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Majority Rule and Human Rights: Identity and Non-Identity in *S.A.S. v France*

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Abstract

This article considers the July 2014 decision of the European Court of Human Rights in S.A.S v France *in which the court upheld the legality of a ban on the wearing of the burqa and niqab in public places. Exploring the connection between* S.A.S *and a related trend of deference to the will of the national community in the court's jurisprudence, it relies on Joseph Slaughter's work to argue that the decision is best explained on the basis of what Theodor Adorno termed 'identity thinking' which, in a human rights context, involves the conceptualisation of human identity as something existing in and defined by the community rather than the individual. Drawing on the work of Franz Neumann, Otto Kirchheimer and Peter Mair, the article reflects on the social and political function of the ECtHR in the light of* S.A.S. *and argues for an alignment between international human rights practice and the 'non-identity thinking' that Adorno advocated.*

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Introduction

In *S.A.S. v France* the Grand Chamber of the European Court of Human Rights ('ECtHR') decided that France's prohibition on the wearing of face coverings in public did not violate the rights of a French Muslim woman who wore the niqab and burqa for religious, cultural and personal reasons.[1] The court preferred '"the rights and freedoms of others"' to her rights because 'the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier'.[2]

Much recent commentary presents the decision as inconsistent with international human rights doctrine.[3] Rejecting these claims, I argue that the better view, grounded in an appreciation of the fundamental connection between international human rights doctrine and what Theodor Adorno labelled 'identity thinking',[4] is that the decision is consistent with and, indeed, the product of international human rights doctrine as reflected in the ECtHR's jurisprudence.

Drawing on Joseph R. Slaughter's work I argue that international human rights doctrine is founded on an understanding of individuals as existing in and identified with a particular, national community, rather than as individuals *qua* individuals.[5] Consistent with this foundation, and contrary to the received wisdom that '[o]ne of the reasons human rights law exists is to ensure that individual lifestyle choices are protected from majoritarian policies or populist infringement',[6] international human rights doctrine recognises that national majorities and the governments who purport to speak on their behalf are entitled

[1] (2015) 60 EHRR 244.
[2] Ibid, 290 (paras. 121 and 122).
[3] See, for example, S Berry, 'SAS v France: Does Anything Remain of the Right to Manifest Religion? <http://www.ejiltalk.org/author/sberry/>; H Yusuf, 'S.A.S. v France: Supporting "Living Together" or Forced Assimilation?' (2014) 3(2) International Human Rights Law Review 277-302, available at <https://pure.strath.ac.uk/portal/files/39350802/Yusuf_IHRLR_2014_S_A_S_v_France_Supporting_Living_Together_or_Forced_Assimilation.pdf>; J Adenitire, 'SAS v France: Fidelity to Law and Conscience' 2015(1) European Human Rights Law Review 78; J Adenitire, 'Has the European Court of Human Rights recognized a legal right to glance at a smile?' (2015) 131 Law Quarterly Review 131 43; J Marshall, 'S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities' 2015 15(2) Human Rights Law Review 377; M Hunter-Henin 'Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS' (2015) 4(1) Oxford Journal of Law and Religion 94, at 96-97 and 99-100.
[4] T W Adorno *Negative Dialectics* (Continuum 2007, originally published 1966) 149 translates the original German as 'identitarian thinking'; G Rose, *The Melancholy Science: An Introduction to the Thought of Theodor W. Adorno* (Verso 2014, originally published 1978) 57 prefers 'identity thinking'.
[5] J R Slaughter, *Human Rights, Inc: The World Novel, Narrative Form, and International Law* (Fordham University Press 2007).
[6] Marshall (n 3) 387.

to regulate the terms in which a non-identical individual presents their identity in the community.[7] Reading international human rights doctrine in this way, the ECtHR's decision in *S.A.S.* can, in a purely doctrinal sense, be seen as correct and consistent with a long-established trend of deference to community will in the court's jurisprudence.

In place of the critique of *S.A.S.* in the existing literature and its assumption that international human rights doctrine prioritises the individual over the community this article reflects on the social and political function of the ECtHR, drawing on the work of Peter Mair, Franz Neumann and Otto Kirchheimer. Linking Mair's, Neumann's and Kirchheimer's work with Adorno's thought, it concludes with an argument for an alignment between international human rights practice and 'non-identity thinking'.[8]

Identity thinking and international human rights doctrine

Identity thinking involves the assumption that any individual can be identified with someone or everyone else.[9] From this perspective legal processes and methods force everyone to identify with the(ir) community. Individuals are not the same as everyone else but law strives to make them so in pursuit of order, dealing with its inevitable failure to capture the individual's complexity by insisting that individuals live according to a legally prescribed identity.[10]

Barter involves one thing being exchangeable for another despite them being non-identical and 'it is through barter that non-identical individuals and performances become commensurable and identical':[11]

[7] Marshall, ibid, notes '[i]n a liberal democracy, human freedom to develop one's own personality, as the person concerned sees fit, will thrive when people are not in fear of the consequences of wearing items of clothing. Thus that particular person is in control and empowered, as much as he or she can be in a social environment, of any decisions they take', but maintains that the individual *qua* individual is protected by human rights doctrine. See also J Marshall, 'The Legal Recognition of Personality: Full-Face Veils and Permissible Choices', (2014) 10 International Journal of Law in Context 64.

[8] Adorno (n 4) does not use 'non-identity thinking', preferring 'negative dialectic' – see Adorno (n 4) 146-151 - but – see Rose (n 4) 57 – that has become the standard term.

[9] Adorno (n 4) 5: 'To think is to identify.'

[10] Ibid 309: 'In law the formal principle of equivalence becomes the norm; everyone is treated alike … For the sake of an unbroken systematic, the legal norms cut short what is not covered … The total legal realm is one of definitions … These bounds, ideological in themselves, turn into real violence as they are sanctioned by law as the socially controlling authority.'

[11] Adorno (n 4) 146.

'[t]he spread of the [barter] principle imposes on the whole world an obligation to become identical'.[12] Thought ignores 'its own contradiction' as it glosses over the impossibility of a total knowledge or explanation of the world, emphasising the sense in which one person is like another whilst ignoring the sense in which they are not.[13]

Because thinking necessarily involves some measure of identity Adorno advocates non-, rather than anti-, identity. Non-identity thinking accepts that individuals can be known to an extent, that there is a degree of sameness between individuals, whilst recognising the difference or non-identity between individuals.[14] It aims to mitigate the violence involved in the subjection of the non-identical to a dominant identity by treating thought as inherently incomplete and partial.[15] Whilst from the perspective of non-identity thinking thought and, by extension, law, offer partial and incomplete representations of the individual,[16] identity thinking insists on complete knowledge of the individual, forcing individuals to accept and identify themselves with the way they are conceptualised and known by others through legal processes:

> After the unspeakable effort it must have cost our species to produce the primacy of identity even against itself, man rejoices and basks in his conquest by turning it into the definition of the conquered thing: what has happened to it must be presented, by the thing, as its "in-itself." [17]

[12] Ibid.
[13] Ibid 148: 'Identity is the primal form of ideology. We relish it as adequacy to the thing it suppresses; adequacy has always been subjection to dominant purposes and, in that sense, its own contradiction.'
[14] Ibid p. 5: 'The name of dialectics says no more, to begin with, than that objects do not go into their concepts without leaving a remainder, that they come to contradict the traditional norm of adequacy. Contradiction … indicates the untruth of identity, the fact that the concept does not exhaust the thing conceived'; 'Dialectics is the consistent sense of non-identity … My thought is driven to it by its own inevitable insufficiency, by my guilt of what I am thinking.'
[15] T Adorno and M Horkheimer *Towards a New Manifesto* (Verso 2011) 71: 'True thought is thought that has no wish to insist on being in the right'; T Adorno, *Minima Moralia: Reflections from Damaged Life* (Verso 2005, originally published in 1951): 'The whole is the false'; T W Adorno and M Horkheimer, *Dialectic of Enlightenment* (Verso 1997, originally published 1944) 244-5: 'The proposition that truth is the whole turns out to be identical with its contrary, namely, that in each case it exists only as a part.'
[16] W Benjamin, *The Origin of German Tragic Drama* (Verso 1998, originally published 1963) 28: 'If philosophy is to remain true to the law of its own form, as the representation of truth and not as a guide to the acquisition of knowledge, then the exercise of this form – rather than its anticipation in the system – must be accorded due importance.'
[17] Adorno (n 4) 148.

