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Seminar

"The articulation between the European Convention of Human Rights and the European Law: past, present and future"

"Living together" in a polarised European society

By Loïc Azoulai

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I would like to consider the issue of living together in European society as it is reflected in the legal systems of the Convention and the European Union, starting from the assumption that any such examination is relevant not only in terms of the formal articulation between these two legal systems, but, more generally and at a more profound level, from the perspective of the role played by European law and the European courts in an era of widespread social polarisation. I shall do so briefly and partially, putting to one side the countless implications of the vast theme of "living together", as expressed in law and beyond the law. If I have chosen this particular theme, it is, firstly, on account of what is happening in Europe *today*: a disturbing overlap between, on the one hand, a level of economic, institutional, technical, technological and cultural interdependence between European societies, of an intensity that has probably never been experienced in their history; and, on the other, an equally intense degree of polarisation between social groups within these societies. This polarisation goes further than mere conflicts of interests and differences in opinions. It concerns our very relationship to reality, a fundamental disagreement about what is occurring in society and in the world, and the causes for this. It would be foolhardy to venture to analyse the causal links in this process. Such a project would require us to draw on historical analysis and the social sciences, in a truly multidisciplinary study. As a lawyer, it is enough to note the increasing tendency to seek judicial solutions to the forms taken by this polarisation, that is, to the circumstances in which we coexist, and the incessant conflicts to which this coexistence gives rise. This process of seeking judicial solutions is increasing observed, everywhere and in all areas. The corresponding scenarios are being played out before the courts, and especially before the European Courts, which today appear not only as one of the main channels for the expression of this political and social polarisation, but also as one of its main targets.

"Living together"

However vague and problematic it might seem to us today, the concept of "living together", which emerged in the European Court of Human Rights' case-law via the Grand Chamber judgment in *S.A.S. v. France* ([GC], no. 43835/11, ECHR 2014) delivered almost ten years ago to the day (1 July 2014), is the first conclusive evidence of increased polarisation in the judicial arena. The case

concerned the enactment of the French law of 2010 prohibiting the concealment of one's face in public places. An applicant of Pakistani origin, stating that she was a "devout Muslim" and "*[wore] the burqa and niqab in accordance with her religious faith, culture and personal convictions"*, considered this prohibition to be contrary to Articles 8 and 9 of the Convention. The Court decided to conduct *"an in-depth examination"* of the objectives relied on by the French Government in relation to the legitimate aims for limiting the rights protected by the Convention. It concluded that only "*respect for the minimum requirements of life in society*", in other words, "*living together*", could justify the impugned legislation. The Court accepted that "*the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier*". The principle having been justified, the blanket ban on the wearing of full-face veils in public places passed the proportionality test, in that it was intended to "*secure the conditions whereby individuals can live together in their diversity*". Thus, "living together" seems to be related to a form of natural sociability: it arises from the "*significant role*" played by the face in social interactions between individuals. According to the Court, however, this was also a genuine *"choice of society"*, specific to French society; this is the first time such a term appears in the case-law of the European Court of Human Rights (G. Gonzalez and G. Haarscher, "Consécration jésuistique d'une exigence fondamentale de la civilité démocratique ? Le voile intégral sous le regard des juges de la Cour européenne", *Revue trimestrielle des droits de l'homme*, 2015). The concept of "living together" appears both as a form of natural life and a culturally-aligned way of belonging to a given society.

