Integration reasoning at the ECtHR: Challenging the boundaries of minorities’ citizenship

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Abstract
This contribution zooms in on a particularly disconcerting development in the jurisprudence of the European Court of Human Rights, that is visible in several recent cases brought by religious minorities with a migrant background, in which the Court accepts – in the name of (requirements for) integration – far-reaching restrictions on the rights of these religious minorities with a migrant background to be respected in their own religiously inspired way of life. The Court furthermore glosses over a context of Islamophobia and related stereotypes, thus failing to identify and counter instances of discrimination on grounds of religion. The article argues that the ECtHR in these cases not only drifts away from the counter-majoritarian core of human rights protection, turning several of its steady lines of jurisprudence favourable to (the effective protection of) minorities’ fundamental rights on their head, but also allows States to basically push religious minorities with a migrant background out of the public space/public schools, in the name of social integration – an integrated society. Ultimately, States are contesting the substantive citizenship of religious minorities with a migrant background and the Court, unfortunately, enables them to exclude and marginalise these religious minorities with a migrant background. The Court thus disregards the foundational value of the right to equal treatment for the human rights paradigm, and moves away from an equal and inclusive citizenship. Put differently, the Court enables governments to dress up Islamophobic, exclusionary agenda’s with a human face, thus challenging the boundaries of citizenship in the name of ‘integration’.

Keywords
ECtHR, minorities, integration, citizenship, majoritarianism

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I. INTRODUCTION

The jurisprudence of the European Court of Human Rights (‘ECtHR’ or ‘Court’) is often a source of inspiration for other courts, both national and international.1 Notwithstanding the ECtHR’s status as one of the most widely respected international human rights courts, the Court’s jurisprudence has also been the object of (serious) criticisms.2 For example, in relation to claims put forward by ethnic, religious and/or linguistic minorities, traditionally, the lack of a minority specific provision in the European Convention on Human Rights (‘ECHR’ or ‘Convention’) translated into a restrictive interpretation of the Convention rights.3 In the meantime, the Court embraces, at least at the level of principles, real and substantive equality (going beyond mere formal equality)4 and recognises that the Convention also encompasses the right to be respected in a separate, minority way of life.5 Nevertheless, as is more fully analysed elsewhere, these promising principles do not necessarily translate into an optimal protection of the fundamental rights concerned. This is due to the broad margin of appreciation the Court tends to grant States in complex questions about the accommodation of religious and ethnic population diversity.6

This contribution zooms in on a disconcerting development in the Court’s jurisprudence that is visible in several recent cases brought by religious minorities with a migrant background,7 and more particularly Muslim minorities. In these cases the Court accepts – in the name of (requirements for) integration8 – far-reaching restrictions on the rights of these minorities to be respected

1. References to the jurisprudence of the European Court of Human Rights can inter alia be found in judgments of the Inter-American Court of Human Rights, and the Canadian Supreme Court, see Ricardo Canese v Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 111, 89-90 (31 August 2004) and Alberta v Hutterian Brethren of Wilson Colony [2009] S.C.R. 567 (Can.), paras 90, 128-131, respectively.

2. Inter alia Patricia Populier, Sarah Lambrecht and Koen Lemmens (eds), Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level (Intersentia 2016).

3. See inter alia the identification of the ‘missed synergies’ in Kristin Henrard, ‘A Patchwork of ‘successful’ and ‘missed synergies’ in the Jurisprudence of the ECtHR’ in Kristin Henrard and Robert Dunbar (eds), Synergies in Minority Protection (CUP 2008) 314 ff.

4. In its seminal Thlimmenos judgment (2000), the ECtHR recognised for the first time that the prohibition of discrimination is also violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different: Thlimmenos v Greece App no 34369/97 (ECtHR, 6 April 2000) para 44.

5. In Chapman (2001), the Court acknowledged for the first time that Article 8’s right to privacy, family life and home also encompasses a right to a traditional way of life, following which States need to take into account Roma’s special needs and characteristics when making and applying laws: Chapman v UK App no 27238/95 (ECtHR, 18 January 2001) para 96.

6. See for a more extensive reasoning in relation to religious minorities: Kristin Henrard, ‘How the European Court of Human Rights’ concern regarding European consensus tempers the effective protection of freedom of religion’ (2015) 4(3) Oxford Journal of Law and Religion 1, and in relation to Roma, the parts pertaining to the ECtHR in Kristin Henrard, ‘The Council of Europe at the rescue of a paradigmatic case of failed integration. About Roma, the multidimensional nature of integration, and how promising general principles can meet flawed applications in practice’ (2010-2011) 10(1) European Yearbook on Minority Issues 271.

7. Given the fact that two more recent cases against Belgium on similar facts as S.A.S have been argued along similar lines by the government and the ECtHR respectively, one can indeed denote a new line of jurisprudence. See also Marcella Ferri, ‘Belkacemi and Oussar v Belgium and Dakir v Belgium: the Court again addresses the full-face veil, but it does not move away from its restrictive approach’ (Strasbourg Observers, 25 July 2017) <https://strasbourgobservers.com/2017/07/25/belkacemi-and-oussar-v-belgium-and-dakir-v-belgium-the-court-again-addresses-the-full-face-veil-but-it-does-not-move-away-from-its-restrictive-approach/> accessed 8 December 2018.

8. As will be more fully discussed, the Court uses virtually interchangeably ‘respect for the minimum requirements of life in society’, ‘living together’ and ‘social integration’ (as legitimate aims).
in their own religiously inspired way of life. The analysis in this article demonstrates how the ECtHR allows governments to use integration arguments to diminish the substantive citizenship of Muslim minorities in European States. The citizenship lens is used to reveal the magnitude of the problem with the Court’s reasoning in the cases at hand. As will be more fully discussed below, substantive citizenship has indeed several dimensions, and while these are closely interrelated, it remains important to acknowledge these different layers and the way they build on one another. Substantive citizenship goes beyond ‘equal and effective enjoyment of fundamental rights’ and also encompasses a ‘participation’ dimension and a dimension capturing collective identity, belonging and identification. Still, when the equal and effective rights of (groups of) legal citizens are curtailed, this also diminishes their chances for full and equal participation in, and their sense of belonging and identification with society at large. The analysis in this contribution focusses on the ‘rights’ analysis while explicating and marking the implications for the two other dimensions of citizenship, so as to highlight the far-reaching implications of the Court’s reasoning.

Of this new line of cases, S.A.S. v France and Osmanoglu and Kocabas v Switzerland are most prominent. The S.A.S. case was brought by a French Muslima, who wanted to wear the full-face veil in public. According to the applicant, the French law prohibiting and even criminalising the concealment of one’s face in public spaces violated her right to manifest her religious beliefs. Furthermore, she argued that because the law disproportionately affected women who wanted to wear the full-face veil for religious reasons (without reasonable and objective justification), it constituted indirect discrimination on grounds of sex, religion and ethnic origin, to the detriment of Muslim women, who wear the full-face veil. The Court acknowledged that the law amounted to a limitation of the right to manifest one’s religion, which particularly affects Muslim women who wish to wear the full-face veil in public for religious reasons. Nevertheless, the Court found a violation of neither the freedom to manifest one’s religion, nor of the prohibition of discrimination, since the government’s approach was considered proportionate to the legitimate aim invoked. More particularly, the Court accepted that the government’s arguments in terms of ‘the minimum requirements of life within French society’ and ‘living together’ can be linked to the legitimate aim ‘the protection of the rights and freedoms of others’. Admittedly, the Court does not use the concept ‘integration’ in its reasoning. Nevertheless, the judgement, and particularly the references