> The ideological side of thinking shows in its permanent failure to make good on the claim that the non-I is finally the I: the more the I thinks, the more perfectly it will find itself debased into an object. Identity becomes the authority for a doctrine of adjustment, in which the object – which the subject is supposed to go by – repays the subject for what the subject has done to it.[18]

The subject or thinker 'conquers' and identifies the object he thinks about by compelling her to live as his 'definition of the conquered thing', his definition of her.

Identity thinking – the assumption of a communal, rather than individual, identity – is, as Slaughter shows, written into the foundations of international human rights doctrine in the Universal Declaration of Human Rights (UDHR),[19] and the common foundations of the UDHR and ECHR are reflected in the ECHR's preambular assertion that it 'take[s] the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'. Article 1 ECHR situates every individual within a state – '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the [convention's] rights and freedoms' – and Article 19 defines the ECtHR's role as 'ensur[ing] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the protocols thereto'. When assessing the 'observance of the engagements undertaken by the High Contracting Parties' the ECtHR will, therefore, at least to an extent, defer to the state because the ECHR, like the UDHR, understands the individual as situated in a national community.[20]

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[18] Ibid.

[19] Slaughter (n 5) 17: '"personality" is not the thick, multi-faceted differential category of individual identity and self-expression contemplated in psychology and popular culture (although it inevitably has something to do with those). It is not the name of individual, irreducible difference but of sameness, the collection of common modalities of the human being's extension into the civil and social order. "Personality" is a technical term that means the quality of being equal before the law – to put it tautologically, the quality of being a person'; Slaughter (n 5) 20: 'One of the multiple meanings of incorporation comprehended in my title, *Human Rights, Inc*, is the notion that human personality development is a process of socialization, a process of enfranchisement into "those social practices and rules, constitutional traditions and institutional habits, which bring individuals together to form a functioning political community"' (footnote omitted).

[20] Ibid 90: 'The UDHR's solution to this perennial Enlightenment problematic [individual vs state] is to pair the individual and society in a dialectical relation in which the human personality is both the product and engine of their interaction ... international human rights law imagines an idealistic reconciliation of its two primary subjects in which individual and social demands become fully congruent through the mechanics (or aesthetics) of the democratic state'.

Adopting Slaughter's analysis of the UDHR's text, Article 29 provides: 'Everyone has duties to the community in which alone the free and full development of his personality is possible.'[21] UDHR Article 6 builds on this, asserting the universality of legal personhood: 'Everyone has the right to recognition everywhere as a person before the law'.[22] Human rights law requires everyone to be a part of 'the[ir] community' as a means of ensuring that everyone discharges their 'duties to the[ir] community', the chief duty to the community being the 'free and full development of [their own] personality'. It is through this 'free and full development' within 'the community' that a person comes to be, and to be recognised as, 'a person before the law'; personhood and identity in law are equated with being *in* the community.

The development of individual personality outside of the community and in a way that precludes a person's recognition by the community, on the community's terms, as a person is incompatible with international human rights law's concept of human personality. Whilst '[t]he preamble [to the UDHR] initially treats the human personality as if it were an innate aspect of the human being' – through, for example, references to the 'inherent dignity and … equal and inalienable rights of all members of the human family' (quoting from the UDHR's preamble) – 'the [UDHR's] articles describe it as an effect of human rights – the product of contingent civil, political, social, cultural, and economic formations and relations'.[23] This reflects the linkage between human rights law and the *Bildungsroman*, the broad theme of Slaughter's book:

> although the law … presumes that the individual's narrative capacity and predisposition are innate and equally shared by all human beings everywhere, the particular forms in which the will to narrate finds expression are inflected and normalized by the social and cultural frameworks in which the individual participates … precisely through the incorporative process of freely and fully developing the human personality.[24]

[21] See ibid 61 on Article 29.
[22] See ibid on Article 6.
[23] Ibid 61.
[24] Ibid 40.

Slaughter argues that human rights law mirrors the structure of the *Bildungsroman*, a 'literary form … whose plot we could provisionally gloss as the didactic story of an individual who is socialized in the process of learning for oneself what everyone else (including the reader) presumably already knows'.[25] 'Everyone has the right to recognition everywhere as a person before the law', but 'the law' conceives of 'everyone' on the community's terms, with the result that judicial legal reasoning tends to prefer the community's concept of human personality or identity when faced with a non-identical individual.[26]

The story of *S.A.S.* and the related, broader trend of deference to community will in the ECtHR's jurisprudence is, in a sense, a *Bildungroman* in which the individual is 'socialized' by being made to '[learn] for [themselves] what everyone else … already knows'. This article tells that story.

Identity thinking and the ECtHR's *S.A.S.* judgment

French legislative history

In April 2011 a French law, passed in October 2010, entered into force banning the concealment of a person's face in a public place: 'No one may, in public places, wear clothing that is designed to conceal the face.'[27] The legislative history begins in January 2010 with the publication of a parliamentary report that described the wearing of the full-face veil as '"a practice at odds with the values of the Republic"'.[28] The report proposed a variety of measures, including legislation 'guaranteeing the protection of women

[25] Ibid 3.
[26] See P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer 1990, 2nd edition) 605: 'The Commission and the Court appear to follow in many cases what might be called a *raison d'état* interpretation: when they weight the full enjoyment of the rights and freedoms on the one hand and the interests advanced by the State for their restriction on the other hand. They appear to be inclined to pay more weight to the latter'; on a related point see P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer 1998, 3rd edition) 93: 'a mere reference to the margin of appreciation of national authorities without any further elucidation cannot be sufficient to justify the conclusion that there has been no violation … the Court has on some occasions, after referring to the margin, been very sparse in substantiating its approach … It may be doubted whether the Court will ever completely unveil the reasons for all choices of judicial policy that it makes'; and for a more positive assessment, which, nevertheless, recognises the predominance of state interests, see A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 225: 'The margin of appreciation doctrine can have the desirable effect of encouraging an increasing number of states to submit to international judicial review, as those states observe the Tribunals giving appropriate deference to states' interpretations of their international human rights obligations.'
[27] *S.A.S.* (n 1) 254 (para. 28).
[28] Ibid 249-250 (paras. 16-17).

who were victims of duress',[29] whilst noting a lack of 'unanimous [parliamentary] support for the enactment of a law introducing a general and absolute ban on the wearing of the full-face veil in public places'.[30]

In March 2010, following a request from the Prime Minister, the Conseil d'État advised against a ban on the full-face veil because 'such a ban would be legally weak and difficult to apply in practice'.[31] It proposed legislation that would target those 'who forced others to hide their faces and conceal their identity in public places' and prohibit the wearing of anything preventing identification where identification was necessary in connection with 'certain formalities', 'to safeguard public order' or to control 'access to or movement within certain places'.[32] In May 2010 the National Assembly passed a resolution '"on attachment to respect for Republic values at a time when they are being undermined by the development of radical practices"', labelling the 'wearing of the full veil' a 'radical [practice] undermining dignity and equality between men and women … [that is] incompatible with the values of the Republic'.[33] The resolution '[a]ffirm[ed] that the exercise of freedom of expression, opinion or belief cannot be relied on by anyone for the purpose of flouting common rules, without regard for the values, rights and duties which underpin society', and '[s]olemnly reaffirm[ed] … attachment to respect for the principles of dignity, liberty, equality and fraternity between human beings'.[34]

In May 2010 the government introduced a bill, which became the law of October 2010, to prohibit the concealment of the face in public places.[35] The bill's explanatory memorandum noted '"France is never as much itself … [as] when it is united around the values of the Republic: liberty, equality, fraternity … [values which] guarantee the cohesion of the Nation … underpin[ing] the principle of respect for the dignity of individuals and for equality between men and women'.[36] The memorandum claimed that 'the wearing of the full veil is the sectarian manifestation of a rejection of the values of the Republic', adding

[29] Ibid 250 (para. 17).
[30] Ibid.
[31] Ibid 251 (para. 22).
[32] Ibid (para. 23).
[33] Ibid 251-2 (para. 24).
[34] Ibid.
[35] Ibid 252 (para. 25).
[36] Ibid.