The concept of "living together" also runs through the *Osmanoğlu and Kocabaş v. Switzerland* judgment (no. 29086/12, 10 January 2017), which concerned the obligation for school pupils in the Canton of Basle Urban to attend mixed swimming lessons. In the opinion of two Swiss nationals who also held Turkish nationality, were "*devout Muslims*" and were parents of underage girls, this obligation ran counter to their religious beliefs. The *Osmanoğlu and Kocabaş* case involved individuals who, by the standards of the European Court's own case-law, were perfectly integrated into Swiss society: these parents had been living in Switzerland for many years, were employed there, had developed cultural and social ties in the country, and spoke Swiss German fluently. Nonetheless, in their view, there was a risk that the State, in refusing the expression of their religious beliefs and practices, would push them towards "*parallel communities*", which were likely to develop alongside mainstream society. The Swiss Federal Supreme Court perceived this as a threat to the integrity of the country's social fabric. It decided that educational obligations had to prevail over religious precepts. In a striking mirror image of the "full-face veil" case, it held that the "*public interest in an all-round education*" was at stake. Indeed, an all-round education refers to the specific function of ensuring social integration, inherent in education, which must facilitate the alignment of minority groups with the mores, opinions and customs of the majority in society. The European Court was of the same opinion: the measure adopted by the Canton of Basle Urban had been intended "*in particular, ... to protect foreign pupils from any form of social exclusion*"; it had been necessary in order to provide the children with "an all-round education, facilitating their successful social integration according to local customs and mores", which reflected the "needs and traditions" identified by each State. Here again, cultural considerations and ordinary necessities overlap in the definition of living together: what is at stake is as much the assimilation of minority groups into the local customs of a national society as the creation of a human community through the fact of interacting, learning together and taking part in a physical activity collectively (S. Trotter, "'Living Together', 'Learning Together', and 'Swimming Together': *Osmanoğlu and Kocabaş v. Switzerland (2017)* and the Construction of Collective Life", *Human Rights Law Review*, 2018).

As Jacques Derrida pointed out, in a book that also appeared ten years ago, the concept of living together raises the question whether individuals must "live together" in the same manner and *as the group does,* without the possibility of asserting their differences (J. Derrida, *Le dernier des Juifs*, 2014). Fair treatment for individuals from minorities is the inherent contradiction in living together.

In this case, the way in which the European Court resolved this logical contradiction was typically procedural: it asked the State to put in place a flexible framework, in which exemptions would be possible and in which complaints and challenges could be addressed. Living together presupposes creating the possibility to hear minority voices and to integrate them into a collective conversation, within a "democratic society". I believe that this is also how the Court operates with regard to minority groups. It reiterated this in the case of *Gorzelik and Others v. Poland* ([GC], no. 44158/98, ECHR 2004-I), a Grand Chamber judgment of 17 February 2004: "*[t]he harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively*". Minority associations, even those which have secessionist political ambitions, do not pose a threat to social cohesion, provided that pluralism is understood as the essential precondition to social cohesion, and provided also that these associations agree, and are put in a position, to participate in a democratic conversation.

Democratic society, European society

There is, strictly speaking, no concept of living together in European Union law, at least as it was originally conceived. The reason is that the foundational source of EU law is entirely different. Its main concern is not the individual or the *minority* group, but the European worker or citizen *in movement*. Its focus is to develop a conception of coexistence that allows for opening up the societies which form the European Union. Its law is characterised by a move towards making each national society into a context for belonging which acts, from the inside, to promote its own expansion and its compatibility with the other European nations. This gives European citizens the option of moving around and finding a place within the societies which make up the Union. They must be able to imagine themselves as belonging to a societal network that is not strictly national. To this end, European Union law provides for the insertion of European citizens within State-organised systems for community life and protection (the market, employment, education, social protection, justice, health care). In this regard, European Union law certainly creates a form of extended "life in society". It includes a notion of social integration, but this is by no means integration in the Convention sense of "living together", which refers to natural interaction and imposed harmony between social groups; rather, it is integration in the sense of the State assuming responsibility for the actual ties entered into by European citizens whose social existence occurs on a transnational level. Furthermore, this form of integration gives rise to its own contradictions: here, the risk is not that group authority is imposed, to the detriment of an expression of differences; on the contrary, it is that the expression of differences, and of ways of life that reflect non-inclusion, is promoted, thus reducing the needed social cohesion. The Court of Justice of the European Union has usually responded to this risk by inserting a form of moral conditionality: a European citizen enjoys the right to integrate into a national society only if her or she demonstrates an ability to adhere to the system of values that govern life in the society of the host State (L. Azoulai, "Le sens du social dans le droit de l'Union européenne", in *Les frontières de l'Europe sociale,* 2018).

