

# Prohibiting the niqab?

A critical examination of Western attitudes towards the Islamic veil and its  
relationship with law in the United Kingdom and France

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**Dedication:**

**For all the fierce women who didn't give up.**

**And for Tony, without whom...**

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## **Table of Domestic Statutes and Guidance Documents:**

### **Domestic statutes:**

Sexual Offences Act 2003

### **Guidance documents:**

DCSF Guidance to Schools on School Uniform and Related Policies

Department for Education, School Uniform: Guidance for governing bodies, school leaders, school staff and local authorities, September 2013

**Table of International Statutes and Instruments:**

European Convention on Human Rights and Fundamental Freedoms 1950

Loi no. 2010-1192 du 11 Octobre 2010 interdisant la dissimulation du visage dans l'espace public 13 July 2010

*(Law no. 2010-1192, 11 October 2010, forbidding the covering of the face in public places)*

## Abstract:

The central argument of this thesis maintains that the reasons why Muslim women elect to veil various parts of their bodies are not clear-cut or homogenous, but instead cover a spectrum of religious convictions, social motivation, and cultural impetus. It is therefore possible to argue that the West's arguments for, and justifications of, the prohibition of veiling lack universal validity. The thesis will explore and consider some of the reasons for veiling offered by Muslim women, with reference to recent case law, academic debate, published anecdotes and blogs. Additionally, it will offer detailed examinations of recent legal developments and the present socio-legal position in both the UK and France. The author identified these neighbouring jurisdictions, both with growing Muslim populations, as having some noteworthy contrasts in their approaches to the Islamic veil, presumably brought about in part by their differing constitutions: whilst France banned the wearing of face veils in 2011, the UK is yet to follow suit despite pressure from certain political organisations and their supporters. In particular, the in-depth exploration of the UK cases will illustrate some of the difficulties the UK legal system has encountered with disputes over the wearing of religious items, and Islamic garments in particular. Testing of the validity of the thesis will be made through a comparison and critical analysis of these findings and of the reasoning offered by the legislatures of the UK and France for their respective positions on veiling.

The thesis further argues that the prohibition of veiling is problematic and undesirable in twenty-first century Europe, unnecessary in democratic societies, serves to polarise (or further polarise) Western and Muslim populations, and is harmful to the rights and interests of Muslim women. A critical analysis of case law, academic commentary, and media reporting will illustrate that such prohibitions have served to exacerbate tensions between Western and Muslim populations and promote a lack of tolerance and understanding of veiling among Westerners. This will further demonstrate the thesis that prohibition of veiling without a full understanding of the practice is highly inadvisable in our increasingly multicultural society.

## Chapter 1: The history and practice of veiling and the concept of *hijab*

### Introduction

One of the key tenets of Islam is the practice of *hijab*, or modesty in both behaviour and dress. This chapter will outline the spectrum of its extent, limitations, and the different interpretations of the concept, and will examine extracts from the Koran which refer to the concept of *hijab* in dress. It will then consider the custom of veiling the face as a distinct category of *hijab*, discussing its origins, the evolution in both method and connotation, and the current position of the practice. An assessment will be made of evidence that veiling the face is not a uniquely Islamic tradition, and in fact was carried out in Western Europe until relatively recently. Finally, it will discuss the ways in which other religions, with primary reference to Christianity, endorse modesty in dress for their followers, demonstrating that the concept is not a uniquely Islamic construct. In this way, the chapter will demonstrate that veiling of the face has a rich and nuanced history, a variety of meanings, and great personal significance to its practitioners, meaning that attempts to ban the practice by lawmakers with limited understanding and inaccurate perceptions of the practice are inadvisable.

### What is *hijab*?

The word 'hijab' itself has several meanings dependent on context. Its literal Arabic meaning is 'screen' or 'curtain'. In the West, probably the most familiar definition is the actual name for the scarf that many Muslim women wear to cover their hair, head, neck and chest. This scarf is also known as a *khimar* or simply a headscarf. More broadly, *hijab* can also refer to the overall method and style of dress utilised by Muslims to conform to the standard of modesty they perceive as fundamental to their religious practice. Additionally, *hijab* can be defined as an abstract concept, as set down in extracts from the Koran, requiring modesty in dress, behaviour and thought in order to achieve true piety. El Guindi notes that, '[i]n Western feminist discourse, "veil" is politically charged with connotations of the inferior "other", implying and assuming a subordination and inferiority of the Muslim woman.'<sup>1</sup> Further, she points out that the Arabic language does not contain a single catch-all term for 'veil': instead, there are a multitude of different words and phrases, each with different meanings and genders.<sup>2</sup> Within the confines of Islam, veiling is both subtly nuanced and highly complex. For the purposes of brevity and clarity, this thesis will use the term 'veil' or 'veiled'

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<sup>1</sup> El Guindi, Fadwa, *Veil: Modesty, Privacy and Resistance*, Berg, Oxford 1999, p152

<sup>2</sup> *Ibid*, p7

at times to describe a Muslim woman dressed in observance of *hijab*, with the intention only of distinguishing the style from Western-style outfits.

All adherents to the Islamic faith, both male and female, are expected to cover their *awrah*, or intimate parts. As an absolute minimum, it is required that when out in public, men will wear clothing that covers the body from navel to knee. Women are expected to cover themselves from shoulder to knee with an additional covering for their hair. There are a number of ways to observe *hijab*, many of which are attributed to the varying interpretation of certain verses of the Koran. The relevant verses are as follows:

**Surah 24:31:** *And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what must ordinarily appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers, their sons, their husband's sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or the slaves whom their right hand possess, or male servants free of physical needs, or small children who have no sense of the shame of sex, and that they should not strike their feet in order to draw attention to their hidden ornaments.*

This verse outlines the categories of relatives in front of whom a woman need not cover her *awrah*, and clearly emphasises the importance of both dressing and behaving in a modest, humble manner. It should be noted that the only specific dress requirement given here is to 'draw the veil over the bosom', which could translate in the twenty-first century to anything from not wearing tops that show too much of the upper chest or cleavage, to covering the area with a jilbab or abaya and then wearing a niqab, which generally hangs from just beneath the eyes to the upper chest. There is debate amongst the various branches and communities of Islam as to which regions, precisely, of a woman's body are required to be covered by direction of this Surah, resulting in the varying styles of dress worn by Muslim women globally.

**Surah 33:59:** *O Prophet! Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when abroad): that is most convenient that they should be known (as such) and not molested.*

This verse implies that it is advisable for women to cover themselves when out and about, both to protect them from unwanted contact from strangers and to denote themselves as Muslims. This goes some way in demonstrating the importance of dress to the Muslim identity: it is an outward

symbol, a statement, of belonging. A recent Belgian study<sup>3</sup> explored Muslim women's experiences in Western Europe when going about their daily business veiled: sadly, this study indicated that distinctly 'Islamic' garments, including the niqab, seem to attract as much unwanted attention as they discourage. Women reported instances of other citizens questioning or challenging their right to veil, making threatening or racist remarks to them, spitting at them and even tearing their veils away. It seems strange that, in an era where individuality and self-expression are so highly prized, this particular form of expression is condemned to the point of assaulting wearers in the street.

**Hadith (recorded sayings of Mohammed):** *Aisha (the prophet's wife): Asma entered upon the Apostle of Allah (God) wearing thin clothes. The Apostle of Allah turned his attention from her. He said 'O Asma, when a woman reaches the age of menstruation, it does not suit her that displays parts of her body except this and this, and he pointed to his face and hands.*

This verse specifically addresses the change in dress that is expected when a girl enters adolescence: however, it is open to fairly broad interpretation, as to whether the body should be merely covered, or whether the garments should be loose enough to disguise the curves and contours of a woman. This point was at the crux of a lengthy and complex legal challenge by a British Muslim schoolgirl to her secondary school,<sup>4</sup> whereby the school felt a particular outfit mandated by its uniform policy was sufficient to comply with the requirements of *hijab*, but the pupil had a different understanding of her religion and wished to wear a garment not permitted by the uniform policy. Nevertheless, it is clear from this source that Islam requires girls to dress more modestly as they approach adulthood.

The interpretation of hijab also varies from country to country where Islam is the predominant religion, whether by legal dictate or cultural norm: at the most conservative end of the spectrum, Saudi Arabian law requires all women to be fully veiled, except for the hands and eyes, at all times in public. Saudi women generally wear flowing black robes (either *abayas* or *chadors*) together with a head covering and a niqab to cover the face. The abaya is also common elsewhere in the Gulf region, worn with or without a niqab. Muslims in India and Pakistan, in common with many Sikh and Hindu women in the region, tend to wear colourful salwar kameez, using a scarf to loosely cover their hair. In Turkey, despite the Islamic majority population, its secular constitution means that headscarves were actually banned in official buildings and universities for many years, although this policy has

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<sup>3</sup> Brems, Janssens, Lecoyer, Chaib and Vandersteen, Wearing the Face Veil in Belgium: Views and Experiences of 27 Women Living in Belgium Concerning the Islamic Full Face Veil and the Belgian Ban on Face Covering, Human Rights Centre, Ghent University, 1 June 2012, <https://www.ugent.be/re/epir/en/researchgroups/public-law/research/human-rights/faceveil.pdf>, see pages 17-19

<sup>4</sup> R v Denbigh High School, to be discussed in detail in chapter 2

been relaxed recently. Whilst there is no clear consensus as to the extent *hijab* should take, it is apparent that adherents to the various interpretations believe sincerely that theirs is the correct version and take it seriously as an expression of faith.

Veils covering the face are often referred to as ‘burkas’, both in the press and by politicians and political commentators.<sup>5</sup> It is, however, incorrect to use ‘burka’ as a catch-all term for a face veil: in fact, it refers to one distinct garment. A burka is a one-piece full-body cloak that drapes over a woman’s head and covers the entire body, made from silk or heavy cotton with a small crocheted or open-worked panel over the eyes to enable the wearer to see, generally in shades of muted mid-blue or brown. It is, arguably, an outlier in the spectrum of versions of *hijab* and was mandatory dress for all women when Afghanistan was under the control of the Taliban from the mid-1990s until around 2001. In the West, the garment itself now carries connotations of religious extremism, oppression, and draconian attitudes towards women, and it is perhaps unsurprising that Western individuals and groups aiming to criminalise the wearing of face veils tend to apply this emotive term. The key difference, which many opposed to face veiling either forget, disregard or do not realise, is that the Taliban imposed the burka upon women regardless of their will. Conversely, and particularly in Western Europe and the United States, Muslim women often make a free and informed choice to veil their faces, symbolising both religious observance and agency.

Illustrating this point, a study carried out in Belgium during 2010-11<sup>6</sup> consisted of in-depth interviews with Muslim women concerning their feelings and views on *hijab* generally and the niqab in particular. The Belgian study straddled the time period shortly before and shortly after the Belgian government introduced a legal ban on veiling the face, and was instigated when the researchers noticed that the discussions surrounding the proposed ban seemed to lack knowledge and understanding of the concept of veiling the face, and that the voices of veiled women were absent from the debate. After interviewing 27 women, some of whom wore niqabs and others who had done in the past or were considering doing so in the future, the researchers found overwhelmingly that their subjects were in no way forced or coerced into veiling, but had instead reached or were approaching the decision with care and thoughtfulness as ‘a personal trajectory of deepening and perfecting [their] faith.’<sup>7</sup> The study concluded that, on the whole, women viewed the niqab as a non-obligatory part of Islam, but one that represented a greater piety.<sup>8</sup> It was variously described by

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<sup>5</sup> Labour MP Jack Straw, Conservative MP Philip Hollobone, and Nigel Farage, leader of the UK Independence Party, are all on record as using ‘burka’ to refer to face-covering veils in general. This will be discussed in greater detail in chapter 3.

<sup>6</sup> Brems et al, *Wearing the Face Veil in Belgium*

<sup>7</sup> Ibid at p5

<sup>8</sup> Ibid at p6

participants as an outward sign of an inner dignity and grace,<sup>9</sup> a way of reserving their physical appearance for their husband, or a way of avoiding unwanted attention from men.<sup>10</sup> These findings amply demonstrate both the depth and variety of reasons for Muslim women to cover their faces, none of which suggest oppression or a lack of agency.

### **Veiling the face in Christianity**

The practice of Christianity, the dominant religion in the UK and Western Europe, does not involve anything that could be described as a true equivalent to *hijab*, which may go some way in explaining why the West has struggled with the concept. It could be argued that, to the individual, Christianity is a less pervasive religion than Islam, with no codified requirement to dress in a certain way and more scope for compartmentalisation. However, it is worth bearing in mind that the West also subscribes to a dress code of sorts, albeit a fluid and largely unspoken one.

As a general rule, both men and women dress to cover their chest, abdomen, genitals and buttocks as an absolute minimum when out in public. The nature of the public setting also has an effect upon the level of coverage required: for instance, in formal settings such as an office or a courtroom both men and women are generally expected to also cover their shoulders, upper arms, and legs to at least the knee, and to wear structured business dress which partially conceals the shape of the body. Conversely, it is often acceptable for men to leave their chests exposed and for women to uncover their upper chest and abdomen when at the beach or in other casual environments. Until relatively recently, most Christian women in Great Britain would not have contemplated attending a church without wearing gloves and a hat or some other head covering. It was also thought improper for a church outfit to reveal too much bare skin, and so consideration was given to the modesty of necklines, hemlines and sleeve lengths: even in the present day, brides wearing strapless or low-cut wedding dresses to marry in church often choose to cover their arms, shoulders and upper chest with a wrap or shrug during the ceremony and then remove it once they have left the church, and sheer white wedding veils are often worn covering the face for the bride's procession down the aisle. In addition, it should be noted that the customary dress for Christian nuns generally includes a long, loose gown in a dark or muted shade, worn with a head covering designed to conceal the hair and neck: not dissimilar to certain styles of Islamic dress.

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<sup>9</sup> Ibid at p6

<sup>10</sup> Ibid at p7

Parts of the Bible seem to place emphasis on suitable dress for observant Christians: for instance, in 1 Corinthians 11:4–16, St Paul is said to have advocated that women should cover their heads whilst praying:

*‘Any man who prays or prophesies with his head covered brings shame upon his head. But any woman who prays or prophesies with her head unveiled brings shame upon her head, for it is one and the same thing as if she had had her head shaved. For if a woman does not have her head veiled, she may as well have her hair cut off. But if it is shameful for a woman to have her hair cut off or her head shaved, then she should wear a veil.’*

Further, in 1 Timothy 2, a letter from Paul entitled ‘A Call to Prayer: Instructions to Women’ suggests the following:

*‘In like manner also, that women adorn themselves in modest apparel, with shamefacedness and sobriety, not with braided hair, or gold, or pearls, or costly array; but (which becometh women professing godliness) with good works.’*

These directions resonate with the *hijab* direction for women to cover their hair around men to whom they are not related, indicating that the concept of a woman’s hair being a major sexual attractor (her ‘crowning glory’) has endured for millennia and has cross-cultural acceptance. Further, it is apparent that in both Christianity and Islam, in order to be truly pious, women must dress in a way that does not draw attention to themselves: the inference being, if an adherent chooses to dress in expensive, fashionable or eye-catching garments, she is likely to be perceived as more concerned with her appearance than with her faith, and so a ‘lesser’ Christian.

Whilst it is evident that some passages of the Bible advocate modesty in dress and that some Christians hold particular standards of dress for church attendance and day-to-day life, the concept is in no way embedded into Christian culture in the same way that *hijab* inhabits Islamic culture. However, that is unlikely to make it any less important in the eyes of adherents. By the same token, the practice of *hijab* should be equally worthy of respect from non-Muslims within a multi-cultural society.

### **Veiling the face in a non-religious context**

Veiling the face, arguably, resides towards one end of the spectrum of *hijab*. It would be disingenuous of the author not to concede that a covered face, at first encounter, can be disconcerting to some, particularly in Western countries or areas without significant Muslim

communities. Western women do not habitually cover their faces or heads in public: however, it should be noted that this has not always been the case. Depending on age and social class, it was customary for most British women to wear gloves and a hat, shawl or headscarf whenever they left the house, until approximately the mid-1960s, and heads were always covered in church, either by a hat or a chapel veil. Mourning veils were also common, enabling bereaved women to conceal their emotions at a time when formality and reserve were demanded: both Queen Elizabeth II and the Queen Mother, up to and during the funeral of King George VI, and Jacqueline Kennedy, at the funeral of her husband, US President John F Kennedy, concealed their faces with semi-sheer black veils at these hugely public occasions. There is evidence to show that, historically, British women wore face coverings on a regular basis: in her 1973 examination of women's headcoverings from 600AD, Georgine de Courtais described the variety of face veils and even masks that went in and out of fashion over the centuries.<sup>11</sup> These were used primarily to maintain women's highly-prized fair skin: as de Courtais notes, during the Stuart period (1603-1660), it was fashionable not to wear a hat,

*'but to protect the complexion in summer short veils of fine material were draped over the head and face...'<sup>12</sup> Masks, usually made of black velvet, satin or silk were also worn out of doors, possibly as a disguise but also very likely as protection for the complexion against winter winds. Whole masks covering the face were known as vizards and were kept in place by a round bead attached to the inside and held between the teeth. Half masks were fastened by strings round the back of the head.'*<sup>13</sup>

De Courtais also identifies subsequent trends for veiling the face: for example, during the Georgian period (1810-1837), 'as a fair complexion was considered attractive, large veils were often worn with [...] bonnets, particularly in summer'<sup>14</sup>; in mid-Victorian times (1860-1880) 'bonnets worn by widows and the elderly had very large and voluminous dark veils, but except for riding or travelling, veils were not generally fashionable.'<sup>15</sup> By the late Victorian years (1880-1901),

*'veils of net, tulle or gauze frequently patterned with spots and in a colour to match the hat or costume became very popular [...] Short veils reaching the tip of the nose were worn over smaller hats and under large ones during the early 'eighties. By 1890 larger veils were*

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<sup>11</sup> de Courtais, Georgine, *Women's Headdress and Hairstyles in England from AD600 to the Present Day*, 1973, The Anchor Press, London

<sup>12</sup> Ibid at p64

<sup>13</sup> Ibid at p66

<sup>14</sup> Ibid at p108

<sup>15</sup> Ibid at p128

*becoming fashionable. These covered the face entirely and were pulled in under the chin by a string or were pinned at the back of the neck...Veils were also used to secure all types of hats during sporting activities, especially cycling and motoring. The vogue for veiled hats continued into the next period.<sup>16</sup>*

Some of the reasons for veiling the face given by de Courtais help to illustrate why some corners of British society disapprove of the Islamic face veil. Although, relatively speaking, it was fairly recently that fashionable English women often wore full face veils, in fashion terms a span of around a century is an extremely long time, and so to wear a face veil is to resurrect a style presumed long-dead. Furthermore, as popularised by Queen Victoria, a black veil over the face signified deep mourning, potentially adding connotations of morbidity and sadness to the contemporary niqab, which is often made of black fabric and worn with other black garments. Finally, the most usual reason for a face veil was to maintain the pale skin fashionable at the time, thereby making a veil a tool for women to increase their attractiveness to men. Veiling for this reason is no longer necessary since the introduction of sunscreens and other cosmetics, and an ongoing vogue for tanned skin, so to Western culture the veil becomes superfluous. In any case, Muslim women's primary reason for wearing the niqab is to conceal the face from unrelated men. Therefore, the Islamic face veil could be said to turn the English concept of fashionable veiling on its head – by donning it, the wearer can choose to remove herself from the demands of fashion and beauty, rather than be complicit in its requirements.

Most recently, veiling the face by Westerners has emerged as a provocative fashion statement, calculated to garner press attention and stimulate the wearer's social media presence. At the Scream Awards in 2010, British-Sri Lankan rapper MIA wore a niqab and matching jilbab printed with colourful flowers and the slogan 'I Love You',<sup>17</sup> followed by press speculation as to whether she intended the outfit to make a statement about France's ban on veiling the face or merely promote her forthcoming album. Pop singer Lady Gaga has been pictured in scarves covering her face from below the eyes downward, and, in 2013, appeared on stage wearing a sheer shocking-pink garment resembling a burqa. Commenting on this outfit in the Independent, Myriam Francois Cerrah noted that much of the criticism levelled at Gaga for her outfit choice implied that she had made herself a stooge to the patriarchy, had sexualised Muslim culture, and was blindly insulting the oppressed

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<sup>16</sup> Ibid at p138

<sup>17</sup> Homa Khaleeli, *MIA: what was she doing in that niqab?*, The Guardian, 18 October 2010, <http://www.theguardian.com/music/2010/oct/18/mia-wearing-a-niqab-at-awards-ceremony>, last viewed 6 April 2015

women forced to cover their faces. Whilst conceding the potential orientalist overtones of the outfit, Cerrah declared herself unconvinced by these criticisms, suggesting instead that Gaga had merely added another facet of meaning to the garment and associated it with confidence, power, and a bold sexual identity, contrasting with the passivity and repression often applied to veiled Muslim women by the media.<sup>18</sup> US fashion designer Jeremy Scott included cropped burkas in metallic leopard-print and sheer black fabric in a 2013 collection which, he claimed, was inspired by the Arab Spring uprising of the previous year.<sup>19</sup> Scott is well-known for pushing boundaries in his work: as Fogg remarks, he 'is not so much making a political statement as having fun, breaking various taboos based on religious iconography and costume.'<sup>20</sup> The face veil was even used to advertise jeans: in September 2013, when the issue of face veiling was subject to fierce debate amongst the British press, Italian denim brand Diesel launched an advertising campaign titled 'I Am Not What I Appear To Be', featuring a photograph of a white woman wearing a denim garment similar to an Afghan burka, but incorporating an opening for the eyes instead of a crocheted grille and a deep side split, revealing that the model was apparently naked beneath the garment and had numerous tattoos on her arms and torso. Diesel's media consultant stated that the campaign aimed to address the assumptions held by Westerners about veiled women.<sup>21</sup> It is arguable whether these examples constitute a genuine desire to explore the clothing of other cultures, or blunt and insensitive cultural appropriation employed for shock value: however, this thesis tentatively suggests that, by bringing the concept of veiling the face into the context of mainstream Western entertainment and high fashion, it could potentially become more familiar, and so less alarming to Western eyes.

## Conclusions

It is, then, apparent that the practice of *hijab* can be a deeply personal matter, its spectrum of meaning affecting every follower differently. It cannot be understated that there is no firm consensus amongst the global Muslim population on what constitutes sufficient or acceptable *hijab*. This indicates that it would be inappropriate for Western governments to attempt to legislate against any part of the practice: applying a piece of catch-all legislation to the practice would affect

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<sup>18</sup> Cerrah, Myriam Francois, *Lady Gaga's burqa is good for Muslim women*, The Independent, 11 August 2013, <http://www.independent.co.uk/voices/comment/lady-gagas-burqa-is-good-for-muslim-women-8756228.html>

<sup>19</sup> See <http://www.style.com/slideshows/fashion-shows/spring-2013-ready-to-wear/jeremy-scott/collection>, see looks 1 and 22 for runway images

<sup>20</sup> Fogg, Marnie, *Why You Can Go Out Dressed Like That: Modern Fashion Explained*, Thames & Hudson, London 2014

<sup>21</sup> Ameena Meer, Take-Out Media, quoted in '*Diesel Burqa Ad: Islampophobic or Empowering?*', Huffington Post, 21 September 2013, [http://www.huffingtonpost.com/2013/09/21/diesel-burqa-ad\\_n\\_3962554.html](http://www.huffingtonpost.com/2013/09/21/diesel-burqa-ad_n_3962554.html)

some individuals far more than others, making such a move unfair, contrary to the spirit of human rights legislation, and potentially discriminatory.

As we have seen, the concept of *hijab* and the practice of veiling the face are not entirely alien to Western culture, despite often being treated as such. Dress codes and the covering of 'private' parts of the body are enforced and upheld at a societal level, generally by mutual consensus. However, as the next two chapters will discuss, the English courts have recently been called on to wrestle with the range of interpretation in *hijab* and with the enforcement of dress codes: for instance, in *Begum*, the Court of Appeal relied on differing opinions from a number of Islamic authorities in an attempt to establish whether a Muslim schoolgirl should be permitted to wear a non-uniform garment because she felt the school uniform was not modest enough for her understanding of *hijab*, whilst giving her opinion little credence. Similarly, Jack Straw MP demonstrated his failure to understand the subtlety and nuance of *hijab*, and not a little arrogance, when he revealed that he informed one of his constituents (a Muslim woman wearing a niqab) that the garment was not, in fact, obligatory according to Islamic scholars.<sup>22</sup>

In both examples, we observe white men speaking from positions of power and authority, attempting to impose their understanding of a practice that occurs outside their own cultural and gender boundaries, upon the women who choose to engage in the practice. This creates an almost comically paradoxical situation: an assumption is formed that the face veil is imposed upon Muslim women against their will, thereby denying them agency and free choice. As a solution to this perceived problem, pressure is exerted upon the women to remove their face veils, once again denying them agency and free choice.

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<sup>22</sup> 'I felt uneasy talking to someone I couldn't see', October 6 2006. Retrieved via The Guardian (no longer available through original source), <http://www.guardian.co.uk/commentisfree/2006/oct/06/politics.uk>, accessed Sat 11 May 2013 – see chapter 3 for full discussion.

## Chapter 2: Veiling in the UK: a critical examination of the law

### Introduction

In English law, legislative restrictions or guidelines on what citizens must or must not wear in public are seldom found. The key exception can be found in the 'Other Offences' category of the Sexual Offences Act 2003. S.66 of this Act, replacing the earlier offence of indecent exposure, prohibits the intentional exposure of the genitals 'with the intent that someone will see them and be caused alarm or distress'.<sup>23</sup> This offence is worded extremely narrowly and the *mens rea* required to complete the offence indicates that it aims to deter or punish behaviour within the sphere of sexual assault. It is possible to argue that the offence deliberately excludes various other forms of public or semi-public nudity which may be construed as less offensive, such as topless sunbathing, skinny-dipping, and streaking.

In addition, there exists the common law offence of outraging public decency ('It is an offence to commit an act of a lewd, obscene, and disgusting nature, which is capable of outraging public decency, in a public place.').<sup>24</sup> The definition of this offence carries the potential for a person appearing in public unclothed or partially clothed to be charged with disorderly conduct under public order legislation. It is, therefore, apparent that the UK legislature has so far not troubled itself to dictate the clothing choices of the population much beyond the scope of everyday decency.

Leaving aside decency issues, UK courts have ruled on several contentious and divisive cases over the last decade or so regarding clothing choices: more specifically, the wearing of religious or cultural items in schools and workplaces. These cases generally focus on individual rights as defined under the European Convention on Human Rights (ECHR) and its enshrinement in UK law, the Human Rights Act 1998 (HRA). Marshall<sup>25</sup> notes that, prior to these rulings, 'whether or not a person manifests his or her religious beliefs in public spaces and places has largely been a non-issue in the United Kingdom'.<sup>26</sup> Subsequently, the manifestation of religious beliefs in public has become very much an issue, sparking debate and discord in many quarters of society.

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<sup>23</sup> Sexual Offences Act 2003 s.66(1)(b)

<sup>24</sup> Crown Prosecution Service, Other Offences That Might Involve Nudity, [http://www.cps.gov.uk/legal/l\\_to\\_o/nudity\\_in\\_public](http://www.cps.gov.uk/legal/l_to_o/nudity_in_public), last accessed January 2016

<sup>25</sup> Marshall, J, *Women's right to autonomy and identity in European human rights law: manifesting one's religion*, [2008] Res Publica 14(3), 177-192

<sup>26</sup> Ibid, at 178

This chapter will provide an analysis of the judicial reasoning in each case. All the cases share a common basis, in which the claimants are school pupils or employees who have challenged the uniform policy applying to them because there was an attempt to prohibit the wearing of a particular item which they see as a mandatory expression of their religious beliefs. The facts of each case will be outlined individually, followed by a summary of the ruling and its reasoning, and finally a discussion of relevant academic commentary and theory. There will then follow an outline of the non-statutory guidelines on school uniform policy proposed by the Department for Education in 2007 and the ways in which they relate to contemporaneous case law, a consideration of the response to their consultation, and an examination of the current guidelines published by the Department.