'[t]he voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of "living together" in French society', 'falls short of the minimum requirement of civility that is necessary for social interaction', 'clearly contravenes the principle of respect for the dignity of the person', and represents 'a conspicuous denial of equality between men and women'.[37] The memorandum denies the possibility of being an outsider in society by affirming 'the very principles of our social covenant … which prohibit the self-confinement of any individual who cuts himself off from others whilst living among them'.[38]

The Presidents of the National Assembly and Senate referred the legislation to the Constitutional Council who declared the measure constitutional with the caveat that '"prohibiting the concealment of the face in public places cannot … restrict the exercise of religious freedom in places of worship open to the public"'.[39] The Cour de Cassation, giving judgment in a criminal case involving the prosecution of a woman for wearing a full-face veil during a protest against the ban outside the Élysée Palace, affirmed the ban's legality on the basis that "'it seeks to protect public order and safety by requiring everyone who enters a public place to show their face"'.[40]

Whilst the ban prohibits the wearing of face coverings in public places without targeting the burqa and niqab by name it is clear that this is its intent. The explanatory memorandum resonates with the language of a French state united by its opposition to an outsider – indeed, when the memorandum declares that '"France is never as much itself … [as] when it is united around the values of the Republic"' it is clear that France's unification takes place through the othering of Muslim women who wear the burqa and niqab.[41]

[37] Ibid 252-3 (para 25).
[38] Ibid 253 (para. 25).
[39] Ibid 255 (para. 30).
[40] Ibid 260 (para. 34).
[41] C Schmitt, *The Concept of the Political* (Rutgers University Press 1976) 45: 'To the state as an essentially political entity belongs the *jus belli*, i.e., the real possibility of deciding in a concrete situation upon the enemy and the ability to fight [her] with the power emanating from the entity.'

The prevalence of tautology, understood in Slaughter's terms as 'the basic rhetorical and legislative form of obviousness – of truths held to be self-evident', in the legislative history is striking.[42] Vague phrases pepper the reports and memoranda – 'the values of the Republic', 'dignity, liberty, equality and fraternity', 'the values, rights and duties which underpin society' – reflecting the sense in which 'tautology is culturally constitutive – the corporate "everyone" [or insider], who already knows [what the words mean], is to some degree incorporated by that knowledge, by the extent to which a tautology is (or comes to be) compelling cultural common sense'.[43] The community is re-enforced and made real by the 'culturally constitutive' tautologies of the legislative process.[44] '"France is never as much itself…[as] when it is united around the values of the Republic"' – united by phrases whose meaning is apparent only to those who think they already know what those phrases mean; united in opposition to Muslim women who, by wearing the burqa and niqab, supposedly demonstrate that they do not know what those phrases mean; united in a shared sense that those women must, therefore, be taught what those phrases mean by being made to live in conformity with them, compelled to live as France's 'definition of the conquered thing'.[45]

The ECtHR's reasoning in *S.A.S.*

The ECtHR regarded the case as 'mainly rais[ing] an issue with regard to the freedom to manifest one's religion or beliefs [under Article 9]',[46] notwithstanding its conclusion that 'personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his or

[42] Slaughter (n 5) 77.
[43] Ibid 78; See Schmitt (n 41) 30: 'even more banal forms of politics appear, forms which assume parasite- and caricature-like configurations. What remains here from the original friend-enemy grouping is only some sort of antagonistic moment, which manifests itself in all sorts of tactics and practices, competitions and intrigues; and the most peculiar dealings and manipulations are called politics. But the fact that the substance of the political is contained in the context of a concrete antagonism is still expressed in everyday language'.
[44] Schmitt (n 41) 30-31: 'all political concepts, images, and terms have a polemical meaning … Words such as state, republic, society, class, as well as sovereignty, constitutional state, absolutism, dictatorship, economic planning, neutral or total state, and so on, are incomprehensible if one does not know exactly who is to be affected, combated, refuted or negated by such a term' (footnotes omitted).
[45] Adorno (n 4) 148; See also the quotation from Slaughter (n 5) at n 25.
[46] *S.A.S.* (n 1) 287 (para. 108).

her personality and thus fall within the notion of private life [under Article 8]'.[47] The court found an interference with Article 8 and 9 rights because the applicant faced a choice between dressing in accordance with her religious beliefs and complying with French criminal law.[48] The interference was clearly '"prescribed by law"' so the question was whether the ban pursued a legitimate aim and was '"necessary in a democratic society"'.[49]

The French government argued there were two legitimate aims – 'public safety and "respect for the minimum set of values of an open and democratic society"' – linking the second of these aims to 'three values': 'respect for equality between men and women, respect for human dignity and respect for the minimum requirements of life in society'.[50] The court held that the impact of a 'blanket ban' on the applicant could 'be regarded as proportionate only in a context where there is a general threat to public safety' and, in the absence of any such 'general threat', the ban was disproportionate and not 'necessary, in a democratic society, for public safety'. [51]

Turning to '"respect for the minimum set of values of an open and democratic society"', the court noted that neither that aim nor the 'three values' referred to by the French government ('equality', 'human dignity', 'minimum requirements of life in society') are referred to in Articles 8 or 9.[52] The court acknowledged that a prohibition on anyone forcing a woman to conceal their face 'pursues an aim which corresponds to the "protection of the rights and freedoms of others"' but found that the argument could not be turned on its head 'in order to ban a practice that is defended by women … such as the applicant' because 'individuals [cannot] be protected … from the exercise of their own fundamental rights and freedoms'.[53] Similarly, the court concluded that 'respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places'.[54]

[47] Ibid 286 (para. 107).
[48] Ibid 287 (para. 110].
[49] Ibid 287 (para. 111).
[50] Ibid 288 (paras. 114 and 116).
[51] Ibid 294 (para. 139).
[52] Ibid 288 (para. 114 and 116).
[53] Ibid 289 (para.119).
[54] Ibid (para. 120).

The court found, however, that 'under certain conditions … "respect for the minimum requirements of life in society" … – or of "living together" … can be linked to the legitimate aim of the "protection of the rights and freedoms of others"', in the context of 'the right of others to live in a space of socialisation which makes living together easier', describing the burqa and niqab as a 'barrier raised against others … concealing the face'.[55] This, it seems, is a right for the majority in a national community not to see visual evidence of cultural or religious traditions with which they are not associated; a right to live in a 'pure' cultural-aesthetic community free from images that the majority regards as 'other':[56]

> [The court] can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.[57]

For the ECtHR 'the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society', [58] a question the national community is legally entitled to answer on the basis of a concept of identity in community and by 'consensus', and not a question which the individual is legally entitled to answer on the basis of their self-defined identity.

The ECtHR's assertions that 'democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position',[59] and that 'the role of the authorities … is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each

[55] Ibid, 289-290 (paras. 121- 122).
[56] See M Hunter-Henin, 'Why the French Don't Like the Burqa: *Laïcité*, National Identity and Religious Freedom' (2012) 61 International and Comparative Law Quarterly 613, 628: 'Has the protection of public policy turned into the protection of the conformity of appearances?'
[57] *S.A.S.* (n 1) 289-290 (para. 122).
[58] Ibid 296 (para.153).
[59] Ibid 291 (para. 128).

other',[60] ring hollow. The gap between this muted defence of a tolerant, pluralistic democracy and the forced assimilation of a Muslim woman into a French society of visible faces is bridged in two ways. First, by the right to cultural-aesthetic purity, noted above, and, second, by the 'margin of appreciation', with the court explaining that it has a 'duty to exercise a degree of restraint in its review of Convention compliance', that 'in matters of general policy … the role of the domestic policy-maker should be given special weight', and that 'France [therefore has] a wide margin of appreciation'.[61]

In their partial dissent Judges Nussberger and Jäderblom argue that 'there is no right not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the traditional French and European life-style'.[62] They cite the court's insistence in its freedom of expression jurisprudence that the expression of '"opinions … that offend shock and disturb"' is just as protected as the expression of opinions that meet with a more favourable response,[63] and reject the court's implication of a right 'to enter into contact with other people, in public places, against their will' because 'the right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places – the right to be an outsider'.[64]

'[A] [woman] must show what she has to sell'

