# ‘THE GOVERNMENT DID NOT REFER TO IT’: *SAS v FRANCE* AND *ORDRE PUBLIC* AT THE EUROPEAN COURT OF HUMAN RIGHTS

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*This case note comprises a review of the European Court of Human Rights’ (‘ECtHR’) judgment in* SAS v France *which upheld the French ‘burqa ban’. I focus on the ECtHR’s acceptance of a French societal principle,* vivre ensemble*, as a limitation on the rights to privacy and freedom of religion covered by the limitation ground of ‘the protection of the rights and freedoms of others’. I argue that, contrary to what a number of authors have proposed, the ECtHR did not take a new approach to ‘the rights and freedoms of others’ in* SAS v France*. Rather, as I demonstrate with the help of the ‘headscarf cases’ leading up to the judgment and other cases in which the ECtHR sanctioned reliance on fundamental societal principles,* SAS v France *further establishes an emerging trend at the ECtHR to bring in what are essentially* ordre public *(public order) arguments under human rights provisions which do not contain an* ordre public *limitation ground via their inclusion under ‘the rights and freedoms of others’.*

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## I INTRODUCTION

Voted worst judgment of 2014 by Strasbourg Observers,[1] the European Court of Human Rights’ (‘ECtHR’ or ‘the Court’) judgment in *SAS v France*, which

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[1] Stijn Smet, ‘The Results Are In: Poll on Best and Worst ECtHR Judgment of 2014’ on Lourdes Peroni and Stijn Smet, *Strasbourg Observers* (12 February 2015) <http://perma.cc/UE55-XHJN>.

upheld what is commonly known as the French 'burqa ban',[2] stirred up quite some controversy among critics.[3] Not many commentators had expected the ECtHR to uphold the French ban on full-face coverings in public,[4] much less that the Court would do so on the basis of the notion of *vivre ensemble* ('living together') accepted by the Court to form part of the limitation ground of 'the rights and freedoms of others' under arts 8 (privacy) and 9 (freedom of religion) of the *European Convention on Human Rights* ('*ECHR*' or '*Convention*').[5]

Some have argued that the Court took an entirely novel approach to 'the rights and freedoms of others', being for the first time confronted with the concept of *vivre ensemble*.[6] This case note reviews the judgment in *SAS v France* and subsequently argues that the Court was neither first confronted with *vivre*

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[2] *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014). The 'burqa ban' refers to *Law No 2010-1192* of 11 October 2010 'prohibiting the concealment of one's face in public places'. Discussion of the law at the national level revealed it being aimed at banning full-face veils, particularly the burqa. See Myriam Hunter-Henin, 'Why the French Don't Like the Burqa: *Laïcité*, National Identity and Religious Freedom' (2012) 61 *International & Comparative Law Quarterly* 613. See also Eva Brems, 'Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings' (2014) 22 *Journal of Law and Policy* 517, 517–18.

[3] See, by contrast, Céline Ruet who calls the decision finely balanced, Myriam Hunter-Henin who claims that the European Court of Human Rights ('ECtHR' or 'the Court') proceeded from the wrong legal basis but took a balanced approach to the case, Susan Edwards who challenges both the legal basis and approach taken by the Court and Jill Marshall who focuses on the Court having lost the correct perspective on the function of rights. Céline Ruet, 'L'interdiction du voile intégral dans l'espace public devant la cour européenne: la voie étroite d'un équilibre [The Ban on Full-Face Veils in Public Places before the European Court: The Narrow Path of Balance]' (2014) *La Revue des droits de l'homme* [22]–[23] <http://perma.cc/ACJ7-8LWD>; 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, 113; Susan S M Edwards, 'No Burqas We're French! The Wide Margin of Appreciation and the ECtHR Burqa Ruling' (2014) 26 *Denning Law Journal* 246, 253–60; Jill Marshall, '*SAS v France*: Burqa Bans and the Control or Empowerment of Identities' (2015) 15 *Human Rights Law Review* 377, 382, 385–9. See Frank Cranmer for an overview of reactions online: Frank Cranmer, '*SAS v France* and the Face-Veil Ban: Some Reactions' on Frank Cranmer and David Pocklington, *Law & Religion UK* (5 July 2014) <http://perma.cc/S435-L65A>. See also Eva Brems, '*SAS v France* as a Problematic Precedent' on Lourdes Peroni and Stijn Smet, *Strasbourg Observers* (9 July 2014) <http://perma.cc/J2DH-YB7J>; Martin Wählisch, 'ECHR Chamber Judgment Case of *SAS v France*: Banning of Burqas and Niqabs Legal?' on *Cambridge Journal of International and Comparative Law Blog* (21 July 2014) <http://perma.cc/X4UM-JXCS>; Katarzyna Blay-Grabarczyk, 'Une certaine retenue face à un choix de société — l'épilogue européen de la loi interdisant la dissimulation du visage dans l'espace public [A Certain Reservation when Faced with a Choice of Society — The European Epilogue of the Law Prohibiting the Concealment of the Face in Public Places]' (2014) 23 *Revue des Droits et Libertés Fondamentaux* <http://perma.cc/GK2E-K3WK>.

[4] Ruet nonetheless argues that on the basis of the ECtHR's case law, the outcome in *SAS v France* could have been predicted: Ruet, above n 3, [3]. Eva Brems equally noted prior to the Grand Chamber's decision that a victory by the applicant was not certain: Brems, 'Face Veil Bans', above n 2, 551.

[5] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) arts 8, 9 ('*ECHR*' or '*Convention*'). See especially Hunter-Henin's 2012 article in which she predicts that *vivre ensemble* will not pass the *ECHR* test: Hunter-Henin, 'Why the French Don't Like the Burqa', above n 2, 634–9.

[6] See Edwards, above n 3, 255–6. See also Stephanie Berry, '*SAS v France*: Does Anything Remain of the Right to Manifest Religion?' on Dapo Akande et al, *EJIL: Talk!* (2 July 2014) <http://perma.cc/6HV5-NN3C>; Joshua Rozenberg, 'Niqabs Ban: Fine "Margin"', *The Law Society Gazette* (online), 7 July 2014 <http://perma.cc/5PKX-TGHW>.

*ensemble*, nor did it take a novel approach to 'the rights and freedoms of others'. Rather, *SAS v France* forms part of a trend at the ECtHR to include what are essentially public order (*ordre public*) considerations (eg *vivre ensemble*) in 'the rights and freedoms of others' limitation under human rights, which do not contain a public order (*ordre public*) limitation ground. Placing the judgment of *SAS v France* in context, I will demonstrate that it forms part of a development under the ECtHR's case law instead of offering a 'novel approach'.

Following this introduction, I first introduce the case of *SAS v France* (Part II). Thereafter, I explain how the Court in *SAS v France* attempted to 'remedy' the lack of a public order (*ordre public*) limitation under *ECHR* art 8 through an acceptance of *ordre public* considerations under 'the rights and freedoms of others', and that doing so is not a new practice but part of an emerging trend developed within the context of religious manifestation and beyond (Part III). Subsequently, I indicate future implications of broadening the limitation ground of 'the rights and freedoms of others' to encompass public order (*ordre public*) and the ruling in *SAS v France* (Part IV) and end with a short conclusion (Part V).

## II *SAS v France*: Facts and Proceedings

### A *Facts*

On 11 April 2011, *Law No 2010-1192* prohibiting all[7] persons present on French territory to conceal their faces in public, including through full-face veils,[8] entered into force. That same day, a young Muslim woman lodged an application with the ECtHR challenging the law as a violation of her rights under the *ECHR*.[9] Known only by her initials, SAS, the applicant submitted that she was a 24 year-old French national and a devout Muslim. Depending on her spiritual feelings, SAS would sometimes wear a burqa[10] or niqab,[11] although she did not do so systematically and also did not object to showing her face for identity checks.[12] The applicant emphasised that she was not pressured by anyone to wear the full-face veil and at times socialised in public without it, choosing herself to wear the burqa or niqab 'when she believed that she ought to wear it in public in order to express her religious, personal and cultural faith', for example during Ramadan.[13] *Law No 2010-1192* prohibiting the wearing of full-face coverings, however, categorically denied the applicant the right to wear

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7 *Loi n° 2010-1192 du 11 octobre* 2010 (Law No 2010-1192 of 11 October 2010) France JO, 12 Occtober 2010. Exceptions admitted: the law does not apply to people wearing face-coverings for health and occupational reasons, or within the context of 'sports, festivities or artistic or traditional events': at s 2. In addition, it does not apply to places of worship: *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [31].

