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What Happened to 'Vivre Ensemble?': Developments after *SAS v France*

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ABSTRACT

In 2014, the European Court of Human Rights found that France's prohibition on women wearing the full face veil did not violate Article 9. In doing so, it accepted that the ban was necessary in order to achieve 'vivre ensemble' or 'living together'. The use of the concept was controversial and the response at the time was mostly critical. This article examines when and in what ways the Court has used vivre ensemble since that decision. It considers the arguments made by member states and applicants and the Court's reasoning in later cases on the face veil and other Islamic clothing, as well examining reference to vivre ensemble by the Court in other contexts. It finds that the full face veil is constructed as fundamentally different to other forms of religious clothing and there is little reliance on the concept other than in the 'burqa ban' cases

1. INTRODUCTION

In 2014, the Grand Chamber of the European Court of Human Rights (ECtHR) decided that the 'burqa ban' was not a violation of Article 9, the right to freedom of religion, on the basis that the ban was necessary for 'vivre ensemble' or living together. The reception to *SAS v France*,[1] among the English-speaking academic world at least, was overwhelmingly negative. There were fears that the principle could be used to widely justify state actions affecting the rights of minority groups. It was criticized for being at odds with the wording and spirit of the Convention,[2] accepting state Islamophobia[3] and as an illiberal restriction of religious and potentially all counter-majoritarian expression.[4]

Given the significant body of literature which already exists on this, I do not propose to revisit these criticisms of the decision itself. Rather, more than 7 years on, my

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1 *SAS v France* (2015) 60 EHRR 617.

2 Jill Marshall, 'Burqa Bans and the Control or Empowerment of Identities' (2015) 15 Human Rights Law Review 377–89.

3 Kristin Henrard, 'State Obligations to Counter Islamophobia: Comparing Fault Lines in the International Supervisory Practice of the HRC/ICCPR, the ECtHR and the AC/FCNM (2020) 13 Erasmus Law Review 82.

4 Christian Joppke, 'Islam and the Legal Enforcement of Morality' (2014) 43 Theory and Society 589.

purpose here is to examine the subsequent use and development of this doctrine by the ECtHR and consider whether the initial fears regarding the potential consequences of *SAS v France* were justified. The ECtHR does not have a formal system of precedent. Nevertheless it has stated that it will not depart from previous precedents without good reason. Particularly on controversial issues it follows an incremental path, building on previous decisions.[5] Alongside this, it often makes use of general principles, such as tolerance or equality, which are then applied to the specific facts of the case.[6] If living together has been adopted as an additional general principle this could be significant generally for the Court's consideration of whether an interference with Article 9 was justified, and potentially also for the similarly structured Articles 8 and 10.

This article has three parts. In order to understand the scope of the decision, the first revisits *SAS* and examines the extent to which the ECtHR upheld the arguments of the French government in defending the ban. The second explores the use and non use of the doctrine in subsequent Article 9 ECtHR cases on clothing restrictions and, because of *SAS*'s significance and the likelihood of constitutional conversations[7] between these two European courts, in the CJEU cases of *Achbita*[8] and *Bougnaoui*[9] and *WABE*[10] and *Müller Handel*.[11] The third part examines cases in other contexts, most notably Article 8, where the idea of *vivre ensemble* has been explicitly used as part of the ECtHR's decision making.

By examining this caselaw I make two arguments: firstly that subsequent religious clothing cases show a move away from its reasoning and other contexts show only a very minimal use of the doctrine. Vivre ensemble is only decisive in cases on the full face veil. Secondly, whilst vivre ensemble is a complex idea, with a variety of possible meanings and which has been used in different ways by participants in later cases, the Court has not explicitly explored different conceptions of the idea, preferring simply to refer to its pronouncements in *SAS*.

2. THE DECISION IN *SAS V FRANCE*

SAS involved a challenge to a French law prohibiting the concealment of one's face in public places.[12] Failure to comply led to a sanction of a small fine or attendance at a citizenship course designed to 'ensure that those concerned are reminded of the Republican values of equality and respect for human dignity'.[13] The ban on face

5 J Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 Human Rights Law Review 495.

6 R McCrea, 'Secularism before the Strasbourg Court: Abstract Constitutional Principles as a Basis for Limiting Rights' (2016) 79 Modern Law Review 691.

7 See eg M Claes and others, *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012).

8 Case C-157/15 (Grand Chamber, 14 March 2017).

9 Case C-188/1 (Grand Chamber, 14 March 2017).

10 Case C-804/18 (Grand Chamber, 15 July 2021).

11 Case C-341-19 (Grand Chamber, 15 July 2021).

12 Act No 2010-1192 of 11 October 2010 prohibiting the concealing of the face in public. Similar laws have since been adopted in other Member States such as Belgium and Switzerland.

13 *SAS* at para 31. The law also created a criminal offence prohibiting forcing another to wear the face veil. Given that was not challenged by the applicant and involves a different balance of rights it will not be discussed further.

coverings was not absolute. Formally, the law was not based on religion and included any face covering. However, it was written in such a way that in practice only Islamic full face veils[14] were included because of numerous exemptions such as where face coverings were necessary for safety in employment, and more tendentiously, if the clothing was worn in the context of 'festivities or artistic or traditional events'. The law therefore allowed face coverings in the context of Catholic religious processions, carnivals or rituals but would not allow a Muslim woman to cover her face for religious reasons in public spaces. SAS alleged that the refusal to permit her to wear the niqab in public[15] amounted to violations of Article 3, the right to be free from inhuman and degrading treatment; Article 8, the right to respect for private and family life; and Article 9, the right to freedom of religion. The Grand Chamber of the ECtHR rejected the Article 3 claim as manifestly ill founded and ultimately found that the interference with her freedom of religion and right to respect for her private life was justified.

In defending the ban, the French government faced a significant hurdle at the first stage of the enquiry in finding a legitimate aim that accorded with the wording of the Convention. The Government argued that the law pursued two legitimate aims: public safety and 'respect for the minimum set of values of an open and democratic society'. Rather than focusing on the express words in the Convention, its justification was based on the principles underlying this aim, which it held to be: the values of respect for equality between men and women, respect for human dignity and 'respect for the minimum requirements of life in society'. It submitted that these aims could be linked to the 'protection of the rights and freedoms of others'. In response, the Court accepted this approach in principle as legitimate whilst recognizing that these proposed justifications extended the scope of the justifications available.

However, it did not accept that the legitimate aims of protecting gender equality or dignity were relevant to the current situation. The gender equality argument had been accepted in earlier cases. In *Dahlab v Switzerland*[16] it had been held that the hijab worn by a primary school teacher was a 'powerful external symbol' and the wearing of it 'difficult to reconcile ... with the message of tolerance, respect for others, and above all, equality and non-discrimination' and it would inevitably have a proselytizing effect on the children she taught. However, the Court in *SAS* no longer saw the veil as inherently a symbol of subjugation. It accepted the internal perspective of the applicant that it was a way of expressing her own personal and freely made religious beliefs and therefore not necessarily a symbol of gender discrimination. It did not thereby ascribe any automatic meaning to the veil but rather paid attention to the self described loss caused to SAS herself.[17] The Court also rejected

14 Bans are often referred to colloquially as burqa bans, but this is inaccurate as the niqab is much more commonly worn in Western Europe. A burqa covers the whole body, including the face, with a mesh over the eyes. A niqab covers the face, with a gap for the eyes.

