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Chapter 18

Gender Equality and the Scope of Religious Freedom in *S.A.S. v. France*

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In the landmark case of *S.A.S. v. France*,[1] the Grand Chamber of the European Court of Human Rights (ECtHR) held that the French blanket criminal ban on the wearing of full-face veils in public does not violate the European Convention on Human Rights (ECHR).[2] According to the majority of the ECtHR, the ban pursued the legitimate aim of "living together" and was also proportionate to this aim. Before the ECtHR, the applicant complained that the blanket ban violated her rights to freedom of religion and respect for private life, and she also argued that it constituted indirect discrimination on grounds of religion and gender. Ample evidence was presented to the ECtHR to show the dilemma of Muslim women in the applicant's position, who—as the dissenting opinion in *S.A.S.* put it—can either be faithful to their traditions and stay at home or break with them and go outside.[3]

Gender equality played a major part in the arguments of the parties before the ECtHR. On the one hand, the French authorities went to great lengths to convince the ECtHR that a blanket ban was essential to protect women from autonomy-diminishing practices and male domination. On the other hand, the applicant argued that wearing the full-face veil was her own personal choice and that the interpretations of the niqab and the burqa as symbols of hostility and subservience were not the only ones available.[4]

This chapter focuses on how the ECtHR examined the role of gender equality as a component of religious freedom and, as a result, how it constrained gender equality. It is argued that, by focusing on the right to freedom of religion, the ECtHR paid insufficient attention to the repercussions of the ban on full-face veils on gender equality and to the close normative links between gender equality and the prohibition of wrongful religious discrimination. The chapter reconfigures the decision in order to illustrate how the ECtHR should have interpreted the State intervention in question had gender equality, instead of religious freedom, been its main focus. The gender equality dimensions of the issue are markedly topical because post-*S.A.S.* several European States have been planning to enact prohibitions of full-face veils.

1. The Decision: Gender Equality and "Living Together"

1.A. An Overview of the Arguments of the Parties

In *S.A.S. v France*, the Grand Chamber of the ECtHR examined for the first time the compatibility of a national blanket ban on the public wearing of full-face covers with the ECHR. The applicant in *S.A.S.* is a devout practicing Muslim. According to her submission to the ECtHR, she wears the burqa or the niqab by virtue of her religious and cultural convictions. The applicant stressed that neither her husband nor any other members of her family have pressured her to wear the face veil (para. 11). She further noted that she wears her niqab "non-systematically"—that is, she does not wear it when she visits a doctor; when she meets friends in public; when she wants to socialize; or when she must pass security checks in banks, airports, or other public places where those are required (paras. 12–13). Despite accepting those limitations, she wishes to have the choice to publicly manifest her religion through wearing the niqab, depending "on her spiritual feelings" and especially during religious events such as Ramadan. She argued that she does not want to divide but to "feel at inner peace with herself" (paras. 12–13).

The applicant complained that Law no. 2010–1192 (the Law),[5] which prohibits individuals from wearing clothing that is designed to conceal the face in public places, violates, among other rights, her right to respect for private life (Article 8), freedom of religion (Article 9), and freedom of expression (Article 10) taken separately and together with freedom from religious discrimination (Article 14, paras. 69–74). Amnesty International, Article 19, the Human Rights Centre of Ghent University, Liberty, and the Open Society Justice Initiative intervened in support of the applicant's complaint statements (paras. 102–5).

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 aims (para. 114). The French government argued that the Law pursued two aims: public safety and the protection of the rights and freedoms of others through securing the "minimum set of values of an open and democratic society" (para. 116). The ECtHR rejected the public safety justification because the French government did not refer to it either in its written observations or in the question put to it during the public hearing. The ECtHR did accept the second, legitimate, aim behind the ban—namely, that the 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.

The majority of the ECtHR dismissed the gender equality argument because states cannot "invoke gender equality in order to ban a practice that is defended by women, such as the applicant" (para. 119). This part of the judgment is noteworthy because it marks a significant shift in the Court's approach to gender equality[6] compared to previous cases, such as *Dahlab v. Switzerland*[7] and *Leyla Sahin v. Turkey*,[8] in which the ECtHR found

that the Islamic headscarf was at odds with tolerance, respect for others, and nondiscrimination. Contrary to those heavily criticized judgments,[9] 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 gender relations between Muslim women and men.[10] Understanding particular women's needs from their own perspectives is particularly important when dealing with gender-based discrimination, as Sophia Moreau notes.[11] 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 freedom of religion, given that it "would deny women who freely desire to do so their right to cover their face" pursuant to their religious beliefs.[12]

The ECtHR swiftly dismissed the French argument that the ban was necessary to protect human dignity. The majority reasoned that 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. Moreover, there is no evidence that women who wear it show contempt for others (para. 120).