8 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [31].

9 Ibid [54]–[55], [62].

10 Full-body covering with mesh covering the face.

11 A full-face veil with opening for the eyes.

12 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [11]–[13].

13 Ibid [11]–[12].

a burqa or niqab in public on pain of a criminal sanction.[14] This, SAS alleged, violated her rights under the *ECHR*.

### B *Proceedings*

Before the ECtHR's Grand Chamber,[15] the applicant claimed a violation of *ECHR* arts 3 (non-subjection to degrading treatment), 8 (privacy), 9 (freedom of religion), 10 (freedom of expression) and 11 (freedom of assembly), taken alone and in combination with art 14 (non-discrimination).[16] SAS argued in particular that the ban restricted her freedom of manifestation and interfered with her private life, especially since wearing the burqa or niqab formed an important part of her identity.[17] Four non-governmental organisations[18] and the University of Ghent intervened in support of a finding that the French law violated the *Convention*.[19] The Belgian Government, which had previously adopted a law similar to the French one, intervened to support the ban as compatible with the *ECHR*.[20]

The case commenced with three preliminary objections raised by the French Government claiming non-exhaustion of domestic remedies, lack of victim status in absence of a conviction and a possible abuse of procedure.[21] The government went as far as to question the very existence of SAS who had not attended the hearing and of whom 'nothing [was] known'.[22] It deemed the case an *actio popularis*. The Court, however, dismissed all objections, holding that SAS was a victim as the law compelled her to modify her behaviour or face prosecution, her name and address had been verified (hence she existed) and a victim was not obliged to exhaust 'ineffective or pointless' remedies.[23] Given that in the meantime several French courts had upheld the law as compatible with human rights,[24] the application could not be declared inadmissible on this ground. However, the Court did declare the applicant's claims in respect of degrading treatment and freedom of assembly inadmissible for being manifestly

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14 Ibid [14], [76].

15 The case would initially be heard by the ECtHR's Fifth Section, but because it raised important questions of law, it was transferred to the Court's Grand Chamber (a chamber which normally acts as an appeal body, but may also accept first instance cases which contain important points of law). Ibid [5].

16 The article on non-discrimination under *ECHR* is not a stand-alone provision. It can only be invoked when a matter comes within the scope of another *Convention* article. A stand-alone non-discrimination provision is included in *Protocol No 12* to the *ECHR*, which entered into force in 2005, but which France has neither signed nor ratified.

17 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [76]–[80].

18 Amnesty International, Liberty, Open Society Justice Initiative and ARTICLE 19: ibid [8].

19 Ibid [89]–[105].

20 Ibid [86]–[88].

21 Ibid [53]–[68].

22 Ibid [62].

23 Ibid [57], [60]–[61], [64], [68].

24 Conseil Constitutionnel [French Constitutional Court] decision n° 2010-613, 7 October 2010 reported in JO, 12 October 2010, 18345; Cour de Cassation [French Court of Cassation], 12-80.891, 5 March 2013 reported in (2013) Bull crim n° 3, 105. The Conseil Constitutionnel and Cour de Cassation are the highest French courts in matters of constitutional law and criminal law respectively.

ill-founded.[25] It then proceeded to decide the case on the basis of the right to privacy (art 8) and freedom of religion (art 9).

Analysis under *ECHR* arts 8 and 9 rests on the ECtHR finding an interference with the relevant right, followed by a determination of whether the interference can be justified on the basis that it was prescribed by law, served one of the legitimate aims mentioned in either article (the limitation grounds in arts 8(2) and 9(2)), and was 'necessary in a democratic society'. Generally, findings of interference, legal basis and legitimate aim are formalities and the focus of the debate is on necessity (the proportionality test).[26] However, in *SAS v France*, the ECtHR dealt extensively with the question of 'legitimate aim' because the applicant contested the ban's ability to serve either of the aims proposed by the Government, namely public safety and 'the rights and freedoms of others'.[27] Moreover, the French Government had given an unusual interpretation to 'the rights and freedoms of others'. It claimed that 'the rights and freedoms of others' encompassed the notion of 'respect for the minimum set of values of an open and democratic society' and subsequently identified three such values on which it wished to rely.[28] First, 'observance of the minimum requirements of life in society' according to the principle of *vivre ensemble* (translated as 'living together')[29] which included social interaction; secondly, equality between sexes; and thirdly, human dignity (the government argued that full-face veils 'effaced' women from public space which was dehumanising).[30]

Accepting that public safety posed a legitimate aim in view of the danger face concealment could pose, the ECtHR was quick to point out that a blanket ban was not necessary to serve this aim and provided no justification for *Law No 2010-1192*.[31] With regard to 'respect for the minimum set of values of an open and democratic society', the Court considered that the three values mentioned did not as such correspond to any of the legitimate aims in arts 8 or 9, but that the invoked 'rights and freedoms of others' could be relevant.[32] It nonetheless ruled that two of the three values proposed failed to provide a legitimate aim under 'the rights and freedoms of others'. France could not invoke gender equality to ban a practice defended by women as an exercise of a *Convention* right, unless it would be understood that women could be 'protected' from exercising their rights with an appeal to equality.[33] Dignity equally failed to provide a legitimate aim in view of the existing pluralism of 'notions of virtuousness and decency' applied to the uncovering of the body.[34] Also, there

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25 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [69]–[73].

26 Blay-Grabarczyk, above n 3.

27 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [80]–[81].

28 Ibid [81].

29 Living together is a very literal translation of *vivre ensemble*. It fails to capture the connotation of the French word which is concerned with living in harmony, implying a certain sense of conformity, or at least community spirit.

30 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [82]–[84].

31 Ibid [115], [139].

32 Ibid [117].

33 Ibid [119].

34 Ibid [120].

was no evidence that fully veiled women themselves offended the dignity of others in society. A majority of 15 judges nonetheless accepted that 'respect for the minimum requirements of life in society' could be linked to 'the rights and freedoms of others' and provide a legitimate aim for the ban on face coverings, since the possibility of 'open interpersonal relationships' and 'socialisation' were elements of French community life on which a consensus existed that they were necessary to ensure a *vivre ensemble*.[35] Face concealment therefore affected the rights and freedoms of others.[36] To this conclusion, Judges Nussberger and Jäderblom offered a forceful dissent arguing that the limitation ground of 'rights and freedoms of others' required reliance on concrete rights of others and not abstract principles such as *vivre ensemble*.[37]

In considering whether the ban on full-face covering was necessary in a democratic society to protect 'the rights and freedoms of others', the ECtHR, following an overview of applicable general principles,[38] noted on the one hand that several international bodies, including its own organisation's Parliamentary Assembly, had condemned blanket bans on full-face coverings as disproportionate.[39] The Court also observed that the ban had a 'significant negative impact' on the small group of women wearing full-face veils and that Islamophobic remarks had marked the debate on *Law No 2010-1192*.[40] On the other hand, the ban did not target religion expressly, sanctions were light (a fine and/or citizenship course), and although the law restricted pluralism, it responded to a practice deemed incompatible with the ground rules of social communication and requirements of *vivre ensemble*.[41] Moreover, the law was arrived at through democratic process on a matter on which opinions could reasonably differ, which meant that special weight had to be given to the role of the domestic policymaker. Consequently, the French Government enjoyed a

35 Ibid [121]–[122]. To summarise the complex reasoning: face-concealment interferes with open relationships/social communication, open relationships/social communication form part of the notion of *vivre ensemble*, *vivre ensemble* forms part and parcel of 'respect for the minimum requirements of life in society' which itself is a value contained in 'respect for the minimum set of values in an open and democratic society'. 'Respect for the minimum set of values in an open and democratic society' is deemed included in the limitation ground of 'the rights and freedom of others' (but only insofar as 'respect for the minimum requirements of life in society' — including *vivre ensemble* — is concerned).