9. The analysis developed in this article is neither aimed at adding to the conceptual understanding of citizenship, nor at developing an argument about the necessity to apply theories of social sciences and political philosophy on the meaning of citizenship (and integration) for the legal conclusion whether or not a violation of fundamental rights has taken place.
10. See footnote 24 ff.
11. Inter alia Bryan S Turner, ‘We are all Denizens now: on the Erosion of citizenship’, (2016) Citizenship Studies 680, 682; Linda Bosniak, ‘Varieties of Citizenship’, (2005) 75 Fordham Law Review 2449; Jennifer Gordon & R.A. Lenhardt, ‘Citizenship Talk: Bridging the Gap between Immigration and Race Perspectives’, (2005) 75 Fordham Law Review 2504; John Gaventa, ‘Exploring Citizenship, Participation and Accountability’, (2002) 33(2) IDS Bulletin 3, 5.
12. S.A.S. v France App no 43835/11 (ECtHR, 1 July 2014).
13. Osmanoglu and Kocabas v Switzerland App no 29086/12 (ECtHR, 10 January 2017).
14. French Law no. 2010-1192 of 11 October 2010.
15. S.A.S. v France (n 12) paras 74, 76 and 80.
16. S.A.S. v France (n 12) paras 109 and 161.
17. ibid paras 157-159, 161-162. The Court does not specify the ground of discrimination in its analysis. See also part II.A where Islamophobia is defined.
18. ibid paras 121-122.
to ‘living together’ and ‘requirements of life within French society’ dovetail with integration lingo, namely with civic integration requirements.\(^\text{19}\)

In contrast, in *Osmanoglu* particular expressions of religious convictions were not criminalised but parents had to pay a substantial fine for not letting their girls participate in mixed-swimming classes arguing that this would be contrary to their strict Muslim convictions. According to the parents, this fine amounted to a violation of their right to freedom of religion.\(^\text{20}\) Also in this case the Court concluded to the absence of a violation,\(^\text{21}\) because the government’s approach would be proportionate to the legitimate aim of optimising the social integration of foreign children from different cultures and religions, and protecting them against every phenomenon of social exclusion, as ‘respect for the rights and freedoms of others’.\(^\text{22}\)

In order to analyse these ECtHR cases in terms of citizenship, more particularly as challenging the boundaries of citizenship, this contribution starts with a discussion of the core idea of citizenship, its dimensions and overarching principles, as well as the relation to the concept ‘integration’. The second part of the article proceeds with an in-depth analysis of *S.A.S.* and *Osmanoglu and Kocabas* from a citizenship angle, and thus along the lines of the three dimensions of citizenship. In the end, it is argued that the flawed human rights analysis of the ECtHR allows States - in the name of social integration and an integrated society – to exclude Muslim minorities from the public space/public schools, thus curtailing their participation and ultimately their belonging and place in the national society. The Court can thus be seen to allow States to challenge the boundaries of minorities’ citizenship in the name of ‘integration’, moving away from equal and inclusive citizenship. The article concludes with recommendations and suggestions, primarily aimed at the ECtHR, while identifying implications for national courts.

### 2. CITIZENSHIP AND ITS BOUNDARIES

The burgeoning literature on citizenship, which is taken up by a broad variety of social sciences, shows that the underlying core idea is a very old one, and concerns the relationship between an individual and a political community or polity. Over time, shifting spatialities can be identified

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\(^{19}\) For a discussion of relevant indicators, see *inter alia* Ines Michalowski and Ricky van Oers, ‘How can we Categorise and Interpret Civic Integration Policies?’ (2012) 38(1) Journal of Ethnic and Migration Studies 163; Sarah Wallace-Goodman, ‘Integration Requirements for Integration’s Sake? Identifying, Categorising and Comparing Civic Integration Policies’ (2010) 36(5) Journal of Ethnic and Migration Studies 753. For a critical discussion, see Dora Kostakopoulou, ‘The Anatomy of Civic Integration’ (2010) 73(6) Modern Law Review 933, 933-935.

\(^{20}\) Since Switzerland has not ratified the first additional protocol to the Convention, its Article 2 and the State duty to respect parents’ religious convictions in all the activities they undertake in public education, is not applicable. The Court accepts that their complaint falls in the scope of application of Article 9 (*Osmanoglu* (n 14) paras 40-42). In the assessment of the proportionality of the interference the Court adds that it is still relevant to recall the principles of Article 2 protocol 1 as this is in relation to educational matters the *lex specialis* of Article 9, and the Convention needs to be interpreted holistically (ibid paras 90-91).

\(^{21}\) *Osmanoglu* (n 13) para 105.

\(^{22}\) ibid para 63. Interestingly, the governments had also argued that the refusal of the exemption serves the aim of ensuring a proper organisation of education, the respect of the compulsory attendance at school and the equality of the sexes, and ultimately is meant to protect these foreign children against social exclusion. Still, the argumentation by both government and ECtHR in terms of the proportionality requirement (‘necessary in a democratic society’) focuses virtually exclusively on the integration argument (paras 69-103).
within the most relevant territorial units (cities, empires, nation-States), but since the emergence of the nation-State, the latter has remained the central reference point.²³

Important for the analysis here is that different dimensions of citizenship have been distinguished. Despite the fact that distinctive authors may name these dimensions somewhat differently, roughly the following four elements recur: legal status, equal access to rights, participation and collective identity or belonging.²⁴ Put differently, citizenship does not only concern legal citizenship (nationality, having the passport or identity card of a particular State) but also ‘substantive citizenship’, the latter pointing to equal and effective protection of rights, equal opportunities for participation, and ultimately defining one’s social membership (collective identity or belonging).²⁵ Furthermore, these dimensions of substantive citizenship are closely intertwined in the sense that when the equal and effective rights dimension is curtailed, the latter two dimensions are also weakened.

This rough sketch invites two further reflections, one on the central importance of citizenship for equal and effective (enjoyment of) rights, and how this is potentially realised through the ECHR and the jurisprudence of the ECtHR (2.1); and the other on the relationship between citizenship and integration (2.2). The latter is particularly relevant for an article focusing on integration reasoning by the ECtHR as a way of challenging the boundaries of citizenship.

2.1. EFFECTIVE AND EQUAL ENJOYMENT OF FUNDAMENTAL RIGHTS

A constant thread throughout the citizenship literature emphasises citizenship as the promise of full equality: equal and effective enjoyment of rights for all citizens.²⁶ The qualifiers ‘effective’ and ‘equal’ merit further consideration.

Regarding the former, fundamental rights need to be effectively enjoyed, this in view of their special nature as being intrinsically bound up with human nature and securing human dignity. The effective protection of fundamental rights requires that when States seek to limit the enjoyment of those fundamental rights that are not absolute, they need to respect particular requirements,²⁷ and the limitations to fundamental rights need to be duly reviewed by the bodies entrusted with their supervision (international courts in the broad sense of the word).²⁸ In line with this understanding, the overarching interpretation principle of fundamental rights stipulates that the scope of application of fundamental rights is interpreted generously, while

²³. Alexander C Diener, ‘Rescaling the Geography of Citizenship’ in Ayelet Shachar and Rainer Baubock et al (eds), The Oxford Handbook on Citizenship Studies (OUP 2017) 37-44.
²⁴. Kim Rubenstein, ‘Globalisation and Citizenship and Nationality’ in Catherine Dauvergne (ed), Jurisprudence for an Interconnected Globe (Taylor & Francis 2004) 27.
²⁵. See the overview discussed in Jo Shaw and Ivor Sticks’ contribution to the volume they edited on Citizenship Rights: ‘Introduction: What do we Talk About when we talk about Citizenship Rights?’ (Routledge 2013) xi.
²⁶. See also William Rogers Brubaker, Citizenship and Nationhood in France and Germany (Harvard University Press 1992) 36-39; Baubock and Gireaudon, ‘Realignments of Citizenship: Reassessing Rights in the Age of Plural Membership and Multi-level Governance’ (2009) Citizenship Studies 439, 439-440.
²⁷. These conditions are enumerated in the limitation clauses in human rights conventions, and further elaborated upon in the (quasi) jurisprudence of supervisory bodies.
²⁸. Inter alia Giuli Itzcovich, ‘One, None and One Hundred Thousand Margins of Appreciation: The Lautsi case’ (2013) 13(2) Human Rights Law Review 287.
the limitation clauses are interpreted strictly.\textsuperscript{29} The ECtHR’s steady line of jurisprudence following which the Convention’s fundamental rights need to be practical and effective, not theoretical or illusory follows that logic.\textsuperscript{30}