15 She did not wear the niqab at all times but wished to be able to wear the niqab at times when she felt religiously inspired to do so.

16 Application No 142393/98 (ECtHR, 15 February 2001).

17 See Myriam Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*' (2015) 4 Oxford Journal of Law and Religion 94–118; Lourdes 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.

the dignity argument on the similar basis that while wearing the veil may be perceived as strange, those wearing it did not seek to offend the dignity of others.

Having rejected these arguments, the Court was even cautious in accepting the vivre ensemble argument. It began by referring to the importance of toleration and mutual respect in society: 'in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected'.[18] Whilst it then drew attention to previous case law which highlighted that, 'the role of the authorities . . . is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'[19] and noted the finite quality of justifications available, it immediately went on to accept that the list of justifications in Articles 8(2) and 9(2) was not as exhaustive as it may first seem. Notably, it interpreted the 'protection of the rights and freedoms of others' very widely. From this developed the idea that it was permissible to restrict rights for the ease of socialization and interaction between individuals: it even referred to this as a right in its own right. It thus considered that this 'right' was so affected by women wearing Islamic face veils that this could be prohibited. The Court therefore accepted that a need for 'vivre ensemble' or 'living together' could amount to justification for restricting religious freedom rights.

In response, the dissenting judgment of Judges Nussberger and Jäderbloom argued the decision, 'sacrifices concrete individual rights guaranteed by the Convention to abstract principles . . . There is no right not to be shocked or provoked by different models of cultural or religious identity'. Thus they held it was doubtful that the law pursued any legitimate aim. To hold otherwise, they argued, would expand the legitimate aims to include almost any majoritarian strong preference, even if this did not affect the rights of the majority.

A. The reception to *SAS v France*

The academic reception to *SAS v France* was overwhelmingly negative.[20] The decision was criticized for relying on 'circular reasoning',[21] for being open to abuse,[22] an example of legal moralism,[23] and based on an 'irrational idea of threat' from Islam.[24] Joppke summarized it as a 'legal and political mess'.[25] Nevertheless, the Court's

18 *SAS* para 126.

19 ibid para 127.

20 Although not entirely see eg Koen Lemmens, 'Larvatus Prodeo? Why Concealing the Face can be Incompatible with a European Conception of Human Rights' (2014) European Law Review 47.

21 Esther Erlings, '"The Government Did Not Refer to it": *SAS v France* and Ordre Public at the European Court of Human Rights' (2015) 16 Melbourne Journal of International Law 587.

22 Gabrielle Elliot-Williams, 'Protection of the Right to Manifest Religion or Belief Under the European Convention on Human Rights in *SAS v France*' (2016) 5 Oxford Journal of Law and Religion 344.

23 Christian Joppke, 'Islam and the Legal Enforcement of Morality' (2014) Theory and Society 589.

24 Christian Joppke, 'Pluralism vs. Pluralism: Islam and Christianity in the European Court of Human Rights' in Jean Cohen and Cécile Laborde (eds), *Religion, Secularism and Constitutional Democracy* (Columbia University Press 2016).

25 Christian Joppke, 'Culturalizing Religion in Western Europe: Patterns and Puzzles' (2018) Social Compass 234, 243.

decision can be seen as an act of 'self-preservation'[26] and a resultant move towards procedural rather than substantive review of laws on issues that have significant importance to that member state.[27] The legislation had overwhelming public and political support. It was supported by a Parliamentary Commission who investigated the issue in depth. The National Assembly had passed a unanimous resolution calling for legislation and the final legislation passed by 335 votes in favour, one vote against and three abstentions in the National Assembly and in the Senate by 246 votes in favour and one abstention.

This strength of feeling of the significance of the ban in terms of defining a national cultural identity led to a hands-off approach by the Court.[28] The judgment is peppered with reference to 'the fundamentally subsidiary role of the Convention mechanism', the 'direct democratic legitimation' of the national authorities which is, 'in principle better placed than an international court to evaluate local needs and conditions', and the 'balance that has been struck by means of a democratic process within the society in question'. The Court's approach is not unique to this case. A similar result can for example be seen in *Lautsi*[29] and its reconsideration by the Grand Chamber.

As the minority dissenting judgment pointed out though, this is an unusual case for the margin of appreciation to be applied, other than because of the strength of feeling on this matter. It was not an issue on which a European consensus was evolving or even one where the consensus was evenly split. Only France and Belgium out of the 47 Member States prohibited the face veil in public spaces at the time of the judgment. Furthermore, laws introduced in some local jurisdictions have been overturned by the national courts as offending domestic principles of freedom of religion.[30] While arrangements relating to state establishment of religions or secularism vary widely between Member States, and therefore may require a wide margin of appreciation, this case was not about those constitutional arrangements but the rights of individuals.[31]

B. *SAS*'s legacy

Whether or not these criticisms are justified, the case's significance is very different if *SAS* is merely a one off concession to institutional frailty or if it is evidence of a persistent trend towards protecting 'cultural defence' policies, that is policies that 'are aimed at defending/preserving/protecting different forms and expressions of the

26 Joshua Rozenberg, 'Niqabs Ban: Fine "Margin"', *Law Society Gazette*, 7 July 2014 <https://www.lawgazette.co.uk/commentary-and-opinion/niqabs-ban-fine-margin/5042031.article>.

27 Peter Cumper and Tom Lewis, 'Blanket Bans, Subsidiarity and the Procedural Turn of the European Court of Human Rights' (2019) 68 International and Comparative Law Quarterly 611.

28 Liav Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (Oxford University Press 2015) 92–93.

29 (2012) 54 EHRR 3.

30 See eg Maxim Ferschtman and Cristina De La Serna, 'Case Watch: Spanish Supreme Court Repeals City Burqa Ban', *Open Society Justice Initiative*, 22 March 2013 <https://www.justiceinitiative.org/voices/case-watch-spanish-supreme-court-repeals-city-burqa-ban>

31 Myriam Hunter Henin, *Why Religious Freedom Matters for Democracy: Comparative Reflections from Britain and France for a Democratic "Vivre Ensemble"* (Hart 2020).

national culture/identity/character'.[32] Beginning with its use in later clothing cases and then exploring its wider use, in the rest of this article I therefore focus on the use of vivre ensemble arguments post-*SAS* in order to understand when, if it all, the concept is being used. By examining where the court uses it as the basis of its judgment, and whether deliberately or not, its distinct lack of use outside the specific context of the Islamic face veil, I argue that *SAS* is an isolated case, but the Court shows no sign of moving away from vivre ensemble reasoning in this context.

