

RESEARCH ARTICLE

Banning Islamic Veils: Is Social Cohesion (or Living Together) a Valid Argument?

Kaushik Paul 

Lecturer, Leeds Law School, Leeds Beckett University, United Kingdom
Kaushik.Paul@leedsbeckett.ac.uk

doi:10.1017/jlr.2024.2

Abstract

Islamic veiling has attracted a remarkable degree of international and domestic attention in the current political climate. In the popular and political climate, the argument for social cohesion (or living together) is frequently invoked to justify bans on wearing Islamic veils. For example, the social cohesion argument was widely used in parliamentary debates leading up to the bans on wearing Islamic full-face veils (such as *burqa* or *niqab*) in France and Belgium. In response to the French and Belgian bans, the European Court of Human Rights has ruled that a ban on wearing Islamic full-face veils is justified on the grounds of living together, rulings that many academic circles have criticized. Yet in this extensive commentary on the bans of Islamic veiling, one important question remains unanswered: Is social cohesion (or living together) a valid argument for banning the wearing of Islamic veils? The author explores this question through the lens of the European human rights framework and analyzes the ECtHR's approach to French and Belgian anti-veil legislation enacted on the grounds of social cohesion.

Keywords: Islamic veils; bans on veiling; social cohesion; living together; religious freedoms; European Convention on Human Rights Article 9

Introduction

One argument in support of a ban on wearing Islamic veils¹ in public places is that to do so frustrates social cohesion or social integration. There is a widely held view that veil-wearing Muslim women alienate themselves from others and exacerbate their differences by separating themselves from the society they live in, and thus, create or increase societal divisions.² In contemporary European societies, the wearing of Islamic veils by Muslim women in public spaces is perceived by many people as “symptomatic of a reluctance to

¹ Veiling is an Islamic system of modesty in dress. Muslim women don the veil to cover their hair, heads, faces, and other parts of their bodies in various styles, according to professed Islamic codes of modest dress. There are thus many different kinds of Islamic veils. In this article I mainly focus on full-face veils, namely *burqa* and *niqab*. The *burqa*, which is most concealing among all Islamic veils, is a loose garment that covers the whole of a woman's body, from head to toe, with a mesh cloth over the eyes that allows the wearer to see out but prevents other people from seeing her eyes. The *niqab* is a black garment that covers a woman's face with a slit for eyes.

² See Natasha Bakht, *Veiled Objections: Facing Public Opposition to the Niqab*, in REASONABLE ACCOMMODATION: MANAGING RELIGIOUS DIVERSITY 70, 76–78 (Lori G. Beaman ed., 2012).

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integrate”³ and a veil-wearing Muslim woman is seen to be “distancing herself from other, non-Muslim people and furthering social and cultural division.”⁴ It has also been asserted that the religious practice of veiling by Muslim women is problematic because it represents a rejection of the values and culture of the society they live in and a desire to remain isolated from that society. Cynthia DeBula Bains, for instance, states that “a simple *hijab*, when worn by Muslim girls, signifies to many French a refusal to become French.”⁵ The alleged anti-social character of Islamic full-face veils is closely connected with the idea that the most basic human communication is conveyed by the face. Therefore, by concealing their faces with veils, Muslim women sever their links with others,⁶ which in turn affects their integration into mainstream society. In a much-debated newspaper column, Jack Straw, the former member of parliament for Blackburn, requested that women visiting his surgery remove their full-face veils. He stated, “I felt uncomfortable about talking to someone ‘face-to-face’ who I could not see.” He further commented, “wearing the full veil was bound to make better, positive relations between the two communities more difficult. It was such a visible statement of separation and of difference.”⁷ Former prime minister Tony Blair also contributed to the contentious controversy, echoing Straw’s opinion. Blair stated that the full-face veil is “a mark of separation” that makes “other people from outside the community feel uncomfortable.” He further stated, “I think we need to confront this issue about how we integrate people properly within our society.”⁸ These and similar public statements reflect a perception that the Islamic veil is a barrier to social integration. This perception, in turn plays a key role in defending bans on Islamic veiling. Academic commentators have indicated that the “real reason” for which the social cohesion argument is advanced to support bans on the Islamic veil is “the fundamental unease of a large majority of people with the idea of an Islamic face veil, and the widespread feeling that this garment is undesirable in ‘our society.’”⁹

The social cohesion argument was widely used in parliamentary debates leading up to the bans on wearing Islamic full-face veils in France and Belgium. In June 2009, the French National Assembly established a parliamentary commission on the wearing of the full-face veil on national territory. The report released by the commission stated, inter alia, “the full-face veil represented a denial of fraternity, constituting the negation of contact with others and a flagrant infringement of the French principle of living together (*le vivre ensemble*).”¹⁰

³ See DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE 19–20 (2006).

⁴ See ERICA HOWARD, LAW AND THE WEARING OF RELIGIOUS SYMBOLS: EUROPEAN BANS ON THE WEARING OF RELIGIOUS SYMBOLS IN EDUCATION 33 (2012).

⁵ Cynthia DeBula Bains, *L’Affaire des Foulards —Discrimination, or the Price of a Secular Public Education System?*, 29 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 303, 311 (1996).

⁶ See United National Human Rights Committee, Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2807/2016, at 19, ¶ 7, UN Doc. CCPR/C/123/D/2807/2016 (July 17, 2018) (dissenting opinion of committee member Yadh Ben Achour) [hereafter *Miriana Hebbadj v. France*].

⁷ Jack Straw, *I Felt Uneasy Talking to Someone I Couldn’t See*, GUARDIAN (October 6, 2006), <http://www.theguardian.com/commentisfree/2006/oct/06/politics.uk>.

⁸ Quoted in Bakht, *supra* note 2, at 76–77.

⁹ Eva Brems et al., *Uncovering French and Belgian Face Covering Bans*, 2 JOURNAL OF LAW, RELIGION AND STATE 69, 86 (2013); Eva Brems, *S.A.S. v. France as Problematic Precedent*, STRASBOURG OBSERVERS (July 9, 2014), <https://strasbourgoobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/>.

¹⁰ *S.A.S. v. France*, App. No. 43835/1, ¶ 17 (July 1, 2014), citing FRENCH PARLIAMENT, ASSEMBLÉE NATIONALE, ON THE WEARING OF THE FULL-FACE VEIL ON NATIONAL TERRITORY (January 26, 2010). The report recommended “to adopt a resolution reasserting Republican values and condemning as contrary to such values the wearing of the full-face veil.” *S.A.S.*, *supra*, ¶ 17. Consequently, in May 2010, the National Assembly adopted a resolution “[O]n attachment to respect for Republic values at a time when they are being undermined by the development of radical practices,” which stated that “the wearing of the full veil, [is] incompatible with the values of the Republic.” Quoted in *S.A.S.*, *supra*, ¶ 24 (alteration my own). On this point, see Tom Syring, *Introductory Note to the European Court of Human Rights’*

The explanatory memorandum accompanying the bill,¹¹ which led to the enactment of Law no. 2010-1192 of 11 October 2010 prohibiting the concealment of one's face in public places in France, stated that the wearing of full-face veils was "at odds with the social fabric" and "quite simply incompatible with the fundamental requirements of 'living together' in French society."¹² Similarly, in debates in the Belgian parliament, it was submitted that the full-face veil disrupts the social environment because members of the general population have indicated "that they do not wish to encounter something like that in the street," and, "everyone has his own reasons for this, but it concerns a permanent value in any event."¹³ It was also argued that if a woman's face is covered and only her eyes are visible then she would encounter difficulties in participating in the community since "face-covering garments largely precludes verbal and non-verbal communication."¹⁴ The intervention with effective communication arising from this circumstance would consequently "lead to social disruption."¹⁵

The question remains, however, whether the advancement of social cohesion is a convincing argument or legitimate ground to ban and criminalize the wearing of Islamic veils. I address this question through the lens of the European human rights framework by analyzing the approaches the European Court of Human Rights (ECtHR) has taken regarding French and Belgian anti-veil legislation, enacted on social cohesion grounds. While there is an extensive body of academic literature on Islamic veiling bans in Europe, including French and Belgian anti-veil legislation, this question is an understudied aspect of the debate: the legitimacy of social cohesion or living together as a justification for such bans in liberal democratic societies.

Living Together: A Newly Developed Justification for Limitations on Religious Freedom

The ECtHR has accepted that advancing *living together* (or social cohesion) may justify the restriction of the right to manifest one's religion through the wearing of Islamic veils. The concept of living together emerged in the jurisprudence of the ECtHR as a possible justification for limitations on freedom of religion in July 2014, when the ECtHR declared its judgment in the landmark case of *S.A.S. v France*. *S.A.S.* concerned an unnamed twenty-four-year-old woman of Pakistani origin, a "perfect French citizen with a university education ... who [spoke] of her republic with passion"¹⁶ and who wore both types of Islamic full-face veils, the *burqa* and *niqab*, in accordance with her faith, culture, and personal convictions. She stated that it was an entirely voluntary choice of her to wear the full-face veils.¹⁷ She

Judgment on the Legality of a Ban on Wearing Full-Face Veils in Public, 53 INTERNATIONAL LEGAL MATERIALS 1025 (2014). For further discussion, *S.A.S.*, *supra*, ¶¶ 15–24.