36 Ibid [121]–[122].

37 Ibid [3]–[12] (Nussberger and Jäderblom JJ).

38 Ibid [123]–[136]. In particular, the Court reiterated the importance of freedom of religion and the view that pluralism, tolerance and broad-mindedness are the hallmarks of a democratic society. The state is the neutral organiser of religion within its jurisdiction and may limit manifestations in the interest of harmony and democracy. However, democracy does not equal dominance by the majority. The Court exercises important supervision in this respect, despite its subsidiary role to the national decision-maker.

39 Ibid [35]–[39], [147].

40 Ibid [146], [149].

41 Ibid [151]–[153].

wide margin of appreciation to regulate the practice of full-face covering.[42] Having refused to find a European consensus rejecting full-face covering bans, as had been advanced by the University of Ghent intervening, a majority of 15 judges declared the French ban necessary in a democratic society to protect 'the rights and freedoms of others' through the mediating concept of *vivre ensemble* encapsulated in 'the minimum requirements of life in society'.[43] With 15 votes to two, Judges Nussberger and Jäderblom again dissenting on the basis that the ban was disproportionate and France should not have enjoyed a wide margin of appreciation,[44] the ECtHR found no violation of *ECHR* arts 8 or 9. It then decided unanimously that there was no violation of art 14 (non-discrimination) to which provision a similar reasoning as that in respect of arts 8 and 9 could be applied, and no separate issues arose under art 10 (freedom of expression).[45] The French 'burqa ban' was upheld.

## III THE UNCONSIDERED LIMITATION GROUND: *ORDRE PUBLIC*

### A *The 'Absence' of* Ordre Public *Arguments in* SAS v France

France's reliance on the limitation ground (or 'legitimate aim') of 'the rights and freedoms of others' when defending the burqa ban on the basis of *vivre ensemble* is curious when potential limitation grounds to *ECHR* rights are considered. 'The rights and freedoms of others' normally refers to specific rights of third parties that may be affected by the rights-exercise of an applicant, and therefore warrant a limitation on the applicant's *ECHR* rights. Bringing *vivre ensemble* (living together with respect for minimum societal requirements) within the scope of 'the rights and freedoms of others' necessitated a complex construction and unusual interpretation of the limitation ground as explained above.[46] Conversely, *vivre ensemble* could have also been defended by France as included in the different limitation ground of public order (*ordre public*).

Notably, the concept of public order as applied by the ECtHR retains the traditional (French) connotation of *ordre public*, concerning itself with regulating society rather than 'law and order', and is therefore equally called 'public policy'

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42 Ibid [154]–[155]. The margin of appreciation refers to the measure of discretion the Court is willing to grant to states in appreciation of the necessity to adopt rights-limiting measures within their jurisdiction (such as the burqa ban). George Letsas identifies two concepts of the margin of appreciation: substantive (where the Court finds an interference with, but no violation of, a *Convention* right as the state justifiably limited the right) and structural (where the Court defers to the decision of the state because, for example, the state is better placed to make the decision as it involves fact-finding, or the decision is politically sensitive and/or entangled with moral preferences). See George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007) 80.

43 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [156]–[158].

44 Ibid [15]–[26] (Nussberger and Jäderblom JJ).

45 Ibid [160]–[163].

46 Above nn 27, 29, 35–37 and accompanying text.

(hereafter the term '*ordre public*' will be used to prevent confusion).[47] *Ordre public* is described in the *Siracusa Principles* as 'the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded'.[48] The similarity with France's notion of *vivre ensemble* as encapsulated in the 'minimum requirements of life in society', which both refer to rules and principles constitutive of French society, is striking. Consequently, the question arises why France forewent a defence of its law on the basis of the legitimate aim and limitation ground of *ordre public*.

Initially, the French Government had neglected to link 'the minimum requirements of life in society' to any of the legitimate aims mentioned in arts 8(2) or 9(2) of the *ECHR* when it made its submissions in the *SAS v France* case. Saïla Ouald Chaib and Eva Brems, who attended the public hearing, note that the judges specifically asked the government on which of the enumerated aims in *ECHR* art 9(2) it wished to rely.[49] To the apparent unease of the Court, France strategically chose to rely on 'the rights and freedoms of others' and not on the more obvious choice of *ordre public*,[50] despite the national discussion of *Law No 2010-1192* having centred entirely on *ordre public* arguments with consistent treatment of *vivre ensemble* as a matter of *ordre public*.[51] However, France would have shot itself in the foot by relying on *ordre public* since only *one* of the two articles invoked (freedom of religion) recognises *ordre public* as a legitimate aim. Hence the government would not have been able to rely on its reasoning in respect of the argument on privacy. As a result, France would have had great difficulty defending its law in respect of art 8 (privacy), for the government would have had to rely on different arguments in favour of the ban from the ones which had been pertinent to its adoption. Only a very willing court and an

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47 As Ping Xiong argues on the basis of writings by Alexandre Kiss and Bert Lockwood, Janet Finn and Grace Jubinsky, neither 'public order', nor 'public policy' as a translation, does justice to the broad and encompassing term of *ordre public*. See Ping Xiong, *An International Law Perspective on the Protection of Human Rights in the* TRIPS Agreement (Martinus Nijhoff, 2012) 87, 88; Alexandre Charles Kiss, 'Permissible Limitations on Rights' in Louis Henkin (ed), *The International Bill of Rights — The* Covenant on Civil and Political Rights (Columbia University Press, 1981) 290; Bert B Lockwood Jr, Janet Finn and Grace Jubinsky, 'Working Paper for the Committee of Experts on Limitation Provisions' (1985) 7(1) *Human Rights Quarterly* 35.

48 *Status of the International Covenants on Human Rights*, 41st sess, Agenda Item 18, UN Doc E/CN.4/1985/4 (28 September 1984) annex ('*The Siracusa Principles on the Limitation and Derogation Provisions in the* International Covenant on Civil and Political Rights') 4 [22].

49 Saïla Ouald Chaib, '*SAS v France*: A Short Summary of an Interesting Hearing' on Lourdes Peroni and Stijn Smet, *Strasbourg Observers* (29 November 2013) <http://perma.cc/V2K 9-2DR2>; Brems, 'Face Veil Bans', above n 2, 536.

50 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [117].

51 Hunter-Henin, 'Why the French Don't Like the Burqa', above n 2. See especially at 628–35.

exceedingly large margin of appreciation in respect of proportionality could have saved the French law in such a circumstance.[52]

The Court drew attention to the difficulty posed by the lack of *ordre public* under art 8 when considering the concept of *vivre ensemble* as a basis for limitations under the *ECHR*, stating:

> [Relevant aims] are 'public order' and the 'protection of the rights and freedoms of others'. The former is not, however, mentioned in Article 8 § 2. Moreover, the Government did not refer to it either in their written observations or in their answer to the question put to them in that connection during the public hearing, preferring to refer solely to the 'protection of the rights and freedoms of others'. The Court will thus focus its examination on the latter.[53]

In their dissenting opinion, Judges Nussberger and Jäderblom equally pointed to the relevance of *ordre public* when dismissing 'the rights and freedoms of others' as a legitimate aim to which *vivre ensemble* can be attached. Like the majority, the dissenting judges highlighted the difficulty of France's reasoning potentially being one of *ordre public*, but that aim not being listed in art 8, which was 'undoubtedly also infringed' by the ban.[54] To Judges Nussberger and Jäderblom, however, the incompatibility was reason to doubt the existence of a legitimate aim.[55]

Conversely, the majority seemingly attempted to 'remedy' the lack of an *ordre public* limitation under art 8 through incorporation of the concept of *ordre public* under 'the rights and freedoms of others'. Thus, the ECtHR concluded that *vivre ensemble* can be regarded as forming part of 'the rights and freedoms of others' on the basis of the following reasoning:

> The Court … can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that [such practices are] perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.[56]

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52 Note that, while the ECtHR did grant France a wide margin of appreciation when considering proportionality, it did not in that particular context broaden the margin of appreciation, as the reasons on which the Court relied (deference to national policymaker, choice of society, decision arrived at through democratic process and lack of European consensus) had already been accepted to 'require' a broad margin. For discussion of previous case law, see *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [129], [156]. See also *Maurice v France* [2005] IX Eur Court HR 345, 386. If anything, the Court took its supervisory role more seriously in respect of deciding on a European consensus (which it normally simply states is not present, but in *SAS v France* actually discussed), despite ultimately reaching the incomprehensible conclusion that consensus was lacking.