The starting point for the two systems of law is thus very different. However, the most recent developments seem to indicate a move towards incorporating the Convention concept of living together within EU law. In the wake of the crises and disasters affecting Europe (terrorist attacks, the "migration crisis", the "rule-of-law crisis", climate change, global pandemic, the return of war to the continent), this trend has led the European institutions to question the resilience and social cohesion of European societies. It obliges Europe to confront the "*compelling present-day conditions"* as the European Court of Human Rights described them in the recent *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* judgment ([GC], no. 53600/20, 9 April 2024). These conditions involve nothing less than the physical and psychological reproduction of our societies. The European institutions are responding to these challenges by developing a new discourse around the transformation of the European Union into "a resilient" and "fair society" and around defence of the Union's values and of

the "*European way of life*". Their response lies essentially in developing broad systems of rules: the Green Deal, the Pact on Migration and Asylum and, in the digital field, the DSA, the DMA and the AI Act. In this context, however, the lawyer is struck by another distinctive aspect: the introduction of the concept "European society" into EU law and European legal theory (A. von Bogdandy, *The Emergence of European Society through Public Law. A Hegelian and Anti-Schmittian Approach*, 2024).

The concept is set out in the judgment *Russia Today France v. Council of the European Union*, delivered by the Grand Chamber of the General Court (27 July 2022, Case T-125/22), in the specific context of Russia's military attack on Ukraine. The Council of the European Union had decided to suspend, on the territory of the European Union, the activities of those media which were controlled by the Russian Federation. This action was justified by *"public interests which aim to protect European society".* The General Court considered that although "*the restrictive measures at issue"* entailed a restriction on freedom of expression, "[they] *were targeted at the media outlets controlled by the Russian Federation engaged in propaganda actions in support of the military invasion of Ukraine by the Russian Federation, were capable of protecting the Union's public order and security and preserving the integrity of democratic debate within European society, peace and international security".* In other words, the democratic foundations of European society must be defended. This defence has to be mounted against a twofold threat: it is both geopolitical, resulting from the activities of media which serve an authoritarian State that is hostile to the European way of life, and socio-political, given that these media are at the root of "*a continuous and concerted activity of disinformation and manipulation of the facts"*, encouraging the polarisation of European societies. This threat certainly relates to the principle of "living together" in Europe. In the General Court's view, it justified intervention at European Union level, or *"uniform and immediate intervention throughout the territory of the Union"*.

The concept of "European society" which emerges from EU law is not far removed from the classic concept of a "democratic society" as developed by the European Court of Human Rights. The same values of freedom, pluralism and tolerance are evoked. There is, however, a difference. This results from the discrete periods at which the two concepts emerged; it also results from the divergence in jurisdictional contexts, which vary in terms of procedure and judicial approaches. We are familiar with the background to the concept of a democratic society: anti-totalitarian post-war Europe, focused on reconstruction; the struggle against various forms of persecution and discrimination; the development of the State as the guarantor of individual freedoms, particularly freedom of expression; and protection against a State that is potentially oppressive towards individuals and civil society. The concept of "European society" arose in another context: it emerged in EU law both as an instrument of protection against a series of existential threats and, in a context of fragility and fragmentation of European societies, as a justification for regulating freedom of information and expression. We know what "a democratic society" represents: an essential and conceptual compass for the European Court of Human Rights; and we know how it operates: as a technique for assessing the proportionality of State measures affecting fundamental rights, a rational framework for reconciling the collective requirements of life in society and protection of the personal autonomy of individuals. The question is whether this framework can help "European society" to protect itself and ensure its survival.

This classic definition of a democratic society was applied in a textbook manner in the *Vajnai v. Hungary* judgment (no. 33629/06, ECHR 2008), delivered by the European Court of Human Rights on 8 July 2008. The case concerned the wearing of the red star, symbol of the international workers' movement, by a representative of a left-wing political party at a demonstration held in Budapest in 2003. Criminal proceedings were subsequently instituted against Mr Vajnai for having worn a totalitarian symbol in public. At the relevant time, the Hungarian Constitutional Court found that *"the historical context"* and "*a reasonable feeling of menace or fear based on the concrete experience of people – including their various communities – who suffered injury in the past"* were distinct criteria for assessment. It followed, in the Hungarian court's view, that the prohibition under criminal law on

