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‘Living together’, ‘learning together’, and ‘swimming together’: Osmanoğlu and Kocabaş v Switzerland (2017) and the construction of collective life

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'Living Together', 'Learning Together', and 'Swimming Together': *Osmanoğlu and Kocabaş v Switzerland (2017)* and the Construction of Collective Life

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ABSTRACT

In recent years, the principle of 'living together' has emerged in the jurisprudence of the European Court of Human Rights as a possible justification for limitations on the rights to freedom of religion and to respect for private life. This note assesses the meaning of this principle, and, in particular, the critical development in its conceptualisation marked by the recent judgment of *Osmanoğlu and Kocabaş v Switzerland (2017)*. Although the notion of 'living together' is not explicitly mentioned in this case, I suggest that its ethos underlies the judgment entirely, and that what can ultimately be drawn from the reasoning of the Court in this case is a vision of 'living together' as consisting in 'living in exactly the same way'.

KEYWORDS: living together, tradition, social interaction, social integration, protection of the rights and freedoms of others, Article 9 European Convention on Human Rights

1. INTRODUCTION

In recent years, the principle of 'living together' has emerged in the jurisprudence of the European Court of Human Rights (ECtHR) as a possible justification for limitations on the rights to freedom of religion and to respect for private life. The principle has its roots in the submissions of the French Government in *S.A.S. v France (2014),* a case in which the French statutory ban on covering the face in public was challenged on the grounds that it violated the rights of the Applicant to, inter alia, respect for her private life, freedom to manifest her religion or beliefs, and freedom of expression, together with her right to freedom from discrimination in the exercise of these rights.[1] The Grand Chamber of the ECtHR accepted the argument of the French Government that the

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[1] *S.A.S. v France* Application No 43835/11, Merits and Just Satisfaction, 1 July 2014.

prohibition pursued the objective of respect for 'the minimum requirements of life in society', in that it was aimed at a conception of 'living together' in which it was necessary and significant to see the face of the other in social interaction.[2] It considered that 'living together' constituted an element of the protection of the rights and freedoms of others, such that it could justify the limitation on the rights of the Applicant. Thus the notion of 'living together' entered European human rights law; and its new-found position was most recently affirmed in two judgments concerning the Belgian equivalent of the French prohibition on covering the face in public: *Belcacemi and Oussar v Belgium (2017)* and *Dakir v Belgium (2017).*[3]

Despite the significance that has been accorded to the notion of 'living together' in this way, its meaning has been largely unelaborated in the strand of jurisprudence in which it originates. The judgments in *Belcacemi and Oussar v Belgium* and *Dakir v Belgium* do little to change this. Rather, they heighten the need for a specification of the principle and an analysis of its place in, and implications for, European human rights law. In this note, I suggest that of greater conceptual significance in this regard is the case of *Osmanoğlu and Kocabaş v Switzerland (2017),*[4] which came six months before *Belcacemi and Oussar v Belgium* and *Dakir v Belgium.* Although the notion of 'living together' is not explicitly mentioned in *Osmanoğlu and Kocabaş v Switzerland*, its ethos underlies the judgment entirely; and the case therefore represents an important development in the ECtHR's conceptualisation of this principle, and one which is worthy of note. Following a brief account of the emergence of the principle of 'living together' in European human rights law (Section 2), this note consequently summarises and discusses the judgment in *Osmanoğlu and Kocabaş v Switzerland* (Section 3). As this judgment is currently only officially reported in French, I set out the reasoning of the Court in some detail here, before moving on to analyse the underpinning conceptualisation of 'living together' that is presented in this case (Section 4).

2. THE EMERGENCE OF THE PRINCIPLE OF 'LIVING TOGETHER' IN EUROPEAN HUMAN RIGHTS LAW

The emergence of the principle of 'living together', as a possible justification for limitations on the rights to freedom of religion and to respect for private life within the jurisprudence of the ECtHR, can be traced to the submissions of the French Government in *S.A.S. v France (2014).* The case concerned a challenge to the French statutory ban on covering the face in public, which came into force in April 2011. The Applicant, a young French woman, argued that this ban violated a number

[2] Ibid. paras 81-85.
[3] *Belcacemi and Oussar v Belgium* Application No 37798/13, Merits and Just Satisfaction, 11 July 2017; *Dakir v Belgium* Application No 4619/12, Merits and Just Satisfaction, 11 July 2017.
[4] *Osmanoğlu and Kocabaş v Switzerland* Application No 29086/12, Merits and Just Satisfaction, 10 January 2017.