With regard to respect for the minimum requirements of life in a democratic society, the French government argued that the ban was incompatible "with the ground rules of social communication and more broadly the requirements of 'living together'" (para. 153). The ban aimed to protect social interaction, which is essential to pluralism, tolerance, and broadmindedness (para. 153). The ECtHR explained that the face is important to engage in open interpersonal relationships. Moreover, it noted that the explanatory memorandum accompanying the Law recognized that voluntary concealment of the face contravenes the ideal of fraternity and the minimum requirements of civility that are necessary for social interaction (paras. 25, 141). 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" (para. 121–22). 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" (para. 141).

1.B. Fraternity and "Living Together"

As the ECtHR held that the protection of "living together" was a legitimate aim that could justify the enactment of the blanket ban, it is important to analyze the relationship between this concept and fraternity and socialization. In the French context, fraternity is often taken to underlie parts of the relationship between citizenship and national culture. As a value, fraternity is deemed important to form a cohesive and self-governing democratic polity.[13] The idea underlying the relationship between fraternity and citizenship is that democratic self-government depends on political citizenship, which itself depends on values such as trust, solidarity, and civility among citizens—as well as on the social structures fostering those.[14]

The value of fraternity is broader than the value of living in a space of "open socialisation," where individuals can see each other's faces (para. 153). This is because fraternity is linked to broader questions of political justice and fair cooperation. On that account, fraternity is arguably very closely linked to equality. In the French historical context, as Cécile Laborde argues, cultural membership was not considered to be an end in itself but played an instrumental role in forging political citizenship. The idea was that cultural membership can function as "a civic and democratic bond," which brings together a "community of citizens."[15] Although the idea of "living together" may seem overbroad and unclear,[16] what lies at the core of fraternity is the ideal of social unity and the need to address social divisiveness, which causes inequality.[17] In that sense, fraternity is associated with the need to safeguard equal citizenship, not with nationalism or nationhood.[18]

A careful reading of the arguments of the French government suggests that the idea aims to protect some of the "ground rules" of social communication, such as civility (para. 153). On that account, the systematic concealment of one's face in public runs contrary to the ideal of fraternity *because* it falls short of the "minimum requirement of civility that is necessary for social interaction" (para. 25). Neither the applicant nor the third-party interveners disagreed with the French authorities about the importance of civility and social Interaction.[19] In fact, the applicant emphasized her willingness to remove her full-face veil whenever she goes out to socialize or has to undergo security checks (paras. 12–13). But if the disagreement in *S.A.S.* did not concern the importance of civility or the fact that fraternity might at times justify coercive measures, then what did the parties disagree about?

I have argued elsewhere that the disagreement in *S.A.S.* concerned two different interpretations of the main goal served by fraternity or "living together."[20] 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 reflect on the practical meaning of the values of solidarity and fraternity that underpin the "social covenant" of the French state;[21] and that they are allowed enough space to decide reflectively whether particular ways of conduct are respectful toward others.

The second is the goal of *conformity*: 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. As a result, their public conduct, including the public manifestation of their beliefs, can take only the forms that the majority considers appropriate in the light of those values.

The goals of responsibility and conformity are not only different but also antagonistic. On the one hand, the *responsibility* conception recognizes that because there is a plurality of cultural sources that furnish people's conception of civility and fraternity, citizens should be left free to develop their own account of those values. Although some forms of expression in public, such as wearing full-face covers, may look alien to republican values, they often seek to redefine integration into, rather than challenge, liberal democracy.[22]

On the other hand, a *conformity* conception discourages citizens from developing their own account of civility and "living together." In the French context, the conformity conception taps into the presumed links between the discrediting of fraternity and the rise

in radicalization, crime, and the people's sense of insecurity. In response to those threats, there is an urge to strengthen state initiatives on reinvigorating solidarity, integration, civility, and common culture. However, to the extent that those initiatives neglect the fact that solidarity and patriotism can be expressed in different ways,[23] they can be rightly criticized for reactively asserting the authority of the State;[24] for relying on contestable interpretations of "common culture";[25] and for placing too much weight on majoritarian preferences.[26] This is not to suggest that state efforts to strengthen solidarity and civility are morally problematic, but that question falls outside the scope of this chapter. Nor are the responses of the French State to full-face veils opportunistic. On the contrary, they reflect an ongoing debate in the country that started more than twenty years ago.[27]

The legislative history of the ban on the full-face veil in France echoes those two different interpretations of the goals served by fraternity. Before the French Parliamentary Commission and the *Conseil d'État*, there was a contrast between "soft" approaches to the regulation of full-face veils (e.g., raising awareness, strengthening civic education for both genders, a declaration against the oppression of women, etc.) and "hard" approaches, which mainly focused on the criminalization of the wearing of full-face veils in public.[28] The difference between "soft" and "hard" approaches to full-face veils mirrors the contrast between the responsibility and the conformity conceptions of "living together." The applicant aimed to show that she took civility and open socialization as matters of moral importance. More specifically, the applicant adopted an interpretation of "living together" through the lens of responsibility through a series of carefully framed qualifications (e.g., she did not wear her full-face veil systematically and she goes out without it when she wants to socialize; she was happy to remove her veil when there are security checks in place (para. 13)). However, reconciling her religious commitments with the social norms of the French society should be part of her own personal responsibility and should not depend on how the majority interpreted civility and "living together" (para. 77).