¹¹ See *S.A.S.*, *supra* note 10, ¶ 25. Exposé des Motifs [Explanatory memorandum], LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Bill on prohibiting the concealment of one's face in public places] (May 19, 2010), <https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000022234691/>.

¹² *S.A.S.*, *supra* note 10, ¶ 25.

¹³ Parliamentary Proceedings, Belgian Chamber 2010–2011, 28 April 2011, no. 53-30, 35, as quoted in Brems, *The Belgian "Burqa Ban" Confronted with Insider Realities*, *infra* note 69, at 94.

¹⁴ Parliamentary Documents, Belgian Chamber 2010–2011, No. 53-85/1, 3, as quoted in Brems, *The Belgian "Burqa Ban" Confronted with Insider Realities*, *infra* note 69, at 94.

¹⁵ *Id.* at 4.

¹⁶ Kim Willsher, *France's Burqa Ban Upheld by Human Rights Court*, GUARDIAN (July 1, 2014), <https://www.theguardian.com/world/2014/jul/01/france-burqa-ban-upheld-human-rights-court>.

¹⁷ *S.A.S.*, *supra* note 10, ¶ 11.

challenged French Law no. 2010-1192 of 11 October 2010,¹⁸ which prohibited concealing the face in public spaces. She claimed that the Islamic full-face veil ban in France had a negative impact on her free choice to wear the *burqa* and *niqab* and infringed upon her rights under, inter alia, Article 8 and Article 9 of the European Convention on Human Rights. The French government submitted that this ban pursued two aims: (1) “public safety” and (2) “the protection of rights and freedoms of others” through securing respect for a minimum set of values in an open and democratic society.¹⁹ In support of the second aim, the government referred to the following three values: (1) respect for gender equality, (2) respect for human dignity, and (3) respect for the minimum requirements of life in society (*le vivre ensemble* or living together). The ECtHR dismissed the French government’s arguments relating to public safety, gender equality, and human dignity. However, it accepted that “under certain conditions the ‘respect for the minimum requirements of life in society’ referred to by the Government—or of ‘living together’ ... can be linked to the legitimate aim of the ‘protection of the rights and freedoms of others’”²⁰ in the context of “the right of others to live in a space of socialisation which makes living together easier.”²¹ The ECtHR gave very wide latitude and deference to the French authorities by invoking the doctrine of margin of appreciation, and by fifteen votes to two, concluded that there was no violation of Articles 8 and 9 in this case.

The concept of living together from the *S.A.S.* ruling has been recently applied by the ECtHR in two similar judgments delivered on July 11, 2017, concerning the Belgian equivalent of the French ban on Islamic full-face veils in public spaces: *Belcacemi and Oussar v Belgium*²² and *Dakir v Belgium*.²³ In both cases, the ECtHR in line with its previous decision in *S.A.S.*, upheld the ban on wearing Islamic full-face veils in public places in Belgium on the grounds of living together. While in both cases the applicants challenged the ban on wearing full-face veils, the specific facts were slightly different. In *Belcacemi*, two applicants (a Belgian national, Ms. Belcacemi, and a Moroccan national, Ms. Oussar) challenged the Belgian Law of 1 June 2011,²⁴ which prohibited the wearing of clothing that partially or totally covers the face in public places. Following the enactment of the Islamic full-face veil ban in Belgium, Ms. Belcacemi felt that she had no option but to remove her *niqab* temporarily for fear that she would otherwise be stopped in the street and heavily

¹⁸ Loi 2010-1192 du 11 octobre 2010 de interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 11, 2010 on the act of prohibiting concealment of the face in a public space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, no. 0237, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000022911670/> (hereinafter “the Islamic full-face veil ban in France”). Section 1 of Law no. 2010-1192 of 11 October 2010 reads, “[n]o one may, in public places, wear clothing that is designed to conceal the face.” Section 3 states, “[a]ny breach of the prohibition laid down in section 1 hereof shall be punishable by a fine, at the rate applying to second-class petty offences (contraventions) [150 euros maximum]. An obligation to follow a citizenship course ... may be imposed in addition to or instead of the payment of a fine.”

¹⁹ *S.A.S.*, *supra* note 10, ¶¶ 82, 116.

²⁰ *Id.* ¶ 121.

²¹ *Id.* ¶ 122.

²² *Belcacemi and Oussar v Belgium*, App. No. 37798/13 (July 11, 2017), <https://hudoc.echr.coe.int/eng?i=001-175141>.

²³ *Dakir v Belgium*, App. No. 4619/12 (July 11, 2017), <https://hudoc.echr.coe.int/eng?i=001-175660>.

²⁴ Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage [Law to prohibit the wearing of any clothing totally or mainly hiding the face] of June 1, 2011, MONITEUR BELGE [M.B.], July 13, 2011, 41,729 (hereinafter “the Islamic full-face veil ban in Belgium”). Law of 1 June 2011 came into force on July 23, 2011. It inserted Article 563*bis* (hereinafter “the local ban in Belgium”) into the Belgian Criminal Code, which reads, “[u]nless otherwise provided by law, persons who appear in a place that is accessible to the public with their faces completely or partially covered or hidden, such as not to be identifiable, shall be liable to a fine of between fifteen and twenty-five euros [read: between 120 and 200 euros] and imprisonment of between one and seven days, or to one of those penalties alone.” *Id.* at 41,734.

fined or sent to prison. Ms. Oussar decided to stay at home, thus restricting her private and social life.²⁵ In *Dakir*, the applicant, Ms. Dakir, challenged Article 113bis²⁶ of the consolidated municipal by-laws of the Vesdre police district, adopted in June 2008, which prohibited the wearing of clothing concealing the face in all public places in three municipalities: Pepinster, Dison, and Verviers.²⁷ Ms. Belcacemi, Ms. Oussar, and Ms. Dakir all emphasized that they had decided, on their own initiative, to wear the *niqab* because of their religious convictions. They argued that the prohibition on wearing the *niqab* in public places infringed their rights, inter alia, under Article 9 of the European Convention on Human Rights. In *Belcacemi*, it was argued by the Belgian government that “dress codes are the product of a societal consensus and the result of a compromise between individual liberties and codes of interaction in society, and that people who wear a garment concealing their face give to others the signal that they do not want to participate actively in society while one of the values that constitute the basis of the functioning of the democratic society is that an active exchange between the individuals is possible.”²⁸ In *Dakir*, the Belgian government submitted that “those who wore clothing concealing their face were signalling to the majority that they did not wish to take an active part in society,”²⁹ and thus “undermined the very essence of the principle of ‘living together.’”³⁰ Therefore, by enacting the local ban in Belgium, “the legislature had sought to defend a societal model ... [in order] to encourage the full integration and enable citizens to share a common heritage of fundamental values.”³¹

As it did in *S.A.S.*, in the Belgian cases *Belcacemi* and *Dakir*, the ECtHR found that the Islamic full-face veil ban in Belgium and the local ban in Belgium were justified on the grounds of living together. In giving its rulings in these twin cases, the ECtHR first acknowledged that “the terms of the issue as debated in Belgium very closely resemble those surrounding the enactment of the ... French ban examined by the Court in the judgment *S.A.S. v. France*.”³² In fact, the ECtHR referred to the *S.A.S.* case nineteen times in its decision in *Belcacemi* and fifteen times in its decision in *Dakir*. In *Belcacemi* and *Dakir* the ECtHR held, along with the same lines of reasoning as those set out in *S.A.S.*, that in adopting the bans, the law makers in Belgium “sought to address a practice which it deemed incompatible, in Belgian society, with the ground rules of social communication and more broadly the establishment of human relations that are essential for living together.”³³ Affording Belgium “a very wide margin of appreciation”³⁴ it stated that the respondent State was “protecting a condition of interaction between individuals which for the State was essential to ensure the functioning of a democratic society.”³⁵ The ECtHR unanimously held that the Islamic full-face veil ban in Belgium and the local ban in Belgium did not infringe the applicants’ freedom of religion or belief under Article 9 of the European Convention on Human Rights.

²⁵ *Belcacemi and Oussar*, supra note 22, ¶¶ 5–13.

²⁶ Article 113bis reads, “[t]he wearing of clothing concealing the face shall be forbidden at all times and in all public places.” *Dakir*, supra note 23, ¶ 10.

²⁷ *Id.* ¶¶ 6–14.

²⁸ *Belcacemi*, supra note 22, ¶ 42.

²⁹ *Dakir*, supra note 23, ¶ 31.

³⁰ *Id.* ¶ 29.

³¹ *Id.* ¶ 32.

³² *Belcacemi*, supra note 22, ¶ 50; *Dakir*, supra note 23, ¶ 52.

³³ *Dakir*, supra note 23, ¶ 56; *Belcacemi*, supra note 22, ¶ 53.

³⁴ *Belcacemi*, supra note 22, ¶ 55; *Dakir*, supra note 23, ¶ 59.

³⁵ See Press Release, European Court of Human Rights, *Belcacemi and Oussar v. Belgium*, Ban on Wearing Face Covering in Public in Belgium Did Not Violate Convention Rights (July 11, 2017); see also *Belcacemi*, supra note 22, ¶ 53; *Dakir*, supra note 23, ¶ 56.