of her rights under the European Convention on Human Rights (ECHR), including, in particular, her rights to respect for her private life, to freedom to manifest her religion or beliefs, and to freedom of expression, together with her right to freedom from discrimination in the exercise of these rights. One of the justifications offered by the French Government for this ban, however, was that it pursued the objective of respect for 'the minimum requirements of life in society', in that it was aimed at a conception of 'living together' in which it was necessary and significant to see the face of the other in social interaction.[5] It cast the social ties within the community as dependent upon the visibility of the face of each and every member; life within a community of citizens, according to the French Government in *S.A.S. v France*, required the visibility of the face.

The Grand Chamber of the ECtHR accepted that 'living together' could, in this way, constitute an element of the protection of the rights and freedoms of others. It stated that it could accept that 'the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier'.[6] In considering the notion of 'living together' to be an element of the protection of the rights and freedoms of others in this way, the Court also took on the conceptualisation of 'the' community that underpinned the French principle of 'living together' here: a community pre-established and maintained on its own terms. The acceptance of the French Government's emphasis on the visibility of the face as a precondition for 'the possibility of open interpersonal relationships'[7] – an argument which has its more general history in the writings of Levinas on the ethic of the face[8] – was at the same time the acceptance of the institution of a form of sameness in the name of what might otherwise have been expected to have been a pursuit of the negotiation of difference inherent in the lived experience of 'living together'. And in ultimately holding in this case that the French ban was justified in that it sought to guarantee the conditions of 'living together', and was proportionate to that aim, the ECtHR enabled a conceptualisation of the individual as collective agent, charged with upholding and participating in a particular conception of the collective.

This very same reasoning was recently applied by the Chamber Court in two judgments concerning the Belgian equivalent of the French ban on covering the face in public: *Belcacemi and Oussar v Belgium (2017)* and *Dakir v Belgium (2017)*. The Applicants in the first case, Ms Belcacemi and Ms Oussar, challenged the federal law prohibiting the covering of the face in public, which came into force in July 2011; and Ms Dakir, the Applicant in the second case, challenged an earlier

[5] *S.A.S. v France*, supra n 1, paras 81-85.
[6] Ibid. para 122.
[7] Ibid. para 122
[8] Levinas, *Totality and Infinity: An Essay on Exteriority* (transl. A. Lingis) (1991 [1961]), at 194-219.

municipal by-law, which prohibited the covering of the face in public in three municipalities. All three Applicants emphasised that they had chosen to wear the niqab in accordance with their religious beliefs; and they argued, like the Applicant in *S.A.S. v France,* that the restriction on their doing so in public violated a number of their ECHR rights. Under the pressure of the ban, Ms Oussar had, in particular, decided to stay at home, thereby 'considerably restricting her private and social life',[9] whilst Ms Belcacemi felt that she had no option but to remove her veil temporarily, for fear that she would otherwise be stopped in the street and fined or sent to prison.

Just as in *S.A.S. v France,* the Court in each case here primarily examined the ban in terms of Article 8 (the right to respect for private life) and Article 9 (the freedom to manifest one's religion or beliefs), with particular regard to the latter provision. It concluded, along the same lines of reasoning as those set out in *S.A.S. v France,* that Belgium had a 'very large' margin of appreciation here,[10] and that the restriction imposed on the Applicants was proportionate to the overall aim of guaranteeing the conditions of 'living together' – which, the Belgian Government had argued, was the 'most fundamental' objective of the ban.[11] The Court noted, as in *S.A.S. v France,* that it was aware that a State which enters into the realm of legislating on this kind of issue 'takes the risk of contributing to the consolidation of stereotypes which affect certain categories of the population and of encouraging the expression of intolerance' and that the prohibition, 'while not based on the religious connotation of the face covering, weighs especially heavily on Muslim women who wish to wear the integral veil'.[12] It was notable, in this regard, that Belgium, by this measure, was 'restricting in a certain way the scope of pluralism, insofar as the ban obstructed certain women from expressing their personality and their convictions by wearing the integral veil in public'.[13] However, in adopting the ban, Belgium was 'responding to a practice that it judged incompatible, in Belgian society, with the modes of social communication and more generally of the establishment of human relations that were essential to life in society'.[14] Belgium, thus, was seeking to protect 'a mode of interaction between individuals' that was essential to its functioning as a democratic society; and, as for France in *S.A.S.,* 'the question of whether or not to accept the wearing of the integral veil in Belgian public space' constituted 'a choice of [that] society'.[15]

