

Living Together in an Age of Religious

Diversity:

Lessons from *Baby Loup* and *SAS*

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Abstract

This article explores two recent decisions by the European Court of Human Rights and the French Cour de cassation respectively: *SAS v France* –a challenge to the French ban on the full-face covering in the public space and *Baby Loup* –in which a private nursery employee was dismissed for refusing to remove her non-face covering Islamic veil. This article demonstrates that whilst the two decisions share many features, the European Court of Human Rights only offers a semi-support to the French suspicions towards religion. Beyond French borders, the article argues that despite its flawed legal basis (the concept of living together) and its concerning use of proportionality tests, of discrimination protection and of margin of appreciation doctrine, the *SAS* judgment adopts a balanced approach which may pave the way for a less confrontational method of resolution of majority/minority conflicts over the place of religion in Europe.

Keywords: religious symbols in the workplace – French *burqa* ban – *SAS v France* – *Baby Loup* – *laïcité* – proportionality – margin of appreciation – living together.

‘Secularism seldom remains for long as a straightforward state refusal to align itself with, or establish a particular faith; rather, experience suggests it inexorably develops a commitment to actively pursue a policy of established unbelief’.¹

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¹ Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State*, (2nd edn, OUP, 2013), 123.

This prediction has certainly been confirmed by two recent and highly debated cases involving religious symbols in France: the *SAS*² and *Baby Loup*³ cases. On 1 July 2014, the Grand Chamber of the European Court of Human Rights (thereafter ECtHR) held that the French ban on the full covering of the face in public places, commonly known as the *burqa* ban, did not violate Convention rights. According to the Court, the ban interfered with article 8, protecting the right to privacy which includes the right to choose one's appearance and article 9, protecting the right to hold and express religious beliefs. However these interferences were held to be justified (under the minimum requirements of living together) and proportionate, in light of the so-called light sanctions attached to the ban. Furthermore no discrimination was held to arise according to the Court under article 14 of the Convention, taken in combination with either article 8 or article 9. On 25 June 2014, the Cour de cassation in plenary Chamber upheld the dismissal of a nanny, working in a private nursery, who had refused to remove her (non-face covering) Islamicscarf, contrary to the nursery's policy. *Laïcité*, held the Cour de cassation, could not serve as a legal basis for a restriction imposed in a purely private law employment context. However, according to the Cour de cassation, the prohibition of all manifestation of religion throughout the premises and activities of the nursery was nevertheless a justified and proportionate response aimed at preserving children's freedom of conscience. Besides no discrimination claim arose, added the Cour de cassation, as freedom to hold religious beliefs was still intact. The 'privatization' of religion achieved in those cases has reached an unprecedented degree: religion can now be banned in France –at least in its face-concealing manifestations–from the whole of the public sphere (*SAS*). It may also be forbidden in all its manifestations by employers of staff members in

² ECtHR 1 July 2014 *SAS v France* Application No 43835/112014.

³ Cass Ass Plén 25 June 2014 (2014) *Recueil Dalloz*, 1386.

contact with young children (*Baby Loup*). But the lessons that can be drawn from those cases go beyond secularism and beyond France. The reasoning adopted by the Grand Chamber of the ECtHR in *SAS* tackles, more broadly, the delicate relationship between minority religious claims and majority consensus, issues which are also on the rise in England and Wales.

In Britain, the Department of Education⁴ has for example recently reacted to the infiltration of Islamic fundamentalist ideas in Birmingham schools⁵ by a statement that Ofsted, the education inspection body, will from now on ensure that early years educational institutions in receipt of public funding respect British common values. Meanwhile minority religious voices have expressed the wish to be accommodated in university settings through authorized gender segregated seating in public events hosted on campus;⁶ non-believers have challenged the opening of council meetings by prayers⁷ and conflicts between equality policies and religious beliefs have given rise to litigation in the workplace⁸ or in respect of hotel⁹ and adoption or fostering services.¹⁰ On both sides of the Channel, established views are thus being questioned

⁴ See 'Nicky Morgan: toddlers must learn 'British values'', *The Guardian* 8 August 2014, available at <http://www.theguardian.com/education/2014/aug/08/nicky-morgan-toddler-must-be-taught-british-values> [last accessed 22 September 2014].

⁵ On this 'infiltration', see the Government 'Trojan Horse' report, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/340526/HC_576_accessible_-_pdf [last accessed 22 September 2014].

⁶ For the latest non binding response on this issue, see Equality and Human Rights Commission's guidance on Gender Segregation, available at <http://www.equalityhumanrights.com/publication/gender-segregation-events-and-meetings-guidance-universities-and-students-unions> [last accessed 22 September 2014]. The guidance recommends

⁷ *National Secular Society and Bone v Bideford Town Council* [2012] EWHC 275 in which the practice of opening prayers was struck down but on a point of technicality.

⁸ *Eweida v British Airways Plc* [2010] EWCA Civ 80 in which a BA employee unsuccessfully brought a claim of religious discrimination against her employer who had told her to conceal the cross she was wearing round her neck. Ms Eweida later brought a successful challenge before the European Court of Human Rights: ECtHR 15 January 2013 *Eweida and Others v UK*, Application no 51671/10.

⁹ *Bull & Bull v Hall & Preddy* [2012] EWHC Civ 83; Ilias Trispiotis, 'Alternative Lifestyles and Unlawful Discrimination. The Limits of Religious Freedom in *Bull v Hall*' (2014) 1 *European Human Rights Law Review* 39.

¹⁰ *R (on the application of Johns and Johns) v Derby City Council* [2011] EWHC 375 (Admin) where the suitability of a Pentecostal couple as fostering parents was questioned because of their disapproval of homosexuality.

—whether those views reflect religious ideals, a policy of equality or a commitment of disbelief. The hope —if ever entertained— that a moderate establishment constitutional arrangement such as has been adopted in Britain could ensure the peaceful non-litigious co-existence of differing beliefs must therefore be revisited. This article will analyze the crucial teachings of the *SAS* case for *laïc* as well as for mainstream religious views in European countries. How can most widely shared views (in full or in part) be supported by the law in our era of religious diversity? Should they? The *SAS* decision recently released by the Grand Chamber of the ECtHR gives a positive answer to the second question but the contradictions within its reasoning leave in their trail yet more unanswered questions.

In its *SAS* judgment the ECtHR suggests that the full-face veil is special because of the importance in today's societies of facial communication. This sociological justification feeds into the broader notion of living together. Without the possibility of seeing each other's face, contacts between individuals are —if possible at all— much more constrained. But why should this sociological importance of the face have any legal force? The Court does not explain why this sociological consideration should radically transform the way that proportionality tests and discrimination protection operate in law. It does not explain either —more theoretically— why law should suddenly be reduced to reflecting social norms. However the *SAS* judgment also brings positive elements for future law and religion cases. The balanced appraisal of the interests at stake contrasts with the abstract and blanket assumptions present in prior case-law. In that respect the reasoning adopted by the Cour de cassation in *Baby Loup* appears obsolete. The blanket and abstract assumption, not based on evidence, that the Islamic non-face covering scarf would exercise pressure on young children's freedom of conscience no longer seems tenable.

This article will therefore argue that despite its flawed legal basis (the concept of living together) **Part I**, and its worrying consequences for individual freedoms **Part II**, the *SAS* judgment adopts a balanced approach which –in the French context and beyond– may pave the way for a less confrontational method of resolution of majority/minority conflicts over the place of religion in the public sphere and the workplace **Part III**.

I. LIVING TOGETHER: A FLAWED LEGAL BASIS

In *SAS*, the ECtHR recognized that the French veil ban interfered with the claimant's rights to express her personality (under article 8 ECHR) and her religious beliefs (under article 9 ECHR). However it then accepted that these infringements may be seen as necessary to ensure '(harmonious) living together', stating that: 'the barrier raised by a veil concealing the face could be perceived by the respondent State as breaching the minimum requirements of living together'.¹¹ Far from offering an enthusiastic endorsement of this new concept of "living together", the Court however immediately shows concerns about using such a malleable notion as a justification for restricting Convention rights.¹² Ultimately the notion of "living together" is adopted almost reluctantly, as a concession to the extremely covering nature of the prohibited garment and the wide margin of appreciation granted to France. The Court's caution towards this legal basis is understandable. The concept of living together in the context of *burqa* bans goes indeed beyond clearly identifiable threats to public order or public safety. It stretches to loose social expectations as to how to behave in society.¹³ In the context of *burqa* bans, these social requirements would refer to the duty to engage to some degree into social interaction with fellow citizens. Wearing the full veil could be seen as violating these basic social duties in that the wearer would give her religious identity absolute priority over her identity as a citizen and refuse all interaction with fellow members of society. Such reasoning is problematic. Even if it were established that women who wear the *burqa* in France do not in fact

¹¹ ECtHR 1 July 2014 *SAS v France*, supra n 2, paras 121 and 122.

¹² Ibid, para 122.

¹³ See Myriam Hunter-Henin, 'Why the French Don't Like the *Burqa*: *Laïcité*, National Identity and Religious Freedom', (2012) 61 *International Comparative Law Quarterly* 1, 20.

comply with this minimum duty of social interaction,¹⁴ it remains difficult to see why this social expectation of a minimum interaction should automatically be translated into a legal prescription. Certainly ensuring harmonious coexistence, enhancing social cohesion, improving social integration of minority groups are social goals that many policies, statutes or judicial decisions support, especially in cases involving minority religious claims. For instance, section 149(1) of the Equality Act 2010 which came into force in April 2011 in England and Wales provides for example that in the exercise of their functions, public authorities such as schools must have due regard to the need to *inter alia*:

- a) foster good relations between persons who share a religion or belief and persons who do not share it.