Using the Concept of Living Together as a Justification for Banning Islamic Veils: An Analysis

The concept of living together is absent from the text of the European Convention on Human Rights. As noted above, this concept first emerged in *S.A.S.* and was subsequently endorsed in *Belcacemi* and *Dakir*. In cases concerning the bans on the use of the Islamic veil, the ECtHR has done little to define the concept of living together. However, it seems that, as Sarah Trotter argues, the central idea of living together in the European human rights framework is a “state-defined vision of ‘social interaction’ of collective life.”³⁶ As far as the ECtHR’s jurisprudence on Islamic veiling is concerned, the notion of living together appears to be closely associated with the idea that people have the *right* to interact socially with others through face-to-face encounters.

In the parliamentary debates leading up to the Islamic full-face veil ban in France, seeing the face of others had been put forward as a “moral right,” based on the work of French philosopher Emmanuel Levinas and his famous concept of the face-to-face encounter.³⁷ Levinas was very critical of a society in which people did not properly relate to one another, leading to dehumanization.³⁸ In *Totality and Infinity*, Levinas argued that the presence of the face is paramount for “human fraternity” and a face-to-face encounter is the prerequisite for human communication.³⁹ It is, however, arguable that effective human interaction is still possible although the face is partially or totally concealed.⁴⁰ Even if one agrees with Levinas’s *philosophical* argument that face-to-face encounters are the only effective way to create meaningful relationships with others, legal bans on Muslim veiling are still problematic. Forbidding Muslim women to wear full-face veils on pain of a criminal sanction “is a huge step from a postmodern philosophical argument to a criminal prohibition.”⁴¹

It is strongly arguable that the concept of living together lacks sufficient *legal* basis to restrict the right to manifest one’s religion. Foremost is the malleable nature of the concept. In *S.A.S.*, the ECtHR itself took an understandably cautious approach to using living together as a justification for restricting the rights in the European Convention on Human Rights because of the “flexibility of the notion of ‘living together’ and the resulting risk of abuse.”⁴² The hostility toward the wearing of the Islamic full-face veil in public spaces and its perceived harmful impact on (harmonious) living together is based upon “social expectations as to how to behave in the society”⁴³: “the face plays a significant role in human interaction ... [and] [t]he effect of concealing one’s face in public places is to break social ties and to manifest a refusal of the principle of ‘living together’”⁴⁴ because “individuals who are

³⁶ Sarah Trotter, “Living Together,” “Learning Together” and “Swimming Together”: *Osmanoğlu and Kocabaş v Switzerland (2017) and the Construction of Collective Life*, 18 HUMAN RIGHTS LAW REVIEW 157, 160 (2018).

³⁷ See Eva Brems, *SAS v France: A Reality Check*, 25 NOTTINGHAM LAW REVIEW 58, 67 (2016).

³⁸ On this point, see Francois-Xavier Millet, *When the European Court of Human Rights Encounters the Face*, 11 EUROPEAN CONSTITUTIONAL LAW REVIEW 408, 417 (2015).

³⁹ EMMANUEL LEVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* 187–219 (1979).

⁴⁰ For example, people appear in social gatherings or public places wearing Santa costumes during the Christmas holidays and face-concealing masks on Halloween. Nobody claims that in such situations effective communication or social interaction is hindered because of unrecognizability. After the outbreak of COVID-19, many European countries required the wearing of face masks as part of their efforts to help to slow the transmission of Coronavirus despite their concurrent bans on Islamic full-face veils. Even if the vast majority of people wore face masks in public places, such as public transport and government buildings, meaningful social interactions were not impossible in those places during COVID-19.

⁴¹ Brems, *supra* note 35, at 67.

⁴² *S.A.S.*, *supra* note 10, ¶ 122.

⁴³ Myriam Hunter-Henin, *Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS*, 4 OXFORD JOURNAL OF LAW AND RELIGION 94, 97 (2015).

⁴⁴ *S.A.S.*, *supra* note 10, ¶ 82.

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.”⁴⁵ In fact, such actions and activities as engaging in face-to-face interaction, maintaining eye contact, shaking hands, and offering engaged listening or warm greetings are mere social expectations or behavioral norms, not legal obligations. In this sense, considering the social ideal of living together as a *legal* concept is problematic and raises many questions. Armin Steinbach notes, “accepting a uniform behavioural rule on the basis of considerations related to the notions of ‘living together’ lacks sufficient legal ground.”⁴⁶ Likewise, Myriam Hunter-Henin argues, the legal basis of the notion of ‘living together’ is “flawed.”⁴⁷ The concept of living together has no (or very little) *legal* basis.

Additionally, using criminal law to enforce various social obligations or behavioral norms (such as face-to-face encounters) in a liberal democratic society is problematic and undesirable. The use of law to enforce societal ideals involves government expenditures. It also leads to increased workloads for police, prosecutors, and courts. Furthermore, when an individual is forced to obey the social norms and expectations (which are *not* legal obligations) on pain of a criminal sanction, their personal autonomy is diminished. Mere behavioral norms, such as face-to-face interactions, should not be enforced by criminal law. Coercive interventions with an individual’s voluntary (and harmless) lifestyles prevent them from acting in accordance with their own preferences and invade their liberty.

In both French and Belgian cases concerning bans on Islamic full-face veils, by giving “particular weight ... to the interaction between individuals”⁴⁸ the ECtHR accepted that “the barrier raised against others by a veil concealing the face ... breach[es] the *right of others to live in a space of socialisation which makes living together easier*.”⁴⁹ This suggests that the Council of Europe has now recognized a legal right—endorsed by the European Convention on Human Rights—for individuals to be able to socialize in public spaces. It also suggests that barriers to the possibility of such socialization, such as hiding facial expressions of emotions behind Islamic full-face veils, amounts to an infringement of that right. In commenting on the ECtHR’s jurisprudence on Islamic veils, academic commentators have noted that the ECtHR has now created “a legal right for people to see each other’s smile and frowns in public spaces”⁵⁰ and a corresponding legal “duty to engage to some degree in social interaction with fellow citizens.”⁵¹ As John Adenitire convincingly argues, “[i]t is, however, doubtful that such a general right has ever existed, either as a matter of law or morality ... [and] that such a legal duty is desirable especially if its breach is sanctioned by a criminal penalty.”⁵²

⁴⁵ *Id.* ¶ 122.

⁴⁶ Armin Steinbach, *Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights*, 4 CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 29, 52 (2015).

⁴⁷ Hunter-Henin, *supra* note 41, at 96–98. For a contrasting view, see Matthew Nicholson, *Majority Rule and Human Rights: Identity and Non-identity in SAS v France*, 67 NORTHERN IRELAND LEGAL QUARTERLY 115, 123–24 (2016).

⁴⁸ S.A.S., *supra* note 10, ¶ 141; *Dakir*, *supra* note 23, ¶ 3 (Spano, J., concurring, joined by Karakaş, J.).

⁴⁹ S.A.S., *supra* note 10, ¶ 122 (emphasis added); *Dakir*, *supra* note 23, ¶ 3. It is noteworthy that in its Resolution 2076, “Freedom of Religion and Living Together in a Democratic Society,” the Parliamentary Assembly of the Council of Europe has stated that “the right to freedom of religion safeguarded by Article 9 ... coexists with the fundamental rights of others and with the right of everyone to live in a space of socialisation which facilitates living together.” European Parliamentary Assembly Debates 33rd Sess. (Sept. 30, 2015).

⁵⁰ John Adenitire, *Has the European Court of Human Rights Recognised a Legal Right to Glance at a Smile?*, 131 LAW QUARTERLY REVIEW 43, 47 (2015).

⁵¹ Hunter-Henin, *supra* note 41, at 97.

⁵² Adenitire, *supra* note 48, at 47. Juss argues, “[o]ne did not know until [the S.A.S.] decision that living in Europe entailed with it a legitimate right to peer into the faces of others in public.” Satvinder Juss, *Burqa-Bashing and the Charlie Hebdo Cartoons*, 26 KING’S LAW JOURNAL 27, 30 (2015).