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[9] *Belcacemi and Oussar v Belgium*, supra n 3, para 10. (NB: all translations from the official French reports of *Belcacemi and Oussar v Belgium* and *Dakir v Belgium* are my own.)
[10] Ibid. para 55; *Dakir v Belgium,* supra n 3, para 59.
[11] *Belcacemi and Oussar v Belgium*, supra n 3, para 40; *Dakir v Belgium,* supra n 3, para 29.
[12] *Belcacemi and Oussar v Belgium*, supra n 3, para 52; *Dakir v Belgium,* supra n 3, para 55. See also *S.A.S. v France,* supra n 1, para 149.
[13] *Belcacemi and Oussar v Belgium*, supra n 3, para 52; *Dakir v Belgium,* supra n 3, para 55.
[14] *Belcacemi and Oussar v Belgium*, supra n 3, para 53; *Dakir v Belgium,* supra n 3, para 56.
[15] *Belcacemi and Oussar v Belgium*, supra n 3, para.53; *Dakir v Belgium,* supra n 3, para 56.

At the core of the idea of 'living together' in European human rights law is, therefore, this State-defined vision of 'social interaction', of collective life; and yet aside from this, the Court tells us very little in the cases concerning the bans on covering the face in public about the meaning of the principle of 'living together' itself. There is, moreover, only one other case in which the principle has – rather curiously – been explicitly invoked: *Biržietis v Lithuania (2016)*. In that case, Mr Biržietis, a former prisoner, complained that the Lithuanian statute which prohibited prisoners from growing a beard had violated his right to respect for his private life under Article 8 ECHR.[16] The Lithuanian Government argued that this prohibition was aimed at preventing disorder and crime among prisoners, 'as well as at the maintenance of hygiene and at making sure prisoners had a tidy appearance'.[17] The ECtHR, however, was not persuaded by these arguments. In particular, it considered that the Government had failed to explain how ensuring that prisoners had a tidy appearance was related to any of the legitimate aims in Article 8(2) ECHR, and nor was it clear to it how allowing prisoners to grow beards could lead to disorder and crime. It was here that the principle of 'living together' was briefly, and interestingly, mentioned. The Court noted that the Government had not argued 'that the prohibition on beards was aimed at ensuring respect for social norms and standards among prisoners', and in support of the very idea of this argument, it cited *S.A.S. v France,* 'where the Government invoked the need to ensure "respect for the minimum requirements of living together"'.[18]

Ultimately, the Court in *Biržietis v Lithuania* set aside the question of whether the disputed prohibition pursued a legitimate aim, because in any event, it considered that the measure was neither necessary nor proportionate. The Applicant's decision whether or not to grow a beard was protected by Article 8 ECHR – it being 'related to the expression of his personality and individual identity' – and the Lithuanian Government had, simply, 'failed to demonstrate the existence of a pressing social need to justify an absolute prohibition on him growing a beard while he was in prison'.[19] But what is particularly interesting about this case in terms of the principle of 'living together', however, is the subtle suggestion, made by the Court, that this was a case in which the Government could have tried to argue that it was pursuing 'respect for social norms and standards among prisoners'.[20] This was raised by Judge Wojtyczek, who noted, in his Dissenting Opinion, that the Opinion of the majority '[conveyed] the idea that a State may be able to justify a similar

[16] *Biržietis v Lithuania* Application No. 49304/09, Merits and Just Satisfaction, 14 June 2016.
[17] Ibid. para 54.
[18] Ibid. para 54.
[19] Ibid. para 58.
[20] Ibid. para 54.

restriction in the future if sufficiently strong arguments are provided to justify it'.[21] In this case, such arguments were lacking, but the sense was that they could have been made.

And so the principle of 'living together', as an element of the protection of the rights and freedoms of others and as potentially justifying a limitation on individual rights, has been both stated by the Grand Chamber of the ECtHR (and restated by the Chamber Court), and implicitly suggested by the Court as a line of argument elsewhere. The Court has granted 'living together' a position in European human rights law, and it has nodded towards its implications for the value of pluralism. However, the meaning of the principle, at least from within the perspective of the ECtHR,[22] has been left undeveloped in the jurisprudence in which it originates. That is where the judgment of the ECtHR in *Osmanoğlu and Kocabaş v Switzerland,* delivered on 10 January 2017, comes in.