2. Gender Equality and the Scope of Religious Freedom under the ECHR

The section above argued that the disagreement that the ECtHR had to resolve in *S.A.S.* concerned which interpretation of "living together"—a *responsibility* or a *conformity* interpretation—is compatible with the equal exercise of the right to respect for private life and freedom of religion. This background is essential to this chapter's focus on gender equality. Recall that in *S.A.S.* the French government's argument on gender equality was dismissed because, according to the ECtHR, it is not legitimate to invoke gender equality in order to ban a practice defended by women like the applicant (para. 119). Yet, the ECtHR held that it was legitimate for the state authorities to invoke "living together" as a justification for the ban, even though "living together" as a legitimate basis for limitations on human rights raises many important questions.[29]

This section focuses on the relationship between the conformity conception of "living together"—which was the conception used by the French authorities to justify the blanket

ban—and gender equality. The argument proceeds from the following assumption. If, in the context of *S.A.S.*, the conformity conception of "living together" breaches gender equality—for example, because it unfairly disadvantages Muslim women—then that specific conception of "living together" is incompatible with the ECHR. This is because the ECtHR cannot protect gender equality as "a major goal" in the Council of Europe[30] and "living together" as conformity at the same time. That would be a contradiction. On that basis, the first part of this section analyzes the negative impact of the blanket ban on gender equality and the second part assesses the response of the ECtHR on this matter.

2.A. "Living Together," Conformity, and Substantive Equality

The ECtHR found no violation of the Convention in *S.A.S.* Nonetheless, the majority did pay attention to the negative impact of the conformity interpretation of "living together" on gender equality. The Court stated that it seems "excessive to respond to such a situation by imposing a blanket ban" (para. 145), given that only a tiny number of Muslim women residing in France wear the full-face veil. The Court appeared very concerned by some of the interventions of third parties to the case, who pointed to the Islamophobic remarks that marred the legislative debate on the adoption of the ban. The ECtHR stated emphatically that "a State which enters into a legislative process of this kind risks contributing to the consolidation of the stereotypes which affect certain categories of the population and encouraging the expression of intolerance" (para. 149). The Court added that Islamophobic remarks are incompatible with "the values of tolerance, social peace and non-discrimination which underlie the Convention" (para. 149).

The Court acknowledged that the criminal sanctions attached to the ban were among the lightest that could be envisaged. Nonetheless, the majority crucially added that "the idea of being prosecuted for concealing one's face in a public place is traumatizing for women who have chosen to wear the full-face veil for reasons related to their beliefs" (para. 152). In one of the most illuminating paragraphs of the judgment, the majority stated, "There is no doubt that the ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full-face veil for reasons related to their beliefs. . . . They are thus confronted with a complex dilemma, and the ban may have the effect of isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life. It is also understandable that the women concerned may perceive the ban as a threat to their identity" (para. 146).

The ECtHR's discussion of the impact of the ban on Muslim women is crucial for two reasons. First, it shows that the ECtHR rightly places emphasis on the intersectionality of the complaint before it. The majority is right to acknowledge that the ban disadvantages primarily Muslim women and that the inequalities in question occur through the far-reaching interactions between gender and religion.[31] This much is clear from the parts of the judgment where the ECtHR refers to the ban's exclusionary effects on women

and how traumatizing it can be for women to get prosecuted for concealing their face in public (paras. 146, 152). These parts of the judgment indicate that the ECtHR correctly recognizes that the blanket ban spawns gender inequality as much as it spawns religious inequality.

On that account, the reasoning of the ECtHR in *S.A.S.* must be contrasted with the approach of the Court of Justice of the European Union (CJEU) in its decisions on *Achbita*[32] and *Bougnaoui*.[33] Both cases before the CJEU concerned Muslim women who were dismissed because they wore a headscarf at work. Unlike the ECtHR, however, the CJEU paid limited attention to the intersection of gender and religion in the two cases.[34] Analyzing such cases primarily through the lens of religious freedom is problematic because the emphasis of the right to freedom of religion is on individual identity.[35] Therefore, such an approach is much more likely to overlook the effects that the interaction between gender and religion have on the socioeconomic disadvantage experienced by women.[36] So, all in all, it is encouraging that in *S.A.S.* the ECtHR saw through the neutral formulation of the blanket ban and exposed its damaging effects on women. However, sadly, as we will see below, the Court's attentiveness to gender equality did not run through the end of the judgment.