Indeed, it is difficult to argue that there exists a general *legal right* to see the face or facial expressions of an individual (against their wishes). The *right* to live in a space of socialization, which is allegedly affected by the covered faces of veil-wearing Muslim women, suggests that one has some kind of entitlement to demand a face-to-face encounter or social interaction with such women and that this right is unjustly infringed if they decline to interact by uncovering their faces. It also suggests that one can lawfully demand that women forgo their sense of modesty and demands of conscience so that one can interact with them in public places. Amid the Coronavirus pandemic, when the society is changing beyond imagination and new customs and manners are appearing, such as social distancing and wearing face-masks, the right to live in a space of socialization means that one can claim that other individuals cannot wear face-masks in public places because these coverings allegedly hinder social interaction. However, there are doubts as to whether any such right actually exists. Neville Cox argues, “there are no ‘rights’ that derive from the concept of *vivre ensemble* [or living together] and that encompass an entitlement to demand that other people do not wear face veils,” which allegedly makes social interaction harder.⁵³ It is therefore submitted that an individual cannot claim that they have a general *legal right* to have a society free from barriers to living together where such so-called barriers are created by Islamic veils concealing women’s faces. In this sense, the ECtHR’s reasoning in *S.A.S.*, *Belcacemi*, and *Dakir* is unconvincing, because in these cases the ECtHR restricted the applicants’ “Article 9 right in favour of another right, the existence of which is questionable.”⁵⁴ In *S.A.S.*, the dissenting judges rejected the majority’s implication of the right to interact with others against their will by stating that “it can hardly be argued that an individual has a right to enter into contact with other people, in public places, against their will.”⁵⁵ Similarly, the United Nations Human Rights Committee has recognized that there is no such right “to interact with any person in a public space” against their wishes.⁵⁶

If there is a legal right to live in a space of socialization that makes living together easier, then there must be a corresponding *legal obligation* to make socialization easier and if there is a right to enter into or attempt to enter into contact with people in public places notwithstanding their wishes to the contrary, then there must be a countervailing *obligation* on the part of the other party to facilitate that contact or attempt at contact.⁵⁷ It is unclear, however, on what basis such *legal obligation* might rest. The concept of personal autonomy implies that each individual should be free to decide whether or not they want to engage with others. In liberal democracies, an individual must have the opportunity to define their degree of membership in society provided that they do not harm others. If they decide to refrain from interacting with other people in public spaces without causing harm, then one must respect that autonomous decision. Assuming that covering one’s face with a face-veil negates one’s sociability, it is difficult to argue that such negation causes any significant harm to others.⁵⁸ It is clear that in *S.A.S.*, *Belcacemi*, and *Dakir*, the ECtHR failed to recognize

⁵³ NEVILLE COX, *BEHIND THE VEIL: A CRITICAL ANALYSIS OF EUROPEAN VEILING LAWS* 240–46 (2019).

⁵⁴ Gabrielle Elliot-Williams, *Protection of the Right to Manifest Religion or Belief under the European Convention on Human Rights in SAS v France*, 5 OXFORD JOURNAL OF LAW AND RELIGION 344, 346 (2016).

⁵⁵ *S.A.S.*, *supra* note 10, ¶ 8 (Nussberger and Jaderblom, JJ., dissenting in part).

⁵⁶ United Nations Human Rights Committee, Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2747/2016, ¶ 8.10, UN Doc. CCPR/C/123/D/2747/2016 (July 17, 2018); *Miriana Hebbadj v. France*, *supra* note 6, ¶ 7.10.

⁵⁷ On this point, see Elliot-Williams, *supra* note 52, at 347.

⁵⁸ Ioanna Tourkochoriti, *The Burqa Ban before the European Court of Human Rights: A Comment on S.A.S. v France*, I.CONNECT (July 9, 2014), <https://www.iconnectblog.com/the-burka-ban-before-the-european-court-of-human-rights-a-comment-on-s-a-s-v-france/>.

that veiled women have the right *not* to interact with others in public.⁵⁹ In *S.A.S.*, dissenting judges Nussberger and Jaderblom pointed out that “the right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places—the right to be an outsider.”⁶⁰ The ECtHR in its jurisprudence on Article 8 has accepted that the right to respect for private life under Article 8 entails the right to exclude “the outside world”⁶¹ and that the Article 8 right is applicable even in public spaces.⁶² Equally, freedom of association under Article 11 of the European Convention on Human Rights encompasses the freedom to *refuse* to associate.⁶³ Therefore, legally compelling a veil-wearing Muslim woman to interact, socialize, or associate with others in public spaces against her wishes is deeply problematic. It raises many questions when the breach of such an undesirable obligation is sanctioned by criminal penalties as in the cases of *S.A.S.*, *Belcacemi*, and *Dakir*.

It is hard to assert that there exists a *legal right* for an individual to demand social interaction or to be able to live in a society free from barriers to social cohesion. Likewise, an individual can hardly have a *legal right* to see the face or facial expressions of others and to interact socially with them in a space of socialization which makes living together easier. Even if such rights *did* exist in the European human rights framework, it would be hard to demonstrate why those rights would prevail over the right to freedom of religion of Muslim women. Invoking the living together argument to justify an anti-veiling law is not convincing.

To assess whether social cohesion or living together is a valid ground for banning the wearing of Islamic veils, the consequences and the impact of such ban in social and communal harmony and in women’s lives must also to be fully evaluated.

One can rightly argue that bans or limitations on wearing Islamic veils exacerbate the division between Muslim women and non-Muslim people in a society and thus harm social harmony. Empirical evidence from a number of studies⁶⁴ in a range of countries clearly shows that the vast majority of Muslim women who wear Islamic veils in many European countries do so voluntarily as part of their *religious* belief. For these women, the practice of veiling is associated with their modesty as they sincerely believe that veiling is the only way in which a decent and God-fearing Muslim woman should appear in public. Masood Khan notes, many Muslim “women use veiling as a tool to further their own interests in a society where they have no other means of doing so. In this way, veiling provides women with an opportunity to have access to public sphere of society which otherwise is inaccessible to them.”⁶⁵ A law or regulation that prohibits or governs the wearing of Islamic veils in the public sphere, pressures pious Muslim women (that is, those who habitually wear veils in public) to stay home and to avoid public places.⁶⁶ As ample

⁵⁹ On this point, see Róisín Áine Costello and Sahar Ahmed, *Citizenship, Identity, and Veiling: Interrogating the Limits of Article 8 of the European Convention on Human Rights in Cases Involving the Religious Dress of Muslim Women*, 38 *JOURNAL OF LAW AND RELIGION* 81, 104–07 (2023).

⁶⁰ *S.A.S.*, *supra* note 10, ¶ 8 (Nussberger and Jaderblom, JJ., dissenting in part).

⁶¹ *Niemitz v. Germany*, App. No. 13710/88, ¶ 29 (December 16, 1992), <https://hudoc.echr.coe.int/eng?i=001-57887>

⁶² *Von Hannover v. Germany* (no. 2), App. Nos. 40660/08 and 60641/08, ¶ 95 (February 7, 2012), <https://hudoc.echr.coe.int/fre?i=002-98>.

⁶³ *Young, James, and Webster v. UK*, App. Nos. 7601/76 and 7806/77, ¶ 55 (August 13, 1981), <https://hudoc.echr.coe.int/?i=001-57608>; *Chassagnou & Others v. France*, App. Nos. 25088/94, 28331/95 and 28443/95, ¶ 117 (April 29, 1999), <https://hudoc.echr.coe.int/?i=001-58288>.

⁶⁴ See *infra* notes 67–70.

⁶⁵ Masood Khan, *The Muslim Veiling: A Symbol of Oppression or a Tool of Liberation?*, 32 *UMASA JOURNAL* 1, 3 (2014).

⁶⁶ Accordingly, one might argue that a ban on Muslim veiling violates the right to respect for private life under Article 8 of the ECHR because it hinders a woman’s ability to establish a social life and to develop relationships with others outside the inner circle of the home. See *Niemitz*, *supra* note 59, ¶ 29.

evidence suggests, anti-veiling laws create or exacerbate polarization, further dividing mainstream society and the Muslim community, and they can lead to the isolation of veil-wearing Muslim women in the society.

The Open Society Justice Initiative's empirical study *After the Ban: The Experiences of 35 Women of the Full-Face Veil in France* has documented the effects of the Islamic full-face veil ban in France on Muslim women who wore full-face veils prior to the ban. A significant majority of interviewees stated that they went out less often than before the implementation of the ban and thus had become less sociable than what they were before the ban: "The research shows that a clear majority of women substantially reduced their outdoor activities, including taking their children to school, family outings, shopping, and going to the post office. Many respondents described their perception of living 'in a jail' since the ban's enforcement."⁶⁷

The Open Society Foundations' sociological study *Unveiling the Truth: Why 32 Muslim Women Wear the Full-Face Veil in France* was carried out just before the Islamic full-face veil ban in France came into force. This study revealed that criminal prohibitions on veiling further marginalize an already unpopular minority, namely the Muslim, and undermine rather than facilitate social cohesion. According to *Unveiling the Truth*, "[a] majority of respondents said that [once the ban is implemented] their ideal solution for the future was to leave France and settle in a Muslim country. ... A couple of interviewees also mentioned the United Kingdom, which they consider to be more tolerant towards Muslims than France. ... Of more concern was the fact that many respondents said that they would avoid, as much as possible, going outside."⁶⁸

The results of an empirical study conducted by Eva Brems and others in Belgium reveals that women voluntarily practicing veiling state that they will live a less social life if they are prohibited from wearing the veil because they will not feel at ease in a number of circumstances. Some interviewees stated that veiling gave them more freedom to go out.⁶⁹ Human Rights Watch's empirical research regarding restrictions on female civil servants and schoolteachers wearing veils in Germany and the consequences of these restricted measures concluded "banning the [veils] is the worst possible policy response to the need to bring people into mainstream society. Our research showed that the ban serves to exclude, rather than include. Many women we talked to felt alienated by the bans, even though some had lived in Germany for decades or even their entire lives."⁷⁰

These studies offer credible evidence that rather than promoting social harmony and avoiding segregation and separation, blanket bans on wearing Islamic veils in public spaces can have the opposite effect: a ban may stop pious, veil-wearing women from taking part in society, leaving the house, getting jobs, or going to educational

⁶⁷ OPEN SOCIETY JUSTICE INITIATIVE, *AFTER THE BAN: THE EXPERIENCES OF 35 WOMEN OF THE FULL-FACE VEIL IN FRANCE* 8 (2013), <https://www.justiceinitiative.org/uploads/86f41710-a2a5-4ae0-a3e7-37cd66f9001d/after-the-ban-experience-full-face-veil-france-20140210.pdf>.