At first sight, it might therefore appear natural and reasonable for the ECtHR in the *SAS* case to rely –in the footsteps of the French Conseil Constitutionnel¹⁵– on the minimum requirements of living together in order to assess the legitimacy of the French ban on the full-face veil. In the explanatory memorandum which accompanied the French bill and to which the Court refers, the wearing of the *burqa* was described as contrary to the French ideals of fraternity¹⁶ and the rules of civility. Hindering social interaction, the concealment of the face was characterized as running counter to the Republican social covenant on which French society is founded. Assuming for now that a wide discretion may legitimately be granted to those French distinctive views, those statements would suggest that the French ideal of fraternity has a *legal*

¹⁴ In *SAS*, the applicant on the contrary alleged that she did not systematically wear the *niqab*. She declared that she was content not to wear the *niqab* at all times but wished to be able to wear it when she chose to do so, depending in particular on her spiritual feelings. ECtHR 1 July 2014 *SAS v France*, supra n 2, para 12.

¹⁵ Conseil Constitutionnel 7 October 2010, *Journal Officiel* 12 October 2010, at 18345.

¹⁶ For an illustration, see the French parliamentary resolution adopted on 11 May 2010 (Ass Nat XIII législature, TA no 459; (2010) *JCP*, Comments by Anne Levade, 551) in which the full veil is described as a radical practice that is contrary to the values of the French Republic.

content. The purpose of this section is to unravel and criticize the automatic transfer – through the use of the concept of “living together” as justification for the French *burqa* ban – of the social goals of a unified/harmonized public space to the legal realm. This process may be criticized on two levels: contextually, it betrays the roots of French republicanism. Conceptually, it adopts an impoverished and ethically deficient conception of law as a whole.

A. An Erroneous Conception of French Republicanism

The *SAS* judgment (in the wake of the French Conseil constitutionnel’s reasoning)¹⁷ may be criticized for blurring the distinction between a *laïc* State and a *laïc* society. Undeniably the regulation of religious symbols in the streets is both a social and a legal question and undeniably social reactions to these questions will be shaped by the legal environment. In France the issue is inevitably tainted by the *laïc* framework even when the concept of *laïcité*, generally taken to mean the separation of the State and religion,¹⁸ is not strictly applicable. The social consequences of *laïcité* are evident: *laïcité* shapes the way French society perceives religion and encourages the secularization of society. But secularism and secularization¹⁹ remain distinct phenomena just as legal and social norms remain separate (though they may overlap).

The recent cases of *SAS* and *Baby Loup* tend to implicitly separate a technical side of *laïcité* –which they finally confirm is to remain tied to the State– and a social side which is granted a legally recognised life of its own. *Laïcité stricto sensu* may therefore not extend to mere public citizens outside of public services but its social and political consequences –French citizenship– could still be relied upon to ensure

¹⁷See supra n 15..

¹⁸ See Jean Rivéro, ‘La notion juridique de laïcité’, (1949) *Recueil Dalloz* 137.

¹⁹ For a comparable distinction but in respect of pluralism/plurality, see James A Beckford, *Social Theory of Religion* (Cambridge: Cambridge University Press, 2003).

behaviour compliant with French values in the streets²⁰ and in the workplace.²¹ The requirements of living together may now as a result apply beyond *laïcité* and beyond the State's realm. Such extension amounts to a distortion of French Republicanism. Whether in its technical side –as a line of demarcation between the respective spheres of the State and the Church–or in its ideological side, as a value fostering social cohesion through the nurturing of citizenship, French *laïcité* emanates from the State. 'The State, in effect, does not content itself with defining the legal conditions of citizenship, which are otherwise socially constituted: it also has the right and the duty to create and reinforce social cohesion and, thus to contribute to the forging of citizenship. It is not merely the gathering together of citizens that the State makes possible; it is the State that creates citizenship itself'.²²

By severing the links between citizenship and the State, the *SAS* judgment thus betrays French republican traditions. While respect for tradition has no legal legitimacy as such, this particular distortion is problematic because it leaves dominant views unchecked and individual liberties at the mercy of the majority's good will. Indeed the Republicanism that emerges from the *SAS* case is one that relies on social consensus. According to the reasoning adopted by the ECtHR in *SAS*, common values become explicitly part of the problem (as they now openly stand in conflict with the offending minority practice) and yet also form the solution (as they define the *content* of the elusive concept of the minimum requirements of living together). In that sense, this new version of French citizenship stands in opposition to suggestions made by

²⁰ See for such line of reasoning, the French Report commissioned prior to the French ban on the *burqa*, *Rapport de la Mission d'information sur la pratique du port du voile intégral sur le territoire national*, Report submitted to the President of the National Assembly 26 January 2010, 95, available at http://www.assemblee-nationale.fr/13/dossiers/voile_integral.asp [last accessed 2 October 2014]; *SAS v France*, supra n 2, at 141.

²¹ *Baby Loup*, supra n 3.

²² Michel Troper, 'French Secularism or *Laïcité*', (1999-2000) 21 *Cardozo Law Review* 1267, 1268.

Cécile Laborde²³ to devise a fairer and more inclusive citizenship in France. In Laborde's scheme, none of the general values of liberty, equality or fraternity would favour majoritarian domination. By contrast, the French republicanism immanent in *SAS* is the very reflection of dominant viewpoints. Naturally it would be naïve to believe that intellectual debates over *laïcité* and French citizenship have not also been in the past vehicles for the expression of majority feelings. As John Bowen²⁴ has astutely analyzed, the headscarf debates that have occupied the French since the 1980s have concealed underlying concerns about the integration of Islam, fears of *communautarism* and gender discrimination. But the *SAS* judgment now offers a legal basis and therefore a new legitimacy for majority views: the minimum requirements of living together. As will be shown below, individual liberties are as a result in a vulnerable position. Besides, on a theoretical level, such an extended scope challenges the interaction of social and legal norms and leads to an impoverished conception of law.

B. An Impoverished Conception of Law

It has been recognized that law indirectly influences social norms. Neil Duxbury thus explains how social norms literature has revealed the overlaps between social and legal norms: 'social norms –widely internalized patterns of behaviour, deviation from which is likely to meet with social disapproval– influence human action, and law often indirectly influences such action by shaping social norms'.²⁵ But I would argue that in the instances studied by the Law and Sociology's

²³ Cécile Laborde, *Critical Republicanism* (OUP, 2008), 7.

²⁴ John R Bowen, *Why the French Don't Like Headscarves: Islam, the State and Public Space*, (Princeton University Press, 2006).

²⁵ Neil Duxbury, 'Signalling and Social Norms' (2001) 4 *Oxford Journal of Legal Studies* 719, 720.

jurisprudence,²⁶ legal and social norms remain ontologically distinct. The very study of their interaction presupposes that they remain separate entities. This observation does not deny that law, as Roger Cotterrell²⁷ and others before him²⁸ have acknowledged, is embedded in society. But the symbiotic relationships between law and sociology do not –should not– result in a confusion of legal with social norms. Both legal norms and social norms seek to influence social behaviour but they may do so for very different reasons. Legal norms banning smoking in public spaces for example have gradually changed social attitudes and tolerance towards smoking. Law it may be said has changed the social meaning of smoking.²⁹ But this intervention was justified by the harm caused to non-smokers by passive smoking and the resulting cost for the nation on health budgets.

In *SAS* on the other hand it seems that social norms as to how to live together are endorsed by law for the sole purpose of reinforcing those social norms. No external factor account for the desirability of those social rules. Social rules may have emerged for reasons that the law would be keen to uphold. But they may also pursue aims that the law would disapprove of or consider less worthy of protection than other prevailing interests. In other words, the existence of social norms does not carry in itself an ethical claim as to the legitimacy of these norms. An exploration of the reasons behind the social norms is therefore indispensable.³⁰ The reasoning adopted by the ECtHR therefore lacks the crucial investigation as to *why* the social norms of uncovering the face in public should be backed by law. What implicit reasons could

²⁶ See for example, Eric A Posner, *Law and Social Norms* (Harvard University Press, 2002).

²⁷ Roger Cotterrell, *Law, Culture and Society. Legal Ideals in the Mirror of Social Theory* (Ashgate, 2006), 4.

²⁸ See also, Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (1913), English translation by Walter L Moll, in 5(1936) *Harvard Studies in Jurisprudence*, with an introduction by Roscoe Pound.

²⁹ See Neil Duxbury *supra* n 22, 721; Lawrence Lessig, ‘The Regulation of Social Meaning’ 62(1995) *University Chicago Law Review* 943, 971–72.

³⁰ Eric A Posner, *supra* n 23, 58.

justify this mirroring of social norms by law under the concept of living together? The ECtHR does not offer a clear justification for its chosen legal basis of living together. The restrictions carried out for the sake of the minimum requirements of living together upon individual religious freedoms therefore worryingly appear unconstrained by any necessity.

II. WORRYING CONSEQUENCES FOR INDIVIDUAL FREEDOMS

By severing the minimum requirements of living together from the concept of *laïcité*, the *SAS* decision thus also drastically alters their rationale. Their purpose can no longer claim to be to protect individual liberties;³¹ they are to quash their most deviant and disturbing manifestations. The purpose of this section is to analyze how this process –epitomized in *Baby Loup* and partly endorsed by the ECtHR in *SAS*– has led to a worrying (mis)application of legal mechanisms. In both *Baby Loup* and *SAS*, proportionality tests and discrimination provisions have been blatantly misinterpreted or simply ignored whilst *laïcité*, explicitly rejected as a legal basis, has wrongly tainted the debate. Focusing first on the *Baby Loup* case before bringing in the *SAS* judgment, this section will analyze how proportionality tests have been either ignored, in the shadows of *laïcité* or misconstrued and undermined.