The second argument is that, even in the small number of cases where it is used, the way the concept is conceptualized by the parties, intervenors and the Court varies. Even in *SAS* itself, there is significant ambiguity at the heart of the case over what vivre ensemble means, and therefore how the concept should be applied and used. As Trispiotis has argued, vivre ensemble can be understood in two ways: what he calls the 'responsibility' interpretation of living together and the 'conformity' interpretation.[33] The first, based on the underlying ideal of fraternity, understands that individuals have obligations towards others in a democratic and equal society, and this should be taken into account when deciding the content of rights. He argues this understanding of 'living together' has long been an underlying value of the Convention, although expressed in different language. He contrasts this with a conformity interpretation where the goal is not respectful pluralism but homogeneity, whereby a state 'may compel its citizens to embrace forms of social interaction that the majority believes best capture certain values'.[34] Hunter-Henin too proposes that vivre ensemble can be seen in at least two different ways. For her, the French state in the process leading up to the law and in defending it, understood the requirement of vivre ensemble in an illiberal way, construing it as requiring a reflection of fixed majority views. It is though, she argues, never explained why the mere fact a majority in society finds the wearing of the full face veil unacceptable amounts to sufficient justification for its ban. Instead she argues for a 'more democratic' understanding of vivre ensemble, based on three key principles. First, she proposes a principle of avoidance in the sense that the state will refrain from deciding some issues relating to citizens' comprehensive doctrines, allowing for difference on divisive issues. Second there should be a principle of inclusion and third a principle of revision in the sense that 'the terms of legitimate diversity are subject to constant review'.[35] This understanding of the concept is therefore far from the majoritarian idea seen in *SAS*.

3. *VIVRE ENSEMBLE* IN LATER BURQA BAN CASES

The issues in *SAS*, including the permissible use and meaning of vivre ensemble, were raised again three years later in *Dakir v Belgium*[36] and *Belcacemi & Oussar v Belgium*[37] where three Muslim women challenged a municipal ban on the niqab and

32 Orgad (n 28) 5.

33 Ilias Trispiotis, 'Two Interpretations of "Living Together" in European Human Rights Law' (2016) Cambridge Law Journal 580.

34 ibid 600.

35 Hunter-Henin (n 31) 110.

36 Application No 4619/12 (ECtHR, 11 July 2017).

37 Application No 37798/13, (ECtHR,11 July 2017). It was decided on the same day as *Dakir* but the cases were not formally joined.

a subsequent national ban. In both cases, different uses are made of the concept by the applicants, the government and the Court and the conception of it used also varies. There was also reference in the judgment to the use of vivre ensemble by national courts and actors even before the ECtHR's decision in *SAS* itself, demonstrating that this concept has traction across national boundaries.[38]

In *Dakir* and *Belcacemi*, the Belgium government relied on very similar arguments to those put forward by the French government in *SAS*. This included the unsuccessful arguments that wearing the full niqab undermined gender equality and dignity as well as, unsurprisingly given its previous success, vivre ensemble. The conception of vivre ensemble the Belgium government put forward was very similar to that of the French government. It saw vivre ensemble as requiring, not acceptance of different religious and other practices even where they differed from those of the majority, but assimilation. Assimilation was, it argued, required because of the very fact of religious and other diversity in contemporary Belgian society. In arguing that more extensive prohibitions of manifestations of beliefs and traditions are required the more multicultural a society becomes,[39] the Belgium government directly echoed earlier arguments made by the French government, that the law should protect widely shared social norms such as seeing each other's faces in public.

On the other side, the applicants and the intervenors on their behalf were of course in the difficult position of seeking to persuade the court to reach a different decision very soon after a highly politicized, decisive judgment. They addressed the difficulty posed by *SAS* for their case in two ways. First, they argued for a different conception of the concept than was evident in *SAS*: one 'of openness and tolerance' rather than 'homogeneity'. This conception, they suggested, could include a wide range of visible signs of religious difference, including the niqab. The difference between the applicants' and the Belgium government's arguments therefore mirrored Trispiotis's distinction between the responsibility and assimilation conceptions of vivre ensemble. Second, Dakir argued that even if an assimilation conception of vivre ensemble was necessary because the full face veil does hinder living together, this should only be a 'praiseworthy political objective', used to encourage integration in non-coercive ways. It could not, she argued, justify 'stigmatising by-laws that were contrary to the Convention'.[40] Belcacemi and Oussar similarly argued that even if it were accepted that the aim was legitimate, a criminal sanction for wearing the face veil was disproportionate and the aim could have instead been met by education.

Liberty, one of the intervenors in *Dakir*, took a more direct approach and explicitly argued for a reconsideration of vivre ensemble as a relevant concept at all. It argued the political situation across Europe had changed since *SAS*. There had been a rise in Islamophobia since the decision, partly due to the ban and accompanying political debate, which had, it argued, stigmatized and reinforced negative

38 In December 2012, the Belgium Constitutional Court referred to the basis of the bill as being 'the notion of "living together" in a society which sought to emancipate its members and protect the rights of each and every one of them' [para 19, *Dakir*].

39 'The more multicultural a society and the greater the co-existence of different forms of religious beliefs and expressions of cultural traditions, the more individuals had to refrain from ostensibly displaying those beliefs and traditions in public' [ibid para 31].

40 ibid para 27.

stereotypes. It also argued the specific political situation was different to that in *SAS*, as Belgium does not have the same constitutional commitment to laïcité as France. Whilst vivre ensemble is not specifically about ensuring a secular public sphere and laïcité does not require that individuals give up signs of their religious affiliation unless they are fulfilling a public role,[41] both concepts may lead to the proscribing of symbols of religious difference in public spaces, albeit for differing reasons. The constitutional requirement of laïcité had also seen as relevant by the French government when considering whether to introduce the law.

The Human Rights Centre of Ghent University put forward a different kind of argument. It did not challenge vivre ensemble itself as a legitimate aim, but instead submitted an empirical argument that the ban did not have a rational connection to the aim pursued and/or that less restrictive measures should have been considered. This was because of its research demonstrating that if face veils were banned, women who would otherwise wear them were not more likely to engage in socialization with wider society, but instead withdraw further.[42] It argued that the policy therefore did not encourage integration or socialization between different groups and thus was disproportionate.

Despite these varied challenges to its previous ruling and to the legitimacy of the concept at all, and more specifically to the conception of vivre ensemble evident in *SAS*, the Court did not accept any of these challenges and made it clear that it did not want to reopen the issue. It merely stated that the aims proposed by the Belgium government were similar to those previously proposed by the French government and as it had accepted the vivre ensemble argument there, it would accept it in the similar situation presented here. In its discussion of necessity, as in *SAS*, the Court pointed to the long decision making process and comprehensive debate when deciding to legislate, the lack of European consensus, the fundamentally subsidiary role of the Court and the wide margin of appreciation. As in France, the question of whether or not women should be permitted to wear the veil was a 'choice of society'. Therefore, it argued, the ban had the legitimate aim of preserving the conditions of 'living together' as an element of the protection of the rights and freedoms of others and was proportionate, although its reasoning also highlighted that this applied only to the specific context of the full face veil.