⁶⁸ OPEN SOCIETY FOUNDATIONS, *UNVEILING THE TRUTH: WHY 32 MUSLIM WOMEN WEAR THE FULL-FACE VEIL IN FRANCE* 73 (2011) <https://www.opensocietyfoundations.org/publications/unveiling-truth-why-32-muslim-women-wear-full-face-veil-france>.

⁶⁹ Eva Brems et al., *The Belgian "Burqa Ban" Confronted with Insider Realities*, in *THE EXPERIENCES OF FACE VEIL WEARERS IN EUROPE AND THE LAW* 77, 96–101 (Eva Brems ed., 2014). It is noteworthy that this study reflects the experiences of twenty-seven women in Belgium who wore full-face veils. This study consists of twenty-seven interviews conducted between September 2010 and September 2011 and two focus group discussions in April and May 2012. Fourteen interviews were conducted before the adoption of the Islamic full-face veil ban in Belgium and thirteen after the adoption.

⁷⁰ Gauri van Gulik, *Headscarves: The Wrong Battle* (March 14, 2009) <https://www.hrw.org/news/2009/03/14/headscarves-wrong-battle>.

institutions. Thus, it is safe to argue that a ban may have profound, negative effects on Muslim women's lives because it hinders their ability to go out leading to the deterioration of their social lives, dictates to them in a discriminatory way how to behave and dress in public spaces, and prevents them from living a life of their own choosing. The ECtHR has acknowledged this danger in *S.A.S.*: "there is no doubt that the ban has a significant negative impact on the situation of women who ... have chosen to wear the full-face veil ... [because] the ban may have the effect of isolating them and restricting their autonomy."⁷¹ Academic commentators have argued that a ban on the grounds of living together may not achieve the desired result because, in reality, it reduces the social interaction of Muslim women who, despite the ban, do not wish to go out uncovered. As Erica Howard states, rather than facilitating social cohesion, "bans can have the opposite effect: the polarisation between the majority and the Muslim community gets aggravated and the majority community gets less tolerant." She further states, "banning full-face veils might equally be seen as going against the 'living together.'"⁷²

An anti-veil law that is enacted on the grounds of social cohesion or living together cannot be expected to have the desired effect of promoting integration and social harmony. Conversely, the restrictive measure may harm veil-wearing women by undermining their personal autonomy and preventing them from integrating in the mainstream society. Such a ban may also harm society more generally by frustrating social harmony.

Another obvious consequence of anti-veiling laws is the increase of harassment and abuse directed towards veil-wearing Muslim women in public places by anonymous people. The harmful effect of a ban as a catalyst of serious street harassment against veil users has been documented in the sociological study by the Open Society Justice Initiative on the effects of the Islamic full-face veil ban in France. Its findings indicate that Muslim women who are habitually attached to the veil will continue to wear it despite the ban. According to *After the Ban*, "[v]erbal abuse and harassment by members of the public is still a very common experience for the respondents who have chosen to continue wearing their full-face veil. [The interviewees] reported physical assaults such as having their veil pulled off, being violently pushed or spat on. The ban and public discourse seems [*sic*] to have implicitly legitimized the abusive treatment of veiled women. ... [T]he women's testimonies reveal that some members of the public seem to think the law allows for or legitimizes private enforcement."⁷³

Empirical findings thus suggest that a general ban in public places on wearing Islamic veils may result in such actions as hate crime, physical assault, verbal abuse, and harassment by members of the public specifically targeting Muslim women. These incidents will ultimately harm Muslim women who choose to wear a veil in times of growing Islamophobia in Europe. If veil-wearing Muslim women are fearful of being subjected to abuse in public spaces, they will avoid going out as much as possible,⁷⁴ which will seriously harm the social cohesion by increasing alienation and marginalization. Hence, legal bans on veiling are counterproductive to promoting social cohesion. Advancing social cohesion or living together is *not* a legitimate ground or convincing argument to ban the wearing of Islamic veils in a liberal democratic society.

⁷¹ *S.A.S.*, *supra* note 10, ¶ 146.

⁷² Erica Howard, *S.A.S. v France: Living Together or Increased Social Division*, EJIL: TALK (July 7, 2014) <https://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/>.

⁷³ Open Society Justice Initiative, *supra* note 65, at 14.

⁷⁴ Empirical findings suggest that some veil-wearing women avoid "certain activities outside the house" or avoid "as much as possible to go out on their own, because of fear of aggressive reactions of others." Brems et al., *supra* note 67, at 96.

Does a Ban on Wearing Islamic Veils on the Grounds of Living Together Satisfy the European Convention on Human Rights Standards?

Placing *S.A.S.*, *Belcacemi*, and *Dakir* in context is a good measure of whether a general ban on Islamic veiling on the grounds of social cohesion or living together satisfies the justification test under Article 9 of the European Convention on Human Rights.

The Legitimate Aim Test

Assuming that the notion of living together has a sufficient legal basis, the ECtHR still needs to decide whether living together may be considered a legitimate aim that might, in principle, justify a restriction of rights under the European Convention on Human Rights. It is, however, difficult to argue that a ban on the grounds of living together satisfies the legitimate aim test within the meaning of Article 9(2).

Compared to Articles 8, 10, and 11 of the European Convention on Human Rights, Article 9 specifies a very limited number of grounds restricting the legitimate aims for interference and uses restrictive wording: “shall be subject *only* to such limitations”⁷⁵ With regard to the legitimate aims enshrined in Article 9(2), the ECtHR in many cases, including *S.A.S.*, has stated that “the enumeration of the exceptions to the individual’s freedom to manifest his or her religion or beliefs, as listed in Article 9(2), is exhaustive and that their definition is restrictive.”⁷⁶ If the list of legitimate aims under 9(2) is *exhaustive*, then one can reasonably argue that the notion of living together cannot be a legitimate aim on its own. For living together (or social cohesion) is not itself contained in Article 9(2). Neither does it expressly correspond with any of the permissible grounds of limitation articulated in Article 9(2) of the European Convention on Human Rights.

However, a ban on the grounds of living together may still, in theory, satisfy the legitimate aim test within Article 9 if it can be shown that the concept of living together has a sufficiently strong link to “the rights and freedoms of others,” which qualifies as a legitimate aim under Article 9(2). In such circumstances, the ECtHR must interpret the living together justification as falling within the broad “protection of the rights and freedoms of others,” which can be found in this provision. The ECtHR effectively did this in *S.A.S.*, *Belcacemi*, and *Dakir*.

In *S.A.S.*, the ECtHR held that “under certain conditions the ‘respect for the minimum requirements of life in society’ referred to by the Government—or of ‘living together’ ... can be linked to the legitimate aim of the ‘protection of the rights and freedoms of others.’”⁷⁷ An important point merits special attention here. In *Belcacemi* and *Dakir*, the Belgian government, unlike the French government, did not refer to living together as “respect for the minimum requirements of life in society” originating from “respect for the minimum set of values of an open and democratic society.” Rather, they invoked living together as a stand-alone legitimate aim stating that the wearing of Islamic full-face veils “undermined the very essence of the principle of ‘living together.’”⁷⁸ However, the ECtHR was still prepared to accept that the Belgian bans pursued the legitimate aim of living together under the protection of the rights and freedoms of others. The ECtHR regarded living together “as an element of the ‘protection of the rights and freedoms of others.’”⁷⁹

⁷⁵ Convention for the Protection of Human Rights and Fundamental Freedoms art. 9(2), Nov. 4, 1950, 213 U.N.T.S. 222 (emphasis added).

⁷⁶ *S.A.S.*, *supra* note 10, ¶ 113; *Svyato-Mykhaylivska Parafiya v. Ukr.*, App. No. 77703/01, ¶ 132 (June 14, 2007), <https://hudoc.echr.coe.int/?i=001-81067>.

⁷⁷ *S.A.S.*, *supra* note 10, ¶ 121.

⁷⁸ *Dakir*, *supra* note 23, ¶ 29; *Belcacemi*, *supra* note 22, ¶ 40.

⁷⁹ *Dakir*, *supra* note 23, ¶ 51; Press Release, European Court of Human Rights, *supra* note 33.

The ECtHR's conclusion that the French and Belgian bans pursued the legitimate aim of living together within the broad justification of the "protection of the rights and freedoms of others" is unconvincing. Given that gender equality and human dignity arguments failed for *not* fulfilling a legitimate aim in *S.A.S.*,⁸⁰ questions arise in relation to how the ECtHR reached the conclusion that the living together argument was in pursuit of the legitimate aim of the "protection of the rights and freedoms of others."

Surprisingly, the ECtHR in *S.A.S.*, *Belcacemi*, and *Dakir* did not offer a clear explanation as to how the phrase "rights and freedoms of others" captured the vague concept of living together. The only explanation given by the ECtHR in these cases was that the wearing of the Islamic full-face veils in public places breaches "the right of others to live in a space of socialisation" because faceless communication would be tantamount to a violation of the right to live in an environment facilitating living together. Such reasoning of the ECtHR raises two questions that the ECtHR does not address: (1) What rights do others have? (2) What is the nature of those rights?