Furthermore, it is relevant to highlight that thinking about fundamental rights in historical terms was triggered by the plight of minorities, more particularly religious minorities. In response to the atrocities that these groups had to endure at the hand of the rulers,\textsuperscript{31} fundamental rights were initially conceptualised as rights for persons belonging to religious minorities.\textsuperscript{32} Only later, fundamental rights were extended to ‘everyone’ and catalogues of general fundamental rights were developed.\textsuperscript{33} Importantly, conceptualising human rights as rights for every human being has been combined with a keen understanding of the counter-majoritarian core of fundamental rights. The ECtHR can be seen to embrace this understanding where it highlights that ‘the views of the majority must not always prevail’, and that fundamental rights should ensure the fair treatment of persons belonging to minorities.\textsuperscript{34}

The Court has further developed this warning about undue majority pressure in its landmark Chapman judgment in which it identified a State duty to take minorities’ special characteristics and special needs (in relation to their minority way of life) into account, both in the regulatory framework and whilst applying these norms in concrete cases.\textsuperscript{35} Particularly relevant for religious minorities is the Court’s jurisprudence concerning the State duty to respect the religious convictions of parents in relation to all aspects of public education, which similarly underscores that a particular religion cannot have a dominant position in the public curriculum.\textsuperscript{36} These steady lines of jurisprudence have in common that they condemn and seek to counter undue majority pressure, so as to provide actual space for minorities in society.

Admittedly, the doctrine of the margin of appreciation of the ECtHR needs to be introduced here: the Court’s theoretical baseline (in favour of minorities’ fundamental rights) has remained firm, but traditionally the Court has granted States a wide margin of appreciation in relation to the

\textsuperscript{29} Nihal Jayawickrama, The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence (Cambridge University Press 2002) 184.

\textsuperscript{30} Conor A Gearty, Principles of Human Rights Adjudication (Oxford University Press 2004) 200. This famous line of jurisprudence was developed since Airey v Ireland App no 6289/73 (ECtHR, 9 October 1979) para 24. See also for religious minorities inter alia Kimlya and others v Russia App nos 76836/01 and 32782/03 (ECtHR, 1 March 2010) para 86.

\textsuperscript{31} Mark Goodale, ‘Introduction: Locating Rights, Envisioning Law Between the Global and the Local’ in Mark Goodale and Sally Engle Marry (eds), The Practice of Human Rights: Between the Global and the Local (CUP 2007) 30-31.

\textsuperscript{32} Andre Liebich, ‘Minority as Inferiority: Minority Rights in Historical Perspective’ (2008) 34(2) Review of Historical Studies 243, 244. See also Peter G Danchin, ‘Introduction’ in Peter G Danchin and Elizabeth A Cole (eds), Protecting the Fundamental Rights of Religious Minorities in Eastern Europe (Columbia UP 2002) 5.

\textsuperscript{33} Inter alia the French Declaration of Human and Citizen Rights of 1789 and the American Declaration of Rights of 1791. On the 1688 UK Bill of Rights see A.W. Brian Simpson, Human Rights and the End of Empire: Britain and Genesis of the European Convention (OUP 2001) 10-12.

\textsuperscript{34} The ECtHR has an extensive line of jurisprudence on the importance of fair treatment of minorities and avoiding the abuse of a dominant position (among others Young, James and Webster v UK App nos 7601/76 and 7806/77 (ECtHR, 13 August 1981) para 63; Chassagnou e.a. v France App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999) para 112), which is also repeated in the two cases critically reviewed here: S.A.S. v France (n 12) para 128; Osmanoglu (n 13) para 84.

\textsuperscript{35} Chapman (n 5) para 96.

\textsuperscript{36} Folgero and others v Norway App no 15472/02 (ECtHR, 29 June 2007) paras 90-93; Hasan and Eylem Zengin v Turkey App no 1448/04 (ECtHR, 9 January 2008) paras 63-64.
concrete measures that they adopt to accommodate minorities.\footnote{For a critical analysis of the often broad margin that the Court grants States, see references in footnote 5 above and also Stephanie E Berry, ‘A tale of two instruments: religious minorities and the Council of Europe’s rights regime’ (2012) 30(1) Netherlands Quarterly of Human Rights 10, 17-22. For an analysis of the ECtHR's jurisprudence in terms of citizenship, see June Edmunds, ‘The Limits of Post-national Citizenship: European Muslims, Human Rights and the Hijab’ (2012) Ethnic and Racial Studies 1196.} The Court has indeed a long and steady jurisprudence following which it grants States a certain margin of appreciation in assessing the proportionality of their (in)actions.\footnote{Protocol 15 aims at amending the text of the preamble of the ECtHR so as to include a recital that explicitly refers to the margin of appreciation. The entry into force of this protocol requires the ratification of all the contracting States: as of 20 October 2019 all but two States have ratified the protocol: Italy and Bosnia Herzegovina.} The width of this margin is of crucial importance to the outcome of a case: when the State is granted a broad margin of appreciation, the scrutiny by the Court is light, and the Court tends to conclude that the Convention is not violated; conversely when the margin is narrow, the scrutiny is high and the Court tends to conclude to a violation.\footnote{See also Jeffrey A Brauch, ‘The Margin of Appreciation and the Jurisprudence of the ECtHR: Threat to the Rule of Law’ (2004/5) 11(1) Columbia Journal of European Law 113, 115; Steven Greer, The ECHR: Achievements, Problems and Prospects (CUP 2006) 223-225.} Unfortunately, the Court has still not developed a coherent theory to determine the width of this margin of appreciation.\footnote{See also Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (Intersentia 2002) 206-227; Greer (n 40) 223-225.} Over time, academics have identified certain factors that regularly feature in the Court’s argumentation on the width of the margin of appreciation, more particularly the nature of the right (and its importance for the individual), the type of legitimate aim invoked, the prevalence of general policy choices, the existence of a common European standard, and a context of conflicting fundamental rights.\footnote{Lawrence R Helfer, ‘Consensus, Coherence and the European Convention on Human Rights’ (1993) 26(1) Cornell International Law Journal 133, 154-155.} Particularly relevant for the subsequent discussion of the two cases is the Court’s tendency to grant States a broad margin of appreciation in case of general policy choices and the lack of a common European standard.\footnote{See also Samantha Besson, ‘Justifications’ in Daniel Moeckli et al (eds), International Human Rights Law (OUP 2014) 44-45.} 

2.1.1. The Equal Enjoyment of Fundamental Rights

The equal enjoyment of fundamental rights is central to citizenship’s promise of full equality, of equal and effective access to rights for all citizens. While the right to equal treatment is supposedly embedded in the notion of fundamental rights itself, as rights for every person irrespective of particular characteristics,\footnote{See also Samantha Besson, ‘Justifications’ in Daniel Moeckli et al (eds), International Human Rights Law (OUP 2014) 44-45.} the prohibition of discrimination is also a distinctive fundamental right. This independent value of the prohibition of discrimination is particularly visible when conventions do not only contain a prohibition of discrimination in relation to the rights enshrined in that convention, but also a full-fledged non-discrimination provision not requiring this link.\footnote{See inter alia Article 2 and 26 ICCPR, and now also the ECtHR has the 12th Additional Protocol to complement Article 14 ECHR.} Non-discrimination is thus certainly an important and distinctive line of argumentation, and not something to be glossed over when discussing citizenship and the boundaries of citizenship. Furthermore, the...
right to equal treatment is particularly important for persons belonging to minorities, since an effective protection against discrimination is the conditio sine qua non for an effective minority protection. Hence, the way in which the Court evaluates a complaint about discrimination against a particular minority merits special attention, especially when the minority concerned is facing a context of systemic discrimination.