There was an interesting concurring opinion by Judges Spano and Karakaş. They agreed that there was no violation of the Convention because SAS formed 'a solid jurisprudential basis' for the state's actions. They therefore showed no willingness to reopen the divisive issue decided only three years previously. Nevertheless, their discontent with the possible consequences of the decision was clear and they sought to limit its scope, to an even greater extent than the majority decision. First, they argued that allowing criminal prohibition of the face veil did not mean that all criminal sanctions would be legitimate. There were strict limits to the use that the government

41 Myriam Hunter-Henin, 'Why the French Don't Like the *Burqa*: *Laïcité*, National Identity and Religious Freedom' (2012) 61 International and Comparative Law Quarterly 613.

42 See also Eva Brems, '*SAS v France: A Reality Check*'(2016) 25 Nottingham Law Journal 58; Eva Brems and others, *Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium Concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering* (Human Rights Centre, Ghent University 2012).

could make of its coercive power to encourage socialization. The Belgium law allowed imprisonment as a possible sanction compared to only a small fine in France and Spano and Karakaş argued that there was a strong presumption that applying such a sanction would be disproportionate. Moreover, they made it clear that their willingness to use vivre ensemble was based only on the present facts,[43] and this did not mean it could necessarily be applied in different contexts.

Over several paragraphs they also engaged in an extended criticism of the concept, echoing the criticisms made by the dissenting judges in *SAS*. They argued that the concept was 'vague' and so 'malleable and unclear' 'that it can potentially serve as a rhetorical tool for regulating any human interaction or behaviour purely on the basis of a particular view of what constitutes the "right way" for people to interact in a democratic society'.[44] They pointed out the close conceptual ties between living together and majoritarianism and argued that public animus cannot form the basis of justifiable restrictions of Convention rights. This is a concurring opinion which reads far more like a dissenting one and given the extended criticisms they make, it is perhaps odd that they did not dissent.

Overall the decision was unsurprising. Whilst the Court does not formally abide by a doctrine of precedent, asking it to depart from a Grand Chamber decision, barely 3 years after it had been decided, on a hugely politically significant issue was always going to be unlikely to succeed. This is not to say the Court does not sometimes suddenly change direction but there will normally be some external force driving this, such as a change to the European consensus, as for example has occurred over gay rights,[45] or occasionally distinct criticism from Member States.[46] Neither of these had or has since occurred here.

A. Developments post COVID-19

It is an interesting question whether the current context of COVID-19 and the subsequent widespread wearing, and even mandating, of facemasks in public spaces may lead to any reconsideration of this issue. Facemasks themselves are clearly legal under the French law, because they are worn for health and safety reasons, an exception in the legislation. Indeed, they were required to be worn outside in some public spaces for several months, and are still required in many indoor public areas.

Part of the face is thus now concealed far more often and routinely than it was when *SAS* was decided. The importance of revealing the face was the foundation of the Court's judgement. It referred to the face as playing 'a significant role in human interaction: more so than any other part of the body, the face expresses the existence of the individual as a unique person'.[47] The unique nature of the face was also frequently referred to in the Parliamentary and other debates when the law was being discussed. In the French Parliamentary debate, explicitly drawing on the work of the

43 The 'scope and reach of the Grand Chamber's judgment is limited and cannot be readily relied upon by member states in other factual contexts' [ibid para 2].

44 ibid para 6.

45 See discussions in eg *Schalk and Kopf v Austria* (2011) 53 EHRR 20; *Hämäläinen v Finland* Application No 37359/09 (ECtHR, 16 July 2014); *Oliari and Others v Italy* (2017) 65 EHRR 26.

46 As in *Lautsi v Italy* (n 29).

47 *SAS* para 82.

philosopher Levinas, an uncovered face was perceived as demonstrating openness to dialogue and to engagement with society, whilst a veiled woman was seen as 'denying her own identity and depriv[ing] herself from social contacts'.[48]

If it is no longer a cultural norm for people to show all their face whilst communicating with others in public spaces, does this mean there is no longer sufficient justification for banning the niqab? It seems likely that the Court would reject this argument. Practically, the face mask covers less of the face, allowing for more non-verbal communication. Significantly also, if the relevant point is about *openness* to dialogue, wearing a facemask in the current circumstances, especially where it is mandated by law or other rules, does not necessarily demonstrate anything about a willingness to or not to engage in dialogue. This is in contrast to how the niqab was perceived by the French government and by the Court in *SAS*. This assumption could though be challenged: wearing a niqab does not necessarily show unwillingness to communicate with others. Furthermore, even surgical face masks are not only worn to protect each other from illness. They may also be worn because they are perceived as fashionable, to protect the face from the sun or simply because the wearer does not want to reveal her face.[49] Therefore, even if the Court was right to accept that there is a requirement in society to be open to dialogue and the significance of the face for this, and this is of such importance that it is capable of restricting fundamental rights, this argument is weakened by the current situation.

An alternative understanding of vivre ensemble is that living in a multicultural society requires the suppression of some signs of difference where they differ greatly from the norm. A face mask and a niqab cannot therefore be compared because a face mask, unlike the niqab, is not a visible sign of difference, but in fact demonstrates compliance with legal and other norms. However, as Hunter-Henin argues, in a liberal democracy which should include a commitment to the inclusion of religious and other minorities, visible signs of difference are not in themselves problematic and should even be celebrated.[50] A mere uneasiness over visible signs of religiosity, particularly Islamic religiosity, in public spaces cannot be a legitimate reason for restricting their use.This understanding of vivre ensemble is thus highly problematic.

A related argument, not directly referred to in *SAS*, but relevant to other religious clothing cases, is that such forms of dress in public spaces, even where the wearer is not fulfilling any state role, conflict with a state policy of neutrality and laïcité and/or that its use demonstrated an illegitimate lack of integration into French society. As debates in France over other signifiers of Islamic identity such as headscarves or long skirts in schools, volunteering and employment demonstrate, it is not (only) about the face.[51] As Akou points out, there has been much criticism and concern over women who wear the 'burquini' when this leaves the face uncovered and covers the

48 Hunter Henin (n 41).

49 Jacquelyn Flaskerud, 'Masks, Politics, Culture and Health' (2020) 41 Issues in Mental Health Nursing 846.

50 Hunter-Henin (n 29).

51 See eg Anna Korteweg and Gökçe Yurdakul, 'Liberal Feminism and Postcolonial Difference: Debating Headscarves In France, The Netherlands, And Germany' (2021) 68 Social Compass 410; Hunter Henin (n 31) 45–48.

same as a standard wetsuit.[52] An argument that the ban is required by a constitutional commitment to laïcité is though unlikely to be successful. Laïcité has not historically been understood as requiring the exclusion of religion entirely from the public sphere, and current French practice does not require this.[53] There is for example funding of religious schools, as long as they do not discriminate in their admissions on religious grounds.[54] Other signs of religious affiliation are not banned entirely outside the private sphere. Despite this, as the next section will demonstrate, courts are increasing using neutrality arguments in this context.