There is no specific category of rights or interests that may qualify as the rights and freedoms of others.⁸¹ However, as Jacco Bomhoff notes, "the specific use of the term *rights* rather than *interests* in the limitation clause, and the presumption in favour of fundamental rights protection inherent in the whole set-up of the Convention" clearly suggests that not all individual interests can qualify for inclusion under the rights of others.⁸² In paragraph 122 of the *S.A.S.* judgment, the majority recognized the public interest in having public spaces free from practices "which would fundamentally call into question the possibility of open interpersonal relationships." In the next sentence of the same paragraph, the majority stated that "[t]he Court is therefore able to accept that the barrier raised against others by a veil concealing the face ... breach[es] the right of others to live in a space of socialisation which makes living together easier."

This is absurd. The ECtHR's ruling that allowing Islamic full-face veils in public spaces infringes the *right* of others to live in a space of socialization stretches the term *right* to cover a rather intangible and elusive "public interest."⁸³ However, it is widely recognized that the subjects of protection within the meaning of rights of others are individual rights, *not* general public interests. Steinbach argues, regarding Article 9(2) of the European Convention on Human Rights, the "rights of others include rights granted by national legal norms (both constitutional and other norms of lower rank) and rights accruing from the ECHR; they must be stipulated by law. There is thus no caveat for considerations rooted in general public interest making a restrictive interpretation of the grounds of justification necessary." For this reason, Steinbach has criticized the ECtHR's expansion of grounds for justification "to general public interest considerations" in order to restrict a minority practice.⁸⁴ Similarly, Stephanie Berry has criticized the ECtHR for accepting that the prohibition on wearing Islamic full-face veils pursues the legitimate

⁸⁰ *S.A.S.*, *supra* note 10, ¶¶ 119–20.

⁸¹ In *S.A.S.*, the dissenting judges admitted that "the Court's case-law is not clear as to what may constitute 'the rights and freedoms of others' outside the scope of rights protected by the Convention." *S.A.S.*, *supra* note 10, ¶ 5 (Nussberger and Jaderblom, JJ., dissenting in part).

⁸² Jacco Bomhoff, *The Rights and Freedoms of Others: The ECHR and Its Peculiar Category of Conflicts Between Fundamental Rights*, in *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* 619, 624 (Eva Brems ed., 2008) (emphasis in the original). See also Jill Marshall, *S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities*, 15 *HUMAN RIGHTS LAW REVIEW* 377, 385 (2015).

⁸³ On this point, see Eoin Daly, *Fraternalism as a Limitation on Religious Freedom: The Case of SAS v. France*, 11 *RELIGION AND HUMAN RIGHTS* 140, 144 (2016); see also Zia Akhtar, *Court Evidence, "Veils" and the Human Rights Defence*, 181 *JPN* 830, 833 (2017).

⁸⁴ Steinbach, *supra* note 44, at 44–45.

aim of living together under the banner of the protection of rights and freedoms of others.⁸⁵

A closer inspection of the ECtHR's ruling in *S.A.S.*, *Belcacemi*, and *Dakir* makes clear that the majority's preference for face-to-face communication for the establishment of human relations has been uncritically accepted by the ECtHR as the rights and freedoms of others. Arguably, the underlying reason for the majority's preferences for face-to-face encounters is based on a *behavioral* norm of the society: you must uncover your face during verbal or nonverbal communication. In *Dakir*, Judge Spano and Judge Karakaş highlighted that "[t]he requirement of 'living together' has its ideological basis in some kind of societal consensus or a majoritarian morality of how individuals should act in the public spaces."⁸⁶

However, the behavioral norms of society (such as face-to-face communication, recognizability of faces) deduced from the concept of living together do not constitute an *individual right* as required for interference with religious freedom to protect the rights and freedoms of others. Academic commentators have noted that the "subject of protection within the meaning of the 'rights of others' are individual rights, while vague notions of behavioural norms of society or considerations related to the general public interest do not qualify."⁸⁷ This suggests that a mere behavioral custom adopted in the majority part of society does *not* qualify as an individual right falling under the banner of rights of others. Therefore, Vickers has argued, living together "must surely be one of the weakest of legitimate aims identified by the court" under the European Convention on Human Rights.⁸⁸

In their dissenting opinion in *S.A.S.*, Judges Nussberger and Jaderblom heavily criticized the majority's judgement for accepting living together as a justifiable aim to restrict rights under the European Convention on Human Rights. They argued that the idea of living together is "very general,"⁸⁹ "far-fetched and vague,"⁹⁰ and it is unclear "which concrete rights of others" this concept aims to protect.⁹¹ They further argued that the "concrete individual rights" protected by the European Convention on Human Rights were "sacrificed" in the majority judgement to the "abstract principles."⁹² Likewise, in *Dakir*, Judge Spano and Judge Karakaş stated that "[i]t is far from self-evident that it can be legally tenable to interpret the legitimate aim of the rights and freedoms of others to include the concept of 'living together' in ... factual situations where the State wishes to regulate human behaviour thereby restricting Convention rights."⁹³ Similarly, the United Nations Human Rights Committee has rejected living together as a legitimate ground for the limitation of religious freedom because it cannot be a part of the fundamental rights and freedoms of others under Article 18 of the International Covenant on Civil and Political Rights.⁹⁴ Therefore, the protection of living together cannot be regarded as a legitimate dimension of the rights and freedoms of others capable of justifying restrictions on the right to religious manifestation under Article 9 of the European Convention on Human Rights.

⁸⁵ Stephanie Berry, *SAS v France: Does Anything Remain of the Right to Manifest Religion?*, EJIL: TALK (July 2, 2014), <https://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/>.

⁸⁶ *Dakir*, *supra* note 23, ¶ 7 (Spano, J., concurring, joined by Karakaş, J.).

⁸⁷ Steinbach, *supra* note 44, at 45; Mohammad Mazhar Idriss, *Criminalisation of the Burqa in the UK*, 80 JOURNAL OF CRIMINAL LAW 124 (2016).

⁸⁸ Lucy Vickers, *Conform or be Confined: S.A.S. v France*, OXFORD HUMAN RIGHTS HUB (July 8, 2014), <http://ohrh.law.ox.ac.uk/conform-or-be-confined-s-a-s-v-france/>.

⁸⁹ *S.A.S.*, *supra* note 10, ¶ 5 (Nussberger and Jaderblom, JJ., dissenting in part).

⁹⁰ *Id.*

⁹¹ *Id.* ¶ 10.

⁹² *Id.* ¶ 2.

⁹³ *Dakir*, *supra* note 23, Concurring Opinion of Judge Spano Joined by Judge Karakaş, ¶ 5.

⁹⁴ *Miriana Hebbadj*, *supra* note 54, ¶ 7.10.

Moreover, by accepting that the concept of living together “can be linked to the legitimate aim of the ‘protection of the rights and freedoms of others’”⁹⁵ (S.A.S.) and that this concept can “be regarded as an element of the ‘protection of the rights and freedoms of others’”⁹⁶ (*Dakir, Belcacemi*), the ECtHR contradicts itself. The ECtHR had previously stated that the permissible grounds of limitation “must be narrowly interpreted.”⁹⁷

If the permissible grounds of limitation are to be narrowly interpreted, then why read into the “rights and freedoms of others” such a broad, vague, and under-defined concept as living together? Should an interpretation of the so-called legitimate aim of living together fall exclusively within a respondent state’s margin of appreciation? While it is true that the ECtHR afforded a wide margin of appreciation to France and Belgium, the margin cannot be used to extend the wording of the European Convention on Human Rights or to create a new category of justification for violations of fundamental rights.⁹⁸

A ban on Islamic veiling on the grounds of living together may *not* satisfy the legitimate aim test because the “far-fetched and vague”⁹⁹ concept of living together is neither listed as a permissible ground of limitation under Article 9(2) on its own nor does it directly fall under the “protection of the rights and freedoms of others” listed there. Indeed, in relation to the living together (or social cohesion) argument, the ECtHR should have concluded that the French and Belgian bans did *not* pursue any legitimate aim, and thus failed to satisfy the legitimate aim test under Article 9 of the European Convention on Human Rights.

The Necessity Test

Assuming that a ban on wearing Islamic veils, enacted on living together grounds, pursues the legitimate aim of the “protection of the rights and freedoms of others,” for Article 9(2) to be satisfied, the ECtHR would still have to examine whether the restrictive measure in question is proportionate to that aim. The crucial question, however, is whether a blanket criminal prohibition on wearing Islamic veils satisfies the proportionality test under the European Convention on Human Rights. Placing *S.A.S.*, *Belcacemi*, and *Dakir* in context suggests that a blanket ban on the grounds of living together may not satisfy the necessity test within the meaning of Article 9(2).

Who Does the Law Target?

To assess the proportionality of the Islamic full-face veil ban in France in the case of *S.A.S.*, the ECtHR stated that the ban “does not affect the freedom to wear in public any garment or item of clothing—with or without a religious connotation—which does not have the effect of concealing the face.”¹⁰⁰ It took a similar approach in *Dakir*.¹⁰¹ Thus, the ECtHR found a “clever way”¹⁰² to loosen the proportionality assessment. However, while the terms of the

⁹⁵ *S.A.S.*, *supra* note 10, ¶ 121.