3. *OSMANOĞLU AND KOCABAŞ V SWITZERLAND (2017)*

A. The Circumstances of the Case

The case concerned a local curricular requirement, specific to the canton of Basel-Stadt, that obliged pupils to participate in mixed swimming lessons at school and only made exemptions available to pupils who had reached puberty. Aziz Osmanoğlu and Sehabat Kocabaş, who were practising Muslims, had three daughters, two of whom fell within the scope of this requirement; and they refused to send their daughters to the swimming lessons, on the ground of their religious beliefs. The Public Education Department of Basel-Stadt warned them in a letter of August 2008 that they would incur a maximum fine of 1,000 Swiss francs each unless their daughters attended the lessons. Osmanoğlu and Kocabaş continued to object, however, and following unsuccessful attempts on the part of the school to find a solution, fines of 350 Swiss francs per parent per child (a total of 1,400 Swiss francs) were imposed in July 2010.

Osmanoğlu and Kocabaş appealed this decision, but the appeal was dismissed in May 2011 by the Court of Appeal of the Canton of Basel-Stadt. Before the Federal Supreme Court of Switzerland, Osmanoğlu and Kocabaş subsequently argued that the refusal of the authorities to grant their daughters an exemption from the compulsory mixed swimming lessons violated their right to freedom of religion.

In a judgment of March 2012, the Supreme Court rejected this argument. Although it considered that the refusal of the authorities to grant an exemption here represented an interference with the religious freedom of Aziz Osmanoğlu and Sehabat Kocabaş, it found that

[21] Ibid. Dissenting Opinion of Judge Wojtyczek, para 2.
[22] In the academic literature, by contrast, see, e.g. Trispiotis, 'Two Interpretations of 'Living Together' in European Human Rights Law' (2016) 75 *Cambridge Law Journal* 580.

this interference – which had its juridical basis in the curriculum stipulated in the canton of Basel-Stadt – was justified. In particular, the Court confirmed the opinion of the Court of Appeal before it, which had considered that the integration of children, irrespective of their 'cultural or religious origins', was of 'primordial' importance.[23] The effect of the interference was, moreover, mitigated by the fact that the swimming lessons were mixed only up until the age of puberty, and by the fact that the consequences of the measure were lessened by two things: the provision of separate changing and showering facilities for boys and girls, on the one hand, and the option that female pupils had of wearing a burkini, on the other. As to the argument presented by Osmanoğlu and Kocabaş that their daughters could learn to swim in private lessons, this, the Supreme Court considered, was irrelevant. The point of the compulsory school lessons, in its view, was not just that the children learn to swim, but that they learn to 'submit to the conditions surrounding the teaching'.[24] The school served an important function in relation to the social integration of its pupils; and this function meant that exemptions from the swimming lessons should be granted 'sparingly'.[25] The refusal to grant an exemption here was consistent with this practice of 'recognising, in principle, the primacy of school obligations over the respect over the religious commands of part of the population';[26] and for that reason, the comparison that Osmanoğlu and Kocabaş had tried to make between this case and exemptions that were granted for medical reasons was also irrelevant.

B. The Judgment of the European Court of Human Rights

And so Osmanoğlu and Kocabaş took their case to the ECtHR, where they pursued their argument that the requirement that their daughters take part in mixed swimming lessons at school was contrary to their religious convictions. In particular, they complained that the fine that had been imposed on them by the Public Education Department of Basel-Stadt, and the refusal of the authorities to exempt their daughters from the swimming lessons, had violated their right to freedom of religion under Article 9 ECHR. They made their complaint under Article 9 in this way because Switzerland has not ratified Protocol 1 of the ECHR, Article 2 of which protects the right of parents to ensure the education and teaching of their children in accordance with their own religious and philosophical convictions. (The Court, nevertheless, did later recall the principles

[23] *Osmanoğlu and Kocabaş v Switzerland* Application No 29086/12, Merits and Just Satisfaction, 10 January 2017. (NB: all translations from the official French report are my own.)
[24] Ibid. para 20.
[25] Ibid. para 20.
[26] Ibid. para 20.

applicable under Article 2 of Protocol 1, on the grounds that the ECHR is to be read as a whole and that this provision is the *lex specialis* when it comes to matters of education and teaching.[27])

The ECtHR considered that there had been an interference with the Article 9 rights of the Applicants here. Osmanoğlu and Kocabaş had stated that their religious belief prohibited them from allowing their children to participate in mixed swimming lessons, and that it directed them to begin preparing their daughters for the precepts that would apply to them following the onset of puberty. The Court considered that it could interpret this situation as one in which the right of the Applicants to manifest their religion, within the meaning of Article 9, was at issue. As parents, they were responsible for the religious education of their children within the meaning of Article 303 of the Swiss Civil Code; and this parental authority enabled them to claim that there had been an interference with their own right to manifest their religious beliefs here. As to the question of the legal basis of this interference, this was squarely located in the local education laws which regulated the matter.