Second, those parts of *S.A.S.* are important because they show that the ECtHR recognizes that the blanket ban disadvantages women in multiple ways. Sandra Fredman's account of substantive equality illuminates the different dimensions of inequality in this context.[37] The total ban disadvantages women in a distributive sense—both in material and nonmaterial ways. In terms of material disadvantage, as the ECtHR acknowledged, the complete ban places Muslim women at significant risk of socioeconomic disadvantage because it forces many into social isolation. Since the ban risks aggravating women's isolation, it can also fuel power imbalances within the family, which can then start another parallel cycle of material and nonmaterial forms of disadvantage for women.

In terms of the recognition dimension of substantive equality, the blanket ban risks perpetuating wrongful stereotypes and religious prejudices against Muslim women (para. 149). This affects how others regard Muslim women and has consequences that are not only socioeconomic. For example, the ban has a strong stigmatizing effect and creates the impression that Muslim women do not respect the values of the French republic and are less worthy of respect than other citizens as a result, which can expose Muslim women to physical violence and verbal attacks (para. 93). This "recognition wrong"[38] derives from, and compounds, the worrying tendency to attribute any perceived failures of a nation's model of integration to "ungrateful" immigrants or religious minorities.[39] Of course, the recognition dimension of substantive equality is intertwined with its distributive dimension: Fostering stereotypes directly affects the availability of valuable socioeconomic opportunities to Muslim women, especially in the labor market.[40]

It is evident that all the above-mentioned exclusionary effects of the ban also crop up in what Fredman describes as the "participative" dimension of substantive equality.[41] Religious prejudice and socioeconomic disadvantage alienate Muslim women and compromise their ability to participate as equals in political and community activities.[42] In fact, this point was expressly recognized by the UN Human Rights Committee in its 2018

decisions in *Yaker* and *Hebbadj*.[43] By contrast to the ECtHR, the focus of the UN Human Rights Committee on the repercussions of the ban for gender equality led the Committee to conclude that the ban was a disproportionate interference with the right to freedom of religion.[44] For instance, it is noteworthy that, according to the Committee, the complete ban, "rather than protecting fully veiled women, could have the opposite effect of confining them to their homes, impeding their access to public services and exposing them to abuse and marginalization. . . . [The ban] has a disproportionate impact on the members of specific religions and on girls."[45]

The majority of the ECtHR in *S.A.S.* correctly recognized that the blanket ban spawns gender inequality as much as it spawns religious inequality. Nevertheless, it held that two points were capable of counterbalancing those considerations. First, although the ban applied to the entire public space, it did not expressly target religion nor did it affect the wearing of symbols that do not cover the full face (para. 151). Call this the *equality-of-belief* point. Second, the ban epitomized the response of the French State to a practice deemed incompatible with the requirements of "living together" (para. 153). According to the ECtHR, the interpretation of the requirements of "living together" constitutes "a choice of society" through its domestic democratic processes (para. 153). As a result, the ECtHR had "a duty to exercise a degree of restraint in its review of Convention compliance" (para. 154) and France had a wide margin of appreciation in the case (para. 155). Call this the *margin-of-appreciation* point. Based on the equality-of-belief and margin-of-appreciation points, the majority in *S.A.S.* held that the blanket ban was proportionate to the aim pursued—namely, the protection of "living together," an important element of "the rights of others," which can justify limitations on privacy and freedom of religion under Articles 8(2) and 9(2) ECHR, respectively. No violation of the Convention was found as a result.

The equality-of-belief and the margin-of-appreciation points are symptomatic of the theoretical and doctrinal confusion between religious freedom and religious antidiscrimination in the case law of the ECtHR. For reasons that this chapter will sketch toward the end, this confusion is detrimental to the transformative dimension of substantive equality in relation to gender. The rest of this chapter will focus on the equality-of-belief point and will argue that it is at odds with the approach taken by the ECtHR in its case law on the right to respect for private life and its case law on antidiscrimination, including on religious antidiscrimination.

2.B. "Equality of Belief," Religion, and Private Life

Before moving to the margin of appreciation, which played the most decisive role in *S.A.S.*, it is important to highlight two problems with the equality-of-belief argument. The first is that the equality-of-belief argument is inadequate to respond to the applicant's complaint that the ban constitutes a disproportionate interference with her right to respect for private life (apart from her right to freedom of religion) (para. 79). The second is that the equality-of-belief argument neglects the damaging implications of the total ban for gender equality. The attentiveness of the ECtHR to gender equality suddenly vanishes

during the critical last parts of the judgment in *S.A.S.*, and a hasty and shallow conception of religious equality supersedes the Court's prior analysis of the interplay between gender and religion in this context. I will briefly analyze those two points in turn.