A. Proportionality Tests Hidden in the Shadow of *Laïcité*

The *Baby Loup* case dealt with the extent to which an employee of a private nursery could be allowed to manifest her religious faith in the workplace. Following

³¹ On the links between *laïcité* and individual freedoms, see Patrick Weil, ‘Why the French *Laïcité* is Liberal’ 30(6) (2009) *Cardozo Law Review* 2699.

several years of maternity and parental leave,³² Mrs X returned to her post of vice-heard of the nursery *Baby Loup* wearing a non-face covering Islamic scarf. Leaving the face visible, the scarf would not have fallen under the 2010 Law which was passed to prohibit full-face covering garments in all public spaces, including the workplace if it is open to the general public.³³ It did however conflict with provisions in the nursery's policy³⁴ which had been drawn up in the meantime³⁵ and which stated that 'rights to freedom of conscience and freedom of religion recognized to staff members could not be invoked to undermine the principles of *laïcité* and neutrality which applied across all of the nursery's activities both within the nursery's premises and outside, on visits organised for the children'. Having refused to remove her veil, Mrs X was dismissed by her employer. In the employment private sector, individuals are in principle free under French law to manifest their beliefs. Religious neutrality requirements stemming from *laïcité* do not apply except –as held in a concomitant case of *Mme Abibouraguimane c CPAM de Seine Saint Denis*–³⁶ where the company has been entrusted with a mission of public service. In the absence of such mission, restrictions may be imposed by the employer but, under article L.1121-1 of the French Employment Code, only if they are justified by the particular task performed by the employee in question and if the restrictions are proportionate to that justification. More stringent conditions moreover arise if the restrictions are directly or indirectly discriminatory (L. 1321-3 of the Employment Code).

³² Between May 2003 and December 2008.

³³ Confirming this analysis, see Isabelle Desbarats, 'Quelle place pour la religion au travail? Débat classique, nouveaux enjeux' (2013) *JCP Entreprise et Affaires* 1588, 1590.

³⁴ Private company's policies are subject to inspections by work inspectors (inspecteurs du travail) who are civil servants. But the policy remains a private law regulation (see Cass Soc 16 December 1992, *Bulletin Civil V*, n 602). As such the *Baby Loup* case fell under the jurisdiction of French private law courts and not administrative law courts.

³⁵ The new policy came into force in June 2003, whilst the employee was on maternity leave. But a weaker version of religious neutrality was already in place when the employee first joined the nursery.

³⁶ Soc 19 March 2013, (2013) *Recueil Dalloz* 777; Comments by Jérôme Porta, 1026.

The legal battles raised by the *Baby Loup* case took many unexpected turns. The case led to two Court of cassation decisions, two Court of appeal's decisions and one employment law tribunal's ruling. Out of these five decisions, only one –the 2013 Cour de cassation Social Chamber decision³⁷ held that the employee's religious freedom should prevail over the restrictions contained in the nursery's staff policy. But the almost unanimous rulings in favour of religious neutrality hide the wide divergence in approaches and reasoning. According to the first instance tribunal,³⁸ the nursery's activities could be characterized as a public service hence triggering the application of *laïcité* and religious neutrality requirements. For the Court of appeal of Versailles, religious neutrality requirements were mandated by the nursery's mission: offering care to young children.³⁹ Asked to rule on whether *laïcité* was applicable and if it was not, on whether principles of proportionality and non-discrimination had been properly construed, the Cour de cassation, in its 2013 Social Chamber decision,⁴⁰ held that *laïcité* was not at stake and that anti-discrimination provisions had been violated. As usual under French legal procedure, the case was then remanded to a different Court of Appeal. Contrary to usual practice however,⁴¹ the Court of Appeal of Paris did not apply the Cour de cassation's 2013 ruling to the facts of the case. Swapping legal basis and relying on provisions not discussed in the

³⁷ Soc 19 March 2013, (2013) *Recueil Dalloz* 962; Opinion by Bernard Aldigé, 956; Comments by Christian Mouly, 963 and by Jérôme Porta, 1026.

³⁸ Conseil de Prud'hommes de Mantes-la-Jolie 13 December 2010, (2011) *Recueil Dalloz* 85 and (2012) *Recueil Dalloz* 904, Comments by Jérôme Porta.

³⁹ Court of Appeal of Versailles 27 October 2011, (2012) *Revue de Jurisprudence sociale* 106.

⁴⁰ Soc 19 March 2013, *supra* n 34.

⁴¹ Courts of appeal to which a case is remanded following a Cour de cassation's ruling will usually abide by that ruling. But in the absence of a system of precedent, they do not have to. To put an end to litigation, Cour de cassation rulings will exceptionally be binding after two appeals to the Cour de cassation on the same legal issue in the same case. The 2013 Cour de cassation's first ruling on *Baby Loup* was not therefore binding on the Court of Appeal of Paris. But the 2014 Cour de cassation's decision is now final and binding.

previous Cour de cassation case, the Court of Appeal of Paris⁴² held that the dismissal was nevertheless justified under the exemption rule mentioned in article 4(2) of the Council Directive 2000/78/EC of 27 November 2000 (thereafter the Directive) establishing a general framework for equal treatment in employment and occupation.⁴³ Under that article, the nursery *Baby Loup* was entitled, according to the Court of Appeal of Paris, to impose greater restrictions upon employees' individual religious freedoms than would normally be allowed in order to promote a special *laïc* ethos. Following an inevitable further challenge, the Cour de cassation in plenary Chamber⁴⁴ reached a final decision on the case. According to the Cour de cassation's final decision, the Court of appeal of Paris had erred in its choice of legal basis but had nevertheless reached the correct outcome. Proportionality tests had been met and the conclusion that the dismissal had been fair and justified could therefore be upheld.

One way to justify the restrictions contained in *Baby Loup*'s policy would have been to characterize the nursery's mission as one of public service. This line of reasoning –pursued by the first instance employment tribunal⁴⁵ could bring the case back into the ambit of the concept of *laïcité* and consequently avoid assessing the proportionality of the restrictions imposed by the employer's policy altogether.⁴⁶ However it sat uncomfortably with prior French administrative case-law delineating the contours of service public missions and inflated the notion of *laïcité* well beyond

⁴² Court of Appeal of Paris 27 November 2013 (2014) *Recueil Dalloz* 65, Comments by Christian Mouly. See also Sylvie Langlaude, 'Madame Fatima Epouse A v Association Baby Loup (No S 13/02981): Cour d'appel de Paris (Court of Appeal of Paris), France: Degrandi (First President): 27 November 2013' 3(2) (2014) *Ox. J Law Religion*, 363-364.

⁴³ *Official Journal L 303, 02/12/2000 P. 0016*, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0078> [accessed on 2 October 2014]. For a discussion of this provision, see *infra*.

⁴⁴ AP 25 June 2014, *supra* n 3.

⁴⁵ Conseil de Prud'hommes de Mantes-La-Jolie, *supra* n 35.

⁴⁶ See however the more nuanced approach adopted by the Conseil d'Etat in respect of public agents in CE 3 May 2000 Delle Marteaux, (2001) *Revue française de droit administratif* 151, Conclusions by Rémy Schwartz. In this decision, the Conseil d'Etat indicates that the employer's response to a breach of religious neutrality duty by one of his agents must be proportionate. By contrast the Cour de cassation in plenary Chamber in *Baby Loup* seems to suggest that dismissal is an appropriate response for any kind of religious manifestation.

any domain of the State. According to the case-law of the French Conseil d'Etat, a mission of public service requires an activity of general public interest carried out under the control of public authorities. Indirect control may be sufficient to meet the criteria but financial contribution alone –however substantial– will not.⁴⁷ Viewed together, the two 2013 Cour de cassation decisions rendered on the *CPAM* (Health National Insurance Centres)⁴⁸ and *Baby Loup* cases respectively scrupulously followed prior administrative law jurisprudence. Whereas National Health Insurance Centres are controlled by public authorities that have the power should they see fit to dissolve their board of administration,⁴⁹ the ties between the private nursery *Baby Loup* and the public sector were merely financial and social. The nursery carried out an activity of general public interest and relied on public funds for up to 80% of its budget, but it enjoyed complete autonomy of decision. The criteria separating the public and the private sectors –despite their subtleties– have long been settled: national health insurance centres have long been classified on the public side⁵⁰ and nurseries (unless they are run by local public authorities)⁵¹ have always belonged to the private side. How convincing are these distinctions however? How decisive should the presence or absence of decision-making powers by public authorities be in this context? Why should it drastically change the extent to which employees are allowed to express their religious convictions in the workplace? Should the structure

⁴⁷ CE 28 June 1963 arrêt *Narcy*, *Grands arrêts de la jurisprudence administrative* 293 and CE 22 February 2007 arrêt *APREI* (*association du personnel relevant des établissements pour inadaptés*), *Grands arrêts de la jurisprudence administrative* 294.

⁴⁸ In French, *Caisses primaires d'assurance maladie* or *CPAM*.

⁴⁹ See CE 30 March 2005 *Union régionale des syndicats CFTEC de la Réunion*, *Juris-data* n 264541.

⁵⁰ See Conseil constitutionnel Decision n 82-148 14 December 1982, *Journal Officiel* 15 December 1982.