Whatever the merits of these arguments, the ECtHR showed in *Dakir* that it did not want to revisit the specific issue of full face veils. Even if social practice on revealing the face has changed, the Court is likely to argue that the widespread use of face masks in public spaces does not fundamentally change social norms on the importance of the face, but is merely a necessary reaction to a serious public health emergency. It is also likely that the niqab and face masks would not be perceived as analogous, partly due to the meaning or perceived meaning of the face covering in terms of openness to social interaction, and partly for the practical reason that a facemask covers less of the face, and therefore more facial interaction is possible.

4. *VIVRE ENSEMBLE* IN OTHER ARTICLE 9 CASES

Despite its clear wish not to overturn *SAS, Dakir* gave a strong steer that the concept of vivre ensemble should be confined to the specific situation of full face veils. Given that only a small number of Member States ban religious face coverings entirely and only a small minority of Muslim women within these countries wish to wear them,[55] this is of direct significance only for a few, although this does not of course lessen the significance for those women, or for all those who are stereotyped or stigmatized as a result of such policies.[56] Of more widespread direct significance would be if vivre ensemble reasoning were used in other Article 9 claims, in particular the wearing of Islamic headscarves or other forms of Islamic dress.

The Court has examined bans on the hijab several times and the law has not remained static. Cases before *SAS* were unsympathetic to the claims of those who wished to wear a headscarf in the workplace or similar contexts, perceiving these forms of Islamic dress as violating gender equality norms and having an inherently proselytizing effect, especially when worn by state officials (in their widest sense).[57] *SAS* rejected this view as inevitably true, instead looking at the meaning of wearing religiously motivated forms of dress from the perspective of the applicant herself. Cases after *SAS* continue this positive trend by adopting an internal perspective[58] of

52 Heather Akou, 'The Politics of Covering the Face: From the 'Burqa Ban' to the Facekini' (2021) 25 Fashion Theory 5.

53 Hunter-Henin (n 31).

54 ibid Ch 2.

55 See Neville Cox, *Behind the Veil: A Critical Analysis of European Veiling Laws* (Edward Elgar 2019).

56 Peroni (n 17).

57 See *Dahlab* (n 16); *Kurtulmus v Turkey*, Application No 65500/01 (ECtHR, 24 Jan 2006); *Leyla Sahin v Turkey* (2012) 54 EHRR 20; *Dogru v France*, (2009) 49 EHRR 8.

58 See for discussion, Christopher McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (Oxford University Press 2018).

the meaning of Islamic dress, although this does not mean the applicants are always successful. Interestingly, later Court decisions do not rest on vivre ensemble arguments but on the use of laïcité/secularism which was not directly at the basis of the decision making in *SAS*. This can be seen in three cases: *Ebrahimian v France* and *Hamidović v Bosnia*, decided shortly after *SAS* and *Lachiri v Belgium*, decided in 2018.

Ebrahimian v France,[59] involved an assistant psychiatric social worker who did not have her contract renewed after being employed for several months because she refused to remove her headscarf at work. She argued that this violated Article 9. In its submissions, the Government did not refer to vivre ensemble at all, despite having been successful on this ground in *SAS* only a year before. Its argument instead relied on the French state's application of its core constitutional principle of laïcité. Similarly, the applicant did not directly refer to the requirement of vivre ensemble, but deliberately distanced herself from the facts of that case. She conceptualized the forms of Islamic dress in the two cases as having different meanings. The niqab was a symbol of 'social separation' and a 'refusal to integrate', whereas in contrast her headscarf was, she argued, 'anodyne in appearance'.[60]

Perhaps because of the lack of reference to vivre ensemble by the parties, the Court did not refer to it at all. Instead, it accepted the government's argument of the significance of laïcité for its public sector employees, along with the importance of the margin of appreciation on a politically and constitutionally sensitive issue. The partial dissent and dissenting judgments too did not refer to vivre ensemble directly, although they drew similarities between *SAS* and the current case. Both they argued, accepted a broad principle as a legitimate aim and did not apply the proportionality process strictly.

Hamidović v Bosnia,[61] decided only a few weeks after *Ebrahimian*, and *Lachiri v Belgium*,[62] decided three years later, demonstrate too the restricted use of vivre ensemble reasoning when discussing other forms of Islamic dress. Both involved refusals to remove Islamic headwear in court in defiance of an order by the judge. In *Hamidović* a witness refused to remove his Islamic skullcap and was as a result convicted of contempt of court.[63] By a majority, the ECtHR held his conviction was a violation of Article 9. Similarly in *Lachiri*, a civil party to a criminal case involving the unlawful killing of her brother was refused entry to an appeal court because she was wearing a hijab. Again, the ECtHR held this to be a violation.

In *Hamidović*, there was no use of vivre ensemble arguments by the Government. The legitimate aims the government proposed for the ban on religious headwear in court were to protect the rights of others by upholding secular and democratic values and to uphold the authority and impartiality of the judiciary. The Court too did not refer to vivre ensemble or any reasoning relating to integration or ease of socialization, although there was significant reference to *SAS* for other purposes. Extensive quotations were used to demonstrate the general principles relating to Article 9 and to say that the limitations on the right are exhaustive and restrictive: the non use of

59 Application No 64846/11 (ECtHR, 26 November 2015).
60 ibid para 38.
61 Application No 57792/15 (ECtHR, 5 December 2015).
62 Application No 3413/09 (ECtHR, 18 September 2018).
63 Although for two judges this was mainly because they thought the conviction was not prescribed by law.

vivre ensemble therefore looks deliberate. Similarly to *Ebrahimian*, the Court instead accepted that the state's 'aim to uphold secular and democratic values' could be linked to 'the legitimate aims of the protection of the rights and freedoms of others' although this was not enough to justify the interference with the claimant's rights on the facts since he was not a state official and maintained a respectful attitude towards the court and the judge.

Despite the lack of reference to integration or to the need to live together peacefully in a democratic society, 'vivre ensemble' in its responsibility sense had direct relevance to the factual background, which was only referred to in the dissenting judgment. The court case involved a criminal case of terrorism, committed by members of the same religious group as the witness. The group opposed the existence of the secular and democratic state and lived in a remote and inaccessible place to allow them to withdraw from wider society. The defendants had refused to remove their skullcaps or to stand for the judge because they did not recognize the legitimacy of the court, although Hamidović was described as acting respectfully to the judge. My argument here is not that the skullcap should have been prohibited in this situation, but that the ECtHR's use and non use of vivre ensemble clearly shows it is only the face veil that is automatically perceived as incompatible with societal norms of social interaction and the harmonious living together of different groups. Other religious symbols, even where they are worn by those who reject the principles of the Convention (and of course, many who do not), are not.

In *Lachiri*, the distinction for the Belgium government and for the ECtHR between other forms of religious dress and the full face veil was made even clearer. The government only justified the ban on wearing headgear in the courtroom on the basis of preventing disrespectful behaviour or disruption of the smooth running of a hearing, rather than any comment on what wearing a headscarf means for socialization or integration. The ECtHR explicitly stated that as the face veil was relevantly different from the headscarf or skullcap it would refer principally to cases which were closer to the facts, such as *Hamidović*, rather than *SAS*. The Court did not refer to the margin of appreciation which was central to the decision in *SAS*.