The Swiss Government argued that the interference here pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order. In support of this argument, it noted the point, made by the Supreme Court in its earlier judgment, about the public interest in the integration of children at school and in the socialisation of children by way of their participation in compulsory lessons. The Government also drew attention to another decision in which the Supreme Court had emphasised the importance of equality of opportunity among children and between the sexes in matters of education and child development. It suggested that these notions of integration, socialisation, and equality were all being pursued by the requirement that pupils attend compulsory mixed swimming lessons, and by the refusal of the authorities to exempt the daughters of the Applicants from these lessons.

The ECtHR agreed. Specifically, the Court considered that the purpose of the disputed measure was to integrate 'foreign children of different cultures and religions' and to ensure 'the smooth progress of education, respect for compulsory schooling, and equality between the sexes'.[28] In particular, the measure was targeted at 'protecting foreign pupils from social exclusion';[29] and taking these objectives together, the Court was prepared to accept that these could be linked to the protection of the rights and freedoms of others or to the protection of public order within the meaning of Article 9(2) ECHR.

The Court elaborated its underlying vision of these notions of integration and socialisation in its analysis of the justifiability of the interference constituted by the refusal of the authorities to

[27] Ibid. paras 90-92.
[28] Ibid. para 64.
[29] Ibid. para 64.

exempt the Applicants' daughters from the mixed swimming lessons. But before embarking on this exercise, it commented on the 'considerable' margin of appreciation that States have when it comes to matters pertaining to the relationship between the State and religions and to the meaning that is to be given to religion in society: something that was all the more so, it added, where such matters arose in the context of education and public teaching.[30] And so, it went on, '[i]f States must disseminate information and knowledge in school curricula in an objective, critical, and pluralistic way, by refraining from pursuing any objective of indoctrination, they are nevertheless free to develop those programmes in accordance with their needs and traditions'.[31] And whilst parents are primarily responsible for the education of their children, 'they cannot, on the basis of the Convention, require of the State that it provide its education or organise its courses in a particular way'.[32] This applied even more strongly in this case since Switzerland had not ratified Protocol 1, and was therefore not bound by its Article 2.

The notion of the 'needs and traditions' of States here grants them, of course, quite a wide leeway, and we will come back to consider the implications of this, against the backdrop of preceding case law, in Section 4. What needs to be outlined for now is the way in which the Court articulated its view of the notions of 'integration' and 'socialisation', mentioned earlier. The Court, firstly, expressed its agreement with the view of the Government as to the 'particular' role played by the school in the process of social integration.[33] This role took on an even greater significance, it stated, when it came to 'children of foreign origin'.[34] Compulsory education, it considered, plays an important role in the development of children, and it could consequently accept that the granting of exemptions from certain lessons was justified only in 'very exceptional' circumstances, 'under well-defined conditions and with respect for the equal treatment of all religious groups'.[35] In this regard, it noted that the fact that the authorities authorised exemptions from the swimming lessons on medical grounds showed that its approach was not 'excessively rigid'.[36]

The Court considered that the children's interest in receiving a full education, which would enable their 'successful social integration according to local mores and customs', consequently prevailed over 'the wish of parents to have their daughters exempted from mixed swimming classes'.[37] It thus dismissed the argument of the Applicants that only a small number of parents actually asked for an exemption from compulsory swimming classes because of their Muslim

[30] Ibid. para 95.
[31] Ibid. para 95.
[32] Ibid. para 95.
[33] Ibid. para 96.
[34] Ibid. para 96.
[35] Ibid. para 96.
[36] Ibid. para 96.
[37] Ibid. para 97.