2.2. INTEGRATION (ARGUMENTS) AND SUBSTANTIVE CITIZENSHIP

When analysing integration reasoning used by a particular court as to challenge the boundaries of citizenship, the meaning of the concept ‘integration’ and its relation to ‘citizenship’ merits exploration. As in the case for citizenship, a very extensive and diverse body of literature exists about ‘integration’, particularly in social sciences and philosophy. Nevertheless, a common core understanding does emerge in the sense that integration is related to population diversity, with such diversity triggering concerns about social cohesion, social inclusion, and avoiding segregation. Roughly speaking, ‘integration’ is aimed at ‘incorporating’ groups that are different from the majority or dominant groups in society, making them ‘part of society’. Hence, integration concerns seem to be targeted at minorities in the broad sense of the word, encompassing traditional minorities and indigenous peoples as well as new or migrant minorities.

Obtaining and maintaining an integrated society is a concern of all times, and as such not inherently bad. A further investigation of the concept integration confirms that it is not problematic
in se. It is generally understood that integration processes have a broad, virtually all encompassing reach, and cover almost any area of societal life.\(^{54}\) This broad reach and coverage is also visible in the multiple integration dimensions that have been distinguished,\(^{55}\) namely structural, social, cultural and identificational integration, covering respectively a) rights, status, access to the labour market and core institutions, b) private relations with people from other groups, intermarriages and engagements in voluntary associations, c) behavioural and attitudinal change and d) having a sense of belonging.

These dimensions of integration are closely interrelated and interwoven,\(^{56}\) with structural integration, and its two central themes of equality and participation, constituting an important stepping stone for the other dimensions. Integration policies are geared towards the highest equality standards.\(^{57}\) While the equality quest primarily concerns an effective protection against invidious discrimination, the right to equal treatment also implies a duty for States to treat persons differently that find themselves in substantively different situations.\(^{58}\) Participation, as second central theme of integration, encompasses not only the typical aspects of political participation but also participation in public life at large, and of course socio-economic participation. The participation and equality themes mutually reinforce one another, thus bringing questions about effective, substantively equal access to employment and education to the table.\(^{59}\) Having equal rights, effectively exercising them and effectively participating in societal life implies concomitant opportunities for social integration, and through the interaction with the dominant population group also for cultural integration.\(^{60}\) Furthermore, having rights, exercising these rights and participating in society, contributes to forging links of mutual understanding and loyalty between the distinctive communities in a State,\(^{61}\) ultimately contributing to a sense of belonging and thus identificational integration.\(^{62}\)

As recognised in the literature, there is substantial overlap and similarity between the dimensions – and their interrelation – of integration on the one hand, and those of substantive citizenship on the other.\(^{63}\) At the same time, the extensive literature on both concepts reveals that a broad

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54. See also the Migration Integration Policy Index discussed in Jan Niessen and Thomas Huddleston, Legal Frameworks for the Integration of Third Country Nationals (Martinus Nijhoff 2009).
55. Hartmut Esser, ‘Welche Alternativen zur Assimilation gibt es eigentlich?’ (2004) 23 IMIS Beitrage 41, 46. See also Godfried Engbersen, ‘Spheres of Integration: Towards a Differentiated and Reflexive Ethnic Minority Policy’ in Rosemarie Sackmann, Bernhard Peters and Thomas Faist (eds), Identity and Integration: Migrants in Western Europe (Ashgate 2003) 61.
56. See also the notes above and below on the justifiability for focusing on the effective and equal rights dimension (of citizenship), while making implications for the participation and belonging/collective identity dimension explicit.
57. Jan Niessen, ‘Construction of the Migrant Integration Policy Index’ in Jan Niessen and Thomas Huddleston (eds), Legal Frameworks for the Integration of Third-Country Nationals (Brill 2009) 5.
58. The ECtHR picks up this Aristotle formulae in Thlimmenos v Greece (n 4) para 44.
59. Tom Hadden, ‘Integration and Separation: Legal and Political Choices in Implementing Minority Rights’ in Nazila Ghanea and Alexandra Xanthanki (eds), Minorities, Peoples and Self-Determination (Martinus Nijhoff 2005) 177-186.
60. Kostakopoulou (n 19) 955.
61. Annelies Verstichel, Participation, Representation and Identity: The Rights of Persons Belonging to Minorities to Effective Participation in Public Affairs: Content, Justification and Limits (Intersentia 2009) 230.
62. See infra the discussion on segmented integration.
63. Inter alia Elaine R Thomas, ‘Competing Visions of Citizenship and Integration in France’s Headscarves Affair’, (2000) Journal of European Area Studies, 167-185; Richard Bellamy, ‘Evaluating Union Citizenship: Belonging, Rights and Participation within the EU’ (2008) Citizenship Studies, 598.
agreement on the core ideas underlying these concepts goes hand in hand with a range of different understandings and even disagreements about the meaning and interrelation of these dimensions of substantive citizenship and of integration.65

2.2.1. Separate Identities, Integration and Substantive Citizenship

Of particular interest to the analysis and discussion here is the controversial question whether integration is compatible with maintaining separate identities, or whether integration presupposes assimilation in the sense of discarding one’s separate identity. The two opposing positions are well known. On the one hand, you have scholars who emphasise that the accommodation of different identities is important for a successful integration of the minorities concerned, and thus for an integrated society.66 The other position rather problematises the recognition and promotion of different identities as a threat to the emergence of a cohesive society.

This question is closely related to the discussion of integration as one-way or as a two-way, reciprocal process.67 In terms of cultural integration, is the behavioural and attitudinal change only expected of new-comers or also of the receiving society? In the meantime, there seems to be a trend – particularly promoted by the EU – to consider integration as a two-way process, emphasising integration as a process of ongoing mutual accommodation.68

Admittedly, the recurring heated discussions in relation to migrants (minorities in the broad sense of the word) point to enduring contestations about how to balance unity and diversity, and more generally, to what can be expected from the migrants and the receiving society respectively.69 Nevertheless, the baseline of integration as a two-way process arguably precludes measures that impose the majority’s way of life on minorities with a migrant background, while disregarding their distinctive religious identity. In this respect, it has been suggested that cultural integration will often only be partial, since one can identify with more than one country.70

Given the considerable overlap between integration and substantive citizenship, it will not come as a surprise that different opinions exist about how citizenship relates to (maintaining) separate identities. Some argue that differentiated citizenship undercuts citizenship’s integrative function, while