Alain Badiou, writing about the 2004 French ban on the wearing of headscarves and other religious symbols in schools, declares 'the [2004] law on the headscarf' to be 'a pure capitalist law' because '[i]t prescribes that femininity be *exhibited* … that the circulation of the feminine body necessarily comply with the market paradigm. It forbids on this matter … all *holding back*'.[65] Badiou asks 'isn't business the

[60] Ibid (para. 127).
[61] Ibid 296-97 (para. 154-155).
[62] Ibid 299-300 (para OI-7).
[63] Ibid.
[64] Ibid (para. OI 7–OI-8).
[65] A Badiou, 'The Law on the Islamic Headscarf' in *Polemics* (Verso 2011) 98, 103.

really big religion?',[66] echoing the connection between identity thinking and a commodified, marketised society suggested in Adorno's linkage of '[t]he barter principle' with 'the principle of identification'.[67]

The 'outsider' who chooses to limit or deny interaction with others is anathema in today's 'space of socialisation', just as the protectionist state, detached from the global market and resistant to trade with the outside world, is anathema in a world of free-trade, foreign investment, convertible currencies and, it seems, convertible people. Being someone is equated with being part of the community, visible to others, to such an extent that 'a girl [or woman] *must* show what she has to sell. She must show what she's got to offer. She must indicate that hereafter the circulation of women shall obey the generalized model, and not a restricted economy'.[68] There is no right to be yourself if being yourself implies non-identity, barriers to trade, or departure from 'the generalized model'. Every individual is compelled to participate in a common space or mutual contract of exchange, 'barter[ing]' themselves with others on the basis of a communal identity.

In cases like *S.A.S.* involving tension between the community's concept of identity and an individual's presentation of a non-identical identity in the community, international human rights doctrine will compel an individual to exist in accordance with their community's 'civil, political, social, cultural, and economic formations and relations' because,[69] as discussed above, international human rights doctrine understands individuals as existing in and identified with a particular, national community. To say that there is no such thing as Judges Nussberger and Jäderblom's 'right to be an outsider' is, therefore, an understatement. A 'right to be an outsider' is anathema to an international human rights doctrine built on the concept of identity in community.

I therefore disagree with Myriam Hunter-Henin when she describes the court's emphasis on 'living together' as '[a] flawed legal basis',[70] with Hakeem Yusuf when he says that '[t]here is no solid legal or

[66] Ibid 101.
[67] Adorno (n 4) 146; Slaughter (n 5) 34-39 considers the linkage between corporations, the market and human rights.
[68] Badiou (n 65) 102.
[69] Slaughter (n 5) 61.
[70] Hunter-Henin (n 3) 96.

moral justification for imposing the will (real or imagined) of the majority',[71] and with Jill Marshall when she states that the court's approach is 'in opposition to rights enshrined in human rights law'.[72] These statements assume that the individual has priority over the community in international human rights doctrine when the opposite can be seen to be the case.

S.A.S. in context: The pre-*S.A.S.* cases

Religious dress and identity

Identity thinking pervades and explains pre-*S.A.S.* ECtHR decisions on Islamic and religious dress and identity. In these cases the ECtHR recognises that national majorities and the governments who purport to speak on their behalf are entitled to regulate the terms in which an individual presents their identity in the community, prefiguring what is described in *S.A.S.* as 'the right of others to live in a space of socialisation which makes living together easier'.[73]

In *Dahlab v Switzerland*, decided in 2001, the court rejected a primary school teacher's challenge to a prohibition on her wearing a headscarf in school.[74] For the Swiss Federal Court her headscarf was 'a powerful religious attribute' which, despite the absence of complaint from parents or pupils, 'may have interfered with the religious beliefs of her pupils, other pupils at the school and the pupils' parents'.[75] The ECtHR concluded that the authorities had not overstepped the margin of appreciation in balancing 'the need to protect pupils by preserving religious harmony' with the applicant's rights, labelling the headscarf 'a powerful external symbol' that 'appears to be imposed on women [and] … is hard to square with the principle of gender equality'.[76]

[71] Yusuf (n 3) 11 (page reference is to weblink version of article referenced in n 3).
[72] Marshall (n 3) 389.
[73] *S.A.S.* (n 1) 290 (para. 122); See S Juss, 'Burqa-bashing and the Charlie Hebdo Cartoons' (2015) 26(1) King's Law Journal 27, 34: 'the ECtHR … is reluctant to go against the interests of the state … it is not difficult to see how we get to SAS. Not only is it very much a continuation of past tendencies in the ECtHR, it is a hardening of them'.
[74] Application No. 42393/98, unreported, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22643#{"itemid":["001-22643"]}>
[75] Ibid 4.
[76] Ibid 13.

In *Leyla Sahin v Turkey*, decided in 2005, the Grand Chamber upheld a ban on the wearing of the headscarf in Turkish universities.[77] It found it 'understandable that the relevant authorities should wish to preserve the secular nature of the institution' in a 'context, where the values of pluralism, respect for the rights of others, and, in particular, equality before the law of men and women are being taught and applied in practice'.[78] Endorsing the emphasis in the Chamber's judgment on '"the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts"',[79] the Grand Chamber concluded that Turkey had not exceeded its margin of appreciation.[80]

In *Lautsi v Italy* the Grand Chamber rejected a challenge to the presence, pursuant to government policy, of a crucifix in every Italian state-school classroom.[81] The applicants argued that the presence of a crucifix violated their rights under Article 9 and Article 2, Protocol No.1.[82] Treating Article 2, Protocol No. 1 as 'the *lex specialis*',[83] the court held that Italy enjoyed a 'wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals'.[84] The Grand Chamber overruled the Chamber's conclusion that the crucifix, like the headscarf, is a '"powerful external symbol"'.[85] In *Dahlab* the court described the headscarf as 'a powerful external symbol' that created a 'need to protect pupils by preserving religious harmony' but in *Lautsi* it described the Christian crucifix as 'above all a religious symbol' that 'is not associated with compulsory teaching about Christianity'.[86] Despite the lack of complaint in *Dahlab* from any parent or pupil, the court concluded that 'it cannot be denied outright that

[77] (2007) 44 EHRR 99.
[78] Ibid 129 (para. 116).
[79] Ibid 128-29 (para. 115).
[80] Ibid 130 (paras.121-2).
[81] (2012) 54 EHRR 60.
[82] Ibid 74 (para. 29); ECHR, Art. 2, Protocol No. 1: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'
[83] *Lautsi* (n 81) 83 (para. 59).
[84] Ibid 84 (para. 61).
[85] Ibid 87-8 (paras. 73-4).
[86] Ibid 85 and 87 (paras. 66 and 74).

the wearing of a headscarf might have some kind of proselytizing effect',[87] but in *Lautsi* the court regarded 'a crucifix on a wall' as 'an essentially passive symbol'.[88]

The court makes assumptions to match the position of the state appearing before it. In *Dahlab* the court feels no need for evidence to support the conclusion that the headscarf may have a 'proselytizing effect'. It is not prepared to make a similar assumption regarding the crucifix in *Lautsi* due to a lack of evidence 'that the display of a religious symbol on classroom walls may have an influence on pupils'.[89] These are not evidence based conclusions. Compatibility of the relevant symbol with the majority, community, government view of national history and culture dictates the outcome in both cases. Under cover of the margin of appreciation the court bends it reasoning and its assessment of the evidence to suit the state in what can be seen as an effort to facilitate 'living together' on the majority's terms.[90]

In *Ahmet Arslan v Turkey*, decided in 2010, the court found violations of the applicants' Article 9 rights.[91] Whilst the finding of a violation in this case appears inconsistent with the image presented thus far of an ECtHR deferential to community will, the decision is a limited exception to the deferential trend which leaves the trend intact.