### **Case analysis: Shabina Begum v Denbigh High School**

The claimant in the first significant UK case to consider the issue of Muslim dress in schools was Shabina Begum.<sup>27</sup> Shabina is a Muslim teenager who attended Denbigh High School in Luton. The school's pupil population is culturally and ethnically diverse: a 2007 Ofsted report published on the school's website confirms that 'the great majority of pupils are from minority ethnic backgrounds',<sup>28</sup> with around 79% identifying as Muslim at the time of the case in 2003-2004.<sup>29</sup> The school acknowledged this diversity in its uniform policy following consultation with the local Islamic community.<sup>30</sup> The required uniform for girls stipulated that, besides the regulation school blazer, tie, jumper, and blouse, they could choose to wear either a skirt, trousers or salwar kameez.<sup>31</sup> Headscarves in school uniform colours were also permitted, provided they were worn without loose or trailing ends, for reasons of health and safety and to allow the school tie to be clearly seen.<sup>32</sup>

Shabina had worn the uniform salwar kameez without issue during her first two years at Denbigh. At the start of her third year in 2002, when she was 14, she arrived at school wearing a jilbab<sup>33</sup> in place

<sup>27</sup> R(SB) v Governors of Denbigh High School [2006] UKHL 15 (hereafter Begum [2006])

<sup>28</sup> Ofsted Inspection, Denbigh High School, 10 October 2007, retrieved via <https://www.denbighhigh.luton.sch.uk/assets/downloads/Ofsted%20Inspection%20Report.pdf> 6 April 2015

<sup>29</sup> R(SB) v Governors of Denbigh High School [2005] 1 WLR 3372 (hereafter Begum [2005]), at p1

<sup>30</sup> R(on the application of SB) v Denbigh High School Governors [2004] ACD 66 (hereafter Begum [2004]), at H4

<sup>31</sup> A loose sleeveless calf-length tunic (*kameez*), often with splits at the seams from hem to mid-thigh, worn over loose trousers, tapered and cuffed to the ankle (*salwar*). Most commonly worn in Southern Asia by Sikh and Hindu men and women as well as Indian, Pakistani and Bangladeshi Muslims.

<sup>32</sup> Denbigh High School uniform policy, <http://www.denbighhigh.luton.sch.uk/pages/uniform.php>, retrieved July 31 2013

<sup>33</sup> A loose, long-sleeved, ankle-length gown worn with a headscarf, usually in black or another solid dark colour, designed to conceal the shape of a woman's body.

of her uniform. She was accompanied by her older brother,<sup>34</sup> and the two advised the assistant head teacher that Shabina did not feel the salwar kameez was appropriate dress for a Muslim girl who had entered puberty. Her construal of the Koran required girls aged 13 and over to wear a jilbab in order to disguise the contours of the body: she felt that the salwar kameez revealed too much of her arms, and that the calf-length hemline was too short to comply with her interpretation of the Islamic requirement for modest dress.<sup>35</sup> The jilbab is a form of traditional Islamic dress not permitted by Denbigh's uniform policy. The assistant head instructed her to return home, change into her normal uniform and return to school. Despite encouragement by the school, Shabina refused to return unless she was allowed to wear her jilbab. Denbigh maintained its refusal to modify its uniform policy and as a consequence of this impasse, she missed two academic years' schooling.<sup>36</sup>

### **Judicial Review Application – 2004**

Shabina, with her brother acting as her litigation friend, sought judicial review on Denbigh's decision on the grounds that it had constructively excluded her by its refusal to allow her to wear her jilbab, and that her right to manifest her religious beliefs under article 9 ECHR<sup>37</sup> had been unjustifiably limited by the school.

In the High Court, Denbigh High School argued that Shabina lived outside the catchment area of the school and her parents had therefore specifically chosen and taken active steps to send her there, that it had apprised Shabina and her parents of the uniform policy before she began school, and that she had previously worn a correct version of the uniform without complaint. It further argued that, following Shabina's complaint, it had taken advice from local mosques and Islamic scholars who had agreed that the uniform policy was sufficient to comply with the requirements of *hijab*.<sup>38</sup>

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<sup>34</sup> Begum [2004] at H3

<sup>35</sup> Begum [2005] at p14

<sup>36</sup> Begum [2004] at H4

<sup>37</sup> Article 9 of the European Convention on Human Rights, ensuring the right to freedom of thought, conscience and religion.

<sup>38</sup> Begum [2004] at H4

### First Instance Judgment (Bennett J.) (2004)

Bennett J held that the interference with Shabina's right to education under article 2 ECHR<sup>39</sup> and the right to manifest her religion under article 9 ECHR flowed from her submittal that she was unlawfully excluded from school.<sup>40</sup> The court further held that Denbigh had not positively excluded Shabina, and therefore her claim for interference with her Convention rights failed.<sup>41</sup>

Bennett J made particular reference to the universality of the salwar kameez, remarking that it was 'worn by a number of different faith groups such as Hindus and Sikhs. This ensured that there was no visible distinction between Muslim, Hindu and Sikh female students.'<sup>42</sup> He did not, however, explain why he felt it was especially beneficial to the pupils to remain, to an extent, culturally anonymous in this way. It is possible to argue that this approach actually contributes toward 'Othering' non-white-British female pupils, by suffusing them into a homogenous mass, rather than allowing them to explore and own their religious identity in a safe and non-judgmental environment. Bennett J further held that 'the school uniform policy avoided any division between those Muslim pupils who would choose to wear the salwar kameez and those who would choose to wear the jilbab':<sup>43</sup> however, achieving this by simply denying one group its choice and enforcing the choice of the other group upon them does not suggest an attitude of inclusiveness, as the school claimed, but rather an approach of over-generalisation and limited cultural understanding.

### Court of Appeal Judgment (2005)

Shabina appealed this decision, and the following year her case was heard by Lords Justice Brooke, Mummery and Scott Baker in the Court of Appeal, with Brooke LJ delivering the primary ruling.<sup>44</sup>

In his ruling, Brooke LJ notes that, in 2003 whilst the dispute was ongoing, the complaints committee of the school's governing body had taken advice from the London Central Mosque Trust, the Islamic Cultural Centre, the Muslim Council of Britain and two local mosques. It had duly concluded that the school's uniform was sufficient to ensure compliance with the requirements of *hijab*, stating that,

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<sup>39</sup> Article 2 of the Convention Protocols of the European Convention on Human Rights – the right to an education.

<sup>40</sup> Begum [2004] at H6

<sup>41</sup> Ibid at H6-9

<sup>42</sup> Ibid at H14

<sup>43</sup> Ibid at H14

<sup>44</sup> R(on the application of SB) v Head teacher and Governors of Denbigh High School [2005] 1 WLR 3372

*‘Whilst accepting that the jilbab such as Shabina Begum wishes to wear constitutes proper Islamic dress for adult Muslim women in a public place, the evidence presented to the committee does not suggest that it is the only form of dress that meets these requirements.’<sup>45</sup>*

Earlier in his ruling, Brooke LJ noted that Shabina’s brother had argued that the salwar kameez was a form of Pakistani cultural dress with no particular religious basis.<sup>46</sup> Shabina and her family came from Bangladesh and so it is significant that her family perceived her school uniform as belonging to another nationality rather than to their own religion. This point goes some way in legitimising Shabina’s concern about the insufficiency of a salwar kameez to comply with *hijab* requirements once she had entered puberty.

Taken together, Brooke LJ identified two main groups of opinion: those who felt that the salwar kameez worn with a headscarf was sufficient to satisfy the requirements of *hijab*, which he termed ‘liberal Muslims’<sup>47</sup> and those who feel that a salwar kameez is insufficient and that a jilbab is required – ‘very strict Muslims’<sup>48</sup>. It is evident that no firm consensus exists on precisely what constitutes ‘appropriate’ Muslim dress, and one could question the wisdom of a court of non-Muslim judges, primarily reliant on a spectrum of ‘expert opinions’, attempting to codify the concept.

Brooke LJ also suggested that, because ECHR was enacted in the 1950s, between states with primarily Christian and Jewish populations, there was inevitably potential for tension between some of its provisions and the requirements of Islam.<sup>49</sup> It could be argued that the authors of article 9 never expected it to have to apply to a diverse range of religions or to a fast-growing minority population, which may go some way in explaining the increase in contentious cases concerning rights under this article. However, this suggests that the UK’s courts and institutions should be increasingly mindful of the need for tolerance and willingness to acknowledge traditions from other cultures, rather than taking a broad-brush, ‘one-size-fits-all’ approach as seen here.

## **Judgment**

The court ultimately held that, because the school had not approached the matter correctly and had not given sufficient credence to Shabina’s religious convictions, it had in fact unlawfully excluded her and unlawfully interfered with her rights under articles 2 and 9 ECHR.<sup>50</sup> However, all three judges

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<sup>45</sup> Ibid at p29

<sup>46</sup> Ibid at p14

<sup>47</sup> Ibid at p31

<sup>48</sup> Ibid

<sup>49</sup> Ibid at p72

<sup>50</sup> Ibid at p78

acknowledged the difficulty for schools in interpreting their obligations under human rights legislation and recommended that the Department for Education issue authoritative guidance to assist in the area.<sup>51</sup>

### House of Lords' Judgment (2006)

Denbigh High School appealed against the Court of Appeal ruling and the case ultimately reached the House of Lords.<sup>52</sup> It was heard by Baroness Hale of Richmond and Lords Bingham of Cornhill, Nicholls of Birkenhead, Hoffmann, and Scott of Foscote in February 2006, almost two years after the initial hearing.

At the beginning of his ruling, Lord Bingham was at pains to point out:

*'It is important to stress at the outset that this case concerns a particular pupil and a particular school in a particular place at a particular time. It must be resolved on facts which are now, for purposes of the appeal, agreed. The House is not, and could not be, invited to rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country. That would be a most inappropriate question for the House in its judicial capacity, and it is not one which I shall seek to address.'*<sup>53</sup>

This remark is very telling, indicating that the court did not intend to offer *obiter* on the broader questions at play. Although this approach ultimately resulted in further legal challenges on the subject of religious dress in schools (see below), it could be viewed that the courts have taken their cue from Parliament. At the time of this ruling it had not issued any guidance, statutory or otherwise, with respect to school uniform policy and schools could therefore be said to have been working blind on this issue.

Lord Bingham acknowledged Shabina's conviction that the jilbab was the only suitable form of dress to comply with her religious beliefs, commenting that '...any sincere religious belief must command respect, particularly when derived from an ancient and respected religion.'<sup>54</sup> He explained that this acceptance meant that her rights under article 9(1) were engaged and the questions to consider were whether there had been interference with those rights and if so, whether the interference was justifiable. He ultimately ruled that there had been no interference with Shabina's rights under

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<sup>51</sup> Ibid at p82, p89, p91

<sup>52</sup> R(SB) v Governors of Denbigh High School [2006] UKHL 15

<sup>53</sup> Ibid at p2

<sup>54</sup> Ibid at p21

article 9(1). This decision was reached on the grounds that the school had ‘gone to unusual lengths to inform parents of its uniform policy’, and that there were three alternative schools in the district which permitted the jilbab and which Shabina could have attended instead without ‘any real difficulty’.<sup>55</sup> It seems somewhat muddled to first assert that a sincerely-held belief ‘must command respect’ before proceeding to belittle an attempt at manifesting that belief. This applies particularly in the case of religious clothing, in which the physical manifestation of the belief is intrinsic to the belief itself. In this case, Shabina had no alternative way of expressing or upholding her belief that the jilbab was the only garment sufficient to comply with her interpretation of the requirements of *hijab*, besides actually wearing a jilbab. There is an absurdity in acknowledging that Shabina’s desire to wear the garment was driven by a ‘sincerely-held religious belief’, rather than by a whim or a fashion trend, but ultimately supporting a decision to prevent her wearing it.

Lord Nicholls was inclined to disagree with Lord Bingham’s finding that the school’s refusal to allow the jilbab did not represent a limitation on Shabina’s article 9 rights. He opined that his colleague ‘may over-estimate the ease with which Shabina could move to another, more suitable school and under-estimate the disruption this would be likely to cause to her education.’<sup>56</sup> However, he agreed that the interference was justified, although chose not to elucidate further, making his opinion somewhat vague and ill-grounded.

Similarly, Baroness Hale stated that she was ‘uneasy’ about her colleagues’ view that there had been no interference with Shabina’s rights because she had chosen to attend Denbigh High School with the knowledge of its uniform policy. Hale made several points with regard to Shabina’s age and likely stage of development, and was of the opinion that the school had in fact interfered with her right to manifest her religion.<sup>57</sup> Nevertheless, like Lord Nicholls, she felt that this interference was justified on the grounds that it had the legitimate aim of protecting the rights and freedoms of others.<sup>58</sup> She was less certain on whether the interference was proportionate and considered a variety of sources concerning freedom of choice and gender equality in terms of veiling, ultimately concluding that it is acceptable for women to veil if they do so of their own free will, but unacceptable if it is imposed upon them or serves to deny them equal treatment.<sup>59</sup> Whilst there is no doubt that Hale spoke sincerely, her conclusion here is somewhat unhelpful. Whilst Denbigh hoped to avoid creating

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<sup>55</sup> Ibid at p25

<sup>56</sup> Ibid at p41

<sup>57</sup> Ibid at p93

<sup>58</sup> Ibid at p94

<sup>59</sup> Ibid at p96

‘classes’ of Muslim girls, which it feared would happen if it allowed the jilbab alongside the salwar kameez, Baroness Hale managed to define two classes of veiled Muslim women: inferior, who veil because they are forced to do so, and better, who make the conscious decision to veil. This distinction is problematic – it maintains a stereotype that at least a sizeable proportion of veiled women are cowed, lacking in agency and entirely under the control of their fathers or husbands, and at the same time disregards any such women as less worthy of support and protection than their ‘better’ counterparts.

Baroness Hale ultimately held that Denbigh’s uniform policy was proportionate to the school’s pursuit of social cohesion and suitably acknowledged cultural and religious diversity, and therefore the interference with Shabina’s rights was fully justified. She drew attention to the school’s report that other girls were concerned about being pressured to wear jilbabs when they did not want to as support for her ruling,<sup>60</sup> although the Lords’ ruling does not at any stage challenge this report or demand tangible evidence of these concerns. It is possible to argue that this problem and Shabina’s case are in fact two separate matters that the school should have addressed individually, rather than conflating them into a single issue linked only by a garment.

Lord Hoffmann, in common with Lord Bingham, was emphatic in his approval of Denbigh’s approach to its uniform policy, describing it as a ‘carefully crafted system’<sup>61</sup> and noting that the school ‘went to immense trouble to accommodate the religious and cultural preferences of the pupils and their families.’<sup>62</sup> As above, this author is less convinced by the inclusiveness of Denbigh’s uniform policy, and would argue that it in fact offered no more than a standard school uniform, similar in style and format to most British state secondary schools, with a catch-all ‘Other’ modification which it hoped would accommodate girls from a variety of non-white-British backgrounds. Lord Hoffmann also demonstrates a certain amount of sympathy for the school in his outline of the events of 3 September 2002, when Shabina first arrived at school wearing her jilbab: he alludes to the assistant head teacher as ‘having a busy morning’ and describes that Shabina’s brother and other male companion addressed him ‘at length and in forceful terms’,<sup>63</sup> implying that Shabina and her family were in the wrong from the outset. Equally, this implies that the assistant head, quite understandably, made a quick decision when put on the spot and under pressure, but the school

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<sup>60</sup> Ibid at p98

<sup>61</sup> Ibid at p54

<sup>62</sup> Ibid at p44

<sup>63</sup> Ibid at p46

then stubbornly clung to that decision rather than giving it the discussion and consideration it merited.

Whilst considering whether the school's decision constituted an infringement of Shabina's rights under article 9, Lord Hoffmann remarked:

*'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. Common civility also has a place in the religious life.'*<sup>64</sup>

This implies that, at least in Lord Hoffmann's opinion, conspicuous religious displays are lacking in civility or consideration for others, and indicates that the English judiciary prefers to endorse private or less obvious manifestations of belief. Whilst there may be religious manifestations that could be said to breach 'common civility', it is something of an exaggeration to suggest that Shabina's desire to wear her jilbab to school constitutes behaviour that goes against 'common civility'.

In common with Lord Bingham, Lord Hoffmann felt that there had been no infringement of Shabina's rights under article 9 because 'there was nothing to stop her from going to a school where her religion did not require a jilbab or where she was allowed to wear one'<sup>65</sup> and 'until after the failure of her application for judicial review before Bennett J on 15 June 2004 she did not seriously try because she and her family were intent upon enforcing her "rights"',<sup>66</sup> published with the rather telling inverted commas which suggest either contempt for or dismissal of the concept of rights in this case. He expressed the opinion that Shabina's change in beliefs 'created a problem for her'<sup>67</sup> for which she should have requested help from the school and local education authority, who,

*'would no doubt have advised her that if she was firm in her belief, she should change schools. That might not have been entirely convenient for her, particularly when her sister was remaining at Denbigh High, but people sometimes have to suffer some inconvenience for their beliefs. Instead, she and her brother decided that it was the school's problem. They sought a confrontation and claimed that she had a right to attend the school of her own choosing in the clothes she chose to wear.'*<sup>68</sup>

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<sup>64</sup> Ibid at p50

<sup>65</sup> Ibid at p50

<sup>66</sup> Ibid at p52

<sup>67</sup> Ibid at p50

<sup>68</sup> Ibid at p50

This remark suggests a significant criticism of Shabina's approach to the matter, and could be said to paint Denbigh High School as a victim in this situation. Whilst her approach may not have been the most diplomatic or well-thought-out, Lord Hoffmann appears to make little allowance for the fact that she was not quite 14 years old at the time of the incident and did not necessarily have the requisite skills or experience to address the matter in a better way: with a little more compassion and a more tolerant dialogue, her school could have helped her find an alternative solution to their disagreement instead of resorting to legal action.

Lord Hoffmann ultimately accepted Bennett J's ruling and held that there had been no infringement of Shabina's rights under article 9. He criticised the ruling of the Court of Appeal on this point, remarking that Brooke LJ had not fully explained why he felt her rights were limited and made no reference to established precedent,<sup>69</sup> and that Mummery LJ's finding that the school had a statutory duty to provide Shabina with education was irrelevant because, again, she could have chosen to transfer to another school.<sup>70</sup>

Lord Scott of Foscote is also supportive of Denbigh's head teacher, and critical of Shabina's initial request to wear her jilbab, particularly of her brother's approach, which he describes as 'quite unnecessarily confrontational'<sup>71</sup> and 'verg[ing] on the threatening.'<sup>72</sup> He considered the issue of whether Shabina was in fact excluded from school with reference to s.64 Schools Standards and Framework Act 1998 and ruled that she was not, because the school had not directed her to stay away and had in fact encouraged her to return, albeit wearing the correct uniform.<sup>73</sup> He was also satisfied that the school's uniform policy was more than reasonable and that its decision not to allow the jilbab was 'unimpeachable'.<sup>74</sup>

Finally, in his consideration of whether the school infringed Shabina's rights under article 9(2), Lord Scott offers an analogy by way of illustrating his point: that of a pupil at a faith school who became an atheist and asked to be excused from the statutory daily act of worship. He states that, if the school refused the request, Strasbourg jurisprudence would only find interference with article 9

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<sup>69</sup> Ibid at p55

<sup>70</sup> Ibid at p57

<sup>71</sup> Ibid at p80

<sup>72</sup> Ibid at p79

<sup>73</sup> Ibid at p82

<sup>74</sup> Ibid at p84

rights if 'the institution offered an essential service not obtainable elsewhere.'<sup>75</sup> Because Shabina had other schools available to her, Lord Scott concurred with Lords Bingham and Hoffmann that her rights were not infringed. However, as previously noted by Lord Nicholls, changing schools is not necessarily an easy or straightforward process. Bearing in mind that Shabina was entering her third year at the school when the matter of her uniform became an issue, it is probable that she had formed friendships, established relationships with her teachers and otherwise become part of the community of Denbigh High School. To figuratively shrug and suggest she change schools seems to deny her the support and guidance she should, as a minor, be entitled to expect from her school and her country's authorities.

## Commentary

### Difficulties with reasoning

Hill and Sandberg are highly critical of Bennett J's reasoning at first instance, remarking that his 'assertion that insistence on wearing religious dress does not constitute a manifestation of one's religion or belief is plainly wrong.'<sup>76</sup> They are more supportive of the House of Lords' ruling but remained critical of the reasoning used to reach the decision, arguing that their Lordships should not have applied the specific situation rule. They point out that 'unlike a university student, a school pupil has not voluntarily accepted an employment or role which might legitimately limit his Art.9 rights. In state schools there is no contractual relationship between school and pupil.'<sup>77</sup> They also suggest that, as an alternative approach, the application of common law may have brought about much the same result, whereas the interpretation of article 9 ECHR 'creates a confusing and unhelpful precedent which may have an unfortunate effect upon future judicial decisions on freedom of religion.'<sup>78</sup> These remarks recognise some of the various flaws in this decision and their potential consequences, which did in fact inform later cases, to be discussed below. However, it would be disappointing, and even irrational, if the key piece of human rights legislation pertaining to UK law was overlooked in a case so obviously focused on the expression of a human right, in favour of the application of common law. Rather, it is possible to view *Begum* as a test case of sorts: the House of Lords had not previously been called upon to apply art.9 ECHR to a case concerning Muslim dress in schools, and it is unfortunate, though perhaps inevitable, that the eventual judgment was flawed in places.

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<sup>75</sup> Ibid at p88

<sup>76</sup> Hill, M and Sandberg, R, *Is nothing sacred? Clashing symbols in a secular world*, PL 2007, Aut, 488-506, at p498

<sup>77</sup> Ibid at p497

<sup>78</sup> Ibid at p498

The reasoning employed in the Court of Appeal's ruling also met with criticism by legal academics. Poole is highly critical of Brooke LJ's comments regarding the failure of the school to employ any kind of proportionality test when devising its uniform policy, remarking that,

*'proportionality is a test to be applied by the court when reviewing decisions of public authorities after they have been made (ex post). It is not a test which ought to mean that public authorities should themselves adopt a proportionality approach to the structuring of their decision-making ex ante.'*<sup>79</sup>

This criticism illustrates the delicacy and difficulty of the facts before the court, and that it seemed favourable to make a ruling on purely procedural grounds rather than put itself in the position of assessing the appropriateness or otherwise of permitting religious dress in schools. In the House of Lords ruling, Lord Bingham's remark that 'The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them'<sup>80</sup> illustrates this point further. Governmental guidelines on school uniform policies, which were first introduced around the time of the House of Lords' judgment in *Begum* (to be discussed later in this chapter), remain somewhat woolly on the subject of restrictions or allowances for religious reasons. Much is left to the discretion or presumed local expertise of the school management team. Poole's point identifies the inadvisability of delegating decisions on what are, essentially, human rights issues to unqualified non-lawyers: it is possible to argue that schools should be subject to more stringent guidelines on the issuing of uniform policies that acknowledge and embrace pupils' rights under article 9.

Davies,<sup>81</sup> in common with Poole, finds the reasoning behind the Court of Appeal's ruling to be lacking in clear and logical thought. He emphasizes that, although the court asserted that Shabina's chosen form of dress was associated with extreme or fundamental branches of Islam, there was no evidence submitted that even suggested that Shabina herself, or any other girls who chose to wear the jilbab, behaved in threatening or intimidating ways toward other pupils. Davies identifies that one of the key arguments contained in the ruling focuses less on Shabina as an individual and more upon how others would perceive her based on her choice of dress. Davies argues that 'the law requires more discipline than this',<sup>82</sup> suggesting that restrictions on certain religious clothing are often based upon

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<sup>79</sup> Poole, T, *Of headscarves and heresies: the Denbigh High School case and public authority decision-making under the Human Rights Act*, PL 2005, Winter, p689. For a similar stance, see Hill & Sandberg, *Is nothing sacred?*, PL 2007

<sup>80</sup> *Begum* [2006], Lord Bingham at p31

<sup>81</sup> Davies, Gareth, *Banning the Jilbab: reflections on restricting religious clothing in the light of the Court of Appeal in SB v Denbigh High School*, ECL Review 2005, 1(3), 511.530

<sup>82</sup> *Ibid* at 520

an assumption that the wearer holds extreme or intolerant views.<sup>83</sup> This particular line of reasoning is particularly illuminating amongst the variety of criticism levelled at this judgment: ultimately, the entire case was about others' perceptions of the dress of one individual, embellished with tortured reasoning on various angles. It is difficult to see why, precisely, the legal system was required to intervene at such a high level on something that could, and perhaps should, have been resolved by Denbigh High School.

It is possible to argue that secondary schools are uniquely placed to correct pupils' perception of commonly-misunderstood things: for instance, Denbigh stated that it was concerned about girl pupils claiming to feel under pressure to wear jilbabs, presumably linking the garment with extremism and radicalisation. Shabina's case would have given the school the perfect platform to disassociate the two things: for instance, the management team could have asked Shabina to give a talk during assembly about the jilbab and what it represented to her, or arranged for lessons appropriate to each year group during its citizenship or religious education sessions exploring the various styles of Muslim dress and their meaning. Instead, as above, it chose to stick with a decision made unexpectedly, at a busy and stressful moment, and treated Shabina no differently from a pupil who had arrived at school without her tie, or wearing trainers instead of school shoes, when it should have been clear after a conversation with Shabina that this was not a standard breach of uniform regulations.

This selection of literature makes it evident that none of the verdicts in Begum met with universal academic approval, and a variety of improvements has been proffered. It could be argued that the combination of an area of law which is often open to wide interpretation, and a set of facts almost guaranteed to evoke a wide disparity of attitude and varying degrees of comprehension, meant that Begum resulted in a perfect socio-legal storm of sorts. Going further, it should also be borne in mind that Denbigh High School was not called on to account for its actions at anywhere close to the level of examination applied to Shabina's behaviour, and the author tentatively suggests that greater focus should have been applied here, bearing in mind the difference in social responsibility between a school and an individual pupil. It seems possible that, had a court at any stage of the process considered the damage done to Shabina's education, the negative press undoubtedly generated, and the dismissive way in which Denbigh apparently handled the Begum family, the judgment may have gone in Shabina's favour and potentially been more legally sound.

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<sup>83</sup> *Ibid* at 521

### **Wearing the jilbab: a personal decision or influenced by outside pressure?**

Writing in-between the rulings of the Court of Appeal and the House of Lords, Blair raised concerns about the wider issue of sexual discrimination within religious groups, which, she argues, results in the application of pressure on girls and their families to conform to particular standards of dress:

*‘ Women much more than men are subject to highly restrictive dress codes by their communities and a big question mark hangs over whether female pupils (or indeed their parents) have real choices about what they should wear. [...] Given the individual rights perspective of this decision, it will be vital to ensure that other young women's voices are not marginalised in future as pressure is placed on them to conform to a more rigid reading of doctrine than they wish to accept. Worryingly, media reports of pressure on young women to wear the jilbab, which they had previously been able to resist because of school uniform rules, emerged within a few months of the Denbigh decision.’<sup>84</sup>*

This point fails to acknowledge Shabina’s unwavering assertion, both in her evidence to the court and in various interviews with and statements to the media,<sup>85</sup> that the decision to begin wearing a jilbab was hers alone, brought about by the evolution of her own religious beliefs. In common with Baroness Hale, Blair doubts the agency of Muslim women and, in her concern that their communities inflict strict dress codes upon them, fails to acknowledge that Denbigh High School was effectively guilty of the same offence. Commentary of this ilk encourages a narrative in which veiled Muslim women are all victims requiring forcible liberation from their purdah by Western institutions. Whilst the author acknowledges that there almost certainly exists a proportion of Muslim women who suffer various types of oppression by their husbands or other male relations, it should not be ignored that some Western non-Muslim women suffer in similar ways, nor that many Muslim women make a free and conscious choice to dress in a way that complies with their religious beliefs. It is regressive and damaging to assume otherwise.