53 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [117].

54 Ibid [11] (Nussberger and Jäderblom JJ).

55 Ibid [11]–[12] (Nussberger and Jäderblom JJ).

56 Ibid [122].

Unless one would accept that individuals hold a right to enforcement of a Rousseauian social contract,[57] with the above reasoning the Court undeniably sanctions disguised *ordre public* arguments under *Convention* articles which do not feature an *ordre public* limitation ground. Particularly, the emphasis on 'indispensable element[s] of community life' in combination with an established consensus echoes the idea of fundamental principles on which society is founded and rules which ensure the functioning of society. In *SAS v France*, the ECtHR thus very visibly 'corrected' the absence of *ordre public* limitations under articles other than that on freedom of religion, which is the only *ECHR* provision to include an *ordre public* limitation ground.

What is more, not only did the Court sanction *ordre public* arguments under 'the rights and freedoms of others' *in principle*, it was equally willing to follow through with the approach in its application to SAS's case by consistently referring to public policy and the national policymaker.[58] The Court derived general principles from *ECHR* cases in which *ordre public* had played an important role,[59] and placed much emphasis on national discussions which had centred on *ordre public*, especially where *vivre ensemble* was concerned.[60] In fact, it can be argued that SAS fared so badly precisely *because* all actors involved in the case engaged in an *ordre public* discussion under the guise of 'the rights and freedoms of others'. Yet, the French Government and Court did so from a French perspective which emphasises assimilation to French (secular) societal values,[61] and the applicant, who had instructed lawyers from England, from a British perspective which places significant value on (religious) minority rights and tolerance of minority practices.[62] For example, the applicant argued against the *vivre ensemble* argument by claiming that it 'failed to take into

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57 See Jean-Jacques Rousseau, *Du contrat social ou Principes Du droit politique* [The Social Contract or Principles of Political Right] (Marc-Michel Rey, first published 1762, 1782 ed).

58 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [123]–[159]. See especially at [153]–[156].

59 Ibid [123]–[131]. For example, the Court referred to: *Şahin v Turkey* [2005] XI Eur Court HR 173; *Maurice v France* [2005] IX Eur Court HR 289, 319; *Manoussakis v Greece* [1996] IV Eur Court HR 1364. See also below n 75, 80–84 and accompanying text

60 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [122], [153]–[156]; Hunter-Henin, 'Why the French Don't Like the Burqa', above n 2. See especially at 628–35.

61 Elisa T Beller, 'The Headscarf Affair: The Conseil d'État on the Role of Religion and Culture in French Society' (2004) 39 *Texas International Law Journal* 581; Hunter-Henin, 'Why the French Don't Like the Burqa', above n 2; Grace Davie, 'Managing Pluralism: The European Case' (2014) 51 *Society* 613, 616–18. Most of the judges in *SAS v France* have received (part of) their education in France, which might partly explain their willingness to engage with French concepts of *ordre public*.

62 Cf Edwards, above n 3, 256; Davie, above n 61. Notably, the United Kingdom's immigration minister at the time of the adoption of the French burqa ban responded publicly by stating that the idea was 'un-British' and at odds with the United Kingdom's 'tolerant society': Allegra Stratton, 'Copying French Ban on Burqa Would Be Un-British, Says Minister', *The Guardian* (online), 18 July 2010 <http://perma.cc/A5KB-MT2N>. The tolerance of minority practices has traditionally formed part of an entrenched policy of multiculturalism, which, despite recent criticism, appears to remain well-established in practice. See Keith Banting and Will Kymlicka, 'Is There Really a Retreat from Multiculturalism Policies? New Evidence from the Multiculturalism Policy Index' (2013) 11 *Comparative European Politics* 577, 585.

account the cultural practices of minorities'.[63] Yet, a minority rights reasoning in respect of French *ordre public* is arguably without cause since one of the fundamental principles of French society, albeit an artificial one, is that France 'knows no minorities' because the Republic is indivisible.[64] France has therefore consistently made reservations to international provisions on minority rights,[65] and whereas the United Kingdom ratified the Council of Europe's *Framework Convention for the Protection of National Minorities* the year it entered into force, France has hitherto declined to even sign the document.[66] While at times it looked as if the applicant was speaking a different language from the Court and French Government, the miscommunication actually highlighted the reliance on *ordre public* arguments, which are often country-specific. Finally, the Court's conclusion that the ban was necessary in a democratic society rested mainly on it having been adopted through democratic process based on societal consensus, not a consideration of the rights of others, bringing the Court's reliance on *ordre public* full circle.[67]

The ECtHR in *SAS v France* thus clearly sought to remedy the absence of an *ordre public* limitation under art 8 by introducing it through a curious interpretation of 'the rights and freedoms of others' with the help of *vivre ensemble*. However, while *SAS v France* is the first case in which the Court rather openly brings *ordre public* in through the back door of 'the rights and freedoms of others' and overtly embraces the concept of *vivre ensemble* in this regard, the judgment does not appear out of nowhere. *SAS v France* should be situated within the context of a trend at the ECtHR to open the system up to *ordre public* limitations under the pretext of 'the rights and freedoms of others'. Rather than offering a new approach to *ECHR* rights, the judgment brought together and consolidated two developments, hereafter discussed, which were already in occurrence under ECtHR case law: first, a shift in focus from *ordre public* to 'the rights and freedoms of others' in so-called 'headscarf cases' (cases concerned with religious attire) with the help of (concepts of) *vivre ensemble*; secondly, a more general openness to inclusion of *ordre public* considerations under 'the rights and freedoms of others' in cases not concerned with religious attire.

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63 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [77].

64 Danièle Lochak, 'Les minorités et le droit public français: du refus des différences à la gestion des différences [Minorities and French Public Law: From Refusal of Differences to Management of Differences]' in Alain Fenet and Gérard Soulier (eds), *Les minorités et leurs droits depuis 1789* [Minorities and Their Rights since 1789] (l'Harmattan, 1989) 111.

65 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

66 *Framework Convention for the Protection of National Minorities*, opened for signature 1 February 1995, ETS 157 (entered into force 1 February 1998). Only four out of 47 member states have neither signed nor ratified the *Convention*; they are Andorra, France, Monaco (which is under a treaty obligation to exercise its foreign policy in accordance with French interests in exchange for sovereignty and protection) and Turkey.

67 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [153]–[157].