belief, and so also the argument of the Applicants that swimming lessons were not part of the curriculum across all schools in Switzerland, or even all schools in the canton of Basel-Stadt. Rather, and in place of these considerations, it set its sights on a vision of the development of the child – and not so much on her development as an individual, but rather on her development as a 'member' of 'the community' into which she was being 'integrated' and a conception of which was, at the same time, being constructed. Thus whilst physical education, including swimming lessons at the school of the Applicants' daughters, was deemed of great importance for a child's health and development, the Court's interest in this education was not limited to the fact of the children learning to swim and to engage in physical exercise. Rather, 'it resided especially in the fact of practising this activity in common with all the other pupils, with no exceptions being drawn based on the children's origin or their parents' religious or philosophical convictions'.[38] It was irrelevant that swimming is a highly individualistic sport. What mattered was that the children were swimming simultaneously. They were 'learning together and practising this activity in common'.[39]

Hence also the emphasis placed by the Court on the longer term social lessons that the children would derive from this experience of swimming together. In addressing the argument made by the Applicants as to the fact of their daughters having private swimming lessons instead, it therefore not only reiterated its statement as to the value of the children swimming together ('learning together and practising this activity in common'[40]), but it also considered that granting an exemption from the lessons to children whose parents could pay for them to have private lessons would generate an impermissible inequality in relation to those children whose parents did not have the means for this. In the same breath, the Court recalled that the authorities had already offered to accommodate the Applicants, whose daughters could, for example, cover their bodies in the lessons by wearing burkinis, and get changed and showered in a female-only changing room. Such measures, it considered, were able to reduce the impact of the participation of the children in mixed swimming lessons on the religious convictions of their parents. Furthermore, the Applicants had not alleged that their daughters had been restricted – other than in the swimming lessons – in the course of the exercise or manifestation of their religious beliefs. The fines imposed, after due warning, were also proportionate to the objective pursued, namely that of 'ensuring that parents send their children to compulsory lessons, and, above all, in their own interest, the successful socialisation and integration of children'.[41]

[38] Ibid. para 98.
[39] Ibid. para 100.
[40] Ibid. para 100.
[41] Ibid. para 104.

The overall view of the Court here was, therefore, that it was important that the children should learn the importance of swimming together and learning together now, as this was integral to their broader 'social integration' – their longer-term living together. The Swiss authorities, it considered, had emphasised the successful social integration of the children and the obligation on children to follow the school curriculum. And in granting this public interest a priority over the 'private interest of the Applicants in seeing their daughters being exempted from compulsory mixed swimming lessons for religious reasons', the authorities had not overstepped the margin of appreciation that they had in this case. Article 9 ECHR had not been violated.

4. THE CONSTRUCTION OF COLLECTIVE LIFE

The focus of the Court in this case on the importance of the children learning together and swimming together calls for further analysis. This focus is presented, in the first instance, in the language of 'social integration', and, as such, it appears to be one step removed from the language of 'social interaction' which underpinned the original notion of 'living together' as expressed by the Court in *S.A.S. v France* and subsequently in *Belcacemi and Oussar v Belgium* and *Dakir v Belgium*. Whereas 'social interaction' was used in those cases to express a vision of the formation of social ties, and one involving the upholding of a particular conception of the collective (a conception requiring the visibility of the face), here 'social integration' was used to express a vision of the very formation of that collective. The implicit view of the Court in *Osmanoğlu and Kocabaş* was that it was important that children should learn the importance of being in common now, and that they should become habituated to this, because that would secure the continuity of this form of life in the long run. The children here were, in this way, written into a conception of collective life at the same time as this conception was normatively inscribed upon their own ways of being.

This is where the notion of 'tradition' comes in. It will be recalled that the Court in *Osmanoğlu and Kocabaş* granted States a freedom to develop their curricular programmes 'in accordance with their needs and traditions':[42] something which, I suggested, grants States a wide leeway. 'Needs and traditions' is, evidently, a broad idea, but this becomes problematically so when we consider the way in which 'tradition' has been interpreted in previous case law, and most notably in *Lautsi v Italy (2011)*. That case, it may be recalled, was about whether the display of a crucifix in the classrooms of a State school infringed the rights to education (Article 2 of Protocol 1 ECHR) and to freedom of thought, conscience and religion (Article 9 ECHR). It is worth going into it briefly here, because an understanding of its conception of 'tradition' is, I think, important

[42] Ibid. para 95.

for grasping the ideas of social integration and continuity that underpinned the reasoning of the Court in *Osmanoğlu and Kocabaş*, and, ultimately, its conception of 'living together'.