First, the equality-of-belief point is inadequate to reconcile the conformity conception of "living together" with the applicant's right to respect for her private life under Article 8 of the ECHR. Recall that the conformity conception of "living together" that underlies the blanket ban rests on the idea that a state may compel its citizens to follow only those forms of social interaction that its majority believes best capture the values of fraternity and civility. However, enforcing "open socialisation" (para. 122)—which is what a conformity interpretation of "living together" licenses—directly contradicts the case law of the ECtHR on the right to respect for private life. Specifically, the ECtHR has recognized that although there is "a zone of interaction of a person with others, even in a public context, that may fall within the scope of "private life,"[46] respect for the right to private life entails a right *not* to interact with others in public[47]—a "right to be an outsider."[48]

Moreover, the ECtHR has repeatedly stressed that the Convention protects the public expression of offensive, shocking, or unpopular views[49] because "such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'"[50] Even when the expression of unorthodox views can cause religious tension, the ECtHR has held that equality of respect requires an integrationist approach that does not restrict pluralism but ensures tolerance "between the vast majority and the small minority."[51] Despite their factual differences, all those cases demonstrate the commitment of the ECtHR to the protection of unpopular forms of public expression from illegitimate coercion—that is, from coercion arising from impermissible reasons, such as majoritarian preferences that some people should enjoy less because of their religion or beliefs.[52] The equality-of-belief argument is at odds with all those important principles underlying the protection of private life under the Convention.

The equality-of-belief argument is unconvincing even as a conception of religious equality. Early parts of the case law of the ECtHR on freedom of religion were informed by a conception of personal autonomy that took access to a sufficient range of choices to be the main requirement of an autonomous life. On that account of personal autonomy, if certain choices become unavailable but the overall range of available choices remains sufficient, personal autonomy is not compromised, regardless of the reasons why some of those choices have become unavailable.[53] However, for reasons that cannot be analyzed here, a better conception of personal autonomy is concerned with both the fact and the character of limitations on individual choices.[54] Personal autonomy creates a scheme of responsibility that is incompatible with constraints based on impermissible reasons and considerations, such as the moral preferences of the majority or illegitimate coercion. Those abridge autonomy regardless of whether the overall range of available choices remains sufficient.[55] The latter conception of autonomy, which involves an interpretation of autonomy in the light of equality, underlies extensive parts of the recent case law of the ECtHR on freedom of religion and religious antidiscrimination.[56] In that sense, the conception of equality of belief that the ECtHR adopted in *S.A.S.*, which focused only on

whether the available choices were sufficient (i.e., *most* religious symbols could still be worn in public) and not on the reasons behind the limitation in question, is a significant step back in the Court's understanding of the values of liberty and equality, and it contradicts significant parts of the Court's recent case law on Article 9 of the ECHR.[57]

Even if the equality-of-belief argument could be taken as a partial response to the applicant's complaint about the impact of the blanket ban on religious equality—that is, her right to manifest her religion in public on an equal basis to others—it still does not respond to her complaint about the impact of the ban on gender equality. This is surprising because, as discussed earlier, the ECtHR expressly acknowledged the intersectional impact of the comprehensive ban on Muslim women in distributive, recognition, and participative ways. The Court accepted that the ban limited *not only* the manifestation of the applicant's religion in public but also the participation of Muslim women in many different spheres, including employment and family and community life (paras. 146–49). So why did equality of belief supersede the Court's nuanced analysis of substantive equality in the earlier parts of the judgment in *S.A.S.*?

The answer to this last question becomes clearer when in just three sentences the majority in *S.A.S.* dismissed the applicant's separate complaint that the ban discriminated against her on grounds of sex and religion (para. 161). The antidiscrimination complaint was dismissed because the reasons for not finding a violation of the right to freedom of religion—that the interference in question was prescribed by law, pursued a legitimate aim, and was necessary in a democratic society[58]—were considered to be equivalent to the reasons that could justify indirect religious discrimination.[59] More precisely, the "legitimate aim" requirement under Article 9 is equivalent to the requirement for an "objective and reasonable justification," which discriminatory rules or policies must fulfill in order to be compatible with Article 14 of the ECHR. Furthermore, both Articles 9 and 14 of the ECHR also require a "reasonable relationship of proportionality between the means employed and the aim sought to be realised," which once again the ECtHR considers equivalent between the two provisions (paras. 160–62). This doctrinal overlap between the two provisions led the ECtHR to conclude that both rights invite similar questions of justification and proportionality. A separate examination of the complaint of religious discrimination was therefore not deemed necessary (paras. 160–62).

In this way, the complaint of intersectional (religion and gender) discrimination was treated by the ECtHR as if it were synonymous with the complaint of a violation of freedom of religion. As a result, the multidimensional impact of the blanket ban on substantive equality was not given the independent significance appropriate to it. The implications of the ban for gender equality (which the Court pointedly highlighted in earlier parts of the judgment) ended up looking more like a side effect of the impugned limitation on religious freedom.