The applicants were convicted of offences relating to the wearing of religious clothing in public pursuant to Turkish legislation passed in 1925 and 1934 that prescribed the wearing of a brimmed hat, prohibited the wearing of a fez or other style of religious headgear and banned religious dress in public.[92] The ECtHR emphasised that the applicants were in a public street rather than a public institution as in *Leyla Sahin* at the relevant time, and that there was no evidence that their conduct threatened public order

[87] Dahlab (n 74) 13.
[88] *Lautsi* (n 81) 87 (para. 72).
[89] Ibid 85 (para. 66).
[90] See C Evans, 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7 Melbourne Journal of International Law 52, 54): 'The two cases [*Dahlab* and *Sahin*] … demonstrate the extent to which the Court was prepared to rely on government assertions about Islam and the wearing of headscarves – assertions that were not substantiated by any evidence or reasoning.'
[91] Application No. 41135/98, unreported, available at <http://hudoc.echr.coe.int/eng#{"itemid":["001-97380"]}> (in French).
[92] Ibid 4 (paras. 20-21); On the laws of 1925 and 1934 see: Y Doğaner (2009) 'The Law on Headdresses and Regulations on Dressing in the Turkish Modernization', (2009) 51 Bilig: Journal of the Social Sciences of the Turkish World 33, 38 and 43; W C Durham, D M Kirkham, and C Scott (eds), *Islam, Europe and Emerging Legal Issues* (Ashgate 2012) 122, footnote 26.

or exerted pressure on others.[93] The Turkish government defended the 1925 and 1934 legislation on the general basis that it sought to preserve a secular Turkish Republic.[94] In contrast with the French government's position in *S.A.S.* there was no suggestion of a recent national debate, a pressing social issue, or a widely supported national policy on religious dress in public places. The divergent outcomes in *Ahmet Arslan* and *S.A.S* are explained by this contrast. The bar that a state needs to clear to avoid the finding of a violation by the ECtHR is low but eighty year-old legislation, with no clearly demonstrated connection to current community will, will not suffice.

Following *Ahmet Arslan* and the enactment of the French ban, but before the judgment in *S.A.S.*, some commentary suggested that the ECtHR, applying *Ahmet Arslan*'s narrow margin of appreciation, would conclude that bans on the burqa and niqab in public violated Article 9.[95] Such suggestions treat the margin of appreciation as substantive and determinative when it seems more appropriate to treat the doctrine as a reflection of the identity thinking on which international human rights doctrine is founded.

Myriam Hunter-Henin separates community will and the state's political programme from international human rights doctrine, noting '[t]he risk … that in the most high-profile cases [like *S.A.S.*] 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'.[96] The suggestion that 'intense national debate' and 'domestic political support' are irrelevant when assessing human rights compliance is, as a matter of doctrine, misconceived. Because international human rights doctrine understands individuals as existing in and identified with a particular national community, rather than as individuals *qua* individuals, the majority within a national community have the 'trump' card when deciding how a non-identical individual may present their identity in the community and the ECtHR applies the margin of appreciation to reflect this. In *Ahmet Arslan* the ECtHR finds a violation of Article 9 because there was no particularly compelling argument that the criminalisation of wearing religious dress in public by historic

[93] *Arslan* (n 91) para. 49.
[94] Ibid para. 26.
[95] See B Rainey, E Wicks and C Ovey (eds.) *Jacobs, White & Ovey: The European Convention on Human Rights* (Oxford University Press 2014, 6th edition 419); Hunter-Henin (n 56) 636-8.
[96] Hunter-Henin (n 3) 116-17.

legislation was supported by current community will. It finds no violation in *S.A.S.* because of a clearly and recently expressed community will. The margin of appreciation is not a fixed test applied consistently across the cases but a synonym for the concept of identity in community; a legal means of allowing the relevant national community rather than the ECtHR to decide.[97]

This analysis explains the finding of an Article 9 violation in *Eweida v United Kingdom*.[98] Of the four applicants in the case only one was successful. The claims of a Christian nurse prevented from wearing the cross in the course of her employment, a Christian civic registrar dismissed because she refused to carry out civil partnership ceremonies due to her belief in exclusively male / female marriage, and a Christian relationship counsellor dismissed because of reservations about counselling same sex couples, each having brought unsuccessful domestic proceedings against their employers, failed. In the case of the nurse the ECtHR reasoned that 'the domestic authorities must be allowed a wide margin of appreciation' because 'hospital managers were better placed to make a decision about clinical safety than a court'.[99] In the registrar's case it held that the avoidance of discrimination against same-sex couples was a legitimate aim, rejecting the claim because '[t]he Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights'.[100] The court dealt with the relationship counsellor's claim on the basis that '[t]he State authorities … benefitted from a wide margin of appreciation in deciding where to strike the balance between [the applicant's] right to manifest his religious belief and the employer's interest in securing the rights of others'.[101]

Only Ms Eweida was successful. Employed by British Airways ('BA') as a member of check-in staff, until May 2006 she had worn the cross under her uniform. In May 2006 she started to wear the cross outside her clothing following a change of uniform. BA insisted that she comply with the uniform policy by concealing or removing the cross and offered her alternative work, which did not involve contact with

[97] For something close to a defence of this understanding of the margin of appreciation, see D McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65(1) International and Comparative Law Quarterly 21.
[98] (2013) 57 EHRR 213.
[99] Ibid 248 (para. 99).
[100] Ibid 248-49 (paras. 105-106).
[101] Ibid 250 (para. 109).

customers, pending resolution of the dispute. Ms Eweida refused the alternative work and BA eventually changed its uniform policy, allowing Ms. Eweida to return to her original post wearing the cross openly. Her ECtHR claim concerned the loss of earnings in the period in which she refused to accept alternative work.[102] The domestic courts dismissed her claim, rejecting the argument that there had been a violation of Article 9.[103] For the ECtHR 'the domestic courts accorded … too much weight' to 'the employer's wish to project a certain corporate image' and, 'there [being] … no real evidence of any real encroachment on the interests of others [by the applicant wearing the cross], the domestic authorities failed sufficiently to protect [Ms Eweida's] … right to manifest her religion'.[104]

The ECtHR's decision involves mild criticism of a domestic court decision and, by implication, the employment practices of a large corporation, but avoids criticism of public authorities – local councils and hospital authorities. Had *Eweida* involved UK legislation limiting the wearing of the cross, analogous to the ban on the burqa and niqab in *S.A.S.*, the court would probably not have found a violation.[105]

The ECtHR will defer to clear and current community will on the basis of a wide margin of appreciation (see *Dahlab*, *Leyla Sahin* and *Lautsi*). Violations may be found if the expression of community will is felt to be unclear, particularly where the legislation is historic (see *Ahmet Arslan*). Violations may also be found where the ECtHR concludes that a domestic court has failed to strike the right balance, particularly where private or commercial interests are involved (*Eweida*). The court will not, however, review the merits of legislation or policy reflecting *current* community will at the instigation of an individual applicant because doing so would, in conflict with international human rights doctrine's understanding of the individual as existing in and identified with a particular national community, imply that the individual exists outside the(ir) national community.

[102] Ibid 219-220 (paras. 9-13).
[103] Ibid 220-221 (paras. 14-17).
[104] Ibid 246-47 (paras. 94-95).
[105] M Hunter-Henin, 'Religion, Children and Employment: The Baby Loup Case' (2015) 64 International and Comparative Law Quarterly 717, 728-9) draws a distinction between the ECtHR's analysis of decision-making by a 'public authority' and decision-making by a 'private employer' in *Eweida* and related cases.

This analysis applies to *Thlimmenos v Greece*.[106] The applicant, a Jehovah's witness and, consequently, a conscientious objector, was convicted of insubordination in 1983 after refusing to serve in the Greek army.[107] Because of that conviction, and on the basis of legislation excluding those convicted of a felony,[108] in 1989 he was refused admission to the profession by the Greek Institute of Chartered Accountants.[109] The applicant claimed that his exclusion from the profession breached his Article 9 right to manifest his religious beliefs and his Article 14 right to non-discrimination in the enjoyment of convention rights.[110]

The court found a violation of Article 14, rejecting the government's argument that 'persons who refuse to serve their country must be appropriately punished' because 'there [was] no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony'.[111] In reaching this conclusion the court criticised the state directly:

> it was the state … which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 … by failing to introduce appropriate exceptions to the rule barring persons convicted of a felony from the profession of chartered accountants.[112]

Whilst, at first glance, this looks like a review of the merits of legislation it needs to be seen in context. The court finds that the legislation governing admission to the profession should have made a distinction between those convicted of felonies and those convicted of felonies relating to the manifestation of their religion. That finding needs to be linked to the fact that in 1997 Greek law was changed to allow conscientious objectors to undertake civilian rather than military service and to allow those, like the applicant, who had been convicted of insubordination to apply to have their conviction deleted from the

[106] (2001) 31 EHRR 411.
[107] Ibid 416 (para. 7), 421 (para. 34).
[108] Ibid 418 (paras. 14-16).
[109] Ibid 416 (para. 8).
[110] Ibid 421 (para. 33) and 425 (para. 50).
[111] Ibid 424-5 (paras. 47-9).
[112] Ibid 425 (para. 48).

records on the basis of retrospective recognition as a conscientious objector.[113] The applicant did not apply for retrospective recognition, claiming to have been unaware of the relevant three month time limit,[114] but all parties accepted that the 1997 law could not have disposed of his claim because it did not provide for the payment of reparations.[115]

The ECtHR effectively applied the 1997 law and extended its logic to offer the applicant reparation.[116] The applicant should not, according to the court, have been barred from the profession because of a conviction related to his manifestation of a religious belief, something implicitly accepted by the 1997 law and its mechanism for deleting the criminal convictions of conscientious objectors.