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<sup>84</sup> Blair, A, *R(SB) v Headteacher and Governors of Denbigh High School: Human rights and religious dress in schools*, 17 C.F.L.Q 3990414 [2005]

<sup>85</sup> See for example, The Guardian 3 March 2005, ‘I hope in years to come policy-makers will take note of a growing number of young Muslims who, like me, have turned back to our faith after years of being taught that we needed to be liberated from it.’ <http://www.theguardian.com/uk/2005/mar/03/schools.faithschools> (last viewed 02.09.13); The Guardian 22 March 2006: ‘Even though I lost, I have made a stand. Many women out there will not speak up about what they actually want...I still don’t see why I was told to go home from school when I was just practising my religion.’ <http://www.theguardian.com/education/2006/mar/22/schools.uk> (last viewed 02.09.13); BBC News 22 March 2006, ‘I feel it is an obligation on Muslim women to wear this [the jilbab], although there are other options.’ <http://news.bbc.co.uk/1/hi/4832072.stm> (last viewed 02.09.13);

Additionally, it cannot be avoided that during each stage of the case, much was made of Denbigh's sensitivity and care in devising a school uniform that, it felt, was appropriate to a variety of religious and cultural beliefs. As discussed above, however, it is possible to argue that, by its insistence on the salwar kameez as the only acceptable alternative to the familiar UK school uniform, Denbigh in fact demonstrated a lack of cultural sensitivity and diminished its female Muslim pupils to a non-specific 'Other'. The salwar kameez is a traditional region-specific garment, worn primarily in South and Central Asia by Sikhs and Hindus as well as Muslims, and by both men and women. It is seldom, if ever, worn in other predominantly Islamic regions such as Northern Africa, the Middle East, Turkey, or Indonesia. Denbigh's uniform policy acknowledged neither the breadth of the Islamic global community nor the diversity of its practice and observance. For a school with such a large Muslim pupil population, this insistence on the salwar kameez for all Muslim girls, because some Muslims in a particular region wear it, is surprising. Whilst it is likely that Denbigh took into account the preference of its largest Muslim group, in retrospect it is short-sighted for it not to have acknowledged other preferences to the extent that one of its pupils lost two years of her education.

Scolnikov appears to have mixed feelings about Denbigh High School's position.<sup>86</sup> On one hand, she conceded that some of the reasons cited by the school for its uniform policy, particularly the concern that Muslim pupils wearing the jilbab would create fear amongst non-Muslim pupils, are inadequate, remarking that 'schools should not pander to prejudice'.<sup>87</sup> On the other hand, she feels that other Muslim pupils may have felt under pressure to adopt a more extreme dress code had Shabina been allowed to continue wearing her jilbab, and believes that it was important to protect the religious freedom of these students from 'subtle restrictions created by communal pressure'.<sup>88</sup> These two contradictory opinions underline the difficulty of the case, and of the broader issue: if the exercising of one individual's rights under s.9 has the potential to infringe upon the same rights of another individual, or group of individuals, whose rights take precedence? Here, it is possible to argue that the potential for a manifestation of Shabina's rights to infringe upon those of the remaining Muslim girls at the school was negligible, and therefore the school could have devised a way for both groups to enjoy their rights concurrently.

Adopting a similar viewpoint to Blair, Scolnikov also considers that although Shabina herself may have made the decision to adopt the jilbab, it seems at least equally possible that she had been

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<sup>86</sup> Scolnikov, Anat, *Case Comment: A dedicated follower of (religious) fashion?*, Cambridge Law Journal 2005 64(3) at 527-529

<sup>87</sup> Ibid at 528

<sup>88</sup> Ibid at 529

under pressure to conform to the more extreme style of dress. She points to Shabina's home life (her father was dead, her mother spoke no English and died before the case was concluded, and her brother had confronted the head teacher over Shabina's initial refusal to comply with the uniform code) to underline her concerns here.<sup>89</sup> In contrast to this opinion, Shabina, accompanied by her barrister, was interviewed on GMTV in March 2006<sup>90</sup>, the morning that the decision of her case was due. She explained that the jilbab is 'what [she] felt was the correct Islamic clothing',<sup>91</sup> and was emphatic that wearing it was entirely her own decision, borne out of a deeper understanding of her religion, and not the result of coercion by any other person.<sup>92</sup> During the interview she appears articulate, bright, and passionate about her subject. It is striking that some commentators are so reluctant to believe that Shabina was not coerced into wearing a jilbab and indicates an ongoing perception of Muslim women being oppressed and without agency. This disparity of opinion relates to Motha's stance (below), in which he asserts that, in many Western democracies, the decision to veil is perceived to occupy an uncomfortably tense region between heteronomy and autonomy.<sup>93</sup>

Edwards notes that the evidence submitted by the head and deputy head of the school tended to codify the jilbab with a 'fixed and specific meaning'<sup>94</sup> by associating it firmly with extremist attitudes. She casts doubt on whether Denbigh High School was, in fact, best placed to assess whether the jilbab was an unequivocal signifier of Islamic extremism, and notes that this opinion appeared to be derived from the opinions of a small group of pupils and two Islamic scholars rather than the school itself.<sup>95</sup> Edwards also argues that the increasing scope of limitations to the manifestation of rights under article 9 seems contrary to the original intention and spirit of the provision, which was 'to defend and uphold' these rights rather than limit them.<sup>96</sup> Vakulenko observes a similar problem, noting that the House of Lords' ruling contained 'constructions of veiling as dangerous religious radicalism'.<sup>97</sup> She is also critical of the Lords' refusal to rule on whether others' perceptions of the jilbab as a threat to moderate Islam were right or wrong, despite upholding Denbigh's decision to ban the garment within its grounds. This is a key point: judges at each stage of this case seemed intent on restricting Shabina's right to religious self-expression in favour of upholding the 'right' of

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<sup>89</sup> Ibid at 529

<sup>90</sup> <http://www.youtube.com/watch?v=9hN-vAb4dQg>, retrieved 4 March 2013

<sup>91</sup> Ibid, at 0.50

<sup>92</sup> Ibid, at 4.22

<sup>93</sup> Motha S, *Veiled Women and the Affect of Religion in Democracy*, (2007) J.L.S 34(1), pp139-62

<sup>94</sup> Edwards, S, *Imagining Islam – of meaning and metaphor symbolising the jilbab*, C.F.L.Q [2007] 19(2), pp247-268 at p250

<sup>95</sup> Ibid at p257

<sup>96</sup> Ibid at p259

<sup>97</sup> Vakulenko, Anastasia, *Islamic Veiling in Legal Discourse*, Routledge, Abingdon, 2012, at p121

an ill-defined and unquoted group of pupils to be protected from encountering a garment with the dubious potential to offend or otherwise trouble them. Concurring with Edwards, this author would argue that it should be an unusual, extreme, and highly provocative matter to legitimately require restriction under art.9(2) ECHR, and that Shabina's request to wear her jilbab to school was none of these.

Edwards also feels that the West often perceives Muslim women as universally oppressed and welcomes part of Baroness Hale's judgment, in which she identified that Muslim girls often wear various forms of the veil for different reasons, such as asserting political or religious identity, rejecting Western values, or declaring control over their bodies. She goes on to identify what she terms 'a disconcerting trend of religious intolerance' emerging from Strasbourg jurisprudence, and 'a rising tide of intolerance flowing across Europe', directed at Muslims and impacting most heavily on Muslim women.<sup>98</sup> This, she feels, has resulted in a disinclination to tolerate the dress standards of Muslim women, designated by the media as 'multiculturalism', which serves mainly to victimise and marginalise these women.<sup>99</sup> However, Edwards' support for Baroness Hale's judgment is problematic: as noted earlier in this chapter, Baroness Hale seemed to divide veiled Muslim women into those who veil of their own volition, and are therefore acceptable, and those who are forced to veil and are unacceptable. It is unhelpful to suggest that such a dichotomy exists, particularly when it implies that one group is both less fortunate and less deserving of societal and legal support than the other.

Moreover, it is possible to argue that Shabina lost out regardless of which category she fell into. No matter whether her brother was forcing her to wear a jilbab or her school were refusing to educate her while she wore one, she missed two years of secondary education and suffered the upheaval of lengthy and onerous legal proceedings. It seems reasonable to suggest that, if her school genuinely believed she was under pressure to wear a jilbab, the most human-rights-focussed, inclusive, and sensible response would be to accept her and educate her in whatever she was wearing rather than allowing her education to stall whilst engaging in a battle of wills over an outfit, which would theoretically leave her even more open to radicalisation, if indeed that was a factor at play.

Motha makes many of the same points as Edwards with regard to the complex and multiple reasons Muslim women choose to wear various forms of the veil, the struggle in the West with the boundaries of multiculturalism, and the 'spurious equivalence' attributed to Islam and terrorism.<sup>100</sup>

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<sup>98</sup> For similar arguments, see Vakulenko, H.R.L.R (2007); Bhandar, J.L.S (2009)

<sup>99</sup> Ibid at p260

<sup>100</sup> Motha, *Veiled Women* at p140

He is, however, more critical of Baroness Hale's ruling, asserting that, despite her acknowledgment of the 'complexity of agentive decisions on veiling' made by Muslim women and girls, her reasoning is based upon a somewhat limited concept of the significance of autonomous agency.<sup>101</sup> Motha rightly feels that the choice of a woman to veil can be informed and influenced by any combination of political, cultural, religious and societal factors. This is another important point, underlining the difficulty of legal involvement in veiling itself: it is an intensely personal and multi-faceted practice, making it challenging to legislate or judge objectively. This is especially true for those with a limited working knowledge of its intricacies, pertinent examples being the various judges who ruled in *Begum*.

Mikhail is dissatisfied with several aspects of the Lords' ruling and identified a theme of 'us and them' in the application of, and perceived right of access to, human rights law.<sup>102</sup> He feels that several of the judges were unnecessarily critical of Shabina and her family's assertion of what they perceived as her legal rights. As he remarks, the Lords 'implicitly reprimanded Begum for injecting her rights into the dispute, characterising this approach as threatening, intransigent and confrontational.'<sup>103</sup> Mikhail also notes that the Lords failed to adequately acknowledge that many Muslim women choose to veil their bodies with loose clothing in order to avoid being objectified by others, or the probability that Shabina had begun to wear a jilbab because she had entered puberty and begun to develop breasts and hips which she wished to conceal from the public gaze.

Finally, Mikhail feels that the Lords' reliance on expressions of opinion by various members of the Muslim community fails to take into account the overriding principle emerging from the Reformation of the sixteenth century, that no individual should feel obligated to accept the religious authority of another. He describes the overarching message of the Lords' ruling as evasive and supportive of double standards, summarising it as

*'We celebrate human rights, heroic individualism and the stubborn vindication of self-determination against established legal, political or religious authorities. You, meanwhile, should avoid making unnecessary assertions of your so-called 'rights', and you must conform to the beliefs of whatever religious authorities of yours we choose to recognise.'*<sup>104</sup>

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<sup>101</sup> Ibid at p144

<sup>102</sup> Mikhail, J, *Dilemmas of cultural legality: a comment on Roger Cotterell's 'The struggle for law' and a criticism of the House of Lords' opinions in Begum*, Int J.L.C 2008, 4(4), 385-393

<sup>103</sup> Ibid at p389

<sup>104</sup> Ibid at p392

As we can see, Blair and, to some extent, Scolnikov, have argued that the decision in this case represented a positive outcome for Muslim girls and women, on the basis that it may help prevent them from those who compel them to cover their bodies or faces against their will. Whilst this position has perennial popularity within areas of Britain's mass media, the author is inclined to contend that this argument is paternalistic and fails to acknowledge those women, including Shabina herself, who make a free and informed decision to veil. Further, it potentially provides academic support to the concept of a ban on aspects of the Islamic veil, to which this author is firmly opposed.

Conversely, Edwards, Motha and Mikhail have argued to varying extents that the judgment in this case fails to recognise the deeper meaning behind veiling and is too ready to equate traditional Islamic practices with extremist Islamist activity. Whilst Mikhail's extended argument is, potentially, overly inflammatory, all three writers concur that Shabina's rights in this issue were unfairly and unnecessarily restricted in favour of 'protecting' her fellow pupils from offence. This is a plausible line of argument, reinforced by the authors' acknowledgment of the variety of reasons Muslim choose to veil all or parts of their bodies, demonstrating a greater understanding of the practice: this author would argue that this understanding is vital in successfully upholding the human rights of all UK citizens, rather than merely the majority group.

### **R (app X) v Y School (2007)**

A year after the House of Lords ruled on Shabina Begum's case, the High Court heard a judicial review on a Buckinghamshire secondary school's refusal to permit a Muslim schoolgirl, referred to only as 'X', to wear a niqab to school.<sup>105</sup> The claimant, in common with Shabina Begum, was resolute and emphatic that her interpretation of her religion demanded a certain standard of dress. In this case, X believed that once she had reached puberty, she should cover her face with a niqab whilst she was at school and being taught by, or likely to be seen by, men. Her three sisters had previously attended the same school and all had worn niqabs whilst in lessons with a male teacher.<sup>106</sup>

X attended a selective girls' grammar school which, in common with Denbigh High School, claimed that it had designed its uniform policy with the aim of fostering a welcoming and comfortable environment, stimulating a sense of identity, equality and cohesion, and reducing social pressures on pupils to dress in any particular way.<sup>107</sup> It went on to explain that it had taken advice from the local

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<sup>105</sup> R(on the application of X (by her father and litigation friend) v The Headteachers of Y School, The Governors of Y School [2007] EWHC 298 (Admin)

<sup>106</sup> Ibid at p7

<sup>107</sup> Ibid at p65 (quote from evidence submitted by the defendants)

county council and several Muslim sources before being satisfied that it had no requirement to permit the wearing of a face veil. In addition, the school referred to concerns about the ease and effectiveness of teaching whilst a pupil's face was covered, the potential for security breaches by intruders using face veils to disguise themselves, and, in echo of Denbigh's reasoning, the possibility of tacit pressure on other Muslim pupils to adopt the niqab who may otherwise not have chosen to wear it. In order to resolve the dispute the school had offered X a small amount of private tutoring in core subjects. As an alternative, the local educational authority offered her a place at an equivalent school which allowed niqabs to be worn during school hours. She declined both offers with the support of her parents.

### **Judgment (Silber J.)**

In an extension of Lord Bingham's words in the Begum decision, Silber J emphasised early in his ruling that.

*'[t]his judgment is fact-sensitive and it does not concern or resolve the issue of whether the wearing of the niqab should be permitted in the schools of this country. That is not a question that a court could or should be asked to resolve. Nothing that appears in this judgment seeks to resolve or to throw any light on this problem or the circumstances in which a veil should be permitted to be worn in schools or any other arena in this country. Indeed it follows that nothing in this judgment is intended to be any comment on the traditions or the requirements of the religion of Islam.'*<sup>108</sup>

This remark makes it evident that the English courts are reluctant to become involved in the wider debate surrounding Muslim dress and instead endorse decision-making on such issues at a local level.

In court, X argued that she had a legitimate expectation that the school would permit her to wear her niqab when she became a pupil. Furthermore, she contended that she would not have applied to Y school had she known it would not permit her to do so, and that there was no good reason for the school to change its position on niqabs. Finally, she contended that the school's refusal to permit her to wear her niqab constituted an infringement of her rights under Article 9 ECHR.

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<sup>108</sup> Ibid at p1

## Rights under Article 9 ECHR

The school countered that it had not interfered with X's Article 9 rights, but that even if it had, it could rely on article 9(2). It also maintained that its actions satisfied the requirements of proportionality.<sup>109</sup> This argument relied heavily on Lord Bingham's reference to Strasbourg jurisprudence in *Begum*, in which he ruled that,

*The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience ...*<sup>110</sup>

Although this dicta appeared to resolve the case on the grounds that X had been offered two alternative educational options, either of which would have meant she could wear her niqab without difficulty, a dispute arose over Lord Bingham's use of the word 'voluntarily'. Silber J acknowledged a material difference in the facts of the instant case and that of *Begum*, in that X had enrolled at Y school in the expectation that she would be permitted to wear her niqab, whereas Shabina Begum enrolled at Denbigh High School in the full knowledge that it did not permit the jilbab.<sup>111</sup>

The court held that, although the school's refusal to allow X to wear a niqab to school had engaged her rights under article 9, it did not constitute an actual infringement because she had received an offer of a place at an alternative local school of equal educational standing which would allow her to wear her niqab. Notwithstanding, Silber J went on to explain that, even if the claimant's rights under article 9 had been engaged, the school's interference with the rights would have been justified under article 9(2), primarily for the method the school used for devising its uniform policy which the court found to satisfy the requirements of the three-limb proportionality test.<sup>112</sup> He also provided some reasoning, with reference to EU case law and the ruling in *Begum*, to explain the difficulty in finding, and reluctance to find, interference with Article 9 rights when the individual had voluntarily accepted a role which did not accommodate her preferred manifestation of her beliefs. For instance, X was free to attend another school where she would have been free to wear her niqab, without

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<sup>109</sup> Ibid at p25

<sup>110</sup> *Begum* [2006] at p23

<sup>111</sup> *X v Y* [2007] at p29

<sup>112</sup> Ibid at p77, p101

undue hardship, and had not submitted as evidence any reason why the alternative school was unacceptable to her.<sup>113</sup>

### **Legitimate expectation**

Silber J went on to hold that X's expectation that she would be allowed by her school to wear a niqab was not reasonable and should at best have been uncertain. His reasoning included the fact that X's sister had been the last pupil at the school to wear a niqab and had left 2 years previously, and that a new head teacher with much more stringent views on uniform policy had joined the school in the meantime.<sup>114</sup> He ruled that, even if the school was found to have made a representation that niqabs were acceptable, its departure from it was proportionate in the pursuit of a legitimate aim (for the reasons outlined above).<sup>115</sup>

Finally, the court held that X had no right to expect treatment similar to that of her sisters. Alongside pointing out the change in headship and complaints from teachers about the difficulty of teaching pupils in niqabs, Silber J pointed out the timescale involved, in which the last of X's sisters had entered Y school in September 1998 whilst X herself had joined in September 2005. He remarks that 'The claimant's case seems to assume that since that time, conditions in the world had stood still while the evidence of the head teacher shows that matters have moved on with a greater number of Muslim girls at the school and increased concern for security.'<sup>116</sup>

### **Commentary**

Although Silber J makes no overt reference to the Al Qaeda attacks on the United States in September 2001 and London in July 2005, it is reasonable to conclude that these are the key 'matters' that have instigated the school's amplified security concerns. It is possible to argue that this approach panders to an elevated suspicion and fear of Muslim individuals in the wake of the terrorist incidents: surely an exaggerated fear when applied to teenage girls attending secondary school. The court's approach seems very much on the side of the school, with a dismissive attitude toward the defendant's complaint. As in *Begum*, Silber J underestimates the ease with which X could change schools and gives undue weight to the issue of security threats: it seems over-cautious to place a blanket ban on a form of religious expression on the basis that it may be used as cover for a terrorist attack, with no real grounds to suggest that such an attack was any more than a remote possibility.

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<sup>113</sup> Ibid at p40

<sup>114</sup> Ibid at p106-107

<sup>115</sup> Ibid at p130

<sup>116</sup> Ibid at p135

Hill and Sandberg argue that the ruling in *Begum* provided a poor precedent for the decision in *X*, and that the specific situation rule was overstated and misapplied without question in this decision. They go on to remark 'it is unfortunate that courts have sought artificially to limit the universal application of such rights rather than systemically developing an exposition of the qualifications to those rights.'<sup>117</sup> This argument recognises the flawed way in which courts have attempted to apply art.9 ECHR, and acknowledges the trend toward finding reasons to restrict human rights rather than uphold them: it is possible to argue that Silber J was bound to follow the precedent set by the higher court in *Begum*, but the author feels that the facts of this case were sufficiently different to those of *Begum* to warrant at least a partial deviation and, potentially, the setting of a more helpful precedent.

### **R(app Watkins-Singh) v Aberdare Girls' School [2008]**

In contrast to *X* sits Silber J's ruling in *Watkins-Singh* a year later.<sup>118</sup> The facts of this case are broadly analogous to *X* and *Begum*: a Sikh schoolgirl, Sarika Watkins-Singh, had been refused permission to wear her steel Kara bangle to school<sup>119</sup> on the grounds that it contravened the school's uniform policy, which prohibited jewellery. Sarika had refused to remove the Kara, which she stated was important to her religious beliefs, and was taught in isolation for as long as she maintained her refusal.

#### **Judgment (Silber J.)**

In 2008 Silber J held that the school's refusal to allow Sarika to wear her Kara amounted to indirect discrimination under section 71 of the Race Relations Act 1976 (RRA), because Sikhs are recognised as a race for the purposes of the Act.<sup>120</sup> The court distinguished the ruling from those in both *Begum* and *X*, comparing the narrow steel Kara to the 'extremely clearly visible and very ostentatious nature of the religious dress sought to be worn by the claimants in those cases.'<sup>121</sup> Silber J was dismissive of

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<sup>117</sup> Hill & Sandberg, *Is nothing sacred?*, at p505. For a similar argument, see Gibson, N, *Faith in the courts: religious dress and human rights*, C.L.J. 2007, 66(3), 657-697, in which he identifies that the approval of 'dubious Convention case-law [has created] a precedent which is already being applied' in reference to *X v Y*. (p669)

<sup>118</sup> *R(on the application of Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865

<sup>119</sup> The Kara is one of the Five Ks, symbols of devotion to Sikhism that are accepted as common to all Sikhs: <http://www.bbc.co.uk/religion/religions/sikhism/customs/fiveks.shtml>, accessed 24 August 2013

<sup>120</sup> *Watkins-Singh v Aberdare* at p35, p91: authority for defining Sikhs as a distinct racial group defined by ethnic origins can be found in *Mandla v Dowell Lee* [1983] 2 A.C. 548, which held that a school could not refuse admittance to a male Sikh pupil on the grounds that his father would not allow him to cut his hair and cease wearing a turban.

<sup>121</sup> *Ibid* at p77

the school's various concerns (social pressures, potential for bullying, the fostering of community spirit, and a 'floodgates' argument in which it feared other pupils would wish to wear various items of jewellery to school if Sarika was permitted to wear her Kara). He opined that the Kara was sufficiently small and 'unostentatious' to attract much attention and held deep religious significance for the claimant.<sup>122</sup> He also reminded the school of its obligations under the RRA and its own Racial Equality Policy to tackle racial bullying.<sup>123</sup>

Finally, the court maintained that requiring a claimant to demonstrate wearing a particular item or garment is a mandatory requirement of her religion is too high a standard.<sup>124</sup> It is difficult not to compare this tolerant and accommodating view with Silber J's earlier ruling in *X*, in which he was highly supportive of Y School's reasons for prohibiting the niqab, despite it doing so for largely the same reasons that Aberdare Girls' School attempted to prohibit Sarika's Kara. Although the Kara is far less obvious than either a niqab or a jilbab, as in *Begum*, the principle of the dispute is identical. Whilst the ruling in *Watkins-Singh* ultimately owed much to the requirements of the RRA and established precedent, it is difficult to reconcile Silber J's lengthy and detailed dismissal of the school's arguments for its refusal to modify its uniform policy with his equally detailed acceptance of very similar arguments put forward by Y School in *X*.

## Commentary

Bhandar argues that France's secular character<sup>125</sup> and the UK's doctrine of multiculturalism, whilst appearing very different, operate similarly by 'hold[ing] in place unitary, sovereign political subjectivity'.<sup>126</sup> She feels that the court in *X*, rather than considering visible manifestations of Islam like the niqab as enhancements to plurality and diversity, found them to be 'too different'.<sup>127</sup> This, she argues, results in the creation of an 'acceptable level' of religious or cultural expression based on how visible the expression is.<sup>128</sup> Bhandar identifies that the clutch of cases related to Muslim veils and a general climate of fear in relation to Islamic extremism contributed to the emergence of an attitude that 'difference was tolerable only in so far as it was palatable to the majoritarian British

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<sup>122</sup> Ibid at p78

<sup>123</sup> Ibid at pp82-84

<sup>124</sup> Ibid at p89

<sup>125</sup> To be considered in chapter 2

<sup>126</sup> Bhandar, B, *The Ties That Bind: Multiculturalism and Secularism Reconsidered*, J.L.S, 2009, 36(3), pp301-326 at p304

<sup>127</sup> Ibid at p313

<sup>128</sup> Ibid at p314

sensibility':<sup>129</sup> an approach by the government and the judiciary of 'so far and no further' in relation to expressions of religious difference, which also relates to the ruling in *Begum*, in which the school deemed a salwar kameez sufficient to comply with Islamic dress requirements but felt a jilbab was excessive and had the potential to incite extremist attitudes.

This is a shrewd point, identifying the unfamiliar nature of Islamic veils to the British eye as a key reason for the level of negativity toward their wearers, both from the judiciary and the media. Hill and Sandberg's argument in relation to *Begum* and *X*, in which it was put that the judiciary has sought to find reasons to restrict this particular right rather than reasons to uphold it, can be extended here. It is possible to argue further that a judge may already hold feelings of distaste or disapproval towards veiling prior to hearing the facts of the case, and whether consciously or otherwise, seek to manipulate legislation to produce an outcome by which the wearing of the veiling garment must be restricted. Whilst in no way doubting the integrity of the judges involved in the cases examined in this chapter, the author must at least consider this possibility as an explanation for the somewhat tortuous and laboured judgments that they generate.

### **R(app Playfoot) v Millais School Governing Body [2007]**

Later in 2007, the High Court presided over a further application for judicial review concerning religious items worn in school.<sup>130</sup> In this case, Lydia Playfoot, a 16-year-old schoolgirl from West Sussex, disputed her school's decision to refuse permission for her to wear a silver 'purity ring' on her finger whilst on school grounds. The ring symbolised her membership of the quasi-Christian organisation Silver Ring Thing, which promotes sexual abstinence until marriage.<sup>131</sup> Millais School is non-denominational and its uniform policy prohibits the wearing of any jewellery without a specific exception, on the grounds of either health and safety, a likely unlawful breach of a pupil's human rights, or 'where there were exceptional and compelling grounds'.<sup>132</sup>

Lydia argued that her school had unlawfully interfered with her right to manifest her religious beliefs under Article 9 ECHR, and, because the school permitted Muslim girls to wear headscarves and Sikh girls to wear Kara bangles, it had unlawfully discriminated against her, contrary to her rights under

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<sup>129</sup> Ibid at p315

<sup>130</sup> R(on the application of Lydia Playfoot (A Minor) by her Father and Litigation Friend Philip Playfoot v Governing Body of Millais School [2007] EWHC 1698 (Admin)

<sup>131</sup> Silver Ring Thing's website describes the organisation as 'a unique para-church youth ministry that promotes the message of purity and abstinence until marriage', <http://www.silverringthing.com/whatisrtr.asp>, retrieved 18 March 2013

<sup>132</sup> Playfoot, at H11

Article 14 ECHR.<sup>133</sup> The court heard that she had worn her ring to school without issue for around a year prior to being asked to remove it in summer 2005 as it contravened the uniform policy.<sup>134</sup> Immediately following this incident Lydia's father wrote to the school's head teacher to assert his support of the purity ring and the values it represented. He also maintained that wearing the ring was an expression of Lydia's personal faith and, as such, was analogous to Muslim pupils wearing headscarves.<sup>135</sup>

The school, following a meeting with its governors, countered that the purity ring was 'representative of a moral stance, not a necessary symbol of Christian faith',<sup>136</sup> and so did not merit the same exemption from the uniform policy as headscarves and Kara bangles. It suggested that the purity ring was more comparable to charity wristbands, which the governors had previously decided pupils were permitted to attach to their bags but not wear on their wrists. Several months later Lydia recommenced wearing her purity ring and, with the support of her father, referred the dispute to court.

### **Judgment**

The court accepted Lydia's statement that, as part of her Christian faith, she held a sincere belief in sexual abstinence until marriage. Consequently, the key questions before the court were whether wearing the purity ring was a legitimate manifestation of Lydia's belief,<sup>137</sup> whether preventing her from wearing it was an interference of her Article 9 rights, and if so whether the interference was justified under article 9(2).<sup>138</sup>

It was held that the wearing of the purity ring was not 'intimately linked' to a belief in sexual abstinence before marriage. Further, because Lydia had not expressed that her belief obliged her to wear the ring, it was found that wearing the ring was not a manifestation of that belief for the purposes of Article 9. This decision was reached with reference to Lord Hoffman's dicta in *Begum* ('Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing') and consideration of Strasbourg authority.

Further, it was held that the school had not interfered with Lydia's rights under Article 9 for two key reasons, which closely echo those decisions reached in both *Begum* and *X*. Firstly, because the

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<sup>133</sup> Article 14 ECHR provides that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground'.

<sup>134</sup> Playfoot, at H6

<sup>135</sup> Ibid, at H7

<sup>136</sup> Ibid, at H8

<sup>137</sup> In contrast to both *Begum* and *X*, in which it was uncontested that the jilbab and niqab were legitimate manifestations of the Muslim faith and intimately linked to its practice.