Furthermore, in *Osmanoğlu and Kocabaş v Switzerland*[64] the court also referred favourably to the use of the 'burkini' as a possibility for Muslim girls to wear during school swimming lessons in order to respect their religious beliefs. The case was brought by two Muslim fathers who refused to let their pre-pubescent girls take part in compulsory mixed swimming lessons at school. Given the support for laws banning the burkini in public swimming pools and beaches in France and Belgium (although these laws were rejected by the domestic courts or never introduced),[65] this too supports the argument that the requirements of vivre ensemble, as conceived by the ECtHR, only applies to restrictions on the full face veil and not to other forms of Islamic dress.

Nevertheless, while suggesting that vivre ensemble did not mean that the burkini was banned, fears over integration, and specifically that the children would not be

64 Application No 29086/12 (ECtHR, 10 January 2017).

65 See Eva Brems and others, '"Burkini" Bans in Belgian Municipal Swimming Pools: Banning as a Default Option' (2018) 36 Netherlands Quarterly of Human Rights 270.

fully integrated into Swiss society because of the beliefs of their parents underly the case. The Court held that the requirement to take part in swimming lessons did not contravene Article 9.[66] The idea of vivre ensemble is not explicitly mentioned but instead a very similar spatial metaphor is used of 'cohabiting'. As Trotter puts it, the Court considered there to be a link between 'living together, learning together and swimming together'.[67] The Court cited *SAS* in saying that the Court has a subsidiary role, particularly where the case is about the relationship between the state and religion. The unusual use of the cohabitation metaphor is likely to be because it involved children and in particular those attending state schools, those 'paradigm labs of integration',[68] and decisions made on their behalf, since the child's voice was not made evident in the case. It is thus different from the other cases which all involve adults.

SAS therefore does not stand for the principle that other forms of religious dress other than full face coverings can be banned merely because they differ from social norms. Later cases instead rely on the importance to the state of complying with its constitutional principles of neutrality and secularism and the subsidiary role for the Court in state and religion issues. This leads to the odd result that the desire to see a person's face when communicating becomes the dominant deciding factor in *SAS*.

In a very different kind of clothing case, vivre ensemble is again notable not for its use but for its absence. In *Gough v UK*,[69] Gough, known as the 'naked rambler', chose to be naked in public because of his belief in the 'inoffensive nature of the human body'. He was arrested over 30 times for public order offences and ended up cumulatively serving several years in prison. On several occasions on his release from prison he was immediately re-arrested because he refused to put clothes on. Most of his time in prison was spent in solitary confinement because he refused to wear clothes.

He argued that his convictions and treatment contravened Articles 9 and 10, although the case was mainly decided under Article 10. Whilst the underlying beliefs were very different from those in *SAS*, both involve a form of dress or non-dress which expresses deeply felt philosophical or religious beliefs. The purpose is not to cause harm or offend but it still violates strong societal norms of what should be visible to others and what should not be. Given this, it shows how limited the vivre ensemble doctrine is that it was not referred to or parallels drawn between the two. Instead, the Court rested the justification more closely on considerations of morality and the rights of others, pointing out that his conduct went 'against the standards of accepted public behaviour in any modern democratic society' and would also be alarming and morally offensive to members of the public. A more narrow, and orthodox, approach focusing on the specific harms caused to others was therefore sufficient to decide the case in the government's favour.

66 Switzerland had not ratified Art 2 Protocol 1, giving the right to respect of parents to ensure education and teaching were in conformity with their religious or philosophical convictions.

67 Sarah Trotter, '"Living Together", "Learning Together", and "Swimming Together": *Osmanoğlu and Kocabaş v Switzerland* (2017) and the Construction of Collective Life' (2018) 18 Human Rights Law Review 157.

68 Trispiotis (n 33) 597.

69 (2015) 61 EHRR 8.

These cases demonstrate that the Court does not seem likely to revisit its decision in *SAS* but conversely that the use of vivre ensemble even in other clothing cases is very limited. It is only occasionally referred to by governments and even then the Court does not always accept it. Instead restrictions on Islamic forms of dress are more likely to be defended by governments on the basis of neutrality: a concept as least as open to different conceptions as vivre ensemble. This suggests that perhaps laïcité or its private sector equivalent of neutrality will replace living together as the legitimate aim referred to where there is no precise competing interest of a specific other (including an employer) to be protected.

5. RELIGIOUS DISCRIMINATION AND THE CJEU

The ECtHR is not the only European court to hear cases relating to the restrictions on Islamic dress. Given the overlap in subject matter in the protection of freedom of religion under the ECtHR and religious discrimination under EU law, and in geographical scope, there is clearly scope for 'constitutional borrowings' between the ECtHR and the CJEU, even though the scope of the right and the exceptions to it are different.[70] The CJEU has not yet considered any cases relating to niqabs, but it has considered policies relating to headscarves in the workplace. In *Achbita* an employee was dismissed for wearing the hijab because her employer, G4S, had a policy of neutrality which prohibited employees from wearing any religious, philosophical or political symbols whilst at work. In *Bougnaoui*, there did not appear to be a neutrality policy but customers had complained to her employer that they did not want her to wear a headscarf whilst she carried out assignments for them in their offices and she was dismissed when she refused to remove it. Two further cases, *WABE*[71] and *MH Müller Handel*[72] seeking further clarification on this ruling have also recently been decided by the Court.

The Court in *Achbita* held that because the policy forbade all political, philosophical or religious signs, it was not directly discriminatory. Whilst it was potentially indirectly discriminatory, a desire on the part of the employer to display religious and political neutrality to its customers was legitimate. Although the Court said it was for the referring court to decide whether or not there was the possibility of moving her into a non-customer facing role, it assumed the legitimacy of the policy as a whole. In *Bougnaoui* the court found that if there was a neutrality rule then this would be only indirect discrimination, rather than direct discrimination, and therefore potentially justifiable. However, the willingness of the employer to take account of the wishes of a customer to no longer to have services provided by a worker wearing an Islamic headscarf could not be considered a genuine and determining occupational requirement. In *WABE* and *Müller Handel*, however, further clarification of this ruling was sought to decide whether a policy of political, philosophical and religious

70 The scope of EU law is limited and only applies to religious discrimination in specific contexts such as employment. A policy of prohibiting face coverings may be easier to uphold where communication and interaction is specifically required, although again, the widespread use of face masks in indoor spaces may demonstrate that this is less of a requirement than may previously have been thought.

71 Case C-804/18.

72 Case C-341/19.

neutrality introduced because of customer wishes could be a legitimate aim. It was decided that it could be.