Seen in this light, *Thlimmenos* is not a case in which the ECtHR reviews the merits of domestic legislation reflecting current community will but a case in which the ECtHR effectively applies current domestic legislation to address what the community itself, through that legislation, has come to recognise as a past injustice.

The court's jurisprudence in general

Consistent with the analysis in the preceding section, and beyond the limits of cases concerned with religious dress and identity, across its jurisprudence the court refrains from reviewing legislation or policy that is perceived to reflect current community will whilst being willing to find a violation where no connection between the legislation or policy in question and current community is apparent.

In *Dudgeon v United Kingdom*, decided in 1981, the applicant, who was gay, claimed that the criminalisation of sex between men in Northern Ireland in Acts of Parliament passed in 1861 and 1885 breached his Article 8 right to private and family life and his Article 14 right to non-discrimination in the enjoyment of convention rights.[117] Sex between men had been decriminalised in all other parts of the

[113] Ibid 419 (para. 24).
[114] Ibid 420 (para. 30).
[115] Ibid (para. 29).
[116] Ibid 427-29 (paras. 64-74).
[117] (1982) 4 EHRR 149, 151 (para. 14), 160 (para. 37), 169 (para. 65).

United Kingdom and,[118] assuming the finding of a breach of Article 8 and consequent reform to bring the law in Northern Ireland into line with the rest of the UK, the applicant argued that the difference in the ages of consent for gay and straight people – 21 for the former, 18 for the latter – breached Article 14.[119]

In 1977, as part of a government review, the Standing Advisory Commission on Human Rights recommended decriminalisation in light of 'evidence from a number of persons and organisations, religious and secular'.[120] The government decided, however, '"to take no further action … [whilst] be[ing] prepared to reconsider the matter if there were any developments in the future which were relevant"' in light of the 'substantial division of opinion' in Northern Ireland revealed in a consultation exercise.[121] Before the ECtHR the government did not defend the substantive merits of the legislation but argued that 'the moral climate in Northern Ireland', read in the context of controversy surrounding '"direct rule" from Westminster' in place of devolved government in Belfast, meant that it had 'a special responsibility to take full account of the wishes of the people of Northern Ireland before legislating'.[122] The court, nevertheless, found a violation of Article 8, noting that attitudes had changed since the passing of the legislation in the mid-nineteenth century, with 'the great majority of the member-States of the Council of Europe' having decriminalised sex between men.[123] It found that no prosecutions had been brought in Northern Ireland concerning consensual sex between men aged over 21 'in recent years' and that there was '[n]o evidence' of any resultant '[injury] to moral standards … or … public demand for stricter enforcement of the [existing] law'.[124] The court was at pains to emphasise that it was not questioning the difference in the age of consent for gay and straight people throughout the UK,[125] reaching the discriminatory conclusion that 'vulnerable members of society, such as the young' required protection

[118] Ibid 152-54 (paras. 17 and 18).
[119] Ibid 169 (para. 65).
[120] Ibid 155 (para. 23).
[121] Ibid 156-57 (paras. 25-26).
[122] Ibid 166 (paras. 57 and 58).
[123] Ibid 167 (para. 60).
[124] Ibid.
[125] Ibid 169 (para. 66).

'against the consequences of homosexual practices' in order to safeguard the '"rights and freedoms of others"' and ensure the '"protection of … morals"'.[126]

Community will in Northern Ireland on the criminalisation of sex between men as reflected in the evidence received by the Standing Commission, the response to the government's consultation exercise, the lack of prosecutions, and the lack of protest against the lack of prosecutions, was ambiguous, and the government was not in a position to argue that criminalisation in Northern Ireland was substantively 'necessary in a democratic society' given decriminalisation elsewhere in the United Kingdom. Seen in this context, *Dudgeon* is not the result of a substantive review of policy or legislation reflecting current community will but a finding of a violation in circumstances where no clear community will in support of historic legislation was discernible. As such, the decision is analogous to *Ahmet Arslan*, discussed above.

This analysis of *Dudgeon* applies equally to the 1988 decision in *Norris v Ireland*.[127] Mr Norris challenged 'the existence' of Irish laws, dating back to 1861, which made sex between men a criminal offence.[128] He had not been charged with or investigated for an offence nor was there any evidence of recent prosecutions for 'homosexual activities'.[129] The Irish government did not argue that current community will supported the legislation but that '[r]espect must … be afforded to [a] transitional period during which certain laws fall into disuse'.[130] Applying *Ahmet Arslan*-type logic, the court found a violation of the article 8 right to private and family life as no current community supporting the legislation was apparent.[131]

In *Hatton v United Kingdom* the ECtHR's Grand Chamber refused to engage in any detailed review of the government's policy or its policy-making process, preferring the government's presentation of the UK economic interest in retaining night flights at Heathrow airport to the applicants' interest, protected under Article 8, as residents living near to Heathrow, in having a good night's sleep free from the disturbance of

[126] Ibid 163 (para. 47).
[127] (1991) 13 EHRR 186.
[128] Ibid 187-190 (paras. 8-14).
[129] Ibid 187-9 and 192 (paras. 8-11 and 20).
[130] *Norris v Ireland*, Report of the European Commission of Human Rights, 12 March 1987, <http://hudoc.echr.coe.int/eng#{"languageisocode":["ENG"],"appno":["10581/83"],"itemid":["001-45392"]}>, para. 42.
[131] *Norris* (n 127) (paras. 42, 43 and 46-7).

aircraft noise.[132] In its 2001 judgment the Chamber found a violation of Article 8 on the basis of a detailed review of government policy on night flights.[133] It noted that the UK government had not fully and properly assessed the economic importance of night flights to the UK economy and that no research into 'sleep prevention' (not being able to get back to sleep after being woken by noise) had been undertaken.[134] In 2003 the Grand Chamber set these criticisms aside and found no violation of Article 8 on the basis of favourable assumptions about the government's policy-making process: 'the Court considers it reasonable to assume that [night] … flights contribute at least to a certain extent to the general economy'.[135] The Chamber's approach, in a departure from the general trend, suggests an understanding of the applicants as individuals *qua* individuals but the Grand Chamber reverts to type, preferring an approach which understands the individual as existing in and identified with a national community whose collective (economic) interests, as interpreted by the government, prevail.

Even the ECtHR's recent prisoner voting judgments, often interpreted as evidence of a court determined to override domestic law and government policy,[136] can be seen to involve only light-touch supervision which does little to disturb the court's general deference to domestic legislation and policy. As Ed Bates explains, whilst some aspects of the *Hirst* and *Frodl* judgments suggest a high degree of ECtHR control over domestic legislation and policy – in particular the suggestion in *Hirst v United Kingdom* and explicit statement in *Frodl v Austria* that a specific judicial decision, rather than legislation of general application, was required to disenfranchise a prisoner [137] – other cases, including *Greens and*

[132] (2003) 37 EHRR 611; Former ECtHR judge Loucaides – in L G Loucaides, 'Reflections of a Former European Court of Human Rights Judge on his Experiences as a Judge' (July 2010), accessible at <www.errc.org/article/roma-rights-1-2010-implementation-of-judgments/3613/8> – cites *Hatton* as an example of the ECtHR's 'reluctance to find violations in sensitive matters affecting the interests of the respondent States' (see p. 3 for quote). (Juss (2015, p.28) refers to Loucaides on *Hatton*.
[133] (2002) 34 EHRR 1.
[134] Ibid, 25 (paras. 101-3).
[135] *Hatton* (n 132) 643 (para. 126).
[136] For discussion see E Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14(3) Human Rights Law Review 503.
[137] *Hirst* (2006) 42 EHRR 849, 867 and 869 (paras. 71 and 77) – on which see Bates (n 136) 509; *Frodl v Austria* (2011) 52 EHRR 267; see also *McHugh and Others v UK*, Application No 51987/08, unreported <http://hudoc.echr.coe.int/eng#{"itemid":["001-151005"]}>, reaffirming *Hirst* and finding a violation of the Article 3, Protocol 1 ECHR rights of 1015 prisoners in view of the UK's continuing 'blanket' ban on prisoner voting.