### B *From* Ordre Public *to the Rights and Freedoms of Others in 'Headscarf Cases'*

Although the 'headscarf affair' is generally thought of as a French affair,[68] the first case on religious attire to reach the ECtHR was one against Turkey,[69] a state which employs a similar (perhaps even stricter) concept of secularity to France. In *Karaduman v Turkey* ('*Karaduman*'), the applicant was refused a transcript of her university diploma because she failed to submit an identity photograph in which she was not wearing a headscarf. In Strasbourg, Senay Karaduman's application on the basis of *ECHR* art 9 (freedom of religion) was nonetheless declared inadmissible by the European Commission on Human Rights ('ECmHR' or 'the Commission')[70] which did not find an interference with Karaduman's right to freedom of religion.[71] While the prime reason to dismiss the application appeared to be the Commission's conviction that the applicant had *chosen* to study at a public secular university, thereby accepting the applicable rules, the ECmHR notably considered that 'university rules … may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure *harmonious coexistence* between students of different beliefs'.[72] This ensuring of harmonious coexistence, essentially a form of *vivre ensemble*, was legitimate in view of ensuring public order (here in the sense of both *ordre public* referring to Turkey's secularism, and maintaining order in society) and 'the rights and freedoms of others'.[73] The notion of harmonious coexistence was intimately linked with *ordre public*, the rights of others specifically identified as those to freedom of religion.[74]

A decade later, the landmark case of *Şahin v Turkey* ('*Şahin*') again saw Turkey as the respondent state in Strasbourg.[75] Leyla Şahin claimed that a Turkish law prohibiting women to wear a headscarf at public universities violated her *ECHR* rights to freedom of religion and education. However, a 2004 Fourth Chamber judgment found no violation of the *Convention*,[76] and, following an appeal by the applicant, also the ECtHR's Grand Chamber held the law to be compatible with the rights enshrined in the *ECHR*.[77] Again the Court

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68 From the French *affaire du foulard*, referring to a 1989 case in which three female students were expelled for refusing to take off their headscarves. The case resulted in an advisory opinion from the Conseil d'État, stating that, unless religious symbols were accompanied by behaviour which rendered them 'ostentatious', they could not be prohibited in public schools. *Avis 'Port du foulard islamique'* [Advisory Opinion: Wearing of Islamic Headscarves], Conseil d'État [French Administrative Court] decision n° 34689327, 27 November 1989 <http://perma.cc/L8FY-9Y3T>.

69 *Karaduman v Turkey* (1993) 74 Eur Comm HR 93.

70 Pre-1998, admissibility decisions at the ECtHR were taken by the European Commission of Human Rights. Under the current system, they are taken by either a single judge or a chamber of three judges, depending on whether important and new legal questions are raised. See European Court of Human Rights, *Practical Guide on Admissibility Criteria* (2014) [377].

71 *Karaduman v Turkey* (1993) 74 Eur Comm HR 93, 109.

72 Ibid 108 (emphasis added).

73 Ibid 108–9.

74 Ibid.

75 *Şahin v Turkey* [2005] XI Eur Court HR 173.

76 *Şahin v Turkey* (European Court of Human Rights, Fourth Section, Application No 44774/98, 29 June 2004) [115], [117].

77 *Şahin v Turkey* [2005] XI Eur Court HR 173, 208 [123], 217 [164], 217 [166].

noted that the law was justified to ensure 'peaceful coexistence between students of various faiths' as a matter of public order and 'the rights and freedoms of others', especially freedom of religion.[78] However, more explicitly than in *Karaduman*, the Court relied on *ordre public* considerations under the aim of public order (*ordre public*) to justify the ban. It held that 'it is the principle of secularism … which is the paramount consideration underlying the ban on the wearing of religious symbols in universities'.[79] The judgment in *Şahin* thus indicated a recognition by the Court that national interpretations of coexistence informed by principles such as secularism may constitute matters of *ordre public* able to limit *ECHR* rights.[80] The main difference with *SAS v France* was that the Court accepted them as *ordre public* and not the rights and freedoms of others, which were separately considered.

The two cases against Turkey at the European level coincided with developments related to the regulation of religious attire in schools in France. A year after the decision in *Karaduman*, the French Government adopted guidelines on restricting the wearing of religious attire in schools based on very similar considerations to the ones advocated in the ECtHR case.[81] Crucially, the guideline's introduction underlined the importance of an interactive living together and highlighted that school was the place where children and young people learned '*vivre ensemble*'.[82] The concept of *vivre ensemble* subsequently gained momentum during national discussions of the 2004 law banning all ostentatious religious attire from French public schools. The explanatory memorandum to the law recognised *vivre ensemble*, together with equality, as

78 Ibid 204–5 [111].

79 Ibid 206–7 [116].

80 The importance of secularism had equally been recognised in the admissibility decision of *Dahlab v Switzerland*, in which an elementary school teacher was prohibited from wearing her headscarf. However, the decision focused almost solely on the influence on children of tender years a veiled teacher would have, and not the principle of secularism itself: *Dahlab v Switzerland* [2001] V Eur Court HR 447, 463. Secularism played a greater role in the subsequent case of *Köse v Turkey*, in which students were prohibited from wearing a headscarf to their secondary school. However, the Court in that case based its decision primarily on the fact that the applicant's parents had known of the rules before registering their children and that the rules were of general application. The parents could not now complain of a general rule (based on secularity) to which they had previously consented by registering their children: *Köse v Turkey* [2006] II Eur Court HR 339, 342.

81 Aims were protecting *laïcité* [secularism], ensuring order in school and protecting the rights and freedoms of others. The guidelines themselves were an implementation of the 1989 advisory opinion by the Conseil d'État, combined with rules derived from further case law, such as the famous *Kherouaa* case in which the Conseil d'État further explained the implications of its advisory opinion as applied to an actual case (the student's exclusion for wearing a headscarf was deemed illegal): *Avis 'Port du foulard islamique'* [Advisory Opinion: Wearing of Islamic Headscarves], Conseil d'État [French Administrative Court] decision n° 34689327, 27 November 1989; *Kherouaa*, Conseil d'État [French Administrative Court], 2 November 1992 reported in [1992] Rec Lebon 389. See also Jean Marcou, 'Le Conseil d'Etat, le droit public français et le "foulard": Interview de Monsieur Jean-Paul COSTA [The French Administrative Court, French Public Law and the "Scarf": Interview with Jean-Paul Costa]' (1995) 19 *Cahiers d'Études sur la Méditerranée Orientale et le monde Turco-Iranien* [5], [20] <http://perma.cc/4L6Q-7DY2>.

82 *Circulaire n° 1649 du 20 septembre 1994, Neutralité de l'enseignement public: port de signes ostentatoires dans les établissements scolaires* [Guideline No 1649 of 20 September 1994, Neutrality of Public Education: Wearing of Ostentatious Symbols in Educational Establishments] (France) JO, 31 July 1994, 8.

the *idée-force* behind the legislation.[83] It explained that, although the law was informed by the principle of *laïcité* (secularism), *laïcité* was itself an aspect of *vivre ensemble*.[84] With *laïcité* recognised as a founding principle of the French Republic (*principe fondateur de la République*),[85] both *laïcité* and *vivre ensemble* can thus be said to form part of French *ordre public*.

Eight ECtHR cases have so far reviewed the 2004 law,[86] and in at least six of them — the ones directly attacking the law — the principles of *laïcité* and *vivre ensemble* have played a defining role (the six cases all contained the very words '*vivre ensemble*').[87] Notably, all eight cases included the following quote:

> [I]n France … secularism [*laïcité*] is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools … [A]n attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion.[88]

This passage, with its reliance on fundamental principles and consensus in society, forms a clear run-up to the one quoted above in *SAS v France*. It is in that respect significant that three of the six applicants who directly attacked the 2004 law had explicitly relied on *ECHR* art 8 (privacy), the material article in *SAS v France* which does not include *ordre public* as an aim for limitation.[89] The ECtHR nonetheless decided that the complaints essentially focused on freedom

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83 Hanifa Chérifi, 'Application de la loi du 15 Mars 2004 sur le port des signes religieux ostensibles dans les établissements de l'enseignement public: Rapport à monsieur le ministre de l'éducation nationale, de l'enseignement supérieur et de la recherche [Application of the Law of 15 March 2004 on the Wearing of Conspicuous Religious Symbols in Public Education Institutions: Report to the Minister of National Education, Higher Education and Research]' (Report, Ministère de l'éducation nationale, de l'enseignement supérieur et de la recherche [Ministry of National Education, Higher Education and Research], July 2005) 47.