⁹⁶ *Dakir*, *supra* note 23, ¶ 51.

⁹⁷ *Sidiropoulos and Others v. Greece*, App. No. 57/1997/841/1047, ¶ 38 (July 10, 1998), <https://hudoc.echr.coe.int/?i=001-58205>. In *Feldbrugge v. The Netherlands*, the dissenting judges stated that “[a]n evolutive interpretation allows variable and changing concepts already contained in the Convention to be construed in the light of modern-day conditions, but it does not allow entirely new concepts or spheres of application to be introduced into the Convention.” *Feldbrugge v. The Netherlands*, App. No. 8562/79, ¶ 24 (May 29, 1986), <https://hudoc.echr.coe.int/?i=001-57486> (Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt, and Gersing, JJ., dissenting).

⁹⁸ On this point, see Steinbach, *supra* note 44, at 52.

⁹⁹ *S.A.S.*, *supra* note 10, ¶ 5 (Nussberger and Jaderblom, JJ., dissenting in part).

¹⁰⁰ *S.A.S.*, *supra* note 10, ¶ 151.

¹⁰¹ *Dakir*, *supra* note 23, ¶ 58.

¹⁰² *Brems, S.A.S. v. France as Problematic Precedent*, *supra* note 9.

Islamic full-face veil ban in France were neutral, the explanatory notes attached to the legislation and the nature of political debates reveal that it was enacted with the sole aim of targeting Muslim women who wore the *burqa* and *niqab*.¹⁰³ In the case of the Belgian bans, although the wording of the relevant provisions does not explicitly refer to the Islamic dress, the political discourse, parliamentary discussions, and media coverage leaves no room for doubt that these bans targeted a small minority of Muslim women who wore the Islamic full-face veils in public.¹⁰⁴

Against this background, it is implausible for the ECtHR simply to hold that French and Belgian bans are not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face. Even if one accepts the ECtHR's observation that the French and Belgian bans did not directly target religious dress or any specific religion, one question would remain unanswered: Why did the ECtHR afford a wide margin of appreciation to the respondent states by stating that "[w]ith regard to Article 9 of the Convention, the State should ... be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is 'necessary'"?¹⁰⁵ The answer to this question cannot be found in the *S.A.S.*, *Belcacemi*, and *Dakir* rulings.

The Lightness of Criminal Sanctions

The ECtHR concluded that restrictions imposed on the exercise of the Article 9 right due to the prohibitions on wearing full-face veils in France and Belgium were justified and proportionate because of the light sanctions provided for by the French and Belgian laws. In *S.A.S.*, the ECtHR stated that the Islamic full-face veil ban in France was justified as "the sanctions provided for by the Law's drafters are among the *lightest* that could be envisaged, since they consist of a fine at the rate applying to second-class petty offences (currently EUR 150 maximum), with the possibility for the court to impose, in addition to or instead of the fine, an obligation to follow a citizenship course."¹⁰⁶ With regard to the Islamic full-face veil ban in Belgium, the ECtHR noted that the "offence," which is constituted due to the concealment of the face in places that are accessible to the public, is classified as a "hybrid offence" in Belgian law (partly under criminal law and partly administrative law). The sanction for the non-compliance with the restriction could range from a fine (which the ECtHR considers the "slightest penal sanction"¹⁰⁷) to a prison sentence of up to one to seven days (which the ECtHR considers a "heavier penalty"¹⁰⁸ and is reserved for repeat offenders only). Consequently, the ECtHR conceded margin of appreciation to the Belgian government and showed its usual reluctance to scrutinize the proportionality of using criminal sanction in the enforcement of restrictions on the rights of women choosing to wear the Islamic veil: "it is ... for the national courts to decide on the severity of sanctions that can be imposed in the specific circumstances of each case and to ensure that the sanction is in compliance with the principle of proportionality."¹⁰⁹ The *lightness* of the criminal sentence, a factor that had been taken into account by the ECtHR in assessing the proportionality of French and Belgian bans and in upholding underserved restrictions on religious freedom, is problematic.

¹⁰³ For a more detailed discussion on this, see Syring, *supra* note 10, at 1025–26. See also Adenitire, *supra* note 48, at 44.

¹⁰⁴ Brems et al., *supra* note 67, at 78.

¹⁰⁵ *Dakir*, *supra* note 23, ¶ 54; *S.A.S.*, *supra* note 10, ¶ 129.

¹⁰⁶ *S.A.S.*, *supra* note 10, ¶ 152 (emphasis added).

¹⁰⁷ *Belcacemi*, *supra* note 22, ¶ 57.

¹⁰⁸ *Id.*

¹⁰⁹ *Dakir*, *supra* note 23, ¶ 12; *Belcacemi*, *supra* note 22, ¶ 60.

A liberal democratic regime must not punish a woman for her religious practice as long as the religious practice in question does not cause harm to others. Put differently, if veiling does not present a danger in itself, then criminal convictions for French and Belgian women who voluntarily wear the veil need to be considered unlawful and immoral and thus a serious wrong. Undoubtedly, the lightness of the sanctions does not remove the wrongfulness of such a punishment. As Hunter-Henin notes, “[h]eavy sanctions may be the downfall of a justified ban but light sanctions cannot save an unjustified prohibition.”¹¹⁰ Even though the punishment for the offence of wearing Islamic full-face veils in public places is primarily a fine only—the slightest penal sanction—the light character of the sanctions is not so straightforward because, as the dissenting judges rightly stated in *S.A.S.*, “where the wearing of the full-face veil is a recurrent practice, the multiple effect of successive penalties has to be taken into account.”¹¹¹ It is also arguable that, irrespective of the heaviness of the punishment or the amount of fine, a *criminal* punishment, for wearing a veil, in itself can be a very embarrassing experience for a Muslim woman because she is treated (and declared) as a criminal in public for her behavior. The ECtHR itself has acknowledged that “being prosecuted ... is traumatising for women who have chosen to wear the full-face veil.”¹¹² Indeed, a criminal conviction, however light, may have profound implications on a Muslim woman’s life because it might adversely affect her employment (such as job applications), immigration (such as traveling abroad), and other important necessities, rights, and privileges. Therefore, Brems has criticized the ECtHR’s findings by stating that “when citizens’ regular behaviour that used to be ignored by the law, is turned into an offence, the amount [of fine] is secondary, it is the criminalisation that matters.”¹¹³

The Number of Muslim Women Using Islamic Full-face Veils

It seems that in upholding the proportionality of the French and Belgian bans, the ECtHR did not take into account the total number of full-veil wearing women in France and Belgium. According to the report *On the Wearing of the Full-face Veil on National Territory*, by the end of 2009, within a Muslim population in France of 4.7 million, there were only 1,900 *burqa* or *niqab*-wearing women (approximately 270 of whom were living in French overseas administrative areas).¹¹⁴ This was approximately 0.0004 percent of the relevant population, a ratio less than 1 in 2500. A 2012 report notes that fewer than 300 women of Belgium’s 375,000 Muslims are estimated to wear full-face veils.¹¹⁵ This suggests that an average person would very rarely encounter a woman wearing a *burqa* or *niqab*; thus, the possible threat to the social harmony that these women allegedly pose is extremely limited. With the small number of women wearing full-face veils in France and Belgium, the ECtHR should have concluded that the impact of wearing Islamic full-face veils in public spaces on living together was minimal. In *S.A.S.*, the ECtHR acknowledged that a blanket ban may be an “excessive”¹¹⁶ response given the very small number of women wearing the full-face veil in France. Nonetheless, the ECtHR contradicted itself by concluding that bans in France and Belgium were proportionate responses to the aim of living together.

¹¹⁰ Hunter-Henin, *supra* note 41, at 108.

¹¹¹ *S.A.S.*, *supra* note 10, ¶ 22 (Nussberger and Jaderblom, JJ., dissenting in part).

¹¹² *S.A.S.*, *supra* note 10, ¶ 152.

¹¹³ Brems, *S.A.S. v. France as Problematic Precedent*, *supra* note 9.

¹¹⁴ FRENCH PARLIAMENT, *supra* note 10 at 366–67, 612.

¹¹⁵ AMNESTY INTERNATIONAL, CHOICE AND PREJUDICE: DISCRIMINATION AGAINST MUSLIMS IN EUROPE 92 (2012), <https://www.amnesty.org/download/Documents/20000/eur010012012en.pdf>; Ilias Trispiotis, *Two Interpretations of “Living Together” in European Human Rights Law*, 75 *CAMBRIDGE LAW JOURNAL* 580, 586–88 (2016).

¹¹⁶ *S.A.S.*, *supra* note 10, ¶ 145.

Breadth of the Ban

The scopes of the French and Belgian bans on wearing full-face veils were broader than necessary for the purposes they intended to achieve. The ECtHR acknowledged this in *S.A.S.* and *Dakir*, stating “it is true that the scope of the ban is broad.”¹¹⁷ Indeed, the Islamic full-face veil bans in France and Belgium, even the local ban in Belgium, covered almost all public areas and so could criminalize Muslim women going about their day-to-day business: taking children to the school, going to see a doctor in a private clinic, or returning home from work at midnight.