wearing this symbol in public was "*indeed a measure with a view to the protection of democratic society"* and not unconstitutional. The European Court of Human Rights took a different approach. It accepted that in Hungarian society, marked by the grip of the communist regime, the wearing of such a symbol "*may create uneasiness amongst past victims and their relatives"*. Nonetheless, "*such sentiments, however understandable, cannot alone set the limits of freedom of expression"*: given the assurances provided by the State to the victims of communism, *"such emotions cannot be regarded as rational fears"*. And here we find the passage that, in my opinion, is the most important: "*public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment"*. There is undoubtedly a reason for these feelings. In a democratic European society, however, bygone emotions and the war of memories must yield to social needs and rational collective action.

The question is whether this same framework continues to operate when the concept of European society results from a different context, in which, having overcome the continent's historical fervours, European law is at the mercy of powerful social emotions (fear, anxiety, mistrust, resentment, anger), a proliferation of sources of existential angst (fears of downgrading, replacement, annihilation) and a proliferation of sources of polarisation (social media, the media in general, the political sphere). In this context, certain collective feelings appear to be rational (fear of climate change, the return of war, a zeal for national defence, anxiety over digital transformation, a fear of the rise of separatism in society). However, these feelings give rise to identity-based demands from opposing and uncompromising groups: polarisation then ensues. The law itself, and judges as the authentic interpreters of the law, are then challenged, accused of being responsible for the current disastrous situation and incapable of responding to the resultant feelings of loss within society (loss of one's living environment, way of life, social position, control, place in the world). It is therefore extremely important to know what role European law and the European Courts are likely to play in resisting polarisation. What must be offered is not *information on how* to live together (rules and precepts) but a *framework* that will make it possible to move towards social peace.

It strikes me that in recent years and months the European Court of Human Rights has attempted to sketch out such a path. I would give two salient examples. The first is drawn from the Grand Chamber judgment in the case of *H.F. and Others v. France* ([GC], nos. 24384/19 and 44234/20, 14 September 2022). It concerned the sensitive issue of the repatriation of the wives and children of European jihadists held in Kurdish camps in north-eastern Syria. The Court established a jurisdictional link with the facts under Article 3 of Protocol No. 4, which prohibits the expulsion of an individual from the territory of which he or she is a national and guarantees the right to enter that State, rather than under Article 3 of the Convention. It accepted that, since *"international mobility has become more commonplace in an increasingly interconnected world, seeing many nationals settling or travelling abroad"*, the States are presented with *"new challenges in terms of security and defence"*. International terrorism and threats to national security nurture legitimate feelings of fear among the public. In those circumstances, although the right of entry of nationals is certainly guaranteed, it does not create "*an absolute right to remain in [the national] territory",* nor does it guarantee a general right to repatriation. In contrast, in order to avoid leaving such nationals in the situation of "exile", the refusal to repatriate them must be subject to a decision-making process that is surrounded by appropriate safeguards against arbitrariness: the decision must be submitted to "*some form of adversarial proceedings before an independent body"*. Agreeing to live with our "enemies" (or individuals perceived as such) entails a resumption of democratic dialogue, while simultaneously broadening it by giving a voice in the decision-making process to the exiles' relatives.

How can we live together with the (endangered) living world? This is the question which was posed in the three climate cases recently examined by the European Court of Human Rights, and especially in the case of "Climate Seniors", which the Court ruled on in its famous *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* judgment (cited above). In it, the Court showed that it was strikingly aware of the existential stakes posed by climate change and the fundamental

conflicts which ensue; it is necessary to develop "*a more appropriate and tailored approach as regards the various Convention issues which may arise in the context of climate change"*. Awareness of the existential problems and handling of the resultant fundamental social conflicts: it seems that these two elements will have to define the law of the European society in future. The core of the Court's approach consists in giving a voice to associations representing the persons affected (in their private, familial and social life) by climate change and encouraging the national courts to listen to them. In this case, the Court even went slightly further: it required that the State put in place a decision-making process, surrounded by procedural safeguards, and introduce a transparent and coherent legislative and regulatory framework establishing the adaptation measures aimed at alleviating the consequences of climate change. In this way, it attempted to bring the climate into the framework of democratic society, in an effort to make society more aware of what should be important for us, in Europe. However, just as in *H.F. and Others v. France* the Court did not venture to indicate the place that exiled individuals should occupy in national society, in the climate case it did not venture to rule on the concentration level that carbon emissions ought to be set at across the national territory. This falls within the discretion of the national authorities.