84 Ibid.

85 On the status of *laïcité*, see Bernard Stasi, 'Rapport au President de la Republique [Report to the President of the Republic]' (Report, Commission de reflexion sur l'application du principe de laïcité dans la Republique [Working Group on the Application of the Principle of Secularism in the Republic], 11 December 2003). See especially at 19, 20. The report describes the principle of *laïcité*, its role in French society and gives recommendations for enhancement of the principle of *laïcité*, including through education.

86 *Dogru v France* (European Court of Human Rights, Fifth Section, Application No 27058/05, 4 December 2008); *Kervanci v France* (European Court of Human Rights, Fifth Section, Application No 31645/04, 4 December 2008); *Bayrak v France* (European Court of Human Rights, Fifth Section, Application No 14308/08, 30 June 2009); *Gamaleddyn v France* (European Court of Human Rights, Fifth Section, Application No 18527/08, 30 June 2009); *Singh v France* (European Court of Human Rights, Fifth Section, Application No 25463/08, 30 June 2009); *Ranjit Singh v France* (European Court of Human Rights, Fifth Section, Application No 27561/08, 30 June 2009); *Ghazal v France* (European Court of Human Rights, Fifth Section, Application No 29134/08, 30 June 2009); *Aktas v France* (European Court of Human Rights, Fifth Section, Application No 43563/08, 30 June 2009).

87 The 2009 cases were the only direct responses to the 2004 law. *Dogru v France* and *Kervanci v France* touched upon the law, which had come into force by the time the cases were considered by the ECtHR, but were concerned with suspension on the basis of a refusal to take off headscarves during physical education. The principal argument in these two cases was therefore one of public safety and not societal values. See below n 91.

88 First adopted in: *Dogru v France* (European Court of Human Rights, Fifth Section, Application No 27058/05, 4 December 2008) [72].

89 *Singh v France* (European Court of Human Rights, Fifth Section, Application No 25463/08, 30 June 2009); *Singh v France* (European Court of Human Rights, Fifth Section, Application No 27561/08, 30 June 2009); *Aktas v France* (European Court of Human Rights, Fifth Section, Application No 43563/08, 30 June 2009).

of religion, which allowed it to disregard *ECHR* articles without an *ordre public* limitation ground. Yet, whereas the ECtHR's discussion focused solely on *ordre public* (the law being 'motivated exclusively by the protection of the constitutional principle of *laïcité*',[90] and the result of a national debate relying on notions of active living together or *vivre ensemble*), the Court did not rely on the aim of *ordre public* alone. Without indicating which aspects of its reasoning related to *ordre public* and which might have been covered by 'the rights and freedoms of others' (not separately discussed),[91] the ECtHR concluded in all six cases that the French law was justified by the aims of '*ordre public* and the rights and freedoms of others', merging the aims to justify an *ordre public* limitation.[92] Hence, five years before the judgment in *SAS v France*, the ECtHR already opened the door to the possibility of *ordre public* considerations under 'the rights and freedoms of others' via conceptions of secularism and harmonious coexistence (*vivre ensemble*), although it would wait until the case of *SAS v France* before openly embracing this approach.

*SAS v France* is therefore not a judgment which introduced a wholly new approach as some have argued,[93] but simply consolidates a development under which national conceptions of *vivre ensemble* or coexistence have lost their (correct) label of *ordre public* and drifted into the direction of 'the rights and freedoms of others', which is a limitation ground not confined to freedom of religion. This construct allows the Court to consider *ordre public* arguments under *Convention* articles which do not contain an *ordre public* limitation ground, especially in view of the increased reliance on such articles in cases traditionally perceived of as 'religious'.[94]

### C Ordre Public *Arguments under the Rights and Freedoms of Others in Other Cases*

The trend at the ECtHR to accept what are essentially *ordre public* considerations as aspects of 'the rights and freedoms of others' is not limited to 'headscarf cases'. In particular with regard to *ECHR* art 8 — in which lack of an *ordre public* limitation ground was explicitly discussed in *SAS v France* — the ECtHR has been willing to accept established national principles to form part of 'the rights and freedoms of others'. In this Part, I will focus on two such principles: the best interests of the child (which does not perhaps form part of a 'trend' as its inclusion in 'the rights and freedoms of others' is long

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90 Below n 94; *Bayrak v France* (European Court of Human Rights, Fifth Section, Application No 14308/08, 30 June 2009); *Gamaleddyn v France* (European Court of Human Rights, Fifth Section, Application No 18527/08, 30 June 2009); *Ghazal v France* (European Court of Human Rights, Fifth Section, Application No 29134/08, 30 June 2009).

91 It has to be noted that at the national level, the idea that girls might be forced to wear a headscarf, and thus suffer a violation of their right to freedom of manifestation, played a role in the debates. The ECtHR in the six admissibility decisions touched upon the matter of pressure, but did nonetheless not deal with them separately under 'the rights and freedoms of others'.

92 See below nn 104, 111 and accompanying text.

93 See above n 6.

94 For example, in *Karaduman v Turkey*, the applicant did not invoke *ECHR* art 8, focusing instead on arts 9 (freedom of religion) and 14 (non-discrimination): *Karaduman v Turkey* (1993) 74 Eur Comm HR 93, 104.

established)[95] and principles of private law *ordre public*, which seem a more recent addition to 'the rights and freedoms of others'.

In the Council of Europe's Handbook on *ECHR* art 8, Ivana Roagna writes:

> On many occasions [protection of the rights and freedoms of others] has resulted in an open clause thanks to which various — potentially not yet clearly defined — kinds of limitations have been justified … In particular, the Court has adopted the 'best interests of the child' formula as a key element for its judgments, even if the expression does not appear in Article 8.[96]

The 'best interests of the child' limitation indeed provides for a good example of a principle which in many countries has reached the status of *ordre public*,[97] but is covered by 'the rights and freedoms of others' at the European level. It is invoked even where the concept of best interests cannot be, or is not, linked to specific rights; for example, because the concept is used to justify care orders not directly based on children's rights, but on the national child protection threshold.[98] This was, inter alia, the case in the 1986 decision of *Olsson v Sweden* ('*Olsson*') in which the ECmHR explicitly recognised that 'the interests of the children … [fall] under the expressions "for the protection of health or morals" and "for the protection of the rights and freedoms of others"'.[99] The applicants contested classification of 'the best interests of the child' under 'the rights and freedoms of others', having previously remarked that there were no legal provisions on which such interests could be based,[100] but the Court judged that the Commission had rightly referred to the limitation ground.[101] What was nonetheless interesting, is that on the one hand the Court neglected to consider what specific rights had been at stake under the notion of children's interests, failing to explain why 'the rights and freedoms of others' were relevant,[102] and, on the other hand, that regard for children's welfare in care proceedings formed a recognised principle of Swedish *ordre public* at the time of the *Olsson* decision.[103] The Commission and Court had thus accepted what was essentially an aspect of Swedish *ordre public* (the best interest principle) under an article

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95 See below nn 104, 111 and accompanying text.

96 Ivana Roagna, *Protecting the Right to Respect for Private Life and Family Life under the* European Convention on Human Rights (Council of Europe, 2012) 44.

97 See Laurence Gareil, *L'exercice de l'autorité parentale* [The Exercise of Parental Authority] (Librairie Générale de Droit et de Jurisprudence [General Library of Law and Jurisprudence], 2004) 476; Mathias Rohe, 'Islamic Law in German Courts' (2003) 1 *Hawwa* 46, 55.

98 See below n 104. For a more recent case (albeit transferred to the Grand Chamber for appeal and not yet final), see, eg, *Dubská v Czech Republic* (European Court of Human Rights, Fifth Section, Application Nos 28859/11 and 28473/12, 11 December 2014) [86], [94].

99 *Olsson v Sweden* (European Commission of Human Rights, Application No 10465/83, 2 December 1986) [143] ('*Olsson*').

100 The applicants nonetheless did so in respect of national legal provisions and not *ECHR* provisions which are the focus of 'the rights and freedoms of others' at the ECtHR: ibid [79].