<sup>138</sup> Ibid, H18-19

school uniform policy was made clear to her and her parents prior to her admission. Secondly, because Lydia had other avenues open to her with which to express her beliefs without undue hardship: for instance, to attach the ring to her bag with a keyring.

### Commentary

In a statement issued shortly after the ruling and published on Lydia's personal blog, she expressed her concern that the decision represented the beginning of a gradual prohibition on the expression of Christian faith. Lydia also explained her motivation for wearing the ring, outlining her concern at the increase in incidences of sexually transmitted infection, pregnancy, and abortion in teenagers, and detailed her decision to commit to God and her future husband not to have sex before she was married. She maintained her view that Millais School's refusal to allow her to wear her ring constituted an interference of her rights under article 9 'in a democratic Christian-based country' and stated that she would consult her legal team about an appeal, which ultimately did not take place.<sup>139</sup>

The Silver Ring Thing was a relatively new organisation at the time of the case, and its symbolic ring is not a widely-known or accepted symbol of Christianity: however, it could be said to have a parallel with the wedding rings worn by some Christian nuns to symbolise their union with God, and is therefore not an entirely novel item.

In his consideration of the ruling in *Playfoot* in the context of various cases concerning religious freedom that were heard around the same time, Sandberg notes that, 'the incorporation of a positive right to religious freedom by the Human Rights Act 1998 may not have affected the actual decisions reached by the judiciary but it has affected their reasoning.'<sup>140</sup> Sandberg doubts the application of the law in *Playfoot*, pointing out that it effectively inverted *obiter dicta* from the House of Lords<sup>141</sup> by ruling that, because Lydia was not under any obligation by reason of her faith to wear her purity ring, wearing the ring could not be a manifestation of that faith. In fact, Lord Nicholls' ruling in *Begum* opined that 'the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice'.<sup>142</sup> He then emphasised that the lack of a perceived obligation did not necessarily mean that the act was not a manifestation of belief.

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<sup>139</sup> Lydia Playfoot Silver Ring Thing Internship Diary, entry dated Monday 16 July 2007 ('Response'), <http://www.lydiaplayfoot.blogspot.co.uk/>, retrieved 20 August 2013

<sup>140</sup> Sandberg, Russell, *Recent controversial claims to religious liberty*, [L.Q.R. 2008, 124\(Apr\), 213-217](#) at p214

<sup>141</sup> *R(on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, Lord Nicholls at pp32-33

<sup>142</sup> *Ibid*, at p32

Sandberg goes on to point out that the courts in both *Begum* and *Playfoot* misapplied Strasbourg jurisprudence in their rulings, by applying the ‘specific situation’ rule to school pupils. He argues that the ECtHR has only applied the rule in contractual settings, such as workplaces or universities, and that misapplication of the rule by domestic courts has created uncertainty as to its scope.<sup>143</sup> He concludes that domestic courts are muddying the waters of this area of law ‘by continuing to struggle with the semantics of Art.9(1) when a more satisfying and Strasbourg-compliant decision could be made by reference to Art.9(2) alone.’<sup>144</sup> As discussed previously in this chapter, the convoluted way in which courts have attempted to apply this piece of law to cases concerning religious dress indicates a desire to suppress pupils’ right to religious expression: Sandberg’s analysis throws this argument into sharp focus by outlining a simpler method of application with potential for a more liberal outcome. However, it is possible to argue that a liberal outcome is precisely the opposite of each court’s preferred outcome, possibly explaining the circuitous route taken through art.9 ECHR.

In her analysis of human rights cases affecting children, Shelley<sup>145</sup> points out a potential weakness in Lydia’s case: that her father was head of the Silver Ring Thing’s UK campaign. Although the text of the ruling makes no reference to his position beyond that of Lydia’s litigation friend, Shelley suggests that ‘his role, interest, and suspicions of parental pressure did not assist his daughter’s case.’<sup>146</sup> Shelley makes a similar point about the eventual ruling in *Begum*, noting that Shabina’s brother, who acted as both her guardian and eventual litigation friend, ‘had staged a campaign in the local Muslim community, including a demonstration outside the school, about the right for female pupils to wear full covering.’<sup>147</sup> The judges in each stage of *Begum* noted the brother’s involvement, but attributed more levity to Shabina’s capacity to inflict pressure on her fellow pupils by wearing her jilbab than her capacity to be pressured by others to wear the garment. Whilst it may be unwise of Shelley to engage in conjecture about factors not considered in the judges’ rulings, it is difficult to dismiss her point entirely: potentially, the courts did not want to assist in what they may have seen as a father or brother of the defendant using his daughter or sister as a pawn to further his own cause. However, it is important to bear in mind that both Shabina Begum and Lydia Playfoot made emphatic statements regarding the personal significance of their respective items. To dismiss such

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<sup>143</sup> Sandberg, at p215

<sup>144</sup> Ibid, at p217

<sup>145</sup> Shelley, Catherine, *Beating children is wrong, isn’t it? Resolving conflicts in the encounter between religious worldviews and child protection*, Ecc. L.J. 2013, 15(2), p136

<sup>146</sup> Ibid at p136

<sup>147</sup> Ibid at p136

testimony, by assuming it to be the result of coercion by an older male relative, would be patronising to the girls and dismissive of their personal agency.

Bacquet raises concerns about the courts' readiness to defer decisions on school uniform to the head teacher or governing board, on the grounds that a person or entity close to the school is better placed to make such decisions.<sup>148</sup> Whilst she concedes that this is true in some situations, she feels it may not be appropriate with regard to decisions relating to human rights issues. Furthermore, she observes that cases like *Playfoot*, *Begum* and *X* have caused school governing bodies to make decisions on what does and does not constitute a valid symbol of faith: an issue which she describes as 'extremely sensitive[...] on which there is no general consensus.'<sup>149</sup> The 'expert evidence' relied upon in *Begum*, for example, demonstrates that even a small sample of Muslim authorities drawn from the Greater London area cannot agree on how far girls should cover themselves to comply with the standard of *hijab*. It seems, therefore, inadvisable to allow such decisions to be made by school staff when devising school uniform policies.

### **Governmental advice on uniform guidelines 2007**

Following the House of Lords ruling in *Begum* [2006], Steve Sinnott, General Secretary of the National Union of Teachers issued a press release welcoming the clarity brought by the ruling but criticising the government for previously failing to provide guidance on school uniform policies. He felt it was 'vital that something as sensitive as the issue of religious belief and school uniform should not be the subject of further legal proceedings.'<sup>150</sup>

### **Consultation**

In March 2007, the Department for Children, Schools and Families (DCSF)<sup>151</sup> issued for consultation a set of non-statutory guidelines concerning school uniform.<sup>152</sup> As of October 2015, there is no legislation dealing specifically with school uniforms or dress codes.

Section 4 of the guidelines addressed the recommended process for a school governing body when setting its uniform policy. It advises: consideration of groups of pupils who may be affected

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<sup>148</sup> Bacquet, S, *School uniforms, religious symbols and the Human Rights Act 1998: the 'Purity Ring' case*, (March 2008) , Education Law Journal, 2008, U of Westminster School of Law Research Paper no 08-05, at p4

<sup>149</sup> Ibid at p7

<sup>150</sup> Press release: Monday March 27 2006, <http://www.teachers.org.uk/node/1937>, accessed 31.07.13

<sup>151</sup> Replaced in 2010 by the Department for Education (DfE)

<sup>152</sup> DCSF Guidance to Schools on School Uniform and Related Policies, available via <https://www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1468&external=no&menu=3>, retrieved 29 April 2013

adversely by any particular part of a uniform policy; weighing the needs and concerns of different groups against each other to explore whether they can be practically met, with reference to considerations of security, effective learning, protection from external pressure to dress in a certain way, and promotion of a cohesive and inclusive school identity; and full documentation of the consultation process.

It is evident that much of this guidance takes its cue from the rulings in *Begum*, *X* and *Playfoot*: for instance, *Begum* considered the potential for Muslim pupils feeling pressure to adopt a style of dress associated with more extreme Islamic groups. Similarly, *X* raised concerns about the difficulty in identifying or engaging with veiled pupils; and all three rulings drew attention to the importance of a consistent uniform in building equality and cohesion within a school.

The document goes on to explain the responsibility of schools to be mindful of the Human Rights Act, in which it paraphrases Lord Hoffman in *Begum* [2006] ('...schools should note that the freedom to manifest a religion or belief does not mean that an individual has the right to manifest their religion or belief at any time, in any place, or in any particular manner.')

<sup>153</sup> It states,

*'a school uniform policy that has the effect of restricting the freedom of pupils to manifest their religion may still be lawful, so long as this interference with pupils' rights is justified on grounds specified in the Human Rights Act',*<sup>154</sup>

And,

*'each case will always depend on the circumstances of the particular school. So the judgements do not mean that banning such religious dress will always be justified, nor that such religious dress cannot be worn in any school in England. It is for a school to determine what sort of uniform policy is appropriate for it.'*<sup>155</sup>

This advice, taken in its totality, appears somewhat vague and succeeds in delegating responsibility for an element of both statutory and religious interpretation to school managers and governors: as discussed above, this may well not be effective or appropriate.

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<sup>153</sup> Ibid, at section 20

<sup>154</sup> Ibid, at section 21

<sup>155</sup> Ibid, at section 21

## Consultation response

DfES released its response to the consultation paper in summer 2007,<sup>156</sup> claiming a generally positive welcome to the new guidance.<sup>157</sup> However, a closer reading of the response demonstrates that a significant proportion of the respondents have serious reservations about the potential effectiveness of the new guidance. Initially, it should be noted that these guidelines were intended to apply to nearly every school and school pupil in the UK, and so a consultation response of 232 is unlikely to be sufficiently representative. In addition, the reported 'positive response' of just over 50% suggests more of a lukewarm, than an overall positive, response. Furthermore, the response document reveals that substantial sections of the respondents raised concerns that the guidance was too open to interpretation and nuance, not sufficiently clear or too vague, and fostered the potential for unwitting discrimination against pupils. There also appeared to be a concern that the guidance left schools with too much responsibility for researching and interpreting their obligations under human rights legislation.

DfES is dismissive of these concerns, pointing to the obligations for schools to act reasonably in accommodating religious garments and comply with their obligations under HRA contained within the guidance. However, it goes on to explain that 'restricting the freedom of pupils to manifest their religion may be lawful, so long as this interference with pupils' rights is justified on grounds specified in the Human Rights Act.' It is possible to argue that the provisions of the HRA are themselves open to interpretation, and that it may not be desirable to delegate the interpretation of key legislation to non-legal bodies or individuals.

## Commentary

Bacquet is critical of the guidelines, noting that they are non-binding on schools, excessively general in scope, and allow individual schools to interpret legislation in their own way. This, she feels, has led to schools becoming 'arbiters of faith' and 'will inevitably result in more litigation.'<sup>158</sup> She argues that this responsibility should be shifted away from schools and suggests a more satisfactory result could be achieved by the establishment of a national body to ensure state school uniform policies comply with the schools' requirements under ECHR and HRA 1998. Bacquet concludes by identifying the

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<sup>156</sup> DfES Guidance to Schools on Uniform Related Policies – Consultation Results, available via <https://www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1468&external=no&menu=3>, retrieved 29 April 2013

<sup>157</sup> Ibid, Overview section

<sup>158</sup> Bacquet at p7

current inclination to devolve responsibility onto school governing bodies and appears sceptical that this will change in the near future.<sup>159</sup>

The Department for Education (DfE)'s current non-statutory guidance on school uniforms,<sup>160</sup> which was issued in September 2013 and is due for review in summer 2015, places its main emphasis on the sourcing, availability and cost of school uniforms. With respect to the issue of accommodating pupils who wish to incorporate items of religious or cultural significance into their uniform, the DfE recommends that the governing body should

*'consider carefully reasonable requests to vary the policy, in particular to meet the needs of any individual pupil to accommodate their religion or belief, ethnicity, disability or other special considerations' and 'consider carefully the risk of a challenge to the policy and consider appropriate insurance cover.'*

This advice presumably takes its cue from the protracted legal action that ensued when Denbigh High School refused to allow Shabina Begum to wear her jilbab, and from the other cases that followed: a realisation of Bacquet's concern that the government devolved too much responsibility for interpretation of human rights legislation onto schools and governing boards.

In the short section 'Human Rights, Equality and Discrimination Considerations',<sup>161</sup> the DfE offers examples of ways in which pupils may feel obliged to outwardly manifest a particular belief, such as 'wearing or carrying specific religious artefacts, not cutting their hair, dressing modestly or covering their head'. The final two examples are most pertinent to this thesis, and whilst covering the face is not mentioned, it could easily be interpreted to fall under either 'dressing modestly' or 'covering the head'. The section goes on to paraphrase Lord Hoffmann in *Begum* [2006] ('Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing'),<sup>162</sup> and references the Equality Act 2010. The next paragraph essentially explains schools' responsibilities in balancing the rights of individual pupils against those of the school community, but gives no real advice on how this is to be achieved apart from stating, 'it should be possible for most religious requirements to be met within a school uniform policy and a governing body should

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<sup>159</sup> Ibid at p 8

<sup>160</sup> Department for Education, School Uniform: Guidance for governing bodies, school leaders, school staff and local authorities, September 2013, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/269113/school\\_uniform\\_guidance\\_2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269113/school_uniform_guidance_2013.pdf), last viewed 07.04.15

<sup>161</sup> Ibid at p6

<sup>162</sup> *Begum* [2006] at p50

act reasonably through consultation and dialogue in accommodating these.’<sup>163</sup> In light of the difficulty in resolving *Begum*, *X*, and *Playfoot*, this remark does not seem entirely satisfactory: if only ‘most’ religious requirements can be met, which ones cannot? How should the governing body decide what constitutes a requirement, bearing in mind, for example, the lack of consensus amongst Muslims as to whether the face should be covered or not? And if what an individual pupil perceives to be her right is at odds with what the governing body perceive as the best interests of the school community, which party has its right upheld?

Rather than attempt to provide detailed guidance for such matters, the DfE instead advises that ‘disputes about school uniforms should be resolved locally and should be pursued in accordance with the school’s complaints policy’, stipulating that there should be a simple way for parents to raise a complaint and that the governing body should work with the parents to reach a ‘mutually acceptable outcome’, whilst being willing to ‘consider reasonable requests for flexibility[...]to accommodate particular social and cultural circumstances.’<sup>164</sup> Although still somewhat non-committal in content, this advice does encourage schools to resolve their own problems and should result in more beneficial outcomes than those achieved from the clutch of cases discussed above. In *Begum*, especially, the issue was exacerbated by the lack of dialogue between the school and Shabina and her family: had both parties taken the opportunity to sit down together, explain their relative positions and try to reach an agreement, possibly with the support of an impartial mediator, the matter could well have been resolved much more quickly, without recourse to legal action and the consequent damage to Shabina’s education.

Although it can be argued that the DfE’s guidance is not entirely satisfactory, it should be noted that, as of April 2015, there have been no significant cases concerning direct challenges to school uniform policies since *Watkins-Singh* in 2008. Whether this can be attributed to the success of the DfE’s guidelines, to the defeat in court of Shabina Begum, *X*, and Lydia Playfoot, or to a combination of the two factors is debatable.

### **Veiling in the workplace: *Eweida and Others v the UK* (2013)**

A ruling handed down by the European Court of Human Rights in January 2013 further illustrates Strasbourg’s reluctance to permit individual religious or ideological convictions to prevail over

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<sup>163</sup> DfE Guidance September 2013, p6

<sup>164</sup> Ibid

prescribed uniform policies. Two of the claims in *Eweida and Others v the UK*<sup>165</sup> concerned women whose workplaces had refused permission for them to wear religious symbols during work: in both cases, a cross on a chain worn visibly round the neck. Shirley Chaplin, who was a nurse on a geriatric ward in an NHS hospital and Nadia Eweida, who worked on a British Airways check-in desk, both argued that their employers' refusal infringed their rights under article 9, both alone and in conjunction with article 14. Both women had appealed to employment tribunals which rejected their claims, and Eweida had unsuccessfully appealed to the Court of Appeal, which reiterated Lord Bingham's objections as outlined in *Begum*. In addition, both employers had offered the women alternative positions without contact with patients (in Shirley's Chaplin's case) or customers (in Nadia Eweida's case), which they had declined.

Eweida argued that, '[n]o other fundamental right was subjected to the doctrine that there would be no interference where it was possible for the individual to avoid the restriction, for example by resigning and finding another job, nor should an individual be considered to have "waived" his or her rights by remaining in employment.'<sup>166</sup> She felt that the availability or otherwise of appropriate means to avoid a restriction on this right should be considered under article 9(2), rather than used as grounds of a finding of no interference.

The ECtHR held, although BA's uniform policy in and of itself did not constitute an interference with Miss Eweida's rights under article 9, 'that a fair balance was not struck'<sup>167</sup> between her fundamental right to manifest her religious convictions and BA's desire to project a particular corporate image. It felt that BA's interests were 'accorded [...] too much weight'<sup>168</sup> by the UK courts, and pointed out that its corporate image had not been damaged by permitting other employees to wear religious garments including turbans and headscarves. Further, the court held that BA had amended its uniform policy fairly readily following Miss Eweida's claim and the attendant negative publicity, so doubted the 'crucial importance'<sup>169</sup> of the ban on religious garments or symbols in the first place.

Chaplin posited that the UK court had set too high a bar for finding a religious practice worthy of protection under article 9.<sup>170</sup> She felt that the court attempted to distinguish between 'requirements' and 'non-requirements' of a religion, which would ultimately offer greater protection

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<sup>165</sup> Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013

<sup>166</sup> *Ibid* at p65

<sup>167</sup> *Ibid* at p94

<sup>168</sup> *Ibid* at p94

<sup>169</sup> *Ibid* at p94

<sup>170</sup> *Ibid* at p67

to religions with specific rules for their adherents (for example, the practice of *hijab* for Muslims, or the wearing of the Five Ks for Sikhs) and less protection to those without (such as Christianity). In addition, she felt that her employer, and subsequently the court, attached undue magnitude to the purported risks to patient and staff health and safety as a result of her cross. A large part of the NHS's case against Mrs Chaplin's wearing of her cross concerned its significant size and weight, and the potential risk of a confused or disturbed patient grabbing the pendant, thereby risking injury to themselves or to Mrs Chaplin: equally, there was concern that the cross could come into contact with an open wound, increasing the risks of infection and cross-contamination. In fact, the ECtHR conceded that 'no evidence was adduced before the Employment Tribunal to demonstrate that wearing the cross caused health and safety problems',<sup>171</sup> which Chaplin argued represented a breach of her rights under article 14.

Notwithstanding, ECtHR felt that the health and safety concerns of the NHS trust outweighed Mrs Chaplin's preferred method of religious expression. It additionally cited that the Mrs Chaplin's employer, as a public hospital, 'must be allowed a wide margin of appreciation'<sup>172</sup> in terms of assessing what does or does not pose a health and safety risk. Further, the court pointed out that the trust's refusal to permit Mrs Chaplin to wear her cross was not unprecedented: within the same hospital, another Christian nurse had been refused permission to wear a cross on a chain, two Sikh nurses had been refused permission to wear a kara bangle, and there was an accepted ban on 'flowing' hijabs<sup>173</sup> (whereas tight-fitting sports-style hijabs were permitted). The court was satisfied that the trust had offered Mrs Chaplin suitable alternative methods to wear her cross (as a brooch, or tucked inside a high-necked top worn under her V-necked uniform, both of which she found unacceptable), and held that the trust's approach was not disproportionate in the circumstances.<sup>174</sup>

Although this ruling represented a defeat for Mrs Chaplin, it could be argued that she appeared exceptionally unwilling to compromise with her employer, despite being offered a number of reasonable solutions. This aspect of the case sets it aside from *Nadia Eweida's* complaint and from *Begum* and *X*, in which compromise did not seem to be an option for either complainant or defendant. It should be noted that, whilst Nadia Eweida's job was primarily desk-based and her cross was described by the court as 'small and discreet', Shirley Chaplin's cross was significantly larger,

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<sup>171</sup> Ibid at p69

<sup>172</sup> Ibid at p99

<sup>173</sup> Ibid at p98

<sup>174</sup> Ibid at p100

worn on a longer chain, and her job involved caring for elderly hospital patients, a role in which the wearing of any jewellery is discouraged, much less large pieces which move and swing freely.

Hill was generally supportive of the decision, noting that the Court's ruling that an action only has to be intimately linked with a religion, rather than expressly mandated, in order to qualify for article 9 protection 'means that dress code policies which only permit items to be worn that are a strict religious requirement will be unduly narrow.'<sup>175</sup> Going further, this ruling may inform future cases to prevent the over-reliance on so-called expert evidence seen in *Begum*: it would have been difficult to argue that the jilbab, or indeed the niqab, are not 'intimately linked' with Islam, regardless of the spectrum of opinion concerning whether they are demanded by the Koran.

*Ladele v Islington*,<sup>176</sup> another case considered by ECtHR at the same time as *Eweida and Chaplin*, was discussed in some depth by Malik in 2011. Although the subject matter of this case sits outside the scope of this thesis, the general principle – the tension between the ideals of a liberal society and the beliefs of the religious – is applicable. Malik notes that 'although liberal societies guarantee freedom of religion and belief, they seem to do so from a position of superiority where the framework and terms of the debate are unilaterally dictated by secular liberalism.'<sup>177</sup> This point can be applied to all of the cases discussed in this chapter: each time, the claimant's behaviour resides somewhere beyond the boundaries of 'normality', effectively Othering her in a judicial sense when she is already Other in terms of gender, culture, religion, and in some cases Other within the scope of her own religious or cultural community (what Malik terms 'minorities within minorities',<sup>178</sup> for example, Shabina Begum's jilbab was apparently considered extremist by other Muslim pupils at Denbigh High).

This observation encapsulates the immensity of the force levelled against the claimants in these cases, and forces one to consider whether they ever had a hope of meaningful success in their claims. Shrewdly, Malik argues that the conflict in *Ladele* was most likely created by a failure of management to effectively resolve the dispute,<sup>179</sup> and recommends better workplace training and management, and the use of mediation or other alternative dispute resolution techniques rather

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<sup>175</sup> Hill, Henrietta, *Eweida v the United Kingdom: the right to manifest religion under article 9 of the ECHR*, E.H.R.L.R. 2013, 2, at p193

<sup>176</sup> *Ladele v Islington*, [2009] EWCA Civ 1357, in which a council registrar argued that her employer had subjected her to discrimination and harassment by requiring her to perform civil partnership ceremonies, which went against her strict Christian beliefs.

<sup>177</sup> *Ibid* at p26

<sup>178</sup> *Ibid* at p38

<sup>179</sup> *Ibid* at p34

than 'the all or nothing structure of litigation which sours relations between the two parties.'<sup>180</sup> This is particularly relevant to the school uniform cases, in which the claimants generally lost significant portions of secondary education, presumably including many of the social and extra-curricular aspects of a state school education.

On the question when an interference with article 9 will be found, the Equality and Human Rights Commission submitted that the courts in the United Kingdom have, in effect, guaranteed different levels of protection for individuals asserting a purely religious identity as opposed to those whose religious and racial identities are intertwined.<sup>181</sup> This point can be traced back to *Watkins-Singh* [2008], which ruled that manifestations of Sikhism in the form of worn articles were sufficient to warrant exemption from the school uniform policy because Sikhs are defined as a racial group, as well as a faith, in UK law. Conversely, neither Christians nor Muslims are recognised as discrete racial groups and the case law examined in the 'Schools' section of this chapter demonstrates that they have not so far been successful in legal challenges to uniform policy. It is to be hoped that *Eweida* has set a more equitable precedent, securing protection for all citizens who wish to wear an outward symbol of their religion or faith except for where there are compelling and reasonable grounds to insist on a compromise.

## Conclusions

The case law discussed above reveals the profound way in which the British judiciary has struggled to understand the concept of veiling. It has persistently attempted to establish precisely what constitutes 'sufficient' coverage to comply with *hijab*, and what is excessive and therefore could legitimately be restricted, all whilst generally failing to give adequate credence to the views of the women and girls directly involved and affected. Instead, it is possible to argue that it has contorted human rights legislation in order to arrive at legally tenuous decisions which disproportionately restrict the rights of women and ethnic minorities.

It is impossible to under-emphasise that, in each of the cases outlined above, the claimant was in a significantly less powerful position than the defendant, both in terms of relationship (either school – pupil or employer – employee) and by dint of her gender and race in a predominately white patriarchal society. When collated in the context of the various cases above, these facts contribute

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<sup>180</sup> Ibid at p38

<sup>181</sup> *Eweida* at p77

to an overarching narrative of veiling as a negative, even distasteful practice, which Muslim women and girls either have forced upon them or blindly follow without thought for the implications on themselves or others, and from which they must be 'rescued'. One of the chief outcomes of this narrative is to suppress the voices of Muslim women, both literally and symbolically, by attempting to restrict their sartorial manifestation of religious belief, and replace them with damaging stereotypes of oppression and extremism. In a broader sense, this may perpetuate discord at the intersection between white Western women, who are primarily at liberty to dress however they like, and Muslim women, who have to struggle to achieve or maintain the same privilege.

The ruling in *Eweida and Others* stands out amongst the other cases for its more logical decision, and it is perhaps unfortunate that none of the cases concerning Muslim garments reached ECtHR for fuller consideration. It should be reiterated that there do not appear to have been any legal challenges regarding the wearing of Muslim garments within UK schools since the introduction of the DfE's uniform guidelines, although it is difficult to know whether this can be attributed directly to the success of the guidelines, to a growth in more liberal attitudes toward Islamic dress, or even to schools' apprehension over potential legal proceedings. Ironically, further disputes and challenges may be an opportunity to improve the legal position here: as illustrated by the various academic literature discussed above, there are fundamental faults in much of the reasoning employed by courts at all levels, misapplications of legal principles, and flaws in understanding of the practice of veiling. Much of this literature exemplifies the weakness of the precedent set in *Begum* and makes a number of suggestions for improvements: a fresh challenge would be welcomed, certainly by the academic community, as a chance to correct this unfortunate area of law.

The chief effect of this collection of cases occurring over a relatively short time span, in the years directly following the terrorist attacks of September 11 2001 and the United States' 'War on Terror', was to convey the issue of Islamic veiling to the forefront of public attention. As we will see in the following chapter, this increase in awareness led to sporadic bouts of intense focus on the part of the British press, coupled with attempts by various political figures to insert themselves into the debate, a Private Members' Bill proposing the banning of any veil which covered the face, and a campaign by a right-wing political party to 'ban the burka'.

## Chapter 3: ‘Un-British’? Discussing the UK’s debate on veiling

### Introduction

A key theme that emerged in the previous chapter was the reluctance of courts at all levels to make recommendations, beyond the facts of the instant case, as to the legal position of wearing religious items. This reticence left the subject wide open to debate. Additionally, the proliferation of cases involving very similar issues over a relatively short span of time, coupled with the blanket media coverage of Al Qaeda activity, seemed to associate face veiling directly with Islamist terrorism and gave it, arguably, more prominence than necessary. This chapter will consider the involvement of political figures and parties in the issue of Islamic veiling in the UK, with specific reference to the positions of Labour MP Jack Straw and of the United Kingdom Independence Party (UKIP). It will explore the origins of these positions, the extent and tone of associated media coverage, and relevant academic commentary where available. Additionally, there will be an examination of the ultimately unsuccessful Private Member’s Bill, Face Covering (Regulation) Bill 2010 and its provisions, followed by a summary of political and media responses to the bill. Finally, this chapter will consider an unusual incident occurring in September 2013, in which a criminal court judge held that a defendant must remove her niqab whilst giving evidence in court, and will assess the ensuing media coverage of the matter.