M.T. v United Kingdom and *Scoppola v Italy,*[138] have moderated the position.[139] In *Scoppola* the Grand Chamber rejected, as incompatible with Article 3, Protocol 1, any 'disenfranchisement [that] affects a group of people generally, automatically and indiscriminately based solely on the fact that they are serving a prison sentence, irrespective of the length of the sentence and irrespective of the nature or gravity of their offence and their individual circumstances',[140] whilst leaving it to individual states to 'decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied'.[141]

Whilst the ECtHR has defined the parameters within which states may legislate to disenfranchise prisoners those parameters exclude only absolute and indiscriminate disenfranchisement.[142] The prisoner voting cases do not suggest an ECtHR prepared to review or reject the expression of current community will. In these cases the ECtHR is seeking the expression of community will on the implementation of convention rights, as indicated in *Hirst*: 'it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote'.[143]

More broadly, the prisoner voting cases are consistent with the court's concern, expressed throughout the jurisprudence reviewed above, to respect community will. On 4th August 2016 85,112 people are imprisoned in the United Kingdom.[144] Not all of them will be eligible to vote but, on the assumption that many of them are, the exclusion of anything like that number would significantly affect the will expressed

[138] *Greens* (2011) 53 EHRR 710; *Scoppola* (2013) 56 EHRR 663.
[139] Bates (n 136) 505-518.
[140] *Scoppola* (n 138) 681 (para. 96)
[141] Ibid 682 (para. 102).
[142] See Bates (n 136) 518: 'following *Hirst* (or the version of that case endorsed by the Grand Chamber [in *Scoppola*] in 2012) Strasbourg still required observance of a minimum European standard – a rights-based approach to convicted prisoner voting in some form – but made it very clear that the model could be very basic and that the boundaries for reform within which the UK had to work really were wide'.
[143] *Hirst* (n 137) 869 (para. 79).
[144] Data from http://www.howardleague.org/weekly-prison-watch/ (as at 4 August 2016).

by the community through democratic processes.[145] If the prisoner voting cases reflect a higher standard of review compared to the cases discussed above this is explained by the fact that the court is, in fact, seeking to protect the expression of community will. The logic of the *S.A.S.* and prisoner voting judgments is one of inclusion in and identification with the community. In *S.A.S.* this leads to a finding in France's favour and in some of the prisoner voting cases – notably *Hirst* – that same logic leads to the finding of a violation.

The court's deference to current community will is apparent in numerous other significant cases. In *Ireland v United Kingdom* (1978) and *Brannigan and McBride v United Kingdom* (1993) the court deferred to the UK government on the question of whether an Article 15 'public emergency threatening the life of the nation' existed and, consequently, found that the arbitrary detention of the applicants did not violate Articles 5 (right to liberty and security) or 6 (right to a fair trial).[146] In *Balmer-Schafroth* (1997) the court rejected an Article 6 challenge to the Swiss government's decision to extend the length of a nuclear power plant's operating license in the face of objections from local residents who claimed that the plant was unsafe because the residents, despite their proximity to the station, 'did not … establish a direct link between the operating conditions of the power station … and their right to protection of their physical integrity'.[147] In *Refah Partisi* (2003) the court upheld the Turkish constitutional principle of secular government without any real review of the Turkish constitutional order, rejecting the applicants' challenge to the banning of their political party because it rejected that principle and declaring 'sharia … incompatible with the fundamental principles of democracy, as set forth in the Convention.'[148]

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[145] See *Frodl* (n 137) 274 (para. 24): 'any conditions imposed [on voting] must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates.'

[146] *Ireland* (1979-1980) 2 EHRR 25; *Brannigan* (1994) 17 EHRR 539; See M B Dembour, *Who Believes in Human Rights: Reflections on the European Convention* (Cambridge University Press 2006) 38: 'Article 15 is an area of the Convention where the Strasbourg institutions have granted states a wide margin of appreciation', 48: 'The granting to states of a wide margin of appreciation in respect of Article 15 has meant that the Court has refrained in practice from undertaking a factually close and theoretically strict analysis of the situation', and, in general on *Ireland* and *Brannigan*, 47-49.

[147] *Balmer Schafroth v Switzerland* (1998) 25 EHRR 398, 615 (para. 40).

[148] *Refah Partisi v Turkey* (2003) 37 EHRR 1, 44 (para. 123); I wrote about the inadequacies of the court's decision in *Refah Partisi* in 'Walter Benjamin and the Re-Imagination of International Law' (2016) 27(1) Law and Critique 103, 114–15.

Taken together, the cases considered in this and the preceding section evidence a trend in the ECtHR's jurisprudence consistent with the identitarian logic of international human rights doctrine and determinative of the outcome in *S.A.S.*; as a general rule the court will defer to current community will as evidenced in domestic legislation or policy.

European democracy

International human rights doctrine and the ECtHR's jurisprudence employ a superficial concept of participatory democracy that assumes a direct connection between community will, government policy, and legislation. That concept supplies the rationale for deferring, in cases like *S.A.S.*, and under cover of 'a wide margin of appreciation', to the state on questions of what is 'necessary in a democratic society'.

Peter Mair's recent book, *Ruling the Void: The Hollowing of Western Democracy*, suggests there may be good reason to question the connection between a national community and legislation passed in its name.[149] Mair depicts a European 'kind of democracy without the demos at its centre' in which 'the people, or the ordinary citizenry, are becoming effectively *non*-sovereign' as '[political] parties and their leaders exit from the arena of popular democracy'[150] Participation in elections has dropped markedly across Western Europe in the post-Cold War era – participation in the 2007 French parliamentary elections, for example, 'fell to a new record low of 60.4 per cent'.[151] Whilst 'the trend is not wholly unidirectional', 'the more recent the elections, the more likely they are to record troughs in participation'.[152] Political parties no longer target particular groups or interests, preferring to address the entire electorate: 'political competition has come to be characterized by the contestation of socially inclusive appeals in search of support from socially amorphous electorates'.[153] Politics becomes an exercise in 'theatre and spectacle', a kind of '"video politics"' as citizens are designed out the process, 'change[d] from participants into spectators, while the elites win more and more space in which to pursue

[149] P Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013).
[150] Ibid 9, 2 and 90.
[151] Ibid 26.
[152] Ibid 27 and 28-29.
[153] Ibid 57.

their own particular interests'.[154] Politics and governance become not so much exercises in reflecting pre-existing community will in legislation as of manufacturing a community and its will through legislation; former French President Sarkozy's announcement, in a 2009 state of the nation address, that the burqa 'will not be welcome on our territory' seems the perfect example.[155] Opposition to an outsider or 'enemy', in the form of Islamic cultural, religious and aesthetic practices, is, then, a potential rallying point for Western European politicians in search of a power base.[156]

Liberalism and assimilation

The apparent affinity between international human rights doctrine, the ECtHR's jurisprudence and the assimilation of a non-identical individual into the community has roots that extend beyond legal doctrine and into the social, political, and philosophical connection between 'liberal theory', its '[assumption] of a unity among men that is already in principle established', and the use of law's 'force' to secure the 'order' or 'harmony of a national community'.[157] Social 'order … in reality cannot exist without distorting [wo]men'.[158] Liberalism's assumption of an individual whose identity and personality depends on the broader community creates a national, liberal-democratic order that constrains individuality by force. Identity thinking is the means to secure order and ensure that individuals identify with the(ir) community.