Giving a voice in society to those who call for it strongly is essential in order to live together. Is it enough? There are more and more instances in which what is at stake, what is being called for, is not simply a voice, but a place in society, against the backdrop of a "place struggle" and considerable uncertainty about the loss of one's own role, whether as a result of a perceived declassification or an illusionary "replacement". Beyond the problems of international terrorism and climate change, and many other issues which threaten "living together" today (the digital revolution, the rule-of-law crisis, inequality and discrimination, mass surveillance), I should like to consider for a moment two questions which test co-existence in society even more acutely: the admission of migrants to our societies, and the place of minority religious groups. Although these two questions are addressed differently in the two legal systems, it is possible to compare briefly the approaches taken by the Strasbourg and Luxembourg Courts.

Living together with migrants

The nature of the immigration problem has changed in recent years in Europe. It is no longer simply a matter of economic, social and cultural integration into societies which, for the immigrants, are post-colonial States. The problem today is how to live together with migrants from the "Global South", who are perceived in turn, and sometimes indiscriminately, as both vulnerable and undesirable, and who are in Europe in unknown geographical and legal areas. Let us compare the approaches taken by each Court in this regard.

The *M.A.* judgment, delivered by the Court of Justice of the European Union on 30 June 2022 (Case C-72/22 PPU), concerned the so-called weaponisation of migration by foreign powers. M.A. was a Syrian national who had entered the territory of Lithuania illegally from Belarus. He was arrested in Poland while travelling to Germany aboard a minibus of migrants, operated by "smugglers", and sent back to Lithuania by the Polish authorities. He was placed in administrative detention in the Kybartai detention facility. This detention was based on an amendment, enacted in August 2021, to the Law on Aliens in response to "*an emergency due to a mass influx of aliens"*. On several occasions, before the administrative authorities and then before the courts examining his placement in administrative detention, M.A attempted to make an application for international protection. This was rejected, on the grounds that it had not been lodged at the border check points or in the transit zones. The particular issue in this case was the lawfulness of the placement in administrative detention. According to the Luxembourg Court, there was no doubt that M.A. had been deprived of his liberty. The exceptional context put forward by the Government *"on account of the mass influx of migrants at its borders, arriving mainly from Belarus"*, instigated by a country which was conducting a "hybrid war" against the Union, could not be used to justify a deprivation of liberty. It did not mean that a foreign national who had crossed borders illegally could be considered as a threat to public order or national

security. However, it is important to note that the Court of Justice did not stop there: it added that it was nonetheless possible to consider that an asylum seeker was capable of posing such a threat, on account of specific circumstances which demonstrate that he or she is dangerous, in addition to being illegally present.

In this judgment, the Court of Justice clearly rejected any policy which consists in reducing the phenomenon of immigration to a geopolitical threat which must, as such, be criminalised. However, it accepted the idea that there are dangerous individuals on the borders and that some of them are migrants. In the case of *ADDE and Others (Associations de défense des droits des étrangers*, 22 September 2023, Case C-143/22), which concerned internal borders, the same pattern was repeated: the illegal entry could not be regarded as threat for society. However, the Court of Justice accepted that illegal entry was not without danger. This danger lay in clearly identified offences and, specifically, in the border areas where there exist particular risks with regard to crime. Thus, political hostility towards migrants was to a certain extent deflected: there were no grounds to criminalise them or to relegate them to limbo, to areas with no law; but it could be accepted that the State will put in place a special regime, focused on border areas, for the protection of public order. The Court of Justice has placed the emphasis on "social defence" rather than "territorial defence".