Even assuming that a ban on wearing the Islamic full-face veils is necessary to facilitate verbal or face-to-face communication or to promote social integration, social cohesion does not require a ban on full-face veils in *all* public spaces at *all* times. There are many situations in public places where the relationship between a veiled Muslim woman and an uncovered person is so superficial that effective facial communication is rarely necessary. For example, if a *niqab*-wearing woman walks alone at midnight on a local road where only a few pedestrians are present, there is no need to force her to remove the veil on the grounds of living together as she does not need to interact verbally or nonverbally with other pedestrians. Similarly, when a veiled woman goes to a public library to borrow books, she does not need make a verbal communication with the librarian(s) or other library users, provided that she is using a self-service machine instead of using counter services to borrow the books. Thus, one can persuasively argue that a face-to-face encounter is not needed in all public places and at all times.

A blanket ban on wearing Islamic veils in all public places open to the general public may not satisfy the proportionality test under the European Convention on Human Rights because a partial ban that is limited only to certain places, for example, where face-to-face communication is necessary, could accomplish the aim of living together. With regard to blanket bans, Peter Cumper and Tom Lewis have argued that “a broadly framed law which is designed to pursue a particular legitimate goal, but casts its net so wide as to interfere with human rights and takes no account of the circumstances of the individual appears to be disproportionate: the less fact-sensitive a measure is, the less likely it is to be found substantively proportionate.”¹¹⁸ The ECtHR itself has acknowledged that “a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate.”¹¹⁹ It is a pity that despite admitting this, the ECtHR came to the conclusion that bans in France and Belgium were compatible with the standards of the European Convention on Human Rights.

The most-far reaching ban on the wearing of religious symbols to have been considered by the ECtHR prior to *S.A.S.*, *Belcacemi*, and *Dakir* was *Ahmet Arslan and Others v Turkey*,¹²⁰ another case that involved a ban on the wearing of certain religious clothing in public places. In *Arslan*, the ban was held to be a disproportionate interference with religious freedoms, because the scope of the ban was too wide. The ECtHR observed that there was a difference between prohibiting religious dress in all public places, including roads that are accessible to all and prohibiting religious dress in state schools and public institutions where religious neutrality might take precedence over the free exercise of the right to manifest one’s religion.¹²¹ *Arslan* suggests that a blanket ban in *all* public places as in *S.A.S.*, *Belcacemi*, and

¹¹⁷ *Id.* ¶ 151; *Dakir*, *supra* note 23, ¶ 58.

¹¹⁸ Peter Cumper and Tom Lewis, *Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights*, 68 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 611, 630 (2019).

¹¹⁹ *S.A.S.*, *supra* note 10, ¶ 147.

¹²⁰ *Ahmet Arslan and Others v. Turkey*, App. No. 41135/98 (February 23, 2010), <https://hudoc.echr.coe.int/?i=001-97535>.

¹²¹ *Id.* ¶ 49.

Dakir is an extreme measure and disproportionate. In fact, the factors that influenced the ECtHR to find a violation of Article 9 in *Arslan* were also present in *S.A.S., Belcacemi*, and *Dakir*: the restriction on wearing religious clothes in ordinary places against ordinary people. The ECtHR should have transported the reasoning of *Arslan* in these cases and reached the conclusion that bans in France and Belgium were disproportionate to the aim pursued.

Proportionality analysis requires the ECtHR to consider all circumstances of the case and pay attention to the effects of the restrictive measure on the free exercise of the rights. In a recent case, *Ibragim Ibragimov and Others v Russia*, the ECtHR has stated that “in exercising its supervisory jurisdiction ... what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’.”¹²² However, based on the foregoing analysis, it seems that the ECtHR did not consider *all* relevant circumstances in its proportionality analysis in *S.A.S., Belcacemi*, and *Dakir* and thus failed to carry out a rigorous proportionality analysis with regard to the French and Belgian bans.

The ECtHR chose some specific factors (such as the lightness of penalty) in its proportionality analysis that favored the respondent states and completely overlooked many important factors (such as the particular segment of the population that was the actual target of anti-veiling laws, the harmfulness of criminal punishments, the number of women wearing Islamic full-face veils, scope of the bans) that would have led the ECtHR to conclude that the restrictive measures were disproportionate. One can reasonably argue that had the ECtHR given greater scrutiny to the proportionality of the bans in the *S.A.S., Belcacemi*, and *Dakir* cases, it would have found that blanket criminal prohibitions on wearing Islamic full-face veils in France and Belgium to pursue the aim of living together were *unnecessary* in a democratic society under Article 9(2) of the European Convention on Human Rights.

Concluding Remarks

Is social cohesion (or living together) a convincing argument or legitimate ground to ban the wearing of Islamic veils in public places? There is a widely held view that the wearing of Islamic full-face veils, namely the *burqa* and *niqab*, in public places should be banned by law because the concealment of the face creates or fosters an obstacle to social cohesion. One of the justifications that the French and Belgian legislators invoked to legislate anti-veiling laws was the promotion of social cohesion or social interaction. As the ECtHR’s rulings in *S.A.S., Belcacemi*, and *Dakir*, show, by giving respondent states a “very wide margin of appreciation,”¹²³ the ECtHR has uncritically accepted that under the European Convention on Human Rights, blanket criminal prohibitions on Islamic full-face veils, such as those currently enacted in France and Belgium, are justified on the grounds of living together.

However, instead of granting a *very wide* margin of appreciation to the French and Belgian authorities, the ECtHR should have provided a more thorough examination of the relevant issues in determining whether the bans were justified under Article 9 of the European Convention on Human Rights. This would have accorded with the dissenting judges in *S.A.S.* who opined that although a state may have a wide margin of appreciation, “it still remains the task of the Court to protect small minorities against disproportionate interferences.”¹²⁴

Indeed, the *legal* basis of the concept of living together is highly questionable. It is difficult to argue that there exists a legal right for people to live in a society free from barriers to social cohesion. Similarly, people can hardly have a right to approach or right to attempt to

¹²² *Ibragim Ibragimov and Others v. Russia*, App. Nos. 1413/08 and 28621/11, ¶ 97 (August 28, 2018), <https://hudoc.echr.coe.int/fre?i=001-185293>.

¹²³ *Belcacemi*, *supra* note 22, ¶ 55; *Dakir*, *supra* note 23, ¶ 59; *S.A.S.*, *supra* note 10, ¶ 155.

¹²⁴ *S.A.S.*, *supra* note 10, ¶ 20 (Nussberger and Jaderblom, JJ., dissenting).

socialize where those advances are unwanted. Even if such rights *did* exist, it would be difficult to show why those rights would prevail over the freedom of religion or the right to respect for private life. It has been argued that a ban on the grounds of living together or social cohesion may not satisfy the legitimate aim test under the European Convention on Human Rights because living together is neither itself contained in Article 9(2) as an exception, nor does it have a sufficiently strong link to other permissible grounds of limitations such as protection of the rights and freedoms of others. Placing *S.A.S., Belcacemi, and Dakir* in context shows that a criminal, blanket prohibition on wearing Islamic veils in all public places at all times on account of living together may fall foul of European requirements for lack of proportionality. Indeed, a blanket ban on full-face veiling to support living together or social cohesion may not satisfy the justification test under Article 9(2) of the European Convention on Human Rights. Rather than fostering social cohesion, a ban on wearing Islamic veils exacerbates the division between Muslim women and non-Muslim people in a society. Further, a ban may have profoundly negative effects on a veil-wearing woman's life as an obvious consequence of anti-veiling laws is the increase of harassment and abuse directed toward veil-wearing Muslim women in public places. Social cohesion is therefore *not* a convincing argument or legitimate ground to prohibit the wearing of the Islamic full-face veils by Muslim women who freely choose to wear it.

“[P]luralism, tolerance and broadmindedness are hallmarks of a ‘democratic society.’”¹²⁵ In *Moscow Branch of the Salvation Army v. Russia*, the ECtHR accepted that “pluralism is ... built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions ... [and] religious beliefs.”¹²⁶ Yet nationwide, blanket criminal prohibitions on Islamic veils, such as those currently enacted in France and Belgium, diminish pluralism. A liberal pluralist society should accommodate strange, unpopular, and nondominant religious practices even though these cultures are inconsistent with the dominant norms of mainstream society. Hence, European societies and their citizens should accept and tolerate the practice of Islamic veiling although it is alien to the European culture.

Acknowledgments and Citation Guide. *The author has no competing interests to declare. This article is cited according to The Bluebook a Uniform System of Citation, 21st edition. All citations to European Court of Human Rights decisions are to the online versions available from HUDOC, <https://hudoc.echr.coe.int>.*

¹²⁵ *Chassagnou*, *supra* note 63, ¶ 112.

¹²⁶ *Moscow Branch of the Salvation Army v. Russia*, App. No. 72881/01, ¶ 61 (October 5, 2006), <https://hudoc.echr.coe.int/?i=001-77249>.

Cite this article: Paul, Kaushik 2024. “Banning Islamic Veils: Is Social Cohesion (or Living Together) a Valid Argument?” *Journal of Law and Religion* 39, no. 1: 34–53. <https://doi.org/10.1017/jlr.2024.2>