### Political and Academic Commentary: a Survey of Views

In October 2006, shortly after the House of Lords ruling in *Begum* and the events leading up to *X v Y School*, the then Home Secretary Jack Straw joined the debate over veiling. In his weekly column for the Lancashire Evening Telegraph, the local newspaper for his Blackburn constituency, he described his practice of asking veiled Muslim women to remove their face-coverings when they attended his surgery.<sup>182</sup> Mr Straw reveals his distaste for veiling with the remark, ‘...this is a country built on freedoms. I defend absolutely the right of any woman to wear a headscarf. As for the full veil, wearing it breaks no laws.’<sup>183</sup>

Straw’s comment almost impeccably contradicts itself. It first reinforces the freedom of expression enshrined within UK law and offers fervent support to women who choose to wear headscarves,

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<sup>182</sup> ‘I felt uneasy talking to someone I couldn’t see’, October 6 2006. Retrieved via The Guardian (no longer available through original source), <http://www.guardian.co.uk/commentisfree/2006/oct/06/politics.uk>, accessed Sat 11 May 2013

<sup>183</sup> Ibid

then virtually dismisses those who elect to wear face veils, their only saving grace that they are not actually breaking the law. Straw goes on to note that he 'can't recall a single occasion when the lady concerned refused to lift her veil; and most I ask seem relieved I have done so',<sup>184</sup> indicating a preconception that all veiled women cover their faces reluctantly and under sufferance. He further reinforces this impression by a description of a specific incident of asking a constituent to remove her veil, in which he expresses surprise that 'the husband had played no part in her decision. She explained she had read some books and thought about the issue. She felt more comfortable wearing the veil when out. People bothered her less.'<sup>185</sup> Ultimately, he challenged this particular woman on the grounds that 'many Muslim scholars said the full veil was not obligatory at all', but advised her that he would consider her points. This attitude illustrates Bhandar's view that 'differences that challenge the boundaries of the sovereign political subject are perceived as a threat to be contained and managed.'<sup>186</sup> It is disappointing that Straw felt it necessary to argue with his constituent even after she explained to him her reasoning and motivation for wearing her niqab, which, after all, she was under no obligation to do. In this way, Straw appears to place himself as some kind of authority on the requirements of *hijab*, refusing to fully concede even to a well-read Muslim woman on the point, and instead attempting to rescue her from the confines of her veil.

Straw's column subsequently attracted a huge amount of debate and media interest, both adverse and supportive. In a press conference, the then Prime Minister Tony Blair was critical of the practice of veiling but planted his opinion in the field of concern for community cohesion, remarking, 'It is a mark of separation and that is why it makes other people from outside the community feel uncomfortable. No-one wants to say that people don't have the right to do it. That is to take it too far. But I think we need to confront this issue about how we integrate people properly into our society.'<sup>187</sup> Speaking on Radio 4's Today programme, Salman Rushdie remarked that 'speaking as somebody with a very large Muslim family, there's not a single woman I know who would have accepted wearing the veil...I think the veil is a way of taking power away from women.'<sup>188</sup>

On the other side of the debate, the Guardian's David Edgar noted 'Now many people who defend free expression to the death want to stop other people wearing what they want, in order to protect

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<sup>184</sup> Ibid

<sup>185</sup> Ibid

<sup>186</sup> Bhandar, *The Ties That Bind*, at p304

<sup>187</sup> Reported by BBC News, 17 October 2006, [http://news.bbc.co.uk/1/hi/uk\\_politics/6058672.stm](http://news.bbc.co.uk/1/hi/uk_politics/6058672.stm), accessed 15 May 2013

<sup>188</sup> Gledhill, Ruth, *Muslim veils suck, Rushdie says*, The Times, 11 October 2006 p13

themselves from cultural offence.<sup>189</sup> He goes on to reflect on the paradox of liberal-minded people defending what they see as illiberal practices in the name of freedom of expression, remarking

*'we are having to defend things we disapprove of, such as the glorification of terrorism or, indeed, calls for censorship. The conundrum that one of the things liberals have to tolerate is intolerance hasn't needed to be at the forefront of debates on free expression before. It is now, and it should be.'*<sup>190</sup>

This argument encapsulates the difficulty veiling seems to cause in UK politics: there is a perception that veiling is forced upon women by powerful men such as political or religious leaders, their husbands and families, so some UK politicians believe they can and should 'release' women from their perceived obligation to veil by attempting to force them to unveil. This approach to the issue has some parallels with the way in which women who are raped or suffer domestic violence are often treated by the judiciary: for instance, a victim will often be asked why she did not leave her abusive husband, or what she was wearing when she was raped. This approach lays a significant amount of responsibility at the victim's feet and, whether intentionally or not, paints the male perpetrator as an unfortunate and helpless slave to his own urges. If parties calling for a ban on veiling the face genuinely believe that all veiled women veil only because their husbands or fathers force them to do so, it would seem more sensible to call for a law preventing any man from coercing any woman into wearing something against her will than to attempt to criminalise the woman for wearing the garment.

Shortly after the publication of Straw's remarks, Professor Eric Barendt gave an interview on freedom of expression.<sup>191</sup> One of the key points of the interview was the media commotion over various controversial cartoons published earlier that year depicting Mohammed and Ariel Sharon in a less than reverent manner. Barendt compared Mr Straw's remarks to the cartoons, and commented that both helped instigate, in their own way, a debate which ought to be taken seriously. He went on to remark,

*'We have difficulties in understanding the Muslim religion and their religious sensitivities, just as they find it hard to accept our easy going philosophy of freedom of discussion and I think*

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<sup>189</sup> Edgar, David, *Sorry, but we can't just pick and choose what to tolerate*, The Guardian, 11 October 2006, accessed via <http://www.guardian.co.uk/commentisfree/2006/oct/11/immigration.comment>, retrieved 21 May 2013

<sup>190</sup> Ibid

<sup>191</sup> Martino, Tony, *In conversation with Professor Eric Barendt: hatred, ridicule, contempt and plain bigotry*, Ent. L.R. 2007, 18(2), 48-55

*the only way in which we can approach each other is to be prepared to discuss these issues.*<sup>192</sup>

Barendt raises a valid point here, especially taking into account the significant Muslim population in Europe and North America. It is possible to argue that Jack Straw's approach was somewhat clumsy. However, the sheer volume of coverage given by the media to what was, after all, merely a politician's weekly column in a small local newspaper, suggests a sense of relief amongst commentators that it had become acceptable to discuss the specific issue of veiling and, in context, the wider issue of Islam in the UK.

A week after Straw's column was published, the research company Ipsos MORI conducted a poll on behalf of ITV.<sup>193</sup> The poll asked 1,023 UK adults about their views on veiling. Its summary of conclusions notes that 'the majority of the public think Muslim women are segregating themselves by wearing a veil (61%) and they [veils] are a clear statement of separation and difference (59%)'.<sup>194</sup> However, it fails to draw specific attention to other conclusions: for instance, 77% of respondents agreed that Muslim women have the right to wear a veil, 74% stated that they understood why some Muslim women wear a veil, and 60% agreed that children should be allowed to wear Islamic dress in schools. This bias in headlining suggests a slight alignment with the reactions to Straw's article published by the more right-wing press.<sup>195</sup> In many ways, the media must accept some responsibility for stimulating and fuelling the controversy over veiling.

## **The Face Covering (Regulation Bill) 2010-12**

In 2010, Conservative backbencher Phillip Hollobone sponsored the Face Covering (Regulation) Bill 2010-12 ('the Bill'). The Bill was drawn seventeenth out of twenty in the Private Members' Bill ballot and primarily followed France's Ban in its remit and extent (see chapter 3). The initial text of the Bill recommends that 'a person wearing a garment or other object intended by the wearer as its primary

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<sup>192</sup> Ibid at p52

<sup>193</sup> *Muslim Women Wearing Veils*, <http://www.ipsos-mori.com/researchpublications/researcharchive/315/Muslim-Women-Wearing-Veils.aspx>, accessed 11 May 2013

<sup>194</sup> Ibid

<sup>195</sup> In particular, the Daily Express, whose front page for 21 October 2006 showed a photograph of a woman wearing a niqab and abaya, with the headline 'BAN IT! The veil is outlawed even by some Arab countries so why must we put up with it here?', <http://www.ukpressonline.co.uk/ukpressonline/open/simpleSearch.jsp;jsessionid=8589F2166045AC01CE3D1C4046EBEE2?is=1>, accessed 11 May 2013

purpose to obscure the face in a public place shall be guilty of an offence.<sup>196</sup> The Bill goes on to make exceptions to the proposed offence, the first four of which mirror those enacted in France's Ban. Further, one of the remaining two exceptions within the Bill ('in a place of worship'<sup>197</sup>) is covered differently by the Ban, which does not classify places of worship as public places.<sup>198</sup> The final exception contained within the Bill does not reflect its French counterpart: it specifies that 'a person does not commit an offence under subsection (1) [above] if the garment or other object is worn for the purposes of art, leisure, or entertainment.'<sup>199</sup>

It is impossible to know how broadly or narrowly this exception is intended to be interpreted, because the Bill was not read in Parliament as scheduled on 3 February 2012 and ultimately failed to complete its passage into the statute books.<sup>200</sup> However, in common with the Ban, it appears from this extensive list of exceptions that Hollobone primarily intended the Bill to criminalise the wearing of Islamic veils rather than face-covering garments in general.

Hollobone was something of a lone voice in Parliament with regard to this issue. During a debate on immigration and immigrant issues in Westminster Hall on 2 February 2010, he interjected with some remarks concerning the growing immigrant population of the UK. He then turned his attention to what he described as 'the burka' (presumably meaning the niqab), remarking that 'I must say that I have huge sympathy with those who want action taken against people who want to cover themselves up in public' and 'it is the religious equivalent of going around with a paper bag over your head with two holes for the eyes. In my view, it is offensive to want to cut yourself off from face-to-face contact with, or recognition by, other members of the human race.'<sup>201</sup> In addition, he remarked that 'part of the British way of life is that you smile at people you pass in the street, wave, say hello – you can't do that if you can't see somebody's face. I think there's a traditional mistrust in

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<sup>196</sup> Face Coverings (Regulation) Bill 2010 s.1(1)

<sup>197</sup> *Ibid* at s.1(3)(f)

<sup>198</sup> 'Q: Is it prohibited to conceal one's face in places of worship? A: Wearing clothes which conceal the face is not prohibited in places of worship when they are prescribed for religious reasons and accepted as such by the person responsible for the premises. In other situations, the specific regulations for public order in places of worship apply, under which the police can only intervene at the request of the religious leaders present.' French Embassy, Burka Ban – FAQs, <http://www.ambafrance-uk.org/Burka-ban-FAQs>, retrieved February 2 2012.

<sup>199</sup> *Ibid* at s.1(3)(e)

<sup>200</sup> UK Parliament website, <http://services.parliament.uk/bills/2010-12/facecoveringsregulation.html>, retrieved May 31 2012

<sup>201</sup> Daily Hansard, Westminster Hall 2 Feb 2010 column 12WH, accessed via <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100202/halltext/100202h0002.htm#10020246000536>, retrieved February 3 2012

this country of people covering their face.’<sup>202</sup> It is possible that Hollobone refers here to the IRA’s practice of wearing balaclavas, as mentioned earlier in this chapter. However, it is something of a stretch to describe this as a ‘traditional mistrust’, bearing in mind the practice was most visible as recently as the 1980s. In fact, there is evidence that veiling the face has sporadically emerged as a fashion statement in the UK over the last few centuries, as explained in Chapter 1 of this thesis.

Hollobone’s remarks, taken as a whole, denote a somewhat rose-tinted view of modern UK society that does not take into account the country’s reputation for moderacy and open-mindedness. Further, as a government minister, he is unusually well-placed to help influence a change to any ‘mistrust’ of people who cover their faces, rather than reinforcing the attitude. None of the other ministers who were engaged in the debate on 2 February 2010 appeared to acknowledge Hollobone’s remarks about the ‘burka’, nor referred to them later in the debate. However, when the BBC reported the debate it quoted Ed Balls (then Secretary of State for Schools, Children and Families), who remarked that it ‘is not British’ to tell people what to wear in the street,<sup>203</sup> and noted that Hollobone’s views mirror those of the far-right United Kingdom Independence Party (UKIP). Hollobone’s phrasing (he wants ‘action taken against’ women who choose to veil their faces) suggests he views the practice of veiling as on a par with criminal offences rather than a personal choice or an overt expression of religious and cultural identity. Later in 2010, the then Environment Secretary Caroline Green commented,

*‘I take a strong view on this, actually, that I don’t, living in this country, as a woman, want to be told what I can and can’t wear. That’s something which both myself and (community cohesion minister Baroness) Sayeeda Warsi have argued very strongly, that one of the things we pride ourselves on in this country is being free - and being free to choose what you wear is a part of that. So actually banning the burka is absolutely contrary, I think, to what this country is all about.’*<sup>204</sup>

The Minister’s remarks indicate a clear disdain for Hollobone’s proposals, and have the political effect of condemning, not veiling, but the Bill itself as intolerant and contrary to ‘the British way of life’.

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<sup>202</sup> BBC news 30 June 2010, accessed via <http://www.bbc.co.uk/news/10465209>, viewed April 11 2013

<sup>203</sup> BBC News 2 February 2010, accessed via [http://news.bbc.co.uk/1/hi/uk\\_politics/8494285.stm](http://news.bbc.co.uk/1/hi/uk_politics/8494285.stm), retrieved February 3 2012.

<sup>204</sup> Damian Green says burka ban would be ‘un-British’, BBC News 18 July 2010, accessed via <http://www.bbc.co.uk/news/uk-10674973>, retrieved 21 May 2013

## United Kingdom Independence Party campaign

At the time the Bill was progressing through Parliament, UKIP was the only UK political party campaigning for a ban on veiling in public places<sup>205</sup>, on the grounds that it is a security risk, not proscribed by the Koran, and is symbolic of Islamic extremism.<sup>206</sup> UKIP's 2010 manifesto also endorsed removal of support for multiculturalism and the UK's withdrawal from the European Union,<sup>207</sup> indicating its desire for the UK to become insular and traditionally 'British'. In September 2013, the party's deputy leader Paul Nuttall advised that the policy had been abandoned, but tacitly confirmed that his party was still at least partially opposed to veiling the face, stating, "'We do not have a policy on it. But our view is pretty much that if people need to see your face, then quite frankly it should be shown.'"<sup>208</sup>

Before abandoning its policy of 'banning the 'burka'', the party's official website featured a video clip showing a feature from the BBC Politics Show<sup>209</sup> in which the party's leader, Nigel Farage, debates his policy alongside Salma Yaqoob, then leader of the Respect Party. The feature opens with footage of a Muslim woman, Rehana Sidat, wearing a niqab and explaining her feelings about her choice of dress. When asked what wearing the veil means to her, she describes it as spiritual, comforting, liberating, and offering purpose and identity. She equates the garment with the goth or punk 'looks', indicating that she recognises her choice is an extreme one, but deserving of no more censure than any other extreme clothing style. She explains that wearing the niqab was her choice, that her husband was initially surprised by her decision, and that she feels it would be oppressive to attempt to control what people may wear in their day-to-day lives.<sup>210</sup>

The remainder of the clip features a debate between the show's presenter, Farage and Yaqoob on UKIP's policy of banning face veils. Farage describes veiling as symbolic of female oppression and of

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<sup>205</sup> UKIP began a campaign to ban the wearing of the burka in public places and buildings in 2010. It appears to include the niqab within its mistaken definition of 'burka': <http://www.ukip.org/content/latest-news/1407-ukip-call-to-ban-burka>, retrieved 3 February 2012

<sup>206</sup> Radio Five Live phone-in debate with Lord Pearson (leader of UKIP), 4 May 2010, [http://www.bbc.co.uk/iplayer/episode/b00s90sq/5\\_live\\_Breakfast\\_Phonein\\_04\\_05\\_2010/](http://www.bbc.co.uk/iplayer/episode/b00s90sq/5_live_Breakfast_Phonein_04_05_2010/), retrieved 8 April 2012

<sup>207</sup> UKIP official manifesto, <http://www.ukip.org/page/ukip-national-manifesto>, retrieved 3 February 2012

<sup>208</sup> Moseley, Tom, *UKIP's Muslim veil ban policy has been reversed*, The Huffington Post, 19 September 2013, [http://www.huffingtonpost.co.uk/2013/09/19/ukip-veil-ban-policy-reversed\\_n\\_3954164.html](http://www.huffingtonpost.co.uk/2013/09/19/ukip-veil-ban-policy-reversed_n_3954164.html), retrieved 28 March 2015

<sup>209</sup> UKIP website video zone, <http://www.ukip.org/content/video-zone/1409-where-angels-fear-to-tread>, accessed 11 April 2013, no longer available

<sup>210</sup> Ibid at 00.26-01.58

‘an increasingly divided Britain’<sup>211</sup> and expresses concern over security issues such as the difficulty in identifying a veiled individual on CCTV footage.<sup>212</sup> Yaqoob argues that to ban veiling is equally as oppressive as to enforce or permit it.<sup>213</sup> The show’s presenter puts to Farage that his party stands for liberalism and minimal state interference in the lives of citizens, which does not appear to sit well with the proposed ban: Farage finds it difficult to respond directly, instead referring again to the veil’s symbolism of oppression and to media debate regarding the introduction of Shar’ia law into the UK system.<sup>214</sup> Yaqoob makes the point that Muslims represent just 2% of the UK population, and that of those, only 0.25% wears any form of face veil.<sup>215</sup> Farage contends that the correct figure for those Muslims who wear face veils is in fact ‘several hundred thousand’,<sup>216</sup> including young children. Neither party provides a specific citation or source for their figures.

Ultimately, the essential point of disagreement is revealed.<sup>217</sup> Yaqoob argues that to attempt to restrict the clothing choices of a part of society, unless they impose those choices upon unwilling others, goes against what she terms ‘the British way of life...live and let live’. Farage retorts that the imposition occurs merely by dint of British citizens appearing in public wearing the clothing choices in question. It is difficult to reconcile the notion that a British citizen should be prevented by law from wearing any particular garment in public lest another citizen see her and be offended by the garment, with the spirit of article 9 ECHR and the HRA. It is possible to argue that, in the wake of the 9/11 and 7/7 Al Qaeda attacks on the United States of America and London, tacit or overt racism towards Muslims has become increasingly acceptable in some parts of British society. The niqab and burka are both highly visible symbols of Islam and without obvious equivalent in any other culture represented within Britain: these reasons may go some way to explaining why they have become a political scapegoat in the way traditionally ‘male’ symbols of Islam, such as beards, keffiyeh (headdresses) and turbans, have not.

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<sup>211</sup> Ibid at 02.20

<sup>212</sup> Ibid at 02.55: the persons engaged in the debate make comparisons with wearing a motorcycle helmet inside a bank, which is almost universally prohibited in the UK. None of them refers to the fact that an individual would be unlikely to have a legitimate reason to wear a motorcycle helmet whilst not actively riding a motorcycle, whereas a Muslim woman’s face veil forms part of her everyday outerwear and in these terms, I believe, is more comparable to a coat or hat.

<sup>213</sup> Ibid at 04.12

<sup>214</sup> Ibid at 05.28

<sup>215</sup> Ibid at 06.41. The Office for National Statistics reported the UK’s Muslim population at the 2011 Census at 2.7m, or 4.8% of the overall population. By Yaqoob’s claim, this would translate to a veiled population of around 6,750. (<http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-religion.html>, accessed 11 April 2013)

<sup>216</sup> Ibid at 08.16

<sup>217</sup> Ibid at 09.34

## September 2013: Niqabs in Court

In September 2013, a dispute between a judge and a defendant due to stand trial for witness intimidation reached the UK's press. An outpouring of debate, opinions and arguments followed, temporarily reigniting the issue of veiling the face.

The defendant in question was a Muslim woman ('D') who habitually wore a very complete form of *hijab*, including a niqab and gloves. She wished to wear her usual dress whilst attending court for her trial, which resulted in the widespread press attention. In a pre-trial hearing at Blackfriars Crown Court, Judge Murphy held that, whilst he held no objections to her wearing her niqab during the majority of the trial, he would insist upon her removing it when giving evidence on the grounds that the jury should be able to see her facial expressions as well as hear her voice in order to reach an accurate verdict.<sup>218</sup> He was willing to allow her to give evidence from behind a screen or via video link to enable her to be shielded from all men in the courtroom besides those on the jury, and also directed that her face should not be depicted in court sketches.

Judge Murphy delivered a substantial ruling, discussing the role of *hijab* in Islam, rejecting the popular concept that veiling the face is a form of abuse or removes the wearer from public life,<sup>219</sup> and expressing his acceptance that D's reluctance to uncover her face in front of unrelated men was a sincerely-held belief.<sup>220</sup> However, he ultimately felt that the needs of the jury to see the defendant's face prevailed over her right to cover her face. For the purposes of this thesis, it appears that the judge gave rather too much weight to the necessity of seeing a defendant's face, noting 'it is unfair to ask a juror to pass judgment on a person whom she cannot see.'<sup>221</sup> This logic implies that, whilst wearing a niqab, D would have been all but invisible, and fails to take into account the scope for the jury to interpret body language, intonation of the voice and expressiveness of the eyes. It seems something of a stretch to suggest that a defendant wearing a niqab would interfere with a universally fair trial to such an extent that she must be required to remove it. Further, the judge acknowledges that removal of the niqab, for a woman who is accustomed to wearing it, may inhibit her whilst giving evidence,<sup>222</sup> thereby potentially affecting the outcome of the trial. He also 'express[es] the hope that Parliament or a higher court will review this question sooner rather than

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<sup>218</sup> R v D(R), the Crown Court at Blackfriars, 16 September 2013

<sup>219</sup> Ibid at 67

<sup>220</sup> Ibid at 14

<sup>221</sup> Ibid at 59

<sup>222</sup> Ibid at 69

later and provide a definitive statement of the law to trial judges.<sup>223</sup> As seen in the previous chapter, however, this may be a vain hope, due to the higher courts' well-documented reluctance to rule on covering the face outside of the facts immediately before them.

The story reached the press the day after Judge Murphy issued his decision, inspiring coverage that ranged from the reasoned to the ill-informed to the vitriolic. The Sun's front page featured a close-up of the face of a woman wearing a niqab beneath the word 'UNVEILED', followed by its proposals for a partial ban in the UK.<sup>224</sup> The story continued on pages 4 and 5, preceded by the somewhat jarring juxtaposition of its traditional photograph of a topless glamour model on page 3. Page 4's headline reads 'It's Time To Face Justice', implying that her niqab would somehow enable the defendant to evade or avoid 'justice'.

The Daily Mail devoted its front cover to a picture of the defendant in her niqab with the headline 'YOU MUST TAKE OFF YOUR VEIL',<sup>225</sup> and pages 4 and 5 went on to isolate some of the more strident remarks from Judge Murphy's ruling and present them, out of context and order, in a separate box, implying that he was entirely opposed to niqabs in general and eliminating all traces of reasoned debate and sensitivity that were present in the full text. In addition, the feature incorporated a column by Jack Straw entitled 'A Sensible Ruling, But We Should Go Further', in which he expands on points raised in his 2007 column (discussed above), including the non-obligatory nature of the niqab based on Koranic interpretation, and suggests that Judge Murphy should, in fact, have decreed that the defendant should remove her veil for the duration of the trial. The tone of this coverage is fairly typical of the Daily Mail, which has a largely middle-aged, middle-class, Conservative-voting demographic, but it could be argued that its presentation of this issue was irresponsibly skewed toward its own agenda rather than to the nuances of the case at hand.

Follow-up coverage in the Daily Telegraph on 14 September referred to a petition and planned protest against Birmingham Metropolitan College's ban on face coverings, which was subsequently reversed.<sup>226</sup> The article quotes a spokesperson for Prime Minister David Cameron, who stated he 'support[ed] the right of schools to set their own uniform policies' but, contrary to the article's headline, would not be drawn on whether or not he approved of specifically banning face veils

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<sup>223</sup> Ibid at 12

<sup>224</sup> *Unveiled: As Judge Orders Woman To Uncover Face, The Sun Demands Vital Reforms*, The Sun, 17 September 2013, pp1, 4-5 (editorial)

<sup>225</sup> Camber, Rebecca, The Daily Mail, p1, 17 September 2013

<sup>226</sup> Dominiczak & Paton, *I would back veil ban at my child's school, says Cameron*, The Daily Telegraph, 14 September 2014, p15

altogether. Elsewhere on the same page, and also covered by the Daily Mail's website, another article describes an academic study by Dionne Taylor of Birmingham City University into the effects on young girls of highly-sexualised music videos.<sup>227</sup> The findings of the study list Miley Cyrus's performance style as an exemplar and report that such performances, in which men tend to be fully clothed whilst women often wear only underwear or equally scant garments, have a negative impact on the confidence and self-esteem of young girls and contribute to an increased focus on their bodies. Whilst a Muslim woman wearing a niqab and abaya in her day-to-day life is clearly not comparable to Miley Cyrus dressed in flesh-coloured latex underwear to perform on stage, and it is not the author's intent to compare the two, it is striking to note the extent of news coverage given to what women choose to wear. In one set of articles, Muslim women are urged to unveil their faces in order to become 'free' and 'liberated', and the very concept of covering one's face is seen as such a problem for British society that there are calls for it to be made illegal. In another set of articles, celebrities are pilloried for exposing too much of their bodies or presenting themselves in too sexual a manner for the press's palate, and blamed for negatively impacting the self-esteem of girls and young women. However, this thesis would argue that blame for this problem cannot be attributed to veiling, nor 'hyper-sexualisation', nor any other style of dress or self-presentation. Instead, the print and online media's obsessive interest in women's bodies and outfits instils a sense in girls and young women that they are perpetual objects of scrutiny, that their appearance is their main or only aspect of value, and that society at large is expected and entitled to make judgments on what they wear and how they look. A paradigm shift in focus toward women's achievements beyond merely being in possession of a woman's body, and using clothes to cover it, could be much more helpful in supporting women who may feel the need for liberation and boosting the self-esteem of others.

The Times<sup>228</sup> echoed several of Judge Murphy's more damning quotes, including 'the niqab has become the elephant in the courtroom', and also quoted Jack Straw as remarking 'I think there is an issue about whether she should have to have it [the veil] off the whole way through the proceedings.' The reiteration of the 'elephant in the courtroom' seeks to imply that English courts are inundated with veiled defendants and that the issue of niqabs being worn during trials is a major headache facing judges across the country, requiring an urgent and drastic solution. As set out in the

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<sup>227</sup> 'Video vixens like Cyrus damage girls' self-esteem', The Daily Telegraph, 14 September 2014, p15; Cox, 'Raunchy, hyper-sexualised popstars like Miley Cyrus and Rihanna damage girls' self-esteem', Mail Online, 13 September 2013, <http://www.dailymail.co.uk/femail/article-2419993/Miley-Cyrus-Rihanna-damage-girls-self-esteem--harm-education-job-prospects--says-academic.html>, last retrieved 2 April 2015

<sup>228</sup> Gibb & Pitel, *Judge bans veil and urges Parliament to rule on 'elephant in the courtroom'*, The Times, 16 September 2014

ruling, however, it is exceptionally rare for the issue to arise in this context, and the number of people potentially affected is minimal (taking into account that only a small minority of Muslim women veil their faces and it is unlikely that more than a very small proportion of those will ever be required to attend court in any capacity), making this a marginal issue at best. Therefore, it is difficult to understand the rationale behind such extensive press coverage on the subject, and hard not to conclude that it is carried out more to promote anti-Islamic sentiment than to report news in a proportionate and considered way.

Malik, writing in the *Guardian*, offered a contrast to the histrionics of the tabloids with a considered piece arguing that veiled Muslim women in 21<sup>st</sup>-century Europe exist in a paradox created by well-meaning political ideology, both victims of a medieval patriarchal culture and emblems of radical Islamism.<sup>229</sup> She feels the way to address the issue of the niqab in this context is for Islamic communities to engage in debate about the niqab's place in British society, ensuring that the voices of the women directly affected by this debate are clearly heard. Malik notes that both the French and Belgian governments introduced niqab bans without proper consultation with niqab wearers and argues that these bans 'left these women feeling alienated, defiant and isolated from mainstream democracy',<sup>230</sup> an outcome that ultimately benefits nobody. Malik does, however, exercise a degree of moderation and is of the opinion that niqabis should accept 'reasonable limits on their freedom',<sup>231</sup> such as removing veils in courts and schools. This restrained approach appears reasonable, although could be said to pander to the sensibilities of those who find the niqab distasteful and avoiding the more controversial aspects of the debate, as discussed earlier in this chapter and in chapter 2.

## Conclusions

The recent domestic case history (*Begum*, *X*, *Playfoot*, *Watkins-Singh*) demonstrates that UK courts are loath to make overarching recommendations with regard to the appropriateness of veiling in schools and workplaces, preferring instead to confine themselves to ruling on a case-by-case basis. However, this reluctance to make a definitive statement on veiling has nonetheless seen courts at all levels reject claims of interference with human rights from both Muslim and Christian women who

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<sup>229</sup> Malik, Maleiha, *Full-face veils aren't barbaric – but our response can be*, *The Guardian*, 17 September 2013, <http://www.theguardian.com/commentisfree/2013/sep/17/full-face-veil-not-barbaric-debate-muslim-women>, last viewed 21 February 2016

<sup>230</sup> *Ibid*, at para 6

<sup>231</sup> *Ibid*, at para 13

were restricted by existing uniform policies from manifesting their religious beliefs. The sole victorious case, *Watkins-Singh*, appears to have succeeded primarily on the technical grounds that the applicant was a Sikh and so her religious manifestation was protected under the Race Relations Act rather than dependent on the court's often convoluted and tortuous interpretation of article 9 ECHR.