64. See also the discussion about segmented integration (in the words of Portes and Zhou, segmented assimilation): Alejandro Portes and Min Zhou, ‘The New Second Generation Segmented Assimilation and its Variants’ (1993) 530 The Annals 74.
65. See inter alia the different contributions in The Oxford Handbook of Citizenship (OUP 2017) edited by Ayelet Shachar, Rainer Baubock, Irene Bloemraad and Maarten Vink; and the different contributions in the Council of Europe 1998 publication on ‘Les Mesures et Indicateurs d’Integration’. See also the discussion in Han Entzinger & Renske Biezeveld, ‘Benchmarking in Immigrant Integration’ August 2003 (European Commission report).
66. Ayelet Shachar, ‘The Paradox of Multicultural Vulnerability’ in Christian Joppke and Steven Lukes (eds), Multicultural Questions (OUP 1999) 88-89.
67. Joseph H Fichter, Sociology (University of Chicago Press 1957) 229.
68. Han Entzinger and Renske Biezeveld, Benchmarking in Immigrant Integration, European Commission Report August 2003, 17.
69. For a critical discussion of civic integration requirements and their alienating effect, see Kostakopoulou (n 20) 936-937.
70. See also Rosemarie Sackmann, ‘Postscript: Cultural Difference and Collective Identity in Processes of Integration’ in Rosemarie Sackmann, Bernhard Peters, Thomas Faist (eds), Identity and Integration: Migrants in Western Europe (Routledge, 2003) 238-239; Majid Al-Haj, Immigration and Ethnic Formation in a Deeply Divided Society (Brill 2004) 17-19.
others highlight the integrative, cohesive effect of such multicultural citizenship. Nevertheless, when combining legal and substantive citizenship, a more positive baseline towards the duty to accommodate separate identities can be identified. Indeed, as all legal citizens (also those that are naturalised) are entitled to equal rights and equal opportunities in terms of participation, thus including effectively equal access to education and the public space at large, this would seem to call for measures ensuring that legal citizens with distinctive ethnic and religious identities are not excluded from public education or public space at large.

3. ANALYSING THE S.A.S. AND OSMANOGLU CASES FROM A CITIZENSHIP PERSPECTIVE

Interestingly, the applicants in both cases discussed here are legal citizens. Both judgments are critically reviewed in terms of the three dimensions of substantive citizenship: equal and effective enjoyment of fundamental rights, participation and collective identity/belonging. As was explained in the introduction, the analysis will focus on the equal and effective rights dimension, while making explicit the negative implications for the two other dimensions of substantive citizenship.

3.1. THE ‘EQUAL AND EFFECTIVE ENJOYMENT OF FUNDAMENTAL RIGHTS’ ANGLE

In order to do justice to the full picture underlying both cases, the analysis in terms of equal and effective enjoyment of fundamental rights proceeds in three steps. A detailed analysis of S.A.S. (3.1.1) and Osmanoglu (3.1.2), is followed by overarching comments (3.3.3).

Admittedly, for both the freedom of religion and the prohibition of discrimination on grounds of religion the central requirements concern a legitimate aim for the interference and a relationship of proportionality between the interference and the legitimate aim. Nevertheless, as was highlighted above, since the prohibition of discrimination and the freedom of religion enshrine two distinctive fundamental rights, and the prohibition of discrimination is particularly important for persons belonging to minorities, the Court’s reasoning in terms of both rights will be discussed separately.

Explicit and implicit signs of Islamophobia are highlighted in the cases at hand, as these both concern complaints by members of the Muslim minority about unfair limitations to their fundamental rights. There may not yet be a generally agreed upon definition of Islamophobia, in its core it concerns a negative, intolerant attitude towards Muslims, prejudice against Muslims, anti-Muslim bias, hostility and even a kind of racism targeting Muslims. It is indeed often extremely difficult to delineate racial from religious discrimination, as racial and religious characteristics and

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71. See the discussion in Will Kymlicka, ‘Comments to Shachar and Spinner Halev: an update from the multiculturamism wars’ in Christian Joppke and Steven Lukes (eds), Multicultural Questions (OUP 1999) 120-121. See also Thom Faist, ‘The Blind Spot of Multiculturalism: From Heterogeneities to Social (in)Equalities’ (2012) ComCAD Arbeitspapiere – Working Papers 108/2012, 6 <http://www.uni-bielefeld.de/(en)/soz/ab6/ag_faist/downloads/Workingpaper_108_Faist.pdf> accessed 10 October 2019.

72. Enes Bayrakli and Farid Hafez, European Islamophobia Report 2017 (SETA 2018). See also Parliamentary Assembly of the Council of Europe (PACE), Islam, Islamism and Islamophobia in Europe (Resolution 1743) (Council of Europe 2010) 1 and see the table of contents in Tufal Choudhury and others, Perceptions of Discrimination and Islamophobia: Voices from Members of Muslim Communities in the European Union (EUMC 2006) <https://fra.europa.eu/sites/default/files/fra_uploads/eume-2006-perceptions-discrimination-islamophobia_en.pdf> accessed 30 September 2019.
the discrimination faced are often a corollary from one another.\textsuperscript{73} The discrimination complaint in S.A.S. reflects this understanding as it mentions both religion and ethnic origin as relevant grounds of discrimination.\textsuperscript{74} To be sure, the Court avoids specifying the ground of discrimination and thus also the possible relevance of ethnic origin as relevant ground of discrimination.\textsuperscript{75} However, the Court’s reasoning is not critically reviewed in this respect. Instead, this contribution – in line with the citizenship and ‘minorities’ angle – focuses more on Islamophobia as deep-grained prejudice, bias and discrimination against the Muslim minority.

3.1.1. S.A.S. v France

S.A.S. has received extensive attention in media, politics and academia, as it was the first time the ECtHR had to pronounce itself on a law that de facto amounted to a full-face veil ban. More importantly for the analysis here, it was also the case which kick-started the emergence of integration lingo in the Court’s reasoning.

3.1.1.1. Effective Enjoyment of the Freedom of Religion?

It should be highlighted that in the limitation clauses of the ECHR, and thus also of Article 9, the legitimate aims are exhaustively enumerated. These concepts are rather vague and general and thus already leave substantial scope to governments in their identification of legitimate aims. In S.A.S., the Court’s assessment of the legitimate aim requirement starts very promising as it adopts a suitably critical stance in relation to several arguments put forward by the government. The Court does not accept the argument that the legislative ban furthered gender equality – as related to ‘the protection of the rights and freedoms of others’ – since ‘the practice is defended by women […] in the context of the exercise of the rights enshrined’.\textsuperscript{76} Nor can ‘respect for human dignity’ be invoked in this respect, since the wearing of clothes that conceal the face ‘is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy’.\textsuperscript{77}

However, the Court did accept that ‘the requirements of life within French society’ and ‘living together’ could qualify as the legitimate aim ‘the protection of the rights and freedoms of others’.\textsuperscript{78} Still, this qualification is everything but self-evident, particularly when one reflects on who are ‘the others’, the protection of whose rights would legitimise a limitation of the rights of the claimant (and other similarly positioned women)? The government describes wearing a face covering veil as an expression of the rejection of the majority and the will to isolate oneself from the rest of society, and thus as a manifest refusal of the principle of living together.\textsuperscript{79} The government thus opposes

\textsuperscript{73} Stephanie E Berry, ‘Bringing Muslim Minorities within the ICERD: Square a Peg in a Round Hole?’ (2011) 11 Human Rights Law Review 2011, 4295.

\textsuperscript{74} Several third party interveners confirm this risk of intersectional discrimination, for example Amnesty International (para 90); Article 19 (para 93); Human Rights Centre of Ghent University (para 97).

\textsuperscript{75} See also Titia Loenen’s warning that the ECtHR is unlikely to accept Islamophobic acts as instances of racial discrimination: Titia Loenen, ‘Framing Headscarves and other Multi-cultural issues as Religious, Cultural, Racial or Gendered: The Role of Human Rights Law’ (2017) 30(4) Netherlands Quarterly of Human Rights 472, 488.

\textsuperscript{76} S.A.S. v France (n 12) para 119.

\textsuperscript{77} Ibid para 120.

\textsuperscript{78} See also the critical remarks by Eva Brems in her blog ‘S.A.S. v France as a problematic precedent’ (Strasbourg Observers, 9 July 2014) <https://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/#more-2495> accessed 8 September 2019.