101 *Olsson v Sweden* (1988) 130 Eur Court HR (ser A) 1, 31 [65].

102 Conversely, there were some concrete concerns about the children's 'health or morals' (the second limitation ground invoked) as the children were all behind in their development and one of the children showed aggressive behaviour: ibid 33–4 [72]–[73].

103 Humphrey Waldock, *Collected Courses of the Hague Academy of International Law Volume 106: General Course on Public International Law* (Brill Nijhoff, 1962) 126, citing *Guardianship of Infants (Netherlands v Sweden)* (*Judgment*) [1958] ICJ Rep 55.

(*ECHR art 8*) which contained no *ordre public* limitation ground through reliance on 'health and morals', and 'the rights and freedoms of others'.[104] Moreover, like *vivre ensemble* in *SAS v France*, the specific aspect of *ordre public* — ie 'the best interests of the child' — presented a broad umbrella term able to encompass myriad other societal rules.

Following *Olsson*, the ECtHR made frequent references to national concepts of children's interests which were without discussion attached to 'the rights and freedoms of others', sometimes in combination with 'health or morals'.[105] In 2008, the approach nonetheless received criticism from within the Court, in the form of a dissenting opinion to *Dolhamre v Sweden* (also concerned with care orders).[106] Judge Zupančič in his opinion complained that art 8(2) 'does not mention the best interests of the child', but that the Court had indiscriminately accepted the principle as being covered by the provision on limitations.[107] While not objecting to the consideration of best interests as an important principle per se, the judge was clearly not convinced by the Court's indiscreet linkage of the term to 'the rights and freedoms of others', *in casu* together with 'health or morals'.[108] However, the majority apparently found nothing objectionable to the government's reliance on Sweden's guiding principle of best interests under 'the rights and freedoms of others', even if the government would not explain how, and which, rights or freedoms were implicated.

Two years later, the ECtHR dealt extensively with the principle of 'the best interests of the child' in the child abduction case of *Neulinger v Switzerland* ('*Neulinger*').[109] Although the question in *Neulinger* was not whether limitations on art 8 could be based on 'the best interests of the child', but rather whether the Court itself was bound by the principle of best interests in deciding on *ECHR* art 8,[110] the case is important in view of its designation of best interests. Despite the ECtHR's initial consideration of the inclusion of 'best interests' in international treaties and declarations under the heading 'relevant domestic and international law and practice',[111] in the operative part of its judgment, the Court did not designate best interests as a *right*. Instead, it held that: '[T]here is currently a broad consensus — including in international law — in support of the idea that in all decisions concerning children, their best interests must be paramount'.[112] To the Court, what was material was a broad consensus in (international) society

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104 *Olsson* (European Commission of Human Rights, Application No 10465/83, 2 December 1986) [143]. Note that the *Olsson* decision was adopted prior to the *Convention on the Rights of the Child* ('*CROC*'), so that a reasoning based on *CROC* art 3 (best interests) could not yet be envisaged.

105 See, eg, *Eriksson v Sweden* (1989) 156 Eur Court HR (ser A) 1, 26 [66]; *Johansen v Norway* (1996) III Eur Court HR 979, 1003 [61]; *Gnahoré v France* (2000) IX Eur Court HR 441, 462 [53].

106 *Dolhamre v Sweden* (European Court of Human Rights, Third Section, Application No 67/04, 8 June 2010) (Zupančič J).

107 Ibid 34.

108 Ibid.

109 *Neulinger v Switzerland* [2010] V Eur Court HR 193. This is a case which had started out under the *Hague Abduction Convention* art 3: *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 97 (entered into force 1 December 1983).

110 *Neulinger v Switzerland* [2010] V Eur Court HR 193, 243–4 [134]–[136].

111 Ibid 216–19 [48]–[56].

112 Ibid 243 [135].

on the overriding nature of the principle of best interests. Hence, the description in the *Neulinger* case was one of *ordre public*, not 'the rights and freedoms of others'.

Reliance on 'the rights and freedoms of others' to justify best interest limitations on art 8 is thus questionable in the light of the ECtHR's own case law with its focus on societal consensus and principles rather than individual rights. Yet it allows the Court to consider this principle of *ordre public* (best interests) under *Convention* articles without an *ordre public* limitation ground. The situation is very similar to that in *SAS v France*, particularly insofar as governments rely on a principle which contains values developed within their society, while failing to identify any specific rights. The main difference is that in respect of best interests there is still the possibility for the Court to explicitly identify a right concerned — eg *Convention on the Rights of the Child*[113] art 3 (best interests) — provided that the Court is authorised and willing to rely on rights not included in the *ECHR* itself.[114]

Perhaps most to the point are cases in which principles of private law *ordre public* (translated as 'public policy') feature as aspects of 'the rights and freedoms of others', like in the surrogacy cases of *Mennesson v France* ('*Mennesson*') and *Paradiso v Italy* ('*Paradiso*').[115] Both France and Italy had elevated to the level of private law *ordre public* — rules which may be opposed to the usual recognition of foreign laws and judgments as they are deemed fundamental in a jurisdiction — the non-recognition of surrogacy arrangements.[116] Accordingly, children born out of legal surrogacy arrangements abroad could not be recognised as children of the putative parents under national law, a situation which the applicants (the 'parents' and children) deemed contrary to the family life aspect of *ECHR* art 8. In both *Mennesson* and *Paradiso*, the ECtHR attached the private law *ordre public* considerations to 'the rights and freedoms of others', although in *Paradiso* it was equally tied up with 'the prevention of disorder (and crime)' as there were human trafficking concerns in that case.[117] In *Menneson*, the Court rejected the aim of prevention of crime, but allowed the French Government to rely on 'the protection of health', while all the same placing emphasis on 'the rights and freedoms of

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113 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

114 The two dissenting judges in *SAS v France* doubted that reliance could be placed on rights not included in the *ECHR* itself. See *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [5] (Nussberger and Jäderblom JJ). Alternatively, rights can be found in the *ECHR* itself which may support aspects of best interests, such as the prohibition on inhuman and degrading treatment (art 3), physical integrity (art 8) or freedom of religion (art 9).

115 *Mennesson v France* (European Court of Human Rights, Fifth Section, Application No 65192/11, 26 June 2014); *Paradiso v Italy* (European Court of Human Rights, Second Section, Application No 25358/12, 27 January 2015). *Paradiso v Italy* was referred to the Grand Chamber. See also Ruet, above n 3, [15].

116 *Mennesson v France* (European Court of Human Rights, Fifth Section, Application No 65192/11, 26 June 2014) [18]; *Paradiso v Italy* (European Court of Human Rights, Second Section, Application No 25358/12, 27 January 2015) [37], [66].

117 *Paradiso v Italy* (European Court of Human Rights, Second Section, Application No 25358/12, 27 January 2015) [73], [76].

others'.[118] The Court nonetheless continued not by explaining how the rights of the child and the mother (the 'others' identified) would be protected by France's legal principle, but by balancing the applicants' rights with the will of the French constituency, thus holding:

> The Court … does not seek to call [an objection on grounds of international public policy (*ordre public*)] into question as such. It must, however, verify whether in applying that mechanism to the present case the domestic courts duly took account of the need to strike a fair balance between the interest of the community in ensuring that its members conform to the choice made democratically within that community and the interest of the applicants.[119]

What was at issue was a 'fundamental principle of French law' inspired by 'ethical and moral principles' on which democratic consensus existed;[120] a rule more concerned with the organisation of French society than the protection of specific rights. The very concept of private law *ordre public* should have made reliance on 'the rights and freedoms of others' suspicious, but the Court's emphasis on the interest in ensuring that 'members conform to the choice made democratically within that community' clearly indicates that the real concern was *ordre public*, not 'the rights and freedoms of others'. Yet in the absence of an *ordre public* limitation to art 8, the Court would have either had to dismiss the government's arguments or rely on a construct allowing it to bring *ordre public* arguments in under another limitation ground. The ECtHR chose the latter and adopted a reasoning showing great similarity with that advanced only a month later in *SAS v France*. Emphasising democratic consensus on a fundamental rule and highlighting the importance of conformity while failing to identify specific rights, the ECtHR gave a judgment in *Menneson* from which *SAS v France* was only the next step in a clear development revealing a bid to 'remedy' the absence of *ordre public* under certain *ECHR* provisions through reliance on 'the rights and freedoms of others'.

