liberty and the Open Society Justice Initiative demonstrates. See *S.A.S. v France*, at [101] and [104] respectively.

<sup>165</sup> *S.A.S. v France*, at paras. [119]–[120].

<sup>166</sup> *Mouvement Raëlien Suisse v Switzerland*, at para. [48]; *Stoll v Switzerland*, at para. [101].

<sup>167</sup> *S.A.S. v France*, at paras. [17] and [31].

<sup>168</sup> *Ibid.* at para. [19] and paras. [103]–[105].

<sup>169</sup> *Ibid.* at para. [135].

<sup>170</sup> J. Baubérot, *Les Sept Laïcités Françaises* (Paris 2015), 16-18.

<sup>171</sup> J. Habermas, "Intolerance and Discrimination" (2003) 1 *I•CON* 2, 6-11.

<sup>172</sup> C. Laborde, "Secular Philosophy and Muslim Headscarves in Schools" (2005) 13 *Journal of Political Philosophy* 305; N. Choudhury, "From the Stasi Commission to the European Court of Human Rights: L 'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls" (2007) 16 *Columbia Journal of Gender and Law* 199, 235-44.

<sup>173</sup> The French Conseil constitutionnel has repeatedly stressed that very point. See e.g. Conseil constitutionnel, decision no. 2012-297 QPC of 21 February 2013, para. 5. Also, this was historically the constitutional role of the principle of *laïcité*. See R. Audi, "The Separation of Church and State and the Obligations of Citizenship" (1989) 18 *Philosophy & Public Affairs* 259, 295; P. Weil, "Why the French *Laïcité* is Liberal" (2009) 30 *Cardozo Law Review* 2699.

<sup>174</sup> D. McGoldrick, "Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?" (2011) 11 *H.R.L.R.* 451, 456. Apart from fair distribution that principle also entails intangible forms of symbolic social recognition. See C. Laborde, "Political Liberalism and Religion: On Separation and Establishment" (2013) 21 *Journal of Political Philosophy* 67.

<sup>175</sup> Parliamentary Assembly Council of Europe, Resolution 2076, at para. [6].



problems that public concealment of faces may pose to an orderly enjoyment of our common space.<sup>176</sup>

So, if we adopt a better interpretation of ‘living together’ in light of secularism – given its central constitutional role in a number of European states including France<sup>177</sup> – then the wearing of the full-face veil does not infringe the principle of ‘living together’ correctly understood. Just like *laïcité*, ‘living together’ is intended as a guarantee, not a limit, to freedom of religion.<sup>178</sup> But if solidarity and fraternity are indeed some of the foundational underpinnings of ‘living together’, as the ECtHR also accepted in *S.A.S.*, then the idea is intertwined with promotion of social inclusion in a way that it is hard to see how excluding veiled women from the public space can be compatible with its very essence. Ensuring that citizens treat social interaction as a matter of moral importance and decide reflectively without coercion seems the best way to promote solidarity and fraternity in our social communication and interaction. Grounding our normative commitment to religious pluralism on the fundamental moral principle that our common culture should be formed organically through individual ethical choices and not through collective action leads to the conclusion that, at least with regard to the wearing of full-face covers in the general public space, it is a responsibility, rather than a conformity, conception of ‘living together’ that has to be preferred.

Of course the state has an interest in fostering solidarity and fraternity, along with a plurality of other values potentially underlying ‘living together’, but that interest has to be satisfied in ways compatible with the fundamental political duty to treat everyone as an equal. Raising awareness, strengthening education for all sexes, and advancing our collective commitment against oppression of women – the ‘softer’ measures that parts of the French Parliamentary Committee recommended over a criminal ban<sup>179</sup> – do not usurp our personal responsibility to develop our public religious conduct in as much compliance with the civic values of a society as possible. Recall that if parts of the normative justification of the right to freedom of religion rest on the need to protect our ethical independence from coercive manipulation motivated by the moralistic preferences of the majority about how everybody should live, any answers on what the right to freedom of religion requires in more specific cases have to be fixed and defended by asking what that abstract right requires. Any contrary argument about the scope of the right to freedom of religion and its interaction with equality and discrimination has to fit that principle.