This is not entirely unsurprising. The approach of the ECtHR in *S.A.S.* is symptomatic of the theoretical and doctrinal confusion surrounding the legal rights to religious freedom and religious antidiscrimination in the case law of the ECtHR. In other parts of my work, I have analyzed in detail the purpose and relationship between the two legal

rights.[60] I have argued that although the two rights share their main normative ground on the moral right to ethical independence, they play distinct roles and should not be treated as if they are synonymous. More specifically, the emphasis of religious freedom is *vertical*: It identifies ethical independence as an important capability in each person and protects it in our dealings with the state and each other. Religious freedom protects our personal responsibility to define value and live in accordance with it. The right's vertical emphasis on individual identity is crucial to thwarting conceptions of equality or fairness that treat everyone's beliefs as equally inconsequential or as a matter of no concern.

However, the emphasis of religious antidiscrimination is *horizontal*: It aims to secure fair background conditions for ethical independence through addressing patterns of group disadvantage that erode the ability of people to pursue their religious or ethical commitments. Its emphasis is horizontal in an additional way: The aim of religious antidiscrimination requires reaching beyond individual conscience by taking into account the interaction between different protected grounds of discrimination. This interaction is often the key to unmasking the patterns of group disadvantage that erode people's ability to pursue their religious or ethical commitments.

This last characteristic of religious antidiscrimination is lost whenever the courts treat complaints of religious discrimination solely through the lens of religious freedom. Conflating the two legal rights leads to an interpretation of religious discrimination along the lines of individual identity, which overlooks the effects that the interaction between religion and gender (and racial and ethnic origin, to name another important protected ground in this context) can have on socioeconomic disadvantage.[61] This also obstructs more engagement with the lived experiences of individual members of belief groups, which is required to understand their own perspectives in greater depth.[62] As a result, a religious-freedom-centered interpretation of discrimination is unsuitable to tackling persisting gender inequality and discrimination in this context; and it is especially detrimental for the transformative dimension of substantive equality. Religious antidiscrimination can realize its transformative potential only by looking beyond the vertical emphasis of religious freedom on individual identity. On that account, the next section sketches how the ECtHR should have dealt with the antidiscrimination complaint in *S.A.S.*

3. Reconfiguring *S.A.S.*: Gender Equality and Religious Antidiscrimination

A series of ambiguous decisions by the ECtHR, such as *Hoffmann* and *Palau-Martinez*,[63] have often led the European scholarship on discrimination law to argue that although states enjoy a narrow margin of appreciation in assessing differential treatment on the grounds of race, gender, sexual orientation, and disability, the situation is not as clear with regard to religion.[64] However, that argument is no longer accurate.

In *Vojnity*, the ECtHR clarified that religion constitutes a "suspect" ground of differential treatment that requires strict judicial scrutiny and justifies only a narrow margin of

appreciation for the respondent states.[65] The applicant in *Vojnity* had his right to contact his son, who was living with his mother after their divorce, removed by the domestic courts because his religion "endangered the development" of the boy and therefore made the applicant "incapable of bringing up his child."[66] The ECtHR agreed that the aim pursued in the instant case—namely, the "protection of the health and rights of the child"—was legitimate.[67] However, the means employed—that is, the removal of all the access rights of the father—also had to be proportionate to the legitimate aim sought. Given that the differential treatment was based on the applicant's religion, the ECtHR held that the restriction of his access rights could be compatible with the ECHR only if "very weighty reasons" existed.[68] On that account, the ECtHR subjected the claim of the domestic authorities to strict scrutiny. The Court found that there were no "weighty reasons"—that is, no evidence of physical or psychological harm to the child[69]—that could explain why the right to respect for parents' religious convictions in education,[70] which encompasses the right to promote their religion as part of their children's education "even in an insistent manner,"[71] should apply differently to the applicant of the case.[72] In the absence of "weighty reasons," the ECtHR concluded that there was "no reasonable relationship of proportionality between a total ban on the applicant's access rights and the aim pursued, namely the protection of the best interests of the child."[73] As a result, the ECtHR found a violation of the prohibition of religious discrimination read in conjunction with the applicant's right to private and family life under Article 8 of the ECHR.[74]

Although in *Vojnity* the ECtHR makes no direct references to substantive equality, the Court's robust response echoes the multidimensional understanding of equality discussed earlier. More specifically, according to the ECtHR the fact that the domestic authorities deprived the applicant of his parental rights solely on account of his "'irrational worldview' . . . without explaining what real harm [this] caused to the child"[75] amounted to "a complete disregard of the principle of proportionality, [which is] requisite in this field and inherent in the spirit of the Convention."[76] The emphasis on the fact that the applicant was stripped of his access rights without any evidence about the harmfulness of his beliefs, solely on the grounds of what the domestic authorities thought about them, reflects an indirect attempt by the ECtHR to bring out the multiple dimensions of inequality in the case.[77] *Vojnity* involves inequality of recognition (through religious prejudice), which causes distributive and participative disadvantage in the form of the denial of parental rights to the applicant.