\textsuperscript{79} S.A.S. v France (n 12) para 82.
the rights of the national majority – as the rights of others – to the rights of the minority and presents the wearing of the full-face veil as a threat to French national identity.  

Moreover, the government justifies the limitation of the rights of religious minorities with a migrant background in name of the rights of the majority, in the sense that the latter are considered to trump the fundamental rights of the minority.

The applicant acutely notes this majoritarian argument when remarking that the government’s conception of ‘minimum requirements of living together’ ‘fails to take into account the cultural practices of minorities which did not necessarily share this philosophy’. Notwithstanding this explicit reminder of the counter-majoritarian core of fundamental rights, the Court goes along with the government’s reasoning. Arguably, in accepting this line of argumentation and pitching the fundamental rights of minorities with a migrant background against ‘the rights of the majority’, the Court’s reasoning is fundamentally at odds with the counter-majoritarian core of human rights.

The Court does recognise the inherent flexibility of the notion of living together, and in view of the related risk of abuse, the Court cautions that the necessity of the measure will require careful examination. In its assessment of the legitimate aim aim the Court even notes with concern the information that it received from third-party interveners about the Islamophobic remarks made during the debate preceding the adoption of the Law concerned. The Court then opines that when a State adopts a law of this kind in a context tainted by Islamophobia, it risks ‘contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance’.

When evaluating the Court’s proportionality review in S.A.S., it is necessary to reflect on the way in which the Court uses the margin of appreciation doctrine. In S.A.S., the Court obviously does not heed its own warning for the need for a careful examination of the proportionality of the legislative ban. Instead of seriously scrutinising the justification put forward by the government, the Court frames the matter in S.A.S. in such a way that it appears appropriate to grant France a broad margin of appreciation, resulting in minimal scrutiny. Indeed, according to the Court ‘the question whether or not it should be permitted to wear the full-face veil in public’ is a ‘choice of society’ which furthermore lacks European consensus. Typically, and also in S.A.S., the grant of a broad margin of appreciation to the State implies very light scrutiny and results in a finding of non-violation. It should be noted though, that the finding of a lack of European consensus in casu is not a foregone conclusion. The Court has to acknowledge that at the time of the relevant facts France was in a minority position with its complete legislative ban. The Court then counters the impression of a common European standard against such a total ban, by arguing that in many States there are still on-going discussions on the regulation of the full-face veil, which would point to a

80. See also Siobhan Mullaly, ‘Civic Integration, Migrant Women and the Veil: At the Limits of Rights?’ (2011) 74 (1) Modern Law Review 27, 32.
81. S.A.S. v France (n 12) para 77.
82. See also Daniel Augenstein, ‘Normative Fault-Lines of Trans-National Human Rights Jurisprudence: National Pride and Religious Prejudice in the European Legal Space’ (2013) 2(3) Global constitutionalism 469, 471.
83. S.A.S. v France (n 12) para 149.
84. ibid para 154.
85. ibid para 156.
86. ibid paras 158-159.
87. S.A.S. v France (n 12), para 156.
lack of European consensus. Arguably, the Court chooses to grant France a broad margin of appreciation, which enables it to disregard the applicant minorities’ divergent views on ‘integration’ – on the requirements of living together. Put differently, the Court’s proportionality review can only be seen to strengthen the majoritarianism identified earlier, thus diminishing the effective enjoyment of the freedom of religion for the minorities concerned.

3.1.1.2. Equal Enjoyment of Fundamental Rights?

At the end of the judgment in S.A.S., the Court summarily dismisses the complaint about indirect discrimination:

while it may be considered that the ban imposed by the Law of 11 October 2010 has specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full face veil in public, this measure has an objective and reasonable justification… for the reasons indicated previously [referring to the analysis in terms of Article 9].

Accordingly, the Court, without having engaged in a distinctive discrimination analysis, concludes that there has been no violation of Article 14 of the Convention taken in conjunction with Article 9. Considering the central value of the right to equal treatment within the human rights paradigm and also for a democratic society under the rule of law, two interrelated concerns can be raised about the Court’s avoidance of a proper non-discrimination analysis.

First, when the Court dismisses a complaint about discrimination for exactly the same reasons as those developed in relation to the freedom of religion, the Court underplays the central value of the right to equal treatment within the human rights paradigm, and fails to recognise that the prohibition of discrimination adds a dimension that is not captured in terms of the substantive rights, such as the freedom to manifest one’s religion. Furthermore, the Court’s reasoning in terms of Article 14 fails to return to the concerns it expressed in its Article 9 analysis about Islamophobic remarks during the parliamentary proceedings of the French Act and the related risk to consolidate stereotypes, which are key to systemic discrimination. Hence, even in a case which the Court itself places in a broader Islamophobic context, the Court refuses to actually

88. ibid para 156.
89. S.A.S. v France (n 12) para 161.
90. The accessory nature of Article 14’s prohibition of discrimination does not change this additional dimension of the prohibition of discrimination: following steady jurisprudence of the Court, the accessory nature of Article 14 (only) means that the complaint needs to concern a matter which falls in the scope of application of a Convention right, so that the Article 14 perspective can be added to the analysis. See inter alia Iovitoni and others v Romania App nos 57583/10, 1245/11 and 4189/11 (ECHR, 3 April 2012) paras 52-53; Case “relating to certain aspects of the laws on the use languages in education in Belgium” v Belgium App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (ECHR, 23 July 1968) para 9.
91. See also Eva Brems and Alexandra Timmer, ‘Introduction’, in Eva Brems and Alexandra Timmer (eds) Stereotypes and Human Rights Law (Intersentia 2016) 4. Here they argue that courts should address harmful stereotypes, inter alia by clarifying States’ obligations in this regard, such as State obligations not to legislate on the basis of harmful stereotypes.
92. See also Mathias Moschel, ‘Stereotypes and Human Rights Law’ in Eva Brems and Alexandra Timmer (eds), Stereotypes and Human Rights Law (Intersentia 2016) 137-140. See also CEDAW General Recommendation no 25, para 6, where the Committee includes the fight against gender stereotypes amongst the three main obligations of State Parties regarding the elimination of discrimination against women.
engage in a discrimination analysis. Is the Court thus not running the risk of emptying the
prohibition of discrimination of any meaningful content?

Second, by not engaging in the non-discrimination analysis, the Court foregoes an important
opportunity to discuss the blurry line between direct and indirect discrimination, which is partic-
ularly visible in instances of systemic discrimination. The main difference between direct and
indirect discrimination concerns the causal link between the differentiation and the protected
ground of differentiation. Direct discrimination captures instances where the differentiation has
a direct causal link with the protected ground, in the sense that the differentiation is made explicitly
on that ground. This causal link is less obvious in case of indirect discrimination, and one has to
regard the effects of the measure, more particularly the disproportionate impact.