With regard to migrants present on the European territory, the case-law of the Court of Justice is built on the idea of co-existence based on fulfilment of their basic needs (CJEU, *Haqbin*, 12 November 2019, Case C-233/18). But this communality of needs does not lead to inclusion. The case-law also contains the idea of an internal separation within society that is essentially cultural in nature (rather than racial or ethnic): migrants have forms of interaction and attitudes which keep them separate from the rest of the population (CJEU, 4 June 2015, *P and S*, Case C-579/13; CJEU, 6 July 2023, *Commissioner General for Refugees and Stateless Persons*, C-8/22). Thus, their presence in society is associated with "*the emergence of points of social tensions"* which must be avoided at all costs (CJEU, 1 March 2016, *Alo and Osso*, C-443/14 and C-444/14). This can justify measures to disperse migrants across the national territory, and measures to separate them from other migrants (CJEU, 1 August 2022, *T.O.*, Case C-184/20), and it justifies the imposition of an obligation to learn the language and customs of the host society (CJEU, 9 July 2015, *K and A*, Case C-153/14). In addition, given that it envisages separation from the perspective of society as a whole, the Court of Justice has great difficulty in accepting discrimination based on racial or ethnic origin (CJEU, 10 June 2021, *KV*, Case C-94/20).

For the European Court of Human Rights, the perspective is different. The case of *N.D. and N.T. v. Spain* ([GC], nos. 8675/15 and 8697/15, 13 February 2020), provides a good point of comparison with regard to the treatment of migrants at land borders. Two migrants, a Malian national and a national of Côte d'Ivoire, had attempted, with a group of about 200 persons, to scale the barriers which surround the Melilla enclave and separate the Spanish and Moroccan territory. Having been apprehended by Spanish border guards, they were returned to Morrocco and handed over to the Moroccan authorities, without being subjected to any identification procedure or examination of their circumstances. Before the European Court of Human Rights, they alleged a violation of Article 4 of Protocol No. 4 to the Convention, which prohibits collective expulsions. In its judgment, the Court indicated that it was clearly aware of the "considerable difficulties" experienced by the States which form the external borders of the Schengen Area in coping with the increasing influx of migrants and, more generally, *"the challenges facing European States in terms of immigration control as a result of the economic crisis and recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East"*: the Convention applies to borders and must be complied with there. Equally, it insisted that the States make available genuine and effective access to established border crossing points, where migrants' basic needs could be taken care of and where they would be able to put forward their arguments against expulsion. However, it accepted that the conduct of persons who cross a border in an unauthorised manner can create a threat to public safety which could, as such, justify dispensing with the procedural protection against collective expulsions.

Where the danger comes from the individuals themselves, the State must be able to defend its borders against "*large numbers*", the "*use of force*", and "*a clearly disruptive situation which is difficult to control*". The Strasbourg Court's approach is characteristically that of protection of territorial integrity. This persecutive was clear already in its first major ruling on migration matters, namely the Plenary Court's judgment in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, (28 May 1985, Series A no. 94): with regard to immigration, States have the right to control the entry of non-nationals into their territory. When it comes to borders, while the Court of Justice's fears focus more on the societal effect of immigration, the concerns of the European Court of Human Rights are more strictly territorial in nature.

Within the national territory, the European Court of Human Rights is attentive, as is the Court of Justice, to the essential needs of asylum seekers and illegal aliens (*M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011). In respect of aliens settled in Europe and subject to an expulsion order, it applies an analysis based not merely on their social and family integration in the host society but also on the quantity and quality of the links with the host country *as these relate* to the ties with their country of origin (*Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX; *Maslov v. Austria* [GC], no. 1638/03, ECHR 2008). Here, the separation in issue is not within society; it exists between the fact of belonging to a given nation and the fact of belonging to a foreign country. This does not rule out coexistence. But coexistence presupposes co-belonging. Accordingly, the Court's approach consists in providing foreigners with the procedural possibility of demonstrating their "belonging" to a European nation (through family, social life or an application for naturalisation) and to combat, in Europe, racial or ethnicity-based discrimination and prejudice (*M.A. v. Denmark* [GC], no. 6697/18, 9 July 2021; *Biao v. Denmark* [GC], no. 38590/10, 24 May 2016).