⁵¹ If the employer is a public authority, the activity carried out will always fall on the public side of the divide, see arrêts *Narcy* and *APREI*, *supra* n 44.

of a company evolve over time to welcome involvement of public authorities,⁵² employees would then suddenly need to abide by the strict religious neutrality requirements that bind all public agents.⁵³ While strict neutrality may arguably be welcome in the core symbolic public sectors of justice and education, the need for neutrality diminishes as the presence of the State becomes more and more covert. Should an employee filing insurance claims be more emblematic of the State than a nanny caring for toddlers? Structurally and historically national health insurance centres are close to the French State.⁵⁴ But in the daily running of the centres, the presence of the State is minimal: for employees subject to private employment law in all other aspects of their work, the extension of the public law principle of *laïcité* and the resulting restriction on their religious freedom may therefore be difficult to understand. Surprisingly, rather than pleading for a retreat of *laïcité*, these uncertainties have led in France to calls for further extensions of the notion.⁵⁵ However supporters of an increased *laïcité* have all turned to Parliament.⁵⁶

In the absence of any existing law in place which could support a further extension of the public realm,⁵⁷ the Court of Appeal of Paris chose another route towards *laïcité*.

⁵² See for example, CE 6 April 2007 *Commune d'Aix-Marseille*, (2007) *Revue française de droit administratif* 812, Conclusions by François Seners which held that the change in the controlling bodies of an organization carried a change in its nature.

⁵³ CE 3 May 2000 *Delle Marteaux*, supra n 43.

⁵⁴ Ordonnances of 4 and 19 October 1945, *Journal Officiel* 6 October 1945, 6280. More generally, see Bruno Bethouart and Philippe Steck, *Prestations familiales: une histoire française*, 6(2012) *Cahier d'Histoire de la Sécurité sociale* (Comité d'Histoire de la Sécurité Sociale, 2012).

⁵⁵ See for example the first instance decision of the Administrative Tribunal of Montreuil extending the obligations of religious neutrality imposed by *laïcité* upon a mother taking part in a school visit, TA Montreuil 22 November 2011, (2012) *Actualité Juridique Droit Administratif* 163, Comments by Stéphanie Hennette-Vauchez and (2012) *Recueil Dalloz* 72, Comments by M-C de Monteclerc and note by A-L Girard.

⁵⁶ See several legislative proposals in favour of an extension of *laïcité* to the whole of the childcare sector, including childminders: Propositions de loi n 56 de Françoise Laborde and n 593 de R-G Schwartzenberg. For comments on the most extensive of these proposals which was voted by the Lower House of the French Parliament, see Frédéric Dieu, 'Laïcité: extension du domaine de la lutte à la sphère privée', (2012) *JCP* 60.

⁵⁷ See the failed attempts by Richard Trinquier, the Mayor of Wissous (near Paris) to extend the requirements of *laïcité* via an executive municipal regulation purporting to ban access to municipal beaches to non-face concealing veiled women. 'Deux femmes voilées interdites de plage dans

Instead of extending the notion of public service –and in its wake, the concept of *laïcité*– beyond its usual remit, the Court of appeal of Paris put *laïcité* back into the equation on the basis of article 4(2) of the Employment Equality Framework EU Directive which generally aims to combat discrimination on grounds of disability, sexual orientation, religion or belief and age in the workplace but which, under that specific article, allows greater latitude to employers who seek to promote a particular ethos within and through their institution..⁵⁸ It is rather counter-intuitive to turn to the Directive –designed to reinforce individual rights and freedoms in the workplace– in order to justify unprecedented restrictions to religious freedoms. Indeed the Directive offers powerful protection to employees against discriminatory measures imposed in the workplace on the ground notably of religion.⁵⁹ However the protection afforded to individual employees have to be balanced against the rights recognized under article 4(2) of the Directive to churches, religious associations or communities as well as to philosophical and non-confessional organizations. Staff employed by these institutions may legitimately be expected to show a certain degree of allegiance to the ethos promoted by the employer’s institution even at some cost to their individual freedom to manifest differing beliefs. But I would argue that *Baby Loup* is hardly a case falling under the scope of article 4(2). First of all, under the Directive’s framework, Member States that wished to avail themselves of derogations under article 4(2) and balance individual rights against collective ethos had to pass

l’Essonne’, *Le Figaro* 8 July 2014, available at <http://www.lefigaro.fr/actualite-france/2014/07/08/01016-20140708ARTFIG00324-deux-femmes-voilees-interdites-de-plage-dans-l-essonne.php> [accessed on 2 October 2014]. The municipal regulation was struck down as *ultra vires* by the French administrative courts, see ‘La justice suspend l’interdiction du port de signes religieux à “Wissous plage”’, *Le Figaro* 12 July 2014, available at <http://www.lefigaro.fr/actualite-france/2014/07/11/01016-20140711ARTFIG00302-femmes-voilees-interdites-de-plage-deux-associations-saisissent-la-justice.php> [accessed on 2 October 2014].

⁵⁸ See *supra*, p 14.

⁵⁹ Article 1 of the Directive.

legislation to that effect.⁶⁰ Besides, such legislation is described in the Directive as crystallising existing practices. French case-law does contain a few decisions where individual freedoms have been construed more restrictively in light of the particular ethos of the employer.⁶¹ But even presuming that these decisions are relevant, the required legislative basis is absent. The French statute, Loi n 2008-496 of 27 May 2008,⁶² that entrenched the Directive's provisions into French law did not mention the possibilities provided for under article 4(2). Could French Courts in *Baby Loup* nevertheless refer to article 4(2)? At what stage –legislative or judicial– should large exemptions of the sort be negotiated? I would argue that it is not for judges to make such policy judgments. Courts are to assess the solutions to be reached in a given particular case; they are ill-equipped to address the general equilibrium that should be reached between religious voices and equality principles in the whole of the employment sector.⁶³

Secondly, even if the Cour de cassation were to be seen as the correct forum for such issues, I would contest the applicability of article 4(2) in the case. How could *Baby Loup* be characterized as a company promoting a particular ethos justifying specific allegiance by its staff? According to the nursery's statutes, the aim pursued by the nursery was to promote the integration of women living in socially deprived areas and offer childcare to babies and toddlers. The Court of Paris held that a *laïc*

⁶⁰ Article 4(2) of the Directive.

⁶¹ Cass Ass Plén 19 May 1978, *Bulletin Assemblée Plénière* 1 in which the dismissal of a Catholic school teacher who had remarried after divorce was upheld; see also Soc 20 November 1986, *Bulletin Civil* V, 555.

⁶² Loi n 2008-496 of 27 May 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations (Act Implementing EU Law Anti-Discrimination provisions), available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018877783> [accessed 24 September 2014].

⁶³ For a similar argument, in respect of the equilibrium between religious freedom and commitment to gender/sexual orientation equality rights, Maleiha Malik, 'Religious Freedom, Free Speech and Equality: Conflict or Cohesion?' (2011) 17(1) *Res Publica* 21, who argues that judges ought not to disturb the balance reached in Westminster Parliament and incorporated into the Equality Act 2010.

ethos could be inferred from those goals. Whilst the ethos that a company or group may promote need not be religious but may also embrace secularist or humanist ideals,⁶⁴ one fails to see how *Baby Loup* could be described as promoting a particular ideology at all. Seeing a *laïc* ethos in any initiatives fostering the integration of minority groups and promoting social cohesion would suggest that a *laïc* policy is the exclusive means of pursuing social harmony. Such reasoning depicts the presence of religion in the public sphere as a threat to peaceful coexistence. Instead of offering a fair and balanced assessment of competing claims, it therefore presupposes the validity of the policy of established unbelief and leaves hardly any scope for religious expression in the workplace. What company nowadays won't be in contact with customers from multi-confessional multi-cultural backgrounds? If the surrounding religious and social diversity justifies the exclusion of religion in the workplace, what employer would not be empowered to unilaterally decide that, for the sake of peaceful co-existence, manifestation of religion should no longer be tolerated, thus depriving his employees of fundamental individual freedoms?⁶⁵ In light of its impact on individual religious freedoms, the identification of a particular company ethos must lie in the activities objectively carried out by the company.⁶⁶ Any company cannot suddenly be promoting a *laïc* ethos for the mere reason that its policy states so. If it did, individual freedoms in the workplace would be at the employer's mercy.

But even if article 4(2) of the directive had been applicable, the restriction imposed by *Baby Loup* would not have been saved, for want of proportionality between the so-called *laïc* ethos of the nursery and the restriction imposed in its name

⁶⁴ Explicit in the directive. Also recognized in ECtHR 18 March 2011 *Lautsi v. Italy*, Application no 30817/06, where the atheist beliefs of the applicants were recognized as falling under article 9 ECHR.

⁶⁵ Bernard Bossu, 'Affaire *Baby Loup*, le retour à la case départ', (2013) *JCP Entreprise et Affaires* 1710.

⁶⁶ See Christian Mouly, 'L'affaire *Baby Loup* devant la Cour de renvoi: la revanche de la *laïcité*', (2014) *Recueil Dalloz* 65.

on individual religious freedoms.⁶⁷ This conclusion applies *a fortiori* in the general context where *laïcité*, whether in the shape of a particular *laïc* ethos or under the general principle of State/religion separation, does not apply at all. It is therefore particularly surprising and –as I will show– unconvincing for the plenary Chamber of the Cour de cassation in *Baby Loup* and the ECtHR in *SAS* to have set *laïcité* aside and yet ruled that proportionality tests and anti-discrimination provisions had been satisfied.