The above overview of the acceptance of *ordre public* arguments under 'the rights and freedoms of others' in headscarf (and other) cases suggests a trend at the ECtHR to remedy the lack of *ordre public* limitation grounds under articles other than art 9 (freedom of religion) through reliance on 'the rights and freedoms of others'. *SAS v France* should be seen in this context as the judgment most openly embracing this approach, or at least the case in which most vigorous objection was raised to it. In the next Part, I will discuss the implications of the now officially established approach.

## IV IMPLICATIONS FOR THE FUTURE

It is unlikely that the ECtHR will reconsider the approach firmly established in *SAS v France* to widen 'the rights and freedoms of others' so as to include *ordre public* considerations. As Joshua Rozenberg and Ronan McCrea have argued respectively, the Court's acceptance of *vivre ensemble* in *SAS v France*

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118 *Mennesson v France* (European Court of Human Rights, Fifth Section, Application No 65192/11, 26 June 2014) [61]–[62].

119 Ibid [84].

120 Ibid [27], [60].

was both an act of 'self-preservation'[121] and a means to 'ensure adequate protection of broader commitments' similar to the European Court of Justice's self-introduced 'mandatory requirements' allowing it to give weight to collective goals.[122] With the ECtHR already suffering from legitimacy issues,[123] the Court took the (wise?) decision not to unnerve one of its most supportive member states and run the risk of further loss of authority should France have subsequently refused to implement the judgment.[124] In doing so, it also provided a response to the difficulty presented by an impossibility of relying on principles fundamental to a society without explicitly adding to the list of limitations under *ECHR* articles which do not include an *ordre public* limitation, or unduly broadening the margin of appreciation in respect of proportionality (instead relocating the margin to the less suspect 'legitimate aim').[125] At a time when the government of a founding member state (the United Kingdom)[126] is considering the possibility of leaving the Court in favour of a national human rights mechanism it would be unrealistic to expect that the ECtHR retreats from a doctrine allowing it to give special consideration to fundamental national values.

As indicated above, opening up the possibility of considering principles of *ordre public* under 'the rights and freedoms of others' can be a positive development, albeit a somewhat artificial one. Laudable principles of *ordre public*, such as the best interests of the child, have been added to the Court's balancing exercise via 'the rights and freedoms of others' either or not in combination with 'health and morals'. Yet, as more than one critic has pointed out in response to *SAS v France*, widening existing limitation grounds to include societal principles like *vivre ensemble* is dangerous.[127] The Court itself recognised it to be so, stating that because of 'the flexibility of the notion of [*vivre ensemble*]' there was a 'resulting risk of abuse' and therefore 'careful examination' of necessity would be required.[128] However, even when there is no abuse and the state is genuine in its desire to protect what it regards as a

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121 Rozenberg, above n 6.

122 Ronan McCrea, 'The French Ban on Public Face-Veiling: Enlarging the Margin of Appreciation' on Steve Peers, *EU Law Analysis* (2 July 2014) <http://perma.cc/PVW5-GN2B>.

123 Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Right's Judgments' (2011) 7 *European Constitutional Law Review* 173, 174.

124 Currently, France is still refusing to implement a decision by the Human Rights Committee which found that the 2004 law prohibiting ostentatious religious attire in schools violated the *ICCPR* and it could have done the same following a condemnation in *SAS v France*. See Human Rights Committee, *Views: Communication No 1852/2008*, 106th sess, UN Doc CCPR/C/106/D/1852/2008 (4 February 2013).

125 The reliance in *SAS v France* on *vivre ensemble* (an umbrella term encompassing what are essentially dominant moral preferences concerning social interaction in France) shows great resemblance to cases decided on the basis of public morals (another legitimate aim under the *ECHR*). These cases have been criticised by Letsas for granting states a structural margin of appreciation by allowing states to interpret the legitimate aim as a means to protect national majority preferences. Letsas, above n 42, 92–8, 120–6.

126 Nicholas Watt and Rowena Mason, 'Cameron "Committed to Breaking Link with European Court of Human Rights"', *The Guardian* (online), 1 June 2015 <http://perma.cc/97LP-PCHP>.

127 See, eg, Edwards, above n 3; Berry, above n 6; Sanjeev Sharma (SAS's lawyer), quoted in Rozenberg, above n 6; Cranmer, above n 3.

128 *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [122].

fundamental value underlying life in society, the reality of reliance on such values is that they impose majority views. Allowing a state to invoke *ordre public* arguments under *Convention* articles where they have traditionally been excluded could thus have a negative effect on the lives of persons belonging to a (de facto) minority. It provides the state with an avenue to impact on the rights of those with an opinion, or interpretation of the possible exercise of their rights, that is different from the consensus reached in society, or even parliament only. Moreover, *ordre public* via 'the rights and freedoms of others', especially on the basis of such mediating concepts as *vivre ensemble*, is a ground which is itself beyond scrutiny in the sense that it cannot be for the ECtHR to decide whether a certain principle is considered fundamental to life in a certain society,[129] save in cases of obvious abuse.

Ultimately, much depends on the vigour with which the Court is willing to perform the proportionality test in the future. Allowing a state to invoke a principle of *ordre public* under 'the rights and freedoms of others' is one thing, but holding that principle to be 'necessary in a democratic society' is quite another. If *SAS v France* is taken as measure, then the future for non-conformists looks grim: the Court in large part relied on a circular reasoning under which a principle adopted through democratic consensus would *therefore* be necessary in a democratic society.[130] *Mennesson* paints a very different, and more hopeful, picture: the Court deemed the principle of *ordre public* to interfere disproportionately with the *Convention* rights of the child applicants, *despite* the principle having been adopted through democratic process.[131] Which of the two approaches will ultimately find favour with the Court is difficult to predict and depends largely on how invested the Court is in protecting human rights against the odds of an opposing society, especially if that society may through its government threaten to leave the *ECHR*, or refuse to implement the judgment.

## V CONCLUSION

Most commentaries on *SAS v France* proclaim that the ECtHR adopted a new approach in the case under which the limitation ground of 'the rights and freedoms of others' has been widened to include 'respect for the minimum set of values of an open and democratic society', in particular *vivre ensemble*. However, neither the concept of *vivre ensemble*, nor the approach under which fundamental principles in society are included in 'the rights and freedoms of others' is entirely new to the Court. Rather, there is an emerging trend at the ECtHR to include principles of *ordre public* (the principles underlying life in society, or fundamental to society) in the limitation ground of 'the rights and freedoms of others' so as to 'remedy' a lack of *ordre public* limitation under *ECHR* articles other than art 9 (freedom of religion). *SAS v France* may have been the judgment in which the ECtHR has most openly — and most controversially — done so, but this case note shows that the case was certainly

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129 Mutatis mutandis the impossibility for decision-makers to decide on what forms part of an individual's religion and its practices: *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [127].

130 Ibid [121]–[122], [153]–[157].

131 *Mennesson v France* (European Court of Human Rights, Fifth Section, Application No 65192/11, 26 June 2014) [84], [99]–[100].

not alone in bringing *ordre public* in through the backdoor of 'the rights and freedoms of others'. Moreover there was a clear lead-up to the judgment in ECtHR 'headscarf cases'. *SAS v France* does nonetheless signal that the approach is here to stay, and while this may enhance the legitimacy of the Court in the eyes of defendant member states, it places non-conformist individuals in a vulnerable position. If 'the government did not refer to it', it is perhaps because *ordre public* does not have a place in the discussion, at least not until the member states have reached a consensus on its inclusion under the relevant *ECHR* provisions.