One of the critical questions in *Lautsi* was about the characterisation of the crucifix at issue, and much hinged on this particular point. In the earlier domestic proceedings, the Administrative Court (2005) had characterised it as a general symbol of Christianity, a historical and cultural symbol, and, 'a symbol of the value system underpinning the Italian Constitution' (including the secular State)[43] – something with which the Supreme Administrative Court (2006) agreed.[44] The Chamber of the ECtHR (2009) had meanwhile considered the crucifix to be a predominantly religious symbol, with its compulsory and highly visible presence in classrooms consequently posing a problem, given, not least, the State's duty to uphold confessional neutrality in public education. Whilst the Grand Chamber of the ECtHR also took as its starting point that 'the crucifix is above all a religious symbol', it considered that there was no evidence that its display on classroom walls 'may have an influence on pupils'.[45] Consequently, it could not 'reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed',[46] as Mrs Lautsi had claimed. Her perception that this display was indicative of Italy's lack of respect for her parental rights regarding the teaching of her children in conformity with her religious and philosophical convictions was not sufficient in itself to establish a breach of these rights.

It is notable that a similar finding as to lack of evidence was not made in *Dahlab v Switzerland (2001),* which concerned the complaint of Ms Dahlab, a primary-school teacher, that a domestic provision prohibiting her from wearing her Islamic headscarf in class violated her right to manifest her religion. There, and notwithstanding that there had been no complaints, objections, or disturbance, the Court considered that it was 'difficult to assess' the impact of the headscarf on the 'very young children' in question, and rather proceeded on the assumption that influence would be had.[47] The distinguishing factor appears to be that whereas in *Dahlab,* the Islamic headscarf was interpreted as being an exclusively religious symbol, in *Lautsi* it was different. For the Government argued that the presence of the crucifix in classrooms also had an 'identity-linked' connotation, corresponding to a tradition it wished to perpetuate, and that, furthermore, 'the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation'.[48] In other words, the crucifix had multiple meanings.

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[43] *Lautsi v Italy* Application No 30814/06, Merits and Just Satisfaction, 18 March 2011, para 15.
[44] Ibid. para 16.
[45] Ibid. para 66
[46] Ibid. para 66.
[47] *Dahlab v Switzerland* Application No 42393/98, Admissibility decision, 15 February 2001, para 1.
[48] *Lautsi v Italy*, supra n 43, para 67.

This interpretation was taken up by the Court, which went on to state that 'the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State'.[49] Although it noted that such reference to tradition could not relieve a State of the obligation to respect fundamental rights and freedoms, this was a less qualified point than it had made on prior occasions when arguments by a State as to culture, history, and tradition came before it.[50] And by recasting the crucifix in terms of tradition, as the Court did here by noting the margin of appreciation, the Court did a very striking thing. Not only did this position enable it to get around saying that the crucifix was an exclusively religious symbol, but also, through reinterpreting the crucifix in terms of 'tradition', many of the qualities and characteristics of a 'symbol' could be repressed: namely, that a symbol indicates a form of transcendence, and points towards another space, another sphere.[51] Casting a symbol in terms of 'tradition' grants it, rather, the authority of continuity. It enables it to be interpreted as something that is, by sheer virtue of its tradition and force of its history, necessarily part of the order and history of European human rights law. A symbol can thus be contained; and in *Lautsi,* the language of tradition secured the place of the crucifix within the 'European' order. Thus, and against this background, even as the Court reverted to analysing the crucifix as a religious symbol, which, by being displayed '[conferred] on the country's majority religion preponderant visibility in the school environment',[52] it considered that this in itself did not denote indoctrination. A crucifix on a wall was, rather, 'an essentially passive symbol'.[53]

What emerges from *Lautsi* is, therefore, a notion of 'tradition' as being something that can dull symbolism. The crucifix is constructed as being a bearer of history, and its continuing legacy is deemed a part of the heritage of the individual in European human rights law. The focus is on securing – in the name of 'tradition' – the continuity of a particular mode of being, which is exactly what emerges in the judgment of the Court in *Osmanoğlu and Kocabaş* too. But in this latter judgment, this vision is coupled with the legacy of *S.A.S. v France*: the principle of 'living together'. If that legacy is, as I suggested above, modified in *Osmanoğlu and Kocabaş*, insofar as it is constructed in terms of 'social integration' and not 'social interaction', it also acquires an additional and distinctive temporal dimension. For the focus of the Court in *Osmanoğlu and Kocabaş* was not only on social integration, but also, and very specifically, on the benefits that the children could derive from engaging in an activity together, in common. To reiterate the point made earlier, what mattered