B. Proportionality Tests and Anti-Discrimination Provisions Misconstrued

Confronted by the growing presence or power of religion in the public sphere,⁶⁸ Law may be torn between protecting the voice of the religious few and strengthening dominant positions. In its appealing simplicity,⁶⁹ *laïcité* pretends to avoid the dilemma, giving no one any (religious) voice but everyone a say, as citizen. But even assuming that *laïcité* can thus side-line the tensions, it is not (and should not), as demonstrated in the preceding section, be of universal application in both the

⁶⁷ See also, in support of such assessment, the nuanced case-by-case approach adopted by the ECtHR in litigation opposing Churches and religious organizations to their employees. Similar facts –adultery committed by an employee in contradiction to the employer’ ethos– may lead to differing assessments depending on whether the employee in question had a high and public profile in the organization, as head of public relations in the Mormon Church (ECtHR 23 September 2010 *Obst v. Germany*, Application no 1620/0323) or was a low-ranking member of staff, as an organist and choir director for a Catholic Parish (ECtHR 23 September 2010 *Schüth v. Germany*, Application no 1620/03).

⁶⁸ The *Power of Religion in the Public Sphere* is the title of a volume of four essays by Judith Butler, Jürgen Habermas, Charles Taylor and Cornel West in E Mendieta et al (eds), (Columbia University Press, 2011).

⁶⁹ See Hana Van Ooijen, *Religious Symbols in Public Functions: Unveiling State Neutrality. A Comparative Analysis of Dutch, English and French Justifications for Limiting the Freedom of Public Officials to Display Religious Symbols*, (Intersentia 2012), 63.

public and the private spheres. Outside⁷⁰ the remit of *laïcité*, proportionality is key to assessing the respective strengths of majority and minority claims.⁷¹ More generally, proportionality is entrenched in human rights protection and intrinsic in anti-discrimination provisions. Under article 9(2) of the European Convention on Human Rights, ‘Freedom to manifest one’s religion or beliefs shall be subject only 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’. Restrictions on religious manifestations will thus need to relate to these legitimate goals in both their aim and their scope. A disproportionate interference would fail the test even if it pursues a legitimate aim. Furthermore, if the restriction applies in the context of employment and occupation and is indirectly discriminatory, it will have to be justified under article 4(1) of Directive. The discriminatory measure will need to satisfy proportionality requirements in two respects: it will need to be adjusted to the specific activities and tasks undertaken by the employees concerned as well as attuned to the legitimate objective it seeks to attain. Despite these stringent tests, the restrictions on religious freedoms imposed by the employer in *Baby Loup* and by the State in *SAS* were upheld. The following paragraph will criticize this outcome.

In *SAS*, the protection afforded by the Directive was not available. The ban on the *burqa* applied outside employment and occupational requirements and therefore fell outside the scope of the Directive. Notwithstanding the non-applicability of the

⁷⁰ It is arguable that proportionality requirements should also apply within the limits of *laïcité* but the argument falls outside the scope of this article.

⁷¹ For a plea in favour of a more robust use of proportionality requirements in law and religion cases, see Myriam Hunter-Henin, ‘Believing in Negotiation: Reflection in Law’s regulation of Religious Symbols in State Schools’ in Guesnet et al, *Negotiating with Religion*, (Ashgate, forthcoming). More generally, see the debate in the *International Journal of Constitutional Law*, Stavros Tsakyrakis, ‘Proportionality: an assault on human rights?’ (2009) 7 *International Journal of Constitutional Law* 468 and (2010) 8 *International Journal of Constitutional Law* 709; Matthias Klatt and Moritz Meister, ‘Proportionality – a benefit to human rights? Remarks on the I CON controversy’ (2012) *International Journal of Constitutional Law* 687.

directive, a proportionality test still had to be met and its discriminatory effects considered. Article 14 of the European Convention protects individuals against discriminatory measures in the enjoyment of convention rights. The applicant⁷² alleged that the French ban on the *burqa* violated article 14 taken in conjunction with her article 9 rights to religious freedom and article 8 rights to choose her own appearance.⁷³ Displaying formalism to the extreme,⁷⁴ the ECtHR dismissed the allegation: because the law is phrased in neutral terms; the fact that it will in effect only apply against Muslim women was simply ignored. Notwithstanding the summary treatment of discrimination protection, a ruling of violation could have been made based on articles 8 and 9 taken in isolation. Having (wrongly in my view)⁷⁵ held that the French ban on the *burqa* pursued the legitimate aim of protecting the minimum requirements of living together, the ECtHR still had to ensure, under the abovementioned article 9(2)⁷⁶ of the Convention, that the restriction was proportionate to that aim. Proportionality tests prompt judges to consider all points of view and pay attention to the impact of state restrictive measures on individual applicants' lives and freedoms. Respectful of this approach, the ECtHR in its *SAS* judgment does not accept the French ban on the *burqa* at face value. It does acknowledge the adverse effect it may have on women wishing to wear the *burqa*.

There is no doubt that the ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full-face veil for

⁷² Allegations of violations of other articles were dismissed. These include allegations of violations of article 3 (right to be protected against torture and inhuman and degrading treatment); article 10 (right to freedom of expression) and article 11 (right to free assembly).

⁷³ For a fuller demonstration of the case for discrimination, see Stéphanie Hennette-Vauchez, 'Débat autour de la décision du Conseil constitutionnel n 2010-613 DC du 7 octobre 2010 Loi interdisant la dissimulation du visage dans l'espace public', (2011) *Recueil Dalloz* 1166.

⁷⁴ See Eva Brems, '*SAS v France* as a problematic precedent', 9 July 2014, *Blog Strasbourg observers*, available at <http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/> [accessed on 24 September 2014].

⁷⁵ See above Part I.

⁷⁶ The reasoning is the same under article 8(2).

reasons related to their beliefs. (...) They are thus confronted with a complex dilemma, and the ban may have the effect of isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life. It is also understandable that the women concerned may perceive the ban as a threat to their identity.⁷⁷

However the conclusion does not match the analysis. Because of the light sanctions⁷⁸ provided for (para 152) and the limited focus of the ban (targeting only fully-face covering garments) (para 151), the ECtHR concludes that the restrictions caused to religious freedoms are justified and proportionate. The reasoning is not convincing. The level of the sanctions should be irrelevant. The lightness of the punishment does not remove the wrongfulness of an undeserved punishment. Light penalties are no guarantee that the prohibition itself is in the first place a proportionate response.⁷⁹ Should the ban on the *burqa* itself be a proportionate response to the concerns of living together (which would first need to be established), heavy sanctions imposed against women infringing the ban may make the French scheme disproportionate. But the reasoning cannot be turned around. Heavy sanctions may be the downfall of a justified ban but light sanctions cannot save an unjustified prohibition. Besides, the lightness of the sanctions is questionable. The criminal penalties provided for may be among the lightest that could be envisaged under French Criminal Law –a maximum fine of 150 Euros or/and the obligation to attend a citizenship course. However criminal sanctions –however light– will always carry considerable stigma on the offenders. Moreover the reasoning hides the recurring

⁷⁷ *SAS v France*, supra n 2, para 146

⁷⁸ A maximum fine of 150 Euros or/and the obligation to attend a citizenship course.

⁷⁹ For a similar unconvincing reasoning, see Conseil constitutionnel 7 October 2010, supra n 15 Considérant 5.

nature of the infraction. Fines incurred every time fully-veiled women go out will eventually reach high figures.

The second reason put forward by the Court to justify the proportionality of the ban is no less satisfactory. The ECtHR notes that the ban only applies to face-covering garments. The ruling of disproportionality reached in its previous case of *Ahmet Arslan*⁸⁰ cannot therefore serve as a precedent, adds the Court (para 151). In *Ahmet Arslan*, the prohibition of a peaceful religious event in the streets was held to amount to a disproportionate interference with religious freedoms. The factors that had supported the conclusion in *Ahmet Arslan* were also present in the *SAS* case: the restriction applied in ordinary places against ordinary people. The reasoning could⁸¹ therefore have been transposed to the *SAS* case and led to the same conclusion of incompatibility. The ECtHR decided otherwise, underlining the fact that ‘while both cases concern a ban on wearing clothing with a religious connotation in public places, the present (*SAS*) case differs significantly from *Ahmet Arslan and Others* in the fact that the full-face Islamic veil has the particularity of entirely concealing the face, with the possible exception of the eyes’. The factual accuracy of the distinguishing factor does not make it relevant in law. It is undeniable that the French ban only applies to full-face covering garments. But why should it matter in law? If the State is to refrain from assessing the legitimacy of particular forms of religious symbols,⁸² how could the Court then conclude that the ban on the *burqa* is proportionate because of its limited application to particular religious symbols? Is the Court not reintroducing distinctions between religious symbols and allowing the State to decide which ones are acceptable and which ones are not, in contradiction to its opening statements and

⁸⁰ ECtHR 23 February 2010 *Ahmet Arslan and Others v Turkey*, Application n 41135/98.

⁸¹ See Myriam Hunter-Henin, *supra* n 13, 27

⁸² ECtHR 26 September 1996 *Manoussakis and Others v. Greece*, 1996-IV, para 47; *SAS v France*, *supra* n 2, para 127.

longstanding principles? It seems difficult to understand how the protected religious practice of wearing the full-veil can be banned from the public space for the sole reason that it covers the face fully. Similar puzzlement arises at the way the Court carried out the proportionality test in its previous case of *Mouvement Raëlien Suisse v. Switzerland*.⁸³ In order to justify the Swiss ban against the display by the Raelien movement of its ideas by posters in the streets, the majority of the Court considered that the prohibition only targeted advertisement by posters. Because Raelien followers could still circulate their views via other means, notably on the group's website, the interference was held to be proportionate. As in *SAS*, the reasoning is flawed. The allegedly moderate ambit of the restriction proves nothing as to its inherent legitimacy. Besides, there is a deep contradiction in proclaiming the lawfulness of a particular group (Raelien movement) or practice (full-face covering) and then denying its expression because of the suspicions that they raise. As Judges Rozakis and Vajić pointed out in their dissenting opinion in the *Mouvement Raëlien* case, 'it seems difficult to understand how a lawful association with its website that is not prohibited cannot use public space to promote the same ideas through posters'. The ruling of proportionality in *Mouvement Raëlien* is therefore unjustified.⁸⁴ The same conclusion applies in respect of its ruling in *SAS*. As demonstrated in this paragraph, the ECtHR should have come to the conclusion that the French ban on the *burqa* caused a disproportionate interference with religious freedom. The same conclusion should have been reached by the Cour de cassation in *Baby Loup*.