The underlying difference in nature between direct and indirect discrimination is captured
in several UN non-discrimination conventions by the concepts ‘purpose or effect’ (impairing
the equal enjoyment of human rights),93 which seem to oppose intent to effect. To disadvan-
tage an individual on a particular ground correlates indeed closely with an intent to differ-
entiate on that ground, and does reflect a strong causality. A disproportionate impact, without
objective and reasonable justification is rather an unintended side-effect of the way in which
the society is organised, and points to a weaker causality. However, it is not always obvious
where to draw the line, especially since there is increasing awareness about the need to hide
discriminatory intent. Arguably, when a bias or ingrained prejudice against a particular ethnic
group is at the root of a disadvantageous treatment, the protected ground plays a causal role,
even when merely unconsciously. This would still point to direct discrimination, also when
the ground does not feature explicitly.94

Reflecting on this blurry dividing line matters for various interrelated reasons. It allows to
highlight the phenomenon of hidden direct discrimination, which is prevalent in cases of sys-
temic discrimination, where deep seated prejudice has seeped into societal structures (as deter-
mined by the majority). When one is keen to eradicate the underlying majoritarianism, it is
important to recognise hidden or veiled direct discrimination for what it is. Unveiling hidden
discrimination also matters because direct discrimination (on suspect grounds) is more difficult
to justify than indirect discrimination: an actual intent to discriminate is more heinous and
deserves an even stronger condemnation95 than a collateral effect of the way in which society
is organised.96

In S.A.S. the applicant may have explicitly denounced indirect discrimination, she also argued
that the law targeted full-face veil’s. The Open Society Justice Initiative similarly highlighted that
‘the legislative history [of the French act concerned] showed that the intent was to target

93. Inter alia the definitions in Article 1 of CERD and CEDAW.
94. See also Lincoln Quillian, ‘New Approaches to Understanding Racial Prejudice and Discrimination’ (2006) 32 Annual
Review of Sociology 299, 300.
95. Inter alia Nachova and Others v Bulgaria App nos 43577/98 and 43579/98 (ECtHR, 6 July 2005) para 145; Timishev v
Russia App nos 55762/00 and 55974/00 (ECtHR, 13 March 2006) para 56.
96. See also Tarunabh Khaitan, A Theory of Discrimination Law (OUP 2015) 185. This understanding about the underlying
difference in terms of ‘intent’ between direct and indirect discrimination, and related difference in degree of ‘hei-
nousness’, could actually explain the different justification scheme for direct versus indirect discrimination in EU law,
with direct discrimination in principle being prohibited, unless an explicit legislative exemption can be relied upon (see
inter alia Article 2 Racial Equality Directive).
specifically the niqab and the burqa’. Islamophobic remarks during parliamentary negotiations can be seen to reveal a broader national context of anti-Muslim sentiment, which should alert the Court when complaints are raised against the eventual law as amounting to direct discrimination. Instead, the Court contends itself to dismissing the complaint about indirect discrimination without a proper non-discrimination analysis. This failure to engage in a discrimination analysis, that takes into account an Islamophobic context and related systemic discrimination, further extends the majoritarian reasoning identified above, thus undermining the equal and effective rights dimension of substantive citizenship.

3.1.2. Osmanoglu and Kocabas v Switzerland

The Osmanoglu case was much less mediatised but certainly deserves attention, since it critically extended integration reasoning at the ECtHR to the educational sphere, again to the detriment of the substantive citizenship of a religious minority with migrant background, more particularly the Muslim minority. Although there may be less obvious signs of Islamophobia, the following analysis will highlight multiple parallels with the S.A.S. case, including signs of stereotypical thinking about the Muslim minority and the Court’s failure to actually engage with this, ultimately undermining the equal and effective enjoyment of the minorities’ fundamental rights.

3.1.2.1. A Disproportionate Limitation of the Freedom of Religion?

Strikingly, the parents in Osmanoglu fully agreed with the importance of social integration and related demands on foreigners that settle in a country. However, they contested that mandatory mixed swimming lessons are necessary for the social integration of their children. According to the applicants, they and their children are perfectly integrated in Swiss society, as can be gleaned from their excellent knowledge of the language, the fact that they all have studied, still study and/or work in Swiss society, while respecting the constitutional and democratic principles of the State and its local social customs. The parents thus contested that the integration of their children would depend on their participation in mixed swimming classes, integration being a process that mainly takes place outside these courses.

The emphasis in the government’s reasoning is clearly on the importance of the overall cohesion of society, and what this means and requires in the eyes of the majority. The government thus (again) pitched minorities’ fundamental rights against the majority’s interests (rights?), while the latter are presented as trumping the former. By accepting this line of reasoning, the Court side-stepped the counter-majoritarian core of human rights and adopted and confirmed majoritarianism. Similarly, the argument that obliging children to swim together, even if this is against the religious convictions of their community, aims to protect

97. S.A.S. v France (n 12) para 102 hints at a context of direct discrimination and prejudice against women wearing the full-face veil that are further fuelled by the legislative ban and the related debates can also be found in the arguments of the NGO Liberty as intervening party (para 100).
98. S.A.S. v France (n 12) para 59.
99. ibid paras 58-60. The parents also argue that the strict enforcement of these obligations in name of integration, actually counter integration of the target groups. For a further discussion of this argumentation in terms of citizenship, see infra.
100. Osmanoglu (n 13) paras 58 and 60.
101. ibid para 58.
them against social exclusion, appears to present the adoption of a minority way of life as ‘inviting’ social exclusion.\(^{102}\)

Also in *Osmanoglu* the Court hardens the majoritarian drive of its reasoning (visible in relation to the legitimate aim) by granting the State a broad margin of appreciation: the contested measure does not only concern the relations between State and religion, about which no European consensus can be detected,\(^{103}\) but also public education.\(^ {104}\) The Court does refer to the counter-arguments brought forward by the parents/applicants, but follows the government’s position while foregoing the opportunity to discuss the merits of these divergent views on integration.\(^ {105}\) Overall, the Court’s majoritarian reasoning can be seen to diminish the effective rights dimension of the minorities’ substantive citizenship.

### 3.1.2.2. Targeting of the Muslim Minority Versus Equal Enjoyment of Fundamental Rights?

At first sight, the Swiss case seems of a very different nature as the French case, where the legislative process of the particular law had been tainted by Islamophobic remarks, and the prohibition appears targeted at Muslims. Nevertheless, on closer scrutiny it does seem that also the Swiss authorities single out the Muslim minority as being an object of special concern in relation to integration concerns. The Swiss Federal Tribunal hearing this case had underscored that the aim of social integration, understood as compliance with the prevailing social conditions in Switzerland, would be particularly relevant for the Muslim minority, since it has grown so significantly in recent years.\(^ {106}\) If no Islamophobia, this arguably does reflect a broader societal context of unease and bias towards the Muslim minority in Switzerland.\(^ {107}\)

The Court, however, does not take this into account in its analysis, not even in relation to an explicit complaint by the applicants as they contest the legitimacy of the aim invoked by the government by arguing that fundamental Christian or orthodox Jews had obtained exemption for the mixed swimming classes.\(^ {108}\) The Court simply notes that the applicants did not put forward proof to back up their allegation of an indirect discriminatory application of exemptions.\(^ {109}\) This case can thus be seen to confirm the difficulties of obtaining proof of discrimination, especially in a context of systemic discrimination and deep seated prejudice towards a particular minority group.

\(^{102}\) A similar ambiguous position towards minorities and their distinctive ways of life comes forward in the discussion about the burkini, where the Court (*Osmanoglu* (n 13) paras 78, 101) glosses over the religious concerns voiced by the parents (the shape of the girls’ bodies would be equally visible when wearing burkini’s; para 76), while the government had extended its majoritarian argumentation: since in Swiss society one sees partially nude bodies frequently, one can better get used to it (ibid para 77).

\(^{103}\) ibid para 87.

\(^{104}\) ibid paras 92, 95.

\(^{105}\) Fabienne Bretscher, ‘Osmanoglu and Kocabas v Switzerland: A Swiss Perspective’ (*Strasbourg Observers*, 30 March 2017) at 3 <https://strasbourgobservers.com/2017/03/30/osmanoglu-and-kocabas-v-switzerland-a-swiss-perspective> accessed 8 December 2018.

\(^{106}\) Bundesgericht [BGer] [Federal Supreme Court] Oct. 24 2008, 2C_149/2008 (Switz).

\(^{107}\) Bretscher (n 105) 3, who underlines that the Muslim minority in Switzerland is now seen as a problem and a threat and identifies a tense environment.