The two bodies of case-law suggest that it is indeed necessary to live together with migrants. It is necessary. Both courts refuse exclusion and stigmatisation. But, while coexistence might be necessary, this does not mean that it is natural or fraternal. In this connection, the solutions proposed by the two Courts resemble each other, but their perspectives differ. From the perspective of the Cour of Justice, cohabitation implies social harmony, and the challenge is accordingly to avert the tensions and conflicts in the social order that migrants bring out. From the perspective of the European Court of Human Rights, coexistence implies co-belonging, and the challenge is then to fight against disruption on the borders and the phenomenon of alienation in relation to the national community.

Living together with Jews and Muslims

In recent years, the European Courts have had to arbitrate disputes over the place of minority religions in European societies. Traditionally, these conflicts have been dealt with under Article 9 of the Convention, reproduced in Article 10 of the Charter of Fundamental Rights of the European Union. The European Court of Human Rights views them in terms of the balance between respect for applicants' religious freedom and the protection of public order. This search for balance is based on two axioms, the fragility of which is even clearer today: on the one hand, the idea that religious freedom, even in its external manifestations, falls within the limited sphere of private choice; on the other, the idea that the protection of public order corresponds to a requirement of neutrality applied strictly, but solely to State bodies. Today, however, religion is perceived by certain groups, such as Jews and Muslims, as touching on all aspects of their lives, whether at the level of their actions, practices or the standards to be followed: it is not simply a matter of private belief. Equally, many European States have undertaken to extend the requirement of State neutrality to life in society as a whole: neutrality no longer concerns only State bodies, but all of public life, and it imposes an attitude of moderation on religious groups in their private attitudes. The result, for the majority group, is the shared perception of a form of religious separatism in relation to shared rules and collective life; for the minority groups, the result is a feeling that their religious identity is being attacked and insulted. It is with these polarised views that the European Courts must deal. The question is whether the

traditional framework of attempting to strike a balance is sufficient. Faced with these views, the European Courts would appear to be looking for new objective bases for their rulings.

A recent case, submitted to both the Court of Justice and the European Court of Human Rights, provides an opportunity for comparison. I refer to the case on the regulation of the ritual slaughter of animals for human consumption. In 2017 the Flemish Government of Belgium, followed a year later by the Walloon Government, decided to prohibit the slaughter of animals without prior stunning, in the name of protecting animal welfare. Under Jewish and Muslim rites, however, it is forbidden to stun the animal prior to slaughter. The Court of Justice was the first of the two courts to examine the case. In its *Centraal Israëlitisch Consistorie van België, Unie Moskeeën Antwerpen and Others* judgment (17 December 2020, Case C-336/19), the Grand Chamber ruled in favour of the Government. It considered that "*the requirements of Article 13 TFEU"*, which lays down the principle that all EU policies and actions pay full regard to the welfare of animals as sentient beings, must prevail over *"Jewish and Islamic religious precepts"*. Three key arguments were mobilised for this purpose. First, animal welfare had been acknowledged as an "*EU value*", a value *"to which contemporary democratic societies have attached increasing importance"*. Secondly, adopting the spirit of subsidiarity dear to the European Court of Human Rights, consideration had to be given to *"national perceptions"* and the "*specific social context of each Member State*", which in the present case was calling for enhanced animal protection. Lastly, regard was to be given to the emergence of a "*scientific consensus"* to the effect that that prior stunning was the optimal means of reducing the animal's suffering at the time of its death. Liberal values, the state of public opinion, science: these are three elements which characterise modern European consciousness, and they are three elements which are the subject of repeated attack in our polarised societies. In the opinion of the Court of Justice, they form an objective basis for overcoming conflict and bringing society round to the concept of prior stunning. In any event, as the Court of Justice pointed out, Jews and Muslims are still able to import from another EU Member State, or even from a non-EU State, products derived from animals that had undergone ritual slaughter. In other words, the continued availability of such products in Europe was not threatened. This assumes, however, that these communities comply with the "European way of life" from which they are, however, symbolically alienated as a result. In other words, they are simultaneously separated from and subjected to it.