⁸³ ECtHR 13 July 2012 *Mouvement Raëlien Suisse v. Switzerland*, Application no 16354/06.

⁸⁴ See Malcolm D Evans, 'Neutrality in and after *Lautsi v Italy*' in J Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, (Martinus Nijhoff, 2012), 327.

It is intriguing that the Cour de cassation in its plenary Chamber⁸⁵ could have –contrary to the Social Chamber’s first judgment–⁸⁶ considered that the restriction imposed by the *Baby Loup* nursery was a proportionate response. The restriction applied to all symbols, to all staff and to all activities undertaken by the nursery both within its premises and outside. The decisive factor for the ECtHR in *SAS* was not present either: the restriction in *Baby Loup* did not only target face-covering garments but applied to all religious manifestation, in all shapes and forms. The Court of cassation justified its position in light of the factors enumerated by the Court of Appeal of Paris, namely the fact that all 18 members of staff had contact with the children in the nursery’s care. Assuming for now that contact with children is a valid reason for abiding by strict religious neutrality requirements, one would question under the prism of proportionality requirements why intermittent contact with children should justify permanent restriction on religious manifestation. While a member of staff exclusively assigned to administrative tasks for example would it seems escape a *Baby Loup*-type restriction, personnel sharing their time between office work and childcare activities would still according to the Cour de cassation have to unveil at all times. The disproportion between the aim and the restriction is obvious. It is likely to be incompatible with both ECHR and EU requirements. In the absence of a preliminary reference made to the Court of Justice of the European Union, EU discrimination provisions seem less promising for the employee in this case⁸⁷ than ECHR protection. Despite the recent endorsement of the French policy of established unbelief by the ECtHR in *SAS*, it is indeed unlikely that *Baby Loup* would

⁸⁵ Cass Ass Plén 25 June 2014, supra n 3.

⁸⁶ Soc 19 March 2013, supra n 39.

⁸⁷ See, in general, in favour of the Luxembourg route, Erica Howard, ‘Protecting Freedom to Manifest one’s Religion or Belief: Strasbourg or Luxembourg’, 32(2) (2014) *Netherlands Quarterly of Human Rights* 159.

receive the same lenient approval in Strasbourg as the French ban on the *burqa* did. Many welcome aspects of the *SAS* judgment support this prediction.

III. HOPEFUL SIGNS

Despite its flawed legal basis and unconvincing use of proportionality and discrimination tests, the *SAS* judgment also contains positive elements. Its balanced approach contrasts with the blanket statements on religion by the Cour de cassation in its concomitant *Baby Loup* decision. Far from siding unreservedly with the French policy of unbelief, the *SAS* decision –as this section will show– thus paves the way for a more concrete and less confrontational method of resolution of future conflicts.

A. Balanced and Nuanced Reasoning

The French *Baby Loup* and ECtHR *SAS* decisions may share the same outcome (the endorsement of widely held views and the creation of an a-religious space) but their approaches differ significantly. The blanket assertions and abstract distinctions that characterize the French Cour de cassation's reasoning contrasts with the nuanced and balanced analysis adopted in the *SAS* judgment. The latter, as will be proven in this paragraph, is more conducive to an effective protection of individual freedoms and to a realistic assessment of the facts. The final Cour de cassation's decision in *Baby Loup* relies on a series of abstract distinctions and assumptions which may be summarized as follows: the nursery *Baby Loup* falls under the private side of the public/private law divide; the employee's claim relates to the freedom to manifest (rather than to hold) religious beliefs; the case raises a conflict between the employee's right to manifest her religious faith in the workplace and children's

freedom of conscience. Based on this dichotomous presentation, several conclusions followed. As an employer operating fully in the private sector, *Baby Loup* could not invoke *laïcité* but had to justify any restrictions on employees' religious freedoms in light of proportionality and anti-discrimination provisions. Because the restriction merely affected freedoms to manifest religious beliefs, leaving employees free to hold these religious beliefs, discrimination protection was then however side-stepped. Finally, because the manifestation of religion was said to conflict with children's freedom of conscience, the restriction imposed by the employer was held to be justified and proportionate. As demonstrated above, the public/private law divide may not be entirely convincing but the outcome it generated in *Baby Loup* is to be approved. The subsequent distinctions, assumptions and conclusions however are open to criticisms. The distinction between freedom of conscience and freedom to manifest one's beliefs results from the European Convention on Human rights. Article 9 grants a stronger protection to freedom of conscience –which is absolute– than to freedom of manifestation –which may be curtailed.⁸⁸ But this lesser protection granted to the visible side of religious freedom by no means warrants the denial of any protection, whether under the ECHR scheme or *a fortiori* under the EU anti-discrimination framework. The suggestion by the Procureur Général Monsieur Jean-Claude Marin in *Baby Loup*⁸⁹ that discrimination provisions should not apply at all therefore amounts to a blatant violation of discrimination law. Irrefutably, a measure that restricts religious manifestation may give rise to a challenge in discrimination law if it is motivated by an anti-religion agenda (or directed against a particular faith) or if

⁸⁸ On this distinction, see Robin Hopkins, 'Religious Liberty in British Courts. A Critique and Some Guidance', (2008) 49 *Harvard International Law Journal* 28, 35–36; Peter Petkoff, 'Religious Symbols between Forum Internum and Forum Externum in Canon Law and Public International Law', 7(3) (2012) *Religion and Human Rights* 183.

⁸⁹ Avis de M. le Procureur Général Jean-Claude Marin, Pourvoi n E13-28.369, 16 June 2014, 14, available at http://www.courdecassation.fr/IMG/Avis_PG_pleniere_140625ano.pdf [accessed 24 September 2014].

—despite its purest motives— it unevenly burdens people of a given faith group. That people may still be free to hold the beliefs whose expression is thus restrained is naturally no justification. If it were, religious manifestation would indeed no longer be protected at all. By relying on the distinction between the *forum internum* and *forum externum* as it did, the Cour de cassation was reflecting French suspicions towards the visible presence of religion in the public sphere, but unduly narrowed human rights and anti-discrimination protections.⁹⁰

In the third and final step of its reasoning the Cour de cassation opposed the employee's right to manifest her religious faith in the workplace to children's freedom of conscience. The Cour de cassation, following once more the Procureur Général's opinion on the case,⁹¹ took the view that respect for children's freedom of conscience and emerging individual beliefs⁹² postulated religious neutrality in educational settings. Naturally babies and toddlers will perceive differences and similarities; they will be able to notice that some women wear veils whilst others do not. They may even ask why nanny X in their nursery wears a veil. The presence of religious symbols may thus encourage their realisation of the surrounding cultural and religious diversity. But in what sense could this increased awareness be seen as conflicting with their freedom of conscience? Is it the contact with Islam or its possible impact on children that is a cause for concern? Or are the two intertwined? Can the wearing of ostentatious religious symbols thus amount in itself to proselytism? The ECtHR was inclined to think so in *Dahlab*⁹³ and in *Leyla Şahin*⁹⁴ where a (non-face concealing)

⁹⁰ See also criticizing this trend, the French National Consultative Committee on Human Rights – Commission nationale consultative des droits de l'homme CNCDH– Opinion on *laïcité* (avis sur la *laïcité*) of 9 October 2013, *Journal Officiel* 9 October 2013.

⁹¹ *Supra* n 91, 33.

⁹² Protected under article 14 of the Convention on the Rights of the Child of 20 November 1989, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [accessed 24 September 2014].

⁹³ ECtHR 15 February 2001 *Dahlab v. Switzerland*, Application n 42393/98.

⁹⁴ ECtHR 10 November 2005 *Leyla Şahin v. Turkey*, Application n App. no. 44774/98.

Islamic scarf⁹⁵ was described as ‘a powerful religious symbol for impressionable young children’⁹⁶ (...) ‘A symbol which is difficult to reconcile with the message of tolerance, respect for others and, above all, equality and non-discrimination.’⁹⁷ By being spared the sight of Islamic scarfs in their daily educational encounters with teachers and carers, young children would allegedly be strengthened in their emerging commitment to gender equality. In the case of *Ladele*,⁹⁸ individual religious freedoms were similarly presented as clashing with general national commitments to equality principles. In *Ladele*, a registrar employed by Islington Borough Council wished to be exempt from conducting same-sex civil partnerships. Ms Ladele claimed that her involvement offended her Christian beliefs while the UK Government alleged that had her exemption request been granted, British sexual orientation equality policies would have been undermined. The ECtHR held that there had been no violation of Convention rights as it considered that religious freedom in the workplace could legitimately be curtailed by state policies promoting equality. By analogy with *Ladele*, the Cour de cassation in *Baby Loup* could thus be seen as implicitly ranking religious freedom below other conflicting fundamental rights to equality (between men and women) and children’s freedom of conscience. On closer look however, the analogy with *Ladele* does not hold.. *Ladele* itself was not a clear-cut case of conflicting rights: if Ms Ladele clearly stood in opposition to the new British state policy of equality, this clash could not alone justify interferences with her individual religious freedoms. However strongly the majority feels about equality, infringements to individual religious freedoms cannot be justified by reference to majority values alone; it must meet the justification test set out under article 9(2). Could the

⁹⁵ Including non-face covering veils.

⁹⁶ *Dahlab v. Switzerland*, supra n 89.