[49] Ibid. para 68.
[50] See, e.g. *Sidiropoulos and Others v Greece* Application No 26695/95, Merits and Just Satisfaction, 10 July 1998.
[51] Tillich, *Dynamics of Faith* (1957), Ch.3.
[52] *Lautsi v Italy*, supra n 43, para 71.
[53] Ibid. para 72.

most was that the children were swimming at the same time, simultaneously. They were 'learning together and practising this activity in common'.[54]

This notion of the simultaneity of activity is integral to the whole idea of social integration - *qua* collective formation – presented by the Court in *Osmanoğlu and Kocabaş*. The use of synchronisation, or action in common, as a means for establishing a mode of collective life is, of course, a common one,[55] and it dates back to the form of monasticism inaugurated by St. Benedict in the sixth century.[56] One of the central tenets of this form of monasticism is the vow of *stabilitas* (stability), which commands a permanent bind to the monastic community and functions to support the monastic organisation as an organisation of common and localised life. Significantly, this localised cenobitic life – the form of common being that was secured by the ethos of *stabilitas* – was never presented by St. Benedict as being characterised by sharing, division of labour, cooperation, and cohesion. Rather, Benedictine common being was characterised, from the outset, by homogeneity and simultaneity. All activities – eating, working, praying, delivering services, and sleeping – were to occur in this way. They derived the dignity granted to them in the Rule from the fact of being done in common.

In fact, the Benedictine idea of order, as expressed in the Rule, gives off the sense that it ought to be possible to look at the monastery and see everything moving in common. To realise this, the monks are not to be distinguishable from each other. They shed their identity and individuality upon admission to the monastery; thereafter, each holds only the status of monk. A distinct conception of identity therefore underlies the ethos of stability and the form of common being that it seeks to bring about. The ethos of stability seeks to secure incorporation and uniformity. Individual difference is alien to its vision of order; rather, the possibility of common being presupposes the renunciation of difference, of individuality. This renunciation and alienation of difference is cast as a unique and integral feature of this vision of collective life.

Why this example matters, in the context of the judgment of the Court in *Osmanoğlu and Kocabaş,* is that it sheds some light on the potential implications of a vision in which action in common, consisting specifically in simultaneous, homogeneous activity, is cast as securing a form of collective life. The combination of the ideas of 'tradition' (from *Lautsi v Italy*) and 'living together' (from *S.A.S v France*) gives rise to something altogether quite new in the judgment in *Osmanoğlu and Kocabaş*. 'Swimming together' and 'learning together' are cast by the Court as enabling a longer-term 'living together'. The vision is one in which a form of collective life and common identity is generated and upheld through simultaneity.

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[54] *Osmanoğlu and Kocabaş v Switzerland*, supra n 54, para 100.
[55] Adam, *Time and Social Theory* (1990), at 108.
[56] See St. Benedict, *The Rule of St. Benedict* (ed. and transl. J. McCann) (1976).

5. CONCLUSION

The judgment of the Court in *Osmanoğlu and Kocabaş v Switzerland* consequently represents an important development in the conceptualisation of the principle of 'living together' in European human rights law, and this is despite the fact that the explicit phrase 'living together' is nowhere to be found in the text of the judgment itself. Rather, the ethos of 'living together' underpins the judgment in a far more subtle, yet vital, way. For it is, essentially, the fundamental objective of the importance that is accorded to the action in common (swimming together and learning together) in this case. Action in common is used to generate a form of collective life and common identity.

Now that the principle of 'living together' is relatively settled in the jurisprudence of the ECtHR as a possible justification for limitations on individual rights, we are likely to see it appearing more and more frequently in the submissions of States before the Court, and, ultimately, in the reasoning of the Court itself. The need to approach this notion critically, and warily, cannot be overstated; and the same applies to terms like 'socialisation', 'social integration', social interaction', and 'tradition'. For if the introduction of 'living together' in *S.A.S. v France* (and subsequently reiterated in *Belcacemi and Oussar v Belgium* and *Dakir v Belgium*) involved the institution of a form of sameness, consisting, in that case, in the visibility of the face, *Osmanoğlu and Kocabaş v Switzerland* concretises this, and uses the essential ethos of 'living together' as a means of constructing a form of collective life, and one consisting in homogeneity and simultaneity. What is intriguing and most revealing in this vein in *Osmanoğlu and Kocabaş v Switzerland* is that 'swimming together' and 'learning together' are not, on the conceptualisation of the Court, clearly about cooperation and working together. Rather, they are about doing something in the same way, at the same time. 'Living together', in other words, becomes 'living in exactly the same way'.