In *Dialectic of Enlightenment* Theodor Adorno and Max Horkheimer, taking the German Third Reich as their example, consider the conditions that lead to the demise of critical, reflective judgment. They argue that the Third Reich was not a deviation from enlightenment rationality but a hideous hyper-extension of enlightenment thought.[159] An insistence on the subordination of everything and everyone to

[154] Ibid 44 and 98.
[155] See D Carvajal, New York Times, 'Sarkozy Backs Drive to Eliminate the Burqa', 22 June 2009, <http://www.nytimes.com/2009/06/23/world/europe/23france.html?_r=0>
[156] Schmitt (n 41) 46: 'The endeavor of a normal state consists above all in assuring total peace within the state and its territory. To create tranquillity, security, and order and thereby establish the normal situation is the prerequisite for legal norms to be valid. Every norm presupposes a normal situation, and no norm can be valid in an entirely abnormal situation. As long as the state is a political entity this requirement for internal peace compels it in critical situations to decide also upon the domestic enemy' (paragraph break suppressed).
[157] Adorno and Horkheimer, *Dialectic* (n 15) 169-170.
[158] Ibid 170.
[159] Ibid 176: 'The alliance between enlightenment and domination has cut the link between the aspect of truth in religion and the consciousness, and has retained only the objectified forms of religion. This is a dual benefit for the Fascists: uncontrolled

social control, produced by a fear of the 'outside', created the conditions for the Third Reich.[160] No effective opposition to National Socialism in Germany was possible because enlightenment thought had created a climate of technical control in which individuals lacked critical subjectivity because they were required to identify with the system, the community.[161] For Adorno law is as much a part of this problem as any other aspect of society; it claims to control the world and everything in it and, in the process, it denies the possibility of non-identity, of individual, critical judgment.[162]

Concerned by the Third Reich's incorporation of legal thought into the state machine, Franz Neumann, in *Behemoth*, contrasts 'general', 'formal' law applied by an independent judiciary, with National Socialist '[i]nstitutionalism', 'a juristic structure serving the common good', 'an integrated system of community law'.[163] Law, as a set of norms applied by judges exercising their own judgment, is overthrown by the rule of power.[164]

In a similar vein, Otto Kirchheimer contrasts the process of liberal-democratic adjudication with '[t]he bureaucracy of fascism'.[165] 'The law courts of a competitive society serve as umpires to regulate the conditions of competition' but under fascism every aspect of the state, 'judicial, administrative and police alike … executes and smooths the path for the decisions reached by the political and economic monopolies'.[166]

Legal controls to safeguard the freedom of the individual and her existence 'independent' from society are required because '[t]he democratic majority may violate rights' and '[a] wrong cannot possibly become right because the majority wills it so' – indeed '[p]erhaps it,

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longing is channelled into nationalistic rebellion, and the descendants of the evangelistic fanatics are turned … into sworn members of blood brotherhoods and elite guards; religion as an institution is partly embodied in the system and partly converted into mass culture.'

[160] Ibid 16: 'Enlightenment is mythic fear turned radical … Nothing at all may remain outside, because the mere idea of outsideness is the very source of fear.'

[161] See ibid 197-98.

[162] Adorno (n 4) 309: 'Law is the primal phenomenon of irrational rationality. In law the formal principle of equivalence becomes the norm; everyone is treated alike …. For the sake of an unbroken systematic, the legal norms cut short what is not covered, every specific experience that has not been shaped in advance'.

[163] F Neumann, *Behemoth: The Structure and Practice of National Socialism* (Victor Gollancz 1942) 361-2, 366.

[164] Ibid 373-74.

[165] O Kirchheimer, 'The Dual State: A Contribution to the Theory of Dictatorship by E. Fraenkel' (1941) 56(3) Political Science Quarterly 434, 436.

[166] Ibid.

thereby, becomes a greater wrong'.[167] Kirchheimer rejects the 'totalitarian judicial functionary' who 'guess[es] what would be the safest, that is, immediately most desirable, interpretation from the viewpoint of the authorities',[168] in favour of the idea of the judge as a constitutional adjudicator: 'the Western judge's policy directive, unlike that of his totalitarian colleague, does not come from explicit or intuitive communion with a party hierarchy [but] … from his own reading of the community needs, where lies its justification as well as its limitation'.[169]

The ECtHR's deference to community will, exemplified in *S.A.S.* and consistent with a long-established trend in the court's jurisprudence, is on the wrong side of the line Neumann and Kirchheimer draw, reflecting the demise of the critical, reflective judgment Adorno and Horkheimer advocate. *S.A.S.* is a stark reminder that the reactionary oppression of a minority can be compatible with, and is a latent but inherent possibility in, liberal democracies and human rights systems founded on identity in community.

Non-identity thinking and legal practice

The existing literature on *S.A.S.* and religious dress and identity before the ECtHR either, as discussed above, assumes that the individual has priority over the community or accepts and endorses the concept of identity in community and its implications for the non-identical outsider.

Ronan McCrea offers an example of this latter tendency.[170] He argues that '[t]he strongest justification for laws prohibiting the wearing of the veil in public are based on a vision of the individual in society and the duties that are incumbent upon us all when we place ourselves in public places shared with others' and that '[t]he individual who will not hold back from expressing their religious convictions … can arguably be accused of seeking to take tolerance from pluralist societies without offering reciprocal tolerance for those who do not share their faith'.[171] Accepting and incorporating

[167] F Neumann, 'On the Limits of Justifiable Disobedience' in F Neumann (H. Marcuse ed.), *The Democratic and the Authoritarian State: Essays in Political and Legal Theory* (Free Press 1957) 149, 156.
[168] O Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton University Press 1961) 425.
[169] Ibid 429.
[170] R McCrea, 'The Ban on the Veil and European Law' (2013) 13 *Human Rights Law Review* 57.
[171] Ibid 78 and 96.

majority rule and identity thinking into international human rights law in this way deprives the ECtHR of any meaningful jurisdiction over states. States become judges in their own cause as the court defers to community will except in cases where there is no clear connection between current community will and the challenged legislation (*Ahmet Arslan*; *Dudgeon; Norris; Thlimmenos*), where the court's deference to community will is challenged by legislation which has the effect of excluding a significant cross-section of society from the formation of community will (*Hirst*), or where a domestic court is regarded as having struck the wrong balance between the rights of the individual and competing commercial or private interests (*Eweida*).

As an alternative to the choices available in the existing literature, jurisprudence and doctrine we might focus on the tension between these existing approaches and the model of the judge, advocated by Adorno and Horkheimer, Neumann and Kirchheimer, as an independent, critical thinker. That model offers a way beyond the ECtHR's current jurisprudence, a way of fulfilling the 'utopian' promise of legal practice as a means of seeking an alternative future.[172]

If, as *S.A.S* suggests, in questions of religious, social and cultural identity, the ECtHR is unwilling to challenge the state and enquire into the rationale for the forced assimilation of non-identical individuals into the community it is preferable, at least in relation to such questions, that there be no ECtHR. The dominant social, cultural and political orthodoxy and the widespread hostility to Islamic cultural, religious and aesthetic practices in Europe does not, after all, need the support of the ECtHR to exert its influence.

For ECtHR judges to neuter themselves on the basis of deference to community will when, as Mair's work shows, the connection between community will and legislation is contested, is to deprive the ECtHR of any independent social or political function on the basis of an outdated model of European democracy. Only by recovering a social and political function through a model of critical adjudication can the ECtHR demonstrate its continued relevance when deciding cases like *S.A.S.* that involve questions of

[172] See C Douzinas, *The End of Human Rights* (Hart Publishing 2000) 369: 'human rights are our utopian principle: a negative principle which places the energy of freedom in the service of our ethical responsibility for the other'.

identity and non-identity. This implies an overt political confrontation between states or, more accurately, their governments, and the ECtHR. Human rights thinkers and practitioners should embrace and advocate for that confrontation as an opportunity to shape the future, a potentially utopian 'break' with 'the system', with international human rights doctrine.[173] The alternative future depicted in *S.A.S.* is of a European human rights system that functions as another means of imposing identity on the non-identical. That future is bleak.

[173] F Jameson *Archaeologies of the Future* (Verso 2007) 232: 'The Utopian form itself is the answer to the universal ideological conviction that no alternative is possible, that there is no alternative to the system. But it asserts this by forcing us to think the break itself, and not by offering a more traditional picture of what things would be like after the break' (footnote omitted).