The reasoning of the ECtHR in *Vojnity* is important because it shows that the ECtHR finally aligned its approach to religious antidiscrimination with the approach it takes to differential treatment on the basis of other "suspect" grounds, such as sex, sexual orientation,[78] race,[79] and disability.[80] Three distinctive characteristics underlie the approach of the ECtHR to "suspect" grounds:

- "Very weighty" reasons are required to justify differential treatment.
- The ECtHR subjects the proportionality of the measure to heightened scrutiny and states are allowed only a narrow margin of appreciation as a result.
- The ECtHR takes multiple dimensions of inequality into account.

All three characteristics—which were present in *Vojnity*—also permeate the case law of the ECtHR on gender discrimination. For instance, in *Emel Boyraz*, the ECtHR held that the refusal to appoint the applicant as a security officer solely because the authorities did not consider women suitable to carry out some of the riskier functions of the position (e.g., working night shifts in rural areas, using physical force or firearms in case of an attack[81]) could not "in itself justify the difference in treatment between men and women."[82] The domestic authorities provided no explanation as to the purported inability of women to cope with those responsibilities. As a result, the ECtHR concluded that the difference in treatment did not pursue a legitimate aim and was therefore in violation of the prohibition of sex discrimination under Article 14 read in conjunction with the right to respect for private life under Article 8 of the ECHR.[83]

Furthermore, *Emel Boyraz* represents another example of the Court's multidimensional approach to substantive equality. More specifically, the ECtHR stated that refusing to appoint the applicant on the sole ground of sex "has adverse effects on a person's identity, self-perception and self-respect and, as a result, his or her private life" and also has tangible material consequences for the well-being of her and her family.[84] The ECtHR links stereotypes (i.e., gender stereotypes) directly to socioeconomic disadvantage (i.e., the denial of a job) and vice versa (albeit that was indirect in *Emel Boyraz*): Distributive disadvantage through the exclusion of women from particular jobs causes further recognition harms.[85] Although due to space constraints a detailed analysis of this area of discrimination law is not possible, it is worth noting that other parts of the case law of the ECtHR on gender discrimination, such as cases involving gender-based violence,[86] feature the same three characteristics mentioned above—that is, differential treatment can be justified only if "very weighty" reasons exist, the necessity of the differential treatment is strictly scrutinized, and the ECtHR analyses disadvantage through the lens of a multidimensional account of substantive equality—albeit the references to substantive equality are more often implicit than explicit.[87]

Following this consistent line of antidiscrimination cases, the complaint of the applicant in *S.A.S.* that she was discriminated against on grounds of her religion should not have been dismissed. Of course, it is noteworthy that even in cases where differential treatment is based on a "suspect" ground of discrimination, like sex or religion, heightened scrutiny is not necessarily fatal to the impugned differentiation. The presumption that no objective and reasonable justification will support the difference in treatment remains rebuttable. That said, in *S.A.S.* the ECtHR should have examined the antidiscrimination complaint as follows.

As discussed earlier, in *S.A.S.* the ECtHR expressly acknowledged the multidimensional impact of the blanket ban on Muslim women (paras. 146–52). As a result, the spotlight now turns on the other two parts of the test applied in cases involving "suspect" grounds: namely, whether there are "very weighty" reasons justifying the differential treatment in question and whether the differential treatment is necessary to achieve the legitimate aim sought.

First, is the protection of "living together" such a weighty reason capable of justifying the difference in treatment? According to the well-established principles from the jurisprudence of the ECtHR, very weighty reasons are reasons relating to the very nature of an activity;[88] or reasons showing that the differential treatment was necessary to correct "factual inequalities" between protected groups (i.e., cases of affirmative action);[89] or reasons that are closely linked to core protections for individuals,[90] such as the protection of children's bodily and psychological health that the ECtHR considered in *Vojnity*.[91] Given the importance of fraternity in the constitutional history of France and also the links that the ECtHR drew between "living together" and democracy, "living together" could be considered a "weighty" reason—although that leaves many different interpretations of the value open.