Similarly, the UK government has not, so far, found it necessary to introduce legislation to regulate the wearing of religious items in any way, instead relying on non-statutory guidance for schools. Whilst in one respect this is beneficial, (as discussed above, statutory restrictions on dress are unlikely to reflect the UK's tolerant character), recent case law suggests that this reluctance to make a definitive statement on veiling has resulted in significant legal and social uncertainty. This applies particularly with regard to veiling the face, which is arguably the most contentious form of religious dress practiced in the UK today. It is impossible to disregard the problems caused by cases such as *Begum* and *X*: for instance, the significant disruption to the girls' education, first by the sanctions imposed through schools' enforcement of the uniform policy and then by the legal process itself; the inevitable distress and anxiety caused to the girls; and the impact, both on the girls and their schools, of significant and sometimes critical media attention.

It should be noted that, whilst neither the Ban (France's prohibition on veiling the face in public, to be discussed in chapter 4) nor the Bill refer directly to Islamic veils of any kind, the remarks made by the proponents of both pieces of legislation prior to their introduction indicate an intention to target veiling specifically rather than 'face-covering garments' in general. Furthermore, both documents contain exceptions which exclude from prosecution the vast majority of instances in which non-Muslim Western citizens would feasibly appear in public wearing a face-covering garment. It is therefore difficult to imagine that either piece of legislation has any significant target aside from veiled Muslim women.

Gareth Davies, commenting on the ruling in *Begum*, reinforces this by remarking 'despite the framing of rules in neutral terms, the debate is all about Islam. The legislative, judicial and public focus is overwhelmingly on the clothes worn by Muslim women and girls.'<sup>232</sup> Preposterously, however, many of those weighing in on the debate appear to do so with extremely limited understanding of why Muslim women and girls choose to dress in certain ways and demonstrate little or no interest in expanding their knowledge by opening a two-way discussion. They prefer

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<sup>232</sup> Davies, *Banning the Jilbab*, 2005

instead to pontificate on the necessity to free women from their veils, without considering the possibility, as evidenced in the Belgian study discussed in Chapter 1, that many women veil of their own volition, as a symbol of their piety and devotion to their beliefs, and as such are in no need of liberation from their veils. To situate these garments as symbolic of extremism or terrorism does a severe disservice to individuals who are already marginalised by Western society, by dint of being female, non-white, and Muslim, and so would benefit from governmental support rather than tacit condemnation.

Following the exhaustive consideration in Chapters 2 and 3 of the amorphous and developing legal position on veiling in the UK, Chapter 4 will examine the equivalent legal position in France, which is much more defined. France has already made it illegal to veil one's face in public, and the chapter will discuss the reasons for the introduction of this law, the debate surrounding it, and the consequences for French Muslim women. In doing so, it will aim to illustrate the disadvantages of banning face veiling and so illustrate why the United Kingdom should not consider the concept any further.

## Chapter 4: The 'Niqab Affair' in France: veiling and multiculturalism in a constitutionally secular society

### Introduction

France has one of the largest Muslim populations in Europe, at around 7.5%, or 4.7 million individuals. This fact makes it particularly significant that it criminalised the wearing of face veils in 2011, a manoeuvre almost guaranteed to provoke discord amongst its many Muslim citizens. This chapter will closely examine this piece of legislation, and the preceding governmental speeches and debates, in order to offer a balanced critique of this legal development. It will also consider the nature of France's constitutional secularity in relation to the requirements of Islam, the historical development of local and national bans on garments commonly associated with Islam, and the various legal challenges brought against these bans. Finally, this chapter will examine a judgment handed down by the European Court of Human Rights in the summer of 2014 in response to a challenge to the banning of face veils by a French Muslim woman, together with a consideration of academic commentary and press coverage. Ultimately, this section will aim to demonstrate that the negative effects of criminalising face veiling far outweigh any positive outcomes, and that it would therefore be inadvisable for the United Kingdom to instigate any similar piece of legislation.

### Legal framework

In 2011, France passed a law prohibiting the wearing of any garment designed to cover or conceal the face in a public place by both French citizens and visitors to the country (the Ban).<sup>233</sup> In theory, this would include balaclavas, face masks, and motorcycle helmets as well as niqabs and burkas, as worn by a very small proportion of French Muslim women. However, the Ban contains several exceptions, which in practice protect a number of categories of garment from prohibition. These include: garments worn for medical or professional reasons; articles that are part of necessary attire for sporting activities; garments required by law for safety reasons, such as a motorcycle helmet worn whilst the wearer is riding a motorcycle; and garments or articles which are not intended to fully conceal the face, such as a hat or a pair of sunglasses.<sup>234</sup>

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<sup>233</sup> Loi no. 2010-1192 du 11 Octobre 2010 interdisant la dissimulation du visage dans l'espace public 13 July 2010, article 1, <http://www.assemblee-nationale.fr/13/ta/ta0524.asp>, retrieved 21 January 2012

<sup>234</sup> *Ibid*, Article 2-II

Contravention of the Ban is currently punishable by either a fine of €150 or a course of citizenship education, or both.<sup>235</sup> Additionally, the Ban incorporates a fine of €30,000 together with a year's prison sentence for anyone found guilty of 'compel[ling] another person, by reason of the sex of said person, to conceal their face',<sup>236</sup> and the penalty here doubles if the person compelled to conceal their face is a minor. This provision is couched in somewhat clumsy language. It uses a gender-neutral pronoun to refer to the person compelled to wear the concealing garment but specifies that the compulsion to wear the garment must be 'by reason of the sex of said person'. It is, arguably, difficult to imagine a situation in which a woman would attempt to force a man to conceal his face in public purely on the grounds that he is male.

In addition, concealment of the face by non-Muslims in Europe, for reasons other than those covered in the Ban's exceptions, is rare, if not unheard of. It is therefore reasonable to conclude that this provision is principally aimed toward the French Islamic community, founded upon the assumption that a proportion of Muslim women are forced by their husbands, fathers or other male relatives to unwillingly wear full face veils in public. The discrepancy between penalties for contravention of the Ban suggests that the French judiciary regards Muslim men as authoritarian and controlling of their wives and daughters, whilst Muslim women are viewed as subservient, oppressed and lacking in agency. This stereotype only reinforces the ill-conceived notion that veiled Muslim women need to be rescued from a kind of medieval purdah by the progressive and enlightened secular West, and does nothing to promote social cohesion and integration, instead emphasising and polarising the differences that exist between the two cultures.

Further weight can be lent to this assertion by examining a remark made by then-president Nicolas Sarkozy concerning veiling in the Islamic community prior to the introduction of the Ban. During a prominent policy speech to the French parliament in 2009, he stated "The burka is not a sign of religion, it is a sign of subservience. It will not be welcome on the territory of the French republic."<sup>237</sup> This demonstrates that Sarkozy believed face veiling is most commonly imposed upon unwilling women by men. In contrast, anecdotal sources indicate that many Muslim women in fact choose to cover their faces in public, sometimes in defiance of their male relatives. This point was discussed in chapter 1 and will be expanded upon in chapter 5 but at present it is sufficient to note Sarkozy's presumption in defining the connotations of the veil for the purposes of the Ban, when the wider Islamic community itself is divided over the meaning, purpose, and necessity of veiling. It should also

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<sup>235</sup> *Ibid*, Article 3

<sup>236</sup> *Ibid*, Article 4

<sup>237</sup> Reported by BBC News 22 June 2009, <http://news.bbc.co.uk/1/hi/8112821.stm>, retrieved 2 February 2012

be noted that Sarkozy refers to the burka. As discussed previously, this garment is, in fact, seldom seen outside Afghanistan: Sarkozy appears to have conflated it with the niqab, which is more commonly worn by Western Muslim women (although still not a widely-worn garment).

For the purposes of this piece, it is important to note that the text of the Ban makes no exception for religious or cultural considerations. At its inception, the French government published a set of explanatory notes in a question-and-answer format.<sup>238</sup> This includes the question ‘Does this prohibition restrict freedom of religion?’ The answer states that the Ban complies with article 10 of France’s Declaration of the Rights of Man and of the Citizen 1789 (‘no one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order’). It goes on to explain ‘[t]his prohibition does not aim to restrict the exercise of freedom of religion in places of worship open to the public.’ However, it is possible to argue that the manifestation of religious identity through the wearing of a veil in everyday life does not, in itself, interfere with law and order. In addition, by relaxing the restriction only when the wearer is in a public place of worship, the legislators appear to have profoundly misunderstood of the concept of veiling in Islam: the wearer’s chosen form of veil or hijab is worn at all times when out in public, not just whilst the wearer is attending a mosque. Further, as discussed in chapter 1, faces must not be covered during acts of worship, making this concession fundamentally meaningless in the Islamic community.

### **Historical context**

France is a constitutionally secular state under the principle of *laïcité*. This enshrines the formal separation of church and state within the French constitution. As such, it is mandated that religion does not play any part in French government and that religious organisations do not become involved in political issues. French citizens are entitled to engage with any religion they choose, but are expected to keep their religious allegiances discreet and unobtrusive, maintained within their private life and away from the public sphere.

Historically, Catholicism was the dominant religion in France and it is, on the whole, a more private and introverted religion than Islam: pertinently, Catholicism has no formal restrictions or requirements for the day-to-day dress of its adherents. In contrast, Islam requires its adherents, both male and female, to dress modestly at all times (although varying interpretations of the Koran

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<sup>238</sup> France requires faces to remain uncovered, [http://www.ambafrance-uk.org/IMG/pdf/Burqua\\_Ban\\_Law\\_-\\_English.pdf](http://www.ambafrance-uk.org/IMG/pdf/Burqua_Ban_Law_-_English.pdf), retrieved 21 January 2012

mean that there is no clear consensus on the degree of modesty required). Regardless of requirement, face veils are both one of the most visible symbols of Islam and probably the least familiar to Western eyes.<sup>239</sup> Idriss notes that, out of the many Western European countries with growing Muslim populations, 'France has had more difficulties adjusting policies towards cultural diversity.' This, he feels, is attributable to *laïcité* and the French preference for immigrants to assimilate to its ostensibly neutral public society, which, it believes, is impossible if they preserve religious or cultural practices not commonly observed in France.<sup>240</sup> It is possible to argue that Islamic veils, which are particularly noticeable symbols of religious identity, became emblematic of France's disquiet with its growing Muslim population and a perceived erosion of its national secular identity. The Ban, therefore, becomes a prop to the Procrustean bed of *laïcité*, attempting to enforce a cultural principle which is increasingly lacking in relevance as France's cultural landscape evolves to include increasing numbers of citizens from other cultures. Pew Research notes that France, together with Germany, has the largest Muslim population in the European Union, with 4.7 million Muslims recorded as living in France in 2010: around 7.5% of its population.<sup>241</sup> Despite these numbers, Idriss argues that many Muslims immigrants living in France are ghettoised, with little opportunity or encouragement to integrate, and so form stronger attachments to cultural and religious practices such as veiling as a form of comfort.<sup>242</sup>

The Ban was preceded in France by a law preventing the wearing of conspicuous religious symbols within French public schools.<sup>243</sup> This was precipitated by what came to be known as *l'Affaire du Foularde* ('the headscarf affair'). It began in 1989 after three Muslim girls were excluded from their school for wearing headscarves in class, on the grounds that it was contrary to the principles of *laïcité*.<sup>244</sup> This event, and the political tumult that ensued, led to a ruling by the Conseil d'Etat that individual schools were responsible for deciding on the acceptability or otherwise of the headscarf within their institution. Fysh and Wolfreys comment that the Affair was, effectively, a highly-charged emotional storm in a very small teacup, and affected a tiny proportion of citizens in a relatively

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<sup>239</sup> Siapno, Jacqueline, *Gender Relations and Islamic Resurgence in Mindanao, Southern Philippines*, in Camilla Fawzi El-Solh and Judy Mabro (eds), *Muslim Women's Choices: Religious Belief and Social Reality*, Berg Publishers Ltd, London 1994, p193

<sup>240</sup> Idriss, Mohammed Mazher, *Laïcité and the banning of the 'hijab' in France*, *Legal Studies* (25) 260-295 (2005), at p265-267

<sup>241</sup> Hackett, Conrad, 5 Facts About The Muslim Population In Europe, <http://www.pewresearch.org/fact-tank/2015/01/15/5-facts-about-the-muslim-population-in-europe/>, retrieved 28 March 2015

<sup>242</sup> Idriss [2005] at p268 (as above)

<sup>243</sup> NB: here, 'public schools' refers to those schools open to the general population, equivalent to UK state schools, and not to fee-paying or selective schools.

<sup>244</sup> Peter Fysh & Jim Wolfreys, *The Politics of Racism in France*, Palgrave MacMillan, London 2003 (2<sup>nd</sup> edition), p64

minor way. They also suggest that Muslim girls who were, according to opponents of the headscarf, oppressed by being forced to wear the scarf, would only be more oppressed if the French government excluded them from school.<sup>245</sup> Writing in 2010, Fernandez noted a variety of negative factors affecting the affair, including: the over-simplification of the meaning of the hijab; the widespread presumption that girls were coerced into wearing it against their will; and most notably, the exclusion of their voices from the debate. She notes that, by wearing their scarves to school in contravention of the ban, the girls effectively transformed its meaning, as understood by the French media, from a symbol of oppression to one of defiance and liberation: however, because their voices were effectively muted, this facet of the argument was lost.<sup>246</sup>

ECtHR has subsequently heard several cases<sup>247</sup> based on Muslim girls' refusal to remove their headscarves whilst in French schools, and in each case has found no interference of the girls' rights under article 9 ECHR. The European Human Rights Law Review, commenting on the decision in *Aktas*, feels that it 'indicate[s] the Court's unwillingness to engage further in debate about the prohibition of religious items in French schools.'<sup>248</sup> The Review considers the equivalent lack of success in similar challenges by other constitutionally secular countries such as Turkey and Switzerland. It goes on to speculate that, given the Court's acceptance of interference with article 9 rights in these cases coupled with its reluctance to overturn decisions made by state governments, that even an application from a country with no constitutional secularity may achieve the same ruling.<sup>249</sup>

As part of its Global Attitudes Project, the Pew Research Centre conducted research about attitudes towards a ban on veiling.<sup>250</sup> In April and May 2010, three months before the lower house of the French parliament voted on the proposed law, the Centre surveyed members of the public from France, Germany, Spain, the United Kingdom and the United States of America. It asked respondents whether they approved of France's plan to 'ban Muslim women wearing full veils that cover all of the face except the eyes in public places including schools, hospitals, and government offices'. All

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<sup>245</sup> *Ibid* p 65

<sup>246</sup> Fernandez, Sonya, *The crusade over the bodies of women*, in *Anti-Muslim Prejudice: Past and Present*, Maleiha Malik (ed), Routledge, Abingdon, 2010, p96-97

<sup>247</sup> *Dogru v France* (app. No. 27058/05); *Kervanci v France* (app. No. 31645/04); *Aktas v France* (app no 43563/08)

<sup>248</sup> Case Comment: *Aktas v France* (43563/08): wearing of religious items in French schools. *European Human Rights Law Review* 2009, 6, at 816

<sup>249</sup> *Ibid* at 816-817

<sup>250</sup> Pew Research Global Attitudes Project: Widespread Support for Banning Full Veil in Western Europe, July 8 2010, retrieved via <http://www.pewglobal.org/2010/07/08/widespread-support-for-banning-full-islamic-veil-in-western-europe/>, accessed 17 October 2013

four European countries surveyed showed a majority would support such a ban.<sup>251</sup> It seems reasonable to assume that a similar ban in the respondents' home states would also find at least a degree of support, indicating a tendency in Europe toward intolerance toward, and limited understanding of, Islamic culture. With the rise in multiculturalism across Western Europe, it is ill-advised for a national government to promote such a divisive piece of law-making. Certainly in light of statistics such as those compiled by Pew, which suggest a serious intolerance toward Muslims in France, the passing of laws clearly aimed at restricting the everyday rights of Muslim women seems almost guaranteed to make the country's Muslim population feel marginalised and unwelcome, whilst validating the views of the intolerant. Idriss concurs, noting that 'the current treatment of Muslims in France belies the myth of equal citizenship...the ban might have been more easily taken had there been additional measures accompanied to assure Muslims that they were not being singled out or targeted.'<sup>252</sup>

## Commentary

Errera<sup>253</sup> is critical of the Conseil's decision to uphold the Ban as valid constitutional law, in particular its attempt to establish the intentions of Parliament by mentioning all aspects of the debate as related to the French constitution rather than affirming a new constitutional principle. He also identifies that the decision does not mention any constitutionally protected freedom aside from freedom of religion (the law has a reservation allowing face-covering garments in public religious spaces) – Errera comments that this acknowledges the religious aspect of face veiling and raises more questions than it solves with regard to religious freedom and France's responsibilities under article 9.

Davis<sup>254</sup> explains the historical background to France's non-secular society, asserting that the concept of *laïcité* was formed during a time of hostility towards religion as a whole in France<sup>255</sup>, and in recent years has been dominated by a fear of what he terms 'the Islamification' of Europe<sup>256</sup>. Davis portrays the origins of *laïcité* as 'less than equitable'<sup>257</sup> and is sceptical of its legitimacy in

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<sup>251</sup> Majorities of 82% in France, 71% in Germany, 62% in the UK and 59% in Spain would approve a ban on veiling in France.

<sup>252</sup> Idriss [2005], p284, discussing the ban on religious symbols in French schools

<sup>253</sup> Errera, Roger, *Case Comment: France: ban on wearing burqa in public (with exception for public religious places) upheld by Conseil Constitutionnel decision*, [P.L. 2011, Apr, 429-431](#)

<sup>254</sup> Davis, Britton D., *Lifting the Veil: France's New Crusade*, 34 B. C Int'l & Comp L Rev 117 [2011]

<sup>255</sup> Ibid at 121

<sup>256</sup> Ibid at 123

<sup>257</sup> Ibid at 125

modern French law, pointing out that the French Constitution guarantees ‘respect for all beliefs’ and equal rights for women to those of men. The Ban on veiling is rooted in laïcité and therefore, under Davis’ argument, lacks validity.

In addition, Davis describes the history of ‘headscarf cases’ since the 1980s in French court.<sup>258</sup> The overall stance of the courts has veered from conservative to liberal over the years but most recently has found in favour of students wishing to wear a headscarf or hijab, indicating that the French judiciary do not necessarily support restriction in dress and, in common with English courts, prefer to apply a case-by-case approach to such matters. Davis also identifies that the Conseil d’Etat tend to defer to Parliament when a balancing test is administered (e.g., between the rights of the individual to manifest religious beliefs versus the provisions of the constitution).<sup>259</sup>

Davis goes on to suggest that Sarkozy’s determination to impose the Ban stems from his defeat in regional elections in March 2010, and a desire to appear more conservative on the issue of immigration<sup>260</sup> rather than a response to any pressing social need. He is critical of the way in which France passed the law: in an unprecedented action, it was submitted to the Council for approval with the defence that it was necessary to uphold the constitutional principles of laïcité and gender equality. Subsequently, the Council did not insist on robust reasons as to how the ban would uphold these principles, or indeed how veiling or other methods of covering the face threaten these principles. Davis argues that the ban is not comparable with cases concerning the wearing of Islamic headscarves in schools as the settings are different (general public space as opposed to the school environment) and that it is harder to adversely influence adult women than schoolchildren.<sup>261</sup> Overall, there is an indication that Sarkozy was determined to make the ban law, one way or another.

Barbibay<sup>262</sup>, in his discussion of the Conseil d’Etat’s refusal to award citizenship to a Moroccan woman, Mabchour, on the grounds that she had failed to assimilate into French culture and was submissive to her husband, habitually wearing the niqab at his initial instigation, is critical of France’s stance on traditional Islamic dress. He traces its position from *l’affaire du foulard* (‘The Headscarf Affair’) in 1989 to Law No. 2004-228, which ostensibly prohibits the wearing of all ‘signs or clothing

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<sup>258</sup> Ibid at 128

<sup>259</sup> Ibid at 130

<sup>260</sup> Ibid at 137

<sup>261</sup> Ibid at 139

<sup>262</sup> Barbibay, Yael, *Citizenship Privilege or the Right to Religious Freedom: the Blackmailing of France’s Islamic Women*, *Cardozo Journal of International and Comparative Law*, vol 18:159 [2010] p159-205

that conspicuously manifest students' religious affiliations'. The wording of the law is general to all religions, not specific to Islamic symbols or dress, but Barbibay contends that 'it is commonly understood that its main purposes and effects are to eradicate Islamic headscarves from educational institutions'.<sup>263</sup> He goes on to argue that France's justification for Law No. 2004-228 on the grounds of cultural preservation conceals a linear link between the 'headscarf ban' itself and an underlying current of 'xenophobia, geographic isolation, dire socio-economic standing and restrictive citizenship laws'<sup>264</sup> that permeates French life.

Barbibay goes on to discuss the likely outcome for potential challenges to the refusal of citizenship on the grounds of interference with Article 9 rights.<sup>265</sup> He is of the opinion that France's decision would not stand up to the three-pronged test required to justify state interference with an individual's rights under article 9(2), stating that although it would be possible for France to demonstrate that the decision served a legitimate aim, it would be impossible to demonstrate the decision's prescription by law or necessity in a democratic society.<sup>266</sup> Barbibay speculatively concludes that the European Court of Human Rights 'would criticise France's attempt to regulate the behaviour of its religious minorities within the private sphere of their family.' He bases this conclusion in part on the ruling in *Dudgeon v United Kingdom*, which established a narrower margin of appreciation for infringements affecting aspects of an individual's private life versus the wide margin used in cases involving public entities. By this deduction, Barbibay demonstrates his lack of support for France's lawmakers in this instance and indicates that he feels the ban poses too much of an imposition on the private lives of French Muslims: even remarking that 'France myopically justifies the enactment of the headscarf ban on the narrow ground of cultural preservation.'<sup>267</sup> It is apparent that he believes France tolerates, rather than welcomes, its Muslim immigrants.

Further, Barbibay distinguishes from the instant case the decision in *Dogru v France*, in which the ECtHR upheld France's refusal to allow a school pupil to wear her headscarf during a sports lesson on the grounds that there were legitimate risks to public safety and order. *Dogru* concerned behaviour within a school, in which pupils can reasonably be expected to behave and dress according to a specified code of behaviour. Barbibay argues that the same reasoning would not stand up to the scrutiny of the ECtHR in *Mabchour's* case: similarly, the 'burka ban', which affects adult citizens in

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<sup>263</sup> Ibid, at 178

<sup>264</sup> Ibid, at 179

<sup>265</sup> Ibid, at 185

<sup>266</sup> Ibid, discussion runs from 190-204

<sup>267</sup> Ibid, at 178-179

both the public and private spheres of their lives, could be considered under the same reasoning in the event of a challenge under Article 9.

Discussing the introduction of the ban, Welch<sup>268</sup> describes Sarkozy's state of the nation address (before an 'agreeable audience'<sup>269</sup>) incorporating the remark that the burka represents 'subservience and debasement' rather than religious beliefs. Welch is of the opinion that Sarkozy is unqualified to assess the symbolism of Islamic dress, and that his decision to ban certain garments is equally oppressive, commenting, 'in a liberal society the state has no place dictating how people dress in the street, particularly when this restricts their right to manifestation of religious belief.'<sup>270</sup> This is a true liberal opinion, but bearing in mind the qualifications that restrict article 9 ECHR, it may represent a somewhat idealistic world view. Welch also contends that banning the veil is counterproductive: he asserts that the ban is more likely to create disenfranchisement and disillusion with the French government amongst Muslim women, and could potentially provoke extremist acts rather than suppress what Sarkozy perceives as Islamic extremism or fundamentalism, particularly since Western-Islamic relations are still fragile post-9/11.<sup>271</sup>

Research into veiling carried out in Belgium in 2010-11, consisting of frank in-depth interviews with Muslim women,<sup>272</sup> found that not one of the 27 participants had been forced to veil by her husband or anyone else, nor knew of any other women who had been forced to veil. Some participants began to wear it after they were married, with the knowledge that their husbands would be happy and supportive; others veiled against their husbands' express wishes; still others had husbands who were neutral on the subject.<sup>273</sup> Negative reactions from other family members were reported by a number of participants,<sup>274</sup> indicating that the decision to veil actually takes considerable individualism and strength of conviction. Additionally, the participants who wore niqabs reported myriad positive effects, including feelings of peace and freedom, an increased closeness to God, and the avoidance of unwanted male attention.<sup>275</sup> These findings imply that one of the key impetuses for banning niqabs – the perception that they are forced on women against their will, thereby oppressing and stifling them – is, in fact, a red herring. If it can be assumed that French Muslim women who veil their faces can report similar experiences to those who participated in the Belgian study, the Ban

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<sup>268</sup> Welch, Tim, *Fanning the Flames*, N.L.J. 2009, 159(7381), 1120

<sup>269</sup> Ibid, at 1120 col 1

<sup>270</sup> Ibid, at 1120 col 1

<sup>271</sup> Ibid, at 1120 col 1

<sup>272</sup> Brems et al, *Wearing the Face Veil in Belgium*, 2012

<sup>273</sup> Ibid, pp8-9

<sup>274</sup> Ibid, p10

<sup>275</sup> Ibid, p11

equates to a significant blow to their personal identity, religious journey, and day-to-day life, without any likely positive effects as a counter.

### European Court of Human Rights' Judgment

Shortly after the introduction of the Ban in 2011, a French Muslim citizen issued a legal challenge to her government. She argued that the legislation was neither necessary in a democratic society nor the pursuit of a legitimate aim and therefore represented an infringement of her rights under articles 3, 8, 9, 10, and 11, taken both separately and together with article 14 of the European Convention of Human Rights. The case reached the European Court of Human Rights, which issued its ruling in July 2014.<sup>276</sup> It held that the applicant's claims under articles 8, 9, and 10, taken both separately and together with article 14, were admissible: however, she had not sufficiently demonstrated breaches of her rights under articles 3 or 11 and these complaints were declared inadmissible.

By a majority of 15 to two, the Court held that the Ban was proportionate in its pursuit of a legitimate aim, 'namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others",<sup>277</sup> and was therefore necessary in a democratic society. However, it should be noted that the three other grounds submitted by the French government as justifications for the Ban were not accepted by the Court: the Ban was deemed disproportionate in its pursuit of public safety, and the Court did not feel that either the equality or human dignity arguments represented the pursuit of legitimate aims.

The Court carried out a detailed examination of the legislative history of the Ban, which verified that its sole target was Muslim women, despite the broad and neutral terms in which it was ultimately drafted. A study carried out by the Interior Ministry in 2009 concluded that around 1,900 Muslim women across France habitually veiled their faces with niqabs, and none wore burkas<sup>278</sup> – a significantly marginal number compared to France's total Muslim population of around 4.7 million.<sup>279</sup> An enquiry by a parliamentary report, submitted in January 2010, described wearers of

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<sup>276</sup> Case of S.A.S v France, app. No. 43835/11, Strasbourg 1 July 2014, accessed via <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%7B%22sort%22:%5B%22kdate%20Descending%22%5D,%22respon%22:%5B%22FRA%22%5D,%22documentcollectionid%22:%5B%22JUDGMENTS%22%5D,%22itemid%22:%5B%22001-145466%22%5D%7D>, last accessed 25.01.15

<sup>277</sup> Ibid at para. 157

<sup>278</sup> Assemblée Nationale, *Rapport d'information au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national*, Jan. 26, 2010, p28, accessed via <http://www.assemblee-nationale.fr/13/pdf/rap-info/i2262.pdf>, last viewed 25.07.15

<sup>279</sup> Hackett, Conrad, *5 facts about the Muslim population in Europe*, Pew Research Centre, January 15 2015, accessed via <http://www.pewresearch.org/fact-tank/2015/01/15/5-facts-about-the-muslim-population-in-europe/>, last viewed 25.07.15

the full-face veil in terms including ‘radical’, ‘in search of identity’, and ‘extremist fundamentalist’.<sup>280</sup> These are highly emotive phrases with connotations of terrorism and jihadists, almost guaranteed to trigger a negative reaction amongst the increasingly vocal anti-Islamic segment of European society. The report’s authors were also of the opinion that veiling the face symbolised subservience, negated the principle of gender equality and was ‘a flagrant infringement of the French principle of living together (“*le vivre ensemble*”)’.<sup>281</sup> It should be noted that, as far as the evidence tells us, no Muslim women were interviewed at any point in the legislative process with regard to the reasons why they wore face veils, or what, if anything, they felt the veil symbolised. It is unsettling that a decision affecting such a specific group of women in such a direct and personal way could be taken without their input, rendering them effectively powerless against the will of the French government.