The CJEU did not refer to *SAS* or to vivre ensemble in any of these cases. The only significant ECHR case law referred to was *Eweida v UK*[73] in support of the, uncontroversial, principle that freedom of religion during employment is not absolute. The concept of living together in the sense of assimilation has therefore not been 'borrowed' by the CJEU. What can be seen from this case law is instead a wide use of neutrality, broader than that of the ECtHR, although its use is growing there too, applying in countries where secularism is not a constitutional principle and to private sector employees beyond the boundaries of the state. Whilst the Court states that customer preferences cannot be a genuine and determining occupational requirement, in reality there may be little difference between this and a neutrality policy. In none of the cases was a neutrality policy interrogated as a cover for a policy of religious discrimination even though it seems unlikely that an employer would wish to introduce such a policy if there were not Muslim women who wished to wear headscarves at work.

6. WIDER INFLUENCE OF *SAS V FRANCE* IN THE ECTHR

As we have seen so far then, the introduction in *SAS* of vivre ensemble as a general principle in interpreting the meaning of the 'rights of others' has not led to widespread acceptance of restrictions on other forms of Islamic clothing or even been seen as particularly relevant to this. The decision was though criticized at the time not only for its effect in that context but because the reasoning was not inherently confined to this.[74] If restrictions on expressive rights are permitted in order to promote social integration and avoid societal conflict when it comes to prohibiting certain unusual forms of dress, why would this not be permitted when it comes to other kinds of expression?

In order to examine whether or not the Court has explicitly moved towards this position in other contexts I searched on the ECtHR's database of cases, HUDOC,[75] for all cases decided by the ECtHR which explicitly refer to *SAS v France* and the concept of *vivre ensemble*/living together in the judgment.[76] Whilst it is not bound by precedent, the Court uses citations of previous cases to add legitimacy to its decisions, particularly to external actors, in a similar way to that of domestic common law courts.[77] The more politically sensitive an issue, the more citations to support

73 (2013) 57 EHRR 8.

74 See eg Marshall (n 2); Kati Nieminen, 'Eroding the Protection Against Discrimination: The Procedural and De-Contextualized Approach to *SAS v France* (2019) 19 International Journal of Discrimination and the Law 69.

75 Hudoc.echr.coe.int.

76 Because of the frequency of the phrase living together/vivre ensemble in cases where this is merely to describe cohabitation rather the concept at issue, a search for this phrase by itself raised many irrelevant results. I therefore focused on cases where *SAS* was cited in addition to vivre ensemble/living together. To check that this would still bring up a sufficient range of cases, I tested this with reference to other concepts in ECHR law. A search for eg '*Handyside* and tolerance' or '*Kjeldsen* and pluralism' brought up the majority of the cases found by searching for the principle alone. Therefore the Court appears to cite significant cases that have used the principle and this is more likely to be the case where the concept of vivre ensemble is inextricably linked with *SAS* in the Court's jurisprudence.

77 Yonatan Lupu and Erik Voeten, 'Precedent in International Court: A Network Analysis of Case Citations in the European Court of Human Rights' (2012) 42 British Journal of Political Science 413.

the argument there are likely to be.[78] There are of course limitations in this methodology, most notably that it cannot show a change in underlying attitude towards 'cultural defence'/assimilationist principles but it shows how the Court is using the concept explicitly.

The main finding is that there is little reference to vivre ensemble at all. There is only reference to it in a few Article 8 cases, discussed below, and in no case is it the predominant reason for the decision. In Article 10 cases, whilst there is reference to *SAS* as a whole, there does not seem to be any specific use of vivre ensemble. It is only possible to speculate as to the reasons for this, but perhaps it is because the Court has tended to give a greater margin of appreciation when considering restrictions based on morality, broadly understood, or cultural diversity than in other contexts and these are more likely to be in issue in Articles 8 and 9 cases[79] Alternatively, perhaps reference to concepts such as tolerance and pluralism in Article 10 cases fulfil the same role as vivre ensemble in its responsibility, rather than assimilation, sense. I suspect that where the court does use reasoning that is closer to the responsibility or democratic models of vivre ensemble as proposed by Trispiotis and Hunter-Henin, they are more likely to refer to more well-established general principles such as tolerance or pluralism, concepts which themselves have numerous conceptions in the ECtHR's use, some of which are more assimilationist or majoritarian than others.[80] This would require further analysis however.

In Article 8 cases, *SAS* as a whole, without specific reference to vivre ensemble, is not referred to many times, but the issues these cases involve are very varied. *SAS* is mostly referred to to confirm that an applicant can be a 'victim' of a Convention breach when a general law prohibits specific conduct and they have as a result altered their behaviour in order to avoid prosecution, even though no enforcement action has been taken against them.[81] In other cases it is cited to affirm other well-understood principles, such as that Article 9 does not protect every religiously inspired act,[82] or that a general policy can be discriminatory if it has disproportionate impact on one group.[83] It is also, oddly, referred to to highlight that the face has a particular human significance and therefore a slap on the face by the police is especially degrading.[84] Since principles are mostly uncontroversial and are outside the scope of this article, I will not address these further.

More substantive use of *SAS* is made in *Parrillo v Italy*.[85] Although it did not refer to vivre ensemble explicitly, the case made broader comments about the relationship between potential legitimate aims relating to Article 8 and the text of the

78 ibid.

79 Yutaka Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry' in A Føllesdal and others, *The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013).

80 See eg Aernout Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights' (2007) 3 European Constitutional Law Review 367.

81 Eg *Karabulut v Germany* (2018) 67 EHHR SE16.

82 Eg *Dogan v Turkey* (2017) 64 EHRR 5.

83 Eg *Pajić v Croatia* (2018) 67 EHRR 12.

84 *Bouyid v Belgium* (2016) 62 EHRR 32.

85 (2016) 62 EHRR 8.

Convention, which are similar to the discussion in Article 9 and *SAS*. Focusing more precisely on vivre ensemble, the concept itself is used in three Article 8 cases on widely differing issues: *Vavricka v Czech Republic*,[86] challenging a compulsory child vaccination scheme, *Biržietis v Lithuania*[87] challenging a prohibition on prisoners growing a beard, and *Lacatus v Switzerland*[88] challenging a conviction for begging.

As in *SAS*, in *Parrillo* the Court was faced with a legitimate aim proposed by the government which did not strictly align with the legitimate aims in the text of the Convention. Parrillo was undergoing IVF treatment with her partner but before their embryos could be implanted her partner died. She decided that she no longer wanted them to be implanted but instead to donate them for scientific research. However, such research would be illegal under Italian law and so her only option would be to have them destroyed. Ultimately, the law prohibiting such research was held not to be a violation of Article 8 and Article 1 Protocol 1. Although the facts of this case are different from those of *SAS*, they raise a similar problem of whether there should be a restrictive interpretation of the legitimate aims enumerated in the Convention and the permissible use of the underlying principles supporting them.

The Italian government proposed two legitimate aims: the protections of morals and protection of the rights of others as 'the protection of the embryo's potential for life'. However, as pointed out in the dissenting judgment by Judge Sajo, an embryo is not a 'person' for the purposes of the Convention. The judgment began by saying, in an orthodox way, that 'the exceptions to the individual's right to respect for his private life, as listed in Article 8(2), [are] exhaustive and that their definition is restrictive'. However, it then went on to say, citing *SAS* in support of this, that a limitation of this freedom must pursue an aim that '*can be linked to one of those listed*'. These statements are not the same: 'linked to' being rather less restrictive than 'listed in'.