That brings us to the second question: Was the blanket ban necessary to achieve the aim of "living together"? Recall that, as cases like *Vojnity* and *Emel Boyraz* clearly show, when differential treatment is based on a "suspect" ground like sex or religion the margin of appreciation afforded to states is narrow.[92] A narrow margin of appreciation entails that the principle of proportionality does not only require that the measure chosen be generally suitable to fulfill the aim sought, but it must also be shown to be *necessary* in the circumstances—and the final decision on that rests with the ECtHR.[93]

Here the argument could go like this. The distinction between *responsibility* and *conformity* conceptions of "living together" does not suggest that laws requiring conformity are ipso facto morally problematic. Rules requiring citizens to conform with, for instance, tax or environmental protection regulations or the prohibition of violence are justified all things being equal—for reasons that cannot be analyzed here.[94] However, expecting conformity in how people understand, and behave according to, fraternity and civility is different because various different and equally valid interpretations are compatible with those values. It is widely debated, for instance, how female members of religious minorities, who are often anxious to comply with a society's secular norms about good citizenship,[95] should behave in public. As the dissenting judges argued in *S.A.S.*, it is a mystery how the wearing of the full-face veil can be distinguished from "other accepted practices of concealing the face, such as excessive hairstyles or the wearing of dark glasses or hats."[96] This is true for many other familiar activities as well, such as skiing, driving a motorcycle with a helmet, covering one's face with a scarf during a cold winter morning, wearing costumes in carnivals, or even *having* to wear a face mask in public for Covid-19 purposes, which was mandatory in France at the time of writing.[97] None of these practices seems to flout the value of civility or pose such significant problems for social interaction that a criminal law intervention is required.

But if the French society's interpretation[98] of civility and fraternity is compatible with practices like scarves and helmets, then full-face veils cannot be treated differently from those practices without a compelling reason ("very weighty" is the term used by the ECtHR). However, the French authorities did not offer any reasons why the "soft" measures advised by the French National Advisory Commission on Human Rights (e.g.,

strengthening of civic education courses, including human rights training, at all levels for both men and women (para. 19); stricter measures against those forcing others to cover their faces (para. 23); prioritizing sociological and statistical studies on the wearing of the full-face veil; and promoting dialogue to understand better other religions (para. 19)) were insufficient to protect gender equality and fraternity. These "soft" measures are entirely compatible with what was described earlier as a responsibility conception of "living together." These "soft" measures are much more compatible than the blanket ban with the normative grounds of fraternity, which is intended as a guarantee for, not a limit to, social inclusion.[99] It is hard to see how excluding veiled women from the public space can be compatible with that aim.[100] In fact, as the ECtHR recognized, the blanket criminal ban exposes women to the risk of further inequality across multiple dimensions: distributive, recognition, and participative. Focusing only on how Muslim women interact with others in public, the blanket ban also lacks transformative potential with regard to deeply ingrained gender roles and cultural stereotypes—and in many ways reinforces the very ideas and structures that disrespect the equality and dignity of women.

For all those reasons, the argument that concealing one's face in public is so inescapably incompatible with civility and "open socialisation" that its criminal prohibition is imperative to achieve "living together" is unconvincing. In the absence of "very weighty" reasons showing why the impugned difference in treatment on grounds of religion and sex was necessary to fulfill the aim of "living together," the ECtHR should have found a violation of Article 14 read in conjunction with Articles 8 and 9 of the ECHR.

Conclusion

S.A.S. is indicative of how the right to freedom of religion can constrain the transformative potential of antidiscrimination law for women. More specifically, this chapter claimed that securing "living together" is ambiguous because it alludes to two different and antagonistic goals, which I called *responsibility* and *conformity*. States have a legitimate interest in fostering solidarity and fraternity, alongside other values underlying "living together," but that interest can be satisfied only in ways that are compatible with the fundamental political duty to treat everyone as equals. This chapter argued that a responsibility conception of "living together" requires citizens to recognize certain social values and decide reflectively, as a matter of moral importance, about whether particular forms of public conduct are respectful toward others. Raising awareness, strengthening education for all sexes, and advancing a collective commitment against the oppression of women—the "soft" measures that parts of the French Parliamentary Committee recommended over a blanket criminal ban on full-face veils (paras. 17, 22)—are compatible with the responsibility conception of "living together." By contrast, under a *conformity* conception, a state can compel its citizens to embrace only the forms of social interaction that the majority believes best capture the ideals of fraternity and civility.

Taking the form of a blanket criminal ban on full-face veils, the conformity conception of "living together" disadvantages Muslim women on multiple levels. It places Muslim women at significant risk of socioeconomic disadvantage because it forces many into social isolation; it aggravates power imbalances within the family; it risks consolidating stereotypes and prejudice against certain women, including that they do not respect the values of the French republic and are therefore less worthy of respect than other citizens; and it compromises their ability to participate as equals in political and community activities.

Crucially, this chapter argued that an interpretation of "living together" through the narrow lens of religious freedom can obscure the damaging consequences of the blanket ban for women. This is because the legal right to freedom of religion places its emphasis on individual identity and, as a result, misses the interactions between religion and gender in this context. *S.A.S.* is a reminder of why a religious-freedom-centered interpretation of religious antidiscrimination is unsuitable to tackle persisting gender inequality and discrimination. Religious antidiscrimination can realize its transformative potential only by looking beyond the vertical emphasis of religious freedom on individual identity and by infusing powerful concepts of equality and disadvantage, which have emerged in other areas of antidiscrimination law, into human rights law and policy.