The same case was submitted to the European Court of Human Rights. On 13 February 2024 it delivered a judgment in *Executief van de Moslims van België and Others v. Belgium* (nos. 16760/22 and 8 others). Its conclusion was similar to that of the Court of Justice and seems to follow the same reasoning: we find the reference to animal welfare as a "*value of the European Union"* and a *"moral value"*, the importance of the "*choice of society"*, and the reference to a "*scientific consensus"*. The one difference in the approach taken by the European Court of Human Rights lies in the emphasis placed on institutional subsidiarity: the Court pointed out that a twofold review, by the Belgian Constitutional Court and by the Court of Justice of the European Union had preceded its own, and it emphasised that the Flemish and Walloon legislatures had carried out all the necessary preliminary studies before enacting their decrees: "*the contested prohibition, contained in the two impugned decrees, results from a choice deliberately entered into by the federated legislatures at the close of a considered parliamentary process"*. Thus, it chose to have regard to the margin of appreciation granted to the State. Inevitably, in such an approach the way in which believers and religious authorities perceive their situation was put to one side. The State's knowledge and rules prevail over religious knowledge and rules. Through its approach, the case-law of the Court of Justice delimited the *place* of believers in European society; in pursuit of the same goal, namely coexistence, the case-law of the European Court of Human Rights restricts their *voice*.

We began by considering the European Court's case-law on the Islamic veil. Let us conclude by returning to that question briefly. In its judgments on the ban on wearing the Islamic veil in companies, the Court of Justice has applied the EU law on combatting discrimination in a manner which refuses, in principle, to consider that these bans, in so far as they are general in scope, amount to direct

discrimination against the individuals concerned. In the Luxembourg Court's view, this was a matter of indirect discrimination based on religion, and could be justified "*where there is a genuine need on the part of [that] employer*". This need was defined with reference to the "*legitimate wishes of [those] customers or users*" and in relation to the employer's freedom to pursue a "*policy of neutrality"*. But there is more: a general prohibition is also justified, perhaps above all, by the fact that "*the aim of the measure at issue is to avoid social conflicts within the undertaking, particularly in view of tensions which occurred in the past in relation to political, philosophical or religious belief"* (CJEU, 15 July 2021, *WABE e.a*., Cases C-804/18 and C-341/19). In its manifestations, religious practice is envisaged as a factor in social disruption. Strong grounds are evident in this case-law, which was already apparent in the migration cases: to prevent the emergence of conflict and to avoid points of social tension. The Cour of Justice thus demonstrates the aim of its case-law: social peace, the ability to live together. However, this is a conception of living together which operates under the constant threat of social tension and disorder; accordingly, it seeks to prevent conflict and, as a result, it had been led to prioritise social cohesion as a whole, or social homogeneity, to the detriment of the expression of differences and of minority groups.

There is, in the case-law of the European Court of Human Rights, the recurrent and focal idea that "*[T]he emergence of tensions is one of the unavoidable consequences of pluralism, that is to say the free discussion of all political ideas. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing political groups tolerate each other"*. Democratic life implies the expression of ideas and ideals which are "*likely to offend, shock or disturb*", provided that this does not entail acts of violence. This idea belongs to the Strasbourg Court's case-law on the democratic role of associations, political groups and ethnic, sexual and religious minorities. But it is also, and equally, valid with regard to the place of individuals and groups in the life of society. This reminds me of the words of Beccaria, quoted by Justine Lacroix in a recent book on the democratic stakes in Europe: *"It is impossible to anticipate all of the misdeeds engendered by the universal combat of human passions"* (J. Lacroix, *Les valeurs de l'Europe, un enjeu démocratique,* 2024). Impossible, and, if the law puts itself at the service of this impossible goal, a dangerous undertaking for freedom. The Court of Justice of the European Union would certainly benefit from incorporating this democratic idea fully into its case-law, which is aimed at social peace. But I would add, in a diagonal approach, that the European Court of Human Rights would benefit from incorporating a concern with social peace and the new existential challenges facing European society within its case-law, which is essentially geared towards the expression of democratic voices. It is perhaps in this intersection of perspectives that the lines of a European legal thinking on living together will emerge, one that is more complete and better adapted to the conditions in our polarised societies.