⁹⁷ *Leyla Şahin v. Turkey*, supra note 90, para 13.

⁹⁸ ECtHR 15 January 2013 *Eweida and Others v UK*, Application no 51671/10.

interference with Ms Ladele's religious beliefs be justified for the sake of the rights of others, namely same-sex couples? It was possible to argue in *Ladele* that same-sex couples' dignity would be eroded if the State allowed a few of its agents to be exempt from conducting same-sex ceremonies.⁹⁹ Even if pragmatic arrangements could ensure that in practice no same-sex couple would be deprived of access to the public service, the accommodation of religious minority views hostile to homosexuality would inevitably taint the equality policy message and symbolically set same-sex couples apart. By contrast, it is not possible to ascertain what concrete or symbolic rights were infringed by the nanny's wearing of a *jilhab*¹⁰⁰. Parents and children attending the nursery were not treated any differently. The offense that the *jilhab* may have caused them does not fall under any protected convention rights. There is no right not to be exposed to beliefs that are different from one's own.¹⁰¹ Parents are entitled under article 2 Protocol 1 of the European Convention on Human Rights to have their children educated in accordance with their own beliefs and convictions. But parents cannot rely on article 2 Protocol 1 to demand that their children not be exposed to particular views simply because they do not share these views. They can, however, object to indoctrination of their children. Precisely, the Cour de cassation assumes in *Baby Loup* that the Islamic *jilhab* –hereby worn by a person of authority in contact with a vulnerable audience– necessarily carries such indoctrination effect. It is however submitted that such abstract assumptions are no longer in line with ECtHR's jurisprudence. The *SAS* judgment explicitly rejects attempts to ascribe unilateral abstract meanings to religious symbols. Symbols must be interpreted in context, in light of the wearer's particular motivations. In *SAS*, the Court thus brings in the

⁹⁹ Ronan McCrea, 'Religion in the Workplace: *Eweida & Others v UK*' (2013) 4 *Modern Law Review* 7.

¹⁰⁰ A long coat garment covering the whole body and the hair but leaving the face visible.

¹⁰¹ See Myriam Hunter-Henin, 'Law, Religion and the School', in S Ferrari (ed), *Handbook of Law and Religion* (Routledge, 2015), chapter 17.

claimant's personal reasons. Departing from its own prior case-law,¹⁰² the ECtHR in *SAS* does not project majority fears and prejudices onto a particular symbol but seeks to ascertain its meaning in real life.¹⁰³ The Court thus remarks that, contrary to majority perceptions there is no evidence that 'women who wear the full-face veil (...) seek to offend against the dignity of others' (para 120). The mere display of symbols cannot be equated to a violation of the rights of others. Even if the Court then goes on to do just that when it states that 'it is able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the rights of others to live in a space of socialisation which makes living together easier' (para 122), its careful analysis is to be praised. It encourages a dialogue between majority and minority views or at least allows a forum in which majority prejudices can be challenged and individual views expressed. Despite the mismatch between this balanced approach and the conclusion finally reached, the *SAS* decision may therefore open the way for a more factual evidence-based interpretation of majority/minority conflicts over the place of religion. Another cause for optimism lies in the restraints that surround the (disappointing) conclusion reached in *SAS*. In view of the limits attached to the outcome, it is likely that in other contexts, such as in a private nursery like *Baby Loup*, the ECtHR would be more attentive to minority views.

¹⁰² In *Dahlab v. Switzerland* (supra n 95), the Court had considered that 'it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect'.

¹⁰³ This subtle approach does make the outcome all the more surprising. As strongly noted by the dissenting judgment, (para 10) 'we cannot find that the majority have shown which concrete rights of others within the meaning of article 8(2) and article 9(2) of the Convention could be inferred from the abstract principle of living together or from the minimum requirements of life in society'.

B. A Restrained Support for the French Policy of Unbelief

Unlike its prior case-law where the ECtHR had seemed to endorse unquestionably the French State's policy of unbelief,¹⁰⁴ the *SAS* judgment attentively examines the French State's goals. This shift is to be approved. The parliamentary democratic process cannot grant a *blanc-seing* to majority decisions. Protection of human rights must occur –if need be– even against the beliefs of the majority. Otherwise human rights protection would become an empty shell. Many of the Court's statements in *SAS* underline this reality: 'a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position. (...) It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a democratic society' (para 128). Emphasizing the need to consider minority positions, the Court warns against the risks of passing legislation for the sake of responding to majority feelings of discomfort (para 149). Such scrutiny contrasts with prior cases involving religion in France. In the case of *Bayrak*,¹⁰⁵ the applicant challenged the decision by French school authorities to expel her from school after she had refused to remove her Islamic scarf (and then the cap she had started to wear in lieu of the scarf). The French government submitted that the decision was justified on the basis of the 2004 French law which, for the sake of *laïcité*, prohibits the display of ostentatious religious symbols in French state primary and secondary schools. The ECtHR not only took for granted the French government's statement that the 2004 law banning all ostentatious religious symbols in French state primary and secondary schools was necessary for the sake of secularism (under the concept of *laïcité*), it also refrained from carrying out any meaningful proportionality test between the aim allegedly

¹⁰⁴ See for example ECtHR 30 June 2009 *Bayrak v. France*, Application no 14308/08.

¹⁰⁵ *ibid.*

pursued (the protection of *laïcité*) and the infringement caused to the individual claimant.¹⁰⁶ Would an artificial appeal to the concept of *laïcité* thus always allow France to escape the Court's scrutiny? The *Bayrak* case led observers to think so. But the *SAS* judgement on the other hand suggests that abstract references to concepts will no longer be systematically upheld. In relation to gender equality, the ECtHR in *SAS* thus rejects the argument that the *burqa* necessarily oppresses women. Abstract assumptions about a practice cannot systematically prevail over its concrete individual meanings (para 119). It is self-defeating to purport to promote women's dignity and equality by prohibiting the autonomous personal decisions that some women make. Had *laïcité* been invoked in support of the ban, the ECtHR could similarly have queried how restrictive measures upon the presence of religion in French streets reinforced *laïcité*, i.e. the separation of the State and religion. The Court's inclination for a closer review indicates that should a challenge be raised against recent extreme applications of *laïcité*, a decision of violation could ensue. The recent extension of the French 2004 ban on conspicuous religious symbols from school children to parent helpers who take part in school outings could thus arguably be condemned.¹⁰⁷ At least such is the implication of the reasoning followed in *SAS*. But might the decision finally reached in *SAS* point to the opposite conclusion? If the minute scrutiny undertaken by the Court in *SAS* was not enough to lead to the conclusion that the ban on the *burqa* was unjustified and disproportionate, why would other instances of restrictions of religion not similarly be upheld? Why would a *Baby Loup*-type restriction then not meet a similar happy fate in Strasbourg?

In order to answer this question, it is necessary to examine in more depth why the ECtHR unexpectedly ruled that the French ban on the *burqa* did not violate article

¹⁰⁶ For a fuller analysis, see Myriam Hunter-Henin, *supra* n 104.

¹⁰⁷ See *supra* n 57.

8 or article 9 Convention rights. The Court's judgment seemed ineluctably to lead to a conclusion of violation. And yet the ECtHR held otherwise, finally giving more weight to the choice of society made by the French Parliament (para 153). The conclusion ultimately lies in the broad margin of appreciation granted to France. The margin of appreciation is a recurring notion in law and religion cases. Where an issue is particularly sensitive or contested amongst Member States of the Council of Europe, the ECtHR will be willing to confer a wide discretion on national authorities. In *SAS*, the Court thus notes that there is no European consensus against a ban (on the *burqa*). In law and religion cases, lack of consensus between Member States is often assumed to exist because of the diversity amongst Member States of Church/State arrangements. The ECtHR is not a Constitutional Court for Council of Europe Member States and is therefore careful not to decide for a particular form of Church/State arrangement across Europe.¹⁰⁸ **But no such sensitive constitutional dimension was at stake in *SAS*.** Taking the prohibitive stance against religious symbols outside of schools and targeting not just civil servants but any passer-by, the restrictions on individual religious freedoms under the French 2010 Act fall outside of the bounds of *laïcité*.¹⁰⁹ Unsurprisingly, the special committee set up in France to consider the issue of the wearing of the full veil had to admit that the concept of *laïcité* was not relevant to the discussion¹¹⁰ and the French government did not rely on the concept either in the text which led to the 2010 law or in its submissions to the ECtHR in the *SAS* case. Lack of consensus could therefore not derive from the diversity of constitutional national Church/State arrangements across Europe. It could

¹⁰⁸ See Rex Adhar and Ian Leigh, 'Post-Secularism and the European Court of Human Rights: Or how God never really went away', 75(6) *Modern Law Review* (2012), 1064.

¹⁰⁹ *Supra* n 13.

¹¹⁰ See *supra* n 22. See also, Report by the Conseil d'Etat, *Rapport sur les solutions juridiques d'interdiction du port du voile intégral* 25 March 2010, 17 JCP 2010, act 406, Comments by Anne Levade, 95.

not rely either, contrary to what the ECtHR has suggested, on the contested nature of the issue. In *SAS*, the ECtHR justifies the alleged lack of consensus by pointing to the unsettled nature of the issue of whether to ban the wearing of the *burqa*. It thus states that: The question of the wearing of the full-face veil in public is or has been a subject of debate in a number of European States. In some it has been decided not to opt for a blanket ban. In others, such a ban is still to be considered. It should be added that, in all likelihood, the question of the wearing of the full-face veil in public is simply not an issue at all in a certain number of Member States, where this practice is uncommon. It can thus be said that in Europe there is no consensus as to whether or not there should be a blanket ban on the wearing of the full-face veil in public places.