\(^{108}\) Osmanoglu (n 13) para 61. See also Lourdes Peroni’s criticism of the ECHR as contributing to the perpetuation of stereotypes against Muslims, because the Court fails to acknowledge that these stereotypes are embedded in public discourses in Europe: Lourdes Peroni, ‘Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising’ (2014) 10 International Journal of Law in Context, 215.

\(^{109}\) ibid para 96.
However, it also raises the thorny question what one can expect from an international human rights court in terms of acknowledging such a tainted context in its non-discrimination analysis.\(^{110}\)

### 3.1.3. Some Overarching Comments: Reversal of Human Rights Logic in Relation to Religious Minorities with a Migrant Background

It was critically discussed elsewhere that the Court tends to grant States a wide margin of appreciation in relation to questions pertaining to State duties to respect and protect minorities’ separate identity,\(^{111}\) so that it can step back in the face of controversial questions, in order to avoid a legitimacy struggle with the contracting states.\(^{112}\) Likewise, the Court has been seen to avoid a non-discrimination analysis in relation to these questions (as possible duties of differential treatment). Unfortunately, what appears to be happening here is that the Court seems to take an extra step back when religious minorities with a migrant background are at the centre of the controversy, namely by allowing majoritarian reasoning to prevail. When the Court accepts the government’s (one-sided) understanding of what is needed for social integration or the requirements of living together as the legitimate aim ‘respect for the rights of others’, it allows the government to pitch the rights of the majority against the rights of the minority, while presenting the former as outweighing the latter. Unfortunately, this majoritarian reasoning is further extended by determination of a broad margin of appreciation and glossing over a discrimination complaint.

Ultimately, the Court almost reverses the entire human rights logic. Whereas the latter implies that governments need to put forward convincing reasons to limit fundamental rights, the judgments in S.A.S. and Osmanoglu signal that religious minorities can only live their religiously inspired way of life in so far as the majority can accept this. Put differently, in these judgments the Court seemingly confirms the government’s message that if one wants to have a ‘worthy’ life, and be socially integrated, one needs to behave like the national majority, there only being room for those expressions of a separate religious identity that the national majority allows. In the end, the Court can be seen to enable states to impose the national majority way of life on minorities under the veil of ‘integration’, sacrificing the latter’s (equal and effective enjoyment of) fundamental rights in the process.

### 3.2. Participation and Belonging/Collective Identity: Counter-Productive Effects of Exclusion, Marginalisation

The problems noted regarding the effective and equal enjoyment of fundamental rights due to the ECtHR’s reasoning are not only at odds with the centrality of equal rights among citizens, they also have negative repercussions for the participation dimension of substantive citizenship for the Muslim minorities concerned. The measures concerned may be in name of integration, but they

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110. There may be factual disagreement and lack of proof about the differential application of exemptions for mixed swimming classes (compare Osmanoglu (n 13) paras 6, 74 and 96), but the Court could have at least acknowledged signs of latent Islamophobia visible in the statement of the Swiss Supreme Court, and accorded this some weight in its proportionality review.

111. See also Augenstein (n 82).

112. See Kristin Henrard, ‘How the ECtHR’s use of European Consensus Argumentations Allows Legitimacy Concerns to Delimit its Mandate’ in Panos Kapotas and Vassilis P Tsevelekos (eds), *Building Consensus on European Consensus* (CUP 2019).
actually produce counter-productive effects, namely de facto hurdles to minorities’ participation. Several third party interveners in S.A.S. underscore the fact that women with full-face veils actually did participate actively in society, while this total ban and criminalisation rather results in ‘the confinement of the women concerned in the home and to their exclusion from public life’. This confinement leads to these women’s ‘isolation and the deterioration of their social life and autonomy,’ and relatedly ‘might impair the right to work, the right to education, and the right to equal protection of the law’. Similarly, in Osmanoglu the applicant parents themselves raised the concern that if the receiving country does not respect the religious convictions of migrants, and does not allow the expression of Muslim identity in the public schools, Muslims will feel pressured to put their children in private (religious) schools. Separate schooling would limit integrated education and, more generally, minimise interaction between (children from) minority and majority, possibly even stimulating the emergence of parallel societies.

Furthermore, when Muslim minorities feel de facto pressured out of public space at large (S.A.S.) and/or public education (Osmanoglu), this also negatively impacts on their sense of belonging, and thus on the collective identity dimension of their substantive citizenship. In the end, in S.A.S. and Osmanoglu the Court allows States – in the name of social integration and living together – to diminish the substantive citizenship of religious minorities with a migrant background, who are legal citizens.

4. SOME CONCLUDING REMARKS AND RECOMMENDATIONS IN RELATION TO ‘INTEGRATION’ ARGUMENTS USED BY GOVERNMENTS

This article critically reviewed two cases of the ECtHR, that seem to initiate a new line of jurisprudence, namely one that explicitly uses integration reasoning in the justification of limitations to minorities’ fundamental rights. The analysis of S.A.S. v France and the Osmanoglu and Kocabas v Switzerland adopts a citizenship lens, to highlight the extent of the problems involved. The article started with a brief exploration of the three dimensions of substantive citizenship, and its possible interrelation with the concept ‘integration’. Subsequently, the two cases are analysed in detail in terms of the effective and equal enjoyment of rights dimension of substantive citizenship, critically reflecting on majoritarian reasoning (opposing the effectiveness) and the lack of proper non-discrimination analysis. These problems in terms of ‘rights’ are furthermore translated in reductions of the participation and collective identity dimension of substantive citizenship. Ultimately, the ECtHR can be seen to allow States – in the name of integration and living together – to push religious minorities with a migrant background out of public space and societal life, thus contesting, and ultimately denying, their substantive citizenship.

Turning to recommendations about integration reasoning at the ECtHR and minorities’ substantive citizenship, it is important to highlight that integration and integration reasoning are not per se problematic. However, the ECtHR, and international human rights courts more generally, should guard against the uncritical adoption of integration reasoning put forward by the

113. S.A.S. v France (n 12) para 92, by the NGO Article 19.
114. ibid paras 96 and 104, respectively by Human Rights Centre of Ghent University and Open Society Justice Initiative.
115. ibid para 90, by Amnesty International.
116. Osmanoglu (n 13) para 59.
governments as justification to limit minorities’ fundamental rights. Unfortunately, the Court’s first explicit engagement with integration lingo disregards the extensive integration literature in social science and political philosophy, more particularly the increased recognition of integration as a multidimensional holistic process, and as a two-way process. The Court’s unquestioning acceptance in both S.A.S. and Osmanoglu of the government’s understanding of integration (requirements of living together) and total disregard of the distinctive views of minorities, does not reflect a vision of integration as a two-way process. Instead, the Court appears to accept integration as a one-way process, whereby only the minority needs to adapt its way of life and give up distinctive identity traits. Furthermore, the ECtHR in Osmanoglu disregards the valid arguments of the parent applicants that integration does not hinge on participation (or not) in one particular activity, but is rather the result of a multitude of factors. Last but not least, the central importance of combatting discrimination and stereotypes (to realise integration, an integrated society), is difficult to reconcile with the avoidance of an explicit discrimination analysis in cases tainted by (at least latent) Islamophobia.

Returning to the analysis in terms of effective enjoyment of fundamental rights: the problematic use of integration reasoning in the two ECtHR cases is strongly interrelated with majoritarian reasoning, and thus contrary to the counter-majoritarian core of fundamental rights. Consequently, the ECtHR is recommended not to persist in this counter-intuitive line of reasoning, and to reverse to a counter-majoritarian drive, respecting the core of the human rights paradigm, and giving pride of place to the prohibition of discrimination. Relatedly, the Court is invited to remain critical towards integration arguments put forward by governments to limit the enjoyment of minorities’ fundamental rights. Similar recommendations can be made towards national courts, arguably even more forceful since national courts are not held back by supranational court’s subsidiarity concerns.

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