An opinion opposing the concept of a ban was submitted in January 2010 by the National Advisory Committee of Human Rights (*Commission nationale consultative des droits de l’homme*, or *CNCDH*). The CNCDH felt that to introduce such a law risked stigmatising Muslims and would deprive women of access to public space, which could only be to their detriment:<sup>282</sup> it was, however, in favour of prioritising political support for women suffering violence and of an increased focus on civic education, the promotion of dialogue between cultural and religious groups, and studies into the evolution of the wearing of face veils.<sup>283</sup>

Days after the submission of this opinion, the *Conseil d’Etat* was tasked by the Prime Minister of France to carry out a study into the legal grounds for banning the face veil. It found that existing legislation was sufficient to address instances of citizens covering their faces for potential criminal purposes. Additionally, it felt that a ban on the face veil on the basis of the values it was perceived to represent, would be legally weak and difficult to enforce.<sup>284</sup> It suggested legislation directed specifically at those forcing women to cover their faces or attempting to use face veils solely and deliberately to conceal their identity may be more sensible.<sup>285</sup> Any of these solutions would have represented a more thoughtful and less antagonistic approach to a relatively minor,<sup>286</sup> though visible, issue. Notwithstanding, the National Assembly pressed ahead in drafting the legislation, which, as discussed above, was enacted in October 2011 and came into force the following spring. Based on the evidence examined above, it is clear that Sarkozy and the French government were

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<sup>280</sup> Ibid at para.16

<sup>281</sup> Ibid at para. 17

<sup>282</sup> Ibid at para 18

<sup>283</sup> Ibid at para 19

<sup>284</sup> Ibid at para 22

<sup>285</sup> Ibid at para 23

<sup>286</sup> Ibid at para 16: in its examination of the Ban’s legislative history, the Court noted that as of 2009, around 1,900 French women regularly wore a face veil, out of a Muslim population of around 4.7 million.

intent on prohibiting the wearing of face veils in an Islamic context, regardless of advice to the contrary.

As a presumably unintended but by no means unforeseeable consequence of the Ban, there were incidents of both verbal and physical aggression toward French Muslim women who chose to disregard the new restriction,<sup>287</sup> which draws into question the wisdom of addressing the issue via the criminal law rather than by a process of social education and dialogue. Because face veiling is practiced uniquely by women and is distinctive even amongst the 'otherness' of Muslim dress in a Western setting, it is possible to argue that a chief effect of the Ban was to situate veiled French Muslim women as a highly visible target for anti-Islamic feeling. In this way, the Ban both legitimised prejudice against Muslims and positioned veiled Muslim women as emblems of Islamic extremism, using the bodies of women as stages to play out the wider debate on immigration and multiculturalism.

Whilst the introduction of the Ban was undoubtedly aimed at the French Muslim community, by definition it only affects Muslim women, as Muslim men generally do not cover their faces in day-to-day life. The French government attached a great deal of weight to the perceived security risks in allowing some citizens to cover their faces, as well as to the potentially deleterious effects upon society, and it was ultimately this second factor that convinced the Court of Human Rights. This thesis argues that the purported risks were infinitesimally small and could be easily tempered with straightforward security procedures, such as asking veiled women to raise their niqab in front of a female member of staff in settings where security is necessarily heightened, such as airports, banks and courts. Instead, the French government allowed the imaginations of a proportion of its citizens and media to run wild, envisaging veiled suicide bombers around every corner.

It should be noted that the January 2015 attacks on the staff of the French satirical magazine *Charlie Hebdo* were carried out by young French-born Algerian Muslims, none of which appeared to cover their faces during the assaults. Whilst many factors were at play in the background to this incident, including the perpetrators' history of radicalisation and the magazine's predilection for satirising Islam, the contribution of the Ban should not be downplayed. It helped to perpetuate a pervasive, intolerant anti-Muslim climate within France, almost baiting those Muslims with more extreme beliefs into retaliation. This argument in no way justifies acts of murder or terrorism, whatever the motive or provocation, but instead acknowledges the ease in which sides can be taken, lines drawn

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<sup>287</sup> For example, 'France has first 'burka rage' incident', Peter Allen, The Telegraph, 18 May 2010, <http://www.telegraph.co.uk/news/worldnews/europe/france/7735607/France-has-first-burka-rage-incident.html>. See also pp18-19 of Brems at al, *Wearing the Face Veil in Belgium*, 2012, in which veiled Belgian women describe acts of aggression and violence they have experienced from those who oppose their niqabs.

and feelings of indignation and vengefulness amplified in an atmosphere of intolerance: an atmosphere that could have been calmed with the promotion of multicultural acceptance.

In their partly dissenting opinions, Judges Nussberger and Jäderblom hold the opinion that the Ban does, in fact, violate the claimant's rights under article 8 and 9 ECHR by dint of not pursuing a legitimate aim, and disproportionality in the pursuit of its stated aims. They are critical of the weight attached by the rest of the court to the abstract concept of 'living together', which they describe as 'far-fetched and vague'.<sup>288</sup> The European Human Rights Law Review concurred, expressing surprise over the 'marked' leeway allowed to France by the Court, to the extent that it 'effectively permitted France to introduce its own legitimate aim, that of 'living together'', thereby 'contaminat[ing] the rest of the legal analysis.'<sup>289</sup> The judges also contest that covering the face does not necessarily inhibit social interaction, as argued by the majority of the court: they agree that the face is an important part of such interaction, but feel that the majority drew a false conclusion by implying that interaction is irretrievably hindered without sight of the face.<sup>290</sup>

This is an important point: whilst a veiled face could potentially form an initial barrier to social interaction, particularly amongst individuals who are unfamiliar with the garment, it is by no means an impassable obstacle. However, banning the face veil on the grounds that it impedes socialisation seems to dismiss veil-wearers as active participants in their choice whether or not to socialise, instead painting them as passive caricatures to be socialised with regardless of their will: as Nussberger and Jäderblom note, 'the right to respect for private life also comprises the right not to communicate and not to enter into contact with others in public places – the right to be an outsider.'<sup>291</sup> As Liogier remarked, 'Others will opine that one cannot be a true citizen if one hides one's face, because one is thus refusing human interaction. Yet some people wear dark glasses out of shyness or pure obnoxiousness, and nobody would think of denying them their right to humanity.'<sup>292</sup> In short, choosing to disguise one's face is not unique to Muslims, and not so aberrant a behaviour as to necessitate legal prohibition.

This point illustrates the fundamental ineffectualness of banning face veils: cross-cultural social interaction and cohesion cannot be forced, but instead must be allowed to evolve and develop.

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<sup>288</sup> Ibid at B-5

<sup>289</sup> *Case Comment: Religion: full-face veil – ban in public places – Islam – women*, E.H.R.L.R 2014, 6, 647-652, p652

<sup>290</sup> Ibid at B-9

<sup>291</sup> Ibid at B-8

<sup>292</sup> Liogier, Raphaël, *France's attack on the veil is a huge blunder*, The Guardian, 26 January 2010, <http://www.theguardian.com/commentisfree/belief/2010/jan/26/proposed-veil-ban-in-france>, retrieved 28 March 2015

Individuals have the right to interact or not interact with each other, and do not owe interaction to anybody. Further, as the minority opinion states, the ECHR does not grant individuals the right to be free from shock or provocation by unfamiliar methods of religious expression.<sup>293</sup> In banning the veil, France has succeeded in stimulating in some segments of its society a perception that face veiling is unacceptable, that it has the right to demand an end to the practice, and that it is entitled to interact with veiled women regardless of their feelings on the matter.

Nussberger and Jäderblom also argue that, in banning the face veil, the French legislature has restricted pluralism and the promotion of tolerance. They note that previous case law has set down that ‘the role of the authorities...is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other’,<sup>294</sup> and that the French government has actually done the precise opposite in this case, to the detriment of one group but with little or no significant consequence to the rest of society. Further, they identify the quandary facing women who choose to veil: either remain faithful to their convictions and choices, but stay at home, or venture outside and risk criminal sanctions.<sup>295</sup> They are also unconvinced by the argument that preventing women from veiling their faces will liberate them from ‘oppression’, but will instead ‘further exclude them from society and aggravate their situation’,<sup>296</sup> and note that the government failed to explain why the less restrictive measures recommended during the legislative process, including awareness-raising and community education, were not considered in place of criminalisation. As discussed above, the existing anti-Muslim feeling in France was only fuelled by the introduction of the Ban: a considered and inclusive programme of cross-cultural education could have done much to dampen such feeling, at the same time as allowing French Muslim women a voice, which they were denied throughout the introduction of the Ban.

## Conclusions

The Ban stands as an emblem of disapproval and intolerance of France’s Muslims, marking out battle lines where none were needed, and stimulating feelings of alienation and disenfranchisement amongst a young minority population. In recent months, hundreds of young Muslims born in the UK and Europe have travelled to Syria to join the militant group Islamic State (IS, ISIL or ISIS), engaging in guerrilla warfare and acts of terrorism in an attempt to establish an Islamic caliphate in the Middle East. Whilst it is mere speculation to argue that the Ban directly prompted this migration, we cannot escape that it contributes to a climate of Western distaste for, and distrust of, Islamic practice, in

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<sup>293</sup> Ibid at B-7

<sup>294</sup> Ibid at para 14, citing *Serif v Greece*, no 38178/97

<sup>295</sup> Ibid at para 21

<sup>296</sup> Ibid at para 21

which some young people feel unwelcome and misunderstood in their country of birth. This succeeds in rejecting them further, denying them a tangible position in Western society. Illustrating this point, a recent conference of the United Nations Security Council heard from Professor Peter Neumann of the International Centre for the Study of Radicalisation and Political Violence at King's College London. The centre has been gathering the stories of young Europeans who have joined Islamic State and has established that, despite their ostensible diversity, their common thread was 'they didn't feel they had a stake in their societies. They often felt that...they weren't European, they didn't belong, that they'd never succeed however hard they tried.'<sup>297</sup> Crown Prince Al Hussein Bin Abdullah II of Jordan, chairing the meeting, urged the council to 'partner with young people...instead of leaving them as a target of violence and destruction'<sup>298</sup> through empowerment and education. In terms of the Ban, it would also be prudent to provide accessible education to non-Muslim French citizens on the basic precepts of Islam and the meaning and purpose of the niqab, in an attempt to reduce the number of citizens who see veiling the face as unacceptable or associated solely with jihad.

Ultimately, in banning the wearing of face veils, France has exacerbated precisely the situation it set out to correct: it has denied agency to, and imposed its own beliefs upon, the women that, it stated, were oppressed, lacking in agency and forced to live in a way that reflected extreme beliefs not their own. Muslim women have been all but dismissed as either cowed servile beings, meekly complying with medieval views on their appearance, or as aggressive radicalised Islamists, liable to commit atrocities at any moment. This result cannot be seen as any kind of a success for basic human rights, much less women's equality. To disempower women, especially young women, in such a fundamental way as to attempt to dictate how they must dress, is to deny them the right to fully participate in society with confidence and pride. Such an approach has no place in the twenty-first century, much less in a country where human rights are guaranteed and protected by law. That Western nations feel both entitled and obliged to enact laws whose primary effect is to undermine these rights is surely cause for disquiet. However, the next, and final, chapter will discuss this tendency in the broader context of the intense scrutiny and commodification attached to women's bodies by Western media and popular culture. With this correlation in mind, it is perhaps less surprising, though no less distasteful, that Western governments societies persist in attempting to meddle with women's right to cover their bodies.

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<sup>297</sup> Feeling Left Out of Society Drives European Youth to ISIS, Expert Says, Newsweek via Reuters, 23 April 2015, <http://www.newsweek.com/feeling-left-out-europe-drives-youth-isis-expert-says-324523>

<sup>298</sup> Ibid

## Chapter 5: Feminism, veiling and twenty-first century women in the media

### Introduction

This chapter will consider the broader reasons why parts of Western society seem compelled to prevent Muslim women from covering their faces. It will apply some of the theories of postcolonial and third-wave feminism to the findings outlined in preceding chapters, incorporating the concepts of Othering and the male gaze, and their position in the debate over veiling. In addition, it will examine the attitudes toward, and treatment of, the bodies of Western women by Western society and media, and compare this with the argument often put forward in favour of banning face veils, that such a ban will liberate women from their oppression.<sup>299</sup>

### Veiling and personal identity

One of the most often-used remarks by those who oppose face veils is ‘you just don’t know who’s behind it.’ Leaving purported security considerations behind and examining the deeper meaning behind this statement, it seems that, in the West, our identity is intrinsically bound up with our outward appearance and, to a lesser extent, how we adapt it to remain societally ‘acceptable’: as will be discussed below, this is most applicable to women. Perhaps the disquiet about veiling the face is more about a perceived removal of identity, an unacceptable level of egalitarianism: how else is society to gaze upon women and deem them acceptable or not, if it can see no more than their eyes? Yet this may be one of the factors that attracts women to veiling their face. In the Belgian study,<sup>300</sup> which interviewed Belgian Muslim citizens, mostly aged between 25 and 40, who wore niqab (discussed in more detail earlier), the following comments were recorded:

*‘We apply makeup, we do our hair, so it [adopting the niqab] actually changed absolutely nothing, we just made a choice to preserve our body and our beauty only for our husband.’<sup>301</sup>*

*‘There are people who need when they go out in the street to not feel the gaze of men, because to them they feel dirty.’<sup>302</sup>*

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<sup>299</sup> As far as different approaches to veiling and the law are concerned, intersectionality (the perspective of examining settings in which more than one socio-cultural force – in this case gender, religion and culture – interact to shape the experience of the subject) can be explored in Vakulenko, ‘*Islamic Headscarves and the European Convention on Human Rights: an Intersectional Perspective*, Social and Legal Studies [2007] 16:183. In this piece, Vakulenko considers ECtHR decisions on cases concerning veils originating in Turkey and Switzerland from an intersectional point of view.

<sup>300</sup> Brems et al, *Wearing the Face Veil in Belgium*, 2012

<sup>301</sup> Ibid, p7

<sup>302</sup> Ibid, p7

*'Once you put the face veil over your eyes, you have the impression of being alone with God in the street.'*<sup>303</sup>

An examination of blogs and comments in online forums by Muslim women reveals similar remarks:

*'Being an active student of knowledge for the past few years, my 'image' became less important and the person inside became more prominent, something I really needed to focus on. I simply understood the beauty of modesty. In actions, in words and in physical covering. My beauty should be for my husband only, I refuse to be looked upon like I'm some prey, and even hijab wasn't enough to keep perverted eyes away. Sacrifices were definitely worth this feeling, and I have never felt more at peace in my life.'*<sup>304</sup>

*'I wear the niqab because I believe it as [sic] an act of worship to God, and a means of identifying myself as a Muslim woman. I do not believe that men (or women) are purely sexual beings without any control over themselves. I do believe that our society has been poisoned by hypersexualization and the commodification of what should be a beautiful thing, and that Muslim or not, men and women alike are suffering on so many different levels because we've been trained to view the other gender as sexual objects, not human beings.'*<sup>305</sup>

*I wear it to become a better human being. To humble myself and to be more tolerant. I wear it in order to respect myself, to raise my status as a proud women who has a brain, a personality and feelings. And I wear it because I'm English. Because I have a right to be happy and to not be oppressed. Wearing it has raised my confidence.'*<sup>306</sup>

These extracts, admittedly, represent a very small sample of a community of Muslim women living in the West who appear overwhelmingly positive about their reasons for, and experience of, veiling their faces. It is evident that these women do not feel emotionally or culturally stifled by their niqab, but rather empowered and confident: a far cry from the timid, repressed woman longing to throw off her veil and embrace Western cultural norms so often portrayed by those who support the banning of face coverings. For these women, their religious beliefs appear to form a large part of their sense of personal identity, and therefore the concept of concealing their face in public is probably less of a reach than it might be for a Western woman accustomed to demonstrating her self-identity through her appearance. As Idriss notes, 'an Islamic headscarf is a continual reminder

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<sup>303</sup> Ibid, p11

<sup>304</sup> Niqabis – Oppressed or in Serenity?, Niqabi Nuances, 28 March 2015, <http://niqablovers.blogspot.co.uk/>

<sup>305</sup> Dear Canadian Journalists..., The Salafi Feminist, 1 April 2014, <http://thesalafifeminist.blogspot.co.uk/2014/04/dear-canadian-journalists.html>

<sup>306</sup> 'H', commenting on Channel 4's Factcheck, 'Britain's Niqab: unveiling the facts', 23 Feb 2014, <http://blogs.channel4.com/factcheck/britains-niqab-unveiling-facts-factcheck/16232>

that one should be a dignified and humble human being and Muslim women see it as part of their religious practice and as a symbol of their Islamic identity.’<sup>307</sup> This symbol of identity should be worthy of no less respect and accommodation than any other such symbol worn by any other woman.

### **The Male Gaze and ‘Raunch Culture’**

Regardless of culture, it is inescapable that women’s bodies are systematically objectified, both by men and by the wider societal environment surrounding them. It is possible to perceive that veiling the entire face and body positions the wearer as a sexual object, a desirable chattel, to be hidden from view lest she inspire uncontrollable lust in passers-by. It is equally possible, however, to argue that, for a Muslim woman, living in Europe in the twenty-first century, to elect to veil her face and body is a conscious, even bold, decision to attempt to remove her physical self from the intense scrutiny prevalent in Western society. The ‘male gaze’, as defined by Mulvey 40 years ago,<sup>308</sup> continues to manifest itself ever more broadly, via innumerable websites, blogs, magazines, music videos and films, together with the increasing pervasiveness of online pornography. As Mulvey noted, ‘in their traditional exhibitionist role women are simultaneously looked at and displayed [...] so they can be said to connote to-be-looked-at-ness.’<sup>309</sup> Women who wear niqabs are still ‘looked at’, especially in the West where they are less commonly seen and carry a certain exoticness, but what they ‘display’ is largely neutral in Western terms of womanly beauty: little or no makeup is visible and nor are any perceived ‘flaws’ in the face; hairstyle and colour are covered and so irrelevant to the casual observer; the garments themselves are often simple, unadorned and remarkably egalitarian; and the body is concealed beneath loose opaque cloth, preventing the idle judgment on the acceptableness or otherwise of aspects of the figure, so familiar to Western women.

In contrast to the debate over whether Muslim women should or should not be permitted to cover their faces sits the argument against the increasingly sexualised culture of the West. In *Living Dolls*, Natasha Walter raises concerns over the apparent U-turn in UK feminism since the mid-1990s. She points to the falling proportion of female MPs,<sup>310</sup> the growing trend for using scientific research to

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<sup>307</sup> Idriss [2005], at p288

<sup>308</sup> Mulvey, Laura, Visual Pleasure and Narrative Cinema, Screen 16.3 Autumn 1975, pp6-18

<sup>309</sup> Ibid, section III

<sup>310</sup> Walter, Natasha, *Living Dolls: The Return of Sexism*, Virago Press, London [2007], p9

ascribe biological rather than cultural explanations for differences between men and women,<sup>311</sup> the acceptance of topless modelling as a legitimate, even aspirational career choice<sup>312</sup> and the increasing 'girlification' and sexualisation of children<sup>313</sup> to illustrate her arguments. Walter believes this combination of influences has served to emphasise the concept that women are the weaker, less intelligent sex whose primary function should be both appearing and being sexually available to men. She expresses particular disquiet at what she identifies as an overt theme of 'empowerment' and 'individuality' promoted by media outlets aimed at young girls, whilst the actual range of acceptable body types and personal styles endorsed by these outlets is extremely narrow and often punishing to achieve or physically or financially unobtainable by most girls.<sup>314</sup>

Current examples of the sexualised culture Walter describes include reality television personality Kim Kardashian, who has twice posed completely naked for US-based fashion magazines and is celebrated for her curvaceous body;<sup>315</sup> pop singer Miley Cyrus, who has cultivated a public image that is both cartoonish and oddly sexual, frequently posts partially naked images of herself on social media and promoted her album with a stage show involving highly sexualised imagery despite her fans tending to be young teenagers; and Katie Price, who began her career as a topless model and became extremely successful through relentless self-promotion, often involving her partners/spouses and children. Whilst the author does not suggest that any of these women is intrinsically correct or incorrect to present herself in a sexual, frequently unclothed manner, it is difficult not to question the way in which they are sometimes held up as examples of strong, empowered women, suggesting to their young admirers that success and empowerment comes most easily from displays of provocative sexiness. Additionally, whilst Kardashian, Cyrus, Price, and others of their ilk undoubtedly have a voice within society, the author believes that their physical image is often, figuratively speaking, a much louder voice. By inviting judgement and celebration of their physicality, it is possible to argue that these women are diminished to mere caricatures of 'Woman', valued most highly for their bodies and ready to be cast aside when those bodies are no longer deemed acceptable to society, either through changes in the fashionable physique or personal changes acquired through, for example, pregnancy or aging.

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<sup>311</sup> *Ibid*, chapter 8, Myths

<sup>312</sup> *Ibid*, chapter 1, Babes

<sup>313</sup> *Ibid*, chapter 3, Girls

<sup>314</sup> *Ibid*, p66-68

<sup>315</sup> Paper, winter 2014, 'Kim Kardashian: Break the Internet' and LOVE Magazine, spring-summer 2015, 'Kim Wears Prada'. Images from both shoots were widely available online, both through news/gossip websites and via social media platforms, including those belonging to Kardashian herself.

Expanding this argument, Western women in general are almost universally judged on their bodies: what Germaine Greer termed The Eternal Feminine, 'the sexual object sought by all men... [whose] value is solely attested by the demand she excites in others.'<sup>316</sup> Greer identified that society often separates women's bodies from themselves, treating them as public property to be variously examined, admired, criticised and abused. Although Greer's earlier writings, emerging as they did from the second wave of feminism, tend towards the strident, her point here remains valid to the present day. This almost forensic level of interest in female physicality has the effect of stifling women's voices to some extent: those who argue that Muslim women who cover their faces are prevented from having a voice within society often fail to consider how frequently the voice of any woman is drowned out by examinations of what she is wearing, whether she has lost or gained weight, and so forth.

Walter's depiction of a highly-sexualised Western culture is not one that sits well with the stereotypical media portrayal of a niqab-wearing Muslim woman, in which it is assumed that she is either a browbeaten adjunct in thrall to a deeply religious, controlling man, or a fundamental Islamist brainwashed by terrorists into extreme modesty. Alongside the highly-charged atmosphere of 'being a woman', with all its markers and expectations, comes an assumption that women actively enjoy showing off their bodies to the world at large, expending time, effort and money on maintaining their physical acceptability: that they are, in fact, inherently sexual beings. Within this assumption, the niqab and its typical accompanying long, loose garments, seem baffling: why would a woman choose to conceal her main form of power? Because neither law-makers nor the mainstream media appear to consult niqab-wearers in any depth before speaking on their behalf, there is a gap in comprehension and a subsequent assumption of something lacking on the part of the niqabis. These groups fail to understand that a woman who chooses to conceal her face and body from the general public can be just as much a woman of agency, a fulfilled being, a strong voice and as sexual or non-sexual as any other woman dressed in any other style, and is just as worthy of consideration and acceptance.

Vakulenko<sup>317</sup> identifies the essential hypocrisy in the West's objection to the Islamic veil, both historically and currently, noting its persistent handwringing over the perceived oppression and confinement of veiled women whilst failing to acknowledge the ways in which it oppresses its own

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<sup>316</sup> Greer, Germaine, *The Female Eunuch*, Harper Collins, London [1971] p67

<sup>317</sup> Vakulenko, *Islamic Veiling in Legal Discourse*, 2012

‘modern’ or ‘liberated’ women. She points towards: the growth in cosmetic surgery procedures, and the increasing societal acceptance of the same; the lack of state-funded childcare in a culture where women are generally expected to be the primary carers for children, despite many families requiring two incomes to achieve a reasonable standard of living; and the less overt, but no less real, constraints placed upon them to dress in compliance with ‘western ideas of what is feminine, fashionable and appropriate.’<sup>318</sup> Vakulenko feels that this hypocrisy may be a product of the way the West prizes what she terms ‘the formal existence of choice’, whilst failing to recognise the limits or barriers to its women actually being able to exercise their right to choose. In this way, the concept of ‘choice’ is illusory: whilst it exists in a theoretical sense, if women are prevented by social, cultural, or economical obstacles from choosing to dress, appear or live in the way they wish, are they any less oppressed than the totemic veiled Muslim woman?

Discussing the specific issue of veiling, Mallik pointed out that,

*‘Veiling need not simply be interpreted as a label of identity. It can constitute a genuine public expression of the personal significance attached to religion’*<sup>319</sup>

and that

*‘[Veiling] is often utilised as a universal response to a sexist and male-dominated society where women are judged by how they look.’*<sup>320</sup>

These two remarks demonstrate just two of the myriad reasons why some Muslim women veil their faces. To assume that all Muslims do so for the same reason is as facile as assuming all Western women who wear high-heeled shoes or skinny jeans do so for the same reasons: for instance these garments may help a woman feel sexually attractive; she may perceive that they flatter her figure better than other styles; the particular style or cut may have a specific cultural indicator or identifiable branding, marking her out as a member of a social tribe or as a culturally recognisable ‘type’ of person; they may merely be a style that she feels comfortable wearing; or they could have been the first things she came across when getting dressed that morning. It should not be ignored that, *per* Vakulenko above, when such items conform to the prevailing fashion, women may feel they have no choice but to wear them, lest society think of them as lesser women, unable to keep up

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<sup>318</sup> Ibid, at p71

<sup>319</sup> Mallik, Afshan, *Is commitment to multiculturalism incompatible with individual autonomy?*, UCL Juris Rev 113, 2002, p115

<sup>320</sup> Ibid at 116

with changing fashions or unwilling to make the required effort to do so. Furthermore, both reasons identified by Mallik provide clear challenges to the ban on veiling in France: if veiling, to some women, can be a genuine expression of religious conviction, there are grounds for contesting the ban under art.9 ECHR. Similarly, if veiling represents a stance against patriarchal standards of female beauty for others, it is difficult to justify the ban on the grounds that it will release women from their oppression.

This motivation for veiling also illustrates the disparity between ideals of female liberation in the Western and Islamic worlds – in recent years, some Western women have adopted actions including the wearing of provocative clothing, stripping, modelling topless or nude, and using or making pornography, as symbolic of female liberation, empowerment and choice. The French ban on veiling suggests a belief that the Islamic approach of modesty is less deserving of recognition and protection than the West's embracing of 'raunch culture'<sup>321</sup>. On this topic Mallik is critical of Okin, referring to her assertion that 'other' cultures should assimilate as 'condescending'<sup>322</sup> and concluding that it is possible to end certain cultural practices without disrespect or damage to the cultural group itself, provided the impetus for change comes from or is supported by members of the cultural group. Again, the ban on veiling in France seems more of an imposition upon Islamic women from outside their cultural sphere, which goes some way to explain the extent of negative reaction against it: young Muslim women seem to have reclaimed the niqab as a reassertion of their identity in the wake of 9/11 and the ensuing conflicts. If wearing it gives them a feeling of empowerment, of belonging, it is difficult to fathom how any positive result could be brought about by unilaterally banning it. Fernandez advocates a re-reading of gender-specific cultural practices such as veiling so that they 'can be considered other than through the prism of racism and Islamaphobia.'<sup>323</sup> This, she feels, will be the first step in allowing Western cultures to understand veiling as a way of reclaiming the female body from male ideals of femininity and as a symbol of personal identity and resistance to global homogenization, rather than one of coercion and patriarchal obedience.