A legal consensus may indeed arise independently of concurring explicit norms in place. In the *Lautsi* case,¹¹¹ in which an atheist parent challenged the obligatory presence of crucifixes on the walls of the Italian state school her children attended, the fact that Italy was the only country in which legislation *mandated* the display of crucifixes in state schools did not imply, according to the ECtHR, a consensus against the presence of crucifixes in state schools. As a living instrument, the European Convention has to respond to the realities of European positions. The absence or presence of legislation regulating the crucifix question did not necessarily reflect the actual place given to the symbol in European state education. It is submitted that the non black-letter law approach adopted by the Court is an accurate way of measuring the existence or absence of a European consensus on a particular issue. But if the ECtHR in the *SAS* case was right in my view to similarly look beyond black-letter law in order to ascertain Member States' positions on the *burqa*, it erred in the interpretation it gave of current diverse national reactions. The ECtHR

¹¹¹ *Lautsi v. Italy*, supra n 66.

conceded that the question of the *burqa* was so novel that most Member States had not considered it yet or were still considering it. Should the conclusion not therefore have been that nothing could be inferred at this stage from European practice? The dissenting positions between Member States on the question did not reflect a divergence of opinions but merely the fact that most had not yet formed an opinion. It is therefore a misrepresentation to rely on the current so-called diversity to infer an absence of consensus and from there to grant a broad margin of appreciation to France. Interpreting the Convention as a living instrument does not imply that the Court can jump ahead of national positions and turn present undecided positions into a firm disagreement. The margin of appreciation should be triggered by existing divergence not the other way round. By upholding the French ban on the *burqa*, the Court is likely to encourage other Member States to regulate against the full-veil.¹¹²

¹¹² Since the release of the *SAS* decision, moves towards such a ban have occurred in Denmark ('Denmark may enact French *burqa* ban', *The Copenhagen Post* 2 July 2014, available at <http://cphpost.dk/news/denmark-may-enact-french-burqa-ban.10086.html>) [accessed 23 September 2014]; in Austria ('Austrian Freedom Party opposes "Islamification" of Europe', *The Local Austria's News in English*, 3 July 2014 available at <http://www.thelocal.at/20140703/fpo-poster-opposes-islamification-of-europe> [accessed 23 September 2014]; and, without accompanying fines, in some parts of Catalonia, Spain, 'City in Tarragona passes bylaw banning *burqas* and *niqabs* in public places', *El Pais* 18 July 2014, available at http://elpais.com/elpais/2014/07/18/inenglish/1405692247_040242.html [accessed 23 September 2014] or the whole of Catalonia, 'Spain: Catalonia to push for *niqab* ban after European approval of French ban', *Daily Mail* 18 July 2014, available at <http://www.dailymail.co.uk/news/article-2688602/Spain-s-Catalonia-region-push->

On novel issues, the Court does not stand above national positions, it contributes to forging them. The existence or absence of a European consensus should not therefore have played any role in the *SAS* decision.

Moreover should a broad margin of appreciation legitimately be recognised, it should not confer onto the respondent State a complete leeway in decision-making. As in *Lautsi*,¹¹³ the ECtHR in *SAS* seems to use the concept of margin of appreciation to justify a retreat of human rights protection in the light of intense political pressure. In an age of subsidiarity,¹¹⁴ the democracy-enhancing approach that the Court now seems keen to promote may help bring rights home¹¹⁵ and satisfy eternal questions as to the Court's legitimacy. The risk is however that in the most high profile cases, national choices will be allowed to trump individual human rights for the sole reason that they have stirred intense national debate and obtained domestic political support. Minority rights would then be at the mercy of political tactics. In *SAS*, the ECtHR adds another factor however to these political considerations: the important role of the face in social interaction (para 122).

The non-violation ruling in respect of the French *burqa* ban is thus unlikely to be extended to *Baby Loup*-type restrictions which apply to all religious garments – face and non-face concealing alike– and which reflect choices made by the employer rather than a national choice of society. The margin of appreciation and public political dimension that allow for such acknowledgment of French (majority) choices thus reassuringly preclude from transferring similar choices in purely horizontal

[ahead-burka-ban-following-EU-ruling-French-restrictions-legal.html](#) [accessed 23 September 2014].

¹¹³ *Supra* n 66.

¹¹⁴ Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487.

¹¹⁵ *Ibid* 491

relationships. Recent European case-law on religion in the workplace supports this view. In *Eweida*,¹¹⁶ the ECtHR seemed to suggest that purely private goals would not trump employees' right to religious freedom easily.¹¹⁷ The promotion of a particular company image for example could not justify restrictions on an employee's right to wear a cross. The classification of private nurseries on the private side of the divide, outside of the remit of *laïcité*, may not have had much impact on employees' freedom of religion before French Courts. It might prove decisive however before the ECtHR.

IV CONCLUSION

'The idea that a successful modern nation-state rests on a dominant culture that encodes shared values is now commonplace'.¹¹⁸

The existence of common values may be acknowledged but the question remains as to how far the promotion of shared values be reconciled with dissenting minority views. The two contemporary cases of *SAS v France* and *Baby Loup* shed lights on this delicate equilibrium. These ECtHR and French Cour de cassation cases share many features. They lead to the same outcome, the priority of common values over dissenting minority voices, and rely on the same questionable legal basis for doing so. Despite its vagueness and lack of legal content, the concept of living together serves in both cases as a justification for curtailing religious individual freedom. On the other hand, both the ECtHR and the Cour de cassation resist the temptation to extend *laïcité* beyond its natural limits and reassert the requirements of

¹¹⁶ *Eweida and Others v. UK*, supra n 100.

¹¹⁷ ECtHR 15 January 2013 *Eweida and Others v. UK*, Application nos 48420/10; 59842/10; 51671/10 and 36516/10, where the Court upheld restrictions on rights to freedom of religion which pursued a state policy of equality (*Ladele and McFarlane* cases) but held that a restriction mandated for the sake of a company uniform's policy was disproportionate (*Eweida* case).

¹¹⁸ Talal Asad, 'Trying to Understand French Secularism' in H de Vries and LE Sullivan (eds), *Political Theologies: Public Religions in a Post-Secular World* (Fordham University Press, 2006) 495.

necessity and proportionality before an interference with religious freedom can be justified. Both Courts however then go on to enforce those requirements very leniently.

Despite this common approach on many issues, namely the endorsement of the concept of living together; the side lining of *laïcité* and a loose proportionality test, this article has argued that the Cour de cassation and the ECtHR are not on the same page. The leniency of the ECtHR is –almost with regret– a concession to the strong political support gathered in France behind the *burqa* ban and the extreme concealing nature of the garment. Moreover, where the French courts apply abstract labels to religion and human dignity, the ECtHR refrains from any sweeping statements and prefers an individually focused approach. Where the French Courts sow the seeds for further relegations of religion, the ECtHR is insistent that the full-face veil ban is the only acceptable limit. As a result it is submitted that if a *Baby Loup*-type case were to be challenged in Strasbourg, it would not be upheld. France has exhausted its allowance in *SAS*. On closer look therefore, the suggestion¹¹⁹ that ‘secularism inexorably develops into a commitment to actively pursue a policy of established unbelief’ is thus given only indirect support in *SAS*. This semi-support generates, as has been shown, many ambiguities: whilst secularism is not discussed, its unifying force is nevertheless endorsed; whilst the State realm is absent from the equation, French Republicanism remains (wrongly) predominant in the discourse. Finally, whilst the ECtHR announces a thorough legal review of the French ban, its conclusion accepts that legal norms may mirror social preferences without any investigation as to the legitimacy of these social preferences.

¹¹⁹ *Supra* n 1.

Beyond French borders and French secularism, it has been argued that the *SAS* case carries important methodological consequences for law and religion cases across Europe. On the positive side, the *SAS* displays a novel balanced fact-sensitive approach to assessing the meanings of religious symbols such as the *burqa* and the impact of restrictive measures on individuals wishing to wear them. It has been submitted that this empirical assessment of religious minority claims avoids the two absolute unsatisfactory alternatives of dissolving common values or silencing dissenting religious minority claims altogether.¹²⁰ On the negative side, however, many arguments developed by the ECtHR in *SAS* are, I have argued, circular. It seems for example difficult to understand how the protected religious practice of wearing the full-veil can be banned from the public space for the sole reason that it covers the face fully: other specific justifications for such a ban would need to be established by evidence. In respect of the margin of appreciation, the acknowledgment of the choice of society made by the French Parliament also begs the question.¹²¹

It is therefore to be hoped that, in future cases, the ECtHR will both confirm its novel nuanced and fact-sensitive approach and change its current use of proportionality tests and unconvincing appeal to the margin of appreciation doctrine or to the concept of living together. The Court should take proportionality tests more seriously and resort to the margin of appreciation doctrine more cautiously. Instead of ‘blurring the standards to be met by those seeking to limit the enjoyment of rights’,¹²² by a dubious recourse to political and sociological considerations, the Court would thus ensure greater clarity and fairness in law and religion cases across Europe.

¹²⁰ For a presentation and a criticism of these two absolute alternatives, see Ayelet Shachar, ‘Demystifying Culture’, (2012) 10(2) *International Journal of Constitutional Law* 429.

¹²¹ As demonstrated by Niels Petersen, ‘Avoiding the Common-Wisdom Fallacy: The role of social sciences in constitutional adjudication’ (2013) 11(2) *International Journal of Constitutional Law* 294, 310: ‘we cannot derive limitations of the court’s competence from the greater legitimacy of the legislature, as this begs the question’.

¹²² Julian Rivers, ‘The Presumption of Proportionality’ (2014) 77(3) *Modern Law Review* 409.