The majority's reasoning was heavily criticized in the dissenting opinion by Judge Sajo. He argued that its approach gave rise to a 'real risk of loosening the standard' in identifying legitimate aims. While he argued this had occurred to some extent in *SAS* so that the aim merely had to be linked to one of those listed in the Convention, he argued that *Parrillo* loosened this further so 'a link may exist if this is not ruled out as unreasonably speculative'. It therefore, he argued, included situations where 'there may be, rather than there can be a link'. This aspect of *Parrillo* is certainly unsatisfactory. The difficulties in finding an appropriate legitimate aim are glossed over. Whilst *SAS* ultimately allowed majoritarian concerns over conformity to prevail, a significant portion of the case was spent grappling with whether the government's proposed aims were legitimate. It rejected two of them, the protection of dignity and gender equality. By contrast, in *Parrillo* there was very little discussion. This unnecessarily widens the basis on which government actions can be accepted, particularly because it was not necessary to decide whether the rights of others were affected in terms of whether an embryo should be considered an 'other'. Restrictions

86 Application No 47621/13 (ECtHR, 8th April 2021).
87 Application No 49304/09 (ECtHR, 14th June 2016).
88 Application No 14065/15 (ECtHR, 19 January 2021).

in such a contested moral area as embryo research could have been justified under the alternative aim proposed by the government of the protection of morals.

Although both cases widen the category of legitimate aims with respect to the rights of others, *Parrillo* loosened the required link between the wording of the Convention and the purpose of the action taken further but in a different, and ultimately less significant, way than *SAS*. *SAS* widened the category of legitimate aims in expanding *when* the rights of others were affected: something that potentially has significance beyond the facts of the case, although as we have seen this has not in practice happened. In *Parrillo* the extension was instead to *who* counted as an 'other' who was capable of having rights to be affected. An embryo has a unique nature and there is no European consensus on the protection it should be given. Restrictions on research, and some outright bans, are widespread. This is therefore an area where the ECtHR is likely to give a wide margin of appreciation. Like *SAS* therefore it seems unlikely that its reasoning would be extended outside this context.

Even in the few cases where vivre ensemble is referred to specifically, there is only minimal use made of vivre ensemble and the Court does not hold that vivre ensemble simply requires the acceptance of majoritarian preferences. In *Vavricka*, parents challenged a compulsory vaccination requirement for children, punishable by a small fine and prohibition of access to preschool, but not compulsory school education. Vivre ensemble is not referred to the main judgment but only in the concurring opinion. It is noticeable that even in a situation which is directly about responsibilities to each other in society but where, like *SAS*, there is no direct intent to harm another, the main judgment does not refer to the concept. Furthermore, the conception of living together Judge Lemmens proposed in the concurring judgment was one based on fraternity and social solidarity and not assimilation. He argued that, 'while everyone enjoys fundamental rights in a given society . . . individuals do not live in isolation . . . "living together" requires respect by each member of society for certain minimum requirements'.[89] The state's policy was not designed to ensure outward conformity or to enforce social norms merely because they are social norms, but to protect the most vulnerable from direct harm. The aim is therefore based on core liberal principles.

In *Lacatus*, the Swiss government drew a link between the protection of others and living together, which if it had been accepted, would have come close to accepting that practices could be prohibited merely if they caused annoyance to others, but the Court did not decide this point. Lacatus, who was destitute, had no work and did not receive social security benefits, argued her conviction, fine and subsequent imprisonment for non-payment for begging violated Article 8. The Swiss government argued that the law protected the rights of others, including by protecting vivre ensemble, understood as respect for the 'minimum requirements of life in society'. This invocation of living together suggested they were proposing the law was legitimate even where there was no harassment or coercion of passers by. The Court left open this question and did not refer to vivre ensemble, thereby implicitly rejecting this

89 ibid para 2.

idea. Instead, it found the law disproportionate, although it accepted that preventing exploitation, especially of children, and protecting the rights of others would be relevant in some cases.

The closest the Court has come to suggesting that majoritarian norms, particularly related to appearance, can be required when considering Article 8, is in *Biržietis v Lithuania.* However, this related to the unusual situation of a prisoner. The Court accepted that there had been a violation of Article 8 because he was not permitted to grow a beard whilst in prison. The Court held that the government's proposed legitimate aims of security and hygiene were unpersuasive. The government did not refer to *SAS* but the Court raised it ab initio. The Court argued that the government could have suggested the prohibition on beards was aimed at vivre ensemble in the sense of 'ensuring respect for social norms and standards among prisoners'. Whilst this seems therefore to suggest that ensuring conformity is a legitimate aim, it is not clear why it referred to vivre ensemble or *SAS* at all, especially as it found the restriction was not necessary in a democratic society. As the dissenting judgment stated, much more severe restrictions on dress were accepted in *SAS*, so the comparison drawn seemed inapposite. It therefore does not seem to be indicative of a wider trend.

These cases demonstrate that the use made of the vivre ensemble doctrine as a general principle in Article 8 cases is very limited. Where it has been used, its use is closer to the responsibility conception than the assimilation conception of the concept. In *Vavricka* it was used by Judge Lemmens to highlight concrete harms that can be caused to (mostly unidentifiable) others, even where this was not the intention, rather than majoritarian pressures to conform. In *Lacatus*, the Court rejected the Swiss government's attempt to use it where no specific harm to others had been demonstrated and where the impact on the applicant was severe.

7. CONCLUSION

Joppke argued that burqa bans and similar policies are a kind of resurrection of the Hart-Devlin debate but one where Devlin wins and the state can 'implement a public morality with the force of law'.[90] Even in *SAS* itself the majority expressed its concerns about the 'flexibility' and 'the resulting risk of abuse'[91] of securing 'living together'. However, the doctrine has not heralded a pro government sea change in approach in cases that do not involve the full face veil. In fact, when it comes other forms of Islamic dress there appears to be a realization by the ECtHR that the margin of appreciation historically given to governments has been too wide. In other contexts, living together has only been used as the explicit basis of decision-making in a few cases and when *SAS* is cited without direct reference to the concept, it is usually cited in support of uncontroversial principles on Article 9.

Despite direct challenges to vivre ensemble though by the applicants in *Dakir* and *Belcacemi* and criticism of it by several judges, including the current Court President, vivre ensemble remains a possible legitimate aim, although it has not become an

90 Joppke (n 25) 243.
91 *SAS* para 122.

established general principle in the same way as for example tolerance or pluralism. In more recent cases on religious clothing, governments and, perhaps taking their lead, the Court, instead refer to requirements of neutrality. The question the ECtHR, and the CJEU, has not yet grappled with is whether neutrality is being used as essentially another way of expressing the assimilation conception of vivre ensemble, in order to ensure visible signifiers of religious difference are pushed out of the public sphere.