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<sup>176</sup> French *laïcité* has been associated with the organisation and separation of our common geographical space in order to secure peaceful coexistence of different faiths and freedom of conscience. See P. Weil, “Headscarf versus Burqa: Two French Bans with Different Meanings” in S. Mancini and M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival* (Oxford 2014), ch. 11, 213-15. For a similar argument in the American constitutional context see K. Greenawalt, “Secularism, Religion, and Liberal Democracy in the United States” (2009) 30 *Cardozo Law Review* 2383.

<sup>177</sup> T. Hammarberg, *Human Rights in Europe: No Grounds for Complacency* (Strasbourg 2011), 39-43.

<sup>178</sup> Laborde, “Secular philosophy and Muslim headscarves in schools”, p. 328.

<sup>179</sup> *S.A.S. v France*, at paras. [17] and [22].

## V. CONCLUSION

It is a significant development that both the jurisprudence of the ECtHR and the work of the Council of Europe have recently identified ‘living together’ as a legitimate dimension of the rights of others that could justify limitations on various rights secured by the ECHR. It could be safely assumed that ‘living together’ will be employed again in future cases in order to justify state limitations on the expressive dimensions of a plurality of rights, including our rights to privacy and freedom of thought, conscience and religion. But that probability should not be worrying per se. In fact, close inspection of the jurisprudence of the ECtHR suggests that the emergence of ‘living together’ is less surprising than initially thought. This article argued that ‘living together’ is closely linked to the republican ideal of fraternity, which reflects a particular kind of social bond between cultural association and democratic citizenship. Given the recurrent emphasis of the ECtHR on the links between liberal democracy and rigorous human rights protection, the emergence of ‘living together’ fleshes out an existing, yet distinctive, dimension of that relationship.

Answering whether protection of ‘living together’ constitutes a legitimate aim, and therefore whether it could be balanced against our rights, is crucial and timely. But even so, the inherent flexibility of ‘living together’ entails that its main contours could be secured in various ways. As a result, it becomes all the more important to explicate which of those ways are compatible with European human rights law, and which are not. Apart from the grounds of ‘living together’, this article argued that there is another, separate question concerning which interpretation of the concept is most compatible with fundamental moral principles underlying the rights to freedom of religion and respect for private life under the Convention. I distinguished between two main conceptions of ‘living together’, based on responsibility and conformity, and argued that a responsibility interpretation of ‘living together’ is more attractive, coherent and plausible, not least in cases of blanket bans on full-face veils in public. Important reasons of human rights theory such as that the function of rights is to exclude majoritarian moralistic preferences as grounds for coercive prohibitions support a responsibility conception. Other important legal reasons, stemming from the constitutional role of fraternity and laïcité as well as from legal coherence, also support a responsibility conception in the cases under consideration. Recall that a blanket criminal prohibition on the wearing of full-face veils in public is at odds with a responsibility interpretation of ‘living together’.

Both the ECtHR and the Council of Europe are right to insist on the importance of democracy and mutual respect for strong human rights protection. But it is those very values that require the ECtHR to interpret open-ended and fluid ideals such as ‘living together’ in ways that are least restrictive of individual rights. In various cases ranging from state limitations on freedom of political association<sup>180</sup> to denial of

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<sup>180</sup> *Christian Democratic People's Party v Moldova (No. 2)*, Application no. 25196/04, 2 February 2010, [24]; *Tsonev v Bulgaria*, Application no 45963/99, 13 April 2006, [48]; *United Communist Party v Turkey*, at paras. [42]–[43].

registration rights to specific religious groups<sup>181</sup> to public expression of disturbing views<sup>182</sup> to restrictions on various instantiations of our private life in public<sup>183</sup> reasons associated with fairness and equal respect have guided the ECtHR to successfully block moralistic majoritarian preferences from justifying limitations on rights. Instead of critiquing ‘living together’ as an arbitrary value under the Convention, it is time to imbue European human rights law with the interpretation that is most compatible with the fundamental values of mutual respect and equal protection that underlie human rights, political morality and the ECHR as a whole.

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<sup>181</sup> *Association Les Temoins de Jehovah v France*, Application no. 8916/05, 30 June 2011 (only in French); *Religionsgemeinschaft Der Zeugen Jehovas and Others v Austria*, Application no. 40825/98, 31 July 2008, [98].

<sup>182</sup> *Perinçek v Switzerland*, at para. [280].

<sup>183</sup> *Peck v United Kingdom*, at para. [57].