### **How to be a woman: consume and conform**

Increasingly, Western society celebrates the pillars of individuality and consumerism. Individuals are able to non-verbally express themselves more and more minutely, simply by buying more and more

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<sup>321</sup> A descriptor used by Natasha Walter throughout *Living Dolls*

<sup>322</sup> Ibid at 119

<sup>323</sup> Fernandez, Sonya, *The crusade over the bodies of women*, 2010, p77

specialised, personalised items. The growth of online retailing has meant that clothing, accessories and jewellery are available to purchase in almost infinite options of style and colour, and unusual or specialised items are more accessible to the purchaser than ever before, since they are not restricted geographically to shopping at whichever stores are closest to home. Media outlets, particularly women's magazines and fashion blogs, encourage the rejection of rules and guidelines on appropriate dress and the development instead of 'personal style'. However, if examined closely, this earnest reification of personal choice and individuality is illusory: the male gaze remains all-consuming. Women are still primarily celebrated for their bodies and overall outward appearance, meaning that however individual her style, it must in some way be attractive, or at the very least acceptable, to the eyes of men: never not enough, and certainly never too much. An overwhelming plethora of advice exists online and in print, with more published daily, describing the various ways women could (or should) adapt their bodies and clothing in order to continue to be acceptable to society, most often necessitating the purchase of new items or products. Their outfits and bodies are intensely scrutinised by the media: entire sections of magazines are devoted to analysing how much weight celebrities have gained or lost recently, whether their latest red-carpet dress is a style failure or success, or whether or not they have had, or should have, or should not have had, cosmetic surgery.

In the West, successfully 'being a woman' in the twenty-first century seems to mean always being well-dressed, made-up, suitably coiffed and stylishly accessorised to at least an 'acceptable' standard during interaction with any other member of society, or else risk encountering ridicule and rejection. As Wolf noted, in her comparison of the transition from girlhood to womanhood in various societies, 'our [Western] girls move toward womanhood through the demarcations of what they can buy and own, or of who wants to sleep with them.'<sup>324</sup> She neatly encapsulates the essence of being a socially successful woman in Western culture: to be a frequent and diligent consumer of goods, and to make oneself sexually attractive at all times. It is possible to argue that the individual style decisions women make are often, in fact, choices between a surprisingly limited selection of options collated for them by the media and the fashion and beauty industries as being 'right' for their particular body or face shape, in order that they remain visually acceptable to the wider male gaze. 'Individuality' and 'personal style' ultimately become modular concepts, available to purchase by collating the appropriate items from the 'right' retailers: even in non-conformity, Western women must conform, or appear to be striving to conform, to one of a few 'ideal' types or else be deemed

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<sup>324</sup> Wolf, Naomi, *Promiscuities: A Secret History of Female Desire*, Chatto & Windus, London [1997], p143

unacceptable. However, Western society continues to at least pay lip service to the concept of personal style, and on the surface it appears that its women are very much at liberty to express themselves through their clothing and other styling choices.

Veiling the face, with its rich history, religious significance and varied meanings, to some extent flies in the face of this type of categorisation. When veiled, the woman is identifiably a woman, and identifiably a Muslim, but it is difficult for the casual Western observer to deduce much more about her appearance. As noted earlier in the chapter, this is one of the reasons some women choose to wear complete veiling: they attract less male attention when out and about, and reserve the visual experience of their faces and bodies for their closest family. This is exemplified by the experiences of teenagers Shabina Begum and X, as discussed in Chapter 2, whose decision to begin wearing, respectively, a jilbab and a niqab, attracted so much negative attention. It is possible to argue that their apparent rejection of Western expectations toward their adolescent bodies were at least partially responsible for their schools' lack of support and their subsequent defeat in court.

### **Post-colonial feminism and veiling**

Mohanty, writing in 1986,<sup>325</sup> was highly critical of the manner in which academics describe what she then termed 'third-world' women and their problems. She identified that Western academics in particular tend to compress these women into a single homogenous mass, and asserts that the issues are significantly more complex and nuanced than 'all women in the developing world are oppressed and disadvantaged'. She also identified the existence of an assumption that all women share the common denominator of 'being oppressed', and argues that this is too narrow and vague a descriptor: Mohanty accepted that some groups of women are lacking in power, but not in equal measure. Specifically, whilst Western women tend to be characterised as 'Other', in the sense that they are not men, they are often more powerful, or have more access to power, than non-Western women: this is most particularly true in multicultural societies like Western Europe, in which Muslim women are 'Other' in terms of both their gender and their culture, putting them at a double disadvantage. With respect to face veiling and attempts to ban it, this type of stance reveals itself in the stereotype that Islamic women are forced by their fathers or husbands to veil their faces against their will, that this practice is oppressive and detrimental to them, and that given the choice they

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<sup>325</sup> Mohanty, Chandra Talpade, *Under Western Eyes: Feminist Scholarship and Colonial Discourse*, Boundary, 2 12 no 3/13 no 1 (Spring/Fall 1986)

would not veil. As earlier chapters have revealed, the reality is quite different: most Muslim women living in Europe veil of their own volition, often after considerable research into their religion. Their lives may become more difficult as a result: as discovered in the Belgian study, discussed above, they may have to tolerate the aggression and condemnation of strangers, or go against the wishes of close family to wear their veils. These findings do not suggest timid, oppressed, or subservient women, and yet proponents of bans on veiling (including Nicolas Sarkozy, Philip Hollobone, and Jack Straw, as previously discussed) maintain that such action is essential in order to liberate women from the impositions of their religion: these men appear to understand veiled Muslim women only as a homogenous group of one-dimensional Others, rather than individuals who happen to have consensus on a particular aspect of their religion. The tendency of the West to 'Other' women who veil their faces assumes both that the veil is a problem, and that it is their only problem: remove the veil, and the problem ceases. Homogenisation in this way ignores the fact that Muslim women living in the West suffer from the same range of problems encountered by white women, including domestic violence, lack of representation, gender stereotyping and pay inequality, to name a few.

Mohanty went on to describe the use of 'cultural Others' as laziness, and recommends that care should be taken to examine the social and political significance of customs or traditions on the community as a whole rather than isolating individual customs or aspects of customs. This is highly relevant to the current debate over European bans on face-covering garments. Both the Ban and the debate focus on one very specific aspect of Islamic culture (veiling) which is not common to all Muslims and carries varying levels of meaning and significance to different branches, communities, and individuals within Islam. Mohanty described the universalism by which academics consider veiled Muslim women from different countries as 'reductive', noting that, whilst the veils themselves may look similar, the cultural heritage and the impetus for veiling varied considerably.<sup>326</sup> She illustrated this point by examining different reasons for veiling, comparing middle-class Iranian Muslim women who wore niqab in support of the working-class women of their community during a 1979 revolution, with the Iranian government's current insistence on full-body veiling. In this way, something that was once a symbol of feminine solidarity between classes, worn by women through their own volition, became a garment imposed upon them by a patriarchal regime and so altered its connotations. Similarly, Muslim women living in Western Europe seem to adopt the niqab as part of a deeper engagement with their religion whilst in an environment where they are able to choose whether or not to cover their face. In this way, banning face veils by law is as repressive as requiring them to be worn, and as likely to stimulate discord amongst those affected.

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<sup>326</sup> Ibid at p347

Finally, Mohanty was at pains to point out that the application of Western values to the cultures and societies of the developing world is inadvisable and liable to have a distorting effect.<sup>327</sup> By applying this assertion to the ban on face-veiling, it should be reiterated that Christianity (the primary religion in Europe) currently makes no formal dress requirements of its adherents<sup>328</sup> whereas most, if not all, branches of Islam insist upon modest dress for both men and women as a basic tenet of the faith. Further, the current largely secular character of Western Europe (most notably in France, with its constitutional secularity) means that overt dress requirements mandated by religion are, to many, an unfamiliar concept. Attempting to treat Western European women and Muslim women living in Europe identically in terms of dress, therefore, is foolhardy. The two groups have fundamental differences both in their manner of dress and in their reasons for choosing and wearing certain garments whilst rejecting others. Banning a garment associated primarily with one group, especially the group holding less societal power, demonstrates a disregard for the rights, wellbeing and private life of its members and risks damage to the relationship between the two groups. Because Muslim women in Europe are generally immigrants, or the children of immigrants, in many aspects of their lives they are at a disadvantage solely by dint of that status: for example, they are likely to be exposed to racist or prejudiced views, their socioeconomic position may well be weakened, and there is potential for a language barrier to make day-to-day communication more difficult. Bans on face veils will only emphasise these disadvantages, whilst at the same time offering little or no tangible benefit to the native population.

Writing in 2002 to consider the tension between culture and the rights of the individual, Afshan Mallik<sup>329</sup> references Andrea Baumeister's opinion that the state is only legitimate as far as it can secure willing assent from its citizens, and that obtaining this assent will depend on the state's sensitivity to the beliefs of its citizens. It must therefore refrain from imposing its own perspective. This position supports Mohanty's views about the inadvisability of applying native French values to the French Islamic community. Mallik is also uncomfortable with what she terms 'the West's dogged obsession with unveiling the Muslim woman'<sup>330</sup>, believing that such a pursuit reduces the common perception of Muslim women to nothing more than passive victims of oppression lurking behind veils.

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<sup>327</sup> Ibid at p348

<sup>328</sup> A point illustrated by the 2010 case of Shirley Chaplin, a Christian nurse who was moved from patient-based to administrative duties when she refused to remove a crucifix necklace on the grounds of health and safety, and whose subsequent religious discrimination claim against her employer (Royal Devon & Exeter NHS Trust) was dismissed, discussed in chapter 3

<sup>329</sup> Mallik, *Is commitment to multiculturalism incompatible with individual autonomy?*, 2002

<sup>330</sup> Ibid at 116

In a bid to identify possible reasons for the West's fixation with banning face veils, El Guindi<sup>331</sup> and Scott<sup>332</sup> both noted the way in which Western colonialists eroticised, even fetishized, the face veil. In particular, the French colonisation of Algeria in the mid-nineteenth century is exemplified by both authors as significant in informing Western attitudes toward veiled women. Scott identifies the way in which Algerian women were homogenised because of their veils, remarking 'There were those who equated Arab women with prostitutes and those who envisioned them as slaves to their husbands and families.'<sup>333</sup> She goes on to describe the many contradictions in the French interpretations of Islamic and Algerian cultural practices, most pertinently to this chapter noting that '[t]he veil was a sexual provocation and a denial of sex, a come-on and a refusal.'<sup>334</sup> El Guindi describes the way in which the French publicly and forcibly unveiled Algerian women in 1958,<sup>335</sup> and identifies that,

*'such tactics led Arabs to link the unveiling of Muslim women with a colonial strategy to undermine and destroy the culture. The effect was the opposite of that intended by the French – it strengthened the attachment to the veil as a national and cultural symbol on the part of patriotic Algerian women, giving the veil a new vitality.'*<sup>336</sup>

These attitudes seem to persist to the present day, whereby the French legislature felt that women wearing veils were both a threat to the country's security and character, and suffered serious personal oppression from which they must be released. Similarly, young Muslim women living in Europe have embraced the niqab as a reassertion of their faith, in a climate where Muslims in general are often characterised as religious fanatics, terrorists or oppressed chattels.

Mallik also describes how motivations for and reasons behind traditional or cultural practices can shift and evolve over time, citing the example of a ban on veiling in Iran during the 1930s, following which a number of wealthy families emigrated because at that time the burka was a symbol of status and affluence. Similarly, an article in the London Evening Standard in 2010<sup>337</sup> spoke with a variety of Muslim girls and women about veiling, and received a wide variety of responses regarding their reasons for wearing hijabs and niqabs: an expression of identity, an accessory, enabling the wearer

<sup>331</sup> El Guindi, Fadwa, 'Veil: Modesty, Privacy and Resistance', Berg, Oxford [1999], pp170-172

<sup>332</sup> Scott, Joan Wallach, The Politics of the Veil, Princeton University Press, London [2007], pp54-64

<sup>333</sup> Ibid at p58

<sup>334</sup> Ibid at p60

<sup>335</sup> El Guindi, 'Veil', p170

<sup>336</sup> Ibid at p170

<sup>337</sup> <http://www.thisislondon.co.uk/lifestyle/article-23894883-beyond-the-veil.do>, retrieved 24.11.11

to feel closer to God, something 'that marks you out but makes you belong at the same time'<sup>338</sup>. As recently as the mid-1990s, academics identified a move towards a 'new veiling movement'<sup>339</sup> in Cairo, Egypt, by which educated middle-class working women embraced traditional Islamic dress. In doing so, they attached a new connotation, that of free choice rather than imposition and duty, to the garments, and simultaneously rejected the values of modern Western culture and subverted those of the traditional Islamic patriarchy. Again, this demonstrates the multiple meanings that can be ascribed to the practice of veiling, and illustrates how, for many women, it can be a symbol of freedom and identity. Examples like this highlight the problematic way in which the West employs women's rights and gender equality as vehicles to support bans on veiling: it neglects to acknowledge the benefits and empowerment represented by veiling, instead imposing its own meaning upon the practice and assuming it has universal resonance.

In her essay *Visibility, Violence and Voice? Attitudes to Veiling Post-11 September*, Alison Donnell surmised that the terrorist attacks carried out on the USA by Al-Qaeda on 11 September 2001 acted almost as a fulcrum in the West's interpretation of the veil. She notes that, prior to the attacks, veiled women had been viewed as exotic objects of Oriental otherness: however, almost immediately afterward, they became 'a highly visible sign of a despised difference'<sup>340</sup> and sitting targets for Islamophobic harassment. Donnell also identifies the problematic way the West fixated upon the imposition of the burka on Afghan women by the Taliban. In doing so, she shrewdly argues, the veil was centralised as the core of the struggle faced by Afghan women, rather than just one facet in a landscape of oppression and abuse. Equally, the dogged and myopic focus on the burka served to fix Afghan women as victims in the eyes of the Western media and its audience.<sup>341</sup>

Over 14 years on from the events of 11 September there is very little significant progress from this position. The notion that 'banning the burka' (as trumpeted, inaccurately, by the British tabloid press and far-right-wing political parties) will in some way 'rescue' or 'liberate' Muslim women from some perceived oppression is as nonsensical as imagining the prohibition of hoodies or baseball caps will, in isolation, eradicate anti-social behaviour. However, to continue to situate Muslim women who veil their faces as victims, lacking in voice or agency is to do them a disservice of some magnitude. It is impossible to ignore that, whilst Muslim women in Europe generally make a free and informed choice to cover their faces (local criminal law notwithstanding), in other parts of the world

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<sup>338</sup> *Ibid*, Mishal Akhtar, a 23-year-old Muslim woman who works for a fashion magazine

<sup>339</sup> Tseëlon, Efat, *The Masque of Femininity*, Sage Publications, London 1995

<sup>340</sup> Donnell, Alison, 'Visibility, Violence and Voice? Attitudes to Veiling Post-11 September', in *Veil: Veiling, Representation and Contemporary Art*, David A. Bailey and Gilane Tawadros (eds.) (Institute of International Visual Arts, 2003), 122-135, p123

<sup>341</sup> *Ibid* at p124

choice may be sorely lacking in many aspects of a woman's life. For instance, Afghan women suffered Taliban-sanctioned violence and girls were banned from attending school, thereby denying them rights seen as fundamental in the West. An obligation to cover their faces when outside could be described as a lesser problem, but the media's presentation of the issue suggested that 'unveiling' the Afghan women solved the larger part of their difficulties in a single gesture. However, attempting to prevent Muslim women living in Europe from covering their faces of their own volition solves precisely no issues facing women in Afghanistan, or any other country where human rights abuses are prevalent.

## Conclusions

Both France and Belgium have indicated a desire to end, or at least alleviate, what they see as the subjugation of a defined group of women by the passing and enforcement of these laws. It may, in fact, be idealistic and glib to assume that every Muslim woman who takes the decision to habitually veil her face does so of her own volition: as Barbibay remarks, 'it is a truism that numerous Muslim women wear religious garb as a direct result of patriarchal imposition.'<sup>342</sup> In the press coverage surrounding the build-up to and imposition of France's Ban, there is evidence that those who support the ban believe that the majority of women who cover their faces do so because of coercion or force.<sup>343</sup> Conversely, those who oppose it feel that Muslim women invariably make a free and informed choice about whether or not to wear a face veil.<sup>344</sup> Similarly, even the various Muslim communities do not reach consensus on the subject of veiling, and there is longstanding disagreement about the precise interpretation of the relevant verses of the Koran. A French Islamic feminist group, Ni Putes Ni Soumises (Neither Whores Nor Submissives) believes that veiling is a patriarchal cultural tradition rather than a practice that is proscribed by Islam, and staged a demonstration in support of the Ban in 2010.<sup>345</sup>

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<sup>342</sup> Barbibay at 201

<sup>343</sup> France's burqa ban is a victory for tolerance, William Langley, The Daily Telegraph, 11 April 2011 (<http://www.telegraph.co.uk/news/worldnews/europe/france/8444177/BurkaFranceNational-FrontMarine-Le-PenMuslimFadela-AmaraAndre-Gerinhijab.html>), retrieved 06/01/12)

<sup>344</sup> France's attack on the veil is a huge blunder, Raphael Lioiger, The Guardian 26 January 2010 (<http://www.guardian.co.uk/commentisfree/belief/2010/jan/26/proposed-veil-ban-in-france>), retrieved 06/01/12)

<sup>345</sup> Vingt Paris, 27 January 2010, <http://www.vingtparismagazine.com/2010/01/ni-putes-ni-soumises-organizes-a-protest-against-the-burqa.html>, retrieved 20 April 2012

It is, therefore, important to consider that not all Muslim women are in favour of veiling the face. However, in attempting to regulate what women of any culture may or may not wear, the law infantilises women to an unacceptable extent. It is indisputable that aspects of major world religions proscribe modesty in dress and appearance in their key texts, and that contemporary authorities on these religions often advocate modern interpretations which can serve to impose restrictions or obligations on the way women dress. However, to attempt to prohibit the wearing of garments associated with a particular religion is problematic. Instead of 'freeing' or 'liberating' women from the perceived confines of their religion, the law merely replaces one set of restrictions with another, intimating that women cannot be trusted to choose their own method and style of dress. Basing such restrictions on ill-conceived and under-evidenced notions of female oppression and fears for security is undesirable and should not be considered within states that are obliged to uphold the human rights of their citizens.

## Chapter 6: Conclusions

On 15 March 2013, Dr Sarah Wollaston, MP for Totnes, Tweeted that she was in favour of banning the niqab ‘within schools and colleges; how on earth do they promote equality when they collude with making women invisible?’<sup>346</sup> This thesis has explored the many and varied reasons why Muslim women in Europe choose to cover their faces, as well as their challenges to those who attempt to restrict them from doing so. Veiling appears to be an overwhelmingly positive and profound experience for them, often begun after much thought, research and consideration. During the research for this project, no sources were found to indicate that Muslim women believe they feel ‘invisible’, in a negative sense, when wearing niqab. There are certainly anecdotes confirming that some women prefer to conceal their faces to deter unwanted attention from men, but this is likely not the type of invisibility Wollaston meant: instead, she is presumably concerned that the niqab is *de facto* oppressive, and that veiled women are isolated, disenfranchised and denied full access to society, stifling their voice as they cover their face. However, Wollaston is fundamentally mistaken in imagining that a niqab acts in the same way as a cloth thrown over a parrot’s cage. Women who wear niqab are no different, no better or worse, no stronger or weaker, no more or less vocal than any other women, and at the same time are as different from each other as any other human beings. Their niqabs are merely something they happen to have in common. Further, Wollaston’s concern about women becoming ‘invisible’ when wearing niqab fails to take into account that many people, men and women, Muslim or otherwise, appear to actively choose isolation in twenty-first century Britain. Whether an individual drowns out the clamour of public transport with earphones, deters unwanted social approaches when alone in public by occupying herself with a smartphone or a book, or chooses to remain within his home where at all possible, societal disconnection is not at all uncommon, nor is it generally an impetus for the introduction of overarching and draconian legislation.

Throughout the chapters of this thesis, it has been clearly demonstrated that Muslim women choose to cover their faces for a spectrum of reasons, including a deeper understanding or less common interpretation of the requirements of their religion; a desire to outwardly display their own piety; a wish to conceal their faces and bodies from the general public, reserving them instead for their husbands and families; and the extremely human urge to feel a sense of belonging. These reasons appear entirely consistent with the exercise of the rights guaranteed to citizens by the European Convention on Human Rights, and do not suggest any pressing need for legal interference in the

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<sup>346</sup> <https://twitter.com/sarahwollaston/status/379199657165197312>

name of protecting or liberating women who cover their faces. However, France's decision to issue a legal prohibition on veiling the face, based partially on those grounds, was successfully implemented and later approved by the European Court of Human Rights. It is difficult to see this situation as anything less than a manipulation of domestic and Community law to exert control over a growing Muslim population by making a small minority of its women into scapegoats. It is likely that the true impetus for the ban was a combination of historic distaste for the veil, dating back to the era of colonialism, and social and political disquiet over a growing Muslim population in France.

Additionally, the author remains sceptical of the existence or extent of the mischiefs which both France's ban on veiling and the ultimately unsuccessful Private Members' Bill submitted to the UK Parliament were purported to correct. Both documents, and their surrounding publicity, generally indicate a wish to 'liberate' women from some perceived oppressive regime and make earnest pronouncements on the security risks of allowing people to conceal their faces in public. As discussed above, there is scant evidence to suggest that Muslim women living in Europe require politicians and law enforcement agencies to rescue them from their niqabs: even if evidence was found to suggest that oppression was a significant problem in this context, the fact that so few women actually veil their faces in Europe implies that support and education through community channels would be more effective and less divisive than criminalisation. Making veiling illegal is liable to marginalise the theoretical oppressed woman even further by either forcing her to go against her oppressor in order to go out unveiled, thereby leaving her vulnerable to potential domestic abuse, or forcing her to remain at home, marginalised from society.

In terms of security considerations, it is important again to consider the numbers: Muslims represent a relatively small proportion of the populations of both France and the UK, and amongst them, women who veil their faces are fairly unusual – for France, the most generous estimate suggests only around 2,000 women nationwide. To ban by law a garment worn by a tiny segment of the population because of fears of, presumably, potential terrorist activity is both specious and likely to be highly ineffectual: if a group or individual did, in fact, plan to carry out terrorist activity using niqab as disguises, but found themselves thwarted because covering the face was illegal, it is at best naïve to imagine that this in itself would prevent the planned terrorist act. Finally, the ECtHR ruling in *S.A.S. v France* relied a great deal on the notion of 'living together', and the way in which the niqab impedes this concept. However, as discussed above, France could equally have banned iPods or smartphones in public places in order to achieve a similar end: Muslim women are not uniquely responsible for creating or upholding some sort of social utopia, in which strangers voluntarily engage with each other during their day-to-day business. Banning the niqab gave a clear signal to France's Muslim citizens that they were tolerated, but not entirely welcome in the country. It also

served to fuel existing anti-Muslim attitudes amongst the white French population and tacitly authorised displays of intolerance and, at times, aggression, toward those women who felt unable to comply with the Ban.

Increasingly, Western society and its media, in all formats, places stringent and often contradictory expectations on its women: they must be slim yet voluptuous; fashionable, but not slaves to fashion; impeccably well turned-out yet 'natural-looking'; they are pilloried for showing signs of age, then ridiculed for undergoing cosmetic procedures to temper those signs; and most of all, they are encouraged to believe that the way they look, particularly to men, should be their primary concern. With this in mind, it is possible to argue that apparently liberated Western women are in fact subject to coercion and subjugation from external forces, which are potentially just as pervasive and insidious as the type of oppression presumed by some to affect Muslim women who wear niqab or other forms of face-covering veil. However, the UK government has not been troubled by calls to ban, for example, women's magazines in order to cease their oppression of women, nor would such a ban automatically result in women becoming free from the demands of patriarchal standards of beauty.

Similarly, to ban the niqab would represent a curtailment of the human rights of those women who actively choose to wear it, regardless of their reasons for doing so, and would not automatically liberate from oppression any woman who may be forced to wear it. In this sense, both the Ban as enacted in France and the calls for a ban in the UK are predicated on a set of assumptions that are at once paternalistic and overly simplistic: that Western women are 'free' and 'liberated' and Muslim women are not; that Muslim women would become 'free' and 'liberated' if they dressed in the same way as Western women, and would be eager to do so; that the Islamic veil, in its various forms, by definition suppresses Muslim women's independence and they therefore need to be 'rescued' from it; and that Western governments can and should perform the job of 'rescuing' them. As discussed, the fact of whether Western women themselves are in fact 'liberated' in terms of dress and appearance is debatable: they are, in fact, often bound by the expectations and restrictions of the male gaze. Further, whilst there are almost certainly Muslim women in some parts of the world who suffer oppression and struggle for recognition of gender equality, with the expansion of Islamic State a prime example, there is no compelling evidence to suggest that Muslim women living in Europe face these problems to the same magnitude. Further, it is facile to assume that banning the niqab in Europe will have a positive effect: it will deny choice and agency to those women who decided to veil their faces of their own volition, and will stigmatise and marginalise any women who have in some way been compelled to veil.

To prohibit veiling places an unfair burden on the women who choose to express themselves by covering their faces, particularly when Western society ostensibly values and protects self-expression through dress in many other ways. Whilst, as discussed in chapter 5, the concept of ‘personal style’ for Western women may be more of a conceit, encouraging the freedom of self-expression whilst ensuring conformity with the demands of the male gaze, there are currently no laws in the UK to restrict or proscribe what citizens may or may not wear.<sup>347</sup> The UK legal cases challenging pupils’ right to wear religious or quasi-religious items with their school uniform, as discussed in chapter 2, did generally result in restrictions to the pupils’ self-expression: however, it is important to note that, despite the pupils’ lack of success in most of these challenges, the courts in each instance were working with little or no guidance, whether from precedent or statute. Subsequently, the Department for Education issued a comprehensive set of non-statutory guidelines to be followed by schools when devising or updating uniform policies. This development appears, at least for the time being, to have stemmed the flow of legal challenges to uniform policies, and, it is to be hoped, has informed a more tolerant and respectful attitude toward the sartorial manifestation of religious convictions within a school setting.

The ruling in *Eweida & Others* demonstrated that the European Court of Human Rights takes a relatively liberal approach to the wearing of Christian symbols by adults within a workplace: it held that British Airways was incorrect in preventing Nadia Eweida from wearing a cross on a necklace with her work uniform, and although it dismissed Shirley Chaplin’s claim against the Royal Devon and Exeter NHS Trust for a similar issue, this was primarily a reflection of the overriding importance of health and safety considerations in Mrs Chaplin’s role as a nurse, than an attempt at stifling her religious expression. However, comparing this ruling with that of *S.A.S. v France*, in which the ECtHR held, by a majority of 15 to two, that France’s blanket ban on women veiling their faces in public is legitimate, it seems apparent that the religious expression of Muslims is of lesser importance to the Court than that of Christians. The dissenting opinion proffered in this case was critical of the dubious interpretation of Community law applied by the Court to permit France its own way on the subject, further illustrating the tenuous logic behind the Ban itself and indicating a determination on the part of the European Union to deny Muslim women the right to veil their faces, effectively using the bodies and faces of women to play out the ongoing debate on immigration.

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<sup>347</sup> The only exceptions to this statement are, as discussed in chapter 2, aimed at criminalising indecent exposure and other behaviours within the bounds of sexual assault.

As El Guindi remarked, '...the veil is a complex symbol of many meanings. Emancipation can be expressed by wearing the veil or by removing it. It can be secular or religious. It can represent tradition or resistance.'<sup>348</sup> In twenty-first century Europe, where women remain covertly oppressed by the weight of expectation placed upon them by a culture which values them primarily for their appearance, it is vital that the meaning of a veil is determined by the individual wearer, not by media campaigns, nor government ministers, nor individual citizens to whom it is merely an object of curiosity. A blanket ban on face veils will potentially force women into making one of three undesirable choices: remaining indoors and potentially dependent on men, going out veiled and risking criminalisation, or abandoning her sincerely-held religious beliefs to go out unveiled. Any of these choices runs counter to what the ban attempts to achieve, namely liberating women who are perceived to be oppressed. Additionally, this outcome can only have an adverse effect upon the already strained relationship between white and Islamic communities in Europe, resulting in further polarisation and stifling social integration. The government, legislature, media, and general society of the United Kingdom must not give any further consideration to banning the niqab, but should instead strive to demonstrate and encourage respect for diversity, for individual expression, and for the basic right of individuals to express their beliefs using their own body, whether or not anyone else agrees with those beliefs.

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<sup>348</sup> El Guindi, 'Veil', 1999, p172

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