Burqa Ban, Freedom of Religion and ‘Living Together’

Lægaard, Sune

Published in:
Human Rights Review

DOI:
10.1007/s12142-015-0362-6

Publication date:
2015

Document Version
Early version, also known as pre-print

Citation for published version (APA):
Lægaard, S. (2015). Burqa Ban, Freedom of Religion and ‘Living Together’. *Human Rights Review*, *16*(3), 203-219. https://doi.org/10.1007/s12142-015-0362-6

Burqa ban, freedom of religion and 'living together'

Sune Lægaard, Philosophy, Department of Culture and Identity, Roskilde University, Denmark

The official final version of this paper has been published in *Human Rights Review* 07 May 2015 and is available as 'Online First' on: http://link.springer.com/article/10.1007/s12142-015-0362-6

Digital Object Identifier (DOI) 10.1007/s12142-015-0362-6

Abstract In the summer of 2014, the European Court of Human Rights ruled that the French 2010 law banning face-covering clothing in public spaces, the so-called burqa ban, did not violate the right to freedom of religion. Due to the 'wide margin of appreciation', the Court deemed the ban proportionate to the French state's legitimate aim with the ban of preserving the conditions of 'living together'. The paper analyses and provides an internal criticism of the Court's justification for this judgement focusing on the aim of living together and the right to freedom of religion. The Court's justification presupposes that (a) there is a justification for the ban in terms of the aim of living together, (b) this is a legitimate aim and (c) the ban is a proportional means of pursuing this aim. The paper analyses the Court's justification and argues that it fails to substantiate all three conditions.

Keywords Human rights; European Court of Human Rights; Freedom of religion; Burqa; Margin of appreciation.

On 1 July 2014 the Grand Chamber of the European Court of Human Rights (ECtHR) passed judgment in the case of S.A.S. v. France (Application no. 43835/11).[1] The case concerned the French ban on wearing clothing designed to conceal one's face in public places, introduced by Law no. 2010-1192 of 11 October 2010. The law is popularly known as the 'burqa ban' since the debate preceding the passing of the law focused on Muslim full-face veiling such as niqab and burqa (Weil 2014, pp. 211-212) and since the law itself was formulated to target such forms of religious dress (Laborde 2012, p. 406). The applicant, an anonymous French citizen, had complained that the law deprived her of the possibility of wearing the full-face veil in public, which she alleged was a violation of the European Convention of Human Rights (ECHR) articles 3 (the right against inhuman or degrading treatment), 8 (the right to respect for private and family life), 9 (the right to respect for freedom of thought, conscience and religion), 10 (the right to freedom of expression) and 11 (the right to freedom of association), taken separately and together with Article 14 (the prohibition of discrimination). The Court eventually ruled that the ban can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the protection of the rights and freedoms of others, and that the ban accordingly did not violate the Convention (ECtHR, sect. 157, 159).

The law itself bans all clothing designed to cover the face in all public spaces, which make the person impossible to identify, e.g. full-face veils (burqa, niqab, etc.). Public spaces include 'the public highway and any places open to the public or assigned to a public service', unless the clothing in question 'is prescribed or authorised by primary or secondary legislation, if it is justified for health or occupational reasons, or if it is worn in the context of sports, festivities or artistic or traditional events.' The ban accordingly goes beyond more specific bans, e.g. on religious

[1] The judgment (European Court of Human Rights 2014) will henceforth be referred to as 'ECtHR'.

signs in public institutions, and restrictions justified on the basis of more specific concerns, e.g. the need to be able to identify people in specific cases, which do not require a general ban. Violations are punishable by fine, and/or by compulsory attendance of 'a citizenship course' supposed to remind transgressors of Republican values and further their social integration.

The law had been justified (in the explanatory memorandum accompanying the bill, quoted in ECtHR, sect 25) on the basis that 'The voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of 'living together' in French society.'

The ban limits people's freedom to observe religious customs insofar as they involve wearing clothing designed to cover the face. The debate leading up to the passing of the law and the circulars sent out afterwards explicitly mention niqabs and burqas as intended targets of the ban. But since the right to freedom of religion is 'subject to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others' (ECHR, art. 9(2)), there is a distinction between *limiting* freedom of religion and *violating* the *right* to freedom of religion. The opinion of both the French Constitutional Council and subsequently the Criminal Division of the Court of Cassation was that the Law did not violate the right to freedom of religion, because the limits it imposed were justified in a way meeting the noted conditions.

The question raised by the ban, then, is *not* whether the ban limits freedom of religion, but whether the limitation is acceptable. The French government itself admitted that the ban limits the freedom to manifest one's religion or beliefs (ECtHR, sect 81) and the Court ruled that the ban limits freedom of religion (ECtHR, sect. 57 and 110). So the case is *not* about whether wearing full-face veiling is indeed a 'manifestation' of religious belief in the sense of ECHR article 9. Both the

Government and the Court accepts that this is the case, so for the remainder of the discussion I will not address issues about either the meaning of 'religion' nor the proper test for whether an act is a manifestation of religious beliefs, which are otherwise central to debates about freedom of religion (cf. Evans 2001, chaps 4 and 6).

The case before the Court did not only concern the question whether the ban constituted a violation of the right to freedom of religion, but also several other rights in the ECHR, namely against inhuman or degrading treatment, to respect for private and family life, to respect for freedom of thought, conscience and religion, to freedom of expression and to freedom of association, taken separately and together the prohibition of discrimination. In this paper I will nevertheless focus solely on freedom of religion, both because it is in itself an important and interesting question whether the ban violated this particular right, and because this right in fact constituted the most important charge against the ban (the Court for instance ruled that the complaints for violations of the right against inhuman or degrading treatment and the right to freedom of association as 'manifestly ill-founded' (ECtHR, sections 70 and 73)).

From a juridical perspective this question is a matter of legal interpretation of the applicable statutory, constitutional and human rights provisions and precedents, against an interpretation of the aim of the ban. My perspective is not juridical in this strict sense. I rather look at the Court's judgment as a public justification for its ruling. So even though I discuss the specific legal case, I do so with a view to reasons articulated by the Court, and I discuss these not as an exercise in legal interpretation with a view to establishing their legal validity but as an examination of public political arguments with a view to establishing whether the Court in fact gives good reasons for its conclusion, namely the claim that a) the ban is justified in a certain way and b) that, considered as such, it does not violate freedom of religion.

I adopt this broader approach because the case raises political issues that are relevant outside the specific French legal case and also outside the wider European human rights framework. The judgment articulates an understanding of what counts as freedom of religion and what counts as sufficient reasons for limiting freedom of religion that has implications for a great number of other cases whether or not they are French and whether or not they are in fact raised as legal cases within the European human rights framework. The judgment of the Court furthermore has political consequences. One example is that, immediately following the judgement, the Danish People's Party proposed a ban similar to the French one in the Danish Parliament with exactly the same justification. So the Court's judgment not only sets *legal precedent* but also opens a *political opportunity space* and feeds into the reasons that are accepted in political debates. Therefore it is important to consider whether the Court actually provides good reasons for its judgement, irrespectively of whether the reasoning is legally valid or not. Therefore my discussion will also be purely internal to the human rights framework, since the Court's justification is formulated within this framework. So I will only discuss whether the reasons given within this framework are sufficient, not whether the framework itself is reasonable or what external factors can explain the Court's judgment. The following argument is therefore neither premised on a particular normative theory, nor is it concerned with the legislative process leading up to the passing of the ban, nor with wider issues, such as the status and behaviour of the Court or policies regarding religious minorities in Europe more generally. The discussion consists in an analysis and assessment of the Court's publicly offered reasons for the ban measured against conditions derived from the statement of the right to freedom of religion in the ECHR.

Given that the question concerns the plausibility of the Court's justification for its judgment that the ban does not violate the right to freedom of religion, the paper is structured in order to address these individually necessary and together sufficient conditions for when a

limitation prescribed by law is not a violation of the right to freedom of religion: a) there must be a *justification* for the ban, b) this justification appeals to a *legitimate aim*, and c) the ban is a *proportional means* of pursuing this aim. I accordingly first analyse how the justification of the ban as a means for securing the conditions of living together was presented in the Court and what it consists in: what does 'living together' mean? I argue that this is not at all clear and that the few attempts to explain it are problematic. I then analyse the categorisation of this aim and argue that the presentation of the justification in terms of categories drawn from the ECHR is problematic. I then turn to the proportionality assessment, which turns on the Court's invocation of the so-called 'wide margin of appreciation'. I argue that this justification, too, is problematic.

The justification for the ban before the court

Since ECHR article 9(2) states that freedom to manifest one's religion or beliefs can only be limited in pursuit of certain aims, it is necessary to present such limitations as having a justification, the legitimacy of which can then be assessed. There have all along been several different justifications in play for the ban. Before the Court, the French Government articulated three main justifications (ECtHR, sect 82); the ban was supposed to serve three aims: a) public safety, b) gender equality and c) a certain conception of 'living together' in society.

I will concentrate on the third justification. The reason for this choice of focus is, first, that the two other justifications seem quite implausible. As has been argued elsewhere (e.g. Kim 2012; Laborde 2012), a *general* ban cannot plausibly be justified as a public safety measure or as a means for securing gender equality, because full-face covering is not always a problem from the point of view of either public safety or gender equality, which would have to be the case for a general ban to be justified. Even if full-face covering is sometimes problematic, a general ban is

not necessary and proportional to secure these aims. Secondly, the Court rejected these justifications (cf. ECtHR, sect. 118-120 on gender equality, and 139 on public safety).

The justification appealing to a certain conception of 'living together' in society could fare better as a justification for a general ban, since a conception of living together is a general concern. This was also taken by the Court to be the main justification for the ban (ECtHR, sect 117), and the Court deemed it a legitimate aim (ECtHR, sect 121-122) and eventually accepted it as a sufficient justification for the ban (ECtHR, sect. 157-159). An assessment of the court's decision therefore requires an investigation of its claim that the aim of 'living together' is legitimate and the ban a proportional way of pursuing his aim.

An additional reason for focusing on this justification, however, is that it is in fact quite puzzling: it is not at all clear what the conception of 'living together' at play really amounts to and why it should carry the weight assigned to it by both the French Government and eventually by the ECtHR (cf. the joint partly dissenting opinion of judges Angelika Nussberger and Helena Jäderblom, who find the concept 'far-fetched and vague', ECtHR, p. 61).

What are the conditions of living together?

In the following I consider the main positive statements in the judgment about what 'living together' means or why face-covering clothing is incompatible with the conditions for living together. It turns out, however, to be quite difficult to flesh out what the aim of protecting the conditions of 'living together' consists in. In fact, most of the references to 'living together' in the judgment are merely statements of the claim *that* face-covering clothing is incompatible with the conditions for living together – there are very few explanations for why this is so or of what the conditions of living together are.

If the aim of protecting the conditions for living together is supposed to provide a justification sufficient to limit a human right, one would think that it could and should be clearly stated. But the few statements are, first, not at all alike and, secondly, not obviously of a kind that can provide a sufficiently weighty justification.

The French Constitutional Court advances what we might call *the conceivability claim*:

> The individuality of every subject of law (*sujet de droit*) in a democratic society is inconceivable without his or her face, a fundamental element thereof, being visible. (quoted in ECtHR, sect 42)

This is not just a practical claim that we cannot identify people with covered faces, but a stronger claim about what individuality and subjectivity *is*. As such it is problematic on several counts.

First, as a *metaphysical* claim about what 'individuality' is, the conceivability claim is surprising as part of a legal text concerned with much more mundane issues of regulation. Such metaphysical claims might be argued to be problematic as part of a justification for political coercion, because the postulated idea of individuality is hard to understand, in this case not least since it is simply unclear what it means, and is controversial, since citizens might reasonably disagree about it, as I will show below.[2]

Secondly, despite the Constitutional Court's lofty formulations, the link between visibility and individuality is not a conceptual truth. If the statement is instead construed as an

[2] Such metaphysical claims will be inadmissible as part of justifications for political coercion according to any form of political liberalism, i.e. the view that all exercises of political power has to be justifiable in ways understandable and acceptable to all reasonable citizens (e.g. Rawls 1993). The constraints on public reason imposed by political liberalism are of course themselves disputed, so nothing in the present argument hinges on acceptance of political liberalism.

inference from the visibility of someone's face to the inconceivability of his or her individuality, it is invalid, since visibility is about something else than conceivability. Such an inference could only be valid if one presupposed a general principle linking visibility and individuality. But such a principle has not been argued for and it is quite easy to provide counter-examples to it (one can conceive of the individuality of people one has only been in contact with over the phone, and blind people can relate to other people as individuals even though they have never seen their faces etc., cf. also sect. 9 in the partly dissenting opinion for further counter-examples).

The Constitutional Court furthermore advances what might be called *the impossibility claim*:

> the creation of human relationships, being necessary for living together in society, was rendered impossible by the presence in the public sphere, which quintessentially concerned the community, of persons who concealed this fundamental element of their individuality. (quoted in ECtHR, sect 42)

This is also an extremely strong claim about impossibility of creating human relationships, which presupposes that human relationships are wholly determined by what happens in the public sphere. But since most human relationships are partly or wholly private, face-covering in public could at most limit the possibility for *some* human relationships being formed here. And even this claim seems overstated, since it presupposes the impossibility of forming human relationships to people with covered faces.

The Constitutional Court finally claimed that:

> To the extent that the concealment of the face has the consequence of depriving the subject of law, a member of society, of any possibility of individualisation by facial appearance, whereas such individualisation constitutes a fundamental condition

> related to its very essence, the ban on the wearing of such clothing in a public place, even though it may be the expression of a religious belief, meets a pressing social need in a democratic society. (quoted in ECtHR, sect 42)

First, note that the first part of this statement, which we might call *the individualisation claim*, is not a practical claim about the need for being able to identify people in specific circumstances, e.g. when there are security risks. The Court has already considered this possible justification of the ban and rejected it; even though security is a legitimate aim, this does not provide a sufficient justification for a general ban. So the claim has to be understood differently, and the reference to 'essence' suggests that it merely restates the conceivability claim and is therefore problematic for the same reasons.

Secondly, the last part of the quote reveals these strong claims as metaphysical window-dressing since it all comes down to 'a pressing social need'. But the question remains what this social need consists in?

The Court's judgment subsequently explains the French Government's view as what might be called *the interaction claim*:

> the face plays a significant role in human interaction: more so than any other part of the body, the face expresses the existence of the individual as a unique person, and reflects one's shared humanity with the interlocutor, at the same time as one's otherness. The effect of concealing one's face in public places is to break the social tie and to manifest a refusal of the principle of "living together" (*le "vivre ensemble"*). (ECtHR, sect. 82)

The first claim is obviously true, although it does not amount to any conceptual or metaphysical necessity, since there are obvious exceptions to it, as already noted. This further means that certain

forms of interaction are inhibited by face-covering. But the claim in the second part of the quote is stronger than this. That face-covering breaks the social tie only follows if one further assumes a value judgment about what the social tie *should* consist in. But as such it is simply just another formulation of the following claim *that* face-covering is a refusal of the principle of living together and therefore not an explanation or justification *for* it. We therefore still do not know what the conditions of living together are supposed to be and why face-covering is incompatible with these conditions.

During its assessment of the case, the Court further articulates what might be called *the community claim*:

> 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. (ECtHR, sect 122)

This is suddenly a completely different kind of explanation and justification; now 'living together' is not about individuality and humanity, but about the *wishes* of some citizens regarding how other citizens appear in public and about the established *consensus* on this. The community claim refers to the fact that the majority of French citizens disapprove of or simply dislike face-covering. As such, the statement is clearly true. But if this is the justification for the ban, it collapses into a simple appeal to majority opinion.

There are several problems with this. First, it is *illiberal* to let the majority's mere dislike or disapproval limit the freedom of a minority – thus construed the ban is a classic case of legal moralism. Secondly, this justification would undercut the point of human rights, which are

precisely supposed to place limits on what a majority can decide. Since the question to begin with was whether the ban constituted a justifiable limit on the right to freedom of religion, an answer to this question cannot be that there is a majority in favour of limiting freedom of religion in this way. This is simply beside the point. It is therefore difficult to see why the Court expresses 'understanding' of this view and therefore 'takes it into account' (ECtHR, sect. 122).

The final attempt by the Court to make sense of the Government's justification of the ban in terms of the principle of living together is this:

> the Government indicated that it was a question of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of "living together". From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society (ECtHR, sect. 153)

This first part of this quote merely restates the claim in need of an explanation and justification. But the second half adds a new aspect to the understanding of the principle supposedly at stake, namely that it is about the expression of pluralism, tolerance and broadmindedness.

As a justification for a ban on what was earlier objected to because of how it met with the disapproval of the majority and differed from the established consensus this appeal to pluralism, tolerance and broadmindedness is ironic: the ban precisely *limits* pluralism and constitutes a strong form of state sponsored *in*tolerance of minority practices. If the assumption is that citizens can only be tolerant if they can see the faces of each other, this is first of all an implausible claim, and secondly hardly an expression of broadmindedness.

The upshot of this investigation of the justification of the ban is that it is either simply unclear what the conditions of living together are, or that the explanation of these conditions turns out to refer to completely different justifications for the ban, which are problematic and fail to provide reasons for limiting freedom of religion that are acceptable in a liberal society respectful of human rights. So the statements in the Court's judgment do not provide a clear or acceptable justification for the ban, which means that the justification for the judgment does not meet the first necessary condition.

Categorising the aim of 'living together'

I will now move on to examine whether the Court's justification for its judgment lives up to the second necessary condition, namely that the aim appealed to has to be a *legitimate aim* for the purpose of limiting freedom of religion. Strictly speaking my conclusion in the previous section, namely that there is no clear or acceptable justification for the ban in the first place, could render this further investigation superfluous – if there is no plausible justification, there is no reason to go on to assess whether there is a legitimate aim. I proceed nevertheless, since the Court might have been able to come up with a better justification than the French Government.

Because the French government acknowledged that the ban limited freedom of religion, it had to explain how the ban was justified in a way that could be presented as an instance of one of the legitimate aims specified in the ECHR (art. 9(2)) for limiting this right. The Government chose to present its justification as falling under the condition that allows interference with freedom of religion if such interference is justified as a means of protecting 'the rights and freedoms of others'. This was so, according to the Government, because the ban was a way of ensuring 'respect for the minimum set of values of an open and democratic society', one of which

concerns ‘the observance of the minimum requirements of life in society’, which the Government spelled out by the statement of the already quoted interaction claim about the significant role of the face in human interaction (ECtHR, sect. 82).

The problem with this way of giving substance to the categorisation of the ban as a means of protecting the rights of others is that the Government’s own presentation in no way establishes how the interaction claim involves rights and freedoms of others.

The normal way of understanding the ‘rights and freedoms of others’ clause is that the rights and freedoms in question must refer to rights set out in the Convention (Evans 2001, p. 161). But none of the subsequent formulations in the judgment about the reasons for the ban can plausibly be interpreted as involving any rights specified in the ECHR. There is no right to see the faces of other citizens in the Convention (cf. section 5 in the partly dissenting opinion included at the end of the ECtHR judgment).

This simple fact is worth underlining, for the Court accepts the Government’s presentation of the justification of the ban in terms of the conditions for living together as an instance of protection of the rights of others (ECtHR, sect. 121) and therefore as a legitimate aim. The Court’s explanation for this categorisation of the justifying aim is that:

> The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. (ECtHR, sect. 122)

This statement on the one hand only means that the Court *understands* that the French Government *thinks* that there is a right ‘to live in a space of socialisation which makes living together easier’. This is clearly correct. But since the Court proceeds to state that it needs to ‘engage in a careful

examination of the necessity of the impugned limitation' (ECtHR, sect 122), this on the other hand means that the Court *accepts* the Government's presentation of the justification of the ban as an instance of the protection of the rights and freedoms of others – for the subsequent assessment of necessity and proportionality is only called for if the justifying aim is *legitimate* in the first place. There is no reason to assess the proportionality of a ban in relation to an illegitimate aim. So, since the Court proceeds to assess proportionality, it must think that the aim is legitimate. And this is indeed what the Court concludes, when it finds that the ban 'can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others'.' (ECtHR, sect. 157)

But the problem remains that there is no such right in the ECHR. Nowhere in the Convention is there any rule that grants citizens a *right* to see the face of other citizens or to live in a space of socialisation which makes living together easier, however desirable this might otherwise be thought to be. And in the absence of such a right, the ban cannot be justified as an instance of the protection of the rights of others, and then there is simply no need to proceed to assess its proportionality in this regard.

The Court's view can of course be explained as an instance of one of the cases where the vague phrase 'rights and freedoms of others' effectively includes either rights *outside* the ECHR or simply functions as a *catchall* for whatever concerns Governments might have (Evans 2011, p. 161). In that case the Court's categorisation of the aim makes sense. But this broad reading of the rights of others then completely undercuts the normative force of this condition on limitations of freedom of religion; if anything can count as rights and freedoms of others, then the Convention protection of freedom of religion evaporates. There are good normative reasons internal to the human rights framework for limiting a human right with reference to other human rights (cf.

ECtHR, sect 128), but it is unjustified to let an unspecified and potentially all-inclusive category of concerns limit Convention rights, as the Court seems to do (cf. Taylor 2005, pp. 301-305).

The upshot of this section is that the Court's justification for its judgment also fails to meet the second necessary condition, since it does not provide plausible arguments for why the ban is justified in a way that can be categorised as a means of protecting the rights and freedoms of others. Since the Court elsewhere, as noted earlier, rejects the other possible ways of categorising the justification of the ban as a legitimate aim, this means that there are no grounds in the judgment for proceeding to the assessment of the proportionality of the ban.

Proportionality and the wide margin of appreciation

Despite what I have argued until now, the Court concludes that there is a justification for the ban in terms of the aim of 'living together' (ECtHR, sect. 142) and that this aim in legitimate (sect 122). It therefore proceeds to assess whether the ban is a proportionate measure for pursuing this aim, which is the third necessary condition for a sound justification of the judgment. The Court enumerates a number of considerations suggesting that the ban is too restrictive (sects 144-149) and a few that could be understood as reasons why the ban is not too restrictive, e.g. that it only affects clothing covering the face (sect 151) and that the criminal sanctions (fine and/or compulsory citizenship course) are relatively light (sect 152).

The curious thing about this as part of an assessment of the proportionality of the ban is that, given my arguments above, it is actually impossible to determine whether the ban is proportional or not, since the aim of the ban is so unclear. Even if the criminal sanction is only a fine, it is impossible to say anything about whether or not this is a proportional sanction, if it is unclear what - and accordingly how important - the aim of the ban is. A fine is certainly not a too

restrictive sanction for murder, since the protection of life is very important. But a fine is much too restrictive as a sanction for nodding off during a boring lecture. Further, the real question about proportionality concerns the severity of the limitation of religious freedom, which the Court does not really consider. Since the judgment has not been able to explain what the aim is, and accordingly where on the range of importance it lies, and the Court fails to consider the severity of the limitation of religious freedom against which the ban should be measured, the assessment of proportionality is lacking.

The real reason for why the Court in the end accepts the ban as a proportional restriction of freedom of religion is not a genuine assessment of proportionality at all, but an appeal to the so-called 'wide margin of appreciation'. This is a legal doctrine in ECHR jurisprudence which functions as a means of granting states the discretionary power to adopt steps which, although interfering with rights in the convention, are considered to be justifiable, e.g. because they are necessary to preserve public order or to protect the rights and freedoms of others in a democratic society. Unlike the rights thus limited, the margin of appreciation doctrine does not appear in the text of the Convention or in its drafting history (Legg 2012, p. 3; Nigro 2010; Taylor 2005, pp. 185-186, 307-309; Wilkins 2002; Evans 2001, p. 142). Originally developed in relation to the question of how to determine the existence of national emergencies required for contracting states to derogate from certain rights guaranteed by the Convention in time of 'war or other public emergency threatening the life of the nation' (ECHR, article 15), the Court has subsequently generalised the idea that national governments are in a privileged position, due to their contact with and knowledge of the sociopolitical situation of their state, to decide to what extent it might be necessary to impose limitations on convention rights, i.e. when the conditions stated in paragraph 2 of articles 8-11 obtain.

In the present case, the Court invokes the margin of appreciation thus:

> The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. … As regards Article 9 of the Convention, the State should thus, in principle, 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". (ECtHR, sect. 129)

Given that the ban constitutes 'a choice of society', the Court explains that:

> the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. The Court has, moreover, already had occasion to observe that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (ECtHR, sect. 154)

There are two elements to the margin of appreciation doctrine as articulated here: 1) *epistemic competence*: national governments are 'better placed to evaluate local needs and conditions', and therefore the Court should defer to Governments' judgments about the proportionality of specific local measures, and 2) *Democratic legitimacy*: national governments have 'direct democratic legitimation', and therefore the Court should show restraint in overturning democratic decisions (Legg 2012, chaps 4 and 6).

The epistemic competence claim seems quite reasonable, since national governments are not only much closer to particular cases and have much better knowledge of the societies in question and the possible effects of and responses to measures, but also have more resources at their disposal for collecting and assessing such knowledge than the Court. Here is a reconstruction of

how the epistemic competence reading of the margin of appreciation could justify the Court's judgment:

1. Implicit: The assessment of the proportionality of a means relative to an aim requires knowledge about local needs and conditions (cf. Tadros 2007, p. 205).
2. Claim about epistemic competence: The national authorities are better placed than an international court to evaluate local needs and conditions.
3. Based on 1 and 2: The State should be afforded a wide margin of appreciation in deciding whether a means is proportional.
4. French claim: The ban is a proportional means of pursuing the aim of securing the conditions of living together.
5. From 3 and 4: Conclusion: The Court finds that the ban can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others" (ECtHR, sect 157).

There are several problems with this justification for why the ban does not violate the right to freedom of religion. First, the argument presupposes that the aim of the ban is specified, which it is not. Secondly, the argument presupposes that the aim is legitimate in virtue of being a way of protecting the rights of and freedoms of others, but this has not been shown either. Thirdly, irrespective of these two already noted problems, the justification for the conclusion is potentially *self-undermining*, since premise 2 (together with premise 1) says that the Court is relatively *incompetent* in matters concerning proportionality, whereas the Court in the conclusion actually makes a judgment about proportionality.

One possible response to this self-undermining objection is to note that the court is competent in *some* cases, e.g. cases concerning legal procedures and legal interpretation (Legg

2012, pp. 167-174). This is true. But if the Court has expertise in this case, then the margin of appreciation cannot be the justification for the conclusion that the ban is proportional. If the Court in fact has expertise, then it should itself assess proportionality, which it has not done. Furthermore, in the cases where the court has in fact *not* deferred to states, which implies that the Court must take itself to have sufficient expertise, this in practice usually means ruling *against* states, so this is not a support for the conclusion in this case, which rules in favour of the state against the claimant. In cases involving religious freedom where the court has adopted a narrower margin of appreciation and thus not deferred, it has done so out of concern for issues it claims to be competent about, such as the value of democracy, which it has interpreted as involving 'the need to secure true religious pluralism' (Evans 2001, p. 144). So this is again not any support for the conclusion regarding the ban, which places a limit on religious pluralism - rather the opposite.

A more sophisticated response to the self-undermining objection is to note that competence is not binary but a matter of *degree*: Strictly speaking, the argument only says that the state is *more* competent than the court. The court has *limited* competence rather than no competence (Legg 2012, p. 147). This is plausible. But either this has to be understood as a) a matter of court competence in *only some areas*, or it has to be understood as b) a matter of assigning *greater weight* to the state's reasons in any given case. On the area of competence reading, if the ban falls within the areas in which the court has competence, then the margin of appreciation plays *no* role as a premise in the justification for the judgment and then we are back with the problem that the Court has not conducted its own proportionality assessment of the ban. If the ban falls outside the Court's areas of competence we rather are back with the self-undermining objection, since the Court then cannot pronounce on the proportionality of the ban. The greater weight reading is therefore more promising as part of an argument for the Court's judgment. But then we need accounts of how the margin of appreciation works and of the reasons to which the court assigns greater weight.

On one theoretical account of how the margin of appreciation works, it concerns deference on the basis of second order reasons (Legg 2012, chap 2). On this account, the margin of appreciation should be understood as deference on the basis of second order external reasons, i.e. reasons not having to do with the case at hand or the balance of first order reasons in this case. Both democratic legitimacy and epistemic competence are such external second order reasons. Given the distinction between first order reasons concerning the case, i.e. the proportionality of the ban, and second order reasons, i.e. the assumption about the greater epistemic competence of the state relative to the court, the threatening incoherence in the justification for the court's conclusion might be avoided. The argument would then look like this:

1. [2nd order] Implicit: The assessment of the proportionality of a means relative to a legitimate aim requires knowledge about local needs and conditions.
2. [2nd order] Claim about epistemic competence: The national authorities are better placed than an international court to evaluate local needs and conditions.
3. [2nd order] Based on 1 and 2: The State should be afforded a wide margin of appreciation in deciding whether a means is proportional.
4. [1st order] French claim: The ban is a proportional means of pursuing the legitimate aim of securing the conditions of living together.
5. [1st order] From 3 and 4: Conclusion: The Court finds that the ban can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others" (ECtHR, sect 157).

This argument is not self-undermining in the same sense as the first reconstruction of the argument, since the potentially incompatible claims 1 and 2, on the one hand, and 5, on the other, are reasons at different levels. On the second order reason account of the margin of appreciation, the Court has

second order reasons to assign greater weight to the first order reasons put forward by national authorities on specific issues, and this is why it affirms the conclusion.

But in this case, we need an account of the first order reasons which the court assigns greater weight to on the basis of its second order reasons. The Court has explained to some length why it has second order reasons to defer to national authorities. But on the second order account of this deference, this can only work as an argument for the conclusion that the ban is proportional if there are also first order reasons for thinking this – otherwise there is nothing the Court can assign greater weight to on the basis of its second order reasons.

But this takes us back to the first two problems with the judgment, namely that it has been shown neither what the aim supposedly justifying the ban is, nor why it can be categorised as a legitimate aim under the ECHR. Given these lacks, the margin of appreciation cannot provide a justification for the conclusion since it only works on the second order model in conjunction with positive answers to these two questions. Furthermore, since we do not have answers to these two questions, we do not know whether the margin applies at all in this case, since we do not know what epistemic competence might mean in this case, which was supposed to be the reason why the margin applies in the first place.

So the epistemic competence version of the margin of appreciation does not work as a justification for the judgment. This leaves the *democratic legitimacy* reading of the margin of appreciation doctrine. This is arguably expressed in the Court's observation that the Government's negative answer to the question whether or not the full-face veil should be permitted in public places 'constitutes a choice of society' (ECtHR, sect. 153). A reconstruction of this as part of a justification for the Court's judgment could be this:

1. [2nd order] [Implicit]: If a measure is democratically decided, it is legitimate.

2. [2nd order] Democratic legitimacy: The national authorities have direct democratic legitimation.
3. [2nd order] The Court has less democratic legitimacy than national authorities.
4. [2nd order] Based on 1, 2 and 3: The Court should afford states a wide margin of appreciation.
5. [1st order] Case at hand: The French authorities have made a choice of society in deciding that the ban is proportionate to the aim of preserving the conditions of "living together" as an element of the "protection of the rights and freedoms of others".
6. [1st order] From 4 and 5: Conclusion: The Court finds that the ban can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others" (ECtHR, sect 157).

There are several problems with this argument. First, an appeal to democratic legitimacy is arguably misplaced as part of an argument for a claim about proportionality. Proportionality of course involves political aims, the pursuit of which is democratically decided. But proportionality assessments take these aims as given and then assess the actual nature and effects of the means adopted in their pursuit. Insofar as this is a factual issue, democratic legitimacy seems not to be relevant to the assessment of proportionality as such, but rather to the legitimacy of the aims. But the Court nevertheless invokes democratic legitimacy as part of the rationale for the margin of appreciation, which it then advances as the main reason for the conclusion that the ban is proportional. One explanation for this might be that the label for proportionality in the ECHR is the phrase 'necessary in a democratic society'. But this is again most plausible interpreted as meaning that the assessment of whether a measure is necessary and proportional has to happen relative to

aims that are legitimate in a democratic society. Again the proportionality assessment as such does not seem to involve issue of democratic legitimacy.

Even if we set this aside, it is clear that the reconstructed argument is much too strong. It in effect says that the Court should always defer to national authorities, since they always have greater democratic legitimacy than the Court. If democratic legitimacy is assigned great weight, this leaves no room for the Court to ever judge against national authorities. This is on the one hand not even in accordance with the practice of the Court, which from time to time rules against states. On the other hand, this suggests that the weight of democratic legitimacy is not absolute – and further that it might wary from case to case.

The Court itself points out that the fact that a decision is a *democratic decision* is not the same as saying that this decision is *necessary* in a democratic society. The Court writes that 'a measure might have wide political support and yet not be "necessary in a democratic society"' (ECtHR, sect 78) and that 'democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position' (ECtHR, sect. 128).

These are sound points which square well with the whole point of having an international convention of human rights, namely that there should be limits to what a majority can democratically decide. This can mean two things. Either this means that there are other reasons which sometimes outweigh reasons of democratic legitimacy, so that the Court can sometimes rule against national authorities even though these as a rule have more democratic legitimacy than the Court. Or it means that the democratic legitimacy of national authorities is not only a matter of majority decision making but is furthermore conditional on conformity with the values protected by the Convention, so that the Court can sometimes rule against national authorities when they fail to

conform to these values because they then no longer have more democratic legitimacy than the Court.

In the present case, the other reasons in play, which either carry independent weight beside reasons of democratic legitimacy or which are conditions for democratic legitimacy, concern the protection of religious minorities against majority decisions. So a plausible way of understanding the margin of appreciation here is that the Court should defer to national authorities unless they fail to adequately protect religious minorities. There are then two possibilities: Either the national authorities adequately protect religious minorities. The Court should then defer to the national authorities by affording them a wide margin of appreciation. Alternatively the national authorities fail to adequately protect minorities. Then the Court should not afford them a margin of appreciation and should show no deference at all. So the question is whether the case about the ban is a version of one or the other of these two scenarios?

The Court's conclusion is explicitly justified with reference to the margin of appreciation. Given that I have already rejected the epistemic competence reading of the margin of appreciation as a plausible justification for the conclusion, the democratic legitimacy reading of the margin of appreciation is needed to support this conclusion. This in turn presupposes that the case about the ban is a version of the first scenario, namely the one in which the national authorities in fact adequately protect religious minorities and the Court therefore has reason to defer.

But this presupposition is unwarranted. What is in question in the case concerning the ban is precisely whether the ban treats religious minorities fairly or is merely an abuse of the majority's dominant position. The question was whether the ban constituted a violation of one of the most important rights protecting minorities, namely freedom of religion, which is one of the foundations of a democratic society (ECtHR, sect. 124). In assessing this potential violation, the

Court therefore cannot simply *assume* that there is no violation, because the ban is a democratic decision. But if the Court's conclusion that the ban is proportionate is justified with reference to the democratic legitimacy reading of the margin of appreciation, this is equivalent to saying that there is no violation of the right to freedom of religion. But since the question was *whether* there is a violation of freedom of religion, the answer to this question cannot *presuppose* that there is no violation of freedom of religion - this justification for the judgment is obviously viciously circular and is simply begging the question.

All that remains as a justification for the Court's judgment is that the Court should not interfere with a national decision. This is not really about epistemic competence or democratic legitimacy; it is really just a matter of deference to national sovereignty. As such it is perhaps wise on the part of the Court, for if it often rejected laws dear to national governments, the whole convention mechanism might lose support from the member states (especially when the state in question is one of the powerful and important member states). But this is not so much a question of what is necessary in a democratic society, but about national sovereignty and international realism (what Leigh (2011, p. 56) calls 'institutional modesty' and 'judicial diplomacy'). The political realities surrounding the Court probably *explain* why the Court did not denounce the French ban as a violation of freedom of religion. But explanation is something else than justification, which is what is under discussion here. The Court cannot appeal to political realities as a justification for its ruling, even if it is wise to respect them. The result is a justification that is lacking.

Conclusion

In this paper I have analysed and provided an internal criticism of the Court's justification for its judgment that the French ban on face-covering clothing does not violate freedom of religion. The

justification is only plausible if a) there is a justification for the ban, b) this justification appeals to a legitimate aim, and c) the ban is a proportional means of pursuing this aim. I have argued that the rationale for the ban in terms of the protection of the conditions of 'living together' is either unclear or implausible. I furthermore have argued that the Court's categorisation of this aim as a legitimate aim is unsubstantiated. Finally, I have argued that the Court's claim that the ban is proportional, which invokes the margin of appreciation, fails to assess proportionality and either contradicts itself or begs the question.

As stated in the beginning, my discussion is not a judicial exercise in legal interpretation. I have rather considered what the Court actually writes as a *public* justification for its ruling and pointed out how what the Court actually says fails to justify the conclusions reached by the Court. I have conducted a critical discussion of the validity and soundness of arguments reconstructed on the basis of the text of the judgment rather than a legal analysis, which must also rely on legal precedent and jurisprudential principles. Irrespective of this caveat, my criticisms should also have legal consequences, for if I am right the Court has failed to live up to the requirements of justification set out in the ECHR itself.

Even if I am right, there might still be conditions for something that might be called 'living together' which are preconditions for a democratic society and to which we should assign great weight. There might be reasons for limiting convention rights when these conditions are threatened. My claim that the French Government and the Court have failed to explain what the conditions for living together are, why they justify the ban, and why the ban accordingly is not a violation of the right to freedom of religion, is compatible with there actually being such a weighty concern that could justify the ban and the Court's ruling. But the Court has failed to articulate and substantiate such a justification, if it exists. This is in itself problematic, since the Court's justification is a public statement about what counts as freedom of religion and what are legitimate

limits to it. The judgment opens a political opportunity space within which political actors can push more effectively for further restrictions on the pluralism, tolerance and broadmindedness that the Court itself sees as hallmarks of a democratic society.

Acknowledgments Earlier versions of this paper were presented at the CONCEPT conference, 'Republicanism and Secularism', University of Nottingham, 15–16 December 2014, and in the Criminal Justice Ethics research group at Roskilde University. Thanks for comments from Cécile Laborde, Michael Freeden, Ronan McCrea, Geoff Cupit, Mark Wenman, Jesper Ryberg, Thomas Søbirk Petersen, Kasper Lippert-Rasmussen, Rune Klingenberg Hansen, Frej Klem Thomsen and Fatima Sabir.

References

European Court of Human Rights (2014) Grand chamber, case of S.A.S v. France (Application no. 43835/11), judgment, Strasbourg, 1 July 2014, available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466#{"itemid":["001-145466"]}

Evans C (2001) *Freedom of religion under the European convention of human rights*. Oxford, Oxford University Press.

Kim E-J K (2012) On the Burka Ban. *Public Affairs Quarterly* 26: 293-312.

Laborde C (2012) State paternalism and religious dress. *International Journal of Constitutional Law* 10: 398-410.

Legg A (2012) *The margin of appreciation in international human rights law*. Oxford, Oxford University Press.

Leigh I (2011) Damned if they do, damned if they don't: The European Court of Human Rights and the protection of religion from attack. *Res Publica* 17: 55–73.

Nigro R (2010) The margin of appreciation doctrine and the case-law of the European Court of Human Rights on the Islamic veil. *Human Rights Review* 11: 531–564.

Rawls J (1993) *Political liberalism*. New York, Columbia University Press.

Tadros V (2007) Rethinking the presumption of innocence. *Criminal Law and Philosophy* 1: 193-213.

Taylor P (2005) *Freedom of religion*. Cambridge, Cambridge University Press.

Weil P (2014) Headscarf versus burqa: two French bans with different meanings. In: Mancini S and Rosenfeld M (eds) *Constitutional secularism in and age of religious revival*. Oxford, Oxford University Press, pp. 195-215.

Wilkins B (2002) International human rights and national discretion. *Journal of Ethics